

St. Anthony Hospital Systems and St. Anthony Federation of Nurses and Health Professionals, AFT, AFL-CIO. Cases 27-CA-7640, 27-CA-7767, 27-CA-9731, and 27-CA-12042

September 22, 1995

DECISION AND ORDER

BY MEMBERS BROWNING, COHEN, AND TRUESDALE

On November 12, 1993, Administrative Law Judge David G. Heilbrun issued the attached Decision. The Respondent, the General Counsel, and the Charging Party each filed exceptions and supporting briefs. The General Counsel and the Charging Party each filed an answering brief in response to the Respondent's exceptions. The Respondent filed an answering brief in response to the General Counsel's and the Charging Party's exceptions, and filed a reply brief to the General Counsel and Charging Party's answering briefs.

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 conclusions¹ and to adopt the recommended Order as modified.

The Respondent relies on *American Diamond Tool*, 306 NLRB 570 (1992), in which the Board found that the Union waived its right to bargain concerning the Employer's layoff of two employees in July 1991. In *American Diamond Tool*, the Board found that the employer violated Section 8(a)(5) by transferring one of them to a nonunit position, without notifying the union and providing it with an opportunity to bargain, but that the union nevertheless waived its right to bargain subsequent to the layoffs by not requesting bargaining when it had the opportunity to do so during ongoing negotiations, in the particular circumstances of that case. The Board emphasized, however, that it was a combination of several circumstances that led it to conclude that the union had waived its right to bargain, both because it did not request bargaining subsequent to the layoffs, and because it "expressly signaled its willingness to permit such conduct [i.e., the layoffs and the transfer] in the future." Id. at 571. The Board stressed that it was not deciding if any of the circumstances present in that case, standing alone, would

prove a waiver, by conduct, of the union's bargaining right. Id.

We find that key circumstances present in *American Diamond Tool* are not present in this case, and that the Union did not waive its right to bargain by its conduct subsequent to the layoffs. The Board in *American Diamond Tool* relied in part on the fact that the union in that case proposed a management-rights provision that expressly authorized the type of layoffs that the Employer had already put into effect. Id. at 570. In this case, there is no indication that the Union proposed the layoff provisions and the management-rights clause which were ultimately agreed to in the parties' collective-bargaining agreement. Further, the Respondent in this case, unlike the employer in *American Diamond Tool*, has not established that the procedures it used in effecting the 1991 layoffs were the procedures stated in the parties' collective-bargaining agreement. Thus, contrary to the specific circumstances that, in their totality, led the majority to find a waiver of bargaining in *American Diamond Tool*, the Union's simple failure in this case to request bargaining upon hearing rumors of an already implemented layoff does not suggest, much less expressly signal, that the Union either accepted the Respondent's unilateral action or condoned similar layoffs in the future.²

Contrary to the judge, we find that a monetary remedy is appropriate here and that it is feasible to make a reasonable determination of losses that employees suffered as a result of the Respondent's unlawful changes in its staffing and leave policy, and that the appropriateness of the standard status quo ante remedy has not been rebutted.³

Member Browning agrees, for the above reasons, that *American Diamond Tool* is distinguishable from this case. In addition, however, for the reasons set forth in Member Devaney's dissent in *American Diamond Tool*, Member Browning does not subscribe to the panel majority's holding in that case, and would overrule it. In Member Browning's view, the union in that case, as well as the Union in this case, had no obligation to request bargaining after the employer implemented the layoffs without giving the union sufficient notice and an opportunity to bargain. Any subsequent bargaining over the layoffs would inevitably have been tainted by the employer's unilateral action.

³In refusing to provide a monetary remedy for these unlawful unilateral changes, the judge was influenced by the fact that the parties had executed two collective-bargaining agreements in the intervening years, citing *Emhart Industries*, 907 F.2d 372, 379-380 (1990), in which the Board denied enforcement of the Board's order, finding no violation of the National Labor Relations Act and also stating that in any event, the court would not require a remedy. It stated that "unexcusable" delay by the Board had resulted in such a change in "the underlying situation at *Emhart* that enforcement of the order now not only would undermine more labor policies that [sic] it would advance, but would mock reality." The holding, however, turned on the particular circumstances of that case. At the time of the court's decision, the reinstatement procedure at issue had been in use for 6 years, mostly with the Union's agreement. Further, at the time of the court's decision the affected facility was vacant.

¹In adopting the judge's rejection of the Respondent's affirmative defense of laches, we note that the Respondent's argument that it has been prejudiced by delay is based, in part, on its own destruction of its own personnel records after the timely unfair labor practice charge had been filed.

November 5, 1985—R.D. reopens record while issuing notice of hearing.

March 20, 1986—R.D. reaffirms 1980 certification by Supplemental Decision and Order.

April 16, 1986—Respondent requests review of this Supplemental Decision.

May 8, 1986—Board denies Respondent’s request for review.

June 18, 1986—Board fixes this date as about when “the Respondent refuses to bargain with the Union.”

July 10, 1986—General Counsel’s Motion for Summary Judgment filed.

July 1986—Board transfers proceeding and issues Notice to Show Cause, to which Respondent files a response.

January 22, 1987—Resultant Board Decision and Order.

Respondent sought review of this decision in the court of appeals, resulting in *St. Anthony Hospital Systems v. NLRB*, 884 F.2d 518 (11th Cir. 1989), denying Respondent’s request for review and granted the Board’s cross-petition for enforcement. The court traced doctrine as to standards for bargaining unit determinations in the health care industry, and found that the technical unit here involved had been correctly fashioned under applicable law. The hospital’s petition for rehearing on the matter was denied on September 18, 1989.

C. General Facts

In the course of administrative law phases of this overall controversy, several actions were undertaken by Respondent which give rise to the majority of issues that are present for treatment. For context Respondent had maintained a comprehensive, 10-page statement of “Staffing Policies” for its nursing department since at least 1979. These policies covered numerous terms and conditions of employment, and particularly as to work scheduling, variations thereto, and time off.

By letter dated October 23, 1981, Claire Dernbach, president of the Denver Federation of Nurses and Health Professionals, requesting negotiations and information concerning “a new paid leave policy for employees” that was termed as having been brought to the Union’s attention. The area organization of which Dernbach was president included the St. Anthony Federation as the only health care facility chapter still viable in actively representing hospital employees. Her letter was answered on October 30, 1981, by then counsel to Respondent, denying the requests on the basis of Respondent’s non-recognition of the Union at that time. On the same date of October 30, 1981, Respondent administratively issued employees notice of its implementing a Personal Employee Time system, to be undertaken in June 1990.

On November 20, 1981, Respondent issued revised staffing policies as a new document with much the same format, and considerably similar content, to what had existed before. It resulted as an 11-page statement, with frequent reference to the new PET concept as it affected work scheduling and time off. On December 16, 1981, Dernbach again wrote to Respondent’s administrator, terming the revised staffing poli-

cies as “changes in working conditions” and requesting negotiations on the subject. This letter was not answered.

Dorothy Mall is a long-service registered nurse recently employed by Respondent as a part-time RN. She held office as president of the Union from July 1981 until January 1986. She had simultaneously held office as vice president of the DFNHP for this same period, then in January 1986 assumed the presidency of the Denver Federation and vacated her position with the St. Anthony Federation. Mall currently remains president of the DFNHP. She testified that during the latter months of 1981, Respondent neither notified her of the staffing policy revisions nor offered to bargain about them.

In May 1986, Mall learned through a newspaper article that a reduction in force had occurred at Respondent. The Union had received no notice of this from the employer. By letter dated June 4, 1986, Mall wrote to Respondent’s personnel official, referring to her indirect knowledge of the layoffs and requesting negotiations on the subject and as to effects on unit employees. Respondent’s then counsel answered this letter on June 18, 1986, denying the request for information or bargaining on the basis of continuing nonrecognition of the Union. The stipulated facts are that 10 individuals employed within the technical unit were laid off as part of this 1986 reduction in force.

When Mall assumed the presidency of DFNHP in January 1986, the St. Anthony chapter had become dormant. Its records were combined into those of DFNHP and no officers existed for the chapter. Following the court of appeals decision in 884 F.2d 518, the parties for the first time commenced contract negotiations. This process began in June 1990, with the representative for the technical unit as now finally recognized being the DFNHP. The agreement ultimately reached in March 1992 became effective on April 1, 1992. After the hiatus that had spanned several years, officers were elected for the St. Anthony Federation following signing of this first contract. A printed booklet form of the agreement runs 82 pages covering typical subjects comprising (DFNHP) a considerable amount of language devoted to the subject of PET as one of the contract articles.

After the parties had commenced bargaining in June 1990 a corporate change occurred involving Respondent. The entity Provident Health Partners became a part of that entity. David Black had become vice president of human resources in November 1989 for the former business entity that Respondent constituted at that time. With the creation of PHP in January 1991, he assumed a broader position as vice president of human resources for that entity. Black has been Respondent’s PET administrator since January 1991. Black was Respondent’s system, to be undertaken in June 1990.

As the course of bargaining proceeded a point was reached in July 1991 when Respondent made two layoffs of respiratory therapists. The employees chosen, Barbara Fadely and Marcie Ordunez, were the lowest and next to lowest in seniority, respectively, for this classification. The layoffs were made effective on July 16, 1991, for Fadely, and July 18, 1991, for Ordunez, at a time when the employees had previously discussed the prospects for layoff with Horace Kerr, another respiratory therapist and member of the Union’s bargaining committee. Mall testified that she had

