Youth Consultation Service of the Diocese of Newark *and* International Union, United Automobile, Aerospace and Agricultural Implement Workers Union of America. Case 22-CA-4748

July 27, 1973

DECISION AND ORDER

BY MEMBERS JENKINS, KENNEDY, AND PENELLO

On December 1, 1972, Administrative Law Judge Sidney Sherman issued the attached Decision in this proceeding. Thereafter, General Counsel filed exceptions and a supporting brief, and Respondent filed a brief in reply to General Counsel's exceptions.

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, and conclusions of the Administrative Law Judge and to adopt his recommended Order, as modified herein.[1]

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 hereby is, dismissed in its entirety.

[1] We are adopting the Administrative Law Judge's recommendation to dismiss the complaint on jurisdictional grounds but we rely solely on the close relationship between Respondent's Holley Center and nonprofit Hackensack Hospital We need not pass on any of the other findings made by the Administrative Law Judge

DECISION

SIDNEY SHERMAN, Administrative Law Judge: The charge herein was served upon Respondent [1] on January 6, 1972, the complaint issued on April 21 and the case was heard on May 17 and July 13. The issues litigated related to alleged violations of Section 8(a)(1) and (3) by the discharge of six child care counselors. After the hearing, briefs were filed by Respondent and the General Counsel.

Upon the entire record,[2] the following findings and recommendations are made:

I THE JURISDICTIONAL ISSUE

Youth Consultation Service of the Diocese of Newark, herein called Respondent, is a nonprofit corporation organized in 1951 under New Jersey law. In 1971, it conducted various operations in the State of New Jersey consisting of a school in Newark of problem high school students, a center in Jersey City for the rehabilitation of juvenile addicts, a psychiatric outpatient clinic in Jersey City for the treatment of emotionally disturbed persons of all ages, and a residence and day care center in Hackensack, hereinafter referred to as the "Holley Center," for the care and treatment of emotionally disturbed girls. The Holley Center is the only operation involved in this case.

That a statutory basis for the Board's jurisdiction exists here is clear from Respondent's admission that it annually receives from out-of-state sources remittances in excess of $13,000, representing payments of interest and dividends on stocks and bonds held by it. Nor is Respondent's nonprofit status a bar to asserting jurisdiction. In *The Children's Village, Inc.*, 186 NLRB 953, and *Jewish Orphan's Home of Southern California a/k/a Vista Del Mar Child Care Service,* 191 NLRB 32, the Board took jurisdiction, although the respondent was a nonprofit organization engaged, like this Respondent, in the care and treatment of emotionally disturbed children. In both cases the Board found that the respondent had sufficient gross receipts to satisfy the $500,000 requirement applicable to retail enterprises, and in *Children's Village, supra,* the Board expressly left open the question whether to establish a separate standard for a facility of the type involved in this case.

We turn now to the question whether the foregoing $500,000 requirement is met here. Although the Holley Center, itself, did not open until August 1971, Respondent has been operating various other facilities since 1951. The record shows that in 1971 Respondent's receipts totaled $346,287, of which $14,601 consisted of income from investments, $150,876 of fees for services rendered, and the balance of grants and contributions from various sources.[3] All these receipts were available for, and expended on, current operations. In addition, Respondent received contributions in 1971 to various so-called "funds" established for specific purposes, such as the construction or renovation of various buildings maintained, or to be maintained, by Respondent.[4] The most significant of these items was a grant of $843,000 from the Federal government to one of these funds to finance the construction of a new building, which grant, it was stipulated at the hearing, was received by Respondent in 1971.[5] Whether the nonrecurring nature of such an item requires that it be disregarded in computing Respondent's gross receipts for jurisdictional purposes is a question which the Board does not seem to have specifically considered. However, there is some authority that, where the question is one of counting capital purchases for the purpose of applying the Board's nonretail inflow test, such purchases will be counted, if they are not the only items of inflow,[6] and

[1] Respondent's name has been amended to conform to its correct legal name as shown by Resp Exh 5 and the stipulation of the parties (G.C Exh 9)

[2] For corrections of the transcript, see the orders of October 2 and November 20, 1972

[3] G C Exh 3

[4] See schedule 3 of G C Exh 3

[5] The record shows that such new building was the one housing the Holley Center, which was completed in August 1971.

[6] *Cemetery Service Corporation, (Parkview and Springdale Cemeteries)* 149

the Board will assert jurisdiction if the total of such capital and noncapital items exceeds $50,000 per annum. Here, as stated, in 1971, Respondent received, in addition to the foregoing grant, nearly $350,000 for current operating expenses. Thus, only about $150,000 of the Federal grant need be counted in order to find that the Board's gross receipts standard for retail enterprises has been met here. Accordingly, if the *Cemetery Service* case, *supra,* is deemed controlling here, and that were the only issue, assertion of jurisdiction over Respondent would be warranted.[7]

However, there remains to be considered an issue which emerges from cases like *Temple University—of the Commonwealth System of Higher Education,* 194 NLRB 1160; *Queens Borough Public Library,* 195 NLRB 974; and *Nassau Library System,* 196 NLRB 864. In those cases, the Board refused jurisdiction over an operation which, while not itself exempt from coverage under the Act, had certain special ties to an entity which was exempt. Thus, the Board declined jurisdiction in the *Temple University* case, *supra,* because of the "unique relationship" between the university and the Commonwealth of Pennsylvania and various state and local government bodies. The principal factors stressed in those cases were the degree of control exercised by the exempt entity over budgetary matters, its authority to audit expenditures, its substantial, financial support of the nonexempt operation, and ownership of the premises occupied by the latter.

Here, there was considerable evidence concerning the relationship between the various operations of Respondent and of certain organizations which are exempt from the application of the Act, including nonprofit hospitals and municipal agencies, and there will next be considered whether such relationship was so close as to bring this case within the rule of *Temple University* and related cases.

As for Respondent's operation immediately involved herein, the Holley Center, the record shows that it has an undeniably unique relationship to the Hackensack Hospital, which is a nonprofit institution, exempt from the Act. In order to qualify for a Federal grant it was necessary for the Holley Center to associate itself with a facility that provided certain health services in addition to those supplied by the Holley Center.[8] The Hackensack Hospital, hereinafter called the Hospital, was such a facility. Accordingly, in February 1971, the Holley Center and the Hospital entered into an agreement to combine certain services of each institution, thereby offering a "comprehensive mental health program." This grouping of services was designated as the "Hackensack Hospital Community Mental Health Center," hereinafter called the "Community Center," and was to be governed by an "Advisory Board," in accordance with the bylaws of the Community Center,[9] which Board was to be composed, *inter alia,* of three representatives of the Hospital, three from the Holley Center, three from an organization identified only as "Friendship House," one each from a state and county hospital, and six from the "community at large," the selection of those six being subject to the approval of the board of trustees of the foregoing institutions. The agreement further provided for the submission by the Holley Center to the Advisory Board of a proposed budget; for revision thereof, if deemed necessary by the Advisory Board; for approval by it of any such revision; for the maintenance by the Holley Center of such financial and other reports as are required by the officials of the Community Center; for submitting to them reports of expenditures to be audited by them; for appointment by the Hospital, subject to the approval of the Advisory Board, of a director of the Community Center, who was to be responsible for all its operations; for approval of the medical director of the Holley Center by the representatives of the Hospital; for participation by the Community Center's medical director in the approval of the professional staff of the Holley Center; and for the maintenance by the Holley Center of medical records, to be made available to personnel of the Hospital. Finally, the foregoing agreement stipulates that the Hospital is the "primary applicant" for the Federal grant and is responsible "for the receipt and disbursement of the finances and the carrying out by all parties of the terms and conditions of the program and the grant."

The General Counsel elicited an admission by the Holley Center's executive director, Stone, that, although that facili-

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NLRB 604, 606, Cf *International Union of Operating Engineers, Local 428, AFL–CIO,* 169 NLRB 184

[7] Another possible basis for finding sufficient annual gross receipts here is supplied by Respondent's stipulation that in 1972 it expects to receive about $600,000 for operating purposes (G C Exh 9) However, the Board has frequently held that, where, as here, the employer has been in operation for at least a year prior to the Board hearing, it will look only to his past experience, and will not rely on his projection of future income, in determining whether to assert jurisdiction *Aroostook Federation of Farmers, Inc,* 114 NLRB 538, *Whippany Motor Co, Inc,* 115 NLRB 52, *The Windsor School, Inc,* 199 NLRB No 54

The General Counsel contends that, if it should find for any reason that Respondent's annual receipts do not exceed $500,000, the Board should establish a less stringent jurisdictional standard for facilities for the treatment of emotionally disturbed children By way of analogy, the General Counsel cites the Board's action in *University Nursing Home, Inc,* 168 NLRB 263, where it announced a special standard for proprietary nursing homes, reducing the annual gross earnings requirement from $500,000 to $100,000 In such decisions as *University Nursing Home* and *Butte Medical Properties d/b/a Medical Center Hospital,* 168 NLRB 266 (reducing the annual revenue requirement for proprietary hospitals to $250,000), the Board based its action on a determination that the total impact of nursing homes and proprietary hospitals on the national economy was substantial, citing statistical data from various governmental and industry publications, including the fact that in 1965 the gross national expenditure for nursing home care had increased to $1 2 billion No comparable data was supplied by the instant parties, and reference to a recent, governmental survey shows that in 1969, there were in the United States only 500 inpatient facilities for the treatment of emotionally disturbed persons of all ages with a total of about 18,000 patients and about 9,000 full-time employees (*Health Resources Statics,* 1971, pp 334–337, published by Public Health Service, U S. Department of Health, Education and Welfare), and that in 1971, for emotionally disturbed children alone, there were in the United States only 33 licensed resident treatment centers (*Id* at p 421 See also, *id* at pp 355–356, for a discussion of the development of Federally funded community mental health centers of the type here involved While it there appears that there were 21,000 employees in such centers in 1970, that number necessarily includes employees of all components of such a center, including affiliated hospitals) By way of contrast, the same source shows that in 1969 the national nursing home population of 638,000 persons was cared for by about 368,000 full-time employees. (*Id* at pp 329-330) This data is supplied for the information of the Board without expressing any judgment as to the conclusions to be drawn therefrom. See *The Windsor School, Inc, supra*

[8] The relevant Federal statute authorizes grants to institutions that provide (1) inpatient care, (2) outpatient care, (3) partial hospitalization, (4) emergency services, and (5) consultation and education The Holley Center could provide only (1) and (2)

[9] The bylaws referred to above empower the Advisory Board "to review and approve all major policy decisions which affect the operation of the Community Center"

ty has been in operation since August 1971, most of the integration provided for in the foregoing documents is still in the blueprint stage. Stone ascribed this to the need for more time to complete the integration process. The General Counsel, on the other hand, would attribute the foregoing delay to the absence of any bona fide intention to consolidate the two operations, contending that the agreement between the two institutions is merely a device adopted to qualify them for a Federal grant. However, that contention requires that one presume that the Federal authorities will not discharge their duty to enforce compliance with the conditions on which the grant was made. Moreover, it would be inappropriate to find on the present record that individuals charged with the administration of two nonprofit organizations would conspire to commit a fraud upon the Federal government.

It is accordingly found that the operations of the Holley Center are in the process of being consolidated with certain operations of the Hospital to form the Community Center, which is governed by an Advisory Board comprised in part of representatives of the Hospital; that the operating head of the Community Center is selected by the Hospital; and that the professional staff of the Holley Center, including its medical director, are subject to the approval of the Hospital or the medical director of the Community Center; that budgetary procedures of the Holley Center are subject to the control of the Advisory Board, and its expenditures subject to audit by the Community Center; and that, as the sponsoring agency, the Hospital is the immediate recipient of such Federal moneys as are made available to the Holley Center and has primary responsibility for compliance by the latter with the terms of the Federal grant.[10]

There remains to be considered the General Counsel's contention that, in determining whether to take jurisdiction here, the Board should look not merely at the operations of the Holley Center but at the totality of Respondent's activities which, in 1971, comprised three other facilities, as well. As already related, there were then in operation (1) a psychiatric clinic in Jersey City for the treatment of emotionally disturbed persons of all ages, (2) a school in Newark for problem high school students, and (3) a center in Jersey City for the treatment of juvenile drug addicts [11] However, with respect to each of these operations there was evidence of a relationship to an organization not covered by the Act. Thus, the Jersey City psychiatric clinic was shown to have entered on January 15, 1971, into an arrangement with the Christ Hospital, a nonprofit institution, similar to that existing between the Holley Center and the Hackensack Hospital,[12] an object of such arrangements being to qualify the psychiatric clinic for Federal grants. In addition, it appears that the Christ Hospital owns the building occupied by the clinic

The school in Newark was established in cooperation with the Newark Board of Education to deal with problem high school students who need special educational programs. The students are referred to Respondent by a local public high school, which bestows its diploma on them when they graduate from Respondent's school. Its activities are directed by a headmaster, who is a staff member of the public high school, paid by it, and subject at all times to the control of its principal.

The Jersey City drug addicts treatment operation was established in June 1971, for a 1-year period through an agreement between Respondent and a municipal agency, an object of which was to qualify that operation for a Federal grant. The agreement (1) required Respondent to establish a facility for treatment of juvenile addicts to be referred by municipal and state agencies, (b) prescribed in great detail intake and treatment procedures, (c) provided for the hiring of personnel in accordance with the hiring policies of the municipal agency, and without discrimination as to race, color, or creed, (d) and required Respondent to furnish to that agency any reports or other data that it might request and to maintain proper records, including those pertaining to expenditures. Respondent further undertook in that agreement to comply with the requirements of a detailed program evaluation procedure developed by the municipal agency, which requirements were designed to insure the maintenance in proper form, and the availability to the municipal agency, of all records of Respondent pertaining to its drug addict treatment program.

In summary, it seems fair to say that all the foregoing operations of Respondent were so closely related to those of nonprofit hospitals or municipal agencies as to bring this case within the rule of the *Temple University* case. Dismissal of the complaint will be recommended on that ground.

II THE UNION

International Union, United Automobile, Aerospace and Agricultural Workers Union of America, hereinafter called the Union, is a labor organization under the Act.

III THE MERITS

While consideration of the merits will be academic, if the Board refused jurisdiction, discussion thereof will be undertaken here on the assumption that the Board may wish to assert jurisdiction.

The only issue raised by the pleadings with respect to the merits was whether Respondent violated Section 8(a)(3) and (1) of the Act by discharging six employees for engaging in union or concerted activities.

A. *Sequence of Events*

As already related, Respondent operates, *inter alia,* the Holley Center, where it provides various services for emotionally disturbed children, including the maintenance of a residence for them. In December 1971, there were 17 such children in that residence, ranging in age from 5 to 12 years, who were attended on a 24-hour-a-day basis by 6 female employees, referred to in the record as "child care workers." The most succinct definition of their duties was given by one of them at the hearing, when she said that they were "parent surrogates" of the children, being with them at all times, and ministering to all their needs.

[10] Respondent conceded that under such grant the Holley Center will receive about $1 6 million over an 8-year period to defray staffing expense

[11] This operation was phased out early in 1972

[12] See Resp Exh 2

The record shows that these children had been referred to the Holley Center because of emotional problems; that even under normal conditions many of them had a tendency to engage in overt misconduct, including acts of physical aggression; that one of them had repeatedly threatened suicide; and that, under conditions of stress, almost all of them would hurt themselves or others. The record shows, also, that the child care workers were fully aware of these tendencies, as witness the following colloquy in the course of the examination of one of their number, Malley:

> Q. We have evidence of girls that scream and bang against doors and kick people and had sucidial tendencies.
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> A. Well, this happens when the full staff is there and everything is going normal because the (sic) children's backgrounds . . . they have been mistreated and abused . . . during their lives and naturally they do have problems.

On various dates in November the instant employees submitted to Stern, the administrator of the center, certain demands for improvements in their working conditions and on December 1, having failed to achieve any results by that procedure, they signed cards designating the Union as their bargaining representative. On December 13, Union Agent Esbensen met with Respondent's executive director, Stone, and asked for recognition, offering to show the cards. Disclaiming any authority to recognize the Union, Stone indicated that the matter would be referred by him to Respondent's board of trustees and Esbensen would be advised the following week. On December 16, the six employees had a meeting with Stern, in the course of which a dispute arose over Respondent's policy regarding inflicting corporal punishment on the children, and, when Stern rejected a request by the girls for clarification of that policy, they decided to engage in a 2-day walkout because of this incident, as well as management's prior indifference to their demands. Accordingly, at about 4:30 that afternoon they told Stern that they would leave within 20 minutes and would not return until 9 a.m. on December 18. They took leave of their charges, advising them they would not return until December 18. When Stern arrived in the children's dormitory, she found them distraught and screaming. The next day the strikers received a wire from Stone discharging them for their "action." When, on December 20, all six girls, accompanied by Esbensen, met with Stone and asked to be reinstated, he rejoined that they had been discharged for walking out and that he was not disposed to reinstate them, but they could appeal to Respondent's board of trustees. However, the board took no action on the matter.

On December 27, Stone wrote the girls, confirming their discharge, and explaining that action on the following ground:

> Walking out, without notice to the agency is in effect an abandonment of the girls in the Residence who are our charges. . . .[13]

[13] G C Exh 8

B. *Discussion*

The General Counsel contends, initially, that the decision to discharge the girls was prompted not only by their precipitate walkout but also by the fact that they had designated the Union as their bargaining agent. However, at the hearing, Stone insisted that the employees' involvement with the Union had no bearing on their discharge. This is confirmed by the timing of the discharges; for, although the Union advised Stone on December 13, that all six girls had signed union cards, it was not until immediately after the December 16 walkout that Stone terminated their services. Under all the circumstances, there appears to be no preponderance of evidence that the girls' adherence to the Union was a factor in the decision to discharge them or that Respondent would have retained them in spite of their walkout, had they not joined the Union.

The General Counsel, next, contends that, even if prompted only by the walkout, the discharge action violated Section 8(a)(1) because it was in reprisal for protected, concerted activities. Respondent rejoins that the walkout was not protected, citing the Board's decision in the case of *Marshall Car Wheel and Foundry Co. of Marshall, Texas, Inc*, 107 NLRB 314. There, about half of the work force in a foundry walked out for several hours in the midst of a critical operation involving the pouring of molten metal from a cupola. Had the respondent not succeeded in completing the operation by emergency measures, serious damage would have been inflicted on its plant and equipment. The Board there stated:

> In cases involving supervisory [14] and plant-protection employees,[15] the Board has recognized the validity of the general principle that the right of certain classes of employees to engage in concerted activity is limited by the duty to take reasonable precautions to protect the employer's physical plant from such imminent damage as foreseeably would result from their sudden cessation of work. We are of the opinion that this duty extends as well to ordinary rank-and-file employees whose work tasks are such as to involve responsibility for property which might be damaged. Employees who strike in breach of such obligation engage in unprotected activity for which they may be discharged or subjected to other forms of discipline affecting their employment conditions.[16]

[14] *Carnegie-Illinois Steel Corporation (Gary Steel Works)*, 84 NLRB 851, affd in *Charles Albrecht* v *N L R B*, 181 F 2d 652 (C A. 7, 1950).

[15] *Reynolds & Manley Lumber Company*, 104 NLRB 827; *United States Steel Company (Joliet Coke Works)* v. *N L R B*, 196 F 2d 459 (C A. 7, 1952), setting aside 95 NLRB 763

[16] The majority of the Board proceeded to find that, although the walkout was unprotected for the reason stated above, the respondent had violated the Act by refusing to take the strikers back except as new employees In so finding, the majority relied on the respondent's admission that it had not discharged the strikers because of the unprotected aspect of their conduct but had refused to take them back as old employees only because of their alleged violation of a plant rule forbidding them to leave work without permission. The Board majority inferred from this that the respondent had condoned the strikers' breach of their obligation to respect their employer's property. (The court of appeals agreed with the Board that the strike was unprotected but, contrary to the Board, found insufficient proof of condonation *N L R B* v. *Marshall Car Wheel and Foundry Co*, 218 F 2d 409 (C A. 5, 1955).) Here, however, Respondent maintained throughout that it was discharging the

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In *Carnegie-Illinois Steel Corp., supra,* the Board refused to find unlawful the discharge of supervisors for joining in a rank-and-file strike, despite their employer's dependence on them for assistance in preventing serious damage to plant equipment from the strike. The Board there said:

> . . . we believe the complainants owed a duty to the Respondent, inherent in their position as supervisors, to comply with all reasonable instructions designed to protect the Respondent's physical plant from imminent damage or destruction. Certainly, if the supervisors had been discharged for wilfully or negligently damaging the Respondent's blast furnaces or coke ovens, we would have no hesitation in finding that such discharge was for good cause. It would have been no defense that such action was taken in concert with other supervisors or in furtherance of a strike by supervisors or other employees. The case is no different in principle if, as in the case at bar, the supervisors, knowing that the furnaces and ovens, unless properly banked or closed down, would suffer serious damage, deliberately and concertedly, and contrary to their employer's instructions, refuse to cooperate with other supervisors in the work necessary to prevent such damage . . . It is true that in this case, insofar as appears from the record, the Respondent was able to avoid damage to its plant, due, presumably, to the efforts of those supervisors who remained at work. However, that fact does not, in our opinion, mitigate the seriousness of the breach . . . in this case
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> So, in the instant case . . . it was not unlawful for [the Respondent] to discharge those of its supervisors who, by walking out or failing to report during the rank-and-file strike, demonstrated their lack of dependability in an emergency.

This holding was affirmed by the court of appeals.[17]

In *Reynolds & Manley Lumber Company, supra,* in justification of its discharge of a "fireman" for leaving his post in a boilerroom to join a strike, the respondent contended that he had forfeited the protection of the Act because he did not wait for his relief man, thereby creating a fire hazard in the boilerroom. The Board recognized the applicability of the principle that "the right of certain classes of employees to engage in concerted activity is limited by the duty to take reasonable precautions to protect the employer's physical plant from such imminent damage as would result from their sudden cessation of work," and the Board found that the nature of the employee's "assignment as a fireman required him to take such precautions before leaving his post to go out on strike." However, the Board, also, found that he had in fact taken such precautions and rejected the respondent's defense for that reason

There emerges from the foregoing cases the following guidelines:

1. The right to strike is limited not only by the duty not to inflict damage on the employer's physical plant but also by the duty to refrain from conduct that will create a serious risk of such damage.

2. This duty is breached by the failure to give the employer sufficient advance notice of strike action to enable him to take such routine precautionary measures as may be necessary to avert such damage.

3. The failure to give such notice renders the strike unprotected even though the employer is able by fortuitous means to prevent any damage from the strike.

4. The foregoing duty extends to all employees and not only to those who have special responsibilities for the protection of the employer's physical plant or who, as in the case of supervisors, owe a special allegiance to management.

Respondent contends that the foregoing rules should be applied not only to situations involving risk of harm to property but also to a case like the one at bar involving a threat to the safety and welfare of human beings. The argument proceeds:

> In the present case the employees had an obligation to preserve life rather than property. This is an obligation that surpasses that of the employees in the *Marshall* case . . . . In the present case the employees simultaneously left their employ in violation of their duty. They deserted the children at a critical time. They must have recognized the dire consequences of their act . . . .

One cannot deny the force of this contention that the welfare of the 17 children at the Holley Center is entitled to at least as much consideration as the preservation of the physical plant involved in the *Marshall Car Wheel* and *Carnegie-Illinois Steel* cases, *supra.* Reference has already been made to the dangerous tendencies which the children exhibited even under normal circumstances and to the fact that under conditions of stress these tendencies were aggravated to the point where they were likely to inflict injury on themselves or others. That the events of December 16 subjected them to considerable stress is evident from the fact that after they were left to their own devices by the child care workers they became hysterical, screaming, "Who is going to take care of me?" And that was the state in which they were found by Stern, according to her credible testimony.

It is true that Respondent was able to make stopgap arrangements for the care of the children until permanent replacements could be found, and there was no evidence that the sudden departure of their custodians had any lasting, harmful effect on the children. However, under the principles set forth above the gravamen of the strikers' offense was not that their action resulted in actual injury to the children but rather that they failed to take reasonable precautions to prevent "such imminent damage as foreseeably would result from their sudden cessation of work." Malley, one of the child care workers, admitted that they knew that, because of their "emotional problems," the children would have an adverse reaction to the walkout. It is clear moreover, from Malley's testimony that she and the others were sufficiently aware of this danger to take the

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child care workers for their walkout and refused to take them back on any terms, and, unlike the situation in *Marshall Car Wheel, supra,* there was no preponderance of evidence that Respondent was provoked by some aspect of the employees' conduct other than that stated in the aforequoted excerpt from Stone's letter of December 27—namely, the "abandonment" of the children entrusted to their care

[17] 181 F 2d 652 (C A. 7, 1950)

trouble to speak to the children before the walkout and to telephone them the next day, assuring them on those occasions of their intention to return in the morning of December 18. At the same time, Malley averred that the girls assumed that suitable replacements would be found to care for the children during the walkout and that they would suffer no "drastic effect." In this connection, Malley pointed out that the walkout occurred when members of Respondent's professional staff were on the premises and she asserted that this fact influenced the timing of the demonstration. However, the six girls could have had no assurance that the professional employees would be willing to take on the chore of ministering to the needs of emotionally disturbed children for any extended period of time, including a night watch; and, in fact, the persons who actually took over for the strikers until permanent replacements could be found were untrained members of the Holley Center's household staff, who had already put in a full day's work. In any event, it is clear from the aforecited cases that the fact that the employer manages, through emergency measures, to cope with a hazardous situation does not excuse the conduct of the strikers in creating such a situation. Here, all that was required of the strikers was that they give Respondent adequate notice of their intention to strike and make a reasonable effort to cooperate with it in effecting a smooth transition between their departure and the advent of replacements. At the very least, they could have stayed with the children until Stern arrived in their quarters and made some emergency provision for their care. Instead, the child care workers left the children without waiting for any adult to arrive on the scene and without giving their charges any assurance that they would be cared for by anyone, thereby instilling in them a hysterical fear of abandonment.[18] That would not seem to be the sort of conduct that would measure up to the standards imposed on strikers by *Marshall Car Wheel* and related cases. Not only did such conduct subject the children to emotional stress that endangered their mental and physical well-being but it also placed in jeopardy the future of the Holley Center; for, had the children suffered any harm as a result of the sudden departure of their "surrogate parents," the reputation of the Holley Center and the good will it enjoyed in the community would have been seriously impaired.

It should be noted, moreover, that the instant employees were entrusted with the sole custody of the children not only while in the relative security of the Holley Center but also during their not infrequent excursions abroad [19] and Respondent could have had no assurance that, if reinstated, such employees would not extend their demonstrations of discontent with their working conditions to occasions when the children were abroad and no replacements of any kind were available. This circumstance underscores the analogy to the situation in *Carnegie-Illinois Steel, supra,* where the Board found that the discharge of the supervisors was justified by the fact that by their conduct they had demonstrated their lack of dependability. That trait is no less important in a supervisor than in one entrusted with sole responsibility for the safety and welfare of emotionally unstable children.

For all the reasons set forth above, dismissal of the complaint will be recommended.

Upon the above findings of fact, conclusions of law, and the entire record in the case, and pursuant to Section 10(c) of the Act, there is issued the following recommended:

ORDER [20]

The complaint herein is dismissed in its entirety.

[18] It appears from the testimony of Malley that, on December 16, after leaving the children's quarters, the six employees waited in an adjacent room for about 15 minutes, and that some time during that period Stern and other staff members came up to the children There was no evidence that the children knew that the employees were standing by during this interval and Malley did not claim that their purpose in doing so was to look after the children pending the arrival of replacements She gave, instead, a rather cryptic explanation, implying that the employees remained on the premises in the hope that management would renew negotiations in an effort to avert the walkout

[19] According to Respondent's executive director, Stone, the children were allowed to leave their living quarters to spend a weekend in a recreation area, to visit the cinema, or to receive medical, dental, or hospital treatment.

[20] 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.