

St. Agnes Medical Center and District 1199C, National Union of Hospital and Health Care Employees, AFL-CIO

St. Agnes Medical Center and Albert L. Becker, Esquire, Petitioner, and District 1199C, National Union of Hospital and Health Care Employees, Division of RWDSU, AFL-CIO, Jointly with International Brotherhood of Firemen and Oilers, Local 473, AFL-CIO. Cases 4-CA-14407, 4-CA-14407-2, 4-CA-14407-3, 4-CA-14639, 4-CA-14639-2, 4-CA-15064, and 4-RD-1172

August 20, 1991

SUPPLEMENTAL DECISION, ORDER, AND
DIRECTION OF SECOND ELECTION

BY CHAIRMAN STEPHENS AND MEMBERS
CRACRAFT AND DEVANEY

On December 16, 1987, the National Labor Relations Board issued its Decision and Order¹ in this proceeding, finding that the Respondent violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act. The violations found, which occurred both before and after a Board-conducted election, included an interrogation, warning, threat of layoff, suspension, promise of benefits, and changes in terms and conditions of employment. Because of the severity and pervasiveness of the unfair labor practices, the Board found that a bargaining order was appropriate under the test set forth in *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

The Respondent filed a petition for review with the United States Court of Appeals for the District of Columbia Circuit. On March 28, 1989, the court enforced certain of the Board's unfair labor practice findings, reversed others, and remanded the case to the Board for consideration of two issues: whether the decertification election results provided a sufficient basis for the Respondent's asserted good-faith doubt of the Union's majority status, and whether a *Gissel* bargaining order is appropriate.²

On June 16, 1989, the Board advised the parties that it accepted the remand and invited statements of position. Thereafter, all parties filed statements of position. In addition, the Respondent filed a motion to reopen the record for introduction of further evidence regarding turnover of management and employees. We deny that motion as it would not alter our decision on remand as set forth below.³

¹ 287 NLRB 242.

² *St. Agnes Medical Center v. NLRB*, 871 F.2d 137.

³ On April 5, 1991, the Respondent filed a second motion to reopen the record in which it contends, inter alia, that the Board should reopen the record for reconsideration of the monetary award in the original Order concerning payments to union funds because, due to the passage of time, such an award would be punitive. On April 22, 1991, the General Counsel filed an opposition to the Respondent's second motion to reopen the record. We deny the Respondent's second motion as lacking in merit.

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

The Board has considered its original decision and the record in light of the court's remand, which the Board accepts as the law of the case, and the parties' statements of position and has decided to modify the Board's original decision by deleting the *Gissel* bargaining-order requirement and directing that a second election be held.⁴

As to the issue of whether the Respondent violated Section 8(a)(5) by making unilateral changes after expiration of the contract, the Board found that the Respondent had a continuing obligation to bargain with the Union despite the results of a decertification election held shortly before the contract expired.⁵ Despite this obligation, however, the Respondent notified the bargaining unit employees the day after the contract expired that it was unilaterally granting them a substantial wage increase. Consequently, the Board found that the Respondent violated Section 8(a)(5) by granting the wage increase and by making other unilateral changes after the expiration of the contract.

The court remanded this proceeding to the Board to reconsider whether the Respondent was free to make the unilateral changes on the ground that it had a good-faith doubt of the Union's majority status based on the results of the decertification election. Noting that "the standards for determining whether an employer can validly assert a good faith doubt and for determining whether an election should be set aside differ greatly,"⁶ the court stated that it was "troubled by the Board's suggestion that *no* decertification election that is later set aside as the result of an employer's 'objectionable conduct' may serve as a basis for an assertion of a good faith doubt."⁷ (Emphasis in original.) The court further instructed the Board to determine whether the Respondent's preelection unfair labor practices, in light of the court's "winnowing" of the violations,⁸ "were of a nature that would significantly

⁴ In addition, we shall delete from the Order those provisions in the original Order regarding conduct that the Board found to constitute unfair labor practices, but which the court found not to be unlawful.

⁵ In this regard, the Board cited *Decorel Corp.*, 163 NLRB 146, 149 (1967), for the proposition that the "loss of [an] election by the union [is] not a fair reflection of employee desires when [the] election was set aside based on the respondent's objectionable conduct." *St. Agnes Medical Center*, supra at 242 fn. 4. The results of the decertification election were 126 for the Union, 132 against, with 10 challenged ballots. The revised tally of ballots showed 126 for and 138 against the Union.

⁶ *St. Agnes Medical Center v. NLRB*, 871 F.2d at 146-147. The court observed that an employer is only precluded from asserting a good-faith doubt "if its unfair labor practices 'significantly contribute to such a loss of majority or to the factors upon which a doubt of such majority is based,'" although employer conduct that does not rise to the level of an unfair labor practice may upset the "laboratory conditions" required for an election and require that the election be set aside.

⁷ *Id.*

⁸ The court vacated four of the unfair labor practice findings of the judge which were adopted by the Board, on the ground that they were not supported by substantial evidence. Specifically, as to the preelection violations found by

undercut employee support for the Union and thus cast doubt on the validity of the election as a fair reflection of employee sentiment.⁹

Accepting the court's remand as the law of the case,¹⁰ we have reexamined the Respondent's preelection unfair labor practices found by the Board and affirmed by the court and conclude that they were sufficiently serious to significantly undercut employee support for the Union and thus cast doubt on the validity of the election results. In this regard, we emphasize that prior to the election the Respondent subjected employee Porter to onerous working conditions and suspended employee James because of their union activities and that the Respondent's actions in this regard were widely publicized among the unit employees. We also emphasize that on the day before the election the Respondent promised unit employees increased benefits to discourage them from supporting the Union. In these circumstances, we find that the Respondent's singling out of union supporters for punishment combined with its promise of more favorable working conditions if the Union lost the election, acts which were widely disseminated among the unit employees, clearly conveyed to the employees that they must choose between "the carrot and the stick." Accordingly, we conclude that the Respondent cannot rely on the results of the election to support its contention that it had a good-faith doubt of the Union's majority support. Consequently, we reaffirm the Board's finding in its original decision that the Respondent violated Section 8(a)(5) when it unilaterally changed the terms and conditions of employment on expiration of the collective-bargaining agreement.¹¹

the Board, the court denied enforcement to the Board's findings that Supervisor Stanley requested employee Chambers to distribute antiunion literature in violation of Sec. 8(a)(1) and that the Respondent's adoption of the disciplinary guidelines violated Sec. 8(a)(5). As to the postelection violations found by the Board, the court declined to enforce the Board's findings that Supervisor Plotkin promised employees increased benefits and that Supervisor Sams threatened employee Mobley with layoff in violation of Sec. 8(a)(1). As noted above, we shall delete from our Order the provisions relating to this conduct in our original Order.

⁹Id. at 147.

¹⁰As we are accepting the court's remand as the law of the case, this decision should not be read as agreement with the court that a good-faith doubt can be raised in this context. See *W. A. Krueger Co.*, 299 NLRB 914 (1990).

Chairman Stephens takes no position on whether *W. A. Krueger Co.*, supra, was correctly decided. In that case the employer was not found to have committed unfair labor practices or objectionable conduct of any kind prior to the decertification election. The issue was whether the employer violated Sec. 8(a)(5) and (1) of the Act by making unilateral changes in terms and conditions of employment in the period between the initial announcement of the ballot tally showing the union's loss and the Board's final order overruling the union's election objections and certifying the election results. In the present case, as noted, we are setting aside the election for reasons that the remanding court agrees are entirely sufficient, and, pursuant to the requirements of the remand, we are making an additional finding that the unfair labor practices were likely to "cast doubt on the validity of the election as a fair reflection of employee sentiment."

¹¹As the court noted, an employer's obligation to bargain with the exclusive bargaining representative of its employees extends beyond the expiration of the collective-bargaining agreement unless the employer can show that it has a good-faith doubt of the union's continued majority status. Because we find that the Respondent has not rebutted the presumption in favor of the Union's con-

As to the second issue, whether a *Gissel* bargaining order is warranted, the Board concluded in its original decision that a bargaining order was the only reasonable remedy that could restore the status quo as it existed prior to the election in the circumstances as found by the judge. In this regard, the Board noted that the Respondent's unlawful acts of interference, coercion, and discrimination were engaged in by high management officials over the course of several months and that they affected every member of the bargaining unit. The Board emphasized, however, that it found the Respondent's postelection conduct "most significant" in concluding that a *Gissel* bargaining order was warranted. In this regard, the Board found that the Respondent's postcontract-expiration grant of the substantial wage increase, discussed above, would continue to give the Respondent an unfair advantage in a new election because of the "lingering effect" that the wage increase would have on the employees. In these circumstances, the Board concluded that the imbalance could be corrected only by giving the Union an opportunity to resume its role as collective-bargaining representative and that a *Gissel* bargaining order should issue.

In its remand, the court directed the Board to reassess the cumulative impact of the Respondent's violations, especially in light of the court's reversal of some of the unfair labor practice findings and "to justify this extreme remedy" under the analysis in *Peoples Gas System, Inc. v. NLRB*, 629 F.2d 35, 38 (D.C. Cir. 1980).¹² Specifically, the court directed that the Board "explicitly determine whether traditional remedies can erase the effects of the unfair labor practices and ensure a fair rerun election."

In making this assessment, we must initially take account of the fact that the court has characterized the violations which it upheld as a matter of the Respondent's "step[ping] over the line a number of times" in the course of a campaign that was "vigorously contested by both sides." Further, in our view the 8(a)(1) violations upheld by the court were of the type that can be adequately remedied by the customary notice-posting and cease-and-desist orders. See *M. A. Industries*, 285 NLRB 1140, 1147 (1987). There were no plant closure threats (cf. *NLRB v. Sinclair Co.*, 397 F.2d 157 (1st Cir. 1968), *affd. sub nom. NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969)); and nothing

tinuing majority status, we shall include in the Order a provision that the Respondent bargain in good faith with the Union. In this regard, we note that the affirmative bargaining language in the Board's original decision is appropriate as the traditional remedy for the Respondent's 8(a)(5) violations in light of its continuing obligation to recognize the Union's current incumbent status, pending the results of the second election. This traditional remedy is separate and distinct from the extraordinary remedy of a *Gissel* bargaining order to the exclusion of a rerun election. See *Angelica Corp.*, 276 NLRB 617, 617 fn. 2 (1985).

¹²*St. Agnes Medical Center v. NLRB*, supra at 147-149. Because we conclude that a *Gissel* bargaining order is not warranted, we find it unnecessary to apply the analysis set out in *Peoples Gas*, supra.

in the record indicates that the Respondent will renew its unlawful restrictions on the campaign efforts of the Union's supporters. In complying with the affirmative relief granted in our Order, the Respondent will be, to the extent possible, restoring the status quo ante as to its unilateral change violations. With respect to the postelection wage increase, we construe the court's remand order as not permitting us to give that significant weight unless we can find that it was more substantial than the wage increase at issue in *Angelica Corp.*, 276 NLRB 617 (1985). We cannot make that finding. Finally, we note that no employees were discriminatorily discharged and that the unlawful 3-day suspension of Union Steward James was rescinded before the unfair labor practice hearing in this case, pursuant to a grievance settlement that was entered into without prejudice to the Union's ability to file an unfair labor practice charge with the Board. Accordingly, we conclude that a *Gissel* bargaining order is not required in this case, and we shall delete the corresponding language from our original Order, reopen the representation proceeding, and direct that a second election be held once the unfair labor practices found have been remedied.

ORDER

The National Labor Relations Board orders that the Respondent, St. Agnes Medical Center, Philadelphia, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining a rule that precludes the unauthorized solicitation of employees on St. Agnes Medical Center's premises for any purpose.

(b) Maintaining a rule that precludes the distribution of nonwork-related materials without prior approval of the Hospital.

(c) Coercively interrogating employees about their union sympathies.

(d) Promising employees that their previously reduced hours will be restored in order to discourage them from supporting the Union.

(e) Threatening employees with layoff in disregard of established seniority and layoff policies.

(f) Discouraging membership in District 1199C, National Union of Hospital and Health Care Employees, Division of RWDSU, AFL-CIO, jointly with International Brotherhood of Firemen and Oilers, Local 473, AFL-CIO (collectively the Unions) by discriminatorily informing employees that they are being watched, changing their lunch and breaktimes, escorting them whenever they leave their department, including escorting them to the toilet, and changing their job assignments to restrict and confine them to their department and, further, by discriminatorily suspending employees.

(g) Failing and refusing to bargain in good faith with the Union as the exclusive bargaining agent of its employees in the following appropriate unit by failing to contribute to the Union's training fund on behalf of the unit employees and to submit the required reports to the fund as required by the collective-bargaining agreement; by similarly failing to contribute to the legal services fund on behalf of the unit employees and to submit the required reports to the fund; by failing and refusing to transmit to the Union dues deducted from unit employees' wages for the months of April, May, and June 1984 as required by the collective-bargaining agreement; by imposing restrictions on the Union's contractual right of access to the Hospital by refusing access, changing locks on a bulletin board, and removing the bulletin board; by unilaterally continuing to fail to contribute to the training fund and legal services fund; by unilaterally implementing a wage increase for unit employees; by unilaterally laying off employees Johnson, Vereen, and Roberson in violation of job seniority layoff procedures; and by unilaterally failing and refusing to process a grievance filed by the Union concerning employee Moss in accordance with grievance procedures. The appropriate bargaining unit is as follows:

All full-time and regular part-time service and maintenance employees, telemetry technicians, burn technicians, phlebotomists technicians, LPNs by waiver and ICU technicians employed by St. Agnes Medical Center at its 1900 South Broad Street, Philadelphia, Pennsylvania facility; excluding all other employees including professional employees, technical employees, LPGNs, RNs, office clericals, guards and supervisors as defined in the Act.

(h) In any like or related manner interfering with, 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) Rescind and abrogate its no-solicitation/no-distribution rules found unlawful in this decision.

(b) Insofar as it has not already done so, make whole employees Porter and James for any loss of earnings that they may have suffered, with interest, as a result of the Hospital's discriminatory action found unlawful in this decision, in the manner set forth in the remedy section of the judge's decision.

(c) Remove from its files any reference to the disciplinary actions against employees Porter and James and notify them in writing that this has been done and that evidence of these unlawful disciplinary actions will not be used as a basis for future personnel actions against them.

(d) Insofar as it has not already done so, make the required contributions to the Union's training and legal

services fund and remit to the Union deducted dues, together with the related reports, as provided in the remedy section of the judge's decision.

(e) Restore the union bulletin board, as provided in the remedy section of the judge's decision.

(f) Insofar as it has not already done so, offer immediate and full reinstatement to employees Johnson, Vereen, and Roberson to their former jobs or, in the event their former jobs no longer exist, to substantially equivalent jobs, without prejudice to their seniority or other rights and privileges. Make them whole for any loss of earnings they may have sustained as a result of the Hospital's unlawful refusal to follow its seniority layoff procedures, with interest, as provided in the remedy section of the judge's decision, and comply with these and related seniority layoff procedures.

(g) Process the grievance pertaining to the discharge of employee Moss in accordance with the grievance procedures.

(h) On request, bargain in good faith with the Union as the exclusive bargaining representative of its employees in the above appropriate unit and, if an understanding is reached, embody that understanding in a signed agreement.

(i) 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.

(j) Post at its Philadelphia, Pennsylvania facility copies of the attached notice marked "Appendix."¹³ Copies of the notice, on forms provided by the Regional Director for Region 4, 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.

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

IT IS FURTHER ORDERED that Case 4-RD-1172 is reopened and that all prior proceedings held thereunder are reinstated.

IT IS FURTHER ORDERED that Case 4-RD-1172 is severed and remanded to the Regional Director for Region 4 for the purpose of conducting a second election pursuant to the direction set forth below.

¹³ 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."

[Direction of Second Election omitted from publication.]

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 maintain a rule that precludes the unauthorized solicitation of employees on St. Agnes Medical Center's premises for any purposes.

WE WILL NOT maintain a rule that precludes the distribution of nonwork-related materials without prior approval of the Hospital.

WE WILL NOT coercively interrogate employees about their union sympathies.

WE WILL NOT promise employees that their previously reduced hours will be restored in order to discourage them from supporting the Union.

WE WILL NOT threaten employees with layoff in disregard of established seniority and layoff policies.

WE WILL NOT discourage membership in District 1199C, National Union of Hospital and Health Care Employees, Division of RWDSU, AFL-CIO, jointly with International Brotherhood of Firemen and Oilers, Local 473, AFL-CIO (collectively the Unions) by discriminatorily informing employees that they are being watched, changing their lunch and breaktimes, escorting them whenever they leave their department, including escorting them to the toilet, and changing their job assignments so as to restrict and confine them to their department and, further, by discriminatorily suspending employees.

WE WILL NOT fail and refuse to bargain in good faith with the Union as the exclusive bargaining agent of our employees in the following appropriate unit by failing to contribute to the Union's training fund on behalf of the unit employees and to submit the required reports to the fund as required by the collective-bargaining agreement; by similarly failing to contribute to the legal services fund on behalf of the unit employees and to submit the required reports to the fund; by

failing and refusing to transmit to the Union dues deducted from unit employees' wages for the months of April, May, and June 1984 as required by the collective-bargaining agreement; by imposing restrictions on the Union's contractual right of access to the Hospital by refusing access, changing locks on a bulletin board, and removing the bulletin board; by unilaterally continuing to fail to contribute to the training fund and legal services fund; by unilaterally implementing a wage increase for unit employees; by unilaterally laying off employees Johnson, Vereen, and Roberson in violation of job seniority layoff procedures; and by unilaterally failing and refusing to process a grievance filed by the Union concerning employee Moss in accordance with grievance procedures. The appropriate bargaining unit is as follows:

All full-time and regular part-time service and maintenance employees, telemetry technicians, burn technicians, phlebotomists technicians, LPNs by waiver and ICU technicians employed by St. Agnes Medical Center at its 1900 South Broad Street, Philadelphia, Pennsylvania facility; excluding all other employees including professional employees, technical employees, LPGNs, RNs, office clericals, guards and supervisors as defined in the Act.

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 rescind and abrogate the no-solicitation/no-distribution rules found unlawful in the Board's decision.

WE WILL, insofar as we have not already done so, make whole employees Porter and James for any loss of earnings they may have suffered, with interest, as a result of the Hospital's discriminatory action found

unlawful in this decision, in the manner set forth in the decision.

WE WILL remove from our files any reference to the disciplinary actions against employees Porter and James and notify them in writing that this has been done and that evidence of these unlawful disciplinary actions will not be used as a basis for future personnel actions against them.

WE WILL, insofar as we have not already done so, make the required contributions to the Union's training and legal services fund and remit to the Union deducted dues, together with the related reports, as provided in the decision.

WE WILL restore the union bulletin board, as provided in the decision.

WE WILL, insofar as we have not already done so, offer immediate and full reinstatement to employees Johnson, Vereen, and Roberson to their former jobs or, in the event their former jobs no longer exist, to substantially equivalent jobs, without prejudice to their seniority or other rights and privileges, and WE WILL make them whole for any loss of earnings, with interest, they may have sustained as a result of the Hospital's unlawful refusal to follow its seniority layoff procedures, as provided in the decision, and WE WILL comply with these and related seniority layoff procedures.

WE WILL process the grievance pertaining to the discharge of employee Moss in accordance with the grievance procedure.

WE WILL, on request, bargain in good faith with the Union as the exclusive bargaining representative of our employees in the above appropriate unit and, if an understanding is reached, embody that understanding in a signed agreement.

ST. AGNES MEDICAL CENTER