

**BEFORE THE
NATIONAL LABOR RELATIONS BOARD**

In the Matter of:

**Case No.: 14-RC-096744
14-RC-096816**

TOUCHETTE REGIONAL HOSPITAL,

Employer,

and

**SEIU HEALTHCARE ILLINOIS &
INDIANA,**

Petitioner.

**PETITIONER'S STATEMENT IN OPPOSITION TO
EMPLOYER'S REQUEST FOR REVIEW OF REGIONAL DIRECTOR'S
DECISION AND DIRECTION OF ELECTION**

INTRODUCTION

This case involves two petitions filed by SEIU Healthcare Illinois & Indiana ("Union") with Region 14 on January 22, 2013 seeking certification in separate groups of employees at Touchette Regional Hospital ("Touchette" or "Employer"). The Regional Director issued a Decision and Direction of Election ("DDE") on February 15, 2013. Touchette filed its Request for Review ("Req.") on March 1, 2013.

The Regional Director directed elections in two units – a service and maintenance unit and a technical unit. (DDE at 11-12.) The Employer does not dispute the appropriateness of either unit or the job classifications included in them. (Req. at 3.) The Employer disputes only the Regional Director's conclusion that certain employees, which the Union has historically

represented, should vote alongside other employees, which the Union has never represented.
(Id.)

The Board should deny the Request for Review. The Regional Director correctly applied applicable Board principles given the unique circumstances of this case. The Regional Director correctly concluded that *all* employees (whether historically-represented or not) should vote at once, because there is a question concerning representation among both the historically-represented and unrepresented employees, and because the unrepresented employees outnumber the historically-represented employees.

BACKGROUND FACTS

The essential facts are set forth in the DDE. For purposes of this Opposition, it is sufficient to restate that the Union represented a combined unit of service, maintenance, skilled maintenance and technical employees at the now-defunct Kenneth Hall Hospital (“Kenneth Hall”) located in East St. Louis, Illinois. (DDE at 3.) Until approximately 2010, the Employer’s employees at its Centerville, Illinois had no union representation. (Id. at 2.)

The Employer and Kenneth Hall merged in 2008, and the Employer began transferring operations and employees from Kenneth Hall (East St. Louis) to the Employer (Centerville). (Id. at 3.) As the successor to Kenneth Hall, the Employer recognized the Union as the representative of only some of its employees, whom the Union previously represented when they worked for Kenneth Hall. (Id. at 4-5.)¹ The Employer did *not* recognize the Union as the representative of any of the previously unrepresented employees or of certain employees, whom the Union did represent when they worked for Kenneth Hall. (Id.) The Employer and the Union

¹ The Board has never conducted an election among Touchette’s employees. (DDE at 4.)

have never reached a collective bargaining agreement, and the Employer unilaterally implemented a document establishing terms and conditions of employment for the currently-represented employees. (DDE at 4.)

All employees in the same classifications work in the same locations with the same supervision and share a community of interest. Yet, some of these employees have a Union and some do not. For example, employee Lisa Day is a Union-represented “radiology technician,” while employee Kristin Beam is an unrepresented “radiology technician.” (Exhibit B-1 p. 5; Exhibit B-2 p. 1.) And, as discussed more fully below, the *un*represented employees significantly outnumber the represented employees.

ARGUMENT

The Employer asks the Board to grant review on the ground that the Regional Director departed from established Board precedent. (Req. at 3.) The Employer argues that the Regional Director departed from precedent, such as *NLRB v. Southern Indiana Gas*, 853 F.2d 580 (7th Cir. 1988) and *New Berlin Grading v. NLRB*, 946 F.2d 527 (7th Cir. 1991), because those cases require the Board to conduct self-determination elections among unrepresented “fringe groups” when there is *not* a question concerning representation among the represented employees. (Req. at 3-4). The Employer separately (but similarly) argues that the Regional Director misapplied *DV Displays Corp.*, 134 NLRB 568 (1961), because *DV Displays* only allows an election among all employees where there is a question concerning representation among *both* the historically-represented and the unrepresented “fringe group.” (Req. at 5-6.)

In other words, although styled as two separate arguments, the Employer’s argument boils down to one. The Employer argues that the Regional Director should have directed a self-determination election for the *un*represented Touchette employees, because there is not a

question concerning representation among historically-represented employee, and because the *un*represented employees are a “fringe group.” The Employer could not be more wrong. There *is* a question concerning representation among the historically-represented employees, and the *un*represented employees are *not* a “fringe group.”

1. **THERE IS A QUESTION CONCERNING REPRESENTATION AMONG THE HISTORICALLY-REPRESENTED EMPLOYEES**

a. **At Minimum, the Historically-Represented Employees Are Entitled to Vote for Certification**

The Employer tacitly concedes that, if there is a question concerning representation among the employees currently represented by the Union, the Regional Director’s decision is correct. (*See* Req. at 4) (“Where a question of representation exists *only* among the fringe group, it makes little sense to require a unit-wide election.”) (emphasis added) (quotes omitted). It follows that, if there is such a question concerning representation, the Employer’s argument fails. There is undoubtedly a question concerning representation among the historically-represented employees here. The historically-represented employees are entitled to *a* vote on union representation, because their representative was recognized by the Employer and not certified by the Board. *General Box Co.*, 82 NLRB 678, 681 (1949).

As the uncertified representative of the historic unit at Touchette, the Union is deprived of several “statutory privileges and immunities that accompany certification” and is without “significant advantages that accrue to certified unions, as distinguished from those that enjoy recognition without certification.” *Id.* For this reason, the Board gives recognized but uncertified unions the opportunity to “secure a certificate” by filing “formal petition[s]” and through “the statutory method of conducting an election.” *Id.* at 682-83.

Quite simply, even though certain employees at Touchette are technically represented by a union, those employees are entitled to a vote on union representation to obtain certification. Because they are entitled to a vote, the Regional Director correctly concluded that they should vote with the unrepresented employees with whom they share an overwhelming community of interest. For this reason, alone, the Employer's Request for Review must be denied.

This conclusion is supported by the very cases the Employer sites in its Request for Review. In *New Berlin Grading v. NLRB*, 946 F.2d 527 (7th Cir. 1991), the court affirmed the Board's decision *not* to conduct a self-determination election among a smaller group of unrepresented employees (mechanics) and, instead, to conduct a single election among all petitioned-for employees (historically-represented operators and unrepresented mechanics). In *New Berlin*, there was a question concerning representation among the historically-represented operators, because their contracts were § 8(f) contracts. *Id.* at 529, 531-33.

Just as the historically-represented employees in *New Berlin* were entitled to a vote, given their unions' right to be certified, the historically-represented employees here are entitled to vote, given the Union's right to be certified. And, just as in *New Berlin*, it is appropriate to conduct a single vote among all of the employees – historically-represented and historically-unrepresented, because they share a “sufficient community of interest.” *Id.* at 529.²

² *Phototype*, 144 NLRB 1268, cited by the Employer, is inapplicable here. There was no question concerning representative there, because the represented employees were covered by a contract, in effect, that would have barred an election among those employees. *Id.* at 1269. *NLRB v. Southern Indiana Gas*, 853 F.2d 580, is wholly irrelevant here. That case involved an employer's refusal to bargain after the Board conducted a self-determination election to which the employer had stipulated. *Id.* at 582.

b. The Historically-Represented Employees Cannot Vote to Preserve their Current “Minority” or “Members-only” Unit

Even if the historically-represented employees here were not entitled to a vote because their union is uncertified, there would still be a question concerning representation among those employees, because their current bargaining unit is a “minority” or “members-only” unit. Because those employees could not vote to preserve such a unit, the only alternative is for them to vote with employees in the same classifications in overall units.

The Board has used the term “members-only” unit to describe units where only card-carrying “members” of the union are included *and* to describe units where the employer and union agree that some employees are included and some are not, even though all of the employees perform exactly the same jobs. *See e.g., Ron Wiscombe, d/b/a Ron Wiscombe Painting and Sandblasting*, 194 NLRB 907 (1972).

In *Wiscombe Painting*, the collective bargaining agreement covered employees performing sandblasting and related work. The employer, however, with the union’s acquiescence, never applied the agreement to several long-term employees who performed sandblasting and related work. The Board deemed this situation to be a “members-only” arrangement and held:

It is well settled that a “members-only” contract does not afford the kind of representation nor establish the type of bargaining unit which the Act contemplates and consequently the Board will not accord contract-bar quality to it. By parity of reasoning we are likewise satisfied that it will not effectuate the policies of the Act to make the Board’s procedures available to clarify a unit covered by an agreement which has been applied, *in effect* on a “members only” basis.

Id. at 907 (emphasis added).

The principle in *Wiscombe Painting* is compelled by Congress' expectations that the Act would operate on the basis of "majority rule."

Since it is almost universally recognized that it is practically impossible to apply two or more sets of agreements to one unit of workers at the same time, *or to apply the terms of one agreement to only a portion of the workers in a single unit*, the making of agreements is impractical *in the absence of majority rule*. And by long experience, majority has been discovered best for employers as well as employees. Workers have found it impossible to approach their employers in a friendly spirit if they remain divided among themselves. Employers, likewise, where majority rule has been given a trial of reasonable duration, have found it more conducive to harmonious labor relations to negotiate with representatives chosen by the majority than with numerous warring factions.

S. Rep. No. 74-573 at 13 (1935), quoted in *Dick's Sporting Goods*, Case No. 6-CA-34821, 2006 NLRB GCM LEXIS 35, at *16 (June 22, 2006) (emphasis added).

The Board and the courts have followed this reasoning and been clear that minority or members-only arrangements do not comply with the principles of the Act and do not warrant the protections of the Act. The Board refuses to find violations of § 8(a)(5) when employers unilaterally withdraw recognition from unions representing members-only units. *See e.g., Manufacturing Woodworkers Association*, 194 NLRB 1122, 1123 (1972); *Don Mendenhall, Inc.*, 194 NLRB 1109, 1109-1110 (1972). *See also Arthur Sarnow Candy Co.*, 306 NLRB 213, 217 (1992), *enf'd.*, 40 F.3d 552 (2d Cir. 1994) (no bargaining order warranted because the members-only group was not an appropriate bargaining unit within the meaning of § 9(a)).

The historic unit here is no less a "minority" or "members-only" arrangement than the arrangement in *Wiscombe Painting* and those condemned by Congress in S. Rep. No. 74-573. There is no question that the contract implemented by the Employer defining the represented employees' terms and conditions of employment constitutes "one agreement" applied "to only a

portion of the workers in a single unit.” There is no question that the historic unit consists of some employees in classifications falling within the service and maintenance and technical categories, but excludes other employees in the *very same* classifications. Given these circumstances, there is no question that the historic unit at Touchette is a “minority” or “members-only” as that concept is defined by the Board.

It follows that, because the historic unit is not one that the Board would certify or protect under §§ 8(a)(5) and (d), the employees in that unit are entitled to vote on representation in unit that the Board *will* certify and protect under §§ 8(a)(5) and (d). The only units in which those employees could vote are the units the Regional Director found to be appropriate here.

This conclusion coincides with the Regional Director’s conclusion that, if the Union had filed for an election when Touchette first finished the integration at Centerville, the petitioned-for units would have “clearly” been “appropriate,” and there would have been no basis to “exclude employees who work in the same classifications and alongside unit employees.” (DDE at 8.)

Overall, because the Board could not certify the historic unit at Touchette, there is necessarily a question concerning representation among the employees in that unit. Even under the authority cited by the Employer (Req. at 4-5), where there is such a question concerning representation, a self-determination election is not appropriate. For this reason, too, the Board should deny the Request for Review.

2. THE UNREPRESENTED EMPLOYEES ARE NOT A “FRINGE GROUP”

In some cases cited by the Employer, the Board ordered self-determination elections where there was not a question concerning representation among a represented group of employees and where an unrepresented group was a “fringe group.” (See Req. at 4-5.) As

discussed, the first element needed for directing a self-determination does not exist, because there *is* question concerning representation among the represented group here. The second element for a self-determination election also does not exist here, because the *unrepresented* employees are not a “fringe group.”

A “fringe” group for purposes of a self-determination election presumes a *smaller* unrepresented group that was excluded from a *larger* represented group. As the Board explained long ago, self-determination elections “tend to insure that the wishes of *small groups* of employees no longer will be thwarted by the *numerical superiority* of employee-members of an existing historical unit from which the former have been excluded.” *The Zia Co.*, 108 NLRB 1134, 1136 (1954) (emphasis added). *See also Southern Indiana Gas*, 853 F.2d at 581; *Photype*, 145 NLRB at 1268-69. It follows that a self-determination election makes no sense where the *unrepresented* group is numerically superior.

In this case, the *unrepresented* group is numerically superior. There are approximately 13 represented employees, whose jobs fall within the technical unit. There are approximately 34 *unrepresented* employees in the same or similar technical jobs. There are approximately 68 represented employees, whose jobs fall within the service and maintenance unit.³ There are approximately 122 *unrepresented* employees in the same or similar service and maintenance jobs. (Tr. 19-21; Exhibits B-1, B-2, B-3).

³Based on the job titles on the lists submitted with the two petitions, and the parties’ agreement at hearing regarding other job titles read into the record, the Union has identified historic bargaining unit employees on Exhibit B-1, who would fall within the requested technical unit, as those identified by numbers, 2, 9, 10, 12, 23, 28, 36, 37, 52, 58, 66, 71, and 85; and through the same method, the Union identified employees with the following identifying numbers from the historic unit listing in Exhibit B-1 as having jobs that would put them within the requested service and maintenance unit: 4, 5, 8, 13, 14, 16, 21, 22, 24, 25, 26, 29-34, 39, 40, 42, 43, 45-51, 54, 55, 57, 59-62, 65, 68, 72, 74, 75, 77-82, 84, 87, 89, 91, 94, 96, 98-102, 105-109, 111-114, as well as employees identified with numbers 16 and 17 from the first page of Exhibit B-1. (Tr. 14.)

Thus, because the *un*represented employees here outnumber the represented employees in the same classifications by at least two-to-one and by as much as three-to-one, a self-determination election makes no sense. For this reason, too, the Employer's arguments lack merit.

CONCLUSION

Petitioner respectfully asks that Board to deny the Employer's Request for Review.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I caused a copy of the forgoing PETITIONER'S STATEMENT IN OPPOSITION TO EMPLOYER'S REQUEST FOR REVIEW OF REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION on the following on March 8, 2013 in the manner indicated.

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