

**BEFORE THE STATE BOARD OF MEDIATION
STATE OF MISSOURI**

STATE OF MISSOURI,)	
Petitioner,)	
)	
v.)	
)	
COMMUNICATIONS WORKERS OF)	
AMERICA, LOCAL 6355)	
)	Public Case No. UC 2012-003
and)	
)	
AMERICAN FEDERATION OF STATE,)	
COUNTY, AND MUNICIPAL EMPLOYEES,)	
COUNCIL 72)	
Respondents.)	

DECISION

The State of Missouri, acting through its Office of Administration (OA), petitions for a unit clarification following the transfer of maintenance workers from the supervision of the Department of Social Services to the supervision of OA. The State asserts that the Board should remove these workers from the department-wide Social Services bargaining unit in which they have historically been represented (along with other, non-maintenance workers employed by that Department) and placed in the craft and maintenance bargaining unit that covers all the other represented maintenance workers employed within OA. Communications Workers of America, Local 6355 (CWA), the certified bargaining representative for the Social Services unit, responds that the transferred maintenance workers should remain in their existing unit. CWA also asserts as a preliminary matter that its existing labor agreement covering the Social Services unit, which expressly covered the maintenance workers at issue here before their transfer, operates as a contract bar to the State's unit clarification petition. American Federation of State, County, and Municipal Employees, Council 72 (AFSCME), the certified representative for the craft and

maintenance unit, has not participated in this proceeding other than to report, through an affidavit presented by CWA, that it is not claiming to represent the transferred workers.

The Board concludes that a contract bar does apply. The effect of this bar is that the maintenance workers at issue remain in the Social Services unit and are still represented by CWA. The State may of course file another unit clarification petition at the appropriate time, if it still chooses to do so. In the interim, the State should negotiate with CWA with regard to the consequences of the transfer of these workers from the Department of Social Services to OA.

JURISDICTIONAL AND PROCEDURAL BACKGROUND

The general question presented by the petition in this case is whether certain classifications of workers appropriately belong in one bargaining unit or another. Questions regarding the appropriateness of bargaining units fall within the jurisdiction of this Board. § 105.525, RSMo.

The Board held a hearing in Jefferson City, Missouri, on March 30, 2012. Acting Board Chairman Michael Pritchett, Employer Members Emily Martin and Leonard Toenjes, and Employee Members Lewis Moye and Robert Miller were present in person to hear the case. Representatives of the State and CWA attended the hearing and had a full opportunity to present evidence and make arguments. They also filed post-hearing briefs. AFSCME did not take part in the proceedings other than by providing the affidavit that was presented by CWA.

Based on its review of the whole record, including the evidence presented, arguments made, and briefing filed, the Board issues these Findings of Fact, Conclusions of Law, and Order.

FINDINGS OF FACT

Following a representation election in 1984, this Board certified CWA as the exclusive

bargaining representative of a unit comprised of workers employed by the Missouri Department of Social Services in a wide range of classifications, including Laborer I and II and Maintenance Worker (then called Maintenance Man) I and II. The Department and CWA entered into their first labor agreement covering this unit in 1985.

Although amended and clarified a number of times since 1984, the department-wide Social Services unit continues in existence, with CWA's Local 6355 now specifically certified as its bargaining representative. The Department of Social Services (along with two other state agencies) and CWA are currently parties to a labor agreement covering the Social Services unit (and another unit represented by CWA). This agreement became effective on December 1, 2010, and runs through November 30, 2013. The positions of Maintenance Worker I and II and Laborer I and II are expressly included as classifications covered by the agreement.

In mid-June 2011, as part of a continuing effort to improve the efficiency of state operations through centralization and coordination of the management of state employees providing comparable types of services across departmental lines, the State transferred 106 employees from the separate supervision of various departments to the unified supervision of the Office of Administration (OA).¹ Employee transfers such as this one require the pre-approval of the State Budget Director and the General Assembly.

Included among the workers transferred to OA in 2011 were 39 employees belonging to the department-wide Social Services unit represented by CWA. These employees, 38 classified as Maintenance Workers II and one classified as a Laborer I, worked in facilities operated by the

¹ The Office of Administration, although not denominated as such, is itself a state department. § 37.005.1, RSMo. Its basic role is to “combine[] and coordinate[] the central management functions of state government.” Official Manual – State of Missouri 2011-2012, at p. 266, available electronically at: http://www.sos.mo.gov/BlueBook/2011-2012/6_ExecDept.pdf#ch6 (last visited Sept. 7, 2012).

Division of Youth Services of the Department of Social Services. After the transfer, no one within the classifications of Maintenance Worker I and II or of Laborer I and II remained within the Department of Social Services.

The 39 transferred workers continue to work at Youth Services facilities after the transfer, but they are now managed through OA rather than through the Department of Social Services. Following their transfer, four of the Maintenance Workers II were promoted by OA to supervisory positions.

Discussions between OA and the Department of Social Services regarding the transfer of these employees began in the spring of 2010. Negotiations leading to the current labor agreement between the Department of Social Services and CWA that explicitly covered the transferred workers began in January or February 2010 and concluded in December 2010. Nothing was mentioned during the negotiations about the plans under discussion to transfer the maintenance workers and laborer from the Department of Social Services to OA. CWA officials first learned of the transfer in the spring of 2011 when its members reported that representatives of OA were meeting with them to tell them of the consolidation of their jobs into OA.

OA, along with several other state agencies, is a party to a labor agreement covering a bargaining unit made up of craft and maintenance workers employed by the various signatory agencies.² The Department of Social Services is not one of these agencies. The craft and maintenance unit is represented by AFSCME. This unit includes workers of the signatory agencies falling within the classifications of Maintenance Worker I and II and Laborer I and II. At the time of the hearing in this case, OA itself directly employed 420 workers belonging to the

² The labor agreement covering these craft and maintenance workers also covers workers employed by the Department of Mental Health and by the Missouri Veteran's Commission in a unit of direct care workers. That unit is also represented by AFSCME.

craft and maintenance unit, including 145 Maintenance Workers II and five Laborers I.

AFSCME did not participate in the hearing in this case. It did, however, supply an affidavit presented by CWA in which it stated that it is not claiming to represent the workers transferred to OA from the Department of Social Services. AFSCME further reported that retention of CWA as the bargaining representative of the transferred workers would not impede its ability to represent its unit of craft and maintenance employees within OA.

CONCLUSIONS OF LAW

The State asks that the classifications of Maintenance Worker II and Laborer I be removed from the department-wide Social Services bargaining unit in recognition of the transfer of the Social Services employees in these classifications to OA.³ CWA opposes this request on the merits, but also contends that the contract bar rule requires dismissal of the petition without the merits being reached.

I. APPLICATION OF THE CONTRACT BAR RULE

Under the contract bar rule, petitions to the State Board of Mediation are untimely if the bargaining unit subject to the petition is covered by an active labor agreement, unless the petition is filed no earlier than 90 days and not later than 61 days before the termination of the agreement. *Int'l Ass'n of Firefighters, Local 2665 v. North Jefferson County Ambulance Dist.*, Public Case No. R 2000-049, at 13-14 (SBM 2001). If the petition is not filed within this window, it will be dismissed. *Id.* at 19. The contract bar rule is intended to preserve stability in the employer-employee bargaining relationship. *Id.* at 14. “In applying the contract bar rule, the

³ The employees at issue in this case are the 34 Maintenance Workers II and the Laborer I that were transferred and remain in those classifications. The parties agree that the four transferred employees that were subsequently promoted into supervisory positions are not at issue in this case because these promotions to supervisory status make them ineligible for inclusion in a bargaining unit. As indicated above, the Department of Social Services employed no one within the classifications of Maintenance Worker I or Laborer II to be transferred.

Board balances the competing interests of the employees' freedom of choice in selecting a bargaining representative and the stability of collective bargaining agreements between an employer and the employees' elected union." *Id.* The Board applies the contract bar where:

- (1) the employer has met, conferred, and discussed proposals concerning customary terms and conditions of employment with the employees' bargaining representative;
- (2) agreements reached in those discussions have been reduced to writing;
- (3) the employer has presented the written agreement to the appropriate governing body;
- (4) the governing body has adopted those proposals; and
- (5) the terms of the agreement between the employer and bargaining representative that has been adopted clearly cover the employees that are the subject of the petition pending before the Board.

Id. at 14.

The Labor Agreement currently in effect between the Department of Social Services and CWA is a written document governing terms and conditions of employment of certain employees of the Department. This establishes that the employer and bargaining representative met to discuss terms and conditions of employment covering these employees and reduced those discussions to writing. The Agreement bears the signature of the Director of the Department, along with the signatures of a representative of OA and of union officials, attesting to the actual implementation of the agreement. This establishes that the proposals were presented to and adopted by the appropriate governing body. The Agreement also contains an appendix showing that employees in the positions that were later transferred to OA are covered by the Agreement. This establishes that the terms of the Agreement cover the employees that are the subject of the petition in this case.

The State urges, however, that the contract bar is inapplicable here by its own terms in

that OA is now (after the transfer) the employer of the 35 employees at issue and there is no labor agreement between OA and CWA. Although the State's chief negotiator, an officer within OA, signed the labor agreement between the Department of Social Services and CWA that expressly covered these 35 employees, the State contends that she did so only in her capacity as chief negotiator and not as the agent of OA as an employer or potential employer.

The Board concludes that it need not, at least in the context of this case, make fine distinctions with regard to whether one state agency or another was the employer at one time or another of the 35 workers in question. The transfer decision here was not made by one state agency alone. The transfer required agreement between both the Department of Social Services and OA, authorization from the State Budget Director, and approval of the state legislature. Because the transfer was the act of the State as a whole, the Board concludes that the employer to be considered in this case is the State as a whole. CWA's current labor agreement is with the State, through its Department of Social Services. The State continues to be the employer of the transferred workers now that they are managed by OA, another state agency. Considering that the State is the employer, CWA does have a current agreement with the employer of the transferred workers. The contract bar can be applied.

The next question is whether the contract bar rule is applicable to petitions for unit clarification, such as the one pending here. The contract bar rule was designed to apply in the case of petitions for certification and decertification. But the Board will also apply the bar in the case of a unit clarification petition if, in the particular circumstances of the case, allowing the petition would be disruptive of the parties' collective bargaining relationship. *City of Springfield v. IBEW, Local Union 753*, Public Case No. UC 88-005, at 6-7 (SBM 1988).

In this case, the State asks that a CWA represented bargaining unit be clarified to

recognize that the maintenance workers and the laborer that have been included in that unit are now no longer in that unit but, as the result of the transfer of their positions from the Department of Social Services to OA, are now included in an AFSCME represented bargaining unit that covers OA's other maintenance workers and laborers. But it is disruptive of the parties' collective bargaining relationship to call on the Board to alter the makeup of a unit after the parties have bargained and reached an agreement covering that unit when no concerns regarding the unit's makeup were raised during the negotiations. For example, the removal of 35 members from the CWA bargaining unit and their placement in a unit represented by another union as the result of the State's unilateral action would impact CWA's standing with its remaining members. The loss of these members in these circumstances would also likely lead to the loss of some of that basic trust between parties that is so important to effective bargaining.

Not only would consideration of the petition undercut the stability of the relationship between CWA and the State, but the removal of workers from a unit represented by a union that they (or their predecessors) elected as their representative and their placement in a unit represented by a union they have no ties with would deny them their freedom of choice in selecting a bargaining representative. Thus, both of the normally competing interests the Board balances when it applies the contract bar rule support application of the bar here.

Because consideration of the unit clarification petition filed in this case would disrupt the parties' collective bargaining relationship and deny workers their choice of representative, the Board will apply the contract bar here.

II. TRANSFERRED WORKERS CONTINUE TO BE REPRESENTED BY CWA

Normally, once the Board decides to apply the contract bar, it simply dismisses the case without further discussion. Both parties here, however, agree that, in the event that the contract

bar is applied, the Board also needs to address the question of who represents the 35 transferred workers given their transfer from one state agency to another, both of which recognize bargaining units that arguably include the transferred positions. As the State notes in its brief:

If the Board simply dismisses the case, there will be confusion and disagreement between the parties, which could cause disruption. OA will continue to maintain that the 35 new employees are included in the AFSCME bargaining unit, and CWA will presumably continue to maintain that the employees are included in the CWA bargaining unit.

CWA confirms in its brief that, in the event of the dismissal of the petition, it will maintain that the transferred employees remain in its bargaining unit.

It is this Board's responsibility and authority to determine "[i]ssues with respect to appropriateness of bargaining units and majority representative status. § 105.525. The Board has fulfilled that responsibility and exercised that authority by certifying CWA as the exclusive bargaining representative of a unit of Department of Social Services employees, including those in maintenance worker and laborer classifications, in 1984. This unit has been amended and clarified a number of times since 1984, but the Board continues to recognize CWA as its bargaining representative and the maintenance worker and laborer classifications continue to be included within the unit. The transfer of the workers in those classifications to a different state agency does not deprive CWA of its representative status until such time as this Board amends or clarifies the CWA unit to the contrary.

As the United States Court of Appeals for the Seventh Circuit stated with regard to the authority of the National Labor Relations Board, a federal counterpart to this Board:

The need to maintain a fixed bargaining unit is a central element to the congressional purpose of "stabilizing labor-management relations in interstate commerce." . . . For this reason, "once the bargaining unit is established by the collective bargaining agreement or by NLRB action, an employer may not remove a job within the unit without either the approval of the Board or consent of the union."

NLRB v. Illinois-American Water Co., 933 F.2d 1368, 1375 (7th Cir. 1991), quoting *NLRB v. United Technologies Corp.*, 884 F.2d 1569, 1572 (2d Cir. 1989). See also *Arizona Elec. Power Coop.*, 250 N.L.R.B. 1132, 1133 (1980) (“it is well established that the integrity of a bargaining unit cannot be unilaterally attacked, and that once a unit is certified, it may be changed only by mutual agreement of the parties or by Board action”). Although decisions of the NLRB are not binding on this Board, it often looks to them for guidance and may follow them when it finds them persuasive. *Baer v. Civilian Personnel Div., St. Louis Police Officers Ass'n*, 747 S.W.2d 159, 162 (Mo. App. W.D. 1988); *SEIU, Local 1 v. City of St. Joseph*, Public Case No. AC 2011-005, at 5 (SBM 2011). The Board finds it equally appropriate to accept guidance from federal court decisions in appeals from the NLRB when, as here, it finds those decisions persuasive.⁴

The department-wide Social Services bargaining unit represented by CWA includes the maintenance worker and laborer classifications covering the workers transferred from the Department of Social Services to OA. The Board has determined that it is not appropriate for it to consider the effect of their transfer during the middle of the term of the labor agreement between Social Services and CWA. The State may file another unit clarification petition at the

⁴ The state urges the Board to adopt the principle applied by the Federal Labor Relations Authority (FLRA), another federal counterpart of this Board, that “new employees are automatically included in an existing unit where their positions fall within the express terms of a unit certification and their inclusion would not render the unit inappropriate.” *E.g., United States Dep’t of the Navy Commander, Navy Region Mid-Atlantic Program Director, Fleet and Family Readiness Norfolk, Virginia*, 64 F.L.R.A. 782, 785 (2010). The Board declines to adopt this principle in the procedural and factual context of this case. First, considering that the Board is applying the contract bar rule here, it has no basis to reach the merits questions of whether the transferred workers at issue fall automatically within the description of the AFSCME represented craft and maintenance unit and, if so, whether that would render that unit inappropriate. Second, even if it were a proper time to consider application of this FLRA principle and even if the conditions for the application of that principle were met, the Board would not apply the principle in this case because the *automatic* inclusion of the 35 transferred workers in the craft and maintenance unit fails to give adequate consideration to the choice they (or their predecessors) previously made to be included in another unit represented by a different labor organization.

appropriate time, if it still chooses to do so when that time is reached. In the interim, the transferred workers remain in the CWA represented unit and the State should negotiate with CWA in regard to the consequences of the transfer of these workers.

ORDER

The State's petition for unit clarification is dismissed under the contract bar rule. Until such time as the Board might modify the unit description of the department-wide Social Services bargaining unit represented by CWA, CWA remains the certified bargaining representative of the maintenance workers and the laborer transferred from the supervision of the Department of Social Services to the supervision of OA.

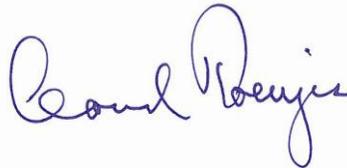
Signed this 24th day of September, 2012.

STATE BOARD OF MEDIATION

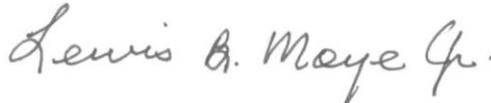
Michael Pritchett, Acting Chairman



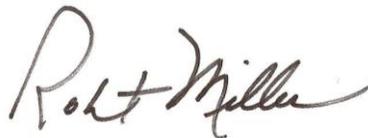
Emily Martin, Employer Member



Leonard Toenjes, Employer Member



Lewis Moyer, Employee Member



Robert Miller, Employee Member