

**West Suburban Hospital and Local Union No. 7,
International Brotherhood of Firemen and Oilers,
AFL-CIO. Case 13-CA-15721**

January 21, 1977

DECISION AND ORDER

BY CHAIRMAN MURPHY AND MEMBERS
JENKINS AND WALTHER

Upon a charge filed on August 17, 1976, by Local Union No. 7, International Brotherhood of Firemen and Oilers, AFL-CIO, herein called the Union, and duly served on West Suburban Hospital, herein called the Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 13, issued a complaint and notice of hearing on September 3, 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 July 29, 1976, following a Board election in Case 13-RC-13562 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 July 30, 1976, and again, on August 12, 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 September 16, 1976, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint.

On October 7, 1976, counsel for the General Counsel filed directly with the Board a Motion To Transfer Proceedings to the Board and a Motion for Summary Judgment. On October 8, 1976, the Charging Party filed a memorandum in support of the motion to transfer proceedings to the Board and the Motion for Summary Judgment, requesting that the Board grant the motion and issue its decision, finding a violation of the statute by the Respondent's refusal

to bargain. Subsequently, on October 15, 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.

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 conclusionary averments on the basis of the alleged inappropriateness of the unit which the Board found appropriate in the underlying representation proceeding. The General Counsel contends that 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 entire record herein, including that in Case 13-RC-13562, discloses that following the close of the hearing in the underlying representation case, the Regional Director for Region 13 transferred the case to the Board for decision. Thereafter, the Respondent and the Union each filed briefs.

On August 21, 1975, the Board, having determined that this and a number of other cases in the health care industry presented issues of importance in the administration of the National Labor Relations Act, as amended, scheduled oral argument in this and related cases,² limited to the issue of the appropriateness and scope of a separate maintenance unit in the health care industry. Oral arguments were heard on September 9, 1975, and briefs and oral arguments on behalf of *amici curiae* were permitted by the Board.

After considering the entire record, including the oral arguments and *amici* briefs, the Board, on June 21, 1976, with Members Penello and Walther dissenting, issued its Decision and Direction of Election (224 NLRB 1349 (1976)) (hereafter Decision), in which *inter alia*, it found appropriate a unit of Respondent's maintenance department employees.³ In so finding, and as set forth in that Decision, the Board took into

¹ Official notice is taken of the record in the representation proceeding, Case 13-RC-13562, 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.V.A., 1967); *Follett Corp.*, 164 NLRB 378 (1967), enf'd 397 F.2d 91 (C.A. 7, 1968), Sec 9(d) of the NLRA, as amended

² *The Jewish Hospital Association of Cincinnati d/b/a/ Jewish Hospital of Cincinnati*, 223 NLRB 614 (1976), *St. Joseph Hospital*, 224 NLRB 270 (1976), *Riverside Methodist Hospital*, 223 NLRB 1084 (1976).

³ The unit petitioned for and considered as the primarily appropriate unit by the Union in the underlying representation case consisted of a portion of the maintenance department—i.e., the "maintenance mechanics" (firemen)

account traditional unit criteria as well as the congressional admonition against proliferation of bargaining units in the health care industry.

Thereafter, on July 21, 1976, the Union won an election in the maintenance department unit found appropriate by the Board, and, as stated above, was certified on July 29, 1976, as the exclusive collective-bargaining representative of the employees in the unit.

In its response to the Notice To Show Cause, Respondent contends that the Board's unit determination is contrary to the congressional mandate against undue proliferation of bargaining units in the health care industry. As noted, however, this contention was specifically considered and rejected in the Board's Decision.

Respondent further contends in response to the Notice To Show Cause that only after the Board rendered its decisions in the cases selected for oral argument could Respondent ascertain with definiteness what criteria for unit determination would be applied. Respondent therefore requests that summary judgment be denied and that a hearing be ordered for the purpose of producing additional evidence. Respondent ignores, however, the fact that in arriving at its unit determination, and as specifically stated in the Decision, the Board considered traditional unit criteria against the background of the congressional admonition against undue proliferation of bargaining units in the health care industry. These are not new criteria which might be viewed as taking Respondent by surprise. A hearing was held in that proceeding and the parties were later given an opportunity to orally argue before the Board. Respondent therefore had more than ample opportunity to and did present its evidence concerning traditional unit criteria.

In the affidavits attached to the response to the Notice To Show Cause, Respondent does not allege or demonstrate any changed circumstances since the original hearing sufficient to warrant further hearing.⁴ Further, Respondent's intent is signified in its letter of July 30, 1976, to the Union. In discussing the Union's request to bargain and the Board's unit determination, Respondent stated, "As you also undoubtedly know, the only way to test this issue is by means of a technical refusal-to-bargain and appeal to the U.S. Court of Appeals."

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

The Respondent contended from the time of oral argument forward that the only appropriate unit was a comprehensive service and maintenance unit. Prior to the oral argument, the Respondent had indicated that an alternative appropriate unit would consist of the entire maintenance department.

⁴ The affidavits disclose that there has been a nominal reorganization and

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.⁵

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. 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 an Illinois not-for-profit corporation which operates a hospital with facilities located in Oak Park, Illinois. During the past calendar year, it had gross revenues in excess of \$250,000 and purchased and received goods valued in excess of \$50,000 directly from sources located outside the State of Illinois.

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 ORGANIZATION INVOLVED

Local Union No. 7, International Brotherhood of Firemen and Oilers, 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

renaming of the maintenance department as well as the addition of some space and personnel, but that the basic functioning of the department has not changed. The other disclosures in the affidavits were previously litigated.

⁵ 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)

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

All maintenance department employees including maintenance mechanics, stationary engineers, carpenters, electricians, handymen, painter, wall washer, splint man, and maintenance secretary, but excluding all supervisors as defined in the Act.

2. The certification

On July 21, 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 13 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 July 29, 1976, and 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 July 23, 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. Commencing on or about July 30, 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 July 30, 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 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), *enfd.* 328 F.2d 600 (C.A. 5, 1964), *cert. denied* 379 U.S. 817 (1964); *Burnett Construction Company*, 149 NLRB 1419, 1421 (1964), *enfd.* 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. West Suburban Hospital is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Local Union No. 7, International Brotherhood of Firemen and Oilers, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. All maintenance department employees including maintenance mechanics, stationary engineers, carpenters, electricians, handymen, painter, wall washer, splint man, and maintenance secretary, but excluding all 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 July 29, 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.

5. By refusing on or about July 30, 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 Respondent, West Suburban Hospital, Oak Park, Illinois, 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 Union No. 7, International Brotherhood of Firemen and Oilers, AFL-CIO, as the exclusive bargaining representative of its employees in the following appropriate unit:

All maintenance department employees including maintenance mechanics, stationary engineers, carpenters, electricians, handymen, painter, wall washer, splint man, and maintenance secretary, but excluding all 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 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 Oak Park, Illinois, facility copies of the attached notice marked "Appendix."⁶ Copies of said notice, on forms provided by the Regional Director for Region 13, 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 13, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

MEMBER WALTHER, dissenting:

For the reasons set forth in my dissenting opinion in the underlying representation proceeding herein, I disagree with my colleagues that the certified unit herein is an appropriate unit under the Act. Accordingly, I would not find that Respondent has violated Section 8(a)(5) of the Act, and I would dismiss the complaint herein.

⁶ 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 Union No. 7, International Brotherhood of Firemen and Oilers, 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 maintenance department employees including maintenance mechanics, stationary engineers, carpenters, electricians, handymen, painter, wall washer, splint man, and maintenance secretary, but excluding all supervisors as defined in the Act.

WEST SUBURBAN
HOSPITAL