Women and Infants' Hospital of Rhode Island *and* New England Health Care Employees Union, District 1199, SEIU, AFL–CIO, Petitioner. Case 1–RC–21289

March 8, 2001

ORDER DENYING REVIEW

BY CHAIRMAN TRUESDALE AND MEMBERS HURTGEN AND WALSH

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel, which has considered the Employer's request for review of the Regional Director's Decision and Direction of Election (pertinent portions are attached as an appendix). The request for review is denied as it raises no substantial issues warranting review.

Pursuant to an election held in 1984, the Petitioner was certified as the exclusive collective-bargaining representative of all technical employees—excluding, inter alia, respiratory therapists—at the Employer's Providence, Rhode Island hospital. The Employer and the Petitioner were parties to successive collective-bargaining agreements, and although the parties have modified the original bargaining unit, the respiratory therapists have never been included in the unit.[1]

The Petitioner now seeks a self-determination election to allow the respiratory therapists to express their interest in representation by the Petitioner in the existing unit of technical employees. The Employer contends that the Petitioner is barred from representing the respiratory therapists solely by virtue of the contractual language that specifically excludes them from the bargaining unit. The Regional Director found that the exclusionary language does not constitute a bar to a self-determination election for the respiratory therapists.

Contrary to our dissenting colleague, we agree with the Regional Director for the reasons set forth in his decision. As conceded by our dissenting colleague, Board precedent fully supports the Regional Director's finding that exclusionary language in a unit description does not constitute an implied promise not to represent employees in the excluded classifications. *Cessna Aircraft Co.*, 123 NLRB 855 (1959). As the Board made clear in *Cessna*, since a promise by a union not to seek representation of a particular group of employees during the term of an existing collective-bargaining agreement "is, in a sense, a limitation upon the rights of employees to select representatives of their own choosing," the Board will enforce such a promise only where it is expressly made. Id. at 856. See also *Budd Co*., 154 NLRB 421, 422–423 (1965); *Lexington House*, 328 NLRB 894 (1999).[2] Here, since there is no express promise by the Petitioner not to seek to represent the respiratory therapists, we deny review of the Regional Director's Decision and Direction of Election.

MEMBER HURTGEN, dissenting.

My colleagues permit the Union to seek to add the respiratory therapists to the extant unit. I would grant review on the issue.

The Employer and the Union have a collective-bargaining agreement which expressly and unequivocally excludes respiratory therapists. I believe in the sanctity of collective-bargaining agreements. Accordingly, I would hold the parties to their agreement to exclude the respiratory therapists from the unit.

My colleagues permit one of the parties to ignore this contractual commitment. They do so because the contract does not expressly state a promise not to seek representation. This position has support in extant Board law.[1] However, in my view, this approach may well elevate form over substance. Arguably, a contractual promise to exclude employees for the life of the contract is a promise not to represent them for the life of the contract.

I am not now saying that extant Board precedent should be reversed. That precedent may reflect values which should be preserved. However, there are also values in giving effect to the plain meaning of a contractual exclusion. In order to fully weigh these competing values, I would grant review.

APPENDIX

DECISION AND DIRECTION OF ELECTION

The Employer is an acute care hospital located in Providence, Rhode Island. The Union currently represents four separate bargaining units of the Employer's employees, including a unit of technical employees. The parties have stipulated that the Employer's unrepresented respiratory therapists are technical employees and share a community of interest with the em-

[1] The parties' current collective-bargaining agreement contains the following recognition clause:

> All full-time and regular part-time Technical Unit Employees as defined in the National Labor Relations Board Election Case No. 1–RC–18134.
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> . . . .
>
> Excluded from the aforesaid bargaining units are Employees who work less than eight (8) hours per week, temporary Employees, confidential Employees, casual Employees, on-call Employees, Respiratory Therapists . . . and all other Employees, Guards and Supervisors as defined in the Act.

[2] Chairman Truesdale agrees that the Board will enforce the promise only when expressly made. He would, in addition, require that the promise be a part of the parties' collective-bargaining agreement. *Lexington House*, supra at 897 (Chairman Truesdale's dissenting opinion).

[1] *Cessna Aircraft Co.*, 123 NLRB 855 (1959).

ployees in the technical unit. They have further stipulated that these respiratory therapists are the only technical employees employed at the hospital who are not included in the existing technical unit. As the Union clarified at the hearing, by the instant petition it is seeking a "self-determination" election in which the respiratory therapists will vote as to whether they wish to be included in the existing technical unit. The Employer asserts that the exclusionary language of the recognition clause of the current collective-bargaining agreement covering the existing technical unit operates as a bar to such an election for the life of that contract.[3]

On June 1, 1984, in Case 1–RC–18134, the Union was certified as the exclusive representative of the employees in the following bargaining unit:

> All technical employees including laboratory technicians I, II and III, radiology technicians and ultrasound technicians employed by the Employer at its 50 Maude Street, Providence, Rhode Island location, but excluding all respiratory therapists, pharmacists, pharmacy technicians, social workers, nutrition aides, dieticians, nutritionists, assistant laboratory supervisors, all other employees, guards and supervisors as defined in the Act.

Thereafter, the parties mutually agreed to modify the bargaining unit. The recognition clause of the current technicians' contract describes the unit as follows:

> All full-time and regular part-time Technical Unit Employees as defined in the National Labor Relations Board Election Case No. 1–RC–18134 (with the addition of OB/GYN Technical and OR Technicians) including per diem employees who work at least eight (8) hours per week.
>
> Excluded from the aforesaid bargaining units are Employees who work less than eight (8) hours per week, temporary employees, confidential Employees, casual Employees, on-call Employees, Respiratory Therapists, Pharmacists, Pharmacy Technicians, Social Workers, Nutrition-Aides, Dietitians, Nutritionists, Assistant Laboratory Supervisors, Anesthesia Technicians, and all other Employees, Guards and Supervisors as defined in the Act.

No evidence extrinsic to the current recognition clause of the technicians' contract was presented at the hearing which in any way indicates that the Union has ever expressly agreed to not seek to represent the respiratory therapists as part of the existing technical unit or otherwise. Based on the testimony of the witnesses, I find that the parties never expressly or explicitly discussed a commitment from the Union not to represent the respiratory therapists. The sole evidence of any sort, apart from the contract language itself, regarding the exclusion of respiratory therapists from the technical unit was from the Petitioner's district vice president, Stan Israel, who had participated in the original organization of the unit in 1984:

> Q: And were, were the respiratory therapists included in the stipulated agreement between the parties, election agreement?
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> A: No, they weren't.
>
> Q: Do you know why?
>
> A: We had no contact with them. They weren't necessarily interested, so they weren't included. We didn't seek to have them included.
>
> . . . .
>
> Q: And was there a recognition clause in the initial agreement?
>
> A: Yes, there was.
>
> Q: And did the recognition clause include respiratory, the position of the respiratory therapists?
>
> No, it excluded it.
>
> Q: Why, Do you know why?
>
> A: Well, they weren't in the election and, you know. That, we, we didn't, they didn't vote. And they didn't come in the election. And they weren't in the Union, so we didn't include them.

The existence of a current collective-bargaining agreement specifying exclusion of named classifications of employees has never, of itself, been considered to bar a self-determination election among those designated classifications. See, e.g., *Armour & Co.*, 40 NLRB 1333, 1335 (1942). The rule is that:

> A union may waive its right to represent certain employees, but it has long been held that such a waiver must be "clear and unmistakable." *Park-Ohio Industries*, 257 NLRB 413 (1981), enf'd. 702 F.2d 62 (6th Cir. 1983). Waiver will not be lightly inferred. . . . *Greensburg Coca-Cola Bottling Co*., 311 NLRB 1022, 1028 (1993).

In this case, the Employer must rely exclusively on the exclusionary language of the current recognition clause to support its contention that the Union has waived its right to seek the inclusion of the respiratory therapists in the existing technical unit for the duration of that unit's contract, because there is no other evidence of waiver. However, the Board will only find a waiver "where the contract itself contains an express promise on the part of the Union to refrain from seeking representation of the employees in question . . . such a promise will not be implied from a mere unit exclusion. *Cessna Aircraft Co.*, 123 NLRB 855, 857 (1959). See also *Walt Disney World Co*., 215 NLRB 421 (1974). Accordingly, I find no basis to conclude that the Union has waived its right to represent the Employer's respiratory therapists.

Because there has been no waiver and the parties agree that respiratory therapists enjoy a community of interest with the represented technicians and are the only technical employees not included in the current technical unit, I find that a self-determination election as sought by the petition is appropriate.[4]

[3] The contract expires November 30, 2001.

[4] I find without merit the Employer's assertions that such a finding is inconsistent with the Board's health care rules for acute care hospitals and that such a finding creates an inappropriate residual unit. To the contrary, in view of the parties' agreement that respiratory therapists are the only technical employees not included in the existing technical unit, and the respiratory therapists share a community of interest with the employees in the existing unit, I find the proposed action fully consistent with the Board's health care rule and governing congressional intent.

Accordingly, I shall direct a self-determination election in the following voting group:

> All full-time and regular part-time[5] respiratory therapists employed by the Employer at its Providence, Rhode Island facility, but excluding all other employees, guards and supervisors as defined in the Act.

If a majority of the valid ballots in the election are cast for the Petitioner, the employees will be deemed to have indicated their desire to be included in the existing unit of technical employees currently represented by the Union, and it may bargain for those employees as part of that unit. If a majority of the valid ballots are cast against representation, the employees will be deemed to have indicated their desire to remain unrepresented, and I will issue a certification of results of election to that effect.

[5] The Employer urges that in the event that an election is ordered in this voting group, that the definition of "regular part-time" use the standard of the current recognition clause, limiting eligibility of per diem employees to those who work at least 8 hours per week. No evidence was offered on this matter, and the Petitioner, at the hearing, stated its position that it sought the Board definition for regular part-time, "we understand that [employees who] regularly average four [or] more hours a week in the pr[e]ceeding qu[arter]. [Reporter's mistranscriptions corrected.]" I find that the Union clearly seeks to invoke the *Davison-Paxon* formula for eligibility of regular part-time employees, and in the absence of express agreement by the parties to a different formula, or any evidence on the matter, I find this is the appropriate formula to determine eligibility. *Sisters of Mercy Health Corp*., 298 NLRB 483 (1990).