

Windham Community Memorial Hospital and Hatch Hospital Corporation and Windham Community Memorial Hospital, Registered Nurses Unit 62, Connecticut Nurses Association. Case 1-CA-12283

July 22, 1977

DECISION AND ORDER

BY MEMBERS JENKINS, PENELLO, AND WALTHER

On May 9, 1977, Administrative Law Judge James L. Rose issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel filed an exception and a brief in support of the Administrative Law Judge's Decision.

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 briefs and has decided to affirm the rulings, findings,¹ and conclusions of the Administrative Law Judge and to adopt his recommended Order, except as modified herein.

In view of certain comments made by the Administrative Law Judge concerning what presumption may apply as to whether striker replacements support the union, we wish to clarify the law on this issue. The Administrative Law Judge cited our decision in *Arkay Packaging Corporation*, 227 NLRB 397 (1976), for the proposition that replacements for economic strikers "might well be presumed not to want the union to represent them." Further, in deciding that Respondent did not possess sufficient objective considerations upon which to predicate withdrawal of recognition from the Union, the Administrative Law Judge assumed that the replacements hired by Respondent might be counted as opposed to the Union, listing the 42 replacements under a column headed, "Against the Union."²

The general rule, however, is that new employees, including striker replacements, are presumed to support the union in the same ratio as those whom they have replaced. See, e.g., *James W. Whitfield, d/b/a Cutten Supermarket*, 220 NLRB 507, 508-509

¹ 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 Although the Administrative Law Judge introduced this discussion by

(1975); *Surface Industries, Inc.*, 224 NLRB 155 (1976). We declined to follow this well-settled principle in *Arkay Packaging, supra*, deciding that the respondent therein could reasonably presume that the striker replacements did not support the union, only because of the unique circumstance that the union had apparently abandoned the bargaining unit. In short, *Arkay Packaging* represented a limited exception to the rule recited above, and thus an employer may not usually assume that replacements he may hire for strikers do not support the union.³ Of course, the normal presumption regarding the loyalties of striker replacements is rebuttable.

On a separate point, the Administrative Law Judge correctly found that nonstrikers may not be presumed not to support the union, either because they decided not to strike in the first place or because they decided to return to work during the strike. Contrary to the Administrative Law Judge, however, we do not believe it proper to conclude that, because the Union herein won the election by a ratio of 2 to 1, 8 of the 24 nonstrikers may thus be presumed not to desire union representation in determining whether Respondent had objective considerations sufficient to withdraw recognition. To decide otherwise would be to permit Respondent to rely on a presumption, rather than an objective factor, in assessing support for the Union.

Finally, General Counsel excepts to the Administrative Law Judge's failure "to include in his Order that upon application to Respondent, the strikers are entitled to reinstatement," as the Administrative Law Judge found that the strike was converted from an economic to an unfair labor practice strike on August 23, 1976. In light of the General Counsel's exception, we shall grant the following remedy in lieu of that recommended by the Administrative Law Judge, and we shall modify the recommended Order and notice accordingly.

The Remedy

Having found that Respondent has engaged in an unfair labor practice within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Having further found that the economic strike that began on April 21, 1976, was prolonged on August 23, 1976, by Respondent's unlawful refusal to

stating, "Nor did the Respondent establish that in fact a majority no longer supported the Union," it is clear that he was referring to whether Respondent had adequate objective considerations on which to ground a reasonable doubt of the Union's majority status.

³ Member Jenkins notes that he dissented in *Arkay Packaging* and applied the presumption that the replacements supported the union in the same ratio as those whom they replaced.

bargain with the Union and that the strikers therefore became unfair labor practice strikers on and after August 23, 1976, Respondent will be ordered, upon application, to offer to those employees reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges, as follows:

1. Striking employees whose jobs were not filled by permanent replacements before August 23, 1976, are, upon application, to be offered immediate reinstatement, dismissing persons hired on or after that date, if necessary, to make room for them.

2. Striking employees whose jobs were filled by permanent replacements before August 23, 1976, are, upon application, to be offered reinstatement upon departure of their replacements.

In the event Respondent does not reinstate the striking employees in the manner set forth above within 5 days from the date reinstatement is required, backpay shall commence running with interest at 6 percent⁴ from the date on which the 5 days expires.

Any dispute over to whom offers of reinstatement must be made and what backpay, if any, is due, may, if necessary, be litigated in a backpay proceeding.

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 herein, and hereby orders that the Respondent, Windham Community Memorial Hospital and Hatch Hospital Corporation, Willimantic, Connecticut, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Add the following as paragraphs 2(b) and (c) and reletter remaining paragraphs accordingly:

“(b) Upon application reinstate the unfair labor practice strikers and make them whole for any loss of earnings that they may have incurred in the manner set forth in the section of this Decision entitled “The Remedy.”

“(c) 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 back pay due under the terms of this Order.”

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

⁴ As prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

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 recognize and bargain in good faith with Windham Community Memorial Hospital, Registered Nurses Unit 62, Connecticut Nurses Association, as the exclusive representative of our employees in the following bargaining unit:

All full-time and regular part-time Registered Nurses in the Department of Nursing and the Emergency Department including Staff Nurses, IV Therapists, In-Service Instructors, LPN Program Instructors, Utilization Review Nurses and Health Service Coordinator employed by Respondent at its Connecticut hospital, but excluding all other employees, LPN Program Coordinator, In-Service Education Coordinator, Utilization Review Coordinator Supervisor, Head Nurses, Assistant Head Nurses, Emergency Department Supervisor, Operating Room Supervisor, OBS Supervisor, Night Supervisor, Assistant Night Supervisor, Relief Night Supervisor, Evening Supervisor, Assistant Evening Supervisor, Relief Evening Supervisor, Clinical Nursing Supervisor, ICU-CCU Supervisor, Administrative Assistant Supervisor, Director of Nursing, guards and supervisors as defined in Section 2(11) of the Act.

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

WE WILL, upon request, recognize and bargain in good faith with Windham Community Memorial Hospital, Registered Nurses Unit 62, Connecticut Nursing Association, as the exclusive representative of the employees in the above-described appropriate unit.

WE WILL, upon application, reinstate our striking employees, who it has been found were, on and after August 23, 1976, protesting our unlawful refusal to bargain with Windham Community Memorial Hospital, Registered Nurses Unit 62, Connecticut Nurses Association, as follows:

(1) Striking employees whose jobs were not filled by permanent replacements before

August 23, 1976, will, upon application, be offered immediate reinstatement, and persons hired on or after that date will be dismissed if necessary to make room for them.

(2) Striking employees whose jobs were filled by permanent replacements before August 23, 1976, will, upon application, be offered reinstatement upon departure of their replacements.

(3) If we do not reinstate the striking employees in the manner set forth above within 5 days from the date reinstatement is required, backpay shall begin running with interest at 6 percent from the date on which the 5 days expire.

WINDHAM COMMUNITY
MEMORIAL HOSPITAL
AND HATCH HOSPITAL
CORPORATION

DECISION

STATEMENT OF THE CASE

JAMES L. ROSE, Administrative Law Judge: This matter was heard before me on March 15, 1977, at Hartford, Connecticut, upon the General Counsel's complaint which alleged that since on or about August 23, 1976, Respondent has failed and refused to bargain with the above-named labor organization in violation of Section 8(a)(5) of the National Labor Relations Act, 29 U.S.C. § 151, *et seq.*

Respondent contends that since on or about August 15, 1976, it has had a good-faith doubt that the Union in fact continued to represent a majority of its employees in the unit for which the Union was certified. Accordingly, its withdrawal of recognition and its refusal to bargain was justified.

Upon the record as a whole, including my observation of the witnesses, briefs, and arguments of counsel, I hereby make the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. JURISDICTION

Respondent is a Connecticut corporation engaged in operating a general hospital providing health care services. Respondent has annual gross receipts in excess of \$250,000 and annually receives goods, products, and materials valued in excess of \$50,000 directly from points outside the State of Connecticut. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Windham Community Memorial Hospital, Registered Nurses Unit 62, Connecticut Nurses Association (herein the Union), is the organization which the Board certified as the exclusive collective-bargaining representative of the employees in the unit described below. The Union was certified by the Board on August 15, 1975, and thereafter negotiated with Respondent for a collective-bargaining agreement to cover the terms and conditions of the employment of members of the bargaining unit. The evidence demonstrates that employees were in fact members of the Union and did participate in it.

While Respondent denies that the Union is a labor organization within the meaning of the Act, I find that it is, and all material times has been, an organization in which employees participate and which exists in part for the purpose of dealing with an employer concerning terms and conditions of employment of its members. The Union therefore is a labor organization within the meaning of Section 2(5) of the Act.

III. THE BARGAINING UNIT

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

All full-time and regular part-time Registered Nurses in the Department of Nursing and the Emergency Department including Staff Nurses, IV Therapists, In-service Instructors, LPN Program Instructors, Utilization Review Nurses and Health Service Coordinator employed by Respondent at its Connecticut hospital, but excluding all other employees, LPN Program Coordinator, In-service Education Coordinator, Utilization Review Coordinator Supervisor, Head Nurses, Assistant Head Nurses, Emergency Department Supervisor, Operating Room Supervisor, OBS Supervisor, Night Supervisor, Assistant Night Supervisor, Relief Night Supervisor, Evening Supervisor, Assistant Evening Supervisor, Relief Evening Supervisor, Clinical Nursing Supervisor, ICU-CCU Supervisor, Administrative Assistant Supervisor, Director of Nursing, guards and supervisors as defined in Section 2(11) of the Act.

IV. THE ALLEGED UNFAIR LABOR PRACTICES

On or about August 7, 1975, a majority of the employees in the above-described bargaining unit selected the Union as their representative for purposes of collective bargaining with Respondent, and on or about August 15 the Union was so certified by the Regional Director for Region 1.

Beginning on or about November 6, 1975, representatives of the Union commenced negotiations with representatives of Respondent. There were several negotiation sessions through April 20, 1976.¹ On that date, members of the bargaining unit voted to engage in an economic strike of Respondent which commenced on April 21.

¹ Hereafter all dates are in 1976 unless otherwise indicated.

The parties nevertheless continued to meet and negotiate with a number of items being resolved. On June 9, they held their last negotiation session, all parties agreeing at that time that there was substantial disagreement on important items.

Of the approximately 72 employees in the bargaining unit, 57 went on strike on April 21. Of these 57, 6 resigned prior to August 23 and 9 returned to work. Approximately 15 employees did not go on strike. From April 21 through August 23, Respondent hired 42 strike replacements who continued to be employed as of August 23. Thus, the records of Respondent stipulated to by the parties indicate that as of August 23, including strikers, there were approximately 108 employees in the bargaining unit of which approximately 42 were strike replacements and 24 were members of the original bargaining unit who either did not go on strike or had returned to work after the strike commenced. There were 42 employees still on strike.

On or about August 23 Mary Lou Millar, the chief spokesperson for the Union, called Respondent's attorney, Robert B. Snow, Jr., and advised him that the Union would like to recommence negotiations. She stated that some movement could be made with regard to the matter of wages and the formula by which Respondent would take back the striking employees.

Snow said he would communicate this to the hospital authority, which he did. The hospital administrator, Frank E. Ritchie, testified that when Snow contacted him, he advised Snow that the hospital would no longer negotiate with the Union, as they did not feel that the Union continued to represent a majority of the nursing employees. This position was communicated then by Snow to Millar.

Some events occurred after August 23 including contact by an attorney for the Union with the Company, some strikers were reinstated and others resigned. However, inasmuch as the complaint alleges that the refusal to bargain occurred on August 23, and Respondent states as of that date it had a reasonable doubt of the Union's continued majority status, those subsequent events appear not to be relevant.

Analysis and Concluding Findings

The General Counsel rested on the theory that the Union, which had established its majority by secret ballot election on August 15, 1975, was presumed to continue to represent a majority through August 23, 1976. The vote was 38 for to 19 against the Union.

As stated by the Board in *Taft Broadcasting, WDAF-TV, AM-FM*, 201 NLRB 801 at 802 (1973):

The legal principles relating to withdrawal of recognition of a bargaining representative are well settled. Absent special circumstances, a union enjoys an irrebuttable presumption of majority status for 1 year after certification. Thereafter, the presumption continues, but becomes rebuttable upon a sufficient showing to cast serious doubt on the union's continued majority status.

And, as the Board recently held in *Arkay Packaging Corporation*, 227 NLRB 397, 398 (1976), where an employ-

er demonstrates objective considerations upon which to base its claim that the union no longer represents a majority of the employees then such "reasonably based doubt constitutes a complete defense to the allegations of unlawful refusal to bargain. . . ." Thus irrespective of whether the Union in fact represented a majority as of August 23, 1976, if Respondent is able to demonstrate sufficient objective considerations to believe that the Union no longer did so such is a complete defense to the allegation that it violated the Act when it withdrew recognition on August 23. On the other hand, absent such objective considerations, Respondent must prove the Union no longer represents a majority. If it fails to do so, then the presumption of continued majority status is not rebutted and Respondent could not with impunity withdraw recognition. *Bartenders, Hotel, Motel and Restaurant Employers Bargaining Association of Pocatello, Idaho and Its Employer-Members*, 213 NLRB 651 (1974).

The principal consideration Ritchie testified to was the fact that approximately 20 employees in the bargaining unit had not gone on strike in the first instance and that 40-plus employees had been replaced following the strike. He felt that these employees, since they were not strikers, did not wish the Union to bargain for them. Since this number was more than those remaining on strike, he felt that the Union no longer represented the majority.

Ritchie also testified that the intensity of the picketing had slackened substantially from April through the summer and by the first of August there was no picketing at all. This indicated to him that the Union, even those on strike, had in fact abandoned the strike.

I do not believe that the intensity of the picketing is significantly relevant; or that absent other factors, such would reasonably be cause for an employer to conclude that the Union no longer had a majority. In fact some evidence is to the effect that the picketing was cut back due to summer vacations.

Ritchie's principal basis for withdrawing recognition was that by August 23 the bargaining unit was substantially filled with people who were crossing the picket line, two-thirds of whom were strike replacements. Thus he could assume that those individuals did not want the Union to represent them. But this inference does not follow, particularly in this industry where, according to the testimony, many union adherents did not support the strike because they thought it was unprofessional. Such does not mean they rejected the Union as their bargaining representative. Cf. *Terrell Machine Company*, 173 NLRB 1480 (1969) enfd. 427 F.2d 1088 (C.A. 4, 1970).

In any event there is an obvious distinction between employees who, for whatever reason, rejected the strike as a means for attaining bargaining objectives and strike replacements. The latter might well be presumed not to want the union to represent them. *Arkay Packaging Corporation, supra*. No such presumption can be made of the former.

Beyond this is Ritchie's testimony to the effect that the determination to withdraw recognition was made before the expiration of the certification year and was based in part, at least, on his desire not to bargain any longer with

the Union. Thus he testified that with the new hires he felt the employees no longer wanted the Union and:

I also recall that I said something like I was very discouraged about the last 4 or 5 negotiation sessions and I felt that it wasn't — that we shouldn't enter into them again, because I did not want to continue on the same path.

* * * * *

And we had these two unresolved issues that we couldn't seem to resolve and I didn't feel it would be prudent to continue the discussions.

Dissatisfaction with the course of bargaining is not grounds for withdrawing recognition. Nor is it an objective consideration upon which to conclude that a union no longer represents a majority. Yet it is apparent that Ritchie's feelings in this regard were important to the decision to cease bargaining.

In summary, the objective considerations relied on by Respondent to justify withdrawing recognition are: about 20 employees did not go on strike and 40—some were hired as replacements,² some of the nonstrikers did not approve of the strike, and the intensity of the picketing slackened.

Unlike *Arkay Packaging Corporation, supra*, there was no evidence that the Union had abandoned the bargaining unit. There were negotiations until June, an impasse, and finally the Union asked for a meeting indicating that there could be movement. In this context, the mere fact that there were some replacements and some nonstrikers is not of itself sufficient to justify withdrawing recognition.

Nor did Respondent establish that in fact a majority no longer supported the Union. Indeed, assuming that the replacements had no allegiance to the Union, but the nonstrikers and those who returned do in the same ratio as the vote (2-1) then as of August 23:

Prounion	Antiunion
42 Strikers	42 Replacements
16 Nonstrikers	8 Nonstrikers
<u>58</u>	<u>50</u>

From the totality of the record, I conclude that the Union's presumption of continued majority has not been rebutted, that Respondent did not demonstrate sufficient objective considerations to justify its withdrawal of recognition, and in doing so it has breached its duty to bargain in violation of Section 8(a)(5) of the Act.

The General Counsel further contends that the strike, economic in its inception, was converted to an unfair labor practice strike by virtue of Respondent's refusal to bargain. The Union sought to negotiate further and one item was ending the strike. This Respondent rejected. I therefore

² Ritchie did not testify to precise numbers nor did he have them at the time he withdrew recognition.

³ 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,

conclude that a precipitating cause, at least, for the strike's continuance was the unfair labor practice, and find that the strike was converted on August 23. The strikers are entitled to reinstatement as unfair labor practice strikers.

V. THE REMEDY

Having found that Respondent has engaged in an unfair labor practice within the meaning of Section 8(a)(5) and (1) of the Act, I will recommend that Respondent be ordered to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Upon the above findings of fact, conclusions of law, the entire record in this case, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER³

The Respondent, Windham Community Memorial Hospital and Hatch Hospital Corporation, Willimantic, Connecticut, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to recognize and bargain with Windham Community Memorial Hospital, Registered Nurses Unit 62, Connecticut Nurses Association, in the following unit found appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time Registered Nurses in the Department of Nursing and the Emergency Department including Staff Nurses, IV Therapists, In-service Instructors, LPN Program Instructors, Utilization Review Nurses and Health Service Coordinator employed by Respondent at its Connecticut hospital, but excluding all other employees, LPN Program Coordinator, In-service Education Coordinator, Utilization Review Coordinator Supervisor, Head Nurses, Assistant Head Nurses, Emergency Department Supervisor, Operating Room Supervisor, OBS Supervisor, Night Supervisor, Assistant Night Supervisor, Relief Night Supervisor, Evening Supervisor, Assistant Evening Supervisor, Relief Evening Supervisor, Clinical Nursing Supervisor, ICU-CUU Supervisor, Administrative Assistant Supervisor, Director of Nursing, guards and supervisors as defined in Section 2(11) of the Act.

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

2. Take the following affirmative action:

(a) Upon request, recognize and bargain with Windham Community Memorial Hospital, Registered Nurses Unit 62, Connecticut Nurses Association, in the above-described unit.

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.

(b) Post at its Willimantic, Connecticut, facility copies of the attached notice marked "Appendix."⁴ Copies of the notice on forms provided by the Regional Director for Region 1, after being duly signed by its authorized representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places

⁴ 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

where notices to employees are customarily posted. Reasonable steps shall be taken to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 1, in writing, within 20 days from the date of this Order, what steps it has taken to comply herewith.

Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."