

YHA, Inc. and Service Employees International Union Local 627, AFL-CIO, CLC. Case 8-CA-22754

May 29, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND OVIATT

On September 11, 1991, Administrative Law Judge Irwin H. Socoloff issued the attached decision. The Respondent filed exceptions and a brief in support, and the Charging Party filed a brief in opposition to the Respondent's exceptions.

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 and to adopt the recommended Order.

The judge concluded that the Respondent violated Section 8(a)(5) of the Act by refusing to bargain with the Union prior to its intended implementation of its new no-smoking policy. The Respondent excepts contending, inter alia, that the judge erred in finding that it "did not formally and fully apprise the Union of its intent completely to eliminate employee smoking in its facilities until March 23, 1990." The Respondent asserts that the Union learned well before that date of the Respondent's intent to implement the no-smoking policy on April 1, 1990. In support of this contention, the Respondent refers to the smoking task force meeting agendas and attached no-smoking policy drafts that were mailed before each task force meeting to task force members, including Union Steward Flannery, whom Union President Lewis appointed to attend the meetings. The Respondent contends that the no-smoking policy draft attached to the February 8 agenda made clear the Respondent's intention to implement a total smoking ban and that the draft attached to the March 7 agenda clearly establishes that the effective date for the policy was April 1, 1990. The Respondent also asserts that the Union should have known that April 1 was the implementation date because the attached agenda referred to the March 7 draft as final. We disagree.

Initially, we note that when Mullen, the Respondent's assistant administrator, notified Lewis in January

¹The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

1990 that a smoking task force would be formed, he did not tell Lewis specifically what the purpose of the task force was or that his mandate, in fact, was to implement a smoke free policy by April 1, 1990. Thus, the Respondent led the Union to believe that the purpose of the task force was a general discussion of the smoking policy. Contrary to the Respondent, we do not find that the documents referred to above were sufficient to dispel that belief. As to the February 8 no-smoking policy draft, there is nothing in it to indicate that its purpose was other than to promote general discussion of the smoking policy, which Lewis, in fact, was led to believe was the purpose of the task force. As to the March 7 no-smoking policy draft, we agree with the Respondent that it clearly gives the effective date as April 1, 1990, and that the attached agenda refers to it as the final draft. We do not agree, however, that these factors require a finding that the March 7 draft put the Union on notice that the no-smoking policy would be implemented on April 1. Not only is the "Date Effective" of the draft given as "4/1/90," but the same date is given as the "Date Revised" and the "Date Reviewed." Consequently, it is difficult to determine from the face of the draft what significance, if any, to assign the "4/1/90" date. Further, as to the designation of this draft as the final one, we note that the word final on the March 7 agenda is surrounded by quotation marks, suggesting that it was "final" in name only and was subject to further general discussion by the task force. In these circumstances, for the other reasons stated by him, we agree with the judge that the Respondent did not "formally and fully apprise" the Union of its intentions until March 23, 1990, when the Respondent's medical director informed the union presidents that the Respondent "had adopted" a smoke-free policy and intended to implement it on April 1. Accordingly, and in view of the judge's further findings, with which we agree, that the Union on and after March 23 repeatedly demanded negotiations over the policy and that the Respondent then refused to bargain over the matter, we adopt the judge's conclusion that the Respondent violated the Act.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, YHA, Inc., Youngstown, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Rufus L. Warr, Esq., for the General Counsel.

Jon R. Steen, Esq., of Youngstown, Ohio, for the Respondent.

Anthony P. Sgambati, Esq., of Youngstown, Ohio, for the Charging Party.

DECISION

STATEMENT OF THE CASE

IRWIN H. SOCOLOFF, Administrative Law Judge. On a charge filed June 4, 1990, by Service Employees International Union Local 627, AFL-CIO, CLC (the Union) against YHA, Inc. (the Respondent), the General Counsel of the National Labor Relations Board, the Regional Director for Region 8, issued a complaint dated October 31, 1990, alleging violations by Respondent of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act (the Act). Respondent, by its answer, denied the commission of any unfair labor practices.

Pursuant to notice, trial was held before me in Youngstown, Ohio, on February 21, 1991, at which all parties were represented by counsel and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. Thereafter, the parties filed briefs which have been duly considered.

On the entire record in this case, and from my observations of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, an Ohio corporation, maintains facilities in Youngstown, Ohio, where it is engaged as a nonprofit health care provider. Annually, Respondent, in the course and conduct of its business operations, derives gross revenues in excess of \$250,000. It purchases and receives at its Ohio facilities goods and materials valued in excess of \$10,000, which are sent directly from points located outside the State of Ohio. I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and a health care institution within the meaning of Section 2(14) of the Act.

II. LABOR ORGANIZATION

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

III. THE UNFAIR LABOR PRACTICES

A. *Background*

Respondent operates hospitals and medical facilities in the Youngstown, Ohio area, including North Side and South Side Medical Centers, and Beeghly Medical Park. The majority of its employees are represented in multifacility bargaining units, including the 1200 to 1300 nonprofessional service and maintenance employees represented by the Union, Local 627, since 1966.

Prior to April 1, 1990, smoking was permitted in designated areas of the YHA facilities. On that date, however, Respondent instituted a new rule prohibiting smoking by employees and others anywhere inside its facilities. It did not engage in collective bargaining with the Union about the matter.

In the instant case, the General Counsel contends that, by making unilateral changes in the terms and conditions of employment of the bargaining unit employees, Respondent violated Section 8(a)(5) of the Act. Respondent asserts that it

acted lawfully as, in its view, the Union waived its right to bargain about the changes in the smoking policy.

B. *Facts*¹

Before 1987, Respondent imposed few restrictions on employee smoking at its facilities, prohibiting smoking, generally, only in those areas when that activity might pose a safety hazard. During the first half of 1987, Jack Mullen, an assistant administrator, was instructed by his superiors to develop a more restrictive policy. With the aid of a committee which he formed to study the matter, Mullen developed a new policy under which employees were permitted to smoke in designated areas only. The designated smoking areas included lobbies, lounges, locker rooms, cafeteria areas, vending areas, restrooms, and areas within each department. In June of that year, Mullen scheduled a meeting to discuss the new policy, with the presidents of the Ohio Nurses Association (representing the nurses working at Respondent's facilities), the Professional Employees Association (the representative of the laboratory and pharmacy employees) and Local 627. Kenneth Lewis, president of Local 627, chose not to attend the meeting and did not send a representative. Likewise, Lewis did not respond to Respondent's June 18, 1987 letter, inviting comments and discussion about the new policy. The policy was implemented on October 1, 1987. At trial, Lewis testified that he did not seek to engage in negotiations at that time because he regarded the new policy as fair and reasonable and one which did not violate the rights of the employees he represents, some 25 percent of whom are smokers.

Late in 1989, Respondent's board of trustees, its governing body, passed a resolution requiring that, effective April 1, 1990, all of Respondent's facilities become smoke-free. This directive mandated that employees and others not be permitted to smoke, after April 1, anywhere within Respondent's facilities. In December 1989, Respondent's president, David Cornell, instructed Mullen to implement the smoke-free policy by April 1, 1990. Mullen formed a task force to assist in drafting and implementing the new policy.

In January 1990, Mullen contacted Lewis by telephone. According to Mullen's testimony, he told Lewis that he, Mullen, had been asked by Respondent's president to gather a task force "to look at" becoming smoke-free by April 1, 1990. Lewis said that he did not want to serve on the committee but that he would have a steward, Bonnie Flannery, so serve. Lewis testified that he was told, only, that Respondent was forming a committee with regard to the smoking policy. As no specifics were supplied, and as Lewis had other matters to attend to, he told the caller that he would have Flannery attend the committee meetings in his stead.²

¹The factfindings contained herein are based on a composite of the documentary and testimonial evidence introduced at trial. To the extent that there are conflicts between the testimonial accounts of events of Kenneth Lewis, the Union's president and business representative, and Jack Mullen, Respondent's assistant administrator for medical affairs, I have credited the testimony of Lewis. Lewis impressed me as an honest and forthright witness while Mullen, whose testimony was, at times, evasive concerning critical matters, appeared to me to be engaged in a decided effort to present events in a light most favorable to Respondent's interests.

²For the reasons stated at fn. 1, I credit Lewis' testimony rather than Mullen's, and find that the conversation occurred substantially

Continued

The committee, primarily composed of management officials, met on five occasions between January 24 and March 28, 1990, and served its function of aiding Respondent in drafting and implementing a policy to eliminate entirely smoking in all areas inside its facilities. According to Mullen's testimony, Flannery attended at least two of the meetings. Lewis testified that Respondent did not release her, and so she was unable to attend many of the meetings. In any event, the record evidence does not reveal which meetings she attended and which she did not.

Lewis and the presidents of the other unions representing Respondent's employees were invited by Respondent on March 19 to attend a meeting being held on March 23 to discuss the smoking policy. Mullen testified that the purpose of the meeting was to inform the union presidents of the new policy, not to negotiate with them. Prior to that meeting, on March 20, 1990, an article appeared in the local newspaper describing Respondent's new policy. Lewis testified that, on reading the article, he learned, for the first time, of Respondent's intentions in this regard.

Lewis attended the March 23, meeting, along with Arleen Nagy, president of the Nurses Association, and Dave Shively, president of the Professional Employees Association. Conducting the meeting for Respondent were Dr. Gene Butcher, medical director, Sandy Butler, corporate director of human resources, and Mullen. According to Lewis' testimony, Respondent's officials, with Butcher acting as chief spokesman, informed the union presidents that Respondent had adopted a smoke-free policy, and copies of the new policy were distributed. The union presidents were also advised that the disciplinary policy would be revised so as to provide for disciplinary action against employees caught smoking on Respondent's premises. Lewis, Nagy, and Shively voiced their "disbelief" at the manner in which they learned of the change.

Lewis further testified that he voiced his objections to the new policy, stated that smokers had rights, and demanded that Respondent engage in collective-bargaining negotiations concerning any new policy on smoking. Lewis insisted that smokers be provided with designated areas in which to smoke. Butcher responded, stating that there would be no negotiations and that the new policy was in place. He further stated that Respondent had considered, and rejected, the possibility of providing designated smoking areas. Lewis insisted that there were a number of areas suitable for smoking. Butcher replied, stating that he had heard it before and he did not want to hear it again. When Lewis again asked for negotiations, Butcher stated that he had better things to do, and he left the meeting. Lewis then talked about the adverse impact that the new policy would have on the employees he represents. Under that policy, smoking employees would have to stand outside the premises, in rain and snow, in order to smoke. Butler and Mullen shrugged their shoulders.

Butcher did not testify in this proceeding. Mullen, in his testimony, stated that, at the March 23 meeting, Respondent's officials advised the union presidents that "we're going

as related by Lewis. I note, too, that the conclusions reached in this case would not be different if Mullen's testimony were accepted. Thus, even if the conversation had occurred as related by Mullen, the statements made by Mullen were neither an invitation to engage in collective bargaining, nor a notification that Respondent intended to ban all smoking in its facilities.

with this policy." Mullen further testified that "I don't remember any request or demand to negotiate over this policy," but he conceded that there was "reflective thinking going on" between Lewis and Nagy concerning the need for negotiations. Butler testified that at the meeting none of the union presidents requested negotiations, but she conceded that Lewis made "references" to negotiations.³

It is undisputed that, immediately following the March 23 meeting, Lewis did not visit the neighboring office of William Cummins, Respondent's vice president of human resources, to make further oral demand for negotiations. Rather, Lewis' subsequent negotiation demands were made in writing and were, in fact, addressed to Cummins.⁴ Thus, on March 27, Lewis sent a letter to Cummins, received by Respondent on March 30, requesting that Respondent refrain from implementing the policy prohibiting smoking by employees and announcing the Union's willingness to enter into negotiations with Respondent in order to reach agreement "on a reasonable no smoking policy which will accommodate the needs of all involved." By letter dated April 2, 1990, Cummins responded, stating:

I am unsure as to your reasons why YHA, Inc. must now negotiate this matter with the Union. We have always looked upon the implementation of smoking restrictions in the Hospital as our right. We have implemented earlier phases of our smoking restriction policy without request from your Union to negotiate.

On receipt of that letter, Lewis, on April 10, sent another letter to Cummins, adhering to the Union's demand to negotiate "a fair and reasonable smoking policy." Respondent did not reply.

C. Conclusions

Generally, "an employer violates its duty to bargain collectively when it institutes changes in employment conditions without notice to and bargaining with the exclusive collective-bargaining representative of its employee."⁵

In this case, it is beyond legitimate dispute that, when Respondent, beginning April 1, 1990, entirely prohibited smoking in all areas of its facilities, it unilaterally discontinued an employee privilege, of importance to a large number of unit employees, which, prior to April 1, had been an existing condition of employment.⁶

Respondent argues that the Union waived its right to bargain about the total ban on smoking by employees in its facilities because it did not request to bargain about the partial

³For the reasons stated at fn. 1, I credit Lewis' testimony rather than Mullen's, and find that the March 23 meeting occurred, substantially, as related by Lewis. I find unpersuasive the brief, and rather vague, testimony of Butler concerning events at the meeting.

⁴Respondent argues that any negotiation demands made by Lewis on March 23 were invalid, as they were addressed to Dr. Butcher, rather than Cummins, who normally receives bargaining demands. I reject this contention. Lewis addressed his initial demands for negotiations concerning the new smoking policy to the very official designated by Respondent to notify the Union of this policy. The demands of Dr. Butcher were made in the presence of Butler, Respondent's corporate director of human resources. Subsequent written demands were addressed to Cummins.

⁵*NLRB v. Katz*, 396 U.S. 736 (1962).

⁶See *Santa Rosa Blueprint Service*, 288 NLRB 762 (1988).

ban instituted in 1987, and because it did not timely request bargaining in 1990. With respect to the Union's inaction in 1987, I note the established Board case law holding that a right once waived is not necessarily lost forever.⁷ Moreover, in 1987, the Union waived on its bargaining rights concerning the imposition of smoking restrictions. The total ban imposed in 1990 was an entirely different matter, and was a material, substantial, and significant change in existing rules and practices.

With respect to the timeliness of the Union's request to bargain in 1990, it is true, as argued by Respondent, that the Union, upon receipt of notice of Respondent's decision to change terms and conditions of employment, was obligated to act with due diligence in requesting bargaining.⁸ In light of the participation on the task force, however limited, of the Union's designee, Flannery, it may be argued that the Union learned, or should have learned, prior to March 23, that Respondent planned a substantial modification in its smoking policy. The fact remains, however, that Respondent did not formally and fully apprise the Union of its intent completely to eliminate employee smoking in its facilities until March 23, 1990. At that time, 9 days remained before the intended implementation of the new policy, an ample amount of time for bargaining about this issue. On being presented with Respondent's intended new policy, the Union immediately, forcefully, and repeatedly demanded negotiations.⁹ Respondent refused to bargain, asserting that it "looked upon the implementation of smoking restrictions in the hospital as our right." In taking that approach, I find and conclude that Respondent failed to fulfill its bargaining obligation, in violation of Section 8(a)(5) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES ON 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.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practice conduct in violation of Section 8(a)(5) and (1) of the Act, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

CONCLUSIONS OF LAW

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

2. Service Employees International Union Local 627, AFL-CIO, CLC is a labor organization within the meaning of Section 2(5) of the Act.

3. All nonprofessional service and maintenance employees employed by Respondent at its Youngstown, Ohio facilities, excluding all other employees, guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. At all times material the Union has been, and is now, the exclusive representative of all employees in the aforesaid bargaining unit for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

5. By implementing changes in the terms and conditions of employment of the bargaining unit employees, without affording the Union an opportunity to negotiate and bargain with respect to those changes and the effects thereof, Respondent refused to bargain in good faith with the Union as the exclusive representative of the bargaining unit employees, concerning rates of pay, wages, hours, and other terms and conditions of employment, and thereby engaged in unfair labor practice conduct within the meaning of Section 8(a)(5) of the Act.

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

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹⁰

ORDER

The Respondent, YHA, Inc., Youngstown, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain in good faith concerning rates of pay, wages, hours, and other terms and conditions of employment with the Union as the exclusive bargaining representative of its employees in the appropriate unit.

(b) Implementing changes in the terms and conditions of employment of the bargaining unit employees without first giving adequate and timely notice to the Union and affording it an opportunity to engage in collective bargaining with respect thereto.

(c) 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 necessary to effectuate the policies of the Act.

(a) On request, bargain in good faith with the Union 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.

(b) Notify and bargain collectively with the Union, on request, concerning changes in policy with regard to smoking inside the facilities by unit employees.

(c) Rescind the April 1, 1990 policy regarding smoking inside the facilities by unit employees, and restore the policy as it existed prior to that date.

⁷ *Murphy Diesel Co.*, 184 NLRB 757 (1970), enf. 454 F.2d 303 (7th Cir. 1971).

⁸ *Talbert Mfg.*, 264 NLRB 1051 (1982).

⁹ Cf. *Ventura County Star Free Press*, 279 NLRB 412 (1986).

¹⁰ 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.

(d) Post at its, Youngstown, Ohio facilities copies of the attached notice marked "Appendix."¹¹ Copies of the notice, on forms provided by the Regional Director for Region 8, after being signed by the Respondent's authorized representative, shall be posted by the 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 the 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.

¹¹ 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."

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 refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Service Employees International Union Local 627, AFL-CIO, CLC as the exclusive bargaining representative of our employees in the appropriate bargaining unit:

All nonprofessional service and maintenance employees employed at the Youngstown, Ohio, facilities, excluding all other employees, guards and supervisors as defined in the Act.

WE WILL NOT implement changes in the terms and conditions of employment of the bargaining unit employees without first giving adequate and timely notice to the Union and affording it an opportunity to engage in collective bargaining with respect thereto.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of their rights under the Act.

WE WILL, on request, bargain with the Union as the exclusive representative of all employees in the appropriate unit, described above, with respect to rates of pay, wages, hours, and other terms and conditions of employment.

WE WILL notify and bargain collectively with the Union, on request, concerning changes in policy with regard to smoking inside the facilities by unit employees.

WE WILL rescind the April 1, 1990 policy regarding smoking inside the facilities by unit employees, and restore the policy as it existed prior to that date.

YHA, INC.