

**Yonkers General Hospital and International Union of  
Operating Engineers, Local 30, 30A, AFL-CIO.**  
Case 2-CA-16315

June 29, 1979

DECISION AND ORDER

BY CHAIRMAN FANNING AND MEMBERS JENKINS  
AND PENELLO

Upon a charge filed on March 14, 1979, by International Union of Operating Engineers, Local 30, 30A, AFL-CIO, herein called the Union, and duly served on Yonkers General Hospital, herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 2, issued a complaint and notice of hearing on March 23, 1979, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meeting of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge, complaint, and notice of hearing before an administrative law judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges, in substance, that on February 20, 1979, following a Board election in Case 2-RC-17926, the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate;<sup>1</sup> and that, commencing on or about March 1, 1979, and at all times thereafter Respondent has refused and continues to date to refuse to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. On April 2, 1979, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint.

On April 19, 1979, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on April 25, 1979, the Board issued an Order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent thereafter filed a response to Notice To Show Cause.

<sup>1</sup> Official notice is taken of the record in the representation proceeding, Case 2-RC-17926, as the term "record" is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and Regulations, Series 8, as amended. See *LTV ElectroSystems, Inc.*, 166 NLRB 938 (1967), enfd. 388 F.2d 683 (4th Cir. 1968); *Golden Age Beverage Co.*, 167 NLRB 151 (1967), enfd. 415 F.2d 26 (5th Cir. 1969); *Intertype Co. v. Penello*, 269 F. Supp. 573 (D.C. Va. 1967); *Follett Corp.*, 164 NLRB 378 (1967), enfd. 397 F.2d 91 (7th Cir. 1968); Sec. 9(d) of the NLRA, as amended.

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.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

In its answer and thereafter in its opposition to the General Counsel's Motion for Summary Judgment, Respondent denies the appropriateness of the unit and contends that an appropriate unit would consist of all service and maintenance employees. In his Motion for Summary Judgment, counsel for the General Counsel contends that Respondent seeks to relitigate matters previously considered by the Board and found to be lacking in substance and that there are no new factual issues which warrant a hearing. We agree with the General Counsel.

Review of the record, including that of the representation proceeding, Case 2-RC-17926, shows that at the hearing on the Union's petition for a unit of all employees of the engineering and skilled maintenance department, Respondent opposed such a unit on three grounds: (1) that the Board has held that separate engineering and maintenance units are inappropriate in the health care industry; (2) that the United States circuit courts of appeals have affirmed these Board decisions; and (3) that such a unit would be contrary to the congressional mandate against undue proliferation of units in the health care industry. On May 25, 1978, the Regional Director issued a decision and direction of election finding that Respondent's engineering and maintenance employees constitute a homogeneous unit whose employees share a community of interest sufficiently separate and apart from the rest of Respondent's service employees to justify separate representation. In its request for review of the Regional Director's decision and direction, Respondent reiterated its position that a decision finding appropriate a unit composed solely of engineering and maintenance employees is contrary to prior decisions and to the congressional mandate. Respondent also argued that the Regional Director erroneously determined that the engineering and maintenance department employees possess a community of interest separate and apart from other service and maintenance employees. On June 27, 1978, the Board granted Respondent's request for review, but on January 29, 1979, the Board issued an Order affirming the Regional Director's unit determination. That Order stated that subsequent to the grant of review the Board issued a Supplemental Decision and Order in *Allegheny General Hospital*, 239 NLRB 872 (1978), which set forth in detail the reasons for the policy

determination that hospital maintenance employees may constitute an appropriate bargaining unit under the health care amendments to the Act. Furthermore, the Order reiterated that a majority of the Board in *Allegheny General Hospital* found that the standard for determining the appropriateness of such a unit is the traditional community-of-interest test of *American Cyanamid Company*, 131 NLRB 909 (1961). Applying these standards, the Board thereby determined that the Regional Director's unit determination was appropriate. In the instant case Respondent again questions the appropriateness of the unit. In so doing Respondent raises no issue that it did not raise in the representation proceeding.

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.<sup>2</sup>

All issues raised by Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that any special circumstances exist herein which would require the Board to reexamine the decision made in the representation proceeding. We therefore find that Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding. Accordingly, we grant the Motion for Summary Judgment.

On the basis of the entire record, the Board makes the following:

#### FINDINGS OF FACT

##### I. THE BUSINESS OF RESPONDENT

Respondent, a health care institution within the meaning of Section 2(14) of the Act, is a New York corporation engaged in operating an acute care hospital at 2 Park Avenue, Yonkers, New York. In the normal course and conduct of its business operations during the past 12-month period, which period is representative, Respondent had gross revenue in excess of \$1 million and purchased and received goods valued in excess of \$50,000 directly from suppliers located outside the State of New York.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will

effectuate the policies of the Act to assert jurisdiction herein.

##### II. THE LABOR ORGANIZATION INVOLVED

International Union of Operating Engineers, Local 30, 30A, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

##### III. THE UNFAIR LABOR PRACTICES

###### A. *The Representation Proceeding*

###### 1. The unit

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 engineering and maintenance department employees, including firemen/engineers, engineering foremen, engineering assistants, maintenance mechanics, electricians, maintenance helper, carpenters, painters, groundskeepers/gardeners employed by Respondent at its Yonkers, New York, hospital, but excluding all other employees, professional employees, guards and supervisors as defined in the Act.

###### 2. The certification

On February 9, 1979, a majority of the employees of Respondent in said unit, in a secret-ballot election conducted under the supervision of the Regional Director for Region 2, designated the Union as their representative for the purpose of collective bargaining with Respondent. The Union was certified as the collective-bargaining representative of the employees in said unit on February 20, 1979, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

###### B. *The Request To Bargain and Respondent's Refusal*

Commencing on or about February 23, 1979, 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 March 1, 1979, and continuing at all times thereafter to date, Respondent has refused and continues to refuse to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit.

Accordingly, we find that Respondent has, since March 1, 1979, and at all times thereafter, refused to

<sup>2</sup> See *Pittsburgh Plate Glass Co. v. N.L.R.B.*, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit, and that 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.

#### IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

#### V. THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit and, if an understanding is reached, embody such understanding in a signed agreement.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785 (1962); *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229 (1962), *enfd.* 328 F.2d 600 (5th Cir. 1964), *cert. denied* 379 U.S. 817; *Burnett Construction Company*, 149 NLRB 1419, 1421 (1964), *enfd.* 350 F.2d 57 (10th Cir. 1965).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

#### CONCLUSIONS OF LAW

1. Yonkers General Hospital is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. International Union of Operating Engineers, Local 30, 30A, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. All full-time and regular part-time engineering and maintenance department employees, including firemen/engineers, engineering foremen, engineering assistants, maintenance mechanics, electricians, main-

tenance helper, carpenters, painters, groundskeepers/gardeners employed by Respondent at its Yonkers, New York, hospital, but excluding all other employees, professional employees, guards, and supervisors as defined in the Act constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since February 20, 1979, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about March 1, 1979, and at all times thereafter to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced and is interfering with, restraining, and coercing employees in the exercise of the rights guaranteed to them in Section 7 of the Act and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

#### ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Yonkers General Hospital, Yonkers, New York, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with International Union of Operating Engineers, Local 30, 30A, AFL-CIO, as the exclusive bargaining representative of its employees in the following appropriate unit:

All full-time and regular part-time engineering and maintenance department employees, including firemen/engineers, engineering foremen, engineering assistants, maintenance mechanics, electricians, maintenance helper, carpenters, painters, groundskeepers/gardeners, employed by Respondent at its Yonkers, New York, hospital, but excluding all other employees, professional employees, guards and supervisors as defined in the Act.

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

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its Yonkers, New York, hospital copies of the attached notice marked "Appendix."<sup>3</sup> Copies of said notice, on forms provided by the Regional Director for Region 2, 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.

(c) Notify the Regional Director for Region 2, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

MEMBER PENELLO, dissenting:

For the reasons set forth in my dissenting opinion in *Allegheny General Hospital*, 239 NLRB 872, I would reverse the Regional Director's unit determination, dismiss the petition, and therefore deny the General Counsel's Motion for Summary Judgment.

<sup>3</sup> 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."

## APPENDIX

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

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with International Union of Operating Engineers, Local 30, 30A, AFL-CIO, as the exclusive representative of the employees in the bargaining unit described below.

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

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

All full-time and regular part-time engineering and maintenance department employees, including firemen/engineers, engineering foremen, engineering assistants, maintenance mechanics, electricians, maintenance helper, carpenters, painters, groundskeepers/gardeners employed by Respondent at its Yonkers, New York, hospital, but excluding all other employees, professional employees, guards and supervisors as defined in the Act.

YONKERS GENERAL HOSPITAL