

Highlands Hospital Corporation d/b/a Highlands Regional Medical Center and District 1199, The Health Care and Social Service Union, SEIU, AFL-CIO. Case 9-RC-17212

March 24, 1999

ORDER DENYING REVIEW
BY CHAIRMAN TRUESDALE AND MEMBERS
LIEBMAN AND BRAME

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 Order Denying Motion (a copy of which is attached as an appendix). The request for review is denied as it raises no substantial issues warranting review. The Employer's request for a stay of the election is also denied.

APPENDIX

ORDER DENYING MOTION

On February 10, 1999, the Petitioner filed the petition in the above-captioned matter, pursuant to Section 9(c) of the National Labor Relations Act, herein called the Act, seeking to represent a collective-bargaining unit consisting of all full-time and regular part-time registered nurses (RNs) employed by the Employer. On February 24, 1999, the Employer and the Petitioner entered into a Stipulated Election Agreement, herein called the Agreement, which was approved by the undersigned on February 25, 1999. Pursuant to the terms of the Agreement, the parties agreed that the Employer is engaged in the operation of an acute care hospital and agreed to the conduct of an election on March 25, 1999, in the unit described below, herein called the Unit, which they agreed was appropriate for purposes of collective bargaining:

All registered nurses, including charge nurses employed by the Employer at its 5000 Ky Route 321, Prestonsburg, Kentucky facility, but excluding assistant vice-presidents of nursing, clinical and other patient service managers, house supervisors, RN circulators in surgery (OR 1st floor), clinical liaison, manager of education, staff development education, infection control employee health nurse, diabetic education CME program coordinator, UR case manager, case manager, discharge planner, certified registered nurse anesthetists, PACU charge nurse, dietitians, pharmacists, physicians, employee health nurses, office clerical employees, service and maintenance employees, LPNs, technical employees, business office clericals, other professional employees, guards and supervisors as defined in the Act.¹

In addition, the parties entered into a separate written voter eligibility agreement on February 24, 1999, specifically naming the employees who were employed in the excluded job classifications and agreeing that these individuals are not eligible to vote in the election in this matter.²

¹ There are approximately 92 RNs employed in the Unit as described in the Agreement.

² Although the terms of this voter eligibility agreement do not expressly provide that the agreement is final and binding on the parties, I find that it is informative insofar as establishing that the parties were in

Thereafter, on March 5, 1999, the Employer filed with me an Employer Petition to Revoke Approval of or to Modify Election Stipulation Agreement (the Employer's Motion). In its Motion, the Employer requests that the undersigned revoke approval of the Agreement or, in the alternative, modify the Agreement to describe the appropriate collective-bargaining unit by including certain previously excluded classifications of RNs as follows:

All full-time and regular part-time registered nurses employed by the Highlands Regional Medical Center at its site located at 5000 Ky Rt. 321, Prestonsburg, Ky, including staff registered nurses, CRNAs, UR Case Manager, Case Manager, Discharge Planner, Infection Control Nurse, nurse educators and O.R. Circulators, but excluding managers, supervisors, confidential employees, and guards as defined under the Act.

The Employer then identifies 17 employees who are employed in the previously excluded classifications and who, it contends, would be eligible to vote in the election if the Agreement were modified as it proposes. I note that the names of all 17 employees appear on the voter eligibility agreement executed by the parties on February 24, 1999, as individuals who are not eligible voters.

In its Motion, the Employer further requests permission to withdraw from the Agreement in the event I decline its request to revoke approval of the Agreement or modify the appropriate collective-bargaining unit described therein.

The Petitioner opposes the Employer's Motion and requests that I proceed to conduct an election in accordance with the Agreement.

In support of its Motion, the Employer maintains that certain of its RNs, including the operating room nurses, the staff development educator, the diabetic educator, the utilization review manager, the case manager, the discharge planner, the infection control nurse and the certified registered nurse anesthetists (CRNAs), herein called the disputed RNs, are neither managerial nor supervisory employees, that they share a community of interest with the RNs in the Unit as currently described in the Agreement, and that they should be included in the Unit. The Employer asserts that the Disputed RNs hold positions which are routinely included in registered nurse bargaining units by the Board and that their exclusion from the Unit, as set forth in the Agreement, would result in the creation of a potentially unrepresented residual unit within the RN unit resulting in the proliferation of bargaining units in a health care setting which is contrary to the Board's Rule on the structure of bargaining units in the health care industry. The Employer further maintains that because CRNAs are excluded from the Unit, the Unit set forth in the Agreement is inconsistent with a Decision and Direction of Election issued on July 18, 1995, in Case 9-RC-16570 following a formal hearing involving the same parties in which the Acting Regional Director found that the CRNAs should be included in a unit of the Employer's RNs.

The Board's Final Rule on Collective-Bargaining Units in the Health Care Industry, herein called the Rule, is set forth at 29 CFR Part 103, 54 Fed. Reg. 16336, 284 NLRB 1586, (1989). Section 103.30, paragraph (a) thereof provides that a unit of all registered nurse is one of eight units which may be

full agreement concerning the composition of the Unit at the time they entered into the Stipulated Election Agreement.

appropriate for bargaining in acute care hospitals. Assuming that the Employer is correct in its assertion that the Unit excludes RNs who are statutory employees, it appears that the Unit does not conform to paragraph (a) and that in the absence of the Agreement, the Board, if called upon to do so, might well conclude that the Disputed RNs should appropriately be included in a unit of registered nurses.

Paragraph (d) of Section 103.30, however, permits regional directors to approve stipulations for bargaining units not in conformity with paragraph (a), provided that the stipulated unit is otherwise acceptable. In its comments on the proposed Rule, the Board, at 284 NLRB 1572–1573, explained the desirability of allowing parties to stipulate to nonconforming units and concluded that such stipulations should be permitted unless they are statutorily prohibited or violate other established Board policies. The Board specifically noted that to the extent such a stipulation may later result in the creation of a residual group of unrepresented employees, it would “address their representation concerns as it would those of other groups of residual employees present in partially organized acute care hospitals—on a case-by-case basis applying the rules insofar as practicable.”

The Board has long held that election agreements are contracts binding on the parties who executed them, that they may be set aside only in limited circumstances and that they will be enforced provided that their terms are clear, unambiguous and do not contravene expressed statutory exclusions or established Board policy. *T & L Leasing*, 318 NLRB 324, 325 (1995); *Business Records Corp.*, 300 NLRB 708 (1990). After approval by the Regional Director, election agreements may not be modified by either a party or an agent of the Board without the agreement of the other parties. *T & L Leasing*, supra. Additionally, Section 11098 of the NLRB Casehandling Manual for Representation Proceedings states that “once an election agreement has been approved, a party may withdraw therefrom only upon an affirmative showing of unusual circumstances or by agreement of the parties.” See also *Sunnyvale Medical Center, Inc.*, 241 NLRB 1156 (1979), and *Unifemme, Inc.*, 226 NLRB 607 (1976).

I note that because the disputed RNs are specifically excluded from the Unit set forth in the Agreement, the Agreement is clear and unambiguous as to their unit placement. The Employer’s Motion does not assert that any unusual circumstances have arisen since the approval of the Agreement nor does the Employer contend that the Unit set forth in the Agreement contravenes any statutory exclusions. The Employer asserts, in substance, that if the status of the disputed RNs were litigated, the Board would include them in the appropriate unit, because such RNs are normally included in RN units. However, with respect to election agreements, it is the Board’s practice to honor concessions made in the interest of expeditious handling of representation cases even though the Board may have reached a different result upon litigation. *Hollywood Medical Center*, 275 NLRB 307 (1985); *Pyper Construction Co.*, 177 NLRB 707, 708 (1969). Thus, the questions as to whether the Disputed RNs share a sufficient community of interest with other RNs in the Unit to warrant their inclusion therein or whether the Board would include them in the appropriate unit upon litigation represent an improper line of inquiry and are issues not relevant to determining whether the Agreement

should be enforced. *Business Records Corp.*, supra at 708 and fn. 6.³

Even accepting the validity of the Employer’s assertions that the Board, upon litigation, would include the Disputed RNs in a unit of registered nurses, that their exclusion would result in the creation of a residual unit and that the Unit is contrary to a prior unit determination made in an earlier case, it does not follow that the Unit in the Agreement is contrary to established Board policy or represents unusual circumstances which would warrant a refusal to enforce the Agreement. In adopting the Rule, it is clear that the Board contemplated and approved of the creation of non-conforming units by agreement of parties and with the knowledge that the creation of such non-conforming units could result in the proliferation of residual units. Further, it does not follow that the prior different determination made in Case 9–RC–16570 renders the Agreement contrary to established Board policy. The prior determination was a result of litigation while the Unit was the result of an election agreement. As noted above, an election agreement providing for a unit different from one which would be determined through litigation may nonetheless be enforced.⁴

In view of the foregoing, I conclude that the Employer’s Motion fails to present facts sufficient to establish that the Agreement contravenes statutory provisions or is contrary to established Board policy or to establish that unusual circumstances exist which would warrant either vacating the Agreement or permitting the Employer to withdraw from the Agreement.

Accordingly, I having duly considered the matter,

IT IS HEREBY ORDERED that the Employer’s Motion and its request for permission to withdraw from the Agreement is, and they hereby are, denied.

IT IS FURTHER ORDERED that the election in this matter be conducted pursuant to the terms of the Agreement.

³ The Employer relies on *Sunrise, Inc.*, 282 NLRB 252 (1986); *Valley View Hospital*, 252 NLRB 1146 (1980); and *Business Records Corp.*, supra, in support of its assertion that the Agreement is contrary to established Board policy. However, in *Sunrise* and *Valley View*, the Board refused to enforce election agreements because they provided for the inclusion of professional employees in a unit of nonprofessionals without their consent, contrary to the provisions of Sec. 9(b)(1) of the Act. In the instant matter, the Employer does not assert, nor does it appear, that the exclusion of the disputed RNs is contrary to any statutory provision. *Business Records Corp.* involved a question of the unit placement of an inspector in a stipulated unit which specifically included inspectors. The Board found that based solely on the clear and unambiguous language of the stipulation, the inspector should be included in the unit absent evidence that he was a member of an excluded category of employees, concluding that it would be improper to now determine through a hearing whether the inspector shared a community of interest with other unit employees.

⁴ The cases cited by the Employer for the proposition that prior unit determinations may not be altered absent a showing of changed circumstances, *Holiday Inn of Victorville*, 284 NLRB 916, 926 (1987); *Kansas City Terminal Elevator Co.*, 269 NLRB 350 (1984); *Crown Zellerbach Corp.*, 246 NLRB 202 (1979); and *Newspaper Production Co.*, 205 NLRB 738, 740 (1973), are unavailing as those cases all involve issues as to whether substantive changes could be made to the composition or scope of existing certified or recognized bargaining units unlike the situation in the instant case where there is no history of collective bargaining in the unit sought by the Petitioner.