

Allied Services Division, Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees, AFL-CIO and Mary E. Sheahan and Missouri Pacific Employees' Hospital Association and St. Louis Little Rock Hospitals, Inc., Party to the Contract. Case 14-CB-3404

January 20, 1978

DECISION AND ORDER

BY MEMBERS JENKINS, MURPHY, AND
TRUESDALE

On September 15, 1977, Administrative Law Judge Frank H. Itkin issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

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 and brief and has decided to affirm the rulings, findings,¹ and conclusions² of the Administrative Law Judge, to modify his remedy,³ and to adopt his recommended Order as modified herein.

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, Allied Services Division, Brotherhood of Railway, Airlines and Steamship Clerks, Freight Handlers, Express and Station Employees, AFL-CIO, its officers, agents, and representatives, shall take the action set forth in the said recommended Order, as so modified:

Substitute the following for paragraph 2(b):

"(b) Reimburse said Employer's technical nurse employees for any initiation fees, dues, or other moneys unlawfully exacted from them pursuant to the above memorandum of agreement or any extension, renewal, modification, or supplement thereof, plus interest as set forth in *Florida Steel Corporation*, 231 NLRB 651 (1977)."

¹ The Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an Administrative Law Judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (C.A. 3, 1951). We have carefully examined the record and find no basis for reversing his findings.

² Absent exceptions taken thereto, we adopt *pro forma*, the Administrative Law Judge's fn. 11 wherein he finds employees Concepcion and Nicks joined the Union voluntarily and therefore excludes them from the coverage of the reimbursement remedy.

³ The Administrative Law Judge, citing *Florida Steel Corporation*, 231 NLRB 651 (1977), inadvertently specified interest to be paid at 7 percent; however, interest will be calculated according to the "adjusted prime rate" used by the U.S. Internal Revenue Service for interest on tax payments. See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

DECISION

FRANK H. ITKIN, Administrative Law Judge: The unfair labor practice charge in this case was filed on December 6, 1976, and was amended on January 14, 1977. The unfair labor practice complaint was issued on January 21, 1977. The hearing was conducted in St. Louis, Missouri, on February 8 and 9, 1977.

General Counsel alleges that Respondent Union violated Section 8(b)(1)(A) and 8(b)(2) of the National Labor Relations Act, as amended, by entering into a collective-bargaining agreement with the Employer Hospital on or about November 1, 1976, covering hospital employees classified as technical nurses even though the Union had not been selected as bargaining agent by a majority of these employees; by providing in the agreement that "all employees working as technical nurses will join the Union on November 1, 1976, or after 30 days from the date of hire, whichever comes first as a condition of employment . . ."; by threatening a technical nurse with discharge on or about October 24, 1976, if she did not join the Union by November 1, 1976; and by posting a notice at the Hospital which stated that "all technical and part-time nurses will join the Union on November 1, 1976, or 30 days from the date of employment, as a condition of employment according to the terms of the agreement." Counsel for Respondent Union asserts:

The Union admits that it entered into the challenged agreement with the Hospital on November 1, as alleged, but denies that it was unlawful to do so. The Union has been the recognized bargaining representative of a unit of service and maintenance employees of the Hospital since 1969, and the "TNs" [technical nurses] were properly accreted [to] that unit by the agreement of November 1, 1976, when the Union learned that the "TNs" were doing the same work as attendants, who were a part of the existing unit. The Union also admits that, due to inadvertent error, the Union security provision of the November 1 agreement did not provide the required 30-day grace period for [the] present employees. However, this provision has not been enforced. Neither the Charging Party, Mary Sheahan, nor any other "TN", has been intimidated, threatened or coerced into joining the Union; the Union has not attempted to cause the discharge of any "TN" who has not joined; and the only "TNs" who have joined have done so strictly on their own volition.

Upon the entire record, [errors in the transcript have been noted and corrected], including my observation of the witnesses, and after due consideration of the briefs of counsel, I make the following:

FINDINGS OF FACT

It is undisputed, and I find and conclude, that the Missouri Pacific Employees' Hospital Association and St. Louis Little Rock Hospitals, Inc. (the Hospital), a corporation of Missouri, is engaged in operating a health care facility in St. Louis. The Hospital's gross income during the prior calendar year exceeded \$500,000. During this same period, the Hospital purchased goods valued in excess of \$50,000 which were transported directly to its facility from outside Missouri. The Hospital is therefore an employer engaged in commerce under Section 2(2), (6), and (7) of the Act. It is also undisputed and I find and conclude that Respondent Union is a labor organization under Section 2(5) of the Act.

The parties stipulated that the Hospital's classification of technical nurse included the following personnel as of November 1, 1976:

1. Full-time students of an accredited school of nursing.
2. Graduate nurses of a foreign school of nursing who have been licensed in a foreign country or in a state other than Missouri, but who have not received their license from Missouri.
3. Graduate nurses who have either failed their license examination or have not attempted to take that examination as soon as possible after they graduate.

Further, the parties stipulated that, "in the negotiations leading up to the November 1, 1976 memorandum of agreement, . . . there was no claim by Respondent Union that [the Union] represented a majority of the technical nurses . . ." and, in addition, Respondent Union "did not have evidence" that these employees wanted the Union to "represent them."

I. BACKGROUND; THE HOSPITAL GRANTS
RECOGNITION TO THE UNION AND EXECUTES THE
1970 AND 1975 CONTRACTS

Mary Townsend, director of nursing for the Hospital, testified that the Hospital employs nursing personnel known as registered nurses, licensed practical nurses, technical nurses, and attendants. Townsend explained that, prior to 1967,

[W]e did not have the term technical nurse . . . we were calling them student nurses and foreign nurses or graduate nurses at that time.

However, about 1967,

. . . the State board of nursing . . . said that the term [student nurse] could no longer be used for those people who were employed by hospitals [and] who were not actually in hospitals as student nurses. So, at that time, we came up with the term technical nurse . . . This included the student nurse who we were employ-

ing and the foreign graduate and some of the attendants who we had been giving on-the-job training at that time . . .

Townsend noted that there were then five levels of attendant employees (attendants I through V). The Hospital included in the technical nurse classification only those attendants who were above the first level.

During 1969, the Union requested recognition from the Hospital as bargaining agent of the Hospital's nonprofessional employees. Following a "card check," the Hospital granted recognition to the Union.¹ On April 24, 1970, the Hospital and the Union entered into their first collective-bargaining agreement, effective May 1, 1970, covering "all employees engaged in the work of the craft or class of hospital, clerical, office, commissary, orderlies, attendants, laundry and analagous employees . . ." (G.C. Exh. 14.) Shortly thereafter, the Union asserted that the Hospital "improperly excluded 27 positions from coverage of our agreement" (G.C. Exh. 2). Union General Chairman A. M. Fitzjarrell stated in his letter to Hospital President Carl A. Reis on July 28, 1970 (G.C. Exh. 2):

During our negotiations and all through our conferences with you regarding excepted positions, we never did discuss excepting any of the nursing department ward secretaries and attendants . . .

Following a discussion of this claim, the Hospital and the Union agreed that "all the attendants" would be included in the bargaining unit and, consequently, attendants above level I would not be classified as technical nurses.

Director of Nursing Townsend testified that the classification of technical nurse has been used at the Hospital since about 1970. This classification included those persons who were "enrolled in an accredited school of nursing, or . . . had been enrolled in an accredited school of nursing, or had been graduates of an accredited school of nursing . . ." Moreover, as the record shows, the terms "technical nurse" and "student nurse" were the subject of negotiations and discussions between the Hospital and the Union during 1970 and 1971. As Hospital President Reis wrote Union General Chairman Fitzjarrell on June 15, 1971 (G.C. Exh. 22):

In reference to your observation regarding the designation of "Technical Nurse."

This is the classification accepted for replacement of the title for "Student Nurse" and in connection with which there were considerable discussions in the negotiations. *At that time it was decided that these people are not considered in the non-professional category as they have had nursing education or are attending formal nurses' education courses and classes* [emphasis supplied].

Also see Reis' earlier letter to Fitzjarrell, dated May 28, 1970 (G.C. Exh. 21).

meeting show that the card check was conducted against a roster prepared by the Hospital of all non-professional employees, including 21 student nurses. After discussing the matter, the parties agreed to exclude 7 "excepted" positions and the 21 student nurses . . .

¹ As counsel for Respondent notes:

The card check was conducted at a meeting between the Union and the Hospital's executive committee on August 6, 1969. Minutes of that

Director of Nursing Townsend explained that the Hospital employed some 20 to 23 persons known as technical nurses on or about November 1, 1976. Of these 20 to 23 technical nurses 9 were foreign nurses who were not licensed in Missouri. Earlier, in 1970, the Hospital employed about the same total number of technical nurses; however, at the time, the group included only two or three foreign nurses. Townsend further explained that student nurses who had graduated from an accredited school of nursing were allowed by the Missouri licensing authority to function as registered nurses until their first opportunity to take the Missouri license examination. Likewise, foreign nurses who were able to comprehend English sufficiently were allowed by the Missouri licensing authority to function as registered nurses. These graduate and foreign nurses, who were permitted by the Missouri licensing authority to work as registered nurses, were not placed by the Hospital in the technical nurse classification.² However, if the graduate nurse failed her license examination or failed to take the examination as soon as possible, she was then placed by the Hospital in the technical nurse classification. Likewise, if the foreign nurse was unable to obtain the necessary permission to function as a registered nurse because of her inability to comprehend English adequately, she was placed by the Hospital in the technical nurse classification. And, as stated, those persons who were full-time students of an accredited school of nursing were also placed by the Hospital in the technical nurse classification.

Further, as Director of Nursing Townsend explained, the *attendant* employee "basically" has "no formal nursing education . . ." They have various levels of nursing training which they [acquire] on the job from on-the-job apprentice-type teaching . . . [It] is not a requirement that they have any theory and most of them have never had any theory or have been connected with formal nursing education . . ." On the other hand, the *technical nurse* employee must have received instruction in "fundamentals of nursing" as "part of [her] nursing education . . ." This would include training in subjects such as professional adjustment or nursing ethics, anatomy, sociology, psychology, medical research, medical-surgical diseases and treatments, and pharmacology. (See G.C. Exh. 11, the job description of technical nurses employed by the Hospital; G.C. Exh. 10, the job description of the attendant III employed by the Hospital; and G.C. Exhs. 6 and 8, the job descriptions for the attendants I and II, respectively, employed by the Hospital.) Although Townsend generally acknowledged that attendants and technical nurses perform similar nursing duties, she noted that the technical nurse provides a "higher quality of care."

The Union and the Hospital executed their second collective-bargaining agreement, effective May 1, 1975 (G.C. Exh. 15). This agreement covered "all employees engaged in the work of the crafts or classifications of hospital, clerical, office, commissary, attendants, laundry and related employees." In the meantime, as Director of

² The Missouri Nurses Association is the bargaining representative of the Hospital's registered nurses. Director of Nursing Townsend testified that a nurse who was "given permission to function as a registered nurse" was "represented by the RN unit."

³ About April 1976, the Joint Commission on Hospital Accreditation again notified the Hospital, as Townsend testified:

Nursing Townsend testified, the total number of attendants employed by the Hospital was decreasing. In 1970, the Hospital employed some 90 to 100 attendants. In 1976, the Hospital only employed some 44 attendants. Townsend explained that, in 1970, the Hospital's patient count was about 300; in 1974, the patient count was down to about 200; and currently, the patient count is down to about 140. Consequently, there was and is less of a need for hospital attendants. Further, in 1974, the Joint Commission on Hospital Accreditation "advised [the Hospital], as rapidly as possible . . . to replace the non-professional" with "registered licensed" personnel. The Hospital was instructed that it was "low" on registered nurses and licensed practical nurses. About this same time, the Missouri Division of Health also apprised the Hospital, as Townsend testified:

. . . we must as rapidly as possible take those attendants who have been trained on the job to give medication, to replace them with . . . the RNs, the LPNs, and the student nurse under supervision could give medication.³

Accordingly, Townsend noted, "we have increased our number of RNs and LPNs, which would cut down on the number of attendants. This we had to do . . . in order to get our accreditation . . ." However, the total number of technical nurses employed by the Hospital since about 1970, as stated above, has remained about the same.

Union Chairman Fitzjarrell testified that about 1970 the Union agreed to exclude "student nurses" from the bargaining unit because

. . . we were persuaded that they would not be a part of the unit because they would be in a training program not performing scheduled duties.

Fitzjarrell further testified:

. . . I don't recall the exact words . . . We were trying to find out who we represented and we were persuaded to exclude bona fide students because of the training [status] that they would be in, not doing nurses' attendants, not doing the work that we were bargaining for, totally.

Fitzjarrell also asserted:

. . . we were informed [by Nursing Director Townsend] that the student nursing program was necessary to maintain accreditation . . . and if pressed to eliminate them, it would cause serious harm to the accreditation program.

Elsewhere in his testimony, Fitzjarrell acknowledged that "we didn't know the difference between a student nurse and a nurses aide"; "we didn't know they existed"; "I don't

[W]e need — we were quite low on night nurses, RNs and [LPNs] . . . and they did not want the attendants to be giving medication . . . or the technical nurses, and as rapidly as possible . . . we should take this duty or skill . . . out of that category.

even recall discussing foreign nurses at any time"; the Union made no claim to include "foreign nurses" in the bargaining unit; and the Union was unaware whether "student nurses" were "receiving credit from their school of nursing for the time they worked at the Hospital" or whether they "were being compensated for working at the Hospital." As Fitzjarrell put it: "I didn't represent them; I didn't get into that."

Louis Maloof, assistant vice president of the Union, testified that, during late 1974, his local representatives apprised him that "the technical nurses were taking our work away from us; they were performing Union work and technical nurses were replacing attendants." In early 1975, according to Maloof, union representatives met with hospital representatives to discuss this contention. At a meeting, as Maloof testified, Director of Nursing Townsend stated:

. . . in order for the Hospital to maintain their accreditation they must have student nurses working as technical nurses there

Maloof also claimed that "we talked about technical nurses in general"; there was no "particular discussion about student nurses"; and Maloof was "assured" that "we would not be losing attendants" and "did not pursue the matter any further."

Maloof raised this subject again about November 1975, when the Union and the Hospital were negotiating their second contract.⁴ The problem, however, was not resolved. As Maloof testified:

Every meeting that took place, which is approximately every three or four weeks after the [second] contract was negotiated, and I have reference to November, December, January, February of 1976, up to and including March of 1976 when Mr. Reis retired . . . [we] had at meetings discussed it and the answer was the same, "Look at my desk, I'm buried, I haven't had a chance to take care of it."

Maloof recalled that, during early 1976, he again met with Reis. Maloof assertedly "made him [Reis] aware of our findings that . . . we were misadvised by Mrs. Townsend . . ."; "that keeping student nurses was not a criteria for maintaining their accreditation"; and that "when we brought this information forward to him it was when he informed us he would do everything to correct this problem." Maloof claimed that he had discovered shortly prior to this meeting that it was not necessary for the Hospital to continue using student nurses as technical nurses in order to maintain its accreditation. Maloof further asserted that he "first" became "aware of the fact

⁴ This second agreement was not in final form until about November 1975; it was then made "retroactive to May 1, 1975."

⁵ According to Townsend, some "student nurses," who receive academic credits for their work at the Hospital, also work for the Hospital for compensation on weekends as "technical nurses." The Union admittedly does not seek to represent persons performing work at the Hospital as part of an academic program.

⁶ Director Federle testified that the Union's claim made no "differentiation between foreign and student nurses" — the claim was for "technical

that the Hospital employed foreign nurses" when we "filed our claim" in 1976.

Director of Nursing Townsend explained on rebuttal that the Hospital in the past has utilized the services of "different types of student nurses." There are "students who we employed who are known as TNs [and] students who come in under contract . . . in the program of associate degrees." The students in the latter group are not compensated by the Hospital; instead, they receive academic credits for their time in the Hospital. Director of Nursing Townsend recalled that, during negotiations in 1975 and 1976 with Union Representative Maloof, a "statement about student nurses" was made. Townsend testified:

. . . I was explaining that if we did not have these student nurses who were producing our RNs we would be unable to get accreditation. They furnished most of our RNs. They come there for their clinical experience and this is a way of recruiting for our RNs.

Townsend added:

The conversation was about the technical nurses. And I was objecting to the student technical nurses going under [Union] contract because I felt that they would no longer want to come to work for us if they were students in the Hospital and knew what was going to happen.⁵

II. THE HOSPITAL AND THE UNION AGREE TO INCLUDE TECHNICAL NURSES IN THE BARGAINING UNIT

On July 27, 1976, Marion Watson, local chairman of the Union, notified Dennis Federle, the Hospital's director of personnel, that the collective-bargaining agreement between the Hospital and the Union "is being violated each day when 32 . . . technical nurses, who are non-union employees, are permitted to perform the same duties as attendants, who are union employees that are covered under rule # 1, scope of work" (G.C. Exh. 23). Personnel Director Federle denied this claim and, by letter dated August 9, 1976 (G.C. Exh. 24), the Union took an appeal to Hospital Administrator James C. Gwyn. The Union noted in its letter of appeal that "the amount of the [Union's] claim has already exceeded \$100,000."⁶

Following discussions between hospital and union representatives with respect to this claim, the Hospital and Union entered into a memorandum of agreement, effective November 1, 1976, providing (G.C. Exh. 25):

It has been agreed to add the position of Technical Nurse to Rule 2 of the Agreement that is presently in effect between Missouri Pacific Employees' Hospital

nurses." According to Federle, the Hospital employed some 51 attendants in the summer of 1975 and some 43 attendants in the summer of 1976. He attributed the loss of eight attendants in 1976 to "normal attrition" as a result of construction at the Hospital and "the patient census had declined during that time." Federle recalled that the Hospital employed about 31 licensed practical nurses and about 54 registered nurses in the summer of 1975. The Hospital employed about 40 licensed practical nurses and about 57 registered nurses in the summer of 1976. As for the technical nurses, the Hospital employed about 22 in 1970 and about 23 in 1976.

Association and Allied Services Division of the Brotherhood of Railway and Airline Clerks, effective November 1, 1976.

It is understood that all employees working as Technical Nurses will join the Union on November 1, 1976, or after thirty (30) days from date of hire, whichever comes first, as a condition of employment, according to the terms of Rule 35 of the Agreement.

Federle recalled that a notice was posted at the Hospital, stating in part:

It has been agreed to add the position of Technical Nurse to the agreement that is presently in effect between Missouri Pacific Employes Hospital Association and Allied Service Division of the Brotherhood of Railway and Airline Clerks effective Nov. 1, 1976. All Technical and Part Time Nurses will join the Union on Nov. 1, 1976 or after thirty (30) days from date of employment as a condition of employment according to the terms of agreement. Effective Nov. 1, 1976, Technical Nurses will be covered by all conditions of the agreement including fringe benefits and wage increases which includes the fifteen cents per hour increase effective Nov. 1, 1976.

Federle recalled, *inter alia*, that he first saw such a notice "prior to November 1" — Federle "thought it was on the board prior . . ." to November 1.

In addition, Director Federle testified that, following the effective date of the memorandum of agreement, the Union "asked me to invoke the security clause . . .; there were a number of technical nurses who had failed to pay the dues." Federle referred to the following notice which he had received from Union Lodge President Marie Miller, dated November 30, 1976 (G.C. Exh. 26):

This is to inform you that as of this date Ms. Maniquita Concepcion was the only technical nurse that joined the Union as agreed.

Will you please inform the rest of the TN unit that they must join the Union at once.

III. TECHNICAL NURSE MARY SHEAHAN IS
THREATENED WITH DISCHARGE; TECHNICAL NURSES
SIGN A PETITION OPPOSING MEMBERSHIP IN THE
UNION

Mary Sheahan, a nursing school student who is employed by the Hospital as a technical nurse, testified that about 3:30 p.m. on October 24, 1976, she had the following conversation with Rose Emanuel in the Hospital:

She [Emanuel] had given me two pieces of paper, one of which was a card where you would have to sign to say that you were going to join the Union and the other one was to deduct the money from your paycheck to pay the Union every month. She gave me these and said that I had to join the Union or else that my job was on the line, that I would be fired if I didn't join the Union and she said I had until November 1st to join.

* * * * *

I asked her who she was and she said she was a representative of the Union, and I told her at that time that nobody had asked me to join the Union, and she said that I didn't need to be asked, that I was being told.

* * * * *

I didn't see any notice before I was up on the floor, but I asked if she had any booklet or anything telling me the specifics of the Union or what the benefits were, and she said that she didn't have any type of booklet, but that there was a notice across from the time clock downstairs. So, when I was clocking out, I saw this notice and it said that all technical nurses were to join the Union before November 1st.

It was stipulated that Rose Emanuel was a member of the board of trustees of the Union's local lodge and assisted the secretary-treasurer in collecting dues. It was further stipulated that "at the time [Emanuel] spoke to Mary Sheahan, she was acting as agent of Local Lodge 250."

Sheahan testified that a "notice" similar to General Counsel's Exhibit 19 was posted at the Hospital on October 24, 1976. Sheahan recalled that the posted "notice" was dated "November 3." Sheahan testified:

I did think it was kind of funny that if we were supposed to join on November 1 or before, that the letter would be signed or dated November 3

Sheahan, however, was certain that the above incident was "prior to when I had to join"

Sheahan later discussed the above incident with Director of Nursing Townsend. According to Sheahan, Townsend stated "that she [Townsend] could not become involved" Sheahan then "took it upon [herself] to call together some of the technical nurses . . ." to discuss the matter. She recalled attending a meeting with approximately 10 technical nurses where "everybody . . . was saying how they didn't want to join because they didn't think it was fair that we had to pay the dues or that we should be a member of a Union because we wanted to have some kind of say . . ." Sheahan later prepared and circulated a "petition" for the technical nurses to sign, indicating that they "did not want to join" the Union. A number of the technical nurses signed the "petition." (See G.C. Exh. 30.) Sheahan also filed an unfair labor practice charge in this case on December 6, 1976.

Rose Emanuel testified that she is employed by the Hospital as an attendant I, that she is a member of the Union's board of trustees, and that she in fact "did have a conversation with Mary Sheahan." Emanuel claimed that this "conversation" was on November 6 and not on October 24. Emanuel asserted that on November 3 Union Secretary-Treasurer Elizabeth Westbrooks "gave me the Union deduction dues, she gave me the papers, where if they wanted to join, they could sign up and join the Union." Emanuel claimed that, subsequently, on November 6,

I asked her [Sheahan] if she was a TN and she told me yes. And I asked her if I could see her for a moment and she said yes. And I took her into room 521. . . . I told her that I had the papers for the Union and asked her if she had read the bulletin downstairs on the first floor. So, she said she hadn't, and I told her that there was a bulletin downstairs I asked her if she wanted the papers [for membership and dues deductions] and she said yes. So, she didn't say anything else; she asked me if she had a choice and I told her yes. And she asked me what was the choice and I told her the choice was she would join or she didn't have to

On cross-examination, Emanuel claimed that she was unaware that the memorandum of agreement between the Hospital and the Union, effective November 1, 1976, required technical nurses "to join the Union within a certain period of time." Emanuel acknowledged, however, that Union Secretary-Treasurer Westbrooks "told me that the TNs were suppose[d] to join the Union." Emanuel also claimed that she was accompanied in her visit to Sheahan on November 6 by Licensed Practical Nurse Mingo. Emanuel had asked Mingo "to come along" as "a witness." When asked "why" Emanuel needed a witness, she claimed:

Just like she [Sheahan] sat up there and said I harassed her, which I did not harass her.

Emanuel added: "I didn't know what she [Sheahan] was going to say." Nevertheless, according to Emanuel, "Mingo was outside the door" and did not witness their conversation.

Elizabeth Westbrooks, employed as an attendant III at the Hospital, testified that she is secretary-treasurer for the Union; that she "knew . . . after November 1, when Mrs. Watson told me . . ." that an agreement had been negotiated covering the technical nurses. Westbrooks further testified:

After she [Watson] told me about it, I called Miss Washington and Miss Emanuel down to the floor I was working on. That was around about the 3rd [of November] that I called them. I gave them some dues deduction slips and application blanks and the names and the pins of the student nurses.

* * * * *

And I told them they were supposed to, that I was going on vacation and they would have to take this over

⁷ Union Representative Maloof recalled that the hospital and union representatives "reached final agreement" on the terms of the above memorandum during mid-October 1976. The agreement was to be "effective November 1." The agreement assertedly was executed on November 1. According to Maloof:

My instructions to [Local Union Representatives] Mrs. Watson and Mrs. Miller were . . . they were not to say anything to the membership, even at the Union meeting, until we had all signed that agreement. . . . Not to take any action until the agreement was signed.

After the agreement was signed, as Maloof claimed,

I suggested that they put a notice on the bulletin board making

for me. And to ask the TNs, to ask them if they wanted to be on the dues deduction list and give them applications if they would accept it. If they wouldn't, don't argue, just say O.K.

Westbrooks claimed that she made no attempt "to collect dues or collect membership cards from technical nurses prior to November 1" and she did not "cause anyone or direct anyone" to do this "prior to November 1." Westbrooks claimed: "I didn't know anything about it at that time." Westbrooks further recalled that she "told" Emanuel that the technical nurses "were supposed to join the Union" "according to the notice that was up on the board"⁷

I credit the testimony of Director of Nursing Townsend as recited in the above findings. I am persuaded on this record, including the demeanor of the witnesses, that Townsend's testimony as detailed above is a reliable and trustworthy account of the sequence of events. Her testimony is corroborated in part by the testimony of Director Federle and by documentary evidence of record. Her testimony is also substantiated in part by testimony of Union Representatives Fitzjarrell and Maloof. Insofar as the above testimony of Townsend and Federle conflicts with the testimony of Fitzjarrell and Maloof, I am persuaded here that the recited testimony of Townsend and Federle is more reliable and trustworthy. Further, I credit the testimony of Technical Nurse Sheahan as recited above. I find on this record, including the demeanor of the witnesses, that Sheahan gave a complete, truthful, and accurate account of her confrontation with Union Representative Emanuel on or about October 24. I also find that Sheahan credibly recalled that the Union's notice to the technical nurses, as described above, was posted on or about October 24, and not on November 6 as claimed by Respondent's witnesses. I note that the notice reads in part: "effective November 1, 1976"; "all technical and part-time nurses will join the Union on November 1, 1976"; and "effective November 1, 1976, technical nurses will be covered" (emphasis supplied). I also note that Hospital Director Federle acknowledged that the notice was or may have been posted prior to November 1. Further, Union Representative Maloof acknowledged that the parties in fact had reached agreement to include the technical nurses in the unit by mid-October. Under all the circumstances, I find Sheahan's recollection of the incident to be more credible, trustworthy, and reliable than the conflicting assertions of Union Representatives Emanuel, Watson, Westbrooks, and Maloof. I find that the Union's notice was in fact posted before November 1, as testified by

technical nurses aware that we had come to an agreement, that they would be eligible to join the Union.

* * * * *

I was unaware of any notices prior to November 1.

Marion Watson, Local Chairman for the Union, claimed that G.C. Exh. 19, the Union's notice to the technical employees, was "worded" by her; the notice was "typed" and "posted" in the Hospital on November 3, 1976; and she did not post "a notice like this any time prior to November 3."

Sheahan, and Sheahan was in fact threatened by Emanuel with loss of her job if she did not join the Union by November 1.

Discussion

Counsel for Respondent Union argues that the Hospital's technical nurse employees were "properly accreted" by the Hospital and the Union to the existing bargaining unit. The pertinent principles of law were recently restated by the United States Court of Appeals for the Third Circuit in *N.L.R.B. v. Security-Columbian Banknote Company*, 541 F.2d 135, 140-142 (C.A. 3, 1976), in part as follows:

Simply stated, an accretion is the incorporation of employees into an already existing larger unit when such a community of interest exists among the entire group that the additional employees have no separate unit identity. Thus, they are properly governed by the larger group's choice of bargaining representative. See *N.L.R.B. v. Food Employers Council, Inc.*, 399 F.2d 501, 502-03 (9th Cir. 1968). An accretion and a unit determination are similar concepts, but the Board has restrictively applied the accretion principle since it operates to deny the accreted employees a vote on their choice of bargaining representative. See *Sheraton-Kauai Corporation v. N.L.R.B.*, 429 F.2d 1352, 1355-56 (9th Cir. 1970); *Pix Manufacturing Co.*, 181 NLRB 88, 90 (1970); *Melbet Jewelry Co., Inc.*, 180 NLRB 107, 110 (1969). The factors relevant to finding an accretion include integration of operations, centralization of managerial and administrative control and geographic proximity. Also relevant are similarity of working conditions, skills and functions, common control over labor relations, collective bargaining history and interchangeability of employees. *N.L.R.B. v. Sunset House*, 415 F.2d 545, 548 (9th Cir. 1969); *Spartans Industries, Inc. v. N.L.R.B.*, 406 F.2d 1002, 1005 (5th Cir. 1969); *The Great A & P Tea Co.*, 140 NLRB 1011, 1021 (1963). "Whether or not a particular operation constitutes an accretion or a separate unit turns . . . on the entire congeries of facts in each case." *The Great A & P Tea Co.*, 140 NLRB at 1021.

Moreover, as the Board noted in *The Standard Oil Company (Ohio) (Akron Division)*, 146 NLRB 1189, 1191 (1964):

Clarification of a certification or amendment of a unit description may be in order where a new employee classification has been created, or an employer's operations have been expanded subsequent to a certification, and the employees involved are normal accretions to the certified unit. Here, however, the categories of distributor and consignment or fuel oil distributor are not new, since they antedate the certification by many years, and it is not even alleged that their duties have undergone such change as would be tantamount to the creation of a new classification. Thus, . . . we believe that they do not constitute an accretion to the existing unit. The proper procedure for accomplishing Petitioner's purpose in the instant matter is a petition filed

pursuant to Section 9(c) of the Act, seeking an election rather than a motion for clarification, and we shall therefore dismiss the instant proceedings.

Also see *San Jose Motel d/b/a Hyatt House Motel*, 174 NLRB 1009, 1010 (1969); and *Westinghouse Electric Corp.*, 142 NLRB 317, 319-320 (1963).

Applying these principles here, I find and conclude that the Hospital's technical nurse employees are not an "accretion" to the existing bargaining unit of "all employees engaged in the work of the crafts or classifications of hospital, clerical, office, commissary, attendants, laundry and related employees" (G.C. Exh. 15). The credible evidence of record, recited *supra*, shows that a sufficiently separate and identifiable group of employees classified as technical nurses has existed at the Hospital since about 1970. The Hospital and the Union have excluded these technical nurse employees from two collective-bargaining agreements executed by the parties in the past 6 years. Counsel for the Union attempts to explain this prior practice by asserting, "Not until January 1975, five years later, did representatives of the Union learn that the so-called student-nurse program was not needed for the Hospital's accreditation . . . and [Director of Nursing] Townsend had misinformed them . . ." However, I do not find on this record that Townsend "misinformed" the union representatives, as claimed. Moreover, the Union's inaction or acquiescence in the exclusion of the technical nurses from the bargaining unit for the past 6 years cannot be justified by a claimed misrepresentation by Townsend during earlier discussions between the parties. The Union must be held to a greater degree of diligence in understanding the claimed composition of its unit during such an extended period. In addition, the essentially uncontroverted evidence of record shows that, during this same 6-year period, the work of the technical nurses has remained essentially the same except for certain modifications and restrictions resulting from or imposed by the state licensing and accreditation bodies. And, although the Union has asserted generally that the technical nurse employees "were taking our work away from us," the record shows that, not only have the technical nurse employees continued performing basically the same nursing functions since 1970, their total number has remained about the same. The Hospital, instead, has increased the number of its licensed and registered personnel in response to recommendations from state licensing and accreditation bodies.

In sum, we have here a classification of technical nurse employees existing for some 6 years and through two contracts. This classification is not new and the record does not show that the duties of technical nurses have undergone "such change as would be tantamount to the creation of a new classification . . ." *Standard Oil Company, supra*. Under such circumstances, the accretion principle should not be applied thereby denying the technical nurse employees their statutory right of a vote on their choice of a bargaining representative. *N.L.R.B. v. Security-Columbian Banknote Co., supra*.

Moreover, the record also shows that there are significant differences between the training, duties, and functions of the technical nurse employees and of the attendant employees. As Director of Nursing Townsend credibly

testified, the attendant employee "basically . . . comes on the staff with no formal nursing education They have various levels of nursing training which they [acquire] on the job [It] is not a requirement that they have any theory and most of them have never had any theory or have been connected with formal nursing education" The technical nurse employee — a full-time student of an accredited nursing school or a graduate nurse — has received instruction in "fundamentals of nursing" as part of her "nursing education." This academic training includes nursing ethics, anatomy, sociology, psychology, medical research, medical-surgical diseases and treatments, and pharmacology. The technical nurse is consequently more capable of providing a higher quality of nursing care than the attendant.⁸ And, although there is testimony of record that certain attendant employees in past years have performed procedures and functions essentially similar or identical to those procedures and functions performed by technical nurses, it appears that these attendants were not engaged in routine attendant functions or, because of special qualifications or special circumstances, were permitted to deviate from the existing norms and limitations. Nevertheless, there are by and large significant distinctions between the training and job functions of the technical nurses and those of the various levels of attendants. I would therefore not apply the foregoing principles of accretion for this additional reason.

Accordingly, as the credited evidence of record recited *supra* shows, and I find and conclude that, Respondent Union violated Section 8(b)(1)(A) and 8(b)(2) of the Act by entering into a collective-bargaining agreement with the Hospital on or about November 1, 1976, covering the employees classified as technical nurses at a time when the Union had not been designated by a majority of the technical nurse employees to represent them; by also including in that agreement a union-security clause which gave technical nurse employees less than 30 days in which to join the Union; by posting a notice advising technical nurse employees that they must join the Union by November 1 as a condition of employment; and by threatening Technical Nurse Sheahan with discharge on or about October 24 if she did not join the Union by November 1, 1976. Cf. *N.L.R.B. v. Security-Columbian Banknote Co.*, *supra* (and cases cited); *True Temper Corp.*, 217 NLRB 1120 (1975). The credible evidence of record shows that Respondent Union's agents attempted to

⁸ An examination of the job descriptions of the technical nurse and the various levels of attendants generally supports this testimony. The duties of the technical nurse include (G.C. Exh. 11):

May do nursing admission interviews, nursing discharge summary, charting, patient care plans, transcribe doctors orders and treatments under supervision of an R.N.

a. Nursing admission interviews, discharge summary and charting must previously be done under direction of instructor. Charge nurse should check and complete admission interviews and discharge summary.

b. When treatments assigned, nurse in charge should clarify ability of T.N., before assigning.

The qualifications of the attendant I are (G.C. Exh. 6):

1. Able to pass test at Missouri Employment for Attendant I.
2. Previous experience in hospital work as an Attendant I or . . . comparative education.

enforce this unlawful agreement and union-security clause by posting a notice stating that technical nurses "will join the Union November 1, 1976, or after 30 days from the date of employment as a condition of employment, according to the terms of the agreement"; by notifying management on November 30 that "only one" technical nurse has joined the Union "as agreed" and "please inform the rest of the TN unit that they must join at once"; and by threatening technical nurse employee Sheahan with discharge if she did not join the Union by November 1.⁹

CONCLUSIONS OF LAW

1. The Hospital is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Respondent Union is a labor organization within the meaning of Section 2(5) of the Act.
3. Respondent Union violated Section 8(b)(1)(A) and 8(b)(2) of the Act by entering into a memorandum of agreement with the Hospital on or about November 1, 1976, extending the coverage of its existing collective-bargaining agreement to employees working in the classification of technical nurse even though Respondent Union had not been selected as bargaining agent by a majority of the employees in the classification of technical nurse; by providing in said agreement that technical nurse employees "will join the Union on November 1, 1976 or after 30 days from the date of hire, whichever comes first, as a condition of employment . . ."; by posting a notice at the Hospital requiring that "all technical and part-time nurses will join the Union on November 1, 1976 or after 30 days from the date of employment, as a condition of employment according to the terms of agreement"; and by threatening technical nurse employee Sheahan with discharge if she did not join the Union by November 1, 1976.
4. The unfair labor practices found affect commerce within the meaning of Section 2(2), (6), and (7) of the Act.

REMEDY

To remedy the unfair labor practices found in this Decision, Respondent Union will be directed to cease or desist from engaging in the conduct found unlawful; to cease and desist from in any like or related manner

3. Pass hospital physical and be in good health.
4. Ability to spend long hours on feet and ability to lift heavy objects properly.
5. Neat and attractive appearance, well groomed in proper uniform (without earrings).
6. Be able to take directions accurately and cooperatively.

The performance requirements and duties of attendants II and III are somewhat higher than those of the attendant I; nevertheless, the performance requirements and duties of the attendants significantly fall short of those assigned to technical nurses (G.C. Exhs. 6, 8, and 10).

⁹ I find and conclude that Rose Emanuel was an agent of Respondent Union acting on its behalf within the meaning of Sec. 2(13) of the Act when Emanuel admonished Sheahan on or about October 24 that Sheahan "would be fired if [she] didn't join the Union" by November 1. Emanuel was a member of the Union's board of trustees and, at the time, was admittedly acting as agent of the local lodge.

interfering with employee Section 7 rights; and to post the attached notice.¹⁰ Respondent Union will also be directed to cease and desist from acting as collective-bargaining representative of the Hospital's technical nurse employees unless and until the Union is certified by the Board as their bargaining representative; to refrain from seeking to enforce the memorandum of agreement executed by the Union and the Hospital on or about November 1, 1976; and to reimburse the technical nurse employees for any initiation fees, dues, or other moneys unlawfully exacted from them (*Sheraton - Kauai Corporation*, 177 NLRB 25 (1969), enfd. 429 F.2d 1352, 1357-58 (C.A. 9, 1970), with interest at the rate of 7 percent per annum in accordance with *Florida Steel Corporation*, 231 NLRB 651 (1977).¹¹

ORDER¹²

The Respondent, Allied Services Division, Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees, AFL-CIO, its officers, agents, and representatives, shall:

1. Cease and desist from:

(a) Acting as the exclusive collective-bargaining agent of any of the technical nurse employees of the Missouri Pacific Employees' Hospital Association and St. Louis Little Rock Hospitals, Inc., for the purpose of dealing with said Employer concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment, unless and until said Union is certified by the National Labor Relations Board as the exclusive bargaining representative of said employees.

(b) Giving effect to the memorandum of agreement executed by said Employer and Respondent Union on or about November 1, 1976, or to any extension, renewal or modification thereof.

(c) Threatening the Employer's technical nurse employees with discharge if they do not join the Union as provided in the memorandum of agreement.

(d) Requiring in a collective-bargaining agreement as a condition of employment membership in any labor organization on less than the 30th day following the effective date of such an agreement or the beginning of employment, whichever comes first.

(e) In any like or related manner restraining or coercing said Employer's employees in the exercise of the rights guaranteed them in Section 7 of the Act.

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

(a) Post in conspicuous places in Respondent Union's business office, meeting halls, and places where notices to its members are customarily posted, copies of the attached notice marked "Appendix."¹³ Copies of said notice, on forms provided by the Regional Director for Region 14, after being duly signed by an authorized representative of Respondent Union, shall be posted immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(b) Reimburse said Employer's technical nurse employees for any initiation fees, dues, or other moneys unlawfully exacted from them pursuant to the above memorandum of

agreement or any extension, renewal, modification, or supplement thereof, plus interest at the rate of 7 percent per annum, as set forth in *Florida Steel Corporation*, 231 NLRB 651 (1977).

(c) Furnish to the Regional Director signed copies of the notice for posting by said Employer in places where notices to its employees are customarily posted. Copies of said notice, to be provided by the Regional Director, shall, after being signed by Respondent as indicated, be forthwith returned to the Director for disposition.

(d) Notify the Regional Director in writing, within 20 days from the date of Order, what steps Respondent Union has taken to comply herewith.

¹⁰ Copies of said notice will be directed to be made available to the Employer Hospital for posting.

¹¹ Technical Nurses Maniquita Concepcion and Diane Nicks testified that they in effect joined the Union voluntarily. As the Court of Appeals stated in *Sheraton-Kauai Corporation v. N.L.R.B.*, 429 F.2d 1352, 1357-58 (C.A. 9, 1970):

The Board orders reimbursement where coercion is established either by direct evidence or, as here, by inference from the fact that the employees joined the union after being informed that they were bound by a collective bargaining agreement containing a union security clause which conditions continuation of employment upon union membership Reimbursement is not ordered unless coercion is established either directly or by inference.

Under all the circumstances, the credible evidence of record does not provide sufficient basis for extending an inference of coercion here to Concepcion and Nicks. I would therefore exclude them from the coverage of this reimbursement remedy.

¹² 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.

¹³ 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 MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations has found that we have violated the National Labor Relations Act and has ordered us to post this notice. We therefore notify you that:

WE WILL NOT act as the exclusive collective-bargaining agent of any of the technical nurse employees of the Missouri Pacific Employees' Hospital Association and St. Louis Little Rock Hospitals, Inc., for the purpose of dealing with said Employer concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment, unless and until we are certified by the National Labor Relations Board as the exclusive bargaining representative of said employees.

WE WILL NOT give effect to the memorandum of agreement executed by said Employer and us on or

about November 1, 1976, or any extension, renewal, modification, or supplement thereof.

WE WILL NOT threaten said Employer's technical nurse employees with discharge if they do not join our Union as provided in the memorandum of agreement.

WE WILL NOT otherwise require in a collective-bargaining agreement as a condition of employment membership in a labor organization on less than the 30th day following the effective date of such an agreement or the beginning of employment, whichever comes first.

WE WILL NOT in any like or related manner restrain or coerce said Employer's employees in the exercise of

the rights guaranteed them in Section 7 of the National Labor Relations Act.

WE WILL make whole said Employer's technical nurse employees for any dues and initiation fees unlawfully paid to us, as provided in the Decision and Order of the National Labor Relations Board.

ALLIED SERVICES DIVISION,
BROTHERHOOD OF
RAILWAY, AIRLINE AND
STEAMSHIP CLERKS FREIGHT
HANDLERS, EXPRESS AND
STATION EMPLOYEES, AFL-
CIO