

**Kenmore Mercy Hospital and United Food and Commercial Workers District Union Local One, AFL-CIO.** Cases 3-CA-18976 and 3-RC-10195

October 19, 1995

DECISION, ORDER, AND DIRECTION OF  
SECOND ELECTION

BY MEMBERS BROWNING, COHEN, AND  
TRUESDALE

On July 7, 1995, Administrative Law Judge James F. Morton issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief, and the Petitioner filed an answering brief in support of the judge's 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 and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Kenmore Mercy Hospital, Kenmore, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

IT IS FURTHER ORDERED that the election in Case 3-RC-10195 is set aside and that the case is severed and remanded to the Regional Director for Region 3 to conduct a new election whenever he deems appropriate.

[Direction of Second Election omitted from publication.]

<sup>1</sup> The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

*Rafael Aybar, Esq.*, for the General Counsel.  
*Joseph Randazzo, Esq. (Flaherty, Cohen, Grande, Randazzo & Doren)*, of Buffalo, New York, for the Respondent.  
*Gene M. J. Szuflita, Esq. (Leibowitz, Belson, Perlman and Szuflita)*, of New York, New York, for the Union.

DECISION

STATEMENT OF THE CASE

JAMES F. MORTON, Administrative Law Judge. The complaint in Case 3-CA-18976 alleges that Kenmore Mercy

Hospital (the Respondent) has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the National Labor Relations Act. The Respondent is alleged to have, at meetings it held with its employees, coercively interrogated them about the extent to which they had been contacted by representatives of United Food and Commercial Workers District Union Local One, AFL-CIO (the Union), and directed them to report to it any "harassment" by the Union. The Respondent is also alleged to have maintained, and to have selectively enforced, work rules restricting its employees from promoting the Union. The Respondent's answer puts those allegations in issue. Substantially the same issues are presented for resolution with respect to objections filed by the Union to conduct affecting the results of an election held among the nonprofessional employees of the Respondent in Case 3-RC-10195. The cases, thus, were consolidated for hearing.

I held the hearing in Rochester, New York, on April 10 and 11, 1995. On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by counsel for the General Counsel, the Union, and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION

The Respondent operates a hospital and related facilities in Kenmore, New York. In its operations annually, it meets the Board's standard for asserting jurisdiction.

The Union is a labor organization as defined in the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

The Respondent has about 1200 employees, approximately 425 of whom are nonprofessional employees, the unit involved in this case. On September 28, 1994 (all dates hereafter are for 1994 unless stated otherwise), the Union filed the petition in Case 3-RC-10195 for an election among those employees. At the election held on November 17, 220 votes were cast against the Union and 149 for the Union; the challenged ballots were insufficient in number to affect the results.

During the preelection period, the Union distributed leaflets outside the Respondent's premises; the Respondent mailed its campaign literature to employees' homes; and some employees who referred to themselves at various times as "Satisfied employees of KMH" or as "employees for KMH" posted and distributed leaflets, some quite sophisticated, on the Respondent's premises urging rejection of the Union as the collective-bargaining representative of the unit employees.

B. *The Meetings*

A nun, Sister Mary Joel Schimscheiner, who is known as Sister Joel, is chief executive officer of the Respondent. She held eight separate meetings with its employees on November 9 and 10, each attended by about 100 to 150 employees. She used a written outline to discuss the Respondent's finances and building plans and also the upcoming election. The section of the outline dealing with the election contained the notation, "Do not allow anyone to harass you." As of

the dates of the meetings, she had received no complaints that any employee was being harassed.

At each meeting, Sister Joel discussed the Respondent's operations and then urged the employees to vote in the upcoming election. She then asked if there were any questions. The General Counsel called three nonprofessional employees as witnesses who testified at what ensued at the meetings they attended. None attended the same meeting. Their respective accounts are summarized next.

Catherine Dragoo, a cleaning employee, testified as follows. After discussions that took place as a result of questions by some employees about whether they could be forced to join the Union and about other matters, a secretary asked Sister Joel when the Union would stop coming to the homes of employees and calling employees on the telephone. Sister Joel responded that the Respondent had been required to give the Union the names and addresses of the employees. She then asked how many were contacted by the Union. Getting no response, she asked for a show of hands. About 15 raised their hands. On cross-examination, Dragoo related that Sister Joel told the employees that, if they felt that they were being harassed by the Union, they should get in touch with her. Dragoo also testified that Sister Joel did not say that she would refer any such complaints to the Respondent's attorney for possible action by the Board.<sup>1</sup>

Bella Bolt, a cook, gave the following account. At the meeting she attended, a girl behind her wanted to know what could be done about the Union coming to her home, after stating that the Union had come to the home of a friend. Sister Joel then asked whether anyone else has been contacted by the Union and about half of the 150 employees present raised their hands.

General Counsel's third witness about the meetings, Daniel Schanley, a utility mechanic, testified as follows. One person at the meeting he attended stated that a friend was really upset because she was called on by a union representative. Sister Joel then asked if anyone else was being harassed by the Union. When there was no response, she asked if anyone received calls at home from the Union. About 20 people raised their hands.

The accounts given by these three witnesses were given in a candid, straightforward manner. I credit them.

In *Hawkins-Hawkins Co.*, 289 NLRB 1423 (1988), the Board stated that the respondent there, by telling its employees to let it know if they felt harassed by the union in that case and that it would then take care of the matter, had, in effect, announced to them that it would take action to stop the subjectively offensive activity without regard to whether or not the reported activity was protected by the Act. The Board held that that respondent thereby violated Section 8(a)(1) of the Act. As the facts in the instant case are substantially the same as those in that case, I find that the statements of the Respondent's chief executive officer, instructing employees to get in touch with her if they felt that the Union was harassing them, interfered with, coerced, and restrained employees in the exercise of their Section 7 rights. See also *Brunswick Electric Membership Corp.*, 289 NLRB 361, 421

<sup>1</sup>Sister Joel testified later that she had advised employees, when she received a complaint at any of the meetings about the Union harassing them, that they should contact her and that she would take the up their complaints with the Respondent's attorneys who might refer them to the Labor Board.

(1992). In her asking employees at several general meetings, at a location away from their regular workplace, for a show of hands as to whether they have met with union representatives, when done in the context of various acts of interference with employee Section 7 rights as found herein, the Respondent has engaged in coercive interrogation of its employees as to the extent of their union activities. Cf. *Rossmore House*, 269 NLRB 1176, 1178 fn. 20 (1984).

### C. Allegations About Work Rules

The Respondent has promulgated a rule that authorizes the wearing of an employee's identification badge on the employee's working apparel "and no other tags, labels visible to others, pin-on or clip-on buttons containing messages or symbols or insignia shall be worn on (the Respondent's) premises by employees." It is well settled that such a rule violates Section 8(a)(1) of the Act in the absence of "special circumstances." See *DeMuth Electric, Inc.*, 316 NLRB 935 (1995), and cases cited therein. The Respondent has failed to show that there were special circumstances justifying the rule. It has shown that there were instances in which employees have violated the rule without their being disciplined therefor, but that does not serve to effect a rescission of the rule. The Respondent could more directly have accomplished that result, if it so wished, by giving its employees clear notice of its rescission. I thus find that, by promulgating this rule, the Respondent has interfered with, restrained, and coerced its employees in the exercise of their rights under Section 7 of the Act.

The complaint also alleges that the Respondent has selectively and disparately enforced its rule that bars employees from soliciting for any purpose during worktime and from distributing literature for any purpose during worktime or in working areas. The employees who testified in support thereof were Bella Bolt and Gail Brosig.

The uncontroverted testimony of Bella Bolt, which I credit, establishes that the Respondent, by Ted Rymarziak, a dietary supervisor, told her that she was not allowed to talk about the Union on company time. In doing so, the Respondent violated Section 8(a)(1) of the Act. See *Litton Microwave Cooking Products*, 300 NLRB 324 (1990). Her account also established that George Page, the director of the dietary department, told her that employees can talk about the Union only during breaks or outside the hospital. As the evidence is clear that employees have talked without restriction on a host of subjects during worktime at their workplaces, the disparate restriction placed on employees by the Respondent's director of dietary department also violated Section 8(a)(1) of the Act. See *Industrial Wire Products*, 317 NLRB 190 (1995).

The evidence is also uncontradicted<sup>2</sup> that one of the Respondent's pharmacy department supervisors, Ken Lackie, told Gail Brosig, a pharmacy assistant, that she could not post pronoun literature on a bulletin board, notwithstanding that, at that very same time, they watched a secretary post

<sup>2</sup>I received in evidence Lackie's prehearing affidavit in order to consider whether it is entitled to any weight in view of the fact that he was out of state on vacation, as of the date of the hearing. Upon reflection, I find that no weight can be attributed to it. Cf. *Teamsters Local 812 (Sound Distributing Corp.)*, 307 NLRB 1267, 1269 at fn. 3 (1992).

antiunion literature on that board. This disparate treatment by the Respondent further interfered, coerced and restrained employees in the exercise of their rights under Section 7 of the Act.

#### CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization as defined in Section 2(5) of the Act.

3. The Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act by having coercively polled its employees about whether they were contacted by the Union, by having told them to report to it any instance in which the Union harassed them, by restricting employees from distributing or posting literature on its premises that supported the Union while permitting other employees to post and distribute literature opposing the Union, by prohibiting employees from engaging in conversations about the Union while allowing them to converse about other matters, and by maintaining a rule against the wearing of union buttons or the like while at work when there are no special circumstances justifying the rule.

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

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>3</sup>

#### ORDER

The Respondent, Kenmore Mercy Hospital, Kenmore, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively interrogating its employees about their support of United Food and Commercial Workers District Union Local One, AFL-CIO (the Union), telling them to report any alleged harassment by the Union, warning them not to talk about the Union, prohibiting any employee from posting or distributing literature in favor of the Union while allowing other employees to circulate antiunion literature, and maintaining a rule barring employees from wearing buttons, pins, or like insignia containing messages about the Union.

(b) 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) Post at its facilities in Kenmore, New York, copies of the attached notice marked "Appendix."<sup>4</sup> Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately

<sup>3</sup>If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

<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."

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.

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

#### The Objections

The Union had filed Objections 1, 2, and 3 to the conduct of the election referred to above, alleging that the Respondent had interfered with the right of its employees to choose freely whether they wished to be represented by the Union for purposes of collective bargaining by having engaged in essentially the same conduct found above to be unfair labor practices. In view of the nature of these unfair labor practices, it is appropriate to apply the Board's usual policy of directing a new election in the unit involved in this case. In that regard, see *Bon Marche*, 308 NLRB 184, 186 (1992). I therefore recommend that the Board sever Case 3-RC-10195 from Case 3-CA-18976, that it set aside the election conducted in Case 3-RC-10195, and that it direct that a new election be held.<sup>5</sup>

<sup>5</sup>I find no merit to the Union's contention that the rule against employees soliciting during worktime or distributing literature during worktime or in working areas is per se unlawful as its arguments in support of that contention are based on other considerations. Any exception to this finding or to my recommendations above about the disposition of Objections 1, 2, or 3 are to be filed in conjunction with exceptions to the recommended Order pertaining to the unfair labor practices found above. In that regard, see Sec. 102.69 and Sec. 102.46 of the Board's Rules and Regulations.

#### 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 coercively question you as to whether you have been contacted by representatives of United Food and Commercial Workers District Union Local One, AFL-CIO (the Union).

WE WILL NOT direct you to report to us any alleged harassment by the Union.

WE WILL NOT prohibit you from talking about the Union while at work as we do not prohibit you from discussing other subjects.

WE WILL NOT reject any request by an employee to post or distribute, on our premises, literature in favor of the Union as we have allowed the posting and distribution of antiunion literature.

WE WILL NOT give any effect to our rule that prohibits you from wearing pins, buttons, or other such insignia that

carry messages about your rights, noted above, under 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.

KENMORE MERCY HOSPITAL