

PENNSYLVANIA AMERICAN WATER CO.

Employer

and

Case 06-RC-218527

**UTILITY WORKERS UNITED ASSOCIATION,
LOCAL 537**

Petitioner

and

**UTILITY WORKERS OF AMERICA, AFL-CIO,
CLC, AND ITS LOCAL 537**

Intervenor

**REGIONAL DIRECTOR'S DECISION
AND
DIRECTION OF ELECTION**

I. INTRODUCTION

On April 17, 2018, the Utility Workers United Association, Local 537 (“the Petitioner”) filed a petition (“the Petition”) in this case, seeking to represent the production, maintenance, and clerical employees of Pennsylvania American Water Co. (“the Employer”) at four of the Employer’s facilities¹ within the greater Pittsburgh, Pennsylvania metropolitan area (“the Pittsburgh Districts”). Historically, these employees have been covered by a single collective-bargaining agreement (“the Pittsburgh Districts Agreement,” or “the PDA”), and are represented by the Utility Workers Union of America, AFL-CIO, CLC (“the National Union”), and its Local 537 (“the Local”) (collectively, “the Intervenor”).

On April 18, 2018, in a related case,² the Employer filed a Motion to Suspend the Election Deadlines Contained in the Region’s April 11, 2018 Letter, which requested an indefinite postponement of the processing of the petition in that case. On April 20, 2018, the Employer, Petitioner and Intervenor requested that the processing of this petition be indefinitely postponed in order to permit for additional time to determine the impact, if any, of the pending litigation in the United States District Court for the Western District of Pennsylvania on the

¹ The four facilities that comprise the Pittsburgh Districts include: (1) Bethel Distribution Center, 560 Horning Road, Bethel Park, Pennsylvania 15102; (2) Meter Shop, 160 Sherman Street, Pittsburgh, Pennsylvania, 15210; (3) Aldrich Treatment Plant, 60 Elrama Avenue, Finleyville, Pennsylvania 15332; and (4) Becks Run-Hays Mine Treatment Plant, 380 Becks Run Road, Pittsburgh, Pennsylvania 15210.

² Case 06-RC-218209.

processing of the instant petition. On April 23, 2018, the Regional Director of Region Six of the National Labor Relations Board (“the Region”) issued an Order Partially Granting the Employer’s Motion to Suspend the Election Deadlines and Order Postponing Hearing Indefinitely. This Order provided that the Employer must post the Notice of Petition for Election, but indefinitely postponed the hearing and the due date for the filing of the Statements of Position. On April 24, 2018, the Intervenor filed a Motion to Intervene, and the Petitioner filed a Response to the Motion to Intervene that did not oppose the Petitioner’s Motion to Intervene but denied that a contract bar was in place. On June 14, 2018, the Region issued an Order Granting Motion to Intervene.

On June 15, 2018, the Region issued an Order to Show Cause as to whether a question concerning representation may be raised in this matter. The Intervenor, the Employer, and the Petitioner all timely filed responses to the Order to Show Cause on June 29, 2018.

The Employer and the Intervenor argue that the petition should be dismissed because there is a contract bar in place that would prohibit further processing of the petition. Additionally, the Employer and the Intervenor further argue that the Petition should not be processed while federal litigation among the parties is pending in district court. The Petitioner disputes the existence of a contract and argues that the pending federal litigation should not impact the processing of the Petition.

I have carefully reviewed and considered the evidence submitted in response to the Order to Show Cause and the arguments of the parties. For the reasons that follow, I find that there is no contract bar to the processing of the Petition. I further find that the Petition should be processed because there is no basis for dismissing or staying the Petition pending the federal trusteeship litigation.

II. FACTUAL OVERVIEW

1. Facts Related to the Contract Bar

The Intervenor represents production, maintenance and clerical workers in the Pittsburgh Districts. Traditionally, these employees have been covered by the Pittsburgh Districts Agreement. The most recent Pittsburgh Districts Agreement was effective by its terms from August 18, 2014 through May 17, 2018.

On October 13, 2014, the Employer and the Intervenor entered into a settlement agreement,³ which provided, in relevant part:

A. Each of the Unions and/or its Local affiliates (“Union/Local”) which has a current Local collective bargaining agreement (“Local CBA”) or which is in the process of negotiating

³ This was a settlement agreement entered into between the Employer and the Intervenor for the purposes of resolving an alleged unfair labor practice.

a successor Local CBA with the Company has the option of electing to extend its Local CBA for one year with the only change being an across-the-board wage increase of 2.25% for such extension year.

B. A Union/Local with a current Local CBA may exercise this option by providing the Company with written notice by no later than the final contractual date for notice of modifying and/or terminating the Local CBA that the Union/Local opts to extend its current Local CBA for one year.

Both the Employer and the Intervenor signed this settlement agreement.

On December 13, 2017, Kevin Booth, then-President of the Local, sent a letter by email to Jeff McIntyre, the Employer's President. This letter stated:

This letter is with regard to the current Collective Bargaining Agreement in the Pittsburgh District. Upon ratification, that CBA was set to expire on May 17, 2018. The members in our Pittsburgh District recently ratified the contract extension offer that was made available to them in the American Water/UWUA, National Health and Pension settlement.

This letter simply memorializes the fact that the members in the Pittsburgh District have accepted the terms and conditions of the one (1) year extension with an anniversary wage increase of 2.25%. The current CBA will continue through May 17, 2019, with the wage increase being the only change.

Please let me know if I can be of any further assistance.

This letter was signed in ink by Booth, but contains no signatures from any of the Employer's representatives.

On April 16, 2018, Paul Varnum, an employee covered by the Pittsburgh Districts Agreement and a member of the Petitioner, filed the Petition at issue here. Varnum is not an officer of the Petitioner, nor was he an officer of the Local.

2. Facts Related to the Federal Litigation

On March 19, 2018, two significant events occurred. First, the Petitioner declared in writing to the Employer that the membership of the Local voted to disaffiliate from the Intervenor and become members of the Petitioner. Second, the National Union placed the Local under trusteeship, and appointed John Duffy as the trustee. The former officers of the Local were removed by the National Union.

On March 28, 2018, the National Union filed a Complaint for Preliminary and Permanent Injunctive Relief and for Declaratory Judgment to Enforce Trusteeship in the United States District Court for the Western District of Pennsylvania (“the District Court”), seeking to enforce the trusteeship imposed on the Local and its officers. The following day, the National Union filed a Notice of Motion and Motion for a Preliminary Injunction in the District Court, also seeking enforcement of the trusteeship.

On April 3, 2018, the parties to the federal litigation filed a proposed Consent Order Granting Preliminary Injunction with the District Court. According to this proposed order, Booth and the Petitioner’s officers were prohibited from “interfering in any manner with the trusteeship or with Local 537’s collective bargaining and grievance handling relationships with any and all employers that employ Local 537 members”

On April 19, 2018, the District Court approved the proposed Consent Order Granting Preliminary Injunction. The questions of the effectiveness of the asserted disaffiliation and enforcement of the trusteeship are still pending before the District Court.

III. LEGAL ANALYSIS

1. There is No Contract Bar to the Petition.

Under controlling Board law, a document can only serve as a contract bar to an election if it is signed by both parties prior to the filing of a petition and it contains substantial terms and conditions of employment sufficient to stabilize the parties’ bargaining relationship. *Appalachian Shale Products Co.*, 121 NLRB 1160 (1958). To be sure, the agreement does not need to be embodied in a formal document. Rather, informal documents, including written proposals and acceptance, can be sufficient to establish a contract bar. *Georgia Purchasing*, 230 NLRB 1174 (1977). But, if the document asserted to be the bar does not contain all the substantial terms, is not signed by both parties, or contains some significant ambiguity, then the Board will not find a contract bar. *Waste Management of Maryland, Inc.*, 338 NLRB 1002 (2003); *Seton Medical Center*, 317 NLRB 87 (1995).

Since the finding of a contract bar restricts the rights of employees to freely choose a collective bargaining representative, the party asserting such a bar bears the burden of proving its existence. *Roosevelt Memorial Park*, 187 NLRB 517 (1970). However, the Board has consistently limited this inquiry to the four corners of the document, or documents, asserted to bar an election or a petition, while excluding extrinsic evidence. *Waste Management.*, 338 NLRB at 1003 (citing *United Health Care Services*, 326 NLRB 1379 (1998); *Jet-Pak Corp.*, 231 NLRB 552 (1977); *Union Fish Co.*, 156 NLRB 187 (1965)).

A. The Pittsburgh Districts Agreement Does Not Serve as a Contract Bar.

A contract will not act as a bar to a petition if the contract extends beyond a “reasonable duration.” The Board has long held that a “reasonable duration” for collective bargaining agreement is no more than three years. *General Cable Corporation*, 139 NLRB 1123, 1125 (modifying *Pacific Coast Association of Pulp and Paper Manufacturers*, 121 NLRB 990 (1958) (having found that a reasonable duration two years)). As a result, collective bargaining agreements with a fixed term of more than three years will act as bar to election petitions only during the first three years of that contract. *Id.*

The Pittsburgh Districts Agreement was effective, by the terms on its face, from August 18, 2014 to May 17, 2018. This term of three years and nine months exceeds what the Board has long considered to be a “reasonable duration.” Accordingly, the Pittsburgh Districts Agreement would only serve as a contract bar to petitions filed until the contract’s third anniversary date, August 18, 2017. Here, the Petition was filed well after that date, on April 16, 2018.

With the original contract not serving as a bar to the Petition by its terms, the Employer and the Intervenor could only “reactivate” the contract bar if the parties reached a new agreement. *Shen-Valley Meat Packers, Inc.*, 261 NLRB 958 (1982). For the reasons discussed below, I find that the letter dated December 13, 2017 did not “reactivate” the contract bar.

B. The Extension Letter Does Not Serve as a Contract Bar.

The Employer and the Intervenor both contend that the December 13, 2017 extension letter serves as a bar to the petition. I disagree. In order to serve as a contract bar, the substantial terms of an agreement must be clear on the face of the document. *Waste Management*, 338 NLRB at 1003 (finding no contract bar because there was ambiguity as to the terms of the agreement). Clear durational language, including effective dates and expiration dates, are among the “substantial terms” that must be included in a document for it to act as a contract bar. *See, e.g., Cind-R-Lite Co.*, 239 NLRB 1255, 1256 (1979) (“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.”); *South Mountain Healthcare and Rehabilitation Center*, 344 NLRB 375 (2005) (“Both an effective date and an expiration date are material terms of a contract.”). More still, these terms must be clear from the face of the document, in order to permit employees and outside unions to determine the appropriate time to file a petition. *Cooper Tire & Rubber Co.*, 181 NLRB 509 (1970); *Cind-R-Lite*, 239 NLRB at 1256 (finding that 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.”).

The Board has applied this principle to find that an agreement does not constitute a contract bar when, like here, the actual effective date of the contract could not be determined from the four corners of the document. *South Mountain Healthcare*, supra. In that case, the employer and intervenor-union entered into an agreement with a stated duration of four years. However, the Board found it was not readily apparent from the face of the document when,

exactly, those four years would begin and end. There, the Board noted that there were four possible options for the effective date of the contract: (1) the date the union signed the contract; (2) the date the employer signed the contract; (3) the effective date of the healthcare and pension contributions; or (4) the date of the first wage increase. With this clear conflict among different dates, the Board held that the agreement was not a bar to a petition because third parties could not determine the appropriate time for filing a representation petition.

Here, the December 13, 2017 letter is ambiguous on its face with respect to the effective dates of the agreement. Much like the situation in *South Mountain Healthcare*, there are a number of possible effective dates for the purported extension agreement. The extension could be effective from the date of the ratification vote. Yet, if this were the case, then it would be impossible for a third party to ascertain the date without resorting to parol evidence because the letter is silent as to the date of the ratification. Alternatively, the extension could be effective from the date of the letter. Or, the extension could be effective upon expiration of the Pittsburgh Districts Agreement. A review of the four corners of the letter offers no guidance to a third party attempting to determine when the agreement became effective. Without such a “substantial term” contained in the document, the agreement cannot act as a contract bar to a petition.

Second, and equally important, the letter’s reference to the 2014 settlement agreement calls into question the ability of a third party to adequately determine whether the Pittsburgh Districts Agreement itself was for a fixed, definite term. The Board has clearly held that the term or duration of a contract must be identified on its face. Specifically, in *Union Fish Co.*, the Board stated:

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. The desired predictability would be lost if reliance were to be placed on factors other than the fixed term of the contract. Accordingly, the Board requires that the term, as well as the adequacy of a contract, must be sufficient on its face, with no resort to parol evidence necessary, before the contract can serve as a bar. 156 NLRB 187, 191-92 (1965).

Here, the 2014 settlement agreement, which granted the Intervenor the unilateral right to extend the duration of the Pittsburgh Districts Agreement, frustrates the clear policy intent of the Board. That settlement agreement is precisely the type of parol evidence that the Board has warned

against for over half a century. Third parties, including rival unions and current bargaining unit employees, would be required to refer to the settlement agreement in order to know that the Pittsburgh Districts Agreement could expire on either May 17, 2018 or May 17, 2019.

To be sure, in deciding whether to apply the contract bar doctrine, the Board considers both policy goals of promoting industrial stability and giving effect to employees' right to determine their bargaining representative. *Union Fish*, 156 NLRB at 191-92; *see also Pacific Coast Association of Pulp and Paper Manufacturers*, 121 NLRB 990, 993 (1958) ("one of the principal objectives of the contract bar policy is to provide employees the opportunity to select representatives at reasonable and predictable intervals ..."). Here, the contracting parties entered into the Pittsburgh Districts Agreement for an unreasonable duration of three years and nine months. Then, just a few months after executing that contract, the contracting parties entered into a separate agreement that permits the Intervenor to unilaterally extend the contract – already with an unreasonable term – for an *additional* year. Moreover, this right can be exercised at any time up until "the final contract for notice of modifying or terminating" the Pittsburgh Districts Agreement. This process circumvents the clear requirements that the Board has established for contract bars, including: the need for the substantial terms of the agreement to be clear and unambiguous, the limitation of contract bars for only a reasonable duration, the formal requirement for both parties' signatures on any documents purported to act as a bar, and the prohibition against premature extensions. Put most simply, to find a contract bar in this case would be to defeat employee free choice, and thwart the basic mission of the National Labor Relations Act ("the Act"), to enhance labor stability.

For the above reasons, I find that there is no contract bar to the Petition.

2. The Petition Should be Processed Despite the Pending Trustee Litigation Because it Raises a Question Concerning Representation.

As the Board has recently found, a necessary distinction exists between "questions of representation" and "trusteeship issues," with the former being in the exclusive jurisdiction of the Board and the latter being a matter for the courts to decide. *West Virginia American Water, Co.*, Case 09-RC-219179 (2018) (not reported in Board volumes). That case, involving the same Petitioner, the same Intervenor, and an entity affiliated with the Employer, addressed and answered the question of whether a petition should be dismissed or held in abeyance while federal trustee litigation was pending. The answer was clear: no.

Under existing Board law and a plain reading of both the Act and the Labor Management Reporting and Disclosure Act ("the LMRDA"), there is "no basis for dismissing or staying the petition merely because of the pendency of trusteeship litigation." *Id.* at fn. 1. In reaching that decision, the Board noted that it has consistently "refused to entertain arguments that allegedly improper disaffiliations precluded a question concerning representation." *Id.*; *citing Sperry Gyroscope Co.*, 88 NLRB 907, 908-09 (1950); *Sylvania Electric Products, Inc.*, 89 NLRB 398, 398 fn. 1 (1950). Indeed, the Board found that this notion was specifically contemplated in Section 603(b) of the LMRDA, which states that "... nor shall anything contained in [titles I through VI] ... of this Act be construed to confer any rights, privileges, immunities or defenses

upon employers, or to impair or otherwise affect the rights of any person under the National Labor Relations Act, as amended.” *Id.*; quoting 29 U.S.C. 523(b). Thus, the question pending in the federal litigation described above – namely, whether the Petitioner’s disaffiliation was effective or if the trusteeship should be enforced – has no impact on the question concerning representation raised here.

Here, a question concerning representation exists. *See* 29 CFR § 102.64(a) (“A question of representation exists if a petition as described in section 9(c) of the Act has been filed concerning a unit appropriate for collective bargaining, or in the case of a petition filed under section 9(c)(1)(A)(ii), concerning a unit in which an individual or labor organization has been certified or is being currently recognized by the employer as the bargaining representative.”). As discussed above, the collective-bargaining agreement does not preclude the filing of the Petition, and the Petitioner seeks to represent a unit appropriate for the purposes of collective bargaining. Although the objections raised by the Employer and the Intervenor in *West Virginia American Water* are certainly different than those raised here, the Board’s logic in that case remains applicable. The District Court did not enjoin the Petitioner from filing the Petition here, nor did it enjoin the Board from exercising its authority under the Act. Accordingly, I find that there is no basis for dismissing the Petition, or holding it in abeyance, because of the pending federal trustee litigation.

IV. CONCLUSIONS AND FINDINGS

Under Section 3(b) of the Act, I have the authority to hear and decide this matter on behalf of the Board. 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.
2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.
3. The parties stipulated, and I find, that the Intervenor is a labor organization within the meaning of Section 2(5) of the Act.
4. The Petitioner is a labor organization within the meaning of Section 2(5) of the Act.
5. There is no contractual bar, nor any other bar, to conducting an election in this matter.
6. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Sections 2(6) and (7) of the Act.

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. Employees will vote whether or not they wish to be represented for purposes of collective bargaining by Utility Workers United Association, Local 537 or Utility Workers Union of America, System Local 537.

A. Election Details

The election will be held on a date and at a time and location to be determined following the issuance of this Decision.

B. Voting Eligibility

Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the issuance 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 an 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 that 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. 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.

C. Voter List

As required by Section 102.67(1) of the Board's Rules and Regulations, the Employer must provide the Regional Director and parties named in this decision a list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cell telephone numbers) of all eligible voters.

To be timely filed and served, the list must be *received* by the regional director and the parties by **November 13, 2018**. The list must be accompanied by a certificate of service showing service on all parties. **The region will no longer serve the voter list.**



Unless the Employer certifies that it does not possess the capacity to produce the list in the required form, the list must be provided in a table in a Microsoft Word file (.doc or docx) or a file that is compatible with Microsoft Word (.doc or docx). The first column of the list must begin with each employee's last name and the list must be alphabetized (overall or by department) by last name. Because the list will be used during the election, the font size of the list must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. A sample, optional form for the list is provided on the NLRB website at www.nlr.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015.

When feasible, the list shall be filed electronically with the Region and served electronically on the other parties named in this decision. The list may be electronically filed with the Region by using the E-filing system on the Agency's website at www.nlr.gov. Once the website is accessed, click on **E-File Documents**, enter the NLRB Case Number, and follow the detailed instructions.

Failure to comply with the above requirements will be grounds for setting aside the election whenever proper and timely objections are filed. However, the Employer may not object to the failure to file or serve the list within the specified time or in the proper format if it is responsible for the failure.

No party shall use the voter list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.

D. Posting of Notices of Election

Pursuant to Section 102.67(k) of the Board's Rules, the Employer must post copies of the Notice of Election in conspicuous places, including all places where notices to employees in the unit found appropriate are customarily posted. The Notice must be posted so all pages of the Notice are simultaneously visible. In addition, if the Employer customarily communicates electronically with some or all of the employees in the unit found appropriate, the Employer must also distribute the Notice of Election electronically to those employees. The Employer must post copies of the Notice at least 3 full working days prior to 12:01 a.m. of the day of the election and copies must remain posted until the end of the election. For purposes of posting, working day means an entire 24-hour period excluding Saturdays, Sundays, and holidays. However, a party shall be estopped from objecting to the nonposting of notices if it is responsible for the nonposting, and likewise shall be estopped from objecting to the nondistribution of notices if it is responsible for the nondistribution.

Failure to follow the posting requirements set forth above will be grounds for setting aside the election if proper and timely objections are filed.



RIGHT TO REQUEST REVIEW

Pursuant to Section 102.67 of the Board's Rules and Regulations, a request for review may be filed with the Board at any time following the issuance of this Decision until 14 days after a final disposition of the proceeding by the Regional Director. Accordingly, a party is not precluded from filing a request for review of this decision after the election on the grounds that it did not file a request for review of this Decision prior to the election. The request for review must conform to the requirements of Section 102.67 of the Board's Rules and Regulations.

A request for review may be E-Filed through the Agency's website but may not be filed by facsimile. To E-File the request for review, go to www.nlr.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the request for review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Neither the filing of a request for review nor the Board's granting a request for review will stay the election in this matter unless specifically ordered by the Board.

Dated: November 8, 2018



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