

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 29**

**BROOKDALE UNIVERSITY HOSPITAL  
AND MEDICAL CENTER**

**Employer**

and

**Case No. 29-RC-9421**

**LOCAL 971, INTERNATIONAL  
BROTHERHOOD OF SECURITY GUARDS**

**Petitioner**

and

**BROTHERHOOD OF SECURITY PERSONNEL,  
OFFICERS AND GUARDS INTERNATIONAL  
UNION**

**Intervenor<sup>1</sup>**

**DECISION AND DIRECTION OF ELECTION**

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, herein called the Act, as amended, a hearing was held before Peter Pepper, a Hearing Officer of the National Labor Relations Board, herein called the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:

1. During the hearing, the Intervenor introduced into evidence a collective bargaining agreement with the Employer and contended that said contract barred an election in the petitioned-for unit. The Petitioner argued that

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<sup>1</sup> The Intervenor intervened on the basis of its collective bargaining agreement with the Employer.

the contract was not a bar because it contained an unlawful union security clause. The Intervenor maintained that the union security clause in the aforesaid collective bargaining agreement was not unlawful. In an offer of proof, it sought to introduce testimony from its president that the union security clause had not been enforced in an unlawful manner. The hearing officer rejected the offer of proof and refused to allow the Intervenor's president to testify concerning the enforcement of the disputed provision.

I find that the hearing officer acted properly in rejecting the Intervenor's offer of proof. The Board has long recognized that in representation cases, time is of the essence, and substantial delays caused by needless litigation can render meaningless employees' Section 7 rights. Tropicana Products, Inc., 122 NLRB 121, 43 LRRM 1077, 1079 (1958). At the same time, Section 9(c)(1) of the Act provides that once a petition has been filed and investigated the Board shall, upon due notice, conduct a hearing if it has reasonable cause to believe that a question concerning representation exists. Section 101.20(c) of the Board's Rules and Regulations provides that the parties to a hearing shall be afforded the appropriate opportunity to present their positions and to introduce evidence to support their arguments. Not only must the hearing officer afford parties the opportunity to submit relevant evidence, he himself must develop a full and complete record. Rules and Regulations, Sections 101.20(c), 102.64(a). North Manchester Foundry, Inc., 328 NLRB No. 50 (1999); Barre National, Inc., 316 NLRB 877 (1995).

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At the same time, the right to introduce evidence in a representation case is not absolute. Bennett Industries, 313 NLRB 1363 (1994). Rather, a hearing officer must strike a balance between the Board's goal of expeditiously resolving questions concerning representation and affording parties a full opportunity to present evidence in support of their contentions. In keeping the record "as short as is commensurate with its being complete" the hearing officer must "guide, direct and control the hearing, *excluding irrelevant and cumulative material...*"(emphasis added.) Case Handling Manual, Representation Proceedings, Sec. 11188.1.

In Paragon Products Corp., 134 NLRB 662 (1961), the Board set forth its standards for evaluating the bar status of collective bargaining agreements with allegedly unlawful union security provisions. Therein, the Board stated that contracts with union security clauses that were clearly *unlawful on their face* would forfeit their bar quality. In that case, and in subsequent cases in which it has applied the standards set forth in Paragon Products, the Board made it clear that for a contract to lose its bar status, the unlawful character of the union security clause must be ascertainable from the four corners of the document without resort to extrinsic evidence. Specifically, the Board stated,

No testimony and no evidence will be admissible in a representation proceeding, where the testimony or evidence is only relevant to the question of practice under a contract urged as a bar to the proceeding.<sup>2</sup>

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<sup>2</sup> Paragon Products, supra at 667. See also Suffolk Banana Co., Inc., 328 NLRB No. 157 (1999).

This is precisely the type of testimony the Intervenor sought to introduce. Since it was of no relevance to the impact the contract's union security provision had upon its bar status, I find that the hearing officer did not err by excluding it.

In sum, I find that the hearing officer complied with Section 101.20(c) of the Board's Rules (i.e., affording the appropriate opportunity to submit evidence in support of their contentions) by allowing the Intervenor to introduce its collective bargaining agreement. He met the Board's goal of enforcing Section 9 in an expeditious manner by excluding irrelevant testimony concerning the enforcement of the above-described union security clause. Since the legality of the union security provision was the sole issue before the Hearing Officer, by receiving the contract into evidence, he also fulfilled his mission, set forth in Sections 101.20(c) and 102.64(a) of the Board's Rules, of developing a full and complete record.

Accordingly, I find that the hearing officer's rulings made at the hearing are free from prejudicial error, and they hereby are affirmed.

2. The parties stipulated that the Employer, a New York corporation with a facility located at 1 Brookdale Plaza, Brooklyn, New York, herein called the Brooklyn facility, is engaged in the operation of a hospital. During the past year, which period is representative of its annual operations in general, the Employer, in the course and conduct of its business operations, derived gross revenues in excess of \$250,000. During that same period, the Employer purchased and received at its Brooklyn facility, goods and materials valued in excess of \$5,000 directly from suppliers located outside the State of New York.

Based upon the stipulations of the parties, and the record as a whole, I find that the Employer is a health care institution within the meaning of Section 2(14) of the Act. I further find that the Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The labor organizations involved herein claim to represent certain employees.

4. As earlier noted, the Intervenor contends that its contract with the Employer bars an election in the above matter. The Petitioner maintains that the contract is not a bar because it contains an unlawful union security clause.

Since 1983 the Intervenor has been the collective bargaining representative of the Employer's full-time and regular part-time guards. Its current Memorandum of Agreement (MOA), attached hereto as Appendix A, is effective from July 1, 1999, through June 30, 2002. The dates appearing next to the signatures indicate that it was executed on August 31, 1999. With the caveat that "effective January 1, 2000," the parties will enter into negotiations concerning wage increases, pension fund contributions and severance pay, the MOA incorporates terms of the July 1, 1996, to June 30, 1999 contract. The 1996 to 1999 agreement, in turn, is an MOA that incorporates, with certain modifications, the terms of the 1993 to 1996 contract. The 1993 to 1996 contract thus appears to be the most recent fully integrated collective bargaining agreement between the Employer and the Intervenor, and it is the only recent

agreement that fully sets forth the union security obligations of the employees it covers. Article 2(2) of the 1993 to 1996 agreement provides as follows:

All employees on the active payroll who are not members of the Union shall become members of the Union within thirty (30) days after the effective date of this Agreement.

Because the current MOA is retroactively effective, and it incorporates this clause, I find that it does not bar an election.

The Board has long held that an employer and union may not require, as a condition of employment, membership in the union during a period that there is no contract in effect. See Namm's Inc., 102 NLRB 466, 468-469 (1953); Flying Dutchman Park, Inc., 329 NLRB No. 46, fn. 3 (1999). Since an employee would only *definitively* know that he or she has certain union obligations when a contract is executed, the Board has required that the 30 day grace period to which employees are entitled under Section 8(a)(3) of the Act be keyed to the contract's execution date. Contracts whose union security clauses are retroactively keyed to their effective date, rather than their execution date, provide incumbent employees with fewer than 30 days to consider their membership obligations, and are unlawful on their face. See Anderson Express Ltd., 126 NLRB 798, 803 (1960) and the cases cited therein. In Standard Molding Corporation, 137 NLRB 1515 (1962) the Board found that such a clause could not bar an election.

In the instant matter, the contract was executed on August 31, 1999. However, it was made retroactively effective to July 1, 1999. Article 2(2) of the union security provision in the 1993 to 1996 contract, which the current MOA

incorporates, keys the union security obligations of incumbent employees to July 1, 1999, the MOA's effective date. Thus, on August 31, 1999, the date the contract was executed, incumbent employees would have had fewer than 30 days to consider their membership obligations. If such employees had been hired before August 1, 1999, they would have had no time at all.

Since the unlawful character of the union security provision is ascertainable from examining the four corners of MOA and the 1993 to 1996 contract it incorporates, I find that the MOA does not bar an election in the instant matter.<sup>3</sup>

Accordingly, I find that a question affecting commerce exists concerning the representation of certain employees.

5. The parties stipulated, and I find, that the following unit is appropriate for the purposes of collective bargaining:

All full-time and regular part-time<sup>4</sup> security guards employed by the Employer at its facility located at 1 Brookdale Plaza, Brooklyn, New York excluding all other employees, clerical employees, temporary employees, managerial and supervisory employees, i.e. sergeants, lieutenants, captains and other supervisory ranks, or other supervisors as defined in Section 2(11) of the Act.

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<sup>3</sup> This case is distinguishable from Federal Mogul Corporation, 176 NLRB 619 (1969). Although the contract in that matter was executed on June 10, 1968, and was retroactively effective to May 20, 1968, the preamble contained language stating the contract was "made and entered into" on May 20. The Board found that inasmuch as the contract stated it was "made and entered into" on its effective date, it was neither retroactively effective nor clearly unlawful on its face. The Board did not state whether it believed the above language rendered the union security provision ambiguous. In any event, the union security provision in the instant matter does not contain the above described "made and effective" language.

<sup>4</sup> Regular part-time employees shall be defined as those employees working more than one fifth (1/5) of the regular full-time work week. This requirement is set forth in the current collective bargaining agreement between the Employer and the Intervenor.

## DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently subject to the Board's Rules and Regulations. Eligible to vote are employees in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation or temporarily laid off. Also eligible are employees engaged in an economic strike that commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States who are employed in the unit may vote if they appear in person or at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible to vote shall vote whether they desire to be represented for collective bargaining purposes by Local 971, International Brotherhood of Security Guards, by Brotherhood of Security Personnel, Officers and Guards International Union, or by neither labor organization.

## LIST OF VOTERS

In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of the statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *N.L.R.B. v. Wyman-Gordon Company*, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within seven (7) days of the issuance of this Decision, four (4) copies of an election eligibility list, containing the full names and addresses of all the eligible voters, shall be filed by the Employer with the undersigned who shall make the list available to all parties to the election. *North Macon Health Care Facility*, 315 NLRB 359 (1994). In order to be timely filed, such list must be received in the Regional Office, One MetroTech Center North-10th Floor (Corner of Jay Street and Myrtle Avenue), Brooklyn, New York 11201 on or before February 23, 2000. No extension of time to file the list may be granted, nor shall the filing of a request for review operate to stay the filing of such list except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

## **NOTICES OF ELECTION**

Please be advised that the Board has adopted a rule requiring that election notices be posted by the Employer at least three working days prior to an election. If the Employer has not received the notice of election at least five

working days prior to the election date, please contact the Board Agent assigned to the case or the election clerk.

A party shall be estopped from objecting to the nonposting of notices if it is responsible for the non-posting. An Employer shall be deemed to have received copies of the election notices unless it notifies the Regional office at least five working days prior to 12:01 a.m. of the day of the election that it has not received the notices. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure of the Employer to comply with these posting rules shall be grounds for setting aside the election whenever proper objections are filed.

### **RIGHT TO REQUEST REVIEW**

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570. This request must be received by March 1, 2000.

Dated at Brooklyn, New York, this 16th day of February, 2000.

/S/ ALVIN BLYER

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