UNITED STATES GOVERNMENT
BEFORE THE NATIONAL LABOR RELATIONS BOARD

REGION 29

CONSUMERS ENERGY GROUP, INC.

Employer

and

LOCAL 553, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, AFL-CIO **Case No. 29-RC-9612**

Petitioner

and

UNITED SERVICE WORKERS OF AMERICA, LOCAL 955, TCU, AFL-CIO, CLC

Intervenor[1]

DECISION AND ORDER

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, herein called the Act, as amended, a hearing was held before Kevin Kitchen, a Hearing Officer of the National Labor Relations Board, herein called the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned:

Upon the entire record in this proceeding, the undersigned finds:

1. The Hearing Officer's rulings made at the hearing are free from prejudicial error and hereby are affirmed.[2]

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[1] The record reflects the correct name of the Intervenor.

[2] In its brief, the Intervenor requests that Intervenor's Exhibit 7 be received into evidence. Brief of Intervenor at 5 n. 8. This exhibit is an unsigned letter concerning the enforcement of the 1995-98 contract, which is not at issue in this case, and is therefore only minimally relevant.

In its brief, the Petitioner's attempts to circumvent the Hearing Officer's rulings by relying on a number of rejected exhibits, in addition to citing documents that were never offered into evidence. Brief of Petitioner at 2-4, 12, 16-18. I will disregard any exhibits that are not part of the evidentiary record.

2. The parties stipulated that Consumer Energy Group, Inc., herein called the Employer, is a domestic corporation with its principal office and places of business located at 222 Varick Avenue and 872 Metropolitan Avenue, Brooklyn, New York, herein called the Brooklyn facilities, where it is engaged in the delivery of fuel oil and the servicing and installation of oil burners to commercial and residential customers. During the past year, which period is representative of its annual operations generally, the Employer, in the course and conduct of its business operations, derived gross annual revenues in excess of $500,000. During the same period of time, the Employer purchased and caused to be transported and delivered to its Brooklyn facilities goods and materials valued in excess of $5,000 directly from entities located outside the State of New York.

Based on the stipulation of the parties, and the record as a whole, I find that the Employer is engaged in commerce within the meaning of the Act, and that it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The labor organizations involved herein claim to represent certain employees of the Employer.

4. No question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Sections 2(6) and (7) of the Act.

5. Local 553, International Brotherhood of Teamsters, AFL-CIO, herein called the Petitioner or Local 553, seeks to represent a unit of all full-time and regular

part-time drivers and service technicians.[3] There is a dispute among the parties as to whether the petition is barred by a contract between the Employer and United Service Workers of America, Local 955, TCU, AFL-CIO, CLC, herein called the Intervenor or Local 955, purporting to cover the employees in the petitioned-for unit. The contract asserted to be a bar was effective from November 1, 1998, through October 31, 2002, and a successor contract bears the effective dates of November 1, 2001, through October 31, 2004. The petition was filed on March 1, 2001.

The Intervenor and Employer maintain that their contract is a bar, and urge that the petition be dismissed. The Petitioner proposes that its petition be processed under the *Deluxe Metal*[4] exception to the Board's rules governing the timely filing of representation petitions. Additionally, the Petitioner asserts that the 1998 contract does not function as a bar, because it was not enforced, and/or because it was only enforced on a members-only basis. Three witnesses testified at the hearing: Danilo Rodriguez, a truck driver, Anthony Losquandro, the Employer's president and sole shareholder, and Vincent Dippolito, the Local 955 business agent in charge of negotiating and enforcing the Intervenor's contract with the Employer.

Non-Enforcement of Contract

To demonstrate that a contract lacks bar status on non-enforcement grounds, a petitioner has to show either that it has been abandoned, that it has not been enforced at all for a substantial period of time, that working conditions have been greatly at variance with the contract's terms, or that the Intervenor is not presently "ready, willing or able" to

[3] The petitioned-for unit was amended at the hearing to conform to the existing contractual unit. The employees referred to on the record as "service technicians" are apparently the same as the employees referred to as "servicemen" in the contracts between the Employer and Intervenor.
[4] *See Deluxe Metal Furniture Company*, 121 NLRB 995 (1958).

enforce the contract. *See United Artists Communications* 280 NLRB 1056 (1986) (multi-site contract no bar at location where not enforced at all for one year); *Tri-State Transportation Co., Inc.,* 179 NLRB 310 (1969)(no contract bar after 1 ½ years of complete nonenforcement); *compare Kent Corporation*, 272 NLRB 735 (1984); *Visitainer Corp*., 237 NLRB 257 (1978); *Road Materials*, *Inc*., 193 NLRB 990 (1971). Proof of incomplete or lax enforcement of a contract does not remove it as a bar. *See Visitainer*, 237 NLRB at 257 (contract bar despite minimal enforcement of the contractual minimum hourly wage rate, night-shift differential, holiday pay and union security provisions); *Kent,* 272 NLRB at 735 (contract bar despite lack of members, membership applications, initiation fees, dues, bank account, books or records, meetings, elections, or information regarding contract negotiations or enforcement); *Road Materials*, 193 NLRB at 991 (contract bar despite employees' withdrawal of checkoff authorizations and union's failure to appear at facility or investigate unilateral changes).[5]

In the above-captioned case, the record does not support the conclusion that the 1998 and 2001 contracts were abandoned, or not enforced.[6] The testimony of truck driver Danilo Rodriguez, the sole employee to appear at the hearing, indicates that he has been receiving his contractual holiday pay, vacation and sick leave. There is no evidence that these provisions have not been applied to other unit employees. Although Rodriguez

[5] The Petitioner's brief cites several 8(a)(5) cases which declined to accord the presumption of continuing majority status to unions that had failed to police their contracts. Brief of Petitioner at 17-18 (*citing McDonald's Drive-In Restaurant*, 204 NLRB 299, 309 (1973)("it is undisputed that the Union neither administered the contract nor serviced the employees"); *Bender Ship Repair Company*, 188 NLRB 615, 616 (1971)(practice of "ignor[ing] contract benefits except for a few favored employees); *Weber's Bakery*, 211 NLRB 1, 12 (1974) ("the Union did not 'service' the employees in any manner…75% to 85% of the unit…did not even know they were 'represented' by a union or covered by a collective-bargaining agreement" and did not receive the contractual wage rates). These cases are inapposite.

[6] In addition, the Employer's brief cites evidence in the record regarding compliance with the 1995-98 contract, which is not at issue in this case. Brief of Employer at 9.

does not read English and thus was unable to identify any documents, the record reflects that unit employees receive annual statements from the Intervenor's Security Fund. It is undisputed that bargaining unit employees are represented by a shop steward, who discusses their "beefs" with the Employer.

In addition, the record discloses that the 1998 and 2001 collective bargaining agreements have been substantially enforced with respect to contractually-required funds contributions. To this end, the Intervenor submits monthly dues checkoff and funds contribution statements to the Employer. These statements set forth the names of the unit employees, and the moneys owed in their behalf. The Employer updates the lists of employees contained on the statements, revises the dues and funds calculations accordingly, and remits payment.

The record further indicates that when there is an error or discrepancy in the Employer's dues or funds calculations and/or payments, the Intervenor's Bookkeeping Department generates either a credit, in the event of an overpayment, or a "short payment" or "shortage billing" statement, if there was an underpayment. For example, in late 2000, the Employer hired three truck drivers, Hugh McClean (November), Danilo Rodriguez (December) and Enrique Talango (December), but delayed for several months in inserting their names on the Intervenor's monthly dues and funds statements. On March 21, 2001, and April 3, 2001, the Intervenor generated shortage billing statements for the three new unit employees. Subsequently, the Employer made retroactive dues and funds payments in their behalf, and they received coverage retroactive to their dates of hire. The Petitioner's brief emphasizes that the contractual dues and funds provisions were not applied to these three drivers until after the instant petition was filed, on March

1, 2001.[7] However, none of the authorities cited by Petitioner find a lack of contract bar status based on comparable facts.

"Members-Only" Allegation

A contract for union members only, or one which contains a provision extending special benefits to union members only, does not operate as a bar. *See Bob's Big Boy Family Restaurants*, 625 F.2d 850, 852 (1980); *Radio Frequency Connectors Corp*., 126 NLRB 1076 (1960); *Appalachian Shale Products Co*., 121 NLRB 1160, 1164 (1958). In determining whether a contract or provision is for members only, the Board examines the express provisions of the contract. It may then consider extrinsic evidence of the intent and practice of the contracting parties, particularly if the contract is ambiguous with respect to its intended coverage. *See Post Houses, Inc.,* 173 NLRB 1320 (1968); *Hebron Brick Co*., 135 NLRB 245 (1962); *see also A & M Trucking*, 314 NLRB 991, 992 (1994). Although the parol evidence rule does not normally permit reliance on extrinsic evidence if a contract is *un*ambiguous, the Board has observed that "rules governing the interpretation of ordinary contracts are not strictly applicable to collective bargaining agreements. Rigid restrictions on the admission of parol evidence in this context are inappropriate." *Beatrice/Hunt-Wesson,* Inc., et al., 302 NLRB 224, 231-232 (1991)(*quoting L.B. Priester & Son, Inc*., 669 F.2d 355, 365 (5th Cir. 1982), *enfg*. 252 NLRB 236 (1980)). Moreover, since "third party strangers to the contract are not bound by the parole evidence rule…it would seem, a fortiori, that [the rule does not bind] the Board, in executing its statutory obligation…." *Richmond Homes, Inc., et al.,* 245 NLRB 1205, 1212 n.16 (1979)(*citing Brassert v. Clark*, 162 F.2d 967 (2d Cir. 1947); *American Crystal Sugar Co. v. Nicholas*, 124 F.2d 477, 479 (1941)). Accordingly, "extrinsic

[7] Brief of Petitioner at 16.

evidence of a 'members only' practice is considered by the Board in refusal-to-bargain and representation cases, where the question concerning the state of actual employee representation is basic to the determination." *Schorr Stern Food Corp*., 227 NLRB 1650, 1654 (1977). Even if a contract purports, on its face, to cover all employees, it cannot serve as a bar if it has not been equally applied to all employees. *See Makins Hats*, 332 NLRB No. 1 (2000); *Reebie Storage and Moving Co., Inc.,* 313 NLRB 510 (1993), *enf. den. on other grounds,* 44 F.3d 605 (1995); *Grocers Wholesale, Inc.,* 163 NLRB 937 (1967); *Sumergrade,* 121 NLRB 667, 669-670 (1958); *but see Jet-Pak Corp*., 231 NLRB 552 (1977); *Paragon Products Corporation*, 134 NLRB 662, 666 (1961).

Based on the present record, however, I am unable to conclude that the contract asserted as a bar is a members-only agreement. The Petitioner does not claim that the following provision, contained in both the 1998 and 2001 collective bargaining agreements, is facially invalid:

> ARTICLE 2 – UNION SECURITY
>
> a) All present employees who are members of the Union on the execution or effective dates of this Agreement, whichever is later, shall remain members of the Union as least to the extent of paying Union dues and periodic fees including initiation fees related to representational costs. All present employees who are not members of the Union and all employees hired hereafter, shall become and remain members of the Union at least to the extent of paying Union dues and periodic fees including initiation fees related to representational costs on and after the 31st day following the beginning of their employment, or on and after the 31st day following the execution or effective date of this Agreement, whichever is later.

Although there is some record evidence suggesting possible inconsistencies between this provision and its actual application, with respect to the 30-day grace period and the rights of "financial core members,"[8] this evidence was not fully developed at the hearing, nor

[8] *See Communications Workers of America v. Beck*, 487 U.S. 735, 108 S.Ct. 2641 (1988).

does Petitioner rely on it. Rather, Petitioner's "members only" argument is primarily based on the delay of several months in applying the contractual dues checkoff and funds contribution provisions to three new drivers, until after the petition was filed on March 1, 2001.[9] However, there is no evidence that the Intervenor was aware of their employment prior to that date, or acquiesced in the delay in their enrollment. Moreover, the Petitioner did not adduce evidence of any prior delays in applying contractual provisions to any other members of the bargaining unit. During the time period that the three new hires were not covered by the dues and funds provisions, the bargaining unit (inclusive of the three new hires) consisted of 13 to 14 employees. Thus, the record does not establish that any failure to enforce the contract was either longstanding, pervasive or deliberate.

In light of these facts, the cases cited by the Petitioner are not on point.[10] For example, *Arthur Sarnow Candy Co*., 306 NLRB 213 (1992), is a Section 8(a)(5) case in which the charging party union forfeited its presumption of continuing majority status by applying its contract to union members only. The parties in *Arthur Sarnow,* unlike those in the instant case, had applied the contract to "less than 15 percent of the work force that is argued to be covered by the contract," and there was evidence that the charging-party union had acquiesced in this practice. *Arthur Sarnow,* 306 NLRB at 215 n. 5, 215-216.

In *Ron Wiscombe Painting & Sandblasting Co*., 194 NLRB 907 (1972), a contract that "contain[ed] no union-security clause, but instead require[d] that all employment applicants must be referred for hire through the Union's hall unless no individual is

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[9] See *supra* at 5. In addition, the Petitioner's arguments purport to be based on statements in unsworn affidavits by three individuals who did not appear at the hearing. Since the Hearing Officer correctly declined to receive these hearsay documents into evidence, they are not part of this record and cannot be considered .

[10] Brief of Petitioner at 14-16, 18. *See also* cases discussed *supra* at 4 n. 4.

registered with the hall for the particular job vacancy," was found to be a members-only contract. *Wiscombe Painting*, 194 NLRB at 907, 908. The parties in *Wiscombe* had withheld contractual benefits from three employees who performed bargaining unit work, but who were not union members and had not been referred through the union's hiring hall. *Wiscombe Painting*, 194 NLRB at 907. Moreover, the evidence revealed that the employer and union had entered into an agreement to exclude one of these employees, who had been employed for six years but had never been included in the bargaining unit. *Wiscombe Painting*, 194 NLRB at 907. In the instant case, by contrast, there is no record evidence of deliberate discrimination, nor does the disputed contract contain any overtly discriminatory provisions.

Similarly distinguishable is *N. Sumergrade & Sons,* 121 NLRB 667 (1958), also cited by Petitioner. In *Sumergrade*, there was a finding that prior to the filing of a decertification petition, the incumbent union made no serious effort to enforce its contract equally with respect to funds contributions or union security. *Sumergrade,* 121 NLRB at 668-669. Many employees had not received a contractual wage increase. *Sumergrade,* 121 NLRB at 669. Out of approximately 65 production and maintenance employees, about 40 "were not required to become members of the Intervenor." *Sumergrade,* 121 NLRB at 668. Based on these facts, the Board found that the Intervenor had "never in fact represented all the employees equally and without discrimination between union and nonunion members." *Sumergrade,* 121 NLRB at 669. The present record does not disclose similar evidence of longstanding or widespread non- application of the contract, or collusion by the Intervenor in such non-application.

***Deluxe Metal* Exception to the Board's Timeliness Requirements**

During the term of a 3-year contract, a representation petition is timely filed only if it is submitted during the 30-day 'open period' running from the 90th day to the 60th day prior to the existing contract's termination date." *Suffolk Banana Co., Inc.,* 328 NLRB 1086, 1087 n. 4 (1999); *Leonard Wholesale Meats*, 136 NLRB 1000, 1001 (1962); *see also Deluxe Metal Furniture Company*, 121 NLRB 995, 1000 (1958)(establishing "a 60-day insulated period immediately preceding and including the expiration date of an existing contract," during which rival petitions could not be filed[11]). For contract bar purposes, a contract with a fixed term longer than three years is treated as though it were a three-year contract. *Dobbs International Services, Inc.,* 323 NLRB 1159 (1997); *General Cable Corporation*, 139 NLRB 1123 (1962).

The above-captioned petition was filed on March 1, 2001, more than 90 days before the third year anniversary date of the existing, 1998 contract. However, Petitioner urges that an election be held in accordance with an exception to the Board's timeliness rules which was first enunciated in *Deluxe Metal Furniture Company*, 121 NLRB at 999, and subsequent cases interpreting *Deluxe Metal*. *Deluxe Metal* provided that "a hearing on an otherwise premature petition will be directed…if an investigation conducted on the basis of information furnished by the petitioner establishes reasonable grounds for believing that the existing contract is not a bar for some reason other than timeliness, such as schism, defunctness, illegal union security, etc." *Deluxe Metal*, 121 NLRB at

[11] *Deluxe Metal* held that "all petitions filed more than 60 days but not over 150 days before the terminal date of any contract will be timely." *Deluxe,* 121 NLRB at 1000. This rule was subsequently modified by *Leonard Wholesale Meats, supra,* establishing an open period running from the 90th day to the 60th day prior to the existing contract's termination date.

999. If this test is met and "a hearing is directed despite the prematurity of the petition and the Board's decision issues on or after the 90th day preceding the expiration date of the contract," the petition will not be dismissed on timeliness grounds. *Deluxe*, 121 NLRB at 999. Here, however, the decision is being issued at a time when a successor contract is in effect, and which has bar quality. The open period for the 1998 contract has past, and the current contract is a bar to the processing of a petition. Thus, the *Deluxe Metal* exception is inapplicable.

Petitioner's brief cites numerous cases in which prematurely-filed petitions were processed pursuant to the *Deluxe Metal* exception.[12] However, none of these cases addressed the question of whether the negotiation of a successor agreement should require a different outcome. *See Maramount Corp*., 310 NLRB 508, 512 (1993); *The Mosler Safe Company*, 216 NLRB 9 (1974); *Westclox Division of General Time Corporation*, 195 NLRB 1107 (1972); *Pacific Far East Line*, 174 NLRB 1168 (1969); *Royal Crown Cola Bottling Co*., 150 NLRB 1624, 1625 (1965); *Water Tower Inn, A Partnership*, 139 NLRB 842, 847 (1962); *S.J. Doroski*, 132 NLRB 746, 747 (1961); *United Fruit Company*, 134 NLRB 287, 293 n.23 (1961); *see also W.A. Foote Memorial Hospital*, 230 NLRB 540 (1977); *The Ohio Valley Gas Company,* 124 NLRB 579, 580 (1959). However, in *Randolph Metal Works, Inc*., 147 NLRB 973 (1964), the Board confronted a similar situation to the present one. In *Randolph*, the parties entered into a contract with a union security provision which may not have been valid. The parties then amended the contract, substituting a clearly valid union security provision. Days thereafter, a petition was filed by another union. The amended contract between the

[12] Brief of Petitioner at 5-6, 6 n. 13, 7.

parties ran for over two more years. In *Randolph*, the Board found that the amended contract was a bar to the processing of the petition. In rejecting the application of *Deluxe Metal*, the Board reasoned that the purpose of the *Deluxe Metal* exception is to avoid subjecting the Board to "an immediate repetition of the proceeding as a new petition could be timely filed as soon as a decision [dismissing the untimely-filed] case issues." *Randolph Metal Works, Inc*., 147 NLRB 973, 974-75 n. 5 (1964)(*construing Mason & Hanger-Silas Mason Company*, 142 NLRB 699, 700 (1963)). Similarly, here, the execution of a successor agreement eliminated the risk of an "immediate repetition of the proceeding," since a new petition would be barred by the new contract. *Id*. Under these circumstances, the *Deluxe Metal* exception appears inapplicable.

In its brief, Petitioner asserts that, "A successor agreement between an employer and an incumbent union entered into while a representation petition from a rival union is pending before the Board does not bar an election in the petitioned-for unit."[13] However, the two cases cited by Petitioner in support of this contention are inapplicable to this case. In *RCA Del Caribe*, 262 NLRB 963 (1982), the petition had been timely filed. *RCA*, 262 NLRB at 964. In *United Service Company d/b/a A-1 Linen,* 227 NLRB 1469 (1977), the existing contract was no bar because it was executed prior to a substantial increase in the employee complement. *A-1 Linen,* 227 NLRB at 1470.

In conclusion, I find that the instant petition is barred by the 1998 contract and must be dismissed, in view of the prematurity of the petition, the negotiation of a successor contract, and the insufficiency of the evidence of alternative grounds for invalidating the contract asserted as a bar. I am therefore dismissing the petition.

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[13] Brief of Petitioner at 10.

ORDER

IT IS HEREBY ORDERED that the petition in Case No. 29-RC-9612 be, and it hereby is, dismissed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570. This request must be received by April 24, 2002.

Dated at Brooklyn, New York, April 10, 2002.

/s/ Alvin Blyer
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