

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

CVS/PHARMACY,

Petitioner,

and

TEAMSTERS LOCAL 727,

Respondent.

Case No. 13-UC-266228

**REQUEST FOR REVIEW OF REGIONAL DIRECTOR'S  
DISMISSAL OF UC PETITION**

**I. Introduction**

CVS/pharmacy (“CVS”) hereby requests review of the decision (the “Decision”) by the Regional Director of Region 13 to dismiss the instant unit clarification petition (“Petition”). The Petition seeks to exclude Section 2(11) supervisors from an established bargaining unit. After receipt of position letters and without holding a hearing, the Regional Director concluded that the Petition was untimely. The Regional Director’s decision did not rely on either of the Board’s two recognized grounds for untimeliness for petitions involving statutory supervisors. The Petition was not filed during the first year following initial certification. Nor is there a collective bargaining agreement in effect; the last agreement expired over four years ago. Rather, the Regional Director erroneously relied on a principle that is only applicable in cases that do not involve statutory supervisors. Decades of unambiguous Board precedent make clear that the principle cited by the Regional Director does not and cannot apply to the instant Petition. CVS cited that precedent and the Regional Director disregarded it. The dismissal of the Petition was

therefore improper. CVS requests that the Board reinstate the Petition and order that a hearing be held on the merits.

If permitted to stand, the Regional Director's decision would mean that Section 2(11) supervisors would be permanently part of the existing bargaining unit with no opportunity, ever, for their status to be adjudicated. The Regional Director's decision that the Petition was untimely was based solely on the supervisors' historic inclusion in the unit and the supposed disruption in the bargaining relationship between CVS and Teamsters Local 727 ("Local 727") if they were excluded now. There is no expiration date on those factors – indeed, on the contrary, their force would only grow stronger over time. The Board has applied this principle to disputes over unit placement of statutory employees, but has never applied it to questions about Section 2(11) status. Questions about unit placement of employees are within the Board's expertise and discretion; questions about whether a worker is a Section 2(11) employee are governed by the statute. The Board has therefore always applied a very narrow and time-limited test to disputes about statutory supervisors. The one-year-after-certification rule is limited, obviously, to one year. The contract bar rule cannot exceed three years. Thus, whenever the Board has found a petition raising 2(11) issues to be untimely, it was always temporary – allowing the statutory mandate to be vindicated in the near term. Here, the Regional Director's decision would preserve in perpetuity statutory protections for supervisors whom Congress excluded from the Act's coverage.

Under Section 102.67(d)(1)(ii) of the Board's Rules and Regulations, a request for review may be granted where a substantial question of law or policy is raised because of a departure from officially reported Board precedent. That is the case here. The Board should review and reverse the Regional Director's decision dismissing the Petition.

## **II. Background**

Local 727 is the bargaining representative of pharmacists in certain CVS pharmacies in the greater Chicago area. Neither CVS nor Local 727 was involved in the initial organizing of this bargaining unit. Originally, Teamsters Local 714 represented the pharmacists working at Chicago-area Osco Drug stores (“Osco”). CVS purchased certain stores from Osco, and thereafter Local 727 took over representation from Local 714. CVS and Local 727 negotiated their first agreement in 2010. Their second agreement ran from 2013 to 2016 and is now expired. The Recognition clause of the expired CBA excludes supervisors. The Recognition clause is silent as to the status of Team Leaders, the position at issue in the Petition.

The position letter CVS filed with the Regional Director previews the evidence expected to be introduced at hearing to establish the supervisory status of the Team Leaders. In brief, Team Leaders are responsible and held accountable for hiring, disciplining, promoting, transferring, directing, and assigning the work of pharmacy technicians; and they meet several secondary indicia of supervisory status, including developing and executing business plans for the pharmacy, attending management-only meetings and trainings, and being entrusted with access to parts of CVS’s systems that are limited only to management.

The evidence as to the Team Leaders’ supervisory status is overwhelming. As CVS’s position letter describes, CVS is prepared to present witness testimony and documentary evidence at hearing. Among the documents that CVS expects to present are:

- Hiring requisitions showing Team Leaders creating job openings and being hiring managers (totaling over 200 documents);
- Disciplinary documents created and delivered by Team Leaders to technicians (totaling over 50 documents);
- Performance reviews given by Team Leaders to technicians (totaling over 100 documents);

- Disciplinary documents given to Team Leaders by District Leaders showing Team Leaders being held accountable for fulfilling, or failing to fulfill, supervisory functions (totaling over 50 documents);
- Performance reviews given by District Leaders to Team Leaders showing their being held accountable for fulfilling, or failing to fulfill, supervisory functions (totaling over 100 documents);
- CVS scorecards given only to Team Leaders in the pharmacy showing the pharmacy's profit and loss and other performance metrics (consisting of exemplar documents for each store);
- Business action plans prepared by Team Leaders describing the ways in which they will improve the profitability, and other metrics, in their pharmacies (consisting of exemplar documents for each store); and
- Management-only trainings delivered to Team Leaders.

CVS provided the Regional Director with sample documents for each of these categories along with its position statement. Witness testimony will explain and expand upon the documents.

### **III. Procedural History**

CVS filed the Petition on September 16, 2020. In the box asking Reason Why Petitioner Desires Clarification, CVS stated: "Team Leaders should be excluded from the bargaining unit because they are statutory supervisors under the Act." In response to a request from the Regional Office, CVS submitted an email on September 22, 2020 explaining why the Petition was timely. Thereafter the Regional Office requested position letters, which the parties cross-filed on September 30, 2020. CVS's position letter addressed both timeliness and the merits. The Union's position letter was almost exclusively about timeliness. On October 7, 2020, CVS submitted another email responding to the Union's position letter and further explaining why the Petition was timely.

The essence of CVS's timeliness argument to the Regional Office was as follows:

(1) longstanding and clear Board precedent distinguishes between questions of 2(11) status and disputes concerning unit placement of statutory employees; (2) UC petitions raising questions of 2(11) status are only untimely if filed during the first year following initial certification or when there is a collective bargaining agreement in effect; (3) historical inclusion of a position in the bargaining unit and the absence of recent substantial changes are not grounds for dismissal on timeliness where the dispute involves 2(11) status; and (4) since the instant Petition involves a 2(11) question, it is timely because it was not filed during the first year following initial certification and there is no collective bargaining agreement in effect.

Despite the Board precedent, the Regional Director treated the Petition as though it involved a dispute over unit placement of statutory employees, and consequently dismissed it as untimely:

“The instant petition is not timely filed inasmuch as there is no ambiguity of the placement of Team Leaders, there have been no substantial changes to the classification, and the parties are currently in negotiations. The inclusion of the Team Leader classification in the bargaining unit is a result of negotiations between the parties and this agreement has been embodied in multiple collective bargaining agreements.”

Decision at 3.<sup>1</sup>

This request for review follows.

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<sup>1</sup> The factual basis for the Regional Director's conclusion that “there have been no substantial changes to the classification” is unclear. There was no hearing or other taking of evidence by the Regional Office, and therefore CVS has not addressed this factual question. CVS's position, supported by Board law, is that whether or not there have been substantial changes is irrelevant to a timeliness claim in a case involving 2(11) status.

#### IV. Discussion

The Act does not cover supervisors. *See* 29 U.S.C. §§ 152(3), 164(a); *see also* *T. K. Harvin & Sons, Inc.*, 316 NLRB 510, 530 (1995) (“Supervisors are excluded from coverage of the Act.”). The Board has long recognized that it cannot take any actions that would compel, or even permit, statutory supervisors to be unionized. *See Continental Oil Co.*, 95 NLRB 358, 361 n.8 (1951) (“The Board has no authority to order an employer to bargain with supervisors.”); *In re St. Paul & Tacoma Lumber Co.*, 81 NLRB 434, 436 (1949) (“Although Section 14 (a) of the amended Act may, as urged by the Petitioner, permit an employer voluntarily to bargain collectively with a labor organization which includes supervisors among its members, the section also prohibits the Board from lending its processes to such activity.”). This is a non-discretionary principle because the exclusion of supervisors is mandated by the Act; the Board lacks authority to disregard its governing statute. *See Washington Post Co.*, 254 NLRB 168, 169 (1981) (noting, in case involving 2(11) supervisors, that the Board “is required to exclude positions from a bargaining unit where the inclusion of those positions would violate the principles of the Act”); *Int’l Alliance of Theatrical Stage Emps. (IATSE), Local 127*, No. 16-CB-219221, 2019 NLRB LEXIS 357, at \*47 (2019) (“The Board must follow, not rewrite, the statute which created it.”).

Nonetheless, from time to time it happens that bargaining units contain statutory supervisors. This can occur for any number of reasons, one of which is that in a voluntary recognition process the parties may include supervisors in a unit without Board knowledge or involvement. The Board has established the UC petition as a vehicle by which a party can ask the Board to clarify an existing unit to remove those supervisors. *Frontier Hotel & Casino*, 318 NLRB 857, 868 (1995) (noting that where unit contained supervisors and had never been

certified by the Board, employer could “seek to modify the collective-bargaining unit to comport with the statute” by “fil[ing] a unit clarification petition”).

There are only two situations, narrow in scope and temporary in duration, where the Board will delay entertaining a UC petition that raises 2(11) questions. First is during the initial year following Board certification. *See Firestone Tire & Rubber Co.*, 185 NLRB 63, 64 (1970) (“[T]he Board has established and consistently applied a rule requiring the dismissal of any representation petition filed during the certification year. . . . The Board action sought by [a unit] clarification petition would be no less disruptive of the orderly and stable labor relations envisioned by a certification [and should] be governed by the same principles and be subject to the same rules with regard to timely filing.”).<sup>2</sup> Second is during the term of a collective bargaining agreement. *See Edison Sault Elec. Co.*, 313 NLRB 753, 753 (1994). In both cases, the Board has prioritized the interests of labor relations stability for the unit as a whole over the short-term risk that supervisors might unlawfully be included in a bargaining unit. *Id.* (“The Board’s rule is based on the rationale that to entertain a petition for unit clarification during the midterm of a contract which clearly defines the bargaining unit would disrupt the parties’ collective-bargaining relationship.”). In balancing these conflicting prerogatives, the Board is mindful that its tacit sanctioning of a possibly illegal unit will be temporary. Thus in *Washington Post Co.*, 254 NLRB 168, 169 n.13 (1981), the Board explained that “[s]ignificantly,” a prior case dismissing a UC petition during the term of a collective bargaining agreement was “without prejudice to its being filed at an appropriate time” – i.e., after the contract had expired.

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<sup>2</sup> *But see Kirkhill Rubber Co.*, 306 NLRB 559, 559 (1992) (finding that even during initial certification year UC petitions are timely filed).

**There is not a single case in the history of the NLRB where a UC petition raising 2(11) issues was dismissed on timeliness grounds in the absence of one of the two *Edison* factors (within a year of certification or where a CBA was in effect).**

Most timeliness questions in 2(11) UC cases involve whether or not there is a collective bargaining agreement in effect. *See Edison Sault Elec. Co.*, 313 NLRB at 753 (UC petition untimely “during the course of a contract”); *Arthur C. Logan Mem. Hosp.*, 231 NLRB 778, 778 (1977) (UC petition untimely during term of “current collective bargaining agreement”); *Wallace-Murray Corp.*, 192 NLRB 1090, 1090 (1971) (UC petition untimely “midway during the term of the current agreement”); *Rapid Armored Corp.*, 323 NLRB 709, 710 (1997) (denying request for review of Regional Director’s decision holding that “until the extant contract expires, the Board will not entertain a petition for clarification”).

To the extent the Board has recognized exceptions to this contract bar rule, it has always been to expand the range of times in which a petition is timely, allowing the Board to hear a petition even during the contract term. For example, a UC petition may be filed near the end of the term of a contract, without requiring waiting until the agreement has actually expired. *See, e.g., Shop Rite Foods, Inc.*, 247 NLRB 883, 883 (1980) (“petitions are appropriately filed shortly before the expiration of the collective-bargaining agreement [because] when the parties are preparing for negotiations on a new contract, unit clarification may spare them an unnecessary labor dispute”). Challenges may also be filed at the beginning of a contract, if a party has reserved its right to do so during negotiations. *See, e.g., Baltimore Sun Co.*, 296 NLRB 1023, 1023 (1989) (although usually “the Board will not consider unit clarification petitions filed midway during the term of a contract,” an employer could do so when it reserved its rights during contract negotiations).

These cases compel the conclusion that the Petition here is timely. The Regional Director did not find that the unit was ever certified, let alone within the past year. Nor did he find that there is a contract in effect. On the contrary, his decision specifically found that the “parties are currently negotiating a successive (sic) collective bargaining agreement to their agreement that expired in 2016.” In effect the Regional Director found that an agreement which expired over four years ago permanently bars the Petition. His ruling not only contradicts undisputed Board precedent; it renders that precedent nonsensical. A necessary corollary to the proposition in *Wallace-Murray* that a petition was untimely “midway during the term of the current agreement” is that the petition would be timely when that current agreement expired; and even, as *Shop Rite Foods* recognized, “shortly before the expiration.” Likewise, as *Baltimore Sun* found, the Board will entertain a UC petition even during the term of a contract where the employer reserved its rights during contract negotiations. Here, where the parties are still in negotiations, CVS necessarily has the right to have its Petition heard. If CVS could, in the pending negotiations, preserve its right to file a petition during the term of a contract the parties might reach, then CVS must have the right to file now while bargaining is ongoing.

The Board applies different principles when the issue in the UC petition is merely a question of unit placement of statutory employees, rather than 2(11) status. This is a distinct body of precedent because the dispute does not involve a statutory mandate, but instead an issue as to which the Act accords the Board broad discretion. *St. Vincent Hosp.*, 285 NLRB 365, 367 (1987) (“The courts have recognized consistently that, in making unit determinations under Section 9(b), Congress entrusted the Board with broad discretion.”); *Davis Cafeteria, Inc.*, 160 NLRB 1141, 1143 (1966) (“Congress authorized the Board to make the determination as to what is an appropriate unit, and, in making this determination, a wide discretion has been vested with

the Board.”). In these cases, the Board will dismiss a petition as untimely if the positions at issue have been historically included in the unit and there have been no recent substantial changes. *See, e.g., Kaiser Foundation Hospitals*, 337 NLRB 1061, 1061 (2002). The permanence of such decisions does not violate the Act, because the Act does not mandate one unit composition or another; instead it allows the Board to decide. The Board has used its discretion in these cases to refuse to revisit long-settled unit questions, prioritizing stability in labor relations over fine-tuned perfection in bargaining unit make-up.

This distinction between UC petitions involving 2(11) questions and those raising only issues of unit composition of statutory employees is not novel. It has been litigated in several Board cases, going back over 55 years, and each time the Board made clear that the *Kaiser* test does not apply to 2(11) disputes. CVS brought these cases to the attention of the Regional Director, who disregarded them and then misapplied the *Kaiser* test in this 2(11) context.

In 1964, the Board noted that:

Although in certain circumstances when determining the scope of the appropriate unit, weight is given to bargaining history and to the prior agreement of the parties, such factors are not determinative of the status of disputed employee categories whose exclusion may be required because of the statute or for policy reasons.

*Bhd. of Locomotive Firemen*, 145 NLRB 1521, 1525 n.10 (1964). The Board reaffirmed this principle seventeen years later, in *Washington Post Co.*:

Thus, except in certain limited and well-defined factual situations, the Board, when presented with an appropriate petition or claim, is required to exclude positions from a bargaining unit where the inclusion of those positions would violate the principles of the Act. **While it may be that certain of the positions sought to be excluded by a unit clarification petition have long been included under previous contracts, and the job duties of those positions have remained unchanged, nonetheless, if it can be shown that the persons in such positions meet the test for**

**establishing supervisory, managerial, or confidential status, we are compelled to exclude them.**

*Washington Post Co.*, 254 NLRB at 169 (emphasis added). Again in 2007, in *Goddard Riverside Community Center*, the Board once again made clear that “a UC petition seeking to exclude a classification based on supervisory status may be processed even though the disputed classification has been historically included.” 351 NLRB 1234, 1235 (2007). Later in the decision, the Board explained that a petition was “timely filed” so long as it was not “during the term of the contract.” *Id.* at 1236.

Nearly sixty years of Board precedent thus makes clear that, except during the limited and temporary duration of a non-expired contract, a UC petition seeking to adjudicate the exclusion of statutory supervisors from a bargaining unit must be heard. Nonetheless, the Regional Director chose to disregard the applicable law for 2(11) UC disputes and apply precedent that is limited to non-supervisor UC cases. The Regional Director’s decision relied explicitly on the inapplicable *Kaiser* factors:

“UC petitions are appropriate for resolving 1) ambiguities concerning unit placement, or 2) placement of an existing classification that has undergone recent, substantial changes in employee duties and responsibilities.”

Decision at 1.

“UC petitions are timely if the petition is intended to clarify employees performing newly created operations or there are new classifications that were not in existence at the time the contract was signed or where those classifications were not considered in the contract.”

*Id.*

“The instant petition is not timely filed inasmuch as there is no ambiguity of the placement of Team Leaders, there have been no substantial changes to the classification, and the parties are currently in negotiations.”

Decision at 3.

The Regional Director did cite several of the applicable Board cases but ignored what they actually said, focusing instead on irrelevant factual distinctions. Several times the Regional Director referred to the “contractually agreed-upon unit” as though the parties currently had a contract, when it is undisputed that they do not. Decision at 2. The final sentence of the Regional Director’s decision states that the historical inclusion of Team Leaders in the bargaining unit “is the result of negotiations between the parties and this agreement has been embodied in multiple collective bargaining agreements.” Omitted is the fact that there is not now a collective bargaining agreement, and there has not been one for over four years. Thus, the decision takes longstanding Board precedent barring petitions when a contract is in effect and applies it to a situation where a contract is not in effect, but used to be.

In all prior Board cases where a contract barred a petition involving a 2(11) question, it was a temporary bar – ending when the agreement ended. The Regional Director’s decision here bars a petition in perpetuity because sometime in the past there was a contract. Under this logic, the statutory supervisors will unlawfully remain in the unit forever without any peaceful means to have their status adjudicated.

The Regional Director’s decision departs even further from the Board’s precedent in the following statement:

A petition may also be entertained shortly after a contract is executed when the parties could not reach agreement on a disputed classification and the UC petitioner did not abandon its position in exchange for contract concessions. *St. Francis Hospital*, 282 NLRB 950, 951 (1987). See also *Goddard Riverside Community Center* 351 NLRB 1234 (2007). The parties in the instant case have not recently executed a contract as they are currently in negotiations for a successive collective bargaining agreement.

Decision at 2. This says that if CVS informed the Union during negotiations that it disputed the supervisory status of Team Leaders, then it could timely file a petition to exclude them after a new contract was signed. Thus, an actual contract would not be a bar if the employer raised the issue during bargaining. In fact, CVS has now raised the issue, while bargaining is ongoing and before a contract has been reached, yet the Regional Director has found that the petition is untimely. At best this rationale is backward. There is decades of Board precedent barring a petition when there is a contract, but allowing a petition when there is no contract. The Regional Director nevertheless concluded that the petition was untimely even though there is no contract between CVS and the Union, but went on to say that the petition could become timely if or when a contract is signed. This makes no sense and it is not the law.

The Regional Director incorrectly characterized CVS's position as being that "supervisory status must be determined whenever it is raised." Decision at 2. That is not CVS's position. Rather, CVS's position is that supervisory status must be determined via hearing so long as the petition was not filed within one year of certification or when a collective bargaining agreement is in effect. That is the Board's explicit holding in numerous cases, including *Washington Post*. The Board should uphold its precedent here. Because Local 727 was not certified in the past year and there is no CBA in effect between the parties, the Petition is timely.

## **V. Conclusion**

The Regional Director's decision dismissing the Petition without a hearing on timeliness grounds is erroneous; violates the Act; contradicts Board precedent; and would be injurious to sound labor relations policy. It should be reviewed and reversed.

Dated: November 5, 2020

Respectfully submitted,

CVS/PHARMACY,

By its attorneys,



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**Certificate of Service**

I hereby certify that on this 5th day of November, 2020, I caused one true and correct copy of the foregoing document to be e-filed with the Executive Secretary of the National Labor Relations Board and with Region 13 of the National Labor Relations Board.

Copies of this document have also been served on the following individuals by e-mail:

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