

Yale-New Haven Hospital and District 1199, National Union of Hospital and Health Care Employees, RWDSU, AFL-CIO. Case 1-CA-14509

May 29, 1979

DECISION AND ORDER

BY CHAIRMAN FANNING AND MEMBERS JENKINS
AND MURPHY

On December 21, 1978, Administrative Law Judge Robert Cohn issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel filed 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 conclusions² of the Administrative Law Judge and to adopt his recommended Order.

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 and hereby orders that the Respondent, Yale-New Haven Hospital, New Haven, Connecticut, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

¹ In agreement with the Administrative Law Judge, we conclude that it would be improper to pass on the validity of the contractual no-distribution rule in these proceedings. Since only the application of the oral rule to the specific facts of this case, and not the lawfulness of the contractual rule itself, was put in issue, Respondent was not given an opportunity adequately to defend its case on this ground. We, however, do not rely on the Administrative Law Judge's reference to the necessity of joining the Union as a party-respondent as a prerequisite to passing on the legality of the contractual no-distribution rule herein.

² Member Murphy believes that the employee's right to distribute the leaflet at the appropriate time and place is also protected by the first amendment to the Constitution. See *William C. Linn v. United Plant Guard Workers of America, Local 114, et. al.*, 383 U.S. 53 (1966).

DECISION

STATEMENT OF THE CASE

ROBERT COHN, Administrative Law Judge: Upon an original charge filed May 19, 1978, by District 1199, National Union of Hospital and Health Care Employees, RWDSU, AFL-CIO (herein the Union), a complaint and notice of hearing issued June 21, 1978, against Yale-New

Haven Hospital (herein Respondent). The only unfair labor practice alleged in the complaint is that Respondent violated Section 8(a)(1) of the National Labor Relations Act, as amended (herein the Act), when, on or about May 4, 1978, an agent of Respondent prevented an employee from distributing union literature. By its duly filed answer, Respondent admitted that it prevented an employee from distributing union literature on or about the said date, but contends that it was privileged to do so by virtue of an article in its collective-bargaining agreement with the Union (more fully discussed hereinafter) and, moreover, asserts that it is ready to arbitrate the issue of the application of its collective-bargaining agreement to the conduct of the employee. Accordingly, Respondent argues that the matter should be deferred to arbitration under the principle of the Board's decision in *Collyer Insulated Wire, A Gulf and Western Systems Co.*, 192 NLRB 837 (1971). Respondent further asserts that by virtue of the aforesaid collective-bargaining agreement, the employee agreed to waive any right to engage in union activities on behalf of the union. Finally, Respondent contends that distribution of literature at the place where such occurred, "interferes with patient care and the operations of the hospital."

The matter came on for hearing before me in New Haven, Connecticut, on September 8, 1978. At the close of the hearing, oral argument was waived; however, helpful, post-hearing briefs have been filed by the counsel for the General Counsel and by the counsel for Respondent, which have been duly considered.

Upon the entire record, including my observation of the witnesses, and a consideration of the arguments of counsel, I make the following:

FINDINGS OF FACT

I. JURISDICTION

Respondent operates a nonprofit general hospital in the City of New Haven, Connecticut. In the course and conduct of its business, it causes large quantities of medical supplies and related products to be purchased and transported in interstate commerce from and through various States of the United States into the State of Connecticut, in an annual amount valued in excess of \$50,000. Its annual gross revenues are in excess of \$1,000,000.

I find, as Respondent admits, that it is an employer engaged in commerce within the meaning of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The complaint alleges, the answer admits, and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICE

The facts giving rise to the dispute in this case are not complicated, and may be briefly summarized as follows:

Respondent's New Haven facility is divided into three buildings, only one of which is involved herein. That building is denominated the Memorial Unit, and is termed by all

parties as a hospital area. The building housing the memorial unit has 11 floors, 10 of which are occupied. In the basement are located the general offices of Respondent and food service; on the first floor are some laboratories, some lobbies where patients are admitted, a cafeteria, a coffee shop, a doctor's lounge, some classrooms, and a service area.¹ The Memorial Unit houses approximately 400 beds and employs approximately 2,000 employees.

Since 1973, Respondent has recognized and bargained with the Union in a unit of food service employees. The last collective-bargaining agreement was entered into on March 17, 1978, for a period up to and including December 31, 1979.

On May 4, 1978, at approximately 12:30 p.m., Raymond Milici, an assistant chef of Respondent (and also a union delegate or steward), commenced distributing a leaflet which announced a public meeting for all nonsupervisors which was to be a discussion of collective bargaining for registered nurses.² Milici commenced distributing the leaflets on his lunch period in a foyer on the first floor of the hospital just outside of the cafeteria. On the other side of the foyer are entrances to a coffee shop and to a gift shop.³ After distributing the leaflets for approximately 15 minutes, one of Respondent's security guards approached Milici and advised that he would have to cease such distribution at that place, and that if he wanted to continue the distribution, he would have to do so outside the building. Milici protested that he had a right to distribute under a recent ruling of the "Labor Board" as long as he was not in a work area or a patient area. However, the guard advised him that he was unaware of any such ruling and suggested that Milici accompany him to a telephone so that a supervisor of Respondent might be contacted. This was accomplished, and the supervisor took the same position as the guard, i.e., that the only place Milici could distribute the leaflets was outside of the building. Whereupon Milici went outside and distributed the leaflets for approximately another 10 minutes, and then returned to work.

The foregoing incident, wherein Respondent prohibited Milici from distributing leaflets in the foyer above-described, gave rise to the charge herein which was filed on May 19, 1978.

Analysis

As all parties recognize, this case must be decided in the light of recent, applicable precedent dealing with the right of union solicitation and distribution in hospitals over which the Board has recently acquired jurisdiction. In *St.*

¹ This list is not meant to be all inclusive, but to give the reader an impression of what is contained on the first floor of the facility where the dispute in the instant case arose. There are no patients' rooms, lounges, or operating rooms on the first floor; such rooms are located on the upper floors of the facility.

² The meeting was sponsored by the Union and was to take place that evening at a hotel in downtown New Haven. Milici had volunteered to distribute the literature upon the request of union representative William Morico.

³ Both the coffee shop and gift shop are operated by a nonprofit auxiliary for the purpose of raising money to buy special equipment for the hospital.

John's Hospital and School of Nursing, Inc.,⁴ the Board, after noting the general rules governing solicitation and distribution applicable to industrial plants,⁵ went on to consider such rules in a context of a hospital environment, as follows:

We recognize that the primary function of a hospital is patient care and that a tranquil atmosphere is essential to the carrying out of that function. In order to provide this atmosphere, hospitals may be justified in imposing somewhat more stringent prohibitions on solicitation than are generally permitted. For example, a hospital may be warranted in prohibiting solicitation even on nonworking time in strictly patient care areas, such as the patients' rooms, operating rooms, and places where patients receive treatment, such as x-ray and therapy areas. Solicitation at any time in those areas might be unsettling to the patients—particularly those who are seriously ill and thus need quiet and peace of mind.

The Board concluded that banning solicitation during nonworking time in patient care areas was justified. However, it disallowed the restriction "in visitor access areas other than those involved in patient care, [since] the possibility of any disruption in patient care resulting from solicitation or distribution of literature is remote. As to the restrictions in patient access areas such as cafeterias, lounges, and the like, we do not perceive how patients would be affected adversely by such activities. On balance, the interests of patients well enough to frequent such areas do not outweigh those of the employees to discuss or solicit union representation."

In *Beth Israel Hospital v. N.L.R.B.*,⁶ the Supreme Court generally affirmed the Board's striking of the aforesaid balance between employee organizational rights and employer property rights in the hospital area.

In a more recent case,⁷ the Court of Appeals for the Tenth Circuit had occasion to construe the Supreme Court's decision in *Beth Israel*. That case dealt, in part, with the legality of solicitation in a hospital cafeteria. The Court of Appeals noted that:

The Supreme Court spoke with approval of the Board's conclusion that the strict rules against solicitation applied only to patients' rooms, operating rooms and places where patients received treatment, such as x-ray and therapy rooms. . . . The court said that in determining whether solicitation is permissible for areas accessible to patients, the National Labor Relations Board must balance the relative strengths of the competing interests which are, on the one side, the like-

⁴ 222 NLRB 1150 (1976).

⁵ In general, no-solicitation rules are presumed valid if applicable only to solicitation during working time, but are presumed unlawful if they extend to solicitation during nonworking time irrespective of whether the solicitation occurs in a work or nonwork area. Rules prohibiting distribution of literature are presumed valid unless they extend to activities during nonworking time and in nonworking areas. [citing, *Stoddard-Quirk Manufacturing Co.* 138 NLRB 615 (1962)]. In order to justify the existence of a rule which is on its face presumptively unlawful, an employer must present sufficient justification to warrant the further curtailment of employee rights.

⁶ 437 U.S. 483 (1978).

⁷ *N.L.R.B. v. National Jewish Hospital and Research Center*, 593 F.2d 911, 914, 915 (10th Cir. 1978).

lihood of disruption of patient care, as opposed to the extent of the interference with union organizational activities. The court termed the cafeteria in *Beth Israel* as being a natural gathering area for employees, one in which the risk of harm to patients is relatively low as compared to potential alternative locations within the facilities. The court regarded the evaluations of the Labor Board in that case as valid since it had considered all the competing interests.

* * * * *

It was noted by the Supreme Court that the Board had recognized that a hospital may be warranted in prohibiting solicitation even on nonworking time, in strict patient care areas, having in mind that solicitation could affect the patients. It was said that areas where this could happen would include the patients' rooms, operating rooms and patient treatment areas like x-ray and therapy. At the same time the court, however, rejected the notion that the possibility of disruption to patients required a prohibition on solicitation in any area accessible to a patient. . . . To so hold excludes all sections of the hospital from solicitation. A patient could have access to the entire hospital. The court agreed with the Board that the possibility of disruption to patient care from solicitation in cafeterias was remote.

I am of the view, as was the court in *National Jewish Hospital*, that the record herein provides no factual basis for a conclusion that the patients at [Respondent's] hospital suffered upset or experienced disruption of tranquility as a result of the [distribution of union literature]:

In this connection we must be mindful that the Supreme Court in *Beth Israel* made it plain that the burden was on the employer to bring forward positive evidence showing that solicitation activities had a disrupting effect upon patients' health.

I find, based upon a careful consideration of the record evidence, that Respondent here made no showing that the distribution of the pamphlet in the foyer outside of the cafeteria had a disruptive effect upon patients' health. In this connection, I note that the foyer constituted for the hospital employees a place for exchange of information respecting all kinds of activities of interest to the employees. Thus, there were present two bulletin boards on the walls in the area which contained announcements of events inside and outside of the hospital as well as job postings. Also attached to a wall in the area was a holder which normally contained issues of a "newspaper" published by the hospital's public relations department which listed items for sale by employees or items wanted by employees. The record also contains uncontradicted evidence that at least once a year there were tables set up in the area where literature was distributed by dietitians in the food service department during National Nutrition Week. Thus, as Milici testified, he determined to distribute the literature at the location specified because this was where workers, on their way to and from the cafe-

teria, coffee shop, and gift shop would come to obtain information respecting their economic and social activities.⁸

However, Respondent vigorously argues that various activities of employees and medical staff which do—or might—occur in the area under consideration constitute it a "work area in which the hospital is permitted to ban distribution of literature at any time."⁹ Thus it points to evidence that at the end of the first floor corridor, approximately 55 feet from where the distribution occurred, there are located two classrooms which are used by the hospital for a variety of activities including departmental meetings, medical board meetings, training programs, and instruction for prospective new mothers. It is suggested that "any distribution of literature permitted in the corridor would necessarily interfere and disrupt the work of the hospital in the aforementioned manner, inasmuch as access to the classrooms can only be had by going through the area in which Milici was distributing literature."¹⁰ It is further pointed out that there is a doctors' lounge located approximately the same distance away and that they would use the corridor to reach the patient and service elevators located in a corridor adjacent to the area of distribution.¹¹

Respondent also points out evidence that the first floor corridor serves as an area through which supplies, equipment, materials, and food are delivered to the coffee shop and gift shop, and garbage from those areas is removed with the assistance of handtrucks through the area. Finally, Respondent argues that the distribution of literature in the foyer would interfere with and disrupt the operations of the hospital in that such activities would hinder and delay the eating time of employees which would result in delay of their return to their patients. On the other hand, there is little or no evidence that patients frequent the area under consideration, or that such a distribution as is involved herein would carry the potential of interference or disruption with patient care.¹²

In sum, as the court noted in *National Jewish Hospital*, *supra* at 915, "the Supreme Court in *Beth Israel* made it plain that the burden was on the employer to bring forward positive evidence showing that solicitation activities had a disrupting effect upon patients' health." After a consideration of all of the evidence in the record, I find that Respondent did not meet that burden in this case, and therefore

⁸ The Supreme Court, in *Beth Israel* at 502-503, pointed to the fact that the hospital in that case "recognized that at least some solicitation and distribution would not upset patients and undermine its function of providing quality medical care . . . [The hospital] had permitted use of the cafeteria for other types of solicitation, including fund drives, which, if not to be equated with union solicitation in terms of potential for generating controversy, at least indicates that the hospital regarded the cafeteria as sufficiently commodious to admit solicitation and distribution without disruption."

⁹ Resp. br., at p. 10.

¹⁰ Resp. br., p. 11.

¹¹ This contention is based upon a conclusion of the hospital administrator since no doctor testified at the hearing.

¹² It is conceded by the hospital that, generally speaking, inpatients eat in their rooms and do not frequent the cafeteria area (the hospital administrator guessed that perhaps 1 to 5 percent of the patients used the cafeteria). It might be reasonably inferred that if patients are well enough to utilize the gift shop and coffee shop areas, their health would not be jeopardized by the distribution of literature in the corridor outside these areas. As the Board said in *St. Johns Hospital* at 1151, "On balance, the interests of patients well enough to frequent such areas (cafeterias, lounges, and the like), do not outweigh those of the employees to discuss or solicit union representation."

conclude that "the possibility of disruption to patient care in that area must be deemed remote."¹³

The remaining arguments of Respondent may be quickly disposed of. It contends that the Union waived its rights as well as the rights of its members to engage in union activities of the type involved in the instant case by virtue of article V, section 2 of the current collective-bargaining agreement, as follows:

No employee shall engage in union activities, including the distribution of literature, on hospital time or in working areas of the hospital at any time except when specifically permitted to do so in connection with the grievance procedure.

Assuming without deciding that the asserted waiver was statutorily effective,¹⁴ it would not appear to be applicable to the instant circumstances in view of the finding that Milici was not distributing union literature either on hospital time (he was on his lunch hour) or in a working area of the hospital.¹⁵ Accordingly, this defense of Respondent must be rejected.

In view of all of the foregoing I conclude, and therefore find, that by prohibiting Milici from distributing union literature at the time and place above stated, Respondent has interfered with, restrained, and coerced employees in the exercise of rights guaranteed in Section 7 of the Act, in violation of Section 8(a)(1) of the Act.¹⁶

¹³ In its brief, Respondent relied on a decision of the United States Court of Appeals for the District of Columbia in *Baylor University Medical Center v. N.L.R.B.*, 578 F.2d 351 (1978), in which the court denied enforcement of an order of the NLRB which had found a no-solicitation and no-distribution rule of the Baylor Hospital to be an unfair labor practice in violation of Section 8(a)(1) of the Act. On October 30, 1978, in a *per curiam* decision of the United States Supreme Court, certiorari was denied with respect to the application of the aforesaid no-solicitation-no-distribution rule to the corridors of the hospital.

However, I find that case distinguishable from the instant case since the issue there involved the application of a rule to corridors generally and not to a specific locality, as in the case at bar. The court noted the evidence in that case which related directly to the relationship between the corridors and patient care, such as testimony "that a great deal of the physical therapy undertaken at Baylor actually took place in the corridors, and that for many departments the corridors served as the only available waiting room, . . . and that at Baylor the corridors seemed to serve as much as additional all-purpose rooms than merely as hallways" (Id. at pp. 355-356). There is no such evidence in the instant case. In any event, I am required to apply Board precedent in such circumstances until it has been changed, or reversed by the Supreme Court. *Iowa Beef Packers, Inc.*, 144 NLRB 615, 616 (1963).

¹⁴ Cf. *The Magnavox Company of Tennessee*, 195 NLRB 265 (1972), aff'd, 415 U.S. 322 (1974).

¹⁵ For purposes of this case, the term "working areas" in the above-quoted section of the contract is construed to be equated with the term "patient care areas."

¹⁶ Respondent contends that this case should have been deferred to the parties' contractual grievance-arbitration procedure pursuant to *Collyer Insulated Wire*, supra. However, I agree with the counsel for the General Counsel's contention that such deferral should not be made in the instant case which involves a basic, statutory right. See *General American Transportation Corporation*, 228 NLRB 808 (1977).

On the other hand, I disagree with the position of the counsel for the General Counsel that the aforesaid contractual provision should be found unlawful on its face. The counsel for the General Counsel, in his opening remarks, stated that he was not attacking the provision as *per se* unlawful; rather, that the General Counsel was attacking the manner in which the hospital had interpreted the rule, i.e., that Milici was distributing in a work area. Accordingly, Respondent did not defend the case on that theory nor was the Union—a party to the contract—joined as a party Respondent to that issue. See *N.L.R.B. v. IBEW, Local 25 AFL-CIO*, 556 F.2d 76, (D.C. Cir. 1977).

In view of all the foregoing, I find that the prohibition by Respondent of Milici's distribution of union literature at the time and place above set forth, constituted interference, restraint, and coercion of employee rights protected by Section 7 of the Act, in violation of Section 8(a)(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 the operations of Respondent 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 thereof.

V. THE REMEDY

Having found that Respondent has engaged in certain conduct in violation of Section 8(a)(1) of the Act, I shall recommend that Respondent be ordered to cease and desist therefrom, and to take certain affirmative action designed to effectuate the policies of the Act.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. By prohibiting an employee from distributing union literature in the manner described in section III, above, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.
4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

On the basis of the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER¹⁷

The Respondent, Yale-New Haven Hospital, New Haven, Connecticut, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:
 - (a) Promulgating, maintaining, or enforcing any rule or regulation prohibiting its employees from soliciting on behalf of any labor organization during their nonworking time or distributing union literature in nonworking areas during employees' nonworking time, in any area on Respondent's premises other than immediate patient care areas.

¹⁷ 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.

(b) Prohibiting employees from distributing union literature in the foyer outside the cafeteria on the first floor of the Memorial Unit during their nonworking time.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the right to self-organization, to form or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of mutual aid or protection as guaranteed in Section 7 of the Act, or to refrain from any and all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8(a)(3) of the Act.

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

(a) Rescind its rules respecting the areas in which employees may solicit on behalf of a labor organization during the employees' nonworking time, and prohibiting distribution of union literature during employees' nonworking time in nonworking areas of its operations insofar as such rules apply to other than immediate patient care areas.

(b) Post at its hospital facility in New Haven, Connecticut, copies of the attached notice marked "Appendix."¹⁸ Copies of said notice, on forms provided by the Regional Director for Region 1, after being duly signed by Respondent's representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 con-

¹⁸ 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."

secutive 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 said Regional Director, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

APPENDIX

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

WE WILL NOT promulgate, maintain, or enforce any rule or regulation which prohibits our employees from soliciting on behalf of any labor organization on our hospital premises or grounds other than immediate patient care areas during employees' nonworking time, or from distributing other than in immediate patient care areas literature on behalf of any labor organization in nonwork areas of our hospital.

WE WILL NOT prohibit employees from distributing union literature in the foyer outside the cafeteria on the first floor of the Memorial Unit during their nonworking time.

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

YALE-NEW HAVEN HOSPITAL