

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

GENESIS ELDERCARE d/b/a CAREHAVEN
OF BERKELY

Employer

and

Case 5-UC-383

DISTRICT 1199, THE HEALTH CARE AND
SOCIAL SERVICE UNION, SEIU, AFL-CIO

Union-Petitioner

DECISION AND ORDER DISMISSING PETITION

On January 31, 2002, District 1199, The Health Care and Social Service Union, SEIU, AFL-CIO, (the Union) filed the instant unit clarification petition under Section 102.61(e) of the National Labor Relations Board's Rules and Regulations, Series 8, as amended, and Section 101.17 of the Board's Statements of Procedures. The Union seeks to include in the current bargaining unit of the Employer's employ all full-time and regular part-time employees provided to Genesis ElderCare d/b/a Carehaven of Berkley (the Employer) through Genesis ElderCare Staffing, a temporary staffing agency.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned. Based on my investigation and the following facts, I dismiss the Union's petition for the reasons set forth below.

I. PROCEDURAL BACKGROUND¹

The Union was certified on or about September 2, 1993 as the collective-bargaining representative of the Employer's employees. The most recent collective-bargaining agreement between the Employer and the Union is effective July 1, 1999 to July 1, 2002. The recognition clause of that contract (Article 2) provides:

The Company recognizes the Union as the exclusive bargaining unit [agent], as certified in the National Labor Relations Board in Case No. 5-RC-13919 employed at the company's Martinsburg, WV facility; and more particularly described as follows:

All full time and regular part time service and maintenance employees, including all registered nurses aides, restorative aides, dietary assistants, cooks, laundry, housekeeping, activity assistants

¹ For purposes of this Decision and Order Dismissing Petition, the facts as asserted by the Union are assumed to be true.

and maintenance employees employed at the Employer's Martinsburg, West Virginia location, and excluding all registered nurses, licensed practical nurses, office clerical employees, guards, and supervisors as defined in the Act.

Article 3 of the current collective-bargaining agreement, the management rights clause, provides inter alia, that "the responsibility for managing and operating the Company is vested exclusively in management. This includes, but is not limited to, the right...to subcontract to any concern for performance within or without the Company any work customarily performed by employees within the bargaining-unit.... [T]his clause is intended to refer to construction and maintenance work which cannot normally be performed by bargaining unit members, not to erode the bargaining unit...."

Article 24, Section 7 of the agreement (General Provisions) provides, "There will be no sub-contracting which will result in the layoff of any employee in the bargaining unit."

The Union asserts that the Employer started hiring a number of employees through a related employment Agency in about November, 2001. The Unions claims that, at one unspecified point in time since then, the Employer employed as many as 14 of these persons.

The instant unit clarification petition was filed on January 31, 2002. The Union proposes to clarify the unit "to confirm that full-time and regular part-time employees provided to the employer through the employer's 'Genesis ElderCare Staffing' agency are a part of the bargaining unit."

II. POSITION OF THE PARTIES

A. THE UNION'S POSITION

The Union contends the Employer has hired persons from an affiliated employment agency to work in unit positions and, therefore, the unit description should be clarified by adding to it the employees of the related employer, Genesis ElderCare Staffing.

B. THE EMPLOYER'S POSITION

The Employer contends the instant unit clarification petition is inappropriate and urges the Region to dismiss it. In this regard, the Employer contends the issue at hand involves the Employer's use of subcontractors. The Employer notes the parties have had a series of collective-bargaining agreements dating back to 1993, and that the current agreement, which is effective from July 1, 1999 to July 1, 2002, contains the Recognition clause (Article 2), Management Rights clause (Article 3), and General Provision clause (Article 24) referred to in Section 1, above.

In addition, the Employer provided evidence it has used employment agency personnel since at least July, 1998, a date preceding the signing of the current collective-

bargaining agreement. The Employer urges dismissal of the instant petition as it seeks to add historically excluded employees to the existing unit.

III. ANALYSIS

For the reasons set forth below, I find that the instant unit clarification petition concerns positions that have been historically excluded from the unit and have not been shown to have undergone recent substantial change. I find no hearing is necessary because application of well-settled Board law to certain undisputed facts warrants dismissal of the petition under well-established historical exclusion principles. Accordingly, I dismiss the petition.

The issue in dispute is not whether to include employees who are performing new work not previously performed by the unit. It is undisputed the employees of the subcontractor are performing unit work, and no claim has been raised that these are new duties. Rather, the issue raised is whether to include the employees of a subcontractor, where the subcontracting of the work predates the signing of the current collective-bargaining agreement, in an existing unit.

The Board's express authority under Section 9(c)(1) to issue certifications includes the implied authority to police such certifications and to clarify them as a means of effectuating the policies of the Act. Thus, Section 102.60(b) of the Board's Rules and Regulations provides that a party may file a petition for clarification of a bargaining unit where there is a certified or currently recognized bargaining representative and no question concerning representation exists.

The Board described the purpose of unit clarification proceedings in Union Electric Co., 217 NLRB 666, 667 (1975):

Unit clarification, as the term itself implies, is appropriate for resolving ambiguities concerning the unit placement of individuals who, for example, come within a newly established classification of disputed unit placement or, within an existing classification which has undergone recent, substantial changes in the duties and responsibilities of the employees in it so as to create a real doubt as to whether the individuals in such classification continue to fall within the category—excluded or included—that they occupied in the past. Clarification is not appropriate, however, for upsetting an agreement of a union and employer or an established practice of such parties concerning the unit placement of various individuals, even if the agreement was entered into by one of the parties for what it claims to be mistaken reasons or the practice has become established by acquiescence and not express consent. (emphasis added).

As stated in Robert Wood Johnson University Hospital, 328 NLRB 912, 914 (1999), quoting United Parcel Service, 303 NLRB 326, 327 (1991), *enfd.* Teamsters National UPS Negotiating Committee v. NLRB, 17 F.3d 1518 (D.C. Cir. 1994):

The limitations on accretion discussed above... require neither that the union have acquiesced in the historical exclusion of a group of employees from an existing unit, nor that the excluded group have some common job-related

characteristic distinct from unit employees. *It is the fact of historical exclusion that is determinative.* (emphasis in original).

When employees have not been included in the unit for some time and the Union has made no attempt to include them, the Board may find the position is historically outside the unit and the Union has waived its right to a unit clarification proceeding. Sunar Hauserman, 273 NLRB 1176 (1984); Plough, Inc., 203 NLRB 818 (1973). Accord: ATS Acquisition Corp., 321 NLRB 712 (1996); Robert Wood Johnson University Hospital, supra.

Applying these principles to the circumstances of this case, I find that the employees of the subcontractor do not fall within any newly established classification of disputed unit placement or within any existing classification which has undergone recent, substantial changes in duties and responsibilities. Rather, the administrative investigation establishes that for a number of years the Employer has utilized employees of a subcontractor or a temporary staffing agency to perform duties also performed by bargaining unit employees, and that those employees have been historically excluded from the recognized bargaining unit. In these circumstances, unit classification is not appropriate. Bethlehem Steel Corp., 329 NLRB 243 (1999). Accordingly, I shall dismiss the petition.

ORDER

The petition is 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 APRIL 26, 2002.

Dated: April 12, 2002
At Baltimore, Maryland

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

