D.R. NO. 82-34

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION
BEFORE THE DIRECTOR OF REPRESENTATION

In the Matter of

CITY OF ATLANTIC CITY,

Public Employer,

-and-

NATIONAL POLICE SECURITY OFFICERS LOCAL 9,

DOCKET NO. RO-82-31

Petitioner,

-and-

AMALGAMATED TRANSIT UNION DIVISION 880, AFL-CIO,

Intervenor.

SYNOPSIS

The Director of Representation, on the basis of an administrative investigation, directs an election in a unit of all salary and hourly rated employees classified as baggage agents, bagpersons, janitors, matrons, and security guards employed by the City of Atlantic City at the Atlantic City Bus Terminal, excluding managerial executives, confidential employees, professional and craft employees, police, and supervisors within the meaning of the New Jersey Employer-Employee Relations Act. The Director finds that the current collective agreement between the City and Amalgamated Transit Union, Division, 880, AFL-CIO does not bar the filing of a representation petition because it lacks an explicit termination or duration clause.

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Appearances:

For the Public Employer
John Miraglia, Consultant

For the Petitioner
G. Chip Dunn, President

For the Intervenor
Weitzman, Brady & Weitzman, attorneys
(Richard P. Weitzman of counsel)

DECISION AND DIRECTION OF ELECTION

On September 9, 1981, a Petition for Certification of Public Employee Representative was filed with the Public Employment Relations Commission (the "Commission") by National Police Security Officers, Local 9 (the "NPSO") with respect to a unit of security officers employed by the City of Atlantic City (the

"City") and working at the Atlantic City Bus Terminal. On October 2, 1981, NPSO sought to amend the representation petition by enlarging the scope of the unit to include:

> ... All regularly employed full time and part time employees, employed by the City of Atlantic City, regarding Security Officers, Baggage Agents, Bagpersons, Janitors, [and] Matrons presently employed at the Atlantic City Bus Terminal and future depots.

The amended petition, which is supported by an adequate showing of interest, was deemed filed as of October 2, 1981. The Amalgamated Transit Union, Division 880, AFL-CIO (the "ATU") is the current representative of the petitioned-for employees and has intervened herein, pursuant to N.J.A.C. 19:11-2.7, on the basis of a current written agreement covering these employees.

The undersigned has caused an administrative investigation to be conducted into the matters and allegations set forth in the Petition.

Based upon the administrative investigation to date, the undersigned finds and determines as follows:

1. The disposition of this matter is properly based on the administrative investigation herein, it appearing that no substantial and material factual issues exist which may more appropriately be resolved after an evidentiary hearing. Pursuant to N.J.A.C. 19:11-2.6(b), there is no necessity for a hearing, where, as here, no substantial and material factual issues have been placed in dispute by the parties.

2. The City of Atlantic City is a public employer within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (the "Act"), is the employer of the employees who are the subject of the Petition, and is subject to the provisions of the Act.

3. The Amalgamated Transit Union, Division 880, AFL-CIO, and the National Police Security Officers are public employee representatives within the meaning of the Act, and are subject to the provisions of the Act.

4. NPSO seeks to represent a unit of all regular full time and part time security officers, baggage agents, bagpersons, janitors and matrons employed by the City of Atlantic City at the Atlantic City Bus Terminal and future depots. The petitioned-for unit is coextensive with the unit currently represented by the ATU.

5. The City and the ATU have filed statements of position, with accompanying documentation, in which they assert that the current contract does not expire until December 31, 1982, and, therefore, under N.J.A.C. 19:11-2.8(c)(2), 1/ the

1/ N.J.A.C. 19:11-2.8(c) provides, in pertinent part:

> During the period of an existing written agreement containing substantive terms and conditions of employment and having a term of three years or less, a petition for certification of public employee representative ... normally will not be considered timely filed unless:
>
> * * *
>
> 2. In a case involving employees of a county or a municipality, any agency thereof, or any county or municipal authority, commission or board, the petition is filed not less than 90 days and not more than 120 days before the expiration date or renewal date of such agreement.

current contract bars the instant Petition.

6. NPSO responds that the current contract, effective January 1, 1981, does not provide for a definite term and, therefore, under N.J.A.C. 19:11-2.8(d), [2/] it should be construed as a one year agreement expiring on December 31, 1981.

7. The first paragraph of the current contract between the City and ATU provides that this agreement was "made and entered into effective as of January 1, 1981 ...." The contract does not contain an explicit termination or duration clause. The contract does set forth a rate of pay for various job classifications. Thus, Article V(a) sets forth six different rates of pay for baggage agents, baggagemen, janitors and matrons effective on different dates: (1) January 1, 1981; (2) July 1, 1981; (3) November 1, 1981; (4) January 1, 1982; (5) July 1, 1982; and (6) November 1, 1982. Article V(b) sets forth six different rates of pay for various guards effective on different dates. The effective dates of the pay rates are identical to those set forth in Article V(a) except that the third and sixth rates of pay are effective December 1, 1981 and December 1, 1982 respectively.

8. Copies of two previous contracts between ATU and the City have also been submitted; one contract was effective January 1, 1977, the other January 1, 1979. Neither contract contains an explicit termination or duration clause.

9. The limited issue of whether the instant Petition is untimely pursuant to the contract bar rule contained in N.J.A.C.

2/ N.J.A.C. 19:11-2.8(d) provides in pertinent part: "For the purpose of determining a timely filing, ... an agreement for an indefinite term shall be treated as a one-year agreement measured from its effective date."

19:11-2.8, is properly before the undersigned for consideration at this time. If, as the City and the ATU contend, the current contract carries a fixed two year term expiring December 31, 1982, then the Petition is untimely pursuant to N.J.A.C. 19:11-2.8(c)(2). If the instant contract is an agreement for an indefinite term and, therefore, is treated as a one year agreement for contract bar purposes, then the NPSO's Petition is timely filed. For the reasons which follow, it appears to the undersigned that the instant contractual agreement is of an indefinite duration.

The undersigned has previously addressed the issue of indefinite duration contracts in In re East Brunswick Bd. of Ed., D.R. No. 80-39, 6 NJPER 308 (¶ 11148 1980). In East Brunswick, the undersigned, taking guidance from the experience of the National Labor Relations Board in addressing the concerns arising from the application of the contract bar rule, quoted the following passage from Union Fish Co., 156 NLRB No. 30, 61 LRRM 1012 (1965):

> Two objects of the Board's contract bar policies are to afford parties to collective bargaining agreements an opportunity to achieve, for a reasonable period, industrial stability free from petitions seeking to change the bargaining relationship, and to provide employees the opportunity to select bargaining representatives at reasonable and predictable intervals. To properly achieve these objects in determining whether an existing contract constitutes a bar, the Board looks to the contract's fixed term or duration because it is this term on the face of the contract to which employees and outside unions look to predict the appropriate time for the filing of a representation petition ...

Accordingly, parol evidence is inadmissible to establish the intent of the parties concerning contract duration; instead, the

face of the contract must allow the employees or outside unions to predict with reasonable certainty the contract's fixed term. In re East Brunswick Bd. of Ed. supra; see also In re Tp. of Franklin, P.E.R.C. No. 64 (1971); In re City of Jersey City, E.D. No. 78 (1975); In re Hudson Cty. Bd. of Chosen Freeholders, D.R. No. 78-14, 3 NJPER 295 (1977). 3/

The National Labor Relations Board has consistently held that collective bargaining agreements which lack termination or duration provisions shall not be considered a bar for any period. Pacific Coast Assn. of Pulp & Paper Mfgs., 121 NLRB No. 134, 42 LRRM 1477(1958); see also Dalmo Victor Co., 132 NLRB No. 68, 48 LRRM 1487 (1961); W. Horace Williams Co., 130 NLRB No. 3, 47 LRRM 1337 (1961); United Wallpaper, Inc., 124 NLRB No. 3, 44 LRRM 1290 (1959); Office of the General Counsel of the NLRB, An Outline of Law and Procedure in Representation Cases, p. 89 (1970); The Developing Labor Law, p. 168 (1971). In T. E. Connolly, Inc., 239 NLRB No. 197, 100 LRRM 1139 (1979), the Board applied this rule to a factually similar case. There, on April 5, 1978, the parties ratified a contract which did not contain a specific termination or duration clause, but did provide for three annual wage increases effective April 1, 1978, April 1, 1979 and April 1, 1980. The next day a decertification petition

3/ Because the face of the contract controls resolution of the contract bar issue, the undersigned will not consider documentary or other evidence of previous contractual relationships between the City and ATU. Further, because there are apparently no existing substantial or material factual issues which may more appropriately be resolved after a hearing, the undersigned denies the request of the City and ATU for a hearing. N.J.A.C. 19:11-2.6(c).

was filed, and on April 19, 1978, the parties executed a formal agreement specifically providing for a three year term from April 1, 1978 until March 31, 1981. In determining that no existing contract barred the filing of a decertification petition on April 6, 1978, the Board stated:

> To serve as a bar to a petition, a contract must contain substantial terms and conditions of employment deemed sufficient to stabilize the bargaining relationship. It is well settled that the expiration date is one of those "substantial terms" and that contracts having no fixed duration shall not be considered a bar for any period. Thus, it is required that the expiration term must be apparent from the face of the contract without resort to parol evidence, before the contract can serve as a bar.
>
> In the instant case, the proposal admittedly had no stated expiration date. The fact that it provided beginning dates for three annual wage increases, without more, fails to give it a fixed terminal date because the last annual wage increase could continue indefinitely.
>
> Therefore, contrary to the finding of the Regional Director, we find that the contract lacked an expiration date at the time the instant petition was filed, and therefore could not serve as a bar.

Supra, at 1139 (Footnotes omitted) 4/

4/ The Board in Connolly distinguished Cooper Tire & Rubber Co., 181 NLRB 509, 73 LRRM 1402 (1970). In Cooper, the contract stated it would be "effective from ____ 1968 ... until ___ 1971" and provided for three annual wage increases on September 1, 1968, 1969, and 1970; the Board construed the duration clause providing for a three year span in conjunction with the periodic wage increases to find a three year term effective September 1, 1968. By contrast, in Connolly, as here, there was no duration clause making it clear that the contract would expire in a given year.

On December 4, 1981, the undersigned advised the parties of the results of the investigation and further advised the parties that, on the basis of the above analyses of the issues, Connolly appeared to control and the Petition appeared to be timely. An additional opportunity was provided to the City and the ATU to present documentary or other evidence and/or statements of position.

Both the ATU and the City responded to the undersigned's correspondence and each has again requested a hearing. The ATU desires to provide testimonial evidence which, allegedly, would demonstrate that the employees covered by the contract and outside unions would have no difficulty in determining the termination date of the Agreement. The City argues that its testimony would establish the intent of the contracting parties concerning the contract's expiration date. The City further urges that the undersigned consider a past pattern of two year agreements between the contracting parties.

However, the Commission, following the NLRB policy, has already determined that parol evidence concerning the parties' intent is not admissable in ruling upon contract bar issues. In re Cty. of Middlesex, D.R. No. 81-1, 6 NJPER 355 (¶ 11179 1980), req. for review den. P.E.R.C. No. 81-29, 6 NJPER 439 (¶ 11224 1980). Accordingly, the undersigned's review is confined to the parties' agreement. The undersigned has analyzed the instant agreement consistent with the procedure outlined in Connolly, supra. Neither the ATU nor the City has directed the undersigned to salient provisions of the contract other than those which have been reviewed

above, and the undersigned's independent review does not reveal any contract provision that sets the termination date of the agreement.

Lastly, the City claims that the assigned staff agent rendered improper advice to the NPSO which assisted the NPSO in amending and filing a proper Petition. The City does not state the nature of the allegedly improper assistance rendered by the staff agent; nor is its allegation accompanied by any factual evidentiary proffer. Accordingly, the City's claim is unsupported. Notwithstanding the nature of the City's claim, the Commission cannot disregard an amended Petition which warrants processing under its rules.

Accordingly, for the reasons stated above, the undersigned finds that there are no substantial and material factual issues in dispute which would warrant the convening of an evidentiary hearing. The undersigned therefore concludes that a valid question concerning representation exists among employees and directs the conduct of an election. The appropriate unit is: all salary and hourly rated employees classified as baggage agents, bagpersons, janitors, matrons and security guards employed by the City of Atlantic City at the Atlantic City Bus Terminal excluding managerial executives, confidential employees, professional and craft employees, police, and supervisors within the meaning of the Act.

Pursuant to N.J.A.C. 19:11-2.6(b)(3), the undersigned directs that an election be conducted no later than thirty (30) days from the date set forth below.

Those eligible to vote are employees set forth above, who were employed during the payroll period immediately preceding the date below including employees who did not work during that period because they were out ill, or on vacation, or temporarily laid off, including those in the military service. Employees must appear in person at the polls in order to be eligible to vote. Ineligible to vote are employees who resigned or were discharged for cause following the designated payroll period and who have not been rehired or reinstated prior to the date of the election.

Pursuant to N.J.A.C. 19:11-9.6, the City is directed to file with the undersigned and with NPSO and ATU, an election eligibility list consisting of an alphabetical listing of the names of all eligible voters together with their last known mailing addresses. In order to be timely filed the eligibility list must be received by the undersigned no later than ten (10) days prior to the date of the election. A copy of the eligibility list shall be simultaneously filed with NPSO and ATU with statements of service to the undersigned. The undersigned shall not grant an extension of time within which to file the eligibility list except in extraordinary circumstances.

Those eligible to vote shall vote on whether they wish to be represented for the purposes of collective negotiations by the National Police Security Officers Local 9, the Amalgamated Transit Union Division 880, AFL-CIO, or by neither of the above employee organizations.

The exclusive representative, if any, shall be determined by the majority of valid ballots cast by the employees voting in the election. The election shall be conducted in accordance with the provisions of the Commission's rules.

BY ORDER OF THE DIRECTOR
OF REPRESENTATION

Carl Kurtzman, Director

DATED: January 6, 1982
Trenton, New Jersey