

**Children's Orthopedic Hospital and Medical Center and Daniel T. Kennedy and Gary A. Markegard and Scott B. Johnson. Cases 19-CA-14835, 19-CA-14850, and 19-CA-14877**

30 April 1984

## DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS  
ZIMMERMAN AND HUNTER

On 22 July 1983 Administrative Law Judge James M. Kennedy issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief and a brief in support of the decision.

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,<sup>1</sup> and conclusions,<sup>2</sup> but to substitute the following Order for that of the judge.<sup>3</sup>

## ORDER

The National Labor Relations Board orders that the Respondent, Children's Orthopedic Hospital and Medical Center, Seattle, Washington, its officers, agents, successors, and assigns, shall

### 1. Cease and desist from

(a) Reducing the working hours of employees or discharging employees because they are members of the Seattle Building and Construction Trades Council, AFL-CIO, or any other labor organization.

(b) Refusing to permit union stewards to represent employees in discussions regarding employees' terms and conditions of employment.

(c) Issuing disciplinary warnings to employees because of their activities as union stewards.

<sup>1</sup> We correct the judge's inadvertent reference, in sec. IV.A, of his decision, to employees Kennedy and Quinn as carpenters rather than painters.

<sup>2</sup> In his Conclusions of Law, the judge found that the Respondent violated Sec. 8(a)(1) of the Act by refusing to permit a union steward to represent an employee in a discussion regarding terms and conditions of employment. In the text of his decision, the judge appeared to find that this action also violated Sec. 8(a)(3) of the Act. Chairman Dotson adopts the finding that the Respondent violated Sec. 8(a)(1) only, as set forth in the judge's Conclusions of Law. Member Zimmerman would find that the refusal to permit the steward to be present was part of the Respondent's effort to undercut the Union's effectiveness as the employees' bargaining representative and therefore violated Sec. 8(a)(3) and (1). Member Hunter agrees that the Respondent did not violate Sec. 8(a)(3) in this instance, and would find no 8(a)(1) violation because the conversation was not an investigatory nor a disciplinary interview, but concerned only one employee's personal complaint directed to his supervisor.

<sup>3</sup> Our order conforms to the administrative law judge's Conclusions of Law.

(d) Threatening to discharge employees and saying that employees have been discharged because of their union activities.

(e) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

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

(a) Offer Scott B. Johnson immediate and full restoration to a 40-hour week as a carpenter, and make him whole for any earnings lost since his unlawful reduction of hours in February 1982, in the manner set forth in the remedy section of the judge's decision.

(b) Offer Daniel T. Kennedy immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the decision.

(c) Remove from its files any reference to Kennedy's unlawful discharge, Johnson's unlawful reduction in hours, and Markegard's unlawful disciplinary warning, and notify the employees in writing that this has been done and that these unlawful actions will not be used against them in any way.

(d) 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.

(e) Post at its Seattle, Washington facilities copies of the attached notice marked "Appendix."<sup>4</sup> Copies of the notice, on forms provided by the Regional Director for Region 19, 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.

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

<sup>4</sup> 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.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge or reduce the working hours of any employee for exercising such rights.

WE WILL NOT refuse to permit union stewards to represent employees in discussions regarding employees' terms and conditions of employment.

WE WILL NOT issue warning notices to employees because of their activities as union stewards.

WE WILL NOT discipline union stewards because they seek to assist employees in settling questions relating to their wages, hours, and terms and conditions of employment.

WE WILL NOT threaten to discharge employees or say that employees have been discharged because of their union activities.

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 offer Scott B. Johnson immediate and full restoration to a 40-hour week as a carpenter, and WE WILL make him whole for any loss of earnings, plus interest, resulting from his reduction in hours.

WE WILL offer Daniel T. Kennedy immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed and WE WILL make him whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL expunge from our personnel records, or any other files, any reference to Gary Markegard's warning notice, Johnson's reduction in hours, and Kennedy's discharge, and WE WILL notify these employees, in writing, that we have

done so and that we will not use those actions against them in any way.

CHILDREN'S ORTHOPEDIC HOSPITAL  
AND MEDICAL CENTER

DECISION

STATEMENT OF THE CASE

JAMES M. KENNEDY, Administrative Law Judge. This case was tried before me at Seattle, Washington, on March 3, 4, and 9, 1983, pursuant to a consolidated complaint issued by the Regional Director for the National Labor Relations Board for Region 19 on September 10, 1982,<sup>1</sup> amended on January 18, 1983, and based on timely charges filed by the individual Charging Parties in July and August 1982. The consolidated complaint alleged that Children's Orthopedic Hospital and Medical Center (Respondent) has engaged in certain violations of Section 8(a)(1) and (3) of the National Labor Relations Act.

Issues

Whether or not the General Counsel has proven that Respondent violated Section 8(a)(3) and (1) of the Act by: (1) reducing the hours of work for carpenter Scott Johnson; (2) issuing a disciplinary warning to electrician and union steward Gary Markegard; and (3) discharging painter Daniel Kennedy. In addition, there is the question of whether Respondent committed independent violations of Section 8(a)(1) directed at certain employees because they chose to be represented by the Seattle Building and Construction Trades Council, AFL-CIO (the Trades Council). Respondent denies the charges and asserts that Johnson's reduction of hours and Kennedy's discharge were for economic reasons and that Markegard was disciplined for good cause. The General Counsel counters that the economic defense is nothing but a subterfuge, asserting that Respondent simply transferred, for discriminatory purposes, bargaining unit work from the employees represented by the Trades Council to other employees represented by the International Union of Operating Engineers, Local 286 (called the IUOE), thereby creating an artificial "lack of work."

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. Both the General Counsel and Respondent have filed briefs and they have been carefully considered.

From the entire record of the case, and from my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. RESPONDENT'S BUSINESS

Respondent admits that it is a nonprofit State of Washington corporation operating a hospital in Seattle. It fur-

<sup>1</sup> All dates herein refer to 1982 unless otherwise indicated.

ther admits that during the past year its gross sales of goods and service exceeded \$250,000 and that it purchased goods and material valued in excess of \$50,000 from sources outside the State. Accordingly, it admits and I find it to be an employer engaged in commerce within the meaning of Section 2(6) and (7), as well as a health care institution within the meaning of Section 2(14) of the Act.

## II. THE LABOR ORGANIZATION INVOLVED

Respondent admits, and I find, the Trades Council to be a labor organization within the meaning of Section 2(5) of the Act.

## III. THE ALLEGED UNFAIR LABOR PRACTICES

### A. Background and Participants

Respondent operates a large medical center for children. Its principal nonmedical support group is the building and engineering department which provides maintenance service throughout the hospital. For a number of years the IUOE has represented a bargaining unit of 12 or 13 workmen known as "steam engineers." Each is licensed by the city of Seattle to operate the heating system. They also perform a variety of mechanical work throughout the hospital. In addition to the engineers the building and engineering department also employs one carpenter, three to four electricians, and two or three painters. Until mid-1981 these individuals were unrepresented. In 1981 the Trades Council filed an NLRB representation petition, won an election, and was certified as their exclusive representative. On January 29, 1982, a 1-year collective-bargaining contract was signed covering these craftsmen.

Until mid-May, when he retired, the building and engineering department director was Lon Redwine; his assistant was Steve Scheibe. On Redwine's retirement, Scheibe assumed the directorship of the department. Beneath those individuals were at least three others who are admitted to be statutory supervisors. These include lead electrician David Lord and two lead engineers.

The Charging Parties in this case are, or were, craftsmen employed in the Trades Council's bargaining unit. Johnson is the carpenter, Kennedy a painter, and Markegard an electrician. Markegard was designated by the Trades Council to be its steward.

Although their duties are not exactly clear from the record, and apparently have some overlap, two associate administrators of the hospital were involved in these transactions at various stages. These are William Hall and Philip Gustafson. The latter became an associate administrator sometime in late 1980 or early 1981. They in turn reported to the hospital's executive director, Truman Katz.

### B. Preelection Evidence of Union Animus

Despite the fact that Respondent negotiated a collective-bargaining contract approximately 6 months after the Trades Council was certified, the General Counsel relies on, among other things, some preelection conduct as evidence of Respondent's animus against the Trades

Council. In the summer of 1980 Respondent had implemented a progressive wage structure for various classifications throughout the hospital. The craftsmen, familiar with construction rates of pay, were dissatisfied and wanted to obtain a percentage of the prevailing construction rate, rather than to be governed by the wage schedule.

Sometime in late 1980 or early 1981, they actually began "to organize," although the steps they took are not clear in the record. In January or February 1981, associate administrator Hall, together with some assistants including Redwine, held a meeting with the craftsmen regarding the wage structure. According to painter Kennedy, Hall told the employees that he preferred that they did not go union, saying the hospital "could do better" for them if they stayed out of it. Hall also suggested they go to the IUOE if the employees wished to unionize.

Carpenter Johnson testified that the employees told Hall they were interested in a percentage of the construction rate but Hall responded the hospital would not grant that. Markegard testified Hall nonetheless told them the hospital would take the craftsmen off the 7-step system.<sup>2</sup>

In early February 1981, apparently February 4, Johnson asked Redwine to reclassify him from carpenter to lead carpenter. Redwine denied the request saying that to be a "lead" an employee had to have authority over other employees and since Johnson was the sole carpenter he did not qualify. Johnson thereupon filed a written request to the same effect with Katz. His request was reviewed by Personnel Director Linda Pederson. During the course of Pederson's review Redwine informed her by memo that the carpenter's job "has evolved from a part-time position to the present job and the possibility is very real that once renovation of the building is complete, and all owner furnished equipment, installed and mounted, the position could again become part-time."<sup>3</sup> She affirmed Redwine's analysis. A month later associate administrator Gustafson affirmed Pederson.

Whatever the merits of Johnson's concern, it is apparent that management recognized it as part of the craftsmen's dissatisfaction with the current system. Management no doubt viewed Johnson's unhappiness as at least one of the reasons the craftsmen sought representation by the Trades Council.

Lord recalls that at one point (he believes it was in May, but in view of the substance, must have been sometime prior to the representation case hearing of April 14) if the employees joined the Trades Council, especially the electricians, Redwine told him Respondent might well eliminate the electricians and hire biomedical engineers instead. Moreover, he recalls Redwine saying that if Lord had to join they would probably eliminate his

<sup>2</sup> Markegard also testified that when he was hired in 1977 Redwine had told him to "stay away from" the people who belonged to the IUOE. Similarly, lead electrician Lord testified that when he was hired in 1974 Redwine told him if he joined the IUOE he would be paid \$5.115 an hour, but if he did not join he would receive \$5.356 an hour. Lord chose not to join the IUOE.

<sup>3</sup> The renovation to which Redwine referred was the pending completion of Phase II, a large remodeling project which was then in its last year.

job. According to Lord, nearly 2 years later, about 2 weeks before the instant hearing began, Scheibe essentially repeated the same thing. Lord says Scheibe told him if Lord had been put in the bargaining unit he would have been "busted back down to an electrician and they would eliminate an electrician, one of the electricians that already works there, which would probably have been Mr. Markegard." Neither Redwine nor Scheibe denied those two statements.

In late May, shortly before the representation election, management conducted another meeting. Kennedy testified Hall repeated that management did not want the craftsmen "to go union" and again suggested they join the IUOE. He also recalls Hall saying the hospital was in the process of making a wage study for each construction trade and would try to get them comparable wages. Kennedy recalls both Markegard and Johnson replied they mistrusted the hospital to some extent, because of changes in management as well as because of a perceived lack of clarity. They asserted they needed a representative to assist them. Markegard corroborated Kennedy recalling that Hall wanted to know how the craftsmen felt about the Trades Council, asking if there was anything the hospital could do to change their minds. Markegard, too, recalls Hall suggesting the craftsmen join the IUOE. He remembers Johnson told Hall that he was a carpenter and wanted to be represented by someone who understood carpenters. Lord recalls that during the meeting associate administrator Gustafson said the hospital had treated its employees fairly in the past and intended to continue doing so but asserted it would be hard with a "third party" representing them. Lord recalls Gustafson suggesting the craftsmen join the IUOE. Hall then repeated what Gustafson had said.

Gustafson admitted that during the meeting Hall asked why the employees, after getting a "satisfactory agreement" on wages, had nonetheless caused an election petition to be filed. He asked what had happened to precipitate it. He denied only that Hall had made reference to "a third party."

Shortly after the meeting, Kennedy had a conversation with Redwine expressing fear that Respondent would retaliate against the craftsmen for seeking union representation. He says Redwine assured him he should not worry about it, "there would always be a need for three painters." Kennedy recalls Redwine going on to say, however, that if he had anything to do with it he would get rid of Johnson and the two electricians who he believed had "started it." Redwine did not deny that conversation.

Markegard testified that after the May meeting was over he spoke privately with Gustafson who said he could not tell Markegard what to do regarding joining or not joining the Union, but Markegard should be aware that the hospital had "tough people working for it, too." He said they could make it "rough" on the craftsmen. Gustafson testified that during his conversation with Markegard he observed the Trades Council was a "fairly tough union" and although the hospital was ready to deal with it, "negotiations would be tough." In

any event, the Trades Council won the election and was certified.<sup>4</sup>

Sometime thereafter, described only as "during the Fall" of 1981, Kennedy participated in a conversation with Scheibe and lead painter Shane Quinn. Because of the tenor of the conversation, it seems more likely to have occurred after the contract was signed in December. Kennedy recalls Quinn complaining aloud that, although he had helped the others get more money, unionization had done nothing for him—he had not gotten a raise. Scheibe observed that, since they had all signed union cards and had all gone union, they would have to suffer the consequences.

In January, after Johnson's hours were reduced and two others laid off, Kennedy again sought reassurance from Redwine. Redwine told him there would always be a need for three painters and the terminations would not affect him. Redwine then repeated that if he had his way he would terminate the electricians who were causing the trouble. If he had to, he would phase out their jobs and get outside help. About half an hour later, Scheibe told Kennedy he had heard Kennedy was concerned. Scheibe told him not to worry, he would always have a job as a painter due to the increased workload.

### *C. Respondent's Work Assignment Practices*

The General Counsel contends that, until the collective-bargaining contract was signed in December 1981, it was Respondent's practice and announced policy of assigning work to the craftsmen in accordance with traditional craft lines. In support of that contention is the testimony of lead electrician Lord, as well as some admissions by Redwine. Respondent contends, however, that work assignments were fluid and that the engineers and craftsmen often did each other's work. I have carefully considered the conflicting evidence and conclude that the General Counsel's contention has been proven, with two exceptions. These both involve the work of the night engineer. In general it had been the carpenter's responsibility to replace broken ceiling tiles. However, years before, Redwine had issued a standing order to the night engineer to replace broken ceiling tiles as necessary. Second, it appears that, although most of the painting was done by the painters, on occasion engineers would spray-paint minor repair work and would also paint boiler room equipment which they used or worked on. Painters, of course, did that as well. Except for these two areas it appears to me that the General Counsel has proven that it was Respondent's policy prior to the beginning of 1982 to assign work along craft lines.

In reaching this conclusion I specifically note the job classification descriptions which are in evidence. In the case of the carpenter there are two such descriptions. While there are minor differences between the old and the new job descriptions, clearly the carpenter had responsibility for constructing and repairing furniture,

<sup>4</sup> Neither the date of the election nor the date of the certification appears in the record, although it is probable that the election did not actually take place until June or July as Respondent filed with the Board a request for review of the Regional Director's Decision and Direction of Election. That request was denied on June 24, 1981.

doing minor remodeling and millwork, building and installing cabinetry and similar equipment, as well as installing the ceiling tile framework and the tiles themselves. In addition there is Lord's testimony that craft lines had been followed since 1974 when the department was first divided. Several employees testified that on a number of occasions Redwine had remarked aloud in making work assignments: "If it has wires running to it, it's the electricians'; if it's wood, it's the carpenters'; and if it needs to be painted, it's the painters'." Redwine testified that he did not recall making that statement, but conceded, "It sounds good." In addition, at the representation case hearing Redwine testified that he attempted to run his department on a craft basis saying, however, that he had not had any engineers shift into the electrician, painter, or carpenter classifications. Later in his testimony he stated that the carpenter normally worked in the carpenter shop although he did occasionally mount equipment on walls, depending on its weight and type. If the equipment was quite big the engineer would take over. When he was asked if the carpenter ever worked with the engineer on mounting such equipment, Redwine responded, "He could, but the two trades don't really cross that often."

Accordingly, I conclude that, except for the two matters mentioned above, night ceiling tile work and equipment painting, it was at all times Respondent's policy to assign work to its employees on the basis of craft lines, modified only to the extent that the job classification descriptions may have altered them.

#### D. Scott Johnson's Reduction in Hours

##### 1. Statements to Johnson

Carpenter Scott Johnson was hired as a full-time carpenter in November 1978. Prior to his hire, the hospital had employed a carpenter on a part-time basis for several years. The first was a retired carpenter who only worked part time in order to maintain retirement benefits. He was succeeded by others who also worked part time. According to Johnson, when he was hired the Phase II remodeling job was 30 to 40 percent complete.<sup>5</sup>

Johnson was interviewed by both Redwine and Scheibe. He states that during the interview they discussed the length of his tenure. He recalls the conversation because his then employer did not provide for retirement. He said he was keen on obtaining a position with retirement and during the interview was told that he "could retire in this position." He also said the com-

<sup>5</sup> Phase II involved the renovation of the old hospital building, upgrading it to be consistent with the new wing which had earlier been completed, known as Phase I. The addition of Phase I had doubled the size of the hospital. Both Phase I and II were performed by an independent construction company, Baugh Construction, a general contractor. Phase I, as a new building, appears to have been constructed without impeding the hospital's operation. Phase II, however, was completed on a "rolling basis" or stage by stage. Thus, when the general contractor or any of its subcontractors occupied a portion of the existing building to perform their work, hospital personnel were ousted. When the contractor was finished and the particular stage completed, hospital personnel would resume their occupancy and the hospital's maintenance personnel would once again assume responsibility for maintaining it.

pletion of Phase II as it might affect his tenure was not discussed.

Johnson also testified, regarding his workload during the Phase II period, that to the extent Phase II involved hospital installed furniture or equipment, such installation was principally handled either by the contractor or by the IUOE-represented engineers. Until January 1982, his position was that of a regular full-time employee. Thus, from his viewpoint, there was sufficient carpentry work to justify a full-time employee even with portions of the hospital under construction. As he viewed it, the completion of Phase II ultimately expanded the opportunity for carpentry work.

On January 19, 1982, however, Johnson was notified by Redwine and Scheibe that the completion of Phase II had reduced the amount of work available in the building and engineering department and Respondent had determined it could justify a carpenter for only 24 hours per week. Redwine gave Johnson a letter advising him the change would be effective on February 12.

Johnson says during the discussion they told him they were basing their decision on "joint knowledge" from Scheibe and Redwine. Scheibe told him they were making projections from the work Johnson had turned in and they had contracted with a computer firm to take the material to give them a continuous feedback of the functions of the department, as well as projecting workloads. Johnson observed to Redwine that the only time he had been requested to turn in work orders was when he was first hired and since that time he had not done so; neither had anybody requested him to do so except for a specific work order which Scheibe had given him which had taken several months to complete. That project had occurred a year and a half before. Neither Scheibe nor Redwine disagreed with Johnson's characterization of the meeting.<sup>6</sup>

However, Johnson says he had noticed during the 3 to 4 weeks before the meeting that his work had been reduced to "menial type of tasks." He also says he had become aware that work was being withheld from him. Accordingly, shortly thereafter, probably February, he had another meeting with Scheibe and Redwine to describe his concern that carpentry work as described in his job description was being performed on days he was absent. This principally took the form of replacing broken ceiling tiles. Shop steward Markegard also attended at Johnson's request. During the course of the meeting Johnson contended that carpentry work was being done in his absence and he believed it to be contrary to a statement made to him on January 19. They

<sup>6</sup> Contemporaneous with Johnson's hours reduction were the involuntary departures of electrician David Woodland and an engineer. Electricians Lord and Markegard testified, in corroboration of Johnson, that neither had the electricians installed any owner-furnished equipment. Moreover, Lord believed that Woodland was still needed to accomplish the electrical work. Redwine did not consult him regarding the continued need for Woodland's services. Redwine told him only that Woodland's layoff was the result of a "work order count." Lord replied that, if work orders were the criteria, the hospital could not justify even one electrician, but Redwine did not reply. Lord also accused Redwine of laying Woodland off because of his union activity. Redwine did not reply to that assertion either. Later, Lord told employees that Woodland had been laid off for union activity.

went over the carpenter's job description and Scheibe agreed that all the work he had done since he had been hired would continue to be performed by him and that it would not be done on his days off by anybody else. Specifically, Scheibe told him that he would be the only one to replace damaged ceiling tiles. Indeed, Redwine asserted Johnson was the only one qualified and who had the tools; he did not want engineers working on the ceilings.

About a month later, still perturbed by the loss of hours, Johnson had another meeting with Scheibe. He told Scheibe that he was "really having problems dealing with" the part-time situation. He told Scheibe he believed the workload justified a full-time job and said the consequences were "hitting home" and his family situation had become "very strained." As Johnson explained his circumstances, his eyes began to tear. He asked Scheibe to explain the situation "off the record." Johnson states Scheibe softened and said, "I'm going to tell you something so that you can better understand and deal with this situation, and if you ever ask me to repeat it I'll deny saying it." Scheibe told him, "I don't know how to put this. If you had never joined the Union, none of this would have ever happened to you." Johnson responded he did not understand how that was supposed to help him; if anything he was more frustrated than he had been before. Scheibe did not deny the conversation.

A few days later, Johnson had a conversation with Redwine in which he attempted to explain that he had joined the Union not to stir up trouble but to seek representation at contract time. He told Redwine he wanted a professional and that was his reason for choosing unionization. Redwine replied he "understood all that" and was not concerned with Johnson, but it was the electricians who were "always stirring up trouble and if he had his way he'd get rid of a few more of those troublemakers."<sup>7</sup>

## 2. Markegard attempts to assist Johnson

In late June shop steward Gary Markegard had observed, on one of the Johnson's days off, an engineer working with a cartload of ceiling tiles. He called Johnson to report it. Johnson, concerned with a breach of Scheibe's earlier promise regarding ceiling tiles being reserved exclusively for him, decided to confront Scheibe.<sup>8</sup> They had a conversation in the boiler room/workshop area on June 30. Johnson asked Markegard, as the shop steward, to be present during the conversation.

<sup>7</sup> This appears to be a reference to the discharge of electrician David Woodland who had been terminated on February 12, 1982, and referred to above in fn. 6. A letter dated January 15 had advised Woodland that his job was being eliminated due to the end of Phase II and the completion of installation of "owner furnished equipment." Woodland's termination slip dated February 5 cites "reduction in force—junior man" as the reason for his layoff.

<sup>8</sup> During this period a large amount of work normally done by the carpenter, and described in his job description, was given to the engineers. Some of it was small maintenance work such as hinge and hasp replacements, i.e., miscellaneous "drill and screw" jobs. A large amount dealt with furniture and cabinet repair. In particular, there was a large waiting room furniture job which Johnson had begun, but which had been taken from him. This involved furniture for waiting rooms on four floors on two wings.

According to Johnson, when he arrived at the shop he observed Scheibe standing near the telephone. He told Markegard he was going to go ahead and talk with Scheibe. Markegard was momentarily busy at his workbench but said, "Fine, I'll be right there." The conversation began without Markegard.

Johnson asked Scheibe if he was aware that the engineers were doing "my" ceiling tiles, and suggested Scheibe might not be aware of it; perhaps their supervisors were performing the work without Scheibe's knowledge. Markegard joined them at that moment and heard Scheibe's answer. Scheibe replied he was not aware that they were doing "your job, your ceiling tiles, but I am aware that they are doing ceiling tiles." Johnson said he thought they had earlier reached the agreement that he would do ceiling tiles. Scheibe said he did not think Johnson wanted to do the ceiling tiles in question as the engineers had been working in a room and had damaged many tiles and he did not want to ask Johnson to clean up after their mess. Johnson replied that he thought that had been laid out in the previous agreement, that he would repair all damaged ceiling tiles; it did not matter who had damaged them.

Johnson says at that point Markegard asked, "How are we supposed to believe you people; we have been over that territory. What do you mean you didn't know [Johnson] wanted ceiling tiles?" As that point Scheibe looked at Markegard and asked what he was doing there, saying the meeting was between Johnson and him. Markegard said Johnson had asked him to be there and he was present as the union shop steward. Scheibe replied he did not have to recognize the Union and did not have to recognize Markegard's status as shop steward. He told Markegard to leave. Johnson intervened saying, "Wait a minute. I did ask Gary to be here as my representative. In the past it has been proven to me that I do need witnesses in these situations and Gary is here in the capacity as my shop steward."

At that point Scheibe turned away from Markegard. About the same time Johnson asked Scheibe if he would give him a "redefinition of who does ceiling tiles and when?" Scheibe said "he" would replace the damaged ceiling tiles and that only Johnson would do it "except under other than normal situations." That was a new phrase to Johnson for in past meetings the exception had been "under emergency situations." Since he was not certain of the distinction, Johnson asked Scheibe to explain what "other than normal conditions" meant. Scheibe replied he did not feel the need to. Johnson then described two hypotheticals, one where a ceiling tile was missing over a patient's head and another where one was missing in a hallway. In each case Johnson was off work. Johnson asked whether Scheibe would replace those tiles. To each Scheibe replied, "I might." At that point Johnson told Scheibe that he needed to discuss it with Markegard some more, particularly as a grievance might be necessary.

Markegard testified that when he entered the conversation Scheibe and Johnson were already talking, Johnson was "pleading his case" asking why he should believe Scheibe when Scheibe had earlier agreed with him

and Markegard that Johnson was to work on the tiles. Markegard's recollection of the agreement was that "under no conditions" was anyone other than Johnson to work on the ceiling tiles. He remembers Johnson telling Scheibe that they were doing him a "grave injustice" as the hospital had cut him down to 24 hours per week saying there was not enough work for him while nonetheless assigning his work to other people. Markegard testified Scheibe gave Johnson "basically no response." At that point Markegard told Scheibe that he had heard the agreement, that Scheibe had promised them both that Johnson would do the ceiling tiles. Markegard told Scheibe that he felt Scheibe was betraying them and "was a liar to us," that Markegard had trusted Scheibe in the past but was now very upset.

Markegard said Scheibe told him the conversation had nothing to do with him, that it was between Johnson and himself and Markegard had no business being there. Markegard replied he had been asked to the meeting by Johnson and was present as the union representative, as the shop steward, and had every right to be there. At that point Scheibe told him to "get out," that he had nothing more to say to Markegard, the conversation had nothing to do with him. Scheibe then turned his back and shut Markegard out of the conversation. Scheibe and Johnson continued to talk for a while. When they finished Markegard heard Johnson say they were "getting nowhere" and apparently Scheibe's "agreement about the ceiling tiles would not hold true" and that "we" have to pursue it by other means, "through the Union or whatever."

Scheibe's testimony is quite different. He testified that he had been talking to Johnson in the boiler room regarding an incident where the engineers had done a poor job of replacing ceiling tiles and he had instructed their supervisor to have them do it correctly. At that point, Markegard "walked up [and] butted into the conversation." He denies Markegard ever identified himself as the shop steward during the conversation. Furthermore, he says Markegard spoke in a voice loud enough to be heard 30 feet away on the other side of the boiler room and shook his finger under Scheibe's nose. Scheibe took offense and told him he would not be spoken to in that manner and then continued his conversation with Johnson.

Electrician Robert Sarff was also at work in the boiler room that day. He was some 50 to 60 feet away. Although he could not hear their conversation he did observe them talking. He said they were not yelling at each other and if they had been he would have heard it. Sarff said that because the boiler room is often noisy people commonly shout across it for various reasons and that ordinary shouts can be heard above the machinery.

Both Johnson and Markegard deny that they raised their voices. Furthermore Markegard denies physically threatening Scheibe and says he neither touched him, pushed him, or made as if he was about to do so.

### 3. Scheibe disciplines Markegard

On the following day, July 1, at 9:30 a.m. pursuant to Scheibe's request, Markegard went to Scheibe's office. Scheibe says during that meeting he told Markegard that

his manner would not be accepted and that he would not stand there and let anybody yell at him or shake his finger under his nose. If Markegard wanted to discuss something he was to do it in a civil manner and Scheibe would be more than happy to sit down and discuss the problem with him. In addition, Scheibe gave Markegard a work performance evaluation saying that although he was an acceptable electrician his troubleshooting ability was poor. At the conclusion of the meeting, Scheibe issued Markegard a written warning which stated, "This is to document the counseling you received this morning concerning your rude behavior. Your yelling, and abusive and demanding attitude will not be tolerated. Any problems you have will be discussed in a civil manner on an appointment basis." Markegard refused to initial the slip.

Markegard says Scheibe, very upset, said, "I don't know who you think you are. This deal about shop steward means nothing to me and nothing to the hospital." He said neither he nor the hospital recognized the position of shop steward. When Markegard did not reply, Scheibe accused Markegard of being a troublemaker and told him to keep his mouth shut in the future. Markegard told him there was no "need for this type of stuff," that the only thing the craftsmen wanted was to do their work, following the trades lines as they had before the organizing. He said the employees had signed a contract and now wanted things "to get back to normal." Scheibe told him, "You guys will never get things back to normal. You have taken care of that. You will never get things back to normal." Markegard says it was not until later that afternoon that he was given the warning slip.<sup>9</sup>

### E. Daniel Kennedy

Much of the evidence involving Kennedy's situation is recited above in subsection B, above. In essence, Kennedy had been told on various occasions that there would "always be a need" for three painters. When on occasion he had expressed some fear that he might be subject to layoff, either Redwine or someone else from management had assured him that his job was not in jeopardy.

On July 19, Scheibe told Kennedy he would be terminated effective October 1. Kennedy became upset. He said he had asked about it before and had been constantly assured that his job was not in jeopardy. Kennedy then asserted he was being laid off because of the union activity. Kennedy quotes Scheibe as replying, "Correct," but would not repeat it. Kennedy then argued that the inside painting was "piling up," and Scheibe replied the matter was "out of his hands." He did not deny there was work available. Scheibe does not deny any of Kennedy's testimony.

Kennedy had originally worked in Respondent's purchasing and receiving department and had experience in that field. Between July and October while his painter's job was being eliminated, two openings occurred in that department. The first occurred while Kennedy was on a scheduled vacation. It involved a transfer from the ware-

<sup>9</sup> He refused to sign it as inaccurate. He later asked for a copy. He was given G.C. Exh. 35, but says it is not the slip he was originally shown.

house to the purchasing department. It reopened after Kennedy returned from his vacation when the newly transferred employee decided he did not want the job. Kennedy then spoke to the head of that department and found there was still an opening. He said he was interested. Even so, no offer was made.

Kennedy testified that prior to the election Respondent had made work assignments according to craft and there was no intermingling of jobs. Nonetheless after the election he observed that engineers were beginning to do painting as well as the work normally reserved to other crafts. In early August, Kennedy asked Scheibe about his layoff, questioning it, saying that there still seemed to be work to do. Kennedy produced a list of needed painting work which he had found, saying he could not understand why he was being laid off. He said Scheibe did not reply, but only looked at him and grinned.

Kennedy's layoff was not rescinded and took effect as scheduled.

#### IV. ANALYSIS AND CONCLUSIONS

##### A. *The Personnel Actions*

The General Counsel's theory is that Respondent, utilizing a sophisticated, delayed action tactic, artificially created a work shortage to justify two otherwise unlawfully motivated personnel actions. He argues that the reduction in carpentry work, as well as the reduction in painting work, were simply shams as the work was in fact performed by IUOE personnel. In support of this theory, he points to numerous statements made by Redwine and Schiebe, as well as one made by Lord, constituting admissions or, at the very least, expressions of union animus. Respondent failed to adduce any sort of denials with respect to the statements themselves, relying instead on factual circumstances surrounding Johnson's hours reduction and Kennedy's layoff.

Thus, I find that Respondent has harbored union animus since the craftsmen began to organize in early 1981. Indeed, its animus against the Trades Council was expressed in the very beginning when its responsible officials first attempted to adjust a wage program in direct response to the expressed concern of the involved employees. That was a clear and simple attempt to "buy them off." Failing that it sought to divert them to the IUOE, a known quantity. It is apparent to me that Respondent was principally concerned with the perceived risk of being "whipsawed" by two labor organizations, each seeking to top the other. It did not wish to be in that position, constantly bargaining with one or the other, and trying to keep wages under control. However, when it failed to persuade the employees to forgo representation by the Trades Council and further saw that at least some of the more visible union adherents, such as Johnson, insisted on Trades Council representation rather than the IUOE, it concluded that the only way to avoid the whipsaw effect was to undermine the Trades Council's strength. Thus, although there does not appear to be a great difference between the wage packages of the collective-bargaining agreements in evidence, Respondent nonetheless had a significant motive to "do in" one union or the other. The weakest of the two appeared to be the

Trades Council for it had fewer members. Moreover, its people favored seeking more restrictive work practices than the IUOE.

It is true, however, that Respondent has consistently argued that each of the personnel actions that it took which have been scrutinized in this hearing were taken because of the completion of Phase II in late 1981. Electrician David Woodland and engineer Richard Strahm were terminated contemporaneously with the reduction in Johnson's hours. Both Woodland and Strahm were told by letters dated January 15 that their jobs were being eliminated due to the completion of Phase II. Strangely, however, the termination slip maintained in Strahm's file (G.C. Exh. 12) shows that he was discharged because of "poor work performances and attendance." In addition several counseling slips are in his file, each of which refers to his lack of reliability.<sup>10</sup> The termination notice states Strahm is not to be rehired even though the letter written to him says his layoff was "an involuntary termination without prejudice." Why has Respondent said one thing to Strahm while saying the exact opposite to itself?

Moreover, why on several occasions did both Redwine and Schiebe make remarks regarding Woodland's discharge, asserting that the electrician had been considered a troublemaker? Once prior to Woodland's discharge, Redwine referred to him as one he would like to get rid of; he made a similar remark afterwards. Again, however, the documentation shows Woodland was laid off because of the completion of Phase II.

It seems likely, therefore, that Respondent had other reasons and other motivations for discharging those two. No doubt it wished to get rid of Strahm because he was a poor employee. While Woodland's discharge is not the subject of this complaint, as no charges was filed on his behalf, there is nonetheless curious evidence surrounding it. Redwine considered him to be one of the individuals who was responsible for the unionization of the craftsmen. Indeed, Johnson was considered in the same light.

In the abstract, Respondent's reasons advanced for these three personnel actions is credible. The completion of Phase II might well have resulted in the reduction of maintenance work. After all, new equipment had been installed and, although an initial surge of work might have occurred while the occupants in the remodeled facility adjusted themselves, it would have been short-lived. Thus, the advanced reason appears facially credible. Yet, the craftsmen's observation, that although they had been unable to work in the areas under construction while the contractors' employees were present yet nonetheless remained employed, is a salient one. Once the contractors had left, not only would the craftsmen's full employment continue, but the additional square footage which had become accessible to them would have created additional work. That observation, when coupled with the Respondent's strange treatment of Strahm and Woodland, strongly undermines Respondent's credibility on the point.

<sup>10</sup> An engineering supervisor told Lord that Strahm had been fired for intoxication and sleeping on the job.

First, Respondent adduced no evidence whatsoever to rebut the employees' observation with respect to the additional area of work, and second, the deliberately deceptive treatment of Straham's file suggests that Respondent is fully capable of deceit in other areas. This becomes even more apparent when one looks to the amount of available carpentry work as shown on work requests (G.C. Exhs. 26-31) and the reassigned work. Similarly, contrary to Scheibe's statement to Johnson that his hours reduction was based on a study of his work orders which had been turned over to a computer company to make projections, no such evidence was ever adduced. It appears that work orders were not a reliable means of determining the amount of work actually done. I conclude, therefore, that Scheibe lied to Johnson on the point. Scheibe further appears to have been deceitful in dealing with Johnson with respect to his reneging on his and Redwine's promise to give Johnson all the ceiling tile repair work. In addition, Respondent assigned a large amount of furniture repair work to the engineers, work clearly falling within Johnson's job description. Thus even Redwine's 1981 prediction that the carpenters might be reduced to a part time had only minimal value when weighed against the other evidence.

Moreover, I have already concluded that it was Respondent's practice, prior to the election, to assign work along craft lines, leaving the so-called mechanical work to IUOE employees. Respondent argues that craft lines were not always followed. But, curiously, even to the extent that they may not have been followed the work which both groups historically were supposed to have done seems to have benefited only the IUOE group. In other words, on every occasion where there was a so-called misassignment the work was taken from the craftsmen and given to the IUOE group. Whenever the IUOE group was seen to be doing work also historically done by the craftsmen, it was deemed to be a correct assignment. I find that to be further evidence of a sophisticated effort to undermine the Trades Council's unit.

Accordingly, I conclude that Respondent's defense does not rebut the General Counsel's evidence. Indeed, I find that the General Counsel has proven that Respondent engaged in a sophisticated effort to undermine the Trades Council by reducing the work of the carpenter.

Similarly, although it took place 7-1/2 months later, the Kennedy discharge must be seen in the same light. The evidence with respect to Kennedy is not quite as strong but the policy remains clear. It may well have been that Kennedy was not the most visible Trades Council adherent but in a sense that would be one of the reasons to choose him for layoff. Curiously, Respondent did not discuss his layoff with the lead carpenter, Shane Quinn, or even talk to Quinn regarding the ability of the remaining two painters to perform the traditional painting work.

Furthermore, I find it significant that, on every occasion where Kennedy had an opportunity to discuss his tenure with either Redwine or Scheibe, they invariably told him he had nothing to fear and that the hospital would "always" have work for three carpenters. While I do not regard those promises as a contract between Kennedy and Respondent, nonetheless it appears to be an ac-

curate assessment of the amount of work regularly available to the painting crew. Moreover, their treatment of him at the end seems quite strange. Kennedy had come from the purchasing department and could easily have been bumped into that job without affecting anyone else's employment had Respondent truly wished to keep him. After all he was supposedly being laid off without prejudice. Why not simply move him back to his old job? Did they choose not to do so because he had voted in favor of union representation? That seems to be a likely explanation.

These observations, coupled with the admissions made by Scheibe to Johnson and Kennedy, compel me to conclude that those two men were the victims of a sophisticated plot to undermine the Trades Council's bargaining unit. Such a motivation violates Section 8(a)(3) and (1) of the Act, and I so find.

With respect to the June 30-July 1 conversation involving Scheibe, Johnson, and Markegard, I also find that Respondent violated Section 8(a)(3) and (1) of the Act. Scheibe has already been found deceitful, and is not a credible witness. Moreover, Johnson's and Markegard's version of the conversation was visually corroborated by Sarff who heard nothing of the shouts and finger-pointing reported by Scheibe. Instead he saw what appears to have been a civil conversation. Moreover, Scheibe was well aware Markegard was the shop steward whether he was contractually obligated to recognize him or not. Indeed, he had given Markegard's stewardship a certain recognition by permitting Markegard to be present and to participate during the February discussions regarding Johnson's ceiling tile work. Thus, even without any contract, there had been a tacit recognition. Finally, Markegard does not appear to have left his work inappropriately to participate in that conversation; Respondent has never claimed that he did. The disciplinary warning issued to him on July 1 appears to have been, once again, part of Respondent's effort to undercut the Trades Council's effectiveness as a bargaining representative. What better way to undermine that representation than to prevent its steward from assisting employees?

Accordingly, Scheibe's version of the conversation is discredited and Johnson's and Markegard's versions specifically believed. I therefore conclude that Respondent, in issuing the disciplinary warning to Markegard, violated Section 8(a)(1) and (3).

#### B. Threats, Restraints, and Coercion

The complaint alleges that Respondent committed several acts which separately violated Section 8(a)(1). Some of these involve statements which are simply admissions of the unlawfully motivated personnel actions discussed above. I do not deem it necessary to provide a separate remedy for them. Another involves a statement made by lead electrician Lord to the effect that Woodland had been laid off in retaliation against the union organizing. Earlier, Lord had accused Redwine of having that motivation and Redwine had avoided answering. Thus Lord believed his accusation to be accurate. His later remark to that effect did not, therefore, have the intent of restraining future union activity. Even so, it must have had

that result. As Lord was not at any time a participant in Respondent's antiunion scheme, his statement is not independent evidence of Respondent's actual motive. He is, to some extent, an unwitting participant. Nonetheless, I must find his remark unlawful, for his intent is irrelevant.

The only remaining allegation is that Redwine unlawfully threatened to get rid of union activists—a remark made to Kennedy in February. It is undenied and clearly violates Section 8(a)(1).

#### V. THE REMEDY

Having found that Respondent has engaged in violations of both Section 8(a)(3) and (1) of the Act by reducing the hours of carpenter Scott Johnson, discharging painter Daniel Kennedy, and disciplining union steward/electrician Gary Markegard in order to undermine the status of the Seattle Building and Construction Trades Council as the exclusive representative of such employees, and by other acts, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. The affirmative action shall include an order requiring Respondent immediately to restore Johnson to a 40-hour workweek, to reinstate Kennedy to his former job, and to make each whole for any loss in pay he may have suffered by reason of the discrimination against him. Backpay for Kennedy shall be computed on a quarterly basis in the manner prescribed by the Board in *F. W. Woolworth Co.*, 90 NLRB 289 (1950). Interest for both Kennedy and Johnson shall be governed by *Florida Steel Corp.*, 231 NLRB 651 (1977), and *Isis Plumbing Co.*, 138 NLRB 716 (1962). In addition, Respondent shall be required to expunge from its records any reference to Johnson's hours reduction, Kennedy's discharge, and Markegard's disciplinary warning, and to provide written

notice of such expunction to each of them and to inform them that its unlawful conduct will not be used as a basis for further personnel actions concerning them.

On the foregoing findings of fact and on the entire record in the this case, I make the following

#### CONCLUSIONS OF LAW

1. Respondent, Children's Orthopedic Hospital and Medical Center, is an employer and health care institution engaged in commerce within the meaning of Section 2(6), and (7), and (14) of the Act.

2. The Seattle Building and Construction Trades Council, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(3) and (1) of the Act when on February 15, 1982, it reduced the hours of employment of carpenter Scott B. Johnson because of his union membership.

4. Respondent violated Section 8(a)(3) and (1) of the Act when on October 1, 1982, it discharged Daniel T. Kennedy because of his union membership.

5. Respondent violated Section 8(a)(3) and (1) of the Act when on July 1, 1982, it issued a disciplinary warning to its employee Gary A. Markegard because of his activities as a union steward.

6. Respondent violated Section 8(a)(1) of the Act when on June 30 and July 1, 1982, it refused to permit a union steward to represent an employee in a discussion regarding the employee's terms and conditions of employment.

7. Respondent violated Section 8(a)(1) of the Act by threatening employees with discharge and saying employees had been discharged because of their union activity.

[Recommended Order omitted from publication.]