

Beverly California Corporation d/b/a Morgan Manor Nursing and Rehabilitation Center and District 1199, the Health Care and Social Service Union, SEIU, AFL-CIO, Petitioner. Case 6-RC-10763

October 31, 1995

DECISION ON REVIEW AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING
AND TRUESDALE

On November 16, 1994, the Regional Director for Region 6 issued a Supplemental Decision, Order Revoking Certification of Representative, and Direction of Election, in which he found that the Employer's licensed practical nurses (LPNs) are statutory supervisors within the meaning of Section 2(11) of the Act. Further, the Regional Director found that the certification issued September 9, 1992, must be revoked and a new election directed as the unit no longer is coextensive with the unit which voted in the original election.

Thereafter, in accordance with Section 102.67 of the National Labor Relations Board's Rules and Regulations, the Petitioner filed a timely request for review of the Regional Director's action, maintaining that the Regional Director erred in determining that the exclusion of the LPNs from the unit previously certified resulted in such a significant change in the character and scope of the unit as to warrant the revocation of the certification and the direction of a new election.

The Petitioner contends that the Board should reverse the Regional Director's actions and simply issue an order amending the certification. By Order dated April 12, 1995, the Board granted the Petitioner's request for review.¹

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.²

The Board has considered the entire record in this case, and has decided, contrary to the Regional Director, to reinstate the Petitioner's certification, amend that certification specifically to exclude the Employer's LPNs, and vacate the election directed by the Regional Director's Supplemental Decision and Order.

The facts are not in dispute. On July 13, 1992, the Regional Director issued a Decision and Direction of Election, in which he found that the LPNs were not statutory supervisors within the meaning of Section 2(11) of the Act, based on well-established Board precedent. Accordingly, the Employer's 16 LPNs were

included in the service and maintenance unit found appropriate. Thereafter, the Employer filed a timely request for review. The Board denied the request for review on August 27, 1992, and the election was conducted as scheduled. The results of the election, in which approximately 82 employees were eligible to vote, were: 55 votes cast for Petitioner and 20 votes cast against the participating labor organization. There were three challenged ballots, a number insufficient to affect the outcome of the election. No objections were filed, and the Petitioner was certified as the exclusive collective-bargaining representative on September 9, 1992.

Subsequently, the Employer filed a motion for reconsideration, which was granted on May 16, 1993. The Board affirmed the Regional Director's Decision and Direction of Election on May 11, 1994, relying on the analysis set forth in *Northcrest Nursing Home*, 313 NLRB 491 (1993). Shortly thereafter, however, the Supreme Court rejected the Board's analysis in that case in *NLRB v. Health Care & Retirement Corp.*,³ and the Employer filed a second motion for reconsideration. The Employer's motion was granted on August 4, 1994, and the case was remanded to the Regional Director for reconsideration consistent with the Supreme Court's decision.

At the reopened hearing, the parties stipulated that the LPNs, at all times relevant, were statutory supervisors as they direct employees in the performance of their duties in other than a routine manner in the interest of the Employer. Accordingly, the Regional Director found that the LPNs must be excluded from the unit as mandated by Section 2(3) of the Act; and further, that it was necessary to determine whether the certification previously issued should be amended to exclude the LPNs or whether that certification must be revoked and a new election directed inasmuch as the unit is no longer coextensive with the unit which voted in the original election.

The Petitioner maintained that the Board simply should amend the certification to exclude the LPNs, while the Employer contended that the change in the size and composition or scope of the unit, which resulted from the removal of the LPNs, denied the non-supervisory unit employees the opportunity to make an informed choice when they voted.⁴

The Regional Director found that the exclusion of the 16 LPNs from the unit, which numbered approximately 82 preelection, resulted in a 20-percent reduc-

³ 114 S.Ct. 1778 (1994).

⁴ Alternatively, the Employer contended that the petition should be dismissed because of alleged supervisory taint in the entire election process, and particularly, in the solicitation of the authorization cards in support of the Petitioner's showing of interest. The Regional Director found that there was no merit to these assertions. (See original Decision and Direction of Election, pp. 7-8 fn. 5.) There was no request for review of this issue.

¹ Further, the Petitioner's motion to cite supplemental authority is granted.

² The Employer's request for oral argument is denied as the record, the Petitioner's request for review, and the Employer's opposition adequately present the issues and the positions of the parties.

tion in the size of the unit, postelection; and that that amount, particularly when combined with other factors, constituted a significant reduction in the preelection size of the unit. Furthermore, the Regional Director found that their removal signified a major change in the scope and character of the postelection unit, as the LPNs were named specifically in the preelection unit description, and as described in the original Decision and Direction of Election, they play a central role in the function of the facility. Thus, the remaining unit employees—more than half of whom are the 46 nursing aides who work directly beside and under the LPNs on a daily basis—went into the election with the expectation that the LPNs would be part of the unit.

Accordingly, even though the election results were not particularly close, the Regional Director found that the previously issued certification must be revoked and a new election must be directed in order for the remaining employees to make a choice as to whether they desire to be represented by the Petitioner in the smaller unit. In so concluding, the Regional Director relied on the Second Circuit's decision in *Hamilton Test Systems v. NLRB*,⁵ and similar cases.⁶

We disagree with the Regional Director, and find that he erred in revoking the certification and in directing a new election. Further, we find the decisions he relied on to be clearly distinguishable from the instant case.

In *Hamilton Test Systems*, an election was directed in a facilitywide unit of 31 employees in five classifications. As in this case, the election was held and the ballots were impounded, pending the parties' requests for review. On review, the Board found that a smaller unit was appropriate; thus, the postelection unit was reduced by 50 percent—to 14 employees, and the number of classifications included in the unit was decreased from five to three. Similarly, in *Lorimar Productions*, the unit was reduced by approximately 40-percent postelection, from 17 employees in two classifications to 11 employees in one classification.⁷

⁵ 743 F.2d 136 (2d Cir. 1984), denying enf. 268 NLRB No. 175 (Feb. 27, 1984) (not reported in bound volumes).

⁶ *NLRB v. Lorimar Productions, Inc.*, 771 F.2d 1294, 1300–1302 (9th Cir. 1985), denying enf. 270 NLRB 18 (1984); *NLRB v. Parsons School of Design*, 793 F.2d 503, 507 (2d Cir. 1986), denying enf. 275 NLRB 173 (1985).

⁷ See also *Parsons School of Design*. In that case, although the postelection unit was reduced only about 10 percent, the Second Circuit found that the nature of the change in the scope of the unit (i.e., the exclusion of the full-time faculty members from a combined preelection unit of full-time and part-time faculty members) was of special significance as “the full-time faculty members, unlike the part-timers, are committed primarily to their academic careers.” 793 F.2d at 507.

In contrast, in this case, the exclusion of one classification from a facilitywide service and maintenance unit comprised of employees in nine other specifically named classifications, represents a numerical change which we, contrary to the Regional Director, do not view as signifying a sufficient change in unit size to warrant setting aside of the election. See *Toledo Hospital*, 315 NLRB 594 (1994).⁸

Further, we find that the scope and character of the petitioned-for preelection unit in this case remains essentially the same postelection. The Petitioner sought to represent a broad service and maintenance unit excluding, inter alia, “supervisors as defined in the Act”; and the stipulation entered into by the parties at the reopened hearing established that, “at all times relevant,” the LPNs were statutory supervisors. Thus, the acceptance of this stipulation, as the Regional Director properly found, mandates that the LPN classification be excluded from the bargaining unit in order to conform the unit to the statute. It is clear, however, that scope and character of the unit have not changed to any significant extent, and that unit remains the service and maintenance unit petitioned-for originally.⁹ *Toledo Hospital*, supra.

Lastly, as the Regional Director found, the results of the election in this case were not close. As the tally showed, the Petitioner won by a margin of 35 votes—55–20 with 3 nondeterminative challenged ballots. In the cases relied on by the Regional Director, a change of one to four votes would have altered the outcome of the elections. Even assuming arguendo, that all 16 LPNs in this case voted for the Petitioner, the removal of the LPNs' votes from the tally still leaves the Petitioner with a 19-vote winning margin in the post-election unit.

Accordingly, for the above reasons, the Regional Director's Supplemental Decision and Order Revoking the Certification of Representation is reversed, the Direction of Election of vacated, and the case is remanded to the Regional Director for further appropriate action including the amending of the certification to exclude the LPNs.¹⁰

⁸ We note that our calculation of the percentage of the reduction in the size of the unit here, in fact, is identical to the reduction in *Toledo Hospital*, i.e., approximately 19.5 percent, just slightly less than the 20 percent found by the Regional Director.

⁹ Further, we note that it is not necessary to speculate as to the impact, if any, on unit employees due to the late exclusion of the LPNs, for even though the parties' limited stipulation established supervisory authority for the purposes of statutory exclusion from the unit, it does not demonstrate that the LPNs possess and/or exercise the authority to discipline, evaluate, or otherwise affect the employment status of the remaining bargaining unit employees.

¹⁰ This decision renders the Petitioner's motion to stay the election moot.