Lexington Health Care Group, LLC, d/b/a Lexington House *and* New England Health Care Employees Union, District 1199, AFL–CIO, Petitioner. Case 34–RC–1383

June 30, 1999

DECISION ON REVIEW AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS LIEBMAN AND HURTGEN

On March 21, 1996, the Acting Regional Director for Region 34 issued a Decision and Direction of Election in the above-entitled proceeding in which he concluded that there was no bar against the Petitioner seeking to represent the employees located at the Employer's Lexington House facility in New Britain, Connecticut. Thereafter, in accordance with Section 102.67 of the National Labor Relations Board's Rules and Regulations, the Employer filed a timely request for review of the Acting Regional Director's decision. The election was conducted as scheduled on April 12, 1996, and the ballots were impounded. By Order dated April 17, 1996, the Board granted the Employer's Request for Review.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has carefully considered the record in this case, including the Petitioner's brief on review, with respect to the issue under review. As explained below, we reverse the Acting Regional Director's Decision and Direction of Election, and find that the petition is barred by the Petitioner's express agreement not to organize the employees encompassed by the petition.

I. FACTS AND FINDINGS OF THE ACTING REGIONAL DIRECTOR[1]

The Employer, Lexington Health Care Group, LLC, operates five health care facilities—Pond Point, Fairfield Manor, Bentley Gardens, Country Manor, and Lexington House. The Petitioner has been the bargaining representative for various units of employees at Pond Point, Fairfield Manor, and Bentley Gardens. Jack Friedler, owner of Lexington House, an unorganized facility, acquired Pond Point, Fairfield Manor, and Bentley Gardens, as well as Country Manor, which was also unorganized, on July 1, 1995,[2] and began operating those facilities as the Lexington Health Care Group.

Because the contracts covering Pond Point and Fairfield Manor expired in October, the parties commenced negotiation for new agreements at these facilities in September.[3] According to Harry Dermer, the Employer's chief financial officer, the Petitioner formally proposed at a mid-September meeting that the Employer agree to take a neutral position during any organizing campaign at any of the five facilities. Friedler stated that before there could be any discussion about neutrality, the Petitioner would have to agree not to organize the Lexington House facility for as long as he owned it. Jerry Brown, the Petitioner's president, specifically "agreed that for as long as Mr. Friedler will own Lexington House, there will be no union organizing in that particular facility."[4]

According to Brown and Kevin Doyle, the Petitioner's vice president, the Petitioner requested Employer neutrality because it was an important "pattern" issue for the Petitioner—it wanted the same concession from other employers with whom the Petitioner was negotiating. Brown testified that the Petitioner offered the Employer moderated economic demands in return for Employer neutrality, and rejected the Employer's proposal to exclude registered nurses from any organizing drive by the Petitioner. Brown also testified that the Employer adamantly opposed neutrality at Lexington House. According to Brown, Friedler "couldn't agree to neutrality because that would be like inviting the Union in." Brown agreed to Friedler's demand, stating: "The workers at Lexington House can fight to get in the Union if they want to get in the Union . . . we were not talking about neutrality any more for Lexington House . . . Lexington House was off the table." With respect to Lexington House, Doyle also testified: "The Employer, while not closing the door on neutrality in the facilities, said that he wanted to remove Lexington House from this discussion. He didn't want to give the Union Lexington House." Finally, Doyle testified that Brown agreed to this.[5]

At the conclusion of negotiations on October 1, the parties rolled over the earlier agreements with various properly formalized addenda. One of these dealt with "neutrality"; it provided:

> In the event the [Petitioner] attempts to organize employees at other facilities or facilities where collective bargaining agreements exist the Employer will take a position of neutrality. This means the Employer may advise employees that they have the legal right to join or not join the [Petitioner] and have that right exercised in a secret ballot election run by the National Labor Relations Board but the Employer will not take any action or make any statements which states opposition to the selection of the [Petitioner] by employees and will not

[1] Pertinent portions of the Acting Regional Director's Decision are attached as an appendix. The facts concerning the parties' negotiations are fully set forth therein, and will not be repeated here.

[2] Unless otherwise indicated, all dates are in 1995.

[3] The Bentley Gardens contract expired in 1998.

[4] The notes of Tom Cloherty, the Employer's attorney, included the notation "no Lexington until Jack sells," along with Brown's response to "leave Lexington out of the mix but the [Petitioner] would not agree not to organize other employees."

[5] A proposal dated September 27 from the Employer included a promise by the Petitioner not to "organize employees at the Lexington New Britain facility," and a promise of neutrality by the Employer in the event that the Petitioner attempted to organize employees at other facilities. Doyle testified that he could not recall having ever seen this proposal at any time during the negotiations.

> take any action or make any other statements with regard to the election. (Agreement A)

Prior to signing Agreement A, Dermer insisted that another document be prepared reflecting the Employer's "position regarding the [Petitioner] neutrality regarding the other Lexington facilities and the other classes of employees not organized" and that a "specificity of the Lexington facility be put in writing." This second document dealing with "neutrality" provided:

> Re: Neutrality in Lexington Facilities
>
> In the negotiations with respect to neutrality by the company in new organizing the [Petitioner] agrees not to undertake organizing activities for unorganized employees at existing facilities or in unorganized facilities for a period of 12 months (until October 1, 1996). (Agreement B)

Agreement B was signed by Doyle, but was not signed by a representative of the Employer. Doyle had initially refused to sign Agreement B until Cloherty agreed that it would remain in his safe and not become part of the published collective-bargaining agreements. Doyle stated that he would agree as long as Agreement B was not "public knowledge," since he was afraid the agreement "would hurt his image in Connecticut."

According to Dermer, Agreements A and B reflected the parties' agreements on neutrality, including the Petitioner's agreement not to organize Lexington House for a period of 12 months. Dermer testified that Doyle refused to include Lexington House's limitation of "until Mr. Friedler sells" in Agreement B and said this would have to be "a gentlemen's agreement." According to Brown and Doyle, Agreement B merely qualified Agreement A —"the Employer neutrality agreement is contingent on us not beginning an organizing campaign or filing for an election . . . for 12 months . . . if we went to organize . . . before the date that neutrality is supposed to kick in . . . he would be perfectly free to campaign against the Union." As to Lexington House, Brown testified, "we never gave any pledge not to organize it—period."[6]

On February 12, 1996, the Petitioner filed a petition seeking to represent service and maintenance employees at the Employer's Lexington House facility. The Employer claimed that the petition was barred by Agreement B entered into by the Petitioner which, the Employer argued, precluded the Petitioner from organizing at any of the Employer's facilities for a year. The Petitioner contended that Agreement B did not apply to Lexington House and, in any event, was insufficient to constitute a bar under Board precedent.

[6] Both Brown and Doyle conceded that the Petitioner might violate Agreement B if it filed a petition at Country Manor, a nonunion Lexington facility, within the designated 12 months.

The Acting Regional Director found that the Employer had failed to establish that the Petitioner had waived its right to represent Lexington House employees under the principles of *Briggs Indiana*, 63 NLRB 1270 (1945), as applied in *Cessna Aircraft,* 123 NLRB 855 (1959), and reaffirmed in *Walt Disney World Co.*, 215 NLRB 421 (1974). The Acting Regional Director reasoned that, under these cases, an agreement not to organize will bar a petition only when *the contract itself* contains an *express* promise by the union to refrain from seeking to represent the employees in question, and such a promise will not be implied on the basis of a unit exclusion or an alleged understanding of the parties during negotiations. The Acting Regional Director found that Agreement B was not part of the Pond Point/Fairfield Manor collective-bargaining agreements between the Petitioner and the Employer, was signed only by the Petitioner, and by the parties' mutual agreement was concealed in a safe. Thus, the Acting Regional Director concluded that there is no single collective-bargaining agreement containing an express promise by the Petitioner to refrain from organizing the Lexington House employees, and Agreement B does not bar the petition.

Even conceding formal collective-bargaining agreement status to Agreement B, the Acting Regional Director further found that it failed to embody the mutual understanding of the parties concerning Lexington House. The Acting Regional Director concluded that Agreement B was not intended by either party to include Lexington House because that facility had been excluded, at the Employer's insistence, from the negotiations that produced Agreements A and B.

II. LEGAL PRINCIPLES

In *Briggs Indiana*, the Board held that a union that promises not to represent certain categories of employees during the term of an agreement may not file a petition with the Board seeking to represent those employee during that period. The Board found that such a promise was a permissible limitation on the employees' right to choose a collective-bargaining representative, since the promise was for a reasonably brief period of time and the result of collective bargaining between presumptive equals. As the Board observed, the "exercise of the right of given employees to choose any representative they desire is never literally unrestricted; the field of choice is necessarily limited by the number of labor organizations willing to undertake collective bargaining on their behalf." 63 NLRB at 1272. In *Cessna*, the Board stated the following:

> A union which agrees by contract not to represent certain categories of employees during the term of a collective-bargaining agreement may not during that period seek their representation. However, this rule will be applied only where the contract itself contains an *express* promise on the part of the union to refrain from

> seeking representation of the employees in question or to refrain from accepting them into membership; such a promise will not be implied from a mere unit exclusion, nor will the rule be applied on the basis of an alleged understanding of the parties during contract negotiations. *Cessna*, supra, at 857.

We do not believe that the *Briggs Indiana* principle rests solely, or even mainly, on contract bar policies. The contract bar policies are premised on the notion that a contract containing substantial terms and conditions of employment stabilizes the bargaining relationship. Therefore, for appropriate contractual periods, that relationship should not be disrupted by questions concerning representation. By contrast, the *Briggs Indiana* principle does not rest on these policies. Rather, it rests on the notion that a party should be held to its express promise.

We recognize that the Board said in *Cessna* that the *Briggs Indiana* principle is "an aspect of contract bar." We agree that it is "an aspect." That is, both the contract bar doctrine and the *Briggs Indiana* rule pertain to agreements that can be used, in various circumstances, to dismiss an otherwise valid petition. However, as discussed above, in other respects, the doctrines are quite distinct and have a different basis. The Board's contract bar policies are essentially inapplicable to a *Briggs Indiana* promise not to seek representation. Such a promise is irrelevant to the goal of stability in giving effect to established, contractual terms and conditions of employment in the unit. The Lexington House employees at issue are not part of any unit for which the parties have negotiated contract terms. Nor is there any stable collective-bargaining relationship which must be protected from disruption in the interest of statutory aims. To the contrary, these employees derive no benefit or stability from any *Briggs Indiana* agreement reached by the Petitioner and the Employer. On the other hand, the employees of the Lexington House facility are not foreclosed during a contract term from selecting any collective-bargaining representative of their choosing, except the Petitioner here, which has voluntarily agreed for whatever reasons and consideration it deemed sufficient, not to organize them for a period.[7] Thus, the concern addressed by the Board's contract bar policies that outside unions must be able readily to ascertain when a representation petition covering currently represented employees may be filed, i.e., at the clearly delineated end of a contract term, has no applicability to the situation here. Nor is there a need for a balancing of the goal of labor stability against that of employee freedom of choice here, because neither statutory aim is compromised by an agreement not to organize. Thus, there is no need to scrutinize a union's agreement to refrain from organizing under the Board's strict contract bar rules, and, therefore, no concomitant need to require the agreement be contained in a collective-bargaining agreement.

It follows from the above, that the *Briggs Indiana* promise not to seek representation need not be embodied in a collective-bargaining agreement. It is sufficient that there be an express promise. If there is such a promise, we will enforce it, for a party ought to be bound by its promise.[8]

We think that this approach is not foreclosed by Cessna. We do agree, however, that *Cessna* should be clarified. A close reading of *Cessna* reveals that the case does not actually require that a union's express promise not to organize certain employees be included in a collective-bargaining agreement. The issue in *Cessna* was whether a waiver of organizational rights could be inferred from a provision in a collective-bargaining agreement that excluded certain employees from the unit covered by the agreement. The Board held that a waiver could not be inferred; the Board would not find a waiver in the absence of an *express* promise by the union to refrain from seeking representation of the employees in question. In restating the *Briggs Indiana* rule, the Board held only that the promise not to organize had to be express, and not implied. Indeed, the Board emphasized the word "express," thereby making clear that this was the holding of the case.

The issue in *Cessna* was *not* whether the promise had to be in a collective-bargaining agreement. The promise in that case *was* contained in such an agreement, and that fact was clearly noted. Thus, the case did not present the issue of what result would obtain if the promise were not contained in a collective-bargaining agreement.

The same result was reached in *Budd Co.*, 154 NLRB 421 (1965). The Board declined to infer a promise. The Board repeated that a promise had to be express. Again, the alleged promise was in a collective-bargaining agreement, and the case thus did not present the issue of what result would obtain if the promise had not been so contained.

Accordingly, we clarify *Cessna,* and conclude 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.[9]

Finally, Federal labor policy promotes flexibility in labor-management relations as a means to resolve strife that would adversely affect industrial peace and thus the

[7] This minor limitation does not render an agreement not to organize contrary to the policies of the Act. As the Board noted in *Briggs Indiana*, the right of given employees to choose any representative they desire is never literally unrestricted.

[8] The parties to the agreement are abviously aware of its terms, and the agreeement is being invoked here against one of those parties.

[9] *Walt Disney World Co.,* supra, is not to the contrary. In that case, the waiver was in the recognition agreement that was superseded by a collective-bargaining agreement containing a recognition clause. That clause did not set forth the waiver. In such circumstances, there was clearly no waiver in effect.

public interest.[10] As the Supreme Court noted in *Retail Clerks Locals 128 & 633 v. Lion Dry Goods,*[11] the public policy supporting labor-management contracts extends beyond traditional collective-bargaining agreements. We fashion an approach compatible with these policies here. In sum, we believe that each of the parties to a collective-bargaining relationship should honor its promises, irrespective of whether those promises are in the collective-bargaining agreement.

III. APPLICATION OF LEGAL PRINCIPLES

Applying the requirements of *Briggs Indiana* to the instant case, we find Agreement B (containing the Petitioner's express promise not to organize) bars the instant petition. To do otherwise would permit the Petitioner to take advantage of the benefits accruing from its valid contract while avoiding its commitment by petitioning to the Board for an election. As discussed below, we believe the fundamental policies of the Act can best be effectuated by dismissing the petition.

Agreement B states that "the union agrees not to undertake organizing activities for unorganized employees at existing facilities or in unorganized facilities for a period of 12 months (until October 1, 1996)." During negotiations, the parties discussed both the Employer's neutrality and the Petitioner's curtailed organizing. They reached accord on both. As to the latter, the affected employees are not completely disenfranchised. Agreement B merely decreases the affected employees' options as to union representation by one union for the 12-month duration of the promise. There is no contention that the Petitioner's vice president, Doyle, lacked the authority to commit the Petitioner to an agreement to refrain from organizing, and it was at Doyle's request that Agreement B remained unpublished. The requirements of the Board's rule in *Briggs Indiana*—namely that the promise be express, for a reasonable period of time and the result of bargaining between equals—are met by Agreement B.

In this regard, we note that Agreement B clearly states that it applies to "unorganized facilities" and Lexington House falls indisputably within this category. Thus, on its face, Agreement B applies to Lexington House. However, the Acting Regional Director found otherwise. In doing so he relied on evidence proffered by the parties during the hearing in this case. We, however, find no such conclusive evidence in this record. Dermer testified that the Petitioner agreed not to organize Lexington House pursuant to Agreement B and for as long as it was owned by Jack Friedler. Brown testified that the Employer refused to promise neutrality in any future organizing by the Petitioner at Lexington House, and Brown categorically denied that there was any pledge not to organize Lexington House. In sum, the evidence is mixed and thus does not clearly negate the plain meaning of Agreement B that expressly precludes the Petitioner from organizing at unorganized Lexington facilities, which include Lexington House, for a period of 12 months after October 1.

Accordingly, we find that the Petitioner made an express agreement not to organize the unorganized Lexington facilities, which include Lexington House employees. The Petitioner thus waived its right to file a petition to represent those employees. We therefore dismiss the petition.

ORDER

The petition in this case is dismissed.

CHAIRMAN TRUESDALE, dissenting.

Contrary to my colleagues, I would affirm the Regional Director's finding that the Union is not barred from seeking to represent the Lexington House employees since the Petitioner's promise not to represent those employees was not part of the parties' collective-bargaining agreement. Accordingly, I do not join the majority in their modification of well-settled precedent and their finding that a waiver of the right to represent will bar an election even if that waiver is outside the collective-bargaining agreement.

Under *Briggs Indiana*, 63 NLRB 1270 (1945), *a collective-bargaining agreement* in which a union agrees not to seek the representation of certain employees bars a petition by that union for the specified employees during the life of the agreement. In *Cessna Aircraft*, 123 NLRB 855 (1959), the Board noted that earlier that year it had reevaluated and restated its contract bar policies in a series of lead cases[12] and that since the *Briggs Indiana* rule was an aspect of the contract bar that those lead cases had not embraced, it was important to restate the rule with respect to agreements not to represent certain employees. Accordingly, the Board reiterated its view that a union which agrees by contract not to represent certain categories of employees during the term of a collective-bargaining agreement may not during that period seek their representation. The Board explained that this rule is applied only where the contract itself contains an express promise on the part of the union; and that such a promise will not be implied from a unit exclusion, nor will the rule be applied on the basis of an alleged understanding of the parties during the contract negotiations. 123 NLRB at 857.

Applying *Briggs Indiana* and *Cessna*, the Board in *Budd Co.*, 154 NLRB 421 (1965), declined to infer a promise not to organize from the unit exclusions in the agreement for consent election, the current collective-

[10] *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 455 (1957).

[11] 369 U.S. 17 (1962).

[12] *Keystone Coat, Apron & Towel Supply Co.*, 121 NLRB 880 (1958); *Hershey Chocolate Corp.*, 121 NLRB 901 (1958); *Pacific Coast Assn. of Pulp & Paper Mfrs.*, 121 NLRB 990 (1958); *Deluxe Metal Furniture Co.*, 121 NLRB 995 (1958); *Appalachian Shale Products Co.*, 121 NLRB 1160 (1958); and *General Extrusion Co.,* 121 NLRB 1165 (1958).

bargaining agreements and a strike-settlement agreement. The Board found no bar to the petitions because the "collective-bargaining contracts contain no express agreement on the part of the Petitioner that it will not seek to represent the two groups of employees here involved." 154 NLRB at 423. The Board further noted that even if it "were to treat a promise not to represent certain employees, contained in a consent-election or strike-settlement agreement, as a bar to an election among such employees, neither the consent-election nor strike-settlement agreements involved herein contains such an express promise." Id. at fn. 3. *Budd Co.* confirms that, following *Cessna*, the Board required a *Briggs Indiana* waiver to be included in the collective-bargaining agreement.

In *Walt Disney World*, 215 NLRB 421 (1974), the Board refused to give effect to an express promise not to represent certain employees contained in a recognition agreement which was followed by a collective-bargaining agreement containing a recognition clause but no disclaimer. Despite the employer's contention that it was the clear understanding of the parties that the representation disclaimer remained in effect after the execution of the contract, the Board, applying *Cessna*, found that the relevant collective-bargaining contract did not contain the disclaimer and that the alleged understanding of the parties was not a substitute for an express disclaimer clause in the contract itself. 215 NLRB at 421.

In giving bar effect to a union's waiver under *Briggs Indiana*, the Board overruled a long line of cases, beginning with *Packard Motor Car Co.*, 47 NLRB 932 (1943), which held that such provisions constituted an invalid restriction on the right of employees guaranteed by the Act to "bargain collectively through representatives of their own choosing." In *Briggs Indiana* and *Cessna*, the Board found that such a promise does not contravene the policies of the Act where it is an express promise contained in a collective-bargaining agreement, is for a relatively short duration, and the result of bargaining between presumptive equals. 63 NLRB at 1272. In my view, removing the requirement that a union's waiver of the right to represent be included in the collective-bargaining agreement unnecessarily expands the narrow restriction of *Briggs Indiana* and *Cessna*. In the absence of a collective-bargaining agreement that expressly sets forth the rights of the parties, it will be impossible for others to determine in a timely manner whether the election is barred. The Board's contract bar policy is weakened by the ensuing loss of stability and the likelihood that representation cases will not be processed expeditiously.

The *Cessna* requirement that a waiver of the union's right to seek to represent employees be expressly set forth in the collective-bargaining agreement is, in my view, an important aspect of the Board's contract bar policy which has proven to be a hallmark brightline area in labor law and served well the interests of those governed by our Act. I see no sufficient basis for setting aside such a longstanding rule.

The subject document here containing the Union's promise not to organize for a 12-month period was not incorporated by reference into the parties' contract. Nor was it even signed by the Employer. Accordingly, in agreement with the Regional Director, I would find that, under *Briggs Indiana* and *Cessna*, it does not bar the Union's petition.

APPENDIX

DECISION AND DIRECTION OF ELECTION

. . . .

4. The Employer contends that the petition should be dismissed pursuant to the Board's decision in *Briggs Indiana Corp.*, 63 NLRB 1270 (1945) because the Petitioner (hereinafter also referred to as the Union) waived its right to represent the petitioned-for employees. The Petitioner seeks to represent a unit consisting of all full-time and regular part-time service and maintenance employees employed by the Employer at its facility known as Lexington House located in New Britain, Connecticut. Prior to July 1, 1995, Lexington House was owned and operated solely by Jack Friedler. Although not entirely clear from the record, it appears that on July 1, 1995, an entity known as Lexington Health Care Group, LLC (hereinafter referred to as LHCG) acquired four health care facilities from Beverly Enterprises: Pond Point, Fairfield Manor, Bentley Gardens, and Country Manor. Those four facilities, together with Lexington House, then began operating as LHCG.

At the time of the acquisition, certain employees employed at Pond Point, Fairfield Manor, and Bentley Gardens were represented by the Union, and the collective-bargaining agreements at each of those facilities were assumed by LHCG. None of the employees at Country Manor and Lexington House were represented by any labor organization. The agreements at Pond Point and Fairfield Manor were due to expire in October 1995, so the parties arranged to meet in September to begin negotiations. In early September, the Union's president, Jerry Brown, and its vice-president, Kevin Doyle, met with LHCG's attorney, Thomas Cloherty, at a restaurant in Hartford to discuss various background issues affecting the negotiations. During that meeting, Brown raised the subject of LHCG taking a neutral position in any future Union organizing campaigns, although no particular facilities, including Lexington House, were mentioned. Cloherty responded that it was a difficult issue, but that he would speak to his client and get back to Brown.

In mid-September, the parties met again, this time in Cloherty's office, in order to commence negotiations for Pond Point and Fairfield Manor. The same individuals were present, along with Jack Friedler, managing partner of LHCG and owner of Lexington House; Harry Dermer, the chief financial officer for LHCG; and Mark Barwise, then acting district manager of LHCG and administrator of Bentley Gardens.

According to Dermer, the only witness called by the Employer in support of its Motion to Dismiss, the Union formally proposed at that meeting that LHCG agree to take a neutral position during any Union organizing campaign at any of the five facilities. Friedler responded that before there could be any discussion about neutrality by LHCG, the Petitioner would

have to agree not to organize Lexington House for as long as it was owned by Friedler. After initially objecting to that proposal, according to Dermer, Brown agreed that

> the neutrality will be covering all Lexington facilities. And that originally was—we didn't put a date on that. We are looking for 18 months. I believe the Union had agreed that 12 months to the non-union facilities. And then Mr. Brown has included the Lexington facility to be not only part of this agreement, but also not to be organized at any given time that Mr. Friedler owns the facility.

Cloherty's handwritten notes of that meeting include the notation "no Lexington until Jack sells," to which Brown replied "leave Lexington out of the mix but the Union would not agree to not organize other employees." Dermer could not recall whether Brown had said to "leave Lexington out of the mix."

According to Brown, at the mid-September meeting, Friedler stated that he had very serious economic problems, and that he needed a contract that saved him money. Brown informed him that the Union could moderate its economic demands in those facilities where it had contracts if a procedure could be put in place to permit new members to join the Union in a quick non-confrontational manner. This led to the discussion of the so-called neutrality agreement, with Brown suggesting that such an agreement was very important to the Union. Friedler responded that the question of neutrality created big problems for him, but he proposed that in return for a neutrality agreement the Petitioner agree that it would never organize RNs. Although Brown rejected that suggestion, he offered to phase in union scale wages and benefits in those facilities which were newly organized as a result of the neutrality agreement. At some point, according to Brown, Friedler stated that under no circumstances could he agree to neutrality at Lexington House, because he owned that facility and "he didn't want the workers at the Lexington House in the Union." Brown responded "Jack, that's where you live. If you don't want neutrality at Lexington House, we won't have neutrality at Lexington House . . . .The workers at Lexington House can fight to get in the Union if they want to get in the Union. You don't have to give us neutrality at Lexington House. Let's talk about neutrality at the other places." According to Brown, the parties then engaged in further discussions regarding the neutrality agreement, but there was never any further discussion about Lexington House. No agreement was reached on neutrality by the end of that meeting, although Brown agreed to get back to Cloherty regarding a proposal that the Petitioner agree that in any future organizing campaigns, all RNs would be considered supervisors. Doyle's testimony generally corroborated that of Brown regarding the parties discussions about the neutrality issue. In this regard, he asserts that the parties specifically agreed during that meeting that there would be no neutrality agreement covering Lexington House. As a result, according to Doyle, all subsequent discussions between the parties concerning the neutrality issue did not apply to or involve Lexington House.

The day after the above-described meeting, Brown called Cloherty and informed him that the Union would not agree to consider RNs as supervisors in future campaigns. Cloherty indicated that there was enough common interest to continue negotiations, so they arranged for further meetings to be held. However, Brown did not participate in any of those meetings.

The next meeting between the parties was held at Cloherty's office on or about September 27, with the Union represented by Doyle and another union official, Mary Ann Allen. Present for the LHCG was Friedler, Dermer, Barwise, and Cloherty. In contrast to his testimony regarding the first meeting described above, Dermer asserted that the neutrality agreement was actually finalized at this meeting, "and we agreed upon the 12 months non-organizing of any kind, shape or form by the Union starting October 1st or starting at the date of signing of the agreement." However, as noted in a letter from Cloherty to Brown which was prepared subsequent to the filing of the instant petition, Dermer also acknowledged that during this meeting the following proposal was made by LHCG to the Union (hereinafter referred to as the September 27 proposal):

> The Union may seek to organize unrepresented employees at facilities affiliated with, managed or owned by Lexington Group, Inc. These efforts could include facilities where no employees are Union members or facilities where service and maintenance employees are currently represented but other classes of employees (e.g., RN, LPNs,) are not.
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> The parties agree as follows:
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> 1. The Union will not seek to organize employees at the Lexington New Britain facility.
> 2. The Union will agree to defer organizing activities at Lexington's related facilities and for unorganized employees at union affiliated facilities (unintelligible) for 12 months from 10/1/95.
> 3. In the event the Union attempts to organize employees at other facilities, the Employer will take a position of neutrality. That means the Employer may advise employees that they have the legal right to join or not to join the Union and have that right exercised in a secret ballot election run by the National Labor Relations Board but the Employer will not take any action or make any statements which state opposition to the selection of the Union by employees and will not take any actions or make any other statements with regard to the election.
> 4. If the Union prevails in an NLRB election, the Employer will recognize and bargain with the Union and not pursue any appeals.
> 5. The Employer reserves the right to assert in an NLRB proceeding that RNs are supervisors under the NLRA.
> 6. The Employer reserves the right to assert in an NLRB proceeding that individual LPNs are supervisors but will not take the position that LPNs as a category are supervisors.
> 7. As a prerequisite to this agreement, the parties will enter into a three year collective bargaining agreement for Pond Point and Fairfield Manor.
> 8. It is anticipated that the collective bargaining agreement will be negotiated by September 30, 1995.
> 9. The Union will make its "best efforts" to assist the Employer in obtaining an appropriate rate.
> 10. If a new facility is organized, Union agrees to a "Class B" contract like Bentley, e.g., 5 year—co-insurance—deferral of pension—different wages.
> 11. The Union agrees that it will not engage in coercive tactics in organizing or any threats or threats of reprisal to employees.

According to Doyle, the parties merely discussed the neutrality agreement during that meeting, with no final agreements

reached at that time. He could not recall having ever seen the September 27 proposal at any time during the negotiations.

Further meetings were held on September 29, during which there was no discussion of the neutrality issue, with the final sessions held on October 1. At a meeting which included the parties representatives as well as employees form the Pond Point and Fairfield Manor bargaining units, the parties finalized their agreement. At that point, Doyle, Dermer, and Cloherty went to another location in order to prepare and sign the appropriate documents reflecting their agreement. Those documents included a two-page handwritten Memorandum of Agreement for each facility along with several handwritten attachments, including the following document which appears to track the language from item # 3 of the September 27 proposal:

> In the event the Union attempts to organize employees at other facilities or facilities where collective bargaining agreements exist the Employer will take a position of neutrality. This means the Employer may advise employees that they have the legal right to join or not join the Union and have that right exercised in a secret ballot election run by the National Labor Relations Board but the Employer will not take any action or make any statements which states opposition to the selection of the Union by employees and will not take any action or make any other statement with regard to the election.

According to Dermer, prior to signing any of the above-described documents, he insisted that there be another document prepared which reflected "our position regarding the Union neutrality regarding the other Lexington facilities and other classes of employees not organized," and that "a specificity of the Lexington facility be put in writing." When Doyle refused, Dermer indicated that he would not sign any of the agreements, and he left the area. Shortly thereafter, Doyle informed Dermer that he would agree to such a document as long as it remained in Cloherty's safe "not to be for public knowledge," because he was afraid it "would hurt his image in Connecticut." Dermer agreed to keep the document secret, and the following document (which appears to track the language of item # 2 of the September 27 proposal) was prepared by Doyle in his own handwriting and signed by Doyle (but not Dermer):

> Re: Neutrality in Lexington facilities
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> In the negotiations with respect to neutrality by the company in new organizing the union agrees not to undertake organizing activities for unorganized employees at existing facilities or in unorganized facilities for a period of 12 months (until October 1, 1996).

According to Dermer, he agreed to the language in this document because he was convinced by Cloherty (but not by Doyle) that it reflected what had originally been sought in item #1 of the September 27 proposal. The parties then signed all of the remaining documents, and the negotiations were concluded. Dermer admitted that the final document he demanded from Doyle as described above would remain in Cloherty's safe and would not become part of the published collective-bargaining agreements at Pond Point and Fairfield Manor.

Doyle provided a different version of the final sessions on October 1. He agrees that the parties concluded their negotiations in the presence of employees from the respective bargaining units, during which there was no further discussion regarding the neutrality agreement. Following those discussions, he, Dermer and Cloherty met for the purpose of reducing all the agreements to writing. At some point Dermer stated that he wanted a written agreement indicating that the neutrality provisions would not be in effect for 12 months. Doyle responded that although that was their agreement, he did not want to reduce it to writing. After further discussion, according to Doyle, he agreed to prepare a document reflecting their agreement that would not be a part of the collective-bargaining agreements, but which would be held by Cloherty and would not be disclosed. Doyle asserts that there was no discussion at the time he prepared and signed that document concerning its applicability to Lexington House or any alleged agreement by the Union not to organize Lexington House until it was sold by Jack Friedler.

The Employer, relying solely upon the testimony of Dermer, contends that the provision in the collective-bargaining agreements at Pond Point and Fairfield Manor by which the Union agreed that with regard to "Lexington facilities" it would not "undertake organizing activities for unorganized employees at existing facilities or unorganized facilities for a period of 12 months," coupled with the parties' contemporaneous statements and the conduct of negotiations, require the dismissal of the petition in the instant case. In this regard, the Employer asserts that by entering into the above-described agreements, the Union agreed that it would not engage in any organizing at any LHCG facility for a 12-month period, *and* that the Union would never engage in any organizing at any time at Lexington House so long as it was owned by Jack Friedler. In return for these concessions, according to the Employer, the Union secured the agreement of LHCG to remain neutral in any organizing campaign which occurred after a 12-month period at any LHCG facility other than Lexington House.

Under the Board's decision in *Briggs Indiana Corp.*, supra, a collective-bargaining agreement in which a union agrees that it "will not accept for membership" certain specified employees bars a petition by that union for those employees during the life of the agreement. In *Cessna Aircraft Co.*, 123 NLRB 855, 857 (1959), the Board, noting that the case involved an aspect of its contract bar principles, restated the *Briggs Indiana* rule to specify that the rule

> will be applied only where the contract itself contains an *express* promise on the part of the union to refrain from seeking representation of the employees in question or to refrain from accepting them into member-ship; such a promise will not be implied from a mere unit exclusion, nor will the rule be applied on the basis of an alleged understanding of the parties during contract negotiations (emphasis in original).

In subsequent cases, the Board has held that a waiver of the right to file a petition with the Board seeking to represent certain employees must be "clear, knowing and unmistakable." *Northern Pacific Sealcoating, Inc.*, 309 NLRB 759 (1992). In determining whether a union waived its right to "organize" employees during the term of a collective-bargaining agreement, the Board held that it must analyze the parties' collective-bargaining negotiations in order to determine whether the parties intended to contract "within the *Briggs Indiana* rule." *United Broadcasting Co.*, 223 NLRB 908 (1976). Finally, inasmuch as the waiver of the right to organize under *Briggs Indiana* is an aspect of the Board's contract bar principles, the party asserting the waiver bears the burden of establishing all of the elements necessary to find such a waiver. See *Roosevelt Memorial Park, Inc.*, 187 NLRB 517 (1970) (citing *Bo-Low Lamp Corp.*, 111 NLRB 505 (1955), where the Board, at 508, stated that

the burden "must be sustain[ed] by a preponderance of the evidence.")

Based upon the foregoing and the record as a whole, I find that the Employer has failed to establish by a preponderance of the evidence that the Union waived its right to represent the petitioned-for employees. Thus, the Employer's Motion to Dismiss must be denied. More particularly, I note that the relevant provision in the collective-bargaining agreements at Pond Point and Fairfield Manor does not *expressly* waive the Union's right to organize the Employer's service and maintenance employees at Lexington House for as long as that facility is owned by Jack Friedler. To the contrary, the provision on its face only provides that "with respect to neutrality by the company" (which is described in a separate provision of the agreements), the Union would not organize at "Lexington facilities" for a period of 12 months. Thus, the Union was clearly waiving its right to organize for a period of 12 months in return for the promise of neutrality by LHCG. However, the record clearly establishes the mutual understanding of the parties that there would be no agreement to be neutral by Lexington House. If neutrality by Lexington House was not part of the agreement, then neither was the Union's agreement not to organize at Lexington House for a period of 12 months. That neutrality was not part of the agreement is further revealed by the Employer's inherently contradictory assertion, as expressed by Dermer in his testimony, that the collective-bargaining agreements at Pond Point and Fairfield Manor not only prohibited the Union from organizing at Lexington House for a period of 12 months, but also prohibited such organizing beyond that period for as long as Lexington House was owned by Jack Friedler. If, as contended by the Employer, the Union had agreed never to organize Lexington House under any circumstances so long as it was owned by Friedler, it simply makes no sense to have included it as part of an agreement which *permitted* the Union to organize after a specified period of time. Under such circumstances, the Union's agreement not to organize at "Lexington facilities" for a period of 12 months in return for neutrality by LHCG cannot be deemed a "clear and unmistakable waiver" of the Union's right to ever organize Lexington House as long as it was owned by Jack Friedler. *Northern Pacific Sealcoating, Inc.*, supra.

Moreover, even assuming arguendo that the parties had reached a separate agreement that the Union would never organize Lexington House so long as it was owned by Jack Friedler, the terms of that agreement are not contained in any collective-bargaining agreement. See *The Budd Co.*, 154 NLRB 421 (1965); *Walt Disney World*, 215 NLRB 421 (1974); *Peabody Coal Co. v. NLRB*, 709 F.2d 567 (9th Cir. 1983). In this regard, the record establishes that LHCG specifically demanded in the September 27 proposal that "the Union will not seek to organize employees at the Lexington New Britain facility." Although other aspects of that proposal were specifically codified in the attachments to the Memorandum of Agreements, the proposal that the Union would not seek to organize the "Lexington New Britain facility" is not included in those agreements. Moreover, the final document demanded by Dermer on October 1, which he did not sign and which the parties agreed to keep secret and not append to the published collective-bargaining agreements at Pond Point and Fairfield Manor, does not appear to be a part of those agreements. Thus, the evidence does not establish that with regard to Union organizing at Lexington House, the parties intended to contract "within the *Briggs Indiana* rule." *United Broadcasting Co.*, supra.

Accordingly, I find that 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.

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