

St. Francis Hospital, Inc. and St. Francis Federation of Nurses and Health Professionals, affiliated with the Wisconsin Federation of Nurses and Health Professionals, affiliated with the American Federation of Teachers, AFL-CIO, Petitioner. Case 30-UC-230

4 February 1987

DECISION ON REVIEW AND ORDER

BY MEMBERS JOHANSEN, BABSON, AND
STEPHENS

On 19 August 1985 the Acting Regional Director for Region 30 of the National Labor Relations Board issued a decision and order clarifying unit in this proceeding. In his decision, the Acting Regional Director concluded that the unit should be clarified to include registered nurses who are employed in the Employer's Internal Float Pool (IFP). Thereafter, in accord with Section 102.67 of the Board's Rules and Regulations, the Employer filed a timely request for review of the Acting Regional Director's decision, and the Union filed a statement in opposition. The Employer contended, *inter alia*, that the IFP registered nurses are not an accretion to the existing unit; that a unit clarification procedure is inappropriate to add approximately 100 employees to a unit of 240 employees; and that the Union had agreed to exclude IFP registered nurses from the unit by agreeing to certain unit-description language in the parties' collective-bargaining agreement. The Union contended that the IFP nurses are included in the unit as regular part-time registered nurses, that it never has agreed to exclude these nurses from the unit, and that the inclusion of the IFP nurses in the unit is consistent with the agreement's unit-description language and consistent with the Board's unit description in its 1979 direction of election. On 10 February 1986 the Board granted the Employer's request for review with respect to whether accretion is proper in light of the unit description in the parties' collective-bargaining agreement.

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

The Board has reviewed the entire record in this case and makes the following findings.

1. The Employer, a Wisconsin corporation, provides acute health care services at its hospital located in Milwaukee, Wisconsin. The parties stipulated that the Employer is engaged in interstate commerce and that during the past calendar year, a representative period, the Employer derived gross revenues in excess of \$250,000; and during the same period of time purchased and received goods

valued in excess of \$50,000 directly from points located outside the State of Wisconsin. The parties also stipulated that the Petitioner is a labor organization within the meaning of the Act.

On these facts, we find that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

2. Pursuant to the Board's Decision and Order in *St. Francis Hospital*, 263 NLRB 834 (1982), *enfd.* 729 F.2d 844 (D.C. Cir. 1984), the Union became the exclusive collective-bargaining representative of the employees in the following unit.¹

All full-time and regular part-time registered nurses employed by the Employer including graduate nurses, infection control coordinator, utilization review coordinator, home care coordinator, diabetes center nurses, certified registered nurse anesthetists and staff development coordinators, excluding guards and supervisors as defined in the Act, and all other employees.²

The parties began bargaining in 1985 for their first collective-bargaining agreement.³ During negotiations, a dispute arose concerning the inclusion of the IFP registered nurses in the unit. The Employer took the position that the IFP nurses "work only as called and needed" and that they therefore were not included in the unit; the Union took the position that they were "regular part-time" employees and were included. The parties each set out their respective positions in writing in March in an exchange of letters. The Union's letter indicated that "our agreement to the wording of the NLRB certification in no way should be interpreted as an agreement to any Hospital position that those employees are excluded from the unit."⁴

¹ The Union did not receive a majority of the valid ballots cast in an election conducted on 26 October 1979. The Board, however, determined in *St. Francis Hospital*, *supra* at 836-837, that the unfair labor practices committed by the Employer were such "that a bargaining order, rather than another election would best protect employee sentiment as indicated by the authorization cards."

² At the time of the 1979 election, the Employer employed full-time and part-time registered nurses in a float pool, which differed in certain respects, not material here, from the present IFP, which was instituted in 1982 and which comprises part-time registered nurses and other classifications not at issue. The part-time nurses employed in the float pool in existence in 1979 were eligible to vote in the election. The Employer contends that its present IFP differs from its earlier float pool, however, the only difference explicated with respect to the registered nurses is that the earlier float pool included both full-time and part-time registered nurses. The present IFP no longer includes full-time registered nurses, but we note that both pools included part-time registered nurses.

³ Hereafter, all dates refer to 1985 unless noted otherwise.

⁴ It is clear from the context of the letter that the reference to the "NLRB certification" refers to the contract's language setting out the bargaining unit.

The parties continued bargaining and thereafter reached agreement on 10 April; the agreement, however, was not executed until 10 May. In the interim, the parties discussed their respective positions regarding the dispute about the unit placement of the IFP nurses. The Employer's vice president of personnel McCormick testified that the Employer then considered not signing the agreement because of the Union's adherence to the position that the IFP nurses were included in the unit. Following advice of counsel, however, the Employer on 10 May did execute the agreement. The Union filed the unit clarification petition on 27 June.

Section 1.01 of the parties' agreement lists classifications of employees in the bargaining unit and is consistent with the unit description set out in the Board's Decision and Order of 1982 noted above. Section 1.01 specifically states, as did the Board's earlier Decision and Order, that the unit includes "all full-time and regular part-time registered nurses." Section 2.03 of the agreement, however, defines a "regular part-time" employee as being "an employee who is normally scheduled to work 40 hours or more but less than 80 hours in a two-week pay period." As noted earlier, the Employer argues that by agreeing to the language of section 2.03, the Union has agreed to the exclusion of the IFP nurses from the unit. In this regard, the Employer notes that the IFP nurses are not regular part-time registered nurses as that term is defined in the collective-bargaining agreement.⁵

The Board generally declines to clarify bargaining units midway in the term of an existing collective-bargaining agreement that clearly defines the bargaining unit. *Wallace-Murray Corp.*, 192 NLRB 1090 (1971). To do otherwise, the Board has held, would be unnecessarily disruptive of an established bargaining relationship. *San Jose Mercury & San Jose News*, 200 NLRB 105 (1972); *Wallace-Murray*, above. In some limited circumstances, however, the Board finds the interests of stability are better served by entertaining a unit-clarification petition during the term of a contract. Thus, where the parties cannot agree on whether a disputed classification should be included in the unit but do not wish to press this issue at the expense of reaching an agreement, the Board will entertain a petition filed shortly after the contract is executed, absent an in-

dication that the petitioner abandoned its request in exchange for some concession in negotiations. *WNYS-TV (WIXT)*, 239 NLRB 170 (1978); *Massey-Ferguson, Inc.*, 202 NLRB 193 (1973).

Based on substantial record evidence establishing that the Union did not waive the inclusion of the IFP registered nurses in the unit when it agreed to the contract, we disagree with the Employer's contention that the contract language noted above now precludes their inclusion in the unit through a unit clarification petition. In this regard, we note that the Union advised Employer during negotiations that it considered the IFP nurses to be regular part-time employees included in the unit. The Union preserved its position in its March letter to the Employer. Moreover, it is clear that the Union did not abandon its position but reiterated during discussions with the Employer prior to the agreement's execution that, in its view, the IFP nurses were included under the contract. The testimony of the Employer's vice president McCormick establishes that the Employer itself did not believe that the Union, in agreeing to the contract language, also agreed to the exclusion of these nurses from the unit. In fact, the Employer, very much aware of the continuing dispute with the Union over the issue, considered not executing the agreement because of the Union's position. It is thus clear that the parties signed the agreement despite their acknowledged disagreement over this matter. Moreover, the Union filed the instant petition shortly after the agreement was executed. Accordingly, and since the record is devoid of any evidence that the Union at any time abandoned its position in exchange for bargaining concessions, we find that the Petitioner's decision to execute the agreement does not preclude finding that the IFP registered nurses are in the unit. *WYNS-TV*, above; *Massey Ferguson*, above.

We note, furthermore, that section 1.01 of the agreement describes the unit as including, inter alia, "regular part-time registered nurses" and, in this respect, is identical to the unit description in the earlier representation case and in the Board's subsequent bargaining order.⁶ As noted above, the part-time registered nurses in the float pool voted in the election. As also noted above, the Employer has not shown that the current IFP nurses differ in any material respect from the nurses employed in the earlier float pool. While section 2.03 of the agreement defines "regular part-time" employees in a fashion which would, by implication, exclude the

⁵ The IFP nurses average fewer hours than those specified for "regular part-time" employees in sec. 2.03. They are assigned their work hours by the Employer's assistant director of nurses based on their submission to her of a monthly calendar indicating their availability for work. The IFP nurses are required to work at least four 8-hour shifts per month; however, on average, they work about 2 days a week. According to the Employer's rules and regulations for the IFP, nurses will be terminated if they should cancel accepted, prescheduled assignments three times within a 6-month period.

⁶ It is clear that the IFP nurses meet the Board's standard for "regular part-time" registered nurses as set forth in the unit description in the 1979 election. *Newton-Wellesley Hospital*, 219 NLRB 699, 703 (1975)

IFP nurses, this section, which does not refer to IFP nurses, does not expressly exclude them, and the Union expressly and continuously declined to agree that the contract required their exclusion. In this light, the import of section 2.03 is unclear. Thus, as distinguished from *Consolidated Papers v. NLRB*, 670 F.2d 754 (7th Cir. 1982), relied on by the Employer, it cannot be said that the Union agreed to contract language which clearly modifies the bargaining unit to exclude the IFP registered nurses. We find that the clarification question may be properly considered and that the IFP registered nurses are included in the unit by the terms of the unit description.⁷ We find moreover that the IFP registered nurses have a sufficient community of interest with the other employees to warrant their inclusion in the unit under accretion principles.⁸

The record shows that the Employer's assistant director of nursing hires, schedules, and disciplines the IFP registered nurses. The Employer's other registered nurses are hired and disciplined by their respective unit nurse managers. The IFP nurses report to a unit nurse manager or supervisor, who assigns them their duties, while other registered nurses have regular unit assignments. Both groups of nurses perform nursing duties in generally the same nursing units under the same on-unit clinical supervision. Both groups fill out timecards and wear St. Francis ID tags. Both groups undergo a similar orientation, but the IFP orientation is generally shorter. The IFP nurses' wage rate (12.38 per hour) is generally higher than that of the other nurses, which ranges from \$9.20 to \$12.99 per

hour. Other than a cafeteria discount, the IFP nurses do not receive any of the fringe benefits received by the other registered nurses. The IFP nurses are not formally evaluated and they receive wage increases when there is a general wage adjustment for the Employer's unrepresented employees. The other registered nurses are evaluated annually, and their evaluations affect their pay rates.

There have been transfers between the IFP and the regular staff of registered nurses; however, a transfer requires termination from the former position with no carryover of seniority. IFP nurses can fill in for the other registered nurses with the Employer's approval. As noted earlier, the IFP nurses have flexibility in scheduling their working days in that their hours are scheduled based on their submission of a calendar showing their availability; however, of the mandatory four shifts per month which IFP nurses are required to work, two must be weekend shifts, and IFP nurses must work two holidays per year. Moreover, IFP nurses who cancel accepted prescheduled assignments three times within a 6-month period will be terminated from the IFP.

Based on the above, we find that the IFP registered nurses share a substantial community of interest with the Employer's full-time and other part-time registered nurses and that it is appropriate that they be included in the unit. We particularly note that the IFP nurses perform the same nursing duties in the same nursing units alongside the Employer's other registered nurses. While the IFP nurses do not share the same fringe benefits and they have a degree of flexibility in setting their hours, we find that this does not detract from the substantial community of interest they share with the other registered nurses. *Milwaukee Childrens Hospital Assn.*, 255 NLRB 1009, 1014 (1981).

Accordingly, we shall clarify the unit to include the registered nurses in the Internal Float Pool.⁹ The following constitutes a unit appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time registered nurses employed by the Hospital including graduate nurses, infection control coordinator, utilization review coordinator (now called DRG Coordinator), home care coordinator, diabetes center nurses, certified registered nurse anesthetists, staff development coordina-

⁷ As further distinguished from *Consolidated Papers*, we also note the absence of any other considerations which would warrant dismissal of the petition. Thus, the petition was filed shortly after the execution of the agreement, not midterm; and as the parties were bargaining for their first agreement, they have not "historically" excluded the IFP nurses from the unit. Thus, our entertaining of the petition will not disrupt the parties' bargaining relationship. We further note that in *Consolidated Papers*, the court specifically noted that there, unlike here, the facts did not fall within the exception to *Wallace-Murray* established in *WNYS-TV and Massey-Ferguson*, as discussed above.

⁸ The Acting Regional Director, in concluding that the unit should be clarified to include the IFP registered nurses inappropriately applied the "disparity of interests" test set out in *St. Francis Hospital*, 271 NLRB 948 (1984). We note that the disparity-of-interests test is applicable when determining the scope of the unit (i.e., which job classification should be placed in the unit), not, as in the instant case, when determining whether specific groups of employees fall within the unit scope which has already been determined. We do note, however, that there may be some circumstances in which a unit clarification case may raise the unit proliferation concerns addressed in *St. Francis* and, in that event, the disparity-of-interests test properly would be applied. Member Johansen finds no need to address this possibility.

Because Member Stephens believes that unit clarification determinations can sometimes implicate the same unit proliferation concerns that unit scope determinations do, he does not agree that the "disparity of interest" test applies only in original determinations of unit scope. His reservation on this point does not, however, preclude his agreement with the result in this case. Where, as here, a particular group of employees is found to possess a community of interest with the other employees in the unit concerned, it would follow a fortiori that they should be included in that unit if a disparity-of-interests test were to be applied.

⁹ Contrary to the Employer's contention that it is inappropriate to accrete some 90 to 100 employees to an existing unit of approximately 240 employees, neither the number nor the ratio of employees to the existing unit, in itself, precludes their accretion. See, e.g., *Southwestern Bell Telephone Co.*, 254 NLRB 451 (1981); *Public Service Co. of New Hampshire*, 190 NLRB 350 (1971).

tors and registered nurses in the Internal Float Pool; excluding guards and supervisors as defined in the Act, and all other employees.

ORDER

It is ordered that the petition for unit clarification is granted and that the unit is clarified to include individuals classified as registered nurses in the Internal Float Pool.