UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

REGION 28

AMERICAN MEDICAL RESPONSE, INC., Respondent, and SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 1107, Charging Party.	Case No. 28-CA-064303 **OPPOSITION OF SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 1107 TO AMERICAN MEDICAL RESPONSE'S MOTION FOR SUMMARY JUDGMENT**

JONATHAN COHEN
ELI NADURIS-WEISSMAN
ROTHNER, SEGALL & GREENSTONE
510 South Marengo Avenue
Pasadena, California 91101-3115
Telephone: (626) 796-7555
Facsimile: (626) 577-0124
e-mail: jcohen@rsglabor.com

Attorneys for Service Employees International Union, Local 1107

I. INTRODUCTION

Pursuant to section 102.24(b) of the National Labor Relations Board's ("Board") Rules and Regulations, Service Employees International Union, Local 1107 ("Local 1107") hereby opposes the instant motion to summary judgment filed by American Medical Response ("AMR"), respondent in the above-captioned case.

AMR moves for summary judgment on the ground that a previous unit clarification proceeding raised similar issues as those presented in the instant unfair labor practice proceeding, and that the General Counsel should be barred from raising issues in the instant unfair labor practice proceeding that were addressed in the previous unit clarification proceeding.

AMR's contention is frivolous. As is discussed below, the cases it cites each concern an attempt by the General Counsel to litigate an issue in an unfair labor practice proceeding that it could have, but did not, raise in an earlier unfair labor practice proceeding. Here, of course, there was no earlier unfair labor practice proceeding, and the General Counsel was not a party to the earlier unit clarification proceeding. Moreover, the unfair labor practices at issue in this proceeding arose *after* the underlying unit clarification proceeding. Thus, even if the cases cited by AMR applied here, unless Local 1107 was clairvoyant it could not have raised the instant unfair labor practice allegations in the earlier representation proceeding.

AMR further argues that Local 1107 waived its right to bargain over Critical Care Transport Paramedics – the classification of employees at issue in the present unfair labor practice proceeding and the underlying unit clarification proceeding – by filing an untimely unit

clarification petition. It is well-settled, however, that AMR cannot relitigate the propriety of the unit clarification petition in the present unfair labor practice proceeding.

AMR finally requests that the instant proceeding be held in abeyance pending resolution of its Request for Review of the Regional Director's Decision and Order in the underlying unit clarification proceeding, which is currently pending before the Board. Local 1107 opposes that request, which is sure to result in lengthy delays and further discord between the parties.

II. ARGUMENT

A. Each of the Cases Cited by AMR Address Duplicative Unfair Labor Practice Proceedings, and are Therefore Inapposite.

AMR contends that summary judgment in its favor is proper because some of the issues raised in the instant unfair labor practice proceeding were raised, or could have been raised, in an earlier unit clarification proceeding [AMR Brief, p. 14]. Specifically, AMR focuses on the paragraphs 6(d), (e), and (f) of the Complaint alleging that it has failed and refused to provide the identity and terms and conditions of employment of Critical Care Transport Paramedics ("CCTs") in violation of Section 8(a)(5) of the National Labor Relations Act ("Act") [AMR Brief, pp. 15-16]. It seems that AMR believes that Local 1107 should have, but did not, raise this allegation in the earlier unit clarification proceeding.

AMR relies on inapposite authority in support of its baseless argument. The two cases cited by AMR, Highland Yarn Mills, Inc., 315 NLRB 1169 (1994), and Union Electric Co., 210 NLRB 1081 (1975), involved the General Counsel's attempt to litigate an unfair labor practice allegation that could have been, but was not, litigated in an earlier unfair labor practice

proceeding. See Highland Yarn Mills, Inc., 315 NLRB at 1169 n.1; Union Electric Co., 210 NLRB at 1081 n.2.

As the Board explained in Highland Yarn Mills, the decisions in Jefferson Chemical Co., 200 NLRB 992 (1972), and Peyton Packing Co., 129 NLRB 1358 (1961), upon which it relied, established a rule that the General Counsel may not litigate an unfair labor practice allegation that is based on events which the General Counsel "knew or should have known about when issuing an earlier complaint or at the time of trial in the earlier complaint, if that allegation is of the same general nature as, or is related to, an allegation in the earlier complaint." Highland Yarn Mills, 315 NLRB at 1169 n.1.

Here, of course, AMR does not point to an earlier unfair labor practice proceeding at which the General Counsel could have, but did not, litigate AMR's refusal to respond to Local 1107's information request. *There was no such proceeding.* Rather, the earlier proceeding AMR relies on was a unit clarification proceeding to which the *General Counsel was not a party.* Needless to say, whatever the General Counsel knew, or should have known, at the time of the earlier unit clarification proceeding, it was not a party to the unit clarification proceeding and therefore was in no position to raise an issue at the hearing.

Further undermining AMR's contention, it is undisputed that at the time of the unit clarification hearing, Local 1107 had not yet submitted the information request seeking information about the identity and terms and conditions of employment of the CCTs that is a subject of the instant unfair labor practice complaint. According to paragraph 6(d) of the complaint, the union's information request was dated August 15, 2011 [AMR Brief, Ex. A, ¶ 6(d)]. The hearing on the unit clarification petition, however, was more than a month earlier

[see AMR Brief, p. 10]. Hence, at the time of the underlying unit clarification proceeding, AMR had not yet committed the unfair labor practice that is the subject of paragraphs 6(d), (e), and (f) of the pending Complaint. Even assuming *arguendo* that the cases AMR cites apply to the instant matter, AMR does not contend that the cases require Local 1107 to be clairvoyant and raise an unfair labor practice that has not yet come to pass.[1]

Put simply, AMR's reliance on Highland Yarn Mills, Inc., 315 NLRB 1169 (1994), and Union Electric Co., 210 NLRB 1081 (1975), in support of its motion is frivolous.

B. AMR's Contention that Local 1107 Waived the Opportunity to Bargain Over CCTs Relates to the Timeliness of a UC Petition, Which is Not Relevant in the Instant Proceeding.

AMR repackages the same "waiver" arguments in the present motion for summary judgment that it made in support of its Request for Review of the Regional Director's Decision and Order in the underlying unit clarification proceeding [AMR Brief, pp. 16-19]. In short, it claims that Local 1107's "delayed and prejudicial attempt to now include the . . . CCTs into the clearly defined unit is subject to waiver analysis." [AMR Brief, p. 19]. The cases cited by AMR in support of its position have no bearing on the instant unfair labor practice proceeding. Rather, AMR makes a failed attempt to relitigate the timeliness of the unit clarification petition which it already argued in the underlying UC case.

---

[1] Moreover, Local 1107 could not have prosecuted a section 8(a)(5) charge in the unit clarification proceeding. Only the General Counsel could have prosecuted such a charge following the issuance of an unfair labor practice complaint.

Each of the cases cited by AMR in support of its "waiver" analysis concerns only the timeliness or propriety of a unit clarification petition, which has no bearing on the instant unfair labor practice proceeding [AMR Brief, pp. 16-17]. See, e.g., Bethlehem Steel Corp., 329 NLRB 243 (1999) (holding that unit clarification petition was improper); Edison Sault Electric Co., 313 NLRB 753 (1994) (holding that unit clarification petition was untimely); Baltimore Sun Co., 296 NLRB 1023 (1989) (holding that unit clarification petition was proper); Union Elec. Co., 217 NLRB 666 (1975) (holding that unit clarification petition was improper). Indeed, AMR is plainly attempting to relitigate the propriety of the unit clarification petition in the present unfair labor practice proceeding, something which it cannot do. See Pittsburgh Plate and Glass Co. v. NLRB, 313 U.S. 146, 162 (1941); see also Thomas-Davis Med. Ctrs., 324 NLRB 29 (1997) (holding that respondent was barred from raising any issue in an unfair labor practice proceeding that was or could have been litigated in underlying representation proceeding).

What is more, despite AMR's urging in the underlying representation proceeding, the Regional Director did not reach the propriety or timeliness of the unit clarification petition since he concluded that CCTs were *already part of the bargaining unit and clarification of the unit was unnecessary*. As the Regional Director stated, "the record shows that a CCT paramedic employee is a paramedic, a classification *specifically included in the Unit description.*" [AMR Brief, Exhibit C, p. 10 (emphasis added); see also id. at 11 ("The record fails to establish the warrant for a clarification of the Unit to either further specifically include such employees, which would be redundant, or exclude such employees, which would be contrary to the record evidence and Board law.")]. Thus, pursuant to the Decision and Order of the Regional Director in the underlying UC proceeding, the timeliness of the underlying UC petition was irrelevant since

CCTs were *already part of the bargaining unit*. There is therefore no basis to conclude that Local 1107 somehow "waived" its right and duty to represent a classification of employees that is expressly included within its certification.

C. AMR's Factual Assertions Are Not Supported by the Record.

Not only does AMR rely on clearly inapposite authority in its motion for summary judgment, it misstates the facts of the underlying UC proceeding.

First, AMR is incorrect that "substantially all of the information referenced in the Complaint was previously provided to Charging Party during the July 6, 2011 hearing in NLRB Case No. 28-UC-060436." [AMR Brief, p. 12]. As the instant unfair labor practice complaint alleges, Local 1107 sought a "listing of all CCT Paramedics employed by AMR, their contact information, copies of all policies that apply to CCT Paramedics, including wages, and any individual contracts the company has with these employees." [AMR Brief, Ex. A, ¶ 6(d)]. No such information was provided, "substantially" or otherwise, in the underlying UC proceeding. AMR concedes as much by failing to identify any specific citation to the record establishing that such information was provided to Local 1107 at the unit clarification hearing.

Second, AMR contends that "Charging Party and the Respondent were both aware of, but never intended the CCT Paramedics to be covered by the current agreement or otherwise represented by the Union." [AMR Brief, p. 18]. This, too, is an unfounded assertion. As the Regional Director's Decision and Order establishes, Local 1107's certification explicitly includes "paramedics," and CCT Paramedics are indeed "paramedics." In fact, AMR acknowledges that

prior to filing a UC petition, Local 1107 twice grieved AMR's refusal to bargain over CCT Paramedics [AMR Brief, p. 19]. Surely, such evidence contravenes AMR's blanket claim that Local 1107 "never intended the CCT Paramedics to be covered by the current agreement . . . ."

Third, in support of its misguided "waiver" argument, AMR asserts that the parties' agreement requires it to provide Local 1107 with a roster of employees in the bargaining unit, and that the CCT Paramedics were not included in "three to four rosters provided by the Respondent to the union . . . ." [AMR Brief, p. 18]. Conspicuously absent, however, from AMR's discussion is any citation to the record in the underlying UC proceeding supporting that claim. That is because AMR never offered evidence that such rosters were provided by AMR to Local 1107, or that such rosters omitted CCT Paramedics.

In sum, the factual assertions made by AMR in support of its motion are unsupported by the record.

D. Placing the Instant Matter in Abeyance is Sure to Result in Lengthy Delays, and Will Cause Further Uncertainty in the Relations Between Local 1107 and AMR.

In a last ditch attempt to avoid facing the pending unfair labor practice allegations, AMR pleads for a stay of the instant case [AMR Brief, 19]. It notes that it has filed a Request for Review of the Regional Director's Decision and Order in the underlying unit clarification proceeding, and contends that there is a potential for duplicative proceedings if the instant unfair practice complaint is litigated [id.].

In support of its plea, AMR cites section 11490.3 of the Case Handling Manual, which provides as follows:

> When a UC or AC petition and an 8(a)(2) or (5) charge raise the same issue, the UC or AC petition may be the more effective way of resolving the issue. Ordinarily, the UC or AC case should be processed while the 8(a)(2) or (5) charge is held in abeyance, *unless the potential for excessively lengthy or duplicative proceedings warrants a determination to process the issue through the unfair labor practice case.* Secs. 11730.5 and 11731.3.

(emphasis added). As the italicized text denotes, there is an exception to the Case Handling Manual's suggestion that a section 8(a)(5) charge be held in abeyance pending processing of a UC petition: where there is potential for excessively lengthy proceedings, the unfair labor practice proceeding *should not* be stayed.

That exception applies clearly to the instant case. The presently constituted National Labor Relations Board no longer includes three members because the term of Member Craig Becker, who served under a recess appointment, terminated at the end of 2011. In the event that Member Becker is not granted a further recess appointment, and no further action is taken to fill the three vacant slots on the Board, there will be no quorum to conduct the business of the Board, see New Process Steel, L.P. v. NLRB, 130 S. Ct. 2635 (2010), including resolution of AMR's Request for Review of the Regional Director's Decision and Order in the underlying unit clarification proceeding. Hence, placing the instant proceeding in abeyance pending resolution of AMR's Request for Review will surely result in excessively lengthy delays and undermine the purpose of the Act, which is to facilitate resolution of industrial disputes. See 29 U.S.C. § 151.

///

///

///

III. CONCLUSION

For the foregoing reasons, Local 1107 respectfully submits that AMR's motion for summary judgment be denied.

Dated: January 3, 2012

JONATHAN COHEN
ELI NADURIS-WEISSMAN
ROTHNER, SEGALL & GREENSTONE

By 
JONATHAN COHEN
Attorneys for Service Employees International Union, Local 1107

CERTIFICATE OF SERVICE

Case No.: 28-UC-060436

I hereby certify that on the 3rd day of January, 2012, a copy of the foregoing OPPOSITION OF SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 1107 TO AMERICAN MEDICAL RESPONSE'S MOTION FOR SUMMARY JUDGMENT 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
E-mail: jwalters@laborlawyers.com

Pablo Godoy
National Labor Relations Board, Region 28
Las Vegas Resident Office
600 Las Vegas Boulevard South, Suite 400
Las Vegas, NV 89101-6637
Phoenix, AZ 85004-3099
E-mail: pablo.godoy@nlrb.gov

Dorothy A. Martinez

Dorothy A. Martinez