

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD¹
REGION 32

ARC OF AMADOR AND CALAVERAS

Employer

Case: 32-UC-123983

and

SERVICE EMPLOYEES INTERNATIONAL
UNION, LOCAL 1021

Petitioner

REGIONAL DIRECTOR'S DECISION AND ORDER

Arc of Amador and Calaveras, herein the Employer, operates facilities located in Sutter Creek, Jackson, and San Andreas, California, where it is engaged in the business of operating a membership-driven non-profit organization that provides services to persons with developmental and intellectual disabilities. Petitioner Service Employees International Union, Local 1021, herein the Union, filed a petition on March 6, 2014² with the Board under Section 9(b) of the National Labor Relations Act, herein the Act, seeking to clarify an existing Board certified unit (the Unit) of about 30 employees employed by the Employer. This Unit consists of “all full-time and regular part-time community specialists, administrative coordinators, supported-living specialists and employment specialists employed at the employer’s Sutter Creek, Jackson and

¹ Herein called the Board.

² All dates herein occurred in 2014, unless otherwise noted.

San Andreas facilities and excluding all other employees, guards and supervisors as defined in the Act.”³ The Union’s petition in Case 32-UC-123983 seeks to clarify the stipulated Unit by adding to it “all coordinators, including but not limited to the Amador Coordinator and the Calaveras Coordinators.”

The positions in question were occupied at the time of the hearing as follows:

Sutter Creek - Amador Coordinator, Kim Vinciguerra
San Andreas - Calaveras Coordinator, Lori Green

A Hearing Officer of the Board held a hearing in this matter on April 14. The Union and the Employer appeared at the hearing and the parties filed post-hearing briefs with me. I have carefully considered the evidence and the arguments presented by the parties on this issue. For the reasons discussed below, applying the test set forth by the Board in *Caesar’s Tahoe*, 337 NLRB 1096, 1097 (2002), I find, in agreement with the Employer, that the January 31, 2014 stipulated election agreement in Case 32-RC-121245 is unambiguous and, accordingly, I shall enforce the terms of this agreement which, by setting forth the specific classifications that are to be included, which list does not include the Amador or Calaveras Coordinators, and then expressly excluding “all other employees,” excludes these two disputed classifications. Accordingly, the petition in this matter is hereby dismissed.⁴

³ The Unit appears as stipulated at the hearing.

⁴ Because of my finding that the terms of the Stipulated Election Agreement expressly exclude the Amador and Calaveras Coordinators, I find it unnecessary to resolve the issue of whether these positions are supervisory within the meaning of Section 2(11) of the Act.

I. FACTS

A. Background

On January 24, the Union filed a Representation Petition in Case 32-RC-121245, seeking to represent a unit consisting of “All full and part-time professional, technical, clerical and hourly employees excluding managers, guards and supervisors as defined in the Act.”⁵ Thereafter, on January 31, the parties signed, and the Regional Director approved, a stipulated election agreement. This stipulation set forth the Unit as follows: “All full-time and regular part-time community specialists, administrative coordinators, supported-living specialists and employment specialists employed at the Employer’s Sutter Creek, Jackson and San Andreas facilities and excluding all other employees, guards and supervisors as defined in the Act.” By its terms, this Unit included, *inter alia*, “Administrative Coordinators,” of which there was only one at the time of the stipulation, and excluded “all other employees.” There was no reference to the Amador and/or Calaveras Coordinator(s). Vinciguerra and Green were not on the *Excelsior* list submitted by the Employer to the Region. On February 13, the Union notified the Region that it believed that Vinciguerra and Green had been inappropriately omitted from the *Excelsior* list, and stated that they would vote subject to challenge. As a result, Vinciguerra and Green voted in the February 20 election under challenge. I take administrative notice that their two challenged ballots were not determinative and that the Union was certified on February 28. Since that date, the parties have bargained over the unit scope issue but have been unable to date to reach any agreement to either include or exclude the disputed classifications in the Unit. Accordingly, on March 6, the Union filed the instant petition, seeking to have me issue a

⁵ The petition was not introduced into evidence at the hearing. However, I hereby take administrative notice of its terms.

Decision and Order to clarify the existing unit by adding in the classifications of Amador Coordinator and Calaveras Coordinator.

B. The Disputed Job Classifications

The Employer's organizational charts and the record evidence show that it currently employs a single administrative coordinator in its Sutter Creek facility, who reports to the Employer's Director of Operations. The Employer also currently employs a single Amador Coordinator who works at the San Andreas facility and a single Calaveras Coordinator who works at the Jackson facility. They report to the Amador and Calaveras Directors of Services, respectively.⁶

C. The Union's Argument

The Union argues that both the Amador and Calaveras Coordinators signed Union authorization cards and were present for the January 27 Board meeting in which the Union presented the demand for recognition. Further, Executive Director Molina testified that the Employer was aware that the Union wanted the Amador and Calaveras Coordinators to be included in the Unit, and the Employer did not communicate its contrary position to the Union. Finally, the Union argues that reference in the Stipulated Election Agreement to "Administrative Coordinators," in the plural, contemplates multiple coordinators, and thus includes the Amador and Calaveras Coordinators, because at the time of the stipulation there was only one administrative coordinator. As such, the Union argues that its intent was to include these three

⁶ The Employer's organizational chart also shows a single Supported Living Coordinator who reports to the Director of Supported Living. The Supported Living Coordinator position is currently vacant and has been vacant since about October 2013, and there are currently no plans establishing if and when the position will be filled. Since this unit clarification petition does not seek the inclusion of this position in the unit, I find it unnecessary to rule on whether this classification should or should not be included in the Unit.

positions in the stipulated Unit, the Employer was aware of this intent, and the term “Administrative Coordinators” was therefore intended to encompass the Amador and Calaveras Coordinators. The Union argues, alternatively, that the Employer’s narrow interpretation of the Unit’s reference to “Administrative Coordinators” renders the Unit description ambiguous, and therefore requires clarification. The Union asserts that the above-detailed extrinsic evidence shows that both parties (or at least the Union) intended to include the two disputed classifications in the Unit.

D. The Employer’s Arguments

As a threshold argument, the Employer first argues that the instant unit clarification petition should be dismissed because unit clarification is only appropriate where a disputed classification is “newly established (or) has undergone recent substantial changes in the duties and responsibilities of the employees in it so as to create a real doubt as to whether the individuals in such classification continue to fall within the category – excluded or included – that they occupied in the past.” *Union Electric Co.*, 217 NLRB 666, 667 (1975). In the instant case, since there is no contention that either of these factors applies, the petition should be dismissed. Alternatively, the Employer argues that, even assuming that the Regional Director decides that it is appropriate to process the instant petition, “clarification is not appropriate, however, for upsetting an agreement of a union and employer.” *Id.* Thus, the Employer argues that by signing a stipulation that did not include the two disputed classifications in the list of specific inclusions, but then contained an express exclusion for “all other employees,” the Union agreed to exclude these two classifications from the Unit. Finally, regarding any contention by the Union that the stipulation should not be enforced by its express terms because it was misled,

the Employer again cites *Union Electric* for the principle that clarification is not appropriate for upsetting an agreement between the parties “even if the agreement was entered into by one of the parties for what it claims to be mistaken reasons.” *Id.* Thus, the Employer argues that since the Unit description is unambiguous and since the Union knew or should have known that the Amador and Calaveras Coordinator positions were separate and distinct job classifications from the Administrative Coordinator position at the time of the stipulation, the Union’s petition should be dismissed.

II. ANALYSIS

A. Is It Appropriate to Process the Instant Petition?

As a threshold matter, I reject the Employer’s contention that the instant unit clarification petition should be dismissed because there is no evidence or contention that either of the disputed classifications of Amador Coordinator and Calaveras Coordinator are newly created or have undergone recent substantial changes. Rather, I find that a unit clarification petition is precisely the appropriate vehicle to resolve the unit placement status of employees in disputed classifications who vote under challenge in a representation election won by a union but whose ballots are not determinative. In those circumstances, since the challenged ballots were not determinative, the Board will not hold a post-election hearing on challenged ballots but will initially leave it up to the parties to resolve these issues during post-certification bargaining. Thereafter, however, if the parties are unable to reach agreement, either the union or the employer is free to file a unit clarification petition asking the Board to resolve their unit

placement issues. See, e.g., *Kirkhill Rubber Co.*, 306 NLRB 559 (1992) and cases cited therein at fn. 2.⁷ This is precisely the case before me.

B. The Caesar's Tahoe Test: Is the Stipulated Election Agreement Ambiguous?

Having concluded that it is appropriate to process the instant unit clarification petition, I nevertheless find that the instant petition for unit clarification, seeking to include all coordinator positions, including the Amador and Calaveras Coordinator positions, should be dismissed. In this regard, the instant case requires the Region to clarify the parties' intent regarding the January 31st stipulated election agreement setting forth the parties agreement as to which classifications should be included and excluded from the Unit. In analogous cases resolving determinative ballots where the parties have signed a stipulated election agreement, the Board has long held that its function is to ascertain the parties' intent and then to determine whether this intent is contrary to any statutory provision or Board policy. See *Caesars Tahoe*, 337 NLRB 1096 (2002). In such circumstances, the Board looks to the objective intent of the parties as reflected on the face of the stipulation, rather than their subjective intent. See *White Cloud Products*, 214 NLRB 516, 517 (1974) (holding that evidence of subjective intent is not a proper consideration).⁸

Under *Caesars Tahoe*, the Board must first determine whether the stipulation is ambiguous. 337 NLRB at 1097. If the language is unambiguous, the Board merely enforces the agreement. *Id.* On the other hand, if the language is ambiguous, the Board looks to extrinsic

⁷ Moreover, in *Kirkhill*, the Board held that its holding allowing the process of a unit clarification petition in this circumstance does not conflict with the Board's certification year rule, since it does not infringe upon the union's representation status.

⁸ The *Caesars Tahoe* test is most commonly applied to post-election challenged ballot hearings in cases involving stipulated bargaining units. However, I find that this same test should be applied here, in a post-election unit clarification proceeding involving undeterminative challenged ballots.

evidence, and if such evidence clarifies the ambiguity, the stipulation is enforced. *Id.* However, where such evidence is inadequate to resolve the ambiguity, the Board proceeds to a community of interest analysis. *Id.* The instant case can be resolved at the first prong of this three-part analysis, as I find that the stipulated election agreement unambiguously excludes the two disputed classifications.

Examining the terms of the Unit description in the Stipulated Election Agreement on its face, it is clear that this description does not either specifically include or exclude the two disputed classifications. In such circumstances, the Board has found that the parties' intent with respect to that classification may be ambiguous. *Caesars Tahoe*, 337 NLRB at 1097-98 ("the failure to list a disputed classification ... as an included classification does not establish that the parties clearly intended to omit that classification."). Similarly, the failure to list a disputed classification in the list of exclusions does not, by itself, establish that the parties intended to include that classification. In such circumstances, the Board looks to whether either the list of inclusions or the list of exclusions contains broad "all other employees" language. In *Los Angeles Water and Power Employees Assoc.*, 340 NLRB 1232, 1235-1236 (2003), the Board applied this analysis and held that a stipulated unit of "all full-time and regular part-time employees including board liaisons, benefit administrators, cashiers, and clerks... excluding all other employees," was ambiguous because the plain language of the unit both included "all full-time and regular part-time employees" and excluded "all other employees."

By contrast, in the instant case there is no such ambiguity. Here, the stipulated Unit does not contain the open-ended language of "All full-time and regular part-time employees including..." coupled with the "exclusion of all other employees," found to be ambiguous in *Los*

Angeles Water and Power Employees Assoc. Instead, the Unit description begins with the distinct classifications to be included in the Unit: “All full-time and regular part-time community specialists, administrative coordinators” ... and then concludes by “excluding all other employees.” *Id.* at 1235. As such, the Unit description specifies distinct job classifications in the list of inclusions, with the only open-ended language being the blanket exclusion of all other employees.

In such circumstances, the instant case fits within the line of Board’s cases holding stipulated unit descriptions unambiguous where specific enumerated included classifications are set forth to the exclusion of all other employees. In such cases, the Board will find a clear unambiguous intent to include those classifications that match the express included language of the stipulated unit description, and will find a clear intent to exclude those classifications not matching. See *Bell Convalescent Hospital*, 337 NLRB 191 (2001); see also *Reliable Trucking, Inc.*, 349 NLRB 812, 815 (2007). Thus, the Board has held that a stipulation is unambiguous where an employer has distinct separate categories of employees, the parties agreed to language that expressly includes specific classifications, and further excludes “all other employees.” *National Public Radio*, 328 NLRB 75 (1999) (holding stipulated unit of “all full-time and regular part-time broadcast/recording technicians,” and excludes “all other employees,” unambiguously excludes temporary employees broadcast/recording technicians); see also *Prudential Insurance Co. of America*, 246 NLRB 547 (1979) (holding unambiguous stipulated unit that includes specifically named classifications, and excludes ‘all other employees.’). The Board’s reasoning is rooted in the expectation that the parties know the eligible employees’ job titles, and intend their descriptions in the stipulation to apply to those job titles. See *Bell Convalescent Hospital*, *supra*; see also *Reliable Trucking, Inc.*, *supra*.

In the instant case, the stipulated Unit language is analogous to the language in *National Public Radio, supra*, and *Prudential Insurance Co. of America, supra*. Specifically, the Unit description sets forth distinct job classifications, described as, *inter alia*, “All full-time and regular part-time... administrative coordinators,” to the exclusion of all other employees. The Employer has multiple job classifications between its three facilities, and the record shows that the administrative coordinator, Amador Coordinator, and Calaveras Coordinator, are three separate and distinct job classifications. While the Union argues that the stipulated Unit description is ambiguous because it includes ‘administrative coordinators’ in the plural, when at all relevant times there was only one such coordinator, the Union fails to recognize that all classifications are described in the plural for the purpose of allowing new hires to be included in the Unit without the need for unit clarification. This is common practice where stipulated unit descriptions are negotiated, and moreover, does not establish that the parties’ intended to include, or includes, the separate categories of Amador and Calaveras Coordinators under the rubric of “Administrative Coordinators.” As such, because the Amador and Calaveras Coordinators are not expressly included in the stipulated Unit description, I find a clear intent to exclude those classifications as they do not match any of the expressly stated job classifications of the stipulated Unit. See *Bell Convalescent Hospital*, 337 NLRB 191 (2001); see also *Reliable Trucking, Inc.*, 349 NLRB 812, 815 (2007). In reaching this conclusion, I note, in agreement with the Union, that the record contains some evidence that the Union intended to include the Amador Coordinator and the Calaveras Coordinator. However, the Board does not take such subjective intent into consideration when determining whether the parties’ stipulation is ambiguous. See *White Cloud Products, supra* at 517. Based on the foregoing, I find that the objective intent of the stipulated Unit description is unambiguous, and expressly excludes the

Amador and Calaveras Coordinators. As neither party argues that enforcement of the stipulated Unit description is contrary to the Board's policy or statutory provision, the Board's role is limited to enforcing the parties' agreement by dismissing the Union's petition. Therefore, the petition is dismissed.⁹

III. CONCLUSIONS AND FINDINGS

Based on the entire record in this proceeding and in accordance with the discussion above, 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 parties stipulated, and I find, that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the purposes of the Act to assert jurisdiction in this case.
3. The parties stipulated, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

⁹ On brief, the Union also argues that the extrinsic evidence shows that the Employer was aware that the Union sought to include the two disputed classifications in the Unit and yet the Employer took no steps to communicate its alternative position to the Union at any point before the Stipulation Election Agreement was signed. As such, the Union argues that the Board should find the Unit should include the two disputed classifications, perhaps on the theory that it would be equitable to do so. But at the hearing, the Union admitted that it "wanted a fast election," so it agreed to the Employer's proposal to include the words "excluding all other employees" in the Stipulation, hoping that the Employer "would be reasonable" if the Union won the election. However, the Board finds that "election agreements are contracts that are binding on the parties who execute them." *T & L Leasing*, 318 NLRB 324 (1995). The Board's practice (is) to honor concessions made in the interest of expeditious handling of election cases, even if the Board may have reached a different result upon litigation." *Highlands Regional Medical Center*, 327 NLRB 1049 (1999). "Thus, the question as to whether the stipulated unit shares a sufficient community of interest with the (disputed) employees... or whether the Board would include or combine them in one unit upon litigation, are issues not relevant to determining whether the Stipulated Election Agreement should be enforced." *Id.*

4. The parties' stipulated Unit description is unambiguous, and expressly excludes the disputed classifications of Amador Coordinator and Calaveras Coordinator.

IV. ORDER

I hereby order that the petition in Case 32-UC-123983 be, and it hereby is, dismissed.

V. 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 and Order 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 5 p.m. EST on June 24, 2014. The request may be filed electronically through the Agency's website, www.nlr.gov,¹⁰ but may not be filed by facsimile.

DATED AT Oakland, California, this 10th day of June, 2014.

/s/ Valerie Hard-Mahoney
Valerie Hardy-Mahoney, Acting Regional Director
National Labor Relations Board, Region 32
1301 Clay Street, Suite 300N
Oakland, CA 94612

¹⁰ To file the request for review electronically, go to www.nlr.gov, select File Case Documents, enter the NLRB Case Number, and follow the detailed instructions.