UNITED STATES GOVERNMENT
National Labor Relations Board

Memorandum

TO : George Squillacote, Director
Region 30

DATE: APR 30 1979

FROM : Harold J. Datz, Associate General Counsel
Division of Advice

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SUBJECT: Local 2653, AFSCME (AFL-CIO) and
Michigan Council No. 25, AFSCME (AFL-CIO)
(The Sisters of the Third Order of St. Francis,
St. Francis Hospital, Escanaba, Michigan)
Cases 30-CG-11; 30-CB-1431; 30-CB-1431-2
30-CB-1431-3; and 30-CB-1437

These cases were submitted for advice on the issues of (1) whether the Union's commencement of picketing and a strike after the time specified in its ten-day notice was unlawful; (2) whether the Union unlawfully harassed the Employer with 8(g) notices; (3) whether one of the Union's bargaining proposals violated Section 19 of the Act; and (4) whether 10(j) injunctive relief is warranted.

FACTS

Cases 30-CG-11; 30-CB-1431 and 30-CB-1431-2

On February 13, 1979, the Union sent a strike and picketing notice by certified mail to St. Francis Hospital (the "Employer"), the Federal Mediation and Conciliation Service ("FMCS") and the Michigan Employment Relations Commission ("MERC"). The Employer received this notice on February 15. The notice advised the Employer that a strike and picketing would occur at 12:01 A.M. on March 1.

At 9:00 A.M. on March 1, the Union established an informational picket in front of the hospital, but it did not strike. Later that morning, the Employer filed a charge with the Board in Case 30-CG-11, alleging that the Union violated Section 8(g). After speaking with the Board agent and its attorney, the Union stopped picketing that same day at approximately 12:30 P.M., around three and a half hours after the picketing began.

On March 1, the Union sent a second 8(g) notice by certified mail to the Employer, the FMCS and the MERC, stating that a strike and picketing would begin at 12:01 A.M. on March 15. The Employer received this notice around March 5.

On March 5, Union President Elizabeth Melling and Union Vice-President Lois Smith met with Ron Schurra, hospital adminstrator for the Employer. According to the Employer, Melling told Schurra that the 10-day notice was sent out as a matter of routine and was merely a legal formality to keep the Union's options open. The Employer avers that Smith stated that the Union would withdraw the notice if it would "blow" the next bargaining session, scheduled for March 8, out of the water. The two Union officials then told Schurra that they would have Ed Faccio, the Union's staff representative, contact him. Smith and Melling deny telling Schurra that the notice could be ignored, but they admit expressing concern that the notice might have an adverse effect on negotiations.

Schurra received a call from Faccio later that day. According to the Employer, Faccio told Schurra that the notice was not to be read literally and that the Union would propose at the next bargaining session that both sides withdraw all their unfair labor practice charges and that the Union would withdraw its 10-day notice at that meeting. Faccio denies telling Schurra that the Union would rescind the 10-day notice or that the Union would propose that all unfair labor practice charges be withdrawn. Faccio avers that Schurra told him that he was too busy to discuss the notice.

On March 6, the Employer filed an 8(b)(3) charge in Case 30-CB-1431 alleging that the Union was harassing the Employer by serving written notices of intent to strike and picket.

On March 14, the Union hand delivered a letter to the Employer stating that the strike and picketing would commence at 7:00 A.M. on March 15, the start of the day shift, instead of at 12:01 A.M. on March 15 as the original notice had stated. This letter was not served on FMCS or MERC. At 7:00 A.M. on March 15, the Union struck and began picketing the hospital. The strike and picketing have continued since that date. 1/

1/ The Union has filed a Section 8(a)(1) and (5) charge alleging that the Employer polled employees regarding their sentiments toward the Union and that the Employer unilaterally granted a wage increase to employees on March 4. Case 30-CA-5107. The Region has found merit to these allegations and has concluded that the current strike is an unfair labor practice strike.

On March 19, the Employer filed a charge in Case 30-CB-1431-2, alleging that the second notice did not comply with the requirements of Section 8(g) and that the Union thereby violated Section 8(b)(3). The Employer requested 10(j) injunctive relief in all of the cases mentioned above.

Case 30-CB-1431-3

For the past six years, the Union has had a union security clause in its contract with the Employer. 2/ During negotiations, the Union proposed that before an employee could exercise his/her option to make a charitable contribution in lieu of the payment of union dues, the employee must provide the Union with a notice from his/her clergyman verifying that his/her religion proscribes payment of dues or fees to a union.

On March 19, the Employer filed a charge in Case 30-CB-1431-3, alleging that this proposal was unlawful since it violated employee rights under Section 19. 3/

Case 30-CB-1437

On March 12, the Union posted at the hospital a list of the names of 18 employees who had recently resigned their membership in the Union. The notice stated that the "Union regrets the loss of the following." Upon discovering the notice, the Employer removed it from the bulletin board. The notice was posted again the following day and the Employer removed it again. Some of the employees whose names appeared on the list have received anonymous or obscene phone calls. 4/ Under the terms of the expired contract, the Union could not post notices at the hospital without the Employer's permission.

On March 16, the Employer filed the instant Section 8(b)(1)(A) charge and requested 10(j) injunctive relief.

ACTION

It was concluded that all the instant charges should be dismissed, absent withdrawal, for the reasons detailed infra. 5/

2/ The Region has found that one of the major stumbling blocks to an agreement is the Employer's insistence upon no union security clause and no dues checkoff provision in the new contract.

3/ The Employer did not request 10(j) injunctive relief in this case.

4/ All of the 18 employees named in the notice have continued working during the strike.

5/ As the charges are being dismissed, 10(j) relief was deemed unwarranted.

Case 30-CG-11

Initially, it was noted that the Board has interpreted Section 8(g) to cover any kind of picketing at a health care institution, including informational picketing. 6/ With respect to the delay in the commencement of the picketing, the legislative history of Section 8(g) indicates that Congress intended that picketing or a strike should commence within a reasonable time after the hour specified in the ten-day notice. 7/ Consistent with this rule of reason, the General Counsel has taken the position that if the noticed time occurs within the middle of a shift, a union should be able to wait until the start of the new shift to commence its activity, without serving a 12-hour notice specifying a change in the noticed time. 8/ In the instant case, the picketing occurred about nine hours after the time specified in the ten-day notice, but only two hours after the shift change. Thus, it would be argued that the delay in picketing in the instant case was not unreasonable. 9/ Even assuming arguendo that the requirements of Section 8(g) were not strictly met because of the delay in the commencement of the picketing and because the strike specified in the notice did not take place, the violation here would be de minimis since the Employer suffered no adverse effects 10/ and the Union stopped picketing after being informed that it might be violating Section 8(g). Since Congress did not intend the Board to litigate "technical minutiae", 11/ the instant 8(g) charge should be dismissed, absent withdrawal.

6/ United Hospitals of Newark, 232 NLRB No. 67.

7/ S. Rep. No. 93-766, 93d Cong., 2d Sess. 4 (1974); H. Rep. No. 93-1051, 93d Cong., 2d Sess. 5 (1974).

8/ General Counsel Memorandum 74-49, "Guidelines for Handling Unfair Labor Practice Cases Arising Under the 1974 Nonprofit Hospital Amendments to the Act," dated August 20, 1974, at 8. The 12-hour notice which specifies a change in the time for commencement of a strike or picketing is not part of the statute, but is drawn from the legislative history. Id. at 6-7.

9/ Compare Hospital and Service Employees Union Local 399 (Broadway Convalescent Hospital), Case 21-CG-4, Advice Memorandum dated August 21, 1976 (no violation of 8(g) based on a three hour and 45 minute delay in commencement of picketing) with Service Employees International Union Local 250 (Various San Franciso Hospitals), Cases 20-CG-7, et al., Advice Memorandum dated October 7, 1975)(violation of Section 8(g) when picketing began some 22 hours after the time specified in the ten-day notice).

10/ See Office and Professional Employees International Union, Local 33 (Monongahela Valley Association of Health Centers, Inc.), Case 6-CG-9, Advice Memorandum dated December 30, 1977.

11/ 120 Cong. Rec. 12,104 (daily ed. July 10, 1974).

Case 30-CB-1431

Repeated service of ten-day notices upon a health care institution may be deemed to be evidence of bad faith by a labor organization. 12/ In the instant case, there was an insufficient basis on which to conclude that the Union was acting in bad faith since the Union here sent only two ten-day notices to the Employer. With respect to the March 5 conversations between the union officials and the Employer, it does not appear that the Employer was harassed or misled by this discussion. Instead, the March 5 conversations appear to have been an attempt by the Union to resolve the remaining issues on the bargaining table and to avoid a strike. Therefore, the instant charge should be dismissed, absent withdrawal.

Cases 30-CB-1431-2

With respect to the change in the commencement of the strike and picketing from 12:01 A.M. to 7:00 A.M. on March 15, the General Counsel has taken the position, as noted supra, that a union may delay the commencement of its action until the start of a new shift without sending a 12-hour notice. Thus, the March 14, 12-hour notice was not required. Moreover, although this notice was not served on the FMCS or the MERC, Advice has taken the position that the mere failure to serve the FMCS with a 12-hour notice as required by G.C. Memorandum 74-49 would not, standing alone, warrant the issuance of a complaint. 13/ Under the rule of reason approach mandated by Congress, it was concluded that the instant charge should be dismissed, absent withdrawal.

Cases 30-CB-1431-3

In Pottsdam Memorial Medical Center, 14/ it was noted that the legislative history of Section 19 makes clear that this exception to the union security obligation is only available to those individuals who belong to one of the few bona fide religions, the tenets of which historically oppose joining or financially supporting a union. In the instant case, the Union has proposed a provision providing that

12/ G.C. Memorandum 74-49, supra, at 8.
13/ Hospital and Institutional Workers' Union, Local 250 (Plymouth Square), Case 20-CG-9, Advice Memorandum dated March 5, 1976.
14/ Case 4-CA-7040, et al., Advice Memorandum dated January 22, 1975.

an employee who seeks to use this exception must give the Union a notice from his clergyman that his religion proscribes payment of Union dues. Since this proposal merely institutes a method for verifying an employee's claim, it was not deemed to be repugnant to Section 19. Therefore, the instant Section 8(b)(3) charge should be dismissed, absent withdrawal.

Case 30-CB-1437

The posting of a list of the names of employees who had recently resigned from the Union was not deemed to be a Section 8(b)(1)(A) violation. Here the notice merely listed the names of employees and there is no evidence that the Union encouraged members to call these individuals. Moreover, it was noted that the Employer removed the notice from the hospital bulletin board each day shortly after it was posted, and under the expired contract the Employer had the right to control such notices. Therefore, it was concluded that the instant Section 8(b)(1)(A) charge should be dismissed, absent withdrawal.

H. J. D.