United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: October 27, 2005

TO : Dorothy D. Moore-Duncan, Regional Director
Region 4

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Lourdes Medical Center
of Burlington County
Cases 4-CA-32472 240-3333-8700
4-CA-32636 240-3367-5076
4-CA-33290 524-8372-7500
530-6033-7056
530-6083-0125
530-8045-3700
530-8045-6200
530-8045-6201-5000

The Region has resubmitted Case 4-CA-33290 and requested that we reconsider our prior decision to not rely on an arbitrator's award.[1] The Region submitted Cases 4-CA-32472 and 4-CA-32636 as to whether the Employer (1) unlawfully modified the parties' collective-bargaining agreement in violation of Section 8(a)(5) and 8(d); and, if so, (2) whether the unlawful modification caused or prolonged the employees' strike; and (3) whether the unlawful modification tainted the parties' bargaining precluding a bona fide impasse.

We adhere to our earlier conclusion that deferral of Cases 4-CA-32472 and 4-CA-32636 in inappropriate. We further conclude, however, that the Employer was privileged under its contract to consolidate departments and change

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[1] The Region initially submitted Case 4-CA-33290 for advice as to whether it should rely on an arbitrator's award in two related cases (4-CA-32476 and 4-CA-32636) to determine the merits of Case 4-CA-33290. We concluded then that the Region should not rely on the arbitrator's award because the deferred issues were inextricably intertwined with non-deferrable issues raised in Case 4-CA-33290 and therefore continued deferral would have been inappropriate. See, Lourdes Medical Center of Burlington County, Case 4-CA-33290, Advice Memorandum dated February 9, 2005.

employees' shifts, and that it has presented a "sound arguable basis" for its interpretation of the contract that exempts the changes at issue from the contractual posting and bidding procedures. Given our conclusion that the Employer's conduct was lawful, we further conclude that the Employer lawfully advised striking employees that the Employer intended to hire permanent replacements, and lawfully implemented its final offer.

FACTS

Background

Lourdes Medical Center of Burlington County (the Employer) operates an acute care hospital in Rancocas, New Jersey. JNESO – District Council 1, IUOE (the Union) represents graduate and registered nurses at the hospital. The Employer and the Union were parties to a collective bargaining agreement, effective by its terms from April 15, 2002, through February 29, 2004.

The contract contained a broad management rights clause and other clauses that governed the Employer's rights and obligations when altering its operations or when changing employees' shifts or hours. Article 4, "Management Rights," provides that, absent explicit restriction elsewhere in the contract, the Employer has the right to

> determine and change work shifts, work schedules, rotations, starting and quitting times, number of hours per day or per week worked, . . . permanently or temporarily transfer employees as operations require, . . . organize, discontinue, enlarge or reduce a department, function or division, [and] introduce new or improved methods[.]

Article 14, "Hours of Work," provides that, while shifts must start and end between specific times, "[a]lteration of normal working hours or work week . . . will be permitted[,]" as long as no employees are laid off as a result of any new shift.

Article 47, "10 and 12 Hour Shifts," gives the Employer the right to "establish new 10 and 12 hour shifts as it deems appropriate."

Article 12 of the contract, "Job Postings," states that "vacancies, shift changes, unit transfers, and newly created positions within the bargaining unit will be posted" for bidding.

The Employer's Alleged Contract Modifications

A. Post-Partum Unit and Nursery Unit

During a September 23, 2003, meeting between representatives of the Union and the Employer, the Employer advised the Union that it had been suffering significant financial losses – as much as $500,000 per month - and intended to correct its situation through certain staffing changes, including some reductions in force, that would go into effect on October 26, 2003. The Employer provided the Union representatives with binders containing the Employer's comprehensive changes.

The Employer proposed to combine its previously separate Post-Partum and Nursery units to conform to a "mother-baby" model of patient care used by its competitors. The Employer also proposed changing employees' shifts in several other departments and identified six employees who would be laid off as a result of the changes.

The conversion to the "mother-baby" model would require Post-Partum and Nursery unit employees to undergo training in order to perform the additional or changed duties they would have in the new unit. Employees in the new unit would also be required to work 12-hour shifts, rather than the 8-hour shifts they had been working.

The Employer solicited the Union's response to its proposal, but the Union refused to discuss the proposal, asserting that it was presented as a *fait accompli*. The Union has also argued that it had no obligation to bargain over the matter because the proposed changes would violate the parties' contract, and the time frame for the Employer's proposed changes was unrealistic.

By letter dated October 1, the Employer offered to bargain with the Union regarding the proposed changes. The Union warned the Employer not to proceed with its proposal, and advised the Employer that the Union intended to enforce the "clear and unambiguous language" of the collective bargaining agreement.

The Employer again offered to bargain over its proposed changes, but the Union refused to bargain except to demand that the Employer withdraw its proposal. The Employer then met with the employees identified in the binders as targets for lay-off. The Employer allowed those

employees to exercise their contractual bumping rights to obtain other positions in the hospital.[2]

The Employer implemented its changes on October 26, 2003, as proposed. The Employer's changes eliminated 6.79 full-time equivalent positions and six (6) regular part-time positions, reduced the hours for 27 staff nurses (20 of whom went from full-time to part-time), and increased the hours for 24 nurses. The Employer's changes moved some nurses from day shift to night shift, moved others from night shift to day shift, and transferred those nurses working on the eliminated evening shifts to either day or night shifts.
The Employer did not post and bid any of the shift changes or unit transfers.

B. Emergency Department

During an October 24 meeting between Union and Employer representatives, the Employer announced that it intended to make shift changes in the Emergency department, effective November 23. The Employer provided the Union representatives with a second binder detailing the proposed changes which, if implemented, would result in a net loss of 1.65 full-time equivalents in the Emergency department. The Employer's proposal explicitly identified one employee whose position would be eliminated as a result of the changes; six employees who would have their hours reduced, and three who would have their hours increased.[3]

The Union again refused to bargain over the proposed changes and demanded that the Employer honor the contract and withdraw its proposal. The Employer implemented its changes to the Emergency Department on or about November 23, as proposed.

The Union grieved the Employer's changes and their effects, and alleged them to be unfair labor practices in cases 4-CA-32472 and 4-CA-32636. The Region deferred the

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[2] One operating room employee chose not to bump into another department, opting instead to seek operating room experience at another hospital.

[3] Unlike the earlier changes, there is no evidence that the proposed changes to the Emergency Department would force nurses to work different shifts (e.g., day rather than night), or change employees' status (e.g., full-time to part-time).

charges to the parties' grievance arbitration procedure; the Office of Appeals affirmed the Region's deferral decision.

C. Post-Change Events

In mid-February 2004,[4] the Union called meetings to discuss the status of negotiations and whether to call a strike. Union representatives told members that the Employer's unilateral changes would serve as bases for a strike, and discussed the Employer's proposals for a successor agreement. Members questioned the purpose of a contract if the Employer would ignore it and the Union and do simply what the Employer wished. The Employer's conduct, they complained, was proof that it would not honor its contract or deal with the Union as the employees' collective-bargaining representative. Members ultimately voted to strike. After giving the Employer adequate notice as required under Section 8(g) of the Act, the Union struck the Employer on April 19, 2004.

Also on April 19, an arbitrator opened his hearing of some of the Union's grievances over the October and November changes. The hearing continued on May 7 and June 8. On or about August 16, 2004, the arbitrator issued his award regarding some of the Employer's unilateral changes. Though explicitly refusing to consider any unfair labor practice issues, the arbitrator found that the contract privileged the Employer to change employees' shifts and combine departments. The arbitrator, however, issued his award in favor of the Union because the Employer violated the parties' contract by implementing its changes in an "arbitrary" manner.

The Employer relied on temporary nurses immediately after employees went on strike. By letter dated August 2 the Employer advised unit employees that it would end its "reliance on temporary nurses" and "fill [any open positions not filled by current bargaining unit nurses] with nurses who choose to commit to the hospital on more than a temporary basis (i.e. "permanent replacements")." It remains unclear whether, and if so to what extent, the Employer has "permanently replaced" striking nurses.[5]

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[4] All dates herein are in 2004 unless noted otherwise.

[5] The Union has not yet made an unconditional offer to return to work, and there is no evidence that the Employer has rejected any employee's individual offer to return to work.

The parties met to bargain approximately ten (10) times between February and August 2004, with the issue of the shift changes an apparent obstacle to completing negotiations for a successor agreement. Each side attempted to obtain language in the successor agreement that would clearly reflect its position regarding the Employer's ability to act unilaterally. At an August 6 bargaining session attended by state and federal mediators, the Employer and the Union agreed that the parties were at impasse. By letter dated August 10 the Employer reiterated to the Union that the Employer considered the parties to be at impasse and, therefore, intended to implement its most recent contract proposal. The Employer implemented its offer, effective August 11.

On September 16, the Employer filed in the United States District Court for the District of New Jersey a complaint and petition to vacate the arbitrator's award. That action is pending. The Union has not filed a counter suit to enforce the arbitrator's award. To date the Employer has refused to comply with the arbitrator's award.

A decertification petition was filed in Case 4-RD-2029 on November 8. That petition is blocked by the pending unfair labor practice charges.

ACTION

We conclude, consistent with our earlier determination, that deferral of Cases 4-CA-32472 and 4-CA-32636 is inappropriate because the arguably deferrable issues raised in those cases are inextricably intertwined with the non-deferrable issues raised in Case 4-CA-33290. After reviewing the contract and the parties' arguments, we further conclude that the Employer was privileged under the contract to consolidate departments and change employees' shifts. We also conclude that the Employer has presented a "sound arguable basis" for its interpretation of the contract that would exempt the shift changes and unit transfers from the contractual post and bid procedures. Given our conclusion that the Employer has not committed any unfair labor practices, we conclude that the employees' strike was at all times an economic strike, and that the Employer's conduct did not taint the parties' bargaining for a successor agreement. Thus, the Employer lawfully advised striking employees that it intended to hire permanent replacements, and lawfully implemented its final contract offer. The Region should therefore dismiss the charges, absent withdrawal.

A. Deferral of Cases 4-CA-32472 and 4-CA-32636 is Inappropriate

The Union alleged in Case 4-CA-33290 that the Employer unlawfully threatened to permanently replace unfair labor practice strikers and unlawfully implemented its last contract proposal. The merit of those allegations, however, remains wholly dependent on whether the Employer violated the Act by its October and November 2003 conduct. As we stated in our previous memorandum, such a determination can only be reached after a careful examination of the parties' rights under the Act.

While an arbitrator may be competent to determine whether the Employer's actions violated the parties' collective-bargaining agreement, "[o]nly the Board can actually determine whether an unfair labor practice has been committed"[6] and only the Board can determine whether a strike is an unfair labor practice strike.[7] Resolution of the issues raised by Case 4-CA-33290 was, and remains, inextricably intertwined with the issues in cases 4-CA-32472 and 4-CA-32636. Thus, deferral to the parties' grievance-arbitration procedure is inappropriate.[8]

Because deferral is inappropriate in these cases, we must interpret the parties' contract to determine whether the Employer has committed unfair labor practices by modifying that agreement.

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[6] Dennison National Co., 296 NLRB 169, 170 fn. 4 (1989).

[7] Harley Davidson Motor Co., 214 NLRB 433, 439 (1974).

[8] See, e.g., Sheet Metal Workers Local 17 (George Koch Sons), 199 NLRB 166, 168 (1972) and See, e.g., Servair, Inc., 265 NLRB 181 (1982) enfd. 726 F.2d 1435 (9th Cir. 1984) (deferral inappropriate where "the issue before the arbitrator, the discharge of 19 employees, [was] so closely intertwined with, and, indeed a part of the 8(a)(2) allegations, which types of allegations never have been and cannot be delegated to an arbitrator, that a hearing and decision by the Board is required.") (Emphasis added).

The Board's decision in Smurfit-Stone Container Corp., 344 NLRB No. 82, slip op. (2005) is inapposite. In that case, the Board reiterated its policy strongly favoring arbitration, when appropriate. However, that case does not address a situation where, as here, deferrable issues are inextricably intertwined with non-deferrable issues.

B. The Employer Was Privileged to Make the Changes at Issue, and Has Presented a "Sound Arguable Basis" for Its Position Regarding Posting and Bidding of Changes to Shifts and Hours

1. Articles 4, 14, and 47 of the Collective Bargaining Agreement Explicitly Grant the Employer Authority to Make the Changes at Issue

A party to a collective-bargaining agreement contravenes Section 8(d), and violates Section 8(a)(5), when, during the life of the agreement, it unilaterally modifies or terminates contract provisions which are mandatory bargaining subjects.[9] After reviewing the parties' collective-bargaining agreement, we conclude that the parties' contract privileged the Employer to make the changes at issue. We further conclude that the Employer has presented a "sound arguable basis" for its position that Article 12 does not apply to the changes at issue here.

The management rights clause of the contract explicitly grants to the Employer the right to, among other things, "determine and change work shifts, work schedules, rotations, starting and quitting times, number of hours per day or per week worked, . . . permanently or temporarily transfer employees as operations require, . . . organize, discontinue, enlarge or reduce a department, function or division, [and] introduce new or improved methods[.]" Article 14 explicitly "permits" the Employer to "[a]lter [employees'] normal working hours or work week," and create new shifts outside the contractual window periods as long as no employees are laid off as a result. Article 47 gives the Employer the right to "establish new 10 and 12 hour shifts as it deems appropriate." There is nothing in the contract that would otherwise limit the Employer's express

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[9] AlliedSignal Aerospace, 330 NLRB 1201, 1203 (2000), citing Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co., 404 U.S. 157, 185-186 (1971). See also, Republic Die and Tool Co., 343 NLRB No. 78, slip op. (2004) quoting Fort Pierce Jai-Alai, 310 NLRB 862 (1993): "It is well established that Section 8(a)(5) and (1) and Section 8(d) of the Act prohibit an employer that is a party to an existing collective-bargaining agreement from modifying the terms and conditions of employment established by the agreement without obtaining the consent of the union[;]" and CBS Corp., 326 NLRB 861, 872 (1998).

rights. We therefore conclude that the Employer did not modify any contract provision when it consolidated departments, altered employees' hours and shifts, and created new positions.[10] We also conclude that, given the express language that authorized the Employer to make the changes, the Employer has presented a "sound arguable basis" for its position that the changes at issue are outside the scope of Article 12 of the contract, and therefore exempt from the contractual post and bid requirements.

2. The Employer Has a "Sound Arguable Basis" for Its Position that Article 12 Does Not Apply in this Case

Having decided that Articles 4, 14, and 47 expressly authorize the Employer to make the changes at issue, we must address the Union and the Employer's competing arguments as to whether Article 12 required that the Employer post and allow employees to bid on the related shift and hour changes, or changes to post-partum and nursery positions directly affected by the conversion to the mother-baby model. We note, however, that "[w]here ... the dispute is solely one of contract interpretation, and there is no evidence of animus, bad faith, or an intent to undermine the Union, [the Board] will not seek to determine which of two equally plausible contract interpretations is correct."[11] And in such cases, the Board will not find an 8(a)(5) violation if the record shows that "an employer has a sound arguable basis for ascribing a particular meaning

[10] Section 14(D) of the contract does not limit the Employer's ability to make the changes at issue here. While the Employer may not "establish new shift hours [if any] employee is laid off as a result[,]" that limitation applies to new shifts that begin and/or end outside the established start and end times, also known as "window periods," listed in Section 14 (A). It is undisputed that the new 12-hour shifts began and ended within the contractual window periods. Thus, it is irrelevant whether the Employer in fact laid off the six (6) employees identified in its proposal.

[11] Crest Litho, Inc., 308 NLRB 108, 110 (1992) quoting Atwood & Morrill Co., 289 NLRB 794, 795 (1988).

to his contract and his action is in accordance with the terms of the contract as he construes it."[12]

The parties' contract expressly allowed the Employer to consolidate departments and alter shifts and hours as it saw fit. Article 12 of the contract, however, states that "vacancies, shift changes, unit transfers, and newly created positions" will be posted for employees to bid on. The Union argues that Article 12 therefore applies to the Employer's October and November 2003 changes. On the other hand, the Employer argues that it has not created new shifts or positions, but instead altered the hours and job descriptions for incumbent employees – changes expressly authorized by Articles 4, 14, and 47 and outside the scope of Article 12. The Employer further argues that the Union's interpretation of Article 12 would "illogically" require the Employer to post any change to any employee's hours or job description. Such an interpretation would run counter to the parties' past practice, would unreasonably impede the Employer's operation, and would render meaningless the express language of Articles 4, 14, and 47.

Without deciding whether the Union or the Employer has the correct or better interpretation of Article 12, we conclude that the Employer has presented a "sound arguable basis" for its interpretation that language and has acted consistent with that interpretation. The Employer's interpretation of Article 12 is consistent with its efforts to harmonize its express rights under Articles 4, 14, and 47 with its obligations to the Union and elsewhere in the contract. We also note that the Employer has attempted to engage the Union in every step, agreed to submit the issue to an arbitrator, and has otherwise met its obligation to bargain with the Union over this and other matters. In these circumstances, the Employer's conduct does not violate Section 8(a)(5) and the Region should dismiss the allegations, absent withdrawal.[13]

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[12] Crest Litho, above, 308 NLRB at 110; NCR Corp., 271 NLRB 1212 (1984); Vickers, Inc., 153 NLRB 561, 570 (1965); Thermo Electron Corp., 287 NLRB 820, 820 (1987).

[13] See, e.g., Plasterers Local 627 (Jack Hart Concrete), 274 NLRB 1286, 1287 (1985) (Board dismissed 8(a)(5) allegation where union and employer had "significantly different" but "equally reasonable" interpretations of a contractual notice provision); Crest Litho, above, 308 NLRB at 111 (employer's permanent layoff of employees did not violate Section 8(a)(5) because the employer had a "sound arguable basis" for contending that its position comported with contractual requirements); Intrepid Museum Foundation,

The arbitrator's ambiguous award supports our conclusion that the Employer has presented a "sound arguable basis" for its interpretation of the contract. The arbitrator concluded, as we have, that the Employer was privileged under the contract to make the changes at issue. The arbitrator further found, without reference to any specific contract provision, that the Employer violated the contract by "arbitrarily" assigning employees to the new shifts. The arbitrator's failure to expressly cite Article 12 as a basis for his conclusion suggests that he could not dismiss out of hand the Employer's defense that Article 12 did not apply to the Employer's changes.

Notwithstanding the ambiguity of the arbitrator's award, it does provide the Union with a remedy for the Employer's contract violations. The arbitrator's award requires the Employer to restore the status quo by reverting to the pre-October 23, 2004, shifts, and to make all effected employees whole for any lost wages and/or contractual benefits. The arbitrator's award remains fully enforceable, and nothing in our decision affects the Union's right to defend and seek enforcement of the award through the pending district court litigation.

C. The Employer Lawfully Announced That It Would Permanently Replace Strikers

It is well established that a work stoppage is considered an unfair labor practice strike only "if it is motivated, at least in part, by the employer's unfair labor practices[.]"[14] Given our conclusion that the Employer lawfully combined departments and changed employees' shifts and hours, we must conclude that the employees' strike was at all times an economic strike. Therefore, the Employer

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Inc., 335 NLRB 1, 16 (2001) (employer a "sound arguable basis" for its interpretation of the contractual drug testing policy and acted consistent with the interpretation when testing employees); Yellow Freight Systems, Inc., 313 NLRB 309, 331 (1993) (employer had "sound arguable basis" for its interpretation of the contractual access clause, and lawfully limited union agent's access to unit employees and evicted the agent from the premises when he refused to comply with that limitation).

[14] Outdoor Venture Corp., 336 NLRB 1006, 1007 (2001) citing Golden Stevedoring Co., 335 NLRB 410, 411 (2001).

did not violate Section 8(a)(3) by telling striking employees it would permanently replace them.[15]

D. The Employer Lawfully Implemented Its Final Offer

The Union alleges that the Employer's October and November 2004 changes changed the status quo and, therefore, prevented the parties from engaging in meaningful bargaining and reaching a bona fide impasse. Thus, the Union alleges, the Employer violated Section 8(a)(5) by unilaterally implementing its final proposal. However, given our conclusion that the Employer's October and November 2004 was lawful, me must reject the Union's contention. The Employer's lawful conduct did not taint bargaining and, therefore, the Employer lawfully implemented its final offer after bargaining in good faith to impasse.[16]

CONCLUSION

In sum, deferral is inappropriate where, as here, arguably deferrable issues are inextricably intertwined with nondeferrable issues. We further conclude that the parties' contract privileged the Employer to make the changes at issues, and that the Employer has presented a "sound arguable basis" for its position that the changes at issue are not subject to the contractual posting and bidding requirements. Thus, absent any unlawful conduct by the Employer, the Region should dismiss, absent withdrawal, the Union's allegations that the Employer unlawfully changed employees' terms and conditions of employment, unlawfully implemented its last contract offer, and unlawfully threatened to permanently replace strikers.

B.J.K.

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[15] See, e.g., Industrial Elec. Reels, above, 310 NLRB at 1073; Kimtruss Corp., 305 NLRB 710, 710 (1991); and Bil-Mar Foods, 286 NLRB 786, 796 (1987).

[16] See, e.g., Industrial Elec. Reels, 310 NLRB 1069, 1073 (1993).