Bay Medical Center, Inc. *and* Michigan Licensed Practical Nurses Association. Cases 7-CA-1417 and 7-CA-16215

September 30, 1980

DECISION AND ORDER

BY CHAIRMAN FANNING AND MEMBERS JENKINS AND PENELLO

On May 5, 1980, Administrative Law Judge Frank H. Itkin issued the attached Decision in this proceeding. Thereafter, Bay Medical Center, Inc., Respondent herein, filed exceptions and a supporting brief, the General Counsel and the Charging Party, Michigan Licensed Practical Nurses Association, filed briefs in opposition to Respondent's exceptions, and the General Counsel filed a motion requesting that the Board modify the Administrative Law Judge's Decision and recommended Order to reflect the full and correct name of the exclusive collective-bargaining representative herein.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions, briefs, and motion[1] and has decided to affirm the rulings, findings,[2] and conclusions[3] of the Administrative Law Judge and to adopt his recommended Order, as modified herein.[4]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Bay Medical Center, Inc., Bay City, Michigan, its officers, agents, successors, and assigns, shall take

[1] On June 4, 1980, the General Counsel filed a motion with the Board requesting that it modify the Administrative Law Judge's Decision and recommended Order to reflect the full and correct name of the exclusive collective-bargaining representative herein. In support of its motion, the General Counsel refers to an Order issued by the Board on April 23, 1980, in *Bay Medical Center, Inc.*, 239 NLRB 731 (1978), granting an all-party motion to amend the Board's previous Order and notice to employees to reflect the full and correct name of the exclusive bargaining representative of Respondent's employees by substituting "Bay Medical Center LPN Council, affiliated with Michigan Licensed Practical Nurses Association" for "Michigan Licensed Practical Nurses Association."

The Board granted the all-party motion only because it was joined by all parties and it requested no substantive change. If either the General Counsel or the Charging Party had objected to the proposed change, the motion would have been denied since, for the reasons discussed in fn. 2, *infra*, Respondent would have been estopped to deny the authority of the Michigan Licensed Practical Nurses Association to demand bargaining for the LPN Council. The change being only cosmetic, the granting of the motion did not alter the rights or obligations of parties.

Since no party has objected to the change requested by the General Counsel and since the requested change is in conformity with our Order of April 23, 1980, we hereby grant the General Counsel's motion and we will amend the Administrative Law Judge's Decision and recommended Order accordingly.

[2] Respondent has excepted to the Administrative Law Judge's findings that its duty to bargain under the Act was not suspended by a stay of proceedings ordered by the Sixth Circuit Court of Appeals in the enforcement proceedings of *Bay Medical Center, Inc., supra*. We find no merit in Respondent's exception. A review of the court's order, entered April 16, 1979, reveals that the court was granting Respondent's and the General Counsel's joint motion requesting that "the Court enter an Order staying further *appellate* proceedings herein . . ." (emphasis supplied). As the stay was specifically limited to the appellate proceedings related to *Bay Medical Center, Inc., supra*, it had no effect upon Respondent's duty to bargain herein.

Respondent has also excepted to the Administrative Law Judge's findings that it violated Sec. 8(a)(5) and (1) of the Act by refusing to bargain with the Charging Party. Respondent argues that, since the exclusive bargaining representative is the Bay Medical Center LPN Council affiliated with the Charging Party, it acted lawfully in refusing to bargain with the Charging Party. The record herein, including Respondent's brief to the Administrative Law Judge, reveals that "Respondent has consistently refused to bargain with [the Charging Party] on the grounds that it was not an appropriate unit by itself . . . ." Thus, Respondent's refusal to bargain was based upon its assertion that the bargaining unit was inappropriate rather than upon any claim that the Charging Party lacked authority to demand bargaining on behalf of the Bay Medical Center LPN Council. In fact, in its answer and amended answer filed herein, Respondent admitted all of the factual allegations related to the identity of the collective-bargaining representative, disputing only the appropriateness of the unit. Under these circumstatances we find that Respondent is estopped to assert that the Charging Party lacked authority to demand bargaining on behalf of the Bay Medical Center LPN Council. See *Argus Optics, a Division of Argus, Inc.*, 210 NLRB 923 (1974), enforcement denied for other reasons 515 F.2d 939 (6th Cir. 1975).

[3] Respondent has excepted to the Administrative Law Judge's conclusion that the charges herein were filed within the time limits specified in Sec. 10(b) of the Act. We find no merit in Respondent's exception. The record establishes that, since November 24, 1976, Respondent consistently has refused to bargain with the Charging Party or the LPN Council despite repeated requests that it do so. As a result of its numerous refusals to bargain, Respondent has been engaged in litigation before the Board and the courts for the last 4 years. Each of Respondent's refusals to bargain, however, have included an indication that it would engaged in bargaining "as soon as the legalities of the unit question are decided . . ." (quoting Respondent's December 17, 1976, letter to the Charging Party). Clearly, the "legalities of the unit question" could have been resolved prior to the completion of Respondent's new facility and, if they had been, Respondent, by its own admission, would have bargained about any future changes in working conditions. Given the uncertainty inherent in Respondent's contingent refusals to bargain, we agree with the Administrative Law Judge's conclusion that the 10(b) period did not begin to run until Respondent unilaterally implemented the change in the former General Division LPNs' 7.8 hour workday when they transferred to the new facility.

[4] Member Penello's participation in this Decision does not represent a retreat from his position that a unit limited to licensed practical nurses is inappropriate in the health care industry (see generally his dissenting opinion in *Allegheny General Hospital*, 329 NLRB 872 (1978), enforcement denied 608 F.2d 965 (3d Cir. 1979)), but rather is based upon the fact that Respondent is no longer contesting the appropriateness of the unit involved herein.

the action set forth in the said recommended Order, as so modified:

1. Modify paragraph 1(a) by substituting "Bay Medical Center LPN Council, affiliated with Michigan Licensed Practical Nurses Association" for "Michigan Licensed Practical Nurses Association."

2. Modify paragraph 2(a) by substituting "LPN Council" for "Association."

3. Substitute the attached notice for that of the Administrative Law Judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a full hearing at which both sides had the opportunity to present their evidence, the National Labor Relations Board has found that Bay Medical Center, Inc., has violated the National Labor Relations Act, and has ordered us to post this notice. We therefore notify you that:

WE WILL NOT, upon request, fail or refuse to bargain collectively and in good faith with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment, with Bay Medical Center LPN Council, affiliated with Michigan Licensed Practical Nurses Association, as the exclusive bargaining representative of the employees in the unit described below, by unilaterally instituting a 7.5-hour workday for our General Division employees upon their transfer to our new facility; by unilaterally changing the method of computing vacation benefits for said unit employees; or by unilaterally changing the method of computing contributions to said unit employees' annuity accounts. The appropriate bargaining unit is:

All full-time and regular part-time licensed practical nurses and graduate practical nurses employed by the Employer at its Bay City, Michigan, installations, excluding other technical employees, registered nurses, nurses aides, ward clerks, guards and supervisors as defined in the Act, and all other employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of rights guaranteed them in Section 7 of the National Labor Relations Act.

WE WILL, upon request, bargain collectively in good faith with the LPN Council as the exclusive representative of our employees in the above appropriate unit with respect to rates of pay, wages, hours of work, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

WE WILL reinstate our General Division unit employees' 7.8-hour workday to on or about November 1, 1977, when said employees commenced working at our new facility, and make said unit employees whole for any losses which they may have sustained as a result of this unilateral action, together with interest as provided in the Board's Decision and Order.

WE WILL similarly restore the *status quo ante* and make whole our unit employees for losses, if any, sustained by our unilateral changes in computing their vacation benefits and payments to annuity accounts as provided in the Board's Decision and Order.

BAY MEDICAL CENTER, INC.

DECISION

STATEMENT OF THE CASE

FRANK H. ITKIN, Administrative Law Judge: Unfair labor practice charges were filed in this proceeding on December 22, 1977, and on March 27, 1979. An amended consolidated complaint was issued on April 25, 1979. The case was heard in Bay City, Michigan, on August 1, 1979. Briefly, General Counsel alleges that Respondent, in violation of Section 8(a)(5) and (1) of the National Labor Relations Act, changed terms and conditions of employment with respect to certain of its employees in an appropriate unit without bargaining with their representative, the Charging Party Association, including the institution of a 7.5-hour workday on or about November 1, 1977; a change in the method of computing vacation benefits on or about January 5 and April 13, 1978; and a change in the method of computing contributions to employee annuity accounts on or about November 22, 1978. Respondent denies that it has violated the Act as alleged. Upon the entire record, including my observation of the witnesses, and after due consideration of the briefs of counsel, I make the following:

FINDINGS OF FACT

Respondent Bay Medical Center, Inc., is admittedly an employer engaged in commerce. Charging Party Michigan Licensed Practical Nurses Association is admittedly a labor organization. Background findings and related litigation between the parties are summarized by the Board and court of appeals in *Bay Medical Center, Inc.*, 224 NLRB 69 (1976), enfd. 588 F.2d 1174 (6th Cir. 1978), cert. denied 444 U.S. 827 (1979), and 239 NLRB 731 (1978). The Board found in 239 NLRB 731:

Respondent has been engaged in the business of providing health care at two hospitals, Mercy Division and General Division, located in Bay City, Michigan. It appears that recently Respondent has begun to merge the two facilities and to move its operations to a new single facility.

* * * * *

The following employees of Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time licensed practical nurses and graduate practical nurses employed by the Employer at its Bay City, Michigan, installations, excluding other technical employees, registered nurses, nurses aides, ward clerks, guards and supervisors as defined in the Act, and all other employees.

* * * * *

At all times since 1968 and continuing to date, pursuant to voluntary recognition and a series of collective-bargaining agreements, the latest of which covered the period from March 1, 1974, to February 28, 1977, the Union has been the duly designated collective-bargaining representative of all full-time and regular part-time licensed practical nurses and graduate practical nurses employed at Respondent's General Division, and, by virtue of Section 9(a) of the Act, has been, and is now, the exclusive representative of said employees for the purpose of collective bargaining.

On September 23, 1976, a majority of full-time and regular part-time licensed practical nurses and graduate practical nurses employed at Respondent's Mercy Division, pursuant to an *Armour-Globe* type secret-ballot election conducted under the supervision of the Regional Director for Region 7, designated the Union as their representative for the purpose of collective bargaining with Respondent. On or about October 5, 1976, the Regional Director for Region 7 issued a Certification of Results of Election in Case 7-RC-13740, wherein the Union was certified to bargain for these employees as a part of the group of employees which it then represented. Accordingly, the Union is the collective-bargaining representative of said employees in the above-described unit within the meaning of Section 9(a) of the Act.

* * * * *

In addition to the findings we made in the cases reported at 231 NLRB 647 and 607, we find that commencing on or about June 28, 1977, and at all times thereafter, the Union has requested Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above described unit. Commencing on or about July 6, 1977, and continuing at all times thereafter to date, Respondent has refused, and continues to refuse, to recognize and bergain with the Union as the exclusive representative for collective bargaining of all employees in said unit. Accordingly, we find that Respondent has, since July 6, 1977, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit, and by such refusal Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

Counsel for Respondent, in his brief filed in the instant case on September 18, 1979 (Br. pp. 2-3), states:

> The Respondent has consistently refused to bargain with the Michigan Licensed Practical Nurse's Association on the grounds that it was not an appropriate unit by itself, and Respondent has maintained this position throughout all past and current proceedings.

At the time, Respondent's petition for a writ of certiorari to the Sixth Circuit was still pending before the Supreme Court with reference to the Board's Order in 224 NLRB 69. The petition, as noted, has since been denied. Summarized below is the testimony and related documentary evidence pertaining to the present unfair labor practice complaint.

A. *The Institution of a 7.5-Hour Workday During November 1977*

James Chiodini, director for the Michigan Licensed Practical Nurses Association, testified that his Association had a collective-bargaining agreement "covering the General Division . . . licensed practical nurses," effective March 1, 1974, to February 28, 1977 (G.C. Exh. 2). This agreement provided (p. 10) that the "standard workday shall consist of 7.8 hours in a 24-hour period . . . ." On November 12, 1976, Chiodini sent Respondent notification of its "intent to amend and/or modify the present agreement . . . which will expire on February 28, 1977" (G.C. Exh. 3). Later, on November 24, 1976, Chiodini sent Respondent a letter requesting "some clarification regarding the Hospital's position towards our upcoming negotiations." See General Counsels Exhibit 5. Chiodini noted: "In view of the several NLRB decisions and our recent election at Mercy Division it would be our intention to renegotiate a contract covering both General and Mercy Division LPNs." On November 24, 1976, Respondent's administrator, James E. Wharton, replied, in part as follows (G.C. Exh. 6):

> This entire subject is presently before the United States Court of Appeals for the Sixth [Circuit]. Until a decision is handed down, we must in good faith respectfully decline your request to bargain over a collective bargaining agreement covering the licensed practical nurses of the Mercy Memorial Division. We are, however, available to meet with you . . . relative to negotiating amendments to the agreement presently in effect . . . .

The Union thereafter filed unfair labor practice charges with the Board. (See G.C. Exhs. 7 and 8.) And, on December 3, 1976, Chiodini wrote Wharton (G.C. Exh. 7):

> In the meantime, we can begin negotiations in the other areas, which have been rescheduled . . . on December 6, 1976 . . . .

However, on December 17, 1976, Wharton apprised Chiodini (G.C. Exh. 8): "Since receiving these charges and discussing the matter fully with counsel, we must inform you that the Medical Center will not be able to bargain with your Association with respect to any matters covering licensed practical nurses until a decision is handed down from the Sixth Circuit in the case which is now pending before that Court . . . . For the reasons indicated, we will not be meeting with you further to negotiate amendments to the present agreement . . . ."

Chiodini testified that during early May 1977, he had been informed "that some LPNs were being . . . temporarily transferred from the General Division to the Mercy Division, and that they were wondering and concerned . . . whether they'd be receiving 8 hours pay." Chiodini explained: "At the Mercy Division, where they had been without a contract, the normal workday had been 7.5 hours"; however, as noted, the "standard workday" at the General Division was 7.8 hours. Accordingly, Chiodini sent Wharton the following letter on May 2, 1977 (G.C. Exh. 9):

> I've been informed that the Hospital may soon be transferring some units and nursing personnel from General Division to Mercy Division.
>
> Since, unfortunately, we have not been able to discuss the procedure for transfers either to the Mercy Division or to the new building, I will assume that the LPNs will continue to receive the full benefits of our labor agreement, including pay for a 7.8 hour day.

Wharton replied on May 6, 1977, in part as follows (G.C. Exh. 10):

> For legal reasons about which you have been previously informed, Bay Medical Center declined to recognize your Association as the exclusive bargaining agent for the LPNs at the General Division.
>
> No new collective bargaining agreement was negotiated to succeed the one which expired on February 28, 1977, and as a result there are no contractual obligations with respect to transfers, working hours, etc.

Wharton asserted in his letter that "over a year ago" the "three unions at the General Division" were apprised that the "team nursing concept has been in use at the Mercy Division for many many years" and Respondent "planned to use this method in the new Bay Medical Center when that facility is occupied"; the LPNs at Mercy Division "work a 7.5 hour shift"; Respondent has had "some General Division . . . LPNs work at the Mercy Memorial Division to familiarize them with this method"; "since the summer of 1976 the team nursing concept has been used in a limited manner at the General Division to familiarize nursing service personnel with the concept"; and, further,

> [during] the past winter, nursing service administration and [Wharton] invited all the LPNs to attend a meeting and at the time the LPNs were again informed that [the Employer] intends to use the team nursing concept in the new facility and that the LPNs would be scheduled to work 7.5 hour shifts.

On June 9, 1977, Chiodini again wrote Respondent, stating on behalf of the LPNs "their very grave concern over the Hospital's proposed move to reduce their working hours from 7.8 hours to 7.5 hours per day." Chiodini added: "Because we have been prevented from discussing this formally, I would like to take this opportunity to ask you to reconsider your decision." (See G.C. Exh. 11.) Wharton replied on June 17, 1977, noting, *inter alia*, that there are about 140 LPNs at the Mercy Division and about 78 LPNs at the General Division; and that "the Hospital is not cutting the hours of *all* of its LPNs to 7.5 hours per shift . . . the Mercy Division LPNs, of whom there are 140, have worked that schedule for years and years." (See G.C. Exh. 12.)

Thereafter, on June 28, 1977, Chiodini "again" requested Respondent "to negotiate a collective bargaining agreement" for the entire LPN unit. (See G.C. Exh. 13.) And, on July 7, 1977, Wharton replied (G.C. Exh. 14): "As you know, the unit question is being litigated in the courts and we hope to resolve the situation in the next few months." Later, on September 8, 1977, and on January 3, 1979 (G.C. Exhs. 16 and 17), Chiodini renewed his requests to bargain, without success. On January 26, 1979, counsel for Respondent notified Chiodini that "we will continue to process our appeal in the LPN unfair labor practice case" and "for these reasons . . . will not be willing to bargain. . . . " (See G.C. Exh. 18.)[1]

Angela Uhlman, employed as an LPN at the Hospital's "new building," and also a union representative, testified that she "started working at General Hospital" about 1970; that "General merged with Mercy Hospital" about 1972 and she then "started working for General Division of Bay Medical Center"; that she "was paid for 7.8 hours" when she worked at the General Division; and that she now works 7.5 hours a day and is paid for 7.5 hours. Uhlman recalled that she "was transferred" to the "new building" of Bay Medical Center on November 11, 1977. Uhlman testified:

> [s]he [the supervisor at General Division] brought me the slip and she said that . . . I had to sign this [G.C. Exh. 19] to work at the new Hospital. And, I said I don't agree with this because they're changing my hours from 7.8 to 7.5, and we had not had a chance to talk about it . . . . And she said that [my]

[1] Chiodini acknowledged that he "first heard" that Respondent "was planning to use a 7.5 hour day" for "nurses in the new building" about August 1976. This would take effect, Chiodini believed, "when they entered the new building, whenever that was completed."

job would be terminated. I had to sign it or else. So, I signed it.[2]

Hospital Administrator James E. Wharton, recalling the transfer of General Division LPNs to the Employer's new facility, testified, in part as follows:

> Q. Isn't it true, Mr. Wharton, that most if not all of the LPNs from General Division and Mercy Division were given employment at the new Bay Medical Center facility?
>
> A. Indeed, most of them were.
>
> Q. Isn't it true, Mr. Wharton, that most if not all of the LPNs now employed at Bay Medical Center were formerly employed at either the General Division or the Mercy Division?
>
> A. There's a rapid turnover in Hospital personnel, but I still think that most of them had been there prior to—you see, we've been in the new Hospital now about 18— 19 months—and I'd say most of them, yes.
>
> Q. What date would you set as the date you moved into the new Hospital?
>
> A. It was a continuing process over a four or five month period. It started November of 1977, it wasn't completed until, I'd say, sometime in March or April of 1978.
>
> Q. During that period of time were most if not all of the LPNs of the new facility from either General or Mercy Division?
>
> A. During that time, yes, they were.
>
> * * * * *
>
> Q. [What] was done with the remaining LPNs who worked at General Division when General Division was being closed down pending the opening of the new facility? Were they not in fact transferred to the Mercy Division temporarily?
>
> A. Yes, some of them were. Some of them were laid off.
>
> Q. And that was in order to begin gradually closing the General Division, isn't that correct?
>
> A. Yes.
>
> Q. That they were transferred to the Mercy Division?
>
> A. Yes.
>
> Q. For a temporary time, until the new facility opened?
>
> A. Yes.
>
> Q. Okay, and isn't it true that when the new facility opened, they were then transferred to the new facility?
>
> A. Some were, yes.
>
> Q. Do you have any LPNs still working in the Mercy Division?
>
> A. No, but some quit. Some don't like the new Hospital.
>
> Q. Those who did not quit were transferred to the new facility?
>
> A. Yes. Two retired.
>
> Q. Mr. Wharton, you testified you had numerous meetings with the LPNs regarding the transfers to the new facility, but you could not recall when the—what these names were—or specifically who was present. Isn't it true that during these meetings you did not bargain or negotiate with any representative of the LPNs, staff council of the Michigan Licensed Practical Nurses, with respect to the length of the workday? In other words, 7.5 hour day, in the new facility?
>
> A. That's true.

B. *The Change in the Method of Computing Vacation Benefits and Contributions to Employee Annuity Accounts*

The 1974–77 contract between the parties (G.C. Exh. 2, p. 16) also provides that "an employee's vacation pay formula shall be calculated by multiplying his previous hours of pay up to a maximum of 2080 by 1/1850 times 80 hours times his regular rate of hourly pay excluding shift and weekend differentials until he accumulated 9250 hours of paid hours . . . ." Union Director Chiodini explained that this formula "computes . . . vacation pay . . . on all *paid hours* for the employee." Chiodini first learned that the Hospital "changed its method of computing vacation pay from the method as provided in the contract" in December 1978 at "a meeting with [his] staff council"—he had received no notification from the Hospital and "theHospital has refused all of [his] requests to bargain about anything."

Chiodini further testified that he had been informed "that the Hospital had instituted a tax deferred annuity program for employees including LPNs' that the Hospital then changed the method for computing the contributions of these annuities"; and that

> I was made aware of that change . . . at that same time in December, at that same meeting where they told me about the change in vacations.

Chiodini "received no notification from the Hospital" for this change in computing contributions to the annuity accounts.

LPN Uhlman testified that on January 5, 1978, she received a copy of General Counsel Exhibit 20 "in [her] paycheck," which provided a "new and improved method of calculating vacation pay . . . ." Uhlman explained that "they were [now] computing the vacation pay on hours worked, not hours paid. Previously, everything had gone by hours paid. "Later, on or about April 13, 1978, Uhlman received a further notification from the Employer for "computing vacation days," "still based on hours worked." See General Counsel's Exhibit 21.

Sandra Wisnewski, employed by the Hospital as an LPN and also a union representative, testified that in the past the Employer did not have an annuity program for LPNs; that on December 23, 1976, she received notification from the Employer pertaining to "a tax deferred annuity program" (G.C. Exhs. 22, 23, and 24); and that on November 22, 1978, she received notification from the Hospital that it was changing the method of comput-

[2] Uhlman acknowledged that she "first" "learned" that the General Division LPNs who were to be transferred to Bay Medical "would go from a 7.8 day to a 7.5 day on or about August . . . 26, 1976."

ing the contribution to the annuity account (G.C. Exh. 25). Also see Respondent's Exhibit 3.

I credit the testimony of Chiodini, Uhlman, and Wisnewski as summarized above. Their testimony is essentially uncontradicted, mutually corroborative, and substantiated in large part by the testimony of Wharton as well as by undisputed documentary evidence. Insofar as the testimony of Wharton differs with the above testimony of Chiodini, Uhlman, and Wisnewski, I credit the testimony of Chiodini, Uhlman and Wisnewski. On this entire record, including the demeanor of the witnesses, I am persuaded here that the above testimony of Chiodini, Uhlman, and Wisnewski is more complete, detailed and reliable. On the other hand, Wharton's testimony was, at times, incomplete, vague, and unclear.

Discussion

It is settled law that "an employer violates his duty to bargain" with the duly designated representative of his employees in an appropriat unit "if— when negotiations are sought or are in progress—he unilaterally institutes changes in existing terms and conditions of employment." *Taft Broadcasting Co.*, 163 NLRB 475 (1967), enfd. 395 F. 2d 622 (D.C. Cir 1968). The Board, as recited above, ordered Respondent here to bargain with the Union as the exclusive representative of "all full-time and regular part-time licensed practical nurses and graduate practical nurses employed by the Employer at its Bay City . . . installations. . . ." See 239 NLRB 731. The Board found that Respondent, "by refusing on or about July 6, 1977, and at all times thereafter, to bargain collectively with the [Union] as the exclusive bargaining representative of all of the employees of Respondent in the appropriate unit . . . has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act." (*Ibid.*) These findings are, of course, binding upon the parties in the instant case, where Respondent, as part of its persistent and continuous refusal to bargain with the Union, is alleged to have unilaterally instituted certain changes in the unit employees' terms and conditions of employment on or about November 1, 1977, and January 5, April 13, and November 22, 1978.

The essentially uncontradicted evidence of record, as detailed *supra*, makes it quite clear that, at all times pertinent here, Respondent employer repeatedly refused to bargain with the Union with respect to any terms and conditions of employment pertaining to its LPN unit employees. As Respondent apprised the Union on December 17, 1976 (G.C. Exh. 8): "the Medical Center will not be able to bargain with your Association with respect to any matters covering LPNs until a decision is handed down by the United States Court of Appeals for the Sixth Circuit in the case which is now pending before that Court . . . ." During the following year, on May 2, 1977, when the Union questioned the Employer as to whether or not nursing personnel temporarily transferred from its General Division to its Mercy Division, pending completion of its new facility, "will continue to receive the full benefits of our labor agreement including pay for a 7.8 hour day" (G.C. Exh. 9), Respondent again asserted that "for legal reasons about which you have been previously informed, Bay Medical Center declined to recognize your Association as the exclusive bargaining agent for the LPNs at the General Division" (G.C. Exh. 10, also see G.C. Exhs. 14 and 18). It is, however, "well settled that collateral litigation does not suspend the duty [of an Employer] to bargain under section 8(a)(5) . . . ." *Montgomery Ward & Co.*, 228 NLRB 1330, 1331 (1977).[3]

The essentially uncontradicted evidence of record in this case also makes it quite clear that Respondent Employer unilaterally instititued a 7.5-hour workday for its General Division LPNs when they transferred to the new facility commencing on or about November 1, 1977. Repeated requests by the Union to bargain over this contemplated change in the unit employees' workday were either rejected or ignored, pending resolution of Respondent's unit contentions before the court of appeals and Supreme Court. Counsel for Respondent now argues (br. pp. 9–14) that the initial unfair labor practice charge in this case was filed by the Union on December 22, 1977, and, consequently, "[a]lthough the final act or change did not occur until November 1977. . . the activities culminating in the final transfer occurred well before six months of the filing of the charge and, as such, are barred by" Section 10(b) of the Act. In support of this and related contentions, counsel for Respondent notes, *inter alia*, that the Employer announced this contemplated change in the unit employees' workday in 1976; that unit employees who were temporarily transferred from General Division to Mercy Division pending completion of the new facility were previously affected by this same change; and that the Union had filed earlier and timely charges pertaining to this change which were withdrawn. (See Resp. Exh. 1.)

It is true, as counsel for Respondent argues, that the Employer announced during 1976 that it contemplated using a 7.5, and not a 7.8, hour day for its LPNs "in the new building" Accordingly, the General Division LPNs would be changed from their 7.8-hour day to a 7.5-hour day when and if they transferred to the new facility. It is also true that General Division LPNs were temporarily transferred to Mercy Division, pending completion of the new facility, where they, like the Mercy Division personnel, worked a 7.5-hour day. However, it is these temporary transfers which were the subject of the earlier unfair labor practice charges; The General Counsel is only concerned here with the transfer of former General Division unit personnel to the new facility and the change in their workday (G.C. br. p. 2); and the new facility was, as noted, not opened until early November 1977.

Under these circumstances, the 10(b) time period should not commence to run from the Employer's general announcement of a contemplated change in 1976 or

[3] Counsel for Respondent has annexed to his brief a copy of a joint motion by the parties (dated March 27 and April 9, 1979) and an order by the Sixth Circuit (filed on April 16, 1979), granting a stay of proceedings with respect to the Board's Order in 239 NLRB 731, pending final determination of the Employer's petition for a writ of certiorari with respect to the Sixth Circuit's decision reported at 588 F.2d 1174 (1978). The Supreme Court, as noted, has since denied the Employer's petition. In any event, the stay of proceedings and mandate referred to in the Employer's joint motion did not suspend the Employer's bargaining obligation at any time pertinent here.

from the temporary transfer of LPNs among the divisions pending completion of the new facility. These earlier announcements and temporary transfers are too remote from the final act which is the subject of complaint here. Indeed, the Employer, in the meantime, could have agreed to bargain or determined not to implement the contemplated change in the former General Division LPNs' 7.8-hour workday when they were transferred to the new facility. In sum, the General Counsel complains here only of the change unilaterally implemented at the new facility (see *Swift Service Stores, Inc.*, 169 NLRB 359, 360 (1968), and the "earliest possible date that [the] . . . employees could have been aware of the changes affecting them" at the new facility was "the date each was" transferred or recalled to that facility (*Florida Steel Corp.*, 235 NLRB 1010, 1011 (1978).[4]

The record here also makes it quite clear that Respondent unilaterally changed the method of computing unit employees' vacation benefits and contributions to employee annuity accounts, as alleged. These allegations are similarly not barred by Section 10(b) of the Act. For, "the Board is not precluded from 'dealing adequately with unfair practices which are related to those alleged in the [earlier] charge and which grow out of them while the proceeding is pending before the Board." *N.L.R.B.* v. *Fant Milling Company*, 360 U.S. 301, 305–309 (1959). Further, counsel for Respondent's related contention that the Union, by its conduct, waived its right to bargain here is plainly contrary to the evidence of record. Respondent repeatedly and persistently refused to bargain with the Union over any terms and conditions of employment at all times pertinent here.

Respondent therefore has violated Section 8(a)(5) and (1) of the Act, as alleged.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce as alleged.

2. The Charging Party is a labor organization as alleged.

3. Respondent violated Section 8(a)(5) and (1) of the Act by changing terms and conditions of employment with respect to its employees in an appropriate unit, as described below, without bargaining with their duly designated representative, Charging Party, by instituting a 7.5-hour workday for its General Division employees when they transferred to the Employer's new facility commencing on or about November 1, 1977; by changing the method of computing vacation benefits for said unit employees on or about January 5 and April 13, 1978; and by changing the method of computing contributions to said unit employees' annuity accounts on or about November 22, 1978. The appropriate bargaining unit, as alleged, is as follows:

> All full-time and regular part-time licensed practical nurses and graduate practical nurses employed by the Employer at its Bay City, Michigan, installations, excluding other technical employees, registered nurses, nurses aides, ward clerks, guards and supervisors as defined in the Act, and all other employees.

4. The unfair labor practices found above affect commerce as alleged.

REMEDY

To remedy the unfair labor practices found above, Respondent Employer will be directed to cease and desist from engaging in the conduct found unlawful herein, or like or related conduct; to bargain upon request with the Union; and to post the attached notice. Further, Respondent Employer will be directed to restore the *status quo ante* with respect to the General Division unit employees transferred to the Employer's new facility commencing on or about November 1, 1977, by rescinding the unilateral change in their 7.8-hour workday, as found unlawful herein, and to make said unit employees whole for any losses they may have sustained as a result of this unilateral action, together with interest thereon to be computed in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977). See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962). The record is not sufficiently clear as to whether or not unit employees sustained any losses as a result of the Employer's unilateral changes in computing vacation benefits and annuity contributions, also found unlawful here. Such a determination may be made during the compliance stage of this proceeding. If it is determined that unit employees sustained any losses from these additional unilateral actions, the above restoration of the *status quo ante* and make whole remedial provisions shall be applicable to these unilateral actions as well.

ORDER[5]

The Respondent, Bay Medical Center, Inc., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Failing and refusing, upon request, to bargain collectively and in good faith with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment with Michigan Licensed Practical Nurses Association, as the exclusive bargaining representative of the employees in the unit described below, by unilaterally instituting a 7.5-hour workday for its General Division employees upon their transfer to Respondent's

[4] Counsel for Respondent's reliance on cases such as *Nazareth Regional High School* v. *N.L.R.B.*, 549 F.2d 873 (2d Cir. 1977), and *N.L.R.B.* v. *California School of Professional Psychology* 583 F.2d 1099 (9th Cir. 1978), is misplaced. These, and related cases, are factually inapposite here. The court noted in *Nazareth, supra*: "The action taken by *Nazareth* . . . was not tentative but a final decision not to hire [the employee] for the coming school year and any alleged unfair labor practice charge . . . would have to be filed . . . within 6 months of that event." The court similarly noted in *California School of Professional Psychology, supra*: "the School's letter of July 23 was an unequivocal statement that [the employee] would not be rehired."

[5] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

new facility; by unilaterally changing the method of computing vacation benefits for said unit employees; and by unilaterally changing the method of computing contributions to said unit employees' annuity accounts. The appropriate bargaining unit is:

> All full-time and regular part-time licensed practical nurses and graduate practical nurses employed by the Employer at its Bay City, Michigan, installations, excluding other technical employees, registered nurses, nurses aides, ward clerks, guards and supervisors as defined in the Act, and all other employees.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which is deemed necessary to effectuate the purposes and policies of the Act:

(a) Upon request, bargain collectively and in good faith with the Association as the exclusive representative of its employees in the above appropriate unit with respect to rates of pay, wages, hours of work, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Reinstitute its General Division unit employees 7.8-hour workday retroactively to on or about November 1, 1977, when said employees commenced working at Respondent's new facility, and make said unit employees whole for any losses which they may have sustained as a result of this unilateral action, together with interest, as provided in the Board's Decision.

(c) Insofar as it may be determined upon compliance proceedings that said unit employees also sustained losses as a result of Respondent's unilateral changes in computing vacation benefits and payments to annuity accounts, the above provisions directing restoration of the *status quo ante* and a make whole remedy shall also be applied to this additional unilateral action, as provided in the Board's Decision.

(d) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Post at its facilities in Bay City, Michigan, copies of the attached notice marked "Appendix."[6] Copies of said notice, on forms provided by the Regional Director for Region 7, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 7, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

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[6] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."