Dr. George Szele, Anesthesiologist *and* Mary Ellen Furstenberg. Case 5-CA-9146

September 29, 1979

DECISION AND ORDER

BY CHAIRMAN FANNING AND MEMBERS JENKINS AND MURPHY

On July 25, 1978, Administrative Law Judge John F. Corbley issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief and a motion to strike portions of Respondent's exceptions, and the Charging Party filed a cross-exception and a supporting brief. Respondent also filed a motion to strike the General Counsel's motion.[1]

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[2] and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, and hereby orders that the Respondent, Dr. George Szele, Anesthesiologist, Manassas, Virginia, his agents, successors, and assigns, shall take the action set forth in the said recommended Order, except that the attached notice is substituted for that of the Administrative Law Judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had the chance to give evidence, it has been decided that I, Dr. George Szele, Anesthesiologist, have violated the National Labor Relations Act and I have been orderd to post this notice.

The National Labor Relations Act gives you as employees, certain rights including the rights to self-organization; to form, join, or help unions; to bargain collectively through a representative of your own choosing; to act together for collective bargaining or other aid or protection; or to refrain from any or all such activities.

Accordingly, I give you these assurances:

I WILL NOT threaten or promise you benefits to forego the rights set forth above NOR WILL I do anything which interferes with your exercise of these rights.

I WILL NOT coercively interrogate you about your union activities or sympathies.

I WILL NOT refuse to hire you NOR WILL I discharge you or take any other reprisal against you because you join, support, or are sympathetic to any labor organization.

I WILL NOT in any other manner interfere with, restrain, or coerce my employees in the exercise of the rights guaranteed them by Section 7 of the Act.

I WILL offer to hire Mary Ellen Furstenberg and I WILL make up all pay she lost as the result of the refusal to hire her with interest computed thereon.

DR. GEORGE SZELE, ANESTHESIOLOGIST

DECISION

STATEMENT OF THE CASE

JOHN F. CORBLEY, Administrative Law Judge: A hearing was held in this case on May 4, 1978, at Washington, D.C., pursuant to a charge filed by the Charging Party (sometimes referred to hereinafter as Furstenberg) on January 23, 1978, and served on Respondent by registered mail on the same date and on a complaint and notice of hearing issued by the Regional Director for Region 5 of the National Labor Relations Board on March 14, 1978, which was also thereafter duly served on Respondent. The complaint alleges that Respondent violated Section 8(a)(1) of the Act by

[1] Respondent's exceptions included a motion to dismiss the complaint. We hereby deny that motion and his subsequent motion to strike the General Counsel's motion to strike; we hereby grant the General Counsel's motion. Accordingly, we strike Resp. Exh. E 1 through E-5, inclusive, and exceptions 3, the last sentence of 7, and 35 as not being based on evidence in the record. Furthermore, considering those exceptions as a motion to reopen the record, we find the evidence is neither newly discovered nor previously unavailable. See Sec. 102.48(d)(1) of the Board's Rules and Regulations, Series 8, as amended.

[2] Respondent has excepted to certain credibility findings made by the Aministrative Law Judge. It is the Board's established policy not to overrule an Administrative Law Judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (C.A. 3, 1951). We have carefully examined the record and find no basis for reversing his findings. We also find totally without merit Respondent's allegations of bias and prejudice on the part of the Administrative Law Judge. Upon our full consideration of the record and the Administrative Law Judge's Decision, we perceive no evidence that the Administrative Law Judge prejudged the case, made prejudicial rulings, or demonstrated a bias against Respondent in his analysis or discussion of the evidence.

various acts of interrogation and threats and that Respondent violated Section 8(a)(3) and (1) of the Act by refusing to hire the Charging Party because of her union activities. In its answer to the complaint, which answer was also duly served, Respondent has denied the commission of any unfair labor practices.

For reasons which appear hereinafter I find and conclude that Respondent has violated the Act essentially as alleged in the complaint.

At the hearing all parties were represented by counsel. The parties were given full opportunity to examine and cross-examine witnesses, to introduce evidence, and to file briefs. At the conclusion of the hearing each party waived the opportunity to present oral argument. Excellent briefs have subsequently been received from all parties and have been considered.

Upon the entire record in this case, including the briefs, and from my observation of the witnesses, I make the following:[1]

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent is a medical doctor in the practice of anesthesiology. On October 1, 1972, he entered into an agreement with Prince William Hospital Corporation (hereinafter the Hospital) whereby he has "direct and responsible control over the Anesthesia Department of the Hospital."[2] The agreement requires that he employ the personnel of that department including another physician anesthesiologist and an "adequate number of nurse anesthetists." Respondent is further required to be responsible for the professional and personal conduct of such employees. He, in fact, employs an additional anesthesiologist as well as four nurse anesthetists and an aide. He has hired and pays these individuals. The 1972 agreement between Dr. Szele and the hospital was still in effect at the time of the hearing.[3]

Inasmuch as Respondent has hired, pays, and is responsible for the conduct of these nurse anesthetists, the anesthesiologist, and the aide, it is clear that he is an "employer" within the meaning of the Act.[4]

Respondent contests the Board's jurisdiction in this matter. He urges that his work is essentially local in character, his dollar volume of business does not exert any substantial impact on interstate commerce, and that it has not been shown that a substantial portion of it derives from Federal funds or crosses state lines. Respondent says that Respondent cannot be held to be in commerce because of any relationship with the hospital because the latter has not been shown to be an employer within the meaning of the Act and because Respondent furnishes services, in any event, to patients directly, and not to the hospital. Finally, Respondent urges that even if the Board has jurisdiction it should not assert it here.

The hospital is a nonproprietory , nonprofit community hospital incorporated in the Commonwealth of Virginia and it is not a political subdivision of Prince William County, Virginia, nor of the Commonwealth of Virginia, nor of any other government. During the calendar year 1977 the hospital had gross revenues in excess of $250,000 and purchased and received materials and supplies in excess of $50,000 from points outside Virginia.

The hospital had 150 beds, operations are performed there, x-ray services are provided, and drugs are administered. It has other doctors and nurses on its staff besides Respondent and his employees. It also employs administrative personnel such as Philip Warman, its assistant administrator for fiscal service.

In view of the foregoing, I conclude that the hospital is a health care institution within the meaning of the Act and is subject to the Board's jurisdiction.[5]

During the same calendar year, 1977, Dr. Szele received $300,000 from the hospital pursuant to his contractual arrangements with it. These moneys were based on collections by the hospital from the patients or from the patients' insurers, e.g., Blue Cross-Blue Shield of Virginia, Blue Cross of Washington, National Blue Cross, Travellers, Lincoln National, Medicare, and Medicaid. After deductions of 10 percent for losses due to bad debts, free service, insurance adjustments, etc., Dr. Szele receives from the hospital 65 percent of the balance which, as noted, amounted to over $300,000 last year. Dr. Szele provides only the professional services of himself, his medical associate, and his nurses. The patient is billed separately by the hospital for Dr. Szele's use of drugs, agents, or anesthesia equipment which belong to the hospital.

It seems clear that the nature of the service provided by Respondent falls short of health care in the normal sense with which that phrase is used. For, at least insofar as this record shows, anesthesia does not offer diagnosis, cure, therapy, treatment or hospitalization for any disease or condition. It is rather an adjunct to medical practice.[6] That is, anesthesia is an assist to a surgeon in performing an operation or to a doctor in performing a diagnostic procedure. Anesthesia is not performed except as an aid to these procedures.[7]

It also seems clear that such aid is the type of help to the work of a surgeon, or in some cases, to the work of a diagnostician without which the latter cannot succeed.[8]

I conclude, therefore, that while Respondent serves patients directly, in so doing its service necessarily coincides with, and is an adjunct to, the hospital's surgery and diagnostic practice. Inasmuch as Respondent receives more than $50,000 annually for providing such adjunct service to an institution over which the Board has jurisdiction, I further conclude that Respondent is an employer engaged in

[1] Certain errors in the transcript herein have been noted and corrected.

[2] Under the agreement he also directs and supervises the hospital's department of inhalation therapy at no charge to the hospital or any patient. This case concerns the anesthesia department.

[3] The parties so stipulated.

[4] That is, his relationship to these individuals is that connoted by the normal definition of the word "employer" and his activities do not fall within any of the statutory exemptions.

[5] *East Oakland Community Health Alliance, Inc.*, 218 NLRB 1270 (1975).

[6] See, e.g., *Bob's Ambulance Service*, 178 NLRB 1 (1969); *Walters Ambulance Service, Inc.*, 212 NLRB 422 (1974); *San Diego Blood Bank*, 219 NLRB 116 (1975).

[7] Szele so admitted.

[8] In the bronchoscopy example shown by the record, the patient was paralyzed and the anesthetist operated an apparatus which "breathed" for the patient.

commerce or in an industry affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act based on the Board's nonretail dollar standard (indirect outflow).[9]

II. THE LABOR ORGANIZATION INVOLVED

The record indicates that the Nurse Anesthetists of the Washington Area exists for the purposes of representing employees in collective bargaining with employers, that it admits employees to membership, and that it has indeed (in 1976) been certified by the Board as the exclusive bargaining representative of the nurse anesthetists of the Washington Area Anesthesiologists Chartered (hereinafter WAAC, which was the Charging Party's former employer) in Case 5-RC-9833.

I accordingly conclude that the Nurse Anesthetists of the Washington Area is a labor organization within the meaning of Section 2(5) of the Act. That organization will sometimes be referred to hereinafter as the Union.

III. THE ALLEGED UNFAIR LABOR PRACTICES

The Charging Party, Furstenberg, began her medical training in 1961, becoming a registered nurse in 1964. Thereafter, she served in operating rooms and took further training as a nurse anesthetist (N.A.), which training she completed in January 1968, obtaining a certificate a few months later. From then until 1973, she was employed at various hospitals as an N.A. until she became employed by WAAC[10] in August 1973 at Sibley Hospital in Washington, D.C. By 1975 she had progressed to chief N.A., in which position she served as the liaison between the N.A.'s and WAAC.

In the fall of 1975, the N.A.'s met with WAAC concerning work policies. As a result, a policy paper was furnished to Furstenberg by WAAC, but the N.A.'s considered it unsatisfactory. Furstenberg had further discussions with WAAC in an effort to make changes in the policy statement but her efforts were only partially successful.

In the summer of 1976, the N.A.'s organized the Union and filed a petition for a Board-conducted election in Case 5-RC-9833. The Union was certified to represent WAAC's N.A.'s on November 9, 1976. After certification, the Union attempted unsuccessfully to negotiate with WAAC. Furstenberg was the spokesperson. By January 1976, several of the N.A.'s had received reprimands and warning letters which they considered unjust. They, accordingly, filed unfair labor practice charges with the National Labor Relations Board against WAAC.

In March 1977, one of the N.A.'s, a union member, was suspended by WAAC for the second time. On March 29, 1977, the N.A.'s notified WAAC that the N.A.'s would finish the cases they were working on that morning and then they were going to walk out in protest over the suspension.

The N.A.'s did leave work that day as they had threatened, and they picketed Sibley Hospital for the next few days. In early April, the N.A.'s offered to return to work but were told they were no longer considered employees. The strikers were not reinstated but filed additional unfair labor practice charges against WAAC. These charges were settled in August 1977 but Furstenberg and other strikers agreed to forego reinstatement to WAAC.

Some of the principals of WAAC at the time of the strike were Dr. Frank Nelli, then head of the anesthesiology department at Sibley, Dr. Mary Louise Barker, who was in charge of WAAC's N.A.'s, and Dr. Walter Helmig.

Furstenberg was unemployed from the time of the strike at the end of March until December of 1977.

On December 9, 1977, Furstenberg telephoned the Respondent, Dr. Szele, at the hospital and inquired about an opening for an N.A. In this conversation Furstenberg briefly described her educational and professional background, indicating where she had worked and that she had some 10 years' experience as an N.A. It was then arranged between Szele and Furstenberg that Furstenberg would come to the hospital for an interview on December 14.

Furstenberg arrived at the hospital between 9 and 10 a.m. on the latter date and was directed to the operating room suite where she met Szele and chatted with him for a few moments. Szele suggested that Furstenberg don operating room attire and accompany him when he administered anesthesia that morning. She did as requested.

Initially, Szele and Furstenberg went to the obstetrics department where Szele provided anesthesia and discussed certain techniques in that field with Furstenberg. Thereafter, they went to the operating room where Szele again administered anesthesia, discussed equipment and recordkeeping, and also described insurance and other employees benefits to Furstenberg. From there they went to the recovery room where Szele introduced Furstenberg to other hospital employees. Szele likewise introduced Furstenberg to another N.A. in another operating room and suggested that Furstenberg remain in order to ask that N.A. questions about procedures.

While Furstenberg was speaking with this N.A., Furstenberg got a call that Szele wanted Furstenberg in the first operating room in order to observe Szele giving an anesthetic for a bronchoscopy. Again Furstenberg did as requested. While Szele was administering the anesthetic, Furstenberg discussed techniques for this type of procedure. The anesthesia method being used by Szele at the time involved the squeezing of a bag to force air into the patient's chest, that is, to "breathe" for the patient who is otherwise paralyzed during this type of examination. While this was going on, Szele was called away to the phone and left the patient to Furstenberg who took over the "breathing" apparatus.

Szele returned after a time and, when still in the operating room, asked Furstenberg whether her 8 months away from her field would require her to take refresher training.

[9] *Siemons Mailing Service*, 122 NLRB 81, 85 (1958); *Bob's Ambulance Service, supra; Walters Ambulance Service, supra.* In such situations the Board has asserted jurisdiction pursuant to its nonretail standard even though the actual sources of the revenue to the employer indirectly engaged in commerce were individual consumers, rather than an employer directly engaged in commerce. *Bob's Ambulance Service, supra.*

In the light of these cases, I detect no warrant to decline jurisdiction herein.

I also find it unnecessary to reach or pass upon the Charging Party's contention that Respondent and the hospital are joint employers of Respondent's employees which, if so, would—on the basis of the Board's jurisdiction over the Hospital—make Respondent likewise subject to the Board's jurisdiction as a hospital department. *St. Luke's Episcopal Hospital, et al.*, 222 NLRB 674 (1976).

[10] Which had a different name at the time.

She did not think so. Szele thereupon asked why she had left her last previous employer and Furstenberg stated that the N.A.'s there had a serious dispute with their employer and walked out. Szele inquired what the dispute was about and Furstenberg replied that she considered it inappropriate to discuss the matter while they were still in the operating room and other people were listening. Szele did not pursue the matter but suggested that Furstenberg go to lunch with the other N.A. which she did.

After lunch, Furstenberg returned and gave Szele her resume. Szele looked at it and told Furstenberg he needed two references from Furstenberg's last employment so she pencilled in the name of Dr. Frank Nelli. Dr. Helmig's name was already on the resume. Szele stated he would telephone these doctors for references. Szele also gave Furstenberg a blank application form which he said was used by the hospital and suggested that she fill it out and return it. Szele asked her about her licenses, and she said she was not licensed in Virginia. He suggested that she start the process. She advised him that she also needed to renew her national license for which she needed verification of employment. He suggested that she bring that with her when she returned with the application.

At some point during this postprandial discussion, Szele told Furstenberg that he would like to hire an N.A by January 1, 1978, to replace someone who was leaving, and he offered Furstenberg a salary of $23,000 per year. Furstenberg did not accept at that time, but she advised Szele that if she did come to work for him, she might need a couple of Fridays off to attend certain seminars. He said this would cause no problem, and he opined that Furstenberg would enjoy working at the hospital. Szele did state, however, that he would like to know if she was interested in the job so he could decide whether to interview other people. She agreed to call him back in a few days.[11]

On December 16, 1977, Furstenberg called Szele and said she was interested in the position but felt that a salary of $25,000 was appropriate. Szele responded that $24,000 was the highest he paid anyone and that he would pay Furstenberg the latter figure with the understanding that the position would be reevaluated in 6 months. Furstenberg accepted this offer, and the two agreed that she would commence on the first workday of January 1978. Szele requested her to return to the hospital the following Tuesday or Wednesday to finish the paperwork, that is, to bring in her completed application form, together with her current R.N. license and the application form, together with her current R.N. license and the application for her national license which he had to sign. Szele also asked Furstenberg to call before coming to the hospital.

At no time up to this point had any mention been made by Szele to Furstenberg of letters of reference, although Szele had indicated on December 14 that he would call two of the doctors with whom Furstenberg had last worked to obtain references from them.[12]

At some time during the next several days, Szele telephoned listed references Nelli and Helmig. He also called Barker, who had been head of the N.A.'s at WAAC while Furstenberg was employed.

Nelli told Szele that Furstenberg was a very competent N.A. Szele then asked why Furstenberg had left WAAC to which Nelli replied that there had been a disagreement between the N.A.'s and WAAC which degenerated into a suspension and a strike. Nelli stated that the N.A.'s had a union and that the strike was the only way they could protest. The conversation was a brief one, and Szele did not ask for any written reference from Nelli.

When Szele spoke to Barker, Barker refused to discuss Furstenberg's qualifications. Szele did not ask her for a written reference.

Helmig likewise told Szele that Furstenberg was a very competent N.A. After Szele asked Helmig some questions about Furstenberg's union activities and about the disagreement between the N.A.'s and WAAC, Szele posed to Helmig a hypothetical question whether Furstenberg would work out all right if Furstenberg promised not to engage in the same activities again. Helmig responded that this would be up to Szele. Szele did not ask Helmig for a written reference.[13]

On or about December 20, Szele called Furstenberg at home. He told her he was upset because he had called her former employers and learned she had organized the N.A.'s at Sibley Hospital, had gone on strike, and had walked up and down with picket signs. He asked her if she had actually done these things, which she admitted. He also asked if she had done the same thing at another employer, which she denied. She then asked if Helmig and Nelli had refused to write letters of reference for her and he admitted they had not. He said he would not hire her without these reference letters which, he said, were necessary for him to present her to the staff of the hospital. He continued he did not want to hire anyone who would come to the hospital and do the same thing she had done at Sibley Hospital. He then asked her if she would give her word that she would not try to organize people at the hospital. She said that his question to her was illegal. He said he did not care about the legality but that he did not want to hire a troublemaker. He said he normally called for references as a matter of form but that he had never gotten a bad one before. He then asked her why she had not told him about the strike matter previously. She said she considered it over and done with. He concluded the conversation by saying that he would wait and see whether he got two letters of reference, and he told Furstenberg to call him in a few days. This was the first

[11] The findings thus far are based on the credible testimony of Furstenberg as not denied by Szele but, in fact, in part corroborated by him.

[12] These findings and the findings as to the December 16, 1977, phone call are based on the credible testimony of Furstenberg in this regard. To the extent that the testimony of Szele is contrary I do not credit it. I found Furstenberg to be a sincere witness who testified with confidence in a straightforward manner. Szele, on the other hand, was uncertain in his demeanor and in the phrasing of his answers, as the record suggests. Thus, his frequent initial response was "I think." Other responses were "I don't remember," "Presumably," "probably" and "its possible." My findings hereinafter are based essentially on the credible testimony of Furstenberg and I will, for the reasons just described, discredit any testimony by Szele to the contrary.

[13] The findings as to these telephone references are based on the credible testimony of the references as partly corroborated by Szele. To the extent Szele's testimony is contrary I do not credit it. The references were all disinterested witnesses in the current proceeding. If they had any bias it would be against Furstenberg (not in her favor) in view of the prior settlement (involving a $40,000 backpay provision) by their organization of the unfair labor practice charges by Furstenberg's Union against the organization. I have already commented on Szele's credibility.

instance in which Szele mentioned the need for letters of reference to Furstenberg.[14]

Furstenberg called Szele on December 29 and inquired if he had received the two letters of reference. He stated he had not and was, in fact, unsure if he would be hiring anyone, inasmuch as the person who had given him notice of leaving might remain. He added that he was considering other applicants in any event.[15]

At the end of December 1977, Barbara Johnson gave Szele an application for a position of N.A. Shortly thereafter, Szele obtained a telephone reference from a doctor at Johnson's place of employment and a written reference from another doctor on the reference form Szele used for this purpose. Barbara Johnson began work for Respondent on January 16, 1978, at a salary of $24,000.

Steven Johnson began work for Szele on the same day. Steven, who had previously been employed by Szele, had spoken to Szele several times during 1977 about returning to work for him. Szele, in fact, had called Steven twice in mid-December 1977 stating that Szele had an opening for an N.A. Steven's salary began on January 16, 1978, at $24,000 per year. Steven completed his application for employment on January *17*, 1978.

Since January 1978, Szele has hired, or committed himself to hire, two other N.A.'s in addition to the Johnsons. As of the date of the hearing, Szele had not spoken to Furstenberg since December 29.

Concluding Findings

Respondent elected not to put on a case in chief. However, he presented his defenses and, in my judgment, fully litigated the case through the General Counsel's witnesses among whom was Dr. Szele, himself.

A. *The Alleged 8(a)(1) Violations*

As I have found, *supra*, Szele, in his conversation with Furstenberg on or about December 20, 1977, (a) inquired whether Furstenberg had indeed participated in a strike and picketing, (b) asked her to promise she would not try to organize employees at Prince William Hospital, and told her (c) he would not want to hire a troublemaker.

Having told Furstenberg that he did not want to hire a troublemaker (*viz* someone who had engaged in a strike and picketing), in the same conversation that he asked her if she had engaged in such activities at Sibley Hospital, it is clear and I find that Szele coercively interrogated Furstenberg about her former union or other concerted activities in violation of Section 8(a)(1) of the Act.[16]

By conditioning, in effect, any further chance of employment with him or her agreement not to engage in union or concerted activities, he further violated Section 8(a)(1) by the implied promise of benefit (possible employment) to forego her Section 7 rights to participate in such activities.[17]

Finally, by telling her in the same conversation that he could not hire such a troublemaker, he yet further violated Section 8(a)(1) by threatening Furstenberg that he would not hire her unless she forswore her Section 7 rights.

B. *The Refusal To Hire*

In its brief Respondent defends that Furstenberg was not hired because:

(a) She did not perfect her application (i.e., she never submitted an application nor supplied the required written references).

(b) Other well or better qualified candidates were available who, unlike Furstenberg, had not been out of the field of anesthesiology for 8 months.

(c) Of Szele's concern over Furstenberg's "clearly unlawful, improper and unexplained abandonment of patients."

I reject each of these contentions.

To begin with, based on my findings, *supra*, I conclude that as of December 20, 1977, Furstenberg was no longer simply an applicant for employment. For Szele, on December 16, had agreed to hire her to begin work just after January 1. But even if I am in error in this record, the law is well settled that an applicant for employment is an employee within the meaning of the Act and entitled to its protection.[18]

Contrary to Respondent's claim that Furstenberg had not completed her application, she had done so but had not returned it to Szele. But this failure to return it was the fault of Szele, not Furstenberg. For he told her he would not hire a "troublemaker" like Furstenberg without a promise from her to forego her Section 7 rights. She refused so to do. Hence, and submission of an application thereafter would have been an exercise in futility, which is not required by law. Contrary to the related claim that Furstenberg failed to submit written references, that claimed requirement was never mentioned to Furstenberg by Szele, as I have found, until the fateful telephone call of December 20 when, it was clear, he decided not to hire her because she would not agree to surrender her Section 7 rights. His comment at the conclusion of the call that he would await written references from Nelli and Helmig was a subterfuge because he had never asked them for such references nor did he demand that she obtain them.[19]

Moreover, as the record amply demonstrates, Szele is flexible with regard to submission of written applications and written references. Thus, Szele, variously, obtains references by phone or in writing. In the case of Steven Johnson, Johnson was hired *and began* work in January 1978, *before* completing his written job application.

As to Respondent's claim that Furstenberg had been away from her field for 8 months—implying that she was rusty—such a claim must be rejected in the light of the favorable references given to Szele by Nelli and Helmig in respect to Furstenberg's qualifications and by the fact that Szele himself entrusted a patient to Furstenberg's care on

[14] These findings are based on the credible testimony of Furstenberg in this regard as partially corroborated by Szele. To the extent the testimony of Szele disagrees, I do not credit it.

[15] These findings are based on the credible testimony of Furstenberg.

[16] See *Ascot Nursing Home, et al.*, 216 NLRB 680 (1975).

[17] *N.L.R.B.* v. *Lucy Ellen Candy Division of F & F Laboratories, Inc.*, 517 F.2d 551 (C.A. 7, 1975).

[18] *Phelps Dodge Corporation* v. *N.L.R.B.* 313 US 177 (1941); *Briggs Manufacturing Company*, 75 NLRB 569, 570 (1947).

[19] I have discredited his testimony to the contrary.

December 14 for 5 or 10 minutes while he took a telephone call. Failure to provide proper anesthesia to this patient, as Szele admitted, would have caused the patient's death in a couple of minutes. Moreover, Furstenberg began working as an N.A. at a local hospital in late January 1978 and was so employed at the time of the hearing.

I reject the claim that Szele refused to hire Furstenberg because he was concerned over Furstenberg's abandonment of the patients at Sibley Hospital, because this is not what he said to Furstenberg in the crucial phone call of December 20. His concern, as expressed by him, was that she had engaged in a strike and in picketing—activities normally protected by Section 7 of the Act.

I likewise reject this defense as pretextual because it developed for the first time at the hearing, after the General Counsel had put on his evidence of the December 20 phone call. Such a defense was not mentioned at all in Respondent's extensive and carefully written statement of position set forth in a letter from Szele to the Board, dated February 1, 1978.[20]

As to Respondent's related and belated claim that the Sibley Hospital strike was unlawful, I need not reach or pass upon this question. For again, Szele did not tell Furstenberg that he did not want to hire her because she had engaged in an unlawful strike, rather, he hectored her for simply engaging in a strike and picketing.[21]

I conclude that Szele refused to hire Furstenberg for the reasons he, in effect, gave her on December 20; that is, because she had once participated in a strike and picketing and would not agree to forego these rights if he hired her. I further conclude that by refusing to hire her for these reasons Respondent violated, and is violating, Section 8(a)(1) and (3) of the Act.[22]

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

The recommended Order will contain the conventional provisions for cases involving unlawful discrimination in violation of Section 8(a)(3) and (1) of the Act, and unlawful coercion and interference in violation of Section 8(a)(1) of the Act. This will require Respondent to cease and desist from the unfair labor practices found and to post a notice to that effect which will also state the affirmative action Respondent will be required to take to remedy its unlawful refusal to hire Furstenberg. Thus, Respondent will be required to offer Furstenberg employment in the position for which she was unlawfully denied employment on December 20, 1977, or the substantial equivalent of such position, without prejudice to her seniority or other rights and privileges as if, in fact, she had begun work on the first work day after January 1, 1978, the day she agreed to commence work when she accepted employment during her telephone employment interview on December 16, 1977. Furstenberg will also be made whole for any loss of earnings she may have suffered by reason of the discrimination against her by payment to her of a sum of money she would have earned from the first work day after January 1, 1978, until she is offered employment, as aforesaid, less net earnings, if any, during such period to be computed in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest thereon as required by *Florida Steel Corporation*, 231 NLRB 651 (1977).[23]

It will also be recommended, in view of the nature of the unfair labor practices in which Respondent has engaged (see *N.L.R.B.* v. *Entwistle Mfg. Co.*, 120 F.2d 532, 536 (C.A. 4, 1941)), that Respondent be ordered to cease and desist from infringing in any other manner upon the rights guaranteed by Section 7 of the Act.

CONCLUSIONS OF LAW

1. The Respondent is engaged in commerce within the meaning of the Act.
2. The Union is a labor organization within the meaning of the Act.
3. By refusing to hire Mary Ellen Furstenberg because of her prior union activities or sympathies toward a union, the Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act.
4. By coercively interrogating Furstenberg about her prior union activities and by threatening her and by promising her benefits to forego her Section 7 rights, Respondent has violated Section 8(a)(1) of the Act.
5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

Upon the foregoing findings of fact, conclusions of law, and the entire record in this proceeding, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[24]

The Respondent, Dr. George Szele, Anesthesiologist, Manassas, Virginia, his agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in, activities in behalf of,

[20] A belated shift in defenses in a discharge proceeding has been held a factor militating against acceptance of the new defense; e.g., *Ingersoll-Rand Company*, 230 NLRB 455 (1977).

[21] I therefore find it unnecessary to rule on the General Counsel's motion that this defense be stricken from Respondent's brief.

[22] Cf. *Chef Nathan Sez Eat Here, Inc., et al.*, 181 NLRB 159 (1973), enfd. 434 F.2d 126 (C.A. 3, 1970).

[23] See, generally, *Isis Plumbing and Heating Co.*, 138 NLRB 716 (1962).

[24] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

or sympathies toward any labor organization by discriminating in regard to hire or tenure of employment of in any other manner in regard to any term or condition of employment of any of Respondent's employees in order to discourage union membership, activities or sympathies.

(b) Coercively interrogating its employees, or threatening them, or promising them benefits to forego their rights guaranteed by Section 7 of the Act.

(c) In any other manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which is deemed necessary to effectuate the policies of the Act:

(a) Offer Mary Ellen Furstenberg employment in the position for which she was denied employment, or a substantially equivalent position, without prejudice to her seniority or other rights and privileges, as if she had been hired and began work on the first work day after January 1, 1978, and make her whole for any loss of pay she may have suffered in the manner set forth in "The Remedy" section of the Administrative Law Judge's Decision herein.

(b) Preserve and, upon request, make available to the Board or its agents for examination and copying all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its place of business copies of the attached notice marked "Appendix."[25] Copies of this notice, on forms provided by the Regional Director for Region 5, after being duly signed by Respondent's representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Respondent steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 5, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

[25] In the event that this Order is enforced by a judgment of the 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."