Bethlehem Steel Corporation *and* United Steelworkers of America, AFL–CIO, CLC. Case 5–UC–334

September 27, 1999

DECISION ON REVIEW AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS FOX, LIEBMAN, HURTGEN, AND BRAME

On May 22, 1996, the Regional Director for Region 5 issued a Decision and Order Dismissing Petition finding that the instant petition seeking the exclusion of customer service account representatives, telephone operators, and administrative assistants (customer service employees) from the existing unit was untimely. Thereafter, in accordance with Section 102.67 of the National Labor Relations Board's Rules and Regulations, the Employer filed a timely request for review of the Regional Director's Decision. The Union filed a timely opposition brief.

The Employer's request for review of the Regional Director's Decision and Order dismissing the unit clarification petition is granted. Having carefully considered the matter, we affirm the Regional Director's dismissal of the petition, but do not rely on the Regional Director's finding that the petition was untimely. Instead, we find that the customer service employees have been historically excluded from the bargaining unit represented by the Union, and since no party has established that recent and substantial changes have occurred, the Employer's claims are not appropriately resolved in a unit clarification proceeding.

The Union and Employer have been parties to successive collective-bargaining agreements covering a unit of office and technical employees at the Employer's Sparrows Point, Maryland facility.[1] The most recent collective-bargaining agreement was effective from August 1, 1993, to August 1, 1999. In 1991, the Board in Case 5–UC–302 clarified the unit to exclude customer service employees. During 1993, prior to the execution of the most recent contract, additional customer service employees relocated to the Sparrows Point facility. During 1993 contract negotiations, the Union proposed including customer service account representatives and telephone operators in the unit. The Employer rejected those proposals. In October 1994, the Union filed grievances contending that the contract covered these customer service employees.[2] In response, on June 23, 1995, the Employer filed the instant UC petition seeking to clarify the unit specifically to exclude the disputed customer service employees and, thus, to confirm the current bargaining unit. The Regional Director found that the existing contract clearly defined the scope of the unit and that the customer service employees were not included. Citing *Wallace-Murray Corp.*, 192 NLRB 1090 (1971),[3] he then dismissed the petition as untimely, because it was filed during the term of the contract and no party had reserved the right to file a UC petition after contract ratification. The Regional Director thus implicitly suggested that the Employer could file a new petition at an appropriate time closer to the expiration date of the collective-bargaining agreement, at which time the Region would entertain the petition.[4]

Although we affirm the Regional Director's dismissal of the petition, we find that the problem with the petition is not simply untimeliness. Rather, because the petition deals with positions that have historically been excluded from the bargaining unit, and have not been shown to have undergone recent substantial changes, it is a petition that the Board would refuse to entertain even if the existing collective-bargaining agreement were about to expire. As the Board has explained:

> Unit clarification, as the term itself implies, is appropriate for resolving ambiguities concerning the unit placement of individuals who, for example, come within a newly established classification of disputed unit placement, or, within an existing classification which has undergone recent, substantial changes in the duties and responsibilities of the employees in it so as to create a real doubt as to whether the individuals in such classification continue to fall within the category-excluded or included-that they occupied in the past.

[1] The unit description reads:

> All non-exempt salaried office clerical Employees, non-exempt salaried plant clerical Employees and non-exempt salaried technical Employees employed by the Employer at its Sparrows Point, Maryland, facilities; but excluding all shipyard employees, hourly paid production and maintenance employees, all employees in the General Manager and Industrial Engineering Departments, all programmers, project/program librarians, and key entry operators in the Information Services Department, managerial trainees (including loopers, interim loopers, and technical trainees), confidential employees, professional employees, guards and supervisors as defined in the Act, and contractor personnel.

[2] Pursuant to an April 1997 settlement agreement of unfair labor practice Case 5–CB–8102, the Union has since agreed to withdraw its grievance and arbitration demands which sought to compel the accretion of customer service account representatives and telephone operators to the bargaining unit.

[3] In *Wallace-Murray*, the Board refused to entertain a unit clarification petition filed midway in the term of an existing collective-bargaining agreement which sought to exclude from a unit otherwise made up of nonguards certain individuals whom the parties agreed were statutory guards. Noting that the bargaining unit was "clearly define[d]" in the agreement to include the guards, the Board said that to allow such a midterm petition would be disruptive of a bargaining relationship voluntarily entered into between the parties when they executed the contract. The petition therefore was dismissed without prejudice to the filing of another petition "at an appropriate time."

[4] The dismissal of the petition as untimely under *Wallace-Murray* is ordinarily without prejudice to the filing of another petition at "an appropriate time," usually near the expiration of the existing contract, before agreement on a new contract. See, e.g., *Shop Rite Foods, Inc.*, 247 NLRB 883 (1980); *Arthur C. Logan Memorial Hospital*, 231 NLRB 778, 779 fn. 4 (1977).

> *Clarification is not appropriate, however, for upsetting . . . an established practice of such parties concerning the unit placement of various individuals.*

Union Electric Co., 217 NLRB 666, 667 (1975) (emphasis added). Thus, where a position or classification has historically been excluded from or included in the unit, and there have not been recent, substantial changes that would call into question the placement of the employees in the unit, the Board generally will not entertain a petition to clarify the status of that position or clarification, regardless of when in the bargaining cycle the petition is filed. See, e.g., *Plough, Inc.*, 203 NLRB 818, 819 fn. 4 (1973).[5]

In this case, the customer service employees at issue have been excluded from the existing bargaining unit represented by the Union since at least 1991. Moreover, since the disputed classifications have *not* undergone recent, substantial changes, such classifications should continue to be excluded from the unit. In 1993, before the execution of the contract, more customer service employees relocated to the Sparrows Point facility. These relocated customer service employees have more contact with unit employees than they did before their relocation, since they now work side-by-side with them under a team concept, rather than communicating with them over the telephone and by computer. However, the customer service employees retain basically the same job function as they had previously, with separate supervision and little temporary interchange with unit employees. Thus, the changes since 1993 have not been substantial.

For the reasons stated above, we find that no valid issue has been raised concerning the unit placement of the customer service employees that is appropriate for resolution in a unit clarification proceeding. Accordingly, we affirm the Regional Director's dismissal of the petition.

ORDER

The petition is dismissed.

MEMBERS HURTGEN AND BRAME, concurring.

We agree that the petition here is not dismissable under *Wallace-Murray*, 192 NLRB 1090 (1971). That case teaches that a petition for unit clarification will not lie during the midterm of a contract if the petition seeks to "modify a unit which is clearly defined in the current collective bargaining agreement." To entertain such a petition would be "disruptive of the collective bargaining relationship."[1] In the instant case, the status of the customer service employees is not clearly defined in the contract. Thus, *Wallace-Murray* does not apply.

On the merits, it is clear that these employees have been historically excluded from the unit, and there have been no significant changes regarding them. Accordingly, we agree that they should continue to be excluded.

The difference between our colleagues and us is that they would not entertain the petition. We would entertain the petition and, on the merits, we would continue the historic exclusion of the classification contested here. The practical result is the same as that reached by our colleagues, viz, the classification is excluded. However, inasmuch as we consider the evidence of historic exclusion, and the evidence of no changes in the classification, we should explicitly resolve the merits, i.e., exclude the classification.[2]

[5] As an exception to this general principle, the Board will clarify a unit to exclude a position or classification that has historically been included in the unit where the Petitioner has established a statutory basis for the exclusion (e.g., that the individuals are statutory supervisors, as in *Shop Rite Foods,* supra; or that they are guards and that the unit includes nonguards, as in *Peninsula Hospital Center*, 219 NLRB 139, 140 (1975)). In those situations, the only issue as to whether the Board will entertain the petition is whether it is filed at an appropriate time. *Washington Post Co.*, 254 NLRB 168, 168–169 (1981); *Wallace-Murray*, supra. The Board has also processed a petition to confirm the exclusion of an historically excluded position in order to prevent the enforcement of an arbitration award which would have effectively accreted the position to the unit in contravention of established Board policy. *Williams Transportation*, 233 NLRB 837 (1977).

We note that the Petitioner here is not asserting a statutory basis for excluding the customer service employees from the unit. Moreover, although the Union originally filed a grievance and sought arbitration to compel the inclusion of the disputed classifications in the bargaining unit, the grievance and arbitration demands have been withdrawn. Thus, neither of the above noted exceptions applies to this case.

[1] If the petition is filed near the end of the contract, the Board will entertain it. See *Shop-Rite Foods, Inc.,* 247 NLRB 883 (1980).

[2] By contrast, in the *Wallace-Murray* situation, the contract itself clearly resolves the issue, and the Board will not *entertain* a petition to modify the contract.