

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 5**

NABET-COMMUNICATION WORKERS OF
AMERICA

Employer

and

Case 5-UC-370

BROADCAST EMPLOYEES STAFF
TEAM

Union-Petitioner

DECISION AND ORDER

Upon a petition duly filed under Section (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 hereby affirmed.
2. NABET-Communication Workers of America (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 Broadcast Employees Staff Team (Union) is a labor organization within the meaning of the Act and is recognized by the Employer as the collective-bargaining representative for certain employees in the unit set forth below.
4. The Union seeks by its unit clarification petition to include the network coordinator within its existing contractual bargaining unit of staff representatives.

At the hearing, the Union presented as its witnesses Director of Membership Information/Staff Representative Michael Tiglio and ex-Network Coordinator Tom Kennedy,¹

¹ Kennedy had been Network Coordinator from 1986 to 1996, and is now retired.

chief spokesperson for the Union during contract negotiations. The Employer presented one witness, President John Clark.

For reasons set forth below, I find that the issue presented raises a question concerning representation which may not properly be resolved in a unit clarification proceeding. I find that the proper procedure for resolving the united inclusion of the Network Coordinator is through a petition seeking an election.

PROCEDURAL/BARGAINING HISTORY

On December 6, 1999, the Union presented a petition to the Employer requesting recognition as the bargaining agent for six named employees (five Staff Representatives, signatories to the petition, and one non-signatory Network Coordinator). By letter dated December 14, 1999, the Employer granted recognition to the Union as bargaining agent for “an initial bargaining unit of [the five signatories to the petition only], all of whom are employed by CWA as NABET-CWA Representatives.”

In an e-mail memo dated January 20, 2000, from Union Sec/Treasurer Paula Olson to Employer President John Clark, Olson stated, “We reserve our right to bargain over all terms and conditions of employment, including the scope of the bargaining unit regarding present and future employees.”

Several bargaining sessions were held in February 2000. At the first bargaining session, on or about February 15, 2000, the Union made a verbal proposal that the Network Coordinator, the Assistant to the President, and the Staff Attorney positions be included in the bargaining unit. The Employer would not agree to bargain over the scope of the unit. The parties discussed the possibility that, due to the strong differences on this issue, the Union would have to go to the Board to resolve the issue. The Employer said if the Union wanted to press the issue, bargaining could stop while the Union went to the Board. The Union expressed its desire to continue bargaining, and also the hope the issue could be dealt with through bargaining.

In the second bargaining session, the Union raised the issue of unit scope again, and again the Employer said it was not going to discuss the issue, suggesting bargaining could stop while the Union went to the Board. In the third session, on February 22, 2000, the Union raised the issue again. The Union made the statement again that it was not going to the Board, and negotiations continued. In the last session, on February 23, 2000, the Employer presented the Union with a final packet. The Union noted that the final packet did not address the scope of the unit issue, and indicated it would pursue the issue later. The Employer and the Union both provided testimony that the Union wanted to get through the negotiations so that agreement could be reached, and that, for this reason, the Union dropped the issue of unit scope each time so that negotiations could continue. At no time did the Union offer to withdraw the proposal regarding bargaining unit scope in exchange for something else nor did it expressly waive its right to go to the Board for a unit clarification.

A collective-bargaining agreement between the parties was ratified by the Union and executed on February 23, 2000, effective by its terms March 1, 2000 through September 30, 2003. Article 1.1 states:

The Employer recognizes BEST [the Union] as the Collective Bargaining Agent for all Employees employed as NABET-CWA Representatives by CWA at the NABET-CWA Sector Office in Washington, D.C., and will bargain with the Union on all matters of wages, hours of work, benefits and working conditions.

On or about May 1, 2000, the Union filed a unit clarification petition, seeking to include the classification of Network Coordinator in the unit with the Staff Representatives. On June 7, 2001, the undersigned issued a Decision and Order in Case 5-UC-370, dismissing the instant petition as untimely. On September 19, 2001, the Board granted the Union's Request for Review and remanded to the Regional Director for further investigation, including, if necessary, holding a hearing. A hearing was conducted in case 5-UC-270 on March 27, 2002, in Washington, D.C.

POSITIONS OF THE PARTIES

The Employer's position is that the petition is untimely. It contends that, after it voluntarily recognized a unit solely consisting of Staff Representatives, the parties negotiated and reached a collective-bargaining agreement without the Union reserving any right to seek the inclusion of the Network Coordinator position in the unit through a unit clarification petition to the Board. The Employer contends further that, were the Board to consider the petition timely, it should be dismissed, for two reasons. First, the Employer asserts that the Network Coordinator is a statutory supervisor, and properly excluded from the unit. Secondly, regardless of supervisory status, the Employer contends that the Network Coordinator does not have a community of interest with the Staff Representatives in the bargaining unit, as the Network Coordinator's job duties are substantially different than the Staff Representatives' duties, and thus cannot meet the strict test for inclusion through an accretion.

The Union contends that it clearly reserved its right to file the unit clarification petition with the Board. Further, the Union asserts the Network Coordinator is not a statutory supervisor and shares substantial community of interest with the Staff Representatives already in the bargaining unit.

TIMELINESS OF UNIT CLARIFICATION PETITION

The Board generally declines entertaining unit clarification petitions midway in the term of a collective-bargaining agreement that unambiguously defines the unit, because to do otherwise would be disruptive of an established bargaining relationship. Edison Sault Electric Co., 313 NLRB 753 (1994); Wallace-Murray Corp., 192 NLRB 1090 (1971). Absent exceptional circumstances,² a unit clarification petition filed during the contract period is therefore considered untimely. Baltimore Sun Co., 296 NLRB 1023 (1989). However, the petition may be considered if the petitioner expressly informs the other party during the

² The Board has found in certain exceptional circumstances, including where there is no evidence that a specific request for inclusion of certain classifications was ever abandoned and the unit clarification petition is filed shortly after the beginning of the contract period, Wallace-Murray analysis does not apply. In those circumstances, the Board will entertain a unit clarification petition, and is not precluded by the execution of a collective bargaining agreement from finding that the disputed classifications are in the unit. St. Francis Hospital, Inc., 282 NLRB 950 (1987). I do not find such exceptional circumstances exist here.

negotiations of the contract that it is reserving its right to file such a petition. SunarHauserman, 273 NLRB 1176 (1984). I find that the Union did not do so in this case.

The record evidence of the Union's actions and communications, from the point at which it asked for voluntary recognition throughout negotiations, fails to support the Union's contentions that it expressly reserved and maintained its right to have the Board determine if the Network Coordinator should be included in the unit. On the contrary, the Union's acceptance of the Employer's recognition of a unit consisting solely of Staff Representatives in lieu of petitioning the Board for an election, and the Union's e-mail message stating it reserved its right "to bargain over all terms and conditions of employment, including the scope of the bargaining unit regarding present and future employees," [emphasis added], demonstrates the Union's decision to accept voluntary recognition for a unit of those five representatives, albeit with the hope that it might persuade the Employer to negotiate over the non-mandatory unit scope issue.

Based on the foregoing, the record as a whole and careful consideration of the arguments of the parties at the hearing, I find that the Union by deciding to accept voluntary recognition of a unit consisting solely of Staff Representatives is precluded from almost immediately thereafter -- without any changed circumstances -- seeking to include the Network Coordinator position as an accretion the current bargaining unit. See Premier Living Center, Inc., 331 NLRB No. 9 (2000). The appropriate procedure for accomplishing the Union's purpose is a petition seeking an election. Copperweld Specialty, 204 NLRB 46 (1973).

I therefore find it unnecessary to reach the supervisory and community of interest issues raised by the parties.

ORDER

IT IS HEREBY ORDERED, that the petition be dismissed.

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, NW, Washington, DC 20570. This request must be received by the Board in Washington by MAY 27, 2002.

Dated: MAY 13, 2002

At Baltimore, Maryland

/s/ WAYNE R. GOLD
Regional Director, Region 5



Re: NABET-COMMUNICATION WORKERS
OF AMERICA
Case 5-UC-370

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May 13, 2002