Dominican Santa Cruz Hospital *and* Operating Engineers Local Union No. 3 *and* California Nurses Association, Petitioners. Cases 32–RC–3421 and 32–RC–3426

May 13, 1992

ORDER DENYING REVIEW

BY MEMBERS DEVANEY, OVIATT, AND RAUDABAUGH

The National Labor Relations Board Board has delegated its authority in this proceeding to a three-member panel. Petitioner Operating Engineers Local Union No. 3's request for review of the Regional Director's Decision, Direction of Election, and Order is denied as it raises no substantial issues warranting review. Petitioner Operating Engineers Local Union No. 3's request to stay the election also is denied. Among the issues raised by the request for review is the propriety of the double self-determination election directed by the Regional Director.[1] In view of the novelty of this issue, and the Regional Director's discussion as to it, with which we agree, we are attaching the relevant parts of that decision as an Appendix.

[1] The only other issues raised in the request for review relate to the supervisory status of the Employer's charge nurses and the clinical laboratory evening/night supervisor. Member Raudabaugh, dissenting in part, would grant review as to these issues.

APPENDIX

Scope of Unit

Operating Engineers Local Union No. 3, the Petitioner in Case 3–RC–3421 (hereinafter referred to as Local 3), initially petitioned to represent a collective-bargaining unit consisting of ''all unrepresented employees'' employed by the Employer at its acute care hospital and rehabilitative services center, excluding ''chief engineers, assistant chief engineers, boiler room foremen; biomedical electronics technicians, watch maintenance engineers, gaurds [sic] and supervisors as defined in the Act.'' California Nurses Association, the Petitioner in Case 32–RC–3426 (hereinafter referred to as CNA), initially sought to represent all registered nurses employed by the Employer at its acute care hospital, excluding supervisors as defined in the Act. CNA clarified its petition at the hearing to reflect that it was seeking to represent all registered nurses at the rehabilitation services center as well as at the hospital (with certain exceptions as set forth and discussed below) and further amended its petition to exclude all other employees and guards as well as supervisors.

During the hearing, the parties stipulated, and I find that the registered nurses are professional employees within the meaning of the Act. In addition, Local 3 and the Employer identified and stipulated to the various classifications or positions held by other professional as well as non-professional employees whom Local 3 seeks to represent.[9] Neither Local 3 nor CNA seeks represent the physicians. The parties stipulated that the physicians have a contractual rather than an employee relationship with the Employer and that they should be excluded from any unit found appropriate herein, and I so find.

Local 3 acknowledges that Section 103.30 of the Board's Rules and Regulations specifies that a unit of ''all registered nurses'' and of ''all professionals except for registered nurses and physicians'' are two of the eight units that ''shall be appropriate units,'' but nevertheless maintains that, in the circumstances presented here, it petitioned-for ''wall-to-wall'' unit (with certain exclusions as noted above and below and subject to the professional employees, including registered nurses, being given the opportunity to vote on whether or not they wish to be included in a unit with non-professionals for collective bargaining purposes) is the ''most'' and, therefore, the ''only'' appropriate unit in view of the Congressional directive against proliferation of units in the health care industry and under both the Board's traditional community of interest test and its more recent disparity of interests test. Local 3 asserts that in a situation such as here, when two or more labor organizations petition for competing, appropriate units in the health care industry, an election should be directed in only the broader, appropriate unit and the Board's Rules and Regulations governing bargaining units in the health care industry should be clarified to so provide. Local 3 further argues that preference should be given to the petition that was filed first, as long as it is for an appropriate unit.

Alternatively, Local 3 submits that the smallest appropriate units would be a unit of all professionals, including registered nurses, and a unit of all non-professionals. However, without prejudice to its position that the ''wall-to-wall'' unit is the most appropriate, Local 3 stated at the outset of the hearing, that in certain circumstances, it would participate in an election in a unit limited to registered nurses. This matter is dealt with further in the Direction of Election.

CNA takes the position that, if any labor organization seeks to represent employees in any one of the eight units set forth as being appropriate in Section 103.3 of Board's Rules as CNA has with respect to the registered nurses, such a unit is presumptively appropriate under the Health Care Rule and must accordingly be found so even if another labor organization seeks a combination of some or all of these eight units, as Local 3 has done. CNA also stated at the hearing that if its sought-for unit of registered nurses was not found to be an appropriate unit, it did not wish to represent or participate in an election involving any other units, even if they consist in part of the registered nurses.

The Employer argues neither for or against the appropriateness of the units sought by Local 3 and CNA, recognizing that various combinations of the units enumerated in the Board's Rule may also be appropriate, but only, as the Board has indicated, ''if sought by labor organizations.'' See 284 NLRB at 1573, 1597. In addition, the Employer acknowledges that no ''extraordinary circumstances'' exist that would require a determination of appropriate units by adjudication.

[9] See Appendix C. As set forth infra, the registered nurses, the other professional employees and the non-professional employees will be in Voting Groups A, B and C, respectively.

Nevertheless, as noted above, the Employer has requested the undersigned to transfer these consolidated representation cases to the Board for initial decision on the basis that there is no guidance provided by the Board in either its health care Rule or case law to resolve the ''substantial policy questions'' of ''first impression'' allegedly raised by the filing of the petition in these cases. As posed by the Employer, the first ''policy question'' is: ''What is an appropriate unit when one union seeks to represent nurses and another union has petitioned for a 'wall to wall' unit that would include those same nuses.'' The other question raised by the Employer concerns election mechanics, asking what is the appropriate procedure for holding a *Sonotone* election when there are three possible voting groups: registered nurses, other professional employees, and nonprofessional employees.

I find that transfer of these proceedings to the Board is not warranted in the circumstances. I also reject the arguments of Local 3 that the ''wall to wall'' unit it has petitioned for is the most and/or only appropriate unit or that a unit of all professionals and a unit of all non-professionals is the ''next most appropriate.'' In making these arguments, Local 3 primarily relies on various cases decided before the Board's Health Care Rule became effective, in which the Board rejected a separate unit for registered nurses in favor of an overall unit of professionals as being the smallest appropriate unit for collective bargaining purposes.

A review of the Board's proceedings in formulating and adopting the final health care Rule fails to reveal anything that supports the position of Local 3 or otherwise precludes a determination that a separate unit of registered nurses is an appropriate unit. Nor is there a complete lack of guidance as claimed by the Employer.

As the Board determined after exhaustive deliberation and as the Rule plainly states, a unit of registered nurses is one of eight units that ''shall be appropriate units, and the only appr priate units'' for petitions filed pursuant to Section 9(c)(1)(A)(i) or 9(c)(1)(B) of the National Labor Relations Act (footnote omitted).'' 284 NLRB at 1543–1551, 1597. In addition, the Board deliberately modified its original proposal that ''any combination [of units] *will* also be appropriate'' to provide instead that ''various combinations of units *may* also be appropriate [emphasis added].'' In making this change, the Board specifically noted that there was insufficient evidence to find that ''*per se*, all combinations should be found appropriate or otherwise required under the Rule although it observed that some combinations . . . would obviously be appropriate, such as all professionals, or all non-professionals. 284 NLRB at 1573. But there is no suggestion that preference must be given to broader combined units over the separate enumerated units or even that a choice must be mad between competing, appropriate units. The Board found that ''the evidence does not warrant limiting the number of units to two broad units of all professionals/all non-professionals.'' 284 NLRB at 1536.

Moreover, the Board expressly considered in the course of its rulemaking whether a separate unit of registered nurses or the alternative of an all-professional unit including registered nurses would be appropriate and decided that the former was ''appropriate for collective bargaining purposes.'' 284 NLRB at 1551. In reaching this conclusion, the Board noted that it had considered its recent decision in *St. Vincent Hospital and Health Center*, 285 NLRB 365 (1987), in which the Board had held that a separate unit of registered nurses was inappropriate for reasons substantially the same as those given in the cases cited by Local 3, and stated that in view of the evidence presented during the rulemaking proceedings, ''it might well reach a different result in St. Vincent'' for the reasons discussed, in particular because it had ''a far better understanding of the RN's training, functions, interests and involvement in hospital operations, and of the actual and potential ramifications.'' 284 NLRB at 1551, n. 22.

Moreover, the Board made very clear that Congress' admonition against proliferation of health care bargaining units was ''kept firmly in mind'' and ''carefully considered'' in formulating its health care Rule and that the Board was ''satisfied'' that the eight ''health care units established by the Board do not constitute proliferation either in terms of the legislative history of the amendments or in the context of the history or realities of the industry.'' 284 NLRB at 1522, 1535, 1536, 1575, 1593–1595. At the same time, the Board emphasized ''its statutory mandate to make unit determinations 'in order to assure to employees the fullest freedom in exercising the rights guaranteed by [the] Act' [footnote omitted].'' 284 NLRB at 1522.

In addition, Local 3 has failed to demonstrate that there are extraordinary circumstances warranting an exception being made in the application of the Board's health care Rule to the situation presented here. Its arguments are not substantially different from those the Board considered at length during the rulemaking proceedings. It has not shown that the Employer or these cases are so ''uniquely situated'' or deviate in such ''unusual and unforeseen'' ways from the range of circumstances already examined by the Board to require individual treatment or separate adjudication. The fact that the Employer does not have a nursing department to which the registered nurses are the only professionals assigned is not sufficient to invoke the exception. The record reflects that one of the four divisions is often referred to as the nursing division. Sister Michaella Siplak, the current vice-president of that division, is a registered nurse and held the position of Director of Nurses until a reorganization resulted in the elimination of that title. It appears that a majority of the registered nurses work in the departments/units overseen by her. Even though other professionals work in the nursing division and some registered nurses work in departments that are in divisions under other vice-presidents, these variations or differences apear to be relatively minor and ordinary rather than the extraordinary circumstances that would make application of the Board's Health Care Rule unjust. See 284 NLRB at 1573, 1574.

Nor do I find the fact that CNA seeks to exclude from its petitioned-for unit those registered nurses who do not have direct patient care duties or functions, but rather perform other administrative functions, to be either unusual, see, e.g., *Ralph K. Davies Medical Center*, 256 NLRB 1135 (1981), or precluded by either the intent or application of the Board's Health Care Rule. These are merely unit placement issues.

Finally, I am not persuaded by either the Employer or Local 3 that having two unions petition for ''competing, appropriate'' units is so unique or extraordinary as to require special or preferential treatment being given to these two cases. As the Board has often stated, ''The Act does not require that the unit for bargaining be the *only* appropriate unit

or the *most* appropriate unit. Rather the Act requires only that the unit be 'appropriate' (footnote omitted).'' See e.g., *Dominican Santa Cruz Hospital*, 218 NLRB 1211, n. l; see also *Family Doctor Medical Group*, 226 NLRB 118, 120, n. 18 (1976). In promulgating its Health Care Rule, the Board has not significantly changed or modified that proposition, either generally or specifically, for the health care industry, but rather has reaffirmed it. Moreover, in *Family Doctor Medical Group*, supra, the Board noted that the creation of two separate units, one for registered nurses and another for all professional employees, excluding registered nurses, ''are appropriate when they are so sought.'' 226 NLRB at 120. In that case, however, these separate units were being sought by the employer and not the union, which had petitioned for a single unit encompassing all employees. In finding that a unit of professionals, including nurses, constituted an appropriate bargaining unit, and providing for those employees to vote separately on their inclusion within the unit of nonprofessional employees found appropriate, the Board noted that the separate units referred to above had not been ''sought'' (i.e. by the union) in that case. However, in the present case, one of the unions, CNA, has ''sought'' at least one of these separate units. Moreover, in promulgating its Rule, the Board specifically finds and provides that separate units of all registered nurses and of all professionals except for registered nurses are two of eight units that ''shall be'' appropriate if sought by a labor organzation and that various combinations of units ''may also be'' appropriate if sought by a labor organization, with some combinatins, such as allprofessionals, all non-professionals, being ''obviously appropriate.'' Consequently, I do not find anything in the Board's rulemaking proceedings or Health Care Rule that supports Local 3's position that its petitioned-for unit is more appropriate or should otherwise be given preference because its petition was filed first. The appropriateness of alternative units is no longer the issue under the Health Care Rule and will not be examined unless a labor organization seeks to represent ''other, more unusual combinations.'' 284 NLRB at 1573. That is not the case here.

Accordingly, I conclude that under Section 103.30 of the Board's Rules and Section 9 of the Act, and in the circumstances presented, I am not precluded from finding that not only are separate units of registered nurses and all professionals except registered nurses and physicians appropriate here, but that units of all professionals except physicians and all non-professionals as well as a ''wall-to-wall'' unit would also be appropriate. However, inasmuch as the wishes of the registered nurses and the other professional employees are critica1 in this matter, a final unit determination cannot be made at this time but is dependent on the results of the elections directed in the voting groups as set forth below.

In reaching this conclusion, I have also considered the second question raised by the Employer regarding what is the appropriate procedure for conducting an election where there are three voting groups, two of which consist of professional employees. Although this particular situation does not appear to have arisen before, I disagree with the Employer's assertion that there is no guidance available from the Board for resolving this problem.

The Employer notes that the Board has previously raised but not passed on the question ''whether, in the absence of a separate petition seeking registered nurses only, we would direct an election in an overall professional unit, including registered nurses, if such a unit were sought, or whether, if we did, we would allow the nurses a voice as to whether they wished to be included in a unit with other professionals.'' The Board further stated that it did not mean to suggest by the foregoing quoted language that ''if only an all professional unit is sought, nurses may possibly be given a separate vote entitling them to remain unrepresented.'' *Mercy Hospitals of Sacramento*, 217 NLRB 765, 769 n. l8 (1975). Unlike that case, however, in the present case, not only is there a petition by Local 3 for a ''wall-to-wall'' unit that implicitly seeks to represent an all professional unit, including nurses, should the professionals vote not to be included with non-professionals for collective bargaining purposes, but there is also a ''separate petition seeking registered nurses only,'' which was filed by CNA. In these circumstances, it appears appropriate and suitable to offer the registered nurses the opportunity to choose between representation in separate unit or inclusion in a unit of all professionals (with, if inclusion is voted for, the additional opportunity to then choose along with the other professionals whether to be included in an overall unit with non-professionals for collective bargaining purposes). Cf. *Syracuse University*, 204 NLRB 641 (1973). If the registered nurses do not vote for representation in a separate unit of registered nurses, they must then be given the opportunity along with the other professionals to choose whether the professionals wish to be included in an overall unit with non-professionals for collective bargaining purposes, as required by the Board's decision in *Sonotone Corp.*, 90 NLRB 1236 (1950).