Grancare, Inc., d/b/a Premier Living Center *and* United Food & Commercial Workers Union, Local 204. Case 11–UC–83

May 15, 2000

DECISION ON REVIEW AND ORDER

BY MEMBERS FOX, LIEBMAN, AND HURTGEN

Pursuant to a Stipulated Election Agreement in Case 11–RC–6262, an election was conducted on May 8, 1998, among employees in voting group B, a nonprofessional unit consisting of the Employer's licensed practical nurses (LPNs) and service and maintenance employees. A majority of employees voted for the Union. The Employer filed election objections asserting, contrary to the Stipulated Election Agreement, that the LPNs are supervisors, and that, acting as union agents, they engaged in objectionable conduct.[1] Following a hearing on the objections, the hearing officer found that the Employer was bound by its election agreement, which clearly and unambiguously stipulated to the inclusion of the LPNs in the unit. The hearing officer further found that the LPNs are not statutory supervisors. Assuming arguendo that the LPNs are supervisors, the hearing officer found that the conduct attributed to the LPNs was not objectionable. Accordingly, he recommended overruling the Employer's objections.

On October 30, 1998, the Board adopted the hearing officer's recommendation in Case 11–RC–6262 and certified the Union as the exclusive representative of the unit employees. The Board expressly relied on the hearing officer's finding that the Employer is bound by the Stipulated Election Agreement.[2]

On November 12, 1998, the Employer filed the instant unit clarification petition seeking to exclude LPNs from the certified unit. On November 17, 1998, the Regional Director for Region 11 dismissed the petition without conducting a hearing. He found that the Employer is bound by its voluntary stipulation in Case 11–RC–6262 that the LPNs are included in the unit and, thus, is estopped from seeking to exclude the LPNs from the unit through the filing of this petition. The Employer requested review of the Regional Director's dismissal of the petition. On January 13, 1999, the Board granted review.

In support of its request for review, the Employer contends that, in light of the Act's statutory exclusion of supervisors from the definition of "employee," the Board is required to determine the supervisory status of job classifications in a bargaining unit any time the issue is raised. Accordingly, the Employer asserts that the Regional Director was wrong, as a matter of law, in failing to direct a hearing into issues raised by the instant petition and in finding that the Employer is estopped from seeking to exclude LPNs from the unit solely on the basis of its previous stipulation to their inclusion.[3] We affirm the Regional Director's dismissal of the Employer's unit clarification petition.

1. As an initial matter, we reject the Respondent's contention that the Board is required to determine the supervisory status of job classifications in a bargaining unit any time the issue is raised. In *I.O.O.F. Home of Ohio, Inc.*, 322 NLRB 921, 922–923 (1997), the Board reaffirmed its longstanding rule that in the absence of newly discovered and previously unavailable evidence or special circumstances, an employer may not challenge the validity of a union's certification based on a belief that unit members are statutory supervisors if it failed to raise the issue during the representation proceeding.[4] In accordance with that rule, the Board held that the Respondent in that case, who had stipulated to the inclusion of LPNs in the certified unit but later withdrew recognition from the union on grounds that it had "reconsidered" and now believed the LPNs to be supervisors, was barred from raising the supervisory issue as a defense to a refusal to bargain allegation. The Board also specifically overruled, as inconsistent with its rule, *McAlester General Hospital*, 233 NLRB 589 (1977), in which an employer who had stipulated to the inclusion of certain employees in a certified unit was permitted to litigate their supervisory status in a subsequent unit clarification proceeding. 322 NLRB at 921 fn. 7. Thus, the Employer's assertion that the Board must entertain its petition and rule on the LPNs' supervisory status notwithstanding its pre-election stipulation to their inclusion in the unit is in error.[5]

[1] In Case 11–RC–6262, an election also was held among employees in voting group A, consisting of registered nurses (RNs) employed by the Employer. Employees in voting group A voted against representation. The Employer's objections encompassed the RNs, as well as the LPNs; however, the instant UC petition seeks clarification only as to the supervisory status of the LPNs in the certified unit.

The Employer has incorporated into its request for review in the instant case the relevant portions of the record in Case 11–RC–6262.

[2] The Board did not pass on the supervisory status of the LPNs. However, Members Fox and Liebman assumed for the sake of argument that the LPNs are supervisors and, in agreement with the hearing officer, found that the conduct attributed to the LPNs was not objectionable.

[3] *Angelica Healthcare Services* Group, 315 NLRB 1320 (1995), cited by the Employer in support, is distinguishable. In contrast to the instant case, *Angelica* did not involve a consent election.

[4] This rule is a corollary of the Board's longstanding policy that once a ballot has been cast without challenge, its validity cannot thereafter be challenged, a policy which has met with Supreme Court approval. *NLRB v. A.J. Tower*, 329 U.S. 324 (1946). As the Board and the Court both recognized, without such rules "an election could be converted from a definitive resolution of preference into a protracted resolution of objections purposely disregarded or supressed against the contingency of an adverse result." 329 U.S. at 330, quoting from *A.J. Tower Co.*, 60 NLRB 1414, 1416 (1945).

[5] In its brief in support of its request for review, the Employer relies on several cases that predate *I.O.O.F. Home* in which parties were permitted to litigate supervisory issues notwithstanding a prior stipulation. Those cases include *Rosehill Cemetery Assn.*, 262 NLRB 1289 (1982); *A & B Cartage*, 256 NLRB 14 (1981); *Judd Valve Co.*, 248 NLRB 112 (1980); *Laymon Candy Co.*, 199 NLRB 547 (1972); *Times-World Corp.*, 151 NLRB 947 (1965). In our view, those cases were implicitly overruled by *I.O.O.F. Home*, and to the extent that they are inconsistent with the Board's relitigation rule, as set forth here and in *I.O.O.F. Home*, we now expressly overrule them and similar cases.

2. We find further that the Employer has failed to offer any evidence of changed or unusual circumstances which would bring its unit clarification petition within any exception to the Board's relitigation rule. In support of the its request for review, the Employer contends that it has given LPNs "new" supervisory duties. As discussed below, the Employer has raised these contentions in objections in the underlying representation proceeding as well as the instant UC case.

(a) *The Underlying Representation Case*. As noted above, in Case 11–RC–6262 the parties voluntarily stipulated that LPNs are included in the unit. After the Union won the election, however, and notwithstanding its stipulation to the contrary, the Employer filed election objections asserting, among other things, that the LPNs are supervisors.

During the hearing on the election objections in Case 11–RC-6262 conducted on June 18, 1998, the Employer was permitted to adduce evidence in support of its claims that "new" policies and position descriptions had been implemented and that "new" supervisory job duties had been assigned to its nurses, including LPNs, thus rendering them statutory supervisors. According to the testimony of Staff Development Coordinator Elizabeth Settlemeyer in that case, the LPNs' then-new job duties included: (a) preparation of performance evaluations for CNAs that result in "scores" that correlate to predetermined merit pay raise amounts; and, (b) assignment to nurses of full responsibility "for anything that went on in their halls, that it was not to be just passed up the ladder . . . and to see that the work [of caring for patients] was done."

Uncontroverted evidence revealed, however, that those purportedly "new" job descriptions and duties were standards established by Living Centers of America and that they had been assigned to nurses and implemented in February or early March 1998, following the merger of Grancare with Living Centers and, significantly, before the April 7, 1998 date of the Stipulated Election Agreement. Thus, in Case 11–RC–6262, the Regional Director found that the assignment of the purported "new" duties to LPNs did not constitute newly discovered evidence or a change in circumstances of which the Employer was unaware at the time of the Stipulated Election Agreement. Accordingly, the Regional Director held the Employer bound by the Agreement stipulating to the unit inclusion of LPNs.

(b) *The Unit Clarification Proceeding*. The facts and "new evidence" offered by the Employer in support of its request for review of the Regional Director's dismissal of the instant unit clarification petition are substantially similar to the evidence of "new" supervisory duties offered by the Employer in the hearing in Case 11–RC–6262.[6] That is, here the Employer contends that, "in late April 1998," it implemented Living Center's Performance Review Policy, pursuant to which LPNs prepare performance evaluations for CNAs that directly impact wages. The only new fact contained in the Employer's request for review is that the number of evaluations performed by LPNs has increased from about 4 in June 1998 to about 11 as of December 1998.[7] The Employer has not made even a cursory showing regarding how, if at all, the authority of LPNs to perform evaluations has changed, or how the evaluations performed "in late April 1998" differ from those which have been performed by LPNs since February or March 1998, as determined by the hearing officer in Case 11–RC–6262. Nor has the Employer shown how such evaluations have directly affected any statutory indicium of supervisory status such as rewarding or discharging employees.

The Employer also contends that, "since June 1998," LPNs have been assigned "additional responsibilities for assigning CNAs to provide care for specific patients." The Employer does not say that this assignment occurred after the hearing on June 18, 1998. Even if it did, the Employer's showing is insufficient. The Employer has not made a showing regarding the nature of those purported "additional responsibilities" and how they differ from responsibilities assigned in February or March 1998. Indeed, we are left by the Employer to speculate what such "additional responsibilities" might consist of, in light of Staff Development Coordinator Settlemeyer's testimony in Case 11–RC–6262 that in February or March 1998, LPNs had been assigned full responsibility "for anything that went on in their halls, that it was not to be just passed up the ladder . . . and to see that the work [of caring for patients] was done."

The Employer's vague, ambiguous, and unsupported claims regarding the purported assignment of new duties to LPNs falls far short of demonstrating the existence of new and previously undiscovered evidence or unusual

Parkview Manor, 321 NLRB 477, 478 (1996), which was also cited by the Employer, relied in part on *Rosehill Cemetery*, but also involved special circumstances, namely that the analytical framework used by the hearing officer in finding that charge nurses were not supervisors was rejected by the Supreme Court in *NLRB v. Health Care & Retirement Corp.*, 511 U.S. 571 (1994). Although the "special circumstances" part of *Parkview Manor* remains valid, the part of that case that relied on *Rosehill* was, in our opinion, similarly overruled by *IOOF*.

The Washington Post Co., 254 NLRB 168 (1981), also relied on by the Employer, is distinguishable, and indeed was distinguished by the Board in *I.O.O.F. Home*. In *The Washington Post Co.*, the Regional Director, during the representation proceeding, expressly authorized the parties to raise the supervisory issue by filing a postelection unit clarification petition in exchange for the parties' agreement not to litigate the unit placement issue prior to the election. 322 NLRB 921 fn. 7. In the instant case, and in *I.O.O.F. Home*, the Employer voluntarily stipulated to the inclusion of LPNs in the bargaining unit without any such authorization by the Regional Director to raise the supervisory issue postcertification.

[6] The Employer submitted an affidavit by Administrator Kathy McMahon.

[7] We also note that, according to McMahon's affidavit, 11 of 20 performance evaluations had been completed by LPNs. The Employer offered no explanation regarding the other nine evaluations.

circumstances that would warrant review of the inclusion of the LPNs in the certified unit.[8] Accordingly, we affirm the Regional Director's dismissal of the petition.[9]

ORDER

It is hereby ordered that the Employer's petition for clarification of the certified unit[10] is dismissed.

[8] We do not hold that an employer is estopped in all cases from seeking clarification of a bargaining unit via a postelection unit clarification petition. Conceivably, there could be instances when such a petition would be appropriate, such as when a genuine claim is advanced that new and previously undiscovered evidence exists. We simply hold that in this case the Employer has not made such a showing and, thus, is estopped in such circumstances from challenging the nonsupervisory status of LPNs following its voluntary stipulation to their inclusion in the unit.

[9] In affirming the Regional Director's dismissal of the petition, we reject the Employer's contention that the Regional Director erred in failing to direct a hearing on issues raised in its petition. Sec. 9(c)(1) of the Act, cited by the Employer, concerns the requirement that a hearing be held upon the filing of a petition for a *representation election*; it is not applicable to unit clarification petitions. Sec. 102.63(b) of the Board's Rules and Regulations, series 8, as amended, specifically states that a Regional Director has the authority to dismiss a unit clarification petition based on an administrative investigation without holding a hearing. In this case, as we have found above, the Employer has failed to offer any relevant evidence that was not already presented in the hearing on the election objections in Case 11–RC–6262 or that otherwise raises substantial factual issues. Thus, the Employer has failed to demonstrate any need for an evidentiary hearing.

In addition to the above, Member Hurtgen notes that the parties have already litigated the "relitigation" issue, viz., the issue of whether the Employer should be permitted to adduce additional evidence on the question of supervisory status. The Board's decision of October 30, 1998, resolves that relitigation issue against the Employer. Thus, the Employer is estopped from again raising the "relitigation" issue. Of course, this paragraph does not pertain to matters arising after the hearing in that case. As to those matters, Member Hurtgen simply agrees with his colleagues.

[10] The certified unit consists of all full-time and regular part-time licensed practical nurses and service and maintenance employees including all certified nursing assistants, dietary, transport, housekeeping and laundry employees, ward clerk, purchasing clerk, and activities employees, employed by the Employer at its Lake Waccamaw, North Carolina facility.