

**Coliseum Hospital, Inc. d/b/a University Hospital and
Harold T. Steen. Case 31-CA-3050**

April 5, 1973

DECISION AND ORDER

BY MEMBERS JENKINS, KENNEDY, AND
PENELLO

On October 11, 1972, Administrative Law Judge George H. O'Brien issued the attached Decision in this proceeding. Thereafter, the General Counsel 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 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 complaint be, and it hereby is, dismissed in its entirety.

¹ The General Counsel 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 were incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544, enf'd 188 F.2d 362 (C.A. 3). We have carefully examined the record and find no basis for reversing his findings.

² Inasmuch as the parties did not raise or litigate the issue of deferral to arbitration at the hearing, the record evidence before us is insufficient for finding that deferral is warranted in this case. Accordingly, we find it unnecessary to pass on the gratuitous comments of the Administrative Law Judge concerning *National Radio Company, Inc.*, 198 NLRB No. 1. For reasons stated in the dissenting opinion in *National Radio*, Member Jenkins would not, in any event, defer to arbitration in this case.

DECISION

STATEMENT OF THE CASE

GEORGE H. O'BRIEN, Administrative Law Judge: On August 31, 1972, in Los Angeles, California, a hearing was held in the above-entitled matter. The complaint, issued July 11, 1972, is based on a charge filed April 20, 1972, by Harold T. Steen, an individual employee, and alleges violations of Section 8(a)(1) and (3) of the National Labor Relations Act by Coliseum Hospital, Inc. d/b/a University Hospital, herein called Respondent.

Upon the entire record in this proceeding, including my observation of the witnesses while testifying under oath, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

Respondent is a California corporation engaged in the operation of a hospital for profit located in Los Angeles, California. Respondent annually receives gross revenue in excess of \$250,000, and annually receives in excess of \$30,000 in the form of Medicare payments from the United States Government. Respondent annually receives, directly from suppliers located outside the State of California, goods and supplies valued in excess of \$5,000, and annually receives from California suppliers goods and supplies valued in excess of \$10,000, which said goods and supplies were shipped to said California suppliers directly from points located outside the State of California. Respondent's business meets the Board's jurisdictional standard described in *Butte Medical Properties, d/b/a Medical Center Hospital*, 168 NLRB 266.

II. THE LABOR ORGANIZATION INVOLVED

Service and Hospital Employees Union, Local 399, Service Employees International Union, AFL-CIO, herein called the Union, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Issues

1. Whether Respondent, when it changed the work schedule of Harold Steen from a regular 5-day 40-hour week to a 3-day 24-hour week was motivated by an intent to discourage membership in the Union.

2. Whether Respondent, by reducing Steen's hours of work, forced him to quit his employment, and thereby constructively discharged him.

B. Material Facts

In December 1971, Respondent employed one male full-time orderly on the day shift. This was Ross Simmons. On December 19, 1971, Harold Steen was hired by Director of Nursing Julia Tovar, and worked regularly 2 days a week on Simmons' days off through the week ending February 19, 1972. He was told by Tovar that he was a "part-time employee." During this period, Steen obtained other work through "The Registry," a vehicle used by nurses and orderlies to obtain employment in hospitals, private homes, and elsewhere.

When, on February 21, 1972, Simmons took a leave of absence projected to last for 6 to 8 weeks, Steen was assigned Simmons' hours and duties as the regular male full-time orderly on the day shift. Except for the fact that he was frequently late for work, and occasionally reprimanded for tardiness, Steen performed these duties to the complete satisfaction of Tovar for the remainder of February and through the month of March.

In late March, Tovar told Steen that Simmons was not coming back, that she was considering giving Simmons' position to Steen for permanent duty, but would first have

Steen in her office to discuss it. This exchange took place in the lobby of the hospital.

On Friday, April 7, 1972, Tovar called Steen to her office and charged him with three separate derelictions of duty. A woman patient had complained that Steen had refused to prepare her sitz bath. Steen answered that the patient had refused the sitz bath. Another woman patient, who was on a salt-free diet, had complained that Steen brought her a food tray with bacon and had compounded his error by setting the tray in a position which she could not reach. Steen merely answered that this was false. Tovar's third complaint was that Steen had failed to answer the bell of a woman patient. Steen's answer was that he was unaware of any occasion when he had failed to answer a bell. Tovar then stated that, because of these complaints, she could not make him permanent at that time, but would see how he worked out in the future.

On the morning of Thursday, April 13, Steen encountered the Union's business agent, Thomas Moore Bond, in a hospital corridor. Steen told Bond that Tovar had refused to make him permanent because of these complaints, and Bond said, "I am going to look into it."

At about 11 a.m. on Thursday, April 13, Bond entered the maternity ward and sat down beside the desk at which Tovar was working. Tovar had just prepared her work schedule for the period, Sunday, April 16, through Sunday, April 30. The schedule is in tabular form. In the left-hand column are 16 names written in ink. The 15 succeeding columns are each headed by day and date. The assignment of each employee on each date is noted in pencil. The document received in evidence shows many erasures, where assignments have been changed. Bond, from where he was sitting, could easily observe that Steen was scheduled to work only on the following days:

Sunday, April 16
 Wednesday, April 18
 Saturday, April 22
 Sunday, April 23
 Wednesday, April 26
 Friday, April 28
 Saturday, April 29
 Sunday, April 30

Although the Union has had a collective-bargaining agreement with Respondent since February 1969, and although Bond had since January 26, 1972, been assigned the duty of administering this contract, he had not previously conferred with Tovar on any matter. Bond opened the conversation by inquiring as to the status of Steen. Tovar answered that Steen was a part-time employee. Bond replied that this was impossible, pointing out that there was no such thing as a part-time employee recognized by the contract. Bond reminded Tovar that Steen had worked longer than the 90-day probationary period set forth in the contract, and, since he had been working 40 hours per week during the entire month of March, he had more than fulfilled the 80-hour requirement for health and welfare contributions set forth in a contract amendment

signed by Respondent February 2, 1972. Tovar insisted that the contract did not apply to part-time employees, that Steen, when he was hired, accepted part-time status, and that Steen had been working 40-hour weeks only because Simmons was on leave of absence. In answer to Bond's inquiry as to why Steen was being cut back to 3 days per week, Tovar answered that she was reducing Steen's hours because her male census was low,¹ because Steen did not appear to get along with female patients, and because he was late. Bond insisted that Steen should be restored to a 5-day work schedule and, when Tovar persisted in her refusal, Bond said he would take it to the Labor Board.

It is doubtful if Bond understood what Tovar was saying. She was annoyed by his intrusion and spoke very rapidly with such a pronounced Spanish accent that Bond thought some of her remarks were in Spanish. Tovar did not erase any mark on her schedule while Bond was present.

Bond went immediately to the employees' cafeteria where he found Steen eating lunch with his charge nurse, Mrs. Wallen. Bond reported that he had been unable to get anywhere with Mrs. Tovar, and that she had told him that she was going to reduce Steen's hours to 2 days per week. At this point, Tovar approached the group and addressing Steen said: "You speak to him and tell him what I told you." Steen made no reply. Bond stood up and told Tovar that they had had their discussion and there was no need to discuss it further. Tovar, as she left, announced: "He will have to go back on three days a week."

Tovar posted the assignment sheet on Friday, April 14. Prior thereto, she had erased the characters "fl" in the square under "4-28FRI" opposite the name, "Steen, H. Orderly." When Steen observed the schedule, he called a hospital where his application had been on file for more than a year and announced that he was available for "on call" work.

On Monday, April 17, Bond handed to Tovar a formal grievance.² Tovar said they would take care of it in the front office. On April 20, Steen, at the suggestion of Bond, filed the charge giving rise to the instant proceeding.

Steen worked for Respondent on Sunday, April 16, and Wednesday, April 19. He was absent on his next scheduled workday, Saturday, April 22. He worked for Respondent on Sunday, April 23, and Wednesday, April 26. He was late for work on Saturday, April 29. During the intervening period, he worked 3 days on calls which he had received from the other hospital.

On Saturday, April 29, when Tovar asked Steen why he was late, Steen replied that he had been working on another job because his days had been cut.

On Friday, April 28, Tovar posted a schedule showing Steen scheduled for 6 days' work in the ensuing 2-week period. Steen worked for Respondent on Sunday, April 30, and on Tuesday, May 2. He did not report for his third scheduled workday during the week beginning April 30. When Steen called for his bi-weekly paycheck on Friday, May 5, he told the charge nurse, Mrs. DeLeone, that he

arbitration. It also contains the following clause:

No employee or applicant for employment shall be discriminated against, either by the Employer or the Union, because of membership in or activities on behalf of the Union, or on account of age, sex, race, color, religious creed, or national origin.

¹ The average number of male patients in April 1972 was between four and five. In addition to the registered nurse in charge of the floor, there were six other female nurses on the day shift. Between April 3, 1972, and May 5, 1972, Steen was the only male employee caring for patients on the day shift.

² The contract contains a detailed grievance procedure ending in binding

would not be returning back to work and that he was quitting because he had another job.

On Monday, May 8, Steen telephoned Tovar. Steen testified:

I was supposed to return to work on a Monday. I didn't go in on that particular Monday because I knew that I had a permanent part-time job that I have now for five days a week. So this is when I called to let Mrs. Tovar know that I wouldn't be returning. I had already notified my charge nurse prior to that on pay day when I picked up my check that I wouldn't be returning.

C. Concluding Findings

Tovar's decision to reduce Steen's hours had been made, and the schedule implementing this decision had been prepared before she was visited by Bond. The reasons which she stated to Bond were true: i.e. the male census was low, female patients had complained, and Steen was frequently late for work. There is no credible evidence in this record of union animus on the part of any of Respondent's officials or supervisors. Respondent, in reducing Steen's hours of work, was not motivated by the intent to discourage union or other concerted activity.

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, conclusions, and recommended Order herein shall, as provided in Sec.

Steen quit his employment because he secured a position which he liked better, prior to the resolution of the grievance which the Union had filed on his behalf. This controversy could and should have been resolved through the grievance procedure of the contract. *National Radio Company, Inc.*, 198 NLRB No. 1.

CONCLUSIONS OF LAW

1. Coliseum Hospital, Inc., doing business as University Hospital, Respondent herein, is an employer within the meaning of Section 2(2) of the Act, engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.

2. Respondent has not, on this record, engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) or (3) of the Act.

Upon 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:

ORDER³

The complaint is dismissed in its entirety.

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.