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

COCA COLA ENTERPRISES INC.[1]

Employer

and **Case 3-RD-1527**

LEIGH PURCELL

Petitioner

and

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 529

Union

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 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, I find:

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

2. The parties stipulated that Coca Cola Enterprises Inc., hereinafter referred to as the Employer, is a corporation with a principal place of business located in Horseheads, New York, where it is engaged in the sale and distribution of non-alcoholic beverages. Annually, the

[1] The Employer's name appears as amended at the hearing.

Employer, in conducting its business operations, purchases and receives goods valued in excess of $50,000 directly from points located outside of the State of New York. Based on the parties' stipulation and the record as a whole, I find that the Employer is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The parties stipulated, and I find, that International Brotherhood of Teamsters, Local 529, hereinafter referred to as the Union, is a labor organization within the meaning of Section 2(5) of the Act. The Union claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

The Petitioner seeks an election in a bargaining unit comprised of all employees in the classifications of work covered by the 2004-2009 collective-bargaining agreement employed by the Employer at its Horseheads, New York facility; excluding all other employees of the Employer, including but not limited to, office clerical employees, professional, managerial and confidential employees, guards and supervisors as defined in the Act. At the hearing, the parties stipulated that the petitioned-for bargaining unit is an appropriate bargaining unit.

At issue is whether the current collective-bargaining agreement between the Employer and the Union serves as a bar to an election. The Employer and the Petitioner take the position that the collective-bargaining agreement is in the fourth year of a five-year contract and the three-year contract bar rule has been exhausted. The Union argues that an amendment to the parties' collective-bargaining agreement extends the three-year contract bar through the fifth year of their contract.

Based on the evidence adduced during the hearing and the relevant case law, I conclude that the amendment to the current collective-bargaining agreement is a new agreement which embodies new terms and conditions of employment. I also conclude that the amendment expressly reaffirms the parties' long-term agreement and it indicates a clear intent on the part of the Employer and the Union to be bound for a specific period.

FACTS

The Employer operates a sale and distribution facility in Horseheads, New York, where it sells and distributes non-alcoholic beverages. Steven Johnson is the director of labor relations for the Employer's northeast business unit. The record establishes that the Employer and the Union negotiated and signed a five-year collective-bargaining agreement effective August 20, 2004 through August 19, 2009. The bargaining unit, as set forth in the contract, includes all drivers, warehousemen, general laborers, cooler service technicians and cooler service trainees employed by the Employer at its Horseheads facility.[2] Article 31 of the collective-bargaining agreement provides for a reopener clause, in the event the Employer desires a change in operations, stating:

> In the event the Employer desires to implement a method of selling and distributing that is different than the system set forth in this Labor Agreement, the Employer shall provide the Union sixty (60) days advance written notice of its desire to reopen the Labor Agreement for the purpose of negotiating said new system. The parties shall then enter into negotiations regarding the terms and conditions of the Employer's proposed new method of selling and distributing.

The record establishes that during the first three years of the collective-bargaining agreement, the Employer and the Union did not amend their contract. However, on September 27, 2007, the Employer and the Union signed a Memorandum of Understanding, hereinafter

[2] There are approximately 37 employees in the petitioned-for unit, of which approximately 11 are drivers and 10 are warehouse employees.

referred to as the MOU, thereby amending the collective-bargaining agreement. The MOU was executed prior to the filing of the instant decertification petition, which was filed on November 19, 2007.

The MOU involved the Employer's implementation, and the effects on unit employees of such implementation, of the Order Fulfillment System, hereinafter referred to as the OFS. The record establishes that the OFS is a more efficient method by which the Employer fills and delivers customer orders. The OFS also introduces a new type of delivery truck for drivers to use daily and eliminates previously used trucks such as the side-load and dockmaster trucks.

The record establishes that, prior to the OFS implementation, in accordance with Article 31 of the collective-bargaining agreement, Steven Johnson, the Employer's director of labor relations, notified John Farwell III, the Union's president and business agent, by letter dated April 23, 2007, that the Employer intended to implement the OFS method of distribution at its Horseheads facility. The Employer further offered the Union an opportunity to discuss any issues prior to the OFS implementation. Accordingly, negotiations between the parties were held on May 11, September 4 and September 27, 2007, and culminated in the following written amendment to the contract:

MEMORANDUM OF UNDERSTANDING

> **WHEREAS**, [the Employer and the Union] have engaged in discussions regarding the Company's proposed implementation of the Order Fulfillment System (OFS) … the parties hereby agree to the following, notwithstanding the provisions of the existing Collective Bargaining Agreement:
>
> 1. The implementation of OFS shall begin on or about June 1, 2007 and will be phased in over the course of the following sixty (60) days.
>
> 2. The Company and Union agree to create the classification of "OFS Driver" said classification to be paid same rate of pay contained in the Collective Bargaining Agreement for a Deliver[y] Merchandiser. All drivers shall be reclassified as an OFS Driver.

3. The base and commission compensation system for Delivery Merchandisers rate for OFS shall be amended as follows:

> In addition to the daily rate contained in the Collective Bargaining Agreement, the employee shall be paid $13.00 for each pallet drop delivery that day. The pallet drop delivery rate shall be in lieu of any per case compensation for the cases contained on the pallet. There shall be no pyramiding of per case compensation and pallet drop delivery compensation. A pallet drop delivery is defined as product contained on a full size pallet, brought into a customer location on said pallet, and the product is not required to be broken down off the pallet, nor required to be merchandised [by] the employee. Drivers may be required to handle cases for scanning purposes at customer locations with no per case compensation.

4. All other provisions of the compensation system for Delivery Merchandisers shall remain unchanged pursuant to the Collective-Bargaining Agreement.

5. In the event an OFS driver is servicing a pallet stop delivery account that is greater than forty-five (45) miles roundtrip from the drivers' next closest account to this pallet stop delivery account for that day, … the OFS driver shall be paid an additional $13.00 to complete that pallet delivery over and above the compensation provided in the OFS Agreement and the Collective Bargaining Agreement.

6. The Company will designate the stops that require merchandising and are paid per case compensation and the stops on the route that are pallet drop delivery customers and are paid the pallet drop delivery rate described above. When a stop has been designated as a pallet drop delivery location and the customer requests merchandising be performed … by the OFS Driver, the driver shall call their supervisor. The OFS Driver shall not be paid per case compensation unless they receive approval from their supervisor to merchandise the product.

7. When an OFS vehicle has six (6) or more pallet drop delivery stops, the OFS Driver shall be paid bulk hourly rate for the day.

8. The Company shall ensure that drivers and warehouse employees are informed and trained, as necessary, on the use of any new equipment required for OFS delivery as well as the Company's merchandising standards.

> 9. The parties have met and discussed, in good faith, the progress and implementation of the OFS delivery system following the OFS implementation … The parties agree that both sides have had an opportunity to present proposals and counter proposals and that this agreement represents the full and complete agreement between the parties regarding the implementation and impact of OFS.
>
> 10. With recognition that the rights and obligations reserved to the Parties under the existing Collective Bargaining Agreement remain unless explicitly waived in this Memorandum of Understanding, the Parties agree that this is the full and complete agreement between the Parties and may not be changed, altered or modified except in writing and signed by the Parties.

The MOU was signed by Steven Johnson the Employer's director of labor relations, John Farwell III, the Union's president and business agent, and by Harry Shaw, the Union's steward, and Steve Richman, the Union's international representative.

The record establishes that, in addition to implementing a new order filling and delivery system, the MOU also contains additional changes in employees' terms and conditions of employment. For example, the MOU changes the wage compensation system for drivers by paying them a base rate of pay as delivery merchandisers. The record reveals that some drivers, such as bulk or utility drivers, were paid on an hourly basis prior to the implementation of the OFS.[3] The MOU also adds to the drivers' compensation by paying them $13.00 for each pallet drop made in a day, an additional $13.00 for pallet drops at customer locations greater than 45 miles from drivers' next closest customer location,[4] and bulk hourly rates for 6 or more pallet drops delivery stops made in a day. The MOU also modifies the bargaining unit by adding a new job classification of "OFS Driver" and reclassifying all drivers as OFS Drivers. Finally, the MOU also requires the Employer to inform and train drivers and warehouse employees on the use of any new equipment required for OFS delivery, as well as the Employer's merchandising

[3] The record does not reveal how many bulk or utility drivers are affected by this change.

[4] The record reveals that this amendment was added to the MOU to compensate drivers for additional time spent delivering customer orders.

standards. At the hearing, Johnson testified that warehouse employees received training on how to safely use and maneuver new carts which were implemented for the OFS and which replaced the former pallets used for moving merchandise.

ANALYSIS

In General Cable Corporation, 139 NLRB 1123 (1962), the Board established its three-year contract bar rule. A collective-bargaining agreement will only serve as a bar to a rival union's representation petition for a period of three years. The Board has held that a contract with a fixed term of more than three years will operate as a bar for as much of its term as does not exceed three years. A representation petition may be filed within the appropriate open period prior to the third-year anniversary date of the contract, or after the third-year anniversary date of the long-term contract. See M.C.P. Foods, 311 NLRB 1159 (1993).

The instant case involves a collective-bargaining agreement with a fixed term of more than three years, which was amended by the parties to the agreement after the third anniversary of the agreement, but prior to the filing of the petition herein. The Board has consistently held that parties to a long-term collective-bargaining agreement can reactivitate the contract bar after the initial term of "reasonable duration" has passed, but before a rival representation petition is filed, by executing "(1) a new agreement which embodies new terms and conditions, or incorporates by reference the terms and conditions of the long-term contract, or (2) a written amendment which expressly reaffirms the long-term agreement and indicates a clear intent on the part of the contracting parties to be bound for a specific period …." Southwestern Portland Cement Company, 126 NLRB 931, 933 (1960). In such cases, the Board has held that the new agreement or amendment shall be effective as a contract bar for as much of its term as does not exceed three years. See General Cable Corporation, supra.

Upon review of the record, for the reasons discussed below, I conclude that the Employer and Union's September 27, 2007 MOU satisfies both grounds set forth in Southwestern Portland Cement Company, supra, upon which an agreement of this nature serves as a contract bar. In finding that the MOU is a new agreement which embodies new terms and conditions of employment, I note that the modified compensation system for drivers, who comprise 30 percent of the bargaining unit, pays them $13.00 for each pallet drop made in a day, $13.00 for pallet drops where customer locations are greater than 45 miles from each other, and bulk hourly rates for 6 or more pallet drops delivery stops made in a day. The MOU also creates a new job classification, reclassifies all drivers and pays them a base rate of pay according to the parties' long-term agreement.

Moreover, the OFS is a new order filling and delivery system which introduces additional new terms and conditions of employment for both drivers and warehouse employees, who together comprise more than half of the bargaining unit. For example, the OFS adds a new delivery truck for drivers to use on a daily basis and new carts for warehouse employees. The MOU addresses the implementation of this new equipment by requiring the Employer to train employees on its use. Moreover, in addition to setting forth certain new substantial terms and conditions of employment, the MOU expressly incorporates by reference the unchanged portions of the parties' long-term agreement and reaffirms the parties' intention to be bound by those terms, by stating that "the rights and obligations reserved to the Parties under the existing Collective Bargaining Agreement remain unless explicitly waived in this [MOU]…."

I also conclude that the parties' written MOU expressly reaffirms the long-term agreement and indicates a clear intent on the part of the Employer and the Union to be bound for a specific period of time; in this case, the duration of the long-term agreement expiring August 19, 2009. The Employer, in its post-hearing brief, argues that the MOU is without a fixed term

or duration and as such fails to provide employees or rival unions with the "ready predictability" for determining the appropriate time for filing a representation petition that the Board in Southwestern Portland Cement Company, supra, required.[5] This issue was also addressed by the Board in Shen-Valley Meat Packers, Inc., 261 NLRB 958 (1982).

In Shen-Valley, a representation petition was filed a month after the third anniversary of a five-year collective-bargaining agreement. The contracting parties asserted that the contract served as a bar to a rival petition. The Board found that the petition would have been timely filed after the third-year anniversary but for an amendment to the original agreement between the employer and intervenor, which was executed prior to the filing of the petition and which reaffirmed the term of their original agreement. The amendment stated that it took effect in the third year of the agreement and was to be "in effect through the remainder of the agreement." The Board found that this amendment expressly reaffirmed the parties' intent to be bound by the agreement for a specific period. See also M.C.P. Foods, 311 NLRB at 1159, reaffirming the Board's holdings in Shen-Valley, supra, and Southwestern Portland Cement Company, supra.

In the instant case, the MOU expressly states that the rights and obligations reserved to the parties in the long-term agreement, which includes a duration clause, "remain unless explicitly waived in this [MOU] …." I find that the MOU thus evidences an intention to be bound for a specific period, i.e., the remaining duration of the long-term contract expiring on August 19, 2009. The language used in the MOU is similar to the language approved by the Board in Shen-Valley, supra, and Southwestern Portland Cement Company, supra. Thus, the

[5] In Southwestern Portland Cement Company, 126 NLRB at 932-933, the Board found that the contracting parties expressly reaffirmed their long-term agreement which stated "said Agreements dated June 1, 1957, July 21, 1957, and June 1, 1958, shall remain in full force and effect and shall be binding upon the parties hereto except as herein amended and supplemented." The supplemental agreement at issue in that case did not itself contain a duration clause.

MOU affords a third party the ability to discern the appropriate time for filing a representation petition.

The Employer also argues, in its post-hearing brief, that the parties' MOU is not an amendment to the collective-bargaining agreement. In support of its position, the Employer asserts that the MOU does not contain language that expressly amends the collective-bargaining agreement. The Employer claims that the MOU expressly states that it is not amending the contract when it states "notwithstanding the provisions of the existing Collective Bargaining Agreement …" in the preamble of the MOU. The Employer also claims that it did not intend on amending, changing, deleting or replacing a single clause in the collective-bargaining agreement. However, I conclude that the MOU is an amendment to the parties' long-term agreement, as it amends the contract with respect to wages, job classifications, working hours and working conditions, as noted above. See Southwestern Portland Cement Company, supra, at 932 (amending the contract with respect to wages, vacation, health and welfare benefits and adding a job classification); Shen-Valley, supra, at 958 (amending the contract with respect to recognition, working hours and conditions, holidays, disability pay, supervisory employees and vacations).

The Employer also asserts that the MOU affects a small minority of employees about unsubstantial or minor changes to employees terms' and conditions of employment. As the Employer points out in its post-hearing brief, the Board, in Appalachian Shale Products Co., 121 NLRB 1160, 1163-1164 (1958), found that "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."

In the instant case, however, the MOU is not limited to a small minority of employees. Instead, the MOU addresses all employees' terms and conditions of employment, inasmuch as it

makes changes to more than half of the bargaining unit, including drivers and warehouse employees, and it expressly incorporates by reference the unchanged portions of the parties' collective-bargaining agreement affecting all employees. The MOU also contains changes to substantial terms and conditions of employment, including wages, working hours, job classifications and change in operations affecting more than half of the bargaining unit, with additional changes in equipment used daily and training. I find that these are substantial changes in employees' terms and conditions of employment, which far exceed the changes found to be insubstantial by the Board in Madelaine Chocolate Novelties, 333 NLRB 1312, 1312 (2001) (finding that the new agreement "was nothing more than an agreement to begin negotiations in the near future"), Radio Free Europe/Radio Liberty, Incorporated, 262 NLRB 549, 551 (1982) (dealing with wages only), and Southern California Gas Company, 178 NLRB 607 (1969) (dealing with a pension agreement and savings plan agreement which the Board found are limited to supplemental topics and do not constitute a contract bar).

Finally, the Employer argues, in its post-hearing brief, that since employees did not ratify the MOU, this agreement can not serve as a contract bar. The Board, in Appalachian Shale Products Co., supra, at 1163, found that "[w]here ratification is a condition precedent to contractural validity by express contractural provision, the contract will be ineffectual as a bar unless it is ratified prior to the filing of a petition, but if the contract itself contains no express provision for prior ratification, prior ratification will not be required as a condition precedent for the contract to constitute a bar." In the instant case, the MOU does not contain an express provision requiring employee ratification. Thus, I find that the absence of ratification does not preclude the MOU from serving as a contract bar.

Thus, I conclude that the MOU is a new agreement which embodies new terms and conditions of employment and also expressly reaffirms the long-term agreement and indicates a

clear intent on the part of the Employer and the Union to be bound for a specific period. Accordingly, I conclude that there is an existing collective-bargaining agreement, executed prior to the filing of the instant petition, that serves as a bar to an election herein.

CONCLUSION

Accordingly, no question concerning representation among employees covered by the petition exists because the MOU executed by the parties is a bar to this proceeding.

ORDER

IT IS HEREBY ORDERED that the petition in this matter be, and 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, 1099 Fourteenth Street, NW, Washington, DC 20570. This request must be received by the Board in Washington by ***April 10, 2008***.

In the Regional Office's initial correspondence, the parties were advised that the National Labor Relations Board has expanded the list of permissible documents that may be electronically filed with the Board in Washington, DC. If a party wishes to file one of these documents electronically, please refer to the Attachment supplied with the Regional Office's initial correspondence for guidance in doing so. The guidance can also be found under "E-Gov" on the National Labor Relations Board website: www.nlrb.gov.

DATED at Buffalo, New York this ***27th day of March, 2008***.

_____

HELEN E. MARSH, Regional Director
National Labor Relations Board, Region 3
Niagara Center Building – Suite 630
130 S. Elmwood Avenue
Buffalo, New York 14202