FORM NLRB-5026 (4-80)

UNITED STATES GOVERNMENT
National Labor Relations Board

Memorandum

RELEASE

TO : Bernard Gottfried, Director
Region 7

DATE: FEB 28 1986

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

530-6067-4011-1100

SUBJECT: Total Health Care, Inc.
Case No. 7-CA-25064

This case was submitted for advice as to whether the Employer violated Section 8(a)(1) and (5) of the Act by failing to bargain with the Union over its decision to subcontract its medical care services.

FACTS

Total Health Care, Inc. (the Employer or THC), a health maintenance organization, operated three medical facilities at 3455 Woodward, Detroit, the eastside of Detroit, and Southfield, Michigan. 1/ Since June, 1981, the American Federation of State, County, and Municipal Employees, Council 25 (the Union) represented a unit of approximately 66 LPNs and clerical employees of THC at these three facilities. The contract between the parties ran from October 1, 1982 to December 31, 1984.

In December 1984, the parties commenced negotiations for a new contract. At that time, THC was in such poor financial straits that, as a condition for relicensing, the State had required that THC do something about its financial situation. The Employer told the Union that it was in a desperate financial stituation and requested that the Union agree to a wage freeze for unit employees. 2/

On August 13, 1985, 3/ the Employer informed the Union of its decision to subcontract the direct medical care performed by THC to a physician association called Amalgamated Physicians, P.C. (Amalgamated), and stated that, as a result, approximately 37 unit employees would be laid off effective September 13. THC told the Union that it would continue to collect a per capita fee from its member/customers and pay a lower per capita fee to Amalgamated. In this way, THC intended to stabilize costs, and pass risks onto

1/ THC also operates approximately 10 satellite facilities located in the Detroit suburbs. At these facilities, THC has always subcontracted to physician associations all the medical care services.

2/ The Union requested certain financial information to substantiate the Employer's claim of an inability to pay. The Employer refused, the Union filed charges alleging a violation of Section 8(a)(5), and complaint issued in Case No. 7-CA-24894. This case was scheduled for trial on January 16, 1986.

3/ All dates are in 1985, unless otherwise noted.

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the subcontractor. The Employer distributed layoff notices throughout the three facilities and suggested to these employees that they apply to Amalgamated for positions. On September 13, the Director of Amalgamated (and a staff doctor with THC) spoke to the unit employees at the Southfield facility and told them that Amalgamated was non-union, but that employees would receive the same wages and benefits they earned while working for THC. 4/

After the September 13 layoff, THC closed its Eastside facility and entered into subcontracting arrangements with Detroit Medical and Surgical Center (Detroit Medical) and C.A. Murphy Family Health Care (C.A. Murphy) to provide the medical services in that area formerly provided by THC employees. On September 16, THC entered into another subcontracting arrangement with Medical Center Health Care Providers (Medical Center) for the medical care to be provided at the Downtown and Southfield facilities. Employees hired by Amalgamated who reported to work on that date were either sent home or offered positions with Medical Center at a wage rate lower than that offered by Amalgamated. As a result of these subcontracting arrangements, the Southfield facility no longer has any THC unit employees, and the Downtown facility has approximately 15 THC unit employees performing clinical, data processing and record keeping functions.

The terms of the three subcontracting arrangements are similar. They are all one year contracts to be extended for another year unless either party notifies the other of termination. The contracts can be terminated during their term by either party if there is a material breach. The Medical Center contract and the C.A. Murphy contract restrict the subcontractor's ability to provide similar medical services elsewhere, unless and until THC approves. Both THC and the subcontractor agree to provide their own medical insurance. In addition, the subcontractor agrees to maintain the necessary medical records, as required by law and by THC. Most importantly, each contract provides that the positions of Medical Director and Medical Center Coordinator will be employed by THC. The Medical Director's functions are to supervise and manage the medical care services provided under these subcontracting agreements. The Medical Director has the ultimate responsibility for the administration and operation of the professional medical services under the plan; the establishment of educational and training standards for physicians; the maintenance of a proper patient/physician ratio; the maintenance of patient/subscriber satisfaction and the implementation of a Quality Assurance Program; the recommendation of disciplinary action against the subcontractor's employees; and the conduct of THC's medical audit. In addition, the Medical Director resolves disputes that may arise between patient/subscribers and the doctors. The Quality Assurance Program consists of a Committee, headed by the Medical Director, that resolves medical ethics questions and questions concerning the interpretation of the subcontracting agreement. The Medical Coordinator's function is that of an administrative liason between THC and the subcontractor and between THC and the patient/subscribers. The Coordinator's duties include, but are not limited to: providing information on policies and

4/ Apparently, at some point prior to September 11, a dispute arose between THC and Amalgamated, and THC cancelled its subcontracting arrangement with Amalgamated.

procedures for subcontractor personnel and THC enrollees; coordinating referrals of enrollees to physicians outside the subcontractor; conducting pre-audit reviews of medical records in preparation for state and federal audits; and processing disenrollment and enrollments.

ACTION

It was concluded that the Employer's decision to subcontract its medical care services was a mandatory subject of bargaining, and that the Employer violated Section 8(a)(5) and (1) of the Act by failing to bargain with the Union over that decision.

In Otis Elevator Co., 5/ the Board laid down several tests for determining whether a particular management decision is a mandatory subject of bargaining. In the view of Chairman Dotson and Member Hunter, a "critical factor to a determination whether a management decision is subject to mandatory bargaining is the essence of the decision itself, i.e., whether it turns upon a change in the nature or direction of the business, or turns upon labor costs. . ." 269 NLRB at 892-94. In the view of Members Dennis and Zimmerman, managerial decisions are mandatory subjects of bargaining where they are "amenable" to resolution through the bargaining process, and where the benefit which accrues to labor-management relations and the collective-bargaining process outweighs the constraints that process places on management. 269 NLRB at 895-897, 901. Member Dennis noted that decisions are amenable to resolution through the collective bargaining process if a key factor underlying the decision is a factor over which the union has control, citing, for example, labor costs. 269 NLRB at 897. Under either test, the management decision in Adams Dairy 6/ was deemed not to be subject to Section 8(d). 269 NLRB at 893, 898-99.

In Adams Dairy, the employer, a milk processor, decided to terminate its driver-salesmen and to contract with independent distributors to deliver its milk products to retail outlets. Prior to making the decision, however, the employer approached the union and made "a generalized request for aid and advice" claiming its delivery costs were not competitive. 7/ The union did not come forward with any proposals, and the employer implemented its decision. The employer sold its trucks and equipment to the independent distributors. The employer did not finance or arrange for the financing of the purchase of the equipment. The independent distributors had complete control over product price, use of additional help, and the selection of drivers. In fact, the only requirement the employer placed on the method of distribution pertained to maintaining certain safety, health, and efficiency standards. 8/ As characterized by the Court and noted in Otis II, the employer's decision in Adams Dairy involved "a change in basic operating procedure in that the dairy liquidated that portion of its business handling distribution of milk products . . . . [T]here was a change in the capital structure . . . which resulted in a partial liquidation and a recoup of capital investment." 9/

5/ 269 NLRB 891 (1984) (Otis II).
6/ Adams Dairy, Inc., 137 NLRB 815 (1962), enf. den. in rel. part 350 F.2d 108 (8th Cir. 1965), cert. denied 382 U.S. 1011 (1966).
7/ 137 NLRB at 821.
8/ 137 NLRB at 822.
9/ 350 F.2d at 111-12, quoted in part in Otis II, 269 NLRB at 893.

Under the majority opinion in Otis II, Chairman Dotson and Member Hunter classified the management decision in Adams Dairy as turning upon "a fundamental change in the scope and direction of the enterprise", and thereby as a nonmandatory subject of bargaining. 10/ Thus, although it might be argued that the employer in Adams Dairy had merely "subcontracted" the delivery function, the employer had no control over the equipment or the employees, and had in essence gone out of the business of distributing milk products. Member Dennis cited Adams Dairy as a case illustrating "weighty" burden elements and stated that in such a case "it is likely that the decision at issue will not be a mandatory subject of bargaining." 11/

It is our view that the Employer's decision in the instant case is not akin to the decision made by the employer in Adams Dairy to liquidate a portion of its business. Thus, although the Employer in the instant case decided to subcontract an aspect of its operations, it maintained control over the quality of performance. As a health maintenance organization, the Employer served two functions: (1) it solicited patient/subscribers for the health care plan; and (2) it provided health care services under the plan. The Employer decided to subcontract to physician associations the provision of the medical care function; yet, under the terms of the agreement between the Employer and these physician associations, the Employer maintains effective control over the quality of medical care delivered to the patient/subscribers. Thus, the Medical Director, employed by the Employer, is still ultimately responsible for the administration of the health plan, doctor/patient relationships, medical ethics questions, and questions over the interpretation of the subcontracting agreement. In addition, the Medical Director has authority to recommend disciplinary action against any of the subcontractor's employees and is responsible for setting up a Quality Assurance Program. The Medical Coordinator, also employed by the Employer, acts as a liason between the subcontractor and the Employer and between the patient/subscriber and the Employer to insure the efficient running of the health plan. Under the terms of the subcontract, the subcontractor agrees to provide space at its facilities for the Medical Coordinator. Moreover, the subcontracting arrangement can be terminated by THC after a year and/or upon a material breach. Therefore, it is conceivable that THC might get back into the business of providing the medical care services itself. Consequently, unlike Adams Dairy, the Employer in the instant case has not made "a fundamental change in the scope or direction of its enterprise," but has merely subcontracted a portion of its business while maintaining extensive control over its performance. 12/

10/ 269 NLRB at 893.

11/ 269 NLRB at 898-99. Member Zimmerman, who would have found a decision to be mandatory if it was amenable to resolution through collective bargaining, did not discuss Adams Dairy in his opinion in Otis.

12/ Compare Gar Wood-Detroit Truck Equipment, Inc., 274 NLRB No. 23 (1985) (the employer's decision to subcontract a portion of its business was a significant change in the nature and direction of the business, and thus a nonmandatory subject of bargaining because it was a decision to abandon completely the servicing aspect of its business with no intention of reestablishing it, and because the decision turned on a reduction of overhead costs across-the-board, of which labor costs were only one component) with Griffith-Hope Company, 275 NLRB No. 73 (1985) (the employer's decision to temporarily subcontract unit work was a mandatory subject of bargaining because the decision did not turn on a fundamental change in the nature of the business, as it was a temporary measure based solely on a need to reduce labor costs).

Finally, it is clear that the Employer's decision turned solely on labor costs. Thus, the Employer decided to subcontract the medical care services after requesting a wage freeze from the Union without providing the Union with adequate information to substantiate its inability to pay. In Oak Rubber Company, 277 NLRB No. 148, slip op. at 1 n. 2 (1985), the Board relied on the fact that the employer closed the door to discussion with the union, at the same time the union offered concessions, to find the employer's decision was a mandatory subject of bargaining. In the instant case, the Employer deprived the Union of an opportunity to bargain over the decision by refusing to provide the Union with the requested information. Consequently, the Union never had the opportunity to offer concessions. In addition, the ultimate result of the subcontracting arrangement was that unit employees had to take a wage cut in order to keep their positions. In Griffith-Hope Company, 275 NLRB No. 73, slip op. at p. 3 (1985), the Board relied on the fact that the Employer offered to recall laid off employees if they agreed to a 50% wage cut as evidence that the Employer's decision turned solely on labor costs. In addition, the fact that the state may have required THC to do something about its financial condition does not make its decision otherwise privileged. See Nurminco, Inc., 274 NLRB No. 112 (1985). In Nurminco, the Employer defended its decision to layoff unit members and transfer the work to non-unit members by asserting a change in state reimbursement regulations that resulted in substantial losses. Nonetheless, Chairman Dotson and member Hunter concluded that the decision "was based in substantial part on labor costs." 274 NLRB No. 112, slip op. at 1-2 n. 2. Indeed, member Dennis concluded that labor costs "were a significant consideration" in the decision, slip op. at 2 n. 2. Thus, it is clear that the Employer's sole motive for subcontracting the medical care services was labor costs. Therefore, since the Employer's decision did not amount to a change in the nature or direction of the business, and because it was motivated solely by labor costs, it was a mandatory subject of bargaining and the refusal to bargain with the Union over this decision violated the Act. 13/

Accordingly, a Section 8(a)(5) and (1) complaint should issue, absent settlement. 14/

HJD

H. J. D.

13/ See Oak Rubber Company, 277 NLRB No. 148 (1985); Griffith-Hope Company, supra; Storall Manufacturing Co., Inc., 275 NLRB No. 39 (1985); Pennsylvania Energy Corp., 274 NLRB No. 174 (1985); Nurminco, Inc., supra.

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