UNITED STATES OF AMERCIA
NATIONAL LABOR RELATIONS BOARD
REGION 5

MAKRO SERVICES, INC.[1] **Employer** **and** **ELIDA MELENDEZ, an Individual** **Petitioner** **and** **SERVICE EMPLOYEES INTERNATIONAL UNION, CLC, LOCAL 32 BJ**[2] **Union**	**CASE 5-RD-1434**

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.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in these proceedings to the undersigned.[3]

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

[2] The Union's name appears as amended at the hearing.

[3] The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed. The parties agreed to and executed a stipulation in lieu of witness testimony. (Board Exhibit 2 with attachments -2(a)-2(g)) The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction. The labor organization involved claims to represent certain employees of the Employer. The Employer and the Union filed post-hearing briefs which have been duly considered.

INTRODUCTION

The Employer, a Maryland corporation with an office in Gaithersburg, Maryland, provides janitorial services in various buildings throughout the State of Maryland, including the National Naval Medical Center in Bethesda, Maryland, the only location involved in this proceeding. There are approximately 104 employees in the unit.[4]

ISSUE

The sole issue for determination is whether the instant decertification petition should be dismissed because of a contract bar.

POSITION OF THE PARTIES

The Union argues that e-mails between the parties on December 10, 2007 satisfied the Board's contract bar requirements and that the decertification petition should be dismissed. The Employer argues that an e-mail sent by the Employer's Senior Operations Manager George W. Donovan to the Union's Chief negotiator, Mike Duffy, on December 10, 2007 at 4:32 p.m. accepting the Union's December 10, 2007 counteroffer was unsigned. Accordingly, the Employer contends that a contract bar did not exist on the date the decertification petition was filed because the parties failed to execute an agreement that reflects the substantial terms and

[4] The parties stipulated that the following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 8(b) of the Act:

> All full-time and regular part-time custodial service employees, housekeepers, and janitors employed by the Employer at the National Naval Medical Center in Bethesda, Maryland, excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

conditions of a new labor contract.[5] The Petitioner likewise contends that there was no contract bar when the petition was filed.

DECISION SUMMARY

I find that the decertification petition is barred by the Board's contract bar rules and, accordingly, I shall dismiss the petition.

FACTS

The Union was recognized by the Employer as the exclusive collective-bargaining representative of unit employees in a collective-bargaining agreement effective from December 12, 2006 until December 11, 2007, and in the successor collective-bargaining agreement effective from December 12, 2007 until December 1, 2010.[6]

While negotiations over the collective-bargaining agreement at issue appear to have commenced earlier,[7] the e-mails comprising the record and their attachments cover the period from December 7, 2007 at 5:10 p.m. to December 14, 2007 at 10:35 a.m.

The initial e-mail exhibit attached to the parties' stipulation (Board Exhibit 2(A)) was sent by the Union's chief negotiator Duffy to the Employer's chief negotiator, Senior Operations Manager Donovan, on Friday, December 7, 2007 at 5:10 p.m.[8] Attached to the e-mail was the

[5] According to the Employer "For purposes of this brief only, Makro does not dispute that an agreement was reached on December 10, 2007. As discussed infra, however, this agreement was not signed by Makro until December 14, 2007." (Employer Brief, pg. 2 at footnote one.)

[6] See Stipulation, Board Exhibit 2, item 5. In its brief, the Union notes that it was certified as the bargaining representative of the cleaning services unit at the National Naval Medical Center in Bethesda on June 28, 2006.

[7] The Union's brief notes that negotiations for a successor agreement commenced in October 2007.

[8] See Board Exhibit 2(A) in which Duffy's name appears three times. Initially his name appears at the top heading section following the word "from". Thereafter, at the conclusion of the text, he typed his full name. Finally, the

Union's latest counter-proposal. The 19 page counter-proposal, a complete collective-bargaining agreement, utilized the format of the preceding agreement and highlighted proposed additions, deletions and/or changes to the existing contract.

On Monday, December 10, 2007 at 10:56 a.m., Donovan sent Duffy an e-mail with the subject heading "Makro counter to union offer dated December 7, 2007."[9] The Employer's response to the Union's December 7, 2007 proposal is a four-page document specifying previously agreed-upon contract provisions and highlighting various new Employer agreements while proposing some further revisions. Thereafter at 2:48 p.m. on December 10, 2007, Donovan sent Duffy another e-mail attaching the Employer's proposed revisions to Section 17.4, a provision regarding Employer reports and payments to the Health Fund.[10]

The Union responded to the Employer's proposal that same day at 3:38 p.m. Duffy's e-mail to Donovan attached two documents. One document represented the Union's counter to the Employer's proposal concerning Section 17.4. The second attachment was a complete 18 page collective-bargaining agreement again highlighting the proposed changes from the previous draft.[11]

Less than one hour later, at 4:32 p.m. on December 10, 2007, Donovan, from his Verizon Wireless Blackberry, sent Duffy a response which read "Makro Svcs accepts to all terms and conditions stated in this counter offer CBA dated 12-10-2007 attached to this e-mail." (Board

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e-mail includes a standard e-mail "signature" (see Microsoft Outlook) that lists his full name, title, address, and telephone and fax numbers.

[9] See Board Exhibit 2(B). The e-mail identifies Donovan at the top as the sender and also includes his e-mail signature listing his complete name, title, and other contact information at the bottom.

[10] See Board Exhibit 2(C). This e-mail also identified Donovan as the sender and included his e-mail signature listing his complete name, title, and contact information below.

[11] See Board Exhibit 2(D). The successor agreement's effective dates are December 12, 2007 until December 11, 2010. The Board has specified that to bar a petition a contract must be for a fixed term. **Pacific Coast Association of Pulp and Paper Manufacturers, 121 NLRB 990 (1958).**

Ex 2(E)) This e-mail correspondence clearly identifies Donovan, the Employer's chief negotiator as the sender in the heading and is itself a continuation of the 2:48 p.m. correspondence which included Donovan's complete e-mail signature at the bottom.[12]

The instant decertification petition was filed on December 13, 2007.

ANALYSIS

The Board has long held that in order to serve as a bar to an election an agreement must be signed by the parties prior to the filing of the petition and contain substantial terms and conditions of employment sufficient to stabilize the parties' bargaining relationship. **Appalachian Shale Products, 121 NLRB 1160 (1958)**. The agreement, however, need not be embodied in a formal document. Informal signed documents, such as a written proposal and acceptance, which nonetheless contain substantial terms and conditions of employment are sufficient. **Seton Medical Center, 317 NLRB 87 (1995)**; **Georgia Purchasing, 230 NLRB 1174 (1977); Appalachian Shale, 121 NLRB at 1164**.

The Board does not require the parties to execute the same document in order to constitute a contract bar. **Waste Management of Maryland, 338 NLRB 1002 (2003); Holiday Inn of Ft. Pierce, 225 NLRB 1092 (1976)**. The flexibility that the Board has written into its contract bar rules does not excuse the parties from the fundamental requirement that they signify their agreement by attaching their signatures to a document or documents that tie together their

[12] Included in the documentation attached to the stipulation are two further documents. The first is an e-mail from Duffy sent December 12, 2007 at 4:25 p.m. attaching a complete clean copy of the negotiated contract signed by Duffy. (Board Exhibit 2(F)) The final document is the signature page evidencing the signature of the Employer's President and CEO. Given my conclusion that a contract bar existed as of Donovan's December 10, 2007 4:32 p.m. e-mail, the later communications are not relevant. The Board has held that a signing of an informal agreement covering substantial terms and conditions of employment satisfies the requirements of the Board's contract bar doctrine even though the parties intended to formally execute a document at a later date. **Television Station WVTV, 250 NLRB 198, 199 (1980); St. Mary's Hospital, 317 NLRB 89, 90 (1995)**.

negotiations, by either spelling out the contract's specific terms or referencing other documents that include them. **Waste Management, 338 NLRB at 1003**.

The Employer contends that because the e-mail sent by its chief negotiator Donovan on December 10, 2007 at 4:32 p.m. from his Verizon Wireless BlackBerry did not contain Donovan's electronic signature or typed name, his acceptance was insufficient to meet the Board's signing requirement. This argument, however, ignores the fact that the Employer's e-mail acceptance at 4:32 p.m. was part of a series of Employer/Union e-mails on that date that contained Donovan's name at the header and his e-mail signature below. More specifically, prior to his 4:32 p.m. e-mail, Donovan sent e-mails to the Union on December 10 at 10:51 a.m. (Board Exhibit 2(B), with attachment summarizing the Employer's position on all contract provisions) and at 2:48 p.m. (Board Exhibit 2(C) concerning CBA Section 17.4). The printed BlackBerry transmission appearing in the record as Board Exhibit 2(E) reproduces and includes Donovan's 2:48 p.m. e-mail, electronic signature and all. [13]

To find, as the Employer argues, that a signing did not occur because Donovan failed to type or electronically sign his name to the 4:32 p.m. e-mail that unequivocally accepted the negotiated agreement ignores the realities of modern electronic communications, invites mischief[14] and misconstrues prior Board decisions demonstrating the evolving application of the

[13] There is no evidence in the record as to why Donovan failed to include an electronic signature with the BlackBerry e-mail transmission. The Employer and the Union in fact stipulated that Donovan's BlackBerry transmission signified that a complete agreement had been reached. Moreover, the record suggests that Donovan routinely included an electronic signature when sending e-mail from his personal computer. A BlackBerry, however, is a mobile device that allows quick messages to be sent on the go. One can speculate therefore, that, in all likelihood, Donovan failed to include an electronic signature with the BlackBerry transmission because the BlackBerry, unlike his personal computer, was not programmed to include an electronic signature automatically.

[14] In **YWCA of Western Massachusetts, 349 NLRB No. 78, slip op. at 3 (2007),** the Board recently examined the distinction between employees challenging a union's representational status and an employer's unilateral withdrawal of recognition. In that case, the Board explained, in dicta, that the rule in **Appalachian Shale** "is essentially an effort to avert the danger that unions and employers may collude to defeat employees' representational wishes on the basis of illusory or fabricated agreements." **Id., slip op. at 3.** Such a threat of fabrication is not present in this case as the e-mails exchanged on December 10, 2007 attached and/or referred to a complete agreement. Accordingly, the

Board's contract bar rules. In **Television Station WVTV,** the Board found that the initialing of a contract was sufficient evidence of a contract bar. In addition, the Board has concluded that an exchange of telegrams incorporating by reference the parties' prior collective-bargaining agreement was sufficient to constitute a bar to a decertification petition. **Georgia Purchasing, 230 NLRB at 1174**. In the latter case, the Board, contrary to the Regional Director, concluded that the Union's telegram detailing the terms of the negotiated agreement, read in conjunction with the preceding agreement, along with the Employer's telegram accepting the terms was sufficient to establish a contract bar and, accordingly, it dismissed the decertification petition.

In the instant case, the Employer's December 10, 2007 4:32 p.m. e-mail replying to the Union's December 10, 2007 3:38 p.m. e-mail that included an attached complete agreement albeit with revisions highlighted, represents a complete collective-bargaining agreement to which the parties have signified their agreement.[15] Moreover, Donovan's acceptance of the agreement in a document that includes his name and incorporates his electronic signature meets the Board's signing requirement for purposes of finding a contract bar.

The case law cited by the Employer in its brief does not support a contrary conclusion. In arguing its position, the Employer relies on the Board's holding in **Seton Medical Center**. That case, however, is inapposite on its facts. The Board refused to find a contract bar because while the parties initialed a series of tentative agreements, there was no signed document that identified

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parties' exchange of e-mails December 10, 2007 leaves no doubt regarding agreed-upon terms. **Waste Management of Maryland; Branch Cheese, 307 NLRB 239 at 240 (1992)**.

[15] I note that my conclusions with respect to the electronic communications in this case are consistent with emerging practices throughout federal agencies, including the Electronic Signatures in Global and National Commerce Act, as codified in 15 U.S.C. 7001 *et. seq.* and also referred to as the E-Sign Act. My conclusions also are consistent with two recent decisions issued by Region 8 Regional Director Fred Calatrello in cases presenting very similar issues, **ABL Wholesale Distributors, Case 8-RD-2095 (Nov. 13, 2007),** and **Angelica Textile Services, Case 8-RD-2073 (April 26, 2007).** Two state court cases cited by the Employer involving statute of frauds issues, **Rosenfeld v. Zerneck, 4 Misc. 3d 193 (NY. Sup. 2004),** and **Parma Title Mosaic & Marble Co., Inc. v. Estate of Short, 87 N.Y. 2d 524 (1996),** are not applicable to the Board's contract bar rules.

the totality of their agreement. Thus, the Board found that that there was no evidence of a complete agreement or that "their contract negotiations were concluded." **Ibid.** In the instant case, the parties agree that their negotiations were concluded and that a complete agreement had been reached. The Employer also cites the Board's decision in **Young Women's Christian Association of Western Massachusetts,** but in that case the Board refused to apply contract bar principles in a situation where an employer had unlawfully withdrawn recognition from the existing union.

Accordingly, based on the foregoing and the record as a whole, I find that the Employer and the Union executed a collective-bargaining agreement prior to the filing of the instant petition. As a result, the petition is barred by the Board's contract bar rules and I shall dismiss it.

ORDER

IT IS ORDERED that the petition in this case 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 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by 5:00 p.m. EST on January 30, 2008. The request may be filed electronically through E-Gov on the Board's website, www.nlrb.gov,[16] but may not be filed by facsimile.

[16] To file the request for review electronically, go to www.nlrb.gov and select the **E-Gov** tab. Then click on the **E-Filing** link on the menu. When the E-File page opens, go to the heading **Board/Office of the Executive Secretary** and click on the "File Documents" button under that heading. A page then appears describing the

Dated at Baltimore, Maryland this 16th day of January 2008.

(SEAL)

/S/WAYNE R. GOLD

Wayne R. Gold, Regional Director
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E-Filing terms. At the bottom of this page, check the box next to the statement indicating that the user has read and accepts the E-Filing terms and click the "Accept" button. Then complete the filing form with information such as the case name and number, attach the document containing the request for review, and click the Submit Form button. Guidance for E-filing is contained in the attachment supplied with the Regional Office's initial correspondence on this matter and is also located under "E-Gov" on the Board's web site, www.nlrb.gov.