BEFORE THE NATIONAL LABOR RELATIONS BOARD
UNITED STATES OF AMERICA
THIRTIETH REGION

Milwaukee, WI

MIDWEST AIR TRAFFIC CONTROL SERVICE, INC.

Employer

and

TODD M. STALNAKER

Petitioner **Case 30-UD-175**

and

PROFESSIONAL AIR TRAFFIC CONTROLLERS ORGANIZATION (PATCO), FPD, NUHHCE, AFSCME, AFL-CIO[1]

Union

DECISION AND ORDER DISMISSING PETITION[2]

The Petitioner is seeking a deauthorization election for the unit employees at the Employer's Appleton, Wisconsin facility. The Union, however, contends the petition should be dismissed as it seeks an election in a unit that is not coextensive with the contract. Specifically, the Union contends the contract indicates the parties have merged multiple units, including the Appleton facility, into one national unit, and an election for just the employees of the Appleton facility is inappropriate. The Employer, in support of the petition, agrees the collective bargaining agreement covers multiple facilities, but asserts it is a master agreement, and that the

[1] The name of the Union appears as amended at hearing.
[2] Upon a petition duly filed under Section 9(e) of the National Labor Relations Act (Act), as amended, a hearing was held before a hearing officer of the National Labor Relations Board, (Board). Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

facilities should still be treated as separate bargaining units as they were certified. The Employer asserts that a deauthorization election involving only the employees at the Appleton facility is appropriate. The Petitioner in essence contends that the Union was initially certified at Appleton as a single unit and a deauthorization election should be permitted in the same unit.

Based on the entire record and current Board law, I agree with the position of the Union. As discussed below, the petition indeed is not coextensive with the contractually-defined national unit, and consequently has not been appropriately filed. Therefore, the petition is dismissed.[3]

FACTS

The Employer holds a contract with the Federal Aviation Administration (FAA) to provide air traffic control services at regional airports throughout the United States. The Employer currently holds the contract for Area 3 of the FAA's contract tower program.[4] Area 3 is a geographical designation covering multiple states in the central United States and the Great Lakes region, including a total of approximately 40 to 50 facilities. Wisconsin and the Appleton facility are located in Area 3. At some point around 2004, the Employer also obtained the Area 1

[3] The initial hearing in this matter was held on July 11, 2006. On October 12, 2006, I issued an Order Remanding for Additional Hearing. Ultimately, an additional hearing was held on December 6, 2006. Timely initial and supplemental briefs from the Employer and Union have been received and duly considered. The Petitioner did not file briefs after either hearing. Upon the entire record in this proceeding, the undersigned finds:

1. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer operates and is engaged in commerce within the meaning of the Act. It will effectuate the purposes of the Act to assert jurisdiction herein.
3. The Union is a labor organization within the meaning of the Act.
4. The Union was certified as the exclusive collective bargaining representative of the following unit on August 23, 2002, as a result of Case 30-RC-6463:

   All air traffic controllers employed by the Employer at the Appleton Airport located in Outagamie County, Wisconsin, but excluding all office clerical employees and all guards and supervisors as defined in the Act.

5. Petitioner seeks an election to rescind the Union's authority to require, under its collective-bargaining agreement with the Employer, that employees make certain lawful payments to the Union in order to retain their employment.

[4] The contract tower program is a competitive bid procedure administered by the FAA. As a result of the program, many of the terms and conditions of the employees' employment, including wages, are controlled, in part, by the Service Contract Act.

contract, adding a significant number of additional facilities to its operation formerly operated by Robinson Aviation (RVA).

Each facility has an air traffic manager responsible for its daily operation. This position is responsible for both coordination with the airport and managing the employees at that location. The air traffic manager's management duties include employee scheduling, assigning work, maintaining a variety of paperwork, conducting employee evaluations, and submitting reports to the corporate office located in Overland Park, Kansas. Jennifer York is the Air Traffic manager at the Employer's Appleton facility.

The Employer operates both union and non-union facilities. Certifications of Representative were issued for units defined as single-facility units. The Employer and Union negotiated one collective bargaining agreement to cover all the Union facilities. The parties' initial agreement is effective May 18, 2004 to September 30, 2007. The recognition clause of this agreement, Section 1, Article 2, states:

> The Employer hereby recognizes the Union as the exclusive collective bargaining representative of all full-time and regular part time air traffic control specialists employed at the air traffic control towers listed in Appendix 1 to this agreement, pursuant to Section 9(a) of the National Labor Relations Act and certification of the Union as the exclusive bargaining agent of bargaining unit employees employed at the Employer's facilities listed on Appendix 1 are attached as Appendix 2 to this Agreement.

The Appleton, Wisconsin facility is among the facilities listed in Appendix 1.

The collective bargaining agreement also contains a union security provision in a 2005 addendum, covering employees assigned to facilities located in states where union security agreements are permissible, and covers sixteen of the facilities located in Area 3, and eight facilities located in Area 1. The Appleton facility is subject to the union security provision. There are no separate local agreements with any of the facilities.

DISCUSSION

Section 9(e)(1) of the National Labor Relations Act provides that a petition for election may be filed with the Board seeking rescission of an agreement made between an employer and a labor organization pursuant to Section 8(a)(3) of the Act. 29 U.S.C. §151 et seq. These agreements, requiring membership in a labor organization as a condition of employment, are commonly known as union security or union shop agreements, and a petition to rescind the authority for such an agreement is known as a deauthorization or UD petition. As with other petitions filed with the Board, a UD petition must meet requirements regarding showing of interest, timing and filing procedures. Rules and Regulations of the National Labor Relations Board, §102.83, §102.84.

In addition to procedural requirements, it is settled law that a proper UD petition must seek an election in a unit that is coextensive with the contractually defined unit. See *Illinois School Bus Co., Inc.*, 231 NLRB 1 (1977). The issue in the instant case is whether the petition, seeking an election only at the Appleton facility, is coextensive with the contractually defined unit.

In *Louisiana Dock Co.*, 293 NLRB 233, 234 (1989), the Board said, "Absent certification, the existence of a multi-site unit is based on the agreement of the parties." The Board went on to say that, absent a clear and unambiguous recognition clause, an examination of bargaining history is relevant to determining whether there is a multi-site unit. In *Heck's, Inc.*, 234 NLRB 756 (1978), the Board relied "particularly on the recognition clause of the [current] contract as evidencing the parties' clear intent to create one overall unit." The recognition clause in that contract stated that it "cover[ed] the employees in the stores and warehouse set out in Appendix 1 of this Agreement." *Id.* at 757. The Board found that the ten locations had been

merged into a single unit despite having previously been recognized or certified as single-store units.

There is no question in the instant case that the Board did not certify a multisite unit. Rather, the Employer introduced into evidence the certifications of each individual unit and the Union does not dispute that the units were individually certified. Therefore, the question is whether the recognition clause in the master agreement is clear and unambiguous and whether the parties agreed, in contract negotiations, that the units became a merged unit.

In the current case, the language of the master agreement's recognition clause is clear. As in the contract in *Heck's*, the recognition clause of the current contract references an appendix which lists the facilities covered by the agreement. The agreement in the current case, Article 2, Section 1, states: "The Employer hereby recognizes the Union as the exclusive bargaining representative of all full time and regular part time air traffic control specialists employed at the air traffic control towers listed in Appendix 1 to this Agreement…." Appendix 1 of the agreement states "PATCO is the collective bargaining agent certified by the National Labor Relations Board (NLRB) for bargaining unit employees employed by Midwest Air Traffic Control Service Inc. at the following facilities…" In addition, the record discloses that the contract provides a uniform policy on dues checkoff, union security, grievances, seniority, layoffs, strikes and lockouts, and other terms and conditions of employment. Based on this, it is apparent that the parties have agreed to a merged bargaining unit.[5]

While the Employer contends that *Louisiana Dock Co.* compels a different outcome, I

[5] See also *S. B. Rest. of Framingham, Inc. a wholly owned subsidiary of Steak & Brew, Inc.*, 221 NLRB 506 (1975), and *S. B. Rest. of Huntington, Inc. a wholly owned subsidiary of Steak & Brew, Inc.*, 223 NLRB 1445 (1976), in which the Board found a merged unit and dismissed UD petitions that were not coextensive with the merged unit. In making its decision, the Board relied on the clear recognition language and that the national contract provided for a uniform policy regarding checkoff, union security, seniority, probationary periods, discharge, grievances, strikes and lockouts.

disagree. In *Louisiana Dock Co.*, which arose in the context of an unfair labor practice proceeding, the Board relied on bargaining history in addition to the recognition language to find that the parties did not agree to a merged unit. The unit description in that case was similar to the one in *Heck's*. However, the bargaining history in that case showed that the parties had separate local addenda which regulated wage rates and holidays at the individual facilities, and these economic packages varied widely. In addition, the addenda were negotiated at various times and places and had different effective dates. Finally, the Board looked at the fact that the parties, in correspondence, had referred to individual units. Thus, the Board considered the bargaining history to clarify the ambiguity posed by the unit description in light of the local addenda.

In the instant case, as described above, the parties do not have separate local addenda.[6] In fact, the contract provides that wages, holidays, and vacations will be paid out based on the Department of Labor wage determinations according to the relevant geographic areas of the facilities, and the Service Contract Act. So, while individual facilities may have different benefits, they are all governed by the same formula. This was negotiated at the same time as the rest of the contract. Any addenda to the master agreement expire at the same time as the master agreement.[7] Also, although the Employer in its supplemental brief argues an email from June 22,

[6] The Employer notes that there is an addendum to the contract relating to the former RVA bargaining units that the Employer acquired in 2005. However, this single addendum covers all the different RVA units, and this was contemplated during the original negotiations. The record clearly shows that Article 2, Section 3 of the Master Agreement was included specifically to address a situation where the Employer acquired additional airports where employees were represented by the Union. It is not accurate to say there are separate addenda covering the different airports in this case.

[7] In its supplemental brief, the Employer contends that the Union's initial proposal indicates that the Union intended the contract to preserve the individual units. However, the Union's proposal does not clearly state that intent. To the contrary, the Union's proposed language suggests that the Union intended that all employees were to be included in one unit. In addition, even if this were the case, the record is clear that the parties worked from the Employer's proposal and reached agreement quickly on the recognition clause. It is the language in the final contract that is controlling.

2006 (Employer Exhibit 18), indicates that the Union agreed the units maintained a separate identity, the email in its entirety actually supports a conclusion that the Union intended the current collective bargaining agreement to create a multisite bargaining unit consistent with the contract language.[8] Therefore, *Heck's* remains the appropriate standard in this case.[9]

The Employer contends that it never intended to create a merged unit. Rather it intended to create a master agreement covering individual bargaining units. However, the evidence fails to reflect this intent. The Employer's bargaining notes fail to reveal the Employer's intent to preserve individual bargaining units. Testimony during the hearing was inconclusive on this issue.[10] Therefore, the best evidence is the collective bargaining agreement language itself, which clearly establishes one bargaining unit made up of the different facilities, as in *Heck's*. Had the parties truly intended to maintain separate bargaining units at each facility, the appropriate language could have been incorporated into the agreement, but it was not.[11]

The Employer also references the individual certifications at the separate facilities and the asserted lack of community of interest in the broader unit as evidence that the individual bargaining units have preserved their identities. However, the content of the individual

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[8] The email in question appears to be discussing the instant UD petition. In the email, Union negotiator Gerald Tuso asserts the Union's position that the collective-bargaining agreement created a single bargaining unit and states, "I will make a statement under oath that the CBA is a master agreement and that it covers all bargaining units."

[9] The Employer argues in its supplemental brief that the Union's ratification procedure further demonstrates that the Union viewed the contract as covering individual bargaining units. However, this is not accurate. Rather, Tuso testified that the contract was provided to the facility representatives, who were told to have the members at each facility vote. Tuso pooled the votes and tallied them into one result.

[10] The Employer's President and CEO Shane Cordes testified that he recalled statements during the negotiations that the Employer intended to negotiate a master agreement but preserve individual units. The Employer's chief negotiator, Attorney Steven Kort, testified that in circumstances such as this, he would normally make statements to the effect that the Employer only wanted a master agreement with the intent that the individual units be preserved, but he could not specifically recall if it was said in this instance. Tuso testified on behalf of the Union that he did not recall any conversation during the negotiations that the Employer intended to preserve the individual units. There is nothing in writing regarding the issue.

[11] Although the certifications of the initial units are attached as Appendix 2 to the agreement, there is no language in the agreement that would actually incorporate the original unit descriptions found in the certifications as part of the agreement.

certifications are not in dispute and are demonstrative of very little, as it is the subsequent actions of the parties and the language of the contract, not the original unit descriptions, that are now at issue. The Employer urges application of a traditional community of interest test between the facilities as if this were an initial representation case, but that analysis is not appropriate where the contract demonstrates there is now a history of a merged unit. *Gold Kist, Inc.*, 309 NLRB 1 (1992).

The Employer also asserts that the contract language indicates there are multiple single bargaining units and not one broader unit. In addition to Cordes's testimony as to his interpretation of the contract, the Employer argues in its brief that the use of the plural in the agreement when referencing "facilities," "towers," and "units" demonstrates an understanding by the parties that the different bargaining units would not be merged. However, contrary to Employer's position, "facilities" is not synonymous with the term "units," and there is no dispute that multiple "facilities" and "towers" are covered by the contract. The dispute is whether or not the contract should be read to treat those multiple facilities (previously separate units) as having been merged into one "unit." This is further complicated by the reference to "units" in Section 2 of Article 2, which is inconsistent to some degree with the remainder of the agreement and its references to a singular "unit" (specifically, and repeatedly, in reference to "bargaining unit employees"). However, as the Union contends in its supplemental brief, there are multiple instances in the contract which make reference to a single bargaining unit, including in Article 5 Grievances, Article 15 Transfers, Article 16 Qualifications, and Article 19 General Provisions. Also, the Board has held that a reference to units as plural in a collective bargaining agreement alone is not sufficient to require a finding of separate units. *General Electric Co.*, 180 NLRB 1094 fn. 6 (1970).

More relevant to the determination, the Employer purports to distinguish the current case from the Board's decisions in the *Heck's* and *S.B. Rest of Framingham* and *S.B. Rest of Huntington, Inc.* (*Steak & Brew*) cases discussed above. The Employer attempts to distinguish *Heck's* arguing that the Board considered the fact that in *Heck's*, grievances were settled and a precedent was established for all facilities while that is not true in the instant case. However, the Employer fails to distinguish the language in the instant recognition clause from the clause in *Heck's*. In fact, the language is almost identical. While there is testimony that grievances under the current contract do not establish precedent beyond the instant facility, those grievances appear to have been resolved locally without involving the Union's business agent, Tuso. Further, no extensive grievance history exists that would shed light on whether Tuso's involvement would result in a broader unit-wide precedent. The Board in *Heck's* also relies on the contract creating "a uniform policy regarding union security, dues checkoff, grievances, holidays, vacations, hours of work, seniority, wages, and other terms and conditions of employment at the covered locations." *Id.* at 757. These factors, with the possible exception of grievances, are all present in the instant case. The Employer makes no specific substantive distinction between the *Steak & Brew* cases and the current facts. Rather, the Employer quickly and erroneously concludes "there is no language in the applicable collective bargaining agreement merging the individual units…." However, in attempting this distinction, the Employer avoids addressing the recognition clause at issue in the current case, and the fact that its language is so similar to the language found by the Board to indicate a merger of units in these prior cases, especially in *Heck's*. Consequently, the Employer fails to address the current UD petition's primary problem – that it seeks a deauthorization election for a different unit than is set forth in the contract.

Finally, the Employer contends that the Union agreed to a UD election in Case 7-UD-538 in an individual unit at the Jackson, Michigan airport in June 2005, and based on this, the Region must properly conclude that the contract was not intended to merge the bargaining units. However, during the hearing, Tuso testified that the Union failed to participate in the pre-election discussions and that it was an error on his part. Board Exhibit 2 reflects that the Regional Director of Region 7 directed the election to proceed in the individual unit and there is no evidence that a Stipulated Election Agreement was entered into by the parties. Therefore, it is not accurate to say that the Union "agreed" to an election in that individual unit. There is also no evidence that a hearing was held in the matter and that the Regional Director of Region 7 had the evidence that is before me at this time when he made his decision. As a result, Region 7's situation does not create a precedent. As discussed fully above, the evidence in this matter shows the parties created a merged unit and the petitioned-for unit is not coextensive with the unit in the collective bargaining agreement.

CONCLUSION

It is well established law that a proper UD petition must seek an election in a unit coextensive with the contractually-defined unit. The collective bargaining agreement in the current case defines the unit by or including a number of specifically identified facilities, including the Appleton, Wisconsin facility, as covered by the contract and represented by the Union. The UD petition in this case seeks a deauthorization election for only the employees at the Appleton, Wisconsin facility. As the unit described in the UD petition is not coextensive with the unit described in the contract, the petition is dismissed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, Franklin Court, 1099 14th Street, N.W., Washington, DC 20570. This request must be received by the Board in Washington by **January 25, 2007**.

OTHER ELECTRONIC FILINGS

In the Regional Office's initial correspondence, the parties were advised that the National Labor Relations Board has expanded the list of permissible documents that may be electronically filed with the Board in Washington, DC. If a party wishes to file one of these documents electronically, please refer to the Attachment supplied with the Regional Office's initial correspondence for guidance in doing so. The guidance can also be found under "E-Gov" on the National Labor Relations Board web site: www.nlrb.gov.

Signed at Milwaukee, Wisconsin on January 11, 2007.

/s/Irving E. Gottschalk
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