

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

| | | |
|---------------------------------|---|-----------------------|
| AMERICAN MEDICAL RESPONSE, INC. |) | |
| |) | |
| Employer, |) | |
| |) | |
| and |) | CASE NO. 28-UC-060436 |
| |) | |
| SERVICE EMPLOYEES INTERNATIONAL |) | |
| UNION, LOCAL 1107 |) | |
| |) | |
| Petitioner. |) | |
| |) | |

EMPLOYER'S REQUEST FOR REVIEW

COMES NOW the Employer, AMERICAN MEDICAL RESPONSE, INC., (hereafter "the Employer" or "AMR"), by and through its undersigned counsel, and timely files this Request for Review of the Regional Director's Decision and Order (hereafter "D&O"), which was issued on August 9, 2011. This Request for Review is filed pursuant to Section 102.67 (c)(1) & (2) of the National Labor Relations Board's Rules and Regulations, as amended.

GROUNDS FOR REQUEST FOR REVIEW

The Employer requests review of that portion of the D&O which provides that CCT Paramedics should be given, in effect, *de facto* accretion status to the existing unit of EMTs and paramedics, on grounds that: (1) a substantial question of law and policy is raised because the D&O departs from officially reported Board precedent regarding bargaining waiver, and (2) the D&O is predicated on several substantial and clearly erroneous factual findings which prejudicially affect the rights of the Employer.

STATEMENT OF THE CASE

The Employer operates a medical transport company employing several hundred medical transport personnel in Las Vegas, Nevada, including the pre-existing bargaining unit. The Petitioner was certified by the Board to represent the existing unit of approximately 340 EMTs and paramedics in 2003 in *American Medical Response and Service Employees International Union, Local 1107*, 339 NLRB No. 1. (May 16, 2003) (Un. Exh. 9). Since that time, there have been a succession of collective bargaining agreements between the parties, with the most recent being effective April 1, 2009 through March 31, 2012.

The Petition in this case, filed on June 20, 2011, sought to accrete a unit of approximately ten (10) "CCT paramedics" into the pre-existing bargaining unit. Pursuant to an Order Rescheduling Hearing, issued by the Regional Director on June 24, 2011, a hearing on this matter was held on July 6, 2011, in Las Vegas, Nevada, before Hearing Officer Clayton C. Stupp. Following the hearing, and receipt of the Employer's and Petitioner's Briefs, the Regional Director issued the D&O which found that no clarification of the unit was warranted, inasmuch as the CCT paramedics were already included in and encompassed by the unit.

Specifically, and in a fairly logic-defying way, the Regional Director first found that:

In technical terms, inasmuch as the record shows that the CCT paramedic function was in existence prior to the execution of the parties' current contract, and in the absence of evidence to suggest or establish that the Petitioner reserved its right to file a clarification petition concerning CCT paramedics prior to the execution of the current collective-bargaining agreement, there is no warrant for clarifying the Unit on such grounds by way of an order clarifying the Unit.

D&O, p. 9.

After some further discussion, the Regional Director ordered that the UC Petition be dismissed:

Based on the foregoing and the record in this proceeding, I find that clarification of the Unit is not warranted or necessary inasmuch as the employees at issue, the CCT paramedic employees, perform essentially the same basic functions performed by Unit paramedics and, as a result, are part of the Unit as paramedics. 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.

D&O, p. 11:

In effect, the Regional Director skirted the serious timeliness/waiver defects in Petitioner's case, failing to take them into account, by technically dismissing the UC Petition, while holding that the CCTs were, in effect, a longstanding and *de facto* part of the pre-existing bargaining unit.

SUMMARY OF ARGUMENT

The Employer first began employing its own "CCTs" (Critical Care Transport employees) in early 2008, while the previous collective bargaining agreement was still in effect. However, even after extended negotiations preceding the current collective bargaining agreement, which took effect in April, 2009, Petitioner failed to address the status of 10 CCTs, who conspicuously disappeared from the 340 person unit roster. In short, Petitioner was well aware of the unit-excluded status of the CCT position for at least three (3) years, and did nothing to effectively preserve its position until the instant unit clarification petition was filed. Consequently, the Petitioner has waived its argument that the CCTs should be included in the pre-existing unit due to the passage of time and the untimely nature of its petition.

Furthermore, the D&O's determination that the CCTs do not fall within a separate and distinct job classification from EMTs and paramedics is erroneous and inconsistent with the record. The Employer has submitted evidence that the CCTs performed different functions, had separate supervisory structures and significantly higher wages than the EMTs and paramedics delineated in the pre-existing unit. For these reasons, the D&O should be overruled and the Petition dismissed on that basis.

STATEMENT OF FACTS

A. Background Facts

The Employer operates a medical transport company employing several hundred medical transport personnel in Las Vegas, Nevada, including the pre-existing bargaining unit with approximately 340 EMTs and paramedics. (TR 17). The Petitioner was certified by the Board to represent the existing unit in 2003 in *American Medical Response and Service Employees International Union, Local 1107*, 339 NLRB No. 1. (May 16, 2003) (Un. Exh. 9). Since that time, there has been a succession of collective bargaining agreements between the parties, with the most recent being effective April 1, 2009 through March 31, 2012. (Emp. Exh. 1). The Employer first began employing its own "CCTs" (Critical Care Transport employees) in early 2008, while the previous collective bargaining agreement was still in effect. (TR 13, 14).

Tony Greenway, an Employer witness, testified that the CCT Paramedic program was commenced because "it became very difficult to retain EMS RNs" (Emergency Medical Service Registered Nurses) "who needed to provide" a certain level of service. (TR 13). Greenway testified that, in terms of fit and skill-sets, the disputed CCTs are

closer to RNs than to paramedics. (TR 18). Greenway further testified that “basic” EMTs (Emergency Medical Technicians) perform the lowest level of pre-hospital care, and are doing such things as basic first aid, CPR, bandaging and splinting. (TR 17). EMT I’s (Intermediate) additionally are able to start IVs and certain medications; and EMT paramedics provide EKG monitoring and advance cardiac life support intervention. (TR 17).

Since the CCT program started in April 2008, AMR has consistently maintained approximately ten CCT employees (TR 17, 68), three of whom are actually FTOs (Field Training Officers), who are specifically excluded from the collective bargaining agreement. (TR 17-18, 96; Emp. Exh. No. 1, p. 5).

There are quite a few significant differences between CCTs and the other medical service personnel. For example, CCTs utilize different vehicles, with center gurneys and a supply of medical air (TR 19); and, in addition, they are trained in and expected to use ventilators and IV pumps, as well as advanced arterial blood pressure monitors. (TR 19). In addition, in the event of a stroke or the absence of a nearby neurosurgeon, the CCT “would be required to go and stabilize that patient, maybe induce a paralytic agent in order to put the patient on a ventilator and then transport the patient to a higher level hospital that can handle that sort of brain surgery.” (TR 20). In addition, there are nine (9) specific kinds of medication that CCTs are authorized to administer, which are out of the licensure requirements of the other EMTs and paramedics. (TR 59, 124).

A typical use for a CCT is facility-to-facility transport, for example, from an outlying hospital’s emergency department to another healthcare facility. (TR 58).

Consequently, CCTs actually perform some of their services at existing medical facilities, whereas EMTs and paramedics do not. (TR 58, 59). CCTs also have required training in emergency surgical procedures, such as emergency, in-transit tracheotomies (“cricothyrotomies”) and chest tube insertions. (TR 59). Conversely, there are only two procedures which an RN can perform, that cannot be performed by a CCT. (TR 74).

In terms of licensing and restrictions, CCTs have an additional complement of training beyond paramedics; have special licenses issued under the auspices of the Southern Nevada Health District; operate out of a different protocol manual; report to a different medical director than the one to which the paramedics and EMTs report. (TR 21). While contract-covered EMTs and paramedics are adequately paid (Emp. Exh. 1), CCTs receive at least six percent more in compensation than the highest paid paramedic. (TR 47). In addition, CCTs, along with similarly non-covered RNs, attend frequent clinical meetings at least every sixty days. (TR 50).

The Employer formulated, announced and implemented the CCT program at its Las Vegas facility in early 2008. The history of the program was explained by Tony Greenway, who testified that, following the lengthy required training, the initial CCT providers “began work in mid-2008.” (TR14, 30). Larry Johnson, the employer’s Clinical Manager, corroborated this, elaborating that the cadre class began in April 2008, with eight individuals, and this was augmented by two more CCT providers in October 2008. (TR 67, 68). The timeline of the implementation of this program was not denied by any of the union witnesses.

Theresa Tao, a CCT called as a witness by the Petitioner, testified that she was one of the first applicants, and had taken the class beginning in April 2008. (TR 95).

And even though she was already excluded from the bargaining agreement by virtue of being a Field Training Officer, Tao testified that those CCT Applicants in her cadre class who had previously been only paramedics were aware that they would not be covered by the collective bargaining agreement. (TR 101, 102). She also testified that in the spring of 2008 it was “common knowledge among the regular paramedics” that this new CCT position had been created and that applications were being accepted. (TR 143). Not only was it common knowledge, according to Tao, “it was kind of a big hubbub” and “a lot of people were talking about it.” (TR 144).

Petitioner fails to explain all of the events that occurred subsequent to the spring and summer of 2008, when the CCT position was created and filled, and prior to the filing of the petition in the instant case, some three (3) years later. These included, among other things, the expiration of the 2005-2008 collective bargaining agreement; the fairly lengthy negotiations for a new collective bargaining agreement, effective April 1, 2009 and remaining effective until the spring of 2012; and, of course, a couple of grievances that touched or concerned the subject, which appeared to have been allowed to lapse, unresolved.

One of Petitioner’s witnesses (Alejandro Ocampo), testified that he could not recall whether the exclusion/inclusion of the category of CCTs even came up during those negotiations in 2009 because he “thought they [CCTs] were part of the bargaining unit.” (TR 180). This thought occurred despite the information-updating language contained in the collective bargaining agreement, mandating that the Employer, in effect, provide a fresh seniority list to the union four times per year. (Emp. Exh. 1, p. 7). Hence, there would have been at least 3-4 opportunities for any of the officers or agents

of Local 1107 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.

PERTINENT CONTRACT ARTICLES

* * *

ARTICLE 2

RECOGNITION

Section 1. Scope of Agreement

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 National Labor Relations Act. (*emphasis supplied*).

* * *

ARTICLE 4

UNION SECURITY

Section 4. Employee Rosters

Within thirty (30) days after the execution of this agreement, and quarterly thereafter, the Employer agrees to furnish the union with the names of all employees covered by this Agreement, including newly hired employees, social security number (if members), or unique seven digit employee identification number (non-members), their addresses, home phone numbers, provided they are not unpublished, available certification, wage rate, employment status (full or part time), shift, dates of hires and names of terminated employees and dates of termination, names of employees on leaves of absence, and names of employees on layoff.

Such information will be provided in digital format as described in Section 1 above.

(emphasis supplied).

* * *

ARTICLE 30

CONTRACT BARGAINING UNDERSTANDINGS

Section 1. Separability

This Agreement shall be subject to all future and present applicable Federal and State laws. Should any provision(s) become unlawful by virtue of the declaration of any court of competent jurisdiction, such action shall not invalidate the entire Agreement. Any provisions of this Agreement not declared invalid shall remain in full force and effect for the life of the Agreement. If any provision is held invalid, the parties hereto shall enter into collective bargaining negotiations for the purpose of arriving at a mutually satisfactory replacement for such provision.

Section 2. Bargaining Waiver and Zipper Clause

This Agreement constitutes the sole and entire existing agreement between the parties and superseded all private agreements, commitments and practices whether oral or written, and expresses all obligations of and restrictions imposed on the Employer and the Union.

The Employer and the Union acknowledge that during the negotiations which resulted in this Agreement, each had the unlimited right and opportunity to make demands and proposals with respect to any subject or matter not removed by law from the area of collective bargaining and the understanding and agreement arrived at by the parties after the exercise of that right and opportunity are set forth in this Agreement.

With respect to the negotiations leading to the execution of this Agreement, the fact that a proposal was made and withdrawn during the course of those negotiations shall not be used to prove that the party making the proposal had in any manner given up any rights granted to him elsewhere in this Agreement.

This Agreement is subject to amendment, alteration, or addition only by a subsequent written agreement between, and executed by, the Employer and the Union. The waiver of any breach, term, or condition of this Agreement by either party shall not constitute a precedent in the future enforcement of any such term or condition. *(emphasis supplied)*

* * *

B. Facts Found in the D&O Which Show That the Petition Was Untimely.

The D&O recognizes that "the negotiations for the current contract began in late

2008, and continued into early 2009, well after the CCT program came into effect. (D&O p. 4). The parties stipulated and the D&O confirmed that the Employer and Petitioner did not specifically bargain over the inclusion or exclusion of employees performing CCT paramedic functions during those negotiations. Id. Further, and most importantly, “[t]he Petitioner did not reserve, during bargaining, the issue of the placement of employees performing CCT paramedic function,” despite the fact that relevant employees were aware of and enthusiastic about the new position. Id.

ARGUMENT AND CITATION TO AUTHORITY

A. The D&O Errs by Disregarding The Board’s Waiver Precedent

Board precedent is clear with regard to proper invocation of the unit clarification process: it is appropriate for resolving ambiguities concerning the unit placement of individuals in newly created classifications, thereby giving rise to a question of whether the individuals in the classification should continue to be included in or excluded from the bargaining unit. However, unit clarification is inappropriate for upsetting an agreement between a union and an employer or an established practice of such parties concerning the unit placement of individuals. Union Elec. Co., 217 NLRB 666, 667 (1975).

The Board generally declines entertaining unit clarification petitions midway in the term of a collective-bargaining agreement that unambiguously defines the unit, because to do otherwise would be disruptive of an established bargaining relationship. Edison Sault Electric Co., 313 NLRB 753 (1994). Absent exceptional circumstances, a

unit clarification petition filed during the contract period is therefore considered untimely. Baltimore Sun Co., 296 NLRB 1023 (1989).

It is also well established that the Board will not entertain a unit clarification petition seeking to accrete a historically excluded classification into the unit, unless the classification has undergone recent substantial changes. Bethlehem Steel Corp., 329 NLRB 243, 244 (1999). Rather, a petition seeking to include a classification that historically has been excluded from the unit raises a question of representation, which can only be resolved through an election, or based on majority status. Boston Cutting Die Co., 258 NLRB 771 (1981). As stated in United Parcel Service, 303 NLRB 326, 327 (1991):

The limitations on accretion ... require neither that the union have acquiesced in the historical exclusion of a group of employees from an existing unit, nor that the excluded group have some common job-related characteristic distinct from unit employees. It is the fact of historical exclusion that is determinative.

(emphasis in original). Consequently, when employees have not been included in the unit for some time and the union has made no attempt to include the position in the unit, the position is historically outside the unit, and the union has waived its right to a unit clarification proceeding. Sunar Hauserman, 273 NLRB 1176 (1984) Accord: ATS Acquisition Corp., 321 NLRB 712 (1996).

In situations where the parties cannot agree on a disputed classification but do not wish to engage the issue at the expense of reaching an agreement, the Board will allow a unit clarification petition to be filed shortly after the contract is executed. Massey-Ferguson, 202 NLRB 193 (1973) (after the Union unsuccessfully tried to obtain the employer's agreement for the inclusion of the disputed employees, the Union stated

"It would handle the matters through legal channels after negotiations had been completed"). However, 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. In this case, no such reservation of rights has been attempted by the Petitioner.

In fact, the record reveals that the Petitioner and the Employer were both aware of, but never intended the CCT Paramedics to be covered by the current agreement or otherwise represented by the union. The collective bargaining agreement between the union and the Employer was negotiated and renewed, but the negotiated agreement has not ever included the CCT Paramedics and does not otherwise purport to cover these employees. Rather, the current agreement expressly includes "all full-time and part-time paramedics, EMT-I's and EMT's employed by the Employer at its Las Vegas, Nevada facility," while excluding "all other employees." (Emp. Exh. 1, p. 5).

Further, the current agreement, which became effective April 1, 2009, provides that "[w]ithin thirty (30) days after the execution of this agreement, and quarterly thereafter, the Employer agrees to furnish the union with the names of all employees covered by this Agreement" It is undisputed in the instant case that the ten (10) CCT Paramedics were not included on the subsequent three to four rosters provided by the Employer to the union, a fact which mitigates against any suggestion that the CCTs were considered to be part of the unit under the contract.

The D&O utterly ignores the presence of the current agreement's Bargaining Waiver and Zipper Clause, which states that "[t]he Employer and the Union acknowledge that during the negotiations ... each had the unlimited right and

opportunity to make demands and proposals with respect to any subject or matter not removed by law ... and agreement arrived at by the parties after the exercise of that right and opportunity are set forth in this Agreement.” Despite the Petitioner’s knowledge of the new CCT classification, it effectively sat on its hands during the negotiations of the current collective bargaining agreement.

Finally, it is undisputed that the Petitioner offered into evidence two Grievances (Un. Exhs. 2 and 4) that were filed, respectively, on July 5 and September 10 of 2010. In the case of the first grievance, this was initiated nearly one year prior to the UC petition in the instant case. When the first grievance (Un. Exh. 2) was denied in writing by the Employer (and not processed further by the Union), the Petitioner filed a virtually identical grievance (Un. Exh. 4), rather than process the first one to arbitration, as it had the opportunity to do. Both grievances related solely to the unit exclusion of CCTs, and there is no evidence in the record of either one being processed to arbitration.

Of course, both of these grievances occurred a year or more after the Petitioner engaged in lengthy negotiations for the current collective bargaining agreement. Petitioner should not be permitted to gain through a Board-sanctioned accretion (*de facto* or otherwise) what it failed to gain through arbitration, and what it did not even try to gain through negotiations. Pursuant to established Board precedent, the Petitioner’s delayed and now prejudicial attempt to now include the 10 CCTs into the clearly defined unit is subject to waiver analysis. Petitioner has not articulated any special circumstances sufficient to justify its excessively delayed reaction to the new CCT position.

In formulating his *de facto* accretion analysis, the Regional Director relied upon

and cited the Board's decision in *Premcor, Inc.*, 333 NLRB 1365 (2001):

“once it is established the new classification is performing the same basic functions as a unit classification has historically performed, the new classification is viewed as belonging in the unit rather than being added to the unit by accretion.”

Id., at 1366.

This might make sense, except that there are two significant distinctions between *Premcor* and the instant case. First and foremost, the operational changes in the unit described were ongoing at the time of the hearing in the former case. The disputed job category of process control coordinator (PCC) was a “newly-created position” at the time of the hearing in that case. *Id.* at 1365. Hence, the issues of waiver, laches, delay, etc. were not even present in that case.

Secondly - and procedurally - there is the manner in which the original unit was ‘clarified’ in each case. In *Premcor*, the Regional Director granted the Union-Petitioner’s sought clarification, using a standard accretion analysis. While the Board technically reversed the Regional Director in that case, it was only the Regional Director’s legal analysis that was overruled. The Board still upheld the ultimate result that “the contractual collective bargaining unit...is clarified to include the position classified as process control coordinator.” *Id.*, at 1366.

In the instant case, however, the Regional Director denied the Union’s clarification petition, in fact dismissing the petition, under the strange theory that, for several years preceding the UC Petition, the disputed CCT’s were already part of the bargaining unit and, in effect, presumably covered by two different collective bargaining agreements.

B. Traditional Accretion Analysis Applies

Despite its failure to preserve bargaining rights through the negotiation process, the Petitioner is attempting to accrete a longstanding and discrete group of employees, the CCT Paramedics, to the existing certified unit. However, “[t]he Board has followed a restrictive policy in finding an accretion because it foreclosed the employees’ basic right to select their bargaining representative.” Towne Ford Sales, 270 NLRB 311 (1984). The Board has said that it will force employees into a bargaining unit without their consent, “only when the additional employees have little or no separate group identity...and when the additional employees share an overwhelming community of interest with the pre-existing unit to which they are accreted.” Safeway Stores, 256 NLRB 918 (1981).

The traditional accretion analysis should apply in the instant case because, contrary to the D&O’s puzzling conclusion, the CCT Paramedics occupy a distinct job classification. For example, the record establishes that CCTs have different and higher skills sets, including the ability to use “medical air,” for use, e.g., in neo-natal transport. In addition, unlike other classifications of paramedics, they are trained, and expected, to use ventilators, IV pumps and arterial BP monitors. They are also expected, if necessary, to stabilize patients for transport by using paralytic agents. Importantly, there are nine (9) types of drugs/medications available for exclusive CCT use.

Further distinguishing the CCTs from EMTs and paramedics, the CCT supervisory hierarchy is substantially different for CCTs than what it is for EMTs and paramedics, and the clinical protocols are different for both groups of employees. The wages for CCTs are significantly higher for CCTs than for the even the highest-paid

paramedics. In short, the D&O not only ignores the union's waiver of its right to include the CCTs in the unit, it also disregards the numerous facts of the record which indicate that the CCTs are a distinct job classification invoking traditional accretion analysis. For that reason, the D&O should be reversed.

CONCLUSION

For all of the foregoing facts, arguments and citations of authority, it is urged that review be granted, that the Regional Director's Decision and Order be overruled and that the Petition in this case be dismissed outright.

Respectfully submitted,



FISHER & PHILLIPS LLP
by James M. Walters
Counsel for the Employer

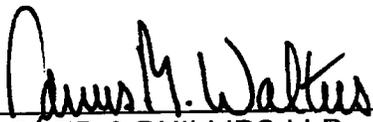
**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

| | | |
|---------------------------------|---|-----------------------|
| AMERICAN MEDICAL RESPONSE, INC. |) | |
| |) | |
| Employer, |) | |
| |) | |
| and |) | CASE NO. 28-UC-060436 |
| |) | |
| SERVICE EMPLOYEES INTERNATIONAL |) | |
| UNION, LOCAL 1107 |) | |
| |) | |
| Petitioner. |) | |
| |) | |

I hereby certify that on September 6, 2011, I caused a copy of the foregoing EMPLOYER'S REQUEST FOR REVIEW to be served upon the following individuals, via email and U.S. Mail, as follows:

Eli Naduris-Weissman, Esq.
Counsel for Petitioner
Rothner, Segall & Greenstone
510 South Marengo Avenue
Pasadena, CA 91101-3115
Enaduris-weissman@rsglabor.com

Cornele A. Overstreet
Regional Director
National Labor Relations Board
Region 28
2600 North Central Avenue - Suite 1800
Phoenix, Arizona 85004-3099
Cornele.overstreet@nrlb.gov



FISHER & PHILLIPS LLP
by James M. Walters
Counsel for the Employer