UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

REGION 20

SAN RAFAEL HEALTHCARE &
WELLNESS CENTRE

Employer

and

NATIONAL UNION OF HEALTHCARE WORKERS-CALIFORNIA NURSES ASSOCIATION-AFL-CIO

Case 20-RC-107479

Petitioner

and

SERVICE EMPLOYEES
INERNATIONAL UNION, UNITED
HEALTHCARE WORKERS-WEST

Intervenor/Incumbent

DECISION AND DIRECTION OF ELECTION

San Rafael Healthcare & Wellness Centre (Employer) operates a skilled nursing facility located in San Rafael, California. National Union of Healthcare Workers-California Nurses Association-AFL-CIO (Petitioner) seeks to represent employees in the following unit stipulated by the parties to be an appropriate unit for collective-bargaining purposes (stipulated unit):

> Certified nursing assistant, nursing assistant, restorative aide, PT aide, LVN, dietary aide, cook, relief prep cook; excluding RNs, confidential employees, professional employees, supervisory employees and guards as defined by the Act.

The unit is comprised of about 42 employees. Service Employees International Union, United Healthcare Workers – West (Intervenor/Incumbent) represented these employees under a collective-bargaining agreement with the previous operator of the Employer's facility. The only issue is whether there is a contract bar to the petition. The Employer and Intervenor/Incumbent take the position that a contract bar exists and Petitioner takes a contrary view. For the reasons set forth below, I find there is no contract bar and I decline to dismiss the petition. I am directing an election in the stipulated unit, as modified herein, which I find to be an appropriate unit for collective-bargaining purposes.

FACTS

The Employer's facility, formerly called Fifth Avenue, is managed by Brius Management (Brius). Brius took over management from the former operator, Kindred Nursing Centers West LLC, (Kindred) on or about November 1, 2012. At the time Brius took over management, the employees in the stipulated unit at Fifth Avenue were covered under a collective-bargaining agreement between Kindred and the Intervenor/Incumbent (the Kindred Agreement), [1] which also covered other Kindred facilities, including one called Bay View. At the same time Brius was seeking to take over Fifth Avenue, it also sought to take over management of Bay View.[2]

The record contains a Memorandum of Agreement (MOA) signed by Brius and the Intervenor/Incumbent [3] on October 12, 2012, a few weeks prior to the November 1, 2012, takeover of the management of Fifth Avenue by Brius.

Section 1.6 of the MOA provides (emphasis added):

> *If* Brius is successful in its bid to manage and operate Bay View and Fifth Avenue, and *assuming* bargaining unit employees at Bay View and Fifth Avenue ratify the terms of this Agreement as set

---

1 The effective dates of the Kindred Agreement were August 1, 2011, through December 31, 2013.

2 Bay View is located in Alameda, California; I take administrative notice that Bay View is about 28 miles from the Employer's facility.

3 The MOA is also signed by representatives of other nursing care facilities and another union which represented employees at those facilities.

> forth in Section 2.3, the [parties] all agree to be bound by the terms of the Agreement set forth in Part II below.

Part II of the MOA, titled "Agreement," provides in Section 2.1 that Brius shall offer employment to all employees of Bay View and Fifth Avenue covered by the Kindred Agreement subject to licensure, background and eligibility to work requirements. Section 2.2 provides that Brius shall recognize and bargain with Intervenor/Incumbent as the exclusive bargaining representative of Bay View and Fifth Avenue employees after (1) being awarded the contract to manage and operate both facilities; and (2) becoming a successor employer of the employees referred to in Section 2.1 above at each facility. Section 2.3 provides, in relevant part, that Brius would set, as the initial terms of employment for employees at Fifth Avenue and Bay View, the terms of a collective-bargaining agreement between the Intervenor/Incumbent and Solnus d/b/a Oakland Healthcare & Wellness Center (Solnus), herein called the Solnus Agreement,[4] except that wages would be as set forth under the Kindred Agreement.

Section 2.5 of the MOA provides:

> **Opportunity for Bay View and Fifth Avenue Employees to Ratify Initial Terms of Employment** If the Company becomes the successor employer at Bay View and Fifth Avenue, and the initial terms of employment are set by the Company as described in paragraph 2.3 above, within sixty (60) days the employees shall be granted the opportunity to vote on whether to ratify those terms. In the event the employees reject the provisions of Section 2.3, the provisions Section 2.6-2.8 shall not go into effect and shall be deemed null and void.

Section 2.6 of the MOA provides:

> Assuming employees at Bay View and Fifth Avenue ratify the initial terms of employment set forth in Paragraph 2.3, the Company shall recognize [the Intervenor/Incumbent] as the exclusive representative of a bargaining unit consisting of employees at the following five facilities: Bay View, Fifth Avenue, Oakland Healthcare, San Pablo Healthcare, and Roseville Point, which shall

[4] The effective dates of the Solnus Agreement, which covered employees at several Bay Area nursing care facilities, are August 9, 2011, through February 9, 2015.

> be memorialized in a Master Collective Bargaining Agreement that contains the terms as set forth in paragraph 2.3 above for employees at Bay View and Fifth Avenue and as set forth in existing CBAs for the employees at Oakland Healthcare, San Pablo Healthcare, and Roseville Point. The Master Collective Bargaining Agreement . . . shall be effective through February 9, 2015.

Section 2.8 of the MOA discusses coordinated bargaining between the various parties and states the parties' intent that there be a Master Collective Bargaining Agreement covering the Bay View, Fifth Avenue, and other facilities listed in Section 2.8. Section 2.12 provides that the MOA may be executed "in counterparts, which taken together, shall constitute one Agreement and be binding upon and effective as to all Parties hereto." The MOA is executed by representatives of Brius and the Intervenor/Incumbent as well as by representatives of Solnus and other nursing care facilities and by SEIU United Long Term Care Workers, all of which were parties to the MOA.

On November 1, 2012, Brius succeeded in taking over management of Fifth Avenue but was unsuccessful in its bid to take over operation of Bay View. Upon taking over operation of Fifth Avenue, the Employer began applying the terms of the MOA to employees in the stipulated unit. Commencing in February 2013,[5] the Employer announced and implemented a reduction in shift hours for employees in the stipulated unit. In an email dated March 4 to the Employer, the Intervenor/Incumbent objected to the Employer's reduction in shift hours; notified the Employer that the terms of the MOA had not been ratified by its membership as required under the MOA; asserted that no valid agreement existed; and demanded that the parties negotiate a new contract. By email dated March 5, the Employer responded that because the Intervenor/Incumbent had failed to conduct a ratification vote within 60 days as required by Section 2.5 of the MOA, the Intervenor/Incumbent had waived its right to reject the contract and demand bargaining. By email dated March 12, Intervenor/Incumbent responded that because various clauses in the MOA had never come to fruition, such as Brius' acquisition of Bay View, no agreement had ever come into existence.

Intervenor/Incumbent further stated that it had delayed conducting a ratification vote until it became clear that Brius was not going to acquire Bay View, and then it had submitted the MOA to employees for ratification in March, and the MOA had been rejected. By email dated April 17, the Employer responded that it did not understand the Intervenor/Incumbent's position since Intervenor/Incumbent had received dues payments from employees at Fifth Avenue and had filed several grievances on their behalf.

At the hearing, Brius' negotiator, Joshua Sable, testified that during negotiations on the MOA, he had proposed the 60-day period for certification contained in the MOA, and had explained to the Intervenor/Incumbent that the reason for the 60-day period was that Brius wanted a date certain when it would know whether the MOA had been ratified. He further testified that he had also made clear to the Intervenor/Incumbent that if ratification did not occur within the 60-day time period, the Intervenor/Incumbent would waive its right to a ratification vote. Intervenor/Incumbent provided no witnesses at the hearing. The petition herein was filed on June 17.

ANALYSIS

As indicated above, the Employer and Intervenor/Incumbent contend the petition should be dismissed because the MOA is a contract bar to the petition. Petitioner takes a contrary view. I find there is no contract bar and decline to dismiss the petition for the reasons discussed below.

When a petition is filed for an election among a group of employees who are asserted to be covered by a collective-bargaining agreement, the Board must decide whether the asserted contract actually exists and whether it conforms to certain requirements. These requirements generally include that the contract be in writing; have been signed prior to the filing of the rival representation petition; contain substantial terms and conditions of employment deemed sufficient to stabilize the bargaining relationship; clearly encompass the employees sought in

[5] All dates hereafter are in 2013 unless otherwise indicated.

the petition; and cover an appropriate unit. See *Appalachian Shale Products Co.,* 121 NLRB 1160, 1161-64 (1958).

If the Board finds that the contract exists and the requirements are met, the contract is held to bar the processing of the petition. This is known as the contract bar doctrine. The doctrine is intended to balance the statutory policies of stabilizing labor relations and facilitating the exercise of free choice by employees in the selection or change of a bargaining representative. See *Direct Press Modern Litho, Inc.*, 328 NLRB 860, 860 (1999); *Bob's Big Boy Family Restaurants,* 259 NLRB 153, 153-154 (1981); *Union Fish Co.*, 156 NLRB 187, 191 (1965); *Appalachian Shale Products Co., supra.*

When analyzing whether a contract exists for contract bar purposes, the Board looks to the *face* of the document and excludes consideration of extrinsic evidence because employees and petitioners would look to the face of the document in order to determine the appropriate time to file a petition. See *South Mountain Healthcare and Rehabilitation Center,* 344 NLRB 375, 375-376 and fn.3 (2005); *Waste Management of Maryland, Inc.*, 338 NLRB 1002, 1003 (2003); *United Healthcare Services*, 326 NLRB 1379 (1998) (for contract bar purposes, inquiry into whether a contract required ratification is limited to the face of the document and excluding parole evidence); *Union Fish Co, supra*, 156 NLRB at 191-192.

If the parties' "understanding" regarding the existence or effective dates of a contract must be examined, the contract is not a bar. See *Shen-Valley Meat Packers, Inc.*, 261 NLRB 958, 958-959 and fn.1 (1982), citing *Pacific Coast Association of Paper and Pulp Manufacturers*, 121 NLRB 990, 994 (1958). See also *South Mountain Healthcare*, *supra*; *Jet-Pak Corp.*, 231 NLRB 552, 552-553 (1977). Moreover, the Board has observed that "where parties to a contract create a situation in which a petitioner cannot clearly determine the proper time for filing a petition, the ambiguity does not inure to the benefit of the parties but instead means that the petition will not be barred." *Bob's Big Boy Family Restaurants*, *supra,* 259 NLRB at 154.

Lastly, the burden of proving contract bar rests with the party asserting the bar. See *Roosevelt Memorial Park, Inc.*, 187 NLRB 517, 517-518 (1970).

In the instant case, the time for filing a petition cannot be determined from the face of the MOA. As pointed out by the Intervenor/Incumbent in its emails to the Employer contesting the existence of a contract, the MOA contains conditions precedent which have not been fulfilled and which appear arguably necessary for a binding collective-bargaining agreement to come into existence. These unfulfilled conditions precedent are the Employer's takeover of Bay View; the Employer's successorship at the Fifth Avenue facility; and the ratification of the MOA by the employees of Fifth Avenue and Bay View. This is clear from the use of the word "if" in Section 1.6 in reference to Brius' successful takeover of not only the Fifth Avenue but also of Bay View, and also from the use of the word "assuming" in reference to the required ratification of the MOA by bargaining unit employees at Fifth Avenue and Bay View in order for the parties to be bound by the terms of Section II of the MOA.

Similar conditional language is present in Section 2.2 of the MOU, providing that Brius shall recognize and bargain with Intervenor/Incumbent "after" being awarded the contract to manage and operate "both" Fifth Avenue and Bay View and becoming a successor employer at both facilities. Section 2.5 similarly contains the word "if" with regard to Brius' successorhip at both facilities being necessary for application of the initial terms and conditions of employment described in Section 2.3. Section 2.5 also provides that "in the event" employees reject the provisions of Section 2.3, Sections 2.6 - 2.8 shall not go into effect and shall be deemed null and void. Lastly, Section 2.6 contains similar conditional language, including use of the word "assuming" with regard to ratification by Fifth Avenue and Bay View employees being necessary to bring about the Master Collective Bargaining Agreement discussed therein. [6]

[6] I reject the Employer's argument regarding the Intervenor/Incumbent having waived its right to contest the MOA by failing to conduct the ratification vote within 60 days of Brius' takeover of Fifth Avenue. The Employer's argument is based entirely on extrinsic evidence, which I cannot consider.

In sum, the MOA is rife with conditional language. The conditions in the MOA described above, which appear necessary for the MOA to become binding, have not been fulfilled. The ambiguity created by the conditional language in the MOA makes it impossible for an outsider to determine from its face when a representation petition could be timely filed. Given that the ambiguity was created by the Employer and the Intervenor/Incumbent, I cannot allow it to inure to their benefit so as to block the instant petition. Accordingly, I decline to dismiss the petition and I am directing an election in the stipulated unit, as modified herein,[7] which I find to be an appropriate unit for collective-bargaining purposes.[8]

CONCLUSIONS AND FINDINGS

Based upon the record,[9] I conclude and find as follows:

1) The Hearing Officer's rulings made at the hearing are free from prejudicial error and are affirmed.

2) The testimony in the record reflects, and I find, that the Employer is an employer as defined in Section 2(2) of the Act, and is engaged in commerce within the meaning of Sections 2(6) and (7) of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case.

3) The parties stipulated, and I find, that the Petitioner and Intervenor/Incumbent are labor organizations within the meaning of the Act.

4) A 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.

---

[7] I have modified the stipulated unit description by including the eligibility language that appears consistent with the Kindred Agreement (i.e., "All full time and regular part-time and per diem" employees," and by adding language referencing the Employer's facility in San Rafael, California).

[8] My finding that the stipulated unit, as modified, is an appropriate unit is supported by the following community of interest considerations: the employees in the stipulated unit work at the same location; have been historically covered by the same collective-bargaining agreement (i.e., the Kindred Agreement); and share common terms and conditions of employment.

5. I find that the stipulated unit, as modified herein, is an appropriate unit for collective-bargaining purposes within the meaning of the Act:

> All full time and regular part-time and per diem certified nursing assistants, nursing assistants, restorative aides, PT aides, LVNs, dietary aides, cooks and relief prep cooks employed by the Employer at its facility in San Rafael, California; and excluding RNs, confidential employees, professional employees, supervisory employees and guards as defined by the Act.

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by **National Union of Healthcare Workers-California Nurses Association-AFL-CIO** or by **Service Employees International Union, United Healthcare Workers-West** or by **no labor organization.**

The date, time and place of the election will be specified in the notice of election that the Board's Regional Office will issue subsequent to this Decision.

A. Voting Eligibility

Eligible to vote in the election are those in the unit found appropriate who are employed during the designated payroll period for eligibility, including employees who did not work payroll during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

---

[9] The parties stipulated, and I find, that the record herein incorporates the record in *Healthcare Services Group*, Case 20-RC-115352.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

B. Employer to Submit List of Eligible Voters

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within seven days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the full names and addresses of all the eligible voters. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). The list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). This list may initially be used by me to assist in determining an adequate showing of interest. I shall, in turn, make the list available to all parties to the election.

To be timely filed, the list must be received in the Regional Office, National Labor Relations Board, Region 20, 901 Market Street, Suite 400, San Francisco, CA 94103, on or before **December 2, 2013.** No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted to the Regional

Office by electronic filing through the Agency's website, www.nlrb.gov,[10] by mail, or by facsimile transmission at (415)356-5156. The burden of establishing the timely filing and receipt of the list will continue to be placed on the sending party.

Because the list will be made available to all parties to the election, please furnish a total of two copies of the list, unless the list is submitted by electronic filing, facsimile or e-mail, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

C. Notice of Posting Obligations

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices to Election provided by the Board in areas conspicuous to potential voters for at least 3 working days prior to 12:01 a.m. of the day of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

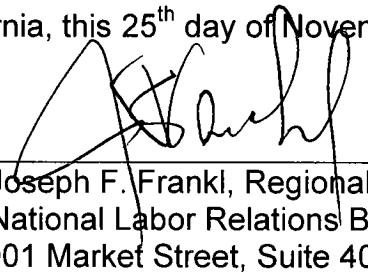
RIGHT TO REQUEST REVIEW

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, DC 20570-0001. This request must be received by the Board in Washington by **December 9, 2013**.

[10] To file the eligibility list electronically, go to the Agency's website at www.nlrb.gov, select File Case Documents, enter the NLRB Case Number, and follow the detailed instructions.

The request may be filed electronically through the Agency's web site, www.nlrb.gov,[11] but may not be filed by facsimile.

DATED AT San Francisco, California, this 25th day of November 2013.



Joseph F. Frankl, Regional Director
National Labor Relations Board, Region 20
901 Market Street, Suite 400
San Francisco, California 94103-1735

[11] To file the request for review electronically, go to www.nlrb.gov, select File Case Documents, enter the NLRB Case Number, and follow the detailed instructions.