Robert Wood Johnson University Hospital *and* Professional Nurses & Hospital Personnel, Division of United Paperworkers International Union, AFL–CIO–CLC and Local 300, United Paperworkers InternationaL Union, AFL–CIO–CLC, Petitioner. Case 22–UC–215

July 8, 1999

DECISION ON REVIEW AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS LIEBMAN AND HURTGEN

On February 17, 1995, the Regional Director for Region 22 issued his Decision and Order Clarifying Bargaining Unit. Based only on an administrative investigation, the Regional Director clarified the existing unit to include approximately 184 employees in the classification of per diem nurses. Thereafter, in accordance with Section 102.67 of the National Labor Relations Board Rules and Regulations, the Employer filed a timely request for review of the Regional Director's Decision. On April 11, 1995, the Board granted the Employer's request for review, vacated the Decision, and remanded the case to the Regional Director for the purpose of conducting a hearing and issuing a Supplemental Decision. The Board directed the Regional Director to consider, among other things, the following in his Supplemental Decision: (1) whether the disputed per diem nurses classification existed at the time of the election but was excluded from the voting unit; and (2) whether the disputed per diem nurses were historically excluded from the bargaining unit.

On November 25, 1996, the Regional Director issued a Supplemental Decision and Order Clarifying Bargaining Unit in which he again clarified the unit to include individuals who are employed by the Employer as per diem nurses who regularly average 4 hours or more of work per week. In accordance with Section 102.67 of the Board's Rules and Regulations, on January 15, 1997, the Employer filed a timely request for review of the Supplemental Decision.

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

The Employer's request for review of the Regional Director's Supplemental Decision and Order Clarifying Bargaining Unit is granted as it raises substantial issues warranting review. Having carefully considered the record with respect to the issue under review, the Board concludes, contrary to the Regional Director, that the per diem nurses have been historically excluded from the bargaining unit represented by the Petitioner, and thus cannot be added to that unit by means of unit clarification.

The Employer operates a nonprofit acute care hospital in New Brunswick, New Jersey. The unit currently consists of approximately 772 full-time and regular part-time nurses.[1] The Petitioner was certified as representative of the nurses on February 22, 1978. The Employer and the Petitioner have been parties to successive collective-bargaining agreements. The Petitioner filed the instant petition on August 26, 1993, during the term of a 1-year year extension of the 1991–1993 contract. The Petitioner sought to include in its unit all per diem nurses who regularly average at least 4 hours work per week.

I. *Whether per diem nurses existed at the time of the election but were excluded from the voting unit.* The Regional Director first determined that it was unreasonable to conclude per diem nurses had been excluded from the voting group at the time of the certification in 1978. The Regional Director noted that the frequency of on-call nurses (per diems) employment and the number of hours they worked at the time of the 1978 election could not be determined from the record.[2] He stated, however, that since the unit certified included all full-time and regular part-time nurses, the on-call staff, i.e., per diem nurses, worked irregularly and therefore were casual employees. The Regional Director reasoned that it was "unreasonable to conclude that the parties would have excluded per diem nurses who work, on aggregate, as many hours as [sic] if not more hours than some admittedly regular part-time nurses."

The Regional Director therefore concluded that casual employees were in existence at the time of the election and found it reasonable to conclude that they were excluded from the voting unit, but that the parties never meant to exclude on-call nurses who worked with sufficient regularity to be deemed regular part-time employ-

[1] The existing unit consists of:

> All full-time and regular part-time registered nurses and graduate nurses employed by the Employer at its New Brunswick, New Jersey location, including those registered nurses and graduate nurses employed as staff nurses, in-service education instructors, infection control nurses, utilization review nurses, community health nurses, neurology clinical coordinator, home trainer coordinators (dialysis), home trainers renal dialysis, field service worker/discharge planning nurses, senior discharge planners, discharge planning nurses, assistant head nurses, scoliosis program coordinators, program coordinators, Pediatric Chronic Disease Program, cardiac catherization nurses, cardiac rehabilitative nurses, special procedure nurses, vascular laboratory nurses, lithotriptor nurse, oncology nurses and employee health nurses, but excluding all clinical supervisors, accepted assistant directors, directors of home care, administrative supervisors, head nurses, and all other professional employees other than registered nurses, technical employees, service and maintenance employees, clerical employees, guards and supervisors within the meaning of the Act and all other employees.

[2] It appears that there were approximately 30 per diem nurses at the time of the 1978 election. The Employer's staffing coordinator, Charlotte Hammond, conceded that at that time not very many of the per diem nurses worked more than 16 hours per week. The only payroll records submitted at the hearing were for May 2–September 5, 1992, for 79 of 82 per diems. Those records show that during that time about 21 per diem nurses averaged working 16 hours or more per week and that about 21 per diem nurses averaged working less than 4 hours per week, with the remainder working an average between 4 and 16 hours per week.

ees. Thus, the Regional Director concluded that since regular part-time nurses were included in the unit, the unit also included per diem nurses who worked with sufficient constancy to be deemed regular. *St. Francis Hospital,* 282 NLRB 950 (1987); *Newton-Wellesley Hospital*, 219 NLRB 699, 703 (1975).

We disagree with the Regional Director. Based on this record, we cannot determine with any degree of certainty whether the parties intended to include or exclude per diem nurses. It is clear that the original certification did not refer to the per diem nurses as either excluded from or included in the voting unit—it did not mention them at all. Nor did the parties' subsequent collective-bargaining agreements specifically list this classification among those recognized by the Employer as represented by the Petitioner, or set forth wage rates or other terms and conditions of employment concerning per diem nurses. It is further apparent, as found by the Regional Director, that on-call, or per diem, nurses existed at the time of the election and certification. Although there is testimony that such nurses then worked in a manner similar to that worked by per diem nurses currently under consideration, there is, as the Regional Director noted, no documentary evidence to this effect. Nonetheless, we do not agree with the Regional Director's supposition that only casual employees were struck from the eligibility list and that the parties never meant to exclude on-call/per diem employees. Quite simply, it is as likely as not that the parties did not consider the issue of the eligibility of the 25–30 on-call nurses, where there were 235 full-time and regular part-time nurses employed at the time of the 1978 election.

The Regional Director's speculation about this issue misapprehends the nature of our inquiry. The Regional Director's analysis is akin to determining whether per diem employees would have been eligible to vote in the 1978 election absent a clear indication that the parties had reached agreement on their placement. The focus here, however, is on the determination of whether, in the first instance, such employees were excluded from the bargaining unit, and thus from voting, due to agreement of the parties, oversight, mistake, or some other reason. The significance of this inquiry stems from the Board's holding in *Copperweld Specialty Steel Co.*, 204 NLRB 46 (1973). There, the Board held that if a classification of employees had been excluded from the voting unit, that classification could not be subsequently added to the unit by means of unit clarification.[3]

In sum, we cannot determine from the state of the record whether, 20 years ago, the disputed classification was excluded from the voting group. But, as discussed below, irrespective of their voting status at the time of the election, the per diem nurses have been in fact historically excluded from the unit, and thus cannot be added to the unit by means of unit clarification.

II. *Whether the per diem nurses have been historically excluded from the unit.* As noted, the Regional Director also concluded that the parties had historically included per diem nurses under the collective-bargaining agreement. He noted that, until 1988, the Employer paid per diem nurses at contract rate. He also found that the Employer had deducted dues for some per diem nurses, and had permitted grievances to be processed for them as well. The Regional Director noted that the Petitioner raised the issue of including per diem nurses in the contract during separate contract negotiations in 1989 and 1991, respectively, and had never abandoned its contention that such employees should be included in the unit. On this basis, the Regional Director concluded that per diem nurses have been historically included in the unit. We do not agree.

We begin with the observation that the Petitioner conceded at the hearing that prior to the mid-1980s, the per diem employees did not meet the contractual limitation on part-time employees. It was the Petitioner's contention, however, that in about 1988 the Employer raised its per diem wage rates and "per diems on a wide-spread scale began to work" more hours. At that point the Petitioner thought that per diems were part of the bargaining unit and sought formally to add the per diems to the contract.

Further, the Petitioner stipulated at the hearing to statements contained in a "certification" of John Regina, the Employer's senior vice president of human resources. By that stipulation, the parties agree that per diem nurses

[3] That the parties may have had divergent views on the eligibility of per diem nurses, had they discussed it, is not unforeseeable. The Board has experienced much litigation over the inclusion and eligibility of on-call employees, particularly in cases involving nursing units. See generally *Sisters of Mercy Health Corp.*, 298 NLRB 483 (1990). The question of whether per diem employees would have been eligible to vote in the 1978 election is, of course, different from the question posed by the Board on remand, i.e., whether the classification existed at the time of the election but was excluded from the voting unit. We also note that *St. Francis Hospital*, supra, and *Newton-Wellesley Hospital*, supra, the cases on which the Regional Director relied, are distinguishable from the instant case. These cases did address questions regarding the inclusion of per diem nurses (i.e., float pool nurses and on-call nurses) in bargaining units, but unlike the case here did not involve the issue of historical exclusion from the bargaining unit. In *St. Francis Hospital*, the float pool nurses met the Board standard for "regular part-time" registered nurses as set forth in the unit description at the time of the election and voted in the election. During the parties' negotiations for their first contract a dispute arose regarding the inclusion of the internal float pool nurses in the bargaining unit, apparently based on the inclusion of a provision in the contract defining "regular part-time employee." The Board found a unit clarification proceeding appropriate as, inter alia, the parties were bargaining for their first agreement and thus had not historically excluded the internal float pool nurses. In *Newton-Wellesley Hospital*, the petitioner sought to represent a unit of all RNs and the employer contended, inter alia, that the on-call nurses were casual employees and should not be included in the bargaining unit. The Board concluded that the on-call nurses were regular part-time registered nurses with a community of interest with the RNs who were included in the unit and therefore included the on-call nurses within the unit.

do not receive contractual fringe benefits such as vacation, holidays, sick days, health insurance, and seniority rights. Also, per diem nurses do not receive negotiated wage increases received by full-time and regular part-time nurses. Rather, the Employer, based upon a competitive market analysis of surrounding hospitals, unilaterally sets per diem rates. In this regard, the parties stipulated that the Employer unilaterally raised the per diem wage rates in 1989, 1990, and 1991, and that the Employer did not grant the per diem nurses any wage increase in 1992.[4]

In addition, the Employer's Policy and Procedure Manual of 1983, reflecting an effective date of September 1981, sets forth the qualifications and requirements of what are called here per diem nurses. That manual, and its progeny to the present, sets forth in detail the qualifications and requirements of per diem nurses. For example, the manual defines how many hours a per diem nurse must work, the prevailing hourly rate for per diems with registered nurse experience, and the benefits they will receive. Subsequent manuals document changes in scheduling and limits on the maximum number of hours such nurses may work. There is no evidence that the Employer and the Petitioner ever bargained over the contents of the manual as it pertains to per diem nurses.

Unit clarification may be appropriate where an employee classification has been newly created or has undergone recent substantial changes so as to create doubt regarding whether that classification should be accreted to an existing unit. But, unit clarification may not be used to add to a unit an employee classification which historically has been excluded from the unit. *Union Electric Co.*, 217 NLRB 666 (1975). Rather, a petition seeking to include a classification historically excluded raises a question concerning representation which can only be resolved through an election, or based on majority status. *Boston Cutting Die Co.*, 258 NLRB 771 (1981). As stated in *United Parcel Service*, 303 NLRB 326, 327 (1991) (emphasis added):

> The limitations on accretion . . . 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.*

Applying these principles in the circumstances of this case, we find that the per diem nurses have been historically excluded from the bargaining unit, and thus cannot be added by means of a unit clarification petition. The evidence fails to establish that the parties ever considered the per diem nurses covered by the contract, or that they ever bargained about them. While there are various Employer manuals concerning terms and conditions of employment for per diems over the years, there is no evidence that these manuals resulted from bargaining between the parties. The record clearly establishes that the per diem nurses were treated differently from both full-time employees and regular part-time employees.[5] Indeed, there is no evidence that the parties ever considered bargaining specifically regarding terms and conditions of employment for the per diem nurses until the contract negotiations in 1989 and 1991. And at that time, the Petitioner withdrew the proposals regarding the per diems, and they did not become part of the contract.[6] Further, the evidence shows that the Employer has acted unilaterally regarding the terms and conditions of employment of per diem nurses with no evidence of protest from the Petitioner until the Employer did not grant the per diem nurses a wage increase in July 1992.

We do not find that the evidence concerning dues checkoff or grievance processing for per diem nurses indicates to the contrary. As to dues checkoff, the evidence is equivocal. While the Regional Director noted that 50 of 93 per diem nurses had dues checked off as of 1993, that figure reflects that almost half of the per diem nurses did not have dues checked off. The Employer explained that it improperly permitted such dues checkoff, and its documentary evidence establishes that it so informed the Petitioner well before the instant petition was filed. Currently, no per diem nurses have dues checked off. In situations when the Petitioner requested Employer action concerning employees who had failed to pay dues, the Employer informed the Petitioner that it was in error with respect to per diem nurses, and such employees would not be terminated. The Petitioner never contested the Employer's actions.

[4] Petitioner's steward, Patricia Kowalski, testified that the Petitioner investigated when per diem nurses did not receive a wage increase when the contractual increase became effective for other unit employees. Regina informed her that the Employer did not perceive the per diem nurses as bargaining unit members. Clarice St. Luce, the Petitioner's president and business manager, testified that when the per diem nurses did not receive a wage increase in July 1992, a grievance was filed which ended in arbitration. According to her, the arbitration was deferred pending the outcome of this case. We note, however, that in a letter to the per diem nurses, dated September 1, 1993, St. Luce stated that at the arbitration hearing the Employer had produced evidence that the per diem nurses had historically received wage increases different from those provided by the contract. Thus, rather than risk being unable to prove to the arbitrator's satisfaction that per diem nurses had received contractual wages, the Petitioner agreed to adjourn the hearing and explore the possibility of settlement.

[5] For example, although the per diem nurses received no fringe benefits, record evidence shows that full-time bargaining unit members were entitled to certain fringe benefits and that part-time employees who were regularly scheduled to work at least 32 hours per biweekly pay period were entitled to certain fringe benefits as specified in the collective-bargaining agreement.

[6] Contrary to the Regional Director, it is immaterial that the record does not establish that these proposals were withdrawn in return for concessions. What is important is that neither the contract that resulted from these negotiations nor any other collective-bargaining agreement between the parties covered the per diem nurses.

In addition, we note that evidence as to grievances for per diem nurses consisted of two alleged episodes over the 15+-year relationship between the parties. In each of these cases, the Employer explained why such conduct was not inconsistent with exclusion of the per diem nurses. Concerning the first example, a series of documents, dated from May 19 through August 5, 1993, were introduced into evidence regarding the 1-day suspension of nurse Sema Hasan and the resulting grievance. Although documentary evidence shows that Hasan was a per diem nurse in 1992, there is, as the Employer attests, no evidence indicating Hasan was in per diem status at the time of the grievance in 1993. The Employer's explanation, not refuted by the Petitioner, was that a per diem nurse would not receive a 1-day suspension, but simply would not be scheduled or called back by the Employer. Therefore, according to the Employer, Hasan was not a per diem at the time of the grievance. The only documentary evidence concerning 1993 fails to list Hasan as a per diem.

In another example, Patricia Kowalski, chief shop steward, testified that she had handled grievances for per diem employees. One was in regard to per diem nurse Heilenberg in 1992. According to Kowalski, Heilenberg was told that her practice was not meeting standards and that the Employer would not accept her as a per diem in that department any longer. Kowalski testified that she met with the Employer's representatives regarding Heilenberg's grievance at steps one and two of the grievance process. Kowalski also stated that she had represented employee Spears, whom she identified as a per diem nurse, regarding a practice issue, but on an informal basis. Kowalski further stated that she had represented another per diem nurse but could not recall any details regarding that incident. We find that this limited evidence of grievances pursued on behalf of per diem nurses, in the context of otherwise unilateral action on the part of the Employer regarding the terms and conditions of employment of per diem nurses, is insufficient to show that the disputed employees have historically been included in the unit, or to rebut the overwhelming weight of the evidence establishing their historical exclusion.

We also note that the evidence adduced by the Petitioner does not show any recent significant changes in the per diem nurses' job duties and/or responsibilities prior to the filing of the instant petition in August 1993. The only record evidence of possible significant change is the apparent increase in 1988 in the number of hours the per diem nurses work. Yet even were we to consider this to be a change in the nurses' status—a conclusion we would be reluctant to make—we note that after the change, the Petitioner twice proposed specifically to include the per diem classification in the contractual unit. Thus, in both the 1989 and 1991 contract negotiations, the Petitioner set forth proposals regarding the terms and conditions of employment of per diem nurses, but these proposals were withdrawn during bargaining.[7] Indeed, neither agreement contains any provision pertaining to the per diem employees. Thus, the only change that even arguably could justify unit clarification here, i.e., the increased number of hours the per diem nurses were allowed to work, occurred 5 years before the instant petition was filed. And even at that time, the Petitioner acquiesced in the exclusion of the per diem nurses by withdrawing its contract proposals. The parties negotiated two contracts after the inception of the alleged change in per diem operations. Yet the Petitioner waited approximately 21 months after the execution of the contract which became effective on June 30, 1991, to file the instant petition. Such conduct indicates acquiescence in the exclusion of per diem nurses from the contract, and thus the Petitioner cannot add these employees by means of unit clarification. *Union Electric*, 217 NLRB at 667. In short, the overwhelming evidence in this case shows that the per diem nurses have been historically excluded from the bargaining unit. Accordingly, we reverse the Regional Director's Supplemental Decision and Order Clarifying Bargaining Unit, and dismiss the petition which seeks to clarify the unit to include the per diem nurses.[8]

ORDER

The petition is dismissed.

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[7] During the 1989 negotiations, the Employer, in response to the Petitioner's proposals, mentioned per diems in a proposal to exclude "[p]arttime employees (including per diems) who are regularly scheduled to work less than thirty-two (32) hours per bi-weekly pay period."

[8] The practical effect of this dismissal is to continue the exclusion of the per diem nurses.