UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
FOURTH REGION

MASTEC NORTH AMERICA d/b/a MASTEC NETWORK SERVICES Employer	
and	Case 4–RC–19797
INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 98 Petitioner	

DECISION AND ORDER

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board; hereinafter referred to as 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.

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 are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The labor organization involved claims to represent certain employees of the Employer.

On September 28, 1999, the Petitioner filed this petition seeking to represent a unit of the Employer's technicians and installers based at its Huntingdon Valley, Pennsylvania facility, herein called the Unit.[1] Pursuant to a Stipulated Election Agreement approved on October 15,

[1] The express language in the petition sought a unit of "All Technicians and Installers (Huntingdon Valley office)" and the Stipulated Election Agreement described the Unit as "all technicians and installers

1999, an election by secret ballot was conducted on November 5, 1999 in the Unit. The Tally of Ballots showed one vote cast for and one vote against the Petitioner, and two determinative challenged ballots. On November 17, 1999, the Petitioner filed timely Objections to conduct affecting the results of the election. The issues raised by the challenged ballots and the Petitioner's objections were not resolved.[2]

On October 13, 2000, the Employer filed a Motion to Dismiss the Representation Petition[3] contending that: (1) there are no outstanding questions concerning representation because the Employer closed its Huntingdon Valley facility and transferred the employees in the Unit there to its Pine Brook, New Jersey office; and (2) in light of these changed circumstances, the Board should dismiss the representation petition. On November 13, 2000, the Petitioner filed an Opposition contending that: (1) the Employer waived any right to claim that its alleged corporate restructuring rendered this case moot; and (2) regardless of the "changed circumstances," the Petition is not moot. On November 15, 2000, the Employed filed a Response.

By Order dated May 2, 2001, the Regional Director issued an Order Denying Employer's Motion to Dismiss and Notice of Hearing. The hearing was ordered to be held on May 23, 2001, to address the following issues:

(1) whether there have been changes to the Employer's operations at its Huntingdon Valley facility since October 15, 1999, such that the Unit is no longer in existence;

(2) whether there have been changes to the terms and conditions of employment of employees in the Unit that would cause it to no longer be appropriate for purposes of collective bargaining;

(3) whether any of the evidence referred to in paragraphs 1 or 2 above, was discovered by the Employer after October 15, 1999, the date of approval of the Stipulated Election Agreement, or was unavailable to the Employer prior to that date; and

(4) whether there are unusual circumstances justifying the Employer's withdrawal from the Stipulated Election Agreement, which would warrant an order revoking approval of the Agreement.

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employed by the Employer at its Huntingdon Valley, Pennsylvania facility, excluding all other employees, guards and supervisors as defined by the Act."

[2] On March 20, 2000, a Report and Recommendation on Challenged Ballots and Objections to Election and Notice of Hearing issued concluding that the challenged ballots and certain of the Objections raised common issues of fact and with the unfair labor practice charges in Cases 4-CA-28710, 4-CA28733 and 4-CA28790 and that these issues would be best resolved by a hearing. An Order Consolidating Cases and Scheduling Notice of Consolidated Hearing issued on August 16, 2000. The unfair labor practice charges were subsequently resolved, and an Order severing them from the instant representation proceeding issued on September 28, 2000. The Employer then filed its Motion to Dismiss the Petition.

[3] In support of its Motion to Dismiss, the Employer attached affidavits and other materials.

The parties filed post-hearing briefs.[4]

The Employer designs, installs and maintains integrated voice, data and video networks for customers and provides infrastructure required to support complex internet and intranet services. In 1996, the Employer acquired Comtec of the Carolinas, whose operations were in Huntingdon Valley, Pennsylvania. In 1997, the Employer acquired Aidco, whose operations were in Chino, California, Pine Brook, New Jersey and other locations. The Pine Brook facility was approximately 75 miles from the Huntingdon Valley facility. After the acquisitions, there were Customer Care Centers (CCC) located in Chino, California and Huntingdon Valley, Pennsylvania, and the Employer eventually concluded that one of the CCCs was unnecessary. At the time of the election, the four technicians and installers in the Unit covered by the election agreement were based at the Huntingdon Valley facility.[5]

In May 1999, the Employer hired Dave Lambert as Vice President of national accounts. Lambert observed a number of inefficiencies in the Employer's operations and began discussing possible restructuring with other Employer representatives in June and July 1999. On September 30, 1999, Lambert prepared a memorandum addressed to Carlos Valdez, the Employer's President in which he discussed the inefficiencies and outlined cost-saving options, including the restructuring and possible closure of the Huntingdon Valley facility. Lambert proposed the consolidation of the CCCs into one facility in Dallas, Texas, and the closure of the Philadelphia area CCC. The penultimate paragraph of the Lambert memo stated *inter alia*:

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[4] As stated by the Hearing Officer, the Motion to Dismiss, the attachments thereto, and the responses were admitted into the record as part of the formal documents, and not as evidence to be considered in this Decision. On May 25, 2001, two days after the close of the hearing, the Employer's counsel filed a Notice of Verification of Record Facts purportedly to verify factual statements contained in its Motion to Dismiss. The Notice attached an affidavit of Barbara Ruiz, the Employer's Human Resources Director, dated May 24, 2001. Ruiz avers essentially that the four individuals who voted in the November 5, 1999 election are no longer employed by the Employer. The Petitioner has taken no position with regard to this Notice.

In its post hearing brief, counsel for the Employer erroneously relies upon facts contained in the affidavits and other materials attached to the Motion to Dismiss, and not introduced at the hearing. In addition, the Employer, in this brief, relies upon the Ruiz affidavit, and argues that the departure of the four voters is one of the circumstances supporting its argument that the Unit no longer exists and that the petition should be dismissed.

In submitting the Ruiz affidavit, as evidenced by its brief, the Employer is attempting to have evidence added to the record after the close of the hearing. The Employer's introduction of this evidence is untimely. Neither in its Notice nor in its brief has the Employer demonstrated extraordinary circumstances justifying this post-hearing introduction of evidence. Nor has the Employer demonstrated why this evidence was not previously presented. Accordingly, and because the evidence in the Ruiz affidavit does not change the result reached below, I reject the Employer's attempt to rely upon the Ruiz affidavit as evidence in this proceeding, I have not considered the contents of the affidavit or the facts in the Notice in deciding the issue presented, and the attachments submitted with the Motion to Dismiss will not include the Ruiz affidavit. See NLRB Rules and Regulations, Section 102.65 (e)(1); *Columbia Transit Corporation*, 231 NLRB 510 (1977); *The Pulitzer Publishing Company*, 203 NLRB 639 (1973).

[5] In addition, there were approximately 20 clerical employees, not covered by the Petition, who worked at the Huntingdon Valley CCC.

> After all of this we can then come back to what do we do with Philadelphia? The answer is we consolidate the CCC under one person. Currently this is a plan in action. We then consolidate the CCC into one location. This leaves Philadelphia with Dennis, [Condon, a manager at Huntingdon Valley] a PM [Project Manager] and four techs. The four techs and PM need to stay in Philadelphia. We can get a small store front if required. Dennis can develop crews to run National Accounts and use the CCC for subbing jobs.

The memo concluded by stating: "Hopefully we can discuss the Philadelphia situation and reach a conclusion soon. If you have any questions please give me a call."

In the early part of October 1999, Steve Palmer, the Employer's chief financial officer, met with Lambert and Valdez and shelved the proposals in Lambert's memorandum because, as Palmer testified, "[t]here were differences of opinion in the senior management team." In mid-October, Valdez resigned, Ramon Mas became President, and Mas spent his first six to eight weeks learning the Employer's operations. In the latter part of November 1999, Mas decided to reject Lambert's proposal to leave the four technicians and installers in the Philadelphia area at a "storefront," opting instead to close the Huntingdon Valley facility and to transfer the technicians and installers to the Pine Brook facility. In so deciding, Mas concluded that there was an insufficient volume of installation and service work to justify maintaining a workforce in Huntingdon Valley and that the work could be covered from the Pine Brook. Accordingly, the Huntingdon Valley office was completely closed in January 2000, and all of the employees in the Unit were transferred to the Pine Brook facility. The Pine Brook employees were covered by a collective bargaining agreement with the Communications Workers of America, Local 9505 (herein CWA) and this agreement was applied to the transferred Huntingdon Valley employees. Their core job duties remained the same, but their direct supervisor changed as did their wage payment and overtime procedures, holidays, vacations and sick leave.

The Petitioner asserts that the Employer waived its right to raise its 'changed circumstances' argument by entering into the Stipulated Election Agreement. The Board has long held that election agreements are contracts binding on the executing parties. *See Barceloneta Shoe Corp.*, 171 NLRB 1333, 1343 (1968); *M.W. Breman Steel Co.*, 115 NLRB 247 (1956). It is well established that once an election agreement has been approved, a party may withdraw therefrom only upon an affirmative showing of unusual circumstances or by agreement of the parties. *See T & L Leasing*, 318 NLRB 324, 325 (1995); *Sunnyvale Medical Center*, 241 NLRB 1156 (1979). Regional Directors may also revoke their approval of stipulations for 'cause.' *See Super Valu Stores*, 179 NLRB 469 (1969). In *Plymouth Shoe Company*, 185 NLRB 732 (1970), the Board dismissed a petition based on changed circumstances arising after the approval of the election agreement.

Here, the "unusual" or "changed" circumstances include the closure of the Huntingdon Valley facility where the employees subject to the election agreement worked. Contrary to the Petitioner's contentions, the evidence presented at the hearing demonstrates that, at the time the

parties entered into the election agreement, the Employer did not have concrete plans to disband the Unit. The Lambert memorandum, issued only two weeks before the parties signed the election agreement, proposed that the Unit employees should remain in the Philadelphia area. Far from being the *fait accompli* contended by the Petitioner, the record evidence shows that there was substantial indecision among the Employer's management as to the closure.[6] Based on the foregoing, I conclude that unusual circumstances arising after the approval of the election agreement permit the Employer to seek the dismissal of the petition. *See Sunnyvale Medical Clinic*, supra.

In *Plymouth Shoe Co.*, supra, the Board dismissed a representation petition after the employer underwent substantial changes extinguishing the viability of the petitioned-for unit in which a second election was to be conducted. In that case, a first election was held pursuant to an election agreement in a unit of employees engaged in the employer's shoe manufacturing operation. The majority of the votes in the election were cast for an intervenor, but the petitioner filed meritorious objections and the Board directed a second election. Before the second election, the employer discontinued its shoe manufacturing operation, liquidated its assets and terminated all the unit employees except for a small percentage engaged in warehousing operations for a related employer. The employer moved to have the original petition dismissed and the Board concluded that a second election was not warranted. In granting the employer's request, the Board concluded:

> In the circumstances, we are persuaded that the changed nature and character of the current operations, the drastic dimunition of the workforce and the radical change in the type and number of job classifications have so altered the scope of the original unit petitioned for and found appropriate by the Board that the original unit is no longer in existence. In our opinion the original petition no longer provides the basis for an election and we feel that no useful purpose will be served by proceeding with a present determination of representatives.

Id. at 733.

The Board has held that it will reexamine and vacate a prior certification "where the 'essential factor[s]' upon which the Board has based its earlier unit determination were eliminated due to the employer's reorganization of its operations." *Murphy Brothers, Inc.*, 265 NLRB 1574, 1575 (1982), quoting *Frito-Lay, Inc.*, 177 NLRB 820 (1969). Here, the Employer's Huntingdon Valley facility has closed, and the employees who comprised the petitioned-for unit were transferred to the Pine Brook facility and merged into a larger bargaining unit that is represented by a different labor organization. In light of the foregoing, the circumstances upon which the underlying unit was found appropriate no longer exist. Consequently, the original

[6] If, rather than agreeing to an election at the time, the Employer had contended that the possible closure of the Huntingdon Valley operations meant that there was no question concerning representation, it is likely that its argument would have failed. *Hazard Express, Inc.*, 324 NLRB 989, 990 (1997); *Hughes Aircraft*, 308 NLRB 82 (1992); *Martin Marietta Aluminum*, 214 NLRB 646 (1974).

petitioned-for unit, and the unit stipulated to by the parties, namely the technicians and installers employed at the Employer's Huntingdon Valley, Pennsylvania facility, is no longer in existence. Accordingly, the petition should be dismissed.

ORDER

IT IS HEREBY ORDERED that the Stipulated Election Agreement approved on October 15, 1999 be, and hereby is, vacated and **IT IS FURTHER ORDERED** that the Petition filed herein be, and it hereby is, dismissed.

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, Franklin Court, 1099 14th Street, N.W., Room 11613, Washington, D.C. 20570. This request must be received by the Board in Washington by **August 3, 2001**.

Signed: July 20, 2001

at Philadelphia, PA /s/

DANIEL E. HALEVY
Acting Regional Director, Region Four

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