Hollywood Presbyterian Medical Center *and* Hospital and Service Employees Union, Local 399, Service Employees' International Union, AFL-CIO, CLC, Petitioner. Case 31-RC-5711

29 April 1985

DECISION AND ORDER DIRECTING HEARING

BY CHAIRMAN DOTSON AND MEMBERS HUNTER AND DENNIS

The National Labor Relations Board has considered the objections to an election held 18 October 1984, and the Regional Director's report recommending dispositions of them. The election was conducted in separate units of professional and nonprofessional employees pursuant to a Stipulated Election Agreement. The tally of ballots in the nonprofessional unit A shows 418 for and 257 against Petitioner with 4 void ballots and 26 challenged ballots, a number insufficient to affect the results. The tally of ballots in the professional unit B shows 183 for and 210 against inclusion in a single unit with nonprofessional employees with 2 void ballots and 21 challenged ballots, a number insufficient to affect the results. The tally of ballots in the professional unit B further shows 214 for the Petitioner and 178 against, with 4 void ballots and 21 challenged ballots, a number insufficient to affect the results. The Employer filed timely objections to the conduct of the election.

On 27 December 1984, the Regional Director served on the parties his "Report on Objections, Order Directing Hearing and Notice of Hearing," recommending that the Employer's Objections 1 through 4 be overruled. With respect to the Employer's Objection 5 he recommended that it be overruled to the extent that the election results stand, but that a hearing be held for the limited purpose of determining whether employees in five disputed job classifications, who had voted without challenge in the professional unit, are professional employees within the meaning of Section 9(b)(1) of the Act. If the hearing officer determined that the five disputed job classifications were composed of professional employees, he was to recommend to the Board that certifications of representative issue in units A and B as they appear in the parties' election stipulation agreement. If the hearing officer determined that any or all disputed classifications were composed of nonprofessional employees, he was to recommend to the Board that the classifications be removed from unit B and placed in unit A and that the Board issue certifications of representative in favor of the Petitioner in the clarified units. The Employer filed timely exceptions to the Regional Director's report and the Petitioner filed an answering brief.

The Board has reviewed the Regional Director's report in light of the exceptions and briefs. For the reasons stated below, the Board reverses the Regional Director's findings and recommendations with respect to the Employer's Objection 5, and remands the case to him for a hearing on the Employer's Objection 2.

1. With respect to the Employer's Objection 5, the stipulated units between the parties were composed of the following employees:

> UNIT A: All full-time, regular part-time and per diem nonprofessional employees including, but not limited to, individuals employed in the job classifications listed on Appendix 2 attached. [Omitted from publication.]
>
> EXCLUDED: All professional employees, casual employees, confidential employees, managerial employees, guards and supervisors as defined in the Act.
>
> UNIT B: All full-time, regular part-time and per diem professional employees, including but not limited to, individuals employed in the job classifications listed on Appendix 1 attached. [Omitted from publication.]
>
> EXCLUDED: All nonprofessional employees, casual employees, confidential employees, managerial employees, guards and supervisors as defined in the Act.

The Employer contends that stipulated unit B is an inappropriate unit because it contains five job classifications of nonprofessional employees (i.e., respiratory therapist, respiratory therapist technician, registered respiratory therapist, student respiratory therapist, and medical photographer), contrary to the mandatory provisions of Section 9(b)(1) of the Act which prohibit the inclusion of professional employees in a unit of nonprofessional employees absent their vote in favor of such inclusion.[1] The Employer further contends that a post-election unit clarification by the Board by which any disputed nonprofessional employee in unit B would be placed in unit A is an impermissible restructuring of the stipulated units. The Employer argues, therefore, that the Regional Director's approval of the parties' election stipulation must be revoked because it does not conform to the facts of the case, conflicts with Board policy, and violates Section 9(b)(1) of the Act.

[1] Sec 9(b) of the Act states that "the Board shall not (1) decide that any unit is appropriate . . . if such unit includes both professional employees and employees who are not professional employees, unless a majority of such professional employees vote for inclusion in such unit"

We agree with the Regional Director that the parties' election stipulation appears on its face to be in accord with both established Board policy and the Act and that it provides for the necessary procedures to ensure that the statutory mandate of Section 9(b)(1) of the Act is obeyed. We, therefore, disagree with his conclusion to hold a hearing as to the professional status of the five classifications now disputed by the Employer. In his discussion the Regional Director noted that the Employer, for no apparent reason, chose to raise the issue regarding the disputed nonprofessional employees for the first time through its objections, having failed either to express its concerns to the Regional Director before the election or to avail itself of the challenge procedure at the election. Nevertheless, the Regional Director concluded that the best procedure was to hold a hearing to determine the professional status of the five disputed classifications and, thereafter, to clarify the stipulated units by removing from professional unit B any employees found to be nonprofessionals and placing them in nonprofessional unit A.

It is settled Board policy to accept stipulations from the parties as to composition of the unit, unless such stipulations are contrary either to the statutory provisions of the Act, or established Board policy.[2]

We find the parties' election stipulation in the instant case binding on the parties as to the placement of the five disputed classifications. Thus, as found by the Regional Director, the stipulation on its face is neither contrary to Board policy nor violative of Section 9(b)(1) of the Act.[3] Pursuant to the statutory mandate of Section 9(b)(1) of the Act, the election agreement safeguarded the statutory rights of professional employees by providing for a *Sonotone* election[4] in which professional employees voted on whether they desired to be included in a unit of nonprofessional employees.

While the Regional Director relied on *Valley View Hospital*, 252 NLRB 1146 (1980), and the Board's unpublished decision in *Gelco Courier Services*, Case 21–RD–1842 (Feb. 15, 1984), as support for overturning the election stipulation, we find those cases inapposite. In *Valley View*, the Regional Director recognized that the unit included registered nurses, who as professional employees normally would be entitled under Section 9(b)(1) of the Act to vote on a separate ballot as to their wish to be included in a unit with nonprofessional employees. Nevertheless, in view of the stipulation of the parties, the Regional Director found the unit to be appropriate for the purposes of collective bargaining. The Board disagreed. It determined that registered nurses had improperly been included in a unit of nonprofessionals without their consent, as the election stipulation, unsupported by any testimony, was, on its face, contrary to the statutory provisions of Section 9(b)(1) of the Act. *Gelco* is also unavailing here, for in *Gelco* the Board did not deal with the question of whether the Regional Director acted properly in sua sponte overturning the parties' election stipulation. Rather, it only addressed the issue of whether certain drivers are statutory guards within the meaning of Section 9(b)(1) of the Act.

The instant case is most similar to *Prior Aviation Service*, supra at footnote 3, wherein the Board overruled objections alleging that the parties' election agreement had improperly included in the unit a relative of the employer in violation of Section 2(3) of the Act and a supervisor in violation of Section 2(11). As in the instant case, neither party raised the issue of the inclusion of the alleged relative and supervisor either at the preelection conference or at the election by means of the challenged ballot procedure. The Board found that, under these circumstances, the objections were impermissible postelection challenges. Here, as there, there are no circumstances which warrant our departure from the Board's practice to "honor concessions made in the interest of expeditious handling of representation cases, even though there may be some question about including certain employees in the unit, or excluding them from it, were the matter litigated."[5] To the contrary, a decision by the Board to reject the parties' election stipulation and to set the election aside here would conflict with our policy of encouraging consent election agreements, and would, without the showing of a valid reason, allow the parties a mechanism for voiding an unwanted election result.[6]

Accordingly, the Employer's Objection 5 is overruled.

2. In Objection 2 the Employer alleges, in substance, that one of the Petitioner's observers engaged in extensive campaigning in the polling area during the balloting. According to the Employer,

[2] *SCM Corp*, 270 NLRB No 119 (May 24, 1984), *Tribune Co*, 190 NLRB 398 (1971)

[3] In reviewing the five classifications in dispute, we find nothing on their face to indicate that they are nonprofessional Moreover, there was no evidence adduced during the investigation that would indicate that the employees in the five disputed job classifications were nonprofessional employees or performed duties different from those implied in their job classifications *Prior Aviation Service*. 220 NLRB 460 (1975), *Penn Truck Painting & Lettering Corp*, 215 NLRB 843 (1974), *Eck Miller Transportation Corp*, 211 NLRB 251 (1974)

[4] *Sonotone Corp*, 90 NLRB 1236 (1950)

[5] *Pyper Construction Co*, 177 NLRB 707, 708 (1969), *Stanley Aviation Corp*, 112 NLRB 461 (1955)

[6] *NLRB v A. J. Tower Co*, 329 U S 324 (1946)

the observer in a consistently loud tone of voice repeatedly engaged in personal conversations with voters, made comments such as "she's for us" in referring to voters, questioned many voters as to their identification, told voters that they could not wear antiunion buttons, directed voters as to which voting line they should stand in and, in at least one instance, yelled at a voter who was at a table the observer was not assigned to observe. The Employer argues that the observer's behavior was particularly disruptive because it took place repeatedly while employees were within the voting area waiting to cast their ballots, and that its cumulative effect gave the impression that the observer was serving a special authoritative function at the election, thereby suggesting that the Petitioner and not the Board was conducting the election.

The Regional Director found that there was insufficient evidence that the observer for the Petitioner engaged in prolonged conversation with voters and that the questions or statements by the observer were for the most part related to her duties as an observer. He concluded that the observer's statement to one or two voters that they could not wear campaign buttons was quickly corrected by the Board agent and did not warrant setting the election aside. Accordingly, the Regional Director recommended that Employer's Objection 2 be overruled.

Contrary to the Regional Director, we find that the evidence revealed during the investigation is sufficient to warrant a hearing on the Employer's Objection 2. Thus, the Employer has presented allegations of behavior by the Petitioner's observer, which, if proven, may have had the potential for distracting voters and gaining an unfair advantage for the Petitioner in violation of the Board's directives in *Milchem, Inc.*, 170 NLRB 362 (1968). Furthermore, the Employer's allegations show that the observer's behavior may have had the added impact of suggesting that it was the Petitioner and not the Board conducting the election. Such behavior, if proven, might indeed have destroyed the laboratory conditions necessary to a free and fair election.

In our view the evidence presented with respect to the Employer's Objection 2 raises substantial and material issues warranting a hearing on whether the alleged conduct occurred and its possible impact on the election. Accordingly, we shall order a hearing on the Employer's Objection 2.

ORDER

It is ordered that a hearing be held before a duly designated hearing officer for the purpose of receiving evidence to resolve the issues raised with respect to the Employer's Objection 2.

IT IS FURTHER ORDERED that the hearing officer designated for the purpose of conducting the hearing shall prepare, issue, and serve on the parties a report containing resolutions of the credibility of witnesses, findings of fact, and recommendations to the Board as to the disposition of the objections. Within 10 days from the date of issuance of the report, either party may file with the Board in Washington, D.C., an original and seven copies of exceptions to the report. Immediately upon the filing of exceptions, the party filing them shall serve a copy on the other party, and shall file a copy with the Regional Director. If no exceptions are filed thereto, the Board will adopt the recommendations of the hearing officer.

IT IS FURTHER ORDERED that the above-entitled matter is referred to the Regional Director for Region 31 for the purpose of arranging a hearing and that the Regional Director is authorized to issue notice of the hearing.

MEMBER DENNIS, concurring in part and dissenting in part.

I agree that the parties' stipulation on its face is not contrary to the Act or Board policy, and therefore a hearing on Objection 5 is not necessary. I do not agree, however, that Objection 2 raises issues warranting a hearing, essentially for the reasons the Regional Director stated.