

Yale University and Local 34, Federation of University Employees a/w Hotel Employees & Restaurant Employees International Union, AFL-CIO.
Case 34-CA-8617

August 8, 2001

DECISION AND ORDER

BY MEMBERS LIEBMAN, TRUESDALE, AND
WALSH

On June 1, 2000, Administrative Law Judge Raymond P. Green issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering 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 and to adopt the recommended Order.

ORDER

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

Margaret La Rue, Esq., for the General Counsel.
Joseph W. Ambash, Esq. and *Daniel Klien Esq.*, for the Respondent.

DECISION

STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge. This case was heard by me in Hartford, Connecticut, on March 7, 2000. The charge was filed on December 10, 1998, and the complaint was issued on September 29, 1999.

In substance, the complaint alleges, under the theory of *NLRB v. Jacobs Mfg. Co.*, 196 F.2d 680 (2d Cir. 1962), enfg. 94 NLRB 1214 (1951), that the Respondent refused to bargain regarding the terms and conditions of certain employees during the term of an existing collective-bargaining agreement. The Respondent asserts that these were new employees, hired into existing bargaining unit jobs, and as such, their terms and con-

ditions of employment were governed by the existing and explicit terms of the collective-bargaining agreement.

On the entire record, including my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

The parties agree and I find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. It also is agreed and I find that the Charging Party, Local 34, Federation of University Employees a/w Hotel Employees & Restaurant Employees International Union, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICE

The Respondent in this case is Yale University which, among other things, has a school of medicine. This is 1 of 10 professional schools operated by the University.

Yale Medical School has maintained an affiliation contract with a completely different entity called Yale New Haven Hospital. This particular contract goes back to about 1975 and it is a reciprocal arm's-length transaction. When the school of medicine uses the services of hospital employees, it pays to the Hospital, the employees' salaries plus an 18-percent surcharge. Conversely, medical faculty of the medical school do clinical services at the Hospital and the Hospital is charged a fee by the medical school.¹

There is a close working relationship between the Hospital and the Medical School. But the two entities are, in fact, separate enterprises having separate corporate officers, directors, managers, and staffs. The General Counsel conceded at the opening of the hearing that she was not contending that Yale New Haven Hospital and Yale Medical School constitute a single employer or that they are joint employers or even that they are engaged in a joint venture.

Notwithstanding that each performs services for the other, Yale University Medical School and Yale New Haven Hospital are separate entities having separate sets of employees. Therefore, the employees of one are not, and have never been, the employees of the other. There are, however, occasions when an employee may be hired by the Medical School who happened to be previously employed by the Hospital, or vice versa.

Of about 600 physicians who are on the medical school's staff and who participate in clinical work at Yale New Haven Hospital, approximately 65, from the medical school's department of internal medicine, provide outpatient care in what is called the Dana 3 medical practice. This work is carried out on the third floor of the Dana building which is leased to the medical school by the Hospital. In relation to the Dana medical practice, the medical school provides the physicians and a few administrative people, whereas the Hospital, before the events

¹ We correct two inadvertent errors by the judge, which do not affect our decision. In sec. II of his decision, the judge stated that the General Counsel was not contending that the Respondent and Yale New Haven Hospital "constitute a single employer or that they are joint employers or even that they are engaged in a joint venture." In sec. III, the judge stated that the General Counsel conceded that the Respondent and the Hospital "have been and are separate enterprises which were not joint employers or joint venturers." At the hearing, however, counsel for the General Counsel stated her position on the Respondent's relationship with the Hospital as follows: "we're not conceding that they're entirely separate entities, but we're not, in these proceedings, making a claim of either single or joint employer status." Counsel for the General Counsel made no reference to engagement in a joint venture. We are satisfied that these minor errors do not undermine the judge's conclusion that the Respondent did not violate Sec. 8(a)(5) and (1) as alleged in the complaint.

¹ The name of both institutions is traceable to Elihu Yale who was born in Massachusetts in 1649 and became an official of the East India Company. In response to requests by Cotton Mather, he became a benefactor to the Collegiate School at Saybrook which later became known as Yale College. See Encyclopedia Britannica.

here, provided a group of about 14 hospital employees in the categories of medical transcriptionists, secretaries, and patient care associates. Patients who are treated at this clinic are considered to be patients of the medical school and not patients of the Hospital. The person in charge of the clinic, insofar as medical procedures and decisions, is Dr. Silvio Inzucchi, who is an associate professor of medicine.

None of the employees of Yale New Haven Hospital are represented by a labor organization and their terms and conditions of employment are established by the Hospital consistent with market conditions in the area. Thus, the employees furnished by the Hospital, who were assigned to work in the Dana 3 medical practice, were nonunion and had their wages, hours, and terms and conditions of employment set by the Hospital. They also were under the direct supervision of Mary Ann Lillie, a supervisory employee of the Hospital.

For many years, Yale University has had a collective-bargaining relationship with Local 34, Federation of University Employees, which represents about 2800 clerical and technical employees of the University. Some of the represented employees work at the Medical School and that unit contains classifications identical to the job classifications of the 14 hospital employees who were assigned to work at the Dana 3 medical practice. (Transcriptionists, medical assistants, etc.)

The most recent collective-bargaining agreement between Local 24 and Yale University runs from January 21, 1996, through January 20, 2002. The contract covers many technical and clerical job classifications and, as noted above, the people who were employed by the Hospital and who worked at Dana 3, worked in job categories identical to people who were employed elsewhere by Yale Medical School. The difference of course, was that the individuals who were hospital employees assigned to Dana 3 were employed by the Hospital and received their supervision, wages, and working conditions in accordance with hospital policy, whereas, similarly situated employees doing identical jobs but employed by Yale Medical School, had their wages and working conditions determined by the collective-bargaining agreement. The few medical school employees who were assigned to clerical jobs at Dana 3, were covered by the collective-bargaining agreement.

The existing collective-bargaining agreement has a number of provisions explicitly relating to new hires. Article X allows the university to unilaterally set, within defined limits, the starting salaries of new hires in the various covered job classifications.² Article XV sets parameters for determining seniority levels for new hires. (Some seniority consideration is given to people who previously worked at the university and this is determined by a contractually determined formula.) Article XVI contains a provision which gives preference to existing bargain-

² Over a number of years and during several sets of negotiations, the Union has sought to limit the discretion of the University to be able to set initial salaries for new hires at levels above the minimum salaries set for the various job classifications defined in the contract. In this regard, the Union has been successful in limiting the discretion of the University and the contract contains specific rules and limits as to when and under what circumstances the University may hire an individual at a salary above the contract's minimum.

ing unit people over outside people when bargaining unit positions become available.

By early 1998, the management of Yale University's Medical School decided that it could save money if it used its own support people to work at Dana 3 instead of leasing them from the Hospital with the concomitant obligation to pay the 18-percent wage surcharge. The Medical School decided that its staffing needs required it to hire 12 such individuals. The positions were for medical assistants, account assistants, and medical transcriptionists. As noted above, these were job classifications which already existed within other departments of the Medical School and people occupying such positions were covered by the collective-bargaining agreement between the University and Local 34.

As a result, the Hospital's employees who were assigned to Dana 3, were told that they could apply for jobs at the Medical School *or* that they could apply to transfer to other jobs within the Hospital. The jobs were also posted in the University in accordance with the provisions of Local 34's collective-bargaining agreement.

During the period from April 1 through June 1, 1998, about half of the employees who had been employed by the Hospital and worked at Dana 3, elected to remain employed by the Hospital and were shifted to other jobs. The other half elected to apply to the Medical School for the equivalent jobs at Dana 3. Of the 12 positions available, the Medical School hired 7 who had previously worked for the Hospital but rejected one hospital employee applicant in favor of an outside applicant whose transcription skills were deemed to be superior. Four of the positions were taken by people who had no prior connection to either the Hospital or the Medical School. And one position was filled by a person who already was employed by the Medical School and therefore could be deemed to be an internal university transferee. In July 1998, Lillie officially left the Hospital's employ and became employed by the Medical School as the nurse manager of Dana 3.

Instead of taking the position that the hiring of this group of employees for Dana 3 created an entirely new unit, the University took the position that these people constituted a minor expansion of the existing bargaining unit, requiring the hiring of a small number of new employees. It therefore took the position that because the people hired to work for the Medical School at Dana 3 occupied job classifications already covered by the existing collective-bargaining agreement, their wages, hours, seniority, and all other terms and conditions of employment should be governed by the existing collective-bargaining agreement and should be the same as those occupying the same job classifications under the labor agreement.³ Therefore, the University, applying the terms of the contract, set the initial salaries and the respective seniority levels of the new employees who were hired to work at Dana 3.

³ This would be the equivalent of an "accretion" where a small group of unrepresented employees is added to an existing bargaining unit and where the company would be obligated to apply the terms of the existing collective-bargaining agreement to this new group of people. *NLRB v Coca Cola of Buffalo*, 191 F.3d 316 (2d Cir. 1999).

The fact that the University applied the labor agreement's terms to the people hired to work at Dana 3, had a negative impact on some of the people who had previously been employed by the Hospital. Several took pay cuts as their non-union salary rates at the Hospital were higher than the rates assigned to them by the University under the terms of the contract. Also, none of the people who had previously been employed by the Hospital were credited with the seniority that they had accrued while employed at the Hospital. Instead, their seniority commenced on the dates that they were hired by the Medical School as new employees.⁴

On May 22, 1998, union organizer Paul Wessel sent a letter to Inzucchi and Mary Ann Lillie. This read as follows:

The Union would like to meet with Dana 3 management concerning the impact of the transfer of staff positions from the Hospital to University payroll.

We are concerned that the manner in which these position transfers were being carried out is disruptive to the long-standing relationships between Dana 3 and its staff. Prior notice of these changes and earlier discussions could have helped smooth out this transition. Even at this late date, however, we strongly believe an open discussion would be to everyone's benefit, including the patients served by the physicians of Dana 3.

Receiving no response, Wessel sent another letter, this time to the Dean of the Medical School. This stated:

Now that the medical transcription, medical assistant, clerical and other positions in Internal Medicine's Dana 3 section have been shifted from the Yale-New Haven Hospital into the Local 34 bargaining unit, Local 34 and the University need to bargain about the terms and conditions of employment for the employees performing the work. We are particularly concerned that the University unilaterally chose to place the employees as new employees with no recognition of their seniority and wage rates in the positions. Please contact me as soon as possible to negotiate appropriate treatment for these positions under our collective-bargaining agreement.

By letter dated June 26, the University, by James Juhas, manager of labor relations, wrote to Wessel as follows:

The changes in Dana 3 came about as a result of a decision by Internal Medicine to cease its contract arrangement with Yale New Haven Hospital to provide certain support services to the clinic. In the alternative, the Department elected to provide these services with its own staff. This required the addition of several Clerical and Technical positions in the unit. These jobs were requisitioned and posted following the University's established procedures. As I understand, Yale New Haven Hospital employees who applied are filling some of the positions.

There is no obligation for the University to bargain about the terms and conditions of employment for these new University employees. They are being hired in the

same manner as any other external applicants for University positions and as such, are appropriately considered part of the Clerical and Technical bargaining unit once they are hired, and covered by our labor agreement.

III. ANALYSIS

Section 8(d) of the Act, among other things, provides that when a contract is made between a union and an employer, the duty to bargain "shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract." The purpose of this provision (enacted to modify the decision in *NLRB v. Sands Mfg. Co.*, 306 U.S. 332, 342 (1939)) was to insure a degree of stability once the parties to a collective-bargaining relationship have established a contract for a fixed term. (A bargain made is a bargain that must be kept.) Thus, for example, if the parties agree that clerical employees are to receive \$15 per hour for 3 years, neither the Company nor the Union could require the other to bargain for a modification of that agreement during the life of the agreement.⁵ To allow either to require the other to bargain about an issue that had been set for a fixed period of time, would, in a sense, make the agreement somewhat illusory and insert a degree of instability into the relationship between the parties. (There is, however, nothing unlawful if both parties to a collective-bargaining agreement voluntarily and mutually agree to a mid-term modification.)

Some people have argued that once a collective-bargaining contract has been agreed to, neither side, during its term, has to bargain with the other for *any* modification, change, or addition. That assertion, however, is one that goes too far. In *NLRB v. Jacobs Mfg. Co.*, 196 F.2d 680 (2d Cir. 1962), enfg. 94 NLRB 1214 (1951), the court held that an employer was required to bargain during the midterm of a contract "as to subjects which were neither discussed nor embodied in any of the terms and condition of the contract." In *Jacobs*, supra, the union demanded, pursuant to a provision of the contract that allowed for a reopening only for wages, that the employer also bargain for changes in the existing insurance program and for the adoption of a new pension plan. The Board and the court concluded that even though the parties were in the middle of the agreement, the employer had an obligation to bargain, *but only as to the union's request for a pension plan*. The reasoning was that there was nothing in the contract about pension plans and therefore when the union demanded to bargain about that

⁴ Additionally one former hospital employee lost her parking privileges as a result of being considered a new employee of the University.

⁵ Not only may either party refuse to enter into negotiations to modify a contract during its mid-term, but either would violate the Act if it attempted to impose contract changes on the other, absent voluntary consent. Thus, in *NLRB v. Electrical Workers (Burroughs Corp.)*, 828 F.2d 936 (2d Cir. 1987), a union violated Sec. 8(b)(3) and 8(d) of the Act by threatening to strike to obtain a mid-term renegotiation of a contract. Similarly, in *St. Vincents Hospital*, 320 NLRB 42 (1995), an employer violated the Act by unilaterally implementing, without the union's consent, a new insurance plan to replace one to which the Union had orally agreed. See also *Mead Corp.*, 318 NLRB 201 (1995).

particular subject, it did not seek to modify or change any term of the existing contract.

The General Counsel contends that Yale University is obligated to bargain with the Union over the wages, seniority, and other terms and conditions of employment for a group of seven individuals whom it hired when it terminated its arrangement with Yale New Haven Hospital. Under the old arrangement, the University had agreed to use the Hospital's employees to provide support services for a medical clinic operated by the University's Medical School on premises it leased from the Hospital. The General Counsel argues that bargaining over such issues, with respect to this group of employees, would fall within the parameters of required bargaining as enunciated by the Board and the court in *NLRB v. Jacobs Mfg. Co.*, supra. She argues that these people considered themselves to be transferees and therefore were not exactly new hires when their services were acquired by the University. She therefore contends that the provisions of the collective-bargaining agreement relating to "new hires" would not be controlling. According to the General Counsel, this group of people should be treated more like transferees than new hires.

I note that the General Counsel does not contend that the Respondent unilaterally changed the terms and conditions for the seven employees and this position follows from the fact that these employees, prior to their hiring by the Respondent, were employees of the Hospital and were not represented by any labor organization. Therefore, the Respondent did not owe any duty to any union with respect to whether these employees should retain the wages and other working conditions that they had when they were employed by the Hospital.

Nor does the General Counsel contend that every time a new person is hired into an existing bargaining unit job, the University has to renegotiate with the Union, that individual's salary, seniority status, or other terms of employment as if there was no contract already in place. Such a position would, in my opinion, require a never ending series of negotiations each time a new person is hired. (Hardly conducive to stable labor relations.)

The Respondent argues, and I agree, that the wages, seniority, and the other terms that were imposed on the seven employees who had previously been employed by the Hospital were determined by the explicit terms of the collective-bargaining agreement that was in existence between Yale University and the Union. That agreement allowed the University to set the initial rates of pay, within certain defined limits, for new employees who are hired into job categories covered by the contract. Further, the contract establishes seniority as starting on the date of hire, although the contract requires that some seniority is added for new employees who had previously worked within the bargaining unit. Therefore, the seniority that the University gave to the seven former hospital employees was

established in accordance with the seniority provisions of the contract.

The General Counsel concedes that Yale University and Yale New Haven Hospital have been and are separate enterprises which were not joint employers or joint venturers. It therefore is axiomatic that the employees of one were *not* the employees of the other. And if an employee of one leaves to become employed by the other, that individual can only be considered as a former employee of one and a new employee of the employer to whom he or she goes. Thus, if the seven former hospital employees were never previously employed by Yale University, even though they provided contract services for the University, they first became employees of the University when they were hired by the University.

If the seven former hospital employees became new hires of the University and were hired for jobs covered by the collective-bargaining agreement, and if that agreement establishes the wages, seniority, and other terms and conditions for new hires within those job categories, then the parties have, by their pre-existing bargain, established the terms of employment for the seven. There was, therefore, really nothing left to bargain about.⁶

This is not a case where a new group of employees is hired and their job categories or job functions are *not* the same or equivalent to jobs covered by the contract. If that were the case, the Union would have a legitimate argument that bargaining would be needed to establish their terms of employment and how such terms should relate to other jobs covered by the collective-bargaining agreement. But this is not the situation here because it is conceded that the seven ex-hospital employees who were hired by the University, were hired to perform jobs in categories already existing at the Medical School and that those jobs were covered by the labor agreement.

CONCLUSION OF LAW

The Employer has not violated the Act in any manner alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁷

ORDER

The complaint is dismissed.

⁶ Would the Regional Director have dismissed an 8(a)(5) charge if the facts had shown that the company, after bargaining to impasse, had set the wages of the seven employees at levels below the contract minimums for the jobs into which they were hired?

⁷ 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.