

Kaiser Foundation Hospitals/Southern California Permanente Medical Group, and Kaiser Foundation Health Plan, Inc. and Independent Brotherhood of Skilled Hospital Maintenance Workers, Petitioner. Case 31–RC–6992

September 30, 1993

DECISION ON REVIEW AND ORDER

CHAIRMAN STEPHENS AND MEMBERS DEVANEY
AND RAUDABAUGH

The issue in this case involves unit determinations in acute care hospitals where there are preexisting units that do not conform to those set forth in the National Labor Relations Board's Final Rule on collective-bargaining units in the health care industry. The specific question presented is whether the Regional Director properly directed an election in a unit of skilled maintenance employees, one of the eight appropriate units set forth in the Rule, where the petitioned-for employees are already represented in a larger, preexisting, nonconforming unit.

On December 1, 1992, the Regional Director for Region 31 issued a Decision and Direction of Election in the above-entitled matter in which he directed an election in a unit of skilled maintenance employees employed by the Employer at its acute care hospitals. Thereafter, in accordance with Section 102.67(b) of the National Labor Relations Board's Rules and Regulations, the Employer and the Intervenor, the United Steelworkers of America, AFL–CIO, filed timely requests for review of the Regional Director's decision. On January 7, 1993, the Board granted the Employer's and the Intervenor's requests for review and granted the Intervenor's request to stay the election.¹ The Employer and the Intervenor filed briefs on review.

I.

The National Labor Relations Board has considered the entire record in this case and, for the reasons set forth below, has decided to reverse the Regional Director's decision and dismiss the petition.

The relevant facts are undisputed. The Employer operates two medical centers in Fontana and Riverside, California, respectively, and auxiliary clinics in surrounding counties, which the parties have stipulated to be acute care hospitals within the definition under the Board's Final Rule on collective-bargaining units in the health care industry.² The Intervenor currently represents a unit consisting of approximately 2800 non-

professional employees, including clericals, technicals, patient-care employees and service and maintenance employees. The collective-bargaining agreement also excludes small pockets of miscellaneous groups of employees, including opticians, administrative staffing clerk, medical research secretary, x-ray technicians, and orthopedic technicians. The Employer initially voluntarily recognized the Intervenor as the bargaining representative of its employees at the Fontana facility in 1949. Pursuant to an accretion agreement, in 1988 the Employer subsequently recognized Intervenor as the bargaining representative of its employees at the new Riverside facility.³

The Petitioner seeks to represent the fewer than 50 skilled maintenance employees who are currently part of the above-described existing unit, which itself is not one of the eight appropriate units enumerated in Section 103.30 of the Rule, i.e., it is a nonconforming unit. In contrast, the petitioned-for unit of skilled maintenance employees is one of those eight appropriate units set forth in the Rule. The Regional Director, in directing an election, found nothing in the Rule or the rulemaking suggesting that the Rule should never be applied to situations involving existing nonconforming units. He further found that neither the Employer nor the Intervenor raised any issues not previously considered during the rulemaking, nor had they shown that any other standard should be applied. Relying on Section 103.30(c) of the Rule,⁴ the Regional Director concluded that it would not be impracticable to apply the Rule to create a unit of skilled maintenance employees where such employees are part of an existing nonconforming unit, and, therefore, he directed an election in the petitioned-for unit. The Employer and the Intervenor argue that according to the plain language of Section 103.30(c), the Rule applies only to initial organizing situations and, therefore, is inapplicable here.

II.

While engaging in the rulemaking process, the Board was not unmindful that the existence of nonconforming units in acute care hospitals raised a variety of issues with respect to unit determinations. The Board found that those issues had not been extensively addressed during the rulemaking proceeding. The

¹ Members Oviatt, Raudabaugh, and Devaney. Members Oviatt and Raudabaugh also denied the Employer's request for oral argument. Member Devaney dissented in part as he would have granted the request to hold oral argument.

² 29 CFR Part 103.30, 54 Fed.Reg. 16336, 284 NLRB 1580 (1989). The Rule was approved by the Supreme Court in *American Hospital Assn. v. NLRB*, 111 S.Ct. 1539 (1991).

³ According to the Employer, the Intervenor represented some Riverside employees prior to the opening of the Riverside Hospital when the Riverside medical facilities reported to Fontana. The Employer states that the collective-bargaining agreement was continued at Riverside, rather than being newly extended to the employees there.

⁴ Sec. 103.30(c) of the Rule states:

Where there are existing non-conforming units in acute care hospitals, and a petition for additional units is filed pursuant to section 9(c)(1)(A)(i) or 9(c)(1)(B), the Board shall find appropriate only units which comport, insofar as practicable, with the appropriate unit set forth in paragraph (a) of this section.

Board therefore determined that “for the time being” such issues would be adjudicated on a case-by-case basis. 284 NLRB at 1570–1571. The Board added that in adjudicating cases it would attempt to apply the new rules in situations involving nonconforming units, “insofar as practicable.” 284 NLRB at 1571.⁵

Initially, we note that the petition here seeks in effect to sever the Employer’s skilled maintenance employees from the larger, long-standing unit in which they are currently represented. Apart from any considerations presented by the Rule, we would dismiss the petition unless the requirements for craft severance are satisfied, as it is not filed in the existing unit.⁶ Contrary to the Regional Director, however, we find that nothing in the Rule may be read to expand the circumstances in which petitions seeking to sever a group of employees from an existing unit will be entertained.

Section 103.30(a) of the Rule provides that, “[e]xcept in extraordinary circumstances and in circumstances in which there are existing non-conforming units,” the eight units described in Section 103.30(a), and only those units, will be found appropriate for petitions filed with respect to acute care hospitals under Sections 9(c)(1)(A)(i) and 9(c)(1)(B) of the Act, with the further exception that, where sought by a union, various combinations of units may also be appropriate. As previously stated, Section 103.30(c) provides that, where there are existing nonconforming units, and “a petition for additional units” is filed, the Board will find appropriate only units which comport, “insofar as practicable,” with the eight appropriate units set forth in Section 103.30(a). As noted above, the Regional Director relied on Section 103.30(c) in directing the election in this case.

Contrary to the Regional Director, we find that Section 103.30(c) is not applicable to petitions which seek to sever, or carve out, a group of employees from an existing unit, whether or not that unit conforms to those established by the Rule. By its terms, Section 103.30(c) applies only to petitions for “additional units,” that is, petitions to represent a new unit of previously unrepresented employees, which would be an addition to the existing units at a facility.⁷ Accordingly, we find that the instant petition, which seeks to create a unit by dividing an existing unit, falls outside the plain language of this section of the Rule.

This interpretation of Section 103.30(c) finds further support in the explanatory comments issued by the Board during the rulemaking process. Thus, in the explanatory comments accompanying the First Notice of

⁵In its First Notice of Proposal Rulemaking, the Board had determined to apply the rules to nonconforming units “insofar as possible.” 284 NLRB at 1521, 1570.

⁶*Mallinckrodt Chemical Works*, 162 NLRB 387 (1966).

⁷Webster’s Third New International Dictionary defines “additional” as “existing or coming by way of addition—added, further”

Proposed Rulemaking, the Board stated that the preamble to the proposed rule “is by its terms limited to petitions for initial organization, since historically the Board has required decertification petitions to be filed in the certified or recognized unit. When institutions are partially organized we assume that petitions for new units will follow the proposed rules, insofar as possible.”⁸ As this comment makes clear, where there are existing units the Board contemplated that the Rule would apply only with respect to petitions for new units. The instant petition does not satisfy this requirement as the unit sought is not new.⁹

Likewise, the preamble to the Second Notice of Proposed Rulemaking demonstrates that the Board did not intend that Section 103.30(c) be read to expand the circumstances in which the Board would accept a petition to sever a group of employees from an existing unit. Rather, the Board’s comments on this point are directed at petitions for additional, residual units in cases in which units *narrower* in scope than those permitted by the Rule already existed.¹⁰ There is no indication that the Board intended Section 103.30(c) to apply where, as here, the existing unit is *broader* than those which the Rule envisions and the petition seeks to sever some of the represented employees from that unit.

Our interpretation of Section 103.30(c) is also consistent with the Board’s treatment of nonconforming units in other settings under the Rule. Thus, as noted above, the Board will require decertification petitions to be filed in the existing certified or recognized unit, even if that unit does not conform to those established under the Rule.¹¹ Likewise, the Rule provides that the Board will accept stipulated units which do not conform to those established by the Rule.¹² In our view,

⁸284 NLRB at 1521.

⁹The Board’s discussion of this issue in the context of proliferation concerns in the preamble to the Final Rule also demonstrates that the Board understood the phrase “new units” to mean those sought in addition to any existing, nonconforming units. See 284 NLRB at 1594–1595.

¹⁰The pertinent portion of the comment reads:

Where existing units are not in conformity with the new proposed final rule, we can anticipate a number of questions arising with respect to the applicability of the new rules. Where units smaller than those permitted by the rules already exist, may the incumbent petition for a residual unit? May another labor organization? What will be the continued vitality of the principles enunciated in *Levine Hospital of Hayward*, 219 NLRB 327 (1975)?

¹¹284 NLRB at 1573 fn. 26, citing *Campbell Soup Co.*, 111 NLRB 234 (1955).

¹²Sec. 103.30(d). In the preamble to the Final Rule, the Board stated that, although it was concerned about the results of allowing the parties to stipulate to a nonconforming unit, and that stipulations in conformity with the Rule surely would be preferable, “[i]n view of Congress’ concern with stability in health care labor relations, the importance of reducing unnecessary litigation, and expeditiously proceeding with elections, permitting stipulations, even when they do not conform to the Board’s explicitly drawn units, seems war-

it would be anomalous to adopt a different rule according any less respect to nonconforming units, in the case of a petition for an election among a subgroup of an existing, nonconforming unit.

Finally, the Board's long-standing policy of according great deference to collective-bargaining history also supports our decision not to apply the Rule automatically to preexisting nonconforming units.¹³ We conclude that this result is consistent with the design and purpose of our decision to engage in rulemaking—to further the long-standing policy of promoting industrial and labor stability—and does not conflict with Congress' admonition against undue proliferation of bargaining units in the health care industry.¹⁴

III.

In light of our finding that this case is not governed by the Rule, we next consider this case under traditional representation law principles. Under those principles, the petition must be dismissed unless the criteria for craft severance established in *Mallinckrodt Chemical Works*, above, are satisfied.¹⁵ For the reasons which follow, we find that the Petitioner has not established that its petition satisfies these requirements.

Analyzing the case under the facts set forth in *Mallinckrodt*, we find severance to be inappropriate. Under *Mallinckrodt*, the following factors are relevant: whether the proposed unit consists of a distinct and homogeneous group of skilled journeymen craftsmen or a functionally distinct department; the collective-bargaining history related to those employees; the extent to which the petitioned-for unit has established and maintained a separate identity during its inclusion in the overall unit; the degree of integration of the employer's production processes; the qualifications of the

ranted." 284 NLRB at 1573. We find that these same concerns militate in favor of our finding here that the Rule also does not expand the circumstances in which groups of employees may be severed from an existing unit.

We further note the Board's additional comment that, "[t]o the extent a stipulation may later result in the creation of a residual group of unrepresented employees, the Board will address their representation concerns as it would those of other groups of residual employees present in partially organized acute care hospitals—on a case-by-case basis applying the rules insofar as practicable." *Id.* Again, this comment demonstrates that Sec. 103.30(c) was not intended to apply to petitions to sever employees from existing units.

¹³ *Great Atlantic & Pacific Tea Co.*, 153 NLRB 1549 (1965).

¹⁴ The Regional Director did not address this issue because, as discussed above, he would have directed an election under the Rule.

¹⁵ The Employer cursorily argues that severance principles should never apply in health care cases. That argument was not presented to the Regional Director. We note, moreover, that application of *Mallinckrodt* craft severance principles in the health care setting is fully consistent with the Congressional directive to avoid undue proliferation of bargaining units, in light of the heavy burden which *Mallinckrodt* places on the party seeking severance. See generally *Kaiser Foundation Hospitals*, 210 NLRB 949 (1974) (analyzing the case under criteria set forth in *Mallinckrodt* and finding severance of LPNs from existing unit not appropriate).

union seeking severance; and the pattern of collective bargaining in the industry.

The skilled maintenance employees are part of the Employer's plant services/plant engineering department, which includes equipment services, clerical, and service and maintenance employees. The petitioned-for unit consists of bio-medical technicians, tool clerk/department clerk, tool crib attendant, maintenance attendant, and engineers, and it is undisputed that these employees are in fact skilled maintenance employees.¹⁶ They perform various maintenance tasks, and service, operate, maintain, and repair hospital equipment and plant systems such as heating, ventilation, air conditioning, electrical, and plumbing. These positions generally require completion of high school and post-secondary training or vocational training and some of the employees are required to be licensed. The petitioned-for employees are separately supervised by the chief engineers or plant engineers for each department, and their contact with other employees, although frequent, is essentially limited to identifying maintenance problems.

Although the skilled maintenance employees here would generally constitute a homogeneous craft or departmental unit,¹⁷ the Board has, in other types of cases, declined to sever a group of maintenance employees from an existing production and maintenance unit in the face of a substantial bargaining history on a plantwide basis.¹⁸ The Employer and the Intervenor have a substantial and long-term collective-bargaining history—almost 40 years—and there is no evidence that the Intervenor has failed to give adequate representation to the employees it represents.

Further, the evidence does not establish that the skilled maintenance employees have maintained a separate identity. Terms and conditions of employment are uniformly determined across the existing bargaining

¹⁶ In the Second Notice of Proposed Rulemaking, the Board described skilled maintenance employees as those employees who are generally engaged in the maintenance and repair of the hospital's physical plant systems such as heating, ventilation a/c, refrigeration, electrical, plumbing and mechanical, as well as their trainees, helpers and assistants. Skilled maintenance classifications typically require some high school, some postsecondary training such as vocational or trade school, formal or informal apprenticeship programs, or an associate's or bachelor's degree or license. The Board found that skilled maintenance employees frequently have separate supervision by the hospital's plant engineering or maintenance department, higher wage rates reflecting higher skills and training, and only incidental contact with employees outside the maintenance department and no direct involvement in patient care. See *Jewish Hospital*, 305 NLRB 955 (1991).

Before the Regional Director, the Employer maintained that several of the classifications sought by the Petitioner should not be included in a skilled maintenance unit. That question is not before the Board now.

¹⁷ See *Jewish Hospital*, *supra*; *Franklin Mint*, 254 NLRB 714 (1981).

¹⁸ *Firestone Tire & Rubber Co.*, 223 NLRB 904 (1976).

unit, including hours of work, holidays, health and pension benefits, vacation, seniority, and leave. The Employer and the Intervenor negotiate on a unitwide basis; there have been no separate negotiations regarding the skilled maintenance employees. Wage increases are negotiated for all job categories based on community surveys of similar positions conducted in the relevant geographic area. The skilled maintenance employees are also actively involved in representation matters. A member of the proposed unit is the current president of the Steelworkers Local 7600.¹⁹ In 1978, this same employee was the grievance representative, and from 1983–1986 he was the vice president. Finally, the petitioned-for skilled maintenance employees have been represented in an overall unit since 1949 or 1988 depending on the facility and, with the exception of two strikes, the bargaining relationship has been predominantly stable.

We note also that the evidence does not establish that the Petitioner is particularly qualified to represent a traditional craft unit; indeed, the Petitioner has no experience representing employees of any kind as it was formed by 17 of the petitioned-for employees only 3 weeks before the petition was filed.

Thus, we conclude that under the traditional *Mallinckrodt* standards, severance of the skilled maintenance employees is inappropriate, and we therefore shall dismiss the petition.²⁰ In dismissing the petition, we are not unmindful that permitting an election in this case might theoretically bring the units at the Employer's facility into closer alignment with those set forth in the Rule. However, the Board is reluctant, absent compelling circumstances, to disturb bargaining units established by mutual consent where there has been a long history of continuous bargaining, even in cases where the Board would not have found the unit to be appropriate if presented with the issue *ab initio*.²¹ For the reasons set forth above, the Board has rejected the view that the instant unit's noncompliance with the units established as appropriate by the Rule is such a

compelling circumstance. As no other compelling circumstance has been shown, we shall reverse the Regional Director's Direction of Election and dismiss the petition.

ORDER

The Regional Director's Decision and Direction of Election is vacated and the petition is dismissed.

MEMBER RAUDABAUGH, concurring.

I agree with the result reached by my colleagues, but not with all of their reasoning. Accordingly, I write this concurrence.

The Steelworkers Union (USW) represents a large unit in a hospital. The unit predates the Rules, and includes many classifications. The unit does not conform to any of the units under the Rules. One of the classifications in the USW unit is "maintenance employees." The petitioning union (Independent) seeks to sever the maintenance employees and represent them separately. A unit of maintenance employees is one of the appropriate units under the Rules.

Section 103.30(a) of the Rule provides for eight appropriate units, except in extraordinary circumstances and in circumstances in which there are existing nonconforming units. The latter exception is relevant here. With respect to nonconforming units, Section 103.30(c) provides that, where there is an existing nonconforming unit, and a petition for an "additional" unit is filed, the Board will find appropriate a unit which comports, insofar as practicable, with one of the eight units.

The problem in this case concerns the wording of Section 103.30(c). Read literally, it applies to the instant case. There is a nonconforming unit, and the Petitioner seeks to create an additional unit. That is, if the Petitioner succeeded, there would be two units instead of the present one unit. Thus, Section 103.30(c) literally applies. However, as set forth in the majority opinion, it is rather clear that, notwithstanding the language of Section 103.30(c), that provision was intended to cover only situations where the petitioner seeks to create an additional unit *comprised of unrepresented employees*. Because the petition here does not fall within the intentment of Section 103.30(c), that section does not apply. In such circumstances, traditional concepts of representational law apply. These concepts include the *Mallinckrodt* severance principle. I agree with my colleagues that, under that principle, the skilled maintenance employees involved here cannot be severed from the longstanding unit in which they are now represented.

¹⁹ Although the International is the Intervenor, the Local administers the collective-bargaining agreement.

²⁰ Cf. *Beaunit Corp.*, 224 NLRB 1502 (1976). In *Beaunit*, the petitioner attempted to sever a unit of electrical mechanics and instrument mechanics from an overall production and maintenance unit involved in the production of nylon fiber. The Board found that even assuming the craft status of the mechanics, severance was not appropriate, particularly in light of the fact that these employees' duties were essential to the overall production process, the 7-1/2-year bargaining history in the overall unit, and the absence of any countervailing considerations.

²¹ *Sonotone Corp.*, 90 NLRB 1236 (1950); *Corporacion de Servicios Legales*, 289 NLRB 612 fn. 1 (1988).