Norfolk Maintenance Corporation, Successor to FD Services, Inc. ***and*** **International Association of Machinists and Aerospace Workers, (IAM), Petitioner.** Case 15–RC–7731

February 25, 1993

ORDER DENYING REVIEW

BY CHAIRMAN STEPHENS AND MEMBERS OVIATT AND RAUDABAUGH

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel, which has considered the Employer's request for review of the Regional Director's Decision and Direction of Election (pertinent portions are attached). The request for review is denied as it raises no substantial issues warranting review.[1]

[1] The only issues raised in the request for review were whether the Regional Director erred by not finding that cessation of the Employer's operation was imminent and by directing an immediate election and whether the Regional Director erred in permitting the hearing officer to introduce allegedly hearsay testimony at the hearing.

APPENDIX

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, 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 this preceding to me.

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. At the hearing in this matter the Petitioner maintained that the employer of the petitioned for employees was FD Services, Inc.[1] (FD). Both FD and Norfolk Maintenance Corporation (Norfolk), who were represented at the hearing by the same attorney, maintained that the sought after employees are now employed by Norfolk. The hearing officer referred counsel for FD and Norfolk's motion to amend the petition herein to name Norfolk as the employer in this matter to me for ruling.

Both FD and Norfolk are wholly owned subsidiaries of Fluor Corporation (Fluor), and California corporations engaged in the business of providing alongside aircraft refueling service (AAR) at Pensacola, Florida, and at Norfolk, Virginia, pursuant to contracts with the United States Government Defense Fuel Supply Center (DFSC). In addition, FD also performs AAR services at Jacksonville, Florida, pursuant to a DFSC contract. The only facility involved herein is the Naval Air Station at Pensacola, Florida (NAS Pensacola).

In 1991, FD became the AAR contractor at NAS Pensacola by virtue of an assignment by Williams Brother Engineering Company, another wholly owned subsidiary of Fluor. The assigned contract between FD and DFSC for the NAS Pensacola operations (the FD/NAS contract), by its terms would have expired on April 30, 1993, absent any extensions.

FD's AAR contracts at Norfolk, Jacksonville, and Pensacola are all being transferred to Norfolk as part of an effort for FD to exit the AAR business. As of the date of the hearing, the project managers at these three locations continue to report directly to George Roy Smith, manager of projects for FD, who works out of FD's corporate headquarters in Greenville, South Carolina. Recently, Norfolk delegated to Smith the responsibility of managing their projects.

On January 12, 1993, FD retroactively assigned its FD/NAS contract to Norfolk effective January 1, 1993. Smith testified that the employee at the Pensacola site ceased working as employees of FD as of December 31, 1992, and become employees of Norfolk effective January 1, 1993. Pensacola site employees have been apprised of FD's anticipated assignment to Norfolk. However, at the time of the hiring, they had not yet been apprised that they are now employed by Norfolk. Shoemaker testified that there has been no change in the AAR operation at NAS Pensacola, and the billing to DFSC is still by FD. Norfolk asserts that the employees at the Pensacola site will shortly be paid by Norfolk, which ''is [still] in the process'' of getting new checks and letterhead printed and stocked in its name. When this is accomplished, the employees at the Pensacola site will be paid from a separate bank account, with income tax withholdings being reported in the name of Norfolk.

After FD's assignment to Norfolk, FD's Pensacola site project manager, Eddie Shoemaker, was retained by Norfolk in that capacity and he reports directly to Smith. Since the assignment, all the employees at the Pensacola site were retained by Norfolk and no additional employees were hired.

The Petitioner's basis for maintaining that FD is the only employer at issue herein is that the DFSC has not yet formally approved the assignment of the FD/NAS contract from FD to Norfolk. The petition did concede that, if the DFSC approves the assignment, Norfolk will became the employer of the petitioned for employees.

Federal Acquisition Regulations require an extensive novation process for the assignment of a Government contract. To obtain a notation agreement, FD must make application to the contracting officer in Alexandria, Virginia. If the notation is approved, the contracting officer sends the contracting officer's representative at NAS Pensacola, William C. Mulligan, notice of the novation. Mulligan is responsible for monitoring the AAR contract on a daily basis to ensure that the contractor is performing in the required manner. Prior to the hearing, Mulligan had no knowledge of FD's assignment to Norfolk. According to Smith, the DFSC was notified of FD's intention to assign all its NAS/FD contracts to Norfolk when it sought a novation with regard to its Norfolk, Virginia site. The record reveals that FD has not yet initiated a formal application for approval of FD's assignment to Norfolk of the FD/NAS contract.

It appears that, as of the date of the hearing, FD was the employer of the petitioned-for unit herein. This finding is based on the record as a whole and particularly the facts that the employees were still being paid by FD at the time of the hearing and that unit employees were not yet apprised that they were employed by Norfolk Company. Nevertheless, it is also clear that based on FD's assignment of the FD/NAS

[1] The name of the Employer is in accord with the decision reached herein.

contract to Norfolk, a successorship situation is imminent and will be completed by the date of the election in this case. Inasmuch as there appears to be no change in the employing industry and, noting particularly that Norfolk has hired FD's entire work force and FD's project manager and that Norfolk is performing the same operation, I find Norfolk to be FD's successor. *Texas Eastman Co.*, 175 NLRB 626 (1969).

Therefore, I shall treat counsel for FD and Norfolk's motion to amend the petition as a motion to correct the name of the employer herein, which the record reflects to be, and I so find to be: Norfolk Maintenance Corporation, successor to FD Services, Inc. If FD's plans change and it continues as the employer, I will entertain an appropriate motion to designate the correct name of the employer. Cf. *Larson Plywood*, 223 NLRB 1161 fn. 2 (1976).

2. At the hearing, the parties stipulated that, during the last 12 months Norfolk, directly received raw materials valued in excess of $55,000 from points outside the State of Florida for use in its Florida operations. In view of the above, Norfolk clearly exceeds the Board's direct inflow standard. *Siemons Mailing Service*, 122 NLRB 81 (1958). Although the parties did not stipulate to the commerce facts with regard to FD, the record reflects that, since early 1991, FD has assumed an existing 4-year contract with the DFSC, valued in excess of $2.5 million, to provide AAR services, to the DFSC at NPS Pensacola. As set forth in a recently issued modification to that contract, each month of such service is valued in excess of $60,000. Accordingly, I find that during the past calendar year FD provided the above-described services valued in excess of $50,000 to the DFSC. Further, given FD's services during the past calendar year to the United States Government, an organization exempted from the Board's jurisdiction but with operations of a magnitude necessary for assertion of jurisdiction over comparable nonexempt organizations, FD clearly exceeds the Board's indirect outflow standard. *Siemons*, 122 NLRB at 85 fn. 12. In addition, given the FD/NAS contract and Norfolk's recently initiated performance of that contract as a de facto subcontractor, both FD and Norfolk provide services that have a substantial impact on the national defense of the United States of America and accordingly the assertion of jurisdiction is appropriate. *Ready Mixed Concrete & Materials*, 122 NLRB 318 (1958). Thus, both FD and Norfolk are employers 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 Norfolk.

4. Norfolk moved to dismiss the petition at the hearing contending that an election in the sought after unit would be futile due to the April 30, 1993 expiration of the FD/NAS contract. Norfolk contends neither FD nor Norfolk plan to continue AAR work at any of the three Naval Air Station sites. On November 9, 1992 at 3 p.m., the bid period closed for the NAS Pensacola site. Neither FD nor Norfolk (nor any subsidiary or parent thereof) bid on the new contract for AAR delivery work at NAS Pensacola.

However, the FD/NAS contract contains an extension provision which the DFSC can exercise on a month-to-month basis up to a 6-month maximum. On January 12, 1993, FD received a modification by facsimile from the DFSC exercising the FD/NAS contract by 4 months. Although conceding that the FD/NAS contract could be extended by as much as 6 months, Smith asserted that DFSC doesn't have the authority to extend the contract other than in 1-month intervals. As a result, Smith considers the extension of the FD/NAS contract to be invalid and plans to notify DFSC of his interpretation of the contract. Norfolk further argues that the DFSC's 4-month extension does not comply with the terms of the FD/NAS contract in that said contract only allows extensions of 1 month at a time. Regardless of the merits of the Employer's interpretation of the contract, it is clear that the DFSC has unequivocally expressed its intention to extend the FD/NAS contract for at least 4 months. The fact that the DFSC may have to rescind the existing 4-month extension and issue the same extension in another form does not render the DFSC's intent to extend the contract speculative. Thus, I find that the FD/NAS contract will remain in effect until at least August 31, 1992, and that Norfolk will remain the Employer of the unit employees until at least August 31, 1993.

Board precedent with regard to the timing of elections dictates that a case-by-case approach be followed. *Clement-Blythe Cos.*, 182 NLRB 502 (1970). Based on the above and acting particularly that DFSC has expressed its intention to extend the FD/NAS contract by 4 months, thereby leaving a 7-month period between the issuance of this decision and the contract's expiration, I find that an election should be directed without any further delay. *E. I. du Pont & Co.*, 117 NLRB 1048 (1957) (election directed with only 6 months left until the Employer's operations ceased). Accordingly, I shall deny Norfolk's motion to dismiss the petition herein.

In its brief, Norfolk argues that the DFSC's extension of the FD/NAS contract is speculative. In support of this position the Employer relies on *Clark Construction Co*, 129 NLRB 1348 (1961), wherein the Board dismissed the Petitioner's petition because the Employer's operation and work force were close to termination. Moreover, the likelihood of a resumption of further work was found to be conjectural inasmuch as no additional contract had been awarded yet. In this case, the DFSC has already notified FD of its intention to extend the contract for at least 4 months. Thus, the Employer's reliance on Clark is inapposite.

In support of its position that there is insufficient time for an election and meaningful collective bargaining, the Employer relies on the Board's holding in the *Longerier Co.*, 277 NLRB 570 (1985). In that case, the Employer's last project was completed 8 months before the Board concluded its Decision and Order. The Board concluded that it could be futile to directing an election in these circumstances and therefore dismissed the petition therein. contrary to the Employer's assertion, there was no finding in *Longerier* that 10 months was insufficient time for an election and meaningful collective bargaining.

Therefore, I find that 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 and I shall direct an election in the unit found appropriate herein.

5. Based on the stipulation of the parties and the record as a whole, the following employees of Norfolk Maintenance Corporation, successor to FD Services, Inc. constitute a unit

appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time production and maintenance employees, including dispatchers/drivers, storage operators/drivers, mechanics, mechanic helpers, driver operators, and plant clericals employed by Norfolk Maintenance Corporation, successor to FD Services, Inc. at its Naval Air Station Pensacola location; excluding all guards, professional employees, and the project manager and other supervisors as defined in the Act.

[Direction of Election omitted from publication.]