The Woods Schools *and* Pennsylvania Federation of Teachers. Case 4–CA–12409

30 April 1984

DECISION AND ORDER

BY MEMBERS ZIMMERMAN, HUNTER, AND DENNIS

On 16 May 1983 Administrative Law Judge Walter J. Alprin issued the attached decision. The Respondent and the General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief.[1]

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, and conclusions[2] and to adopt the recommended Order as modified.

The judge found that the Respondent violated Section 8(a)(3) and (1) of the Act by denying Lois Altman summer per diem employment. The judge found a causal connection between Altman's protected activity as union president and the Respondent's refusal to provide her with per diem work as a substitute. The Respondent's exceptions contend that it based its decision with regard to per diem employment solely on the respective qualifications of potential substitutes. We find merit in the Respondent's contentions.

As of 1981, Lois Altman had been working with handicapped students at the Respondent's facility for almost 20 years. Altman had also been a union official since 1975. In 1981,[3] she was the Union's president and a key member of the Union's bargaining team for new collective-bargaining agreements.

During the regular school year, Altman had worked as a full-time or substitute art "teacher" until 1978, when the Respondent reclassified her as an art "instructor" because she lacked state certification for teacher positions. In August 1981, the Respondent again had to change Altman's job classification in order to comply with state requirements for 5-1/2 daily hours of certified teacher instruction, which included the art and music programs. Altman still did not have the requisite certification. She accepted the option of remaining with the Respondent in a vocational job.

During 16 summers of her tenure with the Respondent, Altman had worked in summer camp sessions. From 1975 to 1980, she was an instructor in the summer art and music program. This program was abolished for economic reasons, however, after the 1980 camp. At the end of the 1981 regular school year, Altman received notice that no full-time summer assignments were available for her. She then placed her name on a per diem substitute list indicating that she was available to substitute during the summer session. Her lack of teacher certification restricted her to work as a substitute for absent instructors at Holland Vocational School. In the course of the summer, the Respondent called her twice to substitute. Both times she was unable to work due to prior personal commitments. The other instructor substitutes at Holland Vocation Center, Nancy Waldrich and Carla Reichman, worked an average of 27 days during the summer.

The judge inferred from the amount of work available to other substitutes that mere lack of work was not the reason Altman was not asked to substitute. He then concluded that a causal connection must have existed between Altman's union activity and the Respondent's failure to provide her with work. He concluded that the Respondent had failed to show that the action would have taken place in the absence of Altman's protected conduct and on that basis found a violation.

Contrary to the judge, we find that the record shows no causal connection between the Respondent's failure to hire Altman as a per diem instructor and her activity on behalf of the Union.[4] Although well aware of Altman's union activity, the Respondent had expressed no animosity against it. The preponderance of evidence supports the Respondent's contention that its hiring decisions were based solely on the unique qualifications of the two other substitutes and the particular needs of the school population. Waldrich had experience as a counselor and was asked to work with traumatized young adults. Reichman had worked with blind students at another school. Altman's experience as an art instructor made her less qualified to work with the special populations that Reichman and Waldrich could serve. Accordingly, we find that the Respondent did not violate the Act by failing to employ Lois Altman as a per diem substitute

[1] The Respondent has requested oral argument. The request is denied. The record, the exceptions, and the briefs adequately present the issues and positions of the parties.

[2] No exceptions were filed to the judge's findings that the Respondent did not threaten to replace employees in violation of Sec. 8(a)(1); did not require employees to obtain certification in violation of Sec. 8(a)(3) and (1); and did not change its dress code, transfer an employee from one set of shift hours to another, and install a timeclock for nonprofessionals in violation of Sec. 8(a)(5) and (1).

[3] All dates are in 1981, unless otherwise indicated.

[4] In this regard, our finding is consistent with the judge's finding that there was no nexus between Altman's union activity and her reclassification to a vocational job at the end of the summer of 1981.

and we dismiss that part of the complaint so alleging.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, The Woods Schools, Langhorne, Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Delete paragraphs 1(c), 2(b), and 2(c) and reletter the remaining paragraphs accordingly.

2. Substitute the attached notice for that of the administrative law judge.

APPENDIX

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

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT change the duties of employees, or the pension benefits payable upon retirement, or other terms and conditions of employment, without bargaining in good faith with Pennsylvania Federation of Teachers as the exclusive bargaining representative of the employees in these appropriate units:

> All teachers, counselors, evaluators and teachers aides employed at our Langhorne, Pennsylvania facility, including teachers at the "Larchwood" unit, but excluding the part-time adult education teachers, office clerical, custodial and confidential employees, guards and supervisors as defined in the National Labor Relations Act.
>
> All nonprofessional and nontechnical service and maintenance employees including housekeepers, houseparents, drivers, custodians, cleaners, pantry workers, seamstresses, counter workers, groundsmen, painters, lifeguards, laundry workers, stockmen, cooks, plumbers, mechanics, dishwashers, pantry employees, apprentice masons, carpenters, electricians, bakers, masons, upholsterers employed at our Langhorne, Pennsylvania facility; but *excluding* all professional, technical, managerial, clerical and confidential employees and guards and supervisors as defined in the National Labor Relations Act.

WE WILL NOT unlawfully poll our employees with regard to their desires for union representation.

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

WE WILL, on request, bargain in good faith with Pennsylvania Federation of Teachers as the exclusive representative of the employees in the above bargaining units concerning rates of pay, wages, hours, and other terms and conditions of employment, and embody any understanding reached in a signed agreement.

THE WOODS SCHOOLS

DECISION

STATEMENT OF THE CASE

WALTER J. ALPRIN, Administrative Law Judge. The complaint in this case was issued October 30, 1981,[1] and was later amended. The issues are generally whether the Respondent conducted a number of specified practices interfering with, restraining, and coercing employees in violation of Section 8(a)(1) of the National Labor Relations Act, by discriminating to discourage union membership in violation of Section 8(a)(3) of the Act, and by refusing to bargain collectively in violation of Section 8(a)(5) of the Act. The case was tried before me at Philadelphia, Pennsylvania, from July 21–26, 1982, inclusive.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the parties on October 18, 1982, I make the following

FINDINGS OF FACT

A. *Business of the Respondent and Description of Labor Unit*

The Respondent is a Pennsylvania corporate nonprofit health care institution within the meaning of Section 2(14) of the Act, with facilities at Langhorne, Pennsylvania. During the 12-month period prior to the complaint, the Respondent's gross annual income received in the course and conduct of providing its services exceeded $250,000, and during said period it purchased goods valued in excess of $50,000 from firms located in Pennsylvania and said firms received the goods from outside Pennsylvania. The Respondent admits, and I find, that it is an employer within the meaning of Section 2(2), (6), and (7) of the Act, that the Pennsylvania Federation of Teachers, hereinafter "the Union," is a labor organization within the meaning of Section 2(5) of the Act, and that the following employees of the Respondent constitute units appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

[1] All dates are in 1981 unless otherwise indicated.

(a) All teachers, counselors, evaluators and teachers aides employed by the Respondent at its Langhorne, Pennsylvania facility, including teachers at the "Larchwood" unit, but excluding the part-time adult education teachers, office clerical, custodial and confidential employees, guards and supervisors as defined in the Act.

(b) All nonprofessional and nontechnical service and maintenance employees including housekeepers, houseparents, drivers, custodians, cleaners, pantry workers, seamstresses, counter workers, groundsmen, painters, lifeguards, laundry workers, stockmen, cooks, plumbers, mechanics, dishwashers, pantry employees, apprentice masons, carpenters, electricians, bakers, masons, upholsterers employed by The Woods Schools at its Langhorne, Pennsylvania facility; but *excluding* all professional technical managerial, clerical and confidential employees and guards and supervisors as defined in the Act.

The Respondent's institution serves mentally, emotionally, and physically handicapped or retarded individuals, aged from 4 to 70 years. It covers 300 acres with over 70 residential, vocational, and educational facilities, caring for a population of over 560 persons. It employs almost 100 nonunionized persons, and approximately 650 unionized persons of whom about 80 are professional educational personnel and 550 are houseparents and other nonprofessionals. The Union was certified as representing the professional unit on September 15, 1975, and the nonprofessional unit on October 6, 1980. A contract between the Respondent and the professional unit of the Union was negotiated effective May 31, 1978, to June 30, 1981, and was extended through September 15. As hereinafter discussed, negotiations did not result in a further agreement with the professional unit, or in an original agreement with the nonprofessional unit, and the Union initiated a strike on October 19. Negotiations continued to December 16.

B. *Interfering With, Restraining, or Coercing Employees*

1. Polling

Upon receipt of the March 26 request of the Union's professional unit to commence negotiation of a contract to succeed the expiring one, the Respondent's director of finance Richard Braksator met with other administrative officers to review what they considered a lack of interest in the Union among the unit members, and to develop a list of some 10 unit members who were said to have such a negative interest.[2] Braksator phoned counsel and requested that an "RM" petition be filed, which was accomplished on March 31. The Regional Director dismissed the petition, finding there were insufficient criteria to support a belief that the Union was no longer representative.

On April 7, after the Board had declined investigation of the RM petition, teachers and instructors were informed by the public address system, about 2 p.m., that they were to report to the cafeteria at the conclusion of the formal education program at 3 p.m., to meet with Director of Program Services Kenowitz. There they were addressed by Kenowitz, who introduced the school's president Dr. Harold Barbour who, paraphrasing from a prepared text, advised them that a decertification petition had been filed because a number of employees did not want the Union, that the Board had required additional information, and that a "straw vote" would be taken then and there to determine whether the employees still favored union representation.

Ballots were distributed, and the Respondent's representatives moved away from where the employees sat at the cafeteria tables while the ballots were marked, folded, and placed in a carton. Employees had been told that a number of them were against the Union, but the method of marking ballots permitted employees to observe how other employees were voting. The ballots were tabulated by representatives of both the Respondent and the Union, and there were 64 votes in favor of the Union and 6 against. The RM petition was withdrawn by the Respondent.

Discussion

The General Counsel alleges that the safeguards required for polling, as established in *Struksnes Construction Co.*, 165 NLRB 1062, 1063 (1967), were absent here, in that (1) the purpose was not to determine the truth of the Union's claim to a majority but, particularly in view of the alleged unfair labor practices later discussed and of the lack of reasonable cause for doubt of the Union's bona fides, was intended as an indication to employees of the Respondent's union animus, and that (2) the balloting in view of fellow employees, particularly after they had been informed that some of the fellow employees were against the Union, did not constitute a secret vote. The Respondent of course argues that all of the *Struksnes* safeguards were provided.

As later discussed, I do not find that the Respondent engaged in most of the unfair labor practices alleged, and do not find that the act of polling was another manifestation of existing union animus. The polling of employees here, however, grossly violated the secrecy principles of *Struksnes*. The employees were specifically told by the Respondent that there were some among them who were antiunion, and yet they knew that fellow voters were able to see how they voted. In *Justus Co.*, 199 NLRB 422, 423 (1972), "Precautionary measures to insure the secrecy of the ballots were not taken and employees were able to observe how others voted." In this case, as in that, such a nonsecret poll of employee sentiments violates Section 8(a)(1) of the Act.

2. Threats to replace employees

In the June 22–28 issue of Management Notes, a weekly newsletter distributed by the Respondent to its supervisors, Braksator informed supervisors that they could advise employees that "if a job action is commenced, the Wood Schools can and will *permanently replace* employees on strike." In late September or early October, several employees asked Supervisor Beaumont

[2] Actually, 2 of the 10 were on the Union's negotiating committee.

what had transpired in a supervisors' meeting. One employee testified that Beaumont responded "that Dr. Barbour said if we go out on strike we're going to be fired." Beaumont denied having made such a response, testifying that he said only that striking employees would have to be replaced so that the Woods schools could continue to function. Another employee testified that on October 5 Beaumont explained to a meeting of employees the distinction between economic and unfair labor practice strikes.

During a negotiating session, Braksator told the Union's negotiators to "tell your people that if they go out on strike they will be fired and permanently replaced." Braksator admitted making the comment, but testified that he had done so in the context of the Union's having threatened a strike if the Respondent did not give in to economic demands, and that the comment was followed by a discussion between the parties as to the differences between economic strikes and unfair labor practice strikes.

After the Union had given the required 10-day notice of intent to strike, the Respondent directed a letter to all employees, advising:

> . . . The Schools intends to replace striking workers. . . . The law provides that . . . employees who engage in an economic strike may be permanently replaced, but they are entitled to reinstatement if they offer to return to work unconditionally and if their jobs have not been permanently filled . . . . You should be aware that if, in the unlikely situation, we commit an unfair labor practice which prolongs the strike, strikers must be restored to their jobs if they ask for unconditional reinstatement.

A similar statement was made to supervisors in a memorandum outlining procedures to be followed in the event of the strike.

Discussion

The issue here is whether the message received by the employees was ". . . that if they engaged in an economic strike they would be replaced and would lose their jobs permanently. As the Board has frequently held, such instruction to employees is not an accurate statement of the law, and 'could have no other than a coercive effect. . . .'"[3] Under the circumstances here I find that no such threat was made to the employees.

Though the statement made in Management Notes regarding permanent discharge was obviously incorrect by reason of being incomplete, there is no evidence that such an incorrect statement was repeated to unit members so as to coerce them, other than the testimony regarding a statement made by Supervisor Beaumont. I credit Beaumont's denial. The alleged statement was made over 2 months after the Management Notes in question was distributed, and it has been undeniably shown that at a time contemporaneous with the alleged statement Beaumont was explaining to employees the difference between economic and unfair labor practice strikes. Equally, Braksator's statement at the August 5 meeting would be likewise improper if there were no more than the statement. The undisputed explanation that the statement was made in response to the threat of an economic strike, and the undisputed testimony that the statement was followed by discussion of economic versus unfair labor practice strikes, places the statement in a noncoercive context where no violation of the Act took place.

3. Requiring certification as a condition of continued employment

Louise Altman, a 20-year employee of the Respondent, active in the Union and its president at the times mentioned herein as well as being on the negotiating team, had been classified as a "teacher" until 1978, and thereafter as an "instructor," the difference being that teachers are state certified. The Respondent pays certified teachers more than instructors. Certificates are awarded by the State to holders of bachelor's degrees with 24 additional postgraduate educational credits. A provisional, temporary certificate valid for 1 year can be obtained by an individual enrolled in a program to obtain certification. At her personal preference, Altman was enrolled at her alma mater, Antioch University, at a cost of $1500 per semester of which $350 per year was reimbursable from the Respondent, rather than at the State University, where up to one-half of tuition was reimbursable.

Beginning about 1976, state statute[4] provided for reimbursable assignment of resident handicapped children to approved private schools. This "third party financing" of instruction and maintenance fees required, inter alia, that at least 5-1/2 hours of instruction daily be by certified teachers. A state audit in 1979 cited the Respondent for improper certification[5] and when Director of Program Services Kenowitz was employed by the Respondent in January 1980, he was specifically given the task of seeing that the Respondent complied with these requirements for third-party financing. Kenowitz determined that there were a number of individuals not certified and, prior to the summer of 1980, he directed a subordinate to contact the instructors and advise that they should do something about obtaining certification. In August 1981 letters were sent to eight instructors, including Altman, reaffirming that certification was required.[6] Both art and music were at this time included in the program of instruction to make up the 5-1/2 hours per day, and thus required certified teachers. Altman was given the option

[3] *St. Anthony's Center*, 227 NLRB 1777, 1785 (1977).

[4] 22 Penn. Code, Ch. 18, §§ 181.11 through 181.23 inclusive.

[5] The 1979 audit was not introduced into evidence or produced at the hearing, but correspondence from the State Department of Education dated April 12, 1982, states that "The Pennsylvania Department of Education, although per previous correspondence, telephone conversations and on-site visits, brought to your attention our concern regarding the certification of several employees" and that it had "alerted the Woods School on numerous occasions that appropriate penalties would be forthcoming for the failure to utilize appropriate certified individuals for teaching assignments."

[6] Of these, several obtained certification, one did not and left the Respondent's employ, one did not and was transferred to a nonteaching function, and Altman, when she did not, was to be offered a transfer to a nonteaching function.

of remaining in the employ of the Respondent, in a vocational as opposed to teaching capacity.

Discussion

The General Counsel argues that requiring employees to obtain certification was a pretext used to discourage membership in a labor organization, in violation of Section 8(a)(3) of the Act. The evidence is that this requirement was imposed upon some eight employees, of whom only Altman was shown to have some involvement with the Union. There is no evidence of a nexus between enforcement of this requirement and union membership or activity. Even if there were such evidence, so that the first portion of the causation test enunciated in *Wright Line*[7] was met and a prima facie case established, the Respondent has demonstrated that the same action would have taken place even in the absence of the protected activity by reason of the requirements of the Pennsylvania legislature and department of education. I find no violation of the Act.

4. Denying Altman summer employment

During her 20 years of employment with the Respondent Altman had worked for 16 summers, and continuously since 1967 or 1968, as a full-time teacher or substitute teacher or instructor. In March, Altman signed a list of those desiring summer employment. She did not hear further, for it was ordinarily the case not to receive assignments till the start of summer. On the last day of the school year Altman inquired as to her summer assignment, and was told that she had not been given full-time summer employment but that she might put herself down for per diem substitute work, which she did. She was phoned at 8:30 a.m. the first day of the summer session to report to work immediately. Having made other plans for the day, Altman declined. She received no further work offers during the summer. The Respondent attempted to use certified teachers as substitutes for certified teachers and therefore Altman could only have been used as a substitute instructor at the Holland Vocational Center. The average number of per diem substitute days over the summer was 16, though in Holland Vocational Center it was slightly over 21 days, and for those working as instructors rather than teachers the average was 27 days.

Discussion

The General Counsel has established that positions for which Altman qualified did in fact exist, as summer per diem substitute to work as an instructor at the vocational center. Though the Respondent's director of education testified that others who signed the employment list also did not work, she was unable to specify who any of those others might have been other than that they might have worked as per diem substitutes. It is clear that Altman was not denied summer employment as per diem substitute instructor by reason of lack of work. Considering Altman's union position and her activity in ongoing negotiations, I believe that a causal connection has been established between the protected activity and the refusal to provide summer per diem employment. The Respondent has failed to meet the shifted burden established in *Wright Line*, supra, of demonstrating that the same action would have taken place in the absence of the protected conduct, and I find that a violation of Section 8(a)(1) and (3) took place.

C. *Refusal to Bargain*

1. The Respondent's unilateral actions

The General Counsel alleges the Respondent refused to bargain in violation of Section 8(a)(5) of the Act through unilaterally affecting changes in the conditions of employment by modifying the dress code, changing shift hours, increasing work duties, installing timeclocks, changing retirement benefits, and implementing wage offers.

a. *Dress code*

In July, Supervisor Chiavachi held a meeting of teachers in the Gardener unit and advised them as to dress. He said that no clogs were to be worn, and sandals only with back straps; that dungarees were permitted if not too patched or worn and not cut off; that slacks and tops were preferred; that women were not to wear short-shorts or bare midriffs, and unless swim suits were conservative it was suggested that a T-shirt also be worn; and, that men were not to wear open neck shirts showing a bare chest, or racing-type bikini swimsuits. Men and women teachers were cautioned against dressing so as to arouse students sexually.

The employees' manual contained the following notation entitled "How Do I Look?—Manners and Dress":

> One of the major functions of all staff members is to operate as an appropriate model on which students can pattern their own behavior and appearance. It is for this reason that staff members are asked to avoid behavior and language which would not be acceptable for the students to imitate. For the same reason, staff members are asked to keep in mind that dress and grooming should be in good taste and not "far out" or unusual. For safety reasons, sensible shoes are required at all times while working. Elevated and clog-type footwear are undesirable and not acceptable for persons employed as drivers. Consult your supervisor in case of doubt in these areas.

Staff members improperly attired were required to change clothes on their own time prior to being permitted to start work. There were no discussions of the dress code during then-current or prior negotiations.

Discussion

The Board has found that the unilateral change of a dress code violates the Act.[8] In the matter at hand, how-

[7] *Wright Line*, 251 NLRB 1083 (1980).

[8] *Concord Docu-Prep, Inc.*, 207 NLRB 981 (1973).

ever, I find that Chiavachi's instructions did not constitute such a change. The original dress code in the employees' manual is very general, using such standards as "good taste and not 'far out' or unusual" and "sensible," with issues of doubt being referred to supervisors. While there is no specific admonition in the code to avoid sexually arousing students, I believe that the reference to "safety," albeit in reference to footwear, makes clear that certain modes of dress might constitute a threat to the safety of both teacher and student. I find that there was no change in the dress code, and no violation of the Act.

b. *Shift hours and cleaning duties*

In March, employee Moyer complained to Union President Altman that her shift as houseparent in Rosewood residential unit was being increased by 2 hours, from 11 p.m. to 7 a.m. to 11 p.m. to 9 a.m., and asked Altman to intercede. Altman phoned Mather and reminded him that shift hours were subject to negotiation. Mather took the position that since a shift of 11 p.m. to 9 a.m. existed in other residential units the change at Rosewood was not a unilateral change in working conditions, but that if Moyer phoned him he would "see what he could do about it." Moyer never recontacted Altman, and Altman assumed that Moyer and Mather had "worked it out."

Harewood, a new residential unit, was opened in July, to replace the Rosewood and Elmwood units. The new unit was to be a "behavior modification" unit, equipped with kitchen facilities. While houseparents at Rosewood and Elmwood had no cooking or cleaning duties, that work being done by separate pantry workers and cleaning help, upon moving to Harewood they were to be required to additionally prepare breakfast, and to clean bathrooms, windows, and floors. The Respondent apparently offered those houseparents involved the option of transferring to other positions, but it is not clear when the offer was made, what other positions were offered, or whether the employees would lose by the transfer.

Discussion

It is undisputed that unilateral changes in working conditions are unlawful and violate Section 8(a)(5) of the Act. However, the Board will not interfere with unilateral actions where within the realm of management prerogatives or authorized by a "management prerogatives clause" of an existing contract, where a continuation of past practices retains the status quo, where of a trivial, de minimis nature, or where required by a necessary promptness to meet a business requirement.[9] The transfer of an employee from one set of shift hours to another, when both sets of hours previously coexisted, is a part of the managerial prerogative, and I find that in this case it did not constitute a violation of the Act.

The change in working conditions upon transfer of houseparents from Rosewood and Elmwood to Harewood, however, is quite another circumstance. The Respondent argues that the increased duties came within the extremely broad job description of a houseparent as being "responsible for complete physical care of a group of multiple handicapped students. . . . Responsible for continuing educational and therapeutic programs. . . . Responsible for assisting in educational, vocational and recreational programs. . . . Responsible for maintaining a warm, homelike environment throughout the residence." In the Respondent's view, the assignment of cleaning and cooking duties, which it refuses to recognize as "additional," comes within "management prerogatives" of assigning any work within the job description. However, there is nothing in the record to indicate that a residential "behavioral modification" program existed prior to the opening of the Harewood residence, and the testimony of the houseparents makes it appear that, rather than the program being a training benefit to the students it was no more than additional drudgery for the staff. The additional duties imposed were transferred from other classes of employees, were new to these employees, were of a highly demanding nature, and should have been negotiated rather than unilaterally imposed. The action of the Respondent in unilaterally assigning these addtional duties without negotiation constitutes a violation of Section 8(a)(5) of the Act.

c. *Implementation of timeclocks*

In early April, the Respondent announced at a teachers' meeting that timeclocks were to be installed, and about the same time Altman was told that "timeclocks were coming." The first, and apparently only, discussion of timeclocks during negotiations was for the nonprofessional unit, on March 31, where the use of timeclocks was explained and comments requested. There is evidence that the Union welcomed the idea, and that a typical comment was that this would stop nonprofessional employees from being cheated out of time. There was also testimony that after installation some machines were sabotaged by stuffing them with paper. About March 26 the clocks were installed and use began for all of the Respondent's employees. Prior to installation of the timeclocks, both professional and nonprofessional unit employees signed in and out of work even though only the nonprofessional unit employees were paid on an hourly basis. Professional unit employees were thereafter required to punch in and out whenever entering or leaving campus rather than merely noting time of daily arrival and departure.

Discussion

The Board has previously found that a change in work rules regarding clocking in and out of work, without notice and bargaining, to be a violation of Section 8(a)(5) of the Act.[10] In the case of the nonprofessional unit employees, however, the timeclock here was no more than a change in the system of existing recordkeeping, and the status quo was retained without meaningful change. New use of the timeclocks for the professional staff, on the other hand, was a change in that it required the clocking in and out each time the employee left campus during

[9] *Postal Service*, 203 NLRB 916, 919 (1973).

[10] *Schraffts Candy Co.*, 244 NLRB 581 (1979); *Anchortank, Inc.*, 239 NLRB 430, 433 (1978).

the day. However, the union representatives knew of the plan to install timeclocks as early as March 31, the installation took place May 26, and the Union raised no complaint until June 15.

A union cannot charge an employer with refusal to negotiate when it has made no timely attempts to bring the employer to the bargaining table.[11] Thus, in the final analysis, the Respondent's action in installing and implementing timeclocks under the circumstances described did not constitute a violation of Section 8(a)(5) of the Act.

d. *Changes in pension benefits*

The Respondent's pension plan was established in 1958 and benefits have been from time to time improved. The Respondent contacted the plan's actuaries during the summer of 1980 to determine whether existing benefits could be increased without additional cost to the Employer. By early 1981 it had a response that this could be done, since return from investment was much greater than had been originally anticipated. On June 15, at a negotiating session, Braksator told the union representatives that he would like to discuss possible improvement in the pension program. Plans and actual data were requested by and provided to the Union, but the issue was not negotiated. On August 1, the Respondent's board of trustees approved the revision and improvement of the plan, effective retroactively to July 1.

Discussion

Citing *Chemical Workers v. Pittsburgh Glass Co.*, 404 U.S. 157 (1971), the Respondent argues that its action was not a violation of the Act since it affected only the rights of retired employees, a group not protected by the Act's collective-bargaining requirements. While it is correct as to the holding of that case, the Respondent has not considered that the benefits which it caused to be increased without negotiation also inure to the benefit of current employees. As stated by the Court in the *Pittsburgh Glass* decision, supra at 180, "future retirement benefits of active workers are part and parcel of their overall compensation and hence a well established statutory subject of bargaining." Thus, I find that the Respondent's failure to negotiate pension increases even though such benefits would not be payable to employees until they retired and could no longer be represented by the Union in collective bargaining to be a violation of the Act.

e. *Unilateral implementation of wage increases*

The Union was certified as bargaining representative of the nonprofessional unit on October 6, 1980, and bargaining for that unit commenced January 29. It was the Respondent's position that noneconomic issues were to be disposed of before bargaining on economic issues, but the Union made a wage demand on August 25 for a 30-percent across-the-board increase. On September 17 the Respondent made its offer, an across-the-board increase of 25 cents per hour. On October 5, the Union responded with a decreased demand for a 25-percent across-the-board increase. At an October 14 meeting the Respondent increased its original offer by adding a provision for a supervisory merit review increase, said by the Respondent to be a 13-percent increase and said by the Union to have been 4- to 6.5-percent increase. On October 19 the Union's strike began, and on October 22 the Respondent directed a letter advising the Union that effective October 26 it was unilaterally implementing its last wage offer.

The Union had previously been certified to represent the professional unit and had negotiated a contract expiring in June 1981. On March 23, the Union requested that bargaining on a new contract begin. There was a similar understanding that the Respondent would not consider economic issues until the noneconomic matters were disposed of. Negotiations had reached a point where a Federal mediator was called in and, on December 16, the mediator announced to the Union that she had prevailed upon the Respondent to make a salary offer. The offer was for a sliding scale of increases resulting in a first year increase of $1395 for most unit members. The most senior members of the unit, those already close to maximum salary, including Union President Altman, would receive an increase of only $200. The Union rejected the proposal as being unfair to those already close to maximum. The Respondent came forward, through the mediator, with a revised offer which, although more generous overall, contained an even greater disparity between those at the minimum salary and those at the maximum salary. The Union asked the mediator to explain to the Respondent that it was the sliding scale concept, rather than the amount of the increase which was objectionable, and that the Union would accept an increase of $1000 across the board, which would result in less expense to the Respondent. There was no agreement, however, and the mediator dismissed the parties. The Union decided to transmit the Respondent's last offer to its membership, which it did 2 nights later, on December 18, at which time the membership rejected the offer. On December 22 the Respondent directed a letter advising the Union that, effective January 1, 1982, it was unilaterally implementing its last wage offer.

At the start of these negotiations the Respondent was represented by an individual whose strategy admittedly was "to negotiate for a year and then walk away." That individual was discharged, and the Respondent's current counsel was retained. In private notes at negotiations, the Respondent sometimes made reference to the 1-year anniversary of union certification for the nonprofessional unit, and that after impasse it would be free to implement wage increases. In June 1982, the Respondent advertised for a personnel specialist, specifying that "Experience in managing a union free environment a plus."

Discussion

The freedom to grant a unilateral wage increase is limited to situations where there has been a bona fide but unsuccessful attempt to reach an agreement with a union, or the union bears the guilt for having broken off rela-

[11] *NLRB v. Alva Allen Industries*, 369 F.2d 310, 321 (8th Cir. 1966); *Carpenter Sprinkler Corp.*, 238 NLRB 974, 983 (1978).

tions.[12] The Board recognizes that while an impasse may be, and frequently is only temporary, it "permits the employer to place into effect those wage increases or benefits it has heretofore offered."[13] In determining whether an impasse has been reached the Board has looked to such issues as the bargaining history and length of negotiations, other aspects of good faith, the importance of remaining disputed issues, and the contemporaneous understanding of the parties.[14]

In the previous single instance in which this Union and Respondent were required to negotiate, they did so successfully and concluded an agreement. The bargaining here for the nonprofessional unit commenced January 29, almost 9 months prior to unilateral implementation of the wage offer. That implementation came only after a union demand, the Respondent's counteroffer, and the Union's counterdemand and its strike. The bargaining here for the professional unit commenced March 27, over 9 months before the unilateral implementation of the wage offer. This bargaining saw the appeal to the Federal Mediation Service, which was unable to bring the parties to an agreement, and a final disagreement not on the increased amount of total wages but on the more basic issue of the manner in which the increase was to be allocated. As discussed earlier herein, during these negotiations there were a number of instances of unfair labor practices by the Employer, but that is only one criterion of impasse. Finally, it is obvious that whatever noneconomic issues had been settled or remained disputed, the unresolved dispute as to wages constituted a major obstruction to agreement.

There is evidence that the Respondent was aware that its obligations under the Act might be different a year after certification if a contract had not been negotiated. That evidence itself does not prove the Respondent to have falsely engineered a situation to be labeled "impasse." On the contrary, I find that the Respondent has fulfilled its obligation to undertake collective bargaining in good faith, over a sufficient time, until both parties were deadlocked by significant and unresolved differences as to the basic issue of wages. The advertisement stressing experience in a union-free environment must be viewed first in the context of a work force of which 13 percent was not unionized, and secondly being placed at a time when the strike had been ineffective for 6 months leading to obvious conclusions as to the Union's future. I find the Respondent's unilateral implementation of previously offered wage increases not to constitute a violation of its obligation under Section 8(a)(5) of the Act to engage in collective bargaining.

D. *Unfair Labor Practice or Economic Strike*

The General Counsel alleges that the strike by both units, which began October 19, was caused by those unilateral actions claimed to have been the Respondent's above-considered unfair labor practices.[15] The Respondent, on the other hand, alleges that the sole basis of the strike was the failure of the Union to obtain the economic gains for which it bargained.

The first time these labor practices were raised by the Union was on June 15.[16] At that time there was a negotiating session at which the matter of pension increases had been raised. The Union called for a caucus, at which the union representative asked the members of the team if there were "other activities that they could recall where the management had made unilateral decisions without dicussing them either at the bargaining table or somewhere else." The representative gave a short explanation of employee rights "and we compiled a list of about six or seven items." The negotiations reconvened, and the union representative told the Respondent:

> That I felt they had committed a number of unfair labor practices, which were impeding our progress at the bargaining table, and that as long as they were going to unilaterally make changes in conditions of employment while we were here trying to negotiate conditions of employment, we would not reach an agreement.

The Respondent's reaction was one of "surprise," and they requested a caucus, from which they returned to state that they had consulted counsel, whose opinion was that the items mentioned, being the changes involving timeclocks, duties, shifts, and retirement increase, were not unfair labor practices.

The Union filed unfair labor practice charges as to these and other items on September 16. In late September it took a strike vote of its members, and on October 2 it directed a letter to the Respondent requesting restoration of conditions of employment "as they existed prior to April 1" advising that "Your compliance with this request would avoid [the] pending strike scheduled for October 19." After the strike there were additional negotiations, culminating in the Federal mediation and economic offers and rejections discussed above.

Discussion

The unfair labor practice complaints were made to the Respondent by the Union on June 15. Economic bargaining did not begin until the first union demand on August 25. The unfair labor practice charges were filed with the Board on September 16. The Respondent's first economic offer was made on September 17. The strike vote was held in late September, with union members specifically being advised that the strike issue was the unfair labor practices. On October 2 the Union directed a letter to the Respondent advising that the strike could be avoided by a return to the conditions of employment which existed prior to the unfair labor practices charged. The Respondent did not agree to such a return, and the strike began October 19. Economic negotiations continued, and on October 22 the Respondent claimed an impasse regarding wages on which it based the implementation of

[12] *Herman Sausage Co. v. NLRB*, 275 F.2d 229 (5th Cir. 1960).

[13] *Charles D. Bonanno Linen Service*, 243 NLRB 1093, 1094 (1979).

[14] *Taft Broadcasting*, 163 NLRB 475, 478 (1967).

[15] The General Counsel made an eleventh-hour motion to amend the complaint to add an allegation of generally failing to engage in bargaining. The motion was denied as untimely.

[16] An exception is the change in shift hours, which occurred in March and was the subject of a single phone conversation between Altman and Mather.

its last offer to the nonprofessional unit. It was not until December 22 that the Respondent claimed an impasse regarding wages on which it based the implementation of its last offer to the professional unit. The economic negotiations were thus in the most formative of stages at the time of the strike vote, while the unfair labor practice charges had been discussed and fully considered by both sides. The Union's final statement on the unfair labor practice charges was its offer to call off the forthcoming strike if those specific issues were settled. This was a clear demonstration that the Union considered the unfair labor practice charges the complete reason, even more than a contributing cause, for the strike of October 19. It is well settled that "If an unfair labor practice is a contributing cause of a strike, then, as a matter of law, the strike must be considered an unfair labor practice strike."[17] It is equally well settled, by the Board and by the courts, that an unfair labor practice strike does not result merely because the strike follows an unfair labor practice, but that a causal connection must necessarily be shown to exist between the two.[18] Thus, I find the strike to have been an unfair labor practice strike.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(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 following employees of the Respondent constitute units appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> (a) All teachers, counselors, evaluators and teachers aides employed by the Respondent at its Langhorne, Pennsylvania facility, including teachers at the "Larchwood" unit, but excluding the part-time adult education teachers, office clerical, custodial and confidential employees, guards and supervisors as defined in the Act.
>
> (b) All nonprofessional and nontechnical service and maintenance employees including housekeepers, houseparents, drivers, custodians, cleaners, pantry workers, seamstresses, counter workers, groundsmen, painters, lifeguards, laundry workers, stockmen, cooks, plumbers, mechanics, dishwashers, pantry employees, apprentice masons, carpenters, electricians, bankers, masons, upholsterers employed by The Woods Schools at its Langhorne, Pennsylvania facility; but *excluding* all professionals, technical, managerial, clerical and confidential employees and guards and supervisors as defined in the Act.

4. By failing to maintain secrecy of balloting in a poll of employees concerning their union sentiment, the Respondent has engaged in an unfair labor practice within the meaning of Section 8(a)(1) of the Act.

5. By denying Lois Altman summer per diem employment, the Respondent has engaged in an unfair labor practice within the meaning of Section 8(a)(1) and (3) of the Act.

6. By modifying the duties of certain of its employees in the unit referred to above in paragraph 3(b) by requiring said employees to perform additional cleaning duties, without prior notice to the Union and without having afforded the Union an opportunity to negotiate and bargain as the exclusive representative of the Respondent's employees, the Respondent has engaged in an unfair labor practice within the meaning of Section 8(a)(1) and (5) of the Act.

7. By increasing pension benefits without prior notice to the Union and without having afforded the Union an opportunity to negotiate and bargain as the exclusive representative of the Respondent's employees, the Respondent has engaged in an unfair labor practice within the meaning of Section 8(a)(1) and (5) of the Act.

8. The strike which began on October 19, 1981, is an unfair labor practice strike.

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

THE REMEDY

Having found that the Respondent violated Section 8(a)(1), (3), and (5) of the Act, I recommend that it be required to cease and desist therefrom, and in any other manner interfering with, restraining, or coercing its employees in the exercise of their rights under Section 7 of the Act.

Having found that the Respondent unlawfully failed to provide Lois Altman with summer per diem employment, I recommend that the Respondent be ordered to make her whole for any loss of earnings she may have suffered as a result thereof by paying her the amount she normally would have earned, less net earnings, to which shall be added interest to be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *Florida Steel Corp.*, 231 NLRB 651 (1977).[19]

Having found that the Respondent changed the duties of employees and changed the pension benefits payable upon retirement without bargaining in good faith with the Union, I recommend that, on request, the Respondent be required to bargain in good faith with the Union and, if an understanding is reached, to embody such understanding in a written, signed contract.

On the foregoing findings of fact and conclusions of law and on the entire record, I issue the following recommended[20]

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[17] *NLRB v. Colonial Haven Nursing Home*, 542 F.2d 691, 704 (7th Cir. 1976).

[18] *Typoservice Corp.*, 203 NLRB 1180 (1973); *Cagle's, Inc. v. NLRB*, 588 F.2d 943, 950 (5th Cir. 1979); *NLRB v. Proler International Corp.*, 635 F.2d 351, 354 (5th Cir. 1981).

[19] See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

[20] 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.

ORDER

The Respondent, The Woods Schools, Langhorne, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Changing the duties of employees, or the pension benefits payable upon retirement, or other terms and conditions of employment, without bargaining in good faith with the Union.

(b) Unlawfully polling its employees with regard to their desires for union representation.

(c) Discriminating against employees in regard to hire or tenure of employment because they engaged in union activities.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights to engage in or refrain from engaging in any or all of the activities specified in Section 7 of the Act.

2. Take the following affirmative action which it is found will effectuate the policies of the Act.

(a) On request, bargain in good faith with the Pennsylvania Federation of Teachers as the exclusive bargaining representative of the employees in the unit described above and, if an understanding is reached, embody such understanding in a written, signed contract.

(b) Make Lois Altman whole for any loss of earnings she may have suffered as a result of discrimination against her in the manner set forth in the section of this decision entitled "The Remedy."

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, timecards, social security payment records, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at the Respondent's facility at Langhorne, Pennsylvania, copies of the attached notice marked "Appendix."[21] Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS ALSO ORDERED that the complaint be dimissed insofar as it alleges violations of the Act not specifically found.

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[21] If 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."