

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 9**

**NEW LEBANON SNF, LLC D/B/A SKLD
NEW LEBANON ^{1/}**

Employer

and

Case 09-RD-250763

PEGGY SUE RASH

Petitioner

and

**SERVICE EMPLOYEES INTERNATIONAL
UNION (SEIU), DISTRICT 1199 ^{2/}**

Union

DECISION AND ORDER

The Petitioner filed a petition seeking to decertify Service Employees International Union (SEIU), District 1199 as the bargaining representative of a unit of certain employees employed by New Lebanon SNF, LLC d/b/a SKLD New Lebanon (the Employer). At the hearing, the parties stipulated that the following unit is an appropriate unit (Unit) within the meaning of Section 9(b) of the Act:

All regular full-time, regular part-time and casual employees (formerly referred to as short hour, per diem, and casual/on-call employees) employed by the Employer at its 101 Mills Place, New Lebanon, Ohio facility, including State Tested Nursing Assistants (STNAs), Nursing Assistants, Rehabilitation Aides, Restorative Aides, Central Supply Clerks, Dietary Aides, Cooks, Housekeeping Aides, Floor care employees, Laundry Aides, Activity Assistants and Maintenance assistant employees and Receptionist Connie McMurray but excluding Registered Nurses (RN's), Licensed Practical Nurses (LPN's), confidential employees, business and office clerical employees, Receptionists, Beauticians, Schedulers, guards and supervisors as defined in the National Labor Relations Act. ^{3/}

^{1/} The Employer's name appears as amended at the hearing.

^{2/} The Union's name appears as amended at the hearing.

^{3/} At the hearing, some evidence was adduced showing that certain individuals in the bargaining unit are jointly employed by the Employer and an uninvolved third-party. Because I am ordering that the petition be dismissed, I will not address that issue.

The Union argues that the petition should be dismissed due to the existence of a contract bar. Petitioner, along with the Employer, disputes that the instant petition is contract-barred, and instead argues that a decision should be rendered that directs a decertification election.

A hearing officer of the Board held a hearing in this matter in Cincinnati, Ohio on November 6, 2019.^{4/} The sole issue involved herein, and the only issue litigated at the hearing, is whether the instant petition is barred by contract. Prior to the close of the hearing, all parties had the opportunity to call witnesses, present evidence, and to orally argue their respective positions and submit a memorandum in support of their positions. Under Section 3(b) of the Act, I have the authority to hear and decide this matter on behalf of the National Labor Relations Board (Board). As explained below, based on the record and relevant Board law, I find that the petition is barred by the existence of a contract between the Employer and the Union. Therefore, the petition is dismissed.

I. FACTS

A. Brief Bargaining History:

On November 30, 2004, in Case 09-RC-17919, the Board certified District 1199, WV/KY/OH, the Health Care and Social Service Union, SEIU, AFL-CIO^{5/} as the exclusive-collective-bargaining representative of certain employees of Harborside Dayton Limited Partnership d/b/a Harborside Health Care-New Lebanon that worked at its location at 101 Mills Place, New Lebanon, Ohio.^{6/} The Union has been the exclusive collective-bargaining

^{4/} Hereinafter, all dates occurred in 2019, unless otherwise noted.

^{5/} The Union involved herein is referred to alternatively in the record as District 1199, WV/KY/OH, the Health Care and Social Service Union, SEIU, AFL-CIO; SEIU District 1199, WV/KY/OH, The Health Care and Social Service Union, CTW, CLC; SEIU District 1199, The Health Care and Social Service Union; and finally Service Employees International Union (SEIU), District 1199 (as stipulated by the parties at hearing). The record reflects, and there is no dispute, that notwithstanding the difference in name, the Union involved herein is one and the same as the Union that has been the exclusive collective-bargaining representative of the Unit since the Board's certification in 2004. Thus, "Union" as used herein refers to the Unit's collective bargaining representative, irrespective of its various name changes throughout the record.

^{6/} As will be discussed in more detail below, the Employer in the instant matter succeeded Harborside Dayton Limited Partnership d/b/a Harborside Health Care-New Lebanon ("predecessor") as the employing entity of the involved unit at the 101 Mills Place, New Lebanon, Ohio facility, the only facility involved herein. At various times throughout the record, the predecessor is referred to as Harborside Dayton Limited Partnership d/b/a Harborside Health Care-New Lebanon; New Lebanon-Harborside of Dayton Limited Partnership; and Genesis Healthcare d/b/a New-Lebanon Harborside of Dayton Limited Partnership. The record reflects that, despite the name changes, for purposes of this proceeding, we are dealing with the same employer that was involved in the Board's certification in Case 09-RC-17919. Thus, "predecessor" as used herein refers to the Unit's employer prior to the Employer's purchase of the facility.

representative of the Unit since that time. On July 1, 2015, the predecessor, along with five other employers, executed a collective-bargaining agreement with the Union. That collective-bargaining agreement governed the terms and conditions of employment of employees at six different facilities, including the Unit herein and, according to its terms, is effective from July 1, 2015 through June 30, 2020.

B. April 12, 2018 Memorandum of Change:

In early 2018, in an effort to attract new employees, the predecessor decided that it needed to raise STNA hiring wages rates in order to attract new employees to the facility.^{7/} Thus, the predecessor contacted the Union to inform the Union of its desire to increase STNA hiring wage rates at the New Lebanon, Ohio facility. Thereafter, predecessor Administrator Alyssa Carter, predecessor Director of Nursing Tina Jacks, and SEIU Organizer Gregory Haddox met at the New Lebanon facility to discuss the predecessor's proposal to increase STNA hiring wage rates. Predecessor Regional Director of Operations Nicole Capesso participated in the meeting by telephone. The meeting culminated in the Union presenting the predecessor's STNA wage rate increase proposal to the membership for a vote; the wage rate increases were approved by the membership.

The approved STNA hiring wage rate increases were formalized in a "Memorandum of Change" (MOC) executed by the predecessor and the Union. The MOC became effective April 12, 2018. According to the MOC itself, the new STNA hiring rates supplanted the hiring rates listed in Appendix A of the collective-bargaining agreement for the New Lebanon facility. Additionally, the MOC made clear that all other sections of the contractual wage provisions remained unchanged, as did the other terms and conditions of employment outlined in the collective-bargaining agreement. Essentially, the MOC only altered the STNA hiring wage rates at the New Lebanon facility—no other provisions in the collective-bargaining agreement were impacted.

C. New Lebanon SNF, LLC d/b/a SKLD New Lebanon purchases the New Lebanon facility:

On about August 12, the Employer purchased the 101 Mills Place, New Lebanon, Ohio facility from the predecessor. As part of the sale, the Employer executed a "Contract Assumption Agreement" (CAA) with the Union on that same date. According to the CAA, the Employer acknowledged that the predecessor and the Union were parties to the collective-bargaining agreement effective from July 1, 2015 through June 30, 2020. Additionally, the Employer specifically agreed "to be bound by the collective bargaining agreement between New Lebanon-Harborside of Dayton Limited Partnership and SEIU District 1199 in the same manner, and with the same duration, as the current collective-bargaining agreement between New Lebanon-Harborside of Dayton Limited Partnership and SEIU District 1199." The CAA did not

^{7/} According to Article 10—Wages—Section 1(B) of the collective-bargaining agreement, "[t]he company reserves the right to increase hiring rates."

alter any terms and conditions of employment for Unit employees. Since the Employer succeeded the predecessor and agreed to assume the 2015-2020 collective-bargaining agreement, the parties have been bound by its terms.

II. APPLICATION OF BOARD LAW TO THE FACTS OF THIS CASE

A. The Board's contract bar principles applicable to this case:

The contract bar doctrine was established to achieve "a finer balance between the statutory policies of stability in labor relations and the exercise of free choice in the selection or change in bargaining representatives." *Appalachian Shale Products Co.*, 121 NLRB 1160, 1161 (1958). In order to act as a bar to a petition, "a collective bargaining agreement must contain substantial terms and conditions of employment deemed sufficient to stabilize the bargaining relationship." *Madelaine Chocolate Novelties, Inc.* 333 NLRB 1312 (2001). The burden of proving that a contract bar exists is on the party asserting the doctrine. *Roosevelt Memorial Park, Inc.*, 187 NLRB 517 (1970). For contract bar purposes, a contract of definite duration that is reduced to writing and signed by both parties will act as a bar for up to 3 years of its term. See *General Cable Corp.*, 139 NLRB 1123 (1962). Further, an assumed contract may act as a bar, but the Board has required that, for contract-bar purposes, an assumption of a prior contract by a new employer must be express and in writing. *American Concrete Pipe of Hawaii, Inc.*, 128 NLRB 720 (1960); *M. V. Dominator*, 162 NLRB 1514, 1516 (1967); Also see, *UGL-UNICCO Service Company*, 357 NLRB 801, 808 (2011).

The Board has confronted situations where, following the expiration of the contract-bar period, but still within the effective dates of a longer-term contract, the parties to that longer-term agreement either amend that contract or agree to a new one. In *Southwestern Portland Cement Co.*, 126 NLRB 931, 933 (1960) the Board stated:

where, after the end of the first 2 years of a long-term contract and before the filing of a petition, the parties execute (1) a new agreement which embodies new terms and conditions, or incorporates by reference the terms and conditions of the long-term contract, or (2) a written amendment which expressly reaffirms the long-term agreement and indicates a clear intent on the part of the contracting parties to be bound for a specific period, such new agreement or amendment shall be effective as a contract bar for as much of its term as does not exceed 2 years.

In effect, such new agreement or amendment will effectively re-set the contract bar period. (The 2-year contract bar period discussed in *Southwestern Portland Cement Co.* has, of course, been extended by the Board to 3 years. *General Cable Corp.*, 139 NLRB 1123 (1962).)

The Board has also examined the implication of the parties agreeing to an amendment *before* the end of the contract bar period but during the life of a longer-term contract – referred to as a “premature extension.” In *Shen-Valley Meat Packers, Inc.*, 261 NLRB 958 (1982), the Board was confronted with whether a contractual amendment executed 2 years into a 5-year collective-bargaining agreement constituted a “premature extension” that effectively re-set the

contract bar period. The amendment in that case, as explained by the Board, “covered a broad range of significant terms and conditions of employment.” *Id.* at 959. ^{8/} Thus, ultimately, the Board in *Shen-Valley Meat Packers* found the amendment contractually barred the involved petition that was filed after the third anniversary of the agreement. *Id.* at 960.

On the other hand, in *Coca-Cola Enterprises, Inc.*, 352 NLRB 1044 (2008), the Board found that a memorandum of understanding executed during the effective dates of a longer-term contract did not re-set the contract bar period. There, the parties executed a memorandum of understanding amending a long-term agreement following the third-year anniversary of the agreement, but before a petition was filed. *Id.* at 1045. Important to the Board’s holding, it was “clear that the parties did not intend for the MOU to be a new agreement embodying new terms and conditions,” but instead the MOU was merely intended to be an addendum to the agreement. *Id.* The Board found that the “MOU [was] not an agreement with new terms and conditions of employment affecting *all* bargaining unit positions.” *Id.* (emphasis in original) Lastly, the Board found dispositive that the MOU did not incorporate by reference the long-term agreement, but merely “refer[ed] to the contract” and “merely affirm[ed] the parties’ rights and obligations under the long-term agreement.” *Id.* at 1045-1046.

B. Application of the Board’s contract bar doctrine to the MOC:

The Union argues that the MOC entered into by it and the predecessor, effective April 2018, operates as a contract bar. In so arguing, the Union likens the MOC to the amendment in *Shen-Valley Meat Packers* that the Board found re-set the contract bar to be effective through the remaining life of the long-term agreement (which was less than 3 years). In support of its argument, the Union notes that the MOC references the long-term collective-bargaining agreement; it expressly amends part of the collective-bargaining agreement; it is effective for a definite duration (through the termination date of the collective-bargaining agreement); and finally, the MOC reaffirms the parties’ intent to be bound by the remaining terms and conditions in the collective-bargaining agreement.

The Employer disagrees with the Union’s argument that the MOC is similar to the amendment in *Shen-Valley Meat Packers* that the Board found created a renewed contract bar. In the Employer’s view, the MOC cannot act as a contract bar because it is more analogous to the type of narrowly tailored wage reopeners that the Board in *Shen-Valley Meat Packers*, *supra*, said would not alter the duration of the long-term agreement or create a contract bar. The Employer notes that the MOC only altered wage rates for a single job classification and was made pursuant to an existing contractual provision that reserved to the Employer the right to increase hiring rates. For those reasons, among others, the Employer argues that the MOC does not bar the instant petition. I agree.

^{8/} The parties had also executed a series of other amendments that, as the Board found to be “essentially wage reopeners” based on the fact that they were narrowly limited in scope by the terms of the original contract. *Id.* at 959, fn. 7. The Board noted that such wage reopeners were of the same type that the Board had previously found did not alter the duration of a long-term agreement. *Id.*, citing *Penn-Keystone Realty Corporation*, 191 NLRB 800 (1971).

Given the predecessor's contractual right to increase wage rates, the predecessor triggered its right under the contract to reopen bargaining concerning STNA wage increases, culminating in the MOC. The MOC only altered STNA hiring wage rates (and gave corresponding increases to STNAs already employed by the predecessor); it did not affect the wage rates of any other classification covered by the collective-bargaining agreement. The MOC merely referred to the long-term collective-bargaining agreement; it did not incorporate it by reference. It is clear from the face of the MOC that the parties did not intend it to be a new agreement embodying new terms and conditions of employment, but merely an addendum to the collective-bargaining agreement, not unlike the MOU in *Coca-Cola Enterprises, Inc.* Accordingly, and based on the Board's rationale expressed in its discussion of the MOU at issue in *Coca-Cola Enterprises, Inc.* and the narrowly tailored wage reopeners in *Shen-Valley Meat Packers*, I find that the MOC herein did not reset any contract bar period and would not bar the instant petition.

C. Application of the Board's contract bar doctrine to the CAA:

Unlike the MOC, however, the CAA executed between the Employer and the Union on about August 12 *does* bar the instant petition. The Board has long recognized that a contract that is assumed by a successor employer can effectively operate as a contract bar. See, e.g., *UGL-UNICCO Service Company*, supra at 808. *Mid-Continent Carton Corp.*, 131 NLRB 423 (1961). Such assumption is need only be "express and in writing" and otherwise meet the criteria to constitute a contract bar. *Great Atlantic & Pacific Tea Co.*, 197 NLRB 922 (1972); *American Concrete Pipe of Hawaii, Inc.*, 128 NLRB 720 (1960); *M. V. Dominator*, 162 NLRB 1514, 1516 (1967).

Here, the CAA meets all criteria to bar the instant petition. The CAA is express, in writing, and signed by the parties, all of which was accomplished prior to the petition being filed. The contract assumption, by its very terms, assumes the in-force long term collective-bargaining agreement, which contains substantial terms and conditions of employment that serve to stabilize the bargaining relationship between the Employer and the Union. See *Appalachian Shale Products Co.*, 121 NLRB 1160, 1163 (1958). It encompasses the employees involved in the petition. See *Houck Transport Co.*, 130 NLRB 270 (1961). It is for a definite duration— from August 12, 2019 through the contract's June 30, 2020 expiration date— that does not exceed the 3-year limit on the doctrine or otherwise contravene the Board's policy assuring employees a free choice in the selection of representatives at reasonable periods of time. See *General Cable Corp.*, supra. Indeed, even if I were to find that the CAA did not act as a contract bar, the successor bar doctrine would preclude a petition for 6 months to a year from the time that the Employer succeeded the predecessor in August to allow time for the parties to negotiate an agreement. *UGL-UNICCO Service Company*, supra.

Based on the foregoing, I find that the petition is barred and hereby order that it be 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 by **December 5, 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 21, 2019



Patricia K. Nachand, Acting Regional Director
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