

St. Vincent Medical Center, a Division of Catholic Healthcare West, Southern California and Healthcare Employees Union, Local 399, Affiliated with the Service Employees International Union.¹ Case 31-CA-24325

February 16, 2007

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS SCHAUMBER
AND WALSH

On March 31, 2003, the National Labor Relations Board issued a Decision and Order in this proceeding,² in which it found that the Respondent had not violated Section 8(a)(3) and (1) of the Act by discharging the employees in its respiratory care (RC) department and subcontracting out their work shortly before a representation election involving those employees. Subsequently, the Union petitioned the United States Court of Appeals for the Ninth Circuit for review of the Board's Order dismissing the unfair labor practice complaint against the Respondent. On September 11, 2006, the Ninth Circuit granted the Union's petition for review and "remanded this case to the Board for further proceedings."³

On January 11, 2007, the Board notified the parties to this proceeding that it had decided to accept the remand from the Ninth Circuit, and that additional briefing was not warranted at this time.

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

We accept the court's remand as the law of the case. As discussed below, the court's decision compels the conclusion that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging the RC employees and subcontracting out their work.

Facts

The Respondent is an acute care hospital in Los Angeles, California. In mid-1999, the Union intensified its efforts to organize the hospital's technical employees, and the employees in the RC department were the core supporters of the organizing campaign. The RC employees comprised a majority of the organizing committee, and they "discussed the Union with co-workers at work, openly talked to Union organizers, and passed out pro-union fliers in front of the hospital." 463 F.3d at 914. About 95 percent of the RC employees signed union authorization cards. The Respondent was aware of their

union support. On November 10, 1999, the Union distributed a flier announcing that it was a "few weeks" away from filing an election petition with the Board, and that once the election petition was filed, the Board would set an election within 45 to 60 days.

The Respondent had had quality control problems in the RC department for 13 years, and has attributed the problems to department management. The RC department's manager was replaced in early 1999, but problems remained. In July 1999, the same month that the Union intensified its organizational campaign, Zita Uy, assistant administrator for the RC department, met with another manager and discussed the possibility of subcontracting out the work of the RC department. They agreed to reassess the situation "later on that year." *Id.* at 915. Conditions did not improve and on November 18, 1999, after the Union announced that it was close to filing an election petition with the Board, management again discussed subcontracting. On November 19, Uy was authorized to investigate possible subcontracting vendors.

On December 20, 1999, management met again to discuss subcontracting, and on December 22, the Respondent's president approved "moving forward with finding a subcontractor." *Id.* On December 27, Uy announced to the RC employees that management intended to investigate outsourcing the work of the RC department and that it would take between 30 and 60 days to investigate possible subcontractors. On January 3, 2000, Uy contacted two companies (Total Rehab Care and Interstate Rehab Care) and solicited proposals for taking over the RC department before February 15, 2000. On January 5, 2000, the Union filed a petition for an election with the Board in a technical unit including the 27 RC employees. On January 21, 2000, the parties stipulated that an election would be conducted by the Board on February 18, 2000. On January 26, 2000, Total Rehab Care and Interstate Rehab Care submitted a combined proposal under the name of California Respiratory Services, which the Respondent accepted the same day.

On February 1, 2000, about 3 weeks after the Union filed its election petition with the Board, management informed the RC department of the outsourcing decision. California Respiratory Services would take over the RC department, and that, effective February 5, 2000, California Respiratory Services would directly employ the RC employees. The RC department employees were not eligible to vote in the February 18 election because they were no longer employed by the Respondent. On February 2, 2000, the Union filed an unfair labor practice charge, alleging that the Respondent subcontracted out the work of the RC department to prevent the RC department employees from voting in the union election, in

¹ We have amended the caption to reflect the disaffiliation of the Service Employees International Union from the AFL-CIO effective July 25, 2005.

² 338 NLRB 888.

³ 463 F.3d 909, 924 (withdrawing an earlier opinion and dissent appearing at 441 F.3d 670 (Mar. 17, 2006)).

violation of Section 8(a)(3) and (1) of the Act. The complaint issued on March 22.

The matter was heard before an administrative law judge who concluded that the Respondent had not violated the Act as alleged because the General Counsel had not established that the Respondent's subcontracting decision was discriminatorily motivated. The Board adopted the judge's decision, but further concluded that even assuming that the General Counsel had met his burden of showing that antiunion animus was a motivating factor in the Respondent's decision to subcontract, the Respondent had established that it would have taken the same action even in the absence of union activity. Above at fn. 4. As set forth above, the Union filed a petition for review in the Ninth Circuit, which granted the petition and remanded the case to the Board for further proceedings. The court found that the Board's conclusions were "not supported by substantial evidence on the record as a whole." 463 F.3d at 924. The court's findings and conclusions are the law of the case.

Analysis

In finding that the Board erred in dismissing the Section 8(a)(3) and (1) allegations, the court applied *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied, 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). The court concluded that the General Counsel met his burden of showing that antiunion animus was a motivating factor in the Respondent's decision to subcontract out the work of the RC department, and that the Respondent failed to demonstrate that the same action would have taken place even in the absence of the protected conduct.

First, the court found "ample evidence that St. Vincent knew about the union activity in the hospital in general, and in the RC department in particular." 463 F.3d at 920.

Second, the court found that the "the timing of [the] decision raises an unmistakable inference of anti-union animus." *Id.* The court emphasized that the Respondent subcontracted out the RC department effective February 5, 2000, a month after the Union filed its petition for an election with the Board, and less than 2 weeks before the scheduled election. In addition, the decision to outsource operation of the RC department disenfranchised 25 percent of the eligible voters (95 percent of whom had already expressed their desire to join the Union). *Id.*

The court also found the timing of the decision to subcontract was "suspicious" because the management problems in the RC department existed for more than a decade before the Respondent decided to subcontract out the work, and there was "no obvious precipitating event for

the subcontracting decision other than the looming union election." *Id.* at 920–921.

Third, the court found that the Board had erred in relying on evidence that productivity in the RC department improved after the subcontracting, because such evidence is irrelevant. *Id.* at 921–922.

Fourth, the court found the Respondent's explanation for contracting out the entire department, rather than simply the managerial function, to lack plausibility. Although the Respondent claimed that outsourcing the RC management while continuing to directly employ the RC employees would create a "divided accountability" problem, the court found that the divided accountability problem was not alleviated by the ultimate subcontracting arrangement because, after the subcontracting, the RC department managers and employees were not directly employed by the same employer.⁴

In sum, based on the following findings, the court concluded that the General Counsel met his *Wright Line* burden: "(1) the General Counsel presented un rebutted evidence concerning St. Vincent's knowledge of union activity, (2) the timing of St. Vincent's decision to subcontract raised a compelling inference of anti-union animus, (3) the ALJ mistakenly relied on post-subcontracting evidence to establish the cause of the subcontracting decision, and (4) St. Vincent's business justification was unreliable, therefore raising the inference that its justification was merely a pretext for anti-union animus." *Id.* at 923.

Turning to the Respondent's affirmative defense, the court concluded that the Respondent did not meet its burden of showing that it would have taken the same action in the absence of the employees' union activity. The court rejected the Board's reliance on the Respondent's implementation of its subcontracting decision "within the 30-to-60 day timeframe it announced prior to the filing of the petition for a representation election." *Id.* at 923, quoting 338 NLRB 888 fn. 4. The court found that the Respondent's December 27, 1999 announcement did not establish that the Respondent would have subcontracted out the RC department when and as it did, in the absence of union activity. *Id.* at 924. The court further found that "St. Vincent's witnesses did not present a consistent or plausible explanation for why it was necessary to subcontract out the work of the entire RC department

⁴ Under the subcontracting arrangement, Total Rehab Care hired all the former St. Vincent managers, and it then contracted with California Respiratory Services to provide management services to the RC department. The RC therapists, on the other hand, worked directly for California Respiratory Services. As observed by the court, "[t]his arrangement did not place the RC therapists and the RC department managers in the same organization." *Id.* at 923.

in order to obtain better managers.” Id. The court therefore rejected the Respondent’s business justification and concluded that “the true motive for the subcontracting decision was anti-union animus.” Id.

Having accepted the court’s remand as the law of the case, the court’s findings and conclusions are necessarily binding upon us. We are therefore compelled to conclude that the Respondent violated Section 8(a)(3) and (1) by discharging the RC department employees and subcontracting out their work.

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 Respondent violated Section 8(a)(3) and (1) of the Act by discriminatorily subcontracting the work of the employees in the respiratory care department and by discharging those employees because they participated in union activity.

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

REMEDY

Having found that the Respondent violated Section 8(a)(3) and (1) of the Act by discriminatorily subcontracting the work of the employees in the respiratory care department and by discharging those employees, we shall order the Respondent to cease and desist from engaging in such unlawful conduct. We shall also order the Respondent to restore its respiratory care department as it existed on or before February 5, 2000.⁵ We shall order the Respondent to offer to its 27 unlawfully discharged respiratory care department employees full reinstatement to their former jobs, without prejudice to their seniority or other rights or privileges previously enjoyed, and to make them whole for any loss of earnings and benefits they may have sustained by reason of the Respondent’s unlawful conduct. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as provided in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). The Respondent will also be ordered to remove from its files any references to the subcontracting and the discriminatory discharges of

⁵ At the compliance stage of this proceeding, the Respondent may introduce evidence that was not available prior to the unfair labor practice hearing, if any, to demonstrate that resumption of an in-house respiratory care department would be unduly burdensome. *Reno Hilton*, 326 NLRB 1421 fn. 4 (1998), *enfd.* 196 F.3d 1275 (D.C. Cir. 1999); *Lear Siegler, Inc.*, 295 NLRB 857, 861–862 (1989).

its 27 respiratory care employees and to notify the discriminatees in writing that this has been done and that their discharges will not be used against them in any way.

ORDER

The National Labor Relations Board orders that the Respondent, St. Vincent Medical Center, a division of Catholic Healthcare West, Southern California, Los Angeles, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discriminating against its respiratory care employees by discharging them, discontinuing its respiratory care department, and contracting out their work because they supported the Union.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Reestablish and resume its respiratory care department as it existed prior to February 5, 2000.

(b) Within 14 days from the date of this Order, offer its unlawfully discharged respiratory care department employees full reinstatement to their former jobs, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(c) Make the discharged respiratory care employees whole for any loss of earnings and other benefits resulting from their discharge, in the manner set forth in the remedy section of this decision.

(d) Within 14 days from the date of this Order, remove from its files any references to the unlawful subcontracting or discharges of its respiratory care employees, and within 3 days thereafter, notify each of those employees in writing that this has been done and that their discharges will not be used against them in any way.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its facility in Los Angeles, California, copies of the attached notice marked “Appendix.”⁶ Copies of the notice,

⁶ 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 Na-

on forms provided by the Regional Director for Region 31, after being signed by the Respondent's authorized representative, shall be posted by the Respondent 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. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 5, 2000.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

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 Federal labor law and has ordered us to post and obey this notice.

tional 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."

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discriminate against our respiratory care employees by discharging them, discontinuing our respiratory care department, and contracting out their work because they supported the Union.

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 reestablish and resume our respiratory care department as it existed prior to February 5, 2000.

WE WILL, within 14 days from the date of the Board's Order, offer our unlawfully discharged respiratory care department employees full reinstatement to their former jobs, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make the discharged respiratory care employees whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any references to the unlawful subcontracting or discharges of our respiratory care employees, and WE WILL, within 3 days thereafter, notify each of those employees in writing that this has been done and that their discharges will not be used against them in any way.

ST. VINCENT MEDICAL CENTER, A DIVISION OF
CATHOLIC HEALTHCARE WEST, SOUTHERN
CALIFORNIA