

Kaiser Foundation Hospitals, Kaiser Foundation Health Plan, Inc., and the Permanente Medical Group, Inc. and Office & Professional Employees International Union, Local 29, AFL-CIO, Petitioner. Case 32-UC-385

August 1, 2002

ORDER DENYING REVIEW

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN
AND COWEN

The National Labor Relations Board, by a three-member panel, has considered the Petitioner's request for review of the Acting Regional Director's Decision and Order dismissing the petition (pertinent portions of which are attached as an appendix). The unit clarification petition seeks to include temporary agency employees who have been employed at the Employer's for over 60 days.

The issue presented for review is whether the Acting Regional Director erred in dismissing the petition because the temporary agency employees have been historically excluded from the unit, rejecting the Petitioner's contention that the Board's recent decision in *M.B. Sturgis, Inc.*, 331 NLRB 1298 (2000), justifies processing the petition.

We find that the petition in this case was properly dismissed under the Board's unit clarification principles governing historically excluded classifications. The Board will not entertain a unit clarification petition seeking to accrete a historically excluded classification into the unit, unless the classification has undergone recent, substantial changes. *Bethlehem Steel Corp.*, 329 NLRB 243, 244 (1999). The Board's decision in *Sturgis* was not intended to reverse this longstanding Board doctrine, and temporary employees who are jointly employed are not excepted from this principle. Further, absent recent substantial changes, the Board will not entertain such a petition, regardless of when in the bargaining cycle the petition is filed, even if there has been a change in the Board's decisional law. *Caesar's Palace*, 209 NLRB 950 (1974).

The Petitioner does not dispute the Acting Regional Director's finding that there is no evidence of any recent, substantial changes in the Employer's operations that would call into question the placement of the temporary agency employees in the unit. Lacking any recent, substantial changes, we find that, regardless of the change in law occasioned by the Board's decision in *Sturgis*, the historical exclusion of the temporary agency employees makes it inappropriate to entertain a unit clarification petition to include these employees in the unit. Accord-

ingly, we deny the Petitioner's request for review of the Acting Regional Director's dismissal of the petition.¹

APPENDIX

DECISION AND ORDER

Upon a petition filed under Section 9(c) of the National Labor Relations Act, as amended, careful investigation and consideration took place.¹

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned Acting Regional Director.

Upon the entire record in this proceeding, the Acting Regional Director finds:

(1) The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction.

(2) Petitioner proposes to clarify the bargaining unit as follows: Petitioner seeks to include in its current collective-bargaining unit temporary agency employees who have been employed at the Employer over 60 days in its geographical jurisdiction.

(3) Clarification of the bargaining unit is presently not warranted inasmuch as the investigation revealed that the temporary agency employees sought by Petitioner historically have been excluded from the bargaining unit. Specifically, a series of collective-bargaining agreements covering the unit at issue, including the current agreement effective October 1, 2000, through November 3, 2006, have contained provisions that reflect that work performed by temporary agency employees is deemed outside the bargaining unit. Pursuant to established Board law, unit clarification is not appropriate during the term of a contract where such clarification would upset the agreement of the parties concerning the exclusion of various individuals. *Union Electric Co.*, 217 NLRB 666, 667 (1975); and *Batesville Casket Co.*, 283 NLRB 795, 797 (1987). There was no evidence that there have been any changes in the functions performed by the temporary agency employees or any other circumstance which would render the *Union Electric* rule inapplicable. Although the Petitioner contends that the Board's recent decision in *M.B. Sturgis, Inc.*, 331 NLRB 1298 (2000), authorizes the granting of the petition for clarification, there is nothing in that decision indicating that the Board has overruled

¹ Member Cowen did not participate in *M.B. Sturgis*, supra and expresses no view regarding the validity of that decision. Member Cowen agrees with his colleagues that the Board's decision in *Sturgis* does not purport to alter the Board's unit clarification principles governing historically excluded classifications, and that the Acting Regional Director properly dismissed the instant petition.

¹The parties each provided position papers and documents in support of their respective positions. A review of those materials reveals that the facts in this matter as discussed infra are undisputed.

or limited its *Union Electric* rule in any way. It is noted that the parties' current contract became effective in October 2000, *after* the Board's *Sturgis* decision had issued. Accordingly, unit clarification remains inappropriate in this matter.

ORDER

IT IS HEREBY ORDERED that the petition in the instant case be, and it hereby is, dismissed.