UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION SIX

LATROBE SPECIALTY METALS CO., LLC Employer,	)	Case 06-RD-300470
and	)	
KERRY HUNSBERGER, Petitioner,	)	
and	)	
UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO, CLC, Union	)	

UNION POST-HEARING BRIEF

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I. INTRODUCTION

The Employer tendered a last, best, and final offer on July 18, 2022, at the culmination of extended bargaining for an initial agreement. This proposal, as compiled and signed by its attorney and lead bargainer, did not contain any agreement that a member vote be a condition precedent. The Union's internal procedures and constitution do not require such a vote. Rather, the signature of its lead bargainer is sufficient to bind the Union. The Union's lead negotiator executed the agreement on July 28, 2022. A contract bar was in effect from that date, so the petition, filed August 1, 2022, should be dismissed.

II. FACTS

A. The Union's constitution does not require member ratification of contracts.

The Union's constitution specifies that it, and not any affiliated local union, is the party to all contracts. (U. Ex. 1, p. 70; Tr. 33). The constitution does not require a member ratification vote. (U. Ex. 1; Tr. 33). There is also nothing in the Constitution that sets procedures for member ratification votes, in the event the Union decides to hold one. (Tr. 33; U. Ex. 1). The Union can and does enter into contracts without a member ratification vote. (Tr. 34, 101). The chief negotiator for the Union has authority to sign and enter into final agreements on behalf of Union. (Tr. 74). Whether or not a contract takes effect is not contingent upon employees voting to approve a contract. (Tr. 94). There is no obstacle to the Union accepting a contract after an employee vote disapproving it. (Tr. 44).

B. The parties bargained for an initial collective bargaining agreement.

Following the Union's initial certification as the representative of employees in the bargaining unit, the Union and Employer negotiated a first collective bargaining agreement from over the course of 2021 and the first seven months of 2022. Tom Giotto ("Giotto") served as a

bargaining representative for the Employer. (Tr. 34).[1] John Ratica ("Ratica") and Daniel Nunzir ("Nunzir") are Union Representatives who were on the bargaining committee for the Union. (Tr. 30-31, 47). As the chief negotiator for the Union, Nunzir had authority to sign a final agreement and bind the Union to it. (Tr. 47, 74).

C. The Employer proposed that member ratification would be a condition precedent to the effectiveness of an agreement, but it removed this proposal after the Union objected.

Throughout the bargaining process, the Employer and Union never agreed that an agreement would not be effective until ratified by Union members. (Tr. 48, 141, 143, 210). On July 12, 2022, at the penultimate bargaining session, the Employer proposed a written agreement that would have require a member ratification vote to become effective. (Tr. 199; Pet. Ex. 1). The proposed agreement language explicitly would have created membership ratification as a condition precedent to the agreement: "The parties additionally agree that ratification of this Collective Bargaining Agreement by the membership of the Union on _____, 2022, shall be a condition precedent to its taking effect and that the Settlement Agreement will become effective immediately upon ratification by the Union on that date." (Pet. Ex. 1).

However, Giotto testified, Nunzir objected to the inclusion of this language, and the Employer removed it. (Tr. 152-153). Notwithstanding the removal of this language explicitly conditioning the effectiveness of the agreement on a member vote, Giotto testified that he subjectively understood that for the parties' agreement to take effect, an employee vote was required. (Tr. 198-199). The basis for Giotto's understanding, he testified, was solely and exclusively the Union representatives' statements to him that they intended to hold an employee vote. (Tr. 199).

[1] References to the hearing transcript are noted as "Tr." The Union's exhibits are abbreviated "U. Ex." The Petitioner's exhibits are abbreviated "Pet. Ex."

D. The Employer made a last, best, and final proposal on July 18.

On July 18, Giotto provided the Union with a "last, best, and final" agreement. (Tr. 35-37; Pet. Ex. 3). This Last, Best, and Final Offer stated a "Term: Three (3) years from the ratification date." (Pet. Ex. 3). It also contained a provision titled "Conversion of Pay System" that indicated "Conversion from a salary pay system to an hourly pay system by first pay period of January 2023." (Pet. Ex. 3).

Ratica testified that Giotto told the Union bargaining committee that the Employer was done bargaining, stating: "There is no more. This is it." (Tr. 37). Ratica and Nunzir testified, without contradiction, that Giotto did not say anything at the July 18 bargaining session that indicated that there would be any barrier to the Employer's proposal immediately going into effect upon acceptance. (Tr. 37, 48-49). When reviewing the offer at this bargaining session, Giotto did not mention needing to negotiate the effective date of the agreement. (Tr. 54). Giotto told the Union that the Employer and Union could work out the details of some items, like the interaction between short-term and long-term disability benefits and the mechanics of the conversion from salary to hourly wages, following the contract's entry into effect. (Tr. 36-37, 55-56).

E. Giotto compiled the complete agreement for the Union's execution.

By July 20, Giotto had compiled and signed off on all other "open items" of the proposed agreement. (Tr. 149, 150; Pet. Ex. 5). On that day, Giotto sent an email to Nunzir detailing all of the agreements that had been signed, as well as the agreements that Nunzir still needed to sign to finalize the agreement. (Pet. Ex. 5).

Notably, Giotto's compilation did not contain the express member ratification language that had been included in its July 12 proposal. (Tr. 210; Pet. Ex. 5). There was no express requirement for a Union member ratification vote in Giotto's compilation. (Pet. Ex. 5). Giotto

admitted that the parties never had any written agreement that there would be a ratification vote or any agreement about how any Union membership vote would be conducted. (Tr. 210, 211).

In his July 20 email transmitting his compilation, Giotto wrote that the parties also needed to clarify the Sickness & Accident ("S&A") benefit and how it would work with the long-term disability ("LTD") benefit. (Pet. Ex. 5). Giotto also mentioned the conversion from salary to an hourly pay system. (Pet. Ex. 5). His email did not indicate that these issues would pose any obstacle to the Employer's offer entering into force if the Union accepted it. (Pet. Ex. 3).

F. The Union held an employee vote on July 25.

On July 25, the Union held a vote by the members to approve the contract. (Tr. 56). The members did not approve the agreement, so Nunzir wrote to Giotto on July 26 and requested that the Union and Employer "resume discussions immediately to improve it." (U. Ex. 6). On July 27, Giotto wrote back and informed Nunzir that the Employer would not improve the offer because the parties had met many times since negotiations began and the proposed agreement was the Employer's "Last Best and Final offer." (U. Ex. 6; Tr. 204, 205). Giotto spoke with Nunzir and Ratica at this time, and they told Giotto that the Union intended to hold another vote on the Last, Best, and Final offer on August 1. (Tr. 164).

G. The Union executed the contract on July 28 to preserve the gains bargained in the agreement and pre-empt the decertification petition circulating at the facility.

On July 28, the Union heard from unit employees that there was a petition for decertification circulating through the facility. (Tr. 59). Nunzir then signed the remaining pages of the agreement that he had not yet signed, resulting in an executed agreement. (Tr. 58). Nunzir testified that he signed the agreement without waiting for the second member vote to protect what the Union had bargained for the protection of the workers. (Tr. 59). Because of this, every

page of the agreement had been signed by both Nunzir and Giotto by July 28. (U. Ex. 8). Nunzir then sent the signed document via email to Assistant General Counsel Nathan Kilbert, District 10 Director Bernie Hall, Sub-District Director Ross McClellan, and Ratica. (U. Ex. 7). Nunzir testified that his July 28 signature indicated that this was the final contract, as he had the authority from the Union to sign the document and that no other Union or Local Union person's signature was required to create a binding contract. (Tr. 72, 74, 272).

H. The Petition was filed August 1, after the Union had already accepted the contract.

The Union held a meeting on August 1 to seek employee approval of the already-accepted contract. (Tr. 81-82). Nunzir testified that this vote was only taken as a courtesy to employees; it was an attempt to obtain their blessing of the contract that the Union had already executed. (Tr. 82). However, it should be emphasized, the Union did not need to seek employee approval. (Tr. 82). The instant petition was filed on August 1, while the vote was still occurring. (U. Ex. 9; Tr. 167, 242).

I. The Employer refused to give effect to the contract on the ground that a member ratification vote did not take place.

Giotto emailed Nunzir and Ratica the decertification petition, stating that the Employer asked him to withdraw the Employer's final offer until they could "resolve the majority status issue." (U. Ex. 9; Tr. 168). On the same day, Nunzir replied Giotto that there was already a binding agreement because Nunzir had executed the agreement on July 28. (U. Ex. 10). Nunzir then asked whether the Employer intended to abide by the agreement. (U. Ex. 10). That same evening, Giotto replied to ask whether the agreement was ratified by the Union members, and Nunzir explained that ratification was not a condition precedent and was not required. (U. Ex. 11). Even if ratification was required, Nunzir continued, the contract had been ratified when Nunzir signed it. (U. Ex. 11).

On August 5, Giotto asserted that the Employer would not give effect to the contract at that time, because there were open issues still to resolve. (U. Ex. 12). Giotto wrote that there were three open issues for the contract: (1) the effective date, (2) S&A and LTD benefits, and (3) the conversion from salary to hourly payments. (U. Ex. 12). Nunzir testified that this was the first time that Giotto stated that these were issues that needed to be resolved before an agreement could enter into effect. (Tr. 63-64).

In response to Giotto's August 5 email, Nunzir stated that the parties already had an agreement that had to be given effect. (U. Ex. 13). The agreement was effective for three years starting on July 28, the date that the Union ratified and signed it. (U. Ex. 13). Nunzir further noted that the parties already had specific agreements for benefits, and that the parties agreed that the conversion to hourly payments would take place in January. (U. Ex. 13).

On August 8, Giotto again insisted via email that there was no final agreement. (U. Ex. 14). He claimed that Nunzir had never mentioned that his signature ratified the agreement, and he claimed that there was no discussion about an effective date. (U. Ex. 14). He also stated that Nunzir had told him that the Union was voting on the contract again on August 1, and he claimed that negotiations were still necessary. (U. Ex. 14). In response, Nunzir stated that Giotto had never mentioned prior to August that the Employer believed there were still open issues to be resolved before an agreement could enter into effect. (U. Ex. 14). Nunzir again informed Giotto that the Union had ratified the agreement and demanded that the Employer immediately place it into effect. (U. Ex. 14). He reminded Giotto that "[n]othing in the parties' agreement conditions its effect on the resolution of any other issue," and asked Giotto to confirm that the Employer would place the contract into effect. (U. Ex. 14).

Giotto's emails in August were inconsistent with his prior conduct. Nunzir testified that Giotto never said at any point prior to August 1 that there would be any obstacle to implementing the agreement if the Union accepted it. (Tr. 56). Indeed, he repeatedly indicated that this was a "final" or "last best and final" offer. (Pet. Ex. 3; U. Ex. 6). Giotto's July 27 email stated that its Giotto testified that its July 18 "Last Best and Final offer" was the Employer's "effort to conclude negotiations." (U. Ex. 6).

Giotto's August emails were also inconsistent with his testimony at the hearing. Giotto testified at hearing that if the Union had ratified the agreement on July 25, the contract would have been in effect as of July 25. (Tr. 193). Giotto testified at the hearing that there would have been time following the effective date of the contract to work the wage conversion and disability benefit issues out. (Tr. 206). In fact, Giotto admitted that the Company had not even yet formulated its position with respect to the mechanics of the salary conversion. (Tr. 268-269).

III. ARGUMENT

A. The Union and Employer did not agree that a member vote was a condition precedent to an effective agreement.

There is nothing in the Act requiring unions to obtain ratification by members or by employees in the bargaining unit as a prerequisite of a final and binding agreement. *North Country Motors Limited*, 146 NLRB 671, 674 (1964). An agent appointed to negotiate a collective-bargaining agreement has apparent authority to bind the principal "in the absence of clear notice to the contrary." *Teamsters Local 662*, 339 NLRB 893, 898 (2003); *University of Bridgeport*, 229 NLRB 1074, 1074 (1977). For employee ratification to be a condition precedent or precondition for formation of a collective bargaining agreement, the employer must be "aware before or during negotiations of such a condition precedent, and [have] expressly agreed to it." *Teamsters Local 589*, 349 NLRB 124 (2007). The Board requires clear evidence of any such

agreement, as "employee ratification marginally diminishes the statutory rights that Congress has bestowed on the union as exclusive bargaining representatives both in the negotiation of labor contracts and in the governance of internal affairs." *New Process Steel LP*, 353 NLRB 111, 114 (2008), *reaff'd* 355 NLRB 586 (2010).

In *Merico, Inc.*, the Board interpreted *Appalachian Shale Products* to mean that a condition precedent of prior ratification "must be expressed in the written instrument itself and cannot be established by parol or other extrinsic evidence." *Merico, Inc.*, 207 NLRB 101, 101 fn. 2 (1979), *citing Appalachian Shale Products*, 121 NLRB 1160, 1162 (1958). Such a condition precedent cannot be created unilaterally, and it cannot be established through extrinsic evidence such as union representations to employees. *See Polycon Industries,* 363 NLRB 294 (2015); *Personal Optics,* 342 NLRB 958 (2004); *Hertz Corp.*, 304 NLRB 469 (1991); *Beatrice/Hunt-Wesson, Inc.*, 302 NLRB 224 (1991). The employer and the union must specifically and bilaterally agree that ratification is a condition precedent. *Polycon Industries,* 363 NLRB at 300 fn. 9; *Personal Optics,* 342 NLRB at 962. The agreement must be express. *New Process Steel,* 353 NLRB 111, 114 (2008).

In *Beatrice,* the Board affirmed the administrative law judge's finding that contract ratification was a condition precedent because there was an explicit agreement by the employer and union to require contract ratification by unit employees. *Beatrice*, 302 NLRB at 224. The employer and union representative both agreed that the contract would be "subject to ratification." *Id.* at 228. While affirming the administrative law judge, the Board relied on the parties' written, explicit agreement and not on the union's representations to unit employees. *Id.* at 224 fn. 1. Similarly, in *Hertz Corp.*, the employer specifically demanded, and the union representative specifically agreed to, employee ratification of the agreement. *Hertz Corp.*, 304

NLRB at 471. The employer and union representative entered into an express oral bilateral agreement requiring ratification. *Id.*

Unlike *Beatrice* and *Hertz*, the Union and the Employer here did not expressly agree to require employee ratification. *Beatrice,* 302 NLRB at 224 fn. 1; *Hertz Corp.,* 304 NLRB at 471. There is no agreement between the parties that the contract was "subject to ratification." *Beatrice,* 302 NLRB at 228. The Employer did not demand, and the Union did not agree to, a ratification vote as a condition precedent. *Hertz Corp.*, 304 NLRB at 471. Rather, the Employer proposed an explicit condition of a member vote, the Union objected, and the employer removed that condition. (Pet. Ex. 1; Tr. 152-153).

Giotto testified that the only reason he believed that ratification by member vote was a condition precedent was that the Union's representatives told him that they intended to take a vote. (Tr. 199). But this is insufficient as a matter of law. The subjective understanding of the parties regarding ratification does not affect whether an employee vote is necessary for ratification. *See Seneca Environmental Products*, 243 NLRB 624 (1979) (employee ratification not required, despite employer belief, because the alleged precondition was never put specifically into words). A union's statement during bargaining that it will take final proposals to bargaining unit membership vote does not make the agreement's ratification contingent upon that vote. *See Newtown Corp.*, 280 NLRB 350 (1986) (finding union decision to take final proposals to bargaining unit membership vote did not make agreement's effectiveness contingent on unit members' approval); *Childers Products Co.*, 276 NLRB 709 (1985) (finding union ratification of agreement was valid even though union said the agreement was "subject to ratification" and no employee vote was taken); *Duro Paper Bag Manufacturing Co.*, 216 NLRB 1070 (1975) (finding a valid agreement without employee vote even though negotiating committee said they

should submit any agreement to membership for approval). This case is like *Personal Optics*, where the Board declared: "Even if the Union's prior statements arguably may have led the Respondent to believe that the Union would conduct a vote of the bargaining unit, there was never any such agreement between the parties." 342 NLRB at 342 fn. 2.

The Union's representations to employees here are irrelevant. *Beatrice,* 302 NLRB at 224 fn. 1. Although the union mentioned that it would take a vote of the bargaining unit employees, and it did take two votes, the union was within its discretion to take a vote of its members and was not obligated to abide by the results of such a vote. *See Newtown Corp.*, 280 NLRB 350 (1986); *Personal Optics,* 342 NLRB at 962. Because there was no express agreement, which is required to find ratification was a condition precedent, employee ratification was not a condition precedent. *Polycon Industries*, 363 NLRB at 294. Similar to *Polycon Industries* and *Personal Optics,* there was no language in the collective bargaining agreement, nor was there any other verbal or written agreement, requiring ratification. *Polycon Industries*, 363 NLRB at 294; *Personal Optics,* 342 NLRB at 962.

To the extent that Petitioner contends that the references to "ratification" in the term provision of the agreement and to a "ratification bonus" create a condition precedent of a member vote, it is incorrect. *Cf. Personal Optics*, 342 NLRB at 96 (finding no condition precedent despite references to "ratification bonus" and raises "upon ratification.");

But even if there it is concluded that some kind of unspecified "ratification" is a condition precedent to the contract entering into effect, the Board is clear that "ratification" is defined by the union in its internal procedures. *Martin J. Barry Co.*, 241 NLRB 1011, 1013 (1979). The Board looks to the union's bylaws and constitution (procedures?) to define ratification. See *Appalachian Shale*, 121 NLRB at 1163; *North Country Motors,* 146 NLRB 671,

673 (1964); *New Process Steel*, 353 NLRB at 117. The Board has held that "it is none of the [e]mployer's business how (or even whether) the [union] obtains the employees' approval of the [e]mployer's offer," and "if a union undertakes to submit a contract proposal to a vote of its members, it is for the union, and not the employer, to construe the meaning of the union's internal requirements for ratification." *Teamsters Local 251,* 299 NLRB 30, 32 (1990); *M & M Oldsmobile*, 156 NLRB 903 (1966).

In its internal procedures, the Union here does not require unit employee ratification of contracts. *Cf. Martin J. Barry,* 241 NLRB at 1013. Neither the Union Constitution nor the bylaws, which would define ratification, require unit member ratification of contracts. *Appalachian Shale Products,* 121 NLRB at 1163. Rather, the unrebutted testimony of Nunzir and Ratica is that the Union may accept a contract through the signature of its lead negotiator and that it has done so in the past. (Tr. 34, 44, 74, 272). Accordingly, the Union's internal procedures have been satisfied and "ratification," to the extent it was necessary, occurred on July 28 when Nunzir signed the agreement. That the Employer was not notified until August 1, after it had attempted to revoke the offer, does not affect that the contract was valid and formed on July 28. *See Felbro, Inc.*, 274 NLRB 1268, 1268 fn.2 (1985) (holding contract entered into effect on date of ratification, and stating "[i]t is immaterial that the Respondent may not have been notified of the ratification prior to its attempt to revoke its contract offer.")

B. The contract is sufficient to serve as a bar.

The contract is sufficient to bar the petition. To serve as a bar to a petition, a contract must contain substantial terms and conditions of employment deemed sufficient to stabilize the bargaining relationship. *Cind-R-Lite Co.*, 239 NLRB 1255, 1256 (1979), citing *Appalachian Shale Products Co.*, 121 NLRB 1160, 1163 (1958). This July 28 signed agreement plainly encompasses substantial terms and conditions: it includes provisions with respect to wages,

grievance handling, vacations, hours, and every other expected part of a labor agreement. (U. Ex. 8). *See Television Station WVTV*, 250 NLRB 198 The Employer's weak *post hoc* attempts at arguing that terms remained to be finalized are undercut by its repeated characterization of its July 18 offer as its "final" or "last best and final," (Tr. 35-37; Pet. Ex. 3; U. Ex. 5; U. Ex. 6); by its failure to mention that the allegedly remaining terms posed an obstacle to an effective agreement at any time in July, including when the Union was conducting its member vote on July 25 (Tr. 37, 48-49, 54, 63-64); and by Giotto's omission of any such objection that the agreement was incomplete in his August 1 reply to the Union's claim that the parties already had an agreement. (U. Ex. 11). Even setting those aside, Giotto's admission at the hearing that if the Union members had voted to approve the contract on July 25, the agreement would have entered into effect on that date is conclusive proof that there was no barrier to the parties' agreement entering into effect. (Tr. 193). That it might be desirable to have further discussions regarding the impact of certain of those agreements does not change this conclusion.

The Petitioner contends that the agreement has no effective date. But the agreement signed July 28, does sufficiently indicate its effective date. The Board has recognized that to serve as a bar, an agreement must be sufficient on its face such that employees and outside unions may determine the appropriate time for filing representation petitions. *Benjamin Franklin Paint & Varnish Co.*, 124 NLRB 54, 55-56 (1959). The agreement in the record in this case satisfies this requirement.

In *South Mountain Healthcare,* the Board found that an agreement with a stated duration of four years but no effective or expiration date was not a contract bar because there were multiple possible effective dates. *South Mountain Healthcare*, 344 NLRB 375 (2005). In that case, the agreement did not include any date on which the four-year term would begin. *Id.*

Therefore, it was unclear whether the four years would be measured by the date on the cover page, the date that wage increases began, or some other date. *Id.*

Here, by contrast, the parties have agreed that the agreement will be effective for "Three (3) years *from the ratification date*." (U. Ex. 8 (emphasis added)). Unlike *South Mountain Healthcare*, the contract here includes an effective date that can be clearly established. *Id.* There is only one possible effective date for this agreement – the date of the agreement's ratification. As the agreement was ratified on July 28, 2022, the agreement became effective on July 28, 2022 and spans three years starting on July 28, 2022. *Cooper Tire*, 181 NLRB at 509. To the extent that it might be necessary,[2] the precise ratification date is evident on the face of the agreement because it is the date of the Union's signature on the remaining open items. (U. Ex. 8). The agreement thus is sufficient on its face such that the bargaining relationship is stabilized, and that employees and outside unions can determine the appropriate time for filing representation petitions in the future. *Cind-R-Lite*, 239 NLRB at 1256; *Benjamin Franklin*, 124 NLRB at 55-56.

The parties do not need to formally sign the agreement for it to constitute a contract bar. See *St. Mary's Hosp.*, 317 NLRB 89, 90 (1995) (finding a contract bar where tentative agreement was reduced to writing and initialed); *WVTC,* 250 NLRB at 199; *Gaylord Broadcasting*, 250 NLRB 198, 199 (1980). Here, the agreement was reduced to writing and signed by both the employer and the union. (U. Ex. 8). Each page of the agreement is signed, signifying agreement to the contract provisions within and clearly identifying the union and employer as parties to the contract. *Television Station WVTC*, 250 NLRB at 199. This is a sufficient signature for contract-bar purposes. *Id.*

[2] While both an effective date and an expiration date are material terms of a contract, the Board has not required parties to specifically set out the effective and terminal dates in the duration clause by the exact month and day. See *Cooper Tire*, 181 NLRB 509 (1970) (finding it clear from the use of the words "shall become effective . . . 1968 . . . until . . . 1971" that the duration spanned three consecutive years and was sufficient to be a bar).

IV. CONCLUSION

In conclusion, the Regional Director should dismiss the petition because it is barred by the collective bargaining agreement entered into July 28, 2022.

Respectfully submitted,

/s/Nathan Kilbert
Nathan Kilbert

Counsel for Union