

St. Vincent's Hospital and Local 68, International Union Of Operating Engineers, AFL-CIO. Case 22-CA-6992

December 23, 1976

DECISION AND ORDER

Upon a charge filed on May 25, 1976, by Local 68, International Union of Operating Engineers, AFL-CIO, herein called the Union, and duly served on St. Vincent's Hospital, herein called the Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 22, issued a complaint and notice of hearing on June 15, 1976, 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 May 13, 1976, following a Board election in Case 22-RC-6277, the Union 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 May 18, 1976, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. On June 24, 1976, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint.

On August 25, 1976, Respondent filed a notice of Motion for Summary Judgment and a brief in support of its motion, with an appendix attached, seeking dismissal of the complaint. On August 26, 1976, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment, and a memorandum in support thereof, with attachments. Subsequently, on September 8, 1976, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the Respondent's and/or the General Counsel's Motion for Summary Judgment should or should not be granted. Neither Respondent nor the General Counsel filed a response to Notice To Show Cause.

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

Ruling on the Motions for Summary Judgment

In its answer to the complaint and its brief in support of its Motion for Summary Judgment, Respondent admits its refusal to bargain but contends it is not obligated to bargain because the unit for which the Union is certified is not appropriate. In this regard Respondent, in substance, argues that finding a unit of 4 boiler operators to be appropriate in a hospital which employs approximately 275 employees constitutes unwarranted proliferation of bargaining units contrary to the public interest and the intent of Congress. The General Counsel contends Respondent is improperly seeking to relitigate issues which were raised and decided in the underlying representation case. We agree with the General Counsel.

Review of the record herein, including the record in Case 22-RC-6277, reveals that, in the representation proceeding, the Union sought to represent a unit consisting of four boiler operators in the plant operations department and three plant maintenance department employees. Respondent contended, in substance, that the requested unit was inappropriate for collective-bargaining purposes as the employees therein did not share a sufficient community of interest separate from the other unrepresented employees. In support of this contention, Respondent's posthearing memorandum asserted (1) a finding that a plant maintenance and plant operations unit is appropriate in a hospital with approximately 280 employees would fragment the hospital into innumerable units contrary to the public interest and the concern of Congress with proliferation of bargaining units in hospitals; (2) the plant maintenance department employees and the plant operations department employees lack the cohesiveness and homogeneity necessary to constitute an appropriate unit; and (3) the plant maintenance employees and the plant operations employees do not share a separate community of interest.

Following the hearing, at which the Union alternatively sought a separate unit of boiler operators, the Regional Director issued his Decision and Direction of Election on December 19, 1974, in which he found that only the boiler operators constituted a unit appropriate for collective bargaining as the maintenance employees should not be placed in a unit separate from Respondent's housekeeping employees. Accordingly, the Regional Director directed an election in the boiler operator unit.

¹ Official notice is taken of the record in the representation proceeding, Case 22-RC-6277, 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), enfd. 388 F.2d 683 (C.A. 4,

1968); *Golden Age Beverage Co.*, 167 NLRB 151 (1967), enfd. 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), enfd. 397 F.2d 91 (C.A. 7, 1968); Sec. 9(d) of the NLRA, as amended.

Respondent filed a request for review of the Regional Director's decision with the Board in Washington, D.C. By telegraphic order dated June 3, 1975, the Board granted the request for review and stayed the election pending a decision on review. Thereafter, on April 2, 1976, after consideration of Respondent's brief in support of its request for review in which it reiterated its contentions regarding unit appropriateness, the full Board issued its Decision on Review.² The Board found, in agreement with the Regional Director, that the boiler operators constituted a separate appropriate unit, and remanded the proceeding to the Regional Director to conduct an election pursuant to his Decision and Direction of Election.³ Pursuant to the Board's decision, an election was held which the Union won. On May 13, 1976, in the absence of objections to the tally of ballots or to the conduct of the election, the Union was certified as the exclusive collective-bargaining representative of the employees in the boiler operator unit found to be appropriate.

It thus appears Respondent is seeking to relitigate herein the appropriate unit issue which was fully litigated and decided adversely to Respondent in the underlying representation case. 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.⁴

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 decision made in the representation proceeding.⁵ We therefore find that the Respondent has not raised any issue which is properly litigable in this unfair labor practice

² 223 NLRB 638 (Chairman Murphy and Members Penello and Walther each concurring separately).

³ In its brief in support of its Motion for Summary Judgment, Respondent contends that the Board, in the underlying representation case, improperly failed to consider the relative size of the hospital in assessing the appropriateness of a unit confined to boiler operators. This factor was raised and fully briefed by the Respondent before the Board and, in finding the boiler operator unit to be appropriate, the Board necessarily considered and found without merit Respondent's argument as to the relative size of the hospital.

⁴ See *Pittsburgh Plate Glass Co. v. N.L.R.B.*, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

⁵ In its brief in support of its Motion for Summary Judgment, Respondent contends the Board should reconsider its unit determination in the underlying representation case due to allegedly inconsistent Board decisions involving hospital boiler operator bargaining units. In this regard, Respondent cites *Shriners Hospitals for Crippled Children*, 217 NLRB 806 (1975), which was decided prior to the decision in the underlying representation case, and *The Paul Kimball Hospital*, 224 NLRB 458 (1976), which was decided subsequent thereto. Initially, we note that Board decisions involving

proceeding. We shall, accordingly, deny the Respondent's Motion for Summary Judgment, and grant the General Counsel's 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

At all times material herein, Respondent has maintained its principal location at 45 Elm Street, Montclair, New Jersey, and is now and has been continuously engaged in providing health care and related services. Respondent's Montclair Hospital is its only facility involved in this proceeding.

In the course and conduct of Respondent's business operations during the preceding 12-month period, which is representative of its operations at all times material herein, Respondent received gross revenue valued in excess of \$250,000.⁶

We find, on the basis of the foregoing, and on the basis of Respondent's admission in its answer, 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 ORGANIZATION INVOLVED

Local 68, International Union of Operating Engineers, AFL-CIO, is a labor organization 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

appropriate bargaining unit determinations are necessarily dependent upon the particular facts of individual cases. Further, with respect to *Shriners Hospitals*, the Board, in the underlying representation case, clearly was aware of that case and considered its impact upon the underlying unit determination herein. (See Member Penello's extensive discussion of *Shriners Hospitals* in his concurring opinion, and Member Walther's agreement therewith). Similarly, with respect to *Paul Kimball*, the Board therein, with Member Fanning dissenting, specifically considered the Decision on Review herein, and found it to be factually distinguishable. As we thus find Respondent's characterization of Board decisions in this area as inconsistent to be without merit, and as Respondent offers no other alleged special circumstances which would require the Board to reexamine the decision in the representation proceeding, we deny the request for reconsideration.

⁶ Although Respondent's answer denies the complainant's allegations as to direct inflow in excess of \$50,000, the answer admits that Respondent is an employer engaged in commerce within the meaning of Sec. 2(6) and (7) of the Act and thus concedes legal jurisdiction. Further, the Regional Director and the Board asserted jurisdiction in the underlying representation case.

purposes within the meaning of Section 9(b) of the Act:

All boiler operators employed at Respondent's Montclair Hospital, but excluding office clerical employees, maintenance employees, dietary employees, housekeeping employees, laundry employees, technical employees, registered nurses, licensed practical nurses, professional employees, guards, supervisors as defined in the Act, and all other employees.

2. The certification

On April 30, 1976, 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 22, designated the Union as their representative for the purpose of collective bargaining with the Respondent. The Union was certified as the collective-bargaining representative of the employees in said unit on May 13, 1976, the Union 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 May 18, 1976, and at all times thereafter, the Union has requested the Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit.⁷ Commencing on or about May 18, 1976, and continuing at all times thereafter to date, the Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit.

Accordingly, we find that the Respondent has, since May 18, 1976, and at all times thereafter, refused to bargain collectively with the Union 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

⁷ Respondent's answer admits that the Union has requested it to bargain, but effectively denies that such requests occurred on or about May 18, 1976, and at other times thereafter to date, including on or about May 25, 1976.

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 Union 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 Union 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), enf'd. 328 F.2d 600 (C.A. 5, 1964), cert. denied 379 U.S. 817 (1964); *Burnett Construction Company*, 149 NLRB 1419, 1421 (1964), enf'd. 350 F.2d 57 (C.A. 10, 1965).

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

CONCLUSIONS OF LAW

1. St. Vincent's Hospital is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Local 68, International Union of Operating Engineers, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. All boiler operators employed at Respondent's Montclair Hospital, but excluding office clerical employees, maintenance employees, dietary employees, housekeeping employees, laundry employees, technical employees, registered nurses, licensed practical nurses, professional employees, guards, supervisors as defined in the Act, and all other employees constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since May 13, 1976, the above-named labor organization 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.

However, as Respondent's answer admits its refusal to bargain as of May 18, 1976, we shall find a request to bargain as of that date.

5. By refusing on or about May 18, 1976, and at all times thereafter, to bargain collectively with the above-named labor organization 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 the Respondent, St. Vincent's Hospital, Montclair, New Jersey, 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 Local 68, International Union of Operating Engineers, AFL-CIO, as the exclusive bargaining representative of its employees in the following appropriate unit:

All boiler operators employed at Respondent's Montclair Hospital, but excluding office clerical employees, maintenance employees, dietary employees, housekeeping employees, laundry employees, technical employees, registered nurses, licensed practical nurses, professional employees, guards, supervisors as defined in the Act, and all other employees.

(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 labor organization 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 Montclair, New Jersey, facility, copies of the attached notice marked "Appendix."⁸

Copies of said notice, on forms provided by the Regional Director for Region 22, 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 22, in writing, within 20 days from the date of the Order, what steps have been taken to comply herewith.

⁸ 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 Local 68, International Union of Operating Engineers, AFL-CIO, 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 boiler operators employed at the Employer's Montclair Hospital, but excluding office clerical employees, maintenance employees, dietary employees, housekeeping employees, laundry employees, technical employees, registered nurses, licensed practical nurses, professional employees, guards, supervisors as defined in the Act, and all other employees.

ST. VINCENT'S HOSPITAL