1115, Nursing Home and Hospital Employees Union, A Division of 1115 Joint Board *and* Smithtown General Hospital. Case 29–CB–4427

26 April 1985

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS HUNTER AND DENNIS

On 22 July 1982 Administrative Law Judge Thomas T. Trunkes issued the attached decision. The Respondent filed exceptions and a supporting brief and the General Counsel filed cross-exceptions and a supporting brief.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.

We agree with the judge that the Respondent violated Section 8(b)(1)(A) of the Act when it filed a petition in court to confirm the arbitrator's award.[1] The Respondent argues that the award[2] is not clearly repugnant to the Act and that we should defer to the arbitrator's decision, citing *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955).

As discussed in greater detail in the judge's decision, it is well settled that assistance by supervisors in obtaining union authorization cards renders the cards so tainted as to remove them as the basis for claiming majority support. It is also clear that an employer does not violate Section 8(a)(5) of the Act by refusing to recognize a union which bases its majority on tainted cards. The judge found that, with the exception of employees in the Hospital's x-ray and maintenance departments, the authorization cards signed by employees were tainted because of supervisory solicitation.

In agreeing with the judge that the Respondent violated Section 8(b)(1)(A) of the Act by seeking to confirm that portion of the arbitrator's award based on tainted authorization cards, we note that under *Olin Corp.*, 268 NLRB 573 (1984), we would not defer to that part of the award regarding the tainted card groups inasmuch as the decision of the arbitrator is palpably wrong and not susceptible to an interpretation consistent with the Act. We therefore find, in agreement with the judge, that the Respondent's petition to confirm the arbitrator's award with regard to the tainted card groups violates Section 8(b)(1)(A) as it seeks to achieve a prohibited objective and lacks a reasonable basis in fact and law. *Bill Johnson's Restaurant v. NLRB*, 461 U.S. 731 (1983). See also *Longshoremen ILWU Local 32 (Weyerhaeuser Co.)*, 271 NLRB 759 (1984).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, 1115, Nursing Home and Hospital Employees Union, a Division of 1115 Joint Board, its officers, agents, and representatives, shall take the action set forth in the Order.

DECISION

STATEMENT OF THE CASE

THOMAS T. TRUNKES, Administrative Law Judge. The above proceeding was heard in Brooklyn, New York, on March 1, 1982, on charges filed on January 8, 1981, by Smithtown General Hospital (the Charging Party or the Hospital) and a complaint issued thereon on February 19, 1981, pursuant to Section 10(b) of the National Labor Relations Act (the Act) which alleges that 1115, Nursing Home and Hospital Employees Union, a Division of 1115 Joint Board[1] (Respondent or the Union) violated Section 8(b)(1)(A) and (2) of the Act by filing a petition in the Supreme Court of the State of New York to confirm an award of an arbitrator notwithstanding the fact that Respondent has not represented an uncoerced majority of certain employee categories, including x-ray and nuclear medicine employees, pharmacists and pharmacy employees, medical records employees, dietician employees, and maintenance employees.

All parties were represented at, and participated at, the hearing and had full opportunity to adduce evidence, to examine and cross-examine witnesses, to file briefs, and to present oral argument.[2] The principal issues presented in this matter are the following:

1. Whether Section 10(b) of the Act is a bar to the instant proceeding.

2. Whether the arbitrator's award to which Respondent has filed for court enforcement is clearly repugnant to the purposes and policies of the Act.

On the entire record, including the joint exhibits introduced by the parties,[3] and after due consideration of the briefs filed by Respondent and the General Counsel, I make the following

[1] The petition was filed by the Respondent in the Supreme Court of the State of New York, County of New York, on 10 December 1980

[2] Briefly summarized, the award determined that the Respondent had gained majority support of the employees in several previously unrepresented departments of Smithtown General Hospital The Hospital was directed to recognize the Respondent as the exclusive representative for purposes of collective bargaining for employees in the Hospital's x-ray and nuclear medicine, pharmacy, medical records, dietary and laboratory, housekeeping, dietician, and maintenance departments

[1] Amended at the hearing by the General Counsel on representation by counsel for Respondent that this is the proper name of Respondent

[2] All parties waived oral argument The General Counsel and Respondent filed extremely helpful briefs

[3] No oral testimony was presented by any of the parties

FINDINGS OF FACT

I. JURISDICTION

The complaint alleges, Respondent admits, and I find that Smithtown General Hospital, located in Smithtown, Suffolk County, New York, provides health care and related services. During the past year, the Hospital derived gross revenues in excess of $500,000, and made purchases in excess of $50,000 directly from firms located outside the State of New York. Accordingly, it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION

Respondent admits, and I find, that it is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*[4]

Since at least 1975, the Hospital has recognized Respondent as the representative of several groups of employees. A collective-bargaining agreement entered into between the parties contains a proviso as follows:

> 1. BARGAINING UNIT
>
> B. Any additional classifications not presently covered shall become part of this Agreement when the Union represents a majority within such classifications and shall be subject to separate negotiations between the parties. The result of such negotiations shall be attached as an appendix to this Agreement. The parties agree that the determination of whether the Union does in fact represent a majority shall be determined in accordance with the arbitration procedures of this Agreement.

The agreement also contains a union-security clause.

In 1978, the Hospital experienced severe financial difficulties. Fearing salary cuts and/or job eliminations, various members of the Hospital's supervisory staff joined the Union with the object of protecting their jobs. Thereafter, supervisory employees solicited union-authorization cards from nonsupervisory employees of unrepresented units, including x-ray and nuclear medicine employees, pharmacists and pharmacy employees, medical records employees, dietary and laboratory employees, housekeeping employees, dietician employees, and maintenance employees.

Upon becoming aware of the union activity of its employees, the Hospital assured the supervisors that there would be no salary cuts or job eliminations, and urged them to rescind their cards, which was done. The Hospital further addressed the employees of the various departments, through various supervisors, and urged them likewise to rescind their cards.

The only department which failed to rescind their union-authorization cards was the x-ray department.

Meanwhile, prior to receiving notice of the card rescissions, the Union, having obtained union-authorization cards from a majority of employees in each of the classifications listed, supra, demanded recognition and bargaining. The Hospital refused to recognize the Union until such time as the Union was certified by the Board, following a secret-ballot election.

Thereafter, in chronological order, the following occurred.

September 12, 1978—The Union invoked the arbitration procedures of the collective-bargaining agreement, asserting violations by the Hospital of Section 1(B) of the agreement, listed supra.

October 1978—Four days of hearings were held before the arbitrator.

October 17 and November 30, 1978—The Union filed charges against the Hospital with the Board.

December 15, 1978—An arbitrator's award granted the Union the status as the exclusive collective-bargaining representative of the employees in the classifications listed, supra issued

August 2, 1979—The Union invoked the arbitration's provisions of the agreement based on the Hospital's refusal to recognize and bargain with the Union for the employees in the classifications listed supra

August and September 1979—An NLRB hearing before Administrative Law Judge Karl H. Buschmann was conducted.

October and November 1979—The arbitrator conducted a hearing based on the Union's invocation of the arbitration provision of the agreement on August 2.

December 27, 1979—An arbitrator's award issued, providing specific terms and conditions for the disputed employees

February 13, 1980—A modification of the December 27, 1979 award issued.

December 8, 1980—The Union filed a petition in the Supreme Court, State of New York, to confirm the arbitrator's award issued on December 27, 1979.

December 23, 1980—The Hospital removed said proceedings to the U S. District Court, Southern District, New York.

December 31, 1980—Judge Buschmann's decision issued, finding the Hospital in violation of Section 8(a)(1) and (2) of the Act.[5] In his decision, Judge Buschmann stated in the remedy provision the following:

> Having found that Respondent engaged in unfair labor practices in violation of Section 8(a)(1) and (2) of the Act, I recommend that Respondent be ordered to cease and desist from its unlawful practices. I further recommend that Respondent be ordered to post an appropriate notice and take affirmative action in order to effectuate the policies of the Act.
>
> With respect to the violation of Section 8(a)(2) of the Act, I recommend that the Board issue only a

[4] As Respondent suggested in its brief, no factual dispute exists The facts, as summarized, are a compendium excerpted and culled from briefs of the General Counsel and Respondent, the decision and recommended Order of Administrative Law Judge Karl H Buschmann, JD–752–80. issued December 31, 1980 (the ALJ decision), and various exhibits received into evidence

[5] "By encouraging and urging its employees to join the Union, attend union meetings and to sign cards"

standard cease-and-desist order. The record indicates that Respondent, by its supervisors, initially encouraged the employees to join the Union. Upon Powers' return, however, the Respondent's actions were reversed to the extent that employees were unlawfully encouraged to rescind their union affiliation. Whatever benefits the Union may have derived from Respondent's initial misconduct were certainly extinguished by Respondent's subsequent misconduct. Local 1115 can, therefore, not be considered an assisted union. Accordingly, this order is intended to reflect that the existing bargaining relationship between the Union and the Hospital not be disturbed by this order, except to the extent of prohibiting any future misconduct.

January 8, 1981—The instant charge was filed

March 4, 1981—In the absence of exceptions, the Board adopted the decision and recommended Order of Judge Buschmann.

B. *Analysis and Decision*

1. The 10(b) issue

Respondent contends that whatever violation may have been committed by Respondent took place more than 6 months prior to the filing of the charge in the instant case, and thus is a bar to the finding of a violation.[6]

The complaint alleges that the filing of a petition in court to confirm an arbitrator's award is the basis for issuance of the complaint.

The record is clear that the filing of the petition occurred on December 8, 1980, and the charge was filed on January 8, 1981.

Accordingly, I find that the Charging Party has met the requirements of Section 10(b), and the General Counsel was not precluded from issuing the instant complaint.

2. The ALJ decision of December 31, 1980

Before any violation of the Act may be found, it is necessary to interpret the meaning of the Judge Buschmann remedial Order in the *Smithtown Hospital* case. (The ALJ decision of December 31, 1980.)

Respondent argues that as it did not engage in any future misconduct, the Board is bound by the ALJ decision which it affirmed.

A literal interpretation of the remedy provision appears to support Respondent's position However, a literal interpretation of the provision is not justifiable under the circumstances.

The judge stated that his order "is intended to reflect that the existing bargaining relationship between the Union and the Hospital not be disturbed by this order, except to the extent of prohibiting any future misconduct." Accordingly, no disestablishment provision was issued.

The record contains no evidence that the "existing relationship" between the Union and the Hospital, i.e., its contractual relationship since 1975, is illegal in any manner. I therefore must conclude that their relationship meets all the requirements of Board law. Thus, whatever violations occurred in 1978 did not void the contractual relationship between the parties which came into existence 3 years earlier, and continues to the present time.

What Judge Buschmann did find was a violation of Section 8(a)(2) of the Act by virtue of supervisory employees of the Hospital encouraging their employees to join the Union. It was this misconduct to which Judge Buschman referred when he stated, "Whatever benefits the Union may have derived from Respondent's initial misconduct were certainly extinguished by Respondent's subsequent misconduct."

It is well settled that the assistance by supervisors in obtaining union-authorization cards for a union renders the cards so tainted as to remove them as the basis for claiming majority support [7]

Although not specifically stated by Judge Buschmann, I find that the cards solicited by the Hospital supervisors are tainted, so that they could not be used *in the future* as a basis for claiming majority support.

3. The arbitrator's award of December 15, 1978

The record is clear that the Union invoked its collective-bargaining agreement in applying for a ruling by an arbitrator with respect to its majority status The record is also clear that the arbitrator awarded exclusive representative status to the Union based on the same cards which Judge Buschmann found, by inference, to be tainted. It is well settled that tainted cards are not counted in determining majority status, and an employer does not violate Section 8(a)(5) of the Act by refusing to recognize a union which bases its majority on said cards [8]

Nevertheless, the arbitrator, although acknowledging the supervisor's participation in organizational activity for the Union, accepted the cards as evidence of majority support.

In *Spielberg*,[9] the Board listed three requirements under which it would defer to an arbitrator's ruling. (1) the proceedings must have been fair and regular; (2) all parties must have agreed to be bound; and (3) the decision of the arbitrator must not be clearly repugnant to the Act.

I find that the third provision has not been complied with in this case. As the cards relied on by the Union were tainted, they cannot be used to support a majority claim. As the General Counsel indicated in her brief, the tainted cards can be expunged by reaffirmation by employees who executed the cards. The record is bare of any evidence to indicate that this event occurred. On the contrary, the evidence reveals that the Union made its demand for recognition on September 11, 1978, based on union-authorization cards acquired through supervisory assistance prior to that date: cards which, by inference, are tainted. By accepting these cards as the basis for majority support, the arbitrator ignored Board precedent in

[6] Sec 10(b) of the Act provides in part " no complaint shall issue based on any unfair labor practice occurring more than six months prior to the filing of the charge with the Board "

[7] *Professional Ambulance Service*, 232 NLRB 1141, 1150 (1977), (with cases cited), *Steele Apparel Co*, 172 NLRB 903 (1968)

[8] *Insular Chemical Corp*, 128 NLRB 93, 98 (1960)

[9] *Spielberg Mfg Co*, 112 NLRB 1080 (1955)

making his award. Accordingly, I reject Respondent's argument that the Board defer to the arbitrator's award in the instant case, and further find that the award is repugnant to the policies of the Act.

4. The Union's petition for court enforcement

The record reveals that following the arbitrator's award of December 15, 1978, in which he found the Union to be the collective-bargaining representative of the disputed group of employees, the Hospital refused to abide by the award. Rather than seek court enforcement, the Union returned to the arbitrator who issued a second award on December 27, 1979,[10] based on the decision in his first award. When the Hospital again refused to comply with the award, the Union petitioned the court on December 8, 1980, for confirmation. It is this petition which the General Counsel contends constitutes a violation of the Act. I find merit in the General Counsel's position.

Respondent contends that the "Board should accommodate its enforcement of the Act to the right of all persons to litigate their claims in court, rather than condemn the exercise of such right as an unfair labor practice," as stated by the Board in *Clyde Taylor Co.*, 127 NLRB 103, 109 (1960).

However, as the General Counsel argues, the Board has deviated from the *Taylor* decision in instances where a lawsuit has been filed by a party in pursuit of an unlawful object, and has found that the filing of the lawsuit violates the Act in those cases.[11]

Respondent contends that the Union's "action in proceeding to confirm the award was in good faith and there is no allegation that it is not in good faith or improperly motivated." It further argues that, "Proof of bad faith is the essence of such a charge which is not alleged or shown here."

I find no merit in Respondent's contention The Board, in addressing this question, stated in a recent decision:[12]

> We agree with the Administrative Law Judge's finding that the Union's action in filing a suit to enforce an unlawful union-security clause violated Sec. 8(b)(1)(A) of the Act—not because of the Union's subjective intent but because of the unlawful objective sought by the Union

As I have found that the objective sought by the Union is unlawful, it follows that the filing of the petition for enforcement of the arbitrator's award in the instant case is a per se violation of Section 8(b)(1)(A) of the Act, and motivation or subjective good faith has no bearing in determination whether or not a violation exists.

Respondent raises several affirmative defenses most of which have been adequately answered. With respect to the fourth affirmative defense,[13] Respondent appears to have abandoned this defense in the first footnote of its brief which states:

> The parties have agreed to ask the Court to hold the confirmation proceedings in abeyance pending resolution of the Board case The parties stipulated to be bound by the National Labor Relations Board decision in the confirmation proceedings.

Thus, no further response by this court is required.

Although not a defense per se, Respondent presents an interesting argument in its brief. It claims, "by no stretch of the imagination could the General Counsel's complaint go towards the union's representation of at least two groups since no taint has been shown to exist."[14]

I find merit in Respondent's contention It is well settled that although tainted cards will not be counted to prove a union majority, it does not follow that other valid cards obtained by a union are not counted. On the contrary, cards legitimately obtained are counted in issues respecting majority representation[15]

The judge's decision reveals that certain supervisors in specific units solicited cards from their subordinate employees. Nothing is mentioned of supervisory solicitation in either the "X-ray" or "Maintenance" groups. In his decision, the judge found that, "The only department which did not rescind their cards following these meetings[16] was the x-ray department."

It is noted that the judge found the meetings to constitute 8(a)(1) activity. Thus, assuming that the maintenance department employees rescinded their union-authorization cards, it was as a result of the Hospital's coercive action

As there was no finding that the cards obtained by maintenance and x-ray department employees were tainted, the arbitrator's award relating to these two groups did meet the *Spielberg* criteria in all respects. Thus, the seeking of enforcement by petitioning the court regarding these two groups did not constitute a violation of the Act. This is a simple matter of separating the "wheat from the chaff." The Union acted in good faith. It has obtained an uncoerced majority in these two units, and as the collective-bargaining agreement provides for inclusion of units where the Union obtains an uncoerced majority, there is no reason why the finding of the arbitrator with respect to these two specified units should be disturbed. Accordingly, I find no violation by Respondent in seeking to enforce the arbitrator's award with respect to either the x-ray or the maintenance department employees.

5. The 8(b)(2) violation

In addition to finding a violation of Section 8(b)(1)(A) of the Act, as the collective-bargaining agreement con-

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[10] Later modified on February 13, 1980

[11] *Service Employees Local 680 (Leland Stanford Junior University)*, 232 NLRB 326, 331 (1977). with cases cited

[12] *Television Wisconsin, Inc*, 244 NLRB 722 fn 2 (1976)

[13] Respondent's fourth affirmative defense states

> No remedy is available in this proceeding since this matter is presently before the Courts on a motion to confirm an arbitrator's award and such defense as may be available to the award must be pursued in Court

[14] Referring to the x-ray and maintenance groups

[15] Cf *Tributani's Detective Agency*, 233 NLRB 1121, 1123 (1977)

[16] Referring to meetings of the Hospital administrator with "the employees of several departments"

tains a union-security clause, I find that the *attempt* of Respondent to enforce the arbitrator's award, which, if successful, would include the affected employees in the agreement, violated Section 8(b)(2) of the Act. Although the execution of the agreement by the parties was never consummated, principally because the Hospital has resisted strenuously the Union's efforts, Section 8(b)(2) clearly states, in part:

> It shall be an unfair labor practice for a labor organization or its agents—
>
> (2) to cause or *attempt to cause*[17] an employer to discriminate . . .

The Board has held an attempt to cause to constitute a violation of Section 8(b)(1)(A) and (2) of the Act.[18]

IV. THE REMEDY

Having found, as set forth above, that Respondent has engaged in certain unfair labor practices, it is recommended that it cease and desist therefrom and take certain affirmative action, set forth below, necessary to effectuate the policies of the Act.

CONCLUSIONS OF LAW

1. Smithtown General Hospital is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act
2. Respondent 1115, Nursing Home and Hospital Employees Union, a Division of 1115 Joint Board is a labor organization within the meaning of Section 2(5) of the Act.
3. By instituting and maintaining a lawsuit against Smithtown General Hospital with an object of compelling said Hospital to comply with an award of an arbitrator who applied a collective-bargaining agreement which contains a union-security clause to pharmacists and pharmacy employees, medical records employees, and dietician employees at a time that Respondent did not represent an uncoerced majority of said employees, Respondent has engaged in unfair labor practices within the meaning of Section 8(b)(1)(A) and (2) of the Act

On the basis of the foregoing findings of fact and conclusions of law, and the entire record, I recommend the issuance of the following[19]

ORDER

The Respondent, 1115 Nursing Home and Hospital Employees Union, a Division of 1115 Joint Board, its officers, agents, and representatives shall

1. Cease and desist from

(a) Instituting and maintaining a lawsuit against Smithtown General Hospital where an object of the suit is to compel said Hospital to comply with an award of an arbitrator which has applied a collective-bargaining agreement containing a union-security clause to pharmacists and pharmacy employees, medical records employees, and dietician employees, at a time when Respondent does not represent an uncoerced majority of said employees.

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

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

(a) Amend its lawsuit filed aginst Smithtown General Hospital on or about December 10, 1980, seeking enforcement of the arbitrator's award described above in 1(a).

(b) Post at its office copies of the attached notice marked "Appendix."[20] Copies of said notice, on forms provided by the Regional Director for Region 29, after being signed by Respondent's authorized representaive, shall be posted by it immediately upon receipt and maintained for 60 consecutive days, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(c) Deliver to the Regional Director for Region 29 signed copies of said notice in sufficient number to be posted by Smithtown General Hospital, the Employer willing, in all places where notices to employees are customarily posted.

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

[17] Emphasis added

[18] See *Cal-Fin*, 217 NLRB 871, 875 (1975)

[19] 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

[20] 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 MEMBERS
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 institute or maintain a lawsuit against Smithtown General Hospital where an object of the suit is to compel said Hospital to comply with an award of an arbitrator which applies a collective-bargaining agreement containing a union-security clause to pharmacists and pharmacy employees, medical records employees, dietician employees, and any other employees at a time when we do not represent an uncoerced majority of said employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the

rights guaranteed them by Section 7 of the National Labor Relations Act, as amended.

WE WILL amend our lawsuit filed against Smithtown General Hospital on or about December 10, 1980, seeking enforcement of an arbitrator's award which has applied a collective-bargaining agreement containing a union-security clause to pharmacists and pharmacy employees, medical records employees, and dietician employees, an uncoerced majority of whom are not represented by us.

1115, NURSING HOME AND HOSPITAL EMPLOYEES UNION, A DIVISION OF 1115 JOINT BOARD