

Affiliated Midwest Hospital Incorporated, d/b/a Riveredge Hospital and Patricia Ann Buffington, Eloise Gohne, and William Koulias, Petitioners and Hospital Employees Labor Program Local 73 (Help!)

Affiliated Midwest Hospital Incorporated, d/b/a Riveredge Hospital, Employer-Petitioner and Hospital Employees Labor Program, Local 73 (Help!). Cases 13-RD-1250, 13-RD-1251, 13-RD-1252, 13-RM-1281, 13-RM-1282, and 13-RM-1283

August 14, 1980

DECISION AND DIRECTION

BY CHAIRMAN FANNING AND MEMBERS
PENELLO AND TRUESDALE

Pursuant to authority granted it by the National Labor Relations Board under Section 3(b) of the National Labor Relations Act, as amended, a three-member panel has considered certain objections to decertification elections held on October 17, 1979,¹ and the Regional Director's report recommending disposition of the same. The Board reviewed the record in light of the exceptions and briefs, and hereby adopts the Regional Director's findings and recommendations only to the extent consistent herewith.

Petitions were filed in Cases 13-RD-1250 and 13-RM-1383² (a service and maintenance unit), 13-RD-1251 and 13-RM-1282 (a registered nurses unit), and 13-RD-1252 and 13-RM-1281 (a technical unit) in July 1979.³ In August, the parties entered into Stipulations for Certification Upon Consent Election in the above cases, one for each unit. The stipulations, while containing the other provisions typical in such agreements, did not contain formal descriptions of the bargaining units. Instead, each of the three stipulations, under the section entitled "12. The Appropriate Collective-Bargaining Unit," contained the following statement: "The parties agree that the attachments are hereby incorporated and a part of this agreement." These respective attachments are lists containing the names of eligible employees and their specific job classifi-

cations in each of the units involved.⁴ The parties stipulated that these lists "expressly resolve any and all issues of eligibility" and constituted a "final and binding list of employees eligible to participate" in each election. The Regional Director approved these consent election agreements and, thereafter, notices of election, containing unit descriptions basically in conformity with the units as set forth in the Board's original certification,⁵ were distributed and posted. On October 4, the Employer notified the Regional Office that the unit descriptions in the notices of elections did not conform to the job classifications agreed to by the parties. No changes were made in the notices and the decertification elections were held on October 17.

The Employer's Ojection 2 alleges that the Regional Office improperly influenced the results of the election in Cases 13-RD-1250 and 13-RM-1283, and cases 13-RD-1251 and 13-RM-1282, respectively, by serving notices of election which contained unit descriptions materially different from the units stipulated to in the election agreements, thereby causing voter confusion and contributing to a low voter turnout.⁶

The Regional Director concluded that this objection, although limited to the two elections won by the Union, raised a serious question as to the manner in which all three decertification elections were conducted. Consequently, his investigation extended to the circumstances surrounding the decertification election in Cases 13-RD-1252 and 13-RM-1283 as well as the elections designated by the Employer in the objection in question.

The Regional Director noted that Section 11084.3 of the National Labor Relations Board Casehandling Manual (Representation Proceeding) clearly states that the determination of a bargaining unit disagreement, in a consent agreement election, is not to be left to a regional director; that a con-

⁴ Such lists are commonly referred to by the Board as *Norris-Thermador* lists after the case of that name (119 NLRB 1301 (1958)). Hereinafter we shall refer to the lists incorporated into the stipulations in these cases as the *Norris-Thermador* lists.

⁵ On June 14, 1978, the Union was certified as the collective-bargaining representative in each of the three units pursuant to the results of elections in three earlier cases.

⁶ The Employer does not contend in this or any other of the objections it filed to the elections conducted in the service and maintenance and technical units (it filed no objections to the election in the registered nurse unit) that the parties had not agreed to the units or their composition. Other than Objection 2, the Employer's objections are based on alleged Board agent misconduct in not permitting an employee whose name was not on any of the *Norris-Thermador* lists to vote a challenged ballot, and alleged misrepresentations by the Union (the Intervenor in these cases).

It should be noted that the Union filed objections limited to the election in the registered nurse unit based on alleged threats of reprisal and the promise and grant of benefits by the Employer. The Union does not contend in its objections that the parties were at odds as to the unit involved.

None of the Petitioners filed objections to the election.

¹ The elections were conducted pursuant to three Stipulations for Certification Upon Consent Election. The tally in Cases 13-RD-1250 and 13-RM-1283 was 25 for the Union, and 23 against the Union with 1 challenged ballot, an insufficient number to affect the results. The tally in Cases 13-RD-1251 and 13-RM-1282 was 9 for and 11 against the Union. In Cases 13-RD-1252 and 13-RM-1281 the tally was 46 for and 38 against the Union.

² The Employer filed the RM petitions after the RD petitions had been filed by employees and the question of the Union's majority status was already in issue. Thereafter, the RD and RM cases were consolidated. Accordingly, the elections herein are treated as decertification elections.

³ All dates hereafter refer to 1979.

sent agreement should set forth the unit in full; and that approval of the agreement should normally be withheld where the inclusion or exclusion of certain categories of employees is left to the challenge procedure. He also noted that Section 11086.3 of the same manual and Section 102.62(a) of the Board's Rules and Regulations also require a description of the appropriate unit in the election agreement, and that Section 9(a) of the Act speaks in terms of "a unit appropriate for collective bargaining." He concluded, therefore, that an election agreement must contain a clear and complete unit description agreed upon by the parties, before it may be approved by the Regional Director. He found that, since descriptions of the appropriate units were omitted from the election agreements in the instant cases and that the unit descriptions on the notices of election varied from the job classifications on the *Norris-Thermador* lists, the parties had failed to reach a meeting of minds as to the description of the appropriate units. The Regional Director further found that the *Norris-Thermador* lists were inadequate substitutes for an agreed-upon description of the appropriate units because they are concerned only with the issue of voter eligibility and do not define the appropriate units. Accordingly, the Regional Director recommends that the approval of the stipulations in the instant cases be revoked, that the elections be set aside, and that the cases be remanded for further appropriate proceedings.⁷ We disagree.

It is well established that the only appropriate unit in a decertification election is the existing or recognized bargaining unit.⁸ The election must be held in that unit, and the Board will not give effect to any agreement for an election in a different unit.⁹ Here, the collective-bargaining agreement between the Employer and the Union, effective from June 14, 1978, to November 14, 1979, sets forth the three recognized bargaining units,¹⁰ and thus, the parties had no choice but to agree to elections in those units. Further, as the following shows, the parties' actions from the filing of the respective petitions up to the elections indicate that they not only were aware that the elections had to

be conducted in the recognized bargaining units but also that they were in agreement in entering into the election agreements that the elections would be held in those units. Consequently, the absence of formal unit descriptions from the stipulations did not raise a serious question as to the identity and scope of the three units agreed upon. In this regard, as noted above, none of the objections filed by the Employer and the Union alleges or claims that there was any disagreement over the units or any question concerning the composition of those units. Thus, it is clear that the Regional Director was neither being asked to resolve a bargaining unit dispute, nor was he faced with the necessity of doing so.¹¹

The petitions filed by the respective parties contain unit description basically in conformity with the existing contractual units. For example, the units described in the Employer's petitions in Cases 13-RM-1282 and 13-RM-1283 are the same as the corresponding recognized units set forth in the contract, and the Petitioner's petition in Case 13-RD-1251, the registered nurse unit, is the same except for the addition of one nurse classification which is not mentioned in the contractual unit. We deem this variance immaterial, however, as it is clear that such unit is restricted to registered nurses regardless of any other designation they might hold. Similarly, although there are some variances between the petitioned-for units in Case 13-RM-1281, 13-RD-1250, and 13-RD-1252 and their contractual counterparts, the differences appear to be minor or relatively insubstantial insofar as they relate to the issue before us. Consequently, we conclude that at the very outset of this proceeding the parties evinced an intent to go to elections in the recognized bargaining units.

In any event, in consenting to the elections, the parties demonstrated conclusively that they were in agreement as to the units and the composition thereof when they incorporated the *Norris-Thermador* lists directly into the election agreements under the section entitled "12. The Appropriate Collective-Bargaining Unit." In doing so, they prefaced the incorporation with "the parties hereby agree" By such language, they noted the fact

⁷ Because of his recommendations in this regard, the Regional Director found it unnecessary to make recommendations with respect to the Employer's and the Union's objections described in fn. 6, *supra*. The Employer and the Union have excepted to his failure to consider and dispose of these objections. In light of our Decision herein, we find merit to those exceptions and shall, therefore, remand this proceeding to the Regional Director for an investigation (if not already conducted) and determination of those objections and the preparation of a supplemental report thereon.

⁸ *Booth Broadcasting Company*, 134 NLRB 817 (1961); and *Newhouse Broadcasting Corporation d/a/b WAPI-TV-AM-FM*, 198 NLRB 343 (1972).

⁹ *Brom Machine and Foundry Co.*, 227 NLRB 690 (1977); and *Fast Food Merchandisers, Inc.*, 242 NLRB 8 (1979).

¹⁰ A copy of the contract has been made a part of the record herein.

¹¹ We basically have no quarrel with the Regional Director's observation that consent election agreements should set forth the unit and should not be approved if they do not do so. But where, as here, the agreements have been approved and elections conducted we will look to the circumstances to see if the intent or agreement of the parties as to the unit's composition can be ascertained; and only if after such consideration and the issue still is in doubt, will we declare the agreement defective and the election a nullity. In this connection, some of the circumstances which we believe might have a bearing on our determination would include the type of petition and the nature of the election sought, whether a bargaining relationship in an established unit exists, and what the relationship of the parties to the election is to each other and any existing unit.

of their being in agreement. By incorporating the lists in the specific place reserved for designating units in the stipulations, the parties indicated that the *Norris-Thermador* lists constituted their agreed-upon units, and by virtue of the lists' inclusion of the eligible employees' job classifications, described the composition of the units as well. Accordingly, we find that, as used by the parties in the instant matter, the *Norris-Thermador* lists, in addition to delineating the identity of the employees eligible to vote, reflect the parties' unit agreements while defining what those units were.¹²

There remains for determination, however, whether the units established by the *Norris-Thermador* lists are coextensive with the bargaining units recognized by the parties, as reflected in the collective-bargaining agreement. A comparison of the former units with their contractual counterparts reveals a striking similarity and hence a direct correlation between them. Indeed, the job classifications in the *Norris-Thermador* list for the registered nurse unit are identical with those in the contract, and the corresponding service and maintenance units contain the same classifications—except that the *Norris-Thermador* lists adds one, stationary engineer, which is not mentioned in the contract. However, that particular classification relates to but one employee and is in any event encompassed by the general appellation of “service and maintenance” employees. As for the technical unit, the *Norris-Thermador* list contains 8 of the 12 specified classifications. The discrepancy created by the omission of four classifications from that list, while on its face substantial, in reality turns out to be insubstantial as the apparent reason for the omission is that there were no employees employed in the omitted classifications. Consequently, the recognized technical unit as it in fact was composed of employees at the time of entry into the election agreements is mirrored in the *Norris-Thermador* lists; therefore,

¹² This finding is also borne out by the Employer's complaining to the Regional Director, when the election notices were received, that the units described in the notices did not comport with the job classifications in the *Norris-Thermador* lists. This complaint clearly manifested the existence of the parties' agreement with respect to the units involved and their scope. Certainly, it should have dispelled the notion apparently entertained by the Regional Director, as reflected by the unit descriptions in the notices, that the parties had consented to elections in the certified units. In this connection, it should be noted that the recognized contract units differ in varying degree from the certified units, although the contract states that the former units conform to the latter. On remand, the Regional Director should determine whether these differences could have had an effect on the elections.

despite the omission from those lists of classifications set forth in the contractual unit, we conclude that the technical unit agreed to by the parties paralleled the unit as it actually existed.¹³

Accordingly, in view of the foregoing, we find that the parties, by virtue of their unit agreements as represented by the *Norris-Thermador* lists, had consented to hold elections in the three recognized bargaining units.¹⁴ We shall, therefore, remand this proceeding to the Regional Director for disposition of the Union's and the Employer's objections, including the latter's Objection 2 alleging employee confusion due to the discrepancy between the units in the notices of election and the *Norris-Thermador* lists, and for such further investigation and determination as is consistent with our decision herein.

DIRECTION

It is hereby directed that this proceeding be, and it hereby is, remanded to the Regional Director for Region 13 for further investigation and determination in accordance with the Decision above.

IT IS FURTHER DIRECTED that the Regional Director shall issue a supplemental report on objections containing his findings and recommendations to the Board as to the disposition of the said issues. Such report shall be served on the parties to this proceeding, and the parties may file exceptions thereto pursuant to Section 102.69 of the Board's Rules and Regulations, Series 8, as amended.

¹³ In order to insure the correctness of this conclusion, however, the Regional Director shall, upon remand, investigate and determine whether the four omitted classifications from the *Norris-Thermador* list for the technical unit is in fact attributable to those classifications being unfilled. He shall also determine whether this omission could have had any effect on the employees exercising their free choice in the applicable election, including whether any of them may have been disenfranchised as a consequence.

¹⁴ We note that the Employer in its exceptions states that it agrees with the Regional Director insofar as he concluded there was no apparent meeting of the minds in Cases 13-RD-1250 and 13-RM-1283 (the service and maintenance unit), and Cases 13-RD-1252 and 13-RM-1281 (the technical unit). The Employer excepts, however, to the Regional Director's same conclusion with respect to the election in Cases 13-RD-1251 and 13-RM-1282 (the registered nurse unit). For reasons already explicated we find no merit to the Employer's new-found position. It is also inconsistent with the Employer's urging us to reverse the Regional Director in the nursing unit election; in any event, the Employer's argument, also advanced in its exceptions, that new elections in the two elections it is contesting should be held in units consisting of the *Norris-Thermador* job classifications belies its currently professed agreement with the Regional Director. By this argument the Employer in essence is arguing that second elections are warranted in the same units in which the original elections were conducted. A more revealing, albeit tacit, admission that there was unit agreement between the parties cannot be imagined.