FORM NLRB-5026 (4-F2)

UNITED STATES GOVERNMENT
National Labor Relations Board

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Memorandum

TO : Thomas W. Seeler, Regional Director
Region 3

DATE: August 13, 1984

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

Index Nos. on last page

SUBJECT: House of the Good Samaritan
Case 3-CA-12135

A.D. 05947

RELEASE

This Section 8(a)(1), (3) and (5) case was submitted for advice as to whether the Employer discriminatorily and unilaterally reorganized its dietary department, eliminating four unit positions.

FACTS

In May 1981, the Union was certified in a unit of technical employees at the Employer's health care facility. 1/ The parties finally reached agreement and signed their initial collective bargaining contract on January 23, 1983, to be effective through October 1984. The contract significantly raised unit employee wage rates from 16% to over 40% in some instances. Shortly after the new agreement became effective, the Employer filed a UC petition seeking to exclude its radiology technicians from the bargaining unit as professional employees. On May 19, 1983, the Regional Director issued a Decision and Clarification of Bargaining Unit, concluding that the X-Ray technicians were properly part of the existing technical unit.

As a health care facility, the Employer is subject to the state health care regulation of New York and is reviewed by the State Health Department and the Joint Commission on Accreditation of Hospitals (JCAH). In the latest review conducted in February 1984, the Hospital was cited for deficiencies in the language of the facility's service contracts, in the employee health program and in electrical safety inspections. Immediately after that review, James Beatty, Director of Food Service, called a meeting of all Dietary Department employees, where he praised their work and stated that they had received an excellent review in the recent JCAH survey.

On April 2, 1984, Beatty called a meeting for all diet technicians where he announced a reorganization plan for the Dietary Department. The reorganization would result in the loss of four of the five diet technicians jobs and the creation of five new positions, viz., two clinical diet aides, one clinical dietician and two kitchen coordinators, all of which would be outside of the unit as either professional or supervisory positions. During a

1/ The Union also represents the licensed practical nurses and service and maintenance employees in separate units.

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meeting held the following day with Kathy Ventiquattro, the Union representative, Beatty explained that the reorganization was necessary to correct charting deficiencies cited by the JCAH. 2/ The Employer stated that it had tried to correct these deficiencies in the past by hiring kitchen coordinators and by counseling the diet technicians, but that these efforts had not solved the problem. The reorganization plan would reassign charting responsibilities to the clinical diet aides. Ventiquattro then requested a copy of the JCAH survey and copies of the job description for the newly created positions. Although both requests, and several subsequent formal request were initially refused, Ventiquattro finally received the new job descriptions just before a meeting on April 16 held to discuss a grievance the Union had filed under the nondiscrimination clause of the contract regarding the reorganization.

The Union was able to verify through the State Health Department that the most recent JCAH survey did not in fact cite any charting deficiencies. Further, the Union has requested a copy of the JCAH report through a Freedom of Information Act request. At the April 16 grievance meeting, Ventiquattro raised the fact that the recent JCAH survey did not cite any Dietary Department deficiencies. The Employer responded that the most recent JCAH survey was not the basis for its decision, that charting problems existed, and that the reorganization would be effective May 7. That meeting, and another held on April 19, ended inconclusively. Immediately thereafter, Beatty offered three dietary employees the positions of kitchen coordinator or clinical diet aide. These dietary technicians refused the Employer's job offers because the new jobs involved substantially similar work but at a lesser wage. A fourth dietary employee applied for, was offered and accepted the clinical dietician position. On May 7, the reoganization plan was implemented.

ACTION

FOIA Exemption 5

[redacted] In addition, a Section 8(a)(5) complaint should issue, absent settlement, regarding the Employer's refusal to provide information.

Section 8(a)(3) allegation

In general, anti-union animus may be inferred when an employer's proferred excuse for terminating unit work is clearly false. Thus, in Town & Country Mfg. Co., 3/ the Board held that the employer violated Section 8(a)(3) and (5) when it discriminatorily and unilaterally terminated its trailer hauling department and laid off those employees. The Board based its finding of anti-union animus on, inter alia, the fact that the employer's proffered

2/ It appears that a previous JCAH survey conducted on June 23, 1982 had listed charting deficiencies in the Intensive Care Unit, and these deficiencies were again cited in a March 2, 1983 survey. These deficiencies were apparently corrected, however, since they were not mentioned in the February 1984 survey.

3/ 136 NLRB 1022 (1962), enfd. 316 F.2d 846 (5th Cir. 1963).

reason for the subcontracting, i.e., that it was necessary to correct violations cited by the I.C.C., was pretextual. In Eagle Material Handling, Inc., 4/ the Board found that the employer violated Section 8(a)(3) by transferring unit work because of a Board bargaining order and not because of an asserted business decline or employee incompetance, both of which excuses were found pretextual. 5/ Of particular importance is Edward M. Rude Carrier Corp., 6/ in which the Board found a discriminatory discontinuance of part of that employer's hauling operation in circumstances markedly similar to those here. In that case, the Administrative Law Judge found unlawful discriminatory intent based upon the timing of the discontinuance immediately after the union's certification, the disingenuousness of the asserted business justification, and the employer's offer of certain benefits to one employee on only one occasion.

In the instant case, the Employer's initial assertion to the Union that the reorganization and resultant layoffs were necessary to correct charting deficiencies cited by the JCAH seems clearly pretextual. Not only did the recent JCAH report cite no such deficiencies, but the Employer also later admitted to the Union, when confronted with this fact, that the JCAH report was not the basis for the reorganization. Further, although the Employer at that time continued to contend that charting deficiencies nevertheless existed, it offered jobs involving substantially similar work to the same employees. If the dietary technicians had been lax in their charting responsibilities, presumably they would not have been offered re-employment. Further, shortly after the JCAH report, the dietary employees were congratulated on the excellent review they had received. Also, the layoff occurred after the initial collective bargaining agreement substantially raised wages and shortly after the Employer unsuccessfully attempted to remove other technical employees from the contract via its filing of the UC petition. The Employer itself concedes that the reorganization plan will realize immediate savings of over $4,000 in labor costs. Based on all the above factors, it may reasonably be inferred that the Employer's true motivation was to rid itself of the contractual obligations, in particular labor costs, entailed by the collective bargaining agreement. Thus, the reorganization and the resulting layoff of the dietary technicians were arguably in violation of Section 8(a)(3).

Section 8(a)(5) allegations

In general, when an employer transfers unit work during the term of a contract in order to avoid one or more specific provisions of the contract, that transfer constitutes a midterm repudiation of the contract in violation of Sections 8(d) and 8(a)(5) of the Act. 7/ For example, an employer may not deliberately dilute the unit without violating the contractual recognition

4/ 227 NLRB 174 (1976), enfd. 558 F.2d 160 (3rd Cir. 1977).

5/ See also Howmet Corp., 197 NLRB 471 (1972) enfd. ___F.2d___, (7th Cir. 1974), 86 LRRM 2572; Syufy Enterprises, 220 NLRB 738 (1975); East Side Shopper, Inc., 204 NLRB 841 (1973); and The Robert's Press, 188 NLRB 454 (1971), enfd. in pertinent part, 451 F.2d 941 (2nd Cir. 1971).

6/ 215 NLRB 883 (1974), enf. denied in pertinent part, ___F.2d___ (4th Cir. 1976), 93 LRRM 2297.

7/ Milwaukee Spring II, 268 NLRB No. 87 (1984).

clause, where one exists. In Arizona Electric Power Corp., 8/ the Board found a Section 8(a)(5) violation where the employer unilaterally withdrew recognition from the union during the term of the contract. In so holding, the Board stated:

> "It is axiomatic that parties to a collective bargaining agreement cannot bargain meaningfully unless they know the scope of the unit for which they are to bargain. Thus, it is well established that the integrity of a bargaining unit cannot be unilaterally attacked, and that once a unit is certified, it may be charged only by mutual agreement of the parties or by Board action. 9/

In that case, the contract contained a clause recognizing the union as the exclusive representative of the defined unit. Similarly, in the instant case, Article I of the collective bargaining agreement provides that the Employer shall recognize the Union as the exclusive bargaining representative for the unit consisting of, inter alia, the dietary technicians for the duration of the contract. Thus, the Employer is not free to unilaterally modify the scope of the bargaining unit. The reorganization plan, however, does modify the unit by eliminating four the five unit positions in the Dietary Department. The collective bargaining agreement further provides, in Article 16, a set scale of compensation to be paid to the various unit members. To the extent that the Employer's reorganization plan is designed to save labor costs, the plan violates Article 16 of the contract. Therefore, by implementing the reorganization plan, the Employer has repudiated various terms of the contract in violation of Section 8(d) and 8(a)(5) of the Act. 10/

In the alternative, even assuming the reorganization did not constitute a modification of the contract, an employer is not free to unilaterally alter terms and conditions of employment involving mandatory subjects of bargaining without first affording the union an opportunity to bargain over those changes. In Otis Elevator, 11/ the Board held that a decision to transfer and consolidate certain work from one facility to another was not a mandatory subject of bargaining. In so holding, the Board members set forth differing criteria to be used in determining whether management decisions are mandatory subjects.

8/ 250 NLRB 1132 (1980).

9/ Id. at 1133 (citation omitted).

10/ The instant case is distinguishable from the transfer of unit work involved in L.A. Marine and Milwaukee Spring I, 235 NLRB 720 (1978) and 265 NLRB No. 28, in that those cases involved transferring unit work to an entirely new location to be performed by different employees. Here, the unit work is being transferred out of the unit but would remain at the same location and would be performed by the same employees, but at a lower rate of pay and without union representation. In addition, the instant case also contains an arguably meritorious Section 8(a)(3) allegation.

11/ Otis Elevator, 260 NLRB No. 162 (1984).

In the view of Board members Dotson and Hunter, if a management decision represents a "change in the nature and direction of a significant facet" of the employer's business, that decision is a nonmandatory subject of bargaining, regardless of whether the decision turns on labor costs. 12/ If a decision, however, does not change a significant facet of the business but instead turns on labor costs, it is a mandatory bargaining subject.

In the opinion of Member Dennis, a decision is a mandatory subject of bargaining, if: (1) it is amenable to resolution through the bargaining process; and (2) bargaining would not place undue burdens on the Employer. Under Dennis' view, such amenability is established when "a factor over which the Union has control [is] a significant consideration in the employer's decision." 13/ In Dennis' view, labor-related factors such as labor costs would be considered amenable to the collective bargaining process. The General Counsel must then establish that the benefits for the collective bargaining process outweigh the burdens placed on the employer, taking into account the Employer's need for speed, flexibility and secrecy. Under Member Zimmerman's analysis, a decision encompasses a mandatory subject matter if it is amenable to the collective bargaining process, i.e., if union concessions could potentially affect the employer's decision. He states: "The Union capacity to affect the employer's decision . . . places the decision within the employer's bargaining obligation absent any . . . urgent need for . . . speed, flexibility, or secrecy . . . ." 14/ Thus, a managerial decision is a nonmandatory subject for Member Zimmerman only when there is no way in which union concessions could affect the concerns underlying that decision.

It appears that the decision here encompasses a mandatory subject matter in the view of all four Board members. First, the Employer is not making any significant alteration in the nature and scope of its business, and no capital expenditure is required. The Employer is still in the business of providing dietary services for the patients; the reorganization scheme does not alter the function of the department, nor does it significantly affect the department's method of operation. Indeed, although two of the new positions are supervisory, the fact that the Employer offered the newly-created nonunit positions to its former unit employees indicates that the reorganization is not a change in the nature and scope of the business. 15/ Secondly, as outlined above, it seems clear that the Employer's decision was motivated by its labor costs. Therefore, the Employer's decision to reorganize encompassed a mandatory subject of bargaining under the position taken by Members Dotson and Hunter.

Further, the reorganization decision is amenable to the collective bargaining process as outlined by Members Dennis and Zimmerman. The Union clearly has the power to lower labor costs, and the Employer is not in any

12/ Otis Elevator, supra, p. 2 of sl. op.
13/ Id. at p. 26.
14/ Id. at p. 30 (citation omitted).
15/ Further, because the instant case does involve a loss of unit jobs, it is distinguishable from Gerber and Hurley, Inc., 269 NLRB No. 146 (1984), where the Board held that creating a supervisory position from a former unit position and accordingly promoting the unit employee to supervisor did not entail a duty to bargain because there was no adverse impact on the unit.

immediate danger of losing its accreditation, nor is there any other indication of a need for speed, flexibility or confidentiality as to this decision. Thus, under the standard enunciated by both Dennis and Zimmerman, the Employer's reorganization plan is a mandatory subject of bargaining.

The Region found that the Employer presented the Union with the reorganization as a fait accompli, and therefore that the Employer unilarally effectuated its reorganization decision. Also, the contractual management rights clause cannot be construed as a waiver by the Union of its right to demand bargaining over the reorganization scheme. 16/ In Ashland Hospital Corp., 17/ a contractual management rights clause that stated that the employer "shall have the right to . . . discontinue, change, combine existing or new departments; the right to introduce new, changed or improved services, methods, facilities or jobs . . . " did not constitute a clear and unmistakable waiver of the Union's right to demand bargaining over the decision to institute primary nursing care using non-unit employees. In that case, the language in that clause reserving the right to change and introduce new methods of operation was not viewed as clearly including the right to assign unit work to nonunion employees. In the instant case, the management rights clause similarly confers the rights to "consolidate or reorganize" without any reference to an additional right to transfer unit work. This clause thus appears to be co-extensive with the clause in Ashland and similarly does not indicate a clear and unmistakable waiver by the Union of its bargaining rights over this subject.

Finally, the Employer is alleged to have unlawfully refused to furnish to the Union the JCAH survey and to have delayed in furnishing the job descriptions. It seems clear that this information was relevant and necessary for the Union to fulfill its responsibilities as bargaining representative. 18/ Although the Employer eventually did provide the new job descriptions, it's delay prevented the Union from being able to effectively utilize the material in the grievance process. The Employer also never supplied the JCAH report, and the fact that the Union was able to obtain that report through alternative channels does not relieve the Employer of its obligation to provide the information. 19/ Thus, the Employer violated Section 8(a)(5) through its refusal to furnish the JACH report and its delay in providing the new descriptions.

16/ That clause states, in pertinent part, that, the "Employer retains the sole . . . right to . . . plan, direct and control the entire operation, . . . discontinue, consolidate or reorganize any department or branch." Article 3. The contract also contains a zipper clause and non-discrimination clause. See Articles 52 and 48 respectively.

17/ Case 9-CA-20204-1, Advice Memorandum dated January 17, 1984. (the Section 8(a)(3) allegations were dismissed in that case for lack of evidence of anti-union animus, thereby distinguishing it from the instant case).

18/ See NLRB v. Acme Industrial Co., 395 U.S. 432 (1967).

19/ Central Suffolk Hospital, Case 29-CA-10719, Advice Memorandum dated March 30, 1984, and Consolidation Coal, Case 14-CA-13506, Advice Memorandum dated July 10, 1980. See also The Kroger Co., 226 NLRB 512 (1976).

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