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

DYCORA TRANSITIONAL HEALTH – CLOVIS LLC, Employer and PATRICK KRONYAK, Petitioner and SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 2015, Union and HEALTHCARE SERVICES GROUP, INC. Involved Party.	Case: 32-RD-213115

REQUEST FOR REVIEW OF DECISION TO NOT CERTIFY ELECTION RESULTS AND TO DISMISS DECERTIFICATION PETITION

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I. INTRODUCTION

In a decertification election on May 30, 2018, twenty-one employees voted against continued representation by the Service Employees International Union, Local 2015 ("Union") and twelve voted in favor. On August 27, the Union waived and disclaimed interest in representing employees in the unit at issue. [1] Although the Regional Director of Region 32 ("RD") properly found that the Union's disclaimer mooted its then-pending objections to the election, the RD failed to take the next logical (and required) step by certifying the election results. Instead, on August 30, the RD dismissed the decertification petition and merely revoked the prior issued Certification of Representative in case number 32-RD-120481.

Where an employee has validly petitioned for a decertification election, the Board has expended resources in holding such election (and before that, investigated and dismissed a blocking charge filed by the union), and the employees' votes have been counted, a union should not be able to strategically dodge an adverse certification of results and twelve-month election bar by disclaiming interest. Section 9(c)(1)(B) of the Act provides that the Board "shall direct an election by secret ballot and shall certify the results thereof" after (like here) the Board has held an initial hearing and there concluded that a question of representation exists. Further, section 9(c)(3) of the Act states that "[n]o election shall be directed in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held."

II. REQUEST FOR REVIEW

Per Section 102.67(c) of the Board's Rules and Regulations, Dycora Transitional Health – Clovis LLC ("Dycora Clovis" or "Employer") requests review of the RD's August 30 decision to

[1] All dates referenced are in 2018 unless otherwise stated.

dismiss the petition filed by Patrick Kronyak ("Petitioner" or "Employee") to decertify the Union as the collective bargaining representative of a unit of employees of the Employer and of Healthcare Services Group Inc. ("HSG") and to not certify the results of the election. Specifically, Dycora Clovis asks the Board to grant this Request for Review and issue an order (a) certifying the election results; and (b) stating that no election may be held in the unit for twelve months from the Union's August 27 disclaimer of interest. Absent (a) or (b), in the alternative, Dycora Clovis requests an order stating that the Union is barred from filing an election petition in the unit for six months from issuance of the Board's order.

Dycora Clovis requests review based on any or all of the following compelling reasons: (1) a substantial question of law or policy is raised because of the absence of or departure from officially reported Board precedent; (2) the RD's decision has resulted in prejudicial error; and/or (3) there are compelling reasons for reconsideration or clarification of an important Board rule or policy.

III. BACKGROUND

On January 17, the Employee filed an RD petition ("Petition") to decertify the Union as the collective bargaining representative of the following unit of employees ("Unit"):

> All full-time and regular part-time certified nursing aides, nursing assistants, restorative nursing aides, cooks, dietary aides, activity assistants, and medical records assistants employed by the Employer, and all employees employed by Healthcare Services Group Inc. (including housekeepers, janitors, and laundry aides) employed at the Employer's facility in Clovis California. Excluded: all registered nurses, licensed vocational nurses, []service central supply clerks, office and [clerical] employees, confidential [employees], professional employees, guards, and supervisors as defined in the National Labor Relations Act.
>
> (Exhibit A).

On January 19, the RD (a) granted the Union's Request to Block the Petition pending investigation of the unfair labor practice charge in 32-CA-212812 which was filed by the Union, and (b) issued an order postponing hearing on the Petition indefinitely. (Exhibit B).

On February 28, the RD dismissed the unfair labor practice charge in 32-CA-212812. (Exhibit C).

On April 24, the Union filed a Statement of Position, agreeing that the Board had jurisdiction in this case, the Unit proposed by the Petitioner was appropriate, and that there was no bar to conducting an election in the case. (Exhibit D). The Union proposed a manual election date of May 24 at the same time proposed by the Petitioner. *Id.*

On May 15, after hearing was held on May 1, the RD issued a Decision and Direction of Election, concluding and finding a question concerning representation exists, and setting the election date for May 23 in the Unit. (Exhibit E). Later, the RD rescheduled the election to May 30. (Exhibit F).

On May 30, an election by the Unit was conducted and overseen by Region 32. *Id.* The tally of ballots prepared by Region 32 showed that of approximately 55 eligible voters, 21 votes were cast against the continued representation by the Union and only 12 cast in favor, 3 ballots were challenged but not counted because they were insufficient to affects the results. *Id.*

On June 6, the Union filed eight objections to the conduct of the election and conduct affecting result of the election. (Exhibit G).

On July 17, the RD issued a decision on the Union's objections and consolidated the case for hearing with another RD petition at a different facility and an unfair labor practice charge against that other facility. (Exhibit F). The RD set five of the Union's eight objections for hearing; the Union withdrew the other three. *Id.*

On August 27, the Union disclaimed any right or in interest in representing the Unit:

> This email serves as notice on behalf of SEIU Local 2015 that the Union waives and disclaims any right to represent the employees of Dycora-Clovis and Healthcare Services Group at the facility located at 111 Barstow Avenue, Clovis, California in the following recognized unit: all full-time and regular part-time certified nursing aides, nursing assistants, restorative nursing aides, cooks, dietary aides, activity assistants, and medical records assistants employed by Dycora Transitional Health – Clovis, and all employees employed by Healthcare Services Group, Inc., (including housekeepers, janitors, and laundry aides) employed at Dycora Transitional Health – Clovis's facility in Clovis. These are the employees involved in NLRB Case 32-RD-213115.

(Exhibit H).

On August 28, Administrative Law Judge Ariel Sotolongo granted counsel for the General Counsel's motion to sever case 32-RD-213115 from the consolidated case set for hearing that date and to remand said case to the Regional Director.

On August 30, the RD issued a "Decision to Dismiss" stating, in relevant part:

> I find that further proceedings are unwarranted. The investigation disclosed that SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 2015 (the Union) was previously certified as the exclusive collective-bargaining representative of the employees in this petition by an election conducted in Case 32-RD-120481. On August 27, 2018, the Union submitted a disclaimer of interest in the continued representation of those employees; therefore, a question concerning representation no longer exists. Accordingly, I am dismissing the petition in this matter. The Certification of Representative issued in Case 32-RD-120481 is revoked. The related pending objections are moot.

(Exhibit I).[2]

On August 31, counsel for Dycora Clovis emailed an NLRB Region 32 Board Agent involved with handling Case 32-RD-213115 and explained that the Union's disclaimer of interest mooted its objections to the election and thus the results showing the vast majority of employees voted against continued representation by the Union, which were tallied prior to the Union's

[2] The Certificate of Representative in 32-RD-120481 is attached as Exhibit J.

disclaimer of interest, should be certified. (Exhibit K). No agent of Region 32 nor the RD responded or provided clarification.

IV. ARGUMENT

A. The Election Results Showing That A Majority Of Employees Voted Against Representation By The Union Should Be Certified; The Union's Disclaimer Of Interest Mooted Its Objections To The Election.

Per section 9(c) of the Act, the Board should (and must) certify the results of the election. The employees' votes have already been counted and there are no objections. "It is well settled that [r]epresentation elections are not lightly set aside." *Safeway, Inc.*, 338 NLRB 525 (2002) (certifying results of decertification election) (internal quotation marks omitted). The Board recognizes that a decertification petition entails "effort, organization, and sometimes even risk" by employees. *Levitz Furniture Co. of the Pacific, Inc.*, 333 NLRB 717, 727 (2001). Indeed, employees may be expelled from the union for even filing an RD petition. *See Tawas Tube Products*, 151 NLRB 46 (1965) (rejecting employer's objection to election where union expelled two employees from membership, and certifying election result). "There is a strong presumption that ballots cast under specific NLRB procedural safeguards reflect the true desires of the employees." *N.L.R.B. v. Hood Furniture Mfg. Co.*, 941 F.2d 325, 328 (5th Cir. 1991).

The RD's failure to certify the election results is a denial of, and interference with, employees' section 7 rights. Here, an employee petitioned for and obtained an election in the unit; the employees' votes have been counted and they should be given full effect. To hold otherwise is to chill and undermine their section 7 and 9 rights. Section 7 of the Act provides that employees "shall have the right" to engage in concerted activities and to refrain from forming, joining, or assisting labor organizations, or bargaining through representatives. As corollary, Section 9(c) guarantees employees the right to file a petition for investigation, hearing, and election on decertifying a "labor organization, which has been certified or is being currently recognized by

their employer as the bargaining representative…." Where the "the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot **and shall certify the results thereof**" under section 9(c)(1)(b) (emphasis added).[3] Here, as discussed above, a hearing was held on the petition on May 1, a question of representation was found to exist by the RD, and an election was directed and held. (Exhibit E). The next, and mandatory, step is certification of the results.

Given the clear results of the election, that the unit of employees rejected continued representation by the Union, the results should be certified and the mandatory election bar required by the Act put in place. Section 9(c)(3) provides that "[n]o election shall be directed in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held."

"Cases presenting a reason good enough for the Board to disregard an election are rare. The Act establishes an electoral apparatus to be administered by the Board because formal elections with secret ballots best express employees' free choice." *Transportation Maint. Servs., v. N.L.R.B.*, 275 F.3d 112, 115 (D.C. Cir. 2002) (granting petition for review where Board "disregarded the results of a potentially valid election merely because one employee [the petitioner for decertification] said that he and his fellows wanted the results thrown out.").

[3] "Congress provided for decertification petitions and elections because the Board's then rule, of not entertaining employee petitions looking toward the ouster of the certified or recognized representative, was looked upon as one-sided." *Campbell Soup Co.*, 111 NLRB 234, 236 (1955) (Member Peterson, concurring) citing Senate Report No. 105 on S. 1126, p. 10 (1 Legis. Hist., p. 416) ("Many of the current procedures developed administratively are properly subject to the criticism that the Board has made collective bargaining a 'one-way street.' Despite the absence of discriminatory language in the Act, the Board refuses to entertain petitions filed by employees who wish to demonstrate that the current or asserted bargaining representative is not the choice of the majority.") (emphasis added) (Exhibit L).

The Board has never held that a union may evade certification of the results of an election, or the resulting twelve-month election bar, by disclaiming interest after votes have been counted, particularly where an employer opposed dismissal of the petition and the employee-petitioner refused to withdraw it. However, as parallel, the Board has clearly rejected disclaimers as a way of attempting "circumvention" of contract-bar doctrine, which like the election bar doctrine is designed to promote industrial stability and afford employees as reasonable opportunity to change or eliminate their bargaining relationship. *See East Mfg. Corp.*, 242 NLRB 5 (1979). Similarly, the Board has rejected requests to withdraw an election petition after employees have already voted because doing so would be "inequitable and prejudicial to other parties interested in the election." *Mississippi Valley Structural Steel Co.*, 115 NLRB 1288 (1956). The employees and employer are entitled to the certification of the election results which section 9(c) of the Act requires.

B. Regardless of Whether The Election Results Are Certified, The Union Should Be Barred From Filing Another Petition For Twelve Months From Its Disclaimer Of Interest.

Although the results of the election should be certified, even if they are not, the twelve-month election bar should be applied. Section 9(c)(3) of the Act provides that "[n]o election shall be directed in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held."

The Board has not specifically addressed imposition of a twelve-month election bar where a union has disclaimed interest after votes have been counted and no certification of election results was issued. However, it would further the purposes and policies of the Act to now so hold. In *National Dairy Products Corp.*, 123 NLRB 310, 312 (1959), the Board ordered an election where a union had not properly disclaimed interest. Member Fanning, in a partial concurrence and dissent, persuasively argued that the petition should have been dismissed based on the union's

admission against interest in representing employees *and* that a formal ruling should have been issued that the union is not the majority representative of employees, that its certification is revoked, and that it may not have a petition entertained as to the unit of employees for a period of twelve months. Member Fanning explained that a union attempting, via strategic disclaimer, to circumvent the Board's processes "should not be placed in a better position that if it has submitted to and lost the election." He reasoned that because losing the election would preclude a union from seeking to become the employees' representative for twelve months, "it is reasonable that the [u]nion should be held to the same result" as a result of its disclaimer and statement against interest in representing the employees. *Id.* at 313-314. Here, just as Member Fanning argued, the Union should not be put in a better position as a result of a strategic disclaimer where it had already lost an election and mooted whatever objections it had filed by its disclaimer.

The RD may argue that its Decision followed guidance in section 11124.2 of the NLRB Casehandling Manual (Part Two: Representation Proceedings). That section states that "in a RD case, a disclaimer unaccompanied by inconsistent action should result in a dismissal [of the petition]." However, the Casehandling Manual is not law, nor is it capable of overriding the Act or the Board. Indeed, the Casehandling Manual itself admits in its introduction at page 1 that it "has been neither reviewed nor approved by the Board … it is the Board's decisional law, not the Manual, that is controlling." Further, it explains that its "guidelines are not intended to be and should not be viewed as binding procedural rules . . . The Manual is not a form of binding authority, and the procedures and policies set forth in the Manual do not constitute rulings or directives of the General Counsel or the Board."

C. Absent Certification of Election Results or Twelve-Month Election Bar, In The Alternative, The Board Should Issue An Order Barring The Union From Petitioning For Election For Six Months From Its Disclaimer of Interest.

If, *arguendo*, the Board does not certify the election results or impose a twelve-month bar on another election in the unit, the Board should issue an order that any petition to represent the Unit, filed by the Union within six months of issuance of said order will not be processed. *See Campos Dairy Products*, 107 NLRB 715 (1954) (dismissing RM petition based on disclaimer by Union and non-opposition to dismissal by employer, but specifying in order that the Board will not entertain a petition by the union within six months from the date of the Board's order).

Although the Casehandling Manual is not law and should be afforded no deference, to the extent the Board believes otherwise, Dycora Clovis notes said manual provides that a six-month election bar is to be included in orders issued by the Region when a disclaimer occurs in an RM or RD case after hearing has been held (like here). *See* section 11124.1 and 11124.2. Here, the RD's Decision did not include such statement. (Exhibit I).

V. CONCLUSION AND REQUESTED RELIEF

The Union delayed the decertification election with a blocking charge, which was dismissed. It lost the election 21 to 12. Rather than accept a certification of that outcome, and the resulting twelve-month election bar required by the Act, the Union disclaimed interest in representing the employees approximately nine weeks after their votes had been counted. That disclaimer mooted the Union's objections to the election, as the RD properly found, so the results should be certified.

Dycora Clovis requests that the Board review the RD's August 30 Decision, and issue an order (a) certifying the election results; and (b) stating that no election may be held in the unit for twelve months from the Union's August 27 disclaimer of interest. Absent (a) or (b), in the

alternative, Dycora Clovis requests an order stating the Union is barred from filing an election petition in the unit for six months from issuance of the Board's order in this matter.

Dated: September 13, 2018

Respectfully submitted:

McDermott Will & Emery LLP

/s/ Christopher M. Foster

_____

RONALD J. HOLLAND
CHRISTOPHER M. FOSTER

Attorneys for Employer,
DYCORA TRANSITIONAL HEALTH – CLOVIS LLC

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

DYCORA TRANSITIONAL HEALTH – CLOVIS LLC, Employer, and PATRICK KRONYAK, Petitioner and SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 2015, [Former] Union, and HEALTHCARE SERVICES GROUP, INC. Involved Party.	Case: 32-RD-213115

APPENDIX FOR REQUEST FOR REVIEW OF DECISION TO NOT CERTIFY DECERTIFICATION ELECTION RESULTS AND TO DISMISS DECERTIFICATION PETITION

Exhibit	Document
A	1-17-18 RD Petition in case no. 32-RD-213115
B	1-19-18 Region 32 Order Postponing Hearing Indefinitely due to Union's Request To Block based on unfair labor practice charge in case 32-CA-212812
C	2-28-18 Region 32 Dismissal of unfair labor practice charge 32-CA-212812 et al.
D	4-24-18 Union Second Amended Statement of Position in 32-RD-213115
E	5-15-18 Region 32 Decision and Direction of Election in 32-RD-213115
F	7-17-18 Region 32 Decision on Objections and Order Consolidating Cases For Hearing

G	6-6-18 Union's Objections To Dycora Transitional Health – Clovis Decertification Election
H	8-27-18 Union Disclaimer of Interest
I	8-30-18 Region 32 Decision to Dismiss Decertification Petition in 32-RD-213115 and not certify election results
J	3-28-14 Certification of Representative in 32-RD-120481
K	8-31-18 emails between counsel for Dycora Clovis and Region 32 re Union disclaimer of interest and Region 32's Decision to Dismiss
L	Senate Report No. 105 on S. 1126, pp 1-18 (April 17, 1947)

Dated: September 13, 2018

Respectfully submitted:

McDermott Will & Emery LLP

/s/ Christopher M. Foster

_____

RONALD J. HOLLAND
CHRISTOPHER M. FOSTER

Attorneys for Employer,
DYCORA TRANSITIONAL HEALTH – CLOVIS LLC

EXHIBIT A

FORM NLRB-502 (RD)
(8-16)

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

RD PETITION

Case No.	Date Filed
32-RD-213115	01/17/2018

INSTRUCTIONS: *Unless e-Filed using the Agency's website, www.nlrb.gov, submit an original of this Petition to an NLRB office in the Region in which the employer concerned is located. The petition must be accompanied by both a showing of interest (see 7 below) and a certificate of service showing service on the employer and all other parties named in the petition of:(1) the petition; (2) Statement of Position form (Form NLRB-505); and (3) Description of Representation Case Procedures (Form NLRB 4812). The showing of interest should only be filed with the NLRB and should not be served on the employer or any other party.*

1. **PURPOSE OF THIS PETITION: RD- DECERTIFICATION (REMOVAL OF REPRESENTATIVE)** - A substantial number of employees assert that the certified or currently recognized bargaining representative is no longer their representative. **The Petitioner alleges that the following circumstances exist and requests that the National Labor Relations Board proceed under its proper authority pursuant to Section 9 of the National Labor Relations Act.**

2a. Name of Employer	2b. Address(es) of Establishment(s) involved *(Street and number, city, state, ZIP code)*
dycora transitional health	111 barstow ave. clovis,ca. 93612
3a. Employer Representative - Name and Title	3b. Address (If same as 2b - state name)
joshua davis executive director	same as 2b

3c. Tel. No.	3d. Fax No.	3e. Cell No.	3f. E-Mail Address
559-299-2591	559-299-6467		joshua.davis@dycora.com

4a. Type of Establishment *(Factory, mine, wholesaler, etc.)*	4b. Principal product or service
skilled nursing facility	healthcare

5a. Description of Unit Involved	5b. City and State where unit is located:
Included: see attached **Excluded:** see attached	

6. No. of Employees in Unit	7. Do a substantial number (30% or more) of the employees in the unit no longer wish to be represented by the certified or currently recognized bargaining representative? ☒ Yes ☐ No
40	

8a. Name of Recognized or Certified Bargaining Agent	8b. Affiliation, if any	
SEIU local 2015		
8c. Address	**8d. Tel. No.**	**8e. Cell No.**
4928 east clinton way #105 fresno,ca. 93727	510-251-1250	
	8f. Fax No.	**8g. E-Mail Address**
	510-763-2680	

9. Date of Recognition or Certification	10. Expiration Date of Current or Most Recent Contract, If any *(Month, Day, Year)*
before 2007	12-31-2017

11a. Is there now a strike or picketing at the Employer's establishment(s) involved? ☐ Yes ☒ No	11b. If so, approximately how many employees are participating?

11c. The Employer has been picketed by or on behalf of *(Insert Name)* a labor organization, of
(Insert Address) since *(Month, Day, Year)*

12. Organizations or individuals other those named in items 8 and 11c, which have claimed recognition as representatives and other organizations and individuals known to have a representative interest in any employees in the unit described in item 5 above. *(If none, so state)*

12a. Name	12b. Address	12c. Tel. No.	12d. Fax No.
		12e. Cell No.	12f. E-Mail Address

13. **Election Details:** If the NLRB conducts an election in this matter, state your position with respect to any such election.	13a. Election Type: ☐ Manual ☐ Mail ☐ Mixed Manual/Mail

13b. Election Date(s)	13c. Election Time(s)	13d. Election Location(s)
	5:45a.m.-7:30a.m. 1:45p.m.-3:45pm	blue room (dining room)

14. Full Name of Petitioner
patrick kronyak

14a. Address *(Street and number, city, state, ZIP code)*	14b. Tel. No.	14c. Fax No.
1151 south chestnut ave unit 166 fresno,ca. 93702		
	14d. Cell No.	14e. E-Mail Address
	599-310-8742	pfk777@msn.com

14f. Affiliation, if any

15. Representative of the Petitioner who will accept service of all papers for purposes of the representation proceeding.

15a. Name	15b.Title	
15c. Address *(Street and number, city, state, ZIP code)*	15d. Tel. No.	15e. Fax No.
	15f. Cell No.	15g. E-Mail Address

I declare that I have read the above petition and that the statements are true to the best of my knowledge and belief.

Name (Print)	Signature	Title	Date Filed
patrick kronyak	Patrick Kronyak	petitioner	1-11-2018

WILLFUL FALSE STATEMENTS ON THIS PETITION CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 *et seq.* The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing representation and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is voluntary; however, failure to supply the information will cause the NLRB to decline to invoke its processes.

15c. Address (Street and number, city, state, ZIP code)	15d. Tel. No.	15e. Fax No.
1 151 South Chestnut Ave., #166 Fresno, CA 93702	15f. Cell No. 559-301-8742	15g. E-Mail Address pfk777@msn.com

I declare that I have read the above petition and that the statements are true to the best of my knowledge and belief.

Name (Print)	Signature	Title	Date Filed
Patrick Kronyak	Patrick Kronyak	Dietary Aide	1-11-2018

WILLFUL FALSE STATEMENTS ON THIS PETITION CAN BE PUNISHED BY FINE AND IMPR'SONMENT (U.s. CODE, TITLE 18, SECTION 1001) PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 et seq. The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing representation and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74,942 (Dec. 13. 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is voluntary; however, failure to supply the information will cause the NLRB to decline to invoke its processes.

Attachment to RD petition — Dycoa Transitional Health

Included: alt full-time and regular part-time certified nursing aides, nursing assistants, restorative nursing aides, cooks, dietary aides, activtty assistants, and medical records assistants employéd by the Employer, and all employees emptoyed by Healthcare Services Group Inc. (including housekeepers, janitors, and laundry aides) employed at the Employer's facility in Clovis Califomia

Excluded: All registered nurses, licensed vocational nurses, seeiai service central suppty clerks, office and clerfcar employees, confidential empbyees, professional employees, guards, and supervisors as defined in the National Labor RelationsAct.

EXHIBIT B

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

DYCORA TRANSITIONAL HEALTH

Employer

and **Case 32-RD-213115**

PATRICK KRONYAK

Petitioner

and

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 2015

Union

ORDER POSTPONING HEARING INDEFINITELY AND DUE DATE FOR STATEMENTS OF POSITION

IT IS ORDERED that the hearing in the above matter set for January 25, 2018, is hereby postponed indefinitely, because I have granted the Union's Request to Block due to the pending unfair labor practice charge in Case 32-CA-212812. The investigation of Case 32-RD-213115 is hereby blocked pending the investigation and processing of Case 32-CA-212812.

The due date for the Statements of Position in this matter is also postponed indefinitely.

Dated: January 19, 2018

Valerie Hardy-Mahoney /hv

Valerie Hardy-Mahoney
Regional Director
National Labor Relations Board
Region 32
1301 Clay Street Suite 300N
Oakland, CA 94612-5224

EXHIBIT C

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
REGION 32
1301 Clay St Ste 300N
Oakland, CA 94612-5224

Agency Website: www.nlrb.gov
Telephone: (510)637-3300
Fax: (510)637-3315

February 28, 2018

MANUEL A. BOIGUES, ATTORNEY
WEINBERG ROGER & ROSENFELD
1001 MARINA VILLAGE PARKWAY
SUITE 200
ALAMEDA, CA 94501

Re: Dycora Transitional Health & Living – Fresno
Case 32-CA-212770

Dycora Transitional Health & Living – Galt
Case 20-CA-212816

Dycora Transitional Health & Living – Hy Pana
Case 32-CA-212774

Dycora Transitional Health & Living – Clovis
Case 32-CA-212812

Dear Mr. Boigues:

We have carefully investigated and considered your charges that Dycora Transitional Health & Living - Fresno, Dycora Transitional Health & Living- Clovis, Dycora Transitional Health & Living - Galt and Dycora Transitional Health & Living - Hy-Pana have violated the National Labor Relations Act.

Decision to Dismiss: Based on that investigation, I have decided to dismiss your charges because there is insufficient evidence to establish a violation of the Act.

Your Right to Appeal: You may appeal my decision to the General Counsel of the National Labor Relations Board, through the Office of Appeals.

Means of Filing: An appeal may be filed electronically, by mail, by delivery service, or hand-delivered. To file electronically using the Agency's e-filing system, go to our website at www.nlrb.gov and:

1) Click on E-File Documents;
2) Enter the NLRB Case Number; and,
3) Follow the detailed instructions.

Electronic filing is preferred, but you also may use the enclosed Appeal Form, which is also available at www.nlrb.gov. You are encouraged to also submit a complete statement of the facts and reasons why you believe my decision was incorrect. To file an appeal by mail or delivery service, address the appeal to the **General Counsel** at the **National Labor Relations**

Board, Attn: Office of Appeals, 1015 Half Street SE, Washington, DC 20570-0001. Unless filed electronically, a copy of the appeal should also be sent to me.

The appeal MAY NOT be filed by fax or email. The Office of Appeals will not process faxed or emailed appeals.

Appeal Due Date: The appeal is due on **March 14, 2018**. If the appeal is filed electronically, the transmission of the entire document through the Agency's website must be completed **no later than 11:59 p.m. Eastern Time** on the due date. If filing by mail or by delivery service an appeal will be found to be timely filed if it is postmarked or given to a delivery service no later than March 13, 2018. **If an appeal is postmarked or given to a delivery service on the due date, it will be rejected as untimely**. If hand delivered, an appeal must be received by the General Counsel in Washington D.C. by 5:00 p.m. Eastern Time on the appeal due date. If an appeal is not submitted in accordance with this paragraph, it will be rejected.

Extension of Time to File Appeal: The General Counsel may allow additional time to file the appeal if the Charging Party provides a good reason for doing so and the request for an extension of time is **received on or before March 14, 2018.** The request may be filed electronically through the ***E-File Documents*** link on our website www.nlrb.gov, by fax to (202)273-4283, by mail, or by delivery service. The General Counsel will not consider any request for an extension of time to file an appeal received after March 14, 2018, **even if it is postmarked or given to the delivery service before the due date**. Unless filed electronically, a copy of the extension of time should also be sent to me.

Confidentiality: We will not honor any claim of confidentiality or privilege or any limitations on our use of appeal statements or supporting evidence beyond those prescribed by the Federal Records Act and the Freedom of Information Act (FOIA). Thus, we may disclose an appeal statement to a party upon request during the processing of the appeal. If the appeal is successful, any statement or material submitted with the appeal may be introduced as evidence at a hearing before an administrative law judge. Because the Federal Records Act requires us to keep copies of case handling documents for some years after a case closes, we may be required by the FOIA to disclose those documents absent an applicable exemption such as those that protect confidential sources, commercial/financial information, or personal privacy interests.

Very truly yours,

/s/ Valerie Hardy-Mahoney

Valerie Hardy-Mahoney
Regional Director

Enclosure

cc: SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 2015
2910 BEVERLY BLVD
LOS ANGELES, CA 90057-1012

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DLA PIPER LLP (US)
555 MISSION STREET, SUITE 2400
SAN FRANCISCO, CA 94105

KEVIN D. HARLOW, ESQ.
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DYCORA TRANSITIONAL HEALTH & LIVING - FRESNO
2715 FRESNO ST
FRESNO, CA 93721-1304

DYCORA TRANSITIONAL HEALTH & LIVING- CLOVIS
111 BARSTOW AVE
CLOVIS, CA 93612-2287

DYCORA TRANSITIONAL HEALTH & LIVING - GALT
144 F ST
GALT, CA 95632-1899

DYCORA TRANSITIONAL HEALTH & LIVING - HY-PANA
4545 SHELLEY CT
STOCKTON, CA 95207-7232

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

APPEAL FORM

To: General Counsel
Attn: Office of Appeals
National Labor Relations Board
1015 Half Street SE
Washington, DC 20570-0001

Date:

Please be advised that an appeal is hereby taken to the General Counsel of the National Labor Relations Board from the action of the Regional Director in refusing to issue a complaint on the charge in

_____

Case Name(s).

_____

Case No(s). *(If more than one case number, include all case numbers in which appeal is taken.)*

_____

(Signature)

EXHIBIT D

FORM NLRB-505
(4-15)

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

SECOND AMENDED STATEMENT OF POSITION

DO NOT WRITE IN THIS SPACE	
Case No. 32-RD-213115	Date Filed 01/17/18

INSTRUCTIONS: *Submit this Statement of Position to an NLRB Office in the Region in which the petition was filed and serve it and all attachments on each party named in the petition in this case such that it is received by them by the date and time specified in the notice of hearing.*
Note: *Non-employer parties who complete this form are NOT required to complete items 8f or 8g below or to provide a commerce questionnaire or the lists described in item 7. In RM cases, the employer is NOT required to respond to items 3, 5, 6, and 8a-8e below.*

1a. Full name of party filing Statement of Position:	1c. Business Phone:	1e. Fax No.:
Service Employees International Union, Local 2015	213-985-0463	
1b. Address *(Street and number, city, state, and ZIP code)*:	**1d. Cell No.:**	**1f. e-Mail Address:**
2910 Beverly Blvd., Los Angeles, CA 90057		

2. Do you agree that the NLRB has jurisdiction over the Employer in this case? [x] Yes [ ] No
(A completed commerce questionnaire (Attachment A) must be submitted by the Employer, regardless of whether jurisdiction is admitted)

3. Do you agree that the proposed unit is appropriate? [x] Yes [ ] No *(If not, answer 3a and 3b.)*

a. State the basis for your contention that the proposed unit is not appropriate. *(If you contend a classification should be excluded or included briefly explain why, such as shares a community of interest or are supervisors or guards.)*

b. State any classifications, locations, or other employee groupings that must be added to or excluded from the proposed unit to make it an appropriate unit.

Added:	Excluded:

4. Other than the individuals in classifications listed in 3b, list any individual(s) whose eligibility to vote you intend to contest at the pre-election hearing in this case and the basis for contesting their eligibility.

5. Is there a bar to conducting an election in this case? [ ] Yes [x] No *If yes, state the basis for your position.*

6. Describe all other issues you intend to raise at the pre-election hearing.

7. The employer must provide the following lists which must be alphabetized (overall or by department) in the format specified at http://www.nlrb.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015
(a) A list containing the full names, work locations, shifts and job classification of all individuals in the proposed unit as of the payroll period immediately preceding the filing of the petition who remain employed as of the date of the filing of the petition. (Attachment B)
(b) If the employer contends that the proposed unit is inappropriate the employer must provide (1) a separate list containing the full names, work locations, shifts and job classifications of all individuals that it contends must be *added* to the proposed unit, if any to make it an appropriate unit, (Attachment C) and (2) a list containing the full names of any individuals it contends must be *excluded* from the proposed unit to make it an appropriate unit. (Attachment D).

8a. State your position with respect to the details of any election that may be conducted in this matter. Type: [x] Manual [ ] Mail [ ] Mixed Manual/Mail

8b. Date(s):	8c. Time(s):	8d. Location(s):
May 24, 2018	Same as proposed by Petitioner	Conference room
8e. Eligibility Period (e.g. special eligibility formula):	**8f. Last Payroll Period Ending Date:**	**8g. Length of payroll period** [ ] Weekly [ ] Biweekly [ ] Other *(specify length)*

9. Representative who will accept service of all papers for purposes of the representation proceeding

9a. Full name and title of authorized representative	9b. Signature of authorized representative	9c. Date
Manuel A. Boigues, Attorney for Union	Manuel A. Boigues	04/24/18

9d. Address *(Street and number, city, state, and ZIP code)*	9e. e-Mail Address
1001 Marina Village Parkway, Suite 200 Alameda, CA 94501	

9f. Business Phone No.:	9g. Fax No.:	9h. Cell No.:
510-337-1001	510-337-1023	

WILLFUL FALSE STATEMENTS ON THIS PETITION CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. Section 151 et seq. The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing representation proceedings. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. 74942-43 (December 13, 2006). The NLRB will further explain these uses upon request. Failure to supply the information requested by this form may preclude you from litigating issues under 102.66(d) of the Board's Rules and Regulations and may cause the NLRB to refuse to further process a representation case or may cause the NLRB to issue you a subpoena and seek enforcement of the subpoena in federal court.

144624/965511

PROOF OF SERVICE

I am a citizen of the United States and an employee in the County of Alameda, State of California. I am over the age of eighteen years and not a party to the within action; my business address is 1001 Marina Village Parkway, Suite 200, Alameda, California 94501-1091. On April 24, 2018, I served upon the following parties in this action:

Regional Director
National Labor Relations Board,
Region 32
1301 Clay Street, Suite 300N
Oakland, CA 94612-5224
(510) 637-3260 General
(510) 637-3315 Fax

Via E-Filing

Mr. Nicholas L. Tsiliacos
National Labor Relations Board, Region 32
Board Agent
1301 Clay Street, Room 300N
Oakland, CA 94612-5224
(510) 671-3046 General
(510) 637-3315 Fax
Nicholas.tsiliacos@nlrb.gov

Mr. Ron Holland
McDermott Will & Emery LLP
275 Middlefield Road, Suite 100
Menlo Park, CA 94025
Rjholland@mwe.com

Patrick Kronyak
1151 South Chestnut Avenue, Unit 166
Fresno, CA 93702
Pfk777@msn.com

copies of the document(s) described as:

SECOND AMENDED STATEMENT OF POSITION

[X] **BY ELECTRONIC SERVICE** By electronically mailing a true and correct copy through Weinberg, Roger & Rosenfeld's electronic mail system from jaranda@unioncounsel.net to the email addresses set forth above.

I certify under penalty of perjury that the above is true and correct. Executed at Alameda, California, on April 24, 2018.

J. L. Aranda

J. L. ARANDA

144624\951342

EXHIBIT E

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

DYCORA TRANSITIONAL HEALTH- CLOVIS LLC

Employer

and **Case 32-RD-213115**

PATRICK KRONYAK

Petitioner

and

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 2015

Union

and

HEALTHCARE SERVICES GROUP, INC.

Involved Party

DECISION AND DIRECTION OF ELECTION

The Petitioner seeks to decertify the Union as the collective-bargaining representative of employees in a unit at the Employer's facility in Clovis, California. It is undisputed that the Employer is the successor employer to predecessor employer Beverly Healthcare-California, Inc. d/b/a/ Golden Living Center-Clovis (Beverly). Through its statement of position and various offers of proof submitted at hearing, the Employer essentially contends that the unit description in the petition is not appropriate because the Employer does not directly employ the unit housekeepers, janitors, and laundry aides, who are employees of another employer, Healthcare Services Group, Inc. (HSG). The Employer also contends that the housekeepers, janitors, and laundry aides do not share a community interest with the Employer's employees. Additionally, the Employer contends that housekeepers, janitors, and laundry aides should be excluded because HSG purportedly did not expressly consent to their inclusion in the bargaining unit. In this regard, the Employer argued that *Miller & Anderson, Inc.*, 364 NLRB 39, (2016), was incorrectly decided, and that the Board should return to the standard in *Oakwood Care Center*, 343 NLRB 659 (2004). HSG appeared at the hearing and stated that it was in agreement with the Employer's position, adding that HSG employees would have to submit their own decertification petition. The Petitioner appeared to side with the Employer but did not attempt to amend his petition to exclude the housekeepers, janitors, and laundry aides and presented no arguments at the hearing. The Union contends that the unit description is appropriate because it reflects the currently recognized bargaining unit.

Upon examination of the underlying policies for conducting decertification elections, I have determined that as a general rule, the bargaining unit in which the decertification election is held must be coextensive with the certified or recognized unit. As explained below in more detail, nothing in this record appears to warrant deviating from that general rule. I have concluded that the recognition language in the Beverly-Union January 1, 2014 to December 31,

2016 collective-bargaining agreement (the Agreement) and the December 6, 2016 Memorandum of Understanding between the Employer and the Union, which extended the Agreement to December 31, 2017, establish that the petitioned-for unit is coextensive with the recognized unit and I am directing an election therein.

I. FACTS

The Employer operates a skilled nursing facility in Clovis, California. HSG provides the Employer with the employees who perform housekeeping, janitorial, and laundry services for the Employer. The Union has continuously represented employees employed by the Employer and its predecessor Beverly and housekeepers, janitors, and laundry aides employed by HSG at the Clovis facility since at least 2014. According to the testimony of Employer Human Resources Representative Keri Oviedo, the Employer took over management of certain Beverly facilities, including the facility involved in these proceedings in December 2016. Beverly and the Union were parties to the Agreement, which contains, in Article 1, the following recognition language:

> The Union and separate employers Beverly Healthcare-California, Inc. or GGNSC Stockton LP d/b/ a Golden LivingCenter-Fresno, Golden LivingCenter-Clovis, Golden LivingCenter-Galt and Golden LivingCenter-Hy-Para, which all parties agree are separate employers, each agree to associate with the other for the purpose of recognizing the Union as the exclusive bargaining representative of a single bargaining unit, as provided for under federal labor law regarding multi-employer bargaining, for all full-time and regular part-time employees in the classifications identified below and any other classifications which may be established within the scope of the duties now included at each respective Employees Facility:
>
> Included: certified nursing aide, nursing assistant, restorative nursing aide, cook, dietary aide, activity assistant, medical records assistant and receptionist (at Golden LivingCenter-Fresno, only).
>
> Excluded: registered nurses, licensed vocational nurses, social service assistants, central supply clerks, office and clerical employees, confidential employees, professional employees, supervisory employees, and guards, as defined in the National Labor Relations Act.
>
> …
>
> Employees in the following classifications working at the Facilities who are employed by HSG, a separate employer: housekeeper, janitor and laundry aide shall also be recognized as part of the above single bargaining unit.

On December 6, 2016, the Employer and the Union entered into a Memorandum of Understanding (the MOU) in which they agreed to alter the wage, union security language, and term of the Agreement and that, "All other terms & conditions of the attached collective bargaining agreements [between each employer in the multi-employer bargaining association and the Union, including the Agreement] shall continue in full force and effect until 12/31/2017."

On October 5, 2017, the Employer withdrew from multi-employer bargaining. To this end, the Employer's attorney wrote to the Union stating that "each Dycora entity is a separate bargaining unit." In that letter, the Employer made no mention of HSG or of its employees. HSG did not write separately to the Union withdrawing from multi-employer bargaining. The Employer and the Union have not started bargaining for a successor agreement covering this facility. Human Resources Representative Oviedo testified that bargaining over another facility of the Employer has commenced but that facility is not at issue here. The record does not reflect any agreement between the Employer and the Union to change the scope of the recognized bargaining unit by excluding the HSG housekeepers, janitors, and dietary aides, nor does it reflect any agreement between HSG and the Union regarding any changes in the scope of the bargaining unit.

HSG Director of Operations Ian Hanley testified that HSG had direct contact with the Union regarding existing terms and conditions of employment including dealing with individual employees' vacation and hours. Additionally, Hanley testified that HSG follows the Agreement, including with respect to grievances, discipline, and wages. Hanley did not testify as to any instances in which HSG and the Union have engaged in collective bargaining negotiations directly.

II. ANALYSIS

All parties involved in this proceeding agree that all full-time and regular part-time certified nursing aides, nursing assistants, restorative nursing aides, cooks, dietary aides, activity assistants, and medical records assistants should be included in the voting group, but the Employer and HSG dispute that the employees employed by HSG, including housekeepers, janitors, and laundry aides should be included in the bargaining unit.

Mindful of the fact that Congress made no provision for the decertification of part of a certified or recognized unit, the existing unit normally is the appropriate unit in decertification cases. *Campbell Soup Co*., 111 NLRB 234, 235 (1955). Accordingly, the bargaining unit in which the decertification election is held must be coextensive with the certified or recognized unit. *Id.*; *W. T. Grant Co*., 179 NLRB 670 (1969); *Bell & Howell Airline Service Co*., 185 NLRB 67 (1970); *WAPI-TV-AM-FM*, 198 NLRB 342 (1972); and *Mo's West*, 283 NLRB 130 (1989).

The documentary evidence[1] in the record clearly establishes that the housekeepers, janitors, and laundry aides have been, for years, included with the Employer's employees in a single unit. The record does not reflect any agreements between the parties to modify the scope of the Unit. The Employer's letter of October 5, 2017, withdrawing from multi-employer bargaining makes no mention of HSG or its employees. HSG did not separately withdraw from multi-employer bargaining. Clearly, since HSG's employees have been at all relevant times part

[1] The documentary evidence relied on is the Agreement between predecessor Beverly and the Union, which expired on December 31, 2016, and the December 6, 2016 MOU signed by the Employer and the Union to alter the wages, union security language, and term of the Agreement, but to extend all other terms and conditions of employment in full force and effect until December 31, 2017.

of the recognized bargaining unit, all parties understood that the Employer's withdrawal from multi-employer bargaining would result in its continued recognition of the Union as the representative of all the unit employees, including the unit employees employed by HSG, and no separate notification of withdrawal by HSG from multi-employer bargaining was necessary.

During the hearing the Employer and HSG sought to stress that they are separate entities. To this end, Human Resources Representative Oviedo testified that that HSG "is its own employer, but for purposes of bargaining, they could be coordinated with us." I find that it is unnecessary to make a determination as to the nature of the relationship between the Employer and HSG as that determination would not be helpful in establishing what the currently recognized bargaining unit is. As to the argument that HSG never specifically agree to the inclusion of its employees in the recognized unit, I find that contention disingenuous. The record, including Hanley's testimony, attests to the fact that HSG has, at the very least, acquiesced to the inclusion of its employees in the bargaining unit.

With respect to the Employer's argument that the housekeepers, janitors, and laundry aides do not share a community of interest with the other employees employed in the unit, I note that "it is established Board policy that the unit appropriate in a decertification election must be coextensive with either the certified or recognized bargaining unit; hence, community-of-interest factors which would be considered in making an initial appropriate unit determination are not relevant herein." *Fast Food Merchandisers, Inc.*, 242 NLRB No. 6 (1979).

The Employer suggested at hearing that the instant case could serve as a vehicle to overturn the Board's decision in *Miller & Anderson,* 364 NLRB 39, (2016)(Board overturned *Oakwood Care Center*, 343 NLRB 659 (2004), and returned to the rule in *M.B. Sturgis*, 331 NLRB 1298 (2000), finding employer consent is not necessary for units that combine jointly employed and solely employed employees of a single user employer). I find this proposition to be of no relevance to determining the composition of the recognized unit in this case. In that regard, *Miller & Anderson* involved an initial appropriate unit determination, inapposite to the situation at hand. Similarly, I find that other cases cited by the Employer do not apply to the instant case (e.g., *Illinois Canning* 125 NLRB 699 (1959), involving agricultural employees).

IV. CONCLUSIONS AND FINDINGS

Based upon the entire record in this matter 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 hereby affirmed.

2. The Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The Petitioner is a labor organization within the meaning of Section 2(5) 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 Section 2(6) and (7) of the Act.

5. The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

Included: All full-time and regular part-time certified nursing aides, nursing assistants, restorative nursing aides, cooks, dietary aides, activity assistants, and medical records assistants employed by the Employer, and all employees employed by Healthcare Services Group, Inc., (including housekeepers, janitors, and laundry aides) employed at the Employer's facility in Clovis, California.

Excluded: All registered nurses, licensed vocational nurses, social service assistants, central supply clerks, office clerical employees, confidential employees, professional employees, guards and supervisors as defined in the National Labor Relations Act.

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. Employees will vote whether or not they wish to be represented for purposes of collective bargaining by Service Employees International Union, Local 2015.

A. Election Details

The election will be held on Wednesday, May 23, 2018, from 6:00 a.m. to 8:00 a.m. and 2:00 p.m. to 4:00 p.m. in the Blue Room dining room located at 111 Barstow Avenue, Clovis, California.

B. Voting Eligibility

Eligible to vote are those in the unit who are employed by Dycora Transitional Healthcare-Clovis LLC and were employed during the payroll period ending **May 9, 2018,** and those in the unit employed by Healthcare Services Group and were employed during the pay period **May 12, 2018,** including employees who did not work during that period because they were ill, on vacation, or temporarily laid off;

Also eligible to vote are all employees in the unit who have worked an average of four (4) hours or more per week during the 13 weeks immediately preceding the eligibility date for the election.

Employees engaged in an 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 that 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.

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.

C. Voter List

As required by Section 102.67(l) of the Board's Rules and Regulations, the Employer and involved party Healthcare Services Group, Inc. must provide the Regional Director and parties named in this decision a list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cell telephone numbers) of all eligible voters that they employ.

To be timely filed and served, the list must be *received* by the regional director and the parties by **May 17, 2018**. The list must be accompanied by a certificate of service showing service on all parties. **The region will no longer serve the voter list.**

Unless the Employer certifies that it does not possess the capacity to produce the list in the required form, the list must be provided in a table in a Microsoft Word file (.doc or docx) or a file that is compatible with Microsoft Word (.doc or docx). The first column of the list must begin with each employee's last name and the list must be alphabetized (overall or by department) by last name. Because the list will be used during the election, the font size of the list must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. A sample, optional form for the list is provided on the NLRB website at www.nlrb.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015.

When feasible, the list shall be filed electronically with the Region and served electronically on the other parties named in this decision. The list may be electronically filed with the Region by using the E-filing system on the Agency's website at www.nlrb.gov. Once the website is accessed, click on **E-File Documents**, enter the NLRB Case Number, and follow the detailed instructions.

Failure to comply with the above requirements will be grounds for setting aside the election whenever proper and timely objections are filed. However, the Employer may not object to the failure to file or serve the list within the specified time or in the proper format if it is responsible for the failure.

No party shall use the voter list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.

D. Posting of Notices of Election

Pursuant to Section 102.67(k) of the Board's Rules, the Employer must post copies of the Notice of Election accompanying this Decision in conspicuous places, including all places where notices to employees in the unit found appropriate are customarily posted. The Notice must be

posted so all pages of the Notice are simultaneously visible. In addition, if the Employer customarily communicates electronically with some or all of the employees in the unit found appropriate, the Employer must also distribute the Notice of Election electronically to those employees. The Employer must post copies of the Notice at least 3 full working days prior to 12:01 a.m. of the day of the election and copies must remain posted until the end of the election. For purposes of posting, working day means an entire 24-hour period excluding Saturdays, Sundays, and holidays. However, a party shall be estopped from objecting to the nonposting of notices if it is responsible for the nonposting, and likewise shall be estopped from objecting to the nondistribution of notices if it is responsible for the nondistribution.
Failure to follow the posting requirements set forth above will be grounds for setting aside the election if proper and timely objections are filed.

RIGHT TO REQUEST REVIEW

Pursuant to Section 102.67 of the Board's Rules and Regulations, a request for review may be filed with the Board at any time following the issuance of this Decision until 14 days after a final disposition of the proceeding by the Regional Director. Accordingly, a party is not precluded from filing a request for review of this decision after the election on the grounds that it did not file a request for review of this Decision prior to the election. The request for review must conform to the requirements of Section 102.67 of the Board's Rules and Regulations.

A request for review may be E-Filed through the Agency's website but may not be filed by facsimile. To E-File the request for review, go to www.nlrb.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the request for review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Neither the filing of a request for review nor the Board's granting a request for review will stay the election in this matter unless specifically ordered by the Board.

Dated at Oakland, California this 15th day of May 2018.

/s/ Valerie Hardy-Mahoney

Valerie Hardy-Mahoney
Regional Director
National Labor Relations Board
Region 32
1301 Clay Street Suite 300N
Oakland, CA 94612-5224

EXHIBIT F

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

DYCORA TRANSITIONAL HEALTH - CLOVIS LLC **Employer** **and** **PATRICK KRONYAK** **Petitioner** **and** **SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 2015** **Union** **and** **HEALTHCARE SERVICES GROUP, INC.** **Involved Party**	**Case 32-RD-213115**

DYCORA TRANSITIONAL HEALTH - FRESNO LLC **Employer** **and** **ROSALINDA LORONA** **Petitioner** **and** **SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 2015** **Union** **HEALTHCARE SERVICES GROUP, INC.** **Involved Party**	**Case 32-RD-213130**

REGIONAL DIRECTOR'S DECISION ON OBJECTIONS AND ORDER CONSOLIDATING CASES FOR HEARING

Based on two petitions filed on January 17, 2018[1] in 32-RD-213115 and 32-RD-213130, and pursuant to two Decisions and Direction of Election, both issued on May 15, a manual election was conducted in each case.

The election in 32-RD-213115 was conducted on May 30 to determine whether a unit of employees of DYCORA TRANSITIONAL HEALTH - CLOVIS LLC (the Employer) and of

[1] All dates in 2018 unless otherwise indicated.

employees employed by HEALTHCARE SERVICES GROUP, INC. (HSG) continued to desire to be represented for purposes of collective bargaining by SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 2015. That voting unit consists of:

> **Included:** All full-time and regular part-time certified nursing aides, nursing assistants, restorative nursing aides, cooks, dietary aides, activity assistants, and medical records assistants employed by the Employer, and all employees employed by Healthcare Services Group, Inc., (including housekeepers, janitors, and laundry aides) employed at the Employer's facility in Clovis, California.
>
> **Excluded:** All registered nurses, licensed vocational nurses, social service assistants, central supply clerks, office clerical employees, confidential employees, professional employees, guards and supervisors as defined in the National Labor Relations Act.

The tally of ballots prepared at the conclusion of the election shows that of the approximately 55 eligible voters, 12 votes were cast for and 21 votes were cast against the Union, with 3 of challenged ballots, a number that is not sufficient to affect the results of the election.

The election in 32-RD-213130 was conducted on May 31 to determine whether a unit of employees of DYCORA TRANSITIONAL HEALTH - FRESNO LLC (the Employer) and of employees employed by HEALTHCARE SERVICES GROUP, INC. (HSG) continued to desire to be represented for purposes of collective bargaining by SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 2015. That voting unit consists of:

> **Included:** All full-time and regular part-time certified nursing aides, nursing assistants, restorative nursing aides, cooks, dietary aides, activity assistants, medical records assistants, and receptionists employed by the Employer, and all employees employed by Healthcare Services Group, Inc., (including housekeepers, janitors, and laundry aides) employed at the Employer's facility in Fresno, California.
>
> **Excluded:** All registered nurses, licensed vocational nurses, social service assistants, central supply clerks, confidential employees, professional employees, guards and supervisors as defined in the National Labor Relations Act.

The tally of ballots prepared at the conclusion of the election shows that of the approximately 183 eligible voters, 32 votes were cast for and 57 votes were cast against the Union, with 28 of challenged ballots, a number that was sufficient to affect the results of the election. Pursuant to the Supplemental Regional Director's Decision and Direction to Count Determinative Challenged Ballots issued on June 12[2], the determinative challenged ballots were opened and counted on June 27. The revised tally of ballots prepared at the conclusion of the count shows that 42 votes were cast for and 74 votes were cast against the Union, with 1 sustained challenged ballot.

[2] An Order Amending Supplemental Regional Director's Decision and Direction to Count Determinative Challenged Ballots issued on June 15.

THE OBJECTIONS

On June 6, the Union filed timely objections to the conduct of the election in 32-RD-213115 (the Clovis Objections). On June 7, the Union filed timely objections to the conduct of the election in 32-RD-213130 (the Fresno Objections)[3]. Offers of proof in support of the Objections were timely submitted in each case. A copy of the Clovis Objections is attached as Attachment A, and a copy of the Fresno Objections is attached as Attachment B.

On July 16, the Union requested withdrawal of Clovis Objections 1, 2 and 3, and Fresno Objections 1, 2, 3 and 7. I hereby approve the Union's withdrawal request. The remaining objections subject to further proceedings are below.

Objection 4 (Clovis and Fresno)

Dycora promised or implied benefits to eligible voters if the Union lost the election.

Objection 5 (Clovis and Fresno)

Dycora and its agents solicited grievances and made an implied promise to remedy them.

Objection 6 (Fresno)

Dycora and its agents questioned and polled employees regarding their support for the Union during the critical period.

Objection 8 (Fresno)

Dycora and its agents changed terms and conditions of employment of eligible voters during the critical period.[4]

Objection 6 (Clovis) and Objection 9 (Fresno)

Dycora discriminatorily applied an unlawful solicitation rule during the critical period by allowing Petitioner's supporters and/or managers to engage in solicitation while on working time and in patient care areas, allowing them to wear anti-union buttons/stickers, while maintaining that a non-solicitation policy that prohibited eligible voters from wearing pro-union stickers.

[3] The Union resubmitted the Fresno Objections on July 3 following the issuance of the revised tally of ballots on June 27.

[4] On May 25, a Complaint and Notice of Hearing issued based upon a charge filed by the Petitioner in Case 32-CA-215700. Paragraph 7 (a) of that Complaint alleges, "on January 9, 2018, Respondent implemented a new shift schedule for dietary department employees." Further, Paragraph 7 (c) of that Complaint alleges, "around late December 2017 or early January 2018, Respondent ended its practice of allowing dietary department employees to eat extra food prepared for, but not consumed by, Respondent's patients and/or residents."

Objection 7 (Clovis) and Objection 10 (Fresno)

> Dycora and its agents provided unlawful aid and assistance to the Petitioner and/or supporters of the Petitioner, including by allowing them to use the employer's bulletin board to solicit and distribute literature but prohibiting the Union from doing the same.

Objection 8 (Clovis) and Objection 11 (Fresno)

> Dycora, during the critical period, maintained unlawfully overbroad rules which interfered with employee free choice and destroyed laboratory conditions for a fair election.[5]

CONCLUSION AND ORDER

I have concluded that a hearing is warranted on the Petitioner's objections 4 through 8 of the Clovis Objections; and 4 through 11 of the Fresno Objections. The evidence described in the offers of proof submitted by the Union accompanying these objections could be grounds for overturning the elections if introduced at a hearing. I have further concluded that these Objections are best resolved on the basis of testimony and other evidence obtained through a formal hearing in conjunction with the hearing in Case 32-CA-215700 because the Complaint in Case 32-CA-215700 alleges related issues. In accordance with Section 102.69(c)(1)(ii) of the Rules and Regulations of the National Labor Relations Board (the Board), I conclude that the purposes of the Act will best be effectuated by considering them jointly in a single consolidated hearing before an Administrative Law Judge. These Objections and the allegations of the Complaint shall be considered to the extent that they bear on the validity of the election. *White Plains Lincoln-Mercury, Inc.*, 288 NLRB 1133 (1988). Accordingly, pursuant to Sections 102.33 and 102.72 of the Board's Rules and Regulations, Series 8, as amended, **I HEREBY ORDER** the consolidation of Cases 32-RD-213115, 32-RD-213130 and 32-CA-215700 for the purpose of a hearing before an Administrative Law Judge.

I FURTHER ORDER that at the same time and place as the hearing in Case 32-CA-215700 currently scheduled for on 9:00 a.m. on August 7, 2018, and consecutive days thereafter in a location to be determined in Fresno, California, a hearing will be held before a duly designated Administrative Law Judge of the Board, at which time and place the parties will have the right to appear in person, or otherwise, to give testimony, and to examine and cross-examine

[5] The Union proffered names of witnesses to testify that the Employer maintains a rule in its employee handbook regarding "Computer Use, E-Mail, Voice Mail and the Internet" that may interfere with employee Section 7 rights.

witnesses with respect to the issues that I identified above as raising substantial and material issues of fact.

I HEREBY REQUEST that the Administrative Law Judge designated for the purpose of conducting the hearing submit to me and serve on the parties a report containing resolution of credibility of witnesses, findings of fact, and recommendations as to the disposition of the Objections, and on other conduct bearing on the validity of the election.

DATED AT Oakland, California this 17th day of July 2018.

/s/ Valerie Hardy-Mahoney

Valerie Hardy-Mahoney
Regional Director
National Labor Relations Board
Region 32
1301 Clay Street Suite 300N
Oakland, CA 94612-5224

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

DYCORA TRANSITIONAL HEALTH - CLOVIS LLC **Employer** **and** **PATRICK KRONYAK** **Petitioner** **and** **SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 2015** **Union** **and** **HEALTHCARE SERVICES GROUP, INC.** **Involved Party**	**Case 32-RD-213115**

DYCORA TRANSITIONAL HEALTH - FRESNO LLC **Employer** **and** **ROSALINDA LORONA** **Petitioner** **and** **SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 2015** **Union** **HEALTHCARE SERVICES GROUP, INC.** **Involved Party**	**Case 32-RD-213130**

AFFIDAVIT OF SERVICE OF: Regional Director's Decision on Objections and Order Consolidating Cases for Hearing, dated July 17, 2018.

I, the undersigned employee of the National Labor Relations Board, being duly sworn, say that on July 17, 2018, I served the above documents by electronic mail upon the following persons, addressed to them at the following addresses:

JOANNE R. STRAUSS, ESQ., CORPORATE COUNSEL-LABOR RELATIONS
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PATRICK KRONYAK
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MANUEL A. BOIGUES, ESQ.
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rowzlorona@yahoo.com

OFFICE OF THE EXECUTIVE SECRETARY
SMO-OfficeoftheExecutiveSecretary@nlrb.onmicrosoft.com

July 17, 2018
Date

Alice Lafontaine, Designated Agent of NLRB
Name

/s/ Alice Lafontaine
Signature

EXHIBIT G

MANUEL A. BOÍGUES, Bar No. 248990
WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway, Suite 200
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Attorneys for Union SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 2015

UNITED STATES OF AMERICA

NATIONAL LABOR RELATIONS BOARD

REGION 32

PATRICK KRONYAK, Petitioner, and SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 2015, Union. DYCORA TRANSITIONAL HEALTH – CLOVIS, Employer	No. 32-RD-213115 **UNION'S OJECTIONS TO DYCORA TRANSITIONAL HEALTH - CLOVIS DECERTIFICATION ELECTION**

Pursuant to the National Labor Relations Board, Rules and Regulations, Section 102.69(a), Petitioner SEIU, Local 2015, hereby files the following objections to the conduct of the election and conduct affecting results of the election conducted by the National Labor Relations Board on May 30, 2018.

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The bases of these objections include, but are not limited to, the following:

1. The Employer, Dycora Transitional Health & Living – Clovis ("Dycora"), was permitted to have two observers on Election Day, Patrick Kronyak and Rosario Montes, while the Union was permitted to have only one observer, Maria Guizar.
2. Dycora and its agents paid full wages to Patrick Kronyak and Rosario Montes during their time serving as observers on Election Day, but the Union's observer during the morning polling period, Maria Guizar, was not compensated.
3. Dycora and its agents made unlawful racial appeals on Election Day with a decision to challenge all votes casted by eligible voters employed by Healthcare Services Group who are Latinas and Asian, although their eligibility had already been litigated and resolved by the Regional Director.
4. Dycora promised or implied benefits to eligible voters if the Union lost the election.
5. Dycora and its agents solicited grievances and made an implied promise to remedy them.
6. Dycora discriminatorily applied an unlawful solicitation rule during the critical period by allowing Petitioner's supporters and/or managers to engage in solicitation while on working time and in patient care areas, allowing them to wear anti-union buttons/stickers, while maintaining that a non-solicitation policy that prohibited eligible voters from wearing pro-union stickers.
7. Dycora and its agents provided unlawful aid and assistance to the Petitioner and/or supporters of the Petitioner, including by allowing them to use the employer's bulletin board to solicit and distribute literature but prohibiting the Union from doing the same.
8. Dycora, during the critical period, maintained unlawfully overbroad rules which interfered with employee free choice and destroyed laboratory conditions for a fair election.

By the foregoing and other unlawful conduct, the Employer, Dycora Transitional Health & Living – Clovis, destroyed the laboratory conditions that are necessary for a free and fair election and such conduct materially and substantially affected the outcome of the election. As a result, the election in this matter must be set aside and the Board should issue an appropriate remedy, including ordering a new election.

Dated: June 6, 2018

WEINBERG, ROGER & ROSENFELD
A Professional Corporation

/S/ MANUEL A. BOIGUES

By: MANUEL A. BOÍGUES
Attorneys for Union SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 2015

144624\971473

EXHIBIT H

From: **Manuel Boigues** <mboigues@unioncounsel.net>
Date: Mon, Aug 27, 2018 at 12:49 PM
Subject: SEIU Local 2015 and Dycora-Clovis
To: "Joanne Strauss (jstrauss@hcsgcorp.com)" <jstrauss@hcsgcorp.com>, "Foster, Chris (Christopher.Foster@dlapiper.com)" <Christopher.Foster@dlapiper.com>, "Holland, Ron (Ron.Holland@dlapiper.com)" <Ron.Holland@dlapiper.com>
Cc: "Nicholas L. Tsiliacos (Nicholas.tsiliacos@nlrb.gov)" <Nicholas.tsiliacos@nlrb.gov>, "Berbower, Amy" <Amy.Berbower@nlrb.gov>, "Hokulani.Valencia@nlrb.gov" <Hokulani.Valencia@nlrb.gov>, Manuel Boigues <mboigues@unioncounsel.net>

Joanne Strauss, Christopher Foster, and Ronal Holland –

This email serves as notice on behalf of SEIU Local 2015 that the Union waives and disclaims any right to represent the employees of Dycora-Clovis and Healthcare Services Group at the facility located at 111 Barstow Avenue, Clovis, California in the following recognized unit: all full-time and regular part-time certified nursing aides, nursing assistants, restorative nursing aides, cooks, dietary aides, activity assistants, and medical records assistants employed by Dycora Transitional Health – Clovis, and all employees employed by Healthcare Services Group, Inc., (including housekeepers, janitors, and laundry aides) employed at Dycora Transitional Health –Clovis's facility in Clovis. These are the employees involved in NLRB Case 32-RD-213115.

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EXHIBIT I

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD

REGION 32
1301 Clay St Ste 300N
Oakland, CA 94612-5224

Agency Website: www.nlrb.gov
Telephone: (510)637-3300
Fax: (510)637-3315

August 30, 2018

PATRICK KRONYAK
1151 S CHESTNUT AVE UNIT 166
FRESNO, CA 93702-3990

Re: Dycora Transitional Health - Clovis LLC
Case 32-RD-213115

Dear Mr. Kronyak:

The above-captioned case, petitioning for an investigation and determination of representative under Section 9(c) of the National Labor Relations Act, has been carefully investigated and considered.

Decision to Dismiss: As a result of the investigation, I find that further proceedings are unwarranted. The investigation disclosed that SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 2015 (the Union) was previously certified as the exclusive collective-bargaining representative of the employees in this petition by an election conducted in Case 32-RD-120481. On August 27, 2018, the Union submitted a disclaimer of interest in the continued representation of those employees; therefore, a question concerning representation no longer exists. Accordingly, I am dismissing the petition in this matter. The Certification of Representative issued in Case 32-RD-120481 is revoked. The related pending objections are moot.

Right to Request Review: Pursuant to Section 102.67 of the National Labor Relations Board's Rules and Regulations, you may obtain a review of this action by filing a request with the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001. The request for review must contain a complete statement of the facts and reasons on which it is based.

***Procedures for Filing Request for Review*:** A request for review must be received by the Executive Secretary of the Board in Washington, DC, by close of business (**5 p.m. Eastern Time)** on September 13, 2018, unless filed electronically. If filed electronically, it will be considered timely if the transmission of the entire document through the Agency's website is **accomplished by no later than 11:59 p.m. Eastern Time** on September 13, 2018.

Consistent with the Agency's E-Government initiative, parties are encouraged, but not required, to file a request for review electronically. Section 102.114 of the Board's Rules do not permit a request for review to be filed by facsimile transmission. A copy of the request for review must be served on each of the other parties to the proceeding, as well as on the undersigned, in accordance with the requirements of the Board's Rules and Regulations.

Filing a request for review electronically may be accomplished by using the Efiling system on the Agency's website at www.nlrb.gov. Once the website is accessed, click on **E-File**

Documents, enter the NLRB Case Number, and follow the detailed instructions. The responsibility for the receipt of the request for review rests exclusively with the sender. A failure to timely file the request for review will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off line or unavailable for some other reason, absent a determination of technical failure of the site, with notice of such posted on the website.

Upon good cause shown, the Board may grant special permission for a longer period within which to file a request for review. A request for extension of time, which may also be filed electronically, should be submitted to the Executive Secretary in Washington, and a copy of such request for extension of time should be submitted to the Regional Director and to each of the other parties to this proceeding. A request for an extension of time must include a statement that a copy has been served on the Regional Director and on each of the other parties to this proceeding in the same manner or a faster manner as that utilized in filing the request with the Board.

Very truly yours,

/s/ Valerie Hardy-Mahoney

Valerie Hardy-Mahoney
Regional Director

cc: OFFICE OF THE EXECUTIVE SECRETARY

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SERVICE EMPLOYEES INTERNATIONAL UNION,
LOCAL 2015
4928 E CLINTON WAY
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FRESNO, CA 93727

EXHIBIT J

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

BEVERLY HEALTHCARE CALIFORNIA, INC., d/b/a GOLDEN LIVING CENTERS- CLOVIS

Employer

and

PATRICK KRONYAK

Case 32-RD-120481

Petitioner

and

SERVICE EMPLOYEES INTERNATIONAL UNION - UNITED HEALTHCARE WORKERS - WEST (SEIU-UHW)

Union

TYPE OF ELECTION: STIPULATED

CERTIFICATION OF REPRESENTATIVE

An election has been conducted under the Board's Rules and Regulations. The Tally of Ballots shows that a collective-bargaining representative has been selected. No timely objections have been filed.

As authorized by the National Labor Relations Board, it is certified that a majority of the valid ballots have been cast for

SERVICE EMPLOYEES INTERNATIONAL UNION - UNITED HEALTHCARE WORKERS - WEST (SEIU-UHW)

and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit.

UNIT: All full-time and regular part-time certified nursing aides, nursing assistants, restorative nursing aides, cooks, dietary aides, activity assistants, and medical records assistants employed by the Employer, and all employees employed by Healthcare Services Group, Inc. (including housekeepers, janitors, and laundry aides), employed at the Employer's facility in Clovis, California, excluding all registered nurses, licensed vocational nurses, social service assistants, central supply clerks, office and clerical employees, confidential employees, professional employees, guards, and supervisors as defined in the National Labor Relations Act.

March 28, 2014

/s/ George Velastegui
George Velastegui
Regional Director, Region 32
National Labor Relations Board

NOTICE OF BARGAINING OBLIGATION

In the recent representation election, a labor organization received a majority of the valid votes cast. Except in unusual circumstances, unless the results of the election are subsequently set aside in a post-election proceeding, the employer's legal obligation to refrain from unilaterally changing bargaining unit employees' terms and conditions of employment begins on the date of the election.

The employer is not precluded from changing bargaining unit employees' terms and conditions during the pendency of post-election proceedings, **as long as** the employer (a) gives sufficient notice to the labor organization concerning the proposed change(s); (b) negotiates in good faith with the labor organization, upon request; and (c) good faith bargaining between the employer and the labor organization leads to agreement or overall lawful impasse.

This is so even if the employer, or some other party, files objections to the election pursuant to Section 102.69 of the Rules and Regulations of the National Labor Relations Board (the Board). If the objections are later overruled and the labor organization is certified as the employees' collective-bargaining representative, the employer's obligation to refrain from making unilateral changes to bargaining unit employees' terms and conditions of employment begins on the date of the election, not on the date of the subsequent decision by the Board or court. Specifically, the Board has held that, absent exceptional circumstances,[1] an employer acts at its peril in making changes in wages, hours, or other terms and conditions of employment during the period while objections are pending and the final determination about certification of the labor organization has not yet been made.

It is important that all parties be aware of the potential liabilities if the employer unilaterally alters bargaining unit employees' terms and conditions of employment during the pendency of post-election proceedings. Thus, typically, if an employer makes post-election changes in employees' wages, hours, or other terms and conditions of employment without notice to or consultation with the labor organization that is ultimately certified as the employees' collective-bargaining representative, it violates Section 8(a)(1) and (5) of the National Labor Relations Act since such changes have the effect of undermining the labor organization's status as the statutory representative of the employees. This is so even if the changes were motivated by sound business considerations and not for the purpose of undermining the labor organization. As a remedy, the employer could be required to: 1) restore the status quo ante; 2) bargain, upon request, with the labor organization with respect to these changes; and 3) compensate employees, with interest, for monetary losses resulting from the unilateral implementation of these changes, until the employer bargains in good faith with the labor organization, upon request, or bargains to overall lawful impasse.

---

1 Exceptions may include the presence of a longstanding past practice, discrete event, or exigent economic circumstance requiring an immediate response.

EXHIBIT K

From: Tsiliacos, Nicholas L. <Nicholas.Tsiliacos@nlrb.gov>
Sent: Friday, August 31, 2018 3:02 PM
To: Holland, Ron; Foster, Christopher
Subject: RE: Dycora Clovis, 32-RD-213115

I'll have to get back to you on that, but Monday is a holiday and I'm not I the office Tuesday. You may speak directly to Acting ARD Valencia. Her number is 510.671.3047. I forwarded your email to her.

Nick

From: Holland, Ron [mailto:Rjholland@mwe.com]
Sent: Friday, August 31, 2018 2:40 PM
To: Foster, Christopher <Cfoster@mwe.com>
Cc: Tsiliacos, Nicholas L. <Nicholas.Tsiliacos@nlrb.gov>
Subject: Re: Dycora Clovis, 32-RD-213115

And Nick can you let us know what the Region's position is regarding election bar doctrine.

Sent from my iPhone

On Aug 31, 2018, at 2:32 PM, Foster, Christopher <Cfoster@mwe.com> wrote:

> Nick:
>
> This is re the Region's attached 8/30 letter to the petitioner for decertification of the union at Dycora Clovis. The union's disclaimer of interest mooted their objections to the election, so there is no reason the election result should not be certified. The election occurred prior to the union's disclaimer. We are looking into the issue further and examining case law, but the Region's dismissal of the entire decertification petition as moot does not appear to be proper as a union could then essentially avoid an election result by disclaiming after the fact. Can you please clarify the situation here?
>
> Thank you,
>
> Chris
>
> **Christopher Foster**
> Partner
>
> McDermott Will & Emery LLP | Three Embarcadero Center, Suite 1350 | San Francisco, CA 94111
> Tel +1 650 815 7515 | Fax +1 650 815 7401
>
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<DIS.32-RD-213115.R Case Dismissal Letter.pdf>

EXHIBIT L

Calendar No. 104

80TH CONGRESS } SENATE { REPORT
1st Session } { No. 105

FEDERAL LABOR RELATIONS ACT OF 1947

APRIL 17 (legislative day, MARCH 24), 1947.—Ordered to be printed

Mr. TAFT, from the Committee on Labor and Public Welfare, submitted the following

REPORT

[To accompany S. 1126]

together with the

INDIVIDUAL VIEWS OF MR. THOMAS OF UTAH, AND THE SUPPLEMENTAL VIEWS OF MR. TAFT, MR. BALL, MR. DONNELL, AND MR. JENNER, AND THE CONCURRING VIEWS, WITH RESERVATIONS, OF MR. SMITH, THEREIN

The Committee on Labor and Public Welfare report an original bill (S. 1126) to amend the National Labor Relations Act, to provide additional facilities for the mediation of labor disputes affecting commerce, to equalize legal responsibilities of labor organizations and employers, and for other purposes, and recommends that the bill do pass.

The problem of the inadequacy of existing laws on industrial relations is one of grave national concern. The basic Federal law on this subject is contained in two statutes—the Norris-LaGuardia Act of 1932 and the National Labor Relations Act of 1935. Enacted at the time when millions of persons were unemployed and labor organizations were relatively weak and ineffective, these statutes, despite their experimental character, have not been changed in any respect since their original enactment.

While the committee does not believe that social gains which industrial employees have received by reason of these statutes should be impaired in any degree, we do feel that to the extent that such statutes, together with the regulations issued under them, and decisions regarding them, have produced specific types of injustice, or clear inequities between employers and employees, Congress should remedy the situation by precise and carefully drawn legislation.

The need for congressional action has become particularly acute as a result of increased industrial strife. In 1945 this occasioned the loss of approximately 38,000,000 man-days of labor through strikes. This total was trebled in 1946 when there were 116,000,000 man-days lost and the number of strikes reached the unprecedented figure of 4,985.

This bill, formulated by the committee, in an attempt to solve some of the more pressing difficulties with which the Nation is confronted, represents the results of numerous hearings before the committee extending over a period of more than 5 weeks. The committee heard 83 witnesses representing not only management, labor organizations, and the Government but also the general public. The actual drafting of the bill was done in executive sessions of the committee during the last 4 weeks, in which almost daily meetings were held. As an indication of the interest in the subject matter, the entire membership of the committee was present at the meetings in which the draft was perfected. Virtually every Senator on the committee made an important contribution to its provisions.

The committee bill is predicated upon our belief that a fair and equitable labor policy can best be achieved by equalizing existing laws in a manner which will encourage free collective bargaining. Government decisions should not be substituted for free agreement but both sides—management and organized labor—must recognize that the rights of the general public are paramount.

The need for such legislation is urgent. Supreme Court interpretations of the Norris-LaGuardia Anti-injunction Act and the Clayton Act seem to have placed union activities, no matter how destructive to the rights of the individual workers and employers who are conforming to the National Labor Relations Act, beyond the pale of Federal law. Moreover, the administration of the National Labor Relations Act itself has tended to destroy the equality of bargaining power necessary to maintain industrial peace. This is due in part to the one-sided character of the act itself, which, while affording relief to employees and labor organizations for certain undesirable practices on the part of management, denies to management any redress for equally undesirable actions on the part of labor organizations. Moreover, as a result of certain administrative practices which developed in the early period of the act, the Board has acquired a reputation for partisanship, which the committee bill seeks to overcome, by insisting upon certain procedural reforms.

In the course of its deliberations, the committee considered many other proposals, such as restricting alleged monopolistic practices by unions, the formulation of a code of rights for individual members of trade unions, and a clarification of the problem of union-welfare funds. In excluding these matters from the purview of the bill, the majority of the committee should not be understood as regarding such proposals as unsound or unworkable, but rather that the problems involved should receive more extended study by a special joint congressional committee for which the committee bill specifically provides. In other words, the committee in this bill attempted to embody reforms which are long overdue and with respect to which the record of the hearings revealed widespread agreement on the part of informed and impartial persons.

The bill is divided into four titles: Title I amends the National Labor Relations Act to achieve the purposes to which reference has been made. Title II creates a new Federal Mediation Service, which transfers the functions of the Department of Labor in the field of conciliation, along with the property and personnel of the present Service. It also provides special procedures for the Attorney General and the President to utilize in national emergencies. Title III gives labor unions the right to sue and be sued as legal entities for breach of contract in the Federal courts. Title IV establishes a joint Committee of the Congress to make a long-range study of certain aspects of labor relations, concerning which further information was thought desirable by the committee. Title V contains definitions.

The major changes which the bill would make in the National Labor Relations Act may be summarized as follows:

1. It eliminates the genuine supervisor from the coverage of the act as an employee and makes it clear that he should be deemed a part of management.

2. It abolishes the closed shop but permits voluntary agreements for requiring such forms of compulsory membership as the union shop or maintenance of membership, provided that a majority of the employees authorize their representatives to make such contracts. It also protects employees against discharge, if unions deny or terminate their membership for capricious reasons.

3. It gives employers and individual employees rights to invoke the processes of the Board against unions which engaged in certain enumerated unfair labor practices, including secondary boycotts and jurisdictional strikes, which may result in the Board itself applying for restraining orders in certain cases.

4. It reorganizes the central structure of the National Labor Relations Board not only by providing for the addition of four new members to the present Board of three, but by placing upon the members individual responsibility in performing their judicial functions. This would be accomplished by eliminating the review section of the legal staff and the reviewing personnel of the Trial Examining Division.

5. In the interests of assuring complete freedom of choice to employees who do not wish to be represented collectively as well as those who do, it requires the Board to enlarge the rights of petition in representation cases and to give greater attention to the special problems of craftsmen and professional employees in the determination of bargaining units.

6. It prevents the Board from continuing to accord affiliated unions special advantages at the expense of independent labor organizations, by requiring that, under identical circumstances, the Board in complaint cases refrain from any disparity of treatment.

SUPERVISORY PERSONNEL

A recent development which probably more than any other single factor has upset any real balance of power in the collective-bargaining process has been the successful efforts of labor organizations to invoke the Wagner Act for covering supervisory personnel, traditionally regarded as part of management, into organizations composed of or subservient to the unions of the very men they were hired to supervise. It was not until 1945, after several changes in position, that the

National Labor Relations Board itself by divided vote finally decided that supervisory employees were covered by the National Labor Relations Act. This construction was recently upheld in the Supreme Court in the *Packard Motor Car case* (decided March 10, 1947). It should be noted that the majority of the Court in this case did not approve the policy of the Board's doctrine but, in the absence of any specific limitation upon the word "employee" in the Wagner Act, merely held that the Board had power to reach such a conclusion. This means, as Mr. Justice Douglas pointed out in his dissenting opinion—and as Board counsel conceded in argument—that unless Congress amends the act in this respect its processes can be used to unionize even vice presidents since they are not specifically exempted from the category of "employees."

The Board has placed the issue squarely up to the Congress by stating in one of its recent decisions:

> So long as the Congress of the United States imposes no limitation on their choice, it is not for us to do so (*Jones & Laughlin Steel Corp.*, 71 N. L. R. B. 1261).

The folly of permitting a continuation of this policy is dramatically illustrated by what has happened in the captive mines of the Jones & Laughlin Steel Corp. since supervisory employees were organized by the United Mine Workers under the protection of the act. Disciplinary slips issued by the underground supervisors in these mines have fallen off by two-thirds and the accident rate in each mine has doubled. (See testimony of H. Parker Sharp, hearings on S. 55 and S. J. Res. 22, vol. 1, p. 339, *Re Jones and Laughlin Steel Corp.*, 71 N. L. R. B. 1261.)

In drawing an amendment to meet this situation, the committee has not been unmindful of the fact that certain employees with minor supervisory duties have problems which may justify their inclusion in that act. It has therefore distinguished between straw bosses, leadmen, set-up men, and other minor supervisory employees, on the one hand, and the supervisor vested with such genuine management prerogatives as the right to hire or fire, discipline, or make effective recommendations with respect to such action. In other words the committee has adopted the test which the Board itself has made in numerous cases when it has permitted certain categories of supervisory employees to be included in the same bargaining unit with the rank and file. (*Bethlehem Steel Company, Sparrows Point Division*, 65 N. L. R. B. 284 (expediters); *Pittsburgh Equitable Meter Company*, 61 N. L. R. B. 880 (group leaders with authority to give instructions and to lay out the work); *Richards Chemical Works*, 65 N. L. R. B. 14 (supervisors who are mere conduits for transmitting orders); *Endicott-Johnson*, 67 N. L. R. B. 1342, 1347 (persons having the title of foreman and assistant foreman but with no authority other than to keep production moving).)

Before formulating this definition, the committee considered a proposal, occasionally advanced, which would have limited the protection of foremen to joining or organizing unions whose membership was confined to supervisory personnel and not affiliated with either of the major labor federations. After considerable discussion, the committee decided that any such compromise would be completely unrealistic. There is nothing in the record developed before this committee to justify the conclusion that there is such a thing as a really independent foremen's organization.

It is true that the Foremen's Association of America is nominally independent, but its president admitted in testifying before us that it was the practice of his union to confer with representatives of various CIO and AFL unions to work out a common policy in the event of a strike. (See testimony of Robert H. Keys, id., vol. 3, pp. 232–233.) A number of Board cases are studded with evidence showing collaboration both in the organizing stage and in concerted activity between the Foremen's Association and affiliated unions. (See *Re Chrysler Corp.*, 69 N. L. R. B. 182; *Re B. F. Goodrich*, 65 N. L. R. B. 294; and *Re L. A. Young Spring Wire*, 65 N. L. R. B. 298.) It also appeared that the only major company in mass-production industry which has had a collective agreement with the Foremen's Association is the Ford Motor Co. Although this was cited by the Foremen's Association as refuting industry's fears that productivity would suffer if it entered into collective relations with supervisors, it is significant that within the past week this very company has served notice of its termination of its agreement with the association. The termination was accompanied with a statement of the company that—

> After 3 years' experience * * * the results have been the opposite of what we have hoped for. Rather than exerting its efforts to bring foremen into closer relationship with management, your association has worked in the opposite direction.

It is natural to expect that unless this Congress takes action, management will be deprived of the undivided loyalty of its foremen. There is an inherent tendency to subordinate their interests wherever they conflict with those of the rank and file. As one witness put it, "Two groups of people working on parallel lines eventually find a parallel interest." (See testimony of James D. Francis, id., vol. 1, p. 239.)

In recommending the adoption of this amendment, the committee is trying to make clear what Congress attempted to demonstrate last year when it adopted the Case bill. By drawing a more definite line between management and labor we believe the proposed language has fully met some of the technical criticisms to the corresponding section referred to in the President's veto of that bill. It should be noted that all that the bill does is to leave foremen in the same position in which they were until the Labor Board reversed the position it had originally taken in 1943 in the *Maryland Drydock case* (49 N. L. R. B. 733). In other words, the bill does not prevent anyone from organizing nor does it prohibit any employer from recognizing a union of foremen. It merely relieves employers who are subject to the national act free from any compulsion by this National Board or any local agency to accord to the front line of management the anomalous status of employees.

Compulsory Union Membership

A controversial issue to which the committee has devoted the most mature deliberation has been the problem posed by compulsory union membership. It should be noted that when the railway workers were given the protection of the Railway Labor Act, Congress thought that the provisions which prevented discrimination against union membership and provided for the certification of bargaining representatives obviated the justification for closed-shop or union-shop arrangements. That statute specifically forbids any kind of compulsory unionism.

The argument has often been advanced that Congress is inconsistent in not applying this same principle to the National Labor Relations Act. Under that statute a proviso to section 8 (3) permits voluntary agreements for compulsory union membership provided they are made with an unassisted labor organization representing a majority of the employees at the time the contract is made. When the committees of the Congress in 1935 reported the bill which became the present National Labor Relations Act, they made clear that the proviso in section 8 (3) was not intended to override State laws regulating the closed shop. The Senate committee stated that "the bill does nothing to facilitate closed-shop agreements or to make them legal in any State where they may be illegal" (S. Rept. No. 573, 74th Cong., 1st sess., p. 11; see also H. Rept. No. 1147, 74th Cong., 1st sess., pp. 19–20). Until the beginning of the war only a relatively small minority of employees (less than 20 percent) were affected by contracts containing any compulsory features. According to the Secretary of Labor, however, within the last 5 years over 75 percent now contain some form of compulsion. But with this trend, abuses of compulsory membership have become so numerous there has been great public feeling against such arrangements. This has been reflected by the fact that in 12 States such agreements have been made illegal either by legislative act or constitutional amendment, and in 14 other States proposals for abolishing such contracts are now pending. Although these regulatory measures have not received authoritative interpretation by the Supreme Court (see *A. F. of L.* v. *Watson*, 327 U. S. 582), it is obvious that they pose important questions of accommodating Federal and State legislation touching labor relations in industries affecting commerce (*Hill* v. *Florida*, 325 U. S. 538; see also, *Bethlehem Steel Co.* v. *N. Y. Labor Board*, decided by the Supreme Court April 7, 1947). In testifying before this committee, however, leaders of organized labor have stressed the fact that in the absence of such provisions many employees sharing the benefits of what unions are able to accomplish by collective bargaining will refuse to pay their share of the cost.

The committee has taken into consideration these arguments in reaching what it considers a solution of the problem which does justice to both points of view. We have felt that on the record before us the abuses of the system have become too serious and numerous to justify permitting present law to remain unchanged. It is clear that the closed shop which requires preexisting union membership as a condition of obtaining employment creates too great a barrier to free employment to be longer tolerated. In the maritime industry and to a large extent in the construction industry union hiring halls now provide the only method of securing employment. This not only permits unions holding such monopolies over jobs to exact excessive fees but it deprives management of any real choice of the men it hires. Extension of this principle to licensed deck and engine officers has created the greatest problems in connection with the safety of American vessels at sea. (See testimony of Almon E. Roth, id., vol. 2, p. 612.)

Numerous examples were presented to the committee of the way union leaders have used closed-shop devices as a method of depriving employees of their jobs, and in some cases a means of securing a livelihood in their trade or calling, for purely capricious reasons. In one instance a union member was subpenaed to appear in court, having

witnessed an assault upon his foreman by a fellow employee. Because he told the truth upon the witness stand, the union leadership brought about his expulsion with a consequent loss of his job since his employer was subject to a closed-shop contract. (See testimony of William L. McGrath, id., vol. 4, p. 1982).

Numerous examples of equally glaring disregard for the rights of minority members of unions are contained in the exhibits received in evidence by the committee. (See testimony of Cecil B. DeMille, id., vol. 2, p. 797; see also, id., vol. 4, pp. 2063–2071). If trade-unions were purely fraternal or social organizations, such instances would not be a matter of congressional concern, but since membership in such organizations in many trades or callings is essential to earning a living, Congress cannot ignore the existence of such power.

Under the amendments which the committee recommends, employers would still be permitted to enter into agreements requiring all the employees in a given bargaining unit to become members 30 days after being hired if a majority of such employees have shown their intent by secret ballot to confer authority to negotiate such an agreement upon their representatives. But in order to safeguard the rights of employees after such a contract has been entered into, three additional safeguards are provided: (1) Membership in the union must be available to an employee on the same terms and conditions generally applicable to other members; (2) expulsion from a union cannot be a ground of compulsory discharge if the worker is not delinquent in paying his initiation fee or dues; (3) if a worker is denied membership or expelled from the union because he exercises the right conferred on him by the act to work for the change of a bargaining representative at an appropriate time he cannot be discharged.

It seems to us that these amendments remedy the most serious abuses of compulsory union membership and yet give employers and unions who feel that such agreements promoted stability by eliminating "free riders" the right to continue such arrangements.

Unfair Practices by Unions

During the public hearings, testimony was presented relating to practices by labor organizations and their agents, which have seriously interfered with commerce and unduly impinged upon the rights of individual employees, employers, and the public. It was made abundantly clear that the Government, under existing legislation and court decisions, is unable to cope with union practices that injure the national well-being. The committee believes that such practices must be corrected if stable and orderly labor relations are to be achieved. Many and diverse proposals designed to define and correct those union practices which are properly the subject of Federal control, have been presented to the committee, by witnesses who appeared before us as well as by members of the committee. Both witnesses and committee members were in substantial accord that many union practices, especially secondary boycotts, jurisdictional disputes, violations of collective-bargaining contracts, and strikes and boycotts against certifications of the National Labor Relations Board, should be subject to Federal regulation. With respect to other aspects of labor-management relations, there has been a considerable divergence of opinion as to the necessity for Federal regulation. Moreover,

witnesses and committee members have made numerous suggestions as to the form in which legislative action to remedy unfair practices by unions should be cast.

After a careful consideration of the evidence and proposals before us, the committee has concluded that five specific practices by labor organizations and their agents, affecting commerce, should be defined as unfair labor practices. Because of the nature of certain of these practices, especially jurisdictional disputes, and secondary boycotts and strikes for specifically defined objectives, the committee is convinced that additional procedures must be made available under the National Labor Relations Act in order adequately to protect the public welfare which is inextricably involved in labor disputes.

Time is usually of the essence in these matters, and consequently the relatively slow procedure of Board hearing and order, followed many months later by an enforcing decree of the circuit court of appeals, falls short of achieving the desired objectives—the prompt elimination of the obstructions to the free flow of commerce and encouragement of the practice and procedure of free and private collective bargaining. Hence we have provided that the Board, acting in the public interest and not in vindication of purely private rights, may seek injunctive relief in the case of all types of unfair labor practices and that it shall also seek such relief in the case of strikes and boycotts defined as unfair labor practices. In addition, we have provided that the Board shall be authorized to appoint arbitrators to hear and determine jurisdictional disputes concerning work tasks, if the parties fail to adjust the disputes within 10 days. Pursuant to this authorization, arbitration awards are to have the same force as final orders of the Board.

Reorganization of the Board

The committee believes that certain changes in the structure and procedures of the National Labor Relations Board are necessary to meet widespread and justifiable criticism. There is no field in which time is more important, yet the Board is from 12 to 18 months behind in its docket. While this condition is due in part to the fact that limited appropriations have made it necessary to curtail the size of the staff in the face of a phenomenal postwar case load, this is not the entire explanation. Much of this delay stems from the fact that the three Board members are so overburdened with the duty of deciding contested cases that they have little or no time to give to problems of internal administration. The result is that the duties of supervision have had to be delegated to subordinate officers who are inured to following a groove of traditional methods. The expansion of the Board from three to seven members, which this bill proposes, would permit it to operate in panels of three, thereby increasing by 100 percent its ability to dispose of cases expeditiously in the final stage, and to leave the remaining member, not presently assigned to either panel, to deal with problems of administration personnel, expenditures, and the preparation of the budget.

One of the major criticisms of the Board's performance of its judicial duties has been that the members themselves, except on the most important cases, have fallen into the habit of delegating the reviewing of the transcripts of the hearings and findings of trial

examiners to a unit of the general counsel's office called the Review Section. This means that after exceptions are filed and oral argument is scheduled, the Board members rely for their knowledge of the cases upon a memorandum submitted by one of the review attorneys. The memorandum sent to each member is identical and has been already reviewed and revised by the supervisory employees of this Section, even though they have not seen the transcripts or familiarized themselves with the briefs and bills of exception. Unless the final memorandum, therefore, differs from the trial examiner's report in major respects, the attention of the Board members may not be focused upon the sharpest issues in the case.

After the Board has voted, it has also been the practice to assign to the Review Section the duty of preparing a draft opinion. Consequently, unless there is a dissent which one of the majority members sees fit to answer, both the decision and the form in which it appears are virtually a product of the corporate personality of this legal section. In other words, the Board, instead of acting like an appellate court where the divergent views of the different justices may be reflected in each decision, tends to dispose of cases in an institutional fashion. To that extent, the congressional purpose in having the act administered by a Board of several members rather than a single administrator has been frustrated.

Since it is the belief of the committee that Congress intended the Board to function like a court, this bill eliminates the Review Section. In its place each Board member may have as many legal assistants of his own as is necessary to review transcripts and assist him in the drafting of the opinions on cases to which he is assigned. Since the Board's function is largely a judicial one, conformance with the practices of appellate courts in this respect should make for decisions which will truly represent the considered opinions of the Board members.

A corollary to this reform relates to the Trial Examining Division. Tremendous responsibility rests upon the judgment of the individual trial examiner who is sent by the Board to the field to hear contested cases, appraise the credibility of the witnesses, resolve conflicts in testimony, make findings of fact and recommendations for Board decision. Under current practice, before a trial examiner issues his report to the parties, its contents are reviewed and frequently changed or influenced by the supervisory employees in the Trial Examining Division. Yet, since the report is signed only by the trial examiner, the Board holds him out as the sole person who has made a judgment on the evidence developed at the hearing. In the first *Morgan case* (298 U. S. 468, at 480–481), one of the leading decisions on administrative law, the Supreme Court enunciated the following principle:

> If the one who determines the facts which underlie the order has not considered evidence or argument, it is manifest that the hearing has not been given * * *. The one who decides must hear.
>
> This necessary rule does not preclude * * * obtaining the aid of assistants.

It would be difficult to think of a practice which does greater violence to this principle. Consequently, the committee bill prohibits any of the staff from influencing or reviewing the trial examiner's report in advance of publication, thereby obviating the need for reviewing personnel in the Trial Examining Division.

Another questionable practice which the committee has considered has been the attendance of trial examiners at executive sessions of the Board when cases are being decided. Under its rules, the Board gives the parties adversely affected by the trial examiner's report an opportunity to appear by counsel before the Board to argue exceptions. The rules also permit opposing counsel to appear to defend findings in a trial examiner's report which represent his position in the case. It is therefore unfair to the parties to permit a trial examiner, after his findings have alternately been assailed and defended at public hearing, to make a final defense of his published determination behind the scenes. It would seem unnecessary to legislate in this matter at all (since the Board has it in its own power to correct these practices) if it were not for the fact that even the present Board has persisted in adhering to such unjudicial practices.

Reform in Representation Proceedings

In recent years, the number of cases involving disputes with respect to the choice of bargaining representatives in the units which they should represent have become the major business of the National Labor Relations Board. Cases of this character for the last 4 years have been more than double the number of complaint cases. In view of the tremendous number of such cases, therefore, it is of utmost importance that the regulations and rules of decision by which they are governed be drawn so as to insure to employees the fullest freedom of choice.

The present act contains virtually no directions as to how representation proceedings are to be conducted nor does it furnish any guide to the Board as to the kind of bargaining unit to be established. It gives the Board latitude to select among craft, plant, and employer units, or subdivisions thereof. The only standard which the present act contains is that the unit decided upon must—

> insure to employees the full benefit of their right to self-organization and to collective bargaining and otherwise to effectuate the policies of the act.

Many of the current procedures developed administratively are properly subject to the criticism that the Board has made collective bargaining "a one-way street." Despite the absence of discriminatory language in the act, the Board refuses to entertain petitions filed by employees who wish to demonstrate that the current or asserted bargaining representative is not the choice of the majority. The only relief for employees suffering from representation by a radical or racketeering union is to file a petition designating another union as their representative. This, of course, puts a premium upon raiding and jurisdictional rivalries. The committee bill would make it necessary for the Board to entertain petitions from employees irrespective of the kind of relief sought. It does not change the Board's rules of decision with respect to requirements of substantiality in order to obtain a hearing or the rules which militate against a change in bargaining representatives while a lawful collective agreement is in effect.

The present Board rules also discriminate against employers who have reasonable grounds for believing that labor organizations claiming to represent their employees are really not the choice of the majority. It is true that where an employer is confronted with conflicting claims

by two or more labor organizations, he may file a petition. But where only one union is in the picture, the Board denies him this right. Consequently, even though a union which has the right to petition and be certified as the majority representative, if it is really such, may strike for recognition, an employer has no recourse to the Board for settlement of such disputes by the peaceful procedures provided for by the act. The one-sided character of the Board's rules has been defended on the ground that if an employer could petition at any time, he could effectively frustrate the desire of his employees to organize by asking for an election on the first day that a union organizer distributed leaflets at his plant. It should be noted that this may be a valid argument for placing some limitation upon an employer's right to petition, but it is no justification for denying it entirely. The committee has recognized this argument insofar as it has point, by giving employers a right to file a petition but not until a union has actually claimed a majority or demanded exclusive recognition. It should be observed that this amendment, like the amendment doing away with disparity of treatment on employee petitions, does not impair the Board's discretion to dismiss petitions by employers where the existence of an outstanding collective agreement or some other special condition makes an election at that time inappropriate.

The committee bill also contains certain standards to guide the Board in unit determinations, thereby meeting some of the valid objections voiced to certain current rules of decision. When Congress passed the National Labor Relations Act, it recognized that the community of interests among members of a skilled craft might be quite different from those of unskilled employees in mass-production industry. Although there has been a trend in recent years for manufacturing corporations to employ many professional persons, including architects, engineers, scientists, lawyers, and nurses, no corresponding recognition was given by Congress to their special problems. Nevertheless such employees have a great community of interest in maintaining certain professional standards. At the hearings, representatives of various professional associations appeared before the committee to protest against the occasional practice of the Board of covering professional personnel into general units of production and maintenance employees or general units of office and clerical employees, despite the fact that their interests in common with such groups was extremely limited. (See testimony of representatives of the American Society of Civil Engineers, American Chemical Association, American Nurses Association, and the American Institute of Architects, hearings, vol. 3, pp. 1702–1715.) Since their number is always small in comparison with production or clerical employees, collective agreements seldom reflect their desires. Under the committee bill, the Board is required to afford such groups an opportunity to vote in a separate unit to ascertain whether or not they wish to have a bargaining representative of their own.

Somewhat similar treatment is provided for members of genuine craft unions. Generally speaking, in plants which have not been organized, the Board has provided an opportunity for craftsmen to vote in a separate unit and thus secure representation of their own if the vote reflects that desire (*Globe Machine and Stamping Company*, 3 N. L. R. B. 294). Where a company has already been organized,

however, the Board does not apply this doctrine unless it is consistent with prior bargaining history. Since the decision in the *American Can case* (13 N. L. R. B. 1252), where the Board refused to permit craft units to be "carved out" from a broader bargaining unit already established, the Board, except under unusual circumstances, has virtually compelled skilled artisans to remain parts of a comprehensive plant unit. The committee regards the application of this doctrine as inequitable. Our bill still leaves to the Board discretion to review all the facts in determining the appropriate unit, but it may not decide that any craft unit is inappropriate on the ground that a different unit has been established by a prior Board determination.

Another important procedural change relates to the rules on run-off elections. Under present regulations, if two or more unions are on the ballot and none of the choices receives a plurality in the first elections, the regional directors are authorized to conduct a run-off. Unless the vote for "neither" or "none" is a plurality, however, the employees are limited in the run-off to a choice between two unions, even though one of these unions might have run in third place. The bill proposes to correct this inequity by requiring that, on the run-off, the ballot give the employees an option between the two highest choices. This would make representation proceedings conform more closely to public elections. In order to impress upon employees the solemnity of their choice, when the Government goes to the expense of conducting a secret ballot, the bill also provides that elections in any given unit may not be held more frequently than once a year.

Equality of Treatment for Independent Unions

Another problem to which the committee gave considerable thought was the extent to which independent unions have a real grievance under current policies and practices of the Board. It has been the contention of leaders of the independents for many years that the Board had one rule for independent unions and another one for organizations affiliated with the A. F. of L. or the CIO. There is no doubt that since the passage of the National Labor Relations Act, independent unions have dwindled greatly in number. To the extent that this change has come about through the provisions of section 8 (2), which forbids employers to dominate or contribute financial or other support to labor organizations, the committee has not seen fit to make any changes in the present act. It believes that employers should not be permitted to take a hand in the internal affairs of labor organizations, whether affiliated or unaffiliated, or to extend financial assistance to them. In one respect, however, the independent unions do have just cause for complaint under current administrative practice of the Board. If an unaffiliated union gains a foothold in a plant through employer encouragement or support, or if some of the supervisory employees join it—*Brown Company* (65 N. L. R. B. 208)—the Board's practice is to issue a complaint under section 8 (2) and if it finds the allegations to be supported by the evidence, to order the company forever to refrain from recognizing such an organization. (See *Tappan Stove Company*, 66 N. L. R. B. 759, and *Brown Company* (supra).) This is called an order of disestablishment. An organization affected by such an order, no matter if its members and officers purge themselves of the taint of employer domination or interference, is never thereafter permitted recognition.

Moreover, neither such an organization nor any successor, no matter how free of employer influence, is subsequently permitted a place on the ballot in a representation case even though, in fact, it may represent the overwhelming choice of the employees.

The Board's policy with respect to affiliated unions is much more lenient. An affiliated union may obtain a collusive contract without representing any of the employees, it may have been organized by supervisors, or it may be receiving a subsidy from an employer. It is true that the Board recognizes that such unions are the beneficiaries of unfair labor practices. Under such circumstances, however, the Board will frame its complaints under subsection 8 (1) and its order will be limited to directing the offending employer to break off relations with the labor organization until such time as it has been certified by the Board. Under current practice, if an employer complies with such an order, an affiliated organization is then permitted to file an election petition 60 days after such a determination. (See *Ohio Valley Bus Co.*, 38 N. L. R. B. 838; *Ace Sample Card Co.*, 46 N. L. R. B. 129; and *Pennsylvania Handbag Company*, 41 N. L. R. B. 1454.) The Board's defense of this disparate practice is that unions affiliated with national organizations stand on a different footing and that a local union chartered by a national body cannot "at least for an extended period of time, be used as a utensil of an employer to deprive employees of free exercise of the rights guaranteed by the act." (See testimony of Chairman Paul M. Herzog, vol. 4, p. 1912.) While this may be true as a general proposition, it is also possible, from the very nature of employee organizational activities, that an independent union which has received employer encouragement may ultimately free itself completely from his control. This is particularly true in view of the fact that what the Board calls domination in independent union cases may merely amount to the mildest kind of support. (See *Brown Company*, supra.) In any event, this is certainly a justiciable issue which should be decided in accordance with the facts of each case and not upon the basis of the a priori reasoning of the Board in 1936. The committee has, therefore, proposed an amendment to section 10 of the act which will assure the application of a fair and uniform rule of decision to both independent and affiliated unions in complaint and representation proceedings.

Settlement of Labor Disputes

In dealing with the problem of the direct settlement of labor disputes the committee has considered a great variety of the proposals ranging from compulsory arbitration, the establishment of fact-finding boards creation of an over-all mediation tribunal, and the imposition of specified waiting periods. In our judgment, while none of the suggestions is completely devoid of merit, the experience of the Federal Government with such devices has been such that we do not feel warranted in recommending that any such plans become permanent legislation.

Under the exigencies of war the Nation did utilize what amounted to compulsory arbitration through the instrumentality of the War Labor Board. This system, however, tended to emphasize unduly the role of the Government, and under it employers and labor organizations tended to avoid solving their difficulties by free collective bargaining. It is difficult to see how such a system could be operated

indefinitely without compelling the Government to make decisions on economic issues which in normal times should be solved by the free play of economic forces. Moreover, the wartime experiment of the 30-day waiting period under the War Labor Disputes Act was not a happy one, since it was too frequently used as a device for bringing to a rapid crisis disputes which might have been solved by patient negotiation. For similar reasons except in dire emergencies the establishment of fact-finding boards or over-all mediation tribunals also cause dubious results. Recommendations of such bodies tend to set patterns of wage settlements for the entire country which are frequently inappropriate to the peculiar circumstances of certain industries and certain classes of employment.

It is our conclusion that by modifying some of the practices under the Wagner Act which tend to destroy the balance of power in collective-bargaining negotiations by restraining one party to a dispute without restraining the other, Congress would go a long way toward making collective bargaining the most effective method of solving the industrial relations difficulties.

The mediation title emphasizes the importance of adjusting disputes through conferences between employers and labor organizations with the Federal Government making available to the parties in the event of an impasse the services of trained mediators. The bill provides for a Federal Mediation Service under a single Director to be appointed by the President with the advice and consent of the Senate. The personnel and functions of the present Conciliation Service in the Department of Labor are transferred to the new Service, thereby relieving the Secretary of Labor of the burdens incident to the administration of such an agency. In taking this step the committee did not overlook the fact that the prestige of the Secretary, as an adviser to the President, is often an important factor in bringing about the settlement of a dispute of national magnitude. Accordingly, the bill should not be understood as prohibiting the Director of the new Federal Mediation Service from calling upon the Secretary of Labor for assistance in major crises.

While the committee is of the opinion that in most labor disputes the role of the Federal Government should be limited to mediation, we recognize that the repercussions from stoppages in certain industries are occasionally so grave that the national health and safety is imperiled. An example is the recent coal strike in which defiance of the President by the United Mine Workers Union compelled the Attorney General to resort to injunctive relief in the courts. The committee believes that only in national emergencies of this character should the Federal Government be armed with such power. But it also feels that this power should be available if the need arises. It should be remembered that the Supreme Court decision in *U. S.* v. *United Mine Workers* (decided March 6, 1947), did not hold in broad terms that the Government was exempted from the Norris-LaGuardia Act. The majority of the court relied in part upon the fact that the Government had previously seized the mines under the War Labor Disputes Act and that the calling of the strike by the officers of the United Mine Workers was undoubtedly a breach of the criminal provisions contained in that statute. This act, however, is only temporary legislation and expires June 30, 1947.

We concluded, therefore, that the permanent code of laws of the United States should make it clear that the Attorney General should

have the power to intervene and secure judicial relief when a threatened strike or lock-out is conducted on a scale imperiling the national health or safety. Recognizing that the right to secure injunctive relief is subject to abuses, this bill is carefully drawn to guard against excessive resort to the courts. It provides that the Attorney General should not petition a Federal court for such relief until he has convened a special board of inquiry to advise him on the matter. It also requires a finding by the court that such drastic measures are necessary as a prerequisite to obtaining a temporary restraining order or other injunctive relief. It makes interlocutory orders subject to appellate review and further provides for the board of inquiry being reconvened during the period in which the Federal Mediation Service is seeking to assist the disputants in reaching a settlement.

Should all such measures prove unavailing after 60 days have elapsed, the National Labor Relations Board is directed by the bill to poll the employees affected on the question of whether or not they wish to accept or reject the last offer of their employer. When results of such ballot are certified, the Attorney General must then ask the court to vacate the injunction. Under these provisions, any temporary restraining order or injunction would not remain in effect for more than 80 days. In most instances the force of public opinion should make itself sufficiently felt in this 80-day period to bring about a peaceful termination of the controversy. Should this expectation fail, the bill provides for the President laying the matter before Congress for whatever legislation seems necessary to preserve the health and safety of the Nation in the crisis.

Enforcement of Contract Responsibilities

The committee bill makes collective-bargaining contracts equally binding and enforceable on both parties. In the judgment of the committee, breaches of collective agreement have become so numerous that it is not sufficient to allow the parties to invoke the processes of the National Labor Relations Board when such breaches occur (as the bill proposes to do in title I). We feel that the aggrieved party should also have a right of action in the Federal courts. Such a policy is completely in accord with the purpose of the Wagner Act which the Supreme Court declared was "to compel employers to bargain collectively with their employees to the end that an employment contract, binding on both parties, should be made" (*H. J. Heinz & Co.*, 311 U. S. 514).

The laws of many States make it difficult to sue effectively and to recover a judgment against an unincorporated labor union. It is difficult to reach the funds of a union to satisfy a judgment against it. In some States it is necessary to serve all the members before an action can be maintained against the union. This is an almost impossible process. Despite these practical difficulties in the collection of a judgment against a union, the National Labor Relations Board has held it an unfair labor practice for an employer to insist that a union incorporate or post a bond to establish some sort of legal responsibility under a collective agreement.

President Truman, in opening the management-labor conference in November 1945, took cognizance of this condition. He said very plainly that collective agreements should be mutually binding on both parties to the contract:

We shall have to find methods not only of peaceful negotiations of labor contracts, but also of insuring industrial peace for the lifetime of such contracts. Contracts once made must be lived up to and should be changed only in the manner agreed upon by the parties. If we expect confidence in agreements made, there must be responsibility and integrity on both sides in carrying them out.

If unions can break agreements with relative impunity, then such agreements do not tend to stabilize industrial relations. The execution of an agreement does not by itself promote industrial peace. The chief advantage which an employer can reasonably expect from a collective labor agreement is assurance of uninterrupted operation during the term of the agreement. Without some effective method of assuring freedom from economic warfare for the term of the agreement, there is little reason why an employer would desire to sign such a contract.

Consequently, to encourage the making of agreements and to promote industrial peace through faithful performance by the parties, collective agreements affecting interstate commerce should be enforceable in the Federal courts. Our amendment would provide for suits by unions as legal entities and against unions as legal entities in the Federal courts in disputes affecting commerce.

The amendment specifically provides that only the assets of the union can be attached to satisfy a money judgment against it; the property of the individual members of the organization would not be subject to any liability under such a judgment. Thus the members of the union would secure all the advantages of limited liability without incorporation of the union.

The initial obstacle in enforcing the terms of a collective agreement against a union which has breached its provisions is the difficulty of subjecting the union to process. The great majority of labor unions are unincorporated associations. At common law voluntary associations are not suable as such (*Wilson* v. *Airline Coal Company*, 215 Iowa 855; *Iron Molders' Union* v. *Allis-Chalmers Company*, C. C. A. 7, 166 F. 45). As a consequence the rule in most jurisdictions, in the absence of statute, is that unincorporated labor unions cannot be sued in their common name (*Grant* v. *Carpenters' District Council*, 322 Pa. St. 62). Accordingly, the difficulty or impossibility of enforcing the terms of a collective agreement in a suit at law against a union arises from the fact that each individual member of the union must be named and made a party to the suit.

Some States have enacted statutes which subject unincorporated associations to the jurisdiction of law courts. These statutes are by no means uniform; some pertain to fraternal societies, welfare organizations, associations doing business, etc., and in some States the courts have excluded labor unions from their application.

On the other hand, some States, including California and Montana, have construed statutes permitting common name suits against associations doing business to apply to labor unions (*Armstrong* v. *Superior Court*, 173 Calif. 341; *Vance* v. *McGinley*, 39 Mont. 46). Similarly, but more restrictive, in a considerable number of States the action is permitted against the union or respresentatives in proceedings in which the plaintiff could have maintained such an action against all the associates. Such States include Alabama, California, Connecticut, Delaware, Maryland, Montana, Nevada, New Jersey, New York, Rhode Island, South Carolina, and Vermont.

In at least one jurisdiction, the District of Columbia, the liberal view is held that unincorporated labor unions may be sued as legal entities, even in the absence of statute (*Busby* v. *Elec. Util. Emp. Union*, U. S. Court of Appeals for the District of Columbia, No. 8548, Jan. 22, 1945).

In the Federal courts, whether an unincorporated union can be sued depends upon the procedural rules of the State in which the action is brought (*Busby* v. *Elec. Util. Empl. Union*, U. S. Supreme Court, 89 Law. Adv. Op. 108, Dec. 4, 1944).

The Norris-LaGuardia Act has insulated labor unions, in the field of injunctions, against liability for breach of contract. It has been held by a Federal court that strikes, picketing, or boycotting, when carried on in breach of a collective agreement, involve a "labor dispute" under the act so as to make the activity not enjoyable without a showing of the requirements which condition the issuance of an injunction under the act (*Wilson & Co.* v. *Birlin*, 105 F. (2d) 948, C. C. A. 3).

A great number of States have enacted anti-injunction statutes modeled after the Norris-LaGuardia Act, and the courts of many of these jurisdictions have held that a strike in violation of a collective agreement is a "labor dispute" and cannot be enjoined (*Nevins* v. *Kasmach*, 279 N. Y. 323; *Bulkin* v. *Sacks*, 31 Pa., D and C 501).

There are no Federal laws giving either an employer or even the Government itself any right of action against a union for any breach of contract. Thus there is no "substantive right" to enforce, in order to make the union suable as such in Federal courts.

Even where unions are suable, the union funds may not be reached for payment of damages and any judgments or decrees rendered against the association as an entity may be unenforceable. (See *Aalco Laundry Co.* v. *Laundry Linen Union*, 115 S. W. 2d 89 Mo. App.) However, only where statutes provide for recognition of the legal status of associations do association funds become subject to judgments (*Deeney* v. *Hotel & Apt. Clerks' Union*, 134 P. 2d 328 (1943), California).

Financial statutory liability of associations is provided for by some States, among which are Alabama, California, Colorado, Connecticut, Delaware, New Jersey, North Dakota, and South Carolina. Even in these States, however, whether labor unions are included within the definition of "association" is a matter of local judicial interpretation.

It is apparent that until all jurisdictions, and particularly the Federal Government, authorize actions against labor unions as legal entities, there will not be the mutual responsibility necessary to vitalize collective-bargaining agreements. The Congress has protected the right of workers to organize. It has passed laws to encourage and promote collective bargaining.

Statutory recognition of the collective agreement as a valid, binding, and enforceable contract is a logical and necessary step. It will promote a higher degree of responsibility upon the parties to such agreements, and will thereby promote industrial peace.

It has been argued that the result of making collective agreements enforceable against unions would be that they would no longer consent to the inclusion of a no-strike clause in a contract.

This argument is not supported by the record in the few States which have enacted their own laws in an effort to secure some measure

of union responsibility for breaches of contract. Four States—Minnesota, Colorado, Wisconsin, and California—have thus far enacted such laws and, so far as can be learned, no-strike clauses have been continued about as before.

In any event, it is certainly a point to be bargained over and any union with the status of "representative" under the NLRA which has bargained in good faith with an employer should have no reluctance in including a no-strike clause if it intends to live up to the terms of the contract. The improvement that would result in the stability of industrial relations is, of course, obvious.

Joint Study Committee on Labor Relations

The analysis infra sets forth the objectives and proposed functions of this committee.

A detailed analysis of the provisions seriatim, follows:

TITLE I—AMENDMENTS OF NATIONAL LABOR RELATIONS ACT

The changes proposed by this title in the present Wagner Act may be summarized as follows:

Section 1: The only substantial change to this section is the insertion of a new paragraph before the final one. Amendments to section 8 creating remedies for unfair labor practices by labor organizations made necessary the broadening of the general statement of policy.

DEFINITIONS

Section 2: This section in the present act defines 11 terms. In the committee bill seven of such definitions remain unchanged. Only those definitions which have been modified or added are considered below.

(1) "Person": The meaning of this term has been amended to make it clear that it includes labor organizations and their agents. Because of the inclusion of unfair labor practices by unions in section 8, as amended, and the use of the word "person" in section 10, this definition required clarification.

(2) "Employer": The meaning of this term has been amended by the insertion of language which makes it clear that the Board may deem an employer association to be an employer, provided the individual employers in such an association have voluntarily delegated their authority to bargain collectively with their employees to such an organization. Under current decisions of the National Labor Relations Board the Board itself has reached such a construction, relying on the phase in the existing statute "acting in the interest of an employer." Although this interpretation has been challenged (see *Matter of Ship Owners Association*, 7 N. L. R. B. 1002; 103 F. (2d) 993; 308 U. S. 401) the Supreme Court has never passed squarely on the question. Consequently, this amendment merely approves of those Board interpretations. By the inclusion of the word "voluntarily," however, the bill makes it clear that the Board cannot treat an employer association as an employer insofar as any individual employer has failed to delegate the association to act as his bargaining representative or has withdrawn authority from it to act in that capacity.

(3) "Employee": The changes in the definition of this term are as follows:

CERTIFICATE OF SERVICE

I, Henry Leung, hereby certify that on September 13, 2018 before 11:59 PM Eastern Time, I e-filed DYCORA TRANSITIONAL HEALTH – CLOVIS LLC's *REQUEST FOR REVIEW OF DECISION TO NOT CERTIFY DECERTIFICATION ELECTION RESULTS AND TO DISMISS DECERTIFICATION PETITION* and the *APPENDIX TO THE SAME* on the NLRB's e-filing system at www.nlrb.gov and served a copy of the foregoing via email upon the following:

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