

**St. Mary's Duluth Clinic Health System and United Steelworkers of America, AFL-CIO, CLC, Petitioner.** Case 18-RC-16399

December 15, 2000

DECISION ON REVIEW AND ORDER  
BY CHAIRMAN TRUESDALE AND MEMBERS  
FOX, LIEBMAN, AND HURTGEN

The issue presented in this case is whether, in an acute-care hospital where there is a nonconforming bargaining unit consisting of some, but not all, of the employees who would otherwise constitute an appropriate unit under the Board's Health Care Rule,<sup>1</sup> the Board will process a petition by a different labor organization for a separate residual unit consisting of the remaining nonrepresented employees. At the time it promulgated its 1989 rule regarding collective-bargaining units in the health care industry, the Board anticipated that this and related questions would arise with regard to the representation of units that are residual to nonconforming units. However, because the issues involved had not been extensively addressed during the rulemaking proceeding, the Board specifically deferred their resolution to the adjudication of particular cases presenting those issues. The Board had its first opportunity to do so in *St. John's Hospital*, 307 NLRB 767 (1992), in which a union representing an existing nonconforming unit of plumbers and refrigeration employees at an acute-care hospital filed a petition seeking to represent a separate unit consisting of some, but not all, of the remaining skilled maintenance workers at the facility. The Board first held that any election to determine a representative for unrepresented skilled maintenance workers would have to include *all* the remaining skilled maintenance workers residual to the existing unit or units. The Board then went on to apply its long-settled rule that an incumbent union<sup>2</sup> wishing to represent employees residual to those in its existing unit could only do so by adding them to the existing unit, usually by way of a self-determination election, and could not seek to represent them as a separate unit. The Board did not, however, address the question presented here, which is whether we will process a petition for a separate residual unit filed by a union other than the union representing the unit to which it is residual. As fully discussed below, we conclude that such a petition may be

<sup>1</sup> 29 CFR § 103.30; 284 NLRB 1580-1597 (1987).

<sup>2</sup> Although the term "incumbent union" usually refers to a union that already represents the petitioned-for employees, in the health care industry where a union has petitioned to represent a unit of unrepresented residual employees, the Board has used the term "incumbent union" to refer to the union that currently represents employees in a nonconforming unit to which the petitioned-for employees are residual.

processed, provided that the petitioned-for unit is an appropriate residual unit.

Background

On February 19, 1999, the Regional Director for Region 18 issued a Decision and Direction of Election, in which he found appropriate the petitioned-for residual unit of all unrepresented technical employees at the Employer's acute-care health facility. In accordance with Section 102.67 of the Board's Rules and Regulations, the Employer and the Minnesota Licensed Practical Nurses Association (MLPNA), the incumbent union representing a unit of licensed practical nurses (LPNs) at the Employer's facility, filed timely requests for review of the Regional Director's decision. By Order dated March 18, 1999, the Board granted the requests for review. The Employer subsequently filed a brief on review. Having carefully considered the entire record in this proceeding, including the Employer's brief on review, we conclude that the petitioned-for residual unit is appropriate.

Facts

The Employer is engaged in the provision of medical and health services at various facilities in Wisconsin and Minnesota, one of which is St. Mary's Medical Center (St. Mary's), an acute-care hospital in Duluth, Minnesota. In January 1997, St. Mary's Medical Center merged with the Duluth Clinic, thereby creating a new corporate entity. For a substantial period of time prior to the merger, and continuing to the time of this proceeding, St. Mary's has maintained bargaining relationships with a number of different labor organizations. The MLPNA, for example, has represented a unit of 175 LPNs at St. Mary's since 1955, with the most recent collective-bargaining agreement covering the period from October 1, 1996, to September 30, 1999. As the MLPNA unit excludes 230 additional technical employees at St. Mary's, it is a "non-conforming" unit (i.e., a bargaining unit that does not conform to one of the specifically enumerated units) under the Board's Health Care Rule applicable to acute-care facilities.<sup>3</sup> See 29 CFR § 103.30.<sup>4</sup>

<sup>3</sup> Additionally, several other labor organizations have long represented units of employees at St. Mary's that do not conform to those units delineated in the Health Care Rule.

<sup>4</sup> The Rule provides:

Except in extraordinary circumstances and in circumstances in which there are existing non-conforming units, the following shall be appropriate units, and the only appropriate units, for petitions filed pursuant to section 9(c)(1)(A)(i) or 9(c)(1)(B) . . . except that, if sought by labor organizations, various combinations of units may also be appropriate:

- (1) All registered nurses.
- (2) All physicians.

On November 17, 1998, the Petitioner filed a petition seeking to represent a residual unit composed of the 230 unrepresented technical employees at St. Mary's, including 9 unrepresented LPNs who had been employed at the Duluth Clinic prior to the Clinic's merger with St. Mary's.<sup>5</sup> Although the MLPNA did not formally appear or intervene at the hearing, it did subsequently file a formal motion to intervene after the close of the hearing.<sup>6</sup> That motion to intervene was denied by the Regional Director in his Decision and Direction of Election, on the ground that the showing of interest submitted by the MLPNA did not predate the close of the hearing, and thus was untimely.

The Regional Director concluded that under the facts of this case, the petitioned-for residual unit is appropriate, noting *inter alia*, that the Petitioner is seeking *all*—rather than a portion—of the unrepresented technical employees. Accordingly, the Regional Director directed an election among the residual technical employees.

The Employer took the position that the petitioned-for unit was inappropriate, and that the only appropriate unit would be an all-technical unit that included both the already represented LPNs and remaining technical employees. In so arguing, the Employer relied on both the Health Care Rule and the Board's pre-Rule decision in *Levine Hospital of Hayward, Inc.*, 219 NLRB 327

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- (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.
  - (8) All non-professional employees except for technical employees, skilled maintenance employees, business office clerical employees, and guards.

29 C.F.R. § 103.30(a).

<sup>5</sup> The nine unrepresented LPNs work in the "walk-in" center at the hospital—an area within the hospital devoted to the treatment of non-emergency patients who come to the center seeking medical care without an appointment. Although the walk-in center is located within the physical boundaries of the hospital, the center historically (prior to the merger with St. Mary's) was a part of the Duluth Clinic.

<sup>6</sup> The MLPNA filed its motion to intervene after the Regional Director advised the union—in response to the MLPNA's letter indicating a desire to participate as an intervenor in any election that might be directed—that it would be required to comply with the Board's rules governing intervention.

The MLPNA claims, however, that it previously had been accorded intervenor status, as evidenced by its designation as an intervenor on the original and amended order consolidating cases and notice of representation hearing. In this regard, the Regional Office administratively advised the Board that the MLPNA had been inadvertently included as an intervenor in the captions of these documents, and that it had never been granted intervenor status.

(1975).<sup>7</sup> Although it does not advance any arguments on the appropriateness of the unit, the MLPNA submits that the Regional Director erred in failing to accord it intervenor status and in failing to include it on the election ballot.

#### Analysis

We conclude, based upon the express language of the Rule, as well as Board precedent and policy, that a non-incumbent union may represent a separate residual unit of employees in the healthcare industry. Further, in accordance with the Regional Director, we find that, consistent with the Board's decision in *St. John's*, the petitioned-for residual unit of all unrepresented technical employees at St. Mary's is an appropriate residual unit.

We begin with the language of the Rule itself. Section 103.30(c)<sup>8</sup> provides that, where there are existing, non-conforming units, additional units will be found appropriate only if they conform "insofar as practicable" to one of the enumerated units. A conclusion that the Rule was intended to permit only those units specifically enumerated in the Rule—the interpretation urged by the Employer here—would render the section superfluous. Rather, the phrase suggests that new units should conform as closely as possible to one of the eight units, given the preexistence of nonconforming units. This interpretation is consistent with other post-Rule decisions in which the Board has considered the meaning and applicability of the Rule. In *Kaiser Foundation Hospitals*, 312 NLRB 933 (1993), for example, the Board concluded that Section 103.30(c) of the Rule does not apply to petitions that seek to carve out or sever a group of employees from an existing nonconforming unit, even when the unit sought conforms to one of the Rule's enumerated units. In determining that the Rule was intended to apply

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<sup>7</sup> In *Levine Hospital*, the Board concluded that a nonincumbent union could not appropriately represent a residual unit of employees at an acute-care hospital. An incumbent union represented a broad unit of service and maintenance employees at an acute-care hospital; the petitioning union sought to represent a residual unit of seven medical records clerks and transcribers. The Board dismissed the petition, finding that the creation of a separate unit would lead to an undue proliferation of bargaining units, contrary to congressional admonition. The Board noted that it was not relegating the clerks and transcribers to "a state of perpetual unrepresentation," since the Board would entertain a timely petition to represent all of the service and maintenance employees (including the clerks and transcribers), or a petition by the incumbent union seeking to add the clerks and transcribers to the existing service and maintenance unit via a self-determination election.

<sup>8</sup> Sec. 103.30(c) provides:

Where there are existing non-conforming units in acute care hospitals, and a petition for additional units is filed pursuant to sec. 9(c)(1)(A)(i) or 9(c)(1)(B), the Board shall find appropriate only units which comport, insofar as practicable, with the appropriate unit set forth in paragraph (a) of this section.

only to petitions for a “new unit of previously unrepresented employees,” the Board emphasized the literal language of the Rule and its accompanying comments, as well as the Board’s longstanding policy of according deference to collective-bargaining history and the promotion of industrial and labor stability. *Kaiser*, 312 NLRB at 934–935. Similarly, in *Crittenton Hospital*, 328 NLRB 879 (1999), the Board concluded that the Rule permitted a nonincumbent union to petition for a historical nonconforming unit, and did not require the addition of historically excluded employees so as to render the unit a “conforming” one pursuant to the Rule. Specifically, the Board indicated that the “perpetuation of a well-established, stable historical nonconforming unit in an RC election is not inimical to the concerns underlying the Rule,”<sup>9</sup> supra at 879. In both *Kaiser* and *Crittenton*, the Board concluded that it was not the intent of the Rule to require the abandonment of, and replacement of, existing historical units with units that specifically conform to those set forth in the Rule.

Although the Board ultimately concluded that Section 103.30(c) of the Rule was not applicable in the above decisions, the cases nevertheless are instructive for their discussion of the Board principles and policies that were deemed to influence and provide context for the proper interpretation of the Rule. Just as the Board in *Kaiser* and *Crittenton* emphasized the Board’s longstanding policy of according deference to collective-bargaining history and promoting labor stability, so too do we consider the significance of these policies in interpreting the phrase “insofar as practicable.” In our view, to require an incumbent union with a long, harmonious bargaining relationship to represent a new, additional group of employees—who may outnumber the employees in its existing unit, and who may have competing interests from the employees in the existing unit—or to require a petitioning union to raid the incumbent’s existing unit, would be antithetical to these important policies. In other words, we conclude that the phrase “insofar as practicable,” viewed in light of the policies discussed above, should not be interpreted to preclude a nonincumbent union from representing in a separate residual unit all unrepresented employees residual to those in the existing nonconforming unit. Although we are not unmindful of the congressional admonition against the undue proliferation of bargaining units in the healthcare industry,<sup>10</sup> we con-

clude that this concern must be weighed against the significant, long-established policy of according deference to existing collective-bargaining relationships.

In any event, we do not believe that our decision today will result in the undue proliferation of bargaining units. In our view, the concerns of unit proliferation articulated in the Board’s decision in *Levine* have been alleviated to a large degree as a result of the promulgation of the Health Care Rule, in conjunction with Board precedent requiring that any residual unit include *all* unrepresented employees in the particular classification at issue. Given this precedent, together with the fact that the Board enumerated only eight appropriate units in the Rule, the potential number of residual units that could exist at any particular facility is limited. Moreover, in our experience, the situation in which multiple unions petition for various units of unrepresented employees at healthcare institutions has rarely presented itself, and we likewise anticipate few such cases in the future.

Our decision that a nonincumbent union may represent a residual unit of employees under the Health Care Rule additionally finds support in the principles underlying the Act itself by preserving the Section 7 rights of the unrepresented employees to pursue bargaining representation. If, as in the instant case, the incumbent union does not attempt to add the unrepresented employees to its existing nonconforming unit through a self-determination election, a dismissal of the petition for a residual unit would necessarily force those employees to remain unrepresented for the duration of the incumbent-employer contract. Depending upon the length of the existing collective-bargaining agreement, the residual employees could be denied the opportunity to choose a bargaining representative for a period of months or even years.

Additionally, the conclusion that a nonincumbent union may represent an appropriate unit of residual employees has the desirable consequence of eliminating the tension created by the Board’s decisions in *Levine* and other cases.<sup>11</sup> A determination of the propriety of a non-

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mittee 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.” *American Hospital Assn. v. NLRB*, 499 U.S. 601, 616–617 (1991). The Court additionally emphasized that the congressional statement concerning the avoidance of proliferation of bargaining units obviously did not have the force of law. *Id.*

<sup>11</sup> See *Michael Reese Hospital*, 242 NLRB 322 (1979). In *Michael Reese*, the Board distinguished *Levine*, and concluded that a petitioned-for unit of 10 chauffeur-drivers at an acute-care hospital was appropriate because the drivers had a separate community of interest from the employees in the existing 1000-employee service and maintenance unit, and because the incumbent union representing the service and maintenance employees had not expressed an interest in participating in an election to represent the drivers. More specifically, although the in-

<sup>9</sup> In so concluding, the Board specifically indicated that it was “[leaving] to another day the question whether a nonincumbent union may represent a residual unit of employees in the healthcare industry.” Supra at 879 fn. 9.

<sup>10</sup> In its decision upholding the Board’s Rule, the Supreme Court stated that “the admonition [against undue proliferation] in the Com-

incumbent union's petition for a residual unit that is not contingent upon the incumbent union's interest or lack of interest in representing the employees obviates the need for inquiry into the incumbent union's interest in representing the residual employees.

Furthermore, our determination that a nonincumbent union's petition for a residual unit may be appropriate pursuant to the Health Care Rule does not suggest that an incumbent union is foreclosed from adding the residual employees to its existing unit through a self-determination election or that a petitioning union is foreclosed from filing a timely petition for an overall unit.

The Regional Director denied MLPNA's motion to intervene, and MLPNA has requested review of that denial. Normally, as an administrative matter, we require a union to request permission to intervene in a representation proceeding and to demonstrate a showing of interest in the petitioned-for unit. We allow intervening unions different levels of participation depending on the type and extent of interest that they have demonstrated. See generally NLRB Casehandling Manual (Part Two), Representation Proceedings Sections 11023.2–11023.5. A union such as the MLPNA, which represents employees of the employer outside the petitioned-for unit, is normally allowed to intervene only to protect its interests in the unit it represents. It is not allowed a place on the ballot, unless it demonstrates a showing of interest in the petitioned-for unit. *Id.* at Section 11023.5. In light of our decision to permit nonincumbent unions to petition for residual units, we have decided to adopt a limited exception to these rules. In cases such as this one where a nonincumbent union petitions for a residual unit, the incumbent union representing the existing nonconforming unit will be entitled, as a matter of course, to a place on the election ballot, without having to formally request intervention or demonstrate a showing of interest in the petitioned-for unit, if it so desires. The incumbent union's participation shall be limited to a place on the ballot. If the incumbent union chooses to be included on the ballot, the employees in the unit will have the opportunity to choose (1) to be represented by the petitioning union in a separate unit, (2) to be represented by the in-

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cumbent union had previously sought to include the drivers in its unit during collective-bargaining negotiations and had subsequently filed a unit clarification petition seeking to add the drivers, the Board found that the incumbent union had never sought to include the drivers in its existing unit via a self-determination election. The Board further indicated that as the incumbent union had not intervened in the election proceedings, the Board would have no reason to believe that the union would then file an election petition. Accordingly, the Board concluded that as a dismissal of the petitioner's petition would relegate the drivers to a perpetual lack of representation, the petitioned-for residual unit was appropriate.

cumbent union as part of its unit, or (3) not to be represented. In our view, this limited exception to the Board's intervention rules strikes a proper balance between the policies of stability of existing collective-bargaining relationships and avoidance of undue proliferation of bargaining units in the healthcare industry, by encouraging, but not requiring, the incumbent union to seek to add the residual employees to its existing unit.

For all the foregoing reasons, we conclude that a petition by a nonincumbent union for a residual unit of employees in the healthcare industry may be appropriate pursuant to the Health Care Rule.<sup>12</sup> We further conclude that, with respect to the instant case, the Regional Director properly found appropriate the petitioned-for residual unit of all unrepresented technical employees at St. Mary's since it includes *all* of the unrepresented technical employees who are residual to the MLPNA unit.

Contrary to the Regional Director, however, and in accordance with our discussion above, we conclude that the MLPNA is entitled to participate as an intervenor in the election if it so desires. Accordingly, we will remand this case to the Regional Director for further action consistent with this decision.

#### ORDER

This case is remanded to the Regional Director for further action consistent with this Decision.

MEMBER HURTGEN, dissenting.

I conclude that the unit found appropriate by my colleagues is contrary to Section 103.30(c) of the Board's Rules, inconsistent with Board precedent, and at odds with the congressional admonition against an "undue proliferation of units" in the health care industry. Accordingly, I dissent.

The MLPNA represents a unit of 175 LPNs. These employees are technical employees. The Petitioner seeks to represent all other technical employees. There are 230 such employees, including 7 LPNs. Under the Health Care Rules (which cover the acute-care facility involved herein) the appropriate unit is all technical employees. Thus, the MLPNA unit is a nonconfirming unit, and the Petitioner seeks to perpetuate the nonconformance.

Section 103.30(c) of the Rules provides:

(c) Where there are existing non-conforming units in acute care hospitals, and a petition for additional units is filed pursuant to section 9(c)(1)(A)(i) or 9(c)(1)(B), the Board shall find appropriate only units which comport, insofar as practicable, with the appropriate unit set forth in [the Rules].

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<sup>12</sup> We accordingly overrule the Board's decision in *Levine Hospital*.

Thus, the unit should include all technical employees if it is practicable to do so. Phrased differently, the unit sought herein (some technical employees) is to be appropriate only if it is shown that it is impracticable to place all of the technical employees in one unit. There is no such showing here. Indeed, my colleagues effectively concede that an all-technical unit would be practicable. That is, one of the choices on the ballot is representation by MLPNA in an all-technical unit. Clearly, my colleagues would not have permitted that choice if they thought that a unit of all technical employees was impracticable.

The only attempt to show that such a unit would be impracticable is the assertion that such a unit would require Petitioner to "raid" the MLPNA unit or would require MLPNA to extend its unit. As to the former assertion, the fact that two unions may compete for the same employees is hardly a showing that the unit itself is impracticable for representation. As to the latter, there is no requirement that MLPNA add employees that it does not seek.

The unit granted by my colleagues is also contrary to Board precedent. My colleagues effectively concede this point, for they find it necessary to overrule *Levine Hospital*, 219 NLRB 327 (1975).

*Michael Reese Hospital*, 242 NLRB 322 is not to the contrary. That pre-Rule case involved a unit of chauffeur-drivers who spent most of their time away from the hospital. In addition, no union other than the petitioner sought to represent them. Those facts are not present in the instant case.

My colleagues also effectively ignore the congressional admonition to refrain from an "undue proliferation" of units in the health-care industry. They do so by placing technical employees in separate units. Worse, they even place a specific job (LPNs) in two separate units.

My colleagues concede that the incumbent union would not be permitted to have separate units. Clearly, it is even worse, from the standpoint of undue proliferation, to have two unions representing separate units. The danger is that each union would seek to outdo the other, with attendant instability in a health care setting.

Finally, my position does not impermissibly intrude on Section 7 rights. Employees do not have a Section 7 right to seek recognition in any unit they wish. They have a Section 7 right to seek recognition in an appropriate unit. As set forth above, the unit sought herein is clearly inappropriate.