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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

American Medical Response of Southern California

Employer

and

National Association of Government Employees/SEIU Local 5000

Petitioner

and

National Emergency Medical Services Association (NEMSA)

Intervenor

and

United Emergency Medical Services Workers, AFSCME Local 4911, AFL-CIO

Intervenor

_____ /

Case No. 21-RC-106534

UNITED EMERGENCY MEDICAL SERVICES WORKERS, AFSCME LOCAL 4911, AFL-CIO'S OPPOSITION TO REQUEST FOR REVIEW OF THE REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION

Intervenor United Emergency Medical Services Workers, AFSCME Local 4911, AFL-CIO (UEMSW) submits the following in opposition to Intervenor National Emergency Medical Services Association's (NEMSA) Request for Review of the Regional Director's Decision and Direction of Election issued on July 19, 2013 ("DD&E").

NEMSA's Request for Review is based solely on a July 16, 2013, recommended decision from a Magistrate Judge in a Section 301 lawsuit pending in federal district court between NEMSA and Petitioner National Association of Government Employees/SEIU Local 5000 (NAGE). In that recommended decision, the Magistrate Judge recommends the District Court Judge to issue an order directing NAGE to withdraw its petition in this matter, pending arbitration of an alleged no-raid agreement between NEMSA and NAGE. For the following reasons, NEMSA's Request for Review should be denied.

First, the Request for Review should be denied because NEMSA did not timely raise this issue for the Board's consideration. While the Magistrate Judge's recommended decision issued on July 16, after close of the June 24, 2013, representation hearing held in this matter, NEMSA actually filed its motion for preliminary injunction on June 14, 2013. (*See* p. 9 of recommended decision, attached as Exhibit 1 to Request for Review.) Yet NEMSA did not at the June 24 hearing submit any evidence or make any argument with respect to its motion for preliminary injunction pending in federal court. (*See* Regional Director's August 1, 2013, denial of NEMSA's request for reconsideration of DD&E (copy attached).)

Second, the Request for Review should be denied because the Magistrate Judge's recommended decision is just that, a recommended decision, one subject to appeal to the District Court Judge assigned the case. Thus, the prospects for a prompt resolution of the jurisdictional dispute between NEMSA and NAGE are ultimately no different than they were on June 21,

2013, when the Regional Director, relying in large part on the fact that NEMSA and NAGE dispute whether the no-raid agreement remains in effect, denied NEMSA's request to suspend proceedings. (*See* Regional Director's June 21, 2013, denial of NEMSA's request to suspend proceedings (copy attached).)

Third, the Request for Review should be denied because the NLRB should not defer to the Magistrate Judge's recommended decision, and not simply because it is only a recommended decision. Federal courts have made clear that in a situation such as this, where there is a conflict between a federal court's jurisdiction to enforce a Section 301 agreement and the NLRB's jurisdiction over representation matters, the federal court must defer to the Board's jurisdiction.

> Representational issues fall within the NLRB's primary jurisdiction. *Local 3-193 v. Ketchikan Pulp Co.,* 611 F.2d 1295, 1298 (9th Cir.1980). Thus "[w]e have recognized repeatedly that courts must refuse to exercise jurisdiction over claims involving representational issues." *Hotel and Restaurant Employees Union v. Marriott Corp.,* 961 F.2d 1464, 1468 (9th Cir.1992). This deference is rooted in both the superior expertise of the Board, *Local 1547, Int'l Bhd. of Elec. Workers v. Local 959, Int'l Bhd. of Teamsters,* 507 F.2d 872, 877 (9th Cir.1975), and the incompatibility of "the orderly function of the process of judicial review" with initial district court consideration of representational issues. *South Prairie Constr. Co. v. Local No. 627, Int'l Union of Operating Eng'r,* 425 U.S. 800, 805, 96 S.Ct. 1842, 1844, 48 L.Ed.2d 382 (1976) (citation omitted).

United Ass'n of Journeymen & Apprentices of Plumbing & Pipefitting Indus., Steamfitters & Refrigeration Union, Local 342, AFL-CIO v. Valley Engineers, 975 F.2d 611, 613 (9th Cir. 1992).

This principle was applied to a situation quite like the present in *Local 1547, Int'l Bhd. of Elec. Workers v. Local 959, Int'l Bhd. of Teamsters,* 507 F.2d 872. In that case, one union, relying on a no-raid agreement, sought to enjoin a second union from participating in an NLRB

election after the Board had ordered an election. The district court denied the injunction, and the Ninth Circuit affirmed.

> We agree that the district court lacked jurisdiction to grant specific enforcement of the no-raid agreement after the NLRB had ordered an election. The superior authority of the Board in representation matters, combined with the paramount employee right of free choice under § 7, requires the district court to defer to Board action.

Id. at 877.

The Magistrate Judge's recommended decision falls squarely under this line of authority and thus does not form a basis for the Board to vacate the DD&E.

Finally, UEMSW wishes to remind the Board that if for any reason the Request for Review is granted in this matter, it should not and cannot result in the automatic dismissal of the Petition. Thus, even if the Board concludes that Petitioner NAGE must be removed from this case due to a federal court decision barring NAGE from proceeding in this matter, the Petition here involves more than just one union that seeks to oust NEMSA as the representative for this bargaining unit. UEMSW has intervenor status.[1] Should NAGE be forced to withdraw from this matter, the Board must still give UEMSW an opportunity to submit a petitioner's showing of interest (something UEMSW has done already) which will preserve the Petition and the opportunity for an election based on this Petition. *See* Casehandling Manual § 11098.

[1] Intervenor Health Care Workers Council of the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO, has withdrawn.

For the reasons stated above, Intervenor UEMSW respectfully requests that NEMSA's Request for Review be denied.

Dated: August 9, 2013

BEESON, TAYER & BODINE, APC

By: /s/Andrew H. Baker
ANDREW H. BAKER
Attorneys for Intervenor United Emergency Medical Services Workers, AFSCME Local 4911, AFL-CIO

CERTIFICATE OF SERVICE

I declare that I am employed in the County of Alameda, State of California. I am over the age of eighteen (18) years and not a party to the within cause. My business address is 483 Ninth Street, 2nd Floor, Oakland, CA 94607. On August 9, 2013, I e-filed and served the foregoing Document(s):

UNITED EMERGENCY MEDICAL SERVICES WORKERS,AFSCME LOCAL 4911, AFL-CIO'S OPPOSITION TO REQUEST FOR REVIEW OF THE REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION

via e-mail and U.S. mail to the following persons:

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ATTACHMENTS

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August 1, 2013

RECEIVED
Beeson, Tayer & Bodine
AUG 05 2013
Oakland Office

TORREN COLCORD
NATIONAL EMERGENCY MEDICAL SERVICES
ASSOCIATION (NEMSA)
4701 SISK RD STE 104
MODESTO, CA 95356-9320

RE: AMERICAN MEDICAL RESPONSE
Case 21-RC-106534

Dear Mr. Colcord:

By letter dated July 30, 2013, on behalf of the National Emergency Medical Services Association (herein NEMSA), you requested that I reconsider the Decision and Direction of Election in the above-captioned case in light of the *Report and Recommendation on Defendants' Motion for Preliminary Injunction and Plaintiff's Motion to Strike Counterclaims* issued on July 16 by U.S. Magistrate Judge Judith Gail Dein in the United States District Court, District of Massachusetts (Boston) in Case 1:13-cv-10854-JLT. You requested that I rescind the Decision and Direction of Election or, in the alternative, "the election be postponed for a reasonable period in order to afford NAGE the ability to comply with the court's (sic) directive and withdraw the petition in case RC-106534 when ordered." I note you did not mention Magistrate Judge Dein's Memorandum of Decision and Order on Defendants' Motion to Stay Litigation dated July 25, 2013.

The District Court matter was filed on April 11, 2013, well before the petition in Case 21-RC-106534 was filed on June 5, 2013. On June 21, 2013, I responded to NEMSA's request that I suspend processing of the petition due to the "no-raid" agreement between it and NAGE. Similarly, on June 17, 2013, in *First Responder EMS, Inc. of Sacramento*, 20-RC-106571, the Regional Director denied NEMSA's request to suspend processing of the petition in that case, and on June 17, in *American Medical Response of New Haven*, 01-RC-102304, the Regional Director issued an *Order Denying Intervenor's Request to Defer Proceedings to Arbitration*. In *Paramedics Plus/Patients Plus*, 32-RC-102941, the Regional Director denied the same request to suspend the processing of that petition. NEMSA then sought permission to file a special request with the Board to appeal the Regional Director's decision to not suspend processing of the petition. The Board subsequently in an unpublished Decision granted special permission to appeal and then denied the appeal on the merits.

I note that the issues underlying your request were not raised at the time of the hearing conducted on June 24, 2013, in case 21-RC-106534. All parties, including NEMSA and NAGE, were presented with the opportunity to bring all issues before the hearing officer. Moreover, contrary to your assertion, there are no changed circumstances, finally I note that you have pending before the Board a Request for Review the Decision and Direction of Election in this case.

I am denying your request to reconsider and to rescind the *Decision and Direction of Election* I issued on July 19, 2013, or to delay the election I have ordered in this matter.

Very truly yours,

OLIVIA GARCIA
Regional Director

cc:

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June 21, 2013

Torren Colcord, Representative
National Emergency Medical Services Association
4701 Sisk Road, Suite 102
Modesto, CA 95356-9320

Re: American Medical Response
Case 21-RC-106534

Dear Mr. Colcord:

Pursuant to a petition filed on June 5, 2013, a hearing was set in the above-captioned matter, which hearing was rescheduled to June 24, 2013. By letter dated June 13, 2013, National Emergency Medical Services Association (herein NEMSA) requested that processing of the petition be suspended, so that it may pursue arbitration of a "no-raid" agreement it contends it has with National Association of Government Employees/Service Employees International Union Local 5000 (herein NAGE). I have carefully considered NEMSA's request to suspend processing of the petition in this matter. For the reasons set forth below, I will deny the request.

NEMSA asserts that it is the exclusive collective-bargaining representative of the employees in the petitioned-for unit. NEMSA contends that since 2012 it has been party to an Affiliation Agreement (herein Agreement) with NAGE, which protects the parties from raids on each other's units, and which provides for final and binding arbitration of disputes under the Agreement. NEMSA has presented evidence that it has initiated an arbitration process, but no other substantive details have been provided regarding such. It does not appear that NEMSA and NAGE have set a date for the arbitration of their dispute.

NEMSA also maintains that processing of the petition should be delayed pursuant to National Labor Relations Board Casehandling Manual, Part Two, Representation Proceedings sections dealing with no-raiding procedures among labor organizations.

For its part, NAGE argues that NEMSA materially breached its Affiliation Agreement with NAGE and, therefore, the Arbitration Agreement is no longer in effect. NAGE contends that it is no longer bound by any no-raid agreement, but agreed to arbitrate on the sole issue of whether the arbitration provision in the affiliation agreement was in effect. NAGE further asserts that the matter of whether it is bound by the no-raid clause will not be decided in the near future.

Regarding the Casehandling Manual (herein CHM) provisions for no-raid agreements, Section 11018, specifically addresses Article XX and XXI among affiliates of the AFL-CIO. It does not appear that NEMSA or NAGE are affiliates of the AFL-CIO. CHM Section 11019 is more applicable inasmuch as it deals with no-raid agreements other than those found in the AFL-CIO's Articles XX and XXI. Section 11019 notes, "It is the Board's policy to follow similar

procedures with respect to such agreements as it does with respect to the AFL–CIO no-raiding agreements, in cases where it appears that their operation holds similar promise of resolving representation disputes among the parties to such agreements."

In this matter, the parties are in dispute as to whether the no-raid agreement remains in effect and whether NEMSA's alleged material breach, renders that clause void. Accordingly, I cannot find that there is any mutually agreed upon dispute-resolution mechanism to which the Board might defer. Moreover, such legal issues could conceivably lead to a significant delay to the question concerning representation.

Further, two other labor organizations have intervened in this matter. Those parties, which have an interest in the question concerning representation, would not be able to participate if the issue is deferred to an arbitration procedure to which they are not a party.

Finally, these same issues were recently raised in Paramedics Plus/Patients Plus, Case 32-RC-102941, wherein the NEMSA appealed to the Board the Regional Director's decision to not suspend processing of the petition therein. The Board granted review, but denied NEMSA's appeal on the merits on May 29, 2013.

In light of the circumstances noted above, deferral would inappropriately delay resolution of the question concerning representation that this Petition has raised. Accordingly, I hereby deny NEMSA's request to suspend the processing of the instant petition.

Very truly yours,

Olivia Garcia
Regional Director

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