

**UNITED STATES GOVERNMENT
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29**

LARO SERVICES SYSTEMS, INC.

Employer

and

Case No. 29-RC-11713

LOCAL 811, UNITED SERVICE WORKERS
UNION, INTERNATIONAL UNION OF
JOURNEYMEN AND ALLIED TRADES

Petitioner

and

REGION 9A, INTERNATIONAL UNION,
UNITED AUTOMOBILE, AEROSPACE &
AGRICULTURAL IMPLEMENT WORKERS
OF AMERICA-UAW

Union

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act (“the Act”), a hearing was held before Michael Berger, a Hearing Officer of the National Labor Relations Board (“the Board”).

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned Regional Director.

Upon the entire record in this proceeding, the undersigned finds:

1. The Hearing Officer's rulings made at the hearing are free from prejudicial error and hereby are affirmed.

2. The parties stipulated, and the record indicates, that Laro Service Systems, Inc., herein called the Employer, is a domestic corporation with its principal office and

place of business located at 271 Skip Lane, Bay Shore, New York, from which it is engaged in providing cleaning services at various locations throughout the United States including a facility located at LaGuardia Airport, Flushing, New York. During the past year, which period is representative of its annual operations generally, the Employer purchased and received at its Bay Shore facility, goods and materials valued in excess of \$50,000 directly from points outside the State of York.

Based on the record and the stipulation of the parties, I find that the Employer is engaged in commerce within the meaning of the Act. It will therefore effectuate the purposes of the Act to assert jurisdiction in this case.

3. The parties stipulated, and the record reflects, that Local 811, United Service Workers Union, International Union of Journeymen and Allied Trades, herein called Local 811, and Region 9A, International Union, United Automobile, Aerospace & Agricultural Implement Workers of America-UAW, herein called the UAW, are organizations in which employees participate, and which exist, in whole or in part, for the purpose of dealing with employers concerning wages, hours and other terms and conditions of employment. Accordingly, Local 811 and UAW are labor organizations within the meaning of Section 2(5) of the Act.

4. UAW contends that it has a current collective bargaining agreement with the Employer covering employees in the unit set forth below and that its contract constitutes a bar to the processing of the instant petition.¹ Local 811 contends that the contract does not possess bar quality and therefore the continued processing of the petition is warranted. The Employer took no position with respect to this issue.

¹ The contract provides that it is between the Employer and Local 365 of the UAW. It appears from the record, that while the UAW negotiates the agreement, it designates a local for enforcement thereof. I find that this is not of importance in the resolution of this case.

The burden of proving that a contract is bar to the processing of a petition rests with the party asserting it. Roosevelt Memorial Park, 187 NLRB 517 (1970). For the reasons set forth below, I find that the UAW has failed to meet its burden and therefore the continued processing of the petition is warranted.

Pursuant to a Decision and Direction of Election issued on August 4, 2005, in Case No. 29-RC-10392, an election in the below described unit was conducted on August 29, 2005. The UAW was the petitioner in that proceeding and received a majority of the valid ballots cast. As a result thereof, the UAW was certified as the Section 9(a) representative in that unit on September 9, 2005.

According to the record, on or about March 26, 2008, the Employer and the UAW entered into a Memorandum of Agreement regarding certain terms and conditions of employment of unit employees (See attachment A). Specifically, the Agreement provided: (1) a description of the bargaining unit; (2) the term of Agreement, March 1, 2008 to February 11, 2011; (3) for wage increases to be implemented on a yearly basis beginning on March 1, 2008; (4) that commencing March 1, 2008, two paid sick days were granted to unit employees per contract year and three paid sick days commencing March 1, 2009; (5) that effective March 1, 2008, a modification to the vacation entitlement schedule to provide that unit employees would be entitled to one week's vacation after one year of employment and two weeks after three years employment; (6) that in the event the Employer lost the USAir account at LaGuardia Airport, Flushing, New York (the work site of the bargaining unit), unit employees would receive both sick leave and vacation pay on a pro-rated basis; (7) that the parties would meet to finalize the language of a contract within a reasonable time after the unit members ratified the

Memorandum of Agreement and; (8) paragraph 7 of the Memorandum stated “This Agreement is subject to ratification by the members of the Union in the bargaining unit.”

The record reveals that the Memorandum of Agreement was never submitted to the unit membership for ratification and that the parties did not engage in further negotiations after the execution of the Memorandum in March 2008. The UAW contends that the language of paragraph 7 of the Memorandum “is not condition precedent language,” and inasmuch as the record reveals that certain terms of the Memorandum were implemented, notwithstanding the lack of ratification, it cannot be a condition precedent. Local 811 asserts that the language in the Memorandum clearly provides that ratification is a necessary condition to the effectiveness of the Agreement, and that Board law supports the conclusion that the Agreement does not possess bar quality because it was never ratified. As previously noted, the Employer took no position regarding this issue.

In *Appalachian Shale Products Co.*, 121 NLRB 1160 (1958), the bedrock Board decision governing the requirements a contract must meet in order to afford it bar quality, the Board stated:

Related to the requirements for proper execution of contracts is the question of prior ratification by the union membership. The general rule is that where ratification is made a condition precedent to contract validity, failure to achieve timely ratification of the contract, i.e., before the filing of the petition, will remove it as a bar. (121 NLRB at 1162)

The Board further concluded that it would no longer consider ratification as a condition precedent to the validity of the contract if such requirement required recourse to documents other than the contract itself:

The Board, in reexamining this extension of the general rule, is

of the opinion that only where the written contract itself makes ratification a condition precedent to contractual validity shall the contract be no bar until ratified. (121 NLRB at 1162)

Thus, it appears that the Board has established a two part test in addressing the issue of ratification as its effects bar quality: (1) Does the ratification requirement appear within the four corners of the contract alleged to have bar quality: and (2) does the language regarding the ratification clearly make ratification a condition precedent to the validity of the contract. The initial inquiry here must be answered in the affirmative as the ratification provision appears in paragraph seven of the Memorandum. I further find that the second part of the test is also met as the language in that paragraph, “This Agreement is subject to ratification by the members of the Union in the bargaining unit,” is unambiguous in its intent and construction. In earlier decisions, the Board has been confronted with ratification provisions possessing far less clarity than the one at issue and nonetheless concluded that ratification was a condition precedent. Thus, in *Merico, Inc.*, 207 NLRB 101 (1973), the contract language stated as follows:

The Union Committee is Unanimous for acceptance and each member (of the bargaining committee) is hereby pledged to recommend this agreement for ratification by the membership at Fort Payne, Alabama, Merico plant.

In finding that the above language made ratification a condition precedent, the Board majority stated:

While the condition of ratification could have been more artfully drawn, we conclude that, as a matter of contractual interpretation, the signatures of the Union Committee reflected merely “a signed agreement to pledge the Committee’s support for ratification of the agreement,” and did not evidence a binding contract absent ratification. (207 NLRB at 101.)

Notwithstanding the less than artful phrasing in *Merico*, the Board found that the second prong of the ratification test was satisfied. Here, the language is clear and unambiguous and leaves no doubt that the parties intended that ratification by the unit was necessary for the contract to be finalized. The testimony of June Benjamin, a representative of the UAW, also supports that conclusion. : (Tr. 37-38)

Q. Why would you bring it to the members to take a vote?

A. Why?

Q. Yes.

A. Well, it's, you know, it's a Constitutional issue with the UAW.

Q. And what if they voted the contract down?

A. What if they voted the contract down?

Q. What if they said they didn't want this contract?

A. Well, at that point in time what happens is normally is that, you know, they, if you don't agree to a contract, you take a strike.

Q. You would go on strike?

A. Yeah.

Q. So you would say that there wouldn't be an agreement – if the members, as you defined ratified, then there wouldn't be an agreement, correct?

A. Right, you would take a strike.

Q. So, there wouldn't be an agreement, correct?

A. Right, there would not be an agreement. If the members were to turn it down, there wouldn't be an agreement until, you know, you go back to the table and you negotiate again. Usually, that is – a vote down of a contract usually means a strike for the UAW.

Q. Okay. So, had the members voted that contract down, there wouldn't have been a contract, correct?

A. Correct.

In light of all the foregoing, I find that ratification was a condition precedent to contractual validity and inasmuch as no ratification vote was ever held, the Memorandum of Agreement does not possess bar quality. *Appalachian Shale Products Co.*, *infra*.

In addition to the foregoing, I would also find that the Memorandum of Agreement does not have bar quality as it fails to “contain substantial terms and conditions of employment.” In *Appalachian Shale Products Co.*, *infra*, at 1163, the Board stated:

Experience demonstrates, however, that real stability in industrial relations can only be achieved where the contract undertakes to chart with adequate precision the course of the bargaining relationship, and the parties can look to the actual terms and conditions of their contract for guidance in their day to day problems. It is felt that the objectivity based on known standards should replace the uncertainty of subjective reasons and explanations.... Accordingly, the rule is restated as follows: to serve as a bar, a contract must contain substantial terms and conditions of employment deemed sufficient to stabilize the bargaining relationship; it will not constitute a bar if it is limited to wages only, or to one or several provisions not deemed substantial.

Using the guidelines set by the Board, I find that the Memorandum does not sufficiently chart with precision the terms and conditions governing the parties collective bargaining relations to warrant the dismissal of the instant petition. Aside from describing the unit and the initiation and termination dates of the agreement, the Memorandum addresses only three employment terms: (1) yearly wage increases; (2) paid sick leave; and (3) vacation eligibility and length.

The agreement does not refer to any of the following terms: wages, a grievance and arbitration procedure, holidays, overtime, seniority, strikes, lockouts, plant safety, holiday pay, discipline or management rights. While an agreement to have bar quality need not cover the full panoply of employment terms, the few set forth in the Memorandum of Agreement, would appear to be too limited to “chart with adequate precision the course of the bargaining relationship” between the UAW and the Employer. In *Austin Powder Company*, 201 NLRB 566 (1973), the Board found that a collective bargaining agreement failed to possess bar quality for several reasons. One of those reasons was the failure of the contract to reflect all of the topics upon which agreement had been reached and the absence of several critical areas within the document itself. The contract was for a specific three year period, contained a recognition clause and provisions involving the following topics: employee bonuses, management rights, grievance procedures, holidays, holiday pay, seniority, wages, plant safety, annual reopening of wage rate negotiations, and strikes and lockouts. Further, the contract provided that it could only be amended by the written agreement of the parties. Prior to the final execution of the agreement the parties agreed to modify it in the following respects: vacation eligibility, length of the probationary period, and wage rates. These changes were reduced to writing. The parties also agreed that overtime would be paid for all work in excess of eight hours per day and that all new employees would join the union after the completion of the probationary period. These changes were not made part of the written agreement. The Board also noted that subsequent to the execution of the

contract, the employer, on two occasions, increased the hourly wage for truckdrivers.

Assuming the contract was the result of collective bargaining (which the Board did not), it nevertheless concluded that it would still fail as a bar:

Moreover, even assuming that the contract is a collective-bargaining agreement, it would still fail to bar an election because several important terms agreed upon...., those dealing with union security, overtime, and drivers' wages, are unwritten or have been abandoned. Under such circumstances, the contract in several critical areas cannot be resorted to by either the employees or the Employer for guidance in governing their day-to-day relations, and therefore does not "impart sufficient stability to the bargaining relationship to justify our withholding a present determination of representation."²

The Memorandum of Agreement executed by the parties here contain far fewer substantive terms than the agreement in *Austin Powder*, and thus would seem to provide substantially less guidance to the parties in the conduct of their day to day relations. In *Austin Powder*, if a dispute arose with respect to a term in the agreement, the parties had in place a grievance mechanism by which to resolve it. There is no such procedure in the Memorandum in the event a dispute arises with respect to the few issues contained in the Memorandum. The absence of such a mechanism can only detract from the stability that a collective bargaining agreement is intended to provide in a commercial environment. UAW representative Benjamin testified that the parties had reached agreement on several additional topics, including a grievance procedure, but that such agreement had not been reduced to writing. However, it was the parties failure to reduce to writing the additional resolved matters, i.e., overtime and union security, in *Austin Powder* that additionally led the Board to conclude that that agreement lacked the

² See *Raymond's, Inc.*, 161 NLRB 838 (1966); and *Emanuel Birnbaum and John W. Jones d/b/a Silver Lake Nursing Home*, 178 NLRB 478 (1969).

precision to adequately chart the course of the parties industrial relationship and thus forfeited bar quality.

That the parties did not intend the current Memorandum of Agreement to constitute the entire collective bargaining agreement is further evidenced by the language in paragraph six of the Memorandum. That provision states:

6. The Union and the Employer shall meet to finalize the language of the contract within a reasonable time after this Memorandum is ratified by the members of the Union in the bargaining unit.

Thus, the parties, by the express language in paragraph six, concede that the Memorandum did not reflect the parties complete agreement and that before further negotiations could resume, ratification of the contract, albeit as a work in progress, was a condition precedent to said resumption.

In view of the foregoing, I find that the Memorandum of Agreement is a partially completed document and not intended by the parties to represent a finalized collective bargaining agreement. As such, it does not chart with adequate precision the course of the parties bargaining relationship and therefore, cannot serve as a basis to deny statutory employees access to the Board's representational procedures as envisioned in Section 7 of the Act.

5. The parties stipulated, and I hereby find, that the following employees constitute a unit appropriate for the purposes of collective bargaining:

All full-time and regular part-time cleaners, window cleaners, project workers and lead persons employed by the Employer at the U.S. Airway Terminal at LaGuardia Airport, Flushing, New York, excluding all confidential employees, guards and supervisors defined in Section 2(11) the National Labor Relations Act.

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether they wish to be represented for purposes of collective bargaining by Local 811, United Service Workers Union, International Union of Journeymen and Allied Trades, Region 9A, International Union, United Automobile, Aerospace & Agricultural Implement Workers of America-UAW or by neither labor organization. The date, time, and place of the election will be specified in the notice of election that the Board's Regional Office will issue subsequent to this Decision.

Voting Eligibility

Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such a strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Those in the military services of the United States who are employed in the unit may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for

cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

Employer to Submit List of Eligible Voters

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. Excelsior Underwear, Inc., 156 NLRB 1236 (1966); NLRB v. Wyman-Gordon Company, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the full names and addresses of all the eligible voters. North Macon Health Care Facility, 315 NLRB 359, 361 (1994). This list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). Upon receipt of the list, I will make it available to all parties to the election.

To be timely filed, the list must be received in the Regional Office, Two MetroTech Center, 5th Floor, Brooklyn, New York 11201, on or before February 25, **2009**. No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile

transmission at (718) 330-7579. Since the list will be made available to all parties to the election, please furnish a total of **two** copies, unless the list is submitted by facsimile, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

Notice of Posting Obligations

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices to Election provided by the Board in areas conspicuous to potential voters for a minimum of three (3) working days prior to the date of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. Club Demonstration Services, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by 5 p.m., EST on **March 4, 2009**. The request may **not** be filed by facsimile.

The parties are advised that the National Labor Relations Board has expanded the list of permissible documents that may be electronically filed with its offices. If a party

wishes to file the above-described Request for Review electronically, please refer to the guidance which can be found under “E-Gov” on the National Labor Relations Board website: www.nlr.gov.

Dated: February 18, 2009.

"/s{Alvin Blyer]"