The Medical Center at Princeton *and* Guy Richard Horner *and* International Union, United Plant Guard Workers of America (UPGWA). Cases 22-CA-9871 and 22-CA-9938

12 April 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND DENNIS

On 24 February 1981 Administrative Law Judge Joel P. Biblowitz issued the attached decision. The Respondent filed exceptions and a supporting brief. Pending the Board's consideration on its exceptions, the Respondent filed a motion for reconsideration and a motion to remand and reopen hearing, to which the General Counsel and the Union each filed responses.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions, briefs, and the Respondent's motion[1] and has decided to affirm the rulings, findings, and conclusions as modified.[2]

We agree with the judge's finding that the Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing to recognize and bargain with the Union as the exclusive collective-bargaining representative for its security guards and parking attendants. We further agree with the judge that the Respondent's refusal to bargain about its decision not to give the spring 1980 wage increase to the unit employees in accordance with its past practice also violated Section 8(a)(5) and (1) of the Act. In this regard, we have often indicated that an employer has an obligation to bargain with the employees' duly certified bargaining representative (the Union in the instant case) over any change in the employees' terms and conditions of employment (here including the annual spring wage increase), even when the employer is testing the union's certification.[3] With respect to matters over which the employer has exercised discretion previously, such as the amount of the wage increase in the instant case, the employer also is obligated to bargain with the union.[4] We further find that the Respondent's 26 March 1980 letter to the Union reflected a fait accompli, not a good-faith willingness to negotiate about its decision to withhold the spring 1980 wage increase from the unit employees, particularly in light of its earlier blanket refusal to recognize the Union as the exclusive bargaining representative. We therefore affirm the judge's finding that the Respondent thereby violated Section 8(a)(5) and (1) of the Act.[5]

ORDER

The National Labor Relations Board orders that the Respondent, The Medical Center at Princeton, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with International Union, United Plant Guard Workers of America (UPGWA) as the exclusive bargaining representative of the employees in the bargaining unit.

(b) Failing and refusing to bargain with UPGWA by unilaterally withholding from its employees in the bargaining unit a general spring wage increase granted to all of its other employees in accordance with its established practice and policy.

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

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain collectively with the Union as the exclusive representative of the employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full time and regular part time security guards and parking attendants employed by the Medical Center at Princeton, at its Princeton, New Jersey, facilities, excluding all professional employees, service and maintenance employees, technical employees, supervisors as defined in the Act and all other employees.

[1] We hereby deny the Respondent's motion as lacking in merit, and as untimely within the contemplation of Sec. 102.65(e)(2) of the Board's Rules. While a portion of the Respondent's motion relies on our 15 September 1981 clarification of the Board's Rules, the motion was dated some 35 days after the clarification, which, under the circumstances, renders the Respondent's motion untimely.

Member Dennis, who did not participate in the underlying representation proceeding, concurs in the denial of the Respondent's motion as untimely. In these circumstances, she finds it unnecessary to pass on the Respondent's contention that the Board erred in failing to review the complete record relied on by the Regional Director.

[2] In finding no merit in the misrepresentations alleged in Objection 2(b), we rely on *Midland Life Insurance Co.*, 263 NLRB 127 (1982), and *Riveredge Hospital*, 264 NLRB 1094 (1982), which issued after the Union was certified.

[3] See, e.g., *Sweetwater Hospital Assn.*, 226 NLRB 321, 324 (1976).

[4] See, e.g., *Charles Mfg. Co.*, 245 NLRB 39, 39 fn. 1 (1979); *Allis Chalmers Corp.*, 237 NLRB 290, 291 (1978), enfd. in relevant part 601 F.2d 870 (5th Cir. 1979); *Oneita Knitting Mills*, 205 NLRB 500, 500 fn. 1 (1973).

[5] In these circumstances, we find it unnecessary to pass on the judge's finding that the withholding of the spring 1980 wage increase also constituted an 8(a)(3) violation.

(b) Pay to its employees in the bargaining unit the wages they would have received except for the Respondent's unilateral withholding of the wage increase granted to its other employees in spring 1980. Interest shall be paid in the manner prescribed in *Florida Steel Corp.*, 231 NLRB 651 (1977).

(c) Preserve and, on 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.

(d) Post at its facility at Princeton, New Jersey, copies of the attached notice marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[6] If this Order is enforced by a Judgment of a 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."

APPENDIX

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

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain with International Union, United Plant Guard Workers of America (UPGWA) as the exclusive representative of the employees in the bargaining unit described below:

> All full time and regular part time security guards and parking attendants employed by the Medical Center at Princeton, at our Princeton, New Jersey, facilities, excluding all professional employees, service and maintenance employees, technical employees, supervisors as defined in the Act and all other employees.

WE WILL NOT fail and refuse to bargain collectively with UPGWA by unilaterally withholding from our unit employees a general spring wage increase granted to all of our other employees in accordance with our established practice and policy.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain collectively with UPGWA as the exclusive representative of all the employees in the above appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

WE WILL pay to our unit employees the wages they would have received but for our unilateral withholding of the wage increase granted to our other employees in spring 1980, with interest.

THE MEDICAL CENTER AT PRINCETON

DECISION

STATEMENT OF THE CASE

JOEL P. BIBLOWITZ, Administrative Law Judge. This case was tried before me in Newark, New Jersey, on November 17, 1980. An order consolidating cases, complaint and notice of hearing issued on May 22, 1980, based on a charge filed in Case 22-CA-9871 on March 31, 1980, by Guy Richard Horner and a charge filed in Case 22-CA-9938 on April 29, 1980, by International Union, United Plant Guard Workers of America (UPGWA), herein called the Union. Basically, the consolidated complaint alleges that the Medical Center at Princeton, herein called Respondent, violated Section 8(a)(1)(3) and (5) of the Act by failing to grant a wage increase to its security guards and parking attendants (the unit for which the Union was certified) while granting a wage increase to its other nonsalaried employees, and by failing to bargain with the Union about this decision, and that Respondent violated Section 8(a)(1)(5) of the Act by refusing to bargain with the Union as the exclusive representative of its security guards and parking attendants.

FINDINGS OF FACT

I. JURISDICTION

Respondent, a New Jersey corporation, with its principal office and place of business located at 253 Witherspoon Street, Princeton, New Jersey, is engaged in providing and performing medical and professional health care services and related services. During the 12-month period preceding the issuance of the consolidated com-

plaint, Respondent, in the course and conduct of its business operations, received gross revenue in excess of $250,000. During the same period, Respondent purchased, and caused to be delivered to its premises, goods and materials valued in excess of $250,000, which goods and material were transported to Respondent directly from States other than the State of New Jersey. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Respondent admits, and I find, that the Union is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

On July 23, 1979, the Union filed a petition to represent certain of Respondent's employees. Pursuant to a Stipulation for Certification Upon Consent Election executed by Respondent and the Union and approved by the Regional Director for Region 22 on August 8, 1979, an election was conducted by secret ballot on September 7, 1979, at which time the Union received eight votes, Respondent four votes, with no challenged ballots. On September 12, 1979, Respondent filed objections to the election alleging, basically, that the Union and the Board agent engaged in conduct designed to mislead the voters to believe that the Board supported the Union's cause, thereby compromising the Board's neutrality.

On November 19, 1979, the Regional Director for Region 29 issued a Report on Objections in which he recommended that Respondent's objections be overruled and that the Union be certified as the exclusive collective-bargaining representative of the employees involved herein. Respondent filed exceptions to this report, and on February 15, 1980, the Board issued its Decision and Certification of Representative in which it affirmed the Regional Director's recommendation to overrule Respondent's objections and the Board certified the Union as the exclusive collective-bargaining representative of certain of Respondent's employees.

The appropriate unit found by the Board and stipulated to by the parties herein is as follows:

> All full time and regular part time security guards and parking attendants employed by the Respondent at its Princeton, New Jersey, facilities, but excluding all professional employees, service and maintenance employees, technical employees, supervisors as defined in the Act, and all other employees.

There are two aspects to this case: one is the alleged refusal to bargain with the Union despite its having been certified as the exclusive collective-bargaining representative of employees in an appropriate unit; the other portion refers to Respondent's failure to grant, and to bargain about, an anticipated wage increase to the employees in the unit set forth above, herein referred to as the guards and attendants; this aspect of the case will be discussed first.

A. *The Failure to Grant the Wage Increase*

The parties stipulated that, at least, for the years 1976, 1977, 1978, and 1979 Respondent granted a wage increase in each of those years to all its nonsalaried employees (including guards and attendants); these increases were granted in the spring of each year and in each particular year all of these employees received the same percentage increase, although the percentage varied from year to year.[1]

In the last 2 weeks of March 1980, Respondent's board of trustees determined what percentage wage increase would be granted to its employees.[2]

On March 26, 1980, counsel for Respondent sent the following letter to the Union:

> We are writing to you on behalf of The Medical Center at Princeton about a matter which concerns its security guards. As we advised you in our recent letter, the Medical Center still maintains that the election held in September among the security guards was invalid and therefore The Medical Center does not recognize the union as the representative of the guards.
>
> Effective April 6, 1980, The Medical Center will be instituting a salary increase for its employees. It is their present intention not to provide a salary increase to security guards at this time because of the adverse legal ramifications which might result if such an increase were unilaterally granted by The Medical Center.
>
> As you know, The Medical Center continues to question the validity of the Labor Board election. They have exhausted the direct review procedures of the Board and their only alternative is to seek an appellate court review. During the pendency of this appeals process, The Medical Center does not intend to take any unilateral action which would affect the wages, hours or other conditions of employment of security guards, so as to avoid any potential unfair labor practice charges and to avoid what might be claimed to be objectionable conduct at a later date if a new election were to be ordered by the appellate court.

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[1] The General Counsel's witness, Clark Hutchinson, who is employed by Respondent as a security guard, testified that he has been employed by Respondent since February 1975 and that in March or April 1975, he received a 10-percent wage increase as did the other security guards and employees in the nursing, maintenance, dietary, and administration department whom he had spoken with. On cross-examination Hutchinson testified that he did not remember the percentage increases he received between 1976 and 1979, but on redirect examination he explained that the reason he only remembered the amount of the 1975 increase was that, at the time, he had only been employed a month or two and "given the amount of the increase, it stuck in my memory." Although the additional year of this past practice would not alter my decision in this matter, I would credit Hutchinson herein as his testimony on the subject was uncontradicted and I found him to be a credible witness. I would therefore find that the spring wage increase was granted by Respondent in 1975, as well as 1976, 1977, 1978, and 1979.

[2] At the hearing, the General Counsel amended the consolidated complaint to withdraw words "cost of living" from the reference to the wage increase.

> Be assured that if the results of the election are upheld, The Medical Center will bargain in good faith with the Union.
>
> Since this is a complex matter and one which is of concern to their employees, The Medical Center would be willing to discuss this matter with you directly. I have enclosed the text of a letter which they are, this day, sending to all security guard employees, explaining The Medical Center's position on this matter.

The Union never responded to this letter.

On the same day Respondent sent the following letter to all of its guards and attendants:

> As many of you know already, The Medical Center will be implementing a wage increase for its employees, effective April 6, 1980. You may be wondering whether you, a Security Guard, will be receiving this increase. We are writing this letter to you to answer this question and to explain why the Medical Center believes it is legally required to take the position described in this letter. It is the intention of The Medical Center not to provide Security Guards with a wage increase at this time, and we believe it is very important that you understand why you will not be receiving this increase.
>
> As you know, the NLRB election was held among Security Guards last September. The Medical Center is presently challenging the results of that election because we feel that it was not conducted fairly and properly. We have exhausted the review procedures before the Labor Board and we must now make an appeal of the Board's decision, to the Federal Appeals Court. The relationship between the Union, the Medical Center and the Security Guards during this appeal process is very unclear. While the Medical Center does not recognize the Union as the bargaining representative of the Security Guards, it is our opinion that we are not free to unilaterally make changes in the wages, benefits or other working conditions of our Security Guard employees, without a substantial risk of being accused by the Union or a Security Guard of committing an unfair labor practice. We also believe that there is a risk that such a unilateral action by the Medical Center now, could later be claimed to be objectionable conduct which could adversely impact on the validity of a second election if the Appeals Court agrees with the Medical Center and orders another election to be held.
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> I want you to understand that the decision of the Medical Center is based on our desire to act properly with regard to our legal obligations to Security employees and the Union, and to avoid any possible violations of the law. Should the validity of the election be upheld by the court, we will certainly bargain in good faith with the Union concerning wages, benefits and other terms and conditions of employment of our Security Guards, in an effort to reach a contract satisfactory to all concerned.

On the same day, the Respondent sent a letter to its other nonsalaried employees informing them of the wage increase that they would be receiving effective April 6, 1980. Shortly thereafter, these employees (but not the guards and attendants) received the wage increase.

The General Counsel's position on this issue is a simple one: Respondent had a past practice of granting wage increases to all its employees in the spring of the year; because the guards and attendants chose the Union as their collective-bargaining representative, Respondent changed this policy and did not pay an increase to the guards and attendants in 1980; Respondent therefore discriminated against the employees due to their activity on behalf of the Union, in violation of Section 8(a)(1) and (3) of the Act. Additionally, because Respondent did not bargain with the Union over this change in the past practice of granting these wage increases, it also violated Section 8(a)(1) and (5) of the Act. Respondent's position regarding the 8(a)(5) portion of this allegation is, as stated in its brief: "[W]age review programs which contain elements of discretion with respect to the amount *or* timing of the increases cannot be unilaterally implemented without violating Section 8(a)(5) of the Act." As there was discretion regarding the amount and the timing of the increase (according to Respondent), not granting it did not violate the Act. As regard the 8(a)(1) and (3) allegation, Respondent alleges that since the General Counsel offered no evidence establishing a discriminatory motive in not granting the increase to the guards and attendants, this allegation must also be dismissed.

In *NLRB v. Katz*, 369 U.S. 736, 742–748 (1962), the Supreme Court stated:

> Unilateral action by an employer without prior discussion with the union does amount to a refusal to negotiate about the affected conditions of employment under negotiation, and must of necessity obstruct bargaining, contrary to the congressional policy. It will often disclose an unwillingness to agree with the union. It will rarely be justified by any reason of substance. It follows that the Board may hold such unilateral action to be an unfair labor practice in violation of § 8(a)(5), without also finding the employer guilty of over-all subjective bad faith.

Numerous cases have discussed the legality of the granting or withholding of a wage increase due to the presence of a union—whether during the election campaign or during the postcertification period when the employer is preparing to test the certification in the courts. In *Florida Steel Corp.*, 220 NLRB 1201, 1203 (1975), the Board found that the employer violated Section 8(a)(1) and (3) of the Act. The administrative law judge stated:

> The Board and courts have long held an employer withholding pay raises and/or benefits from employees who are awaiting the holding of a Board election, or have chosen a union as their bargaining representative, has violated the Act if the employees otherwise would have been granted the pay

raises and/or benefits in the normal course of the employer's business.

Likewise, *Baker Industries*, 224 NLRB 1111, 1113 (1976) states:

> It is well settled that withholding employees' wage increases because of their union activities which otherwise would have been granted, and so advising them, is a violation of the Act. The applicable test with respect to both granting and withholding wage increases under such circumstances is whether or not they would have been granted in the normal course of events absent any union activities. In other words, if a wage increase would have been granted for sound economic reasons in the normal course of events, it should be granted in spite of intervening union activities; and, advising employees that it is being withheld because of such activities, patently discourages their union activities and interferes with, restrains, and coerces them in the exercise of the rights guaranteed by the Act. On the other hand, if a wage increase would not have been granted for sound economic reasons in the normal course of events, its granting after the commencement of union organizational activities and/or after the filing of a petition for an election, for the purpose of inducing the employees to vote against the Union and favor their benefactor, likewise interferes with their guaranteed rights.

In the often quoted language of Administrative Law Judge (then Trial Examiner) Frederick U. Reel, in *McCormick Longmeadow Stone Co.*, 158 NLRB 1237, 1242 (1966):

> An employer's legal duty in deciding whether to grant benefits while a representation case is pending is to determine that question precisely as he would if a union were not in the picture. If the employer would have granted the benefits because of economic circumstances unrelated to union organization, the grant of those benefits will not violate the Act. On the other hand, if the employer's course is altered by virtue of the union's presence, then the employer has violated the Act, and this is true whether he confers benefits because of the union or withholds them because of the union.[3]

Employers in situations such as Respondent was involved herein often defend on the grounds most commonly referred to by the Board and courts as having been "caught between the devil and the deep blue sea" or, alternately, "damned if you do, damned if you don't." As regard Respondent, I disagree. From 1975 through 1979, Respondent had an established practice of granting a wage increase to all of its nonsalaried employees (including the guards and attendants) in the spring of each year. This practice was so well ingrained in the working conditions of Respondent's employees that Respondent would not have violated the Act, or prejudiced its anticipated court challenge to the certification, by granting the increase to its guards and attendants, as well as to its other nonsalaried employees. As the Board stated in *Baker Brush Co.*, 233 NLRB 561, 562 (1977):

> [T]he annual granting of similar wage increases had been a customary practice of Respondent through the years and, as such, was clearly a condition of employment on that basis as well. Accordingly, Respondent would not have been legally restrained from granting the promised increase if the Union had been certified, but rather would have had a legal obligation to pay it. This obligation arose both from Respondent's explicit promises made during the election campaign and the promise implicit by reason of Respondent's longstanding practice. The Board, with Court approval, has consistently held that an employer who withholds pay raises from employees who have chosen a union as their bargaining representative violates the Act if the employees otherwise would have been granted the raises in the normal course of the employer's business.

In *NLRB v. Allied Products Corp.*, 548 F.2d 644, 652 (6th Cir. 1977), enforcing the Board Order at 218 NLRB 1246 (1975), the court stated:

> Nor is the Company's argument, that it has "been caught between the devil and the deep blue sea," sound. It is correct that in some circumstances it will be an unfair labor practice to grant unilaterally a wage increase . . . and that in other circumstances it will be an unfair labor practice to deny unilaterally a wage increase . . . . The Act is violated by a unilateral change in the existing wage structure whether that change be an increase or the denial of a scheduled increase. Because the Company unilaterally *changed* an existing condition of employment, instead of maintaining the status quo, the Board properly found that it had committed an unfair labor practice.

Similar language appears in *NLRB v. Dothan Eagle, Inc.*, 434 F.2d 93, 98, 99 (5th Cir. 1970):

> At first glance it might appear that the employer is caught between the proverbial "devil and the deep blue sea." It is an unfair labor practice to grant a wage increase during the campaign and bargaining periods, but at the same time it may be an unfair labor practice to refuse to grant an increase during the same period. Indeed, the employer in this case has made just this sort of an argument, claiming that it could not grant the pressroom employees their normal progression raises since to do so would have been an unfair labor practice. We find little merit in such arguments. The cases make it crystal clear that the vice involved in both the unlawful in-

[3] See also *Russell-Newman Mfg. Co.*, 167 NLRB 1112 (1967), enfd. 406 F.2d 1280 (5th Cir. 1969), where the wage increase issue arose after the union had been certified, but before the employer had tested the certification in the courts.

> crease situation and the unlawful refusal to increase situation is that the employer has *changed* the existing conditions of employment. It is this *change* which is prohibited and which forms the basis of the unfair labor practice charge.
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> . . . .
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> This policy was widely known and had been in effect for a considerable period of time. It had thus become part of the established scheme of compensation and could not be deviated from for purposes of influencing the vote during the union election. Nor could this policy be changed without union consultation during the collective bargaining period. In other words, the periodic increases were such an integral part of the structure of compensation that the refusal to continue these increases was in effect a denial of benefits which the employees had every reason to expect.

In *Sweetwater Hospital Assn.*, 226 NLRB 321, 324 (1976), respondent defended on the ground that it was legally prohibited from extending the wage increase to the employees involved without bargaining with the union, which it did not want to do because of its wish to test the union's certification. In his decision (which was affirmed by the Board) the administrative law judge stated:

> As to the withholding of the January 1976 wages increase, the record reflects that, since at least 1973, Respondent has had an established practice of adjusting the wages of its employees. The increases have been granted on an annual basis according to the cost of living index and the availability of revenues, and there is no evidence that merit principles played any part in the determination to increase the wages of any employee. On the basis of its established practice the employees in the bargaining unit would have been granted the wage increase, and Respondent's desire to test the legal validity of the certification clearly did not justify withholding the wage increase without notice to the Union or giving it an opportunity to bargain. Accordingly, I find and conclude that, by withholding the January 1976 general wage increase from its employees in the bargaining unit, Respondent violated Section 8(a)(5) and (1) of the Act.

On the basis of the above-cited cases I find:

1. Respondent violated Section 8(a)(1) and (5) of the Act by its failure to pay the spring 1980 increase to the guards and attendants without bargaining with the Union about this decision. The spring wage increases had taken place for the 5 years previous to 1980 and had become a condition of employment for the guards and attendants, as well as the other nonsalaried employees. Prior to changing this condition of employment, Respondent was obligated to notify the Union of the proposed change and give the Union an opportunity to bargain about it.[4]

Respondent did not satisfy this obligation; the March 26, 1980 letter that counsel for Respondent sent to the Union was more a fait accompli rather than a request for negotiations. It was sent to the Union on the same day that a letter was sent to the bargaining unit members informing them that "It is the intention of the Medical Center not to provide Security Guards with a wage increase at this time" and another letter was sent to the remaining nonsalaried employees informing them of the increases they would be receiving. Respondent argues that its March 26, 1980 letter to the Union stating that it "would be willing to discuss this matter with you directly" was a request for negotiation, to which the Union never responded. I disagree. The tenor of the letter (including the statement—"During the pendency of this appeals process the Medical Center does not intend to take any unilateral action which would affect the wages, hours or other conditions of employment of security guards," together with the statements of its intention to appeal the certification) along with the fact that the bargaining unit enployees were informed on the same day that they would not be receiving the regular wage increase, convinces me that Respondent, by its letter of March 26, 1980, was simply informing the Union of its decision and the reasons for it, and that its statement that it "would be willing to discuss this matter with you directly" was therefore not a good-faith offer to negotiate on the subject. If Respondent really intended to negotiate with the Union on the subject, it would have first notified the Union of its intention, and waited for an impasse to develop before notifying the employees of its decision.

2. Respondent violated Section 8(a)(1) and (3) of the Act by its failure to pay the spring 1980 wage increase to the guards and attendants. For the prior 5 years the guards and attendants (together with the nonsalaried employees) had received a wage increase in the spring; I have therefore found that the 1980 wage increase could have been granted to the guards and attendants without prejudicing Respondent's ability to test the certification in the courts. It therefore boils down to the fact that the guards and attendants who chose to be represented by the Union received no wage increase while the remaining nonsalaried employees who did not choose union representation did receive the wage increase. Although it is true (as stated by counsel for Respondent in its brief) that "General Counsel did not offer one iota of evidence at the hearing establishing a discriminatory motive," the 8(a)(1) and (3) violation is still present herein.

In *NLRB v. Great Dane Trailers*, 388 U.S. 26, 34 (1967), the union and the employer were parties to a collective-bargaining agreement, effective to March 31, providing for vacation benefits, payable on or about July 1, to employees meeting specified qualifications. The contract was extended past March 31, but when the parties could not agree on the terms of a new contract, the Union, on May 16, after proper notice, called a strike which lasted until December. After July 1 a number of

[4] As stated in *NLRB v. Laney & Duke Storage Warehouse Co.*, 369 F.2d 859 (5th Cir. 1966): "It is the election—the choice of the Union as the employees' bargaining representative—that gives rise to the employer's duty to bargain. An employer's objection to certification does not relieve it of that duty."

the striking employees demanded their vacation benefits that had accrued prior to the strike; the employer announced that accrued benefits would be paid only to employees who were at work on July 1. The Board found that the withholding of the accrued vacation benefits from the striking employees violated Section 8(a)(1) and (3) of the Act; the court of appeals denied enforcement on the ground that although discrimination between striking and nonstriking employees had been proved, the Board's conclusion that the employer had committed an unfair labor practice was not well founded inasmuch as there had been no affirmative showing of an unlawful motivation to discourage union membership or to interfere with the exercise of protected rights. The Supreme Court, agreeing with the Board that these actions violated Section 8(a)(1) and (3) of the Act, stated:

> From this review of our recent decisions, several principles of controlling importance here can be distilled. First, if it can reasonably be concluded that the employer's discriminatory conduct was "inherently destructive" of important employee rights, no proof of an antiunion motivation is needed and the Board can find an unfair labor practice even if the employer introduces evidence that the conduct was motivated by business considerations. Second, if the adverse effect of the discriminatory conduct on employee right is "comparatively slight," an antiunion motivation must be proved to sustain the charge if the employer has come forward with evidence of legitimate and substantial business justifications for the conduct. Thus, in neither situation, once it has been proved that the employer engaged in discriminatory conduct which could have adversely affected employee rights to some extent, the burden is upon the employer to establish that it was motivated by legitimate objectives since proof of motivation is most accessible to him.

I would find that the first test is satisfied herein, i.e., that granting the wage increase to the other nonsalaried employees and not to the guards and attendants is "inherently destructive" of important employee rights. Both the guards and attendants and the other employees could not help but see that only the employees who voted to be represented by a union did not receive a wage increase. In the alternative, if it should be found that the adverse effect of withholding the wage increase from the guards and attendants was comparatively slight, I would find that an antiunion motivation still need not be proved in order to conclude that Respondent has violated Section 8(a)(1) and (3), as the Respondent has not "come forward with evidence of legitimate and substantial business justifications for the conduct" *Great Dane Trailers*, supra, as I have found that Respondent could have granted the increase to its guards and attendants without prejudicing its attempt to test the certification in the courts.[5]

On the basis of the above, I therefore find that Respondent violated Section 8(a)(1), (3), and (5) by failing to grant the spring 1980 wage increase to its guards and attendants, and failing to bargain with the Union about this decision.

B. *The 8(a)(5) Summary Judgment Action*

As stated, supra, pursuant to a Stipulation for Certification Upon Consent Election Agreement, an election was conducted on September 7, 1979, at which time eight votes were cast for the Union, four votes were cast against and there were no challenged ballots. On September 12, 1979, Respondent filed objections to the conduct of the election, which stated, inter alia, as follows:

> 1. The Petitioner engaged in a course of conduct throughout the pre-election period designed to mislead the eligible voters to believe that the National Labor Relations Board supported the union's cause thereby compromising the Board's neutrality. Such conduct violates the Board's clear standard of impartiality in the course of an election. *Monmouth Medical Center v. N.L.R.B.*, Docket No. 78-1832 (3d Cir. filed August 20, 1979); *GAF Corporation*, 234 NLRB 1209 (1978). Any countenance of the use of the Board's name in a manner which gives the impression that the Board has granted the Union its imprimatur and support breaches the Board's neutrality. *Id.*
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> 2. This pattern of misrepresentation was exhibited and is evidenced by the following conduct:
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> (a) During the pre-election period, the Union, through its agents and representatives sent to the homes of eligible voters literature designed to create an ambiguity in the minds of the reader as to its source, and intended to create the impression of an endorsement by the National Labor Relations Board. Specifically, this literature contained a reproduction of an official Board document thereby misleading the employees to believe that the Board supported the Union.
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> (b) During the pre-election period, the Union, through its agent Lawrence Milner, an employee of the Employer, sent to the homes of eligible voters a letter which alleged the Employer was intent on violating federal law. This letter further indicated that the National Labor Relations Board supported Mr. Milner's position.
>
> (c) Two days before the election the Union had published in a local newspaper received by all eligible voters an interview with its leading employee proponent wherein it was reported that the Board supported the Union in the forthcoming election. The leading employee proponent and Union observer at the election, Lawrence Milner, posted this article on the bulletin board in the work area of all eligible voters. This article improperly conveyed the idea that the Board and its processes were not neu-

[5] If it should subsequently be determined that Respondent's failure to grant the wage increase to its guards and attendants did not violate Sec. 8(a)(3) of the Act, the remedy would not be affected, as I would additionally find that this action violated Sec. 8(a)(1) of the Act by restraining Respondent's guards and attendants in the exercise of their Sec. 7 rights.

tral, but in fact the Board actively supported the Union.

(d) On the day of the election, the Board agent conducting the election failed to retrieve the Board's official observer badge from the Union observer, Lawrence Milner, but retrieved the official observer badge from the Employer's observer. Since the initial polling period commenced in the early morning (6:30 a.m. to 7:30 a.m.), with an intervening hiatus of 8 hours until the next polling period (3:30 p.m. to 5:00 p.m.), Lawrence Milner retained this official Board badge in his possession throughout the day, creating the impression that the Board supported the Union through its official and continued designation of his status.

For these and other reasons, the laboratory conditions required for a fair election have been destroyed. The Employer, therefore, submits that the Union engaged in objectionable conduct which warrants setting aside the election. Additionally, the Board's conduct of the election is objectionable conduct supporting the setting aside of the election.

On November 19, 1979, the Regional Director of Region 22 issued a Report on Objections. As regards Objection 1, the report found it to be a generalized statement of fact and law more fully described in the remaining objections. As regards Objection 2a the report found that the Union sent a letter to the employees (under the Union's letterhead) informing the employees that their right to a secret-ballot election was guaranteed them by law, not by their employer. (This letter was in response to a letter Respondent had sent to its guards and attendants.) The letter also informed the employees that enclosed was a portion of the labor law which stated that, and a copy of the rights of employees which are enforced by the Board. Enclosed in the letter was a reproduction of the Board pamphlet entitled, "Your Government Conducts an Election" and a reproduction of a portion of the text of Section 9 of the Act. As regards this objection, the report states:

> After closely examining the letter of August 22, 1979 together with its attachments, I find that they did not create an ambiguity in the mind of its readers as to the documents' origins. Further, I find that this piece of union literature does not create even a tendency to mislead, as the Board document on its face states that the Board is neutral and informs employees that their rights will be protected against union interference as well as employee interference. There is no alteration of any kind to the Board document, the letter under the Union's letterhead clearly sets out that the attached Board document is merely a statement of the law and does not attempt in any way to align the Board with the Petitioner.
>
> Accordingly, I find that Objection 2a does not raise substantial or material issues with respect to conduct affecting the results of the election and it is recommended that it be overruled.

As regards Objection 2b the report recommended that it be overruled on the ground that the letters were written by an employee of Respondent who was not an agent of the Union and, regardless, the letters satisfied the conditions set forth in *Hollywood Ceramics Co.*, 140 NLRB 221 (1962).

As regards Objection 2c the report found that the wording of the article (including the words "the election is being supported by the National Labor Relations Board") was provided by a writer for the newspaper, not an agent of the Union, and "I conclude that the use of the word 'supported' rather than 'conducted' could not reasonably be interpreted by the electorate as a statement that the Board *supported* the Petitioner's cause in the election. Thus I find that the newspaper article did not have the tendency to mislead employees or create the impression that the Board was not neutral and supported the Union."

As regards Objection 2d, the report found that although the Union's observer at the election wore the Board's observer badge for a few minutes after the first session of voting was completed because the Board agent inadvertently failed to retrieve the badge from him, the effect of this was "*de minimis*, if anything" and "did not create an ambiguity as to the neutrality of the Board." The report recommended that this objection also be overruled.

The Respondent filed exceptions to this report. On February 15, 1980, the Board adopted the Regional Director's findings and recommendations and certified the Union in the unit referred to supra.

On February 26, 1980, the Union wrote to Respondent;[6] on March 7, 1980, Respondent's counsel wrote the following letter to the Union:

> Your letter of February 26th has been forwarded to this office for review and response. Please be advised that at this time the Medical Center at Princeton does not recognize your labor organization as the collective bargaining agent of the guards and parking attendants.
>
> It is the Medical Center's position that certain conduct engaged in by your organization during the pre-election period invalidate the results of the election conducted by the National Labor Relations Board on September 7, 1979. Because of evidence which was not adduced or examined during the investigation and because credibility resolutions of critical importance to the Medical Center's case were made without the benefit of cross examination, we feel strongly that an evidentiary hearing was warranted. It is our contention that certification of your union was improperly granted since the Regional Director and the Board in Washington failed to consider all available evidence and denied the Medical Center the opportunity to confront adverse witnesses.
>
> Be assured that if a certification of your union as bargaining agent is finally upheld, the Medical

[6] Whether or not through inadvertence this letter is not in evidence; however, considering the contents of Respondent's answer dated March 7, 1980, it can be assumed that the Union's letter requested that Respondent bargain with it.

> Center will bargain with you in good faith concerning wages, hours and other terms and conditions of employment for unit employees. However, until such times as a final adjudication is made, the Medical Center must respectfully decline your request to commence negotiations.

It is a well-settled principle that in the absence of newly discovered or previously unavailable evidence or special circumstances, a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in the prior representation proceeding. *Pittsburgh Plate Co. v. NLRB*, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Sections 102.67(f) and 102.69(c).

At the hearing, and in its extensive and able brief, Respondent takes the position that it refused to bargain with the Union because activities by the Union, its alleged agent, and the Board agent prior to, and during, the election, interfered with laboratory conditions for the Board election and that its objections filed thereto should have sustained; in the alternative, Respondent should have been granted a hearing on these objections, it alleges, because of the credibility issues involved in its objections. At the hearing herein, Respondent attempted to adduce evidence regarding the objections referred to, supra, but I did not allow such evidence to be adduced. (There was no allegation by Respondent that the evidence it attempted to adduce was newly discovered or previously unavailable or involved any special circumstance.) In addition, Respondent subpoenaed certain documents from an employee of Respondent who it claimed was an agent of the Union; I did not allow the receipt of these documents because the issue had been decided in the representation case and therefore was not relitigable in the instant matter. Respondent therefore has simply attempted to adduce evidence herein which was, or could have been, litigated in the prior representation proceeding. I conclude that Respondent has failed to establish any newly discovered or previously unavailable evidence, nor has Respondent asserted the existence of my special circumstances warranting a reexamination of the Board's determination in the prior representation proceeding.

It having been established that the Union is the certified bargaining representative in the unit involved herein, and that the Union requested Respondent to bargain with it, and that Respondent refused said request, and as there are no issues to be litigated or to be resolved by a hearing, I hereby make the following further findings.

1. The following employees of Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All full time and regular part time security guards and parking attendants employed by the Respondent at its Princeton, New Jersey facilities, excluding all professional employees, service and maintenance employees, techinical employees, supervisors as defined in the Act and all other employees.

2. On September 7, 1979, a majority of Respondent's employees, in the unit set forth above, in a secret-ballot election conducted under the supervision of the Regional Director for Region 22 designated the Union as their representative for the purpose of collective bargaining with Respondent.

3. On February 15, 1980, the Union was certified as the collective-bargaining representative of the employees in the said unit and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

4. On or about February 26, 1980, the Union requested Respondent to bargain collectively with it as the exclusive bargaining representative of all the employees in the above-described unit.

5. On or about March 7, 1980, Respondent refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective-bargaining purposes of the employees in said unit.

Conclusions of Law

By failing to grant the spring 1980 wage increase to its guards and attendants, by failing to bargain with the Union regarding its decision not to pay the spring 1980 wage increase to its guards and attendants, and by failing and refusing to recognize and bargain with the Union as the exclusive collective-bargaining representative for its guards and attendants (the appropriate unit herein), Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(3),(5) and (1) and Section 2(6) and (7) of the Act.

Remedy

Having found that Respondent has violated Section 8(a)(1) and (3) by failing to pay the spring 1980 wage increase to its guards and attendants while paying said increase to its other nonsalaried employees, I shall recommend that Respondent be ordered to pay this increase, in the same percentage as was granted to its other nonsalaried employees, to its guards and attendants retroactive to April 6, 1980. I would therefore find it unnecessary to order Respondent to bargain with the Union regarding its failure to pay this increase to its guards and attendants, although I have found that it violated Section 8(a)(5) by its failure to do so.

Having also found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, I shall order that it cease and desist therefrom and, on request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit and, if an understanding is reached, embody such understanding in a signed agreement.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, I recommend that the initial period of certification be construed as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); *Lamar*

Hotel, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964); *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

[Recommended Order omitted from publication.]