

**Luceal Fitzpatrick d/b/a Westmoreland Convalescent Hospital and Hospital & Institutional Workers Union, Local 250, AFL-CIO. Cases 20-CA-9121 and 20-RC-11754**

**DECISION AND REPORT ON POSTELECTION OBJECTIONS**

STATEMENT OF THE CASE

January 13, 1975

**DECISION, ORDER, AND CERTIFICATION OF RESULTS OF ELECTION**

BY ACTING CHAIRMAN FANNING AND MEMBERS KENNEDY AND PENELLO

On September 11, 1974, Administrative Law Judge Richard J. Boyce issued the attached Decision in this proceeding. Thereafter, the Charging Party filed exceptions and a supporting brief, and the Respondent filed a brief in opposition to Charging Party'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,<sup>1</sup> and conclusions 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 in its entirety be, and it hereby is, dismissed.

**CERTIFICATION OF RESULTS OF ELECTION**

It is hereby certified that a majority of the valid votes have not been cast for Hospital & Institutional Workers Union, Local 250, AFL-CIO, and that said labor organization is not the exclusive representative of all the employees, in the unit herein involved, within the meaning of Section 9(a) of the National Labor Relations Act, as amended.

<sup>1</sup> The Charging Party 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.

RICHARD J. BOYCE, Administrative Law Judge: This consolidated matter was tried before me in San Jose, California, on August 6, 1974. The charge in Case 20-CA-9121 was filed April 18, 1974, and amended May 31, by Hospital and Institutional Workers Union, Local 250, AFL-CIO (herein called the Union). The complaint issued May 31, alleging that Luceal Fitzpatrick d/b/a Westmoreland Convalescent Hospital (herein called Respondent) has violated Section 8(a)(1) of the National Labor Relations Act.

An election in Case 20-RC-11754 was held among Respondent's employees April 19, 1974. It derived from a petition filed by the Union November 21, 1973, and a Stipulation For Certification Upon Consent Election approved by the Regional Director for Region 20 on March 19, 1974. The tally was five votes for union representation and 20 against, with one challenged ballot. The Union, on April 24, filed objections to the conduct of the election.

The Regional Director, on June 4, issued his report recommending that certain of the objections be overruled, and concluding that other of the objections raised "substantial and material issues of fact . . . , which issues can best be resolved through a hearing." The Regional Director noted in the same document that the unresolved objection issues "are substantially similar" to that raised by the above complaint, so ordered that the two cases be "consolidated for purposes of a hearing before a duly designated Administrative Law Judge." The Board adopted the Regional Director's report by order dated July 5.

Posttrial briefs were filed for the General Counsel, Respondent, and the Union.

I. ISSUES

The issue in Case 20-CA-9121, as stated by the complaint, is whether "on an unknown date in April 1974, Respondent, by [Owner Luceal] Fitzpatrick, threatened employees that no wage increases would be given if the Union was selected as the collective bargaining representative."

The issue in Case 20-RC-11754 is whether conduct by Respondent during the pendency of the election interfered with free voter choice, requiring that the election be set aside.

II. JURISDICTION

Respondent is a proprietorship owned by Luceal Fitzpatrick, engaged in the operation of a convalescent home in Saratoga, California. Its annual revenues exceed \$100,000, over \$10,000 of which comes from the United States Government through the Medicare program.

The complaint alleges, the answer admits, and it is found that Respondent is an employer engaged in and affecting commerce within Section 2(2), (6), and (7) of the Act.

### III. LABOR ORGANIZATION INVOLVED

The Union is a labor organization within Section 2(5) of the Act.

### IV. THE ALLEGED UNFAIR LABOR PRACTICE

#### A. *The Evidence*

At issue is the conduct of owner Fitzpatrick during an employee meeting. The meeting was held in the dining room of the hospital on April 10, 1974, and was attended by 15 to 20 employees and supervisory personnel. The first part of the meeting dealt with nursing techniques. That concluded, Mrs. Fitzpatrick announced the date, time, and place of the coming election in Case 20-RC-11754, and a general discussion of unions and election procedures ensued.

The General Counsel rests its entire case on the testimony of Dawn Owens, one of those present at the meeting. Owens was a nurses aid for Respondent until she quit in anger 5 days after the meeting.<sup>1</sup> According to Owens, Fitzpatrick shook her finger at the employees and "stated that, if a union came in, by no means would we get a raise in pay—not whatsoever." That alleged comment, the General Counsel argues, comprises the violation.

Owens further testified that Fitzpatrick said that: (a) "[I]f the Union was voted in to the hospital, the workers could be called off of their jobs to picket other hospitals, without receiving compensation for our wages"; (b) "[I]f we missed union meetings, we would be fined tremendous amounts of money"; and (c) "[S]he had gone through the phone book and called convalescent hospitals in the area; and that only three or four of them had the Union. . . . [T]hat must mean that the Union was not very well organized; or that the people who worked at these hospitals did not want the Union in the hospitals."

Eight others testified concerning the meeting, none corroborating Owens in any vital respect. Fitzpatrick expressly denied saying there would be no raises should a union get in, testifying that she did say: "As you know, if the Union comes, we have to negotiate; and whatever we negotiate, that will be your wage." Dan Soelberg, a licensed practical nurse who works for Respondent on occasion, corroborated Fitzpatrick in substance:

She said—I don't remember the exact words; but the idea was that, just because the Union gets in, it doesn't absolutely mean that you are going to get a wage increase. She said, "I am still the employer, and the Union still has to negotiate any wage increases with me; and I have to agree to any negotiations with the Union."

None of the other witnesses testified to Fitzpatrick's saying anything one way or the other about wages.

Fitzpatrick also denied the utterances attributed to her by Owens about picketing, fines, and calling other hospitals. Concerning these matters, Kitchen Supervisor Madelyn Withers credibly testified that she raised the

possibility of fines for nonattendance at union meetings, based on her experience with a union in the East; Administrator Elizabeth Barker credibly testified that she mentioned calling other hospitals about their experiences with unions; and Dan Soelberg credibly testified that he suggested the employees look up the numbers of other hospitals in the telephone book and make their own inquiries about the benefit levels at those with unions. No one "owned up" to the picketing reference of which Owens testified.

All of the witnesses impressed me as sincerely trying to relate their best recollections.

#### B. *Conclusion*

Had Fitzpatrick threatened that raises would be withheld should the Union be voted in, as Owens testified and the General Counsel contends, it is inconceivable that this vivid assertion would not have registered sufficiently with anyone else to enable corroboration. Yet, corroboration there is none. This is not to say that Owens lied. The more likely explanation is that she misconstrued Fitzpatrick's perfectly proper comment—that raises would be a matter of negotiation, not automatic, with a union—as a blanket threat to withhold raises. There are other indications, too, that Owens was not listening carefully at the meeting, such as her attribution to Fitzpatrick of sundry comments made by others.

Owens, in short, is not credited that Fitzpatrick made the assertion in question. The complaint therefore is without merit.

### CONCLUSIONS OF LAW

1. Respondent is an employer engaged in and affecting commerce within Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within Section 2(5) of the Act.
3. Respondent has not violated the Act as alleged in the complaint.

### OBJECTIONS

The Union's objections contained eight enumerated allegations. The Board's order of July 5 adopted the Regional Director's recommendation that Objection 1, 2, 4, and 8 be overruled, leaving the remainder to be resolved by hearing.

Objection 3 alleges that Respondent "made promises of benefits" to induce an antiunion vote; Objection 5, that it "made material misrepresentations of fact concerning the Union's policies, programs, and costs of membership"; Objection 6, that it "threatened to close the facility and take other retaliatory measures if the Union won the election"; and Objection 7, that it "interfered with, restrained, and/or coerced its employees in the exercise of their rights guaranteed by Section 7 of the Act."

The breadth of these allegations notwithstanding, the Union sees the objections in much narrower focus. As its brief states:

<sup>1</sup> Owens' quitting had nothing to do with the Union question, instead stemming from an argument over staffing and dental care for patients.

The only issue which is presented is whether Luceal Fitzpatrick threatened the employees . . . at a staff meeting prior to the . . . election . . . . If Luceal Fitzpatrick threatened the employees that if the union were to win the election, they would receive no pay raise, the objection to the election must be sustained and a new election ordered.

The only evidence supportive of this position being Owens' discredited testimony, previously discussed, it follows that the objections must fail.

<sup>2</sup> All outstanding motions inconsistent with this recommended Order hereby are denied. 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

Upon the foregoing findings of fact, conclusions of law, and the entire record, I hereby issue the following recommended:

#### ORDER<sup>2</sup>

The complaint in Case 20-CA-9121 is dismissed.

The objections in Case 20-RC-11754 are overruled in their entirety. It accordingly is further recommended that a certification of election result issue.

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