

The Parker Jewish Geriatric Institute and Local 1199, Drug, Hospital and Health Care Employees Union, RWDSU, AFL-CIO. Case 29-UC-370

August 20, 1991

DECISION ON REVIEW

BY CHAIRMAN STEPHENS AND MEMBERS
CRACRAFT AND OVIATT

On February 20, 1990, the Regional Director for Region 29 issued a decision and order dismissing the unit clarification petition in this proceeding. He found that the Employer had recognized that the employees in dispute, security guards, were members of the overall bargaining unit, and had voluntarily agreed to their inclusion in the unit covered by the current collective-bargaining agreement. Relying on *Wallace-Murray Corp.*, 192 NLRB 1090 (1971), he thus found that the petition was untimely filed. In accordance with Section 102.67 of the National Labor Relations Board Rules and Regulations, The Parker Jewish Geriatric Institute, the Employer-Petitioner, filed a timely request for review of the Regional Director's decision on the grounds that he departed from established Board policy. The Board granted review on August 31, 1990.

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

The Board has considered the decision and record in light of the request for review and has decided to reverse the Regional Director's findings and conclusions, to reinstate the unit clarification petition, and to exclude the security guards from the unit.

The Employer is a nonprofit corporation operating a skilled nursing home. Since at least 1974, it has had a collective-bargaining relationship with the Union and has entered into successive collective-bargaining agreements. Until June 1984, the Employer bargained with the Union through the League of Voluntary Hospitals of New York (League), a multiemployer association. Since 1984 it has bargained through another employer association, the Association of Voluntary Nursing Homes of New York (Association).

The July 1974 through June 1976 agreement did not include a description of the bargaining unit, but a related signed stipulation referred to uniform minimum rates for the positions of security guard and security sergeant as of July 1, 1974, and July 1, 1975. The parties stipulated that there was also a July 1975 through June 1978 agreement which is not in evidence. A July 1978 through June 1980 agreement contained a stipulation listing "guards" as included in the covered unit.

The July 1, 1980, through June 30, 1982 contract negotiated between the League and the Union covered a unit which did not include security guards. A sepa-

rate agreement was negotiated between the Employer and the Union covering only the security guards. This agreement was identical in its terms to the League agreement except for its effective dates, from September 1, 1980, through August 31, 1982. Again in 1982 the Employer and the Union were parties to the League agreement, and also maintained a separate agreement covering security guards, differing only in the employees covered and the effective dates from the League agreement. Following the September 30, 1984 expiration of the guards' agreement, the Employer and the Union negotiated no new agreements covering the guards.

Since 1984, the Employer and the Union have been parties to agreements negotiated through the Association. These agreements do not set out the unit covered, although the 1986 to 1989 agreement identifies uniform job classifications, and does not mention guards. In the current contract negotiated on October 4, 1989, and effective July 1, 1989, to June 30, 1992, there is no reference to the unit or to job classifications.

On October 12, 1989, in a letter signed by its president, Dennis Rivera, the Union wrote to the Employer as follows:

This is to advise you that the Security Guard Contract between your institution and Local 1199, Drug, Hospital and Health Care Employees Union, RWDSU, AFL-CIO expires on September 30, 1989.

Since it is our intention to negotiate a new agreement, we request that your representative get in touch with our office to arrange a mutually acceptable date to commence negotiations.

On November 14, 1989, the Union sent to the Employer by facsimile telecommunication a form of Memorandum of Agreement, described on the cover page as a "*League Me Too Agreement with Attachment*" ("*Me Too*" agreement), which would have continued the terms and conditions applicable to security guards (emphasis added).

On November 27, 1989, the Employer filed the petition in this proceeding. It wishes to clarify the overall unit and exclude the security guards.

In dismissing the petition the Regional Director did not mention the events of October and November 1989 that evidence the Union's attempt to negotiate a new agreement limited to the security guards. Rather, he found that the pre-1980 contracts had included the guards as part of the overall unit; that there had been no negotiated contract covering only the guards since 1984; and that the guards have continuously through the present time received the same terms and conditions of employment as the other employees undisputedly in the unit, had union dues deducted and pension and welfare payments made to the Union on their behalf, and had their grievances processed by the

Union. He found that this evidence showed that the Employer recognized the guards as members of the overall bargaining unit and, in effect, voluntarily had agreed to their inclusion in the unit covered by the current (1989–1992) bargaining agreement. He thus found that under *Wallace-Murray*, supra, the petition was untimely.

After reviewing all the evidence, we agree with the Regional Director that the employees in question are guards within the meaning of Section 9(b)(3) of the Act. We disagree, however, with the Regional Director's findings that the Employer has recognized that the guards are members of the overall unit and has voluntarily agreed to their inclusion in the unit covered by the current contract. We also disagree that *Wallace-Murray*, supra, is dispositive of this case.

In *Wallace-Murray*, the Board found a unit clarification petition untimely when filed during the term of a contract which clearly defined the unit and specifically included the employees in dispute (guards). We have continued to adhere to the policy set out in *Wallace-Murray*, while recognizing exceptions in particular cases.¹ The facts set out above, however, show that this case is distinguishable from *Wallace-Murray* and its progeny.

As noted, only the pre-1980 agreements specifically mentioned the guards as part of the covered unit. From 1980 to 1984 the parties negotiated separate agreements (although identical in most respects to the contract covering the larger unit) for the guards. Since 1984, the contracts entered into between the Association (representing the Employer) and the Union make no mention of the guards.

The fact that the guards continue to enjoy the same terms and conditions of employment as the other em-

ployees does not conclusively demonstrate that the parties meant to include them in the overall unit. At least to an equal degree, it shows that the parties intended to continue the terms and conditions of their separate 1980–1984 agreements, which mirrored the terms of the contract covering the other employees. Further, and more indicative of the understanding of the parties, the October request from the Union to bargain was for a new agreement for the guards alone. This request was dated 8 days after the Union and the Association had entered into an agreement which covered the employees not in dispute. Also, the proffered agreement sent to the Employer by the Union incorporated the contract between the League and the Union, not the Association contract.

Based on all the foregoing, we find that the evidence does not show that the parties recognized that the guards are part of the overall unit or that they agreed to the guards' inclusion in the unit covered by the current agreement between the Union and the Association. As the parties have not agreed to the inclusion of the guards under the current agreement, *Wallace-Murray* does not apply, and the petition was not untimely. Accordingly, we will reinstate the petition and clarify the overall unit to exclude the guards.²

ORDER

It is ordered that the unit of employees employed by The Parker Jewish Geriatric Institute and represented by Local 1199, Drug, Hospital and Health Care Employees Union, RWDSU, AFL–CIO, who are covered under the July 1, 1989–June 30, 1992 contract between the Union and the Association of Voluntary Nursing Homes of New York is clarified to exclude the job classification of guards as defined by the Act.

¹ See, e.g., *Supreme Sugar Co.*, 258 NLRB 243 (1981). Also *St. Francis Hospital*, 282 NLRB 950 (1987).

² *Peninsula Hospital Center*, 219 NLRB 139 (1975).