UMass Memorial Medical Center *and* International Association of EMTS and Paramedics, Local 95, SEIU/NAGE, Petitioner. Case 1–RC–22044

February 20, 2007

DECISION ON REVIEW AND ORDER

BY MEMBERS LIEBMAN, SCHAUMBER, AND WALSH

On August 29, 2006, the Regional Director issued a Decision and Direction of Election in this proceeding, directing an *Armour-Globe*[1] self-determination election among the Employer's per diem EMT/Intermediates and EMT/Paramedics who have worked an average of 4 hours per week during the calendar quarter immediately preceding the date of the election.[2]

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 and Direction of Election, arguing that the Petitioner waived its right to seek a self-determination election to include the petitioned-for employees in the existing unit; that the Board should extend to the self-determination election context its policy barring unit clarification petitions filed during the term of a contract and covering the disputed classifications; and that contract bar principles should apply to self-determination elections. The Petitioner filed an opposition to the Employer's request for review. On October 11, 2006, the Board[3] granted the Employer's request for review.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

We have carefully considered the entire record in this case, including the Employer's brief on review, and conclude that the Regional Director properly directed a self-determination election. Therefore, we affirm the decision and remand this case to the Regional Director for further appropriate action.

I. FACTUAL BACKGROUND

The Employer provides ambulance transportation services in the Worcester, Massachusetts area. The Petitioner represents[4] a unit of the Employer's full-time and regular part-time EMT/Intermediates and EMT/Paramedics.[5] The parties' collective-bargaining agreement, with effective dates from January 19, 2006, though June 30, 2009, contains a recognition clause specifically excluding dispatchers, supervisory, managerial, and per diem employees. It is undisputed, however, that the agreement does not contain a provision in which the Petitioner explicitly agrees not to seek to represent any employees who are excluded from the bargaining unit it currently represents.

In addition to the full-time and regular part-time EMT/Intermediates and EMT/Paramedics, the Employer employs the petitioned-for per diem employees. The per diem employees perform the same job duties as the full-time and regular part-time EMT/Intermediate and EMT/Paramedic employees who are included in the unit.

The parties began negotiating the existing contract in late April or May 2005, and conducted bargaining sessions two to four times per month through January 2006. According to the Employer, the parties discussed per diem employees on two occasions during the course of their negotiations: once in establishing that per diem employees would be utilized to cover gaps in unit employees' schedules, and once when the Petitioner took the position that the Employer should not hire per diem employees who did not work frequently enough to maintain familiarity with changes in procedures and policies. The Petitioner never requested recognition of the per diem employees in the course of the bargaining that resulted in the contract.

On August 7, 2006, the Petitioner filed the instant petition seeking a self-determination election in which the per diem employees would be permitted to vote on whether or not they wish to be included in the existing unit.

II. ANALYSIS

An *Armour-Globe* self-determination election permits employees sharing a community of interest with an already-represented unit of employees to vote on whether to join the existing unit. See *NLRB v. Raytheon Co.*, 918 F.2d 249, 251 (1st Cir. 1990). In *Briggs Indiana Corp.,* 63 NLRB 1270 (1945), however, the Board recognized a restriction on a union's right to petition for an election to represent a specific group of employees, finding enforceable a union's contractual agreement not to represent those employees during a collective-bargaining agreement's term. Subsequently, in *Cessna Aircraft Co.*, 123 NLRB 855, 856 (1959), the Board established that the *Briggs Indiana* rule applies "only where the contract itself contains an *express* promise on the part of the union to refrain from seeking representation of the employees in question or to refrain from accepting them into membership." Thus, a promise not to seek to represent a particular group of employees may not be implied by way of

[1] See *Armour & Co.*, 40 NLRB 1333 (1942); *Globe Machine & Stamping Co.*, 3 NLRB 294 (1937).

[2] The Employer does not request review of the Regional Director's voter eligibility determination.

[3] Members Schaumber and Kirsanow; Member Walsh dissenting.

[4] The record is silent as to when and how the Petitioner first became the bargaining representative of the unit employees.

[5] At the time of the hearing the Employer did not employ any EMT/Intermediates, and the unit consisted entirely of EMT/Paramedics.

an explicit exclusion from a contractual unit or on the basis of an "alleged understanding" between the parties during their negotiations. *Cessna Aircraft*, supra at 856. In *Women & Infants' Hospital of Rhode Island*, 333 NLRB 479, 479 (2001), the Board applied *Cessna Aircraft*, supra, to find that contractual language specifically excluding respiratory therapists from a technical employees unit did not bar the union from petitioning for an *Armour-Globe* election in a unit of respiratory therapists. Because the union never made an express promise not to seek to represent the respiratory therapists, the Board held, the regional director appropriately directed a self-determination election among members of that group. *Women & Infants' Hospital*, supra at 479.

Women & Infants' Hospital, supra, squarely controls the outcome here. When negotiating the contract, the Petitioner never agreed that it would not, during the term of the contract or at any other time, seek to include the per diem employees in the unit. Rather, the Petitioner agreed only that the per diem employees were excluded from that contract. As a contract clause excluding a particular group of employees from its coverage does not bar a union from seeking to represent those employees via a self-determination election during the contract's term, the Petitioner never waived its right to seek a self-determination election among the petitioned-for employees. *Women & Infants' Hospital*, supra at 479.

Allowing the petitioned-for employees to vote in a self-determination election does not, as our dissenting colleague maintains, "negate the choice expressed in the contract." In ratifying the contract, the employees never expressly voted to preclude the per diem employees from joining the unit for the duration of the contract's term. Further, the Employer could have sought an agreement from the Petitioner not to represent the per diem employees during the contract's term, but did not do so. Absent any such agreement on the part of the Petitioner, preventing the petitioned-for employees from voting in a self-determination election would serve only to contravene the freedom of self-organization that Section 7 is designed to protect.

Contrary to our dissenting colleague's view, the fact that *Women & Infants' Hospital* supra, involved an acute care facility does not render the Board's holding in that case any less applicable to the facts here. The Board in *Women & Infants' Hospital,* supra, did not even mention—let alone rely upon—the acute care facility context in permitting the excluded group to vote in a self-determination election. Rather, the Board's rationale in *Women & Infants' Hospital*, supra, focused on the fact that the union never expressly promised that it would not seek to represent the respiratory therapists. Notably, the Employer here did not take the position espoused by our dissenting colleague that *Women & Infants' Hospital*, supra, is distinguishable on the ground that the case involved an acute care facility.

In insisting that *Women & Infants' Hospital*, supra, addresses only a union's right to "seek to represent" an excluded classification and not its right to include that classification's employees in the existing unit, our dissenting colleague ignores the fact that the issue before the Board in that case was, as here, whether the regional director properly directed a self-determination election among members of the excluded classification. The effect of the Board's decision in *Women & Infants' Hospital*, supra, thus was to allow the petitioned-for employees to vote on whether they wished to be represented in the existing unit—the same end result as our decision today will yield.

Additionally, we are not persuaded by the Employer's argument that the Board should apply to the self-determination context its policy barring unit clarification petitions filed during the term of a contract that covers the classifications in question.[6] A self-determination election is meaningfully distinct from an accretion following a unit clarification petition, as a self-determination election affords the employees the opportunity to vote as to whether or not they wish to be included in the existing unit.

We also reject the Employer's assertion that the petition should be dismissed by way of the Board's contract bar doctrine.[7] The Board has long held that, following a self-determination election whereby a new group of employees joins a unit already covered by a collective-bargaining agreement, the employer must bargain as to the appropriate contractual terms to be applied to the unit's new group of employees. *Federal Mogul Corp.*, 209 NLRB 343 (1974). We find that *Federal Mogul*, supra, properly balances the concerns of preventing unilateral application of contract terms to a group of employees who were not represented when the collective-bargaining agreement was negotiated, on the one hand, and allowing for employee free choice, on the other.

[6] Under *Edison Sault Electric Co.,* 313 NLRB 753, 753 (1994), a unit clarification petition submitted during the term of a contract that specifically addresses the disputed classification will be dismissed unless the moving party reserved during the course of bargaining its right to file the petition.

[7] Pursuant to the contract bar doctrine, absent exceptional circumstances "the Board will not entertain a representation petition seeking a new determination of the employees' bargaining representative during the middle period of a valid outstanding collective-bargaining agreement of reasonable duration." *Hexton Furniture Co.*, 111 NLRB 342, 344 (1955).

Accordingly, we find that the Regional Director properly directed a self-determination election.

ORDER

The Regional Director's Decision and Direction of Election is affirmed, and the case is remanded to the Regional Director for further appropriate action.

MEMBER SCHAUMBER, dissenting

The Petitioner and Employer executed a collective-bargaining agreement that excluded per diem EMTs from the unit of the Employer's regular EMTs. A short time later, the Petitioner sought to skirt that agreement by filing a petition for a self-determination election among the per diem EMTs. The Employer argued that the Petitioner's agreement to exclude the per diem EMTs from the unit barred the self-determination election. The Regional Director rejected that argument and directed a self-determination election. For the reasons that follow, I would hold the Petitioner to its contractual commitments and would dismiss the election petition.

I agree that where a union expressly promises not to "represent" certain categories of employees during the term of an agreement, the union may not file a petition with the Board seeking to represent those employees during that period. See, e.g., *Briggs Indiana*, 63 NLRB 1270 (1945). I also agree that unit exclusionary language is insufficient to establish an express promise not to represent the excluded employees. *Cessna Aircraft Co.*, 123 NLRB 855 (1959). In self-determination elections, however, employees do more than choose whether to be represented by a particular union. Employees choose whether they will become part of an existing bargaining unit. Thus, the question is not merely one of representation by a particular union, but rather one of inclusion in a particular unit. Accordingly, the issue presented here is whether the exclusionary language in the contract bars the Petitioner from seeking to *include* the per diem EMTs in the existing unit of regular EMTs. In my view, it does.

Here, the Employer's regular EMTs exercised their Section 7 right to self-organization and elected, through the Petitioner, not to include the per diem EMTs in the unit. That was the express agreement embodied in the contract the parties voluntarily entered. Were the Board to now order a self-determination election among the per diem EMTs, we would negate the choice expressed in the contract and effectively elevate the Section 7 rights of the per diem EMTs over those of the regular EMTs. I see no basis in law or policy for such action.

The Board's decision in *Women & Infants' Hospital of Rhode Island*, 333 NLRB 479 (2001) (denying review of regional director's decision directing a self-determination election) is not controlling.[1] Significantly different policy considerations were at issue there. First, that case involved an acute care hospital, whereas this case does not. Congressional policy prevents the proliferation of units in acute care settings. In *Women & Infants' Hospital*, placing the respiratory therapists in the existing technical employees' unit, as opposed to a separate unit, was required to be in conformity with the Congressional admonition against unit proliferation. Because UMass Memorial Medical Center is not an acute care hospital, placing the per diem EMTs in the same unit as regular EMTs does not raise the same concern. Second, the employer in *Women & Infants' Hospital* did not take the position, as the Employer here does, that the exclusionary language in the contract bars the union from seeking to *include* the respiratory therapists in the existing technical employees unit. The issue in *Women & Infants' Hospital* was whether the exclusionary language barred the union from *representing* those employees in *any* unit—a different issue than the one presented here. Thus, *Women & Infants' Hospital* addresses circumstances where the employer relies on unit exclusionary language to bar employees from selecting the *representative* of their choice. It does not apply to circumstances where the issue is whether such language bars employees from selecting their *unit* of choice.[2]

[1] In *Women & Infants' Hospital*, the union and employer entered into a collective-bargaining agreement that specifically excluded respiratory therapists from a bargaining unit of technical employees. Thereafter, the union filed a petition for a self-determination election among the respiratory therapists, seeking to represent those employees. Id. The employer argued that the exclusionary language in the contract barred the union from representing the respiratory therapists. The Board denied review of the regional director's decision, which applied long-standing Board precedent and found that the exclusionary language did not bar a self-determination election among the respiratory therapists because the union had not expressly "waived its right to represent" those employees. Id. at 479–480.

[2] The Employer's argument here is of this second type. The Employer contends that the exclusionary language in the contract bars the per diem EMTs from inclusion in the unit of regular EMTs. Indeed, the Employer does not argue that the per diem EMTs cannot select the Petitioner as their bargaining representative, and concedes that the Petitioner is free to petition for an election among the per diem EMTs in a separate unit.

In short, in my view, the exclusionary language in the contract bars a self-determination election among the per diem EMTs seeking to include them in the existing unit of regular EMTs.[3] Accordingly, I would dismiss the petition.

[3] I would have no such concerns if the Petitioner filed an election petition seeking to represent the per diem EMTs in a separate unit.