

California Nurses Association, American Nurses' Association and City of Hope National Medical Center. Case 21-CG-16

October 31, 1994

DECISION AND ORDER

BY MEMBERS DEVANEY, BROWNING, AND COHEN

On June 2, 1994, Administrative Law Judge Gerald A. Wacknov issued the attached decision. The Respondent filed exceptions and a supporting brief, and the Charging Party filed an answering 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, and conclusions and to adopt the recommended Order.

We find, for the reasons given by the administrative law judge, that the Respondent was required, pursuant to Section 8(g) of the Act,¹ to give a new 10-day notice, in writing, before it resumed picketing at the Charging Party's medical facility on July 18, after a 3-week hiatus from its earlier lawful picketing. It did not do so and, thus, violated the Act.

The relevant facts are undisputed. In conjunction with the parties' collective-bargaining negotiations the Respondent (the Union) decided to engage in an economic strike and picketing against the Charging Party (the Medical Center). On June 5, 1993, pursuant to Section 8(g), the Union tendered timely and effective notice to the Medical Center of its intent to strike and picket beginning June 15. The Union struck and picketed from June 15 until June 27. The Union ended the economic strike and picketing on June 27 and made an unconditional offer to return to work on behalf of the striking employees. It resumed picketing at the Medical Center on July 18, 1993, without giving 8(g) advance notice.

The date and time provisions of Section 8(g) are mandatory and must be applied and enforced in accordance with their express terms. *NLRB v. Operating Engineers Local 39 (Kaiser Foundation)*, 746 F.2d 530, 533 (9th Cir. 1984), enfg. 268 NLRB 115 (1983). Thus, contrary to the Respondent's contention, it is no defense that, in light of the 8(g) notice tendered on June 5 and the parties' ongoing labor dispute, the Charging Party was "aware of" possible picketing on

July 18. *Operating Engineers Local 39*, 746 F.2d at 532. The strike and picketing had ceased as of June 27, and the Respondent was free from strikes and picketing for 3 weeks, thereby allowing for a resumption of normal operations. Although the Respondent, during this period, may have had grounds for fearing a resumption of picketing, it could not be certain that such picketing would occur, and it could not be secure that it would not occur. In these circumstances, the Union must give a new 10-day notice if it intends to resume picketing. In that way, the health care institution is not forced to play a guessing game with respect to the welfare of its patients. We believe that this reasonable construction of Section 8(g) fully comports with the legislative history of the provision. "Thus, e.g., if the hospital has been lulled by the cessation of the strike and subsequent bargaining from a 'siege' situation . . . it is apparent that a second notice would be required." Leg. Hist. 410, (1974 Amendments); 120 Cong.Rec. 22948-22949 (July 11, 1974) (remarks of Rep. Ashbrook). This result is also consistent with our holding that a union may not commence picketing more than 72 hours after the time specified in its initial 8(g) notice without providing a new 10-day notice. See, e.g., *Hospital Employees (Federal Hill Nursing)*, 243 NLRB 23, 24 (1979). In light of this precedent, it would be anomalous to hold that the June 5 notice retained its validity for almost 6 weeks, particularly where the Union had ceased its original picketing and made an unconditional offer to return to work 3 weeks before it resumed picketing on July 18.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, California Nurses Association, American Nurses' Association, Los Angeles, California, its officers, agents, and representatives, shall take the action set forth in the Order.

Jean Libby, Esq., for the General Counsel.

Ira L. Gottlieb, Esq. (Taylor, Roth, Bush & Geffner), of Burbank, California, for the Respondent.

Lynn K. Thompson, Esq. (Brian Cave), of Los Angeles, California, for the Charging Party.

DECISION

STATEMENT OF THE CASE

GERALD A. WACKNOV, Administrative Law Judge. Pursuant to notice, a hearing in this matter was held before me in Los Angeles, California, on February 17, 1994. The charge was filed on July 19, 1993, by City of Hope National Medical Center (the Employer or the Hospital). On August 31, 1993, the Regional Director for Region 21 of the National Labor Relations Board (the Board) issued a complaint and notice of hearing alleging a violation by California Nurses Association, American Nurses' Association (the Re-

¹ Sec. 8(g) provides that

A labor organization before engaging in any strike, picketing, or other concerted refusal to work at any health care institution shall, not less than ten days prior to such action, notify the institution in writing . . . of that intention. . . . The notice shall state the date and time that such action will commence. The notice, once given, may be extended by the written agreement of both parties." (Emphasis added.)

spondent or the Union) of Section 8(g) of the National Labor Relations Act (the Act). In its duly filed answer to the complaint, the Respondent denies that it has violated the Act.

The parties were afforded a full opportunity to be heard, to call, to examine and cross-examine witnesses, and to introduce relevant evidence. Since the close of the hearing, briefs have been received from counsel for the General Counsel, counsel for the Respondent, and counsel for the Employer. Upon the entire record, and based upon my observation of the witnesses and consideration of the briefs submitted, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Employer is an acute care hospital providing health care services, with facilities located in Duarte, California. In the course and conduct of its business operations the Employer annually purchases and receives goods and materials valued in excess of \$50,000 directly from suppliers located outside the State of California, and derives gross revenues in excess of \$250,000. It is admitted, and I find, that the Employer is now, and at all times material has been, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and has been a health care institution within the meaning of Section 2(14) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

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

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Issue*

The principal issue in this proceeding is whether the Respondent has engaged in a violation of Section 8(g) of the Act by picketing at the Employer's hospital facilities on July 18, 1993, without providing advance written notice to the Employer and the Federal Mediation and Conciliation Service of its intention to engage in such picketing.

B. *The Facts*

The Union has represented nurses at City of Hope National Medical Center for many years. In the most recent round of negotiations, the parties were unable to agree upon the terms of a new contract. Therefore, on June 5, 1993, in accordance with Section 8(g) of the Act, the Union provided the Hospital and the Federal Mediation and Conciliation Service with the following letter which constituted the 10-day notice required by Section 8(g) of the Act:

The California Nurses Association hereby serves notice, pursuant to Section 8(g) of the National Labor Relations Act, as amended, of its intention to engage in a strike, picketing or other concerted activity at City of Hope National Medical Center. Said activity shall commence on Tuesday, June 15, 1993 at 7 a.m.

From June 15 through 27, 1993, the nurses engaged in an economic strike against the Hospital, during which picketing occurred at the Hospital everyday. On June 27, 1993, the

Union made an unconditional offer to return to work on behalf of the striking nurses, and the picketing activity ceased.

On June 16, 1993, the Hospital obtained a temporary restraining order against the Respondent from the superior court of the county of Los Angeles, which imposed certain restrictions on the manner of the Union's picketing at the Hospital, its two Los Angeles offices, or "at any location in Los Angeles County at which an event sponsored by City of Hope takes place." In support of the temporary restraining order, the Hospital's vice president submitted a declaration to the court, *inter alia*, as follows:

As a non-profit, charitable institution, the City of Hope regularly sponsors fundraising events which are held in hotel and convention facilities. Our biannual convention, which is attended by volunteers from all over the United States, is scheduled for July 17-19, 1993, and includes scheduled events at the Beverly Hilton hotel.

On July 1, 1993, after the picketing had ceased, the court held a hearing pursuant to an Order to Show Cause why a preliminary injunction should not issue. The Union argued that an injunction was not appropriate as the strike had ended, but did not say whether it would engage in further picketing. The Hospital argued that the injunction should be issued since the labor dispute was not over and the Respondent was unwilling to disavow further picketing. Thereupon, the court issued a preliminary injunction on the same terms as the temporary restraining order.

The Hospital's biennial convention was held on July 17-19, 1993, in Los Angeles, as scheduled. On July 17, 1993, a reception and dinner was held at the Beverly Hilton Hotel for the delegates who raise money for the Hospital. During this time the Union picketed outside the hotel.

The following morning, Sunday, July 18, 1993, the convention activities included a tour of the Hospital by the delegates to the convention. They were transported to the Hospital in buses. The Union picketed for approximately 1 hour at the main entrance to the Hospital, during the time the buses were transporting the delegates through the gate, and for a brief period thereafter. No amplification devices were used by those individuals who engaged in the picketing. The picketing took place approximately 150 yards from the nearest hospital facility where patient care is administered.

Approximately the same number of security guards were present and available for duty on the hospital campus at the time of the picketing on July 18, 1993, as were present on a daily basis during the June 15-27 strike, when picketing occurred every day. It appears that on both occasions the Union picketed at the main entrance to the Hospital.

Dennis Pruett is director of security for the Hospital. Pruett testified that although he had no idea that there would be picketing at the Hospital on July 18, 1993, he had sufficient security personnel on duty that morning because of the heavy influx of delegates that were scheduled to tour the facility. Pruett testified that the main entrance is the only hospital entrance open on weekends, and all employees, patients, visitors, and delivery vehicles must use this one entrance; during weekdays, other entrances are also used. According to Pruett, there were approximately 30 individuals picketing the entrance, and a security report shows one instance of an al-

tercation that became physical between a supervisor and one of the picketers.

Susan Nye, a labor representative for the Union, testified that the picketing on July 17 and 18, 1993, was part of a "corporate campaign" to pressure the hospital into rehiring some 52 nurses who had been permanently replaced during the strike. The campaign included leafleting at various events, and, in addition, leafleting at board members' homes and in the neighborhood of the Hospital's chief executive officer. The July 18, 1993 picketing at the Hospital was directed at the delegates and was for the purpose of advising them of the Union's "outrage at the City of Hope permanently replacing 52 . . . experienced nurses." In this endeavor the picket signs carried by off-duty nurses were shaped like tombstones and stated: "Three hundred and seven years of nursing experience cannot be permanently replaced."¹

A letter to the delegates from the Hospital, dated July 17, 1993, signed by Sanford Shapero, president and chief executive officer, discusses the Hospital's position regarding the strike and the hiring of permanent replacements, and contains the following paragraph:

CNA may believe that it can gain leverage in the contract negotiations by disrupting our convention. For this reason, you may see CNA representatives with placards and leaflets outside the hotel or at the Medical Center during Sunday's tour. For our part, we will proceed with our deliberations and meetings on schedule. If you have specific questions about this labor dispute, I or a member of our administrative team will be happy to answer them.

Heather Hand-Ruger, associate director of human resources for the Hospital, testified that she did not know there would be picketing or any kind of disruption at the Hospital on July 18, 1993, and no preparations were made for such picketing or disruptions.

C. Analysis and Conclusions

Section 8(g) of the Act provides as follows:

A labor organization before engaging in any strike, picketing, or other concerted refusal to work at any health care institution shall, not less than ten days prior to such action, notify the institution in writing and the Federal Mediation and Conciliation Service of that intention. . . . The notice shall state the date and time that such action will commence. The notice, once given, may be extended by the written agreement of both parties.

The Union gave the requisite 8(g) notice prior to commencing the strike and picketing of the Hospital on June 15, 1993. The strike and picketing was discontinued on June 27, 1993, at which time the striking employees returned to work. Nevertheless, the underlying labor dispute has continued and

¹The Union had previously filed an unfair labor practice charge, apparently alleging that the newly hired nurses were not legitimate permanent replacements. The charge was dismissed by the Regional Office, and the dismissal, appealed by the Union, was recently affirmed by the Board.

has even been expanded from an initial disagreement over contract terms to a further disagreement over the refusal of the Hospital to reinstate nurses who were permanently replaced during the strike. In furtherance of its efforts to cause the Hospital to reinstate the employees, the Union engaged in picketing at the main entrance to the Hospital on July 18, 1993, 21 days after the initial strike and picketing had been discontinued.

It is the position of the General Counsel and the Hospital that the Union has violated the intent of Section 8(g) by failing to give the Hospital a second 10-day notice prior to the July 18, 1993 picketing. The Union takes the position that during a continuing labor dispute subsequent notices for repeated instances of picketing or work stoppage are not literally mandated by Section 8(g), and that the ongoing and active nature of the dispute necessarily provided the Hospital with sufficient notice that a renewal of picketing was a distinct possibility; further, the picketing was clearly not directed at employees or suppliers of the Hospital, but rather was directed at delegates to the convention who were being bused through the main gate, and was of short duration.

"The purpose of Section 8(g) is to give hospitals sufficient notice of any strike or picketing to allow for appropriate arrangement to be made for the continuance of patient care in the event of a work stoppage." *Montefiore Hospital & Medical Center v. NLRB*, 621 F.2d 510, 515 (1980).

The evidence shows that the Union's intent in engaging in the July 18, 1993 picketing was not for the purpose of inducing a work stoppage, or disrupting deliveries or patient care. Nevertheless, the Board has held that the very nature of picketing may bring about such an unintended result, and the reasonable expectations of a union in the conduct of picketing activity are not to be given greater weight than the potential adverse effect such picketing may have upon patient care. Under Section 8(g), the uninterrupted continuance of patient care is of overriding significance, and it appears that this purpose would not be best served by subjecting patients to the vicissitudes of labor disputes in the first instance and then engaging in an after-the-fact analysis of the actual result. See *Hospital Employees (United Hospitals)*, 232 NLRB 443 (1977); *Bricklayers Local 40 (Lake Shore Hospital)*, 252 NLRB 252 (1980). I conclude that the significant aspect of the Union's conduct is the act of picketing, and that the Union's purposes or motives or the actual effects of such picketing upon patient care are immaterial to the finding of a violation.

Section 8(g) requires that the health care institution be apprised, in writing, of "the date and time that such action will commence." The Union, in effect, takes the position that once this requirement has been fulfilled, a health care institution is thereafter no different than any other employer, and may be subjected to intermittent picketing without further advance notice regardless of the intervening time between episodes of picketing; having once been put on notice, the institution should thereafter be prepared for any eventuality until the dispute is resolved. This does not appear to be the logical extension or intent of the statutory scheme embodied within Section 8(g), and would result in according paramount significance to the Union's economic weapon of surprise² over

²It should be pointed out that the Hospital did not engage in any conduct related to the dispute which might arguably have warranted

the patients' well-being; given the clear purpose of Section 8(g), such an incongruous interpretation is simply not tenable. Accordingly, I find that Section 8(g) must be interpreted to require some advance notice to a health care institution in instances of intermittent picketing.

While Section 8(g) does not expressly set forth any notice requirements in intermittent picketing situations, such notice, to be effective, must be reasonable under the circumstances; that is, it must provide the health care institution with a clear notification, sufficiently in advance of the picketing to allow the institution to take the necessary steps to insure the continuation of patient care.

Given the fact that Congress saw fit to impose a 10-day waiting period prior to the initial commencement of a strike or picketing against a health care institution, it would appear that this is also the amount of notice that health care institutions should be given in the event of intermittent picketing.³ In any event, whatever reasonable notice may be required of a union, the Union here admittedly gave no notice whatsoever. And, when patient care is of primary significance, the burden should not be placed upon the health care institution to anticipate when such picketing may reoccur because, if negligent or incorrect in its assessment of the situation, the patient may be adversely affected; this is too critical a matter to be left to chance, happenstance, and an after-the-fact analysis of what the institution should have reasonably anticipated under all the circumstances. In lieu of such uncertainty, a simple, unequivocal notice seems the much better alternative. Accordingly, I conclude that the Union has violated Section 8(g) of the Act, as alleged.⁴

CONCLUSIONS OF LAW

1. City of Hope National Medical Center is an employer within the meaning of Section 2(6) and (7) of the Act, and a health care institution within the meaning of Sections 2(14) and 8(g) of the Act.

2. California Nurses Association, American Nurses' Association is a labor organization within the meaning of Section 2(5) of the Act.

3. By picketing the premises of the Hospital on July 18, 1993, without providing the Hospital or the Federal Mediation and Conciliation Service with reasonable advance notice of such picketing, the Union has violated Section 8(g) of the Act.

an immediate reaction by the Union. See, for example, *Hospital Employees (CHC Corp.)*, 229 NLRB 1010 (1977).

³In her brief, the General Counsel recommends that the Board adopt the notice requirements set forth in General Counsel Memorandum 74-49, Guidelines for Handling Unfair Labor Practice Cases Arising Under the 1974 Nonprofit Hospital Amendments to the Act. This appears to be a matter for the Board to determine. In this decision, I find a violation because the Union gave no "reasonable" notice to the Hospital; however, it is clear that specific notice requirements are necessary to preclude litigation of what might be reasonable under various circumstances.

⁴The Union's constitutional arguments have been addressed by the Board in *Hospital Employees*, supra, and are found here to be without merit.

4. The above unfair labor practice is an unfair labor practice affecting commerce within the meaning of Section 2(6) of the Act.

THE REMEDY

Having found that the Union has violated Section 8(g) of the Act, I recommend that it be required to cease and desist therefrom and from in any like or related manner violating Section 8(g) of the Act. Further, I recommend that the Union be required to post an appropriate notice, attached hereto as "Appendix."

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

ORDER

The Respondent, California Nurses Association, American Nurses' Association, Los Angeles, California, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Engaging in picketing of City of Hope National Medical Center or any other health care institution, at a time when the commencement of such picketing is not in conformity with the notice requirements of Section 8(g) of the Act.

(b) In any like or related manner failing to adhere to the notice requirements of Section 8(g) of the Act.

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

(a) Post at its offices and meeting halls copies of the attached notice marked "Appendix."⁶ Copies of the notice, on forms provided by the Regional Director for Region 21, after being signed by the Respondent's authorized representative, shall be posted by Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Sign and deliver to the Regional Director for Region 21 sufficient copies of the notice, to be furnished by the Regional Director for posting by City of Hope National Medical Center if it is willing, in places where notices to its employees are customarily posted.

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

⁵If 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.

⁶If 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 MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

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

WE WILL NOT engage in picketing at the premises of City of Hope National Medical Center, or any other health care institution, without timely notifying, in writing, any such health care institution and the Federal Mediation and Conciliation Service of the intent to engage in such picketing.

WE WILL NOT in any like or related manner fail to adhere to the notice requirements of Section 8(g) of the National Labor Relations Act.

CALIFORNIA NURSES ASSOCIATION, AMERICAN NURSES' ASSOCIATION