Ziegler, Inc. ***and*** **International Union of Operating Engineers, Local No. 49, AFL–CIO.** Case 18–UC–336

April 12, 2001

DECISION ON REVIEW AND ORDER CLARIFYING UNIT

BY CHAIRMAN TRUESDALE AND MEMBERS LIEBMAN AND HURTGEN

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel, which has considered the Employer-Petitioner's and the Union's requests for review of the Regional Director's Decision and Order dismissing the instant petition (pertinent portions of which are attached as an appendix). The Union's request for review is denied as it raises no substantial issues warranting review. The Employer-Petitioner's request for review is granted. Having carefully considered the matter, we conclude, contrary to the Regional Director, that the bargaining unit should be clarified to exclude the "parts and warehouse employees"[1] who have been historically excluded from the unit.

Since 1952, the Employer-Petitioner and the Union have been parties to successive collective-bargaining agreements covering service department employees at all of the Employer-Petitioner's facilities, as well as warehouse employees at the Employer-Petitioner's Buhl and Shakopee locations. In November 1998, the Union filed a grievance alleging that the Employer-Petitioner improperly failed to apply the terms of the parties' collective-bargaining agreement to the "parts and warehouse employees" at six of the Employer-Petitioner's branch facilities. The Employer-Petitioner, asserting that the collective-bargaining agreement had never been applied to the "parts and warehouse employees" and that they had been historically excluded from the bargaining unit, filed the instant petition seeking clarification of the unit. In agreement with the Employer-Petitioner, the Regional Director found that the "parts and warehouse employees" had been historically excluded from the bargaining unit by the parties. The Regional Director declined to clarify the unit to exclude the "parts and warehouse employees" as requested by the Employer-Petitioner, in reliance on the Board's decision in *Bethlehem Steel Corp.,* 329 NLRB 243 (1999).

In *Bethlehem Steel*, similar to the instant case, the employer—following the filing of a grievance by the union alleging that the parties' collective-bargaining agreement should be applied to certain customer service employees—filed a petition seeking to clarify the bargaining unit to exclude those customer service employees on the basis that they had been historically excluded from the unit. Although the Board agreed that the disputed employees had been historically excluded from the unit, the Board refused to clarify the unit to confirm that exclusion. The Board stated that:

> [W]here a position or classification has been historically excluded from or included in the unit, and there have not been recent, substantial changes that would call into question the placement of the employees in the unit, the Board generally will not entertain a petition to clarify the status of that position or classification, regardless of when in the bargaining cycle the petition is filed.

Id. at 244. At the same time, however, the Board indicated that it has recognized several exceptions to this general principle, including an exception founded upon the Board's decision in *Williams Transportation Co*., 233 NLRB 837 (1977). Id. at fn. 5.

In *Williams Transportation*, a union, pursuant to its collective-bargaining agreement with an employer, filed a grievance alleging that the terms of the parties' contract should be applied to an employee occupying the shop office clerk position at the employer's facility. The grievance proceeded to arbitration, and an arbitration panel ultimately determined that the position was covered by the collective-bargaining agreement. *Williams Transportation*, supra at 837. The employer, however, declined to comply with the arbitration panel's order, and instead filed a petition seeking to clarify the bargaining unit to exclude the shop office clerk. The Regional Director deferred to the ruling of the arbitration panel and, therefore, dismissed the employer's petition. Id. The Board, however, concluded that the decision of the arbitration panel did not appear to be based on an interpretation of the contract, but instead appeared to constitute a determination that the position somehow had been accreted to the unit. Id. at 838. The Board further concluded that, in actuality, the shop office clerk position had been historically excluded from the unit and that, therefore, the arbitration panel's decision was improper, since "[i]t is axiomatic that, where a classification has been historically excluded from a unit, it cannot be added by means of the accretion doctrine." Id. Emphasizing that principle and recognizing that the determination of questions regarding representation, accretion, and unit

[1] Although the Regional Director and the parties utilize various terms to describe the employees who are the subject of the Employer-Petitioner's petition, we refer to the disputed employees at the Employer-Petitioner's branch facilities as "parts and warehouse employees," consistent with our prior order in this case.

placement are not matters for arbitration, but rather, are matters within the exclusive province of the Board to resolve, the Board concluded that processing of the employer's petition to confirm the historical exclusion of the disputed position was necessary to prevent the enforcement of the contradictory arbitration award. Id.

Although the instant case does not involve an arbitration award, the Board's decision in *Williams Transportation* nevertheless supports the processing of the petition here, since there is a pending grievance that ultimately could result in an incongruous arbitration award. The Regional Director here found that the "parts and warehouse employees" have been historically excluded from the bargaining unit. If the Union's pending grievance ultimately concludes in an arbitral determination that the "parts and warehouse employees" are covered by the parties' collective-bargaining agreement, the result would be identical to that which the Board condemned in *Williams Transportation*. Moreover, in the likely event that the Employer-Petitioner in such circumstances thereafter would file another unit clarification petition seeking to confirm the historical exclusion of the employees and to prevent the enforcement of the contrary arbitration award, as in *Williams Transportation*, the Board would process the petition for the reasons identified in that decision. In our view, to require the parties and the Board to expend additional time and resources and suffer additional delays to simply reaffirm that which the Board has already decided in this case (after conducting an investigation, holding a hearing, and reviewing submissions from the parties) would be a wasteful exercise.[2]

As the *Williams Transportation* exception to the Board's general policy of declining to process a unit clarification petition to confirm an historical exclusion fully supports clarification of the bargaining unit in this case, our decision to process the petition is not, contrary to our dissenting colleague's contention, inconsistent with established Board precedent. Although the *Bethlehem Steel* decision indeed reaffirmed the Board's general policy to refrain from clarifying a unit to confirm an historical exclusion, the Board there specifically noted that the *Williams Transportation* exception was inapplicable to the case because, "although the Union originally filed a grievance and sought arbitration to compel the inclusion of the disputed classifications in the bargaining unit, the grievance and arbitration demands [were] withdrawn." *Bethlehem Steel*, supra at 244 fn. 5. As such, the Board in *Bethlehem Steel* did not reach, but rather left open, the question presented by the facts of this case: whether to process a unit clarification petition where there is an outstanding grievance or demand for arbitration alleging that a collective-bargaining agreement between the parties covers a classification of employees that the Board finds has been historically excluded from the unit.

Our dissenting colleague additionally contends that "the collective bargaining process should be allowed to work" and that the parties should be provided the opportunity to settle the dispute through good-faith bargaining. We note first that the applicability of the collective-bargaining agreement to the "parts and warehouse employees" in this case has been the subject of discussion between the parties on various occasions dating back to at least 1987. From that time to the present, however, despite their continuous relationship and negotiation of successive collective-bargaining agreements, the parties seemingly have been unsuccessful in reaching an agreement regarding the representation of these employees. Moreover, given the fact that the Board has concluded that the disputed employees have been historically excluded from the unit, the parties would be foreclosed from now adding them to the unit through the collective-bargaining process without a showing of majority status on the part of the Union. See *United Parcel Service*, 303 NLRB 326, 327 (1991) (holding that an employer and union committed violations of Sec. 8(a)(1), (2), and (3) and Sec. 8(b)(1)(A) and (2) of the Act, respectively, by executing a collective-bargaining agreement that included a group of employees who had been historically excluded from the unit and a majority of whom did not support the union); see also *Williams Transportation*, supra at 838 ("It is axiomatic that, where a classification has been historically excluded from a unit, it cannot be added by means of the accretion doctrine, i.e., without affording employees in that classification an opportunity to select or reject the bargaining representative"). Furthermore, our decision to clarify the unit to confirm the historical exclusion of the "parts and warehouse employees" does not preclude the Union from later seeking representation of those employees through the filing of a petition for an election, nor does it foreclose any opportunity or remedy that otherwise would have been available to the parties.

For all the foregoing reasons, we conclude that the instant unit clarification petition should be processed to

[2] Even if the Union's grievance did not result in an incongruous arbitration award (e.g., if an arbitrator were to determine that the "parts and warehouse employees" are not covered by the collective-bargaining agreement), however, we believe that the processing of the petition and clarification of the unit here nevertheless would serve the beneficial purpose of according some degree of finality and stability with respect to the relationship between the Employer-Petitioner, the Union, and the disputed employees.

exclude the "parts and warehouse employees" from the bargaining unit represented by the Union.

ORDER

It is hereby ordered that the classification of "parts and warehouse employees" is excluded from the unit of the Employer-Petitioner's employees represented by the International Union of Operating Engineers, Local No. 49, AFL–CIO.

MEMBER HURTGEN, concurring.

I agree with the principal opinion's conclusion that *Bethlehem Steel Corp.,* 329 NLRB 243 (1999) is distinguishable. I write separately, however, to make it clear that I do not agree with *Bethlehem Steel*. I also wish to emphasize a disagreement with the dissent.

Consistent with my position in *Bethlehem Steel,* supra, I agree to entertain the petition here to exclude the disputed employees. Where, as here, a group of employees has been historically excluded from the unit and their function has not changed, and a party nonetheless grieves to include them in the unit, the Board, on the filing of a UC petition by the other party, has the responsibility of resolving the issue. Consistent with that position, I agree to resolve that issue here by excluding the disputed group.

Further, even accepting the majority opinion in *Bethlehem Steel* as the law, I agree that the case is distinguishable. In that case, the grievance was withdrawn, and thus there was no prospect that an arbitral award would be contrary to Board principles concerning unit placement. In the instant case, the grievance is proceeding to arbitration, and thus there is that prospect.

Finally, I disagree with the dissent's contention that the Board should withhold its processes, pending resort to collective bargaining. The instant dispute is a representational dispute. That is, the dispute is about who is in the unit; it is not about the terms and conditions of employment of employees who are indisputably within the unit. Although collective bargaining can *permissibly* be used to resolve representational issues, the parties here have not been able to resolve the matter. In these circumstances, I believe that the Board, on a petition, has a responsibility to resolve the representational issue.

MEMBER LIEBMAN, dissenting in part.

The majority's decision to grant the Employer-Petitioner's request for review and clarify the unit to exclude the disputed employees deviates from established and proper unit clarification procedure. Unit clarification is not appropriately used to clarify the placement of employees who have been historically excluded from a unit. Based on that sound principle, I would affirm the Regional Director's dismissal of the petition.[1]

The Union represents a single unit of service department employees at nine facilities and warehouse employees at two facilities. The Union filed a grievance to include warehouse employees at certain other facilities; those employees have been outside the unit since at least the 1970's. In apparent response to the grievance, the Employer-Petitioner filed this unit clarification petition seeking to exclude the disputed warehouse employees from the unit. The Regional Director dismissed the petition because the disputed employees have been historically excluded.

The Regional Director's dismissal accords with Board procedure. The majority's decision does not. In *Bethlehem Steel Corp.*, 329 NLRB 243, 244, (1999), the Board dismissed an employer's petition which, like the Employer's petition in this case, sought to clarify a unit to confirm the exclusion of employees who had been historically excluded by the parties. The Board held, "where a position or classification has historically been excluded from or included in the unit . . . the Board generally will not entertain a petition to clarify the status of that position or [classification], regardless of when in the bargaining cycle the petition is filed." In so holding, the Board quoted *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 established practice of such parties concerning the unit placement of various individuals.* [Emphasis added by *Bethlehem Steel*, supra.]

See also *Boston Cutting Die Co.*, 258 NLRB 771 (1981), which dismissed a petition to clarify the unit to include historically excluded employees.

A limited exception to the procedure to dismiss clarification petitions involving historically excluded employees was created in *Williams Transportation Co.*, 233 NLRB 837 (1977). In that case, an arbitration committee

[1] I agree with my colleagues that the Union's request for review should be denied.

found that an historically excluded shop office clerk should be added to the unit, the Regional Director deferred to the committee's award and included the employee in the unit, and the Board reversed, finding that the unit should be clarified to exclude the disputed employee. The Board explained its holding as follows: "By giving effect to the Committee's decision, the Regional Director has in effect mandated the inclusion of the shop office clerk via the forbidden accretion route." Id. at 838.

In other words, under *Williams Transportation,* the Board will intervene in unit clarification cases involving historical exclusion if there is an arbitral ruling that is clearly at odds with Board policy. This case involves no such arbitral award. Thus, the majority's reliance on *Williams Transportation* is misplaced. Nor is there any compelling reason to expand the limited exception which *Williams Transportation* created.

My colleagues explain that "there is a pending grievance that ultimately could result in an incongruous arbitration award." My colleagues jump the gun. A "pending grievance" is hardly the equivalent of an arbitral award, much less one at odds with Board policy as in *Williams Transportation*. At the core of the Board's decision in *William Transportation* was its conclusion that the arbitration committee had, in effect, accreted the classification into the unit in direct contravention of Board policy. "It is axiomatic," the Board said, "that, where a classification has been historically excluded from a unit, it cannot be added by means of the accretion doctrine." Id. at 838. The Board was unwilling to equate the arbitral award with "collective bargaining," finding that it was not based on an interpretation of the contract, as the contract neither mentioned the disputed classification nor listed any existing wage rate for the position. The Board was therefore unwilling to allow the arbitral award to take effect. Id.

No comparable award exists in this case that contravenes Board policy and would take effect if the Board were to follow its normal procedure and dismiss this unit clarification petition. In this context, the collective-bargaining process should be allowed to work. There is no indication that the parties will not engage in good-faith collective bargaining to resolve their dispute, either within or outside the grievance procedure, in a manner that conforms to Board policy. Collective bargaining is a flexible, adaptable process, and the grievance procedure is an integral part of that process, with which we should not interfere unless there is some reason connected with our statutory duties that compels us to do so. The parties could utilize that process to settle their dispute in any number of ways, most of which we could not even begin to predict. In these circumstances, we should follow established Board law and not make the unit clarification procedure available to the parties to settle their dispute, but should stay our hand and allow them to work it out themselves through good-faith collective bargaining.

Accordingly, I would follow established Board law and dismiss the Employer's unit clarification petition.

APPENDIX

The Employer/Petitioner seeks to clarify the existing bargaining unit to exclude warehouse employees at its branch facilities in Crookston, Duluth, Fergus Falls, Marshall, Rochester, and St. Cloud, Minnesota, who perform duties in addition to their duties as warehouse employees. The Employer/Petitioner contends that these employees have been historically excluded from the unit and argues that the unit should be clarified in a manner consistent with this historical exclusion. The Union contends that because these employees perform the duties of "branch warehouse" employee, a classification included in the unit, they are members of the bargaining unit.

The Employer/Petitioner is engaged in the sale and service of heavy equipment, and it maintains nine facilities throughout the State of Minnesota. The Employer/Petitioner's main facility is located in Bloomington, Minnesota.[3] At this facility, the Employer/Petitioner maintains a sales staff, a parts department, a service department, and its administrative offices. The branch facilities (Buhl, Crookston, Duluth, Fergus Falls, Marshall, Rochester, St. Cloud, and Shakopee) are basically smaller versions of the Bloomington facility. Each maintains a sales staff, a parts department, and a service department. The parts departments at the Bloomington, Buhl, and Shakopee locations are comprised of parts employees and warehouse employees.

The employees in the parts department at these locations are separately identified as either "warehouse employees" or "parts employees." However, the parts department employees at the other six facilities are not separately identified as either "parts employees" or "warehouse employees." Rather, they perform the functions of both.

There are approximately 25 warehouse employees at the Bloomington facility, and they are represented by the International Brotherhood of Teamsters, Local No. 221. The 15 to 20 parts employees at the Bloomington facility are not represented by any labor organization. The parts employees at the Buhl and Shakopee facilities also are not represented by any labor organization.

[3] This facility is also referred to as the Employer/Petitioner's Minneapolis facility.

The service department employees at each of the Employer/Petitioner's nine facilities are included in a single unit which is represented by the Union. The Employer/Petitioner's "branch warehouse employees" are also included in this bargaining unit. The Employer/Petitioner currently maintains "branch warehouse employees" at only two of its eight branch facilities (Buhl and Shakopee).

The Union has represented this unit, which is made up of approximately 300 employees, since at least 1952, although the record does not reflect whether the Union was certified as the unit's bargaining representative or the Employer/Petitioner voluntarily recognized it as such. Currently, this unit is made up of all the Employer/Petitioner's service department employees at all nine facilities and the Employer/Petitioner's warehouse employees at its Buhl and Shakopee facilities.

The present dispute involves the warehouse employees who perform additional duties at the Employer/Petitioner's facilities in Crookston, Duluth, Fergus Falls, Marshall, Rochester, and St. Cloud. As stated above, these employees work in the parts department, but they are not separately identified as either "parts employees" or "warehouse employees." Rather, these employees are responsible to perform the duties of both, and it is undisputed that the employees in question perform duties beyond their responsibilities in the warehouse.

The record demonstrates that the warehouse employees who perform additional duties at the Employer/Petitioner's Crookston, Duluth, Fergus Falls, Marshall, Rochester, and St. Cloud facilities have not been included in the unit represented by the Union since at least the 1970's. The record further demonstrates that the nature of their position and job responsibilities have remained virtually unchanged during that period. The parties have discussed the unit status of these employees on numerous occasions. In 1987, the Union asked that two warehouse employees who perform additional duties at the Crookston facility be placed in the unit. The Employer/Petitioner agreed that one of the two should be included, but this employee was discharged shortly thereafter. His replacement was never considered to be in the unit. Mostly recently, during contract negotiations in 1998, the Union requested that the employees in question be placed in the unit. However, each party provided a separate account of what occurred. Jack Schouveller, the Union's chief negotiator, testified that, during the July 1998 negotiations, he stated that union members were upset that the warehousemen (the warehouse employees who perform additional duties at the six facilities in question) were not in the unit. He further testified that Barb Vermeer, the Employer/Petitioner's human resources director, stated that there was not a problem and that the warehousemen were in the unit. Vermeer testified, however, that Schouveller asked about the warehouse employees at the St. Cloud facility, and that she just responded that those employees were never in the unit.

The Board in *Bethelem Steel Corp.*, 329 NLRB at 244, stated:

> 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.

Id. at 243, 244, quoting *Union Electric Co.,* 217 NLRB 666, 667 (1975).

> Clarification is not appropriate, however, for upsetting
>
> . . . an established practice of such parties concerning the unit placement of various individuals." Id., citing *Union Electric Co.,* 217 NLRB at 667. Unless a position or classification that has been historically excluded has undergone recent, substantial changes, "the Board generally will not entertain a petition to clarify the status of that position." Id.; see also *Plough, Inc.,* 203 NLRB 818, 819 fn. 4 (1973). There is no requirement that the Union has acquiesced to the historical exclusion; it is the fact of the historical exclusion that is determinative. *Robert Wood Johnson University Hospital,* 328 NLRB 912, 914 (1999), citing *United Parcel Service*, 303 NLRB 326, 327 (1991).

Based on the foregoing and the evidence as a whole, I conclude that the petition should be dismissed. As set forth above, the evidence establishes that warehouse employees who perform additional duties at the Employer/Petitioner's Crookston, Duluth, Fergus Falls, Marshall, Rochester, and St. Cloud facilities have existed for at least the last 20 years (or since they opened); and that the employees working in these positions have performed the job responsibilities of both warehouse and parts employees. Additionally, no employee occupying such a position is included in the unit and the warehouse employees that perform additional duties at these six facilities have been historically excluded from the unit. It further appears that their exclusion from the unit has always been based on the fact that they perform the job

duties of parts employees in addition to their warehouse duties. Furthermore, there is no evidence of recent changes in the duties and/or responsibilities of the individuals occupying such positions. Finally, the evidence reveals that the Employer/Petitioner and the Union are currently parties to a collective-bargaining agreement. Under these circumstances, the petition for unit clarification is inappropriate as processing it would be disruptive of, and would undermine, the established bargaining relationship between the parties.

Furthermore, the Union's reliance on *John P. Scripps Newspaper Corp.*, 329 NLRB 854 (1999), is misplaced for two reasons. First, the holding in that case was predicated on the fact that bargaining unit was defined by the work performed rather than defined by job classification. Additionally, the Board specifically limited its holding to situations where the bargaining unit is defined by the work performed. In the present case, however, the bargaining unit is defined by job classifications. Accordingly, *John P. Scripps Newspaper Corp.* is not applicable to the present case.

Second, in *John P. Scripps Newspaper Corp.,* there was no historically excluded classification of employees. However, in the present case, the warehouse employees at the branch facilities who perform additional duties have been historically excluded from the unit. No collective-bargaining agreement has been applied to these employees for at least 20 years and since that time the parties have negotiated six successor agreements. Therefore, *John P. Scripps Newspaper Corp.* is distinguished from the present case.

Additionally, it appears that the Union misconstrues the nature of the historical exclusion. In its brief, the Union argues that branch warehouse employees have been included in the unit since its inception, and they should not now be deemed to have been historically excluded. As the record shows, the historical exclusion does not encompass pure "branch warehouse employees." Rather, the historical exclusion encompasses those warehouse employees at the branch facilities who also perform the functions of parts employees. In fact, the Employer/Petitioner appears to recognize that the ware house employees who do not perform the additional duties of parts employees are members of the bargaining unit. However, pure warehouse employees just do not exist at the six branch facilities in question. Accordingly, the Union's argument that the branch warehouse employees have never been excluded from the unit is misplaced.

As I concluded above, the warehouse employees at the Employer/Petitioner's branch facilities who also perform the duties of parts employees have been historically excluded from the bargaining unit. In this situation, it is inappropriate to entertain a unit clarification petition. *Bethlehem Steel Corp.*, 329 NLRB 243, 244. Accordingly, I shall dismiss the petition.[4]

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[4] The Employer/Petitioner argues because the evidence supports a conclusion that branch warehouse employees who perform additional duties have been historically excluded from the bargaining unit, clarifying the unit accordingly merely recognizes the reality of the situation. However, I am bound by Board precedent to dismiss the petition. While the concurring opinion of Members Hurtgen and Brame in *Bethlehem Steel Corp.,* supra, supports the Employer/Petitioner's position, it was clearly rejected by the majority.

In its brief, the Employer/Petitioner argued that because the Union subpoenaed the Employer/Petitioner's expert, it should be ordered to pay his witness fee. As I believe the Employer/Petitioner's request is beyond the scope of my authority, I decline to issue such an order.