

3. Utility Workers Union of America (“UWUA”) is the national parent union of Local 537.

4. American Water also owns and operates West Virginia American Water (“WVAW”) and Maryland American Water (“MAW”). Both WVAW and MAW employ employees represented by Local 537.

5. Utility Workers United Association, Local 537 (the “Association”), is a disguised continuance of Local 537, created by the former president of Local 537, Mr. Kevin Booth and other former Local 537 officials. The Association does not currently serve as the collective bargaining representative for any group of PAW employees and its officers are exclusively former Local 537 officials.

II. Local 537’s Attempted Disaffiliation From UWUA

6. On March 19, 2018, UWUA’s National President, Mr. Michael Langford, placed Local 537 under trusteeship and removed Local 537’s president, Mr. Booth. President Langford took this action in response to Mr. Booth’s pattern of “obstructionist behavior” and “interference with” national benefits bargaining among UWUA, American Water and several other unions.

7. On that same day, President Langford notified all Local 537 represented employees that he had appointed UWUA Vice President John Duffy as Trustee and removed “all Local 537 System and District Officers.”

8. In response to President Langford’s trusteeship of Local 537, Mr. Booth claimed that Local 537 had “disaffiliated” from the UWUA and reorganized as an independent union, which he identified as the Association. Mr. Booth refused to hand over to the Trustee any of Local 537’s property, including its bank accounts, and held out the Association as the representative of PAW’s work force.

9. In a March 19, 2018 letter to Mr. Jeff McIntyre, PAW's President, Mr. Booth stated that, "[o]n March 19, 2018, a number of meetings took place in multiple locations throughout Pennsylvania, West Virginia and Maryland ... [where] the membership at large cast votes and overwhelmingly determined to disaffiliate from the Utility Workers Union of America, AFL-CIO, System Local 537 and the membership at large ratified membership in the [Association]." Mr. Booth reassured Mr. McIntyre that the current Local 537 "Executive Board, Officers and Union leaders will continue all of their activities as bargaining representatives for the employees ... [and] the Association will honor the contracts that Utility Workers Union of America, AFL-CIO, System Local 537 previously entered into with you exactly as those contracts are written." Mr. Booth ended his letter by stating "[w]e are the same organization which you have recognized and with which you dealt with in the past ... we have simply changed our name."

10. On March 28, 2018, in response to Mr. Booth's letter claiming that the Association now represented American Water's workforce, the UWUA filed a complaint and petition for preliminary injunction against Mr. Booth and other Association officials in the Western District of Pennsylvania, captioned Utility Workers Union of America, AFL-CIO v. J. Kevin Booth, et. al, Case No. 2:18-cv-00398 ("Federal Litigation"). In the Complaint, UWUA sought the "delivery of all funds, assets, books, records, computers, and property of any kind of Local 537 ... to [the] Trustee," and an order that the defendants "cease and desist from representing themselves as the authorized officers or representatives of Local 537 or Utility Workers United Association, Local 537 ... [and] from interfering in any manner with the conduct of the trusteeship by [the] Trustee"

11. On April 3, 2018, the parties to the Federal Litigation entered into a Consent Order that, among other things, prohibited Mr. Booth and all other Association officers, along with “each and every other person acting at the direction of or in concert with them” 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 Federal District Court signed and entered the Consent Order.

III. The Association Attempts to Circumvent the Consent Order by Supporting the Filing of RC Petitions in Region 6

12. On April 10, 2018 (Case No. 06-RC-218209) and April 17, 2018 (Case No. 06-RC-218527), two different PAW employees filed two separate RC Petitions with the Region seeking to replace Local 537 with the Association.

13. The Regional Director commenced processing the Petitions, and on April 13, 2018, PAW filed a “Motion to Suspend the Deadlines Contained in the Region’s April 11, 2018 Letter.” PAW argued that the Region’s processing of the RC petitions violated the Consent Order because it would “interfere with” UWUA’s and Local 537’s collective bargaining relationship with PAW by attempting to effectuate what Mr. Booth was unable to do through his purported “disaffiliation”—replace Local 537 with his new union, the Association, as the certified bargaining representative for PAW’s western Pennsylvania workforce.

14. On April 18, 2018, Region 6 granted PAW’s Motion and “postponed indefinitely” the processing of both the April 10, 2018 and April 17, 2018 RC petitions.

15. On June 15, 2018, the Region issued a Rule to Show Cause requesting that the parties put forth evidence regarding whether the April 10, 2018 and April 17, 2018 Petitions should be processed. On June 29, 2018, the parties each submitted evidence in support of their respective positions.

16. After reviewing the evidence submitted by the parties, the Region scheduled a hearing to take evidence on the contract bar issue raised by PAW and the Intervenor in Case No. 06-RC-218209.

17. The Region did not schedule a hearing to take evidence on the contract bar issue raised by PAW and the Intervenor in Case No. 06-RC-218527.

A. The Outside Districts

1. Negotiations for the Current ODA

18. The April 10, 2018 Petition (case no. 06-RC-218209) concerns PAW employees working at the following facilities located outside of Pittsburgh, Pennsylvania: Butler, Clarion, Uniontown, Indiana, Kane, Kittanning, New Castle, Punxsutawney, Warren, McMurray and Valley (“Outside Districts”).

19. A collective bargaining agreement covering the employees located in the Outside Districts was effective from December 8, 2012 through November 17, 2016, and extended through November 17, 2017. *See* Board Exhibit 2, at ¶8.

20. Local 537 and PAW began negotiations for a successor agreement on October 3, 2017 and continued these negotiations through February 23, 2018. Tr. 27:13-23.¹

21. Robert Burton, Senior Director of Operations for Eastern Pennsylvania, led PAW’s negotiating team. PAW’s negotiating team included, among others, Lu-Ann Glaser (Manager Labor Relations) and Jamie Devine (HR Business Partner). Tr. at 16:22-24, 26:23-27:5.

¹ Citations to testimony from the October 16, 2018 hearing are in the form “Tr. at ___.”

22. Mr. Booth led Local 537's bargaining team. Local 537's bargaining team included Dave Rowland, Vice-President of Local 537, and the local presidents for each of the eleven (11) districts covered by the ODA. Tr. at 26:20-27:12.

23. During negotiations for a successor ODA, the parties created an electronic "red-line" of the expired ODA which resided on an electronic share-point site established by Mr. Booth. The parties used this document as their working draft of a new ODA. Tr. at 28:1-29:12, 51:20-52:4; Employer Exhibit 1; Employer Exhibit 7.

24. As the parties discussed each proposed change to the existing ODA, Mr. Booth and Ms. Devine made revisions to the "red-lined ODA" reflecting the results of those discussions. When the parties reached agreement on a particular proposal, Mr. Booth and Ms. Devine marked the revision to the "red-lined ODA" as "agreed" or "tentative agreement." The parties used electronic initials in lieu of physical signatures to denote agreement. *Id.*; Tr. at 28:19-29:8, 48:7-16.

25. The process described above, *i.e.*, using a "red-line" of the expired collective bargaining agreement as a working draft and indicating agreement to particular proposals by marking the red-line as "agreed" or "tentative agreement," is consistent with the parties' past practice and is Mr. Booth's preferred method for documenting agreements reached through collective bargaining. Tr. at 18:9-20:5, 22:6-23:12.

2. Tentative Agreement and Ratification of the ODA

26. On February 23, 2018, following a three (3) day negotiation session with a federal mediator, the parties reached a tentative agreement for a successor ODA. On that day, while still at the bargaining table, the parties verbally recited the agreed upon proposals to each other and then Mr. Booth and Mr. Burton said "we have an agreement" and shook hands. Tr. at 27:13-25, 28:24-29:24.

27. Later that day, Mr. Booth texted Mr. Burton about the substance of a statement announcing the tentative agreement which he planned to send to his district presidents. Mr. Booth suggested that the statement explain that “the parties have reached a tentative agreement and details will follow pending a joint review of the document for accuracy.” Mr. Burton agreed to Mr. Booth’s suggestion. Tr. at 31:4-32:19, Employer Exhibit 3 at 1.

28. Consistent with Mr. Booth’s text message, between February 23, 2018 and March 3, 2018, Mr. Booth and Ms. Devine worked with each other to finalize the red-lined ODA that Mr. Booth would use for ratification purposes. This finalization process included calculating wages for the wage table in the ODA, revising grammatical errors and “reviewing the document for accuracy to make sure that all of the proposals ... had been captured based on negotiations.” Tr. at 53:24-54:23; Employer Exhibit 8; Employer Exhibit 9 (confirming wage tables “had been fixed”).

29. By March 3, 2018, Ms. Devine’s and Mr. Booth’s review of the tentative agreement was almost complete. On that day, Ms. Devine asked Mr. Booth to make a few final “clean-up” changes, including to confirm that he had marked “tentative agreement” in all comment boxes. Mr. Booth did not think these final revisions were necessary, writing “you are both being persnickety...we will simply accept all changes and print some documents.” *See* Employer Exhibit 9.

30. Between March 3, 2018 and March 17, 2018, Mr. Booth did not request any further negotiations, the parties did not schedule or hold any additional bargaining sessions and made no material changes to the ODA. Tr. at 35:4-8, 35:17-19.

31. On March 17, 2018, Local 537’s membership ratified the ODA. Later that day, Mr. Booth confirmed in a text message to Rob Burton, PAW’s lead negotiator, that “the contract

has been ratified.” Mr. Booth commented on the parties’ success, stating “just because it was in record time doesn’t mean it was easy.” Tr. 32:23-33:4, Employer Exhibit 4.

32. Following the ratification vote, the successor ODA immediately became effective. This was consistent with the parties’ past practice of requiring implementation upon ratification, not formal execution. Tr. at 34:12-25, 35:1-2, 36:13-21, 58:13-21; Employer Exhibit 5.

3. Post-Ratification Implementation of the ODA

33. On March 19, 2018 (the first business day after the March 17, 2018 ratification vote), Mr. Burton announced to American Water management personnel that the contract was ratified and finalized and now changes “have to be implemented.” PAW immediately began to implement the terms of the new ODA, which was represented by the ratified red-lined document. Tr. at 34:12-35:3, 58:17-21; Exhibit 5.

34. For example, on March 19, 2018, Ms. Devine updated the pay rates of Local 537 members to correspond with the ODA’s new wage scale and submitted the new rates to PAW payroll for processing and payment to employees retroactive to March 17, 2018. Tr. at 59:7-60:5; Employer Exhibit 11.

35. On March 19, 2018, Ms. Devine began working with Mr. Booth to implement the posting for the position of Pipeline Inspector, a new position created by the ODA. Mr. Booth was eager to get the position posted, asking Ms. Devine, “[w]hy can’t we post all lists now?” On March 28, 2018, PAW officially posted the position of Pipeline Inspector and individual bargaining unit members applied for the job. Tr. at 61:16-64:4; Employer Exhibit 13; Employer Exhibit 14.

36. On March 23, 2018, Ms. Devine scheduled training for PAW management personnel on the new terms and conditions of the ODA. During the training, Ms. Devine and Ms. Glaser used the red-lined version of the ODA. Tr. at 64:12-25; Employer Exhibit 15.

37. There is no record evidence that Mr. Booth ever asserted prior to the filing of the April 10, 2018 Petition that the parties did not have a final agreement, that further negotiations were required or that the ratified ODA was not a binding agreement because the document did not contain formal written signatures or was “incomplete.”

B. Pittsburgh Districts

38. The April 18, 2018 Petition (case no. 06-RC-218527) concerns PAW employees working at facilities within the greater Pittsburgh, Pennsylvania metropolitan area.

39. The parties historically refer to these locations as the “Pittsburgh Districts.” A single collective bargaining agreement referred to as the Pittsburgh Districts Agreement (“PDA”) covers the approximately one-hundred and forty-four (144) represented employees at these facilities.

40. The current PDA became effective on August 18, 2014 and was set to expire on May 17, 2018. On December 13, 2017, before the PDA expired, PAW and Local 537 (through Mr. Booth) agreed to extend the contract for one additional year, from May 17, 2018 to May 17, 2019.

V. The Regional Director’s Order Directing an Election

A. April 10, 2018 Petition (Case No. 06-RC-218209)

41. On November 8, 2018, the Regional Director issued her Decision and Order Directing an Election (the “Outside Districts Order”).

42. In the Outside Districts Order, the Regional Director found that there is no contract bar to the April 10, 2018 Petition because “it was not sufficiently complete and there is no signed written document specifying the overall terms of the contract at the time the petition was filed.” *See* Outside Districts Order at pg. 6.

43. The Regional Director believed the contract was “not sufficiently complete” because “the parties here did not initial and date every tentative agreement.” She noted that “there are no fewer than twelve comments from the Employer referring to a ‘tentative agreement’ on various dates without a subsequent comment from the Intervenor indicating “agreed” or “okay.” Id.

44. The Regional director determined that the contract did not become complete until after its formal execution by the parties, which did not occur “until almost a week after the Petition was filed.” Id. at 7.

45. The Regional Director also concluded that the Region could process the Petition despite the ongoing Federal Litigation and the disputed status of the Association as a labor organization. The Regional Director explained that because the “District Court did not enjoin the Petitioner from filing the Petition ... there is no basis for dismissing the Petition, or holding it in abeyance, because of the pending federal trustee litigation.” Id. at 8.

B. April 17, 2018 Petition (Case No. 06-RC-218527)

46. On November 8, 2018, the Regional Director issued her Decision and Order Directing an Election (the “Pittsburgh Order”).

47. In the Pittsburgh Order, the Regional Director found that there is no contract bar to the April 17, 2018 Petition because (1) the PDA had a fixed term of more than three years and therefore could not serve as a bar to an election after the third year and (2) the December 13, 2017 contract extension was insufficiently definite as to its effective date and the term of the PDA. Pittsburgh Order at 5-6.

48. The Regional Director applied the same rationale she used in her Outside Districts Order (as explained above) to conclude that the Federal Litigation and disputed status of the Association as a labor organization did not bar processing of the April 17, 2018 Petition.

ARGUMENT

1. The National Labor Relations Board (the “Board”) should grant PAW’s Request for Extraordinary Relief and Review because the Pittsburgh Districts and Outside Districts Orders depart from well-established Board precedent regarding the application of the contract bar doctrine.

I. Applicable Standard

2. Rule 102.67 governs PAW’s Request for Extraordinary Relief and Review.

3. Under this rule, the Board may grant a request for review upon one or more of the following grounds: “1) that a substantial question of law or policy is raised because of (i) the absence of officially reported Board precedent or (ii) a departure from officially reported Board precedent; 2) that the regional director’s decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party; 3) that the conduct of any hearing or any ruling made in connection with the proceeding has resulted in prejudicial error; and 4) that there are compelling reasons for reconsideration of an important Board rule or policy.” 29 C.F.R. 102.67.

4. Rule 102.67 also provides that the Board may grant emergency relief, including the stay of an election, upon a clear showing that it is necessary under the particular circumstances of the case.

5. For all the reasons outlined below, PAW urges the Board to grant its Request for Extraordinary Relief and Review, vacate the Pittsburgh Order and the Outside Districts Order,

and stay the elections until final resolution of this matter or, in the alternative, impound the ballots until the Board finally determines this matter.

II. The Regional Director Erred by Determining that the ODA and PDA did not serve as a Bar to an Election.

A. The Regional Director erred in concluding that the ODA did not bar the April 10, 2018 Petition by misapplying Board precedent and failing to consider essential, unrebutted, evidence.

6. The Board's contract bar rule is well settled and requires the party asserting that an agreement bars an election to show that the agreement under consideration meets certain requirements. *See St. Mary's Hospital*, 317 NLRB 89, 90 (1995) (citing *Appalachian Shale Products Co.*, 121 NLRB 1160 (1958)).

7. First, the agreement must contain substantial terms and conditions of employment sufficient to stabilize the parties' bargaining relationship. *Id.*

8. Second, the agreement must also be "signed" by the parties prior to the filing of a petition. *Id.* In this regard, the Board does not require a formally executed document. *Id.* An informal document that contains substantial terms and conditions of employment and other indicia of agreement to those terms, such as initialing of the agreement, satisfies the contract bar's requirements. *Id.* at 90-91. *See also Jackson-Vinton Community Action, Inc.*, 2007 WL 1160053 (N.L.R.B Div. of Judges April 16, 2007) (holding that interim agreement initialed by the parties, reduced to writing and implemented by the employer met Board's contract bar requirements).

9. Third, while not required in all circumstances, the agreement should be ratified by the bargaining unit. *See, e.g., St. Mary's Hospital*, 317 NLRB at 90. The Board requires that these requirements be met to ensure that a collective bargaining agreement sufficient to identify the parties' rights and responsibilities is in place.

10. Contrary to the Regional Director's decision, the undisputed record evidence demonstrates that the ODA satisfies each of these requirements.

11. First, the "red-lined" ODA ratified by the bargaining unit is a complete, self-contained collective bargaining agreement that embodies all of the terms and conditions of employment for bargaining unit members. Second, the "red-lined" ODA was "signed" by the parties prior to the filing of the Petition through the use of electronic initials on the red-line, in lieu of physical signatures. Finally, the bargaining unit ratified the terms of the "red-lined" ODA and PAW immediately implemented its terms.

12. The Regional Director grounded her opinion in a misapplication of the Board's contract bar doctrine and relied on a fact not supported by the record—that Mr. Booth's failure to add the word "ok" or "agreed" to approximately twelve (12) terms meant that the parties had not reached agreement on those issues.

13. In *Television Station WVTM*, 250 NLRB 198 (1980), the Board held that where an agreement is not formally executed, the determination of whether the contract bar applies includes an analysis of whether the agreement at issue embodies all of the terms and conditions of employment for bargaining unit members, whether the bargaining unit ratified it and whether the employer implemented its terms. *Id. See also St. Mary's Hospital*, 317 NLRB at 90-91 (finding tentative agreement that the parties initialed, the bargaining unit ratified and the employer implemented prior to the filing of the petition barred an election even though the parties did not formally execute the agreement until after the petition was filed).

14. Here, the Regional Director failed to engage in this analysis and disregarded critical un rebutted testimony, including that:

- The “red-lined” ODA covered all of the substantial terms and conditions of employment for bargaining unit members (Tr. at 27:13-25, 28:24-29:24);
- The parties reached agreement on the ODA on March 3, 2018 and the terms and conditions of that new agreement were memorialized in the “red-lined” ODA (Tr. at 53:24-54:23; Employer Exhibit 8; Employer Exhibit 9 (confirming wage tables “had been fixed”));
- Mr. Booth presented the “red-lined” ODA to the bargaining unit and the bargaining unit ratified the agreement (Tr. 32:23-33:4, Employer Exhibit 4);
- Upon ratification, PAW immediately implemented the terms and conditions of the “red-lined” ODA, including revising wage rates, posting the newly created position of Pipeline Inspector and training PAW management personnel on the “red-lined” ODA’s new terms and conditions;
- After March 3, 2018, Mr. Booth never requested any additional bargaining, and he represented to union officials at each facility that the ODA negotiations had concluded (Tr. at 31:4-32:19, 35:4-8, 35:17-19; Employer Exhibit 3 at 1).

The Regional Director’s failure to consider these crucial facts undermines her conclusion that the ODA was not a complete, self-contained document, which bars an election under well-settled Board precedent.

15. The Regional Director compounded her error by grounding her opinion on the unsupported conclusion that Mr. Booth’s failure to initial each and every term meant that the “document does not reflect a complete agreement from *both* parties.” Outside Districts Order at 6. There is **no** record evidence supporting this conclusion. No one from the Association or Local 537’s bargaining team, including Mr. Booth, testified at the hearing, and the Petitioner did

not introduce any documentary evidence indicating that either party believed that the “red-lined” ODA did not constitute a complete agreement. Quite to the contrary, the only witnesses at the hearing who were involved in the negotiations testified without contradiction that both parties considered the “red-lined” ODA to be the parties’ complete agreement.

16. In reaching her conclusion, the Regional Director **ignored** the following undisputed facts:

- On March 3, 2018, Jamie Devine, PAW’s HR Business Partner, emailed Mr. Booth and asked him to make a few final “clean-up” changes, including to confirm that he had marked “tentative agreement” in all comment boxes.
- In response, Mr. Booth did not state that no tentative agreement existed on these points. Instead, he responded “you are both being persnickety...we will simply accept all changes and print some documents.”

See Employer Exhibit 9. Mr. Booth’s email is direct proof that he did not consider his failure to initial each term as evidence that the parties did not have an overall final collective bargaining agreement. The Regional Director’s conclusion to the contrary is entirely unsupported by the record.²

² The Regional Director erred by not drawing an adverse inference against the Petitioner based on its failure to call Mr. Booth as a witness. The Board has long held that the failure of a witness to appear on behalf of a party for whom he/she would be expected to give favorable testimony gives rise to an inference that the witness’s testimony would be unfavorable. See *Carpenters Local 405*, 328 NLRB 788, 788 fn 2 (1999).

If, Mr. Booth had been called as a witness, he would have corroborated the testimony of Mr. Burton and Ms. Devine, particularly that as of March 17, 2018, the ratified ODA was a final binding agreement that did not require formal execution to become effective. Mr. Booth admitted as much in his March 19, 2018 letter to Jeff McIntyre, PAW’s President, where he stated, *inter alia* “the Utility Workers United Association will honor the contracts that the Utility Workers Union of America, AFL-CIO, System Local 537 previously entered into with you exactly as those contracts are written.” In that letter he made no mention of the fact that, as the

17. Under these circumstances, the Regional Director's determination is inconsistent with well-established Board law, unsupported by the record and must be set aside.

B. The Regional Director erred in concluding that the extended PDA did not bar the April 17, 2018 Petition.

18. PAW incorporates by reference as if set forth fully herein the arguments made by the Intervenor in its Request for Review regarding the Regional Director's failure to apply well-settled Board precedent which, if properly applied, would bar the April 17, 2018 Petition.

CONCLUSION

19. For all the reasons set forth above,³ PAW requests that the Board grant its Request for Extraordinary Relief and Review, vacate the Order, and stay the election until final resolution of this matter.⁴

Respectfully submitted,

/s/ Mark J. Foley

Mark J. Foley
Matthew A. Fontana
Drinker Biddle & Reath LLP
One Logan Square, Ste. 2000
Philadelphia, PA 19103-6996

Attorneys for PAW

Petitioner contends now, the ODA still needed formal written signatures. Similarly, none of the text messages Mr. Booth sent to Ms. Devine or Mr. Burton, before and after ratification, reflected any concern on his part that he believed the ODA was not final. Testimony consistent with Mr. Booth's contemporaneous statements obviously would have been unfavorable to the Petitioner.

³ PAW also joins and incorporates all of the arguments made by the Intervenor in its Request for Review in the above captioned matters, including its argument regarding the potential for interference with the federal court's jurisdiction in Case No. 2:18-cv-00398.

⁴ In the alternative, should an election proceed, PAW requests that the ballots be impounded until final resolution of the matter.

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

**PENNSYLVANIA AMERICAN WATER CO. Case Nos. 06-RC-218209
06-RC-218527**

AND

**UTILITY WORKERS UNITED ASSOCIATION,
LOCAL 537**

AND

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

CERTIFICATE OF SERVICE

The undersigned, an attorney, hereby certifies that a true and correct copy of Respondent
**PAW'S REQUEST FOR EXTRAORDINARY RELIEF AND REVIEW OF THE REGIONAL
DIRECTOR'S NOVEMBER 8, 2018 ORDERS** was served by electronic mail on November 19,
2018, upon:

Michael Healey
Healey & Hornack, P.C.
247 Ft. Pitt Blvd., 4th Floor
Pittsburgh, PA 15222

Samuel J. Pasquarelli
Sherrard, German & Kelly, P.C.
535 Smithfield Street, Suite 300
Pittsburgh, PA 15222

Attorney for Utility Workers Union of
America

Attorney for Petitioner

Nancy Wilson, Regional Director
Dee Moeller, Hearing Officer
1000 Liberty Avenue, Room 904
Pittsburgh, PA 15222

Executed on November 19, 2018

By: /s/Matthew Fontana
Matthew Fontana