CHS, Inc. *and* Local 638, International Brotherhood of Teamsters, Petitioner. Case 18–UC–422

August 27, 2010

DECISION ON REVIEW AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBERS SCHAUMBER AND PEARCE

On August 27, 2009, the Regional Director for Region 18 issued a Decision and Order, dismissing the Petitioner's unit clarification petition on the ground that the drivers whom the Petitioner sought to accrete to the collective-bargaining unit had been historically excluded from that unit. Thereafter, in accordance with Section 102.67 of the Board's Rules and Regulations, the Petitioner filed a timely request for review. The Petitioner contends that the drivers in question have not been historically excluded from the unit, and that they should be accreted to the unit.

On March 8, 2010, the Board granted the Petitioner's request for review.[1] Thereafter, the Petitioner filed a brief on review.

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

Having carefully considered the entire record in this proceeding, we conclude, contrary to the Regional Director, that the unit clarification petition should be processed, and thus we remand the case to the Regional Director to address the merits of the accretion issue.

I. FACTS

The Employer, which hauls commodities to cooperatives, bulk plants, and farms, maintains terminals in Grand Forks and Minot, North Dakota. The Employer also has trucks located in Tioga, Carrington, Dickinson, and Fargo, North Dakota.

Petitioner Teamsters Local 638 and another union—Teamsters Local 120–are parties to a single collective-bargaining agreement with the Employer, effective by its terms from November 16, 2005 to November 15, 2010. The recognition clause of that agreement states that the employees "covered by this Agreement shall include any and all the employees of the Employer employed at the terminals indicated in Article 1." Article 1 defines those employees as "all tank drivers and mechanics employed by the Employer at terminals located in North Dakota." Despite the wording of the agreement, the drivers and mechanics at all the locations mentioned above--and not just the locations with terminals--fall within the single collective-bargaining unit. Petitioner Teamsters Local 638 has jurisdiction over unit employees west of Highway 281. There are approximately 17 drivers and 4 mechanics covered by the collective-bargaining agreement west of Highway 281 (in Minot, Tioga, Carrington, and Dickinson). Teamsters Local 120 has jurisdiction over unit employees east of Highway 281. There are approximately 23 drivers and 3 mechanics covered by the collective-bargaining agreement east of Highway 281 (in Grand Forks and Fargo).

In June 2008, the Employer acquired New Rockford-Fessenden Co-op Transport Association (NRF), a nonunion competitor, and hired 14 NRF drivers but none of its mechanics. NRF did not have any terminals. The NRF drivers operated out of several locations including Fargo, but not in the terminal cities of Grand Forks or Minot. At the time of the hearing, there were 10 former NRF drivers or replacements in Petitioner Local 638's jurisdiction (west of Highway 281) and 4 in Local 120's jurisdiction (east of Highway 281).

When the Employer acquired NRF, the Employer's bargaining unit drivers drove "white trucks," and the NRF drivers drove "green trucks." After the Employer acquired NRF, Petitioner Local 638 asked the Employer what its intentions were regarding NRF. The Employer said it would keep NRF as a totally separate entity. The Petitioner filed a grievance claiming that the recognition clause in the parties' collective-bargaining agreement covered the NRF green truckdrivers.

Shortly thereafter, Petitioner Local 638 withdrew its grievance after determining that it could not move forward on the basis of the contract's recognition clause in view of the Employer's intention to treat NRF as a separate entity.

About June 26, 2008, Petitioner Local 638 held a three-way conference call with Teamsters Local 120 and the Employer. The Employer reiterated that it would operate NRF separately and that the NRF green truckdrivers and the Employer's white truckdrivers would each keep their own customer accounts. The Employer also assured both Unions that the Employer would not take any work from one operation and give it to the other.

On June 26 or 27, 2008, Petitioner Local 638, Local 120, and the Employer entered into a Memorandum of Understanding (MOU). The MOU provided that "[w]hen either the Union or Non Union work board has all of its employees working, the extra work can be hauled temporar[ily] and [on a]non precedent setting [basis] by the board that is not busy without the receiving board claim-

[1] Having carefully reconsidered the matter, the panel reaffirms the earlier decision to grant review.

ing the extra work as their permanent work." Accordingly, although the MOU did not mention the NRF drivers by name, the parties understood that the NRF green truckdrivers could make deliveries to the white truckdrivers' customers if the white truckdrivers were all working (and vice versa).

Between June and December 2008, Petitioner Local 638 received complaints from the unionized drivers that the Employer was awarding the green truckdrivers highly desirable runs that the Employer's white truckdrivers historically had performed. Petitioner Local 638 complained to the Employer that the NRF green truckdrivers were performing unit work while the unit drivers were sitting at home, and that the Union did not think that the Employer was really keeping the two companies separate. In December or January, Petitioner Local 638 concluded that some of the NRF green truckdrivers were actually driving the Employer's white trucks and that the Employer had awarded the green truckdrivers a raise.

On January 28, 2009, Petitioner Local 638, Local 120, and the Employer met, and Local 638 complained that, among other things, the NRF green truckdrivers were driving routes formerly driven by the Employer's unionized white truckdrivers, and the green truckdrivers were driving white trucks. The Employer said that it would fix any dispatch problems, but insisted that the MOU arrangement was actually benefiting the unions more than the Employer. Petitioner Local 638 asked the Employer to explain in writing how it was beneficial, but the Employer failed to keep its promise to do so. At the hearing, the parties disagreed about whether Petitioner Local 638 stated at the meeting that it would not continue the MOU. Local 120 did not indicate its position regarding renewing the MOU, because the white truckdrivers in its jurisdiction (i.e., at Grand Forks) had not been hurt the way Local 638's drivers supposedly had been at Minot.

In March 2009, Petitioner Local 638 learned from a newly-hired green truck driver that he was being supervised by the same person who supervised the white truckdrivers. Petitioner Local 638 also concluded that the Employer had not replaced the five white truckdrivers who had left the Employer's employ, but was hiring new green truck rivers.

In an April 20, 2009 letter to the Employer, Petitioner Local 638 complained that the Employer was paying the green truckdrivers higher rates than the white truckdrivers, and that the Employer could not "expect the Union to continue to verbally honor the [MOU] dated June 26, 2008, if [the employer] continues to pay the green truckdrivers more than the white truckdrivers." Petitioner Local 638's letter continued:

> Please note, as of Friday, April 20, 2009, Teamsters Local 638 will no longer recognize the MOU signed June, 2008 which actually expired December 31, 2008. Local 638 wants all work that was being performed by the bargaining unit prior to the MOU to be returned to the bargaining unit. Also, any work performed by the green trucks or Transwood out of Mandan that is protected by the Collective-Bargaining Agreement will be time slipped and if not paid will be grieved and arbitrated if necessary.

Petitioner Local 638 then filed its unit clarification petition seeking to accrete the former NRF-green truckdrivers.

Although the Regional Director did not reach the merits of the accretion issue, he found that the same company official handles discipline for both the unionized white truckdrivers and the NRF green truckdrivers. There was some testimony that some of the same officials can dispatch both sets of drivers. There was also testimony from both sets of drivers that green truckdrivers have performed work normally performed by the unionized white truckdrivers. However, the Regional Director found that there was no evidence that the Employer was violating the MOU by making those assignments, because, according to the Regional Director, there was no evidence that all the unionized drivers were not already busy at the time the NRF green truckdrivers did the unit work. The Employer conceded that it was possible that one green truck driver was handling white truck driver accounts "40% of the time." The Employer conceded that a number of white truckdrivers had left since June 2008 and had not been replaced, but that it had replaced each of the NRF drivers who had departed. The Employer asserted that because white trucks cost less than green trucks, the Company was replacing green trucks with white trucks. In response to Petitioner Local 638's complaints that it would not be able to monitor work assignments if both sets of drivers were driving the same color trucks, the Employer agreed to place an "N" on the trucks driven by the NRF green drivers. Green truckdrivers apparently began wearing the same uniforms as the white truckdrivers in October 2008. The Employer's mechanics service all the trucks--whether white or green. At the hearing, the Employer insisted that it was continuing to operate the two companies separately by, for example, training the two sets of drivers separately.

II. ANALYSIS

The Regional Director dismissed the petition without addressing the merits of the accretion issue because he concluded that the NRF drivers were historically ex-

cluded from the unit. Contrary to the Regional Director, we find that the facts do not demonstrate that the NRF drivers have been historically excluded from the unit so as to preclude the processing of the unit clarification petition.

As part of its authority to police collective-bargaining units, the Board may accrete employees to an existing unit without holding an election. *See Westinghouse Electric Corp. v. NLRB*, 440 F.2d 7, 11 (2d Cir. 1971). As the term itself implies, "[u]nit clarification . . . is appropriate for resolving ambiguities concerning the unit placement of individuals who, for example, come within a newly established classification of disputed unit placement or, within an existing classification which has undergone recent, substantial changes in [its] duties and responsibilities . . . so as to create a real doubt as to whether the individuals in such classification continue to fall within the category--excluded or included-- that they occupied in the past." *Union Electric Co.*, 217 NLRB 666, 667 (1975). Where new groups of employees have come into existence after a union's recognition or certification or during the term of a contract, if the new employees "have such common interests with members of [the] existing bargaining unit [such] that the new employees *would, if present earlier*, have been included in the unit or covered by the current contract, then the Board will permit accretion in furtherance of the statutory objective of promoting labor relations stability." *United Parcel Service*, 303 NLRB 326, 327 (1991)(emphasis added), *enforced*, 17 F.3d 1518 (D.C. Cir. 1994). Accord: *Frontier Telephone of Rochester, Inc.*, 344 NLRB 1270, 1271 (2005) ("The fundamental purpose of the accretion doctrine is to 'preserve industrial stability by allowing adjustments in bargaining units to conform to new industrial conditions without requiring an adversary election every time new jobs are created[.]'") (citation omitted), *enforced*, 181 Fed. Appx 85 (2d Cir. 2006).

However, because employees are accreted to an existing unit without being afforded an opportunity to vote, "the accretion doctrine's goal of promoting industrial stability places it in tension with the right of employees to freely choose their bargaining representative." *Frontier Telephone*, 344 NLRB at 1271. Accordingly, the Board follows a restrictive policy in finding accretions to existing units," *Archer Daniels Midland Co*., 333 NLRB 673, 675 (2001), and Board policy is to "permit accretion 'only when the employees sought to be added to an existing bargaining unit have little or no separate identity and share an overwhelming community of interest with the preexisting unit to which they are accreted.'" *Frontier Telephone*, supra, 344 NLRB at 1271 (citation omitted).

As pertinent here, unit clarification proceedings to accrete employees are generally not appropriate when the accretion would upset an established practice concerning the unit placement of the individuals in question. *Union Electric Co.*, 217 NLRB at 667. As the Board has explained, "No . . . accommodation of the collective-bargaining process is required or warranted . . . where the parties to a bargaining relationship have historically failed to include an existing group of employees [in] a bargaining unit." *United Parcel Service*, 303 NLRB at 327. Thus, if the classification existed at the time of the union's certification or prior to the parties' current collective-bargaining agreement, "the parties have only themselves to blame for any instability resulting from the existence of a group of employees having interests in common with unit employees but excluded from representation in the unit." Ibid. In short, "[t]he Board will not entertain a unit clarification petition [that] seek[s] to accrete a historically excluded classification into a unit, unless the classification has undergone recent, substantial changes." *Kaiser Foundation Hospitals*, 337 NLRB 1061, 1061 (2002). Accord: *Bethlehem Steel Corp.,* 329 NLRB 243, 244 (1999) ("where a position or classification has historically been excluded from . . . the unit, and there have not been recent, substantial changes that would call into question the placement of the employees in the unit, the Board generally will not entertain a petition to clarify the status of that position . . ., regardless of when in the bargaining cycle the petition is filed").

After reviewing the record, we are satisfied that the NRF drivers have not been historically excluded from the unit. No collective-bargaining agreement has ever explicitly excluded those drivers.[2] To be sure, even absent an explicit contractual exclusion, the Board will still decline to process a unit clarification petition if the classification historically has been excluded by practice—i.e., where the parties to a bargaining relationship have historically failed to include the group in the bargaining unit. But the justification for that policy—namely, that if the classification existed prior to the parties' current collective-bargaining agreement, the parties have only themselves to blame for any instability resulting from a group of employees having interests in common with the unit employees but excluded from representation—is not implicated here. After all, the Employer acquired NRF

[2] The parties' contract provides that the employees covered by the agreement include drivers and mechanics "employed by the Employer at terminals located in North Dakota." The Regional Director appears to have concluded that the NRF drivers were not employed at "terminals." But the parties agreed at the hearing, as the Regional Director noted, that the contract does indeed also cover the Employer's drivers who work at North Dakota locations where there are no terminals.

and hired the 14 NRF green truckdrivers in June 2008 during the term of a collective-bargaining agreement that was still in effect when Petitioner Local 638 filed its unit clarification petition in June 2009 and which continues in effect until November 15, 2010. In other words, because the Petitioner has not had the opportunity to negotiate a collective-bargaining agreement with the Employer since the Employer hired the NRF drivers, the Petitioner cannot be penalized by the fact that there are some drivers employed by the Employer who are covered by the collective-bargaining agreement and other drivers who are not. *See SunarHauserman*, 273 NLRB 1176, 1177 (1984) (dock auditor position created in March 1981 during term of collective-bargaining agreement has not been historically excluded, because union's first opportunity to include this position did not arise until 2 years later during the 1983 negotiations for a successor agreement); *Bethlehem Steel Corp.*, 329 NLRB at 241–242 (unit clarification petition is timely despite being filed two years after product marketing employees transferred to facility because the classifications did not exist at the facility when parties executed their current collective-bargaining agreement and had been in dispute since they came into being at the new location).[3]

In finding that the NRF drivers were historically excluded from the collective-bargaining unit, the Regional Director reasoned that Petitioner Local 638 "agreed to the exclusion" of the NRF green truckdrivers by withdrawing its grievance, entering into the MOU allowing those drivers to perform unit work so long as all the unionized white truckdrivers were busy, and failing to reserve the right to file a unit clarification petition. We disagree with the Regional Director because he failed to appreciate the significance of the sequence of events leading to the MOU and the filing of the petition here. It is uncontroverted that Petitioner Local 638 initially filed a grievance alleging that the collective-bargaining agreement *covered* the NRF green truckdrivers, an action that demonstrates that the Petitioner did not acquiesce to the exclusion of the NRF drivers. *See Bethlehem Steel Corp.*, 329 NLRB at 241 (union's filing a grievance demonstrates that union was *not* acquiescing in their exclusion). To be sure, the Petitioner then withdrew the grievance and entered into an MOU with a term of only 6 months. But, the Petitioner did that only after the Employer stated that it would run NRF as a totally separate operation. Indeed, the Regional Director found that the Petitioner withdrew the grievance "after determining that [it] could not move forward on the basis of the recognition clause in view of the Employer's intention to treat NRF as a separate entity." The Petitioner's decision was certainly defensible, because accretion is not appropriate when an employer decides to separately maintain a newly acquired operation, rather than merge it with the existing unionized operation. *See Seven-Up/Canada Dry Bottling Co*, 281 NLRB 943, 946 (1986) (as a general proposition, a separately maintained, newly acquired operation will itself constitute a separate appropriate unit, and thus will not be accreted by the Board).

In the circumstances, we simply cannot find that the Petitioner "agreed" to exclude the NRF drivers *if* the Employer did *not* run NRF as a totally separate operation. Rather, we think that the better conclusion is that the Employer knew that the Petitioner wanted to include those drivers in the unit, and was "dropping" its efforts to include them for 6 months based on the Employer's representation that the two operations would be kept separate. That conclusion is buttressed by the fact that the Petitioner filed its unit clarification after (1) the MOU expired and (2) Petitioner concluded that the Employer was not in fact running NRF as a totally separate operation.[4] The Board has excused union delays in filing unit clarification petitions when an employer has failed to comply with information requests about the positions at issue. *Cf. Westinghouse Electric Corp. v. NLRB*, 440 F.2d 7, 11–12 (2d Cir. 1971) (excusing union's delay in filing unit clarification petition because employer withheld information necessary for union to determine

[3] The three cases relied on by the Regional Director are distinguishable. There, unlike here, either the parties had negotiated collective-bargaining agreements *after* the disputed classifications had come into being but failed to include them in the unit, or the employees at issue were in existence at the time of an election, but were not included in the unit. *See Kaiser Foundation Hospitals*, 343 NLRB 57, 64 (2004) (disputed classification has been historically excluded where it has been staffed continuously for over 20 years during many contract cycles and had always been outside the unit); *United Parcel Service*, 303 NLRB 326, 327 (1991) (employees excluded for years under two successor agreements), *enforced*, 17 F.3d 1518 (D.C. Cir. 1994); *Gitano Distribution Center*, 308 NLRB 1172, 1174 (1992) (it is inappropriate to enlarge unit to include USO employees when they were in existence at time of second election, but were not included in unit).

[4] Similarly, the fact that the Petitioner failed to reserve the right to file a unit clarification petition does not demonstrate that the Petitioner was acquiescing in the exclusion of the NRF drivers *if* the Employer did *not* maintain NRF as a totally separate operation. *See Brookdale Hospital Medical Center*, 313 NLRB 592, 592 fn. 3 (1993) (the absence of an explicit reservation by union of its right to pursue the issue with the Board does not evidence a waiver of the right when it agreed to the contract, because both parties knew–by virtue of the union's letter requesting inclusion of the employees and the employer's refusal–that a dispute existed as to the placement of the therapists which was not resolved during the negotiations). The Regional Director's conclusion—that there is no evidence that the Employer violated the MOU by assigning unit work to NRF drivers when the unit drivers were available—strikes us as largely irrelevant even if true. We believe that the more significant fact is that there *is* evidence that the Employer was not keeping the operations totally separate.

whether positions should be added to unit). A fortiori, a union's delay in filing a petition should be excused if the employer has misled the union regarding its operations or classifications. Moreover, the term of the MOU was from June 26, 2008 to December 31, 2008, a mere six months, and thus "any exclusion" was relatively short-lived.[5]

In sum, based on the particular circumstances of this case, we find that the NRF drivers were not historically excluded from the collective-bargaining unit. Accordingly, we shall remand the case so that the Regional Director can determine the merits of the accretion issue.

ORDER

The Regional Director's Decision and Order is reversed. This case is remanded to the Regional Director for further appropriate action.

Dated, Washington, D.C. August 27, 2010

Wilma B. Liebman,	Chairman
Peter C. Schaumber,	Member
Mark Gaston Pearce,	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[5] The Regional Director also found that the Petitioner "did not renew its demand that the green truckdrivers be included under the collective bargaining agreement, but rather demanded that work be returned to the bargaining unit" in its April 2009 letter to the Employer. We disagree. To be sure, Petitioner stated in one sentence of that letter that it wanted all work that was being performed by the bargaining unit prior to the MOU to be returned to the bargaining unit. But, the letter did not end there. Instead, the Petitioner stated in the next sentence of the letter (emphasis added), "*Also*, any work performed by the green trucks or Transwood out of Mandan that is protected by the Collective Bargaining Agreement will be time slipped and if not paid will be grieved and arbitrated, if necessary." Given that additional language, we believe that the Petitioner was indeed asserting that the green truckdrivers' work *is* covered by the collective- bargaining agreement. Moreover, Petitioner filed a unit clarification petition seeking to include the NRF drivers in the unit.