Kaiser Foundation Health Plan of Oregon *and* Oregon Federation of Nurses, Local 5017, AFT, AFL–CIO. Case 36–CA–4195

30 March 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND HUNTER

On 19 April 1983 Administrative Law Judge Gerald A. Wacknov issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed a reply brief, cross-exceptions, and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

[1] In sec. III,B of his decision, the judge inadvertently ascribed a 1 May 1982 date to a document signed by the operating room nurses on 7 May 1982. Further, in sec. III,C of his decision, the judge erroneously stated that in *Ingalls Shipbuilding Corp.*, 143 NLRB 712 (1963), groups of disgruntled employees used the grievance procedure to pursue complaints against their employer when, in fact, the employees went directly to the employer without using the grievance procedure. These errors do not affect our decision.

[2] In dismissing this complaint Chairman Dotson notes that the complaint on its face would not show a prima facie case of a violation of Sec. 8(a)(5) of the Act. The novel theory set forth by the General Counsel in this case is not supported by any case precedent or any reasonable interpretation of the Act. In fact, case precedent, if studied, would have mandated against the complaint in this area. See *Atlas Metal Parts Co.*, 252 NLRB 205 (1980); *Stanley Oil Co.*, 213 NLRB 219 (1974).

In dismissing the complaint, Member Hunter finds that in the totality of the circumstances of this case no violation has been established. In reaching this conclusion, he notes specifically the following factors: communications between the disgruntled employees and the Respondent concerning resolution of the grievance were initiated by the employees and not by the Respondent; the Respondent never actually met with employees in an attempt to settle the grievance, or otherwise attempted to settle it directly with employees, but merely offered to do so in its 9 July 1982 letter; the 9 July letter set forth the language of Sec. 9(a) of the Act; the Respondent informed the Union that it could attend and participate in the meeting; and at the 23 July meeting the Respondent's representative specifically told the employees present that no resolution of the dispute underlying the grievance could be made without the participation of the Union, that the grievance would proceed to arbitration as scheduled, and that it could only be settled between the Respondent and the Union.

In dismissing the complaint, we do not rely on the judge's discussion of *Ingalls Shipbuilding Corp.*, 143 NLRB 712 (1963), and *West Texas Utilities Co. v. NLRB*, 206 F.2d 442 (D.C. Cir. 1953), nor on his reasoning to the effect that the unlikelihood of success in any attempted grievance settlement is a ground for dismissing the complaint.

MEMBER ZIMMERMAN, dissenting.

Unlike my colleagues in the majority, I would reverse the decision of the judge, and find that the Respondent's 9 July memorandum to operating room nurses violated Section 8(a)(1) and (5) of the Act. The facts are undisputed, and the memorandum itself is in evidence. As the judge noted, after discussing in general the question of duties to be assigned to on-call nurses, the memorandum stated:

> If you continue to be interested in meeting with the Employer in an attempt to adjust this grievance, consistent with the terms of the collective bargaining agreement now in effect, please contact my office.

I would find this to be an offer to deal directly with the employees concerning this matter, and controlled by the Board's decision in *Ingalls Shipbuilding Corp.*, 143 NLRB 712 (1963). It derogated the Union's rights as collective-bargaining representative as explicated in *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953).

That the Respondent, in meeting with the two employees who accepted its offer, indicated that it would not, in fact, proceed to resolve the matter outside the grievance process does not alter the proscribed effect of the letter. The judge found that this behavior cured "whatever unlawful language may have been contained therein." Neither of the cases relied on by the judge is on point. In *Associated Apartment Owners of the Whaler on Kaanapali Beach*, 255 NLRB 127 (1981), the curative statement was made to the same audience as the alleged violative statement during the very same meeting. In *Kawasaki Motors Corp.*, 231 NLRB 1151 (1977), the respondent posted a notice specifically disclaiming the alleged improper actions of its supervisor and reaffirming the statutory rights of the employees. Here the audience for the putative disclaimer was but 2 of the 12 affected employees. The judge "presumed" that the Respondent's position would become known to all who were interested, but stated no basis for the presumption. Further, the Respondent merely failed to carry through on its earlier improper offer to adjust the grievance with the individual employees. It did not recant that offer, or otherwise indicate that it may have been improper.[1]

[1] In attempting to establish that the General Counsel's issuance of a complaint in this case was not substantially justified, Chairman Dotson cites *Atlas Metal Parts Co.*, 252 NLRB 205 (1980), and *Stanley Oil Co.*, 213 NLRB 219 (1974). These cases are inapposite. In *Atlas*, the respondent merely posted, without elaboration, its minutes of bargaining sessions and held a meeting at which, in the words of the administrative law judge whose decision was adopted by the Board, it "offered employees nothing" and "asked them to do nothing." *Stanley*, to the extent possible, is even less on point. It is a case in which the respondent, from the ad-

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For these reasons, I would find that the offer contained in the Respondent's 9 July memo violated Section 8(a)(1) and (5) of the Act. I therefore decline to join in dismissing the complaint.

ministrative law judge's viewpoint, noncoercively informed its employees of the status of negotiations and its bargaining position in them. Here, the Respondent offered to adjust with employees a union-filed grievance. *Ingalls*, above, clearly provides the General Counsel more than reasonable cause to believe the Respondent, in doing so, violated the Act.

DECISION

STATEMENT OF THE CASE

GERALD A. WACKNOV, Administrative Law Judge. Pursuant to notice, a hearing with respect to this matter was held before me in Portland, Oregon, on January 4, 1983. The initial charge was filed on July 27, 1982, by Oregon Federation of Nurses, Local 5017, AFT, AFL–CIO (herein called the Union), and an amended charge was filed on September 7, 1982.

On September 7, 1982, the Regional Director for Region 19 of the National Labor Relations Board (herein called the Board) issued a complaint and notice of hearing alleging a violation by Kaiser Foundation Health Plan of Oregon (herein called the Respondent) of Section 8(a)(1) and (5) of the National Labor Relations Act (herein called the Act).

The parties were afforded a full opportunity to be heard, to call, to examine and cross-examine witnesses, and to introduce relevant evidence. Since the close of the hearing, briefs have been received from counsel for the Respondent and counsel for the Charging Party. Counsel for the General Counsel elected not to file a brief, and argued the matter at the hearing.

On the entire record, and based on my observation of the witnesses and consideration of the briefs submitted, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent has been at all times material herein a nonprofit State of Oregon corporation primarily engaged in the sale, maintenance, and administration of prepaid health care plans in the Portland, Oregon and Vancouver, Washington areas.

Kaiser Foundation Hospitals is a California nonprofit corporation which, inter alia, operates two acute care hospitals in the Portland, Oregon area for the Respondent.

At all times material herein, the Respondent and Kaiser Foundation Hospitals have been affiliated business enterprises with common officers, ownership, directors, management, and supervision; have formulated and administered a common labor policy affecting employees of said operations; have shared common premises and facilities; have provided services for and made sales to each other; have interchanged personnel with each other; and have held themselves out to the public as a single integrated business enterprise. By virtue of their operations described above, the Respondent and Kaiser Foundation Hospitals constitute a single integrated business enterprise and a single employer within the meaning of the Act.

The Respondent and Kaiser Foundation Hospitals, collectively in the course and conduct of their Oregon operations, have an annual total volume of business in excess of $250,000, and received drugs and medical supplies valued in excess of $50,000 directly from outside the State of Oregon. It is admitted, and I find, that Respondent is now, and has been at all times material herein, an employer within the meaning of Section 2(2) of the Act, a health care institution within the meaning of Section 2(14) of the Act, and is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

It is admitted that the Union is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Issue*

The principal issue raised by the pleadings is whether the Respondent bypassed the Union and dealt directly with its employees in violation of Section 8(a)(1) and (5) of the Act by attempting to adjust a grievance with the employees at a time when that specific grievance, filed by the Union, was scheduled for arbitration.

B. *The Facts*

The Union represents approximately 450 nurses at 2 facilities of the Respondent. The nurses are covered by the same collective-bargaining agreement currently in effect from January 1, 1982, to March 31, 1984.

The pertinent provisions of the prior collective-bargaining agreement between the parties contained a "Standby Pay" clause guaranteeing standby employees a minimum of 3 hours' work or pay when they are required to report to work. In practice, the registered nurses assigned to the operating room, who were called in under the provision, would perform their duties in the operating room and would be permitted to leave upon completion of the work. In the current contract, however, the standby pay provision was increased to a minimum of 4 hours' work or pay, and the Respondent commenced to train the operating room nurses to work in the recovery room upon completion of their operating room duties in order to insure that they worked the entire 4-hour period for which they were paid.

This action on the part of the Respondent precipitated the filing of a grievance by the Union on February 18, 1982. There was no resolution of the grievance in the various steps of the grievance procedure.

Meanwhile, on April 15, 1982, 11 of the 12 nurses affected by the Respondent's interpretation of the new agreement protested the 4-hour standby pay provision embodied in the current contract, claiming it was negotiated without their knowledge or consent. Further, they formally requested that the Respondent return to the ap-

plicable standby provision practice under the prior contract. The Respondent did not reply to this request. On May 1, 1982, nine operating room nurses signed a similar petition and submitted it to the Respondent. On May 13, these nurses advised the Union that they were adamantly opposed to proceeding to arbitration of the matter, and would take legal action against the Union if it continued to oppose their proposed resolution to return to the practice under the prior agreement. Nevertheless the Union on May 14, 1982, requested arbitration.

During this same period of time, the Respondent received telephone calls from various operating room nurses requesting information and a meeting to discuss the existing dispute. On May 18, 1982, the Respondent replied in writing to these written and verbal requests, noting that "The Employer is required to bargain directly with the employees' exclusive representative as defined by the National Labor Relations Act," and that the employees should refer their questions to their union representative.

Although there was no further direct communication from the nurses after that date, the Respondent continued to receive reports of unhappiness on the part of the nurses, and on July 9, 1982, sent a letter to the Union attaching a memorandum addressed to the operating room nurses, which advised them that although the matter was scheduled for arbitration on August 4, 1982, the Respondent would be willing to meet with the nurses under the provisions of Section 9(a) of the National Labor Relations Act, which section was fully set out in the letter.[1]

The letter concludes as follows:

> There apparently has been some confusion over the interpretation of the new contract language. The Employer maintains that bargaining unit members may be asked to perform any bargaining unit work for which they are qualified. The Employer does understand the responsibility to provide additional training and orientation for employees who are in need of such programs.
>
> If you continue to be interested in meeting with the Employer in an attempt to adjust this grievance, consistent with the terms of the collective bargaining agreement now in effect, please contact my office.

[1] It reads:

REPRESENTATIVES AND ELECTIONS

Sec. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representative of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment.

Thereafter, there were several telephone conversations between representatives of the Union and the Respondent. In these conversations, the Respondent consistently maintained that such a meeting as requested by the nurses would be appropriate, that the Union could attend and fully participate, and that no resolution of the dispute inconsistent with the terms of the collective-bargaining agreement could or would be reached without participation of the Union. The Union maintained that such a meeting was inappropriate and that it would not attend.

The meeting was held on July 23, 1982, at the Sunnyvale Medical Center. Present for the Respondent were Darrell Bennett, the Respondent's labor relations representative Supervisor Jan Fletcher, Dr. Barbara Robertson, and the Respondent's attorney Ronald E. Goldman. Only two nurses attended the meeting.

The meeting began with general introductions. Goldman then stated that he was representing the Respondent in the pending arbitration, and as such the meeting had aspects of a preparatory interview. He said that the meeting was being held at the request of the nurses, and emphasized that their participation in the meeting was voluntary. He said that the Union had been encouraged to attend, but had declined; that the nurses were entitled to have a union representative present, if they so chose; that they could terminate their participation in the meeting at any time, without fear of retaliation by the Respondent; that they could respond to questions or not, without fear of retaliation; and that they could request that he, or any other management representative, leave at any time, without fear of retaliation.

Goldman then stated that the Respondent could promise nothing as a result of this meeting, but rather that the basic purpose of the meeting would be an exchange of information and concerns, and that no resolution of the dispute could be reached without the participation of the Union. He further advised the nurses that nothing that would occur in the meeting could affect the scheduled arbitration; that this was still a matter that could only be resolved between the Union and the Respondent.

The remainder of the meeting involved discussion between the nurses and the other representatives of the Respondent regarding "floating" to different positions without sufficient training or experience. No proposals were made by any of the participants, and no attempts were made to resolve the existing dispute beyond a clarification of the respective positions of those present.

C. *Analysis and Conclusions*

Counsel for the General Counsel and the Union argue, in effect, that Section 9(a) of the Act was never intended to permit an employer to circumvent a union's right to process a grievance under the contract by attempting to adjust the grievance with individual employees, as this would necessarily undermine the contractual grievance procedure and the status of the Union as the exclusive bargaining representative.

Counsel for the Union cites, as authority for this proposition, *Ingalls Shipbuilding Corp.*, 143 NLRB 712 (1963). The *Ingalls* case, factually similar to the instant matter,

involved the elimination of a production bonus or incentive system from a successor contract, and an employer's subsequent direct dealing with groups of disgruntled employees who thereafter, through the grievance procedure, sought to cause, and did cause, the employer to reinstitute the system. The Board found that by such conduct the respondent had violated Section 8(a)(5) of the Act by direct dealings with the employees, thereby bypassing the union as the collective-bargaining representative. Citing *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953), the Board noted that a union, as bargaining representative of the unit employees, collectively, cannot be expected to fully satisfy the sometimes divergent interests of individuals or classes of employees within the unit. Regarding the interpretation of Section 9(a) of the Act, the Board stated:

> We also disagree with the Trial Examiner's conclusion that the Respondent's unilateral reinstitution of the bonus system was proper as settlement of a grievance in conformity with the provisos to Section 9(a) of the Act. Section 9(a) gives to individuals and minority groups the right to take grievances directly to the employer "and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect." The Trial Examiner held that the action of the dissident employee groups that were seeking restoration of the incentive system for themselves was an attempt to present a "grievance," whose adjustment would not be contrary to the terms of the bargaining agreement.

The Board in *Ingalls*, distinguishing *Douds v. Retail Wholesale Union Local 1250 (Oppenheim Collins & Co.)*, 173 F.2d 764 (2d Cir. 1949), relied on the analysis by the court of appeals in *West Texas Utilities Co. v. NLRB*, 206 F.2d 442 (D.C. Cir. 1953), and stated (143 NLRB at 716):

> In a case factually more similar [*West Texas Utilities*] another court of appeals rejected the proposition set forth in *Douds*, that every dispute is a "grievance," and specifically held that fixing wages or rates of pay for a large percentage of employees in a certified bargaining unit is not an adjustment of "grievances" within the meaning of the proviso to Section 9(a). We think this is the correct interpretation of the proviso, for, as the court there pointed out, if Section 9(a) put an end to the distinction between "grievances" and "other disputes," it would "obliterate the significant differences between a union certified as exclusive bargaining representative and a noncertified union or group."[5]

[5] See also *J. I. Case Company v. NLRB*, 321 U.S. 332; *Dazey Corporation*, 106 NLRB 553.

In the instant case, the grievance of the employees and the contract provision in question also directly affects wages albeit in the context of the amount of work to be performed in exchange for a fixed amount of pay. And although the group of employees directly affected is only comprised of 12 nurses in a unit of some 450 employees, the size of the group does not appear to be of significance as the parties found the matter to be sufficiently serious to warrant the negotiation and inclusion of a specific contract provision regarding the matter.

It seems clear that if an employer is precluded from adjusting "grievances" of this nature directly with employees, it should also be precluded from attempting to do so. Thus, it is the contention of the General Counsel and the Union that, as alleged in the complaint, the direct dealing occurred when the Respondent, in its letter of July 9, 1982, solicited the employees to meet in an "attempt to adjust this grievance," and that what occurred at the subsequent July 23 meeting does not operate as a defense.

It should be first pointed out that, unlike the factual situation in the *Ingalls* case, the Respondent was not attempting to adjust the employees' grievance outside the four corners of the contract by acceding to the nurses' request ro return to the provisions and practice under the prior contract. Rather, the Respondent was taking the same position with the employees that it took with the Union, namely that under the current contract it had the right to provide work for the nurses outside the operating room for the remainder of the 4-hour standby pay period, upon the completion of their operating room duties. On this issue, the employees and the Union were in agreement, namely that they believed the Respondent should have no such right under the contract. Under the circumstances, it was unlikely that any meeting between the Respondent and the employees would have resulted in an adjustment of the matter contrary to the position the Union had consistently maintained. Indeed, under the ground rules for the meeting as enunciated by the Respondent, namely to adjust the grievance consistent with the terms of the collective-bargaining agreement, it seems clear that no adjustment was possible. This is most likely the reason only two nurses elected to attend the meeting.

Further, I do not agree with the contention of the General Counsel and the Union that what occurred at the meeting was of no consequence to the merits of the complaint herein. The meeting was held less than 2 weeks following the July 9 letter. The employees were carefully, repeatedly, and specifically told at the meeting that the matter could not be adjusted without the participation and agreement of the Union, and that the arbitration of the matter would proceed as scheduled. Certainly, this operated as an effective retraction of the "adjustment" language in the July 9 letter, neutralizing whatever unlawful language may have been contained therein. See *Associated of Apartment Owners of the Whaler of Kaanapali Beach*, 255 NLRB 127, 129 (1981); *Kawasaki Motors Corp.*, 231 NLRB 1151, 1152 (1977). While only two employees attended this meeting, it may be reasonably presumed that, under the circumstances, the Respondent's position at the meeting would have readily become apparent to all employees and union representa-

tives who may have been interested or affected by the matter.

As a result of the foregoing, I shall dismiss the complaint.

CONCLUSIONS OF LAW

1. The Respondent is an employer within the meaning of Section 2(2) of the Act, a health care institution within the meaning of Section 2(14) of the Act, and is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

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

3. The Respondent has not violated the Act as alleged.

Based on the foregoing findings of fact and conclusions of law and on the entire record, I issue the following recommended[2]

ORDER

The complaint is dismissed in its entirety.

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[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.