JD(SF)–03–09
Fresno, CA

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES SAN FRANCISCO BRANCH OFFICE

ST. AGNES MEDICAL CENTER
Employer

and Case 32-RC-5552

CALIFORNIA NURSES ASSOCIATION/
NATIONAL NURSES ORGANIZING COMMITTEE
Petitioner

G. Roger King, Rebekah R. Bennett, and Kristine S. Tremble, Attys., of Jones Day, for the Employer.

M. Jane Lawhon, Atty., California Nurses Association, for the Petitioner.

RECOMMENDED DECISION ON PETITIONER'S OBJECTIONS

WILLIAM L. SCHMIDT, Administrative Law Judge. I conducted an objections hearing in this case at Fresno, California, over the course of four consecutive days beginning on November 17, 2008.[1] On May 29, Petitioner filed 29 objections to the election conducted under the supervision of the Regional Director for Region 32 on May 21 and 22 among the Employer's registered nurses at its Fresno facilities.[2] The Tally of Ballots served on the parties at the

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[1] Dates appearing below all refer to the 2008 calendar year.

[2] The petition was filed on March 17. The parties' Stipulated Election Agreement (SEA), approved by the Regional Director on April 2, describes the appropriate unit thusly:

> All full-time, part-time, and per diem Registered Nurses, employed by the Employer at the following facilities in Fresno, California: the main hospital facility located at 1303 East Herndon Avenue; at 1201 East Herndon Avenue, (sic) at St. Agnes Adult Day Center at 1163 East Warner Avenue; at Pre-admission Testing located at 1377 East Herndon Avenue; at the California Eye Institute at Saint Agnes, located at 1360 East Herndon Avenue; at the Wound/Hyperbaric Medical Program at 7202 North Millbrook Avenue; at Saint Agnes Cancer Center located at 7130 North Millbrook Avenue; at Saint Agnes Administrative Center at the Plaza located at 1111 East Spruce Avenue; at 1245 East Herndon Avenue, Department of Employee Health and Safety; and at the Holy Cross Center for Women, located at 421 "F" Street; excluding all other employees; office clerical employees; managerial employees; supervisors within the meaning of the Act including directors, managers, service line leaders, unit coordinators, and Administrative Directors ("House Supervisors"); senior recruiter, QI Clinical Analyst II, and QI Clinical Analyst III at 1201 East Herndon Avenue; confidential employees; guards; employees of outside registries; traveling nurses; and already represented employees.

conclusion of the election shows approximately 844 eligible voters in the unit, 452 ballots cast against representation, and 327 ballots cast for representation. The 13 challenged ballots were obviously insufficient to affect the election outcome.

Following an administrative investigation, the Regional Director issued his Report and Recommendations on Objections (Report) on October 14. Before the October 14 Report issued, Petitioner withdrew Objections Nos. 1, 14, 17, 21, 23 through 26, and 29. In the Report, the Regional Director ordered a hearing to resolve the issues raised by Objections Nos. 2 through 11, 13, 15, 16, 18, 19, 22, and 28.[3] The Regional Director recommended that Objections Nos. 12, 20, and 27 be overruled.[4] At the November hearing, Petitioner withdrew Objections Nos. 3, 6, 7, 9, 10, 11, 15, 18, 19, 22, and 28. That left Objections Nos. 2, 4, 5, 6, 8, 13, and 16 for consideration here.

The November hearing provided the parties with an ample opportunity to call and examine witnesses, to introduce relevant documentary evidence, and to argue procedural and substantive issues. Both parties submitted timely, post-hearing briefs. After carefully considering the hearing record[5] in light of my credibility determinations, and the arguments detailed in post-hearing briefs, I recommend that the Board sustain the Objection No. 2, and direct a second election.

Objection No. 2

> The Employer, through its supervisors and/or agents, concealed information from unit employees necessary for a free and fair election by failing and refusing to post the Notice of Election as required by NLRB Rules and Regulations.

Regional Director's Findings: In support of this objection, the Petitioner asserts that the Employer posted only three notices at the main hospital for the full 72-hour period prior to the election and posted no notices at three out of the seven satellite locations. The investigation of this objection raises material issues of fact or law that can best be resolved by a hearing.

My Findings, Analysis and Conclusion: Paragraph 3 of the parties' SEA provides that copies of the Notice of Election shall be posted by the Employer in conspicuous places and usual posting places easily accessible to the voters "at least three (3) full working days prior to 12:01 a.m. of the day of the election." This language in the SEA effectively incorporates the notice-posting requirement set out in Section 103.20 of the Board's Rules and Regulations that the Board first adopted in 1987. Thus, paragraph 7 of the stipulated election agreement form provides that post-election proceedings "shall conform with the Board's Rules and Regulations." Supplementary information published by the Board in the Federal Register a few months after

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[3] The notice of hearing accompanying the Report scheduled the hearing for October 23. Subsequently, the Regional Director rescheduled the hearing to November 17.

[4] Petitioner filed exceptions concerning the Regional Director's recommendation to overrule Objections Nos. 12 and 20. Those exceptions are currently pending before the Board.

[5] I note that index to transcript volume 3 (covering the Wednesday, November 19 session) incorrectly lumps the testimony of Thomas Morgan and Dan Camp together under Camp's name. The transcript index for that volume is corrected to reflect that Morgan's direct testimony commences at T309, his cross-examination begins at T321, the hearing officer's examination begins at T331, further cross-examination begins T337, and redirect examination begins at T345. Camp's direct testimony commences T346, cross-examination begins at T369, and the hearing officer's examination of Camp starts at T377.

adoption of the final rule clearly shows that the entirety of Section 103.20 applies to elections conducted under its standard election agreements such as the one involved here.[6] Thus, the Board stated that the Regional Offices were to send out a second written reminder of the notice-posting requirement under the rule by attaching a copy "to the Decision and Direction of Election or *the approved election agreement*" (emphasis mine) at the time these documents are mailed to the employer. Moreover, as cases cited below show, the Board has consistently applied all provisions of Section 103.20 to elections conducted under its stipulated election agreements.

Section 103.20 provides:

> (a) Employers shall post copies of the Board's official Notice of Election in conspicuous places at least 3 full working days prior to 12:01 a.m. of the day of the election. In elections involving mail ballots, the election shall be deemed to have commenced the day the ballots are deposited by the Regional Office in the mail. In all cases, the notices shall remain posted until the end of the election.
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> (b) The term "working day" shall mean an entire 24-hour period excluding Saturdays, Sundays, and holidays.
>
> (c) A party shall be estopped from objecting to nonposting of notices if it is responsible for the nonposting. An employer shall be conclusively deemed to have received copies of the election notice for posting unless it notifies the Regional Office at least 5 working days prior to the commencement of the election that it has not received copies of the election notice.
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> (d) Failure to post the election notices as required herein shall be grounds for setting aside the election whenever proper and timely objections are filed under the provisions of section 102.69(a).

In its Explanatory Statement accompanying the final publication of Section 103.20 in the Federal Register, the Board stated:

> The supplementary information accompanying the proposed rule recognized that the official Board Notice of Election contains important information with respect to employee rights under the Act and that such information should be conveyed to the employees far enough in advance of the election so that employees will be adequately apprised of their rights. By establishing a specific length of time for posting, the provision made clear to the parties their respective responsibilities and obligations with respect to notice posting and attempted to eliminate unnecessary and time-consuming litigation on this issue.

In addition, this Explanatory Statement detailed the proposals made in the comments received from various organizations and the public following the initial publication of the proposed notice-posting rule. One suggestion was that "the rule should affirmatively state that failure to post will be grounds for setting aside an election upon timely filing of an objection." That suggestion led the Board to add the language contained 103.20(d) of the final rule.

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[6] This supplementary information and the Explanatory Statement that appeared in the Federal Register (and referenced below) when the Board adopted the final version of Section 103.20 may be accessed under the heading "Explanatory Statements" in the electronic version that section found at the Rules and Regulations link on the Board's web site at www.nlrb.gov.

The Board's Explanatory Statement also addressed various concerns about the 3-day notice period. Interestly, given the setting involved here, the Board rejected suggestions by two nurses' associations that the 3-day period be increased to 5 or 7 days as health care employees "frequently do not work a normal 5-day week." In doing so, the Board said that it was reluctant to "complicate the rule" by establishing different posting periods for different industries.

According to the Explanatory Statement, the precise meaning of the 3-day posting requirement as initially proposed drew several comments and suggestions. One proposal asked that "the rule require a (posting) period of at least 72 consecutive hours during the preceding 3 working days." The Board rejected a posting rule describe by consecutive hours, because it would not "allow for Saturdays, Sundays, and holidays."

Other commentators found the language in the proposed rule providing for posting "3 full working days prior to the commencement of the election" confusing. Some thought it unclear as to whether requirement included the day of the election in the 3 days, and others thought it unclear as to exactly when the 3 days would begin, i.e., 12:01 a.m. on the first day or when the employees actually arrived at work. Those comments led the Board to rewrite Section 103.20(a) to "require that notices be posted at least 3 full working days prior to 12:01 a.m. of the day of the election." It also revised the "working days" definition in Section 103.20(b) to equate a full working day with an entire 24-hour period excluding Saturdays, Sundays, and holidays. These changes, the Board observed, would likely result in the official notice of election being posted for a period longer than three days.

For whatever reason, the Board has never adopted a general requirement that employers post notices in the work place describing employee rights under the National Labor Relations Act (Act). Instead, the Board's notice-posting requirements are situational, e.g., notices to employees or members used for remedial purposes in unfair labor practice cases, and the official election notices in representation cases mandated by Section 103.20. The official election notice (form NLRB 707) is designed for adaptation to fit each election situation. The election notice sets forth a description of the bargaining unit and voting eligibility details as well as the date, place, and hours of the election. The notice contains a reproduction of the ballot to be used at the election and a general summary of employee rights under the Act

The Posting at Saint Agnes Medical Center. In the SEA, the parties agreed that the first polling session would commence at 6 a.m. on Wednesday, May 21, followed by further separate sessions that day and the next. By letter dated April 4, the Regional Director sent the parties and their counsel a conformed copy of the SEA. That letter also included the text of Section 103.20. On May 7, the Regional Director sent the Employer a letter enclosing 40 copies of the Board's standard notice of election designed to inform eligible voters of the balloting details. This letter also enclosed another copy Section 103.20 and an affidavit of posting with instructions that it be provided to the Board agent assigned to conduct the election. No evidence shows that the Employer notified the Regional Office that it failed to receive the official notices of election in sufficient time for posting as required by Section 103.20 so the conclusive presumption of timely receipt under Section 103.20(c) applies here.

Around 10 a.m. on Friday May 16, Lou Bardi, a consultant for the Employer, asked Christopher Willis, the Employer's security manager, to identify locations for posting the official election notice that would be conspicuous and in "high traffic areas where employees would frequent." Willis, who has patrolled the Saint Agnes campus over the course of his 23-year work history there, first reviewed the locations that would meet that description Bardi provided and returned to the consultant to request seven notices for posting. He began posting the

notices around 10:30 a.m. on May 16 and finished "a little after" 2 p.m. that day.[7] Subsequently, he signed the affidavit of posting. In the affidavit, Willis stated that he posted the election notices at the following locations on May 16: (1) the parking garage; (2) the Main Employee Posting Case; (3) the West Information Posting Case; (4) the employee lounge at the Cancer Center; (5) the C.E.I (California Eye Institute) employee lounge; (6) the employee lounge for the Wound & Ostomy section; and (7) at the Holy Cross Center for Women. See Joint Exhibit 3.

On May 19, Willis posted more of the official notices of election.[8] He signed a letter stating that he had posted notices seven additional locations on that day. See Employer's Exhibit 35.

The Employer adduced evidence that it and the Petitioner distributed "multiple communications" that served to apprise the voting employees about the election times and locations. See e.g. Employer's Exhibits 26 through 32, which all show the date, time and location of the voting. Numerous other exhibits allude generally to the election on May 21 and 22. None of the non-official notices contain an objective statement of employee rights. On the contrary, several amount primarily to partisan campaign materials.

Argument, Analysis, and Conclusion. The Petitioner argues that the Employer failed to post the Board's official Notice of Election in a timely manner as provided under Rule 103.20 and that the posting on May 16 was inadequate. The Employer argues that my consideration of any posting timeliness issue is precluded because it was not identified in the Regional Director's Report. In any event, the Employer argues that by posting on May 16 it met the three-day posting requirement because Saint Agnes Medical Center is a "24 hours/day 7 days a week operation." In addition, the Employer argues that the subsequent posting of additional official notices on May 19 as well as numerous pieces of campaign literature distributed by the parties sufficed to give eligible employees adequate notice of the election.

The Employer's contention that I am precluded by the Regional Director's Report from considering a Section 103.20 timeliness question lacks merit. Objection No. 2 specifically states that the Employer failed and refused "to post the Notice of Election as required by NLRB Rules and Regulations," an unmistakable reference to Section 103.20 defining election notice posting timeliness. Hence, this is not a matter where it can be said that the Petitioner's objections failed to raise the timeliness question. Although the Regional Director's finding is puzzling in that there is no rule specifying a "72-hour" posting period under the Board's Rules and Regulations or any of the case law governing this issue and never has been, the Regional Director also

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[7] At the very end of his testimony, Willis said he posted the notices on May 15 or 16. I explicitly discredit any claim that any official election notice had been posted at any location throughout the Saint Agnes Medical Center facilities prior to 12:01 a.m. on May 16. Willis' contemporaneous affidavit of posting states that it the initial posting occurred on May 16. He forcefully, convincingly and credibly testified to that effect several times. Dan Camp, the Employer's senior vice president of human resources and support services, also testified that the posting occurred at least after 9 a.m. on May 16. T373. Bardi, who assigned the notice-posting project to Willis, was not called as a witness to establish that the initial posting occurred at any time prior to late morning on May 16 as Willis testified.

[8] The Employer asserts that it posted at additional locations on the May 19 postings in response to complaints by the Petitioner to the NLRB Regional Office. Oddly, the Petitioner's brief argues that no evidence supports a finding that it complained about the posting. I find the May 19 postings to be of no moment to the outcome here.

implicitly found a sufficient factual issue as to the posting of the election notices to merit a hearing. As found below, there is no credible evidence whatever that the official notices of election in this case were posted 3 full working days prior to 12:01 a.m. on the day of the election as Section 103.20 specifically requires.

Moreover, the employer's reliance on *Iowa Lamb*, 275 NLRB 183 (1985), and other similar cases in support of its preclusion argument is misplaced. Those cases, including *Iowa Lamb*, are invariably fact-peculiar. In *Iowa Lamb*, the Board rejected the hearing officer's finding that a particular employer's statement amounted to objectionable conduct. The Board explained that it did so because the "Petitioner did not allege that the statement was objectionable, the Regional Director did not identify it as an issue in his order directing hearing, and at the hearing the hearing officer did not inform the parties that he would consider it in his report." Hence, nothing in *Iowa Lamb* or like cases precludes a hearing officer from treating with an objection that, as here, has been alleged as objectionable by a party and referred to hearing by the Regional Director. Furthermore, the Employer thoroughly litigated the timeliness issue at this hearing.

The Employer's apparent assumption that Willis' posting of the notices of election on May 16 satisfied the Section 103.20(a) requirement that the official election notices be posted "3 full working days prior to 12:01 a.m. of the day of the election" because Saint Agnes Medical Center is a "24 hours/day 7 days a week operation" is not correct. Rule 103.20(b) specifically provides that the term "working day" means an entire 24-hour period that excludes Saturdays, Sundays, and holidays. Moreover, the Explanatory Statements specifically rejected proposals for different rules in different industries based on the work setting.

In addition, since adoption Section 103.20 the Board has specifically rejected an employer's similar contention about a seven-day workweek. In *Ruan Transport Corp*., 315 NLRB 592 (1994), conducted pursuant to a stipulated election agreement, the regional director, without conducting a hearing, ruled that a new election was required where the employer posted the official notices during the day on Thursday (immediately after receiving them in the mail from the regional director) for an election scheduled to commence on the following Monday. In exceptions to the Board, the employer argued that the director had denied it due process by failing to direct a hearing where it could have shown that it operated seven days a week so that Saturdays and Sundays could be counted as "working days" within the meaning of Section 103.20. The Board rejected that claim. In doing so, it noted that at the time it adopted the Rule 103.20 in 1987, it received comments suggesting that it apply different posting periods for industries in which employees did not work a normal 5-day workweek. However, as *Ruan* explains, the Board rejected that suggestion because it did not want to complicate a rule designed to eliminate litigation over the timeliness of the notice posting. Therefore, the *Ruan* Board held that it did not leave the question open for later consideration and litigation as to "whether Saturdays, Sundays, and holidays should be considered working days within the meaning of Section 103.20(b)." For that reason, the Board affirmed the regional director's conclusion that a new election was required.

Similarly, the Board has consistently rejected assertions made about substantial compliance with the requirements of Section 103.20 as well as claims that alternative notices about the election will suffice. In *Smith's Food and Drug*, 295 NLRB 983 (1989), a case involving an objection to an election also conducted under a stipulated election agreement, the Board signaled its intention to strictly enforce the Section 103.20 notice-posting rule . The Board's decision rejected the employer's claim that it had substantially complied with the notice-posting rule by posting the official election notice at three of four stores, and by posting an alternate notice at the fourth store where copies of the official notice were not received because

of an error in the store's mailing address furnished to the regional office. The decision emphasized the importance of the information about employee rights that appears in the official notice, the rule's purpose in apprising parties of their responsibilities and obligations, and the policy underlying the rule to discourage unnecessary and time-consuming litigation. The employer's arguments about its good faith and the number of employees who actually voted, the Board said, "do not constitute grounds for excusing compliance with the rule" whatever their merit under case law prior to the adoption of Section 103.20.[9] *Id*. at fn. 1.

In two subsequent cases, *Terrace Gardens Plaza, Inc*. 313 NLRB 571 (1993), and *Club Demonstration Services*, 317 NLRB 349 (1995), the majority of members participating emphasized the mandatory character of Section 103.20's provisions. The polling in both cases was by mail ballot. In *Terrace Gardens*, the employer's counsel objected to the regional director conducting an election because the official election notices had not been mailed in sufficient time to allow for a 3-day posting before ballots were mailed to the eligible voters. The regional director denied the employer's request for a postponement of the election essentially on the ground that the voters were mailed copies of the election notice "so that they would 'be properly apprised of their rights and the details of the election.'" After the petitioner won the election, the employer objected, among other things, to the regional director's conduct of the election without the requisite 3-day posting period. The Board panel (Chairman Stephens and member Raudabaugh, with member Devaney dissenting) sustained the employer's objection and directed a new election on the ground that "the Rule's provisions are mandatory in nature." Therefore, the panel majority said that even where the notices are directly mailed to the voters with their ballots, the regional office had a responsibility to timely furnish the election notice to the employer and the employer had an obligation to timely post the election notice. Citing *Smith Food and Drug, supra*, for the proposition that the Board would not inquire into the impact resulting from nonposting, the panel majority rejected the dissenting member's argument that the petitioner should have been certified because all eligible voters received and cast ballots.

The full Board (Members Stephens, Browning, Cohen, and Truesdale with Chairman Gould dissenting) decided the *Club Demonstration* case. Although the majority reiterated the mandatory nature of the posting requirement, it found an ambiguity in the estoppel provision (Section 103.20(c)) not previously considered. The hearing officer found the employer was estopped from objecting to the election on the ground that the employer did not receive the notices in sufficient time for posting as required by Rule 103.20(a). The employer's attorney had notified the regional office that the notices had not been received five full working days before the actual start of the election (found to be at 5:15 on the day in question) but had not so notified the regional office five full working days before 12:01 a.m. of the day the election was to start. Applying the requirement that the employer had a duty to notify the regional office five full working days before 12:01 a.m. on the day the election was to start, the hearing officer held that the employer was estopped from objecting to the election, which the petitioner had won.

When the Board considered the employer's exceptions to the hearing officer's ruling in *Club Demonstration*, it recognized the ambiguity in Section 103.120(c) as drafted. For that reason, the Board treated the employer's notice to the regional office as timely but held that in future cases involving petitions filed after the date of its decision, it would calculate the

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[9] Several cases cited in the Employer's brief pre-date the adoption of Section 103.20. Two that do not, *Cleveland Indians Baseball Co*., 333 NLRB 579 (2001), and *Penske Dedicated Logistics*, 320 NLRB 373 (1995), involved issues about the employees' lack of opportunity to observe the notices otherwise posted in a timely manner under Section 103.20. Accordingly, I find those two cases inapposite to the posting timeliness issue presented here.

103.20(c) notice period from 12:01 a.m. of the date the election is scheduled to commence. Chairman Gould dissented from the specific holding in the case on substantial compliance grounds. The majority, relying on *Smith Foods & Drug, supra*, rejected his substantial compliance argument and noted, in effect, that where Rule 103.20(c) estoppel does not apply, Rule 103.20(d) requires that that an election be set aside for noncompliance with the posting requirement when proper objections have been filed.

For the official election notices to have been timely posted in this case, they needed to be posted prior to 12:01 a.m. on Friday, May 16. Because the Employer did not post the first notices until several hours after 12:01 a.m., May 16, and as the requirements of Rule 103.20 (including Rule 103.20(d)) are mandatory, I recommend that Objection No. 2 be sustained and that the Board direct a second election. *International Baking Company*, 342 NLRB 136, fn 1 (2004) (notices that needed to be posted by 12:01 a.m. on a Wednesday most likely were not posted until sometime after 7 or 8 a.m. that day, *Id*. at 152). In view of this conclusion, I find it unnecessary to consider Petitioner's further argument under Objection No. 2 about the adequacy of the Employer's posting on May 16, or any of the other remaining objections. See *Gaetano & Associates*, 344 NLRB 531 (2005) (Board directed a new election based on an ALJ's finding that an employer's failure to post the official election notice as required by Section 103.20 warranted a new election, and that he, therefore, need not consider the remaining objections.)

Summary of Recommendations

Based on the foregoing discussion, I recommend that the Board sustain Petitioner's Objection 2 and direct a new election in this case.[10]

Dated, Washington, D.C. January 22, 2009

William L. Schmidt
Administrative Law Judge

[10] Pursuant to the provisions of Section 102.69 of the Board's Rules and Regulations, exceptions to this Report may be filed with the Board in Washington, DC within 14 days from the date of issuance of this Recommended Decision. Exceptions must be received by the Board in Washington by February 5, 2009. Immediately upon the filing of such exceptions, the party filing same shall serve a copy thereof upon the other parties and shall file a copy with the Regional Director. If no exceptions are filed thereto, the Board may adopt this Recommended Decision.