

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

PENNSYLVANIA AMERICAN WATER CO.

Employer

And

**UTILITY WORKERS UNITED ASSOCIATION,
LOCAL 537**

CASE NO. 06-RC-218527

Petitioner

And

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

Intervenor

**PETITIONER'S STATEMENT IN OPPOSITION
TO INTERVENOR'S REQUEST FOR REVIEW**

AND NOW, come the Petitioners, Paul Varnum, and the Utility Workers United Association, Local 537 (hereinafter "the Association"), and submit this Response to Intervenor's Request for Review.

STATEMENT OF FACTS

Pennsylvania American Water Company ("PAWC" or the "Employer") is a public utility which provides water service to its industrial, commercial, and residential customers in Western Pennsylvania. Various of its employees are and for many years have been represented for collective bargaining purposes by Utility Workers Union of America, AFL-CIO, System Local 537 ("Local 537" or the "Intervenor"). As is relevant to the instant Request for Review and this

Statement in Opposition to that request, the contract under discussion is the contract in the Employer's Pittsburgh District. That contract ran from August 14, 2014 to May 17, 2018. In October of 2014, the Intervenor's National Union and American Water Works Company, the parent company of PAWC, executed an agreement to settle an unfair labor practice charge that dealt with a dispute between them over the negotiation of insurance and retirement benefits in 2010. As part of the settlement of that dispute, on October 13, 2014, which was only two months after the Pittsburgh contract was entered into, the National Union and American Water Works Company agreed that any of the local labor unions which had collective bargaining agreements with any of the American Water subsidiaries (which included PAWC and the Intervenor) would have the unilateral option to extend its collective bargaining agreement for one year under the exact same terms and conditions as existed in the current agreement, except that wages during the one year extension period would be increased by 2.25%. (Petitioner's Information Request Response, Ex. M, Sec. IV-A., p. 9). That agreement further provided that once a local union exercised this option, it was final and binding and not subject to any further processes. (Petitioner's Information Request Response, Ex. M, Sec. IV-E, p. 10). The right to extend the contract could be exercised at any time, but by the union only, from October 13, 2014 to a date up to sixty days before the expiration of the underlying labor contract. The language in that agreement clearly reveals that this is NOT a case where the parties mutually negotiated a renewal or extension of their agreement, nor did they engage in any conduct that could even remotely be characterized as negotiation or mutual agreement of a new labor contract. The language merely provided that, effective October 13, 2014, the Union had the unilateral right to turn a 3-year, 10-month agreement into a 4-year, 10-month agreement. On December 13, 2017, the Intervenor exercised this right, extending the term of the Pittsburgh agreement to May 17, 2019.

In early 2018, a separate labor organization known as the Utility Workers United Association, Local 537 (hereinafter called “the Association” or the “Petitioner”) was formed. It was formed by members of Local 537 because many of the members of Local 537 were clamoring to disaffiliate from Local 537’s national body, the Utility Workers Union of America, AFL-CIO (hereinafter sometimes referred to as the “National Union”). While the formation of the Petitioner occurred as part of a process to disaffiliate from the Intervenor’s national body, as is relevant to these proceedings, the question here is whether a Decertification Petition that was filed by one of the Pittsburgh District employees and joined in by the Petitioner after its formation is barred by the contract in the Pittsburgh district.

As will be discussed hereinafter, the Intervenor’s national body imposed a trusteeship on the Intervenor, and the National Union commenced litigation in the United States District Court for the Western District of Pennsylvania (“the Federal Court litigation”) to validate the trusteeship. That litigation is still pending and while the Intervenor does not raise any objection to the decision of the Regional Director that the Federal Court litigation does not bar the representation petition under discussion here, the Federal Court litigation will be touched upon to a certain extent in this response.

On April 16, 2018, a Petition for Representation was filed with Region Six of the National Labor Relations Board at 06-RC-218527 relative to the Pittsburgh unit by one Paul Varnum, who was a PAWC employee covered by the collective bargaining agreement between PAWC and Local 537 relative to PAWC’s Pittsburgh district. Not long after this Representation Petition was filed, the Employer and the Intervenor filed Motions to Stay Deadlines, contending that the National Labor Relations Board should await the outcome of the pending federal court proceedings before deciding what to do with the Representation Petition. Both the Employer and

the Intervenor also argued that there was a contract bar in this matter. The Region required the parties to respond to an Order to Show Cause why the Region should not dismiss the representation petition, either because it was barred by the Federal Court litigation or because there was a contract bar to it. All parties did so, and the Region determined that in the instant case, the parties' responses provided enough information for the Region to decide the issues involved. A hearing was held on October 16, 2018 for the parties to present their evidence on the contract bar issue in a separate representation petition filed by the Petitioner relative to one of the other of the Employer's bargaining units, namely the Employer's "Outside Districts" unit, and the Region stated that after that hearing, it would also decide the issues raised in the instant case as well. The Region then decided in the instant case that the Federal Court litigation did not bar the representation petition and that the Pittsburgh contract was not a bar to an election. The Intervenor then filed its Petition for Review, stating that there was a contract bar in this matter.

QUESTIONS PRESENTED

Does The Pending Federal Court Litigation Preclude A Decision On A Question Of Representation?

Is There A Contract Bar To The Pittsburgh District Petition?

ARGUMENT

Does The Pending Federal Court Litigation Preclude A Decision On A Question Of Representation?

Since the Intervenor did not raise a question relative to the Regional Director's determination that Federal Court litigation does not bar the representation petition under review, that issue will not be addressed to any length in this Statement in Opposition. However, the Employer's Request for Review, while not clear on whether it raises a question relative to the

Federal Court litigation, could possibly be interpreted to raise that issue, and the Petitioner will deal with that question in its Statements in Opposition to the Employer's Requests for Review. In brief, however, this very issue has already been dealt with by the Board in West Virginia American Water Co., 09-RC-219179 (2018), unreported, where the exact same Federal Court litigation was held not to prevent the processing of a representation petition filed there.

Is There A Contract Bar To The Pittsburgh District Petition?

An analysis of the Intervenor's Request for Review must start with the reasons that the National Labor Relations Board will consider in ruling on that request. As are germane to this case, those reasons, which are found in the Board's Rules and Regulations at 102.67(d), are the following:

- “(1) That a substantial question of law or policy is raised because of:
 - (i) The absence of; or
 - (ii) A departure from, officially reported Board precedent.
-
- (4) That there are compelling reasons for reconsideration of an important Board rule or policy.”

The Pittsburgh contract initially was entered into for the period from August 14, 2014 through May 17, 2018, and on December 13, 2017 it was thereafter extended unilaterally for one more year so that it expired on May 17, 2019. This extension occurred because an October 13, 2014 agreement to settle an unfair labor practice charge that dealt with a dispute between the National Union and PAWC's parent company allowed any of the local labor unions which had collective bargaining agreements with any of the American Water subsidiaries (of which PAWC was one) the unilateral option to extend its collective bargaining agreement for one year under the exact same terms and conditions as existed in the current agreement, except that wages during the one year extension period would be increased by 2.25%. (Petitioner's Information Request Response, Ex. M, Sec. IV-A., p. 9). The language of that settlement agreement allowed

this extension to be unilaterally implemented at any undefined time from October 13, 2014 through March 17, 2018. Furthermore, the only way that anyone perusing the Pittsburgh labor contract would know if such an extension could occur would be to look at the settlement agreement that was entered into on October 13, 2014-this information could not be gleaned from the Pittsburgh agreement itself since there was nothing contained within the four corners of the Pittsburgh agreement that in any way referred to any such right of extension. As the Region correctly pointed out, not only does the Intervenor bear the heavy burden of proving the existence of a contract bar, Roosevelt Memorial Park, 187 NLRB 517 (1970), for a contract to act as a bar, the fact that it is a bar must appear within the document itself, without reference to extrinsic evidence. See, e.g., Waste Management of Maryland, 338 NLRB 1002 (2003); United Health Care Services, 326 NLRB 1379 (1998); Jet-Pak Corp., 231 NLRB 552 (1977); Union Fish Co., 156 NLRB 187 (1965). It is obvious beyond a doubt that this right of extension in no way appeared within the four corners of the Pittsburgh agreement and the Region correctly decided that an employee who desires to exercise an otherwise valid right to seek decertification based on the terms of the specific labor agreement covering him or her can hardly be held to the terms of some separate agreement executed more than three years earlier that is not referred to in the collective bargaining agreement itself. In its Request for Review, the Intervenor is asking that the Board completely ignore these well-established Board precedents, in total contradiction to Rule/Regulation 102.67(d)(1). If the Intervenor is asking that these precedents be ignored or reversed based on Rule/Regulation 102.67(d)(4), it has woefully failed to show that there is some compelling reason for reconsideration. The only "compelling reason" that the Intervenor can show is that the precedents are contrary to its position, which is no compelling reason at all. If those precedents are ignored or set aside, the Board will end up having to create numerous

exceptions to these precedents to deal with myriad forms of alleged reasons why contracts clear on their face that do not bar representation petitions now should be considered as bars based on outside and extraneous information.

The Intervenor argues that the Region incorrectly held that the letter of December 13, 2017 (“the extension letter”), which the then certified collective bargaining representative sent to the Employer to extend the Pittsburgh agreement from May 17, 2018 to May 17, 2019, was insufficient to cause the contract to constitute a bar. However, the Intervenor’s reasoning must fail for the reasons set forth above. The collective bargaining agreement itself, not some additional document, must set forth the proof that a bar exists. The extension letter and its terms are not contained or referred to in the Pittsburgh agreement itself. It is the Pittsburgh agreement alone and not outside or additional evidence which must be examined to see if a bar exists. See Cooper Tire & Rubber Co., 181 NLRB 509 (1970) and Cind-R-Lite Co., 239 NLRB 1255 (1979), especially at p. 1256 of 239 NLRB, where it was held 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.” These precedents exist in full force at this time, and overturning them, especially considering the unique facts of this case, where the option to extend (and not renew) has been in place for over three years, would be to create an exception that would end up swallowing the rule.

It is also submitted that the Intervenor’s position that Deluxe Metal Furniture, 121 NLRB 995 (1958) and Cushman’s Sons, Inc., 88 NLRB 121 (1950) support its position is incorrect. The Intervenor asserts that Deluxe Metal Furniture, supra, establishes a contract bar because the extension letter was sent at a time when the Pittsburgh contract was not a bar to an election.

However, it is hard to envision a clearer reason for why the extension letter should be ignored as raising a contract bar than the one stated by the Region in its decision, namely—

“Here the contracting parties entered into the Pittsburgh 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 contract that permits the Intervenor to unilaterally extend the contract-already with an unreasonable term—for an *additional* year.¹ Moreover, this right can be exercised at any time up until “the final contract for notice of modifying or terminating” the Pittsburgh District 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 documents² purported to act as a bar, and the prohibition against premature extensions.” Regional Director’s Amended Decision and Direction of Election, Page 7, first emphasis in original, second emphasis added.

The Intervenor takes the position that since the Pittsburgh contract was extended for a one-year period from May 18, 2018 to May 19, 2019, there is no contract bar because, as the Intervenor and the Employer see it, that extension resulted in a new agreement which was entered into on December 13, 2017 and which expired on May 17, 2019. However, that position totally ignores the circumstances that allowed the extension of the contract. The extension of the Pittsburgh contract did NOT occur² because the parties mutually agreed to extend it—it occurred because of the unilateral right of one party to extend the exact same agreement with only a wage modification in the extension year, which wage modification had been established well over three years earlier. The Intervenor cites Cushman’s Sons, Inc., 88 NLRB 121 (1950) as dispositive on this issue by relying on language in that case which stated that a contract bar was re-established where a new contract which extended the termination date of a contract was

¹ The October 13, 2014 agreement that permitted the extension was not even between the Intervenor and the Employer. It was between the Intervenor’s national organization and the Employer’s parent company, all of which makes the Region’s analysis even more compelling.

² The extension letter was not signed by the Employer.

executed by the parties after the then two-year contract bar anniversary of the original contract. That case dealt with a situation where the employer and the union bilaterally entered into a new agreement. It is the exact opposite of the instant case, where there was a 3-year, 10-month contract that only one party could turn into a 4-year, 10-month contract. The Intervenor also ignores the fact that the unilateral right of extension embodied in the October 13, 2014 settlement agreement occurred in the second month of the three-year, ten-month Pittsburgh contract. It is submitted that the instant case is not at all controlled by Cushman's Sons, Inc., supra. Rather, the instant case is simply one involving a collective bargaining agreement that has a term of more than three years and thus is not a bar to the Pittsburgh representation petition. The case that does control this situation is Union Fish Co., supra, relied upon by the Region, where it was held that the term of a labor contract must be apparent on its face, without resort to outside evidence, before it can serve as a bar.

The Intervenor also cites Deluxe Metal Furniture Company, supra, 121 NLRB 995 (1958) for the proposition that where-

“ . . . the contracting parties execute an amendment or new contract which contains a later terminal date than that of the old contract . . . at a time when the existing contract would not have barred an election because of other contract bar rules [the amendment or new contract is a bar].” P. 1001-1002 of 121 NLRB, emphasis added.

Again, the flaw in that reasoning is that in the instant case, the contracting parties did not execute anything. The Pittsburgh contract was a 3-year, 10-month contract that could be unilaterally turned into a 4-year, 10-month contract-this event could occur at any unknown time when the contract had at least three years and eight months left to run. This unilateral extension did not result in the parties doing anything. This was a simple matter of a contract with a fixed term and a clause that allowed that term to be extended by one year unilaterally at any time desired by the

union party without any forewarning. The general logic of forbidding contracts of unreasonable length to bar representation petitions is specifically applicable to this Pittsburgh contract situation just as it would apply to any other situation where a labor contract is for a term of more than three years. The reasoning quoted heretofore from the Region's Amended Decision and Direction of Election is the clear answer to this issue.

It must be remembered that what happened in the Pittsburgh contract situation was not an amendment or re-negotiation of a labor agreement. In the cases cited by the Intervenor, the parties met and came up bilaterally with new agreements. The correct analysis of the current situation is more like that found in Celanese Corporation of America, 83 NLRB 103 (1949), a case specifically cited in Cushman's Sons, Inc., supra. In Celanese Corporation of America, supra, the employer and the certified representative had entered into a labor contract running from February 22, 1947 to February 22, 1949. The agreement also provided that if neither party gave 30 days' notice of a desire to renegotiate the contract, it automatically extended for another year. On August 27, 1948, the employer and the representative of the certified union met to open the agreement for wage negotiations and ended up executing a new agreement, running to February 22, 1950. On December 8, 1948, another labor organization filed a representation petition. The employer and currently certified representative contended that their new agreement was a bar to this petition. The Board found, however, that the contract was not a bar to an election since the parties to the agreement were not able to take away the right of ". . . *employees* . . . to challenge an incumbent union's representative status at predictable and reasonable intervals." p. 104 of 83 NLRB, emphasis in original. In Celanese Corporation of America, supra, the two parties to the agreement renegotiated it to extend it before its expiration date to bar a representation petition. In the instant case, the opposite happened. The parties entered into a

three-year, 10-month contract on August 14, 2014 and two months later, still in 2014, which was still during the contract bar period, it was altered to allow the employees' representative only the right to turn it into a four-year, ten-month agreement. There was no negotiation or re-negotiation since the only change was a wage increase that was predetermined without any input from the Employer or, for that matter, from the Intervenor. The Pittsburgh representation petition was filed on April 16, 2018, which was more than three years after the August 14, 2014 commencement date of the agreement but before the commencement of the beginning of the last year of the four-year, 10-month agreement. As was said in Celanese Corporation of America, supra, the parties to the agreement are not able to take away the right of “. . . *employees* . . . to challenge an incumbent union's representative status at predictable and reasonable intervals.” p. 104 of 83 NLRB, emphasis in original. In the instant case, while the union party had the unilateral right to extend its contract from three years and 10 months to four years and 10 months, there is nothing about that extension that would suggest that the represented employees lost their right to pick a new collective bargaining representative at the appropriate time. While the situation in the Pittsburgh situation may be regarded as somewhat unique, it is submitted that the Board's long-standing policy of upholding properly evidenced employee preference for a collective bargaining representative should lead to the conclusion that there is no contract bar here.

Is The Intervenor Entitled To Have The Election Postponed Or The Ballots Impounded?

A party is entitled to extraordinary relief such as a postponement of an election or the impounding of the ballots only where the requesting party can provide a clear showing that relief is necessary under the particular circumstances of the case. Rule/Regulation 102.67(j)(2). The instant case is one that deals with the usual situation of a direction of election where a contract

bar has been interposed by the Employer as a defense and rejected by the Regional Director. There is nothing unique about such a situation and it is probably one of the usual types of cases that may reach the Board by way of a Request for Review. In addition, the Region set forth all the germane and well settled precedents applicable in this matter, and the Regional Director followed them. It is respectfully submitted that there has been no showing, much less a “clear” showing, that the extraordinary relief of postponing the election or impounding the ballots is necessary in this matter.

CO NCLUSION

In conclusion, as much as the Intervenor may argue that this is a situation that calls for reversal of the Regional Director’s decision, the Regional Director’s decision was fully in accordance with long-settled Board precedent. In fact, the Intervenor is asking the Board to do the very thing that the Board’s long line of precedents counsel against, namely allowing extrinsic evidence to bear upon the question of the term of the contract alleged to be a bar to the representation proceedings. If the logic of the Intervenor were to be adopted, there would be no way to determine if a collective bargaining agreement is a bar since one could imagine the numerous reasons that parties could conjure to deviate from the clear terms of the collective bargaining agreement itself. In its Request for Review, the Intervenor states that “. . . the Petitioner was fully knowledgeable of the terms of the [October 13, 2014] settlement agreement and the execution of the contract extension and cannot benefit from the hypothetical ignorance of a non-existent third party.” (Intervenor Request for Review, p. 11). In short, the Intervenor is asking for the consideration of evidence outside the four corners of the agreement, in violation of cases such as Cind-R-Lite Co., supra and Cooper Tire and Rubber Co., supra. There was no departure from officially reported Board precedent by the Region in its decision in this case and

there are no compelling reasons to reconsider the precedents that the Region relied upon. For all the reasons set forth herein, the Intervenor's Request for Review should be denied.

Respectfully submitted,



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CERTIFICATE OF SERVICE

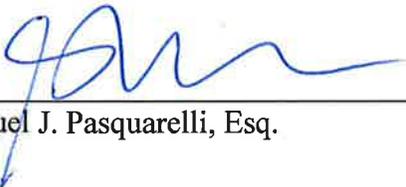
The undersigned hereby certifies that he did, on November 27, 2018, serve a true copy of the document to which this certificate is attached by e-mail, as follows:

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