

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

AMERICAN MEDICAL RESPONSE, INC.

Employer,

and

SERVICE EMPLOYEES
INTERNATIONAL UNION, LOCAL 1107,

Petitioner,

CASE NO. 28-UC-060436

OPPOSITION TO EMPLOYER'S REQUEST FOR REVIEW

I. INTRODUCTION

This case concerns the unit placement of seven (7) Critical Care Transport (“CCT”) paramedics employed by American Medical Response (“AMR” or “Employer”), an ambulance services company whose operational employees are emergency medical technicians (EMTs) and paramedics. The Petitioner in this case, Service Employees International Union Local 1107 (“Local 1107” or “Union”), and AMR are parties to a collective bargaining agreement with the following recognition clause:

The Employer recognizes the Union as the exclusive bargaining agent for all full-time and part-time paramedics, EMT-I's and EMT's employed by the Employer at its Las

Vegas, Nevada facility; excluding all other employees, office clerical employees, supply employees, dispatchers, special event employees, transporters, field training officers, guards and supervisors as defined under the Act.

Employer Exhibit 1, at 5.¹ This agreement, their second, became effective on April 1, 2009 after several months of bargaining [EX1, at 4, 53].

Although AMR created and opened for application the advanced, “CCT” paramedic position sometime prior to negotiations for this agreement, it never notified the Union that it was creating a new position, much less that it intended to treat the position as outside the bargaining unit. When the Union learned that AMR did not consider CCT paramedics to be part of the bargaining unit, and refused to bargain over the terms and conditions of their employment, the Union vigorously pursued inclusion of these employees in the unit, and filed multiple grievances. On June 20, 2011, after those efforts and a request for information about the CCT paramedics were rebuffed, the Union filed the instant petition.

Subsequent to a hearing on the matter and the submission of briefs, the Regional Director issued a Decision and Order (D&O) *dismissing* the Union’s petition, finding that unit clarification was unwarranted on the facts of the case. However, despite the Petitioner’s failure to achieve the relief requested, it is now *the Respondent*, AMR, that asks the Board to review the Regional Director’s Decision – the Union has not filed cross-exceptions.² In these

¹ Citations to the record will be as follows: Tr. x/y–transcript page/line; UX–Union Exhibit and EX– Employer Exhibit. Where appropriate, the exhibit number will be followed by a bates or internal page number.

² The Union has decided to pursue this matter through alternative procedural means, and on September 12, 2011 filed an unfair labor practice charge alleging that AMR’s refusal to apply the parties’ CBA to CCT paramedics, and/or its refusal to bargain over the terms and conditions of employment for CCT paramedics, violates Section 8(a)(1) and (a)(5) of the Act. *See* Exhibit A.

circumstances, where the petition has been dismissed and the Employer has accomplished its opposition, AMR has no standing to appeal and call upon the Board to review a moot issue.

Much less has the Employer provided “compelling reasons” for review, or shown either a departure from “a substantial question of law or policy” as established in Board precedent or “a substantial factual issue [that] is clearly erroneous on the record and . . . prejudicially affects the rights” of the Employer. NLRB Rules and Regulations Section 102.67©.

AMR’s attempts to draw error from the D&O hit far from the mark. As to the “bargaining waiver” argument, AMR’s Request for Review misrepresents both the facts and the law governing this case. The record establishes and the D&O found that there is no evidence that the Union notified the Employer about the implementation of the CCT paramedic “program, function, or position” prior to negotiations for the current CBA [D&O at 4]. In an effort to show that the Union *should have* known about the position at the time, the Employer on appeal adds a new factual argument that is both grossly erroneous and without any foundation in the record – to wit, that a roster provision in the 2009 CBA would have applied *retrospectively* to inform the Union of which employees AMR considered to be part of the Unit. In short, there is no factual basis to suggest that the Union knew of or had sufficient information about the creation of the CCT position to raise the issue in nearly contemporaneous bargaining.

The Employer’s legal arguments regarding “bargaining waiver” are also mistaken. Rather than “waiver,” the cases cited concern whether a unit clarification petition would upset an agreement or established practice between the union and employer. The cases cited by AMR in which a petition was dismissed on these grounds all involve situations in which the petition would have altered the unit placement of employees whose placement was previously agreed

upon by the parties, whether expressly or by longtime past practice. This is clearly not the case here. Moreover, rather than “waiver,” the doctrine cited only concerns whether a petition is *timely*; and does not dispose of the underlying question of unit inclusion.

As to that underlying issue – whether CCT paramedics are so distinct from the “paramedics” of the unit description to justify their exclusion from the bargaining unit – AMR has done little to undermine the clear record evidence showing an overwhelming similarity among the jobs of all paramedics in the company’s employ. The Regional Director’s findings in this regard are not clearly erroneous.

For these reasons, there is no basis for the Board to grant AMR’s request for review of the D&O. In the alternative, if the Board believes review is proper, for the reasons stated herein it should find that the petition should have been granted to clarify the unit to include CCT paramedics.

II. BRIEF FACTUAL SUMMARY

A. **As the Regional Director Found, and as the Employer Has Not Seriously Contested, CCT Paramedics Perform Remarkably Similar Work and Share an Overwhelming Community of Interest with Other Paramedics.**

As the record shows, and as the Regional Director’s D&O makes clear, “CCT paramedic employees perform essentially the same basic functions performed by Unit paramedics” and there is “an overwhelming community of interest between all Unit paramedics, including the CCT paramedics” [D&O at 11]. This is so for a multitude of reasons enumerated in the D&O, including the fact that just like other paramedics, CCT Paramedics are paired with EMT Intermediate employees [*id.* at 5]; are dispatched in the same way as Unit employees [*id.* at 7];

respond to the same types of calls as other paramedics the vast majority of the time [*id.* (CCT calls do not “exceed, at most, thirty percent of paramedic calls, and may be well below that for any particular CCT paramedic employee during any particular week”)]; “typically perform similar paramedic work” as other employees despite differences in certification and training [*id.*]; use “a significant amount of shared equipment” [*id.*]; lack independent discretion to use the higher training they have received on non-CCT calls [*id.* at 8]; have similar working conditions and uniforms [*id.*]; “share common supervision” [*id.*]; the same schedules [*id.*]; and the “difference in training required to move between the EMT positions [all in the unit] is greater than the training required to move from an EMT paramedic to CCT paramedic position” [*id.*].

In the argument section of its Request for Review, the Employer does not seriously dispute these characterizations, and instead spends only two paragraphs arguing that CCT paramedic is a distinct classification and highlighting the minor differences between CCT paramedics and the others that have long been included in the unit [*see* Employer’s Request for Review (ERR), at 15-16]. The Employer makes little effort to overcome the clear conclusion of the Regional Director that CCT paramedics are a type of “paramedic,” and commonly referred to by the Employer as such [*see id.* at 9-10 (“The record reflects that the Employer and Petitioner use the term ‘paramedic’ interchangeably when referring to both EMT and CCT positions.”)].

Accordingly, the Employer has failed to show that the D&O’s findings regarding the CCT position are “clearly erroneous on the record.” *See* NLRB Rules and Regulations 102.67(c)(2).

B. The Union Could Not Have Waived the Right to Bargain Over the Inclusion of CCT Paramedics Where it Had Not Been Notified of Any Dispute Regarding Their Status.

In the D&O, the Regional Director made the following findings regarding the prior bargaining history pertaining to the CCT position:

The negotiations for the current contract began in late 2008, and continued into early 2009. The parties stipulate and the record shows that the Employer and Petitioner *did not specifically bargain* over the inclusion or exclusion of employees performing CCT paramedic functions during those negotiations. The CCT paramedic function was created, and employees were recruited into the CCT paramedic program, prior to the negotiations that resulted in the current contract. *The record does not reflect the date or manner by which the Employer notified the Petitioner, if at all, about the implementation of the CCT paramedic program, function, or position.* [D&O at 4 (emphases added)].

In other words, the record did not establish that the CCT position was known to the Union prior to bargaining the most recent contract, much less that the Union was aware of the Employer's position that CCT paramedics were not part of the Unit.

The Employer does not seriously contest the above description from the D&O. However, in developing its argument that the Petitioner "waived" the right to have CCT paramedics included in the bargaining unit, the Employer makes several characterizations that are not supported by the record. Regarding the issue of notice, the Employer, for the first time in its Request for Review, attempts to argue that the Union should have known of its position regarding CCT paramedics at an earlier time because of Section 4 of Article 4 of the 2009 CBA, which states that "the Employer agrees to furnish the union with the names of all employees covered by this agreement" on a quarterly basis [CBA, EX 1, at 7]. At the hearing, AMR did not present a single employee roster that it provided to the Union, and as such, there is no factual basis to infer either that (1) said lists were in fact provided at relevant times; or (2) that individuals who had been transferred from paramedic position to CCT paramedic position were

removed from any such lists. More fatally for this argument, this provision in the 2009 CBA obviously did not apply *before* bargaining for that agreement, when the claimed waiver is alleged to have taken place. As such, it is a grossly unfounded claim, without any basis in the record, to assert that the Union failed to address the status of 10 CCT paramedics “who conspicuously disappeared from the 340 person unit roster” [ERR at 3] and that “there would have been at least 3-4 opportunities” for the Union to ascertain “in the roughly one year between the CCT Implementation and the new collective bargaining agreement, that some of its former members were no longer listed” [*id.* at 7-8].

On the contrary, and as the Regional Director found, the record does not show that the Employer gave the Union any notice of the creation of the new position nor that it intended to treat the position as outside the bargaining unit [*see* D&O at 4 (“The record does not reflect the date or manner by which the Employer notified the Petitioner, *if at all*, about the implementation of the CCT paramedic program, function, or position.” (emphasis added))]. The record evidence establishes that the first time the Union was given written notification of AMR’s position with respect to the CCT position was in a July 2, 2010 e-mail from Operations Manager Chad Henry to Union representative Alejandro “Alex” Ocampo [Tr. 149/7-8; 160/21-25; UX 1]. The two had an unresolved conversation about the issue sometime prior to this e-mail which most likely occurred after the prior CBA was executed [*See* Tr. 181/10-12 (question by Petitioner’s Counsel to Alex Ocampo: “Q. Do you believe that this occurred after the bargaining was completed, or do you not know? A. I believe it happened after.”)]. Once the Union learned of the Employer’s position, the Union vigorously contested it through the filing of grievances and ultimately the instant petition.

Aside from the lack of actual notice, the Employer has failed to show that the Union either did or could have known of the its existence of the CCT paramedic position and the Employer's position regarding the position prior to the execution of the 2009 CBA. First, the timing of hiring and precise number of the initial CCT paramedics is unclear. While two employer witnesses asserted that the position was created in April 2008 and that there were eight (8) CCT paramedics in the first year, the Employer failed to provide any documentation, or even the names, of these individuals. CCT paramedic Teresa Thao could only name three individuals then in the bargaining unit who became CCT paramedics in the first year [see Tr. 142/19 - 143/5 (testimony of Teresa Tao)].³ Ms Tao did not know whether these individuals knew that they were being treated as outside of the bargaining unit, or whether they discussed this issue with other employees [Tr. 143/6-10]. In a unit of over 300 employees that are spread out in ambulance trucks awaiting calls at different locations, there is no basis to presume that

³ The testimony of employer witness Larry Johnson, the primary witness regarding the number and timing of hiring recruits for the first CCT class, suffered from significant credibility and memory problems. Mr. Johnson has since 2005 been an employee of another company, Medic West, where the CCT position began. Mr. Johnson only joined AMR as an "extra job" in 2007 when it acquired Medic West, and admitted to confusion in separating the affairs of the two companies [see Tr. 70/20-71/4 (asked about whether reports he reviews are from AMR or Medic West: "I'm thinking in the direction of AMR. I'm kind of -- I'm trying to keep my mind on AMR and that's why, you know, I'm so busy with my departments and my direct reports, I don't want to commit myself to solid numbers because I honestly -- I depend on operations to provide numbers like that.... Q. It's hard to tell today what stuff is AMR and what stuff is Medic West? A. Sitting in front of you right now, it would be, yes. I'd have to look at pieces of paper to --"). This confusion extended to the number of initial CCT hires at AMR. Mr. Johnson provided no records regarding class enrollment, and on cross-examination, Mr. Johnson admitted that he was not sure if his prior testimony was correct that all of the eight (8) enrolled students were AMR employees [see Tr. 72/5-9 ("There was some Medic West, I believe -- again, I believe there was Medic West employees involved in that. I do know that we were wanting to get the AMR CCT team up to snuff where they could run calls. So that first class in April of '08 was primarily AMR employees. ... Q. But it might've been some Medic West of the eight, you're not totally sure how many? A. There may've been one or two in there. I'd have to double check.")].

information in the possession of few people was communicated throughout the unit or to union representatives [*see* Tr. 181/11].

In short, the Employer has not disputed the D&O's conclusion that there was no bargaining over the CCT position, and that the record fails to establish any notice by the Employer to the Petitioner of the position prior to bargaining of the CBA.

III. STANDARD OF REVIEW

NLRB Rules and Regulations Section 102.67(c) state that “the Board will grant a request for review *only where compelling reasons exist therefor....*” and “only upon one or more of the following grounds:

- (1) That a substantial question of law or policy is raised because of (I) the absence of, or (ii) a departure from, officially reported Board precedent.
- (2) That the Regional Director's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party.

....

NLRB Rules and Regulations Section 102.67(c) (emphasis added).

IV. BECAUSE THE UC PETITION WAS DENIED, THE EMPLOYER LACKS STANDING TO APPEAL AND THE REQUEST FOR REVIEW IS MOOT

The Union filed the instant petition seeking clarification of the placement of employees on June 20, 2011. In its petition, the Union explained the proposed clarification as follows:

“SEIU Local 1107 seek to clarify that Critical Care Transport (“CCT”) Paramedics are included in the unit description, which includes ‘paramedics.’” In its D&O, the Region ordered that the

petition be dismissed, ruling that there was no warrant for a clarification to “specifically include such employees” [D&O at 11].

Because the Union’s requested relief was denied, there are no “compelling reasons” for the Board to review the Regional Director’s D&O to make clearer or otherwise restate its dismissal. Having accomplished its opposition to the Union’s petition, no further relief is available to the Employer in this proceeding, even if the Board decided to review the case.

Indeed, because the Regional Director dismissed the petition and thus had no occasion to address whether the Union “waived” its right to have CCT Paramedics included in the bargaining unit, the Employer’s main grounds for its request – a departure from Board precedent regarding bargaining waiver [ERR at 1] – is unfounded. It would be a waste of administrative resources and without precedent for the Board to seek out to review an issue that has no bearing on and thus cannot affect the ultimate disposition of the case. For these reasons, the Employer lacks standing to appeal and the issue of bargaining waiver is moot.

V. IN THE ALTERNATIVE, IF THE BOARD BELIEVES IT SHOULD REVIEW THE REGION’S DECISION, IT MUST FIND THAT THE PETITION SHOULD BE GRANTED TO CLARIFY THE UNIT TO INCLUDE THE CCT PARAMEDICS

In the event the Board concludes that AMR’s request for review is proper despite Region 28’s dismissal of the UC petition, it should find that the UC petition was proper and *should have been granted*.⁴ In short, there was never an agreement or established practice between AMR and

⁴ As explained above, Local 1107 opted not to file cross-exceptions to the D&O despite its position that the UC petition should have been granted, but is instead seeking relief through an unfair labor practice charge.

Local 1107 to exclude CCT paramedics from the bargaining unit. As soon as Local 1107 learned that AMR was not applying the CBA to CCT paramedics, it protested AMR's conduct, first by filing grievances, and then by filing the instant UC petition. Hence, the present case is not controlled by the rule that "[c]larification is not appropriate . . . for upsetting an agreement of a union and employer or an established practice of such parties concerning the unit placement of various individuals." *Union Elec. Co.*, 217 NLRB 666, 667 (1975); *see also Wallace-Murray Corp.*, 192 NLRB 1090 (1971). Where, as here, there is no agreement or historical practice regarding the placement of disputed classifications, even a mid-contract UC petition is appropriate. *Bethlehem Steel I*, 329 NLRB 241 (1999).

A. The Employer Has Not Identified Any “Bargaining Waiver” Cases That Apply to This Case.

Despite framing its argument as based on an established principle of “bargaining waiver,” AMR has not cited any cases that use this language; instead the cases refer to whether the Board will clarify a petition in a manner that “upsets an agreement.” The closest the Employer comes to a waiver argument is its uncited proposition that “in order to reserve the right to file a unit clarification petition after negotiations for a contract, a party must inform the other party verbally or in writing that it plans to pursue unit clarification through a Board-filed petition” [ERR at 12]. This is a misstatement of the law. *See Brookdale Medical Center*, 313 NLRB. 592, 592 n.3 (1993) (“The absence of an explicit reservation by the Petitioner here of its right to pursue the [unit clarification] issue with the Board does not evidence a waiver of this right when it agreed to the contract.”).

Moreover, the present case is easily distinguished from the cases cited by AMR: each of the cases it cites addresses a mid-contract UC petition that would have altered the unit placement of employees whose placement was previously agreed upon by the parties, whether expressly or impliedly.⁵ In that circumstance, permitting a party to use a UC petition to change the composition of the bargaining unit would "be disruptive of a bargaining relationship voluntarily continued by the [party] when it executed the existing contract . . ." *Wallace-Murray Corp.*, 192 NLRB at 1090; *see also Consolidated Papers, Inc. v. NLRB*, 670 F.2d 754, 759 (7th Cir. 1982) ("The rule is designed to prevent a party from agreeing to a unit definition and shortly thereafter invoking the unit clarification procedure to upset that agreement."). Put simply, one does not upset an agreement, or waive a right, before a potential dispute rises to the surface of expressed disagreement or established and accepted practice.⁶

⁵ *Compare Union Elec. Co.*, 217 NLRB at 667 (holding that the "classifications or jobs sought by the Petitioners have been excluded from their units for substantial periods of time-in some instances for as long as 20 years" and that various classifications were expressly excluded by the recognition clause); *Edison Sault Elec. Co.*, 313 NLRB 753 (1994) (holding that mid-contract UC petition attempting to exclude foremen from unit was untimely where parties had previously agreed about inclusion of foremen); *Baltimore Sun Co.*, 296 NLRB 1023 (1989) (holding that mid-contract UC petition would have been barred because disputed classifications were previously included in unit by agreement of parties, but that under *St. Francis Hospital*, 282 NLRB 950 (1987), employer properly reserved right to file UC petition during bargaining); *Boston Cutting Die Co.*, 258 NLRB 771, 772 (1981) (holding that mid-contract UC petition was improper where disputed classification was excluded from the unit for approximately twenty five years).

⁶ The cases on historical exclusion are likewise inapplicable here, where at a maximum the position existed six to eight months prior to bargaining, and the company's treatment of that position was not clear until long after bargaining had concluded. In those cases where past practice has been a bar, the exclusion has been of longstanding. *See, e.g., Bethlehem Steel Corp. II*, 329 NLRB 243, 244 (1999) (finding historical exclusion and dismissing UC petition filed in 1995 where "customer service employees at issue have been excluded from the existing bargaining unit represented by the Union since at least 1991"); *Robert Wood Johnson University Hosp.*, 328 NLRB 912, 915 (1999) ("In sum, we cannot determine from the state of the record whether, 20 years ago, the disputed classification was excluded from the voting group. But, as discussed below, irrespective of their voting status at the time of the election, the per diem nurses have been in fact historically excluded from the unit, and thus cannot be

(continued...)

B. A Unit Clarification Petition Is Appropriate to Resolve Ambiguities Regarding the Definition of the Unit Where the Clarification Will Not Modify a Clear Agreement regarding the unit's composition.

Where there is no agreement or practice regarding the placement of a disputed classification, however, processing a UC petition does not disrupt the parties' bargaining relationship. That is the precise lesson of *Bethlehem Steel I*. There, the employer issued a press release, eight months before execution a new CBA, announcing that off-site product marketing employees would be relocated to the bargaining unit facility. 329 NLRB 241, 241 (1999). The parties bargained over inclusion of the to-be-relocated employees but reached no agreement as to their status. When the employer proceeded with the relocation after the CBA was executed, in August 1993, the Union filed a grievance alleging that the relocated employees were performing unit work. *Id.* Eighteen months later, in July 1995, the employer filed a UC petition seeking to clarify the unit specifically to exclude the product marketing employees. *Id.* The Board found that, despite the significant lag and the filing mid-contract, the petition was timely, because: (1) the unit placement issue was not clearly addressed by the CBA; (2) the employees had not actually been relocated at the time negotiations were completed; and (3) the issue had been in dispute since the employee relocation. *See id.* ("The Union's filing of a grievance in November 1993 specifically seeking the inclusion of the product marketing employees in the unit indicated

(...continued)

added to the unit by means of unit clarification."); *Ziegler, Inc.*, 333 NLRB 949, 950 (2001) ("We note first that the applicability of the collective-bargaining agreement to the 'parts and warehouse employees' in this case has been the subject of discussion between the parties on various occasions dating back to at least 1987. From that time to the present [where petition was filed in November, 1998], however, despite their continuous relationship and negotiation of successive collective-bargaining agreements, the parties seemingly have been unsuccessful in reaching an agreement regarding the representation of these employees.").

that the status of these classifications was in dispute and that the Union was not acquiescing in their exclusion from the unit.”). In these circumstances, the Board found that “it would not be disruptive of the collective-bargaining relationship to entertain the clarification petition at this time.” *Id.* at 242.

As in *Bethlehem Steel I*, Local 1107 never acquiesced in AMR's treatment of CCT paramedics as outside the bargaining unit. This is so because (1) at the time negotiations for the 2009 CBA began, the contours of the new CCT position were yet unknown and had not been communicated to the Union; (2) only a limited number of individuals, as few as three that belonged to the bargaining unit according to the record, had become CCT paramedics [*see* Tr. 142/19 - 143/5 (testimony of Teresa Tao)]; (3) there is no evidence that these individuals knew that they were being treated as outside of the bargaining unit, and no evidence that they discussed this issue with other employees [Tr. 143/6-10]; (4) AMR employees are spread out in their ambulance trucks awaiting calls at different locations, and as such information in the possession of few people cannot be presumed to spread throughout the unit or to union representatives [*see* Tr. 181/11]; and (5) AMR did not officially notify Local 1107 of its position regarding CCT paramedics until July, 2010, over a year after the CBA was executed.

Of course, once Local 1107 did learn that CCT paramedics were being treated as though they did not belong to the bargaining unit, it demanded their inclusion and has never relented on this point.⁷ As such, there is no bargaining understanding that AMR can claim to be relying on,

⁷ The record is clear that as soon as Local 1107 learned that AMR was treating CCT paramedics as outside the bargaining unit, it contested this position and insisted that CCT paramedics be included in the unit. Union representative Alejandro Ocampo first learned that the CCT paramedics were not being included in the unit from a CCT paramedic named Jamie Ambrose [Tr. 153/8-9; 185/13-22]. At this time
(continued...)

or that would be upset, if the UC petition is granted clarifying that CCT paramedics belong in the unit. *Cf. Arthur C. Logan Memorial Hosp.*, 231 NLRB 778, 778 (1977) (“The parties were fully aware at the time of the recent negotiations of the uncertainty surrounding the proper unit placement of the disputed classifications, and yet they nevertheless chose to ignore the problem and perpetuate in their current agreement the traditional unit description covering the disputed classifications.”).

Quite opposed to the Employer’s theory, the Regional Director did not find and the record does not reflect that there was any underlying bargaining understanding or historical practice of excluding the CCT paramedics from the unit. Instead, while declining to grant the petition to include CCT paramedics in the unit, the Regional Director found that the CCT paramedics “remain ‘paramedics’” [D&O at 10], and “are part of the Unit as paramedics” [*id.* at 11], citing *Gourmet Award Foods*, 336 NLRB 872 (2001). *See id.* at 873 (“It is axiomatic that when an

(...continued)

Mr. Ocampo raised the issue to operations manager Chad Henry verbally, and both agreed to look into the issue [Tr. 153/2-4].

Mr. Ocampo raised the issue again in July, 2010, after speaking with a CCT paramedic named Leslie Echeverria sometime in late June [Tr. 150/8-10; 151/8-13]. In an e-mail to Chad Henry on July 1, 2010, Mr. Ocampo wrote: “It has come to my attention that CCT paramedics are again being advised that they are being excluded from the bargaining unit” [UX 1 (e-mail message from Alejandro Ocampo to Chad Henry, sent at 10:30 pm on July 1, 2010)]. The following day, Mr. Henry wrote to Mr. Ocampo: “Regarding the recognition of CCT paramedics . . . since their inception they have not been considered nor have been included in the bargaining unit” [UX 1 (e-mail message from Chad Henry to Alejandro Ocampo, sent at 12:06 pm on July 2, 2010)]. Next, Local 1107 pursued the dispute by filing a series of grievances pursuant to the parties’ CBA [UX 2, 4 & 8 (grievances dated July 5, July 28, and September 10, 2010)]. Finally, Local 1107 resorted to the instant UC petition. Local 1107 should not be penalized for attempting to resolve the dispute prior to seeking relief from the Board. *See Sunoco, Inc.*, 347 NLRB 421, 423 (2006) (“By agreeing to discuss the matter, the parties hoped to reach agreement and thereby avoid the necessity for a filing of a UC petition,” although talks later failed).

established bargaining unit expressly encompasses employees in a specific classification, new employees hired into that classification are included in the unit.”).⁸

For these reasons, there is no basis to AMR’s argument that the Union “waived” its right to file a unit clarification petition, and that the Regional Director’s failure to so find constituted a substantial departure from Board precedent warranting further review.⁹

⁸ Arguably, the Regional Director could have, based on these findings, decided to grant the unit clarification petition as the Board did in *Premcor* and *Developmental Disabilities Institute*. See *Premcor, Inc.*, 338 NLRB 1365, 1366 (2001) (clarifying the petition and stating that “once it is established that a new classification is performing the same basic functions as a unit classification historically had performed, the new classification is properly viewed as belonging in the unit rather than being added to the unit by accretion.”); *Developmental Disabilities Inst., Inc.*, 334 NLRB 1166 (2001) (same).

⁹ While there is certainly no factual basis to determine that the Union waived its right to seek inclusion of the CCT paramedics in the unit, the Employer’s presentation of the “waiver” law itself is also flawed, as most of the UC cases cited only concern whether it is an appropriate *time* for a UC petition to be filed, not whether underlying rights have been waived. Thus, even if the Board is inclined to review the decision, and agreed with the Employer, at the most it could find that the UC petition should have been dismissed on timeliness grounds. See *Consolidated Papers Inc. v. NLRB*, 670 F.2d 754, 758-59 (7th Cir. 1982) (“The *Wallace-Murray* rule thus deals only with the timeliness of unit clarification petitions; the rule does not, as the Union argues, allow an employer to escape forever a finding of accretion. The rule expresses a policy of deferring, during the term of the contract, to the negotiated unit description. . . . The rule reflects a discretionary policy of the Board not to entertain certain unit clarification petitions filed during the mid-term of a contract; whether the rule applies in a given case has nothing to do with the appropriateness of the bargaining unit.”).

As discussed in the Union’s post-hearing brief, there are ample reasons in this case, based on the Employer’s disregard of the Union’s requests, to waive any such timeliness issues here. Cf. *CHS, Inc.*, 355 NLRB No. 164, at *6 (Aug. 27, 2010) (“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. 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.”); *Bethlehem Steel Corp. III*, 329 NLRB 245, 245 (finding that it was appropriate to process a UC petition regarding senior credit representatives, even though the position was created over a year before a contract reopener, where “[t]he parties never engaged in bargaining about the unit placement of this classification,” and that during the intervening reopener negotiations “the Employer refused to discuss the unit placement of the new classification.”); *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 whether positions should be added to unit).

VI. CONCLUSION

Because the Employer has not indicated compelling reasons to review the D&O denying the Union's petition, has not identified a substantial departure from Board precedent, and failed to indicate any erroneous factual findings, there are no grounds for the Board to review the Regional Director's Decision and Order. Although there is thus no reason to review this decision decided against the petitioning party, if the Board were to grant review, for the reasons stated it should overrule the D&O and grant the underlying unit clarification petition.

Dated: September 13, 2011

Eli Naduris-Weissman
Rothner, Segall & Greenstone

By 

Eli Naduris-Weissman

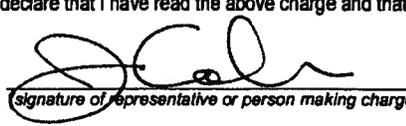
EXHIBIT A

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
CHARGE AGAINST EMPLOYER

DO NOT WRITE IN THIS SPACE	
Case	Date Filed

INSTRUCTIONS:

File an original with NLRB Regional Director for the region in which the alleged unfair labor practice occurred or is occurring.

1. EMPLOYER AGAINST WHOM CHARGE IS BROUGHT	
a. Name of Employer American Medical Repsonse	b. Tel. No. (702) 671-6752
	c. Cell No. (702) 465-6723
	f. Fax No.
d. Address (Street, city, state, and ZIP code) 1200 South Martin Luther King Boulevard, Las Vegas, NV 89102	e. Employer Representative Mike Gorman
	g. e-Mail mgorman@medicwest.com
	h. Number of workers employed approximately 350-360
i. Type of Establishment (factory, mine, wholesaler, etc.) Ambulance and Medical Transportation Company	j. Identify principal product or service Medical Transportation Services
k. The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8(a), subsections (1) and (list subsections) 8(a)(5) _____ of the National Labor Relations Act, and these unfair labor practices are practices affecting commerce within the meaning of the Act, or these unfair labor practices are unfair practices affecting commerce within the meaning of the Act and the Postal Reorganization Act.	
2. Basis of the Charge (set forth a clear and concise statement of the facts constituting the alleged unfair labor practices) Within the past six months, the Employer, by and through its managers, supervisors, and agents has interfered with, restrained, and coerced employees in the exercise of their rights under section 7 of the National Labor Relations Act by (1) failing and refusing to bargain with Service Employees International Union, Local 1107, regarding the terms and conditions of bargaining unit employees, namely, Critical Care Transport ("CCT") paramedics, and/or (2) failing and refusing to apply the parties' existing collective bargaining agreement to CCT paramedics.	
3. Full name of party filing charge (if labor organization, give full name, including local name and number) Service Employees International Union, Local 1107	
4a. Address (Street and number, city, state, and ZIP code) 3785 East Sunset Las Vegas, Nevada 89120	4b. Tel. No. (702) 920-5920
	4c. Cell No.
	4d. Fax No. (702) 386-4883
	4e. e-Mail cbunch@seiunv.org
5. Full name of national or international labor organization of which it is an affiliate or constituent unit (to be filled in when charge is filed by a labor organization) Service Employees International Union	
6. DECLARATION	
I declare that I have read the above charge and that the statements are true to the best of my knowledge and belief.	
By  (signature of representative or person making charge)	Jonathan Cohen, Attorney (Print/type name and title or office, if any)
Address 510 South Marengo Ave., Pasadena, CA 91101	
9/12/11 (date)	
Tel. No. (626) 796-7555	
Office, if any, Cell No.	
Fax No. (626) 577-0124	
e-Mail jcohen@rsglabor.com	

WILLFUL FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 et seq. The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing unfair labor practice and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is voluntary; however, failure to supply the information will cause the NLRB to decline to invoke its processes.

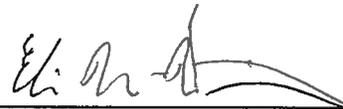
CERTIFICATE OF SERVICE

Case No.: 28-UC-060436

I hereby certify that on the 13th day of September, 2011, a copy of the foregoing
OPPOSITION TO EMPLOYER'S REQUEST FOR REVIEW was sent by e-mail and U.S. Mail
as follows:

James M. Walters
Fisher & Phillips LLP
1075 Peachtree Street, NE, Suite 3500
Atlanta, GA 30309
Tel: (404) 240-4230
Fax: (404) 240-4249
E-mail: jwalters@laborlawyers.com

Cornele A. Overstreet
Regional Director
National Labor Relations Board, Region 28
2600 North Central Avenue, Suite 1800
Phoenix, AZ 85004-3099
E-mail: cornele.overstreet@nlrb.gov



Eli Naduris-Weissman
Counsel for SEIU, Local 1107