

**Westminster Community Hospital, Inc. and David Sabrowski, Petitioner, and Service & Hospital Employees Union, Local #399, Service Employees International Union, AFL-CIO.** Cases 21-RM-1653 and 21-RD-1196

March 21, 1978

SUPPLEMENTAL DECISION, ORDER,  
AND DIRECTION OF SECOND  
ELECTION

BY CHAIRMAN FANNING AND MEMBERS  
JENKINS AND PENELLO

On October 29, 1975, the National Labor Relations Board issued a Decision and Order,<sup>1</sup> finding that Respondent had violated Section 8(a)(1) of the Act by, *inter alia*, granting a wage increase to employees after the election was held in Cases 21-RM-1653 and 21-RD-1196 and while objections to that election were pending. The Board determined that Respondent's entire course of conduct warranted the imposition of a bargaining order. The Board accordingly ordered that the election held on October 18, 1975, be set aside and that the petitions in Cases 21-RM-1653 and 21-RD-1196 be dismissed.

Thereafter, on August 1, 1977, the United States Court of Appeals for the Ninth Circuit, in an unpublished decision,<sup>2</sup> agreed with the Board that Respondent had violated Section 8(a)(1) of the Act. The court refused, however, to enforce the Board's bargaining order, finding that the Union's presumption of continued majority status flowing from its 1973 certification had been rebutted by certain testimony. Accordingly, as the Union did not enjoy majority status, the Board's *Gissel*<sup>3</sup> bargaining order was set aside by the court.

By letter dated November 18, 1977, the Union requested that the Board issue a supplemental decision and order directing a second election. The Union noted that the Board's Order dismissing the representation petitions was based on its issuance of a bargaining order. Inasmuch as the court set aside the bargaining order, the Union claims that the basis for dismissing the petitions no longer exists and that a second election should be directed.

Respondent opposes the Union's request for a second election, noting that, since the court did not

remand the case back to the Board, its decision is final and that portion of the Board's Order which is to be enforced does not include the holding of a second election.

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.

In the aforementioned Decision and Order, we found the Union's objections to the election meritorious and set aside the election. However, we further found that Respondent had engaged in conduct which warranted the issuance of a bargaining order, thereby obviating the necessity for a second election. Consistent with established Board policy,<sup>4</sup> we dismissed the pending representation petitions upon the issuance of the bargaining order.

However, inasmuch as the court has determined that the bargaining order is not enforceable, it is clear that the basis for our dismissal of the representation petitions no longer exists.<sup>5</sup> What does remain is the fact that Respondent's conduct necessitates that the first election be set aside and a second election be held. While the court did not remand the representation case back to the Board for the direction of a second election,<sup>6</sup> or for any other action, we think it clear that, in the absence of a bargaining order but where objections to an election are found to have merit, we must "fulfill [our] duty of determining the choice of the employees in a free and fair election."<sup>7</sup> Accordingly, we shall direct that a second election be conducted.

ORDER

It is hereby ordered that Cases 21-RM-1653 and 21-RD-1196 be, and they hereby are, reopened, and that all prior proceedings held thereunder be, and they hereby are, reinstated.

IT IS FURTHER ORDERED that Cases 21-RM-1653 and 21-RD-1196 be, and they hereby are, remanded to the Regional Director for Region 21 for the purpose of conducting a second election pursuant to the direction below.

[Direction of Second Election and *Excelsior* footnote omitted from publication.]

<sup>1</sup> 221 NLRB 185.

<sup>2</sup> Docket No. 76-1072.

<sup>3</sup> *N.L.R.B. v. Gissel Packing Co., Inc.*, 395 U.S. 575 (1969).

<sup>4</sup> *Riviera Manor Nursing Home, Inc.*, 220 NLRB 124, 125 (1975).

<sup>5</sup> *New Alaska Development Corp., Alaska Housing Corporation*, 194 NLRB 830 (1972), where the court remanded for further explication of the *Gissel* bargaining order and then-Member Fanning dissented from the direction of second election ordered by his colleagues in lieu thereof.

<sup>6</sup> We would find such direction to be inappropriate. The representation case was not before the court, and it is clear that the court had no jurisdiction to review the representation case at that stage of the proceeding. See *Daniel Construction Co. v. N.L.R.B.*, 341 F.2d 805, 808-809 (C.A. 4, 1965).

<sup>7</sup> *Deming Division, Crane Co.*, 225 NLRB 657 (1976), fn. 3 at second paragraph.