

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 32**

**RENZENBERGER, INC.**

**Case 32-RC-117737**

**Employer**

**and**

**UNITED ELECTRICAL, RADIO AND MACHINE  
WORKERS OF AMERICA (UE)**

**Petitioner**

**and**

**TRUCK DRIVERS, CHAUFFEURS, WAREHOUSEMEN  
AND HELPERS UNION, LOCAL 707, AFFILIATED WITH  
THE NATIONAL PRODUCTION WORKERS UNION<sup>1</sup>**

**Intervenor**

**DECISION AND DIRECTION OF ELECTION**

Renzenberger, Inc., herein called the Employer, provides crew transportation services to numerous railroad companies at over 100 locations throughout most of the states in the United States. The United Electrical, Radio and Machine Workers of America (UE), herein called the Petitioner, filed a petition on November 25, 2013, under Section 9(c) of the National Labor Relations Act, herein called the Act, seeking to represent a unit of approximately 580 drivers and yard coordinators employed by the Employer in its California operations. The Truck Drivers, Chauffeurs, Warehousemen and Helpers Union, Local 707, affiliated with the National Production Workers Union,

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<sup>1</sup> The names of the Employer and Petitioner appear as stipulated at the hearing. The name of the Intervenor appears as stipulated and further clarified on the record.

herein called the Intervenor, currently represents the Employer's employees in the bargaining unit for which Petitioner's petition is filed (the California Unit). The prior collective bargaining agreement between the Employer and the Intervenor (the California Agreement) covered the California Unit and was effective by its terms for the period from February 1, 2011 through January 31, 2014. Around September 20, 2013, the Intervenor and the Employer entered into a new agreement (the September 20 Agreement) which, by its terms, merged the California Unit into a Nationwide Unit already represented by the Intervenor and covered by the Nationwide Master Agreement, which is in effect through July 14, 2015.

A hearing officer of the National Labor Relations Board held a hearing in this matter on December 9 and 10, 2013. The Petitioner, the Intervenor, and the Employer appeared at the hearing, and each of the three parties filed post-hearing briefs with me, which I have duly considered.

There are two issues in this matter. The first is whether, as contended by the Employer and the Intervenor, the petition is barred by the September 20 Agreement between the Employer and the Intervenor which merged the California Unit into the Nationwide Unit covered by the Nationwide Master Agreement, or whether, as asserted by the Petitioner, under the Board's premature extension doctrine, the petition was timely filed within the appropriate window period prior to the January 31, 2014 expiration of the California Agreement. In this regard, both the Intervenor and the Employer argue that the premature extension doctrine does not apply in this case because the Intervenor and Employer "terminated" the California Agreement in April of 2013, thus providing an opportunity for Petitioner to file its petition prior to their September 20, 2013 agreement.

The second issue involves the scope of the appropriate bargaining unit. Should I find that the petition is timely under the premature extension doctrine, the Petitioner asserts that the appropriate unit is the statewide California Unit as described in the California Agreement between the Intervenor and the Employer:

All full-time and regular part-time road drivers, yard drivers, radius drivers, yard managers and yard coordinators employed by the Employer at, or out of, rail yards currently located in the State of California but excluding all office clerical employees and guards, professional employees and supervisors as defined in the National Labor Relations Act.

In contrast, should I find that the petition is timely, the Intervenor and the Employer argue that the appropriate unit must be the Nationwide Unit described in their new Nationwide Agreement, consisting of:

All full-time and regular part-time road drivers, yard drivers, radius drivers, yard managers and yard coordinators employed by the Employer at, or out of the rail yards located in the State of California (effective September 20, 2013), Binghamton, Buffalo, and Corning, New York, Houston, Texas, New Mexico, locations in Pennsylvania including South Fork, Etna, Pitcairn, Harrisburg, Lancaster, Reading, Renova, Lockhaven, North Humberland, West Brownsville, Allentown, and Meadville, Pennsylvania but excluding all office clerical employees and guards, professional employees and supervisors as defined in the National Labor Relations Act.

I have carefully considered the evidence and the arguments presented by the parties on these issues.<sup>2</sup> For the reasons set forth below, I find, in agreement with the Petitioner, that the September 20 Agreement and the resulting Nationwide Master Agreement between the Employer and the Intervenor constitute a premature extension of

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<sup>2</sup> At the hearing, the parties stipulated that any unit found to be appropriate should be composed of all full-time and regular part-time road drivers, yard drivers, radius drivers, yard managers, and yard coordinators and should exclude all office clerical employees, professional employees, guards, and supervisors as defined in the National Labor Relations Act. As noted above, these are the same job classifications that are included in, and excluded from, both the California and the Nationwide Units.

the California Agreement. Accordingly, under the Board's premature extension doctrine, since the petition was filed during the appropriate window period prior to the expiration of the California Agreement, it is timely filed. I further find, in agreement with the Petitioner, that the California Unit is the appropriate unit in this matter.

**I. Facts**

The Employer transports railroad operating crews for various railroads throughout the United States, including at and out of approximately 42 separate rail yards located in 33 cities throughout California.<sup>3</sup> Road and radius drivers transport railroad employees between the trains, to and from hotels, and back to their home stations. Yard drivers operate vans in various railroad yards that shuttle railroad employees to and from different trains.

In December of 2010, the Employer voluntarily recognized the Intervenor as the collective-bargaining representative of the Employer's employees in the California Unit. On January 25, 2011, the Employer and the Intervenor executed the California Agreement, Article XX of which, entitled "Termination and Renewal, reads:

This Agreement shall become effective as of February 1, 2011 and shall continue in full force and effect until and including January 31, 2014 and shall continue from year to year thereafter unless written notice of a desire to amend, modify or terminate this Agreement is given by either party to the other at least sixty (60) days prior to January 31, 2014 or at least sixty (60) days prior to January 31<sup>st</sup> of any subsequent year. Failure to give such written notice in a timely fashion shall operate to automatically renew this contract from year to year thereafter.

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<sup>3</sup> I take administrative notice of the record in several related RC cases involving the Employer's facilities located throughout California, Cases 31-RC-008850, 31-RC-008851, 31-RC-008852, 32-RC-008853 and 31-RC-008854, in which a consolidated pre-election hearing was held by Region 31 of the National Labor Relations Board on February 24-25 and March 2-4, 2011.

On July 15, 2012, the Intervenor and the Employer entered into what they termed a “Master Labor Agreement” covering employees employed by the Employer at or out of three rail yards in the state of New York and twelve in the state of Pennsylvania. The “Master Labor Agreement” contained many of the same provisions as the California Agreement but contained some additional ones, including a provision for paid time off. On or about October 1, 2012, through a memorandum of understanding, the Employer and the Intervenor added the Employer’s employees working in or out of eight rail yards in New Mexico to the Master Labor Agreement.<sup>4</sup>

In February or March of 2013, Intervenor President Juan Fernandez contacted Employer Attorney and Negotiator Scott Gore, saying that the Intervenor wanted to negotiate a new contract for the California Unit and to merge the California Agreement into the parties’ existing Master Labor Agreement.<sup>5</sup> The Intervenor sent its initial bargaining proposals to the Employer around April 1, 2013, stating that the California Unit employees wished to incorporate the proposals “into a new Labor Contract and Working Agreements, effective April 1, 2013 and expires March 31, 2016.” The first item in the Intervenor’s proposal was that “All current contracts between Renzenberger and N.P.W.U, local 707 will become one Master National Collective Bargaining Agreement.” There is no mention in Intervenor’s April 1 proposals of prematurely terminating the existing California Agreement.

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<sup>4</sup> Petitioner also represents various bargaining units of the Employer’s employees located in Illinois, Indiana, Wisconsin, Ohio, and New Jersey.

<sup>5</sup> According to the Intervenor, its interest in renegotiating the California Agreement and merging it into the National Agreement arose from concerns about a pending purchase of the Employer by a Canadian firm called Hallcon. Employee witness Stephen Hiebert testified that he was told that the Intervenor needed to start negotiations early because of the Hallcon takeover.

Employer Negotiator Gore sent a letter to Intervenor President Fernandez, dated April 1, 2013, in which he noted that he was in receipt of the Intervenor's bargaining proposals and proposal to "formally reopen" the statewide California Agreement "and renegotiate a new collective bargaining agreement." In his April 1 letter, Gore indicated that he would send a notice to the Federal Mediation and Conciliation Service (FMCS) "informing them that the current agreement will be terminated and that the parties will be renegotiating a new agreement." However, Gore testified that, after he sent the April 1 letter to Intervenor President Fernandez, the Employer decided to hold off on formally agreeing to renegotiate a new agreement. Testimony at the hearing indicates that the Employer was reluctant to agree to reopen the California Agreement, at least in part, because the Employer believed that by doing so it would have to prematurely terminate the California Agreement and would therefore lose the protection of the contractual no-strike clause.

Representatives of the Employer and the Intervenor met at three different Employer facilities in California on April 2, 3, and 4, 2013. At the meetings, the Employer was represented by Employer Negotiator Gore and two other representatives, while the Intervenor was represented by President Fernandez, Business Agent Steve Valenzuela, and different unit employees depending on the location of the meeting. The meetings were held on consecutive dates in Santa Fe Springs, San Bernardino, and Roseville, California and were attended by five, six and six California Unit employees, respectively.<sup>6</sup> At these meetings, after discussing various issues raised by the

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<sup>6</sup> Intervenor President Fernandez testified that the California Unit employees who attended the meetings were considered to be on the Intervenor's bargaining committee. He explained that they are not elected to the bargaining committee, but are individuals who want to be involved in the Intervenor's activities and show-up for the planned meetings. According to employee testimony, the Employer holds

employees, the Intervenor presented its April 1 proposal, including its proposal to merge the California Unit into the Nationwide Master Agreement. At the conclusion of each of the meetings, the Employer stated that there was no obligation on the part of the Employer to reopen the contract, as there were “legal ramifications,” but that the Employer would consider the Intervenor’s proposal and get back to it within the next month. At the hearing in this matter, both the Intervenor and the Employer referred to these April 2 – 4 meetings as bargaining sessions even though the Employer had not agreed to reopen the contract at the time they took place.

Employer Negotiator Gore testified that on May 8, the Employer decided to agree to “terminate the old agreement and renegotiate a new agreement.” Employer General Counsel and Director of Labor Relations Shawn Ford sent a letter to the Intervenor, dated May 8, 2013, in which he responded to Intervenor’s April 2 bargaining proposals and offered counter-proposals.<sup>7</sup> Ford and Gore met with Intervenor representatives in Chicago on a date between May 8 and May 15 “to let them know that [the Employer was] going to renegotiate a new contract.” Gore testified that, other than the Employer agreeing to Intervenor’s proposal of April 1, there were no discussions between the Employer and the Intervenor regarding when the effective date of the “termination” of the contract would be.

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regular, mandatory safety meetings for its California Unit employees at the end of which the Intervenor is allowed to address the employees regarding upcoming matters. Yard Driver Salvador Chaparro testified that he attended one such meeting sometime in the Spring of 2013 where Intervenor Business Agent Steve Valenzuela informed employees that the Intervenor was going to negotiate a new collective bargaining agreement with the Employer and solicited employee volunteers to attend. According to Chaparro’s testimony, Valenzuela did not say anything at the meeting about the California Agreement being terminated.

<sup>7</sup> In the Employer’s May 8 response, the Employer rejected Intervenor’s proposal to incorporate all current agreements between the Employer and the Intervenor into a single nationwide master agreement.

Employer Negotiator Gore sent another letter to Intervenor President Fernandez, dated May 15, 2013, that was basically identical to his April 1 letter, agreeing to “formally reopen” the statewide California Agreement and “renegotiate a new collective bargaining agreement.” Gore also had the FMCS “Notice to Mediation Agencies” that he had prepared on April 2 finally sent to the FMCS, because, as he testified, he understood he was required to do so under Section 8(d) of the Act. The Notice the Employer sent to the FMSC states: “You are hereby notified that written notice of proposed termination or modification of the existing collective bargaining contract was served upon the other party to this contract and that no agreement has been reached.” On the FMCS Notice, which was signed by Gore on April 2 but received by the FMCS in Washington on May 20, Gore indicated that the “Notice Type” was “Reopener” and that the “Contract reopener date” was April 2, 2013.<sup>8</sup> Employer Negotiator Gore testified that he understood his May 15 letter to Intervenor President Fernandez, a copy of which was attached to the Notice to the FMCS, to mean that the Employer and the Intervenor had “terminated” the California Agreement and were moving forward on renegotiating a “brand new agreement.” Gore testified that, from his perspective, the no-strike, no-lockout provision in the California Agreement was no longer in place after the May 15 “termination” of the California Agreement.

The Intervenor and the Employer met again in California on July 16, 17, and 18 following the same three-city format from the early April meetings, including attendance at the meetings by a few employees from the California Unit. At the first meeting on July

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<sup>8</sup> The Intervenor does not know if it served any Notice on the FMCS and there is no evidence that either the Intervenor or the Employer served Section 8(d) notice on the State of California Mediation and Conciliation Service.

16 at the Employer's Santa Fe Springs facility, the Employer and the Intervenor reached a tentative agreement on several non-wage related issues which Gore wrote up and the five bargaining unit employees attending the meeting "ratified" by signing and writing "yes" next to their names. At the meetings in San Bernardino and Roseville on July 17 and 18, the Intervenor representatives went over the "tentative agreement" that Gore had drafted and seven of the employees attending the meetings "ratified" the agreement in the same way as those attending the Santa Fe Springs bargaining session had done.<sup>9</sup> Fernandez and employee witnesses testified that at each location Fernandez explained the terms of the tentative agreement and that the California Unit employees previously covered by the California Agreement would henceforth be covered by the Nationwide Master Agreement. Fernandez testified that he asked the employee bargaining committee members to "talk to their coworkers about . . . what was going." There is no evidence that there was any discussion at the meetings regarding the premature termination of the California Agreement.

Representatives of the Intervenor and the Employer continued negotiations over the telephone and via email in August on the remaining issues involving a wage progression and the number of personal days off. On August 28, Employer Negotiator Scott sent to the Intervenor's representatives by email a proposed Memorandum of Understanding which listed several "modifications to the current collective bargaining agreement covering employees employed in and out of rail yards located in the State of California which was terminated on April 2, 2013." The first modification listed was that the California Agreement would become "part of the 'Master Agreement' covering

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<sup>9</sup> One employee who attended either the San Bernardino or the Roseville meeting declined to write "yes" next to her signature on the draft tentative agreements.

employees in other States including but not limited to New Mexico, Pennsylvania, Texas, Louisiana and New York.”<sup>10</sup>

Around September 10, 2013, the Intervenor sent a letter to employee members of the California Unit informing them that several meetings were scheduled throughout the state “to explain [their] contract.” The letter, which indicated that the meetings would discuss wage increases, guaranteed PTO/vacation pay, the Hallcon take over, and that “Local 707 was able to secure your jobs, seniority and wages,” requested that employees attend “this very important meeting.” There was nothing in the letter to indicate that the California Agreement had been terminated or that employees would be voting at the scheduled meetings to ratify a new contract. Eight different five-hour meetings were scheduled between Monday and Friday, September 16 through 20, at hotels located throughout the state. Intervenor President Fernandez testified that about 15 employees attended the Los Angeles meeting held on September 16. Fernandez received reports that the other meetings were attended by between five and 25 employees. According to the Intervenor, the employees at these meetings voted to ratify the new agreement.

The Intervenor sent a letter to the Employer, dated September 20, officially notifying the Employer that the Intervenor had “agreed and ratified the newly negotiated Master Contract and working agreement” between the Employer and the Intervenor “for employees employed by [the Employer] within the state of California.” The Employer provided a copy of the agreement which is entitled “Changes to Collective Bargaining Agreement” between the Employer and the Intervenor “for employees employed by [the Employer] within the state of California” and signed by the Intervenor on September 23

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<sup>10</sup> There is no explanation why Scott included the state of Louisiana in his list of states that are covered by the Nationwide Master Agreement since the unit description in the Nationwide Agreement does not include employees employed by the Employer in the state of Louisiana.

and the Employer on October 7, 2013. The copy of the agreement provided by the Employer follows the same format as the August 28 Employer proposal, but, instead of the April 2 termination date listed in the August 28 proposal, it states that the “current collective bargaining agreement” covering the California Unit “was terminated on April 1, 2013.”

Eventually, a modified version of the new agreement was attached to the Nationwide Master Agreement as a Memorandum of Agreement.<sup>11</sup> The Recognition and Scope of Agreement clause of the Nationwide Master Agreement was modified to reflect that, effective September 20, 2013, the Nationwide Unit included employees employed by the Employer in the State of California.<sup>12</sup>

Sometime in November, the Intervenor sent letters to employees in the California Unit advising them that it had negotiated and signed a contract with the Employer in September of 2013. The letter discussed what the Intervenor called “a number of new benefits for the drivers in the state of California,” but did not mention that the California Unit had been merged into the Nationwide Unit.

The Employer and the Intervenor did not present any evidence at the hearing establishing that either provided employees with notice that the California Agreement was terminated at any time. To the contrary, Yard Driver Chaparo testified that at a meeting in November, 2013, Intervenor Business Agent Valenzuela informed employees that the original California Agreement was still in effect between April and September

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<sup>11</sup> The Nationwide Agreement also contains other various Memoranda of Understanding or Agreement or Side Letters covering employees in California; New Mexico; Houston, Texas; and Corning, Pennsylvania.

<sup>12</sup> There is no evidence to support Intervenor’s claim, on brief, that California Unit employees received raises and personal time off benefits retroactive to April 1, 2013.

2013. Moreover, Intervenor Shop Stewards Gabriel Lopez and Stephen Hiebert, who testified on behalf of the Petitioner at the hearing, both stated that they were never informed that the California Agreement was terminated. To that same end, employee Malissa Gollaher testified that via a September 11, 2013 letter, the Intervenor attempted to enforce the union security clause of the California Agreement by threatening Gollaher that it would request her termination for failure to pay her monthly dues.<sup>13</sup>

On November 25, 2013, within the 60 to 90 day window period prior to the original expiration date of the California Agreement, Petitioner filed the underlying petition in this matter seeking to be certified as the exclusive collective bargaining representative of the California Unit.

## II. The Positions of the Parties

The Employer and the Intervenor argue that the petition is barred by their September 20 Agreement that merged the California Unit into the National Unit to be covered by the National Master Agreement (as modified by the September 20 Agreement) with an expiration date of July 14, 2015. Citing *Deluxe Metal Furniture Co.*, 121 NLRB 995, at 1001-2 (1958), the Employer argues that the September 20 Agreement constitutes an exception to the premature extension doctrine because it was executed “at a time when the existing contract would not have barred an election because of other contract-bar rules.”<sup>14</sup> The Employer further cites *Providence Television, Inc.*, 194 NLRB

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<sup>13</sup> The letter sent to Gollaher was undated. However, the envelope was postmarked September 11.

<sup>14</sup> In *Deluxe Metal Furniture Company*, supra, the Board stated:

Thus, a contract will continue to be considered prematurely extended if during its term the contracting parties execute an amendment thereto or a new contract which contains a later terminal date than that of the existing contract, except when executed (1) during the 60-day insulated period preceding the terminal date of the old contract, (2) after the terminal date of the old contract if notice by one of the parties forestalled its automatic

759 (1971), for the proposition that this *Deluxe Metal Furniture* exception applies whenever the parties to the existing agreement actually terminate their contract at any point during its original term. Thus, the Employer and Intervenor assert that, because they agreed to terminate the California Agreement in order to negotiate a new agreement, it would not have barred an election if Petitioner had filed its petition between the date it was terminated and September 20, 2013, so the premature extension doctrine should not apply in this case.

The Employer argues that employees in the California Unit had sufficient notice that entering into the September 20 agreement would result in the merger of the California Unit into the larger Nationwide Unit. Citing *Sefton Fibre Can Co.*, 109 NLRB 360 (1954), the Employer argues that the September 20 agreement to merge the California Unit into the larger Nationwide Unit was made in good faith, provided employees with significantly improved terms and conditions of employment, and was timed in relation to the sale of the Employer to Halconn.

Petitioner, on the other hand, argues that the Employer and the Intervenor did not actually “terminate” the California Agreement, and that, even if they had, such an early termination would not have created an exception to the premature extension doctrine because neither bargaining unit employees nor the Petitioner were notified about any such termination.

As to the issue of the appropriate unit, the Employer and the Intervenor argue that the only appropriate unit must be the Nationwide Unit because, as a result of the September 20 Agreement between the Employer and the Intervenor, the unit changed

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renewal or it contained no renewal provision; or (3) at a time when the existing contract would not have barred an election because of other contract-bar rules. (emphasis added)

from statewide to nationwide and thus the statewide unit is no longer coextensive with the recognized and established bargaining unit. *Westinghouse Electric Corp.*, 227 NLRB 1932, 1935 (1977). Citing *Continental Can Company, Inc.*, 145 NLRB 1427 (1964), Petitioner argues that the bargaining unit must be coextensive with the unit in the California Agreement that was prematurely extended.

### **III. ANALYSIS**

#### **A. The Relevant Case Authority**

Under the Board's contract bar doctrine, where a petition is filed seeking a representation election among a group of employees who are covered by an existing valid collective bargaining agreement, the contract is held to be a bar to an election for a period of time up to three years and any representation petition that is attempted to be filed will be dismissed if filed prior to the appropriate window period. *Hexton Furniture Co.*, 111 NLRB 342 (1955); *General Cable Corp.*, 139 NLRB 1123 (1956). However, a contract bar will not be found where the original agreement was prematurely extended. "The doctrine of premature extension provides that a contract with a terminal date later than that of an existing earlier agreement will not bar a petition filed at a time which would not have been barred by the earlier agreement." *Auburn Rubber Co., Inc.*, 140 NLRB 919, 920 (1963); *see also Continental Can Company, Inc.*, 145 NLRB 1427, 1428-1429 (1964); *Congoleum-Nairn, Inc.*, 115 NLRB 1202 (1956). The purpose of the premature extension doctrine is to estopp parties to an agreement from blocking a petition by entering into a supplemental agreement or modifying a contract in advance of the contract's termination date, thereby thwarting the right of the employees to seek a change of their bargaining representative. *See Wichita Union Stockyards Company*, 40 NLRB

369, 372 (1942). The Board has recognized that to hold otherwise would require employees desiring to change their bargaining representative to accelerate organizational activities so that they would be ready to assert a claim of majority representation at any time the contracting parties might elect to discuss modification of the existing agreement, which would lead to disaffection and unrest rather than stabilized labor relations. *See id.* Similarly, this premature extension rule allows outside unions, which might plan to organize employees currently represented by another union, a degree of predictability necessary to allow them to run their campaign. *See Auburn Rubber Co.*, 140 NLRB at 921. The Board further acknowledges that even giving employees notice of the premature termination of an agreement will not suffice because notice to the employees does not equate to notice to outside unions. *See id.*

To this end, in *Auburn Rubber*, *supra*, the Board found that the petitioning union's petition was not blocked by a contract bar where it was timely filed during the appropriate window period before the expiration of the preexisting collective bargaining agreement even though the the employer and intervening union prematurely terminated the existing agreement and reached a successor agreement prior to the start of the window period. *See* 140 NLRB at 919-920. The Board came to this conclusion even though the employer had posted notices to the bargaining unit employees informing them that the employer and intervening union — their current collective-bargaining representative — had terminated the contract and even though this notice further advised the unit employees that, unless the employees indicated a desire to change their bargaining representative, the employer would proceed to negotiate a new contract with the intervening union. *See id.*

Similarly, in *Continental Can*, supra, the Board held that an employer and intervenor union's agreement to fold a single plant bargaining unit into a multi-plant unit covered by a contract with a later expiration date constituted a premature extension of the contract covering the single plant unit and did not bar a decertification petition by an employee during the appropriate window period prior to the expiration of the original contract. *See generally*, 145 NLRB at 1429-1430. In determining the appropriate unit in which to hold the election, the Board gave no weight to the employer and intervening union's protracted 13-month multi-plant bargaining history after the new agreement expanded the unit from a single-plant unit to a multi-plant unit. *See id.* at 1429. The Board directed an election in the original single plant bargaining unit, noting that a contrary holding would subvert the purpose of the premature extension doctrine since, by engaging in "premature" multiplant bargaining for a considerable period, the parties to a single plant contract could effectively prevent the employees covered by the original contract from making a change in their bargaining representatives at an appropriate time. *See id.* at 1430.

**B. Application Of The Case Law To The Case At Bar**

Based on the facts as elicited at the hearing and the case law cited above, I find that the Employer and Intervenor entered into a premature extension of the California Agreement when they reached the September 20 agreement merging the California Unit into the Nationwide Master Agreement. As such, I find that no contract bar exists with regards to the petition at hand. Therefore, since the petition in this matter was filed within the appropriate 60-90 day open period prior to the date that the California

Agreement was scheduled to expire, the petition is timely and I will direct an election in this matter.<sup>15</sup>

As a preliminary matter, in reaching this conclusion, I find that the Employer and the Intervenor failed to establish that the California Agreement was ever terminated. At the hearing, Employer Negotiator Gore and Intervenor President Fernandez gave conflicting testimony as to the date on which the California Agreement was allegedly terminated: April 1, May 8 and May 15. Gore and Fernandez further testified using the terms “terminate” and “reopen” interchangeably without distinction. The September 20 agreement states that the California Agreement was terminated on April 2. In contrast, the Employer’s May 15 Notice to the FMCS indicates that it constitutes “written notice of proposed termination or modification,” indicating that the “contract reopener date” is April 2. The Termination clause in the California Agreement itself contains typical contract language requiring a party to provide written notice of a desire to amend, modify or terminate the agreement at least 60 days prior to the expiration date of the contract on which it would actually terminate. There is also conflicting record evidence that Intervenor Business Agent Valenzuela informed employees that the California Agreement was still effective in September of 2013 and evidence that the Intervenor threatened to invoke the California Agreement’s union security clause to request an employee’s termination in September—during the period in which the California Agreement was allegedly already terminated and before the September 20 effective date of the merger of the California Unit into the Nationwide Master Agreement. Thus, it cannot be concluded with any degree of certainty when, or if, the Employer and

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<sup>15</sup> See *Leonard Wholesale Meats, Inc.*, 136 NLRB 1000, 1000-1001 (1962).

Intervenor actually terminated the California Agreement. In these circumstances, the evidence is insufficient to establish that the California Agreement was ever terminated.

Even assuming that the Employer and the Intervenor did clearly agree to terminate the California Agreement sometime around April or May of 2013 and therefore were operating without a contract until the September 20 agreement was reached, which arguably would have provided unit employees and outside unions approximately five months during which to file a representation petition, such a hiatus would not prevent application of the premature extension doctrine in this case. In this regard, in *Auburn Rubber*, on facts even more compelling than in the case at hand, the Board found that no contract bar existed even though the parties clearly terminated their contract, the employer posted notices to employees informing them that their contract had been terminated and advising them that, unless employees indicated a desire to change their bargaining representative, the employer would attempt to negotiate a new contract, and there was a seven week hiatus period before the new contract was executed. *See* 1140 NLRB at 920. In contrast, in this case, neither the Employer nor the Intervenor clearly notified bargaining unit employees that the California Agreement had been terminated. To the contrary, the only notice of the extension of the agreement that unit employees received was the announcement of meeting to “explain their contract” in September and the Intervenor’s November letter to California Unit employees that it had negotiated and signed a contract with the Employer in September. As such, sufficient notice of the termination of the California Agreement was never provided to employees. Moreover, it is undisputed that no notice of any kind was given to outside unions, including the Petitioner, that might seek to supplant the Intervenor as the bargaining representative of

the California Unit employees. As such, the premature extension doctrine precludes me from finding a contract bar in the case before me. See, *Auburn Rubber*, 140 NLRB at 921.

It is clear that the Employer and Intervenor prematurely ended the California Agreement, which was set to expire on January 31, 2014, when they agreed to the September 20 merger of the California Agreement into the Nationwide Master Agreement and thereby extended their contractual bargaining relationship through July 14, 2015. Just as in *Auburn Rubber* and *Continental Can*, supra, such an act of a premature extension does not bar the processing of a petition that was otherwise timely filed in relation to the preexisting California Agreement.

The Employer's argument that the third *Deluxe Metal Furniture* exception to the premature extension doctrine applies in this case is based on a misreading of the Board's holdings in both *Deluxe Metal Furniture* and *Providence Hospital*. In *Deluxe Metal Furniture*, the Board noted that the exception applied in cases like those where the existing contract had been in effect for longer than a reasonable term (which the Board currently defines as a three year period). In cases with over three year contracts, both the employees and rival unions are able to determine that they could file a petition during the window period prior to the end of the third year or at any point after the third year. All that *Deluxe Metal Furniture* holds is that, in such a case, if employees or rival unions fail to file a petition during the appropriate time and the employer and the union negotiate a new agreement after the end of the window period prior to the end of the third year, the new agreement would not be considered a premature extension. That limited exception

is not present in this case, so the holding of *Deluxe Metal* is inapplicable in this matter.<sup>16</sup> Similarly, I find *Providence Television* to be not on point. In that case, the Board held only that a contract with a broad midterm modification provision would serve as a contract bar for a three year period because a midterm modification, regardless of its scope, does not constitute the actual termination of the contract. This general principle does not, however, stand for the very dissimilar conclusion posited by the Employer that anytime a contract is terminated mid-term and a new agreement is executed to replace it, the premature extension doctrine does not apply. To the contrary, as *Auburn Rubber* clearly states, even if the old agreement was actually terminated prior to its original expiration date, a new agreement negotiated during its term and prior to the appropriate window period constitutes a premature extension. In this regard, the *Auburn Rubber* Board spoke to this exact distinction when it stated that, “for the purposes of applying the Board’s premature extension doctrine, it is immaterial that the premature extension is embodied in an entirely new and separate agreement . . . rather than in an amendment, supplement, or extension.” See 140 NLRB 920 (quoting *Stubitz Green Corp.*, 116 NLRB 965, 967 (1956)). As such, it does not matter whether the previous agreement was terminated and a new agreement created or whether a mere extension occurred. In either case, the contract was prematurely extended.

As to the question of the appropriate unit in which to hold the election, I find that, in agreement with the Petitioner, the election must be conducted in the historical California Unit. Although the Intervenor and the Employer attempted to change the bargaining unit from a statewide unit to the Nationwide Unit, such a change is of no

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<sup>16</sup> See also, *Jackson Engineering, Co.*, 265 NLRB 1688 (1982) (the Board does not prohibit premature extensions, but only subjects them to the condition that if a petition is filed during the open period, the premature extension will not be a bar.

consequence to my determination. This is precisely what the Board decided to prevent when it issued its decision in a similar situation in *Continental Can*, supra. As noted by the Board in *Continental Can*, holding to the contrary would allow a union and an employer to subvert the purpose of the premature extension doctrine merely by agreeing to expand the scope of the existing bargaining unit. To direct the election in the newly-created Nationwide Unit, as advocated by the Intervenor and the Employer, would be antithetical to my finding above that the September 20 agreement does not serve as a bar to the processing of the petition in this case. In determining the appropriate unit in which to conduct the election in *Continental Can*, supra, where the prematurely extended agreement expanded the unit from a single-plant unit to a multi-plant unit, the Board declined to give controlling weight to the 13-month multi-plant bargaining history that followed the premature extension of the single plant contract. *See id.*<sup>17</sup> In the instant case, the California Unit was allegedly merged into the Nationwide Unit in late September of 2013 at the earliest, so there can be no more than three months of bargaining history in the Nationwide Unit. Thus, the bargaining history in this case does not warrant a different conclusion.

Here, just as in *Continental Can*, the unit was expanded after the Employer and Intervenor engaged in a premature contract extension. As stated above by the Board, an expansion to the unit under these circumstances is not controlling. Furthermore, the California Unit is clearly an appropriate unit as it is the historical unit described in the California Agreement, which the Employer and Intervenor previously negotiated and

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<sup>17</sup> I also note that, as the Employer concedes on brief, the *Westinghouse Electric* case was not decided in the context of a premature extension.

honored.<sup>18</sup> I further note that a petitioned for unit need only be an appropriate unit, not the only or even the *most* appropriate unit. *See Specialty Healthcare and Rehabilitation Center of Mobile*, 357 NLRB No. 83, (2011).<sup>19</sup> Therefore, I find that the California Unit is the appropriate unit in this matter in which to conduct the election.<sup>20</sup>

In summary, I find that there is a not a contract bar in this matter because the September 20 agreement that merged the California Unit into the Nationwide Agreement constituted a premature extension of the California Agreement. I further find that the California Unit is the appropriate unit and I am directing an election in that unit.

### CONCLUSIONS AND FINDINGS

Based upon the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

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<sup>18</sup> I further note that, in his Decision and Direction of Election in Cases 31-RC-008850, 31-RC-008851, 31-RC-008852, 31-RC-008853 and 31-RC-008854, and in agreement with the positions of the Intervenor and the Employer at the time, the Regional Director for Region 31 found the voluntarily-recognized statewide California Unit to be an appropriate unit.

<sup>19</sup> In its offer of proof on the issue of the appropriate unit, Intervenor asserted that the California Unit is not appropriate because employees routinely and frequently drive to, and are occasionally assigned to work in, different states outside of the California Unit; all employees nationwide are scheduled and dispatched out of a central Employer location in Kansas City; the Employer maintains tight and centralized control over labor relations policies; and the Employer has informed the Intervenor that it intends to take a companywide approach to the issue of health care benefits under the Affordable Care Act. I note that the Intervenor offered no evidence that any of these factors, except the reference to the Affordable Care Act, are significantly different from what existed at the time the Employer recognized the Intervenor in the California Unit. In this regard, given the bargaining history between the Employer and Intervenor during which the Employer recognized the Intervenor as the exclusive representative of the California Unit, and given that this recognition was embodied in successive bargaining agreements, I find that the Intervenor has failed to demonstrate the existence of any compelling circumstances sufficient to overcome the significance of bargaining history, and that, therefore, the appropriate unit in this matter is the historical California Unit. *See, e.g. Children's Hospital of San Francisco*, 312 NLRB 920, 929 (1993) and *Ready Mix USA, Inc.*, 340 NLRB 946, 947 (2003) (units with extensive bargaining history should remain intact unless repugnant to the Act's policies).

<sup>20</sup> *See also, Shop Rite Foods, Inc.*, 162 NLRB 1020 (1967) (Board applied premature extension doctrine even though nature of the employing entity changed in the new agreement as a result of a merger of the employer and its parent company).

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed.<sup>21</sup>

2. The parties stipulated, and I find, that the Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case.

3. The Petitioner and the Intervenor claim to represent certain employees of the Employer, and 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.

4. The parties stipulated, and I find, that the Petitioner and the Intervenor are labor organizations within the meaning of Section 2(5) of the Act.

5. The following employees of the Employer (the California Unit) 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 road drivers, yard drivers, radius drivers, yard managers and yard coordinators employed the Employer at, or out of, rail yards currently located in the State of California but excluding all office clerical employees and guards, professional employees and supervisors as defined in the National Labor Relations Act.

There are approximately 580 employees in the unit.

### **DIRECTION OF ELECTION**

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The election will be conducted by

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<sup>21</sup> In particular, I hereby affirm the Hearing Officer's decision to preclude the Employer and the Intervenor from litigating the appropriateness of the California Unit at the hearing. Instead, the Hearing Officer allowed the parties to make offers of proof on the issue of the appropriate unit.

mail ballot. The employees will vote whether they wish to be represented for purposes of collective-bargaining by the Petitioner, the Intervenor, or Neither. The positions of the names of the parties on the ballot will be determined by mutual agreement, or, if no agreement is reached, by coin toss. The logistics of the mail ballot election will be specified in the Notice of Election that the Regional Office will issue subsequent to this Decision.

### **Eligibility**

Eligible to vote in the election are those in the California Unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. California Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

### **The Employer to Submit List of Eligible Voters**

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 8 days of the date of this Decision,<sup>22</sup> the Employer must submit to the Regional Office an election eligibility list, containing the full names and addresses of all the eligible voters. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). This list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized. This list may initially be used by the Region to assist in determining an adequate showing of interest. The Region shall, in turn, make the list available to all parties to the election. Because the election will be conducted by mail, the Employer is requested to provide a copy of the list on mailing labels or in an electronic form suitable for printing mailing labels.

To be timely filed, the list must be received in the NLRB Region 32 Regional Office, Oakland Federal Building, 1301 Clay Street, Suite 300N, Oakland, California 94612-5224, on or before **January 8, 2014**. No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may

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<sup>22</sup> An additional day in which to submit the list is afforded to the Employer due to the News Years Day holiday.

be submitted to the Regional office by electronic filing through the Agency's website, [www.nlr.gov](http://www.nlr.gov),<sup>23</sup> by mail, by hand or courier delivery, or by facsimile transmission at (510) 637-3315. The burden of establishing the timely filing and receipt of this list will continue to be placed on the sending party.

Since the list will be made available to all parties to the election, please furnish a total of **three** copies, unless the list is submitted by facsimile or e-mail, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

### **Notice of Posting Obligations**

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices to Election provided by the Board in areas conspicuous to potential voters for a minimum of 3 working days prior to 12:01 a.m. of the day of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

### **RIGHT TO REQUEST REVIEW**

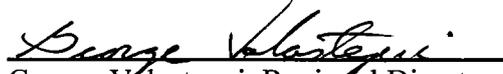
Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by 5 p.m., EDT on

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<sup>23</sup> To file the eligibility list electronically, go to [www.nlr.gov](http://www.nlr.gov), select **File Case Documents**, enter the NLRB Case Number, and follow the detailed instructions.

**January 14, 2014.** This request may be filed electronically through E-Gov on the Agency's web site, [www.nlr.gov](http://www.nlr.gov),<sup>24</sup> but may not be filed by facsimile.

Dated: December 31, 2013,

  
George Velastegui, Regional Director  
National Labor Relations Board  
Region 32  
1301 Clay Street, Suite 300N  
Oakland, CA 94612-5211

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<sup>24</sup> To file the request for review electronically, go to [www.nlr.gov](http://www.nlr.gov), select **File Case Documents**, enter the NLRB Case Number, and follow the detailed instructions. Guidance for electronic filing is contained in the attachment supplied with the Regional Office's initial correspondence on this matter, and is also located on the Agency's website, [www.nlr.gov](http://www.nlr.gov).