United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: May 29, 2007

TO : Michael Lightner, Acting Director
Region 22

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice 355-2201-5000
530-4850-0100

SUBJECT: Robert Wood Johnson University Hospital
Case 22-CA-27693

This Section 8(a)(5) case was submitted to advice as to whether the Employer unlawfully insisted upon a separate collective-bargaining agreement for, and failed to apply a successor collective-bargaining agreement to, a previously excluded group of employees that the Board certified as part of the unit pursuant to a Globe[1] election during bargaining for the successor agreement. We conclude that the Employer had an obligation to apply terms of the new agreement germane to the entire unit to the "Globed-in" employees and then, upon request, to bargain with the Union about terms specific to the Case Managers that were not covered by that agreement. We further conclude that absent withdrawal, the Region should dismiss this charge because there is no evidence that the Employer either failed to apply general terms of the new agreement to the "Globed-in" employees, or failed to bargain about Case Managers' terms and conditions that are not covered by that agreement.

FACTS

On February 22, 1978, the Board certified the Union as the representative of a unit of registered nurses (RNs). This unit did not include the group of approximately 25 RN Case Managers involved here. The most recent bargaining agreement between the parties, set to expire on June 30, 2006,[2] was extended by the parties to August 4. The agreement covered approximately 1300 RNs; it did not cover the RN Case Managers.

Negotiations for a successor agreement began in April. On June 30, a Globe self-determination petition was filed seeking inclusion of the RN Case Managers in the RN unit. On August 11, a majority of the RN Case Managers voted to be included in the existing RN unit, and no party filed objections to the election. On August 20, the Union advised the Employer that the new agreement should include

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[1] Globe Machine and Stamping Co., 3 NLRB 294 (1937).

[2] All dates hereinafter are in 2006 unless otherwise stated.

the Case Managers. The Employer responded that the Case Manager certification had not yet issued. On August 30, the Board issued a certification in the Globe election and placed the RN Case Managers in the RN unit.

Between April and September 2006, the parties met approximately twenty times to negotiate terms and conditions of employment. Neither party asserts that the Case Managers were mentioned during negotiations, except for the brief exchange on August 20, noted above. The parties finally reached agreement on a new agreement on September 18, effective from that date through June 30, 2009.

The parties met on November 21 to discuss the terms and conditions of the Case Managers. The Union proposed that the Case Managers would have the same working conditions as the RNs and would be covered by the new agreement. The Union also proposed additional terms specifically applicable to the Case Managers. The Employer proposed a separate contract to cover the Case Managers based on its position that the RN agreement did not cover them at all. However, the terms of the Employer's proposed Case Managers agreement mirrored those of general applicability in the new RN agreement, e.g., union-security and grievance-arbitration. The Employer's proposed agreement differed only regarding terms and conditions applicable to job classifications, such as wages. With regard to those terms, the Employer either proposed modifications or offered generally to bargain about them.

In January 2007, the Employer agreed to cover Case Managers by the new RN agreement, except where the Employer had exempted a particular section, such as wages, applicable to job classifications. The Employer again either proposed modifications to that section or offered to bargain with the Union concerning it. The parties continue to negotiate concerning the Case Managers.

ACTION

We first conclude that the Employer had an obligation to apply terms of the new agreement germane to the entire unit to the "Globed-in" employees and then, upon request, to bargain with the Union about terms specific to the Case Managers that were not covered by that agreement. We further conclude that absent withdrawal, the Region should dismiss this charge because there is no evidence that the Employer either failed to apply general terms of the new agreement to the "Globed-in" employees, or failed to bargain about Case Managers' terms and conditions that are not covered by that agreement.

Following a Globe election, where a "fringe group" of employees vote themselves into a unit, the parties are obligated to bargain over these employees as part of the larger unit but are specifically barred from applying a previously existing agreement to these "Globed-in" employees.[3] Application of an existing agreement to such employees long excluded from the unit "would, in effect, be compelling both parties to agree to specific contractual provisions in clear violation of the H.K. Porter doctrine."[4] The Employer argues that the holding in Federal-Mogul should privilege its insistence on a separate contract for, and failure to apply the successor agreement to, the RN Case managers where, as here, the negotiations for this successor agreement did not include specific bargaining relative to the Case Managers' job classification. However, Federal-Mogul does not address the issue here, namely, whether the Employer must apply an agreement where the "Globed-in" employees were certified as part of the unit during negotiations for the agreement.

We conclude that Federal-Mogul is inapposite here. The Board in Federal-Mogul concluded that requiring the parties to apply their existing agreement to the "Globed-in" employees would violate the principles of H.K. Porter because it would "force on these employees and their Union, as well as the Employer, contractual responsibilities which neither party has ever had the opportunity to negotiate."[5] In clear contrast, the parties here had a full opportunity to bargain over these employees.

Rather, we conclude that this case is more appropriately analyzed under accretion principles as described in Baltimore Sun Co.[6] In that case, existing bargaining agreement terms applicable to the unit as a whole were immediately applicable to accreted employees and the parties were only required to bargain over terms not covered by that agreement, namely, terms unique to the

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[3] Federal-Mogul Corp., 209 NLRB at 344.

[4] Id., citing to H.K. Porter, 397 U.S. at 102 ("while the Board does have the power … to require employers and employees to negotiate, it is without power to compel a company or a union to agree to any substantive contractual provision of a collective bargaining agreement.")

[5] Federal-Mogul, 209 NLRB at 344.

[6] 335 NLRB 163 (2001).

accreted employees.[7] Applying the existing agreement to accreted employees does not contradict the holding in H.K. Porter because the basis for an accretion "is that added employees share a community of interests with the unit employees and functionally [already were] within the existing bargaining unit but had not yet been formally included."[8]

The status of accreted employees, as functionally within the unit when the existing agreement was negotiated, is similar to the status of the "Globed-in" employees here, who were certified into the unit during negotiations for the new agreement. Just as the principles of H.K. Porter do not apply to bar application of an existing agreement to accreted employees, they do not apply to bar application of the successor RN agreement to the "Globed-in" Case Managers. In view of the similar legal status of accreted employees and these "Globed-in" employees, we apply accretion principles to this case.

We note that applying accretion law here, namely requiring general application of the new RN agreement and bargaining over matters not covered, reaches equitable and pragmatic results that have a salutary effect on the parties' bargaining. Equitably, the Employer should not be allowed to argue that contract terms of general applicability do not apply to these unit employees when the Employer not only negotiated and agreed to those terms after the Board's certification, but issuance of that certification removed the Employer's only objection to bargaining over these employees. Applying the parties' new agreement also is not burdensome because the Employer is required under accretion law to bargain over only noncovered, unique terms and conditions that apply to the "Globed-in" employees. Pragmatically, the parties will not re-bargain issues to which they have already agreed, but will concentrate on issues which have not yet been bargained and need to be resolved. Indeed, as discussed below, this is precisely what the Employer attempted to do even while it maintained, as a legal matter, that the new RN agreement did not apply to the Case Managers.

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[7] Id. at 169, citing to NLRB v. Jacobs Mfg. Co., 196 F.2d 680, 683, 684 (2d Cir. 1952), enfg. 94 NLRB 1214 (1951).

[8] NLRB v. Mississippi Power & Light Company, 769 F.2d 276, 279 (5th Cir. 1985), cited in Baltimore Sun Co., above, at 169.

Finally, we conclude that there is no violation notwithstanding the Employer's erroneous legal position in bargaining and in defense of this charge. Treating the "Globed-in" employees as an accretion, the Employer was required to apply the new RN agreement to the Case Managers, and then bargain over terms and conditions of employment not covered in the agreement.[9] There is no evidence that the Employer actually failed to apply the general terms of the RN agreement to the "Globed-in" employees or refused to bargain over open matters. Indeed, after the Board certification issued, the Union did not reiterate its request to bargain over the Case Managers until after execution of the successor agreement. Although the Employer maintained, as a legal matter, that the RN agreement did not apply to Case Managers, and proposed a separate agreement for them, that separate agreement actually iterated the provisions of the RN agreement that were generally applicable to the unit as a whole. Concerning provisions that would be unique to the Case Manager job classification, e.g. wages, either the Employer's proposed separate agreement modified existing provisions of the new RN agreement, or the Employer offered to bargain over them. Moreover, while the Employer proposed a separate agreement for Case Managers, it did not insist on a separate agreement. The Employer ultimately agreed to the Union's proposal to cover the Case Managers under the new RN agreement, while offering proposals to deal with Case Manager conditions that appeared not to be covered.

Accordingly, the Region should dismiss this charge, absent withdrawal.

B.J.K.

[9] Baltimore Sun Co., 335 NLRB at 169.