

**FTWU, 16 OCB2d 26 (BOC 2023)**

(Rep) (Docket No. RU-1714-23)

**Summary of Decision:** FTWU filed a petition to represent the Marine Consolidated Titles bargaining unit, currently represented by MMP. It alleged that its petition was timely pursuant to an exception to the contract bar rule because a large percentage of employees had signed cards with FTWU, the members believe that MMP had, in effect, abandoned the unit, and MMP had negotiated only one contract. The Board found that the exception to the contract bar rule for unusual or extraordinary circumstances was not applicable because MMP was not defunct and had not abandoned representation of the bargaining unit. Accordingly, it dismissed FTWU's petition as untimely. (*Official decision follows.*)

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**OFFICE OF COLLECTIVE BARGAINING  
BOARD OF CERTIFICATION**

**In the Matter of the Certification Proceeding**

*-between-*

**FERRY TRANSPORTATION WORKERS UNITED,**

*Petitioner,*

*-and-*

**THE CITY OF NEW YORK,**

*Respondent,*

*-and-*

**ATLANTIC MARITIME GROUP, INTERNATIONAL ORGANIZATION  
OF MASTERS, MATES & PILOTS, ILA, AFL-CIO,**

*Intervenor.*

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**DECISION AND ORDER**

On June 20, 2023, the Ferry Transportation Workers United (“FTWU”) filed a petition, docketed as RU-1714-23, seeking to represent the Marine Consolidated Titles bargaining unit, currently represented by the Atlantic Maritime Group, International Organization of Masters,

Mates & Pilots, ILA, AFL-CIO (“MMP”) in Certificate No. 44-77. While the contract bar rule prohibits the filing of a representation petition after the expiration of a collective bargaining agreement covering the employees at issue, FTWU argues that its petition should be processed pursuant to the exception to the rule for unusual or extraordinary circumstances. In support of its position, FTWU states that well over half of the unit signed cards for FTWU and further alleges that the represented employees believe that MMP has abandoned them, that MMP has been the certified representative for a relatively short period, and that it has bargained only one contract. The Board finds that an exception to the contract bar rule is not warranted since MMP is not defunct and has not abandoned representation of employees in the bargaining unit. Accordingly, FTWU’s petition is dismissed as untimely.

### **BACKGROUND**

There are approximately 268 employees in the Marine Consolidated Titles bargaining unit. The unit consists of 17 titles, including Deckhand, Deckhand (Ferry), Marine Oiler, Ferry Terminal Supervisor, and Supervising Dockmaster.<sup>1</sup> Most of the employees in the bargaining unit are employed by the Department of Transportation’s Staten Island Ferry Division. However, some are employed by the Department of Parks and Recreation and the Department of Correction.

For approximately 36 years, starting in 1978, the bargaining unit was represented by Local 333, United Marine Division, ILA, AFL-CIO (“Local 333”). In November 2014, Local 333 members voted by a large margin to merge with the MMP. The merger went into effect on January 1, 2015. Thereafter, in February 2015, MMP filed a motion requesting that the BOC amend Certification No. 44-76 to reflect that the bargaining representative had changed its name. The

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<sup>1</sup> The 12 titles covered by the bargaining certificate that are not listed above are currently vacant.

Board issued notice of this request to the City and the public and no objections were raised. The Board granted the motion. *See Atlantic Maritime Group*, 8 OCB2d 12 (BOC 2015).

MMP subsequently bargained two contracts with the City of New York (“City”): a collective bargaining agreement covering the period of April 27, 2010, through January 5, 2018 (“2010-2018 Agreement”), and a memorandum of agreement covering the period of January 6, 2018, through August 5, 2021 (“2018-2021 MOA”). (MMP Ans., Exhibits C & D)<sup>2</sup>

In September 2019, MMP filed an improper practice petition on behalf of a Shop Steward who had been terminated. Hearings were held in 2022 and in April 2023, the Board of Collective Bargaining (“BCB”) granted the petition and reinstated the Shop Steward with back-pay. *See Atlantic Maritime Group*, 16 OCB2d 15 (BCB 2023). In addition, MMP provided copies of 11 settlements it negotiated between May 2020 and July 2022 on behalf of unit members with disciplinary or licensing issues. (MMP Ans., Exhibit E) MMP also provided copies of eight newsletters and twelve emails directed to the members between March 2020 and March 2023, outlining its work related to COVID-19 and other issues, inviting members to six different membership meetings, and identifying a new union steward for the Staten Island Ferry. (MMP Ans., Exhibit G). On February 23, 2023, MMP emailed the City asking to bargain, and on February 24, 2023, it sent a letter addressed to the bargaining unit members requesting their availability to meet and participate in the bargaining process.<sup>3</sup> (MMP Ans., Exhibits H & I)

On June 28, 2023, FTWU submitted its representation petition with a showing of interest of approximately 78% of the bargaining unit. FTWU alleges that the unit members “feel like

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<sup>2</sup> MMP introduced a memorandum of agreement for 2010-2018 (“2010-2018 MOA”) which was signed on April 30, 2015. We take administrative notice that the terms of the 2010-2018 MOA were incorporated into a complete collective bargaining agreement dated November 30, 2022.

<sup>3</sup> We take administrative notice that the City of New York engages in pattern bargaining. The first memorandum of agreement finalized for the 2021 to 2026 round of bargaining, between DC-37 and the City, was signed on February 16, 2023.

MM&P has informally abandoned the unit” due to “an almost a total lack of service, the lack of any consultation or choice about health-related benefits paid for with City contributions, or any ability to be involved in the governance of MM&P.” (Pet. at 1-2)

### **POSITIONS OF THE PARTIES**<sup>4</sup>

#### **FTWU’s Position**

FTWU argues that unusual and extraordinary circumstances warrant an exception to the contract bar rule and the processing of its petition. FTWU notes that a large majority of the unit members have signed cards for FTWU. It further argues that MMP has “informally abandoned the unit.” (Pet. at 1) Specifically, it alleges that MMP has not served the membership, did not consult or provide choices with respect to member health benefits paid for by City contributions, and did not provide opportunities for bargaining unit members to participate in union governance. FTWU asserts that it is a new union created in 2021 by and for members of the bargaining unit. It claims that MMP has only represented the unit since 2014 and has only bargained a single contract, which expired in 2021.

#### **MMP’s Position**

MMP argues that the petition should be dismissed as untimely because it was not filed during the applicable window period under the contract bar rule. It asserts the percentage of bargaining unit members who have signed cards is immaterial to whether the contract bar rule applies and that no unusual or extraordinary circumstances exist that would warrant an exception to the rule. MMP states that it is and has been vigorously representing the unit. It notes that since

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<sup>4</sup> In its petition, FTWU did not list all titles covered by the bargaining certificate, which resulted in MMP and the City presenting arguments that processing of the petition would result in unit fragmentation. Later, FTWU clarified that it is seeking representation of the entire bargaining unit. As such, we do not address the fragmentation arguments.

2020 it has successfully litigated an improper practice charge before the BCB and negotiated settlements on behalf of at least 11 bargaining unit members in disciplinary and licensing matters, including FTWU's acting president. It asserts that MMP has held regular membership meetings, invited bargaining unit members to participate in its contract negotiations with the City, and provided regular written communication to the members. It further points out that MMP replaced shop stewards and communicated the changes to the bargaining unit members.

MMP disputes FTWU's characterization of it as a short-term representative of the unit, noting that MMP became the bargaining unit representative through a consensual merger with the predecessor union, which was approved by a large majority of the bargaining unit membership. It further asserts that FTWU's contention that MMP has bargained only one agreement is inaccurate, noting that it bargained both the 2010-2018 Agreement and the 2018-2021 MOA. With respect to the current agreement, MMP avers that the City engages in pattern bargaining and that it is customary for contract negotiations to be deferred until after the City has finalized an agreement with District Council 37 ("DC 37"), which sets the pattern. It states that it requested bargaining within a week of the execution of DC 37's most recent contract.

Finally, MMP argues that FTWU is not a *bona fide* employee organization. It states that it was not able to find any information reflecting that FTWU has a constitution, by-laws, membership meetings, or otherwise meets the criteria set forth by the Board. It further asserts that a Google search reveals a website that has only one page with a single statement and a banner indicating that the site is "under construction," and that neither FTWU nor FTWU's purported acting president were listed on the U.S. Department of Labor, Office of Labor-Management Standards website.

**City's Position**

The City argues that the petition should be dismissed as untimely because it was not filed during the applicable window period. It asserts that a large showing of interest is not considered an unusual or extraordinary circumstance to support processing FTWU's petition, which is untimely under the contract bar rule. It notes that unusual or extraordinary circumstances include "when there is reason to believe that [the incumbent union] is defunct or has abandoned representation of the employees in the unit" but that MMP is neither defunct nor has it abandoned representation of the unit members.

**DISCUSSION**

The contract bar doctrine "has been long and firmly established in the field of labor relations." *City Employees Union L. 237, IBT*, 8 OCB 11, at 3-4 (BOC 1971); *see also LEEBA*, 9 OCB2d 26, at 5 (BCB 2016); *SBA*, 14 OCB2d 7, at 7 (BOC 2021). Its purpose is to "balance the statutory objective of stability in bargaining relationships with the statutory right of employees to freely designate or change their representatives." *Terminal Employees L. 832, Intl. Bhd. of Teamsters*, 10 OCB 27, at 5 (BOC 1972) (dismissing a petition filed after the expiration of a contract), *reconsideration denied*, 10 OCB 73 (BOC 1972); *see also Ind. Laborers Union of NYC*, 68 OCB 6, at 6 (BOC 2001), *affd.*, *Ind. Laborers Union of NYC v. Off. of Collective Bargaining*, No. 113973/01 (Sup. Ct. N.Y. Co. Apr. 3, 2002). As PERB has noted, the time limitations for filing a representation proceeding "create some degree of order and stability in the complex world of labor relations in public employment, and, thus, a failure to comply with them should not be easily condoned." *City of Long Beach*, 1 PERB ¶ 1-399.02 at 3119 (1969).

The contract bar rule is set forth in § 1-02(g) of the Rules of the Office of Collective Bargaining (Rules of the City of New York, Title 61, Chapter 1) ("OCB Rules"). It provides that

“[a] valid contract between a public employer and a public employee organization will bar the processing of any petition filed outside of the [30-day] window periods” in which a representation petition can be filed. OCB Rule § 1-02(g). The rule specifies that “[n]o petition for certification, decertification or investigation of a question or controversy concerning representation may be filed after the expiration of a contract.” *Id*; see e.g. *HHC PBA, Inc.*, 5 OCB2d 30, at 6 (BOC 2012) (affirming the dismissal of a petition filed after the expiration of a contract); *Patrolmen and Security Officers Section, Allied Servs. Div., BRAC*, 18 OCB 50, at 2 (BOC 1976) (dismissing a petition filed after the expiration of a contract).

There is an exception to the contract bar rule that permits the processing of a petition that would otherwise be barred “if the Board finds that unusual or extraordinary circumstances exist, such as when there is reason to believe that a recognized or certified employee organization is defunct or has abandoned representation of the employees in the unit for which it was recognized or certified.” OCB Rule § 1-02(g); see *DC 37*, 2 OCB2d 14, at 24-26 (BOC 2009) (finding unusual or extraordinary circumstances when a local law made considerable changes to the levels of bargaining and raised complex unit placement issues). PERB cases further illuminate the test of whether a bargaining representative is defunct. See, e.g., *Eastchester Union Free Sch. Dist.*, 28 PERB ¶ 3064, at 3147-3148 (1995) (finding bargaining representative defunct when it ceased all organizational activity and held no meetings of any kind for over two years); *Union-Endicott Cent. Sch. Dist.*, 28 PERB ¶ 3029, at 3072 (1995), *revd. on other grounds*, 168 Misc. 2d 284, (Sup. Ct. Alb. Co. 1996), *revd.*, 233 A.D.2d 602 (3d Dept. 1996) (finding bargaining representative defunct when it had no members and had given notice to the employer that it was disclaiming its role as bargaining representative).

On the other hand, mere dissatisfaction with the existing bargaining representative or desire to change representatives does not constitute unusual or extraordinary circumstances that are

grounds for an exception. *See, e.g., SBA*, 14 OCB2d 7, at 10 (BOC 2021) (finding no exception to the contract bar rule when the incumbent union was not defunct and had not abandoned representation of the employees); *Ind. Laborers Union of NYC*, 68 OCB 6 at (finding no schism and thus no exception to the contract bar rule despite employees' dissatisfaction with incumbent union); *Sachem Cent. Sch. Dist. No. 5*, 3 PERB ¶ 4021, at 4273-4274 (1970) (finding no exception to the contract bar rule when the allegedly defunct bargaining representative intervened in decertification matter, even though majority of unit had voted to disband current organization and affiliate with a different union).

It is undisputed that FTWU's petition was filed after the expiration of the 2018-2021 MOA. Thus, FTWU's petition is untimely under the contract bar rule unless it can show there are "unusual or extraordinary circumstances." OCB Rule § 1-02(g); *see SBA*, 14 OCB 7, at 9 (dismissing a representation petition filed after the expiration of an MOA). We find no unusual or extraordinary circumstances present here.

"[T]he requirement of a showing of interest serves the limited purpose of enabling the Board to determine whether the surrounding circumstances justify further proceedings on a petition and to screen out petitions which are obviously frivolous." *UFLEA*, 40 OCB 11, at 7 (BOC 1987). A showing of interest is not intended to be dispositive as to which representative the unit members prefer. It is merely an administrative process to "avoid the needless expenditure of public funds in the investigation and processing of cases in which the petitioner does not have substantial support of the employee." *LEEBA*, 11 OCB2d 6, at 5 (BOC 2018). Neither this Board nor PERB has held that a showing of interest, however sizeable, was an unusual or extraordinary circumstance that would support circumvention of the contract bar rule.

Further, despite FTWU's claims, irrefutable facts demonstrate that MMP has not abandoned the unit. MMP sought to oppose the petition by submitting evidence of its



representation of bargaining unit members. That evidence showed that it has regularly acted on behalf of bargaining unit members over the past three years. MMP became the bargaining representative in 2015 following a merger with another union that had represented the bargaining unit for over 30 years. Since 2015, it has negotiated two collective bargaining agreements, processed grievances, held meetings, and communicated with bargaining unit members regarding relevant issues. While FTWU complains that MMP has represented the unit only briefly and has negotiated only two agreements, the contract bar rule sets no exceptions based on the length of the bargaining relationship or the number of contracts negotiated. *See* Rule § 1-02(g). Inasmuch as neither this Board nor PERB have found that a brief period of representation or limited number of contracts negotiated supported an exception to the contract bar rule, we decline to do so here.

Moreover, bargaining unit members' perceived dissatisfaction with MMP is not a basis for finding unusual or extraordinary circumstances and an exception to the contract bar rule. As stated above, "[i]t is well established that employee dissatisfaction with a union's representation is not enough to warrant an exception to the contract bar rule." *SBA*, 14 OCB2d 7, at 10 (citing *Ind. Laborers Union of NYC*, 68 OCB 6, at 13-14); *see also*, *Sachem Cent. Sch. Dist. No. 5*, 3 PERB ¶ 4021 at 4273 (holding that "[m]ere dissatisfaction with the fruits of negotiations does not require making an exception" to the contract bar rule). Accordingly, the petition is dismissed as untimely.<sup>5</sup>

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<sup>5</sup> Because we find the petition is untimely, we do not reach the question of whether FTWU is a *bona fide* employee organization.

**ORDER**

NOW, THEREFORE, pursuant to the powers vested in the Board of Certification by the New York City Collective Bargaining Law, it is hereby

ORDERED that the petition, docketed as RU-1714-23, is hereby dismissed as untimely.

Dated: September 18, 2023  
New York, New York

SUSAN J. PANEPENTO  
CHAIR

ALAN R. VIANI  
MEMBER