

Port Chester Nursing Home and James McEachern and Local 6, International Federation of Health Care Professionals, International Longshoremen's Association, AFL-CIO,¹ Party to the Contract

Local 6 International Federation of Health Care Professionals, International Longshoremen's Association, AFL-CIO and James McEachern and Port Chester Nursing Home, Party to the Contract. Cases 2-CA-17288 and 2-CB-8357

15 March 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS
HUNTER AND DENNIS

On 22 January 1982 Administrative Law Judge Howard Edelman issued the attached decision. The Respondent Union and the Employer filed exceptions and supporting briefs, and the General Counsel filed partial exceptions and a supporting brief.

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 and briefs and has decided to affirm the judge's rulings, findings,² and conclusions³ and to adopt the recommended Order as modified.

The General Counsel urges that a broad remedial order is appropriate in the instant case, particularly in view of the Board's decision in *Sanford Home for Adults*, 253 NLRB 1132 (1981), enfd. 669 F.2d 35 (2d Cir. 1981), wherein the respondent union was found to have committed various violations of Section 8(b)(1)(A) and (2) of the Act including violations similar to those found here. We agree that such a broad remedial order is appropriate and shall modify the judge's recommended Order and notice accordingly.

¹ Hereinafter referred to as the Respondent Union.

² The Respondents have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We also find no basis in the record or otherwise for the Respondent Union's claim that the judge was prejudiced against it and, accordingly, the Respondent Union's motion to disqualify the judge is denied.

In affirming the judge's finding that the merger between Port Chester Nursing Home Employees Association and Respondent Local 6 did not meet the Board's due-process standards, we rely specifically on our recent decision in *F. W. Woolworth Co.*, 268 NLRB No. 115 (Feb. 10, 1984).

³ Chairman Dotson and Member Dennis agree that deferral to the arbitration award in the instant case is inappropriate. In so doing, they rely solely on the fact that the instant case involves issues of representation.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent Employer, Port Chester Nursing Home, Port Chester, New York, its officers, agents, successors, and assigns, and the Respondent Union, Local 6, International Federation of Health Care Professionals, International Longshoremen's Association, AFL-CIO, its officers, agents, and representatives, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph A, 1(e).

"(e) In any manner restraining or coercing employees of Respondent Employer, or any other employer, in the exercise of the rights guaranteed in Section 7 of the Act, including accepting recognition from any employer where Respondent Local 6 does not represent an uncoerced majority of employees in an appropriate unit of said Employer, except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3) of the Act."

2. Substitute the attached notice for that of the administrative law judge pertaining to Respondent Union.

APPENDIX A

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

WE WILL NOT seek to enforce the arbitrator's decision which issued on 10 March 1980, which decision concluded that Port Chester Nursing Home was obligated to recognize and bargain with our Union.

WE WILL NOT demand or accept recognition as the collective-bargaining representative of the Employer's employees unless and until a majority of the Employer's employees, within an appropriate unit, freely and without coercion designate us as their collective-bargaining representative.

WE WILL NOT act as the exclusive collective-bargaining representative of any of the employees of the Employer for the purpose of dealing with the Employer concerning grievances, labor disputes, wages, rates of pay, hours of work, or other terms and conditions of employment, unless and until a majority of the Employer's employees within an appropriate unit freely and without coercion designate us as their collective-bargaining representative.

WE WILL NOT give effect to the collective-bargaining agreement with the Employer executed on 14 May 1980 and effective for the period 14 May 1980 through 13 May 1983 or to any extension, renewal, or modification thereof.

WE WILL NOT in any manner restrain or coerce employees of the Employer, or any other employer, in the exercise of the rights guaranteed in Section 7 of the Act, including accepting recognition from any employer where we do not represent an uncoerced majority of employees in an appropriate unit of said employer, except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3) of the Act.

WE WILL jointly and severally with the Employer reimburse the Employer's employees for any initiation fees, dues, or other payments received by us or otherwise paid as a result of the contract executed by and between us and the Employer on or after 14 May 1980, plus interest.

LOCAL 6, INTERNATIONAL FEDERATION OF HEALTH CARE PROFESSIONALS, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO

DECISION

STATEMENT OF THE CASE

HOWARD EDELMAN, Administrative Law Judge. The hearing in this case took place on July 13 through 15, 1981. This hearing was held pursuant to an order consolidating cases, consolidated complaint and notice of hearing dated August 5, 1980. The complaint issued pursuant to charges filed against Port Chester Nursing Home (Respondent Employer), by James McEachern, an individual, on June 2 and July 25, 1980, and pursuant to charges filed against Local 6, International Federation of Health Care Professionals, International Longshoremens' Association, AFL-CIO (Respondent Local 6), on June 21 and July 25, 1980.

The thrust of the complaint herein alleges that Respondent Employer recognized Respondent Local 6 as the exclusive bargaining representative for a unit of employees employed by Respondent Employer, and thereafter entered into and maintained and enforced a collective-bargaining agreement with union-security provisions, between Respondent Employer and Respondent Local 6, notwithstanding the fact that at no time material herein has Respondent Local 6 represented an uncoerced majority of employees in the unit involved. The complaint alleges violations of Section 8(a)(1), (2), and (3) of the Act and violations of Section 8(b)(1)(A) of the Act.

All parties were represented at the hearing and were accorded full opportunity to be heard, to introduce relevant evidence, to present oral arguments, and to file briefs. Briefs were filed by the General Counsel, by

counsel for Respondent Employer, and by the representative for Respondent Local 6.

On consideration of the entire record, the briefs, and my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT EMPLOYER

Respondent Employer is a wholly owned subsidiary of National Council of Young Israel, a New York nonprofit religious corporation, with its office and sole place of business located in Port Chester, New York, where it has been engaged at all times material herein as a health care institution in the operation of a nursing home providing medical and professional care services. Respondent Employer, in the course and conduct of its business operations described above, annually derives gross revenues in excess of \$500,000 and annually purchased and received at its Port Chester, New York facility nursing home products, goods, and other materials valued in excess of \$50,000 from enterprises located within the State of New York, each of which enterprises receives the said products, goods, and materials directly from points located outside the State of New York.

I find that Respondent Employer is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATIONS

For the reasons set forth below, I find that Respondent Local 6 and Port Chester Nursing Home Employees Association, herein called the Association, are labor organizations within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *The Collective-Bargaining Relationship Between Respondent Employer and the Association*

On February 10, 1971, the Association was certified by the Regional Director for Region 2 of the National Labor Relations Board as the exclusive collective-bargaining representative of the following unit of employees:

All nursing department employees, all housekeeping department employees and all dietary department employees employed by the Employer at its 100 High Street, Port Chester, New York location, excluding all office clerical employees, professional employees, registered nurses, licensed practical nurses, watchmen, guards and supervisors as defined in the Act.

Thereafter, Respondent Employer and the Association entered into a series of collective-bargaining agreements encompassing the above-described unit. The most recent collective-bargaining agreement between Respondent Employer and the Association was effective from November 8, 1977, through July 31, 1980. At all times mate-

rial herein, James McEachern, the Charging Party, was employed by Respondent Employer and acted in the capacity of the Association's president. During the period covered by this most recent collective-bargaining agreement the Association represented approximately 75 unit employees. The terms set forth in the agreement were applied to the unit employees. The Association represented no other employees of Respondent Employer nor does it appear that the Association represented the employees of any other employer.

Based on the above, I conclude that the Association is a labor organization within the meaning of Section 2(5) of the Act.

Respondent Local 6 is an organization that has numerous collective-bargaining agreements with various employers, covering the terms and conditions of employment of more than 3000 employees. I therefore conclude that Respondent Local 6 is a labor organization within the meaning of Section 2(5) of the Act.

B. The January 1980 Merger Agreement

About January 21, 1980, James McEachern, Association president, met with William Perry, president of Respondent Local 6, during which meeting a written merger agreement dated January 21 was executed. The merger agreement set forth in part:

WHEREAS, it is the desire of the above mentioned parties [the Association and Respondent Local 6] to enter into a merger whereby Local 6 will absorb the Port Chester Nursing Home Employees Association. . .

WHEREAS, as a result of this amalgamation, from above mentioned date [January 21, 1980] the Port Chester Nursing Home Employees Association will no longer be in existence, and the result of this merger will be known henceforth as Local 6.

The merger agreement was at this time signed by James McEachern as president of the Association and William Perry as president of Respondent Local 6.

Employees Lottie Callaway,¹ Dorothy Green, and Shirley Spate, employed by Respondent Employer, testified that on February 5, 1980, James McEachern invited them to a meeting in Respondent Employer's cafeteria. Also present at this meeting was William Perry and Steve Jarema, business agent of Respondent Local 6. Callaway, Green, and Spate testified that during this meeting, Perry identified himself and explained to the employees, various benefits that Respondent Local 6 would be able to obtain for the employees. At some point during the meeting Perry requested that the employees sign a blank sheet of paper which would indicate who was in attendance at the meeting. Callaway, Green, and Spate all signed a single blank sheet of paper. Ac-

¹ Callaway testified without contradiction that she is employed by Respondent Employer as a laundry supervisor and that she had the authority to hire, discipline, and effectively recommend wage increases. Inasmuch as it is not material to the disposition of this case, I make no finding as to whether Callaway is employed as an employee within the meaning of Sec. 2(3) or a supervisor within the meaning of Sec. 2(11) of the Act.

ording to their testimony, at this meeting there was neither a discussion of the Association's merger with Respondent Local 6, nor a vote taken to ratify such merger. All three employees were shown at the hearing herein, during the course of their testimony, a copy of the merger agreement described above, with their signatures apparently appearing below those of McEachern and Perry. All three employees denied cosigning this merger agreement.

Perry and Dr. Robert Tublin, vice president and executive committee member of Local 6, testified that they were present on behalf of Local 6 and that they met with employees McEachern, Callaway, Green, and Spate on February 5. According to their testimony, they informed these employees of the merger and engaged in extensive discussion concerning the details. Thereafter, Callaway, Green, and Spate "ratified" and signed the January 21 merger agreement executed by Perry and McEachern.

I credit the testimony of Callaway, Green, and Spate. I do not credit the testimony of Perry or Tublin.

Perry and Tublin testified that they were the sole Respondent Local 6 representatives present during the meeting on February 5 described above. However, Green and Callaway, during their testimony concerning the events of the meeting of February 5, pointed to a man seated in the courtroom, and identified by Perry as Steve Jarema, business agent of Respondent Local 6, as being the Respondent Local 6 representative who was present with Perry during this meeting rather than Tublin. Moreover, Martin Leibman, Respondent Employer's administrator, testified that during an arbitration, held on March 4, 1980, described below, concerning the validity of the merger, he was present and heard Perry testify under oath as to the presence of Jarema at the February 5 meeting rather than Tublin. Consistent with Liebman's testimony and the testimony of Callaway and Green is the arbitrator's factual findings based solely on Perry's sworn testimony. His findings state that those present at the February 5 meeting were Perry and Jarema, representatives of Respondent Local 6, and McEachern, Callaway, Green, and Spate. Perry at no time during the hearing or in his brief disputed the arbitrator's findings of fact or Liebman's testimony. Moreover, Perry did not call Jarema as a witness to rebut the testimony of Callaway and Green, or the findings of the arbitrator.

Additionally, and most significantly, Respondent Local 6 was unable during the course of the hearing to produce the original merger agreement allegedly signed by Callaway, Green, and Spate. A xerox copy of such alleged agreement was produced by Respondent Local 6. However, as counsel for General Counsel contended in her brief, such document could have been fabricated by placing the attendance sheet signed by Callaway, Green, and Spate over the merger agreement.²

² During the hearing Perry contended that he was unable to produce the original merger agreement because he allegedly provided it to the Board during the investigation of this case. Counsel for the General Counsel represented that the Region's investigatory file had been thoroughly reviewed and that, contrary to Perry's contention, the original document was not contained therein.

Additionally, as set forth in detail below, when Perry ultimately demanded recognition on February 18, by mail from Respondent Employer, such demand was based on the merger agreement signed solely by Perry and McEachern, a copy of which was mailed to Respondent Employer with the demand for recognition. Had the merger agreement been signed by Callaway, Green, and Spate on February 5, as alleged by Perry, it would be logical that such agreement would have accompanied the demand for recognition.

Further, based on comparative demeanor considerations, I find Callaway, Green, and Spate to be more credible witnesses than Perry and Tublin. Although Callaway, Green, and Spate displayed considerable hostility toward Respondent Local 6, their testimony that they did not execute the merger agreement was mutually corroborative and supported by Respondent Local 6's inability to produce the original merger agreement allegedly signed by them. Further, Perry was frequently vague throughout his testimony. Additionally, he was frequently nonresponsive and argumentative during cross-examination by the General Counsel.

Tublin's testimony was also vague. In this respect his testimony lacked any details describing the location of Respondent Employer's parking lot where he allegedly parked, the entrance of the Employer's facility where he allegedly entered, or the details of the meeting itself. Possibly this is attributable to the fact that he was not present at such meeting.

Callaway, Green, and Spate credibly testified that, other than the February 5 meeting described above, they attended no meetings where employees voted to ratify the merger agreement between Respondent Local 6 and the Association. Perry testified that sometime between January 21, following the execution by McEachern of the merger agreement and February 18, the date Respondent Local 6 demanded recognition, he was told by an unnamed informant that a general meeting of employees had taken place and a vote had been held ratifying the merger. However, Perry did not testify that he was present at such meeting nor did he call any employees or other witnesses who were present at such alleged meeting. Indeed, Perry's hearsay statement aside, there is no evidence in the record that any meeting took place at any time whereby employees in the bargaining unit met and voted concerning the issue of the merger of the Association into Respondent Local 6.

By a letter dated February 18, 1980, Respondent Local 6 informed Respondent Employer that Respondent Local 6 and the Association had entered into a merger agreement and demanded recognition. The letter requested a meeting between Respondent Local 6 and Respondent Employer representatives for the purpose of implementing the merger agreement. As set forth above, a copy of the merger agreement signed only by McEachern and Perry was attached to this letter.

By a letter dated February 21, Respondent Employer refused to grant Respondent Local 6 recognition.

By a letter dated February 25, Respondent Local 6 again demanded recognition and, citing the arbitration provisions of the Association's collective-bargaining agreement, demanded arbitration.

On March 4, 1980, an arbitration was held at Respondent Local 6's office. Marvin Liebman, Respondent's Employer administrator, represented Respondent Employer and William Perry represented Respondent Local 6. Employees Callaway, Green, Spate, and McEachern were not present. Nor does the arbitration indicate any other employees were present during this arbitration. William Perry presented sworn testimony on behalf of Respondent Local 6 pertaining to the lawfulness of the merger.

On March 10 the arbitrator issued an opinion and award concluding that the merger agreement executed on January 21 was a valid merger agreement, and that as a result of such merger agreement Respondent Employer was obligated to recognize Respondent Local 6 as the bargaining agent of the unit of employees formerly represented by the Association. In this connection, the arbitrator specifically concluded:

The testimony developed at the hearing indicates that the merger between Local 6 and the Portchester Nursing Home Association was the product of several meetings between representatives of the respective organizations. Further, it appears that between the date of the signing of the merger agreement, January 21, 1980 and February 15, 1980, there had been a meeting of the Employer's employees called by the Port Chester Nursing Home Association for the purpose of ratifying the merger.

Given the foregoing, there is no basis for questioning the authenticity of the merger

I find therefore, that the Merger Agreement between Local 6 and the Port Chester Nursing Home Association is binding upon the Employer in that it obliges the latter to recognize Local 6 as the bargaining agent of the employees.

The opinion and award did not set forth when the "several meetings between representatives of the respective organizations" were held, where such meetings were held, the kind of notice, if any, given to Respondent Employer's employees, who attended such meetings or whether a vote was taken, and a description of the voting procedures applied.

According to the testimony of Tublin, Respondent Local 6 vice president, as a result of this merger the Association was dissolved structurally. Respondent Local 6's International offices administered the new organization which was formed as a result of the merger. Additionally, Respondent Local 6's bylaws and constitution applied to this organization.

*C. Respondent Local 6 and Respondent Employer
Negotiate and Execute a Collective-Bargaining
Agreement*

On March 18 and 25 and April 3, Perry and other representatives of Respondent Local 6 met at the White Plains Hotel with agents of Respondent Employer including Liebman, Howard Wolfe, and Lewis H. Silverman, and a negotiating committee which included Callaway, Green, and Spate and two or three other employees. During these three meetings, Respondent Employer and Respondent Local 6 discussed terms and con-

ditions of employment to be embodied in a new collective-bargaining agreement. A memorandum of agreement was executed by representatives of Respondent Employer and Respondent Local 6 at the conclusion of the final bargaining session on April 3. On May 14, 1980, Respondent Employer and Respondent Local 6 executed a collective-bargaining agreement effective by its terms for the period May 14, 1980, through May 13, 1983.³

The collective-bargaining agreement between Respondent Employer and Respondent Local 6 contains a union-shop clause which provides:

ARTICLE II UNION SHOP

A. All regular non-probationary employees covered by this agreement shall, as a condition of continued employment, not later than the 30th day following the effective date of this Agreement, become members of the Union and maintain their membership therein in good standing for the term of this Agreement to the extent to paying periodic membership dues and initiation fees.

B. All employees hired on or after the effective date of this Agreement shall, as a condition of continued employment become members of the Union not later than the 30th day following their hire, and shall maintain their membership in the Union in good standing for the terms of this Agreement to the extent of paying periodic membership dues and initiation fees.

C. The Union agrees to indemnify and holds the Employer harmless as a result of any claims or liabilities arising out of the enforcement of this clause.

The collective-bargaining agreement also contained a checkoff provision. The economic terms have been implemented with the exception of the union-security and checkoff provisions, which have not been enforced as of July 13, the initial date of this hearing.

However, on May 31, 1980, Respondent Local 6 sent a letter to all Respondent Employer's employees notifying them that a collective-bargaining agreement had been signed and that "union dues are \$2.40 per week; and for any new employee, after 30 days probation is completed, a \$10 initiation fee is required." On July 11 Perry sent another letter to all unit employees demanding that they "All signed Deduction of Dues forms immediately, as it is a requirement under the contract."

Analysis and Conclusions

A. *Whether a Valid Merger Took Place*

The Board held in *Amoco Production Co.*, 239 NLRB (1979), that it exclusively determines whether a merger or an affiliation meets adequate due process requirements and further concluded that these requirements included "proper notice to all members, an orderly vote, and some reasonable precautions to maintain the secrecy of

the ballot." See also *American Mailers (Plant No. 2)*, 231 NLRB 1194 (1977); *Bear Archery*, 223 NLRB 1169 (1976); *Peco, Inc.*, 204 NLRB 1036 (1973). The Board in *Peco, Inc.*, supra, applying the principles set forth in *Amoco*, supra, concluded that the affiliation procedure did not meet the Board's minimum due process requirements because there was inadequate opportunity among the employees for complete discussion, because the meeting whereby the affiliation resolution was adopted was attended by no more than 30 percent of the Association's membership, and because such affiliation was adopted by voice vote rather than a secret ballot.

The facts of the instant case establish that the due process requirements required by *Amoco*, supra, were not met. In this respect, there is no evidence that employees were given adequate notice of the proposed merger, that meetings were held to discuss the proposed merger, that a representative complement or a substantial number of employees participated in such meetings, or that a secret-ballot vote was taken to determine whether the employees did indeed desire the proposed merger. Rather, the evidence established that the merger was accomplished entirely through the meeting between Perry and McEachern on January 21, 1980, at which time the merger agreement described above was signed. Accordingly, I conclude that the merger herein did not meet the Board's due process requirements.

The Board has also held that, where a merger or an affiliation failed to satisfy the Board's due process requirements, a question concerning representation exists. *State Farm Ins. Co.*, 225 NLRB 966 (1976); *Peco, Inc.*, supra; *Independent Drugstore Owners*, 211 NLRB 701 (1974); *Gulf Oil Corp.*, 135 NLRB 184 (1962). Moreover, the Board further concluded in *Independent Drugstore Owners* and *Gulf Oil Corp.*, supra, that where the merger resulted in a complete loss of identity of the labor organization with whom the employer originally had a collective-bargaining agreement, by the substitution of a new and different labor organization with its own officers, a complete change in bargaining representatives took place. The Board further concluded that, under these circumstances, a question concerning representation existed, which must be determined through a petition and a secret-ballot election. In view of the substantial change in the new organization resulting from the merger, the Board found it unnecessary to resolve the question of whether its due process requirements for merger were fulfilled.

Thus, whether or not the Board's due process requirements for effecting a merger were satisfied in this case, I conclude that a question concerning representation was raised inasmuch as the merger resulted in a substitution of a completely new and different labor organization. In this connection, the language of the merger agreement itself set forth that the Association "will no longer be in existence." Moreover, Respondent Local 6 representative Tublin testified that the Association's merger with Respondent Local 6 resulted in the Association's virtual dissolution. The testimony of Perry and Tublin further established that the officers and representatives of the Association have been replaced by the officers and repre-

³ As set forth above, the Association contract would not have expired until July 31, 1980.

sentatives of Respondent Local 6. Moreover, the employees are now governed by the constitution and bylaws of Respondent Local 6. Further, the character and size of Respondent Local 6 as compared to the Association is substantially different. In this respect Respondent Local 6 represents in excess of 3000 members and has collective-bargaining agreements with numerous employers as compared to the Association which represented only 75 members all employed by Respondent Employer.

Accordingly, I conclude that the merger agreement between the Association and Respondent Local 6 failed to satisfy the Board's due process requirements and that a question concerning representation exists. I further conclude that whether the Board's due process requirements for merger were met, in view of the substitution, resulting from the merger, of a new and different labor organization with its own officers, constitution, and bylaws, that a question concerning representation exists.

The evidence established that, notwithstanding the ineffective merger and relying solely on the merger agreement signed by McEachern, Respondent Local 6 by its letters to Respondent Employer on February 18 and 25, 1980, demanded Respondent Employer to recognize and bargain with it as the bargaining representative of Respondent Employer's employees. I conclude that such demand at a time when Respondent Local 6 did not represent an uncoerced majority of employees in an appropriate unit constitutes a violation of Section 8(b)(1)(A) of the Act. *Steelworkers (L & S Products)*, 253 NLRB 961 (1980).

I also conclude that Respondent Local 6's demand for arbitration made by its letter to Respondent Employer dated February 25, 1980, constitutes a further unlawful demand for recognition at a time when Respondent Local 6 did not represent an uncoerced majority of Respondent Employer's employees. *Steelworkers*, supra; *Waterfront Guard Assn.*, 209 NLRB 513 (1974).

The evidence also established that pursuant to the arbitrator's award on March 10, as set forth and described below, I conclude to be outside the scope of an arbitrator's jurisdiction and repugnant to the Act, Respondent Employer recognized Respondent Local 6. In view of my prior conclusion that Respondent Local 6 did not represent an uncoerced majority of Respondent Employer's employees, I conclude that, notwithstanding the arbitration award, Respondent Employer's recognition of Respondent Local 6 constitutes a violation of Section 8(a)(1) and (2) of the Act. *Ramey Supermarkets*, 238 NLRB 1719 (1978). Moreover, I conclude that Respondent Employer's good-faith reliance on the arbitrator's decision as grounds for recognition is no defense to my finding that Respondent Employer violated Section 8(a)(1) and (2) of the Act by such recognition. *Ladies' Garment Workers (Bernhard-Altmann) v. NLRB*, 366 U.S. 731 (1961).

As set forth above, Respondent Employer and Respondent Local 6 negotiated and executed a collective-bargaining agreement covering the wages, hours, and other terms and conditions of employment of the Respondent Employer's employees on May 14, 1980, effective through May 13, 1983. Respondent Employer and

Respondent Local 6 contend that, although all other provisions have been enforced since the execution of their agreement, the union-security and checkoff provisions have not been enforced, notwithstanding Respondent Local 6's letters to all unit employees on May 21 and July 11, notifying them of their obligations to remit to Respondent Local 6 union dues and initiation fees. Indeed, there is no evidence that dues or initiation fees have in fact been collected from the employees.

However, the Board has consistently held that, where an employer enters into a collective-bargaining agreement containing a union-security provision with a labor organization which does not represent an uncoerced majority of the employees, the employer violates Section 8(a)(1), (2), and (3) of the Act and the labor organization violates Section 8(b)(1)(A) and (2) of the Act, whether or not dues have in fact been deducted from the employees' wages and remitted to the union. The 8(a)(3) and 8(b)(2) violation is predicated on the theory that the mere inclusion of a union-security and checkoff provision in a collective-bargaining agreement inherently and discriminatorily encourages employees to join the minority union. *Hillcrest Nursing Home*, 251 NLRB 59 (1980); *Unit Train Coal Sales*, 234 NLRB 1265 (1978). Accordingly, I conclude that by entering into a collective-bargaining agreement containing union-security provisions Respondent Employer has violated Section 8(a)(1), (2), and (3) of the Act and Respondent Local 6 has violated Section 8(b)(1)(A) and (2) of the Act.

B. Whether There Should Be Deferral to the Arbitrator's Decision

Respondents contend that the Board should defer to the arbitrator's decision pursuant to the Board's *Spielberg* doctrine.⁴

As set forth above, pursuant to Respondent Local 6's demand for arbitration, the arbitrator issued a decision where the issue presented was whether Respondent Employer was obligated to recognize Respondent Local 6 as the bargaining representative for Respondent Employer's employees. Such ultimate issue necessitated a finding by the arbitrator as to whether a lawful merger had taken place, and whether the merger resulted in a substantial change in the continuity of collective-bargaining agent. As a discussion of the above cases, *Amoco Peco, Inc., Independent Drugstore Owners*, and *Gulf Oil*, supra, establishes the issues presented to the arbitrator concerned basic representational issues encompassed by Section 9 of the Act, they also involve issues within the meaning of Section 8(a)(2) of the Act. A fundamental purpose of the Act is to protect the right of employees to a free choice in selection of their representatives. Section 8(a)(2) of the Act is one of Congress' principal provisions designed to ensure that protection.

⁴ In *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955), as modified by *Suburban Motor Freight*, 247 NLRB 146 (1980), the Board established four criteria for deferral to an arbitrator's award: (1) an agreement to be bound, (2) a fair and regular hearing, (3) the arbitrator considered the issue of the alleged unfair labor practice, and (4) the award is not repugnant to the purpose and policies of the Act.

The Board has consistently held that the determination of questions of representation, accretion, and appropriate unit do not depend on contract interpretation, but rather involve the application of the statutory policy, standards, and criteria, and are matters for decisions solely by the Board rather than an arbitrator. *Marion Power Shovel Co.*, 230 NLRB 576 (1977); *Combustion Engineering, Inc.*, 195 NLRB 909 (1982); *Hershey Foods Corp.*, 208 NLRB 452 (1974); *Pulitzer Publishing Co.*, 203 NLRB 639 641 (1973); *Pilot Freight Carriers*, 208 NLRB 853 (1974); *Auto Workers Local 259 (Stamford Motors)*, 221 NLRB 656 (1975); *Ortiz Funderal Home Corp.*, 250 NLRB 730 fn. 2 (1980).

The Board similarly held that consideration of 8(a)(2) allegations involves basic statutory principles rather than contract interpretation. Thus, such allegations are matters to be heard exclusively by the Board and not by arbitrators. *Senvair, Inc.*, 236 NLRB 1278 (1978).

The issues presented to the arbitrator in the instant case did not involve an interpretation of the collective-bargaining agreement between Respondent Employer and the Association. Rather, they involved the basic representational issue as to whether Respondent Local 6 represented an uncoerced majority of Respondent Employer's employees and whether Respondent Employer was obligated to recognize Respondent Local 6. Accordingly, whether this case be viewed as one where the arbitrator's decision was "repugnant to policies of the Act" within the rule of *Spielberg*, or as one where arbitration was inappropriate because the subject matter was peculiarly within the expertise of the Board, the arbitration award ought not in my judgment be given any effect by the Board.

Moreover, the arbitration additionally failed to meet the *Spielberg* requirements in that the arbitrator failed to apply the Board's due process requirements applicable to merger agreements. In this connection, the arbitrator did not consider whether the employees were given adequate notice of the proposed merger, whether a representative complement of employees attended meetings where the merger was discussed, whether a secret-ballot vote was held, nor did he consider the effect of such factors as the comparative size of the two labor organizations, the effective dissolution of the Association and the imposition upon the employees of Respondent Local 6's officers and their constitution and bylaws. These considerations, as indicated by the above-cited authorities, are essential issues to be considered in determining whether a merger has been effected.

Accordingly, for the reasons set forth above I conclude that the arbitration award should not be given any effect by the Board.

CONCLUSIONS OF LAW

1. Respondent Port Chester Nursing Home is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Respondent Local 6 and the Association are each labor organizations within the meaning of Section 2(5) of the Act.

3. Respondent Local 6 violated Section 8(b)(1)(A) of the Act by demanding that Respondent Employer recognize and bargain with it as the exclusive collective-bar-

gaining representative of Respondent Employer's employees, notwithstanding that it did not represent an uncoerced majority of employees in an appropriate unit.

4. Respondent Local 6 violated Section 8(b)(1)(A) of the Act by initiating arbitration proceedings against Respondent Employer in an attempt to compel Respondent Employer to recognize Respondent Local 6 as the collective-bargaining representative of the Employer's employees, notwithstanding that Respondent Local 6 did not represent an uncoerced majority of employees in an appropriate unit.

5. Respondent Local 6 violated Section 8(b)(1)(A) and (2) of the Act by entering into, enforcing, and maintaining a collective-bargaining agreement containing a union-security clause and checkoff provision, notwithstanding that Respondent Local 6 did not represent an uncoerced majority of Respondent Employer's employees.

6. Respondent Employer violated Section 8(a)(1) and (2) of the Act by recognizing and bargaining with Respondent Local 6 as the exclusive collective-bargaining representative of its employees, notwithstanding the fact that Respondent Local 6 did not represent an uncoerced majority of Respondent Employer's employees.

7. Respondent Employer violated Section 8(a)(1), (2), and (3) of the Act by entering into, enforcing, and maintaining a collective-bargaining agreement containing a union-security clause and checkoff provision, notwithstanding the fact that Respondent Local 6 did not represent an uncoerced majority of Respondent Employer's employees.

8. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent Local 6 and Respondent Employer have engaged in certain unfair labor practices within the meaning of the Act, I shall recommend that they cease and desist therefrom and take certain affirmative action to effectuate the policies of the Act.

On the foregoing findings of fact and conclusions of law and on the entire record, I issue the following recommended⁵

ORDER

A. Respondent Local 6, International Federation of Health Care Professionals, International Longshoremen's Association, AFL-CIO, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Seeking to enforce the arbitrator's decision which issued on March 10, 1980, which concluded that Respondent Port Chester Nursing Home, herein called Respondent Employer, was obligated to recognize and bargain with Respondent Local 6.

⁵ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) Demanding or accepting recognition as the collective-bargaining representative of Respondent Employer's employees unless and until a majority of Respondent Employer's employees, within an appropriate unit, freely and without coercion designate Respondent Local 6 as such representative.

(c) Acting as the exclusive collective-bargaining representative of any of the employees of Respondent Employer for the purpose of dealing with said Respondent Employer concerning grievances, labor disputes, wages, rates of pay, hours of work, or other terms and conditions of employment, unless and until a majority of Respondent Employer's employees within an appropriate unit freely and without coercion designate Respondent Local 6 as their collective-bargaining representative.

(d) Giving effect to the collective-bargaining agreement with Respondent Employer executed on May 14, 1980, and effective for the period May 14, 1980, through May 13, 1983, or to any extension, renewal, or modification thereof.

(e) In any other manner restraining or coercing employees of Respondent Employer in the exercise of the rights guaranteed in Section 7 of the Act, except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3) of the Act.

2. Take the following affirmative action.

(a) Jointly and severally with Respondent Employer reimburse Respondent Employer's employees for any initiation fees, dues, or other payments received by Respondent Local 6 or otherwise paid as a result of the contract executed by and between Respondent Local 6 and Respondent Employer on or after March 14, 1980, with interest thereon computed in the manner provided in *Florida Steel Corp.*, 231 NLRB 651 (1977), and *Isis Plumbing Co.*, 138 NLRB 716 (1962).

(b) Preserve and, on request, make available to the Board or its agents for examination and copying, any and all records necessary to determine the amounts of money due and payable to Respondent Employer's employees under this Order.

(c) Post in conspicuous places at its business offices, meeting halls, and other places where notices to members are customarily posted, including bulletin boards at the premises of Respondent Employer, copies of the attached notice marked "Appendix A."⁶ Copies of the notice, on forms provided by the Regional Director for Region 2, shall be signed and posted by an authorized representative of Respondent Local 6, immediately upon receipt and maintained for 60 consecutive days thereafter. Steps shall be taken by Respondent Local 6 to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps Respondent Local 6 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."

B. Respondent Employer, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Recognizing or bargaining with Respondent Local 6 as the collective-bargaining representative of its employees unless or until a free and uncoerced majority of Respondent Employer's employees within an appropriate unit has designated Respondent Local 6 as their representative for collective-bargaining purposes.

(b) Giving any force or effect to the collective-bargaining agreement executed by and between Respondent Employer and Respondent Local 6 on or about March 14, 1980, covering the rate of pay, wages, hours, and working conditions of Respondent Employer's employees.

(c) Interfering with, restraining, or coercing its employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action.

(a) Withdraw and withhold recognition of Respondent Local 6 as the exclusive collective-bargaining representative of Respondent Employer's employees unless and until a free and uncoerced majority of Respondent Employer's employees within an appropriate unit has designated Respondent Local 6 as their exclusive representative for purposes of collective bargaining.

(b) Jointly and severally with Respondent Local 6 reimburse its employees for any dues or initiation fees or other payments paid to Respondent Local 6, pursuant to the collective-bargaining agreement between Respondent Employer and Respondent Local 6, entered into on March 14, 1980, together with interest thereon provided in the manner prescribed in *Florida Steel Corp.* and *Isis Plumbing Co.*, supra.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, any and all records necessary to determine the amounts of money due and payable to its employees under this Order.

(d) Post in conspicuous places at its principal place of business in Port Chester, New York, and at all other locations where notices to employees are posted, copies of the attached notice marked "Appendix B".⁷ Copies of the notice, on forms provided by the Regional Director for Region 2, shall be signed and posted by Respondent Employer's, authorized representative immediately upon receipt and maintained for 60 consecutive days thereafter. Steps shall be taken by Respondent Employer 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 Respondent Employer has taken to comply.

⁷ See fn. 6, above.

APPENDIX B

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

WE WILL NOT recognize or bargain with Local 6, International Federation of Health Care Professionals, International Longshoremens' Association, AFL-CIO, as the collective-bargaining representative of our employees unless or until a free and uncoerced majority of our employees within an appropriate unit has designated Respondent Local 6 as their representative for collective-bargaining purposes.

WE WILL NOT give any force or effect to the collective-bargaining agreement executed by and between us and Respondent Local 6, on or about March 14, 1980, covering the rate of pay, wages, hours, and working conditions of our employees.

WE WILL NOT interfere with, restrain, or coerce our employees in the exercise of their rights under Section 7 of the Act.

WE WILL withdraw and withhold recognition of Respondent Local 6 as the exclusive collective-bargaining representative of our employees unless and until a free and uncoerced majority of our employees within an appropriate unit has designated Respondent Local 6 as their exclusive representative for purposes of collective bargaining.

WE WILL jointly and severally with Respondent Local 6 reimburse our employees for any dues or initiation fees or other payments paid to Respondent Local 6 pursuant to the collective-bargaining agreement between us and Respondent Local 6, entered into on March 14, 1980, together with interest.

PORT CHESTER NURSING HOME