
July 12, 2022

ORDER

BY CHAIRMAN McFERRAN AND MEMBERS RING AND PROUTY

The Union’s Request for Review of the Regional Director’s Decision and Direction of Election is denied as it raises no substantial issues warranting review.

In denying review, we agree with the Regional Director (pertinent portions of whose decision are attached) that the duration clause in the operative Extension Agreement fails to provide clear notice to individuals or other parties of the effective expiration date of that agreement sufficient to serve as a bar under the Board’s contract-bar doctrine. South Mountain Healthcare and Rehabilitation Center, 344 NLRB 375, 375 (2005). Unlike our colleague, we would not require employees to look to the Master and Local Agreements together with the Extension Agreement to determine the appropriate time to file a petition. Rather, we properly focus on the terms of the Extension Agreement as the operative agreement for determining when a petition could be filed. While our dissenting colleague offers one reasonable interpretation of the Extension Agreement language, the Regional Director’s contrary interpretation is also reasonable. Where two experienced labor lawyers read identical contract language and reach contrary conclusions, we cannot say the language is unambiguous much less that it would provide an employee without legal training with the clear notice of the contract’s duration to which they are entitled. Mountaire Farms Inc, 370 NLRB No. 110, slip op. at 1–2 (2021).

Dated, Washington, D.C. July 12, 2022

Lauren McFerran, Chairman

1 Member Ring additionally notes that the Agency offers assistance to employees in calculating these dates through, among other things, its Information Officer Program. See Mountaire Farms, supra, slip op. at 2 fn. 5 (personal footnote of Chairman McFerran). Here, there is no telling what employees who sought such advice would have been advised about this contract language in light of the contrary interpretations taken by our colleague and the Regional Director.
on September 1, 1968, and terminating at midnight, August 31, 1971.” Id.

Here, likewise, the Extension Agreement’s emphasized reference—in bold and underlined—to a “one-year extension” of the Master Agreement, which was inarguably in effect “through March 31, 2021,” resolves any possible ambiguity over whether the word “midnight” referred to the beginning or the end of the March 31.1 “One year” means one year; it does not and cannot mean 364 days, and there is nothing ambiguous about that at all. Thus, the collective-bargaining agreement was in effect when the petition was filed at 11:47 a.m. on March 31, 2022, and, therefore, it bars the petition pursuant to the Board’s contract-bar doctrine. Respectfully, I dissent from my colleagues’ contrary conclusion.2

Dated, Washington, D.C. July 12, 2022

David M Prouty, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

DECISION AND DIRECTION OF ELECTION

Sarah H. Lund (“Petitioner”) filed the original petition in this case with National Labor Relations Board (“Board”) under Section 9(c) of the National Labor Relations Act (“Act”), on March 31, 2022, seeking to decertify Local 1392, International Brotherhood of Electrical Workers, AFL–CIO (“Union”) as the exclusive collective-bargaining representative of approximately 71 employees employed by Indiana Michigan Power Company (“Employer”) at its facility in Bridgman, Michigan. The parties stipulated to the following unit of current employees (“Unit”).

1 All full-time and regular part-time auxiliary equipment operator seniors, auxiliary equipment operators, utility operators and make-up plant/identification specialists employed by the Employer at its facility located at Bridgman, Michigan; but excluding all electrical employees, managerial employees, guards, professional employees, and supervisors as defined in the Act.

A hearing was held on April 22, 2022, by videoconference before a hearing officer of the Board. The sole issue in this proceeding is whether a collective-bargaining agreement existed that bars the instant petition. The Employer, Petitioner and Union were provided with an opportunity to call, examine, and cross-examine witnesses, to introduce into the record evidence of the significant facts that support their contentions, and to orally argue their respective positions and submit posthearing briefs. The Petitioner and Union submitted posthearing briefs which were carefully considered.

As explained below, based on the record, and having reviewed the submitted briefs and carefully considered the arguments and relevant Board law, I find that the collective-bargaining agreement in question does not bar processing the instant petition. I also find that the current circumstances of the Covid-19 pandemic in Berrien County, Michigan, where a manual election would be held, exceed the thresholds established by the Board in Aspirus Keweenaw, 370 NLRB No. 45 (2020). Accordingly, I am directing a prompt mail-ballot election.

I. FACTS

The Union was certified as the Unit’s exclusive bargaining representative on October 15, 2018. The Employer and Union were parties to two multiemployer collective-bargaining agreements covering the unit in question. The

Agreement. That done, and on the theory that “two experienced labor lawyers” disagreeing demonstrates that the operative language is ambiguous, they somehow convert my showing above—that the Regional Director erred—into proof that the Regional Director was correct. Their reasoning reflects the strained result.

Moreover, contrary to Member Ring’s uncertainty about what the Region’s Information Officer would have advised employees, as I have shown above, a prudent Information Officer surely would not have advised filing 364 days after the “one-year extension” of the agreements.

1 The parties stipulated, and I find, that the stipulated Unit is coextensive with the existing bargaining unit as described in the extended local collective-bargaining agreement between the Employer and Union, despite superficial differences in the language. See Mo’s West, 283 NLRB 130, 130 (1987) (citing Campbell Soup Co., 111 NLRB 234 (1955)).

2 The Employer did not submit a post hearing brief.
first is the Master Agreement. Article III of the Master Agreement states:

“ARTICLE III, COVERAGE, DURATION OF AGREEMENT
Section 1. Duration of Agreement

This Agreement, effective 12:01 a.m., April 1, 2018, except as specifically noted otherwise herein, will continue in full force and effect through March 31, 2021, and for yearly periods thereafter unless either party shall notify the other party in writing not less than sixty (60) days before any termination date of such party's desire to commence negotiations for a new contract.” (emphasis added)

The second agreement is the Local Agreement. Article II of the Local Agreement states:

“ARTICLE II, COVERAGE DURATION OF AGREEMENT
Section 2. DURATION OF CONTRACT

This Agreement shall be in full force and effect beginning (on the day the Agreement is signed and returned) and shall continue in full force and effect until midnight, March 31, 2021, and hereafter for successive one (1) year periods unless either party hereto notifies the other party in writing at least sixty (60) days prior to March 31, 2021 or not less than sixty (60) days prior to the anniversary of the expiration date in any year thereafter, of its desire to modify or terminate this Agreement.” (emphasis added)

On December 4, 2020, the Employer and Union signed an Extension Agreement to the then existing Master and Local Agreements. The Extension Agreement states:

“The Companies, the IBEW System Council U-9 and the above named IBEW Local Unions having entered into a Master Collective Bargaining Agreement and Local Collective Bargaining Agreements effective April 1, 2018, through March 31, 2021 (the "Agreements"), and desiring to extend those Agreements, hereby agree:

1. One-year Extension - The terms and conditions of the current Master and Local Collective Bargaining Agreements that remain in effect until Midnight, March 31, 2021, will be extended for a twelve-month period and through this Extension Agreement, shall remain in full force and effect through Midnight, March 31, 2022.” (emphasis added)

The instant petition was filed on March 31, 2022, at 11:47 a.m.6

The Union's Position

The Union makes several arguments to support its argument that the Extension Agreement was effective through March 31, 2022, and as such, the petition was untimely filed and should be dismissed.

The Union’s primary argument is that the expiration date of the Extension Agreement, particularly when read in context, is not ambiguous. The Union cites Rio Grande Motor Way, Inc., 210 NLRB 73 (1974), for the proposition that when the facts clearly show that the parties intended to enter into an agreement for a certain term, the durational language of the contract must be interpreted to reflect that intention in the event of a dispute. It argues that the duration of the Extension Agreement, when read in context with the other agreements, shows that the parties clearly intended for the Extension Agreement to remain in effect throughout March 31, 2022.

The Union specifically argues that the language contained within the Master, Local and Extension Agreements demonstrates that the use of the word “midnight” was specifically intended by the parties to mean the end of the day in question. To support this contention, the Union notes that Article III, Section 1 of the Master Agreement indicates that when the parties want to identify the very beginning of a day for durational purposes, they use the phrase “12:01 a.m.” Conversely, Article II, Section 2 of the Local Agreement establishes when the parties want to identify the very end of the day, they use the term "midnight."
“midnight.” Further, Article V, Section 1 of the Master Agreement defines a “workday” as “the period of twenty-four (24) hours starting and ending at midnight.”

Further, the Union argues that the totality of the language used in all the agreements clearly demonstrates that the Extension Agreement was intended to extend the Master and Local Agreements for 12 months, which, when read in conjunction with the other two, would result in the contract remaining effective through March 31, 2022. The Union argues that the Master Agreement clearly states that the agreement is effective through March 31, 2021, and that both the Local and the Extension Agreement all refer specifically to the Master as the governing document upon which those two documents rely. Further, the Union argues that if the Board found that the Extension agreement expired at 12 a.m. on March 31, the extension would be in effect for one day less than a year, which was clearly not the intention of the parties.7

Finally, the Union argues that the Petitioner’s argument that the policy of employee free choice should outweigh what it believes is the clear intent of the parties is misplaced. It asserts that there were two 30-day open periods within the operative collective-bargaining agreement during which petitions could have been, but were not, filed—the first being the 60–90-day open period before the original expiration of the Master and Local contracts, and the second being the 60–90-day open period before the expiration of the Extension Agreement. Accordingly, employees had a reasonable opportunity to change their collective bargaining representative and failed to do so. The Union argues that the balance between employee free choice and the stability of collective bargaining relationships weighs in favor of applying the contract-bar to the petition.

The Petitioner’s Position8

The Petitioner argues that the Union did not sustain its burden of demonstrating there is a contract bar in place, and that the petition was timely filed. The Petitioner specifically argues that the clear and plain words of the contract demonstrate that the contract expired at 12:01 a.m. on March 31, 2022. The Petitioner argues that the Board has long held that “the term of a contract technically embraces the effective term provided in the instrument, and it is this term on the face of the contract to which the employees and outside unions look to predict the appropriate time for the filing of a representation petition.” Union Fish Co., 156 NLRB 187, 190 (1965); Benjamin Franklin Paint & Varnish Co., 124 NLRB 54, 55 (1959.)

The plain language of the contract’s duration is paramount because employees are not privy to the Union’s and Employer’s negotiations or their subjective understanding of a contract. Instead, employees must rely on the text alone to anticipate the appropriate time to file an election petition. See Pacific Coast Association of Pulp & Paper Mfrs., 121 NLRB 990, 993 (1958).9

Here, the Extension Agreement states “[t]he terms and conditions of the current Master and Local Collective-Bargaining Agreements that remain in effect until Midnight, March 31, 2021, will be extended for a twelve-month period and through this Extension Agreement, shall remain in full force and effect through Midnight, March 31, 2022.” The Extension Agreement’s plain language shows that the “twelve-month period” of extension commenced at 12:01 a.m., the morning of March 31, 2021, because the prior agreement was in effect “until Midnight, March 31, 2021.” See Williams Laundry Co., 97 NLRB 995, 996 fn. 3 (1952) (holding that a contract in effect until a day certain is to be construed as not including the date named after the word ‘until’); Carter Machine and Tool Co., 133 NLRB 247, 248 fn. 2 (1961).

Finally, the Petitioner argues that to the extent the language is ambiguous, such ambiguity should be construed against the Employer and Union, and the petition should be honored. Bob’s Big Boy Family Restaurants, 235 NLRB 1227, 1228 (1978) (Board rejected a contract bar defense where a union and employer “created a situation

7 The Union cited several administrative law judge’s decisions to support its interpretation of the term “through midnight.” Cavalier Corporation (Teamsters Local 515), Case 10–CA–26369, 1993 NLRB LEXIS 832, at *1, 24 (ALJ, Sep. 21, 1993) and Sheet Metal Workers Local 85 (Price Industries), Case 10–CB–8770; JD (ATL)-03-09, 2009 NLRB LEXIS 45, at *15 (ALJ Feb. 18, 2009). While I have considered the holdings in these cases, they are not binding Board precedent and do not provide any definitive guidance on the issue before me.

8 The Union presented parole evidence on the record regarding the parties’ intent as to the meaning of the term midnight by March 31, 2021, to which the Petitioner objects. I do not rely on that parole evidence in making my determination. The Board has consistently held the legality of a contract asserted as a bar is to be determined from the face of the contract itself, including any terms and conditions incorporated by reference, but parole and extrinsic evidence will not be admitted. Waste Management of Maryland, Inc., 338 NLRB 1002, 1003 (2003) (citing United

9 The Petitioner cites a recent Decision and Order that I issued in VHS Sinai Grace Hospital, Case 07–RD–290351 (2022), where I applied contract-bar principles involving the interpretation of the word “midnight.” That case has not been decided by the Board. Further, while I apply similar principles in both cases, I note that the two are factually distinguishable.
which precluded a clear determination by a potential petitioner of the proper time for filing a new petition.”)

II. CONTRACT BAR PRINCIPLES

The Board’s contract-bar doctrine provides that once a collective-bargaining agreement is executed, no representation elections are permitted in the unit covered until the contract expires, up to a 3-year limit. Representation petitions may be timely filed following the expiration of such contracts, or after the 3-year limit if the contract’s duration exceeds 3 years, or during a 30-day period that begins 90 days and ends 60 days before such a contract expires. *Leonard Wholesale Meats, Inc.*, 136 NLRB 1000, 1001 (1962). This 30-day period is commonly known as the “window period” or “open period.” The subsequent 60-day period preceding and including the expiration date is known as the “insulated period,” and no petition can be timely filed during that span. Id.; *Deluxe Metal Furniture Co.*, 121 NLRB 995, 1000 (1958). The purpose behind the Board’s contract-bar policy is to achieve “a fair balance between the statutory policies of stability in labor relations and the exercise of free choice in the selection or change of bargaining representatives.” *Direct Press Modern Litho, Inc.*, 328 NLRB 860, 860 (1999) (quoting *Appalachian Shale*, 121 NLRB 1160, 1161 (1958)). See also *Corporacion de Servicios Legales de Puerto Rico*, 289 NLRB 612, 613–614 (1988) (“the contract-bar doctrine is not another instance of the Board’s striking an accommodation among three competing interests: the freedom of an employer and a union to enter into a collective-bargaining relationship, the stability of bargaining relations once established, and employee freedom of choice—all of which underlie the Act’s ultimate goal of fostering industrial peace”).

There is no dispute by any party that the Extension Agreement meets the substantive criteria for serving as a bar. It is: (1) reduced to writing; (2) signed by all parties prior to the filing of the petition; (3) contains substantial terms and conditions of employment deemed sufficient to stabilize the bargaining relationship; (4) clearly encompasses the employees involved in the petition; and (5) covers an appropriate bargaining unit. *Appalachian Shale Products Co.*, supra.

III. ANALYSIS AND CONCLUSION

I find that the expiration date of the Extension Agreement is ambiguous and fails to appropriately provide clear notice to individuals or other parties of the effective expiration date of that agreement. This is demonstrated by the fact that different terms are used in describing the expiration dates not only in the various agreements, but also within the terms of the Extension Agreement itself.

For example, the Master Agreement, which is the closest and most consistent of the agreements at issue, clearly states that the agreement is effective 12:01 a.m., April 1, 2018, [and] . . . will continue in full force and effect through March 31, 2021.” Those dates are clearly reflected in the cover page and denote that the contract was in effect throughout the duration of March 31, 2021. The Local Agreement, however, which is meant to cover the same unit for ostensibly the same time period, indicates that the Agreement “shall continue in full force and effect until midnight, March 31, 2021...” (emphasis added)

The Board has consistently held that in conformity with the general rule of construction, in the absence of specific expression to the contrary, a contract in effect until a day certain is to be construed as not including the date named after the word “until.” *Williams Laundry Company*, 97 NLRB 995, 996 fn. 3 (1952). See also, *Carter Machine and Tool Co.*, 133 NLRB 247, 248 fn. 2 (1961), citing *Hemisphere Steel Products, Inc.*, 131 NLRB 56 (1961) (a contract running until a certain date means “exclusive of the day named.”) Thus, the Local Agreement, by its terms, would not be in effect throughout March 31, which is in direct contradiction to the terms of the Master Agreement. Further complicating matters, the Local Agreement cover page indicates that this agreement is “Effective February 28, 2019, through March 31, 2021,” which, while consistent with the Master Agreement, is contrary to the language contained within the document itself.

The Extension Agreement not only combines the ambiguity of the terms contained in the Local Agreement but adds an additional layer of confusion. In the introductory paragraph, it references both the Master and Local agreements as being effective through March 31, 2021, which is not an accurate description of the expiration language in the Local Agreement. Further, in paragraph 1, it states:

One-year Extension—The terms and conditions of the current Master and Local Collective Bargaining Agreements that remain in effect until Midnight, March 31, 2021, will be extended for a twelve-month period and through this Extension Agreement, shall remain in full force and effect through Midnight, March 31, 2022.” (emphasis added).

Thus, not only does the document misstate the expiration date of the Local Agreement, it further states contradictory expiration dates for the Extension agreement within the same sentence. As noted by the Petitioner, the use of the word “until” has specific meaning under Board precedent. *Carter Machine and Tool Co.*, supra (a contract running until a certain date means “exclusive of the day named.”) The use of that term in the Extension Agreement, in conjunction with the contradictory language indicating the agreements remain effective through March 31,
appears to indicate that the Master and Local Agreements that it is extending were both effective *through* and *until* midnight on March 31, 2021. Furthermore, the addition of “through midnight March 31, 2022,” in the Extension Agreement, which did not appear in either the Master or the Local Agreements, adds more confusion. It is unclear whether the language indicates that the contract expires at midnight, the minute after midnight, or at some other time on March 31, 2022. The terms are inconsistent and create ambiguity that cannot be reconciled by the terms of the various agreements.

Accordingly, such ambiguities regarding the expiration date of the contract preclude a finding that the contract serves as a bar under the Board’s contract-bar doctrine and I order an election as further described below.

**IV. CONCLUSION**

For the reasons stated above, I have concluded that there is no contract bar to processing this petition.

Under Section 3(b) of the Act, I have the authority to hear and decide this matter on behalf of the Board. Based on the entire record in this proceeding, I find and conclude as follows:

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.10
3. The Union is a labor organization within the meaning of Section 2(5) of the Act and claims to represent certain employees of the Employer.
4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.
5. The following employees of the Employer constitute an appropriate unit for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:
   - Included: All full-time and regular part-time auxiliary equipment operator seniors, auxiliary equipment operators, utility operators and make-up plant/identification specialists employed by the Employer at its facility located at Bridgman, Michigan.
   - Excluded: All electrical employees, managerial employees, guards, professional employees, and supervisors as defined in the Act.

---

10 The Employer, Indiana Michigan Power Company, a corporation with offices and facilities located at One Cook Place, Bridgman, Michigan, is engaged in the operation of a nuclear electric power generating plant. During the calendar year ending December 31, 2021, the Employer purchased and received at its Bridgman, Michigan facility goods valued in excess of $50,000 directly from points outside the State of Michigan.