

West Lawrence Care Center, Inc. and Rita Aulisio, Petitioner and 1115, Nursing Home and Hospital Employees Union, a Division of 1115 Joint Board Union

West Lawrence Care Center, Inc. and Local 1199, Drug, Hospital and Health Care Employees Union RWDSU, AFL-CIO, Petitioner and 1115, Nursing Home and Hospital Employees Union, a Division of 1115 Joint Board. Cases 29-RD-639 and 29-RC-7396

September 30, 1991

DECISION ON REVIEW AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY, OVIATT, AND RAUDABAUGH

Pursuant to the respective petitions for decertification and representation filed on July 5 and 21, 1989, by Rita Aulisio, an individual, and Local 1199, Drug, Hospital and Health Care Employees Union RWDSU, AFL-CIO (the Petitioners), on April 6, 1990, the Regional Director for Region 29 of the National Labor Relations Board issued a Decision and Direction of Election in a unit of nonprofessional employees of West Lawrence Care Center, Inc. (the Employer).¹

Thereafter, in accordance with Section 102.67 of the Board's Rules and Regulations, the Employer and the current bargaining representative, 1115, Nursing Home and Hospital Employees Union, a Division of 1115 Joint Board (the Union), filed timely requests for review of the Regional Director's decision, and the Petitioners filed a brief in opposition. On May 21, 1990, the Board granted the requests for review, finding that they raised substantial issues warranting review, and the parties thereafter submitted briefs on review to the Board.

The requests for review raise the issue whether the single-employer unit is no longer appropriate because it has been merged into a broader unit by its alleged inclusion in a multiemployer collective-bargaining unit. Briefly, the Regional Director found that there was insufficient evidence that multiemployer bargaining had ever been established. He further found that, even assuming it had been, that the Union's and Employer's practice of changing contract effective dates at mid-term contract reopeners, as well as at other times, prevented the unit employees from ascertaining the open period for any collective-bargaining agreement and thus precluded them from exercising their "last chance" rights, under *U.S. Pillow*, 137 NLRB 584

¹ The unit consists of:

All full-time and regular part-time nonprofessional employees and licensed practical nurses employed by West Lawrence Care Center, Inc., excluding all registered nurses, professional employees, office clerical employees, guards, and supervisors as defined in the Act.

(1962), to determine on a single-employer basis whether they wished to retain union representation.

The Board has reviewed the entire record in this proceeding, including the briefs of the parties, and has decided to affirm the Regional Director's Decision and Direction of Election, but to do so solely for the reasons stated below.

I. THE FACTS

It is undisputed that Seagirt Health Related Facility, the Employer's predecessor,² recognized and entered into the first of a succession of collective-bargaining agreements with the Union covering the petitioned-for unit approximately 15 years ago. It is similarly undisputed that for at least 10 of those years the Employer's attorney, Morris Tuchman, also represented the following five nursing homes in separate contract negotiations with the Union: Bezalel Health Related Facility, Parkshore Health Related Facility, Golden Gate Health Related Facility, Rego Park Nursing Home, and Van Doren Nursing Home. Union Vice President Aldrich testified that all the nursing home contracts contained virtually identical noneconomic provisions and very similar fringe benefits "by virtue of having the same attorney [Tuchman] representing the people, the same geographical situation."

Seagirt's most recent written agreement with the Union was executed on June 17, 1981, effective from March 15, 1981, through March 14, 1985, with a reopener effective March 15, 1984, subject to interest arbitration. In 1984, the Union reopened contract negotiations, but the parties, after failing to reach agreement, submitted the economic issues to interest arbitration, and the resulting arbitration award extended that contract's term from March 15, 1984, through March 14, 1987, with a reopener effective March 15, 1986, also subject to interest arbitration.

In the latter part of 1985, Tuchman advised the Union that an association named "United Health Care Facilities Association" had been formed by the above six health care employers for whom he had negotiated separate contracts with the Union,³ and the Union agreed to negotiate future collective-bargaining agreements on a multiemployer basis.⁴ Thereafter, on December 10, 1985, the Union sent a letter to the Association, and copies to the individual employer-members, invoking "the reopening provisions [in] the

² West Lawrence Care Center, Inc. took over the ownership of the nursing home from Seagirt in January 1988.

³ It is stipulated or undisputed that United Health Care Facilities Association is an unincorporated association without bylaws, officers, or dues, that it uses Attorney Tuchman's office address, and that liability for Tuchman's retainer fee is divided equally among the employer-members.

⁴ An undated document in evidence executed by then Seagirt President Zimmerman purports to authorize "United Health Care Association" (sic) to bargain and execute a collective-bargaining agreement on Seagirt's behalf.

agreements between us.”⁵ Union Business Representative Patrick Berry testified that at a meeting with 40 to 50 Seagirt bargaining unit employees in early 1986 to develop bargaining demands for the reopener negotiations, he informed them that Seagirt was a “part of an association . . . [and] would be involved with a group of other nursing homes for the upcoming agreement”

At the first reopener meeting with Attorney Tuchman and Seagirt representatives on May 12, 1986, the Union only presented its written proposal, entitled “Demands—All Member Facilities of United Health Care Facilities Association.”⁶ At the subsequent Seagirt bargaining meetings on May 27 and June 25, 1986,⁷ the Seagirt management responded to the Union’s demands by stating it “had nothing to give.”⁸ Berry testified that management’s refusal to discuss economics upset the union negotiators and that he explained to the employees in the June 25 meeting “an alternative which was to go to arbitration and by being a part of an association they had more bargaining power.” Thereupon, nine Seagirt employees who were members of the bargaining committee at Seagirt signed a document stating, “The committee of Seagirt H.R.F. accept the proposal to have interest arbitration in connection with economic terms under the contract between the Union and United Health Care Facilities Association.” As the Regional Director correctly noted, on June 25, 1986, there were individual agreements in effect between the Union and each of the nursing homes, including Seagirt, but no contract between the Union and the Association.

On August 1, 1986, the Union notified the Association and employer-members that it was submitting “to interest arbitration the issue of economic terms and conditions of employment to be effective in accord

⁵ By letter of November 11, 1985, the Union had also requested a meeting with Seagirt in connection with bargaining on a “multi-employer basis.”

⁶ The proposal included a 1-year contract term with wage increases effective July 1, 1986, and January 1, 1987 (prior Seagirt contracts provided for increases in March and September instead of July and January), the establishment of a pension program, increased contributions to the Welfare and Prepaid Legal funds, increased vacation leave, uniform allowance, and longevity pay.

⁷ It is apparent that these reopener negotiations in May and June 1986, although referred to as “United Health Care Facilities Association—1986 Negotiations” in Attorney Tuchman’s June 3, 1986 letter to the Union, were in fact conducted in a series of meetings between one or another individual employer and the Union. The letter, thus, makes clear that Tuchman anticipated only a single “client” present at each scheduled meeting; and each meeting—held at the health facility involved—was attended by Tuchman, representatives of the Union including employees from that facility, and representatives of that health facility employer.

⁸ Maurice Radzik, Seagirt’s administrator, testified that the Employer could not agree to any wage increases because of the uncertainty of reimbursement by New York State.

with the agreement between the parties.”⁹ Thereafter, on August 8, Union and Association representatives signed a letter agreeing to submit to interest arbitration the economic terms of a “renewal Collective-Bargaining Agreement effective 4/1/86 through 3/30/88 with a reopening effective for the period 4/1/87 through 3/30/88.”¹⁰ On August 26, 1986, the interest arbitration was opened with Union and Association representatives, as well as employees from the employer-members, in attendance. The arbitrator adjourned the hearing early to consider the Union’s request to subpoena financial information from the Association members. The arbitration proceeding was reconvened on November 24, 1986,¹¹ with designated seating areas for the employees of the various Association members. The arbitrator heard the positions of the parties and made an “in camera” inspection of the subpoenaed financial material, and closed the hearing.

On February 18, 1987, the arbitrator issued an award which extended the term of the contracts for 4 years and specified compensation to be incorporated into the contracts, effective in January and July 1986, 1987, and 1988.¹² The arbitrator’s award states in pertinent part:

This interest arbitration proceeding involves certain terms and conditions to be incorporated in collective bargaining agreements covering classifications of employees in the facilities of Employer members of the Association. Said Association members covered by such multi-[sic]employer, Association-Union agreements are: [The five members of the Association are listed.]

Pursuant to collective bargaining provisions, the parties hereto having failed to reach agreement with respect to terms and conditions for a one-year term (from 1986 to 1987), pursuant to a reopener clause, proceeded to the within arbitration proceeding, initiated by the Union. During the course of these proceedings, the parties agreed that the collective bargaining agreements would be extended beyond said one year period and continue in effect until 1990, with a reopener, subject

⁹ By letter that same day, the Union acquiesced in Golden Gate Health Related Facility’s withdrawal from the Association, which was based on a desire to have a different arbitrator than the one chosen to handle the interest arbitration for the other employers.

¹⁰ Neither this nor any other document in evidence reflects a mid-term “conversion” of the single-employer contracts into a multiemployer or association contract.

¹¹ A decertification petition was filed that same day, in Seagirt Health Related Facility, Case 29-RD-683, but was subsequently withdrawn at the Union’s behest.

¹² On June 2, 1987, the arbitrator issued a supplemental award styled, “Local 1115 Joint Board and Seagirt Health Related Facility (United Health Care Facilities Association),” for the purpose of granting an extra \$125 to the employees of Seagirt only. (This was purportedly done to accommodate the 3-month discrepancy between dates of annual increases before and after the arbitration award.)

to arbitration, for the last year thereof, commencing in 1989.

Following the issuance of this award, the Union initiated state court proceedings on an individual employer basis in order to get judicial confirmation of the award with respect to each employer.

More than a year later, on October 18, 1988, the Union and Association executed a written agreement, retroactively effective from April 1, 1986, to April 1, 1990, with a contract reopener on April 1, 1989, subject to interest arbitration. The record provides little specification on the drafting of this agreement, with the Union and the Employer asserting that it merely drafted a document in conformity with the arbitrator's award. This single Association-wide agreement became the successor to the employers' individual contracts, as amended by the arbitrator's 1987 awards. It also contained new substantive terms beyond those dictated by the interest arbitration award, such as an attendance requirement on the day before and after a holiday to qualify for holiday pay, and the designation of a different arbitrator.¹³

Thereafter, on December 15, 1988, the Union invoked the reopener clause,¹⁴ and the parties met to renegotiate the fourth year of their contract, but on July 28, 1989, again decided to submit the economic issues to interest arbitration. However, as previously noted, the instant decertification and representation petitions were timely filed prior to that date, thus triggering this proceeding.

II. CONTENTIONS OF THE PARTIES

The Petitioners argue that the Regional Director reasonably determined that the decertification petition filed on July 5, 1989, and Local 1199's representation petition filed on July 21, 1989, were timely petitions for elections in an appropriate unit of West Lawrence (formerly Seagirt) employees. In particular, they contend that the Regional Director had two meritorious independent grounds for his decision. First, they contend that the Regional Director correctly concluded that, notwithstanding Attorney Tuchman's late 1985 creation of a multiemployer association and the later

submission of economic terms and conditions to interest arbitration, the only evidence concerning actual bargaining sessions involved individual bargaining between Seagirt and the Union after the Association had been created. The Regional Director concluded there was insufficient evidence to show that true multiemployer bargaining had ever occurred.

They also contend that the Regional Director correctly concluded that, even assuming that there was evidence of multiemployer bargaining, the petitions should be accepted as timely under the rule of *U.S. Pillow*, 137 NLRB 584 (1962). In *U.S. Pillow* at 586, the Board held that in cases in which there is a history of bargaining on a single-employer basis, an election petition in the individual unit will be entertained

if timely filed before the insulated period of the last individual contract, even if the employer has adopted or joined in a multiemployer contract and whether or not that multiemployer contract would otherwise be a bar to a petition.

The Regional Director reasoned that here, owing to confusion about the expiration dates of the various individual collective-bargaining agreements that were extended pursuant to the terms of the interest arbitration award issued in 1987, the Seagirt employees could not reasonably have determined the window period for filing election petitions until after October 18, 1988, when—according to the Regional Director's finding—the Association and the Union executed a full-fledged multiemployer contract for the first time (giving it a 1986 retroactive effective date). Because of the uncertainty concerning the last individual contracts, the Regional Director concluded that the rationale of *U.S. Pillow* should be applied to permit the filing of the two petitions at issue here, which were timely filed with respect to the 1988 agreement.

The Employer and the Union contend that the evidence firmly demonstrates that beginning in 1985 both parties committed to participate in and be bound by group bargaining, and that they did engage in such group bargaining, including interest arbitration in 1986 by their own and their employees' consent. The Employer further points out that such contract-sanctioned interest arbitration is collective bargaining in fact, and that the multiemployer nature of those proceedings is reflected in the arbitrator's awards. Thus, it argues that the arbitrator's incorporating of awarded compensation into existing contracts is not a reference to them as separate, individual agreements, as the Regional Director found. Rather, the arbitrator's listing of changes "under the LPN agreement" and "under the Blue Collar agreement" is merely a reflection of the fact that there traditionally have been separate "Blue Collar" and "LPN" contracts.

¹³The October 1988 agreement was bifurcated into two components, the first being an agreement signed by the Union and by the Association on behalf of all members who authorized it to act as their bargaining agent. In addition, they also executed a series of agreements for each separate employer-member of the Association, setting forth the following economic terms agreed to for each separate facility: workweek, meals, holidays, vacations, sick leave, bereavement leave, paternity leave, leave for marriage, uniforms, wage increases, minimum hiring rate and classification, and cost-of-living increases. In this latter agreement applicable to the Employer, the Employer was still referred to as Seagirt Health Related Facility.

¹⁴On that date the Union notified Attorney Tuchman of its intent to reopen negotiations. This letter provides the earliest documentary reference to West Lawrence Care Center in this record.

They further contend that the Regional Director's reliance on *U.S. Pillow*, supra, was misplaced because the time during which the employees should have exercised their *U.S. Pillow* rights was in 1986, near the expiration date of the last contract negotiated between the Union and Seagirt. They point out that a decertification petition was in fact filed, and then withdrawn, at that time.¹⁵

III. DISCUSSION

We agree with the Regional Director's decision to direct an election in the single-employer unit as requested in the RC and RD petitions because we agree with him—for the reasons stated in section A below—that there was no cognizable evidence of bargaining on a multiemployer basis prior to the October 18, 1988 execution of the written Association collective-bargaining agreement. Consequently, at the time the petitions were filed, employees had worked in a unit governed by a multiemployer agreement for less than a year. We conclude, for reasons stated in section B below, that this brief identity as a multiemployer unit, balanced against the earlier long history of bargaining on an individual basis, should not preclude the West Lawrence (formerly Seagirt) employees from voting within that single-employer unit to determine whether they wish union representation and, if so, by which labor organization.¹⁶

A. There was no Evidence of an Unequivocal Intent to be Bound by Group Bargaining Prior to October 1988

It is long-settled law that a claim for a multiemployer unit must be supported by a history of bargaining on a multiemployer basis in order to defeat a competing claim for a single-employer unit. *Arden Farms*, 117 NLRB 318 (1957). We use the term “history of bargaining” advisedly, because a mere agreement to bargain on such a basis is insufficient. *Arden Farms*, supra, 117 NLRB at 319 (decision at association meetings to bargain on multiemployer basis inad-

equated). Accord: *Ruan Transport Corp.*, 234 NLRB 241, 242 (1978) (“bare covenant” insufficient absent evidence of actual participation in group bargaining). Thus, however clear parties may have been in stating an intent to bargain on a group basis, if their conduct thereafter is inconsistent with this stated aim, we may be unable to find the evidence of unequivocal intent to “be bound in collective bargaining by group rather than individual action” that is critical to establishing a history of multiemployer bargaining. *Ruan Transport Corp.*, supra at 242.

The facts of this case are unusual to say the least. Although the record does include evidence consistent with the Employer's and the Union's claim that as early as 1985 the Union, the Association, and the separate employers who had joined the Association began to interact with respect to collective bargaining as it applied to the employees in question, the record is also replete with indications that the prior history of single-employer bargaining continued well after that time to substantially affect the course of collective bargaining. Given this significantly equivocal bargaining history prior to the execution of the multiemployer bargaining agreement in October 1988, we find that the parties' prior history of single-employer bargaining remained operative as the separate employers began to bargain with the Union on a co-ordinated basis¹⁷ and that it did not definitively cease until the execution of the multiemployer agreement. In sum, our conclusion that the single-employer bargaining unit remained appropriate is grounded on the Employer's and the Union's failure to show an earlier unequivocal intent to engage solely in multiemployer bargaining.

The record recurrently demonstrates that even after the inception of the Association as a bargaining agent, the separate employers continued to deal individually with the Union with respect to negotiations. The first instance of this came in November 1985 in the union letter to Seagirt asking for a meeting with this employer regarding bargaining on a multiemployer basis. The incongruity of such a meeting is not explained in the record. The following month, the Association invoked the reopener provisions in the single-employer contracts, purporting that the contracts were “between us,” i.e., the Union and the Association, when there is no evidence to support this interpretation. In any event, it appears that these reopener meetings occurred between the Union and each employer's representative separately at each respective health care facility, where the Union presented a uniform set of proposals to each employer. In particular, there is a paucity of evidence adduced regarding the three bargaining meetings held at Seagirt in May and June 1986. There is no clear

¹⁵ The Regional Director, referring to “veiled threats,” noted that two employees testified that union representatives told them they would lose benefits if they pursued the petition and would receive better representation if they rescinded it. The Employer argues that no basis for a finding of actual coercion exists, and that the record shows nothing more than the Union's telling the employees they would be better off with union representation than without it.

¹⁶ We affirm the Regional Director's finding that the instant petitions were timely filed after the third year of a 4-year collective-bargaining agreement and prior to execution of a renewal agreement. (As noted in sec. I, above, the 1988 agreement was retroactively given a 1986–1990 term.) In light of our disposition of this case, we find it unnecessary to pass on the Regional Director's application of *U.S. Pillow*, supra. In particular, we do not rely on his observations regarding the employees' knowledge of contract reopening periods and their subjective understanding of the unit implications of an associationwide contract.

¹⁷ Bargaining on this basis is sometimes characterized as “convenience bargaining.” See *Union Plaza Hotel & Casino*, 296 NLRB 918 fn. 5 (Sept. 29, 1989); *Standard Brands*, 175 NLRB 734 (1969).

showing whether those meetings were single employer or multiemployer in scope. Although it is true that the Union had previously announced to some Seagirt unit employees that there would be association bargaining, and that it addressed its written contract demands to the named Association, the only testimonial accounts of those meetings reveal that the Union's repeated presentation of its proposals elicited only a "have nothing to give" reply, or no response from the Seagirt management representatives. This response upset the union representatives and precipitated the interest arbitration.¹⁸ On August 1, the Union notified the Association that in accord with "the agreement between the parties" (which in fact existed only on a single-employer basis), it was submitting the negotiations to interest arbitration. On this same date, the Union freely allowed Golden Gate Health Care Center to withdraw from the Association.¹⁹

It is clear from the evidence that the interest arbitration involved the Union, the Association and its employer-members, and many of their employees in an associationwide proceeding. However, the characterization of that arbitration as associationwide collective bargaining does not establish a multiemployer bargaining history if it does not result in a collective-bargaining agreement which is multiemployer in scope. We find the arbitrator's awards to be equivocal as to whether the parties obtained an associationwide agreement, or merely renewed and extended existing individual contracts with uniform terms and conditions, as was typically the case prior to the formation of the Association. In this connection, the arbitrator's reference to the extension of the contract term for 4 years, and his reference to "terms and conditions to be incorporated in collective bargaining agreements" is strong indication that in his view the interest arbitration award was intended to perpetuate a prior bargaining history in single-employer units. His naming Seagirt as a party in a supplemental award²⁰ is consistent with this interpretation. Although we note that the Employer's contention that the arbitrator's reference to multiple contracts may have been an allusion to the arbitrator's references to the "Blue Collar Agreement," and the "L.P.N. Agreement," contained elsewhere in his arbitration award, we find this explanation unpersuasive, given that the prior bargaining history for these employers did not result in separate contracts

for these various employee subgroups.²¹ Furthermore, the Union's implicit claim that the arbitration award covered all members of the Association in a multiemployer unit is not fully consistent with its filing of state court proceedings against each of the employers individually in order to have the arbitration award judicially confirmed.

We find, in the absence of any document converting the individual contracts into an associationwide agreement, or unequivocal evidence establishing an earlier multiemployer bargaining history,²² that the Association agreement executed on October 18, 1988, i.e., less than 10 months prior to the instant petitions, constitutes the only solid evidence of a replacement of the individual bargaining relationships with one that is associationwide.

B. An Election in the Single-Employer Unit was Appropriate Given the Brief History of Multiemployer Bargaining and the Lengthy Prior History of Bargaining on an Individual Basis

We do not quarrel with the general rule, cited by our dissenting colleague, that a petitioned-for unit in a decertification election must be coextensive with the certified or recognized unit.²³ This rule precludes petitions for otherwise appropriate units that have been merged into the certified or recognized units. We find, however, that the unusual circumstances of this case bring it within an exception to the general rule and render the single-employer unit appropriate.

In *Miron Building Products Co.*, 116 NLRB 1406 (1956), the Board confronted the question whether an RC petition for a unit of Miron's employees was appropriate in view of Miron's having joined with another employer to negotiate a multiemployer agreement with the incumbent union slightly more than 10 months before the election petition. Employer Miron and the incumbent argued that the "history of bargaining on a multiemployer basis renders [the single-employer] unit inappropriate." *Id.* at 1407. The Board disagreed. It noted the long history of bargaining on an individual basis that had preceded the formation of the dual-employer unit and the fact that "less than 1 year elapsed" between the effective commencement of the multiemployer agreement and the filing of the petition. It then stated: "The Board has consistently held that

¹⁸The sparse evidence concerning the substance of the Seagirt meetings led to the following colloquy between counsel at the hearing: Petitioners' counsel (stating his position): "There weren't bargaining sessions." Attorney Tuchman: "There may not have been, and so what?"

¹⁹Although this otherwise untimely withdrawal from the alleged multiemployer bargaining could be warranted on the basis of mutual consent between the Union and the Association, see *Retail Associates*, 120 NLRB 388, 395 (1958), the record provides no indication that the Association agreed to Golden Gate's withdrawal.

²⁰See fn. 14, above.

²¹In the case of the Seagirt employees, the 1981-1984 agreement initially covered "all employees and licensed practical nurses excluding registered nurses, office clerical employees, supervisors, watchmen and guards." Under the interest arbitration award issued December 20, 1984, this agreement was renewed and extended through March 1987, with the arbitrator observing that the registered nurses had been included under the prior bargaining agreement pursuant to an arbitration award effective in April 1983. It is clear that Seagirt did not have separate bargaining agreements for various classifications.

²²See *Ruan Transport Corp.*, supra, 234 NLRB at 242.

²³*Mo's West*, 283 NLRB 130 (1987).

multiemployer bargaining history of such brief duration and not predicated upon a Board certification does not warrant the finding that only a multiemployer unit is appropriate.” *Id.* at 1407–1408 (citation omitted). It accordingly found the single-employer unit appropriate.

In the present case, as in *Miron*, the Employer’s unit employees have had a distinct identity in a single-employer unit for a significant period of time (approximately 15 years). The period between the unequivocal appearance of a multiemployer unit (October 18, 1988) and the filing of the election petitions (July 1989) was of “brief duration,” i.e., less than a year.²⁴ In these circumstances, we will not apply the Board’s unit merger doctrine to block an election in the single-employer unit. In so doing, we are not abandoning our concern for avoiding disruption of established bargaining relationships. As the Board held in *Gibbs & Cox*, 280 NLRB 953, 954–955 (1986), we must weigh the interest in the stability of collective-bargaining relationships against the interest in assuring employees’ freedom of choice. The longer the history of bargaining in a broader unit, the greater the weight of that history in the balance. Also relevant is the extent to which the less comprehensive unit has had separate collective-bargaining identity prior to the time that the employer and union undertook to merge it into a broader unit.

We thus view the result here as entirely consistent with the contrary results reached in *Gibbs & Cox*, supra, and *Green-Wood Cemetery*, 280 NLRB 1359 (1986), which we find distinguishable on their facts.²⁵ In each of those cases, the smaller unit in which a decertification election was sought had, from the outset, when the union was first recognized as the employees’ representative, existed only as part of a larger unit.²⁶ Furthermore, in each case the bargaining history in the broader unit encompassed not only the application of the existing contract to the smaller group of employees but also the execution of a subsequent agreement covering the broader unit. Bargaining on the broader basis had existed for 4 years in *Gibbs & Cox* and 6 years in *Green-Wood*. There was thus in those cases a settled system of bargaining which the Board could not justify upsetting simply in order to allow a vote on representation by employees in a group that did not itself have any corresponding long-time separate identity.²⁷ In the

present case, as shown, it is the separate units that have the long-established identity, and there is no substantial history of group bargaining that would be upset by allowing the West Lawrence employees to vote on the question of their representation.

Accordingly, we shall affirm the Regional Director’s direction of an election in the single employer unit.

ORDER

The Regional Director for Region 29 is ordered to take further appropriate action in accord with this Decision and the National Labor Relations Board’s Rules and Regulations.

MEMBER DEVANEY, dissenting.

Contrary to my colleagues, I would reverse the Regional Director’s Decision and Direction of Election and dismiss the decertification and representation petitions at issue here. I would do so on the ground that the single-employer unit sought in those petitions was merged into the larger multiemployer unit prior to the filing of the petitions.¹ In reaching this conclusion, I emphasize that the Union and the Employer agreed in 1985 to negotiate on a multiemployer basis and that there is no evidence in the record that either party ever disavowed such an intent. To the contrary, the parties continued to negotiate on a multiemployer basis over the next several years and eventually signed a collective-bargaining agreement in the multiemployer unit. In these circumstances, I would find that the petitioned-for single-employer unit was merged into the multiemployer unit in 1985.²

location—was certified in a Board election in September 1984, and immediately thereafter the union and the employer undertook to bring it under the existing multilocation agreement, which expired in 1986. A decertification petition within the 8-employee unit was filed in 1986, just before the execution of a 1986–1989 multilocation agreement. Because there was a somewhat longer history of bargaining on the more comprehensive basis there, we need not decide now how we would rule on such facts were a similar case presented in the future. We, however, disavow reliance on the majority opinion in *Wisconsin Bell* to the extent it embraces principles inconsistent with *Miron Building Products*, supra; but we also emphasize that nothing we say in this case should be taken as indicating acceptance of the reasoning of the dissent, which rested on the dissenting opinion in *Gibbs & Cox*, supra. See *Wisconsin Bell*, supra, 283 NLRB at 1166.

¹ As to the decertification petition, it is well-settled that a petitioned-for unit in a decertification petition must be coextensive with the certified or recognized unit. *Mo’s West*, 283 NLRB 130 (1987). Because I would find that the single-employer unit had been merged into the multiemployer unit prior to the filing of the petition, I would dismiss the petition on the ground that the petitioned-for unit is not coextensive with the recognized unit. As to the representation petition, I would dismiss that petition on the ground that the petitioned-for single-employer unit, having been merged into the multiemployer unit, is no longer an appropriate unit for collective bargaining.

² The Board has long recognized that mutual agreement between the union and the employers is the basic element necessary to estab-

Continued

²⁴ See *U.S. Pillow*, supra, 137 NLRB at 587 fn. 12, collecting cases holding that either “less than a year” or “about a year” of multiemployer bargaining may be considered “brief duration.”

²⁵ We also note that both those cases involve multilocation units of a single employer rather than single-employer units within a multiemployer bargaining unit. That factor alone does not necessarily call for a different balancing of the interests at stake.

²⁶ *Gibbs & Cox*, supra at 954 fn. 5 and 955 fn. 13; *Green-Wood Cemetery*, supra at 1359–1360.

²⁷ *Wisconsin Bell*, 283 NLRB 1165 (1987), on which our dissenting colleague relies, presents somewhat different considerations. In that case, the narrower unit—a unit of eight employees at a single

The majority, however, relies on the history of bargaining in the single-employer unit to find that the petitioned-for single-employer unit is appropriate and asserts that the interest-of-bargaining stability justifies such a result. I do not agree. I believe that by failing to distinguish the facts of the present case from cases in which the Board properly relies on bargaining history and by failing to follow precedent as set out in *Wisconsin Bell*, 283 NLRB 1165 (1987), which the majority overrules today without discussion, the majority undermines the very goal of bargaining stability that it seeks to ensure. In this regard, I emphasize that in the present case, as in *Wisconsin Bell*, neither the Union nor the Employer contends that a multiemployer unit is inappropriate nor attempts to disavow the 1988 collective-bargaining agreement applicable to the multiemployer unit. Thus, in contrast to the cases relied on by the majority, neither party here seeks to disavow its bargaining obligation vis-a-vis the merged unit. In these circumstances, I would find that the history of bargaining in the single-employer unit is not dispositive and does not outweigh the clearly evidenced intent of the parties to negotiate on a multiemployer basis. Further, I believe that nothing can do more to under-

lish a multiemployer bargaining unit. See *Retail Associates*, 120 NLRB 388, 393 (1958).

mine the bargaining on a multiemployer basis than to place the parties, contrary to their wishes, in the bargaining position they were in almost 6 years ago and prior to the signing of the 1988 collective-bargaining agreement.

Finally, I note that in affirming the Regional Director, the majority states that the result protects the Section 7 rights of employees to choose their bargaining representative in a single-employer unit. While I agree with my colleagues that bargaining unit members should be informed of a unit merger at the time so that they may have an opportunity to express their views on the matter, I note that in the present case it is uncontested that the Employer's unit employees were informed of the merger in early 1986 and that one employee did in fact file a decertification petition in November 1986.³

In these circumstances, I believe that the employees' Section 7 rights were sufficiently protected. For all the above reasons, I would follow *Wisconsin Bell* and dismiss the petitions.

³I agree with the Employer and the Union that the decertification petition filed in 1986 was for a then-appropriate single-employer unit under *U.S. Pillow*, 137 NLRB 584 (1962). Accordingly, contrary to the Regional Director, I would find that the "last chance" requirement set out in *U.S. Pillow* has been satisfied in the present case.