Abbott-Northwestern Hospital *and* Hospital and Nursing Home Employees Union, Local No. 113, Service Employees International Union, AFL-CIO, CLC. Case 18-CA-6929

21 March 1985

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS HUNTER AND DENNIS

On 9 August 1982 Administrative Law Judge Sidney J. Barban issued the attached decision. The Respondent filed exceptions and a supporting brief.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

We do not agree with the judge's findings that the Respondent violated Section 8(a)(5) and (1) of the Act by withdrawing recognition from and refusing to bargain with the Union as the representative of psychiatric assistants employed at the Respondent's Northwestern Division, and unilaterally changing wages and other conditions of employment of such employees. The judge's decision is contrary to well-established unit scope principles because, in essence, it orders the Respondent to bargain in an inappropriate unit. Accordingly, we reverse the judge and dismiss the complaint.

This case was submitted to the judge on a stipulated record. The Respondent is a member of a multiemployer association—Health Manpower Management, Inc. (HMMI)—which has negotiated a series of collective-bargaining agreements with the Union covering about 4500 service and maintenance employees, including the Respondent's. These contracts are executed separately by each of HMMI's 22 member hospitals. Since the 1970 merger creating the Respondent, it has operated the Abbott Hospital and the Northwestern Hospital as separate divisions. Until the 2-year agreement signed in March 1979, the Respondent signed separate contracts with the Union for each division.

In August 1978, the Respondent and the Union, in anticipation of expansion of the Northwestern Division facility and consolidation thereof certain operations performed at each division, agreed that in the future there would be only one bargaining agreement covering employees at both of the Respondent's facilities. All job classifications were to be included in the new agreement, "except the psychiatric assistants classification at Abbott." Accordingly, the contract in effect at material times here refers specifically to psychiatric assistants employed at only five HMMI member locations, including the Respondent's Northwestern Division, but not its Abbott Division. The Union never has been recognized as the representative of psychiatric assistants at Abbott.

In November 1979—during the term of the relevant contract—the Respondent consolidated the mental health operations of both its divisions at the Northwestern Hospital location. As part of this consolidation, the Respondent transferred approximately 63 unrepresented psychiatric assistants from the Abbott Division facility to Northwestern, where about 9 represented psychiatric assistants were employed. Since that time, the merged staff of all psychiatric assistants has worked under common supervision and performed the same duties at the Northwestern location.

For about 9 months, the Respondent continued to apply its contract with the Union to the 9 psychiatric assistant positions which were identified with the Northwestern Division before the consolidation, and applied its nonrepresented employee policies to the 63 positions formerly located at Abbott. On 15 August 1980, however, the Respondent advised the Union that it no longer recognized the Union as the representative of any of the psychiatric assistants. Since that date, the Respondent has treated all psychiatric assistants as being unrepresented and has altered their terms and conditions of employment.

Both before and after the merger of the psychiatric assistants at Northwestern, the Respondent filed petitions for an election in a unit of all psychiatric assistants employed by it. The Regional Director dismissed both petitions on the grounds that no question concerning representation existed because the consolidation of the Abbott and Northwestern psychiatric assistants simply involved a change in work location, not duties, and no demand for recognition had been made. The Board denied the Respondent's request for review of both dismissals.[1]

The judge found, as alleged in the complaint, that an appropriate unit consists of all service and maintenance employees of the Respondent and other employer-members of HMMI, "including the psychiatric assistants employed by Respondent at its Northwestern facility."[2] The judge then con-

[1] None of the Board's current Members participated in those representation proceedings

[2] Member Hunter joins his colleagues in honoring the parties' stipulation as to the appropriateness of the multiemployer service and maintenance unit here and notes that he generally will accept unit stipulations in the health care field In so doing, he recognizes that acceptance of parties' unit stipulations fosters the statutory policy of encouraging the practice and procedure of collective bargaining, permits the expeditious resolution of questions concerning representation, and is consistent with Congress' concern that disruptions in health care institutions caused by initial organization activities be minimized He also recognizes, however, that a

Continued

cluded that "[s]ince Respondent has agreed to recognize the Union as the bargaining representative of all the psychiatric assistants at the Northwestern facility for the term of the bargaining agreement, under well-established principles of law, Respondent's actions violated the bargaining agreement and violated the Act. In the circumstances of this case, there is no reason to treat the 63 transferred psychiatric assistants any differently than new employees hired off the street."

In finding a violation, the judge effectively accreted the 63 Abbott psychiatric assistants into the group of 9 Northwestern psychiatric assistants, essentially finding that the Northwestern facility merely had been expanded. He did this, even though the complaint is limited to the Respondent's withdrawal of recognition in connection with the nine Northwestern employees.

Here, after a legitimate change in operations, the Respondent was faced with the problem of having to apply different terms and conditions of employment to a small portion of a larger group of employees, even though all of them performed the same tasks under common supervision at the same facility. The judge himself found that, despite the Respondent's attempts to differentiate among the employees, having represented and unrepresented psychiatric assistants working side-by-side "manifestly became unworkable." Nevertheless, the judge found appropriate a unit including some, but not all, of the employees working in the classification of psychiatric assistant.

In addition to mandating an impractical situation, the judge's finding is inconsistent with longstanding unit principles because it orders the Respondent to bargain in a unit which includes some of the psychiatric assistants and not others. In our view, no unit is appropriate with respect to the Respondent's psychiatric assistants which fails to include all of them.

Further, the 63 historically unrepresented psychiatric assistants cannot properly be found to have been accreted into the unit for several reasons. First, the General Counsel did not allege a withdrawal of recognition from the *merged* unit. Second, the previous split in the Respondent's operations between its Northwestern Division and its Abbott Division has been obliterated by the merger and therefore the Northwestern Division no longer exists for purposes of the contract provisions covering psychiatric assistants. Third, the parties executed an agreement, *in contemplation of the merger*, in which they specifically agreed that the 63 Abbott Division psychiatric assistants would not be represented by the Union. Lastly, the 1980–1982 revised contract for the service and maintenance unit dropped any reference to psychiatric assistants while the Union reserved only its position that it continued to represent the nine historically represented employees.

In sum, the judge erred by accreting the 63 unrepresented employees and in ordering the Respondent to bargain in an inappropriate unit. Accordingly, we shall dismiss the complaint inasmuch as the unit from which the Respondent withdrew recognition on a limited basis is inappropriate.[3]

ORDER

The complaint is dismissed.

stipulated unit may so substantially contravene the congressional admonition to avoid undue proliferation of units as to increase significantly the likelihood of disruption to health care Furthermore, there may be situations when the stipulation is derived from the mere convenience of the parties to the detriment of important rights and interests of the employees, or situations where the stipulation otherwise is contrary to the policies of the Act In all such circumstances Member Hunter will decline to honor the parties' stipulation because the public interest must outweigh the convenience of the private parties involved

In view of the findings below, Member Hunter finds it unnecessary to pass on the judge's conclusion that the multiemployer unit was appropriate

[3] Member Dennis finds it unnecessary to consider any accretion issue and relies solely on the inappropriate unit rationale

DECISION

Statement of the Case

Sidney J. Barban, Administrative Law Judge This matter was submitted to the Division of Judges on a stipulated record, dated March 10, 1982, and has been assigned to me for the issuance of a decision and other appropriate action. The complaint, which was issued June 30, 1981, based on a charge filed by the above-named Charging Party (the Union) on October 29, 1980, alleges that the Respondent violated Section 8(a)(1) and (5) of the National Labor Relations Act (the Act) since about August 15, 1980, by withdrawing recognition from and refusing to bargain with the Union as the bargaining representative of psychiatric assistants previously employed at Respondent's Northwestern Division, and unilaterally changing wages and other conditions of employment of such employees. The answer denies the unfair labor practices alleged.

On the entire record in this case, and after due consideration of the briefs filed by the General Counsel and the Respondent, I make the following

Findings and Conclusions

I. JURISDICTION

At all times material to this matter, Respondent has been and is engaged in the operation of hospitals located at Minneapolis, Minnesota. During a recent annual period, in the course of such operations, Respondent received gross revenues in excess of $250,000 and received

goods and materials at such facilities from directly outside the State of Minnesota of a value in excess of $50,000

Respondent admits and I find that Respondent is now, and has been at all times material herein 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.

Respondent admits and I find that the Union is now, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

II THE FACTS

A. *Background*

Prior to 1970, Abbott Hospital and Northwestern Hospital each operated a hospital and certain subsidiary facilities at two seperate locations in Minneapolis Following a corporate merger of these two in 1970, Respondent continued to operate the two hospitals and adjacent facilities as separate operating divisions, known as the Abbott Division and the Northwestern Division.

For a number of years, Respondent and its predecessor hospitals have been members of a multiemployer bargaining association, known as Health Manpower Management, Inc. (HMMI), which represents approximately 22 hospitals in the Minneapolis-St. Paul metropolitan area, for negotiation and administration of collective-bargaining agreements. It is stipulated that the members of HMMI constitute a multiemployer bargaining unit.

The Union has, for many years, represented nonprofessional (service and maintenance) employees of HMMI member hospitals in the multiemployer unit. This has been embodied in a series of collective-bargaining agreements, including one running from March 1, 1979, to February 28, 1981, covering the approximately 4500 employees in the aforesaid unit. These contracts are executed seperately by each member of HMMI Since the corporate merger in 1970, Respondent has executed seperate contracts, negotiated by HMMI for that unit, for each of its divisions

Although the employee classifications covered by the agreement at the various HMMI member hospital locations are substantially the same, a few variations have grown up during the years. Thus, the agreement for the term from March 1, 1979, to February 28, 1981, refers specifically to psychiatric assistants at only five HMMI member locations, including Respondent's Northwestern Division, but not its Abbott Division.

B. *Bargaining for Psychiatric Assistants Employed by Respondent*

The Union has never been recognized as representing psychiatric assistants employed by Respondent at Respondent's Abbott Division.

In November 1974, the job classification of psychiatric assistant was established at Respondent and the Union agreed to include this classification in the multiemployer contract between the parties covering nonprofessional (service and maintenance) employees at Respondent's Northwestern Division Subsequent bargaining agreements negotiated by HMMI with the Union covered the psychiatric assistants employed at the Northwestern Division, but not at the Abbott Division

On August 7, 1978, Respondent and the Union, in anticipation of the completion of remodeling the expansion of facilities at Respondent's Northwestern Division, which would allow consolidation of certain operations formerly performed separately at each of the two divisions, agreed that henceforth there would be only one bargaining agreement covering unit employees at Respondent's operations, with the understanding that all job classifications, whether common to both previous agreements, or not common to both previous agreements, would be included in the new agreement, "except the psychiatric assistants classification at Abbott. Psychiatric assistants currently at Northwestern are included" in the coverage of the agreement (p 4, par. 11 of the stipulation) The agreement negotiated by HMMI, effective from March 1, 1979, to February 29, 1981, executed on May 2, 1979, specifically provides for coverage of psychiatric assistants at only "Abbott-Northwestern Hospital/Northwestern Division," and four other hospitals, not including the Abbott Division.

Among the operations which Respondents planned to consolidate at the expanded Northwestern Hospital location was the mental health operations of both its divisions, including the transfer of its psychiatric assistants employed at the Abbott Division to work alongside the psychiatric asistants employed at the Northwestern Division facility In November 1979, Respondent transferred approximately 63 psychiatric assistants who had been employed at Respondent's Abbott Division to the facility at its Northwestern Division where approximately nine psychiatric assistants were employed [1] The merged staff of all psychiatric assistants since that time has worked under common supervision and performed the same basic duties and functions at the same location.

From the time that the staffs of psychiatric assistants were consolidated (in November 1979) until August 15, 1980, Respondent attempted to apply its contract with the Union to the nine positions which were identified with the Northwestern Division before the consolidation, and to apply its policies applicable to nonrepresented employees ("non-contract policies") to the 63 positions formerly identified with the Abbott Division These non-contract policies were substantially different from those contained in the union contract at the time of the consolidation, especially with respect to salary schedule, fringe benefits, layoff policy, and job posting

The staffing of psychiatric assistants in Respondent's mental health unit has always been based on a combination of full-time and part-time positions Hours of the part-time staff vary depending on employee desires and staffing needs. At various times from November 1979 through August 15, 1980, when vacancies occurred due either to employee turnover or to the need for additional staff, psychiatric assistants were transferred among posi-

[1] The distance between the Abbott Division and the Northwestern Division is not stated in the stipulation of facts, but in Exh R (the Regional Director's decision dismissing Case 18-RM-1081, discussed hereinafter) it is stated that the distance of the transfer from one facility to the other was 1-1/2 miles

tions asserted to be represented by the Union and positions asserted not to be represented. During this period, both the number of hours and the number of positions fluctuated within the group of psychiatric assistants asserted to be represented by the Union and those allegedly not represented

> This is to advise you that, effective immediately, the hospital is declining to recognize Local 113 as the bargaining representative of any of the psychiatric assistants or mental health counselors employed by Abbott-Northwestern hospital.

Since August 15, the Respondent has treated all psychiatric assistants as being unrepresented and has granted wage increases to some or all of them and otherwise changed their conditions of employment without regard to whether they were formerly employed at the Northwestern Division, where psychiatric assistants were represented by the Union, or at the Abbott Division, where they were not

A new bargaining agreement between Respondent and the Union, negotiated by HMMI pursuant to a wage reopening provision of the prior contract was executed for the term from March 1, 1980, to March 1, 1982 Although the new contract does not specifically cover the classification of psychiatric assistants, it was agreed by the Respondent and the Union that execution of the new agreement by the Union did not constitute a waiver of its claim that it still represents the nine psychiatric assistants formerly employed at the Northwestern Division Respondent and the Union further agreed that the dispute over the psychiatric assistants would be left to the Board for its resolution when disposing of the instant matter.

C. *Prior Proceedings Before the Board*

Prior to the actual merger of the Abbott psychiatric assistants and the Northwestern psychiatric assistants at the expanded Northwestern facilities, Respondent, on May 9, 1979, filed a petition for an election in a proposed unit of all psychiatric assistants employed by Respondent, excluding supervisors and all other employees (Case 18-RM-1059). The petition was dismissed by the Regional Director on May 31, 1979, on the ground that the petition failed to raise a question concerning representation in the established multiemployer service and maintenance unit and because the consolidation and expansion of the Respondent's facilities involved only a change in and expansion of work location, and not a change in work duties of the psychiatric assistants. Respondent filed a request for review, which, on September 11, 1979, was denied by the Board solely on the ground that no demand for recognition for the employees involved had been made and no question concerning representation existed.

On November 23, 1979, after the psychiatric assistants from both of Respondent's divisions had been merged and were working side by side, Respondent filed a second petition for an election among Respondent's psychiatric assistants (Case 18-RM-1083) That petition was dismissed by the Regional Director on November 30, 1979, on the grounds that.

> It does not appear that the Employer's petition herein raises a question concerning representation in the established service and maintenance employee bargaining unit or that the Employer has suffficient objective considerations to support its petition, since the consolidation and expansion of the Abbott-Northwestern facilities involves only a change in and expansion of work location and not a change in work duties of the psychiatric assistants. Further, it appears that the relocation involves the addition of only 63 unrepresented psychiatric assistants to a unit of 4,500 service and maintenance employees, and that there has been no demand for recognition for the employees in the unit involved in the petition.

On December 12, 1979, Respondent filed a request for review of the Regional Director's dismissal of the petition in Case 18-RM-1081. The Board sustained the Regional Director's dismissal, stating:

> The Board agrees with the Director that the Union's claim of accretion of the Employer-Petitioners unrepresented psychiatric assistants to the existing multiemployer service and maintenance unit does not raise a question concerning representation within the single employer unit within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act. See *United Hospitals, Incorporated and Children's Hospital, Inc*, 249 NLRB No. 63 (1980).

There was also a petition filed by an individual, on November 9, 1979, seeking to decertify the psychiatric assistants employed by Respondent at its Northwestern Division facility (Case 18-RD-964). This petition was dismissed by the Regional Director on November 30, 1979. The petitioner did not request a review of the Regional Director's decision.

D. *The Appropriate Unit*

Based on the record as a whole, and in particular the collective-bargaining agreement in effect at times material to this proceeding, I find, essentially as alleged in the complaint, that the following unit is an appropriate unit for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All non-professional (service and maintenance) employees employed by Respondent and other employer—members of HMMI, parties to the multiemployer contract negotiated by that organization with the Union for such employees, including the psychiatric assistants employed by Respondent at its Northwestern facility.

In its brief (p 8), Respondent asserts that "[w]hile [the General Counsel] alleges the appropriateness of a unit including 'psychiatric assistants employed at Respondent's Northwestern facility,' the facts are undisputed that such facility no longer existed after completion of the consolidation." However, to the contrary, according to the stipulation, the only change in the Northwestern facility affecting the psychiatric assistants was the addition of two

floors to the building in which they worked, and the transfer of 63 psychiatric assistants to that location The collective-bargaining agreement, executed May 2, 1979, clearly applied to the Northwestern facility, and the psychiatric assistants employed at that location

III. ANALYSIS AND CONCLUSION

In spite of the apparent complexity of this matter, the essential facts may be summarized as follows. The Union has been recognized as the bargaining representative of Respondent's nonprofessional service and maintenance employees, including psychiatric assistants, at Respondent's Northwestern facility for some time, as evidenced by several multiemployer collective-bargaining agreements to which Respondent and the Union are parties. These agreements cover maintenance service and personnel at a large number of seperate facilities operated by various employees in the Minneapolis-St Paul area (but not necessarily psychiatric assistants at all locations) [2]

In November 1979, at a time when approximately 9 psychiatric assistants were employed at the Northwestern facilities, and clearly covered by the bargaining agreement (sometimes hereinafter referred to as "the original psychiatric assistants"), Respondent transferred approximately 63 psychiatric assistants who had previously been unrepresented (sometimes referred to as "the transferred psychiatric assistants") from its Abbott facilities to its Northwestern facilites. From this point on, the transferred psychiatric assistants and the original psychiatric assistants worked side by side, performing basically the same kind of work, under the same supervision.

For a short time, Respondent attempted to continue to apply the terms of the bargaining agreement to the 9 original psychiatric assistants, but applied different, nonconduct terms and conditions to the 63 transferred psychiatric assistants at the Northwestern facilities. The situation manifestly became unworkable. In about 3-1/2 months, Respondent notified the Union that it would no longer recognize the Union as the bargaining representative of any of the psychiatric assistants employed at its Northwestern facilities

Since Respondent has agreed to recognize the Union as the bargaining representative of all the psychiatric assistants at the Northwestern facility for the term of the bargaining agreement, under well-established principles of law, Respondent's action violated the bargaining agreement and violated the Act. In the circumstances of this case, there is no reason to treat the 63 transferred psychiatric assistants any differently than new employees hired off the street.

However, this case seems to have been presented on a more limited basis. Thus, though the Union's original charge claimed that Respondent was obligated by the bargaining agreement to recognize the Union as the representative of all the psychiatric assistants at the Northwestern facilities, the Union was later induced to amend the charge to exclude the 63 psychiatric assistants. Though the General Counsel's complaint alleges that all psychiatric assistants at Northwestern are included in the unit, the complaint alleges only that Respondent violated the Act by withdrawing recognition from and refusing to bargain with the Union as the representative of the nine original psychiatric assistants, and unilaterally changing the working conditions of those employees.[3]

This presents a problem Thus, Respondent argues that since the General Counsel claims that it is obligated to recognize the Union for only part of a classification (psychiatric assistants) working at the same location, therefore there "is no conceivable way that the psychiatric assistants formerly employed at the Northwestern Division can be deemed to be an appropriate unit, either separately or as part of a broader unit (Br. 8),[4] and in the absence of an appropriate unit *Mine Workers (Jones & Laughlin Steel Corp.)*, 83 NLRB 916 (1949).

However, the complaint alleges, as I have found, an appropriate unit "including psychiatric assistants employed at Respondent's Northwestern facility," and it is clear that at times when the bargaining contract in effect covered that unit, Respondent refused to recognize and bargain with the Union for psychiatric assistants in that appropriate unit, refused and failed to apply terms and conditions of the contract to their working conditions, and unilaterally altered their working conditions. In the circumstances of this case, I therefore find that Respondent thereby violated Section 8(a)(5) and (1) of the Act.

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 and a health care institution within the meaning of Section 2(14) of the Act.

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

3 At all times material to this proceeding, the Union has been the exclusive bargaining representative within the meaning of Section 9(a) of the Act, of all the employees in the unit set forth below, which is an appropriate unit for collective bargaining within the meaning of Section 9(b) of the Act.

> All non-professional (service and maintenance) employees employed by Respondent and other employer-members of Health Manpower Management, Inc., parties to the multi-employer contract negotiated by that organization with the Union for such employees, including the psychiatric assistants em-

[2] The agreement in effect at the times material herein specifically refers to psychiatric assistants at five seperate locations, including the Northwestern facility There is no showing that psychiatric assistants are employed at any of the other facilities covered by the agreement except at Respondent's Abbott facilities, where the psychiatric assistants were *not* covered by the agreement

[3] In the stipulation of facts (made after the issuance of the complaint), it is stated that by entering into a new bargaining agreement with Respondent, the Union did not waive "its claim that it still represents the nine psychiatric assistants formerly employed at the Northwestern [facility]"

[4] See, e g, *Trustees of the University of Pennsylvania*, 247 NLRB 970 at 972 (1980), where the Board held "[V]oluntary recognition of an arbitrary grouping of service and maintenance employees is not sufficient justification for splintering employees who have a common community of interest, evidenced by [common working conditions], and, in many instances, by the performance of similar duties" But cf *St. Rose de Lima Hospital*, 233 NLRB 1511 (1976).

ployed by Respondent at its Northwestern Division facility.

4 By withdrawing recognition from and refusing to recognize the Union as the exclusive bargaining representative of its psychiatric assistants employed at its Northwestern facility, by failing and refusing to apply the terms of its collective-bargaining contract with the Union to its psychiatric assistants employed at that facility, and by unilaterally altering the terms and conditions of employment of such employees, Respondent violated Section 8(a)(5) and (1) of the Act, which unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act

THE REMEDY

Having found that the Respondent has engaged in unfair labor practices in violation of the Act, it will be recommended that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act

It having been found that Respondent violated the Act by failing and refusing to recognize and bargain with the Union as the exclusive bargaining representative of its psychiatric assistants at its Northwestern Division facility, by failing and refusing to apply the terms and conditions of its collective-bargaining agreement with the Union to such employee, and by unilaterally altering the working conditions of such employees, it will be recommended that Respondent be ordered to (1) recognize and bargain with the Union as the exclusive representative of the employees in the appropriate unit found hereinabove, including the psychiatric assistants employed at Respondent's Northwestern Division, (2) apply the terms and conditions of the bargaining agreement with the Union then in effect to the employees in the appropriate unit, including the psychiatric assistants employed at Respondent's Northwestern Division, and (3) make the psychiatric assistants employed at Respondent's Northwestern Division whole for any loss of wages or other benefits or conditions which they may have suffered by reason of Respondent's unfair labor practices found above with interest thereon as prescribed by the Board in *Florida Steel Corp.*, 231 NLRB 651 (1977). See also *Isis Plumbing Co.*, 138 NLRB 716 (1962) [5]

[Recommended Order omitted from publication.]

[5] No portion of the Order is intended to require Respondent to withdraw any benefit or improvements heretofore granted