

**St. Margaret Memorial Hospital and International Union of Operating Engineers, Local Union 95-95-A, AFL-CIO, Petitioner. Case 6-RC-10447**

July 29, 1991

**ORDER DENYING REVIEW**

BY CHAIRMAN STEPHENS AND MEMBERS  
CRACRAFT, DEVANEY, AND OVIATT

The Board has carefully considered the matter at issue and, for the reasons set forth in the Acting Regional Director's Decision and Direction of Election, a copy of which is appended hereto, has decided that the Employer's Request for Review raises no substantial issues warranting review.

**DECISION AND DIRECTION OF ELECTION**

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, a hearing was held before Leo L. Little, a hearing officer of the National Labor Relations Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its powers in connection with this case to the undersigned Acting Regional Director.<sup>1</sup>

Upon the entire record in this case,<sup>2</sup> the Acting Regional Director finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The labor organization involved claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

The Petitioner seeks to represent in a single unit all skilled maintenance employees, including stationary engineers, electricians, HVAC mechanics, carpenters, painters, maintenance mechanics, electronic technicians, and NVAC electronic technicians, employed by the Employer at its Freeport Road facility located in Pittsburgh, Pennsylvania (herein the facility); excluding all business office clerical employees, all technical employees, and professional employees, guards, and supervisors as defined in the Act, and all other employees. Although the Employer concedes that the above-described unit comprises a skilled maintenance unit within the meaning of the Board's Final Rule on Collective-Bargaining Units in the Health Care Industry (herein the Rule),<sup>3</sup> the Em-

ployer avers that the petitioned-for unit is not an appropriate unit for collective-bargaining under Section 9(b) of the Act. There are approximately 17 employees in the petitioned-for unit. There is no history of collective bargaining for any of the employees involved herein.

On April 21, 1989, the Board issued the Rule in which it determined that with respect to acute care hospitals eight units, including a unit of all skilled maintenance employees, shall be appropriate units for collective bargaining purposes and the only appropriate units, absent "extraordinary circumstances," (53 Federal Register No. 170, pp. 33923-33924, 284 NLRB 1561-1562). In this regard, the Board further determined that where extraordinary circumstances exist, the Board shall determine appropriate units by adjudication, to avoid "accidental or unjust application of the Rule. Extraordinary circumstances, according to the Rule, are to be narrowly defined. The arguments raised, in the course of the rulemaking proceedings alone or in combination, even in situations in which such variations may be highly unusual, normally shall not constitute an extraordinary circumstance. Moreover, the party urging extraordinary circumstances bears a "heavy burden" to demonstrate that its arguments are substantially different from those which have been carefully considered in the rulemaking proceedings as, for instance, that there are such unusual and unforeseen deviations from the range of circumstances already considered that it would be "unjust" or "abuse of discretion" for the Board to apply the Rule to the facility involved (53 Federal Register No. 170, PR 33933, 284 NLRB at 1574).

On April 23, 1991, the United States Supreme Court in *American Hospital Association v. NLRB*, 137 LRRM 2001 (1991), upheld the validity of the Rule, finding that the Board's broad rule making process under Section 6 of the Act authorized the Board to make a rule recognizing eight separate bargaining units in acute care hospitals and that these powers are not limited by Section 9(b)'s mandate that the Board decide appropriate bargaining unit(s) in each case.

The record affirmatively establishes that the Employer operates an acute care hospital at the facility. As noted, although the Employer agrees that the petitioned-for unit conforms to a unit defined in the Rule, the Employer contests the appropriateness of a separate skilled maintenance unit at the facility. In this regard, the Employer argues that "extraordinary circumstances" exist within the meaning of the Rule justifying a Board determination of the appropriateness of the petitioned-for unit by adjudication since, if permitted to do so, both testimonial and documentary evidence would be submitted by it establishing that the skilled maintenance employees share a community of interest with other non-professional employees and do not have wages, hours or other terms and conditions of employment so distinct from other nonprofessional employees so as to justify representation in a separate collective-bargaining unit.<sup>4</sup> In support of its aforementioned contention, the Employer notes that the "binding" precedent of the United States Court of Appeals

<sup>1</sup> Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1717 Pennsylvania Avenue, N.W., Washington, D.C. 20570. This request must be received by the Board in Washington by July 12, 1991.

<sup>2</sup> The Petitioner timely filed a brief in this matter which has been considered.

<sup>3</sup> The rule is set forth at 29 CFR Part 103, 54 Federal Register No. 76, pp. 16347-48, 284 NLRB 1579, 1596-1597 (1989). Detailed explanations regarding each segment of the rule are found in the Second Notice of Proposal Rule Making, 29 CFR Part 103, 53 Federal Register No. 170, pp. 33900-33935,

284 NLRB at 1528-1578, and in Final Rule 54 Federal Register 16336-16347, 284 NLRB at 1586-1596.

<sup>4</sup> At the hearing, pursuant to the requirements set forth in the Rule, the Employer presented both an oral and written offer of proof concerning the extraordinary circumstances of the alleged strong community of interest existing between the skilled maintenance employees and the other nonprofessional employees. The hearing officer properly precluded the proffered evidence from being adduced.

of the Third Circuit holds that a collective bargaining unit limited to skilled maintenance employees is not an appropriate unit for bargaining. *Allegheny General Hospital v. NLRB*, 608 F.2d 965 (3d Cir. 1979); *St. Vincent's Hospital v. NLRB*, 567 NLRB 588 (3d Cir. 1977). The Employer also notes that the Supreme Court in *American Hospital Association v. NLRB*, supra, did not overrule the precedent and in fact the Court expressly noted that its opinion did not address "the propriety of the specific unit determinations." 137 LRRM 2007. Thus, the Employer submits that the appropriateness of the petitioned-for unit in this case must be adjudicated in light of the binding Third Circuit precedent and that accordingly it must be permitted to submit its proffered testimony and documentary evidence that the petitioned-for employees do not have a sufficiently separate community of interest to warrant a finding that the petitioned-for unit is appropriate.

The Employer argues further that much of the Board's rationale in support of its Rule that skilled maintenance units are separately appropriate is flawed since many of the factors relied upon by the Board in finding skilled maintenance units in general to be appropriate, including the use of abstract skills, and working with complex equipment, by such employees not unique in a hospital setting to maintenance employees. Accordingly, the Employer contends that the alleged strong evidence of community of interest of the Employer's skilled maintenance employees with other nonprofessional employees strongly contradicts the Board's findings in support of its Rule regarding skilled maintenance units in general and should also be considered to be an extraordinary circumstance excluding the petitioned-for unit from application of the Rule.

Contrary to the assertion of the Employer, it cannot be concluded that such extraordinary circumstances exist herein to compel the conclusion that the Employer should be permitted to introduce testimony and documents to support its position that a separate bargaining unit of skilled maintenance employees at the facility is not appropriate under Section 9(b) of the Act. In this regard, as noted above, the extraordinary circumstances exception is to be narrowly construed. Extraordinary circumstances exist only where a hospital is shown to be uniquely situated such that application of the Rule would be unjust or an abuse of discretion. The arguments presented by the Employer that extraordinary circumstances exist here because of the alleged strong community of interest existing between the skilled maintenance employees and other nonprofessional employees as evidenced by such factors as, inter alia, functions and skill levels; education, licensing and training; wages, hours and working conditions; and interaction with other employees were matters raised in the course of the rulemaking proceedings and were among the factors extensively considered and analyzed by the Board in finding that a unit of skilled maintenance employees is separately appropriate for collective bargaining purposes, 53 Federal Register No. 170, pp. 33920-33924, 284 NLRB at 1556-62. Thus, I find that the community of interest arguments presented herein in the Employer's offer

of proof does not constitute arguments substantially different from those which have been carefully considered at the rulemaking proceedings and accordingly they do not constitute an extraordinary circumstance justifying an exception to the Rule. 53 Federal Register No. 170, pp. 33933, 284 NLRB at 1574.

In reaching this conclusion, I have carefully considered the Employer's contention that since the Supreme Court in *American Hospital Association* avoided any extended comment on the propriety of the specific unit determinations, that the appropriateness of the petitioned-for unit must be adjudged in light of the Third Circuit precedent holding that skilled maintenance units are not appropriate for collective-bargaining purposes. In this regard, I note that the Supreme Court avoided extended comment on various matters related to the Rule, including the propriety of the specific unit determinations, solely because these matters primarily concern the Board's exercise of its authority rather than the limited scope of the Court's review of the legal issues presented to the Court for its determination. 137 LRRM at 2007. Further, there is nothing in the Supreme Court's decision to suggest that it had any reservations concerning the appropriateness of any of the eight separate bargaining units. Indeed, the Court, throughout the decision, emphasized that the Board's rulemaking record revealed that the Board gave extensive consideration to the numerous comments and arguments presented during the rulemaking proceedings concerning the appropriateness of the units recognized by the Rule and that the Rule was based on a "reasoned analysis of the rulemaking record and on the Board's years of experience in the adjudication of health care issues. 137 LRRM at 2006. In these circumstances, notwithstanding that legal precedent concerning unit determinations which are contrary to the appropriateness of the eight separate units recognized by the Rule were not expressly overruled by the Court's *American Hospital Association* decision, I cannot conclude that the Third Circuit's decisions in *Allegheny General Hospital*, supra, and *St. Vincent's Hospital*, supra, compel a finding that extraordinary circumstances exist here warranting an adjudication of the appropriateness of the petitioned-for unit.

Accordingly, pursuant to the Board's Final Rule on Collective-Bargaining Units in the Health Care Industry, the following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of the Act:

All skilled maintenance employees, including stationary engineers, electricians, HVAC mechanics, carpenters, painters, maintenance mechanics, electronic technicians, and HVAC electronic technicians, employed by the Employer at its Freeport Road facility located in Pittsburgh, Pennsylvania; excluding all business office clerical employees, all technical employees and guards, professional employees and supervisors as defined in the Act and all other employees.

[Direction of Election omitted from publication.]