**Valley Hospital, Ltd. *and* Nevada Nurses Association, affiliated with American Nurses Association.** Case 31–CA–5074

January 29, 1976

## DECISION AND ORDER

BY MEMBERS JENKINS, PENELLO, AND WALTHER

On November 3, 1975, Administrative Law Judge James T. Rasbury 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, 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 be, and it hereby is, dismissed in its entirety.

## DECISION

### STATEMENT OF THE CASE

JAMES T. RASBURY, Administrative Law Judge: This case was heard before me in Las Vegas, Nevada, on August 22, 1975.[1] The charge in this matter was filed by the Nevada Nurses Association and was dated February 10, 1975, and date stamped by Region 31 in Los Angeles as having been received on February 11 at 11 a.m. The complaint and notice of hearing issued on June 24, and was amended July 23. The complaint alleges the Respondent to have violated the Act by (a) surveillance, (b) impression of surveillance, and (c) interrogation, all in violation of Section 8(a)(1) of the National Labor Relations Act, as amended. Respondent's answer duly filed on July 10, acknowledged the requisite commerce data to establish jurisdiction under the Act but denied all other allegations of the complaint. An amended answer was filed August 18.

[1] All dates hereinafter will refer to the year 1975 unless otherwise indicated

### Issues

This rather uncomplicated factual situation presents interesting issues concerning (1) whether or not nonemployee union committee representatives may be questioned with resulting violations of Section 8(a)(1) of the Act, and (2) whether or not information gained by an attorney in preparation for hearing, when revealed to union representatives, can create an impression of surveillance, or (3) become proof of actual surveillance violative of Section 8(a)(1) of the Act.

All parties were given full opportunity to participate, to produce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. Helpful briefs were received from both the Respondent and the General Counsel.

Upon the entire record in the case and from my observation of the witnesses and their demeanor, I make the following:

### FINDINGS OF FACT [2]

#### I. THE BUSINESS OF RESPONDENT

Respondent is an independent, investor-owned proprietary hospital offering the usual hospital services as a health care institution in Las Vegas, Nevada. Respondent, in the course and conduct of its business operations, annually purchases and receives goods valued in excess of $50,000 from suppliers located outside the State of Nevada. In the course and conduct of its business operations, Respondent annually derives gross revenues in excess of $500,000. On the basis of these admitted facts I find Respondent to be, and at all times material herein has been, an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.

#### II. THE LABOR ORGANIZATION INVOLVED

The General Counsel alleged the Nevada Nurses Association, an affiliate of the American Nurses Association and in this matter the Charging Party, to be a labor organization within the meaning of the Act. This allegation was denied in the answer to the complaint filed by the Respondent. At the hearing the parties stipulated that the question of whether or not the Nevada Nurses Association is or is not a labor organization within the meaning of the Act had been exhaustively litigated in two previous representation cases [3] currently before the Board for resolution. As a consequence, this issue was not litigated in the instant case and it was agreed that, for purposes of resolving that issue, the Administrative Law Judge herein would be bound by the

[2] The Respondent did not call any witnesses However, counsel did indulge in cross-examination of General Counsel's witnesses in a manner which helped reveal the totality of the conversations which provided the basis for the allegations of the complaint. I am convinced that General Counsel's witnesses were totally honest and candid in their testimony, but I am equally convinced that, being human, their ability to totally recall every word that was said in a conversation some 6 months previous to their testimony was not infallible.

[3] Case 31–RC–3060 involving Valley Hospital, Ltd. and Case 31–RC–3199 involving St. Rose de Lima Hospital

Board's determination. On October 16, the Board issued its decision in Case 31–RC–3060 wherein it found the Nevada Nurses Association to be a labor organization.[4] On the basis of this factual information, I now find the Nevada Nurses Association, affiliated with American Nurses Association, to be a labor organization within the meaning of Section 2(5) of the Act.

### III. THE ALLEGED UNFAIR LABOR PRACTICES

#### The Evidence

The testimony revealed that a meeting was held on February 10 in the administrative offices of the Valley Hospital attended by Mr. Showalter, administrator of the Respondent hospital, and Mr. Efroymson, the attorney representing the Respondent, and Nurses Sandra Smiecinski, Dee Grubbs, and Cora Stockman, each of whom were members of the Economic and General Welfare Committee of the Nevada Nurses Association.[5] Sandra Smiecinski is a staff nurse employed by the St. Rose de Lima Hospital,[6] while Dee Grubbs and Cora Stockman are nurses employed by the Clark County School District.

By way of background it should be noted that a representation petition was filed by Local 707 of the Service Employees International Union seeking to represent the employees of the Respondent herein on December 30, 1974. The Nevada Nurses Association, the Charging Party herein, had intervened in that representation case which was scheduled for hearing on February 11; counsel for the Valley Hospital had raised questions concerning the validity of the authorization cards submitted by Local 707, because of supervisory solicitation and the overall questions concerning the appropriate unit.

Cora Stockman testified that she called the Respondent requesting a meeting for the purpose of hand delivering a copy of an unfair labor practice charge that had just been filed with the National Labor Relations Board. All the evidence indicates that the meeting between the three heretofore named nurses and Mr. Showalter and Mr. Efroymson was conducted in a very cordial and friendly atmosphere. Coffee was served and the evidence clearly indicates that there were questions asked on both sides and contributions to conversation made on both sides. The nurses representing the Charging Party were aware that a petition had been filed by Local 707 at both the Respondent hospital and at the Desert Springs hospital. The evidence further indicates that Mr. Showalter and Mr. Efroymson had been working in preparation for the representation hearing, which was to occur the following day.

During the course of the conversations Mr. Efroymson revealed considerable knowledge concerning the meetings and organizational efforts of the SEIU,[7] as well as the Nevada Nurses Association. According to Nurse Smiecinski, he knew that the Nevada Nurses Association meetings were poorly attended and "stated that he felt that this was too bad, because very good general information had been given and he felt that people again should attend these meetings and find out the content of the information." Efroymson also revealed during the course of these conversations that he had knowledge that a nurse from St. Rose de Lima Hospital had been intimidated by other participants in a meeting of the SEIU because she had asked a number of "provocative" questions from the meeting floor. During the conversation Nurse Smiecinski indicated to Mr. Efroymson that she was the nurse in question. Efroymson also indicated that he had knowledge that following that particular meeting of SEIU a Dr. Batdorf had sought to solicit membership from Nurse Smiecinski and others in her group. During the course of the conversation Mr. Efroymson indicated to the nurses that he had submitted the information to the National Labor Relations Board concerning the solicitation of union memberships by doctors.

The testimony also revealed that during the course of the representation hearing on either February 11 or 12 Nurse Smiecinski approached Mr. Efroymson and volunteered the information that the meeting with Dr. Batdorf had possibly occurred in November instead of December as had been earlier related to him. In the course of this conversation, there was some mention of the number of union authorization cards which might have been obtained at the particular meeting, but the record is far from clear that this information was requested by Mr. Efroymson, and very well may have been voluntarily offered by Nurse Smiecinski. During this conversation Mr. Efroymson asked Nurse Smiecinski if she would be willing to give a statement concerning these events to the National Labor Relations Board Resident Officer in Las Vegas, stating that it could be important to Valley Hospital's challenge to the SEIU's showing of interest.

It was clear from the evidence that there are supervisory nurses who are members of SEIU Local 707, as well as the Nevada Nurses Association, and that medical doctors are members of Local 676 of the SEIU. Norma Cleveland, president of SEIU, Local 707, was, or had been during a portion of the critical time herein, a head nurse at the Respondent hospital. Nurse Smiecinski also acknowledged that she may have told Sister Bridget, the assistant administrator of St. Rose de Lima Hospital, of her experience at the SEIU Meeting. Smiecinski also testified that Miss Generaux, the director of nurses at St. Rose, is a former member of the Board of Directors of the Nevada Nurses Association.

#### Analysis and Legal Conclusions

There was no evidence introduced of any actual surveillance by the Respondent. All of the evidence related to the conversation which occurred in the administrative office of the Respondent hospital in the course of approximately 45 minutes on February 10, and the exchange between Attor-

[4] *Valley Hospital, Ltd*, 220 NLRB No 216, fn. 3 (1975).

[5] While it is well established that contents of the charge do not limit the scope of the complaint, it is interesting to note that all of the evidence presented occurred *after* the charge was filed herein

[6] It was stipulated at the hearing that St Rose de Lima Hospital satisfied the jurisdictional requirements of the Act

[7] The full and correct name appears to be Health, Professional and Technical Employees Association, Local 707, Service Employees International Union, AFL–CIO

ney Efroymson and Nurse Smiecinski at the representation hearing on February 11 or 12. In the Board's decision in *Stewart and Stevenson Services, Inc.*, 164 NLRB 741 (1967), the Board stated in footnote 2 as follows:

> The Trial Examiner found that Respondent was chargeable with engaging in surveillance because of the evidence that Respondent was well aware of the many union activities in the plant. However, there is no evidence that Respondent acquired this knowledge by acts of surveillance. Accordingly, we do not adopt the Trial Examiner's finding that Respondent violated Section 8(a)(1) by engaging in surveillance.

This finding was reached by the Board in the context of a case in which it was found that the Respondent had engaged in widespread violations of Section 8(a)(1) of the Act.

Under all the circumstances of this case and absent a scintilla of evidence of actual surveillance, a similar finding here is certainly dictated. I shall recommend dismissal of paragraph 5(a) of the amended complaint alleging unlawful surveillance by the Respondent.

Respondent's counsel points out there were no employees of the Respondent involved in either the February 10 meeting, or in the conversation between Nurse Smiecinski and Mr. Efroymson at the representation hearing on February 11 or 12, and thus argues that there has been no interference, restraint, or coercion of *employees* in the exercise of their Section 7 rights. The General Counsel argues that Sandra Smiecinski is a statutory employee within the meaning of the Act, although not an employee of the Respondent. He contends that acts of interference directed toward statutory employees, albeit nonemployees of the offender, violate the Act, citing *Frank Visceglia and Vincent Visceglia t/a Peddie Buildings*, 203 NLRB 265 (1973); *Scott Hudgens*, 192 NLRB 671 (1971); and *Fabric Services, Inc.*, 190 NLRB 540 (1971). The *Peddie Buildings* case involved the picketing by employees of their employer's building located within a nonretail commercial center and the finding by the Board that under all the circumstances of that particular case where the owner of the commercial center (not the employer of the pickets) threatened the arrest of the pickets that he was in violation of the employees' 8(a)(1) rights. The *Scott Hudgens* case is a similar case wherein the owner of a shopping center was found guilty of an 8(a)(1) violation of the Act by threatening to have employees of an employer located within the shopping center arrested because they were trespassing on private property. In the *Fabric Services* case the precise issue was resolved by the Administrative Law Judge when he framed the defense of the Respondent as follows:

> Rather, it defends the complaint's unfair labor practice allegations against it solely and entirely upon the ground that because it was not Smoak's employer, it cannot, as a matter of law, be found to have violated Section 8(a)(1) of the Act by its actions toward him.

In *Fabric Services*, Smoak, an employee of the Southern Bell Telephone System, was dispatched to Fabric Services' plant to perform work on Southern Bell's telephone communications located at the plant. Smoak arrived at the Fabric Services plant wearing a pen pocket protector which carried a prounion label. Shortly after arriving to perform the necessary work, a Fabric Services supervisor told Smoak that he would not be permitted to work in the Fabric Services plant while wearing a union pocket protector. Smoak returned to Southern Bell's work center, reported the incident, and was advised by his supervisor to remove the pocket protector and return to Fabric Services and perform his assignment. Both Southern Bell and Fabric Services were found guilty of violating Section 8(a)(1) of the Act, the Administrative Law Judge pointing out that Section 2(3) declares, "the term employee shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise. . . ."

It appears from these cases, at least, that under certain circumstances a respondent may interfere with the rights of employees of another employer in a manner violative of Section 8 (a)(1) of the Act. However, these cases are distinguishable from the instant situation in that in each instance the respondent nonemployer directly interfered with the rights of employees engaged in conduct protected by the Act. In the instant case the knowledge Efroymson imparted to Smiecinski, Grubbs, and Stockman which *might* have tended to create an impression of surveillance, would have to be communicated to the employees of this respondent before there could be a possible violation of Section 8(a)(1) of the Act. In *Kopp-Evans Construction Company*, 143 NLRB 690 (1963), the Administrative Law Judge concluded, and the Board adopted the conclusions, that an employer who had made several hostile antiunion remarks to a building trades union representative working as a journeyman for another employer, had not violated the Act. In another case, *Max Silver & Son*, 123 NLRB 269 (1959), the Board adopted the findings of the Administrative Law Judge who found that although an employer had made coercive remarks to union organizers, nevertheless, "[S]ince the [Employer] was not then represented by the Union as bargaining [agent] for his employees, and since he was speaking to union officials and not, in this instance, threatening employees, [he] was within his rights." The Board spoke directly to the question in *Reilley Cartage Company*, 110 NLRB 1742 (1954), when it reversed the Administrative Law Judge's finding that a coercive remark directed at union organizers constituted an 8(a)(1) violation. The Board said, "we do not believe that these remarks made to the union organizers should, under the circumstances of this case, he deemed to be coercive, or otherwise violative of the rights which the Act guarantees employees." Earlier cases, wherein the Board found 8(a)(1) violations, were either coupled with other violations of the Act or were found to be remarks, actually, or most likely to be relayed to the employees whom the union organizer represented.[8] After a careful analysis of all of the testimony and with due consideration to the cordial atmosphere in which this mutual exchange of information occurred, I am unable to conclude that the remarks made by a knowledgeable and obvi-

[8] *Arlington-Fairfax Broadcasting Company, Inc.*, 95 NLRB 846 (1951), *Rosenblatt's Friendly Mountain Line*, 56 NLRB 769 (1944); and *The Federbush Co., Inc.*, 34 NLRB 539 (1941)

ously competent attorney to three nonemployee union committeemen to be violative of the Act in any way.

It is true, as the General Counsel argues, that Nurse Smiecinski quoted Efroymson as having said he had been "watching" the SEIU and the Nevada Nurses Association since the change in the law that brought hospital employees under the protection of the Act. If taken literally, this would have to constitute surveillance, or impression of surveillance, but on cross-examination Smiecinski acknowledged that she didn't remember the exact words used by Efroymson. If the word "watching" was used, I am convinced that it was in a context that was intended to imply that he was staying abreast of what actions the various unions were taking in their efforts to represent hospital employees. As a labor law specialist, this is part of his job.

The evidence regarding the questioning of any of the committeemen or the employees is equally nebulous and lacking in specificity. While Nurse Smiecinski testified that she definitely recalled providing Mr. Efroymson with information regarding the number of cards which may have been signed at one of the SEIU meetings she was not able to definitively state whether she had volunteered this information or whether it had been requested by Mr. Efroymson. Such indefiniteness hardly constitutes a preponderance of the evidence.

In summary, I find the conversation which occurred on February 10 between Hospital Administrator Showalter, Attorney Efroymson, and Nurses Smiecinski, Grubbs, and Stockman to have been a congenial, intelligent discussion among educated and knowledgeable people that did not interfere with, coerce, or restrain the rights of employees as protected by the Act. The same is true of any exchange of information between Efroymson and Smiecinski on February 11 or 12.[9]

## 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 Nevada Nurses Association is a labor organization within the meaning of Section 2(5) of the Act.

3. The General Counsel has failed to prove by a preponderance of the evidence that any of the allegations set forth in the complaint herein are meritorious and should be sustained.

Upon 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:

## ORDER [10]

The complaint is hereby dismissed in its entirety for lack of merit.

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[9] See *Woodruff Electric Cooperative Corporation,* 174 NLRB 575, 581 (1969), *Trojan Steel Corporation,* 180 NLRB 704 (1970)

[10] 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