

**Northwest Community Hospital and International
Union of Operating Engineers, Local 399, Petitioner.** Case 13–RC–20142

May 31, 2000

DECISION AND CERTIFICATION OF
RESULTS OF ELECTION

BY CHAIRMAN TRUESDALE AND MEMBERS
HURTGEM AND BRAME

The National Labor Relations Board, by a three-member panel, has considered the determinative challenges in an election held on June 25, 1999, and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 12 for and 12 against the Petitioner, with 2 challenged ballots, a number sufficient to affect the results.

The Board has reviewed the record in light of the exceptions and briefs, has adopted the hearing officer's findings and recommendations only to the extent consistent with this Decision, and finds that a certification of results of election should be issued.

The parties agreed to a stipulated bargaining unit¹ which was different from the unit sought in the Union's petition.² Specifically, although the Union petitioned for "hourly on-call skilled maintenance employees," this classification of employees is not referenced in the Stipulated Election Agreement approved by the Regional Director. At the election, the Board agent challenged the ballot of on-call engineer Donald Jarnow, whose name did not appear on the *Excelsior* list. The Employer challenged the ballot of on-call maintenance employee John Colles.³

The hearing officer recommended that the challenges be overruled. Finding the stipulation ambiguous, the hearing officer considered extrinsic evidence, which he found not dispositive as to the parties' intent. Applying community-of-interest principles, the hearing officer recommended that Jarnow and Colles be included in the bargaining unit.

The Employer excepts to the hearing officer's recommendation that the challenges be overruled. It argues that, on its face, the stipulation plainly and unambiguously excludes on-call employees. Alternatively, the Employer contends that if extrinsic evidence is examined, there is no objective manifestation of the parties' intent to include on-call employees. Lastly, the Em-

ployer argues that the hearing officer should not have applied community-of-interest principles, but, assuming the analysis proceeds to that point, Jarnow should not be included in the unit under that test.

The Petitioner contends that the hearing officer's recommended overruling of the challenges was correct because the stipulation clearly and unambiguously includes on-call employees. Alternatively, if extrinsic evidence is considered, the Petitioner asserts that the parties' stipulation manifests an intent to include on-call employees. Finally, the Petitioner argues that if community-of-interest principles are applied, the hearing officer was correct in concluding that Jarnow's and Colles' job duties and hours are sufficiently similar to those of other bargaining unit employees that they should be included in the unit.

We find merit to the Employer's contention that hourly on-call employees should be excluded from the stipulated bargaining unit for the reasons set forth below. The Board has a longstanding policy of permitting parties to enter into stipulations regarding appropriate bargaining units. *Gala Food Processing*, 310 NLRB 1193 (1993). The Board's function is to ascertain the intent of the parties and then to determine whether this intent is contrary to any statutory provisions or established Board policy. *Tribune Co.*, 190 NLRB 398 (1971). If the objective intent of the parties is expressed in clear and unambiguous terms in the stipulation, then the Board will hold the parties to their agreement. In order to determine whether the stipulation is clear or ambiguous, the Board will compare the express language of the stipulated bargaining unit with the disputed classifications, finding a clear intent to include those classifications matching the description and a clear intent to exclude those classifications not matching the stipulated unit description. *Viacom Cablevision*, 268 NLRB 633 (1984). Where the stipulation is unclear, resort to extrinsic evidence is appropriate to determine the parties' intent regarding the disputed classification. See *Gala Foods*, supra. It is only when the parties' intent remains unclear that reliance may be placed upon community-of-interest principles.

In *National Public Radio*, 328 NLRB 75 (1999), the parties stipulated to include all regular full-time and regular part-time employees, but to exclude all other employees. Because the employer maintained distinct categories of regular and temporary employees, the Board held there was no ambiguity in the parties' stipulation. Based on the plain language of the stipulation, "the parties must have intended the exclusion of temporary [employees]." Id. Because the parties' stipulation did not contravene Board policy or established precedent, the Board sustained the challenges to the ballots cast by temporary employees.

Similarly, in *Hotel Inter-Continental Maui*, 237 NLRB 906 (1978), the employer maintained two categories of

¹ The stipulated unit included "all full-time and regular part-time operating engineers, maintenance mechanics, maintenance workers, electricians and bio-medical technicians employed by the Employer in its Facilities Support Department at its facility currently located at 800 Central, Arlington Heights, IL 60005; but excluding all guards and supervisors as defined in the Act."

² The Union's petition sought "all full-time, part-time, hourly on-call skilled maintenance employees in the Maintenance Department."

³ The Employer contends that Colles' name was inadvertently placed on the *Excelsior* list.

part-time employees: regular part-time employees and on-call employees. The parties' stipulation expressly limited the bargaining unit to all "full-time" and "regular part-time" employees. The Board concluded, based on the unambiguous language of the stipulation, that the parties intended to exclude on-call employees. Because the unit did not contravene any statutory provisions or Board policy, the Board found that the on-call employees were properly excluded from the *Excelsior* list.⁴

In the instant case, the Employer maintains three distinct categories of employees: full-time, part-time, and hourly on-call employees. Part-time employees work a set schedule, while hourly on-call employees fill in for employees who are absent for various reasons. There is evidence that employees can transfer from an hourly on-call position, without benefits, to a part-time position, with benefits. The company's business records also illustrate the distinction between regular part-time and hourly on-call employees.

In light of evidence of the distinct nature of part-time employment versus hourly on-call employment, where the Petitioner had specific knowledge of this distinction, some significance must be attributed to the Petitioner's agreement to the stipulation to include only "regular full-time and regular part-time employees." In this regard, we note particularly that the Petitioner originally expressly included "on-call . . . employees," but abandoned this unit description in the agreed-upon stipulated unit. Although the stipulation did not exclude "all other employees," we find that the parties intended to include

only full-time and part-time employees and to exclude hourly on-call employees from the bargaining unit. The stipulated agreement clearly and unambiguously reflects the intent of the parties.⁵ The parties' stipulation does not contravene any provision of the Act or any Board policy. Thus, we shall enforce it and need not consider extrinsic evidence or community-of-interest arguments. Accordingly, we conclude that the parties intended and stipulated to exclude hourly on-call employees Jarnow and Colles from the bargaining unit. We therefore sustain the challenges to the ballots of hourly on-call employees Jarnow and Colles. As the tally of ballots shows that Petitioner failed to receive a majority of votes cast, we shall certify the results of the election.

IT IS CERTIFIED that a majority of the valid ballots have not been cast for International Union of Operating Engineers, Local 399, and that it is not the exclusive representative of these bargaining unit employees.

⁴ In our view, *National Public Radio*, supra, is particularly apposite. Here, as there, the parties' stipulation includes only regular full-time and regular part-time employees. The Petitioner's knowledge of the Employer's well-established distinction between part-time and hourly on-call employees vitiates any significance potentially attributable to the omission, from the instant stipulation, of language explicitly excluding all other employees, and underscores the unambiguous nature of the stipulation at issue.

Member Hurtgen does not necessarily agree that the stipulation, on its face, clearly and unambiguously excludes on-call employees. It does not mention these employees, one way or the other, and it does not exclude "all other employees." However, he notes that the original petition expressly included on-call employees, and that this group was later omitted from the stipulation. Thus, the stipulation, considered in this light, clearly reflects an intention to exclude on-call employees.

⁴ *Excelsior Underwear Inc.*, 156 NLRB 1236 (1966).