

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 12**

HOSPITAL DAMAS, INC.

Employer.

and

UNION GENERAL DE TRABAJADORES,
LOCAL 1199, SERVICE EMPLOYEES
INTERNATIONAL UNION (SEIU)

Cases 12-RC-217725
12-RC-217728
12-RC-217749

Petitioner

and

UNIDAD LABORAL DE ENFERMERAS (OS)
Y EMPLEADOS DE LA SALUD (ULEES)

Intervenor

REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION

Hospital Damas, Inc. (the Employer) is engaged in the operation of an acute care hospital providing medical services in Ponce, Puerto Rico.¹ On April 3, 2018, Union General de Trabajadores, Local 1199, Service Employees International Union (SEIU) (Petitioner)² filed petitions with the National Labor Relation Board (the Board) under Section 9(c) of the National Labor Relations Act (the Act) seeking to represent a unit of the Employer's janitorial employees in Case 12-RC-217725, a unit of the Employer's dietary employees in Case 12-RC-217728, and

¹ The parties stipulated, and I find, that the Employer is a Puerto Rico corporation with a place of business in Ponce, Puerto Rico, and engaged in the operation of an acute hospital providing medical services; and that during the last year, a period representative of its operations annually, the Employer had gross revenues in excess of \$250,000 and purchased and received goods and materials valued in excess of \$50,000 directly from points outside the Commonwealth of Puerto Rico. The parties further stipulated, and I find, that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and is subject to the jurisdiction of the Board.

² The parties stipulated, and I find, the Petitioner is a labor organization within the meaning of Section 2(5) of the National Labor Relations Act.

a unit of the Employer's maintenance employees in Case 12-RC-217749. The petitions were consolidated for hearing. Unidad Laboral de Enfermeras(Os) y Empleados de la Salud (ULEES) (the Intervenor)³ currently represents the employees in the three petitioned-for units.

The parties stipulated, and I find, that each of the following units is an appropriate unit within the meaning of Section 9(b) of the Act:

Case 12-RC-217725

All full time and regular part-time janitorial employees employed by the Employer at its hospital located in Ponce, Puerto Rico, excluding all other employees, guards, and supervisors as defined in the Act.

Case 12-RC-217728⁴

All full time and regular part-time cooks, cook helpers, warehouse person, and food service employees employed by the Employer at its hospital located in Ponce, Puerto Rico, excluding all other employees, guards, and supervisors as defined in the Act.

Case 12-CA-217749⁵

All full-time and regular part-time Maintenance Department employees, including general mechanics, carpenters, boiler operators, drivers, electricians, general helpers, plumbers, cabinet makers, refrigeration technicians, maintenance helps, and masons employed by the Employer at its hospital located in Ponce, Puerto Rico, excluding all other employees, guards and supervisors under the Act.

A hearing was held before a hearing officer of the Board on April 16, 2018. The sole issue is whether there are collective-bargaining agreements between the Employer and the Intervenor that bar the processing of the three election petitions in this case. The Intervenor contends that contract bars exist because it reached a full and complete verbal agreement with the Employer on the terms of collective bargaining agreements in the three units on March 26, 2018, before the filing of the petitions herein on April 3, 2018. The Intervenor further contends

³ The parties stipulated, and I find, the Intervenor is a labor organization within the meaning of Section 2(5) of the National Labor Relations Act.

⁴ The parties further stipulated that work previously performed by cafeteria employees employed by the Employer was awarded to contractor South Food Services Corp, several years ago, and that currently the Employer does not employ anyone in the classification of cafeteria employee.

⁵ The parties further stipulated that work previously performed by bio-mechanical equipment and electronic technicians employed by the Employer has been awarded to contractor CIRASD; that work previously performed by laundry employees employed by the Employer has been awarded to contractor Golden Industrial Laundry; and that there are no longer any bio-mechanical equipment and electronic technicians or laundry employees employed by the Employer.

that under Puerto Rico law a verbal contract bar was formed, even though the Intervenor and Employer had only initialed certain contract provisions as of the time the petitions were filed. The Employer contends that no contract bar exists under current Board law because there were no written contracts at the time the petitions were filed; there was no formal language agreed to and there were no signatures or initials on any documents indicating that agreement on a contract had been reached. The Petitioner also contends that there are no contract bars regarding the three units because, as of the time of the hearing, there were no written or signed contracts between the Intervenor and the Employer.

I. FACTS

The Intervenor represents eight units of employees employed at the Employer's hospital in Ponce, Puerto Rico for purposes of collective-bargaining. There are separate units of graduate nurses (registered nurses); other professional employees; practical nurses and technicians; accountants and bookkeepers; office employees; janitorial employees; dietary employees; and maintenance department employees. The only units at issue in this case are the units of janitorial employees; dietary employees; and maintenance department employees. As of the time of the hearing, the most recent collective-bargaining agreements between the Employer and the Intervenor had been expired since 2006. Union representative Ariel Echevarria Martinez testified that during 2014, the Employer implemented a final contract proposal which became effective sometime in August 2014. Echeverria later clarified that the implemented terms of the final proposal was "what is currently in effect" with respect to employees in the various bargaining units. Neither the agreements that expired in 2006, nor the 2014 final proposal that was implemented were introduced in evidence.

Echevarria testified that the Intervenor and the Employer reached “full collective-bargaining agreements” of three year terms for all eight units on March 26, 2018,⁶ but acknowledged that no agreements were signed at that time. Echevarria did not explain what he meant by “full collective-bargaining agreements.” He further testified that on March 26 the Intervenor asked the Employer to:

ratify the agreement, to sign the agreement, exactly. The Employer agreed to present the draft of the agreement to the members of the units. After that the Employer submitted the agreements, the Union verified them, and we then advised the Employer of any errors that we had found in the agreement. At that time, we again repeated our request for the agreements to be signed.

According to Echevarria, on April 2 and April 3, the Intervenor met with employees and advised them that agreements had been reached, and the Intervenor circulated flyers among employees with the same information. Echevarria testified that although contract ratification was not required, and the employees ratified the agreements reached by the Intervenor and Employer on April 2 and 3.

Echevarria then testified that on April 2, the Intervenor asked the Employer to sign “the agreement” and, apparently in response to the Employer’s statement that it might subcontract the work of the janitorial employees, the Intervenor informed the Employer that whatever the Employer’s intentions were with respect to the janitorial employees unit, the agreement could still be signed.⁷

Echevarria further testified that on April 3, the Intervenor again requested that the Employer sign the agreements, referring to agreements for all eight units, and the Employer told the Intervenor that it was going to consult with its attorneys to determine whether it was going to

⁶ All dates hereafter are in 2018 unless otherwise stated.

⁷ It is apparent from an e-mail in evidence, discussed *infra*, that the Employer had informed that Intervenor that it was considering subcontracting the janitorial employees’ work, and the Intervenor replied that nevertheless, it expected the Employer to sign a collective-bargaining agreement covering the janitorial employees unit.

sign the collective-bargaining agreements. Echevarria testified that the Intervenor then sent some e-mails to the Employer reiterating the request that the Employer sign the collective-bargaining agreements.

There is no probative evidence that the Employer or the Intervenor prepared final drafts of collective-bargaining agreements for either the three petitioned-for units or any of the other five units before the petitions were filed on April 3. No written agreements or drafts of agreements, either unsigned or signed, were offered in evidence, and there is no testimony that any draft agreements existed at any time before the petitions herein were filed on April 3.

On April 10 and 11, the Employer and Intervenor exchanged e-mails concerning the execution of collective-bargaining agreements.⁸ Thus, on April 10, one week after the petitions herein were filed, Echevarria sent an email to the Employer's Director of Human Resources, Gilberto Cuevas, stating that the collective-bargaining agreement covering the unit of Graduate Nurses [i.e. Registered Nurses] had been executed on April 6, and that the parties had agreed that collective-bargaining agreements for the remaining units would be signed on or before April 11, and would be in effect from April 5, 2018 through April 4, 2021. Echevarria stated that the agreements for the units of professional employees other than graduate nurses, practical nurses and technicians, accountants and bookkeepers, and office employees were not to be signed until April 11, because the Employer had not yet submitted drafts to the Intervenor for review, and the Employer had informed the Intervenor that drafts would be ready for signature as of April 11.

⁸ The e-mails introduced in evidence at the hearing were in Spanish, their original form. The record was later supplemented with English translations which were submitted by Counsel for the Employer with a Motion Submitting Translation filed on April 17, certifying their accuracy. On April 19, Counsel for the Intervenor filed a Motion to Correct Translations of Hospital, seeking very minor corrections to one of the e-mails. The corrections do not appear on the Spanish original, and, in any event, are not relevant to the outcome of this matter. The Employer's motion is granted.

On April 11, at 5:41 a.m., Cuevas responded to Echevarria by e-mail, stating that agreements for the office workers unit, accounting unit, practical [Licensed Practical Nurses] and technicians unit, and professional unit were pending signature. Cuevas further stated:

The agreements for Janitorial, Diet and Maintenance will not be signed as explained to you and [Union representative] Mr. Alveiro last Monday April 2, 2018. This determination responds to the petition for representation for these units filed by UGT.

We are working to be able to carry out the signing of the four pending contracts.

Cuevas sent another e-mail to Echevarria on April 11 at 8:54 a.m., stating:

I want to clarify that the date that I notified that we received the representation petitions from UGT was Tuesday April 3, 2018. On April 2, 2018 was the date that I informed you that the Hospital was interested in subcontracting the janitorial services.

That due to this intention we should analyze if it was logical to enter into signing an agreement for this unit.

Echevarria testified that the parties had initialed some articles, but not all articles, of collective bargaining agreements or each of the three petitioned-for units. No initialed portions of agreements for the petitioned-for units were produced at the hearing. He acknowledged that there were not complete collective-bargaining agreements prepared for any of the three petitioned-for units. According to Echevarria the agreements would have been signed, if the Employer had not refused to sign them, but there is no evidence that would have occurred before the petitions were filed, because there is no evidence that any written agreements had been prepared as of April 3. In addition, the evidence indicates that no agreements were signed until April 6, when an agreement covering the RNs unit was executed, and that the agreements covering the five units that are not the subject of this proceeding did not take effect until April 5.

II. ANALYSIS

Based upon the record testimony, documentary evidence, and application of the legal standards discussed below, I find there is no contract barring the processing of the petitions filed herein. Accordingly, I have directed an election in each of the petitioned-for units.

The Board has long held that the party asserting that a contract operates as a bar bears the burden of proving that the contract was signed by both parties before a petition was filed. *Road & Rail Services, Inc.*, 344 NLRB 388, 389 (2005); *Roosevelt Memorial Park, Inc.*, 187 NLRB 517 (1970), *Appalachian Shale Products Co.*, 121 NLRB 1160, 1162 (1958). An oral agreement does not serve as a contract bar. *Appalachian Shale*, 121 NLRB at 1161.

A contract does not need to be a formal and final document to bar an election, but instead can be comprised of a group of informal documents, such as a written proposal and a written acceptance, or initialed tentative agreements, provided they lay out substantial terms and conditions of employment and are signed. *Waste Management of Maryland*, 338 NLRB 1002, 1002-1003 (2003); *B.C. Acquisitions, Inc., d/b/a Branch Cheese*, 307 NLRB 239, 239 (1992). Before finding that such informal documents bar an election, however, the Board must be satisfied that the documents “identif[y] the totality of the parties’ agreement and show[] that their contract negotiations were concluded,” because the “single indispensable thread running through the Board’s decisions on contract bar is that the documents relied on as manifesting the parties’ agreement...must leave no doubt that they amount to an offer and an acceptance of those terms through the parties’ affixing of their signatures.” *Seton Medical Center*, 317 NLRB 87, 87 (1995), citing *USM Corp.*, 256 NLRB 996 (1981).

Although the Intervenor asserts that there was an oral agreement as of April 3, the date the petitions were filed, there is no evidence that either a complete collective-bargaining

agreement or any informal documents constituting a contract existed or had been signed before the petitions were filed.⁹ Accordingly, I find that there is insufficient evidence to establish a contract bar as to any of the three petitioned-for units.

1. CONCLUSIONS AND FINDINGS

Based upon the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

A. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

B. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction therein.

C. The Petitioner is a labor organization within the meaning of Section 2(5) of the Act.

D. The Intervenor is a labor organization within the meaning of Section 2(5) of the Act.

E. 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.

F. The following employees of the Employer constitute units appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

Case 12-RC-217725 – Unit A

All full time and regular part-time janitorial employees employed by the Employer at its hospital located in Ponce, Puerto Rico, excluding all other employees, guards, and supervisors as defined in the Act.

⁹ As noted above, it is undisputed that the Employer did not execute contracts for any of the eight units until after the petitions were filed on April 3, 2018. According to Intervenor representative Echevarria's April 10, e-mail, the first contract the Employer and Intervenor signed in 2018 was the contract covering graduate nurses, which was not signed until April 6.

Case 12-RC-217728 – Unit B

All full time and regular part-time cooks, cook helpers, warehouse persons, and food service employees employed by the Employer at its hospital located in Ponce, Puerto Rico, excluding all other employees, guards, and supervisors as defined in the Act.

Case 12-CA-217749 – Unit C

All full-time and regular part-time Maintenance Department employees, including general mechanics, carpenters, boiler operators, drivers, electricians, general helpers, plumbers, cabinet makers, refrigeration technicians, maintenance helpers, and masons employed by the Employer at its hospital located in Ponce, Puerto Rico, excluding all other employees, guards and supervisors under the Act.

IV. DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the units found appropriate above. Employees will vote whether they wish to be represented for purposes of collective bargaining by Union General de Trabajadores, Local 1199, Service Employees International Union (SEIU), by Unidad Laboral de Enfermeras (os) y Empleados de la Salud (ULEES), or by neither labor organization.

A. Election Details

The election will be conducted by manual ballot on November 5, 2018, from 6:00 a.m. to 8:00 a.m. and from 2:00 p.m. to 4:00 p.m., at the Employer's facility, in the Carolina Fernand Room, 2213 Ponce Bypass, Ponce, Puerto Rico.

B. Voting Eligibility

Eligible to vote are those in the unit who were employed during the payroll period ending October 6, 2018, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off.

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. Employees in the military services of the United States may vote if they appear in person at the polls.

Also, eligible to vote using the Board's challenged ballot procedure are those individuals employed in the classification whose eligibility remains unresolved as specified above and in the Notice of Election.

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(1) of the Board's Rules and Regulations, the Employer 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.

To be timely filed and served, the list must be *received* by the Regional Director and the parties by **October 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.nlr.gov/what-we-do/conduct-elections/representation-case-ruleseffective-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.nlr.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.

V. 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.nlr.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: October 15, 2018.

A handwritten signature in black ink that reads "David Cohen". The signature is written in a cursive style with a horizontal line underneath it.

David Cohen, Regional Director
National Labor Relations Board, Region 12
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