

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD - REGION 3

1199 SEIU UNITED HEALTHCARE WORKERS
EAST,

REQUEST FOR REVIEW

and

Index No.: 03-RM-250927

NCRNC, LLC d/b/a/ NORTHEAST CENTER FOR
REHABILITATION AND BRAIN INJURY,

1199 SEIU UNITED HEALTHCARE WORKERS
EAST,

and

Index No.: 03-RM-250938

C FARE, LLC,

NCRNC, LLC d/b/a NORTHEAST CENTER FOR REHABILITATION AND BRAIN INJURY and C FARE, LLC request pursuant to Section 102.67(c) (d) and (e) of the Board's Rules and Regulations that the Board reviews the decision and order of the Regional Director dismissing their RM petitions in the above captioned matter. A copy of the Decision is attached hereto as Exhibit "A".

REASON FOR REVIEW

Review should be granted pursuant to Section 102.67(d)(1)(i) as there is no Board law which directly addresses the issue of when an RM petition may be filed based on the demand for recognition made in a withdrawn RC petition coupled with current union activity and statements. It is clear the Courts have found a withdrawn RC petition to be a sufficient basis for the Region to order an election. *see Local 130, IUE v. McCulloch*, 1964 U.S. Dist. LEXIS 763 (D. Columbia

1964) (“there is nothing in the National Labor Relations Act which precludes the Board from conducting a representation election on an employer's petition filed under Section 9(c)(1)(B) of the Act where, as in the instant case, a union has made a claim to be recognized as the collective bargaining representative of employees and subsequently withdrawn that claim.”) But the Board has never directly addressed the issue.

As NCRNC, LLC pointed out to the Region, this issue is one which affects the Board’s twin goals of promoting labor relations stability and giving effect to employees’ wishes concerning representation. *Johnson Controls, Inc.*, 2019 NLRB LEXIS 384, 25-26 (July 3, 2019). As such, it is an important issue for the Board to consider.

STATEMENT OF THE INSTANT CASE

Northeast Center is a rehabilitation and long term care facility. C Fare is owned and operated by one of the members of Northeast Center and provides dietary services to Northeast Center.

1199 SEIU Healthcare Workers East (“the Union”) initially filed a petition for election seeking to organize “[a]ll Full-time and regular part-time, including per diem, non-professional employees employed by the Employer.” *See Petition 03-RC-250330*. After the Union filed its initial petition seeking to organize employees of the Employers, the Acting Resident Officer David Turner, Jr. held a conference with the parties’ counsel to clarify the unit sought. At that time, counsel for the Union explained that the Union was seeking a “wall-to-wall unit.”

In subsequent filings and conversations, counsel for the Employers explained that a wall-to-wall unit would include Respiratory Therapists, Receptionists, Ward Clerks, and the jointly employed dietary employees who share common ownership, human resources and supervision.

Thereafter, the Employers were advised by the Board that the Union was withdrawing its petition. No reason for the withdrawal was given. The Region issued an order approving withdrawal.

From the Employers' perspective, however, nothing changed. Employees continued to indicate the union had filed for an election and that they were seeking to have the union recognized as their representative. Since the date of withdrawal, there were text messages to employees from the union regarding an election. The Union passed out campaign literature which states "We filed for your 1199 election". Union officials continued to pass out election campaign literature, and continued to campaign as if the petition were never withdrawn. All of the evidence points to the fact that the Union demanded recognition with its filing of a petition and continued to seek recognition as the bargaining representative of the employees.

Consequently, The Employers filed joint RM petitions seeking an election consistent with the Union's previously withdrawn petition. Namely, the Employers sought a unit of all non-professional employees:

All regular full-time and part-time employees in the following job categories and all per diem employees in the following job categories who meet the Board's standard formula for per diem employees: Activities Aides, Community Support Specialists, Central Supply clerks, CNAs, LPNs, LPN Educator, Maintenance Aides, Nursing Secretary, Receptionists, PT Assistants, Respiratory Aides, Respiratory Therapists, Program Specialists, Ward Clerks, and all employees jointly employed with C Fare LLC: Cooks, Dietary Aides, Dietary Shifts, Dietary Techs, Cafe Aides. Excluding all other job classifications of employees, supervisors, guards, temporary employees and per diem employees who do not meet the Board's standard formula.

Instead of holding an election, the Board issued an Order to Show Cause and subsequently dismissed the petitions.

REQUEST FOR REVIEW

The Board should grant review to resolve the question of when a previously withdrawn RC petition can support an RM petition being filed. Because it is likely the Union will file a subsequent RC petition, the Board should also grant a stay of any election at Northeast Center involving the classifications in the Employers' petitions until this matter is resolved.

The Employers request the opportunity to have thirty (30) days to brief the Board on the issues raised herein.

Dated: November ²²~~19~~, 2019
Binghamton, New York



Dawn J. Lanouette, Esq.
HINMAN, HOWARD & KATTELL, LLP
Attorneys for Employers/Petitioners NCRNC,
LLC d/b/a Northeast Center for Rehabilitation
and Brain Injury and C Fare LLC
Office & Post Office Address
80 Exchange Street
P.O. Box 5250
Binghamton, NY 13902-5250
[Telephone: (607) 723-5341]
dlanouette@hhk.com

EXHIBIT "A"

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 3

NCRNC, LLC D/B/A NORTHEAST CENTER FOR
REHABILITATION AND BRAIN INJURY

Employer/Petitioner

and

Case 03-RM-250927

1199SEIU HEALTHCARE WORKERS EAST

Union

AFFIDAVIT OF SERVICE OF Decision and Order Dismissing Petitions

I, the undersigned employee of the National Labor Relations Board, being duly sworn, say that on November 15, 2019, I served the above-entitled document(s) by **regular mail** upon the following persons, addressed to them at the following addresses:

Dawn J. Lanouette, Esq.
Hinman, Howard Kattell LLP
80 Exchange Street
Binghamton, NY 13901

Patrick Weir, Administrator
NCRNC, LLC d/b/a Northeast Center for
Rehabilitation and Brain Injury
300 Grant Ave.
Lake Katrine, NY 12449

William S. Massey, Esq.
Gladstein, Reif & Meginniss, LLP
817 Broadway, 6th Floor
Floor 6
New York, NY 10003-4709

1199 SEIU Healthcare Workers East
155 Washington Ave.
Lobby 1
Albany, NY 12210

November 15, 2019

Date

Viola Mathis, Designated Agent of NLRB

Name

/s/ Viola Mathis

Signature

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 3

NCRNC, LLC D/B/A NORTHEAST CENTER FOR
REHABILITATION AND BRAIN INJURY

Employer/Petitioner

and

Case 3-RM-250927

1199 SEIU UNITED HEALTHCARE
WORKERS EAST

Union

C FARE LLC

Employer/Petitioner

and

Case 3-RM-250938

1199 SEIU UNITED HEALTHCARE
WORKERS EAST

Union

DECISION AND ORDER DISMISSING PETITIONS

On November 4, 2019,¹ I issued an Order to Show Cause in the above matters where the petitions present the issue of whether the Union's filing of a petition in Case 3-RC-250330 and related organizing activities constitutes a present demand for recognition to support either RM petition and why the continued processing of either RM petition is appropriate given that the Union's RC petition did not seek an election in either of the units claimed to be appropriate.

The Employers/Petitioners and the Union timely submitted responses to the Order to Show Cause. The Employers/Petitioners argue that the Union's filing of the prior RC petition along with asserted organizing activities among the employees at issue satisfies the Board's requirement that the Union has made a present demand for recognition in the units petitioned for in these RM petitions in accordance with Section 9(c)(1)(B) of the Act. The Union argues that these RM petitions should be dismissed because it did not make a demand for recognition in either of the units claimed to be appropriate in these matters. As discussed below, I find that the Union did not make a present demand for recognition sought in either of the units sought by the Employers/Petitioners and I am dismissing the instant petitions.

¹ All dates are 2019 unless otherwise indicated.

Background:

Employer/Petitioner NCRNC, LLC operates a long term care facility in Lake Katrine, New York. Employer/Petitioner C Fare LLC provides dietary services to Employer/Petitioner NCRNC, LLC at the Lake Katrine facility.

On October 22, the Union filed a petition in Case 3-RC-250330 seeking a unit of “all full-time and regular part-time, including per-diem, non-professional employees” of Northeast Center for Rehabilitation and Brain Injury. The Union’s petition did not seek employees of C Fare LLC, the employees of any joint employer, or explicitly any dietary employees. Prior to any stipulated election agreement or hearing, I approved the Union’s request to withdraw its petition without prejudice by Order dated October 30.

On October 31, Employer/Petitioner NCRNC filed Case 3-RM-250927 seeking an election in a unit consisting of:

All regular full-time and part-time employees in the following job categories and all per diem employees in the following job categories who meet the Board's standard formula for per diem employees: Activities Aides, Community Support Specialists, Central Supply clerks, CNAs, LPNs, LPN Educator, Maintenance Aides, Nursing Secretary, Receptionists, PT Assistants, Respiratory Aides, Respiratory Therapists, Program Specialists, Ward Clerks, and all employees jointly employed with C Fare LLC: Cooks, Dietary Aides, Dietary Shifts, Dietary Techs, Café Aides. Excluding all other job classifications of employees, supervisors, guards, temporary employees and per diem employees who do not meet the Board's standard formula.

On October 31, Employer/Petitioner C Fare LLC filed Case 3-RM-250938 seeking an election in a unit consisting of:

All employees as jointly employed with NCRNC LLC; but excluding Director of Dietary.

Employers/Petitioners argue that they are a joint employer of dietary employees.² Employers/Petitioners argue that during the parties discussions about the Union’s petitioned for unit in the RC case, the Union’s representative made statements seeking a “wall-to-wall” unit in the context of discussing the Employers/Petitioners’ claims that any unit should include jointly employed dietary employees of Employer/Petitioner C Fare LLC. Additionally, Employers/Petitioners argue that the Union’s ongoing organizing efforts among various employees at issue constitutes additional evidence that

² Employers/Petitioners do not appear to make a joint employer claim with respect to non-dietary employees. Even assuming that Employers/Petitioners are joint employers with respect to the dietary employees, I note that the bargaining units sought in these RM petitions do not seem to be identical. In this regard, the unit sought by Employer/Petitioner NCRNC, LLC appears to be much broader in scope than the much narrower unit sought by Employer/Petitioner C Fare LLC of only dietary employees jointly employed with Employer/Petitioner NCRNC, LLC. However, as discussed below, this issue is of no consequence based on my finding that the Union never made a present demand for recognition in either units sought by Employers/Petitioners.

the Union has made a present demand for recognition in the units found to be appropriate in the instant petitions.

The Union denies that it has made a present demand for recognition or asserted majority status in the units at issue in these petitions. Moreover, the Union argues that the petitions should be dismissed since the Union's RC petition did not seek an election in the units sought by the Employers/Petitioners in the instant RM petitions.

Discussion:

A finding of a representation question is predicated on a union claim of representative status. It is settled that where a union does not seek to represent the employees in the unit in which the employer seeks an election, no question concerning representation exists. See *United Hospitals, Inc.*, 249 NLRB 562 (1980); *Sonic Knitting Industries*, 228 NLRB 1319 (1977); and *Woolwich, Inc.*, 185 NLRB 783 (1970). As a preliminary matter, without more, a union's mere filing of a representation petition does not trigger a present demand for recognition that would privilege an employer to then file its own RM petition and Employers/Petitioners cite no case holding otherwise. To the contrary, a union which files an RC petition with the requisite minimum 30% showing of interest has only established that there is a question concerning representation that may trigger a Board election – not that it has made a present demand for recognition or claim of majority status within the meaning of Section 9(c)(1)(B). Moreover, even assuming that the filing of an RC petition could constitute a claim of majority status, it is clear in these matters that the Union's petition never sought jointly employed employees, never sought employees of Employer/Petitioner C Fare LLC, and never explicitly sought dietary employees. It is immaterial that the parties may have discussed the inclusion of dietary employees and/or possibly jointly employed employees in the course of exploring a stipulated election agreement in connection with the RC petition where these kinds of discussions fall well short of a demand for recognition or claim of majority status in the petitioned-for units in the instant matters. Finally, the Union's organizing activities alone are similarly of no consequence where the collection of authorization cards, distribution of leaflets, and encouragement of employees to support organization are entirely distinct from a direct or indirect claim of majority status or demand for recognition. There is no support for the concept that an employer may attempt to short circuit employees' Section 7 activities in this regard by filing its own petition on its own terms and timeline absent a demand. "The mere fact that a union is engaged in activities which it hopes will enable it eventually to obtain recognition by the employer is not evidence of a present demand for recognition such as would support the processing of an employer petition. As the Board has noted, all union organizational activity, including such common activities as soliciting authorization cards, meeting employees and appointing in-plant committees, has as its ultimate goal the union's recognition as majority representative." See *The New Otani Hotel & Garden*, 331 NLRB 1078, 1079 (2000).

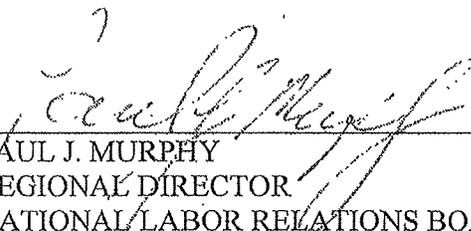
For the foregoing reasons, **IT IS HEREBY ORDERED THAT** the petitions in these matters are dismissed.

RIGHT TO REQUEST REVIEW

Pursuant to Section 102.67(c) of the Board's Rules and Regulations, you may obtain a review of this action by filing a request with the Executive Secretary of the National Labor Relations Board. The request for review must conform to the requirements of Section 102.67(d) and (e) of the Board's Rules and Regulations and must be filed November 29, 2019.

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.

Dated: November 15, 2019



PAUL J. MURPHY
REGIONAL DIRECTOR
NATIONAL LABOR RELATIONS BOARD
REGION-03
130 S Elmwood Ave Ste 630
Buffalo, NY 14202-2465