St. Vincent Charity Medical Center *and* Service Employees International Union, District 1199 WV/KY/OH. Case 08–RC–017027

August 26, 2011

DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBERS PEARCE AND HAYES

On April 16, 2010, the Regional Director for Region 8 of the National Labor Relations Board issued a Decision and Order in this proceeding, in which he dismissed a petition seeking a self-determination election to add the Employer's full-time and regular part-time phlebotomists to an existing nonconforming unit of employees currently represented by the Petitioner. Citing the Board's Health Care Rule,[1] the Regional Director found that an election would risk undue proliferation of bargaining units in acute care facilities by impermissibly leaving unrepresented other residual classifications of the Employer's employees.

Thereafter, in accordance with Section 102.67 of the National Labor Relations Board's Rules and Regulations, the Petitioner filed a timely request for review of the Regional Director's decision, contending that the Regional Director erred in finding that the petitioned-for election among phlebotomists was inappropriate.

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

Having carefully considered the matter, we find, contrary to the Regional Director, that the self-determination election would not run afoul of the Health Care Rule or lead to undue proliferation of units. We further find that the petitioned-for phlebotomists constitute an appropriate voting group and that they share a sufficient community of interest with the existing unit to permit a self-determination election. Accordingly, we grant review, order that the petition be reinstated, and remand this case to the Regional Director to direct a self-determination election.

The Employer is an acute care hospital. The Petitioner currently represents a unit of approximately 200 technical, nonprofessional, skilled maintenance, and business office clerical employees of the Employer at the hospital.[2] The unit was formed in the 1960s, before the Board's Health Care Rule.[3] Because the unit includes some, but not all, of the employees in each of the Employer's technical, nonprofessional, and business office clerical groups,[4] it is a nonconforming unit, i.e., it does not comport with the eight units (or combination of units) that would be appropriate in an acute care facility under the Rule. The 200 unrepresented employees include 83 employees in nonprofessional and business office clerical classifications, and 117 employees in technical classifications who, under the Rule, would be included in nonprofessional, business office clerical, or technical units.

The Petitioner seeks a self-determination election under *Armour-Globe*[5] to determine if the Employer's 15 to 17 phlebotomists, who are either technical or nonprofessional employees,[6] wish to be included in the existing unit of technical, nonprofessional, skilled maintenance, and business office clerical employees represented by the Petitioner.

Analysis

We find, contrary to the Regional Director, that a self-determination election among phlebotomists is not contrary to the Health Care Rule and, further, that these employees share a community of interest with the existing unit and constitute an appropriate voting group for such an election.

The Regional Director dismissed the petition on the basis that the proposed voting group is not appropriate because it excludes other unrepresented "residual" employees. Citing *St. John's Hospital*, 307 NLRB 767, 768 (1992), the Regional Director found that, in applying the Rule to situations where the petitioned-for employees are not part of an existing unit, the Board has relied on the principle that all unrepresented employees residual to an existing unit must be included in an election to represent them. The Regional Director found that although the Petitioner seeks to include phlebotomists in an existing nonconforming unit, rather than to represent them in an

[1] 29 CFR § 103.30 (1990).

[2] The unit includes, among others, licensed practical nurses and state tested nursing assistants; division and department secretaries, aides and assistants who may be business office clericals; anesthesia and emergency care technicians; pharmacy technicians and inventory control specialist; food service employees; engineers, plumbers, painters and general maintenance employees; and patient escort.

[3] The Rule, among other things, designates eight units that would be appropriate in acute care facilities. These units are physicians; registered nurses (RNs); all other professionals; technicals; skilled maintenance employees; business office clericals; guards; and all other nonprofessional (service and maintenance) employees. 29 CFR § 103.30(a).

[4] There is no contention that there are any skilled maintenance employees who are unrepresented.

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

[6] The parties disagreed whether the phlebotomists are technical or nonprofessional employees under the Rule. Although our decision in this proceeding does not depend upon a finding that phlebotomists are either technical or nonprofessional employees, the Board traditionally finds that phlebotomists are not technical employees. *Southern Maryland Hospital Center*, 274 NLRB 1470 (1985).

additional nonconforming unit, such an election would be inappropriate because it would leave other residual classifications of employees unrepresented.

We disagree. We find that the Regional Director erred in finding that where the Petitioner is seeking a self-determination election to determine whether the Employer's phlebotomists desire to be included in its existing unit and is *not* seeking to represent them in a separate, residual unit, the Petitioner is nevertheless required to include all remaining, unrepresented employees residual to the existing unit. Instead, we find that the petitioned-for phlebotomists constitute an appropriate voting group for a self-determination election.

In order to avoid undue proliferation of bargaining units in acute care facilities, the Board's Health Care Rule, as previously stated, designated eight specific units that would be appropriate in acute care faculties.[7] However, the Rule addresses only prospective, initial organizing of units in acute care facilities, and does not specifically address the situation which exists in the present case, i.e., where an acute care facility was partially organized in a nonconforming unit or combination of units. The Board specifically deferred such situations to adjudication. 284 NLRB at 1570–1571.[8]

An *Armour-Globe* self-determination election, which the Petitioner seeks here, undeniably avoids any proliferation of units, much less undue proliferation, because it does not result in the creation of and election in a separate, additional unit. Rather, an *Armour-Globe* election permits employees sharing a community of interest with an already represented unit of employees to vote whether they wish to be added to the existing unit. *NLRB v. Raytheon Co*., 918 F.2d 249, 251 (1st Cir. 1990). Furthermore, the Board has held that a self-determination election is the proper method by which an incumbent union, such as the Petitioner here, may add unrepresented employees to its existing unit, if the employees sought to be included share a community of interest with unit employees and "constitute an identifiable, distinct segment so as to constitute an appropriate voting group." *Warner-Lambert Co*., 298 NLRB 993, 995 (1990).[9] The petitioned-for employees need not constitute a separate appropriate unit by themselves in order to be added to an existing unit. Id.

Here, the Petitioner seeks a self-determination election in a separate appropriate voting group pursuant to *Armour-Globe*, not the creation of, and election in, a separate residual unit. In these circumstances, the proper analysis is whether the employees in the proposed voting group share a community of interest with the currently represented employees and whether they constitute an identifiable, distinct segment.

As the Board typically finds that phlebotomists are nonprofessional employees, we find it clear that they share a community of interest with, at a minimum, the nonprofessional employees in the existing unit represented by the Petitioner. As the Board found in connection with the Health Care Rulemaking, nonprofessionals at an acute care hospital have a presumptive community of interest with all other nonprofessionals. 284 NLRB at 1566. We also find that the phlebotomists constitute a distinct, identifiable segment of the Employer's unrepresented employees so as to constitute an appropriate voting group. The grouping of 15 to 17 phlebotomists, while small, is neither an arbitrary nor a random grouping of employees.[10] Rather, it is a group of employees who perform the same distinct functions, are in the same distinct employee classification, are organizationally included in the same administrative division in the hospital laboratory, work in the same location in the Employer's hospital, and have the same supervision. There is no contention that there are additional employees classified

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[7] In upholding the Health Care Rule, the Supreme Court rejected the notion that avoiding undue proliferation of bargaining units in the health care industry was a Congressional mandate, explaining that the principle was articulated only in Congressional committee reports related to the 1974 Health Care Amendments and was not codified in the legislation itself. *American Hospital Assn.,* 499 U.S. 606, 615–616 (1991) (Congressional committee reports do not have the "force of law"). The Court went on to observe that the "admonition [against unit proliferation] in the Committee Reports is best understood as a form of notice to the Board that if it did not give appropriate consideration to the problem of proliferation in this industry, Congress might respond with a legislative remedy." 499 U.S. at 617. That notice, the Court explained, was not a guide to the meaning of the statute itself, in the absence of "specific statutory language"—language that was not part of the Health Care Amendments. Id. The Board has respected the suggestion made in the Congressional committee reports that it seek to avoid the undue proliferation of bargaining units, notwithstanding the Court's holding that the reports' statements are not binding on the Board. See, e.g., *St. Mary's Duluth Clinic,* 332 NLRB 1419, 1421 fn. 10 (2000).

[8] Our dissenting colleague relies on Sec. 103.30(c) of the Rule in stating that the Board must find appropriate *only* units which comport "insofar as practicable" with the eight appropriate units defined by the Rule. However, the plain language of that section only provides that the Board must make that determination when the petitioner seeks an *additional* unit, a situation which is not present here. See 29 CFR § 103.30(c) ("[w]here there are existing non-conforming units in acute care hospitals, and a petition for additional units is filed, . . . the Board shall find appropriate only units which comport, insofar as practicable, with the appropriate unit" defined by the Rule).

[9] The Board has long held that it will not entertain an incumbent union's petition for a separate residual unit. *St. John's Hospital*, 307 NLRB at 768, citing *Budd Co*., 154 NLRB 421, 428 (1965), and *McKeesport Hospital*, 220 NLRB 1141 (1975).

[10] *Capital Cities Broadcasting*, 194 NLRB 1063 (1972) ("artists" at a television station did not constitute an appropriate voting group as they were an arbitrary segment of a broader group of unrepresented employees who performed similar duties).

as phlebotomists who are not included in the petitioned-for voting group.[11]

We find that *St. John's Hospital* does not support the Regional Director's finding that the voting group must include all employees residual to the existing unit. In that case, where there were already five nonconforming skilled maintenance units, the petitioner, an incumbent, sought to represent yet another separate, residual unit that included only a portion of the remaining unrepresented skilled maintenance employees. The Regional Director found that a separate residual unit would be permitted, but only if it included all remaining unrepresented skilled maintenance employees. The employer requested review of the Regional Director's direction of an election in a sixth unit of skilled maintenance employees, but did not dispute that an election seeking to add all unrepresented skilled maintenance employees to the petitioner's existing unit would be proper. There is no indication that any party requested that the Board reconsider the Regional Director's inclusion of all remaining unrepresented skilled maintenance employees if an election were to be held.

The Board in *St. John's* relied on two grounds in finding that it would not permit an election in the additional petitioned-for unit. First, the Board found that to the extent the petitioner was seeking an election in a separate, residual unit, it was required to include all unrepresented employees residual to the existing unit of skilled maintenance employees. Second, the Board found additionally that it would not entertain the incumbent's petition for a separate, residual unit because to do so would cause undue proliferation of units; the Board found, however, that it would permit the petitioner to *add* skilled maintenance employees to its existing unit. 307 NLRB at 768. While the Board thereupon remanded to the Regional Director to determine whether the petitioner desired to have all remaining unrepresented skilled maintenance employees vote on whether they wished to be added to the petitioner's existing unit, it did not specifically address whether the Regional Director was correct in including the skilled maintenance employees not originally sought by the petitioner.[12]

The Petitioner in this case seeks to *add* the phlebotomists to its existing unit in a self-determination election, and, unlike the petitioner in *St. John's*, does not seek an election in an additional, residual unit. Adding the phlebotomists to an already existing unit comports with the principle, cited above, that the Board will not entertain an incumbent's petition for a separate, residual unit, but will permit an incumbent petitioner to add employees to its existing unit. *Warner-Lambert*, 298 NLRB at 995.

Further, unlike the five preexisting, nonconforming skilled maintenance units in *St. John's*, the Petitioner represents, in a single unit, categories of employees that could have been organized under the Health Care Rule into separate technical, skilled maintenance, business office clerical, and nonprofessional units. A self-determination election where phlebotomists vote whether to be added to that single unit cannot be said to implicate concerns about undue proliferation of bargaining units. Indeed, although an election without the remaining unrepresented technicals and other nonprofessionals would not produce a unit that consolidates all employees in these four separate categories, it would bring the existing unit closer to a grouping sanctioned by the Rule. For this reason, and inasmuch as no union seeks to represent the other remaining employees at this time, a self-determination election would further the petitioned-for employees' interest in obtaining representation while avoiding any undue proliferation of units. While the voting group of phlebotomists may be less inclusive than our dissenting colleague would prefer, there is nothing in the Rule which requires a more comprehensive grouping. In fact, the petitioned-for unit achieves the goals sought by our dissenting colleague, i.e., bringing the unit closer

[11] Although it appears that there are other classifications of employees, such as registered nurses, emergency room technicians, and medical technicians and technologists, who occasionally draw blood from patients, as do the phlebotomists, their primary functions are not the same as the phlebotomists, there is no evidence that their performance of this duty is substantial, and there is no evidence that these other employees perform additional duties that phlebotomists perform. The Employer considers phlebotomists to be "the first line of defense for good specimen testing," as they evaluate the quality of the blood and urine specimens they collect and determine the appropriateness of the test requested. Phlebotomists handle every specimen that comes through the lab and distribute the specimens to the appropriate sections within the lab. Furthermore, there is no contention that emergency room technicians and registered nurses are in the same department or share the same supervision as phlebotomists. In any event, emergency room technicians are already included in the unit represented by the Petitioner, and, under the Rule, phlebotomists, who are not RNs, would not be included with the registered nurses. Although medical technicians and technologists work in the same lab as the phlebotomists, they perform their own primary, distinct functions, i.e., the actual testing of blood and other fluids that phlebotomists do not perform, and it appears that they typically perform blood drawing duties only on the third or evening shift when phlebotomists are not scheduled to work. Thus, contrary to our dissenting colleague's argument, the fact that medical technicians and technologists for limited shifts may perform some duties that phlebotomists perform does not outweigh the facts demonstrating the "distinctiveness" that phlebotomists share as an identifiable grouping of employees.

[12] Thus, we disagree with the dissent's statement that "the appropriate scope of the resulting unit rather than the ultimate number of units was the issue addressed and resolved" in *St. John's*.

to a grouping sanctioned by the Rule, while avoiding unit proliferation.

In light of the foregoing, we find that the petitioned-for phlebotomists share a community of interest with the employees in the existing unit and constitute an appropriate voting group for a self-determination election. Accordingly, we reverse the Regional Director, reinstate the petition, and remand this proceeding to the Regional Director for direction of a self-determination election in which phlebotomists may vote whether or not they wish to be part of the unit the Petitioner already represents.

ORDER

The Regional Director's dismissal of the petition is reversed. Therefore, we reinstate the petition and remand the case to the Regional Director for further appropriate action in accordance with this Decision.

MEMBER HAYES, dissenting.

I would deny review of the Regional Director's dismissal of the instant petition. My colleagues, however, will permit a self-determination election that selectively adds only one group of previously unrepresented employees to an existing historical bargaining unit that does not conform to the Board's Health Care Rule for acute care hospitals. If the fragmented group ultimately chooses union representation, the historical nonconforming unit that predated the Health Care Rule will be replaced by a new nonconforming unit. Numerous categories of employees will be left unrepresented after this election, despite the fact that they would ordinarily be included in a unit conforming to the Health Care Rule. This result cannot be reconciled with the Health Care Rule and Board law.

The Health Care Rule sets forth eight units that are appropriate units in an acute care hospital setting. Board's Rules and Regulations, Section 103.30(a)(1)–(8).[1] Except in extraordinary circumstances, or when existing nonconforming units predate the Rule, these are the only appropriate units the Board permits. Id. Section 103.30(a). Where, as in the instant case, there is an existing, nonconforming unit in an acute care hospital, the Health Care Rule requires the Board, in assessing the appropriateness of a different petitioned-for unit, to find appropriate only those units which comport "as far as practicable" with the eight appropriate units defined by the Rule.[2] Here, the existing bargaining unit is undisputedly nonconforming. There are approximately 200 employees in the unit, including some technical, nonprofessional, skilled maintenance, and business office clerical employees. Approximately 200 other technical, nonprofessional, and business office clerical employees are unrepresented. Thus, in order to conform "as far as practicable" to the contours of a unit appropriate under the Health Care Rule, any petitioned-for new bargaining unit including phlebotomists should at least also include all remaining unrepresented employees in the broad group classification to which phlebotomists belong.[3]

Unlike my colleagues, I agree with the Regional Director that *St. John's Hospital,* 307 NLRB 767, 768 (1991), should apply to the circumstances of this case. Here, as in *St. John's*, the Petitioner is an incumbent union seeking to represent only a fragment of the residual workforce in an acute care hospital. In *St. John's*, the Board reconciled principles of general Board law with those of the Health Care Rule by determining that: (1) consistent with general Board law principles, where the petitioner is an incumbent union, it must seek to incorporate residual employees into an existing unit, rather than create a separate residual unit; and (2) consistent with the Health Care Rule, the scope of a petitioned-for unit at an acute care facility must comport, as far as practicable, with the units described in the Rule. These same issues are presented in this case.

In *St. John's*, skilled maintenance workers, a category of employees recognized as appropriate by the Health Care Rule, had been historically organized by craft in five nonconforming units before the Board adopted the Rule. Three classifications of skilled maintenance employees remained unrepresented. The petitioning union,

[1] These include: (1) all registered nurses; (2) all physicians; (3) all professionals except for registered nurses and physicians; (4) all technical employees; (5) all skilled maintenance employees; (6) all business office clerical employees; (7) all guards; and (8) all other nonprofessional employees. See *Final Rule*, 284 NLRB 1579, 1596–1597 (1989).

[2] My colleagues argue that Sec. 103.30(c) of the Rule does not apply to the instant case, because the instant case involves an election in which employees will vote to join an existing bargaining unit (a self-determination election) rather than to create a second bargaining unit. I interpret the language of the rule to apply to circumstances, like this one, where the petitioner seeks to create a new unit by expanding the scope of an existing nonconforming unit. However, even if I were to agree with my colleagues' interpretation of this section of the Rule, I find the Rule instructive, and expect the Board to find units appropriate in acute care settings when they comport "insofar as practicable" with the eight defined units. See Collective-Bargaining Units in the Health Care Industry, Proposed Rules, 53 Fed.Reg. 170 at 3390, 284 NLRB 1527, 1570–1571.

[3] Approximately 83 nonprofessional employees and 117 technical employees are currently unrepresented. The parties dispute whether the 15 to 17 phlebotomists are nonprofessional employees or technical employees. The Regional Director found they were not technical employees. For this analysis, their classification as nonprofessional or technical employees is immaterial. In either instance, inclusion of the phlebotomists in the new unit would leave a substantial number of employees in either classification out of the unit.

which represented one of the historical non-conforming units, sought to represent a separate unit of the largest classification of unrepresented employees. The Regional Director found, and the Board agreed, that this subset of residual employees was not an appropriate unit. Although the Regional Director found that a separate residual unit including all of these remaining employees would be appropriate, the Board determined that neither the petitioned-for unit, which would have included a subset of employees residual to the nonconforming units, nor the Regional Director's proposed separate residual unit was appropriate. Instead, the Board concluded in *St. John's* that if the petitioner wanted to represent the workers it sought to represent, it must include *all* remaining unrepresented workers residual to the nonconforming units in an *existing* unit. The Board plainly stated in *St. John's*, "[B]ecause the Petitioner already represents a nonconforming unit of skilled maintenance employees, if the Petitioner wants to represent any of the remaining skilled maintenance employees, the Petitioner must represent all the remaining skilled maintenance employees as part of its existing unit. . . ." 307 NLRB at 768. Here, although the petition undisputedly seeks to include some residual employees in an existing unit, it fails to seek a group of employees that comports, as far as practicable, to the Health Care Rule. Therefore, I agree with the Regional Director's analysis that to permit an election limited only to a voting group of the Respondent's phlebotomists would violate the principles of the holding in *St. John's*.

My colleagues misdirect their attention to the issue of unit proliferation in their attempts to distinguish the facts of *St. John*'s from the instant case. The appropriate scope of a petitioned-for new bargaining unit in an acute care hospital subject to the Health Care Rule was the primary issue in *St. John's*, just as in this case. In determining that the unit was inappropriate in *St. John's*, the Board considered the need to avoid unit proliferation, inasmuch as there were five nonconforming units and the petitioner sought to create a sixth one; however, the appropriate scope of the resulting unit rather than the ultimate number of units was the issue addressed and resolved, as the Board determined that a proposed voting group of less than all residual employees of a type defined as appropriate by the Health Care Rule was inappropriate, even though the employees were being sought by an incumbent union.[4]

Moreover, there are insufficient facts to conclude that these phlebotomists are an identifiable employee group with a distinct community of interests for purposes of an *Armour-Globe* analysis.[5] The majority identifies several other classifications of employees at the hospital who do work similar to the phlebotomists. Medical technicians and technologists, for example, work in the same labs as phlebotomists, and typically take over phlebotomists' blood drawing duties on the third or evening shift. The existence of closely related jobs with overlapping duties, integrated purposes, and shared work space, raises doubt as to whether the phlebotomists, alone, are a distinct identifiable group such that they would constitute an appropriate voting group even outside of a health care setting. Thus, my colleagues not only ignore the Health Care Rule but also disregard the general requirements of the Board's *Armour-Globe* analysis by failing to remand to the Regional Director for further findings of fact regarding whether the phlebotomists could be considered a distinct and identifiable employee group.

In my view, in light of the unusual nature of this historical nonconforming unit, a voting group consisting of any residual employees in this acute care hospital should be at least inclusive enough to ensure that, if the employees chose representation, all employees of the same type as defined by the Health Care Rules would be represented in the same unit. Thus, had the Petitioner sought a voting group consisting of all nonprofessional employees residual to the unit, assuming phlebotomists are nonprofessional rather than technical employees,[6] or if it sought to include all employees residual to the existing unit, a self-determination election based on such groupings would have been a superior alternative to the voting group of only phlebotomists endorsed by my colleagues. Either of those alternatives might have resulted in a unit that was closer in scope to one that conformed to the Health Care Rule by including in the voting group all employees residual to the historical unit in at least one category of employees recognized by the Rule. Either of those alternatives would comport more fully with the Board's duty to apply the Rule, as far as practicable, to the circumstances of this or any case. If the petition were dismissed, nothing would prevent the Petitioner, if em-

[4] That the Petitioner does not seek to create an additional bargaining unit here does not eliminate all concern for the potential proliferation of units at this acute care hospital. By allowing a voting group containing only a splintered subset of employees, my colleagues create a situation in which multiple subsets of employees may seek representation at this hospital in an unknown number of mini elections. This undesirable result is fundamentally inconsistent with the Health Care Rule. As my colleagues acknowledge, Board decisions are guided by the principle based on the Board's reasoned judgment that nonproliferation of units is a proper concern in the health care industry.

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

[6] Conversely, if phlebotomists were found to be technical employees, a voting group of all technical employees residual to the unit would be appropriate.

ployees desired, from filing a new petition seeking to represent a voting group that comports with the Health Care Rule, or one that seeks to represent all residual employees. My colleagues choose, instead, to permit the Petitioner to carve out only a narrow subsection of employees for inclusion in a representation election in an acute care hospital, in spite of our Health Care Rule, precedent, and common sense. I would find that the proposed voting group of only phlebotomists is inappropriate in the circumstances of this case.