

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Region 21

Pacifica Hotel Corporation,
d/b/a Shelter Pointe Hotel
and Marina¹

Employer

and

Case 21-RC-20506

Hotel Employees and Restaurant
Employees Union of San Diego,
Local 30, Hotel Employees
and Restaurant Employees
International Union, AFL-CIO, CLC²

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations 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. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

¹ The name of the Employer appears as amended at the hearing.

² The name of the Petitioner appears as amended at the hearing.

2. 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. Petitioner is a labor organization within the meaning of Section 2(5) of the Act, and seeks to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time maintenance department employees employed by the Employer at its facility located at 1551 Shelter Island Drive, San Diego, California; excluding all other employees, guards, and supervisors³ as defined in the Act.

The Petitioner proposes that any unit found appropriate should include the following classifications: All full-time and regular part-time maintenance department employees employed by the Employer at its facility located at 1551 Shelter Island Drive, San Diego, California. The Employer declined to take a position on the appropriateness of the proposed unit.⁴ Evidence was presented and I find that the above-noted employees share a community of interests, and I shall include them in the

³ The Employer and the Petitioner stipulated at the hearing that Vince Reid and Kyle Moore are supervisors of the Employer possessing indicia within the meaning of Section 2(11) of the Act.

⁴ In its brief, the Employer argues that the Petitioner has not "factually established" that the petitioned-for unit is appropriate. However, at hearing, the Employer did not object to the appropriateness of the petitioned-

appropriate unit. The Petitioner also proposes to exclude all other employees, guards, and supervisors as defined in the Act from the appropriate unit. The Employer also declined to take a position on the appropriateness of the proposed exclusions. I concur with these exclusions.

The Employer argued at hearing that the Petitioner is precluded from organizing the maintenance department employees because the most recent collective-bargaining agreement⁵ between the Employer and the Petitioner specifically excludes maintenance department employees in the exclusion language of Section 2(a) of the collective-bargaining agreement:

The following categories of employees are expressly excluded from this Agreement:
executives and managers, supervisors as defined in the National Labor Relations Act, office and clerical employees (sic) all employees responsible for maintaining Security, maintenance department employees, front desk employees, marina employees and health club employees.

The Employer's position is that the above language constitutes an agreement on the part of the Petitioner not to organize the maintenance department employees. The Employer further maintains that such an agreement, as embodied in the language of Section 2(a) of the collective-bargaining agreement, is an issue of contract interpretation, which is appropriately subject to deferral to an arbitrator under Briggs Indiana Corp., 63 NLRB 1270 (1945).

The Petitioner's position is that the exclusion language of Section 2(a) of the collective-bargaining agreement

for unit, and did not present any evidence on that issue. Further, the Employer has not contended that another unit would be appropriate.

does not constitute an agreement not to organize the maintenance department employees, and that Briggs Indiana Corp. does not apply in this case.

The Employer took over the facility at issue in about July of 1998. The collective-bargaining agreement at issue is the first and only collective-bargaining agreement between the Employer and the Petitioner. It is undisputed that the Petitioner has maintained a collective-bargaining relationship with the facility's various owners for at least 21 years.

The Employer presented one witness, Jef Eatchel, who testified at the hearing. Eatchel is the secretary-treasurer for the Petitioner, and has been responsible for negotiations at the Employer's facility, with its various prior owners, since about 1984. Eatchel testified that the Petitioner did not make any promises not to organize the maintenance department, and did not enter into any written agreements to that effect. He further testified, and it is undisputed, that there was no discussion between the Employer and the Petitioner at or away from bargaining as to whether the Petitioner would organize the maintenance department employees.

A. Briggs Indiana Corporation Does Not Apply

In Briggs Indiana Corp., *supra*, the employer and the contracting unions entered into a collective-bargaining agreement that contained a provision that stated specifically as follows:

. . . That it [contracting unions] will not accept for membership direct representatives of the management,

⁵ Effective February 1, 2001, through January 31, 2006.

such as superintendents, foreman, . . . plant protection employees, or confidential salaried employees. Id.

The petitioning union in Briggs-Indiana was an affiliate of one of the contracting unions, and it petitioned to represent the plant protection employees despite the specific agreement to exclude them from membership. The Board found that the petitioning union was bound by the above agreement, and dismissed the petition.

In Cessna Aircraft Co., 123 NLRB 855 (1959), the Board held that absent a clear agreement that the union obligated itself not to organize particular employees, the mere exclusionary clause of a collective-bargaining agreement, without more, is insufficient to invoke Briggs Indiana Corp., *supra*. See also Women and Infants' Hospital of Rhode Island, 333 NLRB No. 65 (2001). In Lexington Health Care, 328 NLRB 894 (1999), the Board clarified Cessna Aircraft Co. The Board concluded "that while an agreement to refrain from organizing certain employees must be express, it does not necessarily have to be included in a collective-bargaining agreement." Lexington Health Care, 328 NLRB at 896.

Here, the facts fall squarely within the framework of Cessna Aircraft Co., *supra*. The Employer argues that the collective-bargaining agreement between the Employer and the Petitioner is unique because previous collective-bargaining agreements between the Petitioner and the facility's prior owners did not specifically contain exclusions, as does the current collective-bargaining agreement. The collective-bargaining

agreements between the Petitioner and the facility's prior owners were not introduced into evidence by the parties. Even assuming however, that the prior agreements did not contain specific exclusions, such evidence would not mitigate the Board's requirement that an agreement not to organize certain employees must be clear and express. Id. The distinction between the prior agreements and the parties' current collective-bargaining agreement is irrelevant, and the mere inclusion of the maintenance department in the exclusionary clause of the parties' collective-bargaining agreement is insufficient to invoke Briggs Indiana Corp., *supra*. A contrary finding would place an overly broad and impermissible limitation on employees' rights to choose a collective bargaining representative.

B. Deferral to an Arbitrator is Not Appropriate

The Employer also contends that the interpretation of the exclusionary clause should be deferred to an arbitrator. In support of this argument, the Employer cites St. Mary's Medical Center, 322 NLRB 954 (1997). In St. Mary's Medical Center, the Board held that it would defer to arbitration in representation proceedings when the resolution of the issue turns solely on the proper interpretation of the parties' contract. The Regional Director in that case deferred to an arbitrator solely the interpretation of the following statement in the exclusionary clause of the collective-bargaining agreement: "positions requiring 600 hours or more of formal training, education, or apprenticeship." The Regional Director did not defer the accretion issue, however, and made an independent finding on that

issue. The Board also noted that the determination of questions of representation, accretion, and appropriate unit do not depend upon contractual interpretation but involve the application of statutory policy, standards, and criteria. These are matters for decision of the Board rather than an arbitrator. Id. See also Marion Power Shovel Co., 230 NLRB 576 (1977).

The question presented in this case is not a matter of mere contract interpretation, as the Employer asserts. Rather, as the Cessna Aircraft Co., *supra*, line of cases makes clear, the question presented here is a matter of statutory policy for the Board to determine. Accordingly, the Employer's reliance on Central Parking System, 335 NLRB No. 34 (2001), and Verizon Information Systems, 335 NLRB No. 44 (2001), is misplaced. In those cases, the issue was not whether the exclusionary clause, by itself, constituted an agreement not to organize certain employees. Rather, those cases involved situations where the parties, through collective bargaining, had reached complete agreement establishing a procedure for voluntary recognition outside the Board's processes.

In Central Parking Systems, the issue was whether the employer and the union were bound by an "after-acquired" clause in their collective-bargaining agreement. The after-acquired clause required the employer to recognize the union as the exclusive bargaining representative of the employees at any properties that the employer acquired after the signing of the collective-bargaining agreement so long as the union could show

majority status with respect to the employees at the newly acquired property.

The Employer's reliance on Verizon Information Systems, *supra*, is similarly misplaced. In that case, the Board deferred to arbitration pursuant to the specific terms of a written agreement between the employer and the petitioner-union regarding neutrality and card check recognition, which the petitioner invoked. Because the union invoked the agreement, the Board held that the union's petition was properly dismissed pursuant to Briggs Indiana Corp., *supra*. Central Parking and Verizon Information System are thus distinguishable from the instant cases because the parties reached agreement on procedures to be used for recognition outside the Board's processes including arbitration while such there is no such express agreement in the instant matter.

The Employer also contends that because the Board held in Lexington Health Care, *supra*, that an express agreement not to organize certain employees need not be contained in a collective-bargaining agreement, an arbitrator would be in an appropriate position to decide whether the exclusion language at issue constitutes an express agreement. However, in Lexington Health Care, the Board did not eliminate the requirement that such an agreement has to be express, but merely clarified Cessna Aircraft Co., *supra*, in holding that such an express agreement need not be in a collective-bargaining agreement but can be embodied elsewhere.

In summary of the foregoing, I find that the Petitioner

herein did not enter into an agreement constituting a promise not to organize the Employer's maintenance employees. I further find that deferral to arbitration of the exclusionary language in the collective-bargaining agreement is inappropriate in the circumstances of this case and clearly inconsistent with the Board's general rule not to defer representation case issues. Accordingly, I shall direct an election among the employees in unit found appropriate for purposes of collective bargaining.

There are approximately 10 employees in the bargaining-unit.⁶

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 those 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

⁶ I make no finding with respect to the Employer's argument in its brief that the Petitioner failed to produce certain documents as requested in its subpoena duces tecum to the Petitioner. The record reveals that both the Employer and the Petitioner were satisfied with the documents produced by each party according to each party's respective subpoenas. Both parties withdrew their respective motions to revoke each other's subpoena.

an economic strike which 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 service of the United States may vote if they appear in person 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 shall vote whether or not they desire to be represented for collective-bargaining purposes by Hotel Employees and Restaurant Employees Union of San Diego, Local 30, Hotel Employees and Restaurant Employees International Union, AFL-CIO, CLC.

LIST OF VOTERS

In order to ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and the addresses that may be used to communicate with them. Excelsior Underwear, Inc., 156 NLRB 1236 (1966); NLRB v. Wyman-Gordon Company, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within 7 days of the date of this Decision, two copies of an alphabetized election eligibility list, containing the names and addresses of all 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 in Region 21, 888 South Figueroa Street, 9th Floor, Los Angeles, California 90017-5449, on or before September 11, 2002. No extension of time to file the list shall be granted, except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

NOTICE OF POSTING OBLIGATIONS

According to Board Rules and Regulations, Section 103.20, Notices of Election must be posted in areas conspicuous to potential voters for a minimum of 3 working days prior to the date of the election. Failure to file the posting requirement may result in additional litigation should proper objections to the election be filed. Section 103.20(c) of the Board's Rules and Regulations requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. Club Demonstration Services, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

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 the Board in Washington by September 18, 2002.

Dated at Los Angeles, California, this 4th day of September, 2002.

/s/Victoria E. Aguayo
Victoria E. Aguayo
Regional Director
National Labor Relations Board
Region 21

347-4070-3300
347-4070-3314
347-4070-3328
347-4070-3328-3300