

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29**

JAMAICA HOSPITAL MEDICAL CENTER,)
)
Employer,)
-and-)
)
INTERNATIONAL UNION OF OPERATING)
ENGINEERS, LOCAL 30,)
)
Petitioner,)
-and-)
)
1199 SEIU UNITED HEALTHCARE)
WORKERS EAST,)
)
Intervenor.)
)

Case No. 29-RC-253629

**PETITIONER'S OPPOSITION TO EMPLOYER'S REQUEST FOR
REVIEW FROM THE DECISION AND DIRECTION OF ELECTION
AND FOR A STAY PENDING THE RESOLUTION**

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INTRODUCTION

Petitioner International Union of Operating Engineers Local 30, AFL-CIO (“Local 30”), by its attorneys, Brady McGuire & Steinberg, P.C., respectfully submits this opposition to the Request for Review filed by Jamaica Hospital Medical Center (“Employer”) from the Regional

Director's Decision and Direction of Election dated February 27, 2020 (hereinafter referred to as the "DDE").¹

In the DDE, the Regional Director correctly found that (1) the Employer failed to carry its burden as relating to its argument that the employees in question (plant supervisors) were supervisors within the meaning of Section 2(11) of the National Labor Relations Act ("Act") and (2) the Employer, along with Intervenor 1199 SEIU United Healthcare Workers East ("Intervenor"), failed to carry their burden as relating to the argument that the plant supervisors shared a community of interest with a unit of employees currently represented by the Intervenor under an existing collective bargaining agreement with the Employer. *DDE at 2*. As a result thereof, the Regional Director directed that an election be held on March 19, 2020 by secret ballot on the question of whether the plant supervisors wished to be represented by the Petitioner Local 30, the Intervenor Local 1199, or not be represented by any labor organization.²

The Employer claims that Board review is appropriate because the Regional Director's decision on a substantial factual issue was "clearly erroneous" and the conduct and/or rulings made at the hearing resulted in "prejudicial error." *See* Employer's Request for Review ("Er. RFR") at 2. The Employer's Request for Review, however, and as explained hereafter, fails because the Regional Director's DDE was well thought out, supported by the record and based upon the appropriate legal standards. The Request for Review also fails from a procedural standpoint since the Employer does not rely solely upon a self-containing document. *See Section 102.67(e), NLRB Rules and Regulations*. Instead, the Employer supplemented its Request for

¹ The Employer mistakenly identifies February 26, 2020 as the date of the DDE in its Request for Review.

² On March 16, 2020, Regional Director Kathy Drew King issued an Order canceling the election indefinitely and directing it to be rescheduled at a later date due to the coronavirus pandemic.

Review with an affidavit containing comments which are self-serving and unsupported by the record in a feeble attempt to overturn the DDE.

STATEMENT OF THE CASE

The Board's attention is respectfully directed to the DDE for a detailed recitation of the facts as well as the hearing transcript. *See Section 102.67(e), NLRB Rules and Regulations* ("... the Board may, in its discretion, examine the record in evaluating the request"). In response to the Employer's discussion concerning "side bar communications" with the Petitioner's hearing counsel (*Er. RFR at 7-8*), the record shows that the Employer's counsel decided not to call its witness, Gerard McCloskey, despite its right to do so. Instead, Employer's counsel sought to address her decision as one relating to Mr. McCloskey's purported feeling of intimidation and his anticipated uncooperation. *Tr. (Vol. III) 260:15-20*. Thereafter, while the Employer's counsel stated that the "hospital also had no custody or control over the plant supervisors," she nevertheless understood that a witness could be subpoenaed. *Tr. (Vol. III) 260:20-22*.

Petitioner's hearing counsel, on the record, addressed the same baseless claims that the Employer now presents to the Board:

... first of all, counsel for Jamaica Hospital is putting our conversation out without any context. The context of our conversation was that counsel for Jamaica Hospital refused to provide documents that she had brought that she had in a box in the room because she said she was afraid of our using it somehow.

At that point, I had said nothing to her about anything anybody "had" on anybody. What I said to counsel for Jamaica Hospital was that my organizer was chomping at the bit waiting for my cross, and I assumed that it was related somehow to her hesitancy to exchange nothing that had been legally subpoenaed and which she had failed to provide in violation of the clear rules of this hearing.

That she has turned that into some sort of veiled threat is unacceptable. There was no threat. I know nothing about the witness, Mr. McClowsey (sic), and I will not tolerate any inference otherwise. It's unacceptable.

Tr. (Vol III) 261:20-262:11. The Employer's failure to accurately reflect the content of the purported side bar conversation with Petitioner's hearing counsel is nothing more than a final attempt to distort the record and somehow serve as the basis to support its Request for Review. For this reason, as well as those articulated hereafter, it is respectfully submitted that the Request for Review should be denied.

ARGUMENT

POINT I

THE REGIONAL DIRECTOR PROPERLY APPLIED *ST. MARY'S DULUTH*

Relying upon the factual record developed at the hearing, the Regional Director concluded in accordance with *St. Mary's Duluth Clinic Health System, 332 NLRB 1419 (2000)*, that "the petitioned-for unit constitutes a residual unit to the Intervenor's non-conforming unit under the Board's Health Care Rule, and that such a residual unit comprising all unrepresented skilled maintenance employees is an appropriate unit under Section 9(a) of the Act." *DDE at 2.* In *St. Mary's Duluth*, the issue before the Board was "whether we will process a petition for a separate unit filed by a union other than the union representing the unit to which it is residual." *332 NLRB at 1419.* This is exactly the issue that was before the Regional Director in the instant matter. As in *St. Mary's Duluth*, Local 30 filed a petition seeking to represent a residual unit of plant supervisors who were employed by the Employer but not included in the collective bargaining agreement the hospital maintained with Local 1199. *332 NLRB at 1420; Tr. (Vol. I) 16:1-5; Bd. Ex. 1-A.* As also the case in *St. Mary's Duluth*, Petitioner Local 30 sought to

represent all of the previously unrepresented employees with the title of plant supervisor (not a portion thereof). *332 NLRB at 1420; Bd. Ex. 1-A.*

In her detailed analysis of the collective bargaining history between the Employer and the Intervenor, the Regional Director relied upon “the uncontroverted representations of counsel for the Intervenor” that Local 1199 “represents approximately 3,000 employees at the Employer’s Facility.” *DDE at 4.* The Regional Director concluded that the scope of the Intervenor’s “bargaining unit is not defined in the CBA” and no documents or testimony in the record addressed this issue. *Id.* In connection with a “Stipulation I” attached to the collective bargaining agreement between Employer and Intervenor, the Regional Director found that the document “in the record is silent regarding the classifications of employees who are covered under the CBA.” *Id.* The Regional Director acknowledged that “the CBA explicitly excludes from the Intervenor’s bargaining unit all ‘supervisory, confidential, executive and managerial employees’” but did not agree with the contention of the Employer and Intervenor that “the Intervenor’s bargaining unit comprises all employees at the Employer’s facility who are not explicitly excluded from the unit under the terms of the CBA.” *Id.* To support this determination, the Regional Director held that “the record establishes aside from the disputed plant supervisors, non-supervisory skilled maintenance employees in the Engineering Department including carpenters, electricians, engineers, painters, plumbers, mechanics, maintenance workers and formen, are all included in the bargaining unit represented by the Intervenor.” *DDE at 4-5.* Finally, the Regional Director found that “[p]lant supervisors have traditionally been excluded from the Intervenor’s bargaining unit based on the Employer’s belief that the plant supervisors are statutory supervisors and are, therefore, excluded from coverage under the

CBA.” *DDE at 5*. Finally, the only witness presented by the Employer addressed the supervisory issue and the Intervenor did not present any witnesses at the hearing. Relying upon the record, it is quite evident that the Employer and the Intervenor failed to satisfy their burden of proof regarding this issue.

Under these circumstances, it is without question that the plant supervisors are entitled to have the opportunity to decide who shall be their bargaining representative in the election as directed by the Regional Director. *DDE at 20*. This conclusion is supported by the analysis in *St. Mary’s Duluth* that “a non-incumbent union may represent a separate residual unit of employees in the healthcare industry.” *332 NLRB at 1420*. In that the collective bargaining agreement between the Employer and the Intervenor fails to define the scope of Local 1199’s bargaining unit together with the Employer’s long considered position that the plant supervisors are statutory supervisors, it was appropriate for the Regional Director to conclude that an election was necessary in order to afford this unit of employees the opportunity to choose their bargaining representative. *See St. Mary’s Duluth, 332 NLRB at 1421* (“Our decision that a nonincumbent union may represent a residual unit of employees under the Health Care Rule additionally finds support in the principles underlying the Act itself by preserving the Section 7 rights of the unrepresented employees to pursue bargaining representation.”).³

³ The Employer’s reliance upon *Premcor, Inc., 333 NLRB 1365 (2001)* is without merit since that case did not involve the Board’s Health Care Rule (29 CFR § 103.30 *et seq.*) and instead addressed whether it was appropriate to clarify an existing unit to include a newly created classification. The plant supervisors in question are not a new classification.

POINT II

THE REGIONAL DIRECTOR PROPERLY FOUND THAT THE EMPLOYER AND THE INTERVENOR FAILED TO PROVE “COMMUNITY OF INTEREST”

During the course of two (2) formal days of testimony along with an additional appearance by the parties before the hearing officer, the Employer presented one witness, Director Engineering Edny Florissant, and the Intervenor did not present a single witness. The Employer’s questioning of Mr. Florissant only addressed its argument that the plant supervisors were statutory supervisors under the Act. The Regional Director concluded that this witness provided conflicting testimony concerning the hearing officer’s own questions concerning various “community of interest” factors. *DDE at 12*. At no time did counsel for the Employer or the Intervenor solicit any testimony from Mr. Florissant concerning community of interest. At no time did the Employer’s counsel reserve the right to recall Mr. Florissant to address the “community of interest” factors or present any other witness to address this issue, despite the fact that the hearing officer “requested that the Parties present additional witnesses to provide evidence relating to the community of interest, or lack thereof, between plant supervisors and employees within the bargaining unit represented by the Intervenor.” *DDE at 11*.

In *Specialty Healthcare and Rehabilitation Center of Mobile, 357 NLRB No. 83 (2011)*, the Board held that where an employer challenges a proposed unit because of an excluded classification, it would have to demonstrate “that employees in the larger unit share an overwhelming community of interest with those in the petitioned-for unit.” *Id. at 945-46*. In the instant matter, little testimony was deduced on the “community of interest” issue and the parties asserting this argument failed to present witnesses, solicit testimony or submit documents which

supported their position. The failure of the Employer and the Intervenor to present a thorough case on this point rests solely with them and left the Regional Director with no alternative but to reach the conclusion articulated in the DDE.

POINT III

THE EMPLOYER FAILED TO SUBPOENA WITNESSES IN SUPPORT OF ITS CASE

At the commencement of the hearing, the hearing officer along with counsel for each of the parties, confirmed that the “issues to be litigated at this hearing are supervisory status of the petition for employees and also contract bar . . .” *Tr. (Vol. I) 18:22-25; 19:1-5*. Thereafter, the Employer was directed to present its case. *Tr. (Vol. I) 19:6-7*. During the course of direct examination of its witness, the hearing officer advised the Employer’s counsel to “stick with supervisory issues for this line of questioning” with testimony relating to the contract bar issue to be presented later. *Tr. (Vol. I) 28:7-11*. At no time after the conclusion of the witness’s testimony regarding the supervisory status issue, did the Employer’s counsel attempt to question its witness concerning the contract bar issue.

Further, prior to the commencement of the second day of testimony, Petitioner’s hearing counsel inquired about the request made by the hearing officer to the attorneys for the Employer and the Intervenor to address the contract bar issue:

. . . In addition, I just had a question. We got an email yesterday from [hearing officer] Annie Sue (phonetic) indicating that today we were going to hear from the Employer and 1199 presenting evidence that the petitioned-for unit is not an appropriate unit.

Tr. (Vo. III) 177:19-23. As identified in the record, the hearing officer directed the Petitioner to present its witness and that the Employer’s plant supervisor witness would testify afterwards

regarding the contract bar issue. *Tr. (Vol. III) 178:14-18*. Neither of the attorneys representing the Employer and Intervenor objected to this course of action. After the Petitioner's witness testified, the hearing officer subsequently confirmed that neither the Employer nor the Intervenor would be presenting a witness to testify concerning the second agreed upon issue:

All right, so let the record reflect that the hearing officer has asked each party to bring in a plant supervisor to testify to the community of interest issue, and in off-record conversations during the course of the hearing, each party has said that they are unable to bring any more witnesses in.

Tr. (Vol. III) 258:1-8.

At the hearing, the Employer's counsel acknowledged that "[a]t the end of Mr. Edny's direct examination, Board -- Ms. Annie Hsu requested that the Employer present a plant supervisor and explained that the Employer had a burden of bringing its case." *Tr. (Vol. III) 259:13-15*. Despite this request and the hearing officer reminding the Employer of the burden of proof, there is nothing in the record to reflect that the Employer made any written request to the Regional Director or that its counsel made any application to the hearing officer to request the issuance of a subpoena to ensure that its witness would testify. *See Section 102.66(f), NLRB Rules and Regulations*. Instead, from the record, it appears that the Employer made the decision to voluntarily seek testimony from plant supervisor Gerard McCloskey. *Tr. (Vol. III) 259:16-18*. The Employer's decision not to compel the testimony of its identified witness, Mr. McCloskey, was solely within its own purview. As counsel for the Employer acknowledged at the hearing, Mr. McCloskey was present and available to testify on January 10, 2020. *Tr. (Vol. III) 259:16-18*. He did not, however, testify nor did the Employer seek to compel Mr. McCloskey's testimony pursuant to a subpoena. Had the Employer obtained a subpoena, it could have

requested the enforcement of same or a finding of contempt against Mr. McCloskey pursuant to Section 102.31(d) the Board's Rules and Regulations. *See Best Western City View Motor Inn, 325 NLRB 1186 (1998)*. The failure of the Employer to seek the testimony of Mr. McCloskey by subpoena despite being fully aware of its burden on the contract bar issue, solely rests with the Employer and in no way reflects conduct or a ruling that resulted in prejudicial error.

POINT IV

THE EMPLOYER HAS FAILED TO ESTABLISH THE BASIS FOR A STAY

Although the Employer requests a stay of the election scheduled for March 19, 2020, it fails to identify the factual or legal basis for this request and as a result of the Regional Director's Order dated March 16, 2020, the basis for this relief is now moot. As relating to the legal basis for its requested stay, the Employer inexplicably addresses the standard for a 10(j) injunction relating to the failure of an employer to bargain in good faith. In *Coffman v. Queen of the Valley Medical Center, No. 17-557, 2017 WL 6884316, at *5 (N.D. Ca. Nov. 30, 2017)*, the United States District Court for the Northern District of California was presented with an application by a regional director to stay certain actions by the employer, including changes to terms and conditions of employment and a refusal to recognize and bargain in good faith, during the adjudication of unfair labor practice charges. In granting the injunction, the court explained that the petitioner had "presented persuasive evidence" sufficient to support a likelihood of succeeding on the merits of its theory that the employer's communications "demonstrated unconditional bargaining which waived the preservation of its certification challenge." *Id. at *2*.

It is odd that the Employer seeks a stay claiming that "[a]bsent the granting of a stay of the duty to bargain, an employer must bargain with a union following the certification of election

results, notwithstanding the employer’s filing of a Request for Review.” *Er. Br. at 16*. There is currently no duty to bargain at issue since the election has not been held and, therefore, no certificate of representation has been issued by the Regional Director. Instead, the DDE directed “a secret ballot election among the employees in the unit found appropriate above.” *DDE at 20*. Since the basis articulated for a stay as sought by the Employer is wholly irrelevant to the facts of this case and the issue is moot as a result of the indefinite cancellation of the election due to the coronavirus pandemic, it is respectfully requested that this relief be denied.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Employer’s Request for Review together with its application for a stay of the election, should be denied.

Dated: Tarrytown, New York
March 18, 2020

Respectfully submitted,

BRADY McGUIRE & STEINBERG, P.C.

By: */s/ James M. Steinberg*

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CERTIFICATE OF SERVICE

This is to certify that on March 18, 2020, Petitioner's Opposition to Employer's Request for Review was electronically filed through the Board's website (www.nlr.gov), with a copy served by email upon Ayanna T. Blake, Attorney for Employer, Gwynn Wilcox, Attorney for Intervenor and Regional Director Kathy Drew King.

/s/ James M. Steinberg, Esq.