Before the National Labor Relations Board
Region 21

International Union, Security, Police &

Fire Professionals of America (SPFPA) and its Local

52, Intervenors and Incumbent Labor Organizations

-and-

Paragon Systems **Case No.** 21-RC-262650

Employer

-and-

Law Enforcement Officers Security

Unions LEOSU-CA, LEOS-PBA

Petitioner

Intervenor's Request for Review

The International Union, Security, Police and Fire Professionals of America (SPFPA) and its Local 52 (Intervenor, collectively), the incumbent unions in this matter, file this Request for Review (Request) of the Regional Director's Denial of the Intervenor's Motion to Dismiss (Denial) and his subsequent Decision & Direction of Election (DD&E.)

For the reasons stated below, during the pre-election hearing,[1] and in the Intervenor's post-hearing brief[2] both the Denial and DD&E raise substantial questions of law and policy because the Denial and DD&E depart from reported Board precedent concerning the Board's contract bar doctrine by relying on extrinsic evidence. They both also clearly and erroneously decided multiple

[1] The hearing transcript is attached as Exhibit 1
[2]The post-hearing brief is attached as Exhibit 2.

substantial factual issues on the record to conclude that the petitioned-for single facility unit was appropriate. Only a multi-facility unit was appropriate, per the Board's traditional community of interest factors. These errors prejudicially affect the rights of the Intervenor to represent employees in its historic multifacility unit.

The Board's ruling on this Request will affect the validity of all ballots to be cast. The Intervenor requests that all ballots be impounded and remain unopened pending the Board's ruling on this Request.

Background concerning the Petitioned-For Unit[3]

In June 2011, Region 21 certified the Intervenor, a 9(b)(3) union, as the collective bargaining representative for a multi-facility bargaining unit of Paragon's (Employer) 9(b)(3) employees including the employees at a so-called "Air and Marine Operations Center" (AMOC facility) in Riverside County, California and including other facilities in Riverside, San Diego, Imperial, and San Bernardino Counties. At the time, the Employer employed employees in this unit to service a service contract for security services between it and Federal Protective Services (FPS), which is part of the Department of Homeland Security (DHS).

In August 2011, the Employer and the Intervenor entered a collective bargaining agreement (CBA) effective from August 31, 2011 to November 30, 2014. This CBA had a recognition clause reading:

> All security officers employed by the Company in the Counties of San Diego, San Bernardino, Riverside and Imperial, California, who are employed pursuant to a contract between the Company and the United States Department of Homeland Security, Federal Protective Services ("DHS/FPS"") Contract, or it successor(s).

It is undisputed that the recognition clause of this CBA applied to AMOC employees and

[3] The documents discussed in this section are contained in the Region's pre-election hearing exhibits, collectively attached as Exhibit 3.

at the Employer's other facilities in Riverside, San Diego, Imperial, and San Bernardino Counties ("other FPS/DHS facilities.")

It is equally undisputed that under this CBA, AMOC employees enjoyed the same collectively bargained wages, hours, working conditions, and terms of employment as those enjoyed by employees at the other FPS/DHS sites.

In November 2014, the Intervenor and the Employer entered into another CBA, effective from December 1, 2014 and November 30, 2017. It had a recognition clause largely identical to the 2011-2014 CBA, including AMOC employees. Accordingly, AMOC employees had the same wages, hours, working conditions, and terms of employment as those employees at other FPS/DHS sites.

In Summer 2017, the Intervenor and Employer learned that FPS/DHS was poised to adjust its contract with the Employer so that employees at the AMOC facility would provide services under a contract with a different federal agency, Customs and Border Patrol ("CBP.")

In August 2017, Intervenor representative Don Eagle[4] and Employer representative Laura Hagan signed a Letter of Agreement ("LOA") that included a recognition clause reading:

> security officers employed by the Company in the Counties of San Diego, San Bernardino, Riverside and Imperial, California, who are employed pursuant to a contract between the Company and the United States Department of Homeland Security, or any sub-agency thereunder, including any successor contract covering the same facilities with employees performing the same or substantially

[4] Don Eagle is the current Secretary Treasurer of the International Union, Security, Police & Fire Professionals, (SPFPA). Before holding this position, he was the SPFPA Region 3 Vice President from 2010 to August 2017. Eagle's duties as Region 3 Vice President included negotiating CBAs, enforcing such agreements, and investigating and filing grievances to do so. Eagle serviced Local 52.

similar functions.

> This shall include, but shall not be limited to, security officers employed by the Company and its successors at the United States Customs and Border Protection Air and Marine Operations Center; at the United States Ports of Entry; and at all other locations currently serviced by the Company under contract with the Department of Homeland Security and its sub-agencies.

From about September 2017 to present, employees at the AMOC facility worked under the CBP contract. The adjustment from working under the FPS/DHS to working under the CBP has not changed operations at the AMOC facility or how it is managed.

After the service contract adjustment, the vast majority of employees already at the AMOC site remained employed there. Since the adjustment, there has been very little turnover at the AMOC facility. Likewise, frontline supervisors have remained unchanged.

Since the adjustment to present, AMOC employees' job duties and post orders remained unchanged. At a prelection hearing, *see infra*, Intervenor witness Ryan Kelly[5] testified without contradiction that, before and after the service contract adjustment, AMOC employees had the same Employer Human Resources department as employees at the Employer's other FPS/DHS facilities. The same Employer-issued employee handbook applies to the AMOC facility and to the Employer's other facilities.[6]

[5] Ryan Kelly has been the SPFPA Region 3 Vice President from August 2017 to present. Kelly's duties are identical to Eagle's when he held the position and include servicing Local 52.

[6] At hearing, Employer representative Laura Hagan claimed that there were some minor differences between the AMOC facility and the FPS/DHS facilities served by the Employer. She alleged that there are two (2) "medical" tests required per year as a term of employment at the AMOC facility, whereas only one (1) such test is required at the FPS/DHS facilities. There was

In November 2017, the Intervenor and Employer entered their third CBA, with effective dates from December 1, 2017 to November 30, 2021. Eagle testified that by entering this CBA, the parties did not intend to and did not in fact defease the 2017 LOA.

From December 1, 2017 and until late 2019, AMOC employees' wages, hours, and working conditions were identical to those employees at the FPS/DHS sites. In August 2019, the Intervenor and Employer signed another Letter of Agreement ("2019 LOA") "amending" the then- and now- current CBA.

By its plain terms, the 2019 LOA, effective October 1, 2019, increased hourly wages for "all work at posts located in Riverside and San Bernardino Counties, and all non-duty time for employees who regularly work in Riverside and San Bernardino Counties." The LOA expressly excluded Riverside employees from another wage increase to take effect January 1, 2020. It also contained a change to Health & Welfare benefit contributions "for employees regularly working in Riverside and San Bernardino Counties" effective retroactive to October 1, 2017.

The LOA also set forth a premium for "all work performed at a post requiring" a "Top-Secret" or "Secret" clearance working a post requiring "Top Secret" and "Secret" clearance. Kelly

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no testimony that these tests are a condition of continued employment. Nor was there any testimony about what these tests involve or how long it takes to administer them. Accordingly, the additional test is, at most, a de minimis difference between the AMOC and FPS/DHS facilities.

Hagan also testified in vague and unspecific terms that the service contract adjustment caused a change in the "contracting officer." A contracting officer is a CBP representative who ensures that the Employer adequately performed the service contract. which "could" change the "nuances" of job duties. When asked to identify what changes occurred because of the carve out, she could not do so and was unaware of any specific changes.

testified that AMOC employees qualify for this premium and have received it since the LOA entered into effect.

Beginning in about June 2020 and continuing, the SPFPA International proposed a CBA covering solely the AMOC facility, which CBA would become effective July 1, 2020.The terms of this CBA are virtually identical to the current CBA. Since the International's proposal, the parties have exchanged multiple proposals but have not entered into any agreement to place the AMOC facility under a CBA separate from the FPS/DHS facilities. There is no evidence that at the same time, the International proposed to the Employer that the CBA covering the Employer's other facilities be amended to expressly exclude the AMOC facility.

Proceedings before Region 21

The Petitioner initiated this case on July 3, 2020[7] when it filed an RC petition with a unit description as follows.

> Employees Included
>
> All full time and regular part time, armed security officers employed by the Company, performing guard duties as defined by Section 9(b)(3) of the National Labor Relations
>
> [at the Air Marine Operations Center (AMOC), Riverside Ca]
>
> Employees Excluded
> Office clerical, managerial personnel, confidential personnel, supervisors as defined by the National Labor Relations Act

The Intervenor intervened in the case and filed a Position Statement and Motion to Dismiss arguing that a CBA barred processing the petition because it covered the petitioned-for unit and because the only appropriate unit was a multifacility unit including both the AMOC facility and the FPS/DHS facilities. The Regional Director later denied this Motion.

[7] All dates in 2020, unless otherwise indicated.

On July 27, a pre-election hearing was held to determine whether a contract bar applies and whether the single facility unit was appropriate.

The Intervenor submitted a post-hearing brief. As in its earlier Motion, the brief argued that the contract bar doctrine required dismissal of the petition. This was because the 2019 LOA was part of the underlying 2017-2021 CBA and applies to employees in Riverside County and the AMOC facility is located in that County. Wholly independent of the 2019 LOA, the brief argued, there was a bar because the underlying CBA had a recognition clause encompassing employees employed to service contracts that are successors to the FPS contract, that the CBP contract is a successor contract to the FPS contract, and therefore AMOC employees were covered by the current CBA.

The brief also argued that the petition should be dismissed because it was for an inappropriate unit. The brief noted the parties' long and productive history of collective bargaining over a multifacility unit including the AMOC facility and the similarity in the terms and conditions of employment between the AMOC and other facilities. It also asked that administrative notice be taken that the AMOC facility was more geographically proximate to certain FPS/DHS facilities than certain FPS/DHS facilities were to each other.

On August 20, the Region issued its DD&E, rejecting the Intervenor's contract bar and community of interest arguments.[8]

As to the contract bar argument, the Region noted that the 2017 LOA had a recognition clause mentioning *both* the AMOC facility and the CBP contract. The Region also noted that the 2011 Regional certification and that the CBAs preceding the current CBA defined the unit by referring to both worksite location and the government contract being serviced (ie, the FPS/DHS

[8] The DD&E is attached as Exhibit 4.

contract.) Ex. 4, pg. 8 ("Since certification in 2011, the existing unit has consistently been defined by two conditions, the location of employment and the contract covering the facility in question.")

The Region then reasoned that these earlier documents required that the 2017-2021 CBA and the 2019 LOA *also* name the AMOC facility by location and by government contract service (ie, the CBP contract) in order to apply to the AMOC facility. Since the 2017-2021 CBA and the 2019 LOA only mentioned successor contracts and facility location, respectively, there was no CBA applicable to the AMOC facility when the petition was filed.

The Region also rejected the contract bar argument, because, by "actions" testified to by the Intervenor and the Employer at hearing, the "AMOC guards" were "treated" as "separate" from the Employer's other employees at FPS/DHS facilities. *Id.* ("The first problem with this argument is that, from 2017 onward, the Intervenors and the Employer treated the AMOC guards as separate. This is demonstrated by their actions and the Employer's former vice president for labor relations and general counsel confirmed as much at hearing.")

The Region rejected the Intervenor's community of interest argument as supported by "scant and conclusory" evidence.

Discussion

Both the Denial and DD&E raise substantial questions of law or policy because they depart from reported Board precedent and because they clearly erroneously decide multiple substantial factual issues on the record and such errors prejudicially affect the rights of the Intervenor.

The Region violated the Board's longstanding prohibition on using extrinsic evidence to assess contract bar arguments when it relied on evidence outside the four corners of the 2019 LOA and the recognition clause of the underlying CBA. *See e.g, Jet-Pak Corp.*, 231 NLRB 552, 552-

553 (1977) ("[I]n determining whether a contract serves as a bar to an election, we are permitted only to examine the terms of the contract as they appear within the four corners of the instrument itself.")

This evidence included the parties' "actions" testified to at hearing and the 2017 LOA, earlier CBAs, and the 2011 certification *South Mountain Healthcare and Rehabilitation Center*, 344 NLRB 375, fn. 3 (2005)(finding that a Region "erred in relying on testimony adduced at the hearing" when assessing a contract bar argument.)

If the Region had properly limited its assessment to the four corners of the 2019 LOA and 2017-2021 CBA's recognition clause, it would have found that a contract bar applied. The 2019 LOA's mention of the Employer's Riverside County locations meant that the AMOC facility was covered, as that facility is in Riverside County. The Employer's contract with CBP was a successor to its earlier contract with FPS/DHS, meaning even absent the amendment to the CBA by the 2019 LOA, the AMOC facility was covered by the CBA when the petition was filed.

Reviewing extrinsic evidence was especially inappropriate considering that Articles 17.2 and .3 of the 2017-2021 CBA state:

> All understandings and agreements reached by the parties are set forth in this Agreement
> […]
>
> [t]his Agreement and the addendum attached hereto contains the entire understanding, undertaking, and agreement of the Company and the Union
> […]
>
> Changes to this agreement whether by addition, waiver, deletion, amendment or modification must be reduced to writing and executed by both the Company and the Union.

The 2017 LOA, earlier CBAs, and the 2011 certification were not "set forth" in the 2017-2021 CBA and were therfore superseded by the 2017-2021 CBA and the 2019 LOA, as the latter

was indeed "reduced to writing and executed by both the Company and the Union." Accordingly, only the 2017-2021 CBA and the 2019 LOU can have any relevance to a contract bar analysis.

Even if relying on extrinsic evidence did not depart from reported precedent, the Denial and DD&E still erred on substantial factual issues in its application of community of interest law, meaning this Request should be granted. There was a long and productive history of collective bargaining for a multi-facility unit including the AMOC facility.

This was true even after the AMOC facility was adjusted so that its work was under the CBP contract, AMOC employees continued to enjoy the same coactively bargained terms and conditions as their counterparts at other FPS/DHS facilities in the unit. The skill set was also the same between the two (2) groups. Specific record testimony by Ryan Kelly so established. Geographical proximity favors a multifacility unit. The AMOC facility is closer to certain FHS/DHS facilities than some FPS/DHS facilities are to each other. None of these factors favoring a multifacility unit can be discounted because the International merely proposed a stand-alone AMOC unit. Again, this proposal was never accepted by the Employer, tentatively or otherwise.

For these reasons, and those stated in the Intervenor's earlier filings with the Region and during the hearing, the Board should grant this Request.

Conclusion

Both the Denial and DD&E raise a substantial question of law or policy because they depart from reported Board precedent and are based on substantial factual errors by the Region prejudicing the Intervenor's right to represent employees in the only unit appropriate here, a multifacility unit. Accordingly, the Board should grant this Request and order that the petition be dismissed. In all events, all ballots in this case must be impounded awaiting the Board's decision on this Request.

Respectfully Submitted,

/s/ Richard M. Olszewski

Richard M. Olszewski

DATE: September 3, 2020, Detroit, Michigan

Certificate of Service

The undersigned affirms that the foregoing and its exhibits have been e-filed with Region 21 and with the Board and served electronically upon the below persons:

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/s/ Richard M. Olszewski

Richard M. Olszewski

DATE: September 3, 2020, Detroit, Michigan