

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

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.

INTERVENOR'S REQUEST FOR REVIEW

Comes now the Intervenor, Utility Workers of America, AFL-CIO, CLC (“National Union”) and its Local 537 (“Local 537”), by and through undersigned counsel, and, pursuant to Section 102.67(d)(1)(ii) of the Board’s Rules and Regulations, 29 CFR § 102.67(d)(ii), requests review of Regional Director Nancy Wilson’s November 8, 2018 Amended Decision and Direction of Election (“D&D”) in the above-captioned matter. The Regional Director’s Decision raises a substantial question of law and policy because of its departure from well-established, long-standing official Board precedent, namely the exceptions to the premature extension doctrine outlined in *Deluxe Metal Furniture Co.*, 121 NLRB 995, 1001-1002 (1958).

Under *Deluxe Metal Furniture*’s third exception, a contract is not prematurely extended—and thus the contract extension constitutes a bar to a subsequently filed representation petition—if the extension was executed at a time when the existing contract would not have barred an election because of other contract-bar rules. “An illustration of the third exception is

where the contract was of unreasonable duration and a reasonable term had passed, as in *Cushman's Sons, Inc.*, 88 NLRB 121 (1950).” An Outline of Law and Procedure in Representation Cases, (Terence G. Schoone-Jongen ed., National Labor Relations Board 2017), at page 105.

Here, as found by the Regional Director, the most recent collective bargaining agreement ran from August 18, 2014 through 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.” (D&D, p. 5). On December 13, 2017—**while a petition would not have been barred under the Board’s contract bar doctrine**—a contract extension through May 17, 2019 was executed. The instant petition was filed on April 16, 2018, during the reasonable term of the contract extension. Thus, under *Deluxe Metal Furniture*, the Regional Director should have dismissed the petition as barred by the contract extension, since that extension was executed at a time when the existing contract would not have barred the filing of a petition.

Inexplicably, despite the Employer, Pennsylvania American Water Co., explicitly raising a contract bar argument based on *Deluxe Metal Furniture* in its June 29, 2018 Response To The Region’s June 15, 2018 Rule To Show Cause, at pages 8-9, and the Intervenor Local 537 explicitly adopting by reference the Employer’s contract bar arguments at page 1 of its June 29, 2018 Response To Order To Show Cause, the Regional Director’s November 8, 2018 D&D is completely devoid of any mention of *Deluxe Metal Furniture* and its exceptions to the premature extension doctrine. Instead, the Regional Director focused on the irrelevant issues of whether the agreed-upon extension had a determinable starting date and whether third parties would have

known about the settlement agreement that entitled the incumbent union to extend the contract. She simply failed to address the dispositive issue. Under these circumstances, the Board should grant this Request for Review, rely on the long-standing *Deluxe Metal Furniture* precedent to correct the Region Director's error, and direct the dismissal of the petition as barred by the contract extension.

FACTUAL BACKGROUND

The employees at issue in this case work for Pennsylvania American Water Co. at four locations in the greater Pittsburgh, Pennsylvania metropolitan area. Historically, these employees have been covered under a single collective bargaining agreement ("the Pittsburgh Districts Agreement") between the Employer and the Intervenor. (D&D, p. 1). The parties' most recent collective bargaining agreement initially extended from August 18, 2014 though May 17, 2018. (D&D, p. 2).

Settlement Providing For Optional Contract Extension. The Employer is a subsidiary of American Water Works Company, Inc. ("American Water"). Since at least 1980, American Water (on behalf of itself and its subsidiaries) and the National Union (on behalf of itself and its affiliated Local Unions, including Local 537, and in consortium with other local and national labor unions representing bargaining units of employees employed by American Water subsidiaries around the country) have, in lieu of local negotiations as to certain employee benefits, participated in multi-union bargaining concerning such benefits. This bargaining typically culminated in an agreement, known as the National Benefits Agreement. See *American Water Works Company, Inc.*, 361 NLRB 64, 65 (2014). The National Benefits Agreement was

then incorporated by reference into a number of local agreements, including the Pittsburgh Districts Agreement.¹

American Water and the National Union engaged in unsuccessful negotiations for a successor agreement to succeed the 2005-2010 National Benefits Agreement. After American Water unilaterally implemented its last best final offer effective January 1, 2011, the National Union filed an unfair labor practice charge which was ultimately determined by the National Labor Relations Board to be meritorious in *American Water Works Company, Inc.*, 361 NLRB 64 (2014). While American Water's petition for review of this decision, and the NLRB's cross petition for enforcement of the decision, were pending in the U.S. Court of Appeals for the Seventh Circuit, American Water and the National Union reached a comprehensive 13 page settlement of the dispute on behalf of all the involved subsidiaries, unions, and employees.² As part of the settlement, at pages 9-10, the parties agreed to a section headed "IV. Option To Extend Local Collective Bargaining Agreements With 2.25% Wage Increase." Paragraphs A and B of that Section IV, quoted by the Regional Director at page 3 of her D&D, state:

- 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 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.

¹ See Pittsburgh Districts Agreement, Section 17, C and D, on page 33, and Appendices A and B.

² This is the settlement to which the Regional Director refers at page 3, footnote 4 of her D&D as being "for the purpose of resolving an alleged unfair labor practice."

This provision of the agreement between the parties thus gave Local 537 the option to extend the expiration date of the Pittsburgh Districts Agreement for one year from May 17, 2018 to May 17, 2019. Paragraph E of Section IV, which was not quoted or referred to by the Regional Director in her D&D, states:

- E. This is a one-time option only which, if not timely exercised by a Union/Local, no longer exists. This option may only be exercised by timely written notice from the particular Union/Local to the Company. **Once a Union/Local has provided timely written notice to the Company that the Union/Local is exercising the option of a one year extension, such notice will be final and binding on both the Company and the Union/Local and not subject to further ratification or approval by the Company or the Union/Local.**

(Emphasis supplied).

Exercise of Contract Option. On December 13, 2017, Local 537 exercised the option contained in the settlement agreement to extend the Pittsburgh Districts Agreement. On that date, Kevin Booth, then-Local 537 President, sent an email letter to the Employer's President, stating, in relevant part:

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.

(D&D, p. 3). Pursuant to Section IV, Paragraph E of the settlement, quoted above, once Booth sent this letter notifying the Employer that Local 537 was exercising its option under the settlement agreement to extend the contract for one year with a 2.25% wage increase, the

contract was extended and “not subject to any further ratification or approval by the Company...”

Trusteeship Imposed, Petition Filed, and Parties Respond To Region’s Order to Show Cause. On May 18, 2018, the National Union decided to place Local 537 in trusteeship, effective March 19, 2018. Late in the evening of March 19, 2018, Kevin Booth, the immediate prior President of Local 537, emailed the Employer’s President advising him that pursuant to purported membership votes Local 537 had determined to disaffiliate from the National Union and form the independent Utility Workers United Association, Local 537, stating: “We are the same organization which you have recognized and with which you dealt in the past with the exact same dues structure, the only difference being that, as a result of this membership vote, we are no longer associated with the Utility Workers of Union of America, AFL-CIO (National Union), and we have simply changed our name.” On March 28, 2018, the National Union filed a complaint in federal district court in Pittsburgh seeking to enforce the trusteeship; on April 3, 2018, the parties to that lawsuit filed an agreed-upon order consenting to the entry of a preliminary injunction and, on April 20, 2018, the district court approved the agreed-upon order.

In the meantime, on April 16, 2018, an employee covered by the Pittsburgh District Agreement filed the instant petition on behalf of Utility Workers United Association, Local 537 (the “Petitioner”). After suspending the processing of the case for a period at the joint request of the parties to permit for additional time to determine the impact, if any, of the federal trusteeship litigation, on June 15, 2018 the Region issued a Notice To Show Cause as to whether a question concerning representation was raised in this case, and two other related cases (Case Nos. 06-RC-218209 and 06-RC-221414) involving the same parties. On June 29, 2018, all three parties filed their responses.

In its response, the Employer raised the issue of a contract bar requiring the dismissal of this petition. Specifically, at numbered paragraphs 18-20 on page 6 of its response, the Employer described the facts concerning the extension of the Pittsburgh Districts Agreement, and, at numbered paragraphs 29-31, it argued that the contract extension came at a time when the existing contract would not have barred a petition, and thus the extension barred the subsequent petition, citing *Deluxe Metal Furniture*, 121 NLRB 995 (1958) and *Cushman's Sons, Inc.*, 88 NLRB 121 (1950). In its response, the Intervenor indicated that there were two questions for consideration—the first concerning the impact of the federal lawsuit over the trusteeship and the second concerning whether there was a contract bar to the processing of any or all of the petitions—and stated that, as to the second question, the Intervenor “adopts by reference the arguments made by the Employer in its separately-filed Response.” Thus, the Employer put the contract bar argument based on *Deluxe Metal Furniture* squarely in front of the Regional Director and the Intervenor adopted the Employer’s arguments on this point.

Regional Director’s Decision. The Regional Director issued her D&D on November 8, 2018 and then, shortly thereafter on the same day, issued an Amended D&D—the differences between the two documents are irrelevant for purposes of this Request for Review. With respect to the contract bar argument, the Regional Director first found that the original agreement was of an “unreasonable” duration as it extended more than three years. Accordingly, the original contract only barred a petition for the initial three years, i.e., until August 18, 2017. She noted that the petition was filed well after that date, on April 16, 2018. (D&D, p. 5).

The Regional Director then turned to whether a new agreement “reactivated” the contract bar, and determined that the contract extension did not do so. She based her determination on a) her view that the extension did not have a determinable starting date and thus lacked a necessary

“substantial term,” (D&D, p. 6), and b) that a third party rival union or current bargaining unit employees might be unaware of the provisions of the settlement agreement giving the incumbent union the unilateral ability to extend the contract (D&D, p. 7), ignoring that the entity exercising the contract extension (Local 537) was the self-described “same organization” as the Petitioner and that Petitioner was fully knowledgeable of the terms of the settlement and, in fact, at the time was the entity that exercised the extension. At no point in her D&D did the Regional Director address the contract extension argument the Employer made (and the Intervenor adopted) based on the long-standing *Deluxe Metal Furniture* precedent.

ARGUMENT

A. The Contract Was Extended At A Time When A Petition Could Have Been Filed; Under Long-Standing Precedent The Extension Serves To Bar A Petition Subsequently Filed During The Extension’s Reasonable Duration.

An extant collective bargaining agreement will serve as a bar to the processing of a representation petition for a “reasonable” period of time; since 1962 the Board has held that the “reasonable” period is three years. *General Cable Corporation*, 139 NLRB 1123, 1125 (1962). If, during the term of an agreement for a “reasonable” period, the parties execute an amendment or a new contract containing a later termination date, the contract is deemed prematurely extended. *Deluxe Metal Furniture*, 121 NLRB 995, 1001 (1958); *M.C.P. Foods, Inc.*, 311 NLRB 1159 (1993). Under these circumstances, the new contract for a longer period, signed during the term of a prior agreement at a time when the prior agreement would bar a petition, can only bar the processing of a petition for the remainder of the period when the prior contract would have been a bar. *The Hertz Corporation*, 265 NLRB 1127, 1129 (1982). Thus, the parties cannot use a premature extension to deprive a petitioner of the open period under the original contract. *M.C.P. Foods*, 311 NLRB at 1159.

However, in *Deluxe Metal Furniture*, the lead case outlining the parameters of the premature extension doctrine along with other modification to the contract bar doctrine, the Board described three exceptions to the rule.

A contract is not prematurely extended when executed (1) during the 60-day insulated period preceding the terminal date of the old contract; (2) after the terminal date of the contract if automatic renewal was forestalled or if the contract 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. *Deluxe Metal Furniture Co.*, 121 NLRB 995, 1001–1002 (1958). An illustration of the third exception is where the contract was of unreasonable duration and a reasonable term had passed, as in *Cushman’s Sons, Inc.*, 88 NLRB 121 (1950).**

An Outline of Law and Procedure in Representation Cases, (Terence G. Schoone-Jongen ed., National Labor Relations Board 2017), at page 105 (emphasis supplied).

Here, as argued by the Employer (which argument the Intervenor adopted), the third exception to the premature extension doctrine applies because the contract was for an unreasonable duration and the contract extension was executed after a reasonable period had passed. The most recent Pittsburgh Districts Agreement was effective by its terms from August 18, 2014 through May 17, 2018. Because the duration of that agreement was longer than the “reasonable” period of three years, under black letter Board law the agreement only served as a bar for three years, until August 18, 2017. On December 13, 2017, **when the extant contract could not serve as a bar and the Region would have processed a petition if filed**, the contract was extended until May 17, 2019, a “reasonable” period of time. Thereafter, on April 16, 2018, a little more than four months after the contract was extended, the instant petition was filed.³

³ Here, as in *Cushman Sons*, 88 NLRB 121 (1950), the petition was filed before the end of the original agreement. In that case, the Board found this fact to be of no moment, stating: “Accordingly, because the agreement is not a premature extension, we attach no significance for contract bar purposes to the fact that the Petitioner’s rival claim and petition preceded the

Thus, under *Deluxe Metal Furniture*'s third exception, the contract extension barred the petition. The Regional Director's failure to so find was clear error and ignored long-standing, well-established, binding precedent. Under these circumstances the Board should grant this Request for Review and direct the dismissal of the petition.

B. The Alleged Indeterminacy of the Extension's Staring Date Is Irrelevant, And The Petitioner Was Fully Knowledgeable About The Terms Of The Settlement And The Exercise Of The Contract Extension.

As detailed above, the Regional Director did not address the dispositive precedent of *Deluxe Metal Furniture* in her D&D. As we now show briefly, the reasons the Regional Director did give for finding the contract extension not to be a bar to processing the petition here do not support upholding her Decision.

The Regional Director was concerned that she could not determine the starting date of the contract extension, and found that the contract was thus lacking a necessary "substantial" term. (D&D, p. 6). However, the evidence before the Regional Director was clear that: a) then-President Booth extended the contract with his letter of December 13, 2017, indicating the terms of the current contract remained the same with the only differences being the 2.25% anniversary wage increase and the extension until May 17, 2019; b) under the terms of the Section IV.E of the settlement agreement, when the Local extended the agreement that extension was "final and binding on both the Company and the Union/Local" and no further action by the Company or

expiration date of the old contract. We are concerned instead with the timing of the claim and petition with respect to the execution date of the current contract. In this connection, it is apparent that the claim and petition followed the execution date and were therefore untimely made." *Id.*, at 123 (footnote omitted).

Local 537 was necessary for the extension to be effective; c) the date of the extension was a date when a petition could have been filed and would have been processed by the Region because it was past the three year reasonable period of the most recent collective bargaining agreement; and d) the petition here was not filed until some four months after the contract was extended and the contract extension was clearly in effect on the filing date. Thus, the contract extension was a complete agreement of a reasonable duration binding on both parties and served to bar the petition—it was no more lacking a “substantial” term than the original agreement was during the initial three years of its tenure, when all agree it would have barred a petition.

The Regional Director also expressed concern that the December 13, 2017 contract extension 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.” (D&D, p. 6). The Regional Director’s speculation in this regard ignores that the Petitioner here is no hypothetical ignorant third party but rather the self-proclaimed “same organization which [the Employer] have recognized and with which you dealt in the past with the exact same dues structure, the only difference being that, as a result of this membership vote, we are no longer associated with the Utility Workers of Union of America, AFL-CIO (National Union), and we have simply changed our name.” The Petitioner, in its prior pre-trusteeship, pre-alleged disaffiliation iteration as Local 537, executed the contract extension after the members of the bargaining unit now subject to the instant petition “recently ratified the contract extension that was made available to them in the American Water/UWUA, national Health and pension settlement.” (D&D, p. 3). Under these circumstances, the Petitioner was fully knowledgeable of the terms of the settlement agreement and the execution of the contract extension and cannot benefit from the hypothetical ignorance of a non-existent third party.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned, an attorney, hereby certifies that a true and correct copy of the foregoing was served by email and first class mail on November 13, 2018 upon:

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