



United States Government

**NATIONAL LABOR RELATIONS BOARD
Region 3**

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January 29, 2009

Ronald W. Smith
1440 County Route 53
Oswego, NY 13126

**RE: PONTIAC NURSING HOME, LLC
Case 3-RD-1547**

Dear Mr. Smith:

The Region has carefully investigated and considered your petition seeking an election to decertify 1199 SEIU, United Healthcare Workers (the Union) as the representative of certain employees of Pontiac Nursing Home (the Employer).

Decision to Dismiss: Based on that investigation, I have concluded that further proceedings are unwarranted, and I am dismissing your petition for the following reasons:

The investigation of the petition disclosed that on or about October 30, 2008 the Employer and the Union reached agreement on the terms of a one-year collective-bargaining agreement with an effective date of September 2, 2008.¹ You filed your petition on November 14, two weeks after the agreement was reached between the Employer and the Union. A contract having a fixed term of more than three years operates as a bar for as much of its term as does not exceed three years. See General Cable Corp., 139 NLRB 1123 (1962).

The investigation revealed that the Employer conveyed a written offer of a collective-bargaining agreement to the Union with a letter signed by its attorney and chief spokesperson dated October 3. The Employer's offer consisted of 14 pages and included 17 articles, that included "substantial terms and conditions of employment sufficient to stabilize the parties' bargaining relationship." Appalachian Shale, 121 NLRB 1160 (1958).

On October 30, the Union's Vice President faxed to the Employer a signed letter in which he notified the Employer that the Union had accepted the Employer's October 3 offer. The exchange of the signed correspondence conveying the Employer's offer and the Union's acceptance of that offer is sufficient to satisfy the Board's requirement that a contract must be reduced to writing and executed before it can serve as a bar to an election. Georgia Purchasing, 230 NLRB 1174 (1977).

In order for a contract to serve as a bar it must also have a fixed duration, and contracts containing no discernible fixed duration shall not be considered as a bar for any period. Cind-R-Lite Co., 239 NLRB 1255 (1979), Coca-Cola Enterprises, Inc., 352 NLRB No.123 (2008). In this particular case, the proposed agreement that was tendered by the Employer on October 3 and accepted by the Union on October 30, reads as follows:

¹ All dates are in 2008 unless otherwise noted.

This Agreement shall be in full force and effect and shall be and remain operative and binding on the parties for the period commencing _____ and ending _____ (one year duration).

Thus, while the collective-bargaining agreement does not set out the effective date and termination date in the duration clause of the agreement, it clearly indicates that the agreement will have a one-year duration. In addition, the collective-bargaining agreement provides in Article 14 that all non-probationary employees will receive a wage increase effective September 1, 2008. A second provision, Article 13, states that all eligible employees will receive another paid personal day effective September 1, 2008.

An agreement of this type reasonably can be construed to have an effective date of September 1, 2008, with a one-year term expiring on August 31, 2009. See Cooper Tire and Rubber Company, 151 NLRB 509 (1970). In that case, the parties agreed to a contract with a duration clause that indicated that it was to be effective from an unidentified date in 1968 to an unidentified date in 1971. Like the instant case, the agreement also provided that wage increases were to be given to employees on September 1, 1968, 1969 and 1970. The Board held that when the duration clause was considered in conjunction with the wage provisions, the agreement reasonably conveyed that it would take effect on September 1, 1968 and expire on August 31, 1971. In the instant case, inasmuch as the duration clause clearly indicates that the parties agreed to a one-year term and two provisions of the contract clearly set forth economic benefits for employees that were to take effect on September 1, the contract reasonably can be construed by employees and outsiders as providing for a one-year term effective September 1. Thus, the agreement satisfies the requirement that a contract must have a discernible duration to serve as a bar to a petition.

The instant case is distinguishable from Cind-R-Lite because the contract involved herein, unlike the one in Cind-R-Lite, contains on its face a means to determine the contract termination date and thus, clearly indicates the intended duration of the agreement. Thus, the agreement reached by the parties on October 30 satisfies all the prerequisites to serve as a contract bar and the petition filed on November 14, is, therefore, untimely. Accordingly, I am dismissing the petition in this matter on that basis.

Moreover, an unfair labor practice complaint has issued in Case 3-CA-26925 alleging, in part, that, since on or about October 30, the Employer has violated Section 8(a)(1) and (5) of the Act by refusing to sign the collective-bargaining agreement it reached with the Union. If the Employer had not failed to sign the collective-bargaining agreement, as alleged in the complaint, it would have been clear that, the petition filed on November 14 was untimely. Even if the October 30 agreement on its face was otherwise insufficient to serve as a bar to the petition, the Employer's alleged unfair labor practice as described above, which predates the filing of the petition, is of the type that precludes the existence of a question concerning representation and provides a separate basis for dismissing the petition in this matter.

Accordingly, in the event the Board does not adopt my finding that the agreement reached on October 30 constitutes a bar to this proceeding, I conclude that the issuance of the complaint in Case 3-CA-26925, alleging unfair labor practices which by their nature preclude the existence of a question concerning representation, provides an alternative basis for dismissing the petition and I hereby also dismiss the petition for that reason.²

² In the event that the Board holds that this alternative basis for dismissing the petition is the only grounds for dismissal, the petition may be subject to reinstatement upon request by the Petitioner upon final disposition of Case 3-CA-26925.

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W. Washington, DC 20570-0001. This request must be received by the Board in Washington DC by 5 p.m. EDT February 12, 2009. This request may be filed electronically through the Agency's web site www.nlrb.gov, but may not be filed by facsimile.³

Very truly yours,
Paul J. Murphy

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PJM/mjm

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³ To file the request for review electronically, go to www.nlrb.gov and select the **E-Gov** tab. Then click on the **E-Filing** link on the menu. When the E-File page opens, go to the heading **Board Office of the Executive Secretary** and click on the "File Documents" button under that heading. A page then appears describing the E-Filing terms. At the bottom of this page, check the box next to the statement indicating that the user has read and accepts the E-Filing terms and click the "Accept" button. Then complete the filing form with information such as the case name and number, attach the document containing the request for review, and click the "Submit Form" button. Guidance for E-Filing is contained in the attachment supplied with the Regional Office's initial correspondence on this matter and is also located under "E-Gov" on the Board's web site, www.nlrb.gov.