

Mercy Hospitals of Sacramento, Inc and Hospital and Institutional Workers, Local 250, Service Employees International Union, AFL-CIO Case 20-

June 7, 1976

DECISION AND ORDER

BY CHAIRMAN MURPHY AND MEMBERS JENKINS
AND PENELLO

Upon a charge filed on November 19, 1975, by Hospital and Institutional Workers, Local 250, Service Employees International Union, AFL-CIO, herein called the Union, and duly served on Mercy Hospitals of Sacramento, Inc, herein called the Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 20, issued a complaint on December 10, 1975, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge, complaint, and notice of hearing before an Administrative Law Judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on or about August 19, 1975, following a Board election in Cases 20-RC-12299, 12300, 12301, and 12302, the Union and Stationary Engineers, Local 39, International Union of Operating Engineers, AFL-CIO, herein called Local 39, as Joint Petitioner (herein referred to collectively as Joint Petitioner), was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate,¹ and that, commencing on or about November 14, 1975, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Joint Petitioner as the exclusive bargaining representative, although the Joint Petitioner has requested and is requesting it to do so. On December 16, 1975, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint.

On February 11, 1976, counsel for the General

Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on February 26, 1976, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent thereafter filed a response to Notice To Show Cause entitled "Opposition to Motion for Summary Judgment." On March 5, 1976, the Union as Charging Party and Local 39, as the other jointly certified collective-bargaining representative, filed a joinder in motion for summary judgment.

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.

Upon the entire record in this proceeding, the Board makes the following

Ruling on the Motion for Summary Judgment

In its answer to the complaint and response to the Notice To Show Cause, the Respondent admits all the operative factual allegations of the complaint but denies the conclusory averments on the basis of the alleged inappropriateness of the unit found appropriate in the underlying representation proceeding and in its objections to the election and the Board's resolution thereof. On the other hand, the General Counsel contends that the Respondent has raised no issues of law or fact requiring a hearing. We agree with the General Counsel.

Review of the entire record herein, including that in Cases 20-RC-12299, 12300, 12301, and 12302, discloses that a hearing on the representation petitions filed was held, in which Local 39 and two other associations participated as intervenors.² Thereafter, the Regional Director, on December 10, 1975, issued a Decision and Direction of Elections in which he found appropriate, *inter alia*, a bargaining unit of all service and maintenance employees and a unit of all office clerical employees, the composition of which the parties stipulated. All parties, except the Respondent, filed with the Board requests for review contending, *inter alia*, that the unit issues raised substantial questions for law and policy and that there were compelling reasons for the establishment of Board rules and policies in this area. The Respondent filed a brief in opposition. Because of the important issues raised by this and a number of other cases in the health care industry, the Board, on January 29, 1976, held oral argument and received briefs *amici curiae* on the general question of the composition of appro-

¹ Official notice is taken of the record in the representation proceeding, Case 20-RC-12299, et al., as the term "record" is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems, Inc.*, 166 NLRB 938 (1967), enf'd 388 F.2d 683 (C.A. 4, 1968), *Golden Age Beverage Co.*, 167 NLRB 151 (1967), enf'd 415 F.2d 26 (C.A. 5, 1969), *Intertype Co. v. Penello*, 269 F.Supp. 573 (D.C. Va., 1967), *Follett Corp.*, 164 NLRB 378 (1967), enf'd 397 F.2d 91 (C.A. 7, 1968), Sec. 9(d) of the NLRA.

² California Association of Medical Technology, Engineers, and Scientists of California (MEBA), AFL-CIO, and California Nurses Association.

priate bargaining units in the health care industry On February 5, 1975, the Board granted the request for review and stayed the elections pending review

After considering the entire record, including the oral arguments and *amici* briefs, in these cases, the Board, on May 5, 1975, with Member Fanning concurring, and former Member Kennedy dissenting, in part, issued its Decision on Review and Direction of Elections (217 NLRB 765 (1975)), herein called Decision on Review, in which, *inter alia*, it found appropriate a unit of all service and maintenance employees and, over the opposition of the Respondent, granted the request of the Union and Local 39 to be on the ballot as a joint petitioner in that unit election, further, it agreed with the Regional Director's determination as to the appropriateness of the office clerical unit, but disagreed with his findings as to the composition of that unit because it decided that in the health care field as in the industrial sphere, it would continue to recognize the distinction between business office clerical employees and other types of clerical employees Accordingly and consistent with the congressional direction against the proliferation of bargaining units in the health care industry, it found appropriate a unit of all business office clerical employees excluding the other types of clerical employees, herein called hospital clericals, who because their interests were more closely related to the functions served by the employees in the service and maintenance unit, were included in that unit sought by the Union and Local 39 as Joint Petitioner

In the June 14, 1975, election in the service and maintenance unit found appropriate by the Board,³ the Union and Local 39 as Joint Petitioner won The Respondent filed timely objections to the election alleging, in substance, that (1) the Board failed to follow its own rules in granting the request of the Union and Local 39 to appear on the ballot as Joint Petitioner, (2) the Union distributed election propaganda which suggested Board support for the Union and which misrepresented facts concerning (a) layoff and subcontracting, (b) wage rates under the Union's contract with another hospital, and (c) the Respondent's role during the malpractice crisis in the hospital industry which resulted in strikes, layoffs, and shortened workweeks After investigation, the Acting Regional Director, on August 19, 1975, issued a Supplemental Decision and Certification of Representative in which she overruled the Respondent's objections in their entirety and certified the Union and Local 39, Joint Petitioner, as the exclusive bar-

gaining representative of the employees in the service and maintenance unit found appropriate by the Board Thereafter, the Respondent filed a timely request for review in which it reiterated its objections and sought to have the election set aside On October 23, 1975, the Board denied the request as raising no substantial issues warranting review

In its response to the Notice To Show Cause, the Respondent also contends the Board violated due process and its own rules by failing to honor the stipulated unit approved by the Regional Director and by excluding the hospital clericals from the stipulated clerical unit and including them in the service and maintenance unit without the Respondent being afforded the opportunity to present evidence and litigate the unit placement of the clerical employees The Respondent also argues that the Board's subsequent decision in *Otis Hospital Inc.*, 219 NLRB 164 (1975), in which the Board decided to apply its general stipulation policy to the health care industry, supports its position as to the stipulated clerical unit

First, we note that the Respondent could have raised and litigated these issues in the underlying representation case but failed to do so until after the instant unfair labor practice proceeding was instituted Further, as set forth in footnote 26 of the Decision on Review in the underlying representation case, the Board stated that "no party could at that time, with any degree of certainty, know what unit or units in this newly covered industry would be found appropriate" and that the "unit determinations [of the Regional Director] were tentative" It was for this basic reason that the Board had requested oral argument in a series of landmark health care cases, in order to enable the parties, including *amicus curiae*, to assist it in making initial unit determinations particularly for hospitals in the newly covered industry Thus, at the oral argument, the Union counsel, averting to the general distinction between plant and clerical employees arising from a difference in community of interest, suggested that the health care industry be treated the same as the other industries, while the Respondent counsel pointed out that the clerical unit stipulated by Respondent with the Union "evolves solely from the unique facts which are in existence at the Mercy Hospitals" and does not have "persuasive weight on the clerical issues which are present before the Board in other cases" In these circumstances, further litigation of the particular facts in *Mercy Hospitals* would not have been of any great significance to the Board in establishing appropriate clerical units for hospitals in the newly covered health care industry Further, as we noted in the subsequent *Otis* decision where it was determined for the first time to give effect to unit

³ Elections in the registered nurse and business office clerical units found appropriate by the Board were not held because the Regional Director had approved the Union's request to withdraw its petitions in Cases 20-RC-12300 and 20-RC-12302

composition stipulations in the health care industry, the cases, in which oral argument was held, "left open the question of the effectiveness of stipulations designating units not in conformity with the determinations made in contested cases"

Therefore, giving the governing weight normally afforded to stipulations in other industries was not warranted with respect to the clerical unit stipulated in the underlying representation case. Accordingly, we find that the Respondent's reliance upon the subsequent *Otis* decision to be not only inapposite but also without merit. Further, upon the records and oral arguments in the above cases, and consistent with the congressional intent, the Board decided, in the health care field as in the industrial sphere, to continue to recognize the distinction between business office clerical employees and other types of clerical employees and, following this determination, excluded from the business office clerical unit found appropriate herein all other clerical employees who were then included in the service and maintenance unit sought by the Union and Local 39 as Joint Petitioner.⁴

It thus appears that except for the *Otis* stipulation argument, which we have found to be inapposite and without merit, the additional contentions raised by the Respondent are without merit and are matters which could have been raised and litigated in the underlying representation case.⁵

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.⁶

All issues raised by the Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and the Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that any special circumstances exist herein which would require the Board to reexamine the de-

cision made in the representation proceeding. We therefore find that the Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding. We shall, accordingly, grant the Motion for Summary Judgment.

On the basis of the entire record, the Board makes the following

FINDINGS OF FACT

I THE BUSINESS OF THE RESPONDENT

Respondent is a California corporation with its principal office and place of business in Sacramento, California, from which it operates three acute care and one geriatric care nonprofit hospital facilities. During the past year it received gross revenues in excess of \$500,000 and purchased goods and supplies valued in excess of \$10,000 from California suppliers who, in turn, purchased said goods and supplies from sources located outside the State of California.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II THE LABOR ORGANIZATIONS INVOLVED

Hospital and Institutional Workers, Local 250, Service Employees International Union, AFL-CIO, and Local 39 are labor organizations within the meaning of Section 2(5) of the Act.

III THE UNFAIR LABOR PRACTICES

A *The Representation Proceeding*

1 The unit

The following employees of the Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act.

All full-time and regular part-time service and maintenance employees, including licensed vocational nurses, graduate vocational nurses, nurse assistants, ward clerks, surgical technicians, ACC clerks, x-ray technicians, cardiopulmonary technicians, respiratory therapy technicians, EKG technicians, tissue technicians, EEG technicians, pharmacy technicians, pharmacy clerks, computer programmers, printing assistants, technicians to receiving clerk, housekeep-

⁴ In so concluding, the Board specifically overruled the decision in *National Medical Hospitals, Inc., of San Diego, d/b/a Chico Community Memorial Hospital*, 215 NLRB 821 (1974), to the extent it was inconsistent with the decision herein. In that case, the appropriate unit consisted of all clerical employees.

⁵ Further, with respect to subsequent Case 20-RC-13017 where the Union and Respondent stipulated to a unit of hospital clerical and business office clerical employees in the Mercy Hospitals, the Regional Director on October 15, 1975, found that the stipulated all-clerical unit was barred by the Decision on Review herein. The Respondent filed a timely request for review raising essentially the same arguments that had been raised herein and in effect requesting reconsideration of the Decision on Review herein. On November 15, 1975, the Board rejected these arguments in denying the request for review.

⁶ See *Pittsburgh Plate Glass Co v NLRB*, 313 US 146, 162 (1941), Rules and Regulations of the Board, Secs 102 67(f) and 102 69(c).

ing technicians, food service workers, laundry workers, department aides, all employees of the maintenance and engineering department, and all clerical employees other than business office clerical employees, employed at Mercy General Hospital, Mercy Convalescent Hospital, and Mercy Children's Hospital, Sacramento, California, and at Mercy San Juan Hospital, Carmichael, California, excluding all other employees, guards, and supervisors as defined in the Act

2 The certification

On June 14, 1975, a majority of the employees of Respondent in said unit, in a secret ballot election conducted under the supervision of the Regional Director for Region 20, designated the Joint Petitioner as their representative for the purpose of collective bargaining with the Respondent. The Joint Petitioner was certified as the collective-bargaining representative of the employees in said unit on August 19, 1975, and the Joint Petitioner continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

B *The Request To Bargain and Respondent's Refusal*

Commencing on or about October 28, 1975, and at all times thereafter, the Joint Petitioner has requested the Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit. Commencing on or about November 14, 1975, and continuing at all times thereafter to date, the Respondent has refused, and continues to refuse, to recognize and bargain with the Joint Petitioner as the exclusive representative for collective bargaining of all employees in said unit.

Accordingly, we find that the Respondent has, since November 14, 1975, and at all times thereafter, refused to bargain collectively with Joint Petitioner as the exclusive representative of the employees in the appropriate unit, and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (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 its operations 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 of commerce.

V THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Joint Petitioner as the exclusive representative of all employees in the appropriate unit, and, if an understanding is reached, embody such understanding in a signed agreement.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Joint Petitioner as the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785 (1962), *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd 328 F 2d 600 (CA 5, 1964), cert denied 379 US 817 (1964), *Burnett Construction Company*, 149 NLRB 1419, 1421 (1964), enfd 350 F 2d 57 (CA 10, 1965).

The Board, upon the basis of the foregoing facts and the entire record, makes the following

CONCLUSIONS OF LAW

1 Mercy Hospitals of Sacramento, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2 Hospital and Institutional Workers, Local 250, Service Employees International Union, AFL-CIO, and Local 39 are labor organizations within the meaning of Section 2(5) of the Act.

3 All full-time and regular part-time service and maintenance employees, including licensed vocational nurses, graduate vocational nurses, nurse assistants, ward clerks, surgical technicians, ACC clerks, x-ray technicians, cardiopulmonary technicians, respiratory therapy technicians, EKG technicians, tissue technicians, EEG technicians, pharmacy technicians, pharmacy clerks, computer programmers, printing assistants, technicians to receiving clerk, housekeeping technicians, food service workers, laundry workers, department aides, all employees of the maintenance and engineering department, and all clerical employees other than business office clerical employees, employed at Mercy General Hospital, Mercy Convalescent Hospital, and Mercy Children's Hospital, Sacramento, California, and at Mercy San Juan Hospital, Carmichael, California, excluding all

other employees, guards, and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act

4 Since August 19, 1975, the above-named Joint Petitioner has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act

5 By refusing on or about November 14, 1975, and at all times thereafter, to bargain collectively with the above-named Joint Petitioner as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act

6 By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed to them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act

7 The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that Respondent, Mercy Hospitals of Sacramento, Inc., Sacramento, California, its officers, agents, successors, and assigns, shall

1 Cease and desist from

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Hospital and Institutional Workers, Local 250, Service Employees International Union, AFL-CIO, and Local 39, Joint Petitioner, as the exclusive bargaining representative of its employees in the following appropriate unit

All full-time and regular part-time service and maintenance employees, including licensed vocational nurses, graduate vocational nurses, nurse assistants, ward clerks, surgical technicians, ACC clerks, x-ray technicians, cardiopulmonary technicians, respiratory therapy technicians, EKG technicians, tissue technicians, EEG technicians, pharmacy technicians, pharmacy clerks, computer programmers, printing assistants, technicians to receiving clerk, housekeeping technicians, food service workers, laundry workers, department aides, all employees of the

maintenance and engineering department, and all clerical employees other than business office clerical employees, employed at Mercy General Hospital, Mercy Convalescent Hospital, and Mercy Children's Hospital, Sacramento, California, and at Mercy San Juan Hospital, Carmichael, California, excluding all other employees, guards, and supervisors as defined in the Act

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act

2 Take the following affirmative action which the Board finds will effectuate the policies of the Act

(a) Upon request, bargain with the above-named Joint Petitioner as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement

(b) Post at its facilities in Sacramento and Carmichael, California, copies of the attached notice marked "Appendix"⁷ Copies of said notice, on forms provided by the Regional Director for Region 20, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive 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 Regional Director for Region 20, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith

⁷ 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"

APPENDIX

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

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Hospital and Institutional Workers, Local 250, Service Employees International Union, AFL-CIO,

and Local 39, Joint Petitioner, as the exclusive representative of the employees in the bargaining unit described below

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

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is

All full-time and regular part-time service and maintenance employees, including licensed vocational nurses, graduate vocational nurses, nurse assistants, ward clerks, surgical techni-

cians, ACC clerks, x-ray technicians, cardio-pulmonary technicians, respiratory therapy technicians, EKG technicians, tissue technicians, EEG technicians, pharmacy technicians, pharmacy clerks, computer programmers, printing assistants, technicians to receiving clerk, housekeeping technicians, food service workers, laundry workers, department aides, all employees of the maintenance and engineering department, and all clerical employees other than business office clerical employees, employed at Mercy General Hospital, Mercy Convalescent Hospital, and Mercy Children's Hospital, Sacramento, California, and at Mercy San Juan Hospital, Carmichael, California, excluding all other employees, guards, and supervisors as defined in the Act

MERCY HOSPITALS OF SACRAMENTO, INC