

**The Baltimore Sun Company and Baltimore Newspaper Graphic Communications Union, Local 31, GCIU. Case 5-UC-264**

September 29, 1989

**DECISION ON REVIEW AND ORDER**

**BY CHAIRMAN STEPHENS AND MEMBERS  
CRACRAFT AND DEVANEY**

On May 11, 1988, the Regional Director for Region 5 issued a Decision and Order dismissing the Employer's petition for unit clarification. Thereafter, in accordance with Section 102.67 of the Board's Rules and Regulations, the Employer filed a timely request for review alleging that the Regional Director erred in finding that the Employer's petition was untimely filed and that the Employer did not reserve its right to go to the Board regarding the seven contested positions when it agreed to the new contract with the Union. The Employer also contends that the Regional Director erred by failing to make findings concerning the supervisory status of the seven positions that the Employer seeks to exclude from the unit.<sup>1</sup> By telegraphic order dated August 9, 1988, the Board granted review.

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

The Board had considered the entire record in this case with respect to the issues under review and makes the following findings.

The Employer is a Maryland corporation engaged in the publication and distribution of a daily and Sunday newspaper. The predecessor to the Union was certified in 1945 as the exclusive collective-bargaining agent of the following unit of employees:

[A]ll employees, of the Employer, in the pressroom, including foremen, pressmen in charge, tension men, oilers, floormen, fly boys, baler men, paperhandlers and helpers and all employees classified as machinits [sic] and machinist helpers in the machine room adjacent to the pressroom, including the machinist foreman, but excluding the electricians, porters, clerical workers, and superintendents.

The Employer and the Union are parties to a collective-bargaining agreement effective May 1, 1987, to April 30, 1990. The Employer filed its unit clarification petition on September 17, 1987. Thus,

<sup>1</sup> The seven positions that the Employer seeks to clarify are assistant superintendent of operations (day), assistant superintendent of operations (night), assistant superintendent (machine shop), maintenance foreman, paper warehouse foreman, operations foreman (day), and operations foreman (night)

there is no dispute that it was filed during the term of the contract. Although the Employer acknowledges that, absent certain limited circumstances, the Board will not consider unit clarification petitions filed midway during the term of a contract that clearly defines the bargaining unit,<sup>2</sup> it argues that such circumstances exist here and that this case falls within the exception of *St. Francis Hospital*, 282 NLRB 950 (1987).<sup>3</sup> In this regard, the Employer contends that the Regional Director erred in finding that the Employer did not reserve its right to go to the Board prior to the execution of the contract and in finding that it did not file its petition within the time period indicated by *St. Francis Hospital*. For the reasons set forth below, we find merit in the Employer's contentions.

The Employer and the Union commenced bargaining over a new contract on February 11, 1987.<sup>4</sup> At the first session, the Union proposed to delete section 4(f)(2) of the existing contract from the new agreement.<sup>5</sup> On March 23, 1987, the Employer and the Union met a second time. At this session, the Employer proposed to exclude several positions, including the ones in dispute, from the bargaining unit. It is undisputed that when the Employer made its proposal, it informed the Union "that if we are not able to negotiate these exclusions we are going to the Board . . . to file a unit clarification petition." At the fourth negotiating session, on May 26, 1987, the Employer modified its proposal to exclude only the seven positions at issue here, but rejected the Union's counterproposal that the excluded employees would not perform bargaining unit work. The last negotiating session took place over 2 days, May 30 and 31, 1987, and resulted in a new collective-bargaining agreement. At this last session, the Union offered to agree to the exclusion of some of the contested classifications in exchange for specific concessions. The Employer, however, rejected the Union's proposal as too expensive. The Employer contends that at this time it specifically told the Union that it was reserving its right to take the matter to the Board while the Union contends that the Employer stated

<sup>2</sup> *Wallace-Murray Corp.*, 192 NLRB 1090 (1971).

<sup>3</sup> In *St. Francis*, supra at 951, the Board stated.

[W]here 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 indication that the petitioner abandoned its request in exchange for some concession in negotiations

<sup>4</sup> On February 2, 1987, the Employer filed a UC petition seeking to exclude 33 employees, including the seven classifications at issue here, from the collective-bargaining unit. The Employer withdrew its petition around the time of the first bargaining session

<sup>5</sup> Sec. 4(f)(2) provided for the exclusion of the superintendent from the provisions of the contract. Thus, the Union's proposal would include the superintendent in the bargaining unit

it was "dropping" its proposal to exclude the seven disputed classifications. The parties agreed to incorporate the language of section 4(f)(2) from the former agreement into the present agreement and the issue of the seven disputed positions was not raised again until the Employer filed its petition in the instant proceeding.

As noted supra, the Regional Director dismissed the petition on the grounds that no "independent evidence" existed that the Employer reserved for the Board the determination of the unit issue. In reaching this conclusion, the Regional Director noted that the parties included the prior provision excluding the superintendent from the bargaining unit in the new agreement, apparently inferring from this that the Employer had abandoned its position as to the seven disputed positions. In addition, the Regional Director found that the Employer's petition was untimely because it was not filed until over 3 months after the parties reached agreement on a new contract.

As found by the Regional Director, the Employer reserved its right to go to the Board regarding the unit issue at the second negotiating session of March 23, 1987. The evidence does not show that the Employer ever withdrew from this position or renounced its reservation in exchange for any concession from the Union. We find that the possibility that the Employer may not have renewed its reservation at the last bargaining session is not sufficient to establish that the Employer had abandoned its right to go to the Board.<sup>6</sup> Furthermore, we find merit in the Employer's contention that the Regional Director erred in inferring, from the inclusion of section 4(f)(2) of the previous contract in the new contract, that the Employer withdrew its reservation of its right to go to the Board. Thus, the inclusion of that provision in the present agreement may be read to signify only that the Employer did not want the unit issue to delay agreement on a new contract.

Finally, the Regional Director relied on his finding that there was no "independent evidence" that the Employer reserved its right to go to the Board. We note, however, that *St. Francis Hospital*, supra, does not impose such a requirement.<sup>7</sup>

As to the timeliness of the petition, we note first that in finding the petition untimely, the Regional Director took as the relevant time period the period between May 31, 1987, the date agreement was reached on the new contract, and September 17, 1987, the date the petition was filed, a period of more than 3 months. As the Employer points out in its request for review, however, the relevant time period in *St. Francis Hospital*, supra, was that between the execution of the contract and the filing of the petition. We agree with the Employer that these are the relevant dates in the present inquiry.

The parties here signed the new agreement on June 30, 1987. Thus, the issue is whether the petition here, filed 79 days after the contract was executed, was timely filed. We conclude that it was. In *St. Francis Hospital*, the Board held that it would entertain a petition under "limited circumstances" (within which we have already determined the present petition fits) if it is filed "shortly after" the contract was executed. In such situations, the Board noted, the interests of stability are better served by entertaining the petition. Although the petition in *St. Francis Hospital* was filed about 7 weeks after execution of the contract and the present one was filed about 11 weeks after execution of the contract, *St. Francis Hospital* should not be construed as setting a precise or outer time limit for the filing of such petitions. Thus, we conclude that the period of 11 weeks also falls within the "shortly after" limitation set forth in *St. Francis Hospital*. Hence, we agree with the Employer that in light of all the circumstances, including the lack of evidence that the Union was disadvantaged by the delay, the petition here was timely filed. Accordingly, we reinstate the petition and shall remand the case to the Regional Director for a determination of whether the seven positions that the Employer seeks to exclude from the unit are supervisory or managerial.

#### ORDER

It is ordered that this proceeding be remanded to the Regional Director for Region 5 for further appropriate action consistent herewith.

<sup>6</sup> Although the Union contends that the Employer informed it that it was "dropping" its proposal to exclude the classifications, such a statement, if made, would not necessarily be inconsistent with its March 23 statement that, if it could not get the desired exclusions in negotiations, it would go to the Board.

<sup>7</sup> Even assuming that the term "independent evidence" is relevant, it is ambiguous in this context. To the extent that it may refer to documentary

evidence, however, we cannot agree that in these circumstances, where the parties agree that the Employer reserved its right to go to the Board at the March 23 negotiating session, that the absence of documentary evidence to that effect nullifies that right