

Before the
NATIONAL LABOR RELATIONS BOARD

International Falls Memorial Hospital Association
d/b/a Rainy Lake Medical Center,

Employer,

and

Minnesota Council 65, AFSCME, AFL-CIO,

Union, Petitioner.

**CASES: 18-RC-17705
18-RC-17706**

**MEMORANDUM IN
SUPPORT OF THE
EMPLOYER'S
EXCEPTIONS TO THE
REGIONAL
DIRECTOR'S
REPORT AND
RECOMMENDATION
ON OBJECTIONS**

Eight days after executing stipulated election agreements in Cases 18-RC-17705 and 18-RC-17706, the Employer, Rainy Lake Medical Center (the "Employer") was startled to find that the National Labor Relations Board (the "Board") Agent and later, the Petitioner, AFSCME Council 65 (the "Petitioner") sought to modify the bargain the Employer thought it had struck in these stipulations. During the discussions leading up to the stipulations, the Petitioner never indicated its position changed from the Petition in Case 18-RC-17706¹ where it sought a unit of consisting only of licensed practical nurses ("LPNs"). In fact, the Board Agent assured the Employer on the day it entered into the stipulations, that the language of Stipulation-17706's unit description did not demonstrate a change in the Petitioner's position. The Board, and apparently the Petitioner, now argue that they were aware of the broader interpretation of Stipulation-17706 at all times.

¹ For ease of reference, the proposed and executed stipulated election agreements in Cases 18-RC-17705 and 17706 will be referred to as Stipulation-17705 and Stipulation-17706, respectively. Similarly, the Petitions in Cases 18-RC-17705 and 17706 will be referred to as Petition-17705 and Petition-17706, respectively.

The Employer contended through its motion to withdraw, objections, and now argues through these exceptions, that the Petitioner did not intend in Stipulation-17706 to stipulate to a unit with scope beyond the LPNs it originally sought to represent. Moreover, even if the Petitioner did so intend when it entered into Stipulation-17706, misrepresentations of the Petitioner's position make Stipulation-17706 voidable. Further, the plain language of Stipulation-17706 is ambiguous and should be properly interpreted in light of the parties' actual agreement and extrinsic evidence. Because the Employer's execution of Stipulation-17705 was linked to and dependent on the agreement in Stipulation-17706, it is likewise voidable. Finally, regardless of the outcome of the dispute about Stipulation-17706, the election in Case 18-RC-17706 should be set aside because of the inadvertent inclusion of a professional employee in a non-professional unit without that professional's consent.

For the reasons set forth below, the Employer should be allowed to immediately withdraw from or void Stipulations-17705 and 17706 based on Exceptions 1-2 and further proceedings should be ordered in these cases. In the alternative, the Board should more narrowly interpret Stipulation-17706 consistent with the actual intent of the parties as discussed in Exception 3. Regardless of the determination with respect to Exceptions 1-3, Exception 4 requires that the election in Case 18-RC-17706 be vacated and further proceedings ordered. At minimum, a hearing should be ordered to obtain the evidence necessary to determine critical fact questions outlined in the Employer's Objections and Exceptions.

FACTUAL BACKGROUND

The Employer operates a hospital and clinic in International Falls, Minnesota. In 2009 the hospital acquired the clinic and created a new entity, Rainy Lake Medical Center. Prior to the Petitions at issue in these cases, certain employees at the Employer's hospital have been

represented by the Petitioner and others by the Minnesota Nurses Association (“MNA”). The Petitioner currently represents a bargaining unit consisting “of all registered Licensed Practical Nurses employed in the Hospital.” The Petitioner also represents a unit commonly referred to as the “technical and support” unit at the hospital. (*See* Petition-17705, Stipulation-17705.)² Despite this reference to a “technical” unit, the Petitioner does not actually represent most technical employees (as defined by the Board) at the Employer’s hospital. Rather, MNA represents a unit of technical employees at the hospital consisting “of all full-time, regular part-time, and casual Medical Technologists, Medical Laboratory Technicians, Clinical Laboratory Assistants, Radiological Technologists, Radiology Operators and Phlebotomists employed by the employer at its [hospital.]” Employees at the Employer’s clinic location have never been organized.

The Petitioner filed two Petitions on April 27, 2010³ seeking to represent certain clinic employees. Petition-17705 sought “an election for unorganized clinic technical and support employees to join the existing technical and support unit of [the Employer’s] hospital.” (Petition-17705, Regional Director’s Report and Recommendation on Objections (hereinafter “RR”), Ex. 2.) The Petition-17706 sought “an election for unorganized clinic LPNs to join the existing hospital LPN bargaining unit.” (Petition-17706, RR., Ex. 3.)

After the Petitions were filed, Board representatives encouraged the parties to enter into

² The Unit Description for this unit simply refers to certain job descriptions, none of which would likely be considered “technical” employees under the National Labor Relations Act (the “Act”), including: Housekeeping, Maintenance Engineer, Maintenance Technician, Accounting Assistant, Payroll/Accounts Payable Specialist, Medical Records Clerk, Medical Records Practitioner (ART), Lead Registrar, Medical Records Transcriptionist, Medical Records Clerk/Transcriptionist, Materials Assistant/Clerk, Nursing Assistant (CNA), Ancillary Dept Aide, Ward Clerk/Secretary, Admitting Registrar, Billing Insurance Clerk, Collector, Central Scheduling/Secretary-Intermediate, and Pharmacy Technician.

³ All dates herein referred are from 2010 unless otherwise indicated.

stipulated election agreements related to the two Petitions. The Employer's counsel and the Petitioner engaged in discussions regarding proposed stipulations, with the Board Agent acting as intermediary. It was the Employer's expressed position throughout this process that it would only stipulate to an election in either case if an agreement was reached with respect to stipulations in both cases.

Throughout the negotiation related to the proposed stipulations, the Petitioner never indicated that it sought a different unit than the one indicated in Petition-17706. On May 17, Board staff forwarded drafts of what became the final stipulated election agreements. (RR., Ex. 11 (May 17 10:22 AM email).) The draft Stipulation-17705 stated that its appropriate unit consisted of:

All full-time and regular part-time nonprofessional employees employed by the Employer at its International Falls clinic facility; ***excluding all professional and technical employees***, and guards and supervisors as defined in the Act.

If a majority of valid ballots are cast for Minnesota Council 65, AFSCME, AFL-CIO (the Union) they will be taken to have indicated the employees' desire to be ***included in the existing "technical and support" unit*** at the Employer's International Falls hospital facility, currently represented by the Union. If a majority of ballots are not cast for representation, they will be taken to have indicated the employees' desire to remain unrepresented.

(RR., Ex. 5 (emphasis added).) Meanwhile, the proposed Stipulation-17706, for the first time, included a description of the bargaining unit at issue that differed from Petition-17706. The draft Stipulation-17706 described the collective bargaining unit at issue as:

All full-time and regular part-time technical employees employed by the Employer at its International Falls clinic facility; excluding professional and nonprofessional employees, and guards and supervisors as defined in the Act.

If a majority of valid ballots are cast for Minnesota Council 65, AFSCME, AFL-CIO (the Union) they will be taken to have indicated the employees' desire to be included in the existing "LPN" unit at the Employer's International Falls hospital facility, currently represented by the Union. If a majority of ballots are not cast for representation, they will be taken to have indicated the employees' desire to remain unrepresented.

(RR., Ex. 5.) The Board Agent explained this new language in his email transmitting the proposed stipulations. He stated “some of the revisions in these agreements is a result of me telling the Union what ‘technical,’ ‘nonprofessional,’ etc. means under the Act, *not any change of its position.*” (RR., Ex. 11 (May 17 10:22 AM email) (emphasis added).) Acting on this expression of the stipulations’ meanings and assurance of the Petitioner’s position, the Employer executed the proposed stipulations on May 17. (RR., Exs. 4-5.)

On May 24, the Employer sent the Board Agent Excelsior lists related to the two upcoming elections. (RR., Ex. 11 (May 24 8:52 AM email).) In response to the list provided with respect to Petition-17706, the Board Agent indicated, for the first time, that he interpreted Stipulation-17706 to include more than just licensed practical nurses (“LPNs”)—the group Petitioner had petitioned to represent. (RR., Ex. 11 (May 25 9:44 AM email).) The Employer’s counsel immediately expressed concern regarding this interpretation. (RR., Ex. 11 (May 25 9:10 AM and following email).)

On June 3, the Employer’s counsel filed a motion to withdraw from the stipulations citing contract law and unusual circumstances sufficient to make withdrawal appropriate. (RR., Ex. 6.) This motion was denied by the Regional Director without briefing or receiving evidence on June 7. (RR., Ex. 7.) Under protest, the Employer submitted revised Excelsior lists. Unknown to the Employer at the time, the revised Excelsior list with respect to Case 18-RC-17706 included a professional employee, Kris Helleloid. Due to a cataloguing error by the Employer, Ms. Helleloid, a medical technologist with the title of Medical Laboratory Scientist, was listed as a Clinic Medical Lab Technician on the Employer’s Excelsior list and was not identified as a professional employee.

On June 14, the elections were held in cases 18-RC-17705 and 17706. During voting the Employer's Election Observer intended to challenge a number of voter's eligibility, but upon the Observer's first attempted challenge the Board agent conducting the election refused to accept the challenge and stated to the Observer that he had informed the Employer's counsel that challenges based on the non-LPN status of employees in Case 17706 would not be accepted. The Board agent's statements in this context were intimidating to the Observer and caused the Observer not to exercise intended challenges. The Observer understood she would not be allowed to make any challenges on the basis of non-LPN status, and did not do so, despite the fact that other voters appeared at the polls whose eligibility the Observer had intended to challenge.

On June 21, the Employer timely filed six objections to the June 14 election and on June 28, the Employer filed its description of witness testimony and other evidence it intended to offer at a hearing in support of its objections. Without receiving evidence, on June 30, the Regional Director filed his Report and Recommendations on Objections, rejecting the Employer's objections and recommending that the appropriate Certifications of Representative issue. (RR., p. 13.)

ARGUMENT

The Employer submits the following arguments in support of its Exceptions to the Regional Director's Report and Recommendation:

Exception 1: The Regional Director Erred In Both His Findings and Conclusions Resulting in Rejection of the Employer's Objection 1. The Board Should Order That the Employer is Allowed to Withdraw from the Stipulations.

The Employer's Objection 1 contended that the Regional Director erred in refusing to allow the Employer to withdraw from the Election Stipulations in these cases. The Employer

now takes exception to the Regional Director's findings and recommendations that his denial of that motion should be upheld. In fact the Regional Director's report and recommendation as to this Objection do not provide an adequate defense of his decision to deny the motion, and Employer excepts to the purported basis on which he attempts to do so.

As indicated by the Board Agent brokering the stipulations, upon entering into Stipulation-17706 both the Petitioner and the Employer believed that this stipulation's unit description represented the unit that the Petitioner sought in its Petition, albeit with more precise language added by the Board Agent. This is illustrated by the Board Agent's message indicating that the Petitioner had not changed its position with respect to the unit it sought. (RR, Ex. 11 (May 17 10:22 AM email).) Petitioner and the Employer only agreed to an appropriate unit of LPNs. If Stipulation-17706's unit description did not, in fact, represent the Employer's and the Petitioner's agreement on May 17 as the Regional Director now contends, there was a mutual mistake making Stipulation-17706, as well as Stipulation-17705, voidable.

Stipulated election agreements, like Stipulation-17706:

are 'contracts,' binding on the parties that executed them. Because they are considered contracts, election agreements may be set aside only in limited circumstances. Additionally, parties may withdraw from approved agreements, but only upon an affirmative showing of unusual circumstances, or upon agreement of all parties.

T & L Leasing, 18 NLRB 324, 325 (1995) (citing *Barceloneta Shoe Corp.*, 171 NLRB 1333, 1343 (1968); *M.W. Breman Steel Co.*, 115 NLRB 247 (1956)); *Sunnyvale Medical Clinic*, 241 NLRB 1156 (1979)); *see also Gala Food Processing*, 310 NLRB 1193 (1993) (discussing interpretation of ambiguous stipulations); *KCRA-TV*, 271 NLRB 1288, 1289 (1984) (holding that a stipulation should be set aside in light of material breach).

The law of contracts is clear:

[A party seeking to reform] a contract under the doctrine of mutual mistake must allege four elements:

- (1) the parties to the contract were mistaken in their belief regarding a fact;
- (2) that mistaken belief constituted a basic assumption underlying the contract;
- (3) the mistake had a material effect on the bargain; and
- (4) the contract did not put the risk of the mistake on the party seeking reformation.

Atlas Corp. v. United States, 895 F.2d 745, 750 (Fed. Cir. 1990) (citing Restatement (Second) of Contracts §§ 151-152, 155). Further, when a written agreement “in whole or in part fails to express the agreement because of a mistake of both parties as to the contents or effect of the writing, the court may at the request of a party reform the writing to express the agreement”⁴

Restatement (Second) of Contracts § 155.

In addition to contract principles:

The Regional Director retains authority to revoke his/her approval of an election agreement for cause at any time before the election. For example, ***if after review of the Excelsior list of eligible voters*** (Sec. 11312.1), ***the number or nature of potential challenges raised is so extensive as to cause serious questions concerning the intent or understanding of the parties***, such challenges may be the basis for revoking approval.

National Labor Relations Board R – Casehandling Manual (II) (hereinafter, “Casehandling Manual”) § 11095 (emphasis added); *See also Sunnyvale Medical Clinic*, 241 NLRB 1156 (1979) (allowing employer to withdraw based on intervenor’s creation of confusion regarding stipulation’s meaning).

⁴ Section 155 continues, “except to the extent that rights of third parties such as good faith purchasers for value will be unfairly affected.” *Id.* § 155. There are no good faith purchasers or other third parties directly involved with the stipulations at issue in this case.

The Regional Director rejected the Employer's mutual mistake argument with minimal analysis stating that no "unusual circumstances or . . . agreement of the parties" existed and the Employer had not "established that the Stipulated Election Agreements are ambiguous; that they contravene established labor policy; or that any other circumstances warrant" allowing the Employer to withdraw from the stipulations. (RR, p. 5-6.) The Regional Director had earlier rejected the Employer's motion to withdraw from the Stipulation, largely relying on the Petitioner's self-serving, post-election statement that it "clearly understood the meaning of the unit descriptions in the Stipulated Election Agreements." (RR, Ex. 7. p. 2.) In his order rejecting the Employer's motion, the Regional Director failed to consider evidence of the most material of the Petitioner's representations, those made *at the time it entered into the stipulations*. The Regional Director refused to hold a hearing to accept testimony and evidence on the key questions before him.

In the Report and Recommendation, the Regional Director discussed only some of the evidence the Employer indicated it would submit. While not discussed with respect to his consideration of Objection 1, the Regional Director did note—in considering Objection 2—the Board Agent's May 17 statement regarding the Petitioner's position made contemporaneously with the Employer's entering into Stipulation-17706. The Regional Director's analysis attempts to extricate the Board from the awkward position created by the Board Agent's statement regarding the Petitioner's position—that it had not changed from the Petition—by citing to statements made by the Employer's former counsel on May 25. (See RR, pp. 7-8.) However, these later statements were made by the Employer's counsel only *after* he was informed that the Board and the Petitioner were, on May 25, interpreting Stipulation-17706 to include more employees than the Employer or its counsel had before heard or agreed to. (See RR, Ex. 11.)

The Regional Director ignores the clearest expression of the Employer's understanding of the meaning of Stipulation-17706 made after May 17. On May 24, seven days after entering into Stipulation 17706, the Employer submitted its Excelsior list and included only names of clinic LPNs.⁵ Only after this submission did the Employer find out what the Board and the Petitioner now sought to represent more than LPNs in Case 17706. The Regional Director cites statements of the Employer's counsel supposedly expressing the Employer's prior knowledge of the broader interpretation of Stipulation-17706. However, none of the cited statements demonstrate that the Employer knew at the of its stipulations of the Board's and the Petitioner's new, broader interpretation of Stipulation-17706.

The evidence is clear and would be clearer still were the Employer's offered testimony and evidence accepted by the Regional Director. Until it entered into Stipulation-17706, the Employer was told that the Petitioner sought to represent "unorganized clinic LPNs" (Petition-17706.) On the day the Employer entered into Stipulation-17706, the Board Agent changed the language of the stipulation but indicated that this language did not represent any change in the Petitioner's position. (RR, Ex. 11.) Therefore, on May 17 the Petitioner and the Employer's "bargain" was only to stipulate to an election for clinic LPNs, not the broader group of employees later sought by the Petitioner and the Board.

All four elements of mutual mistake are present in this matter, (1) despite the Petitioner's post-election statements, on May 17 both parties believed that the unit description in Stipulation-17706 was the same as the unit described in Petition-17706; (2) the unit description is obviously

⁵ The Employer's position is further corroborated by the substance of the agreement alleged to have been made. It is illogical to believe that the Employer would agree to bargain with the Petitioner regarding certain non-LPN technical employees and with MNA regarding the same non-LPN technical employees at facilities so close together as these.

a basic assumption underlying the stipulation; (3) similarly, a mistake in the unit description had a material effect on the parties' bargain; and (4) the stipulation did not put the risk of the mistake on the Employer. This "scrivener's error" is a classic mutual mistake where the written agreement (at least as now interpreted by the Board) does not reflect the parties' actual agreement.⁶ As discussed below, if the Petitioner was not truthful regarding its position, then Objection 2 should have been sustained. Regardless, the Employer should have been allowed to withdraw from Stipulation-17706.

Even if strict contract principles are not applied, there are circumstances warranting withdrawal because other "unusual circumstances" are present and because, similarly, there are circumstances sufficient to warrant an exercise of the Regional Director's discretion as outlined in Section 11095 of the Casehandling Manual. When the Employer submitted an Excelsior list containing names of only clinic LPNs, it should have "cause[d] serious questions concerning the intent or understanding of the parties" Casehandling Manual § 11095. Further, all of the facts of the matter demonstrate its unusual circumstances and confusion warranting withdrawal. *See, e.g., Sunnyvale Medical Clinic*, 241 NLRB 1156 (1979). These facts include (1) the obvious miscommunication relating to the formation of Stipulation-17706; (2) the ambiguity and confusion created by the parties and the Board's use of the term "technical" in *both* stipulations; (3) the confusion created by two different unions representing identical positions at different

⁶ Illustration 7 to Restatement Section 155 is particularly analogous to this matter:

A agrees to sell and B to buy the American patent rights on an invention as to which A holds American, British and French patent rights. In reducing their agreement to writing, the parties use the term "all patent rights," meaning all American rights. A court will interpret the writing in the light of the circumstances to cover only the American and not the British or French patent rights, and it will not reform the writing.

Restatement (Second) Contracts § 155, Illustration 7.

portions of the Employer's single facility; and (4) the Employer's clear misunderstanding upon its submission of its initial Excelsior list.

Finally, the Employer expressly executed Stipulation-17705 as part of its agreement regarding the Stipulation-17706. The Employer would not have agreed to either Stipulation if not for the problems that infected Stipulation-17706. Accordingly, the Employer should have been allowed to withdraw from both Stipulations in these cases and should have been granted an opportunity to be heard on the questions of whether the bargaining units in the Notices of Election are appropriate units for bargaining because of the unusual circumstances under which the Stipulations came to be made.

The Employer should be allowed to immediately withdraw from or void Stipulations-17705 and 17706. At minimum, a hearing is necessary to obtain the evidence necessary to determine the critical fact questions regarding the parties' understandings and communications in forming Stipulation-17706.

Exception 2: The Regional Director Erred In Both His Findings and Conclusions Resulting in Rejection of the Employer's Objection 2. The Board Should Order That Stipulation-17706 Is Voidable Because of Material Misrepresentations Made by the Board and the Petitioner.

Even if only the Employer believed that Stipulation-17706's unit description only encompassed clinic LPN's, this mistaken belief was caused by the Petitioner's intentional or unintentional misrepresentations and/or a misstatement made on behalf of the Petitioner by the Board Agent.⁷ Stipulation-17706 is therefore voidable by the Employer based on contract law principles.

⁷ The Employer does not believe the Petitioner's current, self-serving statements reflect the Petitioner's position on May 17. The Employer desires to cross-examine witnesses, including those for the Petitioner, at a hearing.

The Employer based its motion to withdraw from Stipulations-17706 and 17705 on allegations of mutual mistake, because the Petitioner had not indicated that on or before May 17 the Petitioner believed that Stipulation-17706 unit description encompassed a broader unit than clinic LPNs. The Employer added Objection 2 when it became apparent in the Regional Director's June 7 order that the Petitioner was contending that its position on May 17 was different than had been communicated to the Employer.

As discussed above, stipulated election agreements are contracts and are interpreted by the Board. Either intentional or unintentional misrepresentations may make a contract voidable.

[A] mistake of one party at the time a contract was made as to a basic assumption on which he made the contract has a material effect on the agreed exchange of performances that is adverse to him, the contract is voidable by him if he does not bear the risk of the mistake . . . , and . . . ***the other party had reason to know of the mistake or his fault caused the mistake.***

Restatement (Second) of Contracts. § 153 (emphasis added). Similarly, it is clear that:

(1) If a party's manifestation of assent is induced by either a fraudulent or a material misrepresentation by the other party upon which the recipient is justified in relying, the contract is voidable by the recipient.

(2) ***If a party's manifestation of assent is induced by either a fraudulent or a material misrepresentation by one who is not a party to the transaction upon which the recipient is justified in relying, the contract is voidable by the recipient,*** unless the other party to the transaction in good faith and without reason to know of the misrepresentation either gives value or relies materially on the transaction.

Id. § 164 (emphasis added).

As discussed above, the Board Agent brokered the agreement between the Employer and the Petitioner that resulted in Stipulation-17706. The Petition-17706 stated that it sought an election “for the unorganized clinic LPN’s to join the existing hospital LPN bargaining unit.” (Petition-17706.) After the Board Agent substituted the unit description in the final Stipulation for the Petition’s description, the Board Agent stated that “the revision in these agreements

[Stipulations-17705 and 17706] is a result of [the Board Agent] telling the Union what ‘technical,’ ‘nonprofessional,’ etc. means under the Act, *not any change of its position.*” (RR, Ex. 11 May 17 (emphasis added).) This statement, made by the Board on behalf of the Petitioner, is not consistent with the Regional Director’s June 7, order and other statements from the Board made after the Employer entered into Stipulation-17706. The evidence will demonstrate that these and related statements constitute material misrepresentations that induced the Employer to enter into Stipulation-17706.

The material misrepresentations in this case make Stipulation-17706 voidable at the Employer’s option. *See, e.g.*, Restatement (Second) of Contracts. §§ 153, 164. At a minimum, a hearing should be conducted to obtain the evidence necessary to determine this critical fact question.

Exception 3: The Regional Director Erred In Both His Findings and Conclusions Resulting in Rejection of the Employer’s Objection 3. The Board Should Find That Stipulation-17706 Is Ambiguous and Order That It Be Given Its Appropriate Meaning in Light of the Parties’ Intent.

Stipulation-17706 is ambiguous in context and should be given its reasonable meaning in light of appropriate extrinsic evidence of the parties’ understandings or, in the alternative, a unit determination hearing should be conducted to determine appropriate units in these cases.

As discussed above, stipulated election agreements are contracts and are interpreted by the Board. As such:

“If [a] stipulation is ambiguous . . . as in the case of any contract, the primary question is determining what the parties meant. Thus, the Board has authority to interpret the agreement according to what it finds to have been the intent of the parties.” And, in interpreting ambiguous contractual language, it is, of course, well established that resort to extrinsic evidence is appropriate.

Gala Food Processing, 310 NLRB 1193 (1993) (quoting *NLRB v. Barker Steel Co.*, 800 F.2d 284, 286 (1st Cir. 1986)). The words of the stipulation “are only evidence of the[parties’] intent;

the words are not themselves the parties' intent. The Board may not, in the guise of enforcing the 'plain meaning' of the contractual language, erect an inflexible presumption on an issue turning on the parties' *actual* intent." *Local Union 1395, IBEW v. NLRB*, 797 F.2d 1027, 1036 (D.C. Cir. 1986) (emphasis in original). Where ambiguity creates the opportunity for one or more interpretations of a stipulation, the Board may construe the stipulation in light of the parties' later actions demonstrating their reliance on one of the contested interpretations. *See Gala Food Processing*, 310 NLRB 1193 (1993).

As noted in the Regional Director's June 7, opinion rejecting the Employer's motion to withdraw from Stipulation-17706, that stipulation's description of the appropriate bargaining unit states that the voters include "[a]ll full-time and regular part-time technical employees employed by the Employer at its International Falls clinic facility" However, the Regional Director ignored the context of the use of the word "technical" in these circumstances. Specifically, for example, the Regional Director's very next paragraph in Stipulation-17706, states that if a majority of ballots favor the Petitioner the votes "will be taken to have indicated the employees' desire to be included in the existing 'LPN' unit at the Employer's International Falls hospital Facility, currently represented by" the Petitioner. The existing "LPN" unit at Employer's hospital facility consists of "all registered Licensed Practical Nurses employed in [Employer's] Hospital." In light of the existing Hospital LPN contract's unit description, Stipulation-17706's unit description is not unambiguous and its meaning in context cannot be reconciled without extrinsic evidence. The critical extrinsic evidence here will be the Employer's testimony, the Petitioner's April 27, Petition in which the Petitioner indicates it seeks an election "for the unorganized clinic LPN's to join the existing hospital LPN bargaining

unit” and the Employer’s actions in reliance on its interpretation of Stipulation-17706, its initial Excelsior list consisting only of LPNs. (Petition-17706.)

The ambiguity in Stipulation-17706 is further demonstrated by the language of Stipulation-17705. That stipulation’s unit description states that voting employees include “[a]ll full-time and regular part-time nonprofessional employees employed [at the clinic] excluding all professional and technical employees . . . as defined in the Act.” However, Stipulation-17705 then states that these non-technical employees will join “the existing ‘technical and support’ unit at the Employer’s . . . hospital” (Stipulation-17705.) There is clear ambiguity in the parties’ use of the term “technical.” When Stipulation-17706 is read in light of the Employer’s understanding of Stipulation-17706 and the Petition as well as Stipulation-17705, Stipulation-17706 does not include the non-LPN employees the Petitioner now seeks to include in the unit in Case 18-RC-17706. If Stipulation-17706 is not voidable, its ambiguity requires a hearing to receive the evidence necessary to interpret the Stipulation-17706.

Exception 4: The Regional Director Erred In Both His Findings and Conclusions Resulting in Rejection of the Employer’s Objection 5. The Board Should Order the Election in Case 17706 Set Aside Because A Medical Technologist, a Professional Employee, Was Inadvertently Included in the Case 17706 Unit, Contravening Clear Board Law.

Under the Act, there is a rebuttable presumption that medical technologists are professional employees. *See, e.g., Pontiac Osteopathic Hospital*, 327 NLRB 1172 (1999); *Group Health Assn.*, 317 NLRB 238 (1995). In Case 17706, due to a cataloguing error by the Employer, a medical technologist with the title of Medical Laboratory Scientist, a professional employee, was listed as a Clinic Medical Lab Technician on the Employer’s Excelsior list. Inadvertently, this individual was not identified as a professional employee for the purpose of the

election. Thus this professional was improperly included without her consent in a unit that includes employees who are not professionals.

The Regional Director contends in his Report and Recommendation that the Employer “is estopped from relying on its own misconduct as objectionable.” (RR, p. 12 (citing *B.J. Titan Service Co.*, 296 NLRB 668 (1989)).) The Regional Director further contended that because “the medical technologist’s vote was not determinative” in the election the Employer and the Petitioner should agree to remove the position from the unit or the Employer may “avail itself of the Board’s unit clarification procedure.” (*Id.*)

Importantly, there is no evidence or even a substantive allegation of any “misconduct” by the employer. The only authority cited by the Regional Director, *B.J. Titan Service*, has no relation to the matter at hand. In *B.J. Titan Service*, the Board rejected the Employer’s argument that an election should be set aside based on a member of management’s anti-union threats. 296 NLRB at 668 (1989). There is no evidence of such misconduct in this matter. Rather, it is uncontested that the Employer simply made a mistake. More importantly, the Regional Director ignores Board authority directly on point.

Section 9(b)(1) of the National Labor Relations Act (the “Act”) provides that the “Board shall not . . . 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.” 29 U.S.C. § 159(b)(1). Even if the Employer had stipulated to the inclusion of a medical technologists in the unit,⁸ Stipulation-17706 cannot override the requirements of Section 9(b)(1) in this case. *See Valley View Hospital*, 252 NLRB 1146 (1980). Regardless of any stipulation, including a professional

⁸ As discussed above, the Employer maintains that it did not so stipulate.

employee in a unit with non-professionals without the professional's consent cannot "be remedied simply by modifying the unit." *Sunrise, Inc.*, 282 NLRB 252 (1986). Rather, such an error requires the Board to "set aside the election, vacate the stipulation, and remand th[e] proceeding to the Regional Director to resume processing of the Petition by either assisting the parties to reach agreement on a new stipulation or, in the absence of a new stipulation, conducting a hearing on the unit issue." *Id.* (citing *Valley View Hospital*, 252 NLRB at 1146). Because of the employer's inadvertent error, the election in Case 18-RC-17706 should be set aside and processed in accordance with the clear authority in *Sunrise* and *Valley View*.

Exception 5: The Regional Director Erred In Both His Findings and Conclusions Resulting in Rejection of the Employer's Objection 6. The Board Should Find That the Units in the Stipulations Are Not Appropriate Units for Bargaining. When the Stipulations Are Vacated Unit Determination Hearings Should Follow.

The Employer did not agree to the Regional Director's interpretation of Stipulation-17706 because such a stipulated unit would not be appropriate for bargaining. Such a unit contravenes the Board's fundamental community of interest test. In particular and among other reasons, the history of bargaining in these units has not been correctly taken into account or even been given consideration by the Board. For example, in Stipulation-17706, the unit includes positions the occupants of which who work at the Hospital (rather than the Clinic) are represented by a different union (MNA).

Further, including non-LPN employees in the Hospital LPN unit creates significant potential for conflict between employees who do not share a community of interest. LPN's at the Clinic and the Hospital have different duties and work environments such that there is a discontinuity, rather than a community, of interest between Clinic and Hospital LPN's. This is even more true for non-LPN employees that the Petitioner now seeks to include in the Hospital LPN unit. Had the Employer understood in advance the Board's interpretation of the scope of

the unit in Stipulation-17706, the Employer would never have entered into the Stipulations and, we believe, would have been afforded a hearing on the unit issues before the Director issued directions of elections in these cases.

The Employer understands that where an acute care hospital is combined with a non-acute care health care facility, the two facilities may be treated as a single facility under the Act. *See Child's Hospital*, 307 NLRB 90 (1992); *Kirksville College*, 274 NLRB 794 (1985). Such treatment in these particular cases, however, has the effect of splitting employees with the same job titles (other than their respective facility designations) and similar job descriptions into separate units represented by different unions. Regardless of any stipulations to the contrary, this scenario cannot produce long-term stability in labor relations and constitutes an unnecessary proliferation of units, which is contrary to Board policy in health care.

CONCLUSION

There are serious concerns regarding the formation and meaning of the stipulations at issue in Cases 17705 and 17706. These concerns result in a corresponding need for additional proceedings in these cases. The foundation upon which Stipulation 17706 was built is fundamentally faulty because of a mutual mistake of both the Employer and the Petitioner and because of a mistake of the Employer caused by the Petitioner's and the Board Agent's misrepresentations. Therefore, based on Board and contract law the Employer should be allowed to immediately withdraw from, or to void, Stipulations-17705 and 17706. If Stipulation-17706 is not voidable and the Employer is not allowed to withdraw from it, nevertheless it is ambiguous and requires extrinsic evidence to determine its reasonable meaning in context and the parties' intent.

