

Laurel Associates, Inc. d/b/a Jersey Shore Nursing and Rehabilitation Center and Local 1115-New Jersey-South SEIU, AFL-CIO, Petitioner. Case 22-RC-11456

April 9, 1998

ORDER DENYING REVIEW

BY CHAIRMAN GOULD AND MEMBERS FOX AND BRAME

The National Labor Relations Board, by a three-member panel, has considered the Employer's request for review of the Regional Director's Decision and Direction of Election (pertinent parts of which are attached).¹ The request for review is denied as it raises no substantial issues warranting review.

¹ Review was requested with regard to: (1) the Regional Director's finding that the petitioned-for service and maintenance unit is an appropriate unit for bargaining; (2) the Regional Director's refusal to dismiss the petition as premature or to delay the election; and (3) the Hearing Officer's rulings limiting the Employer to making offers of proof with respect to those two issues.

REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION

The Petitioner seeks to represent a unit of all full-time and regular part-time nurses aides, rehabilitation aides, recreational aides, laundry and housekeeping employees, maintenance employees and dietary aides employed at the Employer's Eatontown, New Jersey nursing home. This unit appears to be a comprehensive service and maintenance unit with traditional exclusions. At the hearing, the Employer asserted that only three separate units within the overall service and maintenance grouping would be appropriate, namely (1) all nurses aides including rehabilitation aides and recreational aides (56 employees); (2) environmental services department which includes laundry, housekeeping and maintenance employees (10 employees); and (3) dietary employees (12 employees). In view of the Employer's unit contention, the Hearing Officer required the Employer to make an offer of proof in support of its unit positions. The Employer asserted that if permitted to present evidence, it would prove that each of the three units has separate supervision,⁸ different wage rates,⁹ no interchange among the groups,¹⁰ each group has different job functions and responsibilities¹¹ and different

⁸The offer of proof failed to indicate the level of supervision involved although it would appear that the Employer meant the immediate supervisory level.

⁹The offer of proof asserts that employees in the nurses aide unit have a starting rate of \$8.50 per hour whereas employees in the other two units start at \$7.25. The offer of proof only provided the starting rate differences.

¹⁰There was no explanation beyond the mere assertion of no interchange.

¹¹In this regard, the offer of proof indicated that the nurses aides, unlike the employees in the other two units, have direct, albeit unspecified, patient care responsibilities. However, in describing the function of dietary aides, the Employer asserted that those employees

training requirements.¹² The Hearing Officer rejected the Employer's offer of proof and precluded the Employer from presenting testimony on the unit issue noting that the unit sought was presumptively appropriate.¹³

The Board held in *Bennett Industries, Inc.*, 313 NLRB 1363 (1994), that it has a duty to ensure due process for the parties in connection with the conduct of Board proceedings. In this regard, the Board provides parties with the opportunity to present evidence and argue positions concerning relevant issues. However, the Board also has a duty to protect the integrity of its processes against unwarranted burdening of the record and unnecessary delay. Here, the Employer, was provided with the opportunity to make an offer of proof in support of its unit contentions despite the appropriateness of the facially valid unit sought by the Petitioner. I find that the evidence offered by the Employer is inadequate to overcome the presumptively appropriate unit sought by the Petitioner. In making this finding, I have considered Congress' admonition to avoid proliferation of bargaining units in the health care industry. Thus, including nurses aides, rehabilitation aides, recreational aides, laundry and housekeeping employees, maintenance employees and dietary aides in the same unit is in accord with this congressional intent. In these circumstances, I find that the Hearing Officer struck the proper balance between the right to due process and the need for prompt resolution of a question concerning representation. *Mariah, Inc.*, 322 NLRB No. 114 (1996); *HeartShare Human Services of New York, Inc.*, 320 NLRB 1 (1995); *Bennett Industries, Inc.*, supra.

In this matter, noting that the unit sought is appropriate on its face as it appears to include all service and maintenance employees, save for traditional exclusions, I find that the unit sought by the Petitioner constitutes a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act.¹⁴ *Park Manor Care Center*, 305 NLRB 872 (1991); *Newington Children's Hospital*, 217 NLRB 793 (1975); also see generally *Hebrew Home & Hospital, Inc.*, 311 NLRB 1400 (1993).¹⁵ In making unit determinations, the Board's task is not to determine the most appropriate unit, but simply to determine an appropriate unit. *P.J. Dick Contracting*, 290 NLRB 150 (1988). In so doing, the Board looks "first to the unit sought by the petitioner. If it is appropriate, [the] inquiry ends. If, however, it is inappropriate, the Board will scrutinize the Employer's proposals." *Dezcon, Inc.*, 295 NLRB 109, 111 (1989). As noted above, I find that

not only prepare food but serve it to the patients. This would appear to entail direct patient contact and care.

¹²The offer of proof is silent as to these training differences, except that the Employer asserts that nurses aides have some unspecified training in "some areas of nursing."

¹³The Employer's attempt to expand upon its offer of proof following the rejection was denied. The Employer's request for special permission to appeal the Hearing Officer's ruling was denied by the undersigned by Order dated October 9, 1997.

¹⁴The Employer has not asserted that any employees or classifications sought by Petitioner are supervisory within the meaning of the Act. It is well settled that the burden of proving supervisory status rests on the party alleging that such status exists. *Tucson Gas & Electric Co.*, 241 NLRB 181 (1979); *Bennett Industries, Inc.*, supra.

¹⁵The Employer's reliance on this case is misplaced as the maintenance employees sought there were deemed skilled and, therefore entitled to a separate unit. *Hebrew Rehabilitation Center*, 230 NLRB 255 (1977); *McClellan Hospital Corp.*, 309 NLRB 564 (1992).

the unit sought by the Petitioner is appropriate for purposes of collective bargaining.

There remains for consideration the Employer's contention that the sought after unit is expanding and there is not currently a representative complement of employees warranting an election. The appropriate test for determining an expanding unit is found in *Endicott Johnson de Puerto Rico, Inc.*, 172 NLRB 1676 (1965), where the Board held that the appropriate consideration is whether the present employee complement is substantial and representative. See also, *General Cable Corp.*, 173 NLRB 251 (1968). Because no definitive rule has been enunciated as to what "substantial and representative" is, the Board will consider several factors before making that determination. One factor is the acuity of the Employer's projection. *American Brass Co.*, 120 NLRB 1276 (1958); *General Engineering Inc.*, 123 NLRB 586 (1959); *Mermac Mining Co.*, 134 NLRB 1675 (1961).

The record disclosed¹⁶ that the Employer began operations on March 17, 1997, and is currently licensed by the State of New Jersey to have 95 beds which were not all filled at the time of the instant hearing. The record does not indicate the

¹⁶The Employer's evidence in support of its expanding unit contention was elicited via an offer of proof that was done in question and answer format through the testimony of the Employer's Administrator, Mark Brosnan.

exact occupancy at the present time. As indicated above, the Employer employs approximately 68 employees in the unit sought by the Petitioner. The Employer's facility consists of five patient wings, which will have a capacity of 158 beds when fully occupied. Currently, only three patient wings are in use. The Employer asserts that it intends to apply to the State for an increase of 30 beds in the near future, "if we so choose." The Employer further asserts that at full capacity (achievable within 12 months), the nursing home will be licensed to operate five patient wings consisting of 158 beds. In this connection, the Employer anticipates the need for 120 unit employees to staff this operation at full capacity. The record is devoid of any evidence regarding the rate of expansion in the future or any evidence of anticipated real increases in capacity. As such, any determination as to when, if ever, the Employer will be operating at full capacity would be mere speculation. *Gerlach Meat Co., Inc.*, 192 NLRB 559 (1971); *Beaert Steel & Key Research & Development Co.*, 176 NLRB 134 (1969). Finally, the record discloses that the job classifications noted above are all in place with no additional job classifications anticipated. In these circumstances, I find, based upon the evidence proffered in the offer of proof and the case law cited supra that a representative and substantial complement of employees by job classification and by number are presently employed.