UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD[1]

REGION 20

SUTTER WEST BAY HOSPITALS d/b/a
CALIFORNIA PACIFIC MEDICAL CENTER

Employer,

and Case 20-RC-112656

CALIFORNIA NURSES ASSOCIATION/
NATIONAL NURSES UNITED (CNA/NNU)

Petitioner

SUPPLEMENTAL DECISION REGARDING DETERMINATIVE CHALLENGED BALLOTS AND EMPLOYER'S AND PETITIONER'S RESPECTIVE OBJECTIONS

Pursuant to a petition filed by Petitioner on September 5[2] and a multi-day hearing that commenced on September 17, I issued a Decision and Direction of Election (*Decision*) in this matter on November 1. Beginning on November 26, an election was conducted by mail ballot among the Employer's employees in the following appropriate collective-bargaining unit:

> All full-time and regular part-time and per diem registered nurses[3] employed by the Employer at its 2333 Buchanan Street, San Francisco, California facility;[4] excluding all other employees, confidential employees, physicians, employees of outside registries and other agencies supplying labor to the Employer, already represented employees, managerial employees, guards and supervisors within the meaning of the Act.

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[1] Also referred to as Board.

[2] This and all subsequent dates refer to 2013 unless otherwise noted.

[3] I shall also refer to registered nurses as RNs.

[4] The Employer's website (see footnote 12) displays a map of buildings, including 2333 Buchanan, bounded by Washington, Buchanan, California and Fillmore Streets, and states below; "The above map of the Pacific Campus..." I shall also refer to this complex as Pacific

A Board agent tallied the ballots and served a copy of the official *Tally of Ballots* on the parties on December 16. The *Tally* showed the following results, including that the unresolved challenged ballots were sufficient in number to affect the outcome of the election:

Approximate number of eligible voters	686
Void ballots	6
Votes cast for Petitioner	351
Votes cast against Petitioner	321
Valid votes counted	672
Challenged ballots	42
Valid Votes counted plus challenged ballots	714

The Challenged Ballots

I caused an investigation into certain of the challenged ballots, which included obtaining sworn testimony from witnesses, and note the results thereof as follows:

In the *Decision*, I found that the record evidence was insufficient to establish whether a number of job classifications should be included in or excluded from the bargaining unit. I noted that,

> My reasons for voting employees in these classifications subject to challenge are...that while these positions are required to be [held by] licensed RNs and appear to be involved in providing patient care and have contact with other RNs, the record is not sufficient to enable me to make a determination as to whether they have a sufficient community of interest/connection with RNs at the Pacific campus to support their inclusion in the petitioned-for unit at that facility. The record is unclear to what extent the employees in these classifications perform their duties at locations or campuses other than the Pacific campus.

As a result of my findings, RNs employed as "pre-registration nurses"[5] and as "Clinical Education Specialists"[6] were among those who were to vote subject to challenge. The Employer submitted an eligibility list that showed the names of 791 voters. The names numbered 1-760 followed a heading that read, inter alia, "undisputed classifications." The

[5] The record shows that the Employer has no classification that applies only to pre-registration RNs.

[6] At the hearing, this classification (hereafter also CES) was characterized interchangeably as Clinical Education Specialist or Clinical Educator Specialist. The Employer used the former on the STC page of the eligibility list, but the latter in the stipulation that it introduced on pp. 225-226 of the Transcript.

names numbered 761-791 were labeled "Classifications Subject to Challenge,"[7] in apparent compliance with the findings in the *Decision*.

Pre-registration Nurses

Prior to the election, Petitioner opposed the Employer's proposal to include RNs working as pre-registration nurses in the bargaining unit. In the "Job Description" column on the STC portion of the eligibility list, the Employer classified eleven employees (Patricia Blumenfeld, Lourdes Boado, Erika Bodo, Rebecca Cardiel, Barbara Friedman, Maureen Kirwan, Christina Mallia, Louise Naughton, Michele Trierweiler, Thuy-Trang Vinh, and Angela Wong)[8] as "Staff Nurse II – benefitted." Because they were named on the STC list, the Board agent challenged their votes. Subsequently, the Employer confirmed that all these employees work as pre-registration nurses. It also advised that it had listed seven additional pre-registration nurses on the portion of the list labeled "undisputed classifications." The Employer classified six of these misplaced RNs as "Staff Nurse II – benefitted," and they voted without challenge. It classified the seventh, Mark Nessim, as "Staff Nurse II – PD."[9] Petitioner challenged Nessim's ballot on the basis that he had not worked sufficient hours to establish eligibility.

The investigation disclosed that late in 2005 or so, the Employer transferred the function of registering patients prior to surgery from its four San Francisco campuses[10] to its facility at 1825 Sacramento Street (hereafter 1825). Evidence establishes that employees who performed the pre-registration duties at the California campus were included in the bargaining unit that Petitioner represented at that location. When the Employer advised Petitioner in 2005 that it intended to consolidate the function at one location, where pre-registration nurses would perform the pre-surgery service for all of its San Francisco campuses, it also announced that

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[7] Hereafter I also refer to this portion of the eligibility list as STC.

[8] Vinh did not vote in the election; the Board agent challenged the votes cast by the other ten employees.

[9] The Employer did not explain why it had misplaced the names of these employees on the list. The six who voted without challenge are Teresa Cucco, Jacob Heberlein, Cecelia Pickerrell, Andrea Riggan, Michael Seneriches, and Judy Tingle.

[10] In addition to Pacific campus at issue in this matter, the Employer's San Francisco campuses are California, Davies, and St. Luke's.

Petitioner would not represent the transferred RNs. Those RNs have remained unrepresented since the consolidation.

The Employer's 1825 location is at least three city blocks distant from any facility on the Employer's Pacific campus.[11] A review of the Employer's website disclosed that it does not show 1825 on its map of the Pacific campus.[12] Pre-registration nurses assigned to 1825 do not work at Pacific or any other CPMC campus, nor do RNs from Pacific work at 1825. The Employer's pre-surgery instructions appear to provide only for pre-registration by telephone, but on exceedingly rare occasions, if a patient insists, he or she is allowed to complete the process in-person at 1825. Thus, the vast majority of pre-registrations occurs by telephone, without the face-to-face contact with patients that is routine for many of the RNs in the bargaining unit, and is accomplished in about 30 minutes. (Some patients who need lab work prior to surgery also accomplish this in-person at 1825, where on any given day, one of the 18 pre-registration nurses staffs the clinic rather than working in the call center. Patients may choose, however, to obtain the requisite lab results through a primary care physician or at a different Employer facility if that proves more convenient for them.)

In sum, unlike bargaining unit RNs, pre-registration nurses work at some distance from, and do not perform duties at, the Pacific campus. Neither do RNs from the Pacific campus perform work at 1825. Additionally, pre-registration nurses perform their services for patients from all four of the Employer's San Francisco campuses, not just those at Pacific.[13] Finally, the nature of pre-registration nurses' work, most of which consists of a relatively brief one-time telephonic interview, differs markedly from the kind of nursing care provided by most of the RNs who are included in the bargaining unit. In these circumstances, I find that the pre-registration nurses who work at the Employer's facility at 1825 Sacramento Street do not share a community of interest sufficient to include them in the bargaining unit. I hereby sustain the challenges to the ballots cast by Patricia Blumenfeld, Lourdes Boado, Erika Bodo, Rebecca Cardiel, Barbara

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[11] The closest address on the Employer's map of the buildings on its Pacific campus is 2323 Sacramento Street. Given the street numbering scheme in San Francisco, that suggests that there may be as many as five blocks of distance between the boundary on the Employer's map of its Pacific campus and 1825. According to Google Maps, the distance between the two points is .5 miles.

[12] *www.**cpmc**.org/.../directions-pac.html*, last visited on February 13, 2014.

[13] Record evidence indicates that the Employer has 15 operating rooms at its California Campus, eight at Davies, 11 at Pacific, and nine at St. Luke's.

Friedman, Maureen Kirwan, Christina Mallia, Louise Naughton, Mark Nessim, Michele Trierweiler, and Angela Wong.

Clinical Education Specialists

At the pre-election hearing in this matter, the Parties stipulated that none of the eleven CESs whom the Employer employs at its four San Francisco campuses is currently included in the bargaining unit that Petitioner represents at the California and St. Luke's facilities. Of the eleven, five were benefited and six were per diems. The Employer described only two individuals (Marilyn Byington and Devon Fordyce-Wilson) as "Specialist, Clinical Education" on the list of employees to vote subject to challenge. Petitioner advocates that employees in this job classification lack sufficient community of interest for inclusion with bargaining unit employees; the Employer argues to the contrary, but apparently confined its candidates for inclusion to the two whom it deemed to have the strongest association with Pacific.

The investigation disclosed that about five years ago, the Employer moved one of its Education Offices from Pacific to its Davies campus.[14] Byington has, and Fordyce-Wilson shares, an office at Davies, and neither works at the Pacific campus.[15] Byington is benefitted; Fordyce-Wilson is per diem; and both work part-time. In general, CESs spend a significant portion of their time working with department and ancillary service managers to write "competencies." Competencies set forth the skills that RNs need for areas such as telemetry, emergency department, and critical care. CESs devote almost all the rest of their work time to teach particular skills to RNs. In particular, Byington teaches EKG, mock codes for med-surg and psychiatry, and advanced cardiac and life support; Fordyce-Wilson teaches some of those same classes and a nursing orientation program. They use a classroom located at 1375 Sutter Street in San Francisco (hereafter 1375).[16] They also teach classes at the Davies or St. Luke's campuses, and have taught in the past at the California campus. They do not teach classes at Pacific, due to the unavailability of suitable space there.

The classes are relatively brief in duration; for example, the EKG class in which Byington specializes requires a total of 16 to 18 hours. Depending on the subject, classes may draw more

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[14] It appears that he Employer also has Education Offices at its California and St. Luke's campuses.

[15] Google Maps shows the driving distance between their offices at Davies and Pacific as 2.1 miles.

[16] Google Maps shows the driving distance between 1375 and the Pacific campus as .8 miles

heavily on RNs from a particular campus, but if space is available, classes are open to RNs from any campus. For instance, during 2013, 31 of Byington's EKG students were from Pacific and 12 came from some other campus. Other subjects, such as advanced cardiac and life support, are generally available to RNs from all four campuses. The evidence establishes that Fordyce-Wilson too teaches RNs drawn from across all four campuses.

In sum, Clinical Education Specialists Byington and Fordyce-Wilson do not have office space at or teach at the Pacific campus. For one specialty, Byington draws mostly but by no means exclusively upon RNs from Pacific, but both she and Fordyce-Wilson teach other subjects that draw upon RNs from all four of the Employer's San Francisco campuses. Their interchange with RNs from Pacific consists of relatively brief and episodic student-teacher encounters, and unlike the RNs whom they instruct, their duties do not entail direct patient care. In these circumstances, I find that Byington and Fordyce-Wilson do not share sufficient community of interest with RNs working in the bargaining unit at the Employer's Pacific campus to be included therein, and I hereby sustain the challenges to the ballots that they cast.

Not on list

The Board agent who conducted the tally challenged the ballot cast by Joanne Lagratta, a per diem RN, because her name did not appear on the eligibility list. Subsequent to the election, the Employer confirmed that it does not believe that Lagratta worked enough hours during the quarter preceding the election to qualify to vote. Petitioner concurs that Lagratta was ineligible to vote on that same basis. Accordingly, I sustain the challenge to Lagratta's ballot.

The Objections:

On December 23, The Employer and Petitioner timely filed respective Objections alleging that the conduct of the other had interfered with the election. The Region served a copy of each party's Objections on the other.

The Employer's Objections read verbatim as follows:

1. The Union provided false information to voters about election procedures in a deliberate effort to discourage voting.
2. The Union distributed false election propaganda in an artful manner designed to prevent voters from recognizing campaign statements for what they are.
3. The Union made implied threats of job loss based on the Union's alleged special relationship with elected officials.

Petitioner's Objections read verbatim as follows:

Objection No. 1
The Employer, California Pacific Medical Center ("Employer") through its supervisors and/or agents, interfered with laboratory conditions and made a free election impossible by denying its off-duty employees access to non-working areas to engage in union activities, as described in Paragraphs 6(c) and (d) of the Complaint issued in Case Number 20-CA-112614.

Objection No. 2
The Employer, through its supervisors and/or agents, interfered with laboratory conditions and made a free election impossible by surveilling employees by writing down the names of employees engaged in union activities, as described in Paragraph 6(e) of the Complaint issued in Case Number 20-CA-112614,

Objection No. 3
The Employer, through its supervisors and/or agents, interfered with laboratory conditions and made a free election impossible by threatening employees who visited the Employer's facilities while off duty with discipline, up to and including termination, because of employees' union activities, as described in Paragraph 6(0 of the Complaint issued in Case Number 20-CA-112614.

Objection No. 4
The Employer, through its supervisors and/or agents, interfered with laboratory conditions and made a free election impossible by imposing more onerous working conditions on employees after the filing of the Petition.

Objection No. 5
The Employer, through its supervisors and/or agents, through its supervisors and/or agents, interfered with laboratory conditions and made a free election impossible by following pro-union employees and/or Union representatives and/or engaging in surveillance of employees and/or Union representatives.

Objection No. 6
The Employer, through its supervisors and/or agents, interfered with laboratory conditions and made a free election impossible by creating the impression of surveillance of pro-union employees and/or Union representatives.

Objection No. 7
The Employer, through its supervisors and/or agents, interfered with laboratory conditions and made a free election impossible by coercively interrogating employees about their union support

and/or union activities.

Objection No. 8
The Employer, through its supervisors and/or agents, interfered with laboratory conditions and made a free election impossible by threatening to withhold RNs' regularly scheduled raises.

Objection No. 9
The Employer, California Pacific Medical Center, through its supervisors and/or agents, interfered with laboratory conditions and made a free election impossible by restricting the access rights of off-duty employees who supported the Union.

Objection No. 10
The Employer, through its supervisors and/or agents, interfered with laboratory conditions and made a free election impossible by granting more favorable conditions to Union opponents.

Objection No. 11
The Employer, through its supervisors and/or agents, interfered with laboratory conditions and made a free election impossible by interrogating employees by conduct about their union support.

Objection No. 12
The Employer, through its supervisors and/or agents, interfered with laboratory conditions and made a free election impossible by promulgating an unlawful rule in response to Union activity.

Objection No. 13
The Employer, through its supervisors and/or agents, interfered with laboratory conditions and made a free election impossible by enlisting employees to inform on their co-workers' union activities.

Objection No. 14
The Employer, through its supervisors and/or agents, interfered with laboratory conditions and made a free election impossible by selectively banning union buttons.

Objection No. 15
The Employer, through its supervisors and/or agents, interfered with laboratory conditions and made a free election impossible by impliedly threatening to discriminate against Union supporters.

Objection No. 16
The Employer, through its supervisors and/or agents, interfered with laboratory conditions and made a free election impossible by impliedly threatening to take away benefits to employees if they vote for the Union.

Objection No. 17
The Employer, through its supervisors and/or agents, interfered with laboratory conditions and made a free election impossible by prohibiting employees from talking about the Union, while allowing other nonwork-related discussions by employees.

Objection No. 18
The Employer, through its supervisors and/or agents, interfered with laboratory conditions and made a free election impossible by disparately enforcing its policy on non-employee visitors to the cafeteria.

Objection No. 19
The Employer, California Pacific Medical Center, through its supervisors and/or agents, interfered with laboratory Conditions and made a free election impossible by materially assisting antiunion employees.

Objection No. 20
The Employer, through its supervisors and/or agents, interfered with laboratory conditions and made a free election impossible by refusing to permit the distribution of pro-union literature in nonwork areas while allowing the distribution of other literature in the same areas.

Objection No. 21
By the above and other conduct, the Employer, California Pacific Medical Center, has significantly interfered with, coerced, and restrained employees in the exercise of their Section 7 rights and has interfered with their ability to exercise a free and reasoned choice in the election.

Analysis:

Section 102.69(a) of the Board's *Rules and Regulations* requires, inter alia, that, "Within 7 days after the filing of objections, or such additional time as the Regional Director may allow, the party filing objections shall furnish to the Regional Director the evidence available to it to support the objections." Similarly, Section 11392.6 of the Board's *Casehandling Manual, Part Two, Representation Proceedings,* provides that absent receipt of timely evidence that establishes a prima facie case in support of objections, the Regional Director need not investigate them. Further, it instructs that, unless the objecting party has specifically identified witnesses who assertedly would provide direct evidence to substantiate its allegations, the Regional Director should overrule them summarily. This guidance is based on Board precedent.[17]

Employer's Objections

The Employer timely submitted its position in support of its Objections on December 30. The Employer's position, however, failed to identify potential witnesses or even to allude to testimony, and hence did not establish the requisite prima facie case. Due to these deficiencies, the Employer did not meet its obligation to provide the information needed by the Region quickly to investigate the merit of its Objections. In these circumstances, the Employer's Objections lack factual support, and I hereby overrule them.[18]

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[17] *Lange and Perkins, LLC d/b/a The Daily Grind*, 337 NLRB 655, 656 (2002).

[18] Although the Employer's insufficient support for its objections eliminated the need, and ability, to investigate them, they do not appear on their face to have merit. (continued on next page)

Petitioner's Objections

Many of Petitioner's Objections evince the same lack of adequate support as do all of the Employer's Objections. I need not address them, however, because my rulings above and corresponding conclusion below render them moot.

Summary:

As noted above, I have sustained the challenges to the ballots cast by Patricia Blumenfeld, Lourdes Boado, Erika Bodo, Marilyn Byington, Rebecca Cardiel, Devon Fordyce-Wilson, Barbara Friedman, Maureen Kirwan, Joanne Lagratta, Christina Mallia, Louise Naughton, Mark Nessim, Michele Trierweiler, and Angela Wong, and their ballots will not be opened and counted. Accordingly, the number of challenged ballots is reduced by 14, to a total of 28. Because the votes favoring representation by Petitioner exceeded the votes against representation by 30, the challenged ballots no longer are determinative. Furthermore, the

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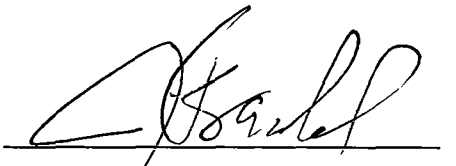
In support of Objection 1, the Employer takes issue with an allegedly false claim regarding the pay rates of represented and unrepresented nurses whom it employs, but notes that it rebutted Petitioner's claim just two days later, and thus just one day after the Regional Office mailed ballots to voters. In *Midland National Life Insurance Co.*, 263 NLRB 127 (1982), the Board declared that it would no longer probe the truth or falsity of parties' campaign statements, and would instead rely upon the intelligence of the voters to evaluate propaganda. This renders the conduct alleged in Employer's Objection 1 of no matter.

In its second Objection, the Employer claims that Petitioner published a flyer, unauthenticated and only partially legible in its submission, in which Petitioner misinformed employees that they could mail their ballots on December 10, when in fact December 10 was the date by which votes were due back in the Regional Office. The Employer adds that the Petitioner challenged one ballot received after December 10, but prior to the tally on December 16, even though Board policy provides that ballots received in advance of commencement of the count should be opened. Whatever the provenance of the flyer attributed to Petitioner, there has been no assertion that the Employer did not adequately display the *Notices of Election* in its facilities, and the instructions that the Region sent to voters with each mail ballot bore the correct due date. In view of the single ballot that remains uncounted due to lateness, and the fact that about 91% of voters listed on the Employer's eligibility list cast a ballot, it is reasonable to conclude that that the asserted misinformation did not negatively impact participation. In this regard, I note that two other recent elections that involved different bargaining units of the Employer had lower participation rates. In any event, under the principle established in *Midland*, supra, the Board has found unobjectionable misrepresentations about Board actions (*Riveredge Hospital*, 264 NLRB 1094 (1982) and misstatements of Board law (*John W. Galbreath & Co.*, 288 NLRB 876 (1988).

The Employer's third Objection cites a purported election-eve communication from Petitioner to voters that included as many as 20 pages of endorsements, presumably of Petitioner, by public officials on their respective letterheads. It did not provide a copy of the communication. The Employer asserted that given the role of these unnamed officials in approving a major but unspecified building project, voters might perceive a "potential threat to their job security." The speculation and lack of support for this Objection compel its rejection *Midland*, supra; *The Daily Grind*, supra.

Employer has failed to raise any material and substantial issue of fact that would warrant a hearing over its Objections, much less necessitate setting aside the election, and they are overruled.[19] Finally, the outcome of the election has rendered moot Petitioner's Objections. In accord with my findings, I shall issue the appropriate Certification of Representation.[20]

DATED AT San Francisco, California this 13th day of February 2014.[21]



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[19] *Park Chevrolet-Geo, Inc.*, 308 NLRB 1010, 1010 fn. 1 (1992).

[20] In large measure, I based my ruling to sustain the challenges to ballots cast by RNs who work as pre-registration nurses and by two Clinical Education Specialists on the fact that none of these voters works at 2333 Buchanan Street, or elsewhere on the Pacific campus. Because the bargaining unit includes only employees who do work at that facility, the certification need not specify as excluded the job classifications of the voters in these two categories.

[21] Under the provisions of Section 102.69 of the Board's *Rules and Regulations*, a party may file exceptions to this Report, limited in scope to the Objection(s) that I recommend that the Board overrule, with the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, DC 20570. Exceptions may also be submitted by electronic filing. See the Attachment provided in the initial correspondence in this case or refer to OM 05-30 and OM 07-07, which are available on the Agency's website at www.nlrb.gov, for a detailed explanation of requirements which must be met when electronically submitting documents to the Board and Regional Offices. Guidance can also be found under *E-Gov* on the Board's website. Exceptions must be received by the Board in Washington D.C. by 5:00 p.m. (ET) on February 27, 2014, and may *not* be filed by facsimile.

Under the provisions of Section 102.69(g) of the *Rules*, documentary evidence, including affidavits, which a party has timely submitted to the Regional Director and which is not included in this Report, is not part of the record before the Board and will not be considered unless appended to the exceptions or opposition thereto which the party files with the Board. Failure to append copies of evidence timely submitted to the Regional Director shall preclude a party from relying on such evidence in any subsequent related unfair labor practice proceeding.