

Healthcare Workers Union, Local 250, a/w Service Employees International Union, AFL-CIO and Alta Bates Medical Center. Case 32-CB-4331

May 30, 1996

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND COHEN

On October 27, 1995, Administrative Law Judge Michael D. Stevenson issued the attached decision. The Respondent filed exceptions and a supporting brief, and the Charging Party filed a brief in response to the Respondent's exceptions.

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,¹ and conclusions and to adopt the recommended Order as modified.²

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Healthcare Workers Union, Local 250, a/w Service Employees International Union, AFL-CIO, Berkeley, California, its officers, agents, and representatives, shall take the action set forth in the Order as modified.

1. Delete paragraph 2(a) and reletter the subsequent paragraphs.*

2. Substitute the following for paragraphs 2(b) and (d).

“(b) Within 14 days after service by the Region, 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 32, after being signed by the Respondent's authorized representative, shall be posted by the Respondent 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 no-

¹ In adopting the judge's finding that the Respondent Union violated Sec. 8(b)(3) of the Act, Chairman Gould relies on the Union's inclusion of text in its additional “Foreword” that conflicted with the shop steward terms of the collective-bargaining agreement. He does not find anything unlawful in the other language, which lauded the Union's bargaining success, the unity of its membership, and the like.

² We shall modify the judge's recommended Order in accordance with our decision in *Indian Hills Care Center*, 321 NLRB 144 (1996).

* Par. 2(a) was deleted and a new notice was substituted by an Order Granting Request for Reconsideration, dated August 26, 1996.

trices are not altered, defaced, or covered by any other material.

“(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.”

3. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES AND 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 refuse to bargain collectively with the Employer, Alta Bates Medical Center, by unilaterally changing the collective-bargaining agreement by including a FOREWARD without the consent of the Employer. We are not required to republish the 1993-1996 collective-bargaining agreement without the aforementioned FOREWARD only because that agreement has expired.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

HEALTHCARE WORKERS UNION, LOCAL
250, A/W SERVICE EMPLOYEES INTER-
NATIONAL UNION, AFL-CIO

Jo Ellen Marcotte, Esq., for the General Counsel.

Paul D. Supton, Esq., of Oakland, California, for the Respondent.

John V. Nordlund, Esq., of San Francisco, California, for the Charging Party.

DECISION

STATEMENT OF THE CASE

MICHAEL D. STEVENSON, Administrative Law Judge. This case was tried before me at Oakland, California, on May 26, 1994,¹ pursuant to a complaint and amendment to complaint issued by the Regional Director for the National Labor Relations Board for Region 32 (the Board) on February 23, 1995, and April 27, 1995, respectively, and which are based on a charge filed by Alta Bates Medical Center (the Employer) on July 1. The complaint alleges that Healthcare Workers Union, Local 250, a/w Service Employees International Union, AFL-CIO (Respondent) has engaged in certain viola-

¹ All dates herein refer to 1994 unless otherwise indicated.

tions of Section 8(b)(3) of the National Labor Relations Act (the Act).

Issue

Whether Respondent, acting without prior notice to the Employer, without affording the Employer the opportunity to bargain, and without the consent of the Employer added a one-page “forward” to a collective-bargaining agreement previously negotiated between the Employer and Respondent and, if so, did Respondent thereby violate the Act.

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and to cross-examine witnesses, to argue orally, and to file briefs. Briefs, which have been carefully considered, were filed on behalf of the Employer and Respondent.²

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

FINDINGS OF FACT

I. THE EMPLOYER’S BUSINESS

Respondent admits that the Employer is a California corporation which operates an acute care hospital located in Berkeley, California. Respondent further admits that during the last 12 months, in the course and conduct of its business operations, it derived gross revenues in excess of \$250,000 and purchased and received goods and services valued in excess of \$5000, which goods or services originated outside the State of California (Tr. 11). Accordingly, I find that the Employer is engaged in commerce and in a business affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Respondent admits, and I find, that it is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICE

A. *The Facts*

The facts in this case are undisputed and may be briefly recited. Since sometime prior to May 1990, Respondent and the Employer have maintained a collective-bargaining relationship. A collective-bargaining agreement, between the parties, effective between May 1, 1990, through April 30, 1993, was received into evidence (G.C. Exh. 2). Beginning in late January 1993 and concluding in December 1993, the parties negotiated a new collective-bargaining agreement, effective December 6, 1993, through April 30, 1996 (G.C. Exh. 6).

The only witness to testify in the instant case was General Counsel’s witness Joanne Carder, the Employer’s director of employee labor relations and the Employer’s chief negotiator during negotiations for the 1993–1996 agreement (G.C. Exh. 6). The primary respondent negotiator was Ralph Cornejo, a business representative. Respondent’s officials Sal Rosselli, president, and Shirley Ware, secretary-treasurer, also represented Respondent during negotiations and played a role in the facts and circumstances of this case.

² At hearing, the General Counsel made a closing argument in lieu of filing a brief.

Once agreement was reached in December 1993, Carder offered to take the negotiated changes back to her office and integrate them into the old contract through a computerized operation. Respondent agreed to this procedure and the end product was resubmitted to Cornejo on or about January 12 (G.C. Exh. 3).

There followed some additional negotiations between the parties over certain changes in the agreement which are not material to this case. Again after agreement was reached, Carder obliged by making the changes on the master copy still contained in the Employer’s computer. As before, Carder sent the new original back to Cornejo together with a cover letter dated February 10 (G.C. Exh. 4). Then in April, Respondent sent the original of the agreement back to Carder with its apparent approval; however, certain Respondent officials had failed to sign certain pages of the agreement. So another letter, this one dated May 6, from Carder to Respondent’s business representative, Pat Gray, was sent regarding the Employer’s desire to have Respondent’s officials supply the missing signatures. In closing of the May 6 letter, Carder wrote, “The Medical Center is willing to split the cost of printing the contract. Please order 300 copies for our use.” (G.C. Exh. 5.)

The basis for these last statements relates to a practice between the Employer and Respondent regarding the printing of the contract in its final form. For the 1990–1993 contract, Respondent had offered to arrange for its printing, thereby assuring that the work would be done by unionized employees. The Employer agreed to this request. For this new agreement, the same format was followed although for some reason, Respondent apparently had the contract printed at a different unionized employer from the employer which had printed the earlier contract.

Late in June, Carder received the requested copies of the printed contract (G.C. Exh. 6). Carder immediately noted the first page inside the cover. Titled “FOREWORD” and numbered page 1, the page was marked at hearing (G.C. Exh. 6(a)) to avoid confusion with another page also titled “FORWARD” (sic) and also numbered page 1, which is found immediately after the table of contents. This second page was marked General Counsel’s Exhibit 6(b).

The page marked General Counsel’s Exhibit 6(a) had never been discussed during negotiations, had never been proposed by Respondent and the Employer had received no advance notice of General Counsel’s Exhibit 6(a). Of course neither Carder nor anyone else on behalf of the Employer had consented to General Counsel’s Exhibit 6(a).

B. *Analysis and Conclusions*

1. Deferral

Respondent contends that this case should be deferred pursuant to the grievance-and-arbitration clause of the collective-bargaining agreement. In support of this contention, Respondent cites the case of *National Radio Co.*, 198 NLRB 527, 532 (1972). In that case, the Board described the controversy as, at bottom, a substantial dispute over the meaning of contract provisions (p. 529). While there exists a major issue concerning whether *National Radio Co.*, supra, is still good law, see 1 Morris, *Developing Labor Law* at 935 (2d ed. 1983), citing *General American Transportation Corp.*, 228 NLRB 808 (1977), it is unnecessary to decide this ques-

tion. I find that even assuming *National Radio Co.* remains good law, it does not apply to the instant case because here, the dispute does not center on an interpretation or application of the collective-bargaining agreement. Rather, the issue as stated above is a statutory dispute: whether the Union may include certain material in a collective-bargaining agreement which has not been agreed to by the Employer. For this reason, the matter may not be deferred. See *Harley Davidson Motor Co.*, 214 NLRB 433, 439 (1974); and *Longshoremen ILA Local 3033 (Smith Stevedoring)*, 286 NLRB 798, 807 (1987).³

2. Respondent's unilateral insertion of union foreword to collective-bargaining agreement

Section 8(b)(3) makes it an unfair labor practice for a union "to refuse to bargain collectively with an employer." Section 8(d) states in pertinent part that

[f]or the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other items and conditions of employment *Provided*, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract

The Supreme Court has held that "within the meaning of § 8(d) . . . a 'modification' is a prohibited unfair labor practice only when it changes a term that is a mandatory rather than a permissive subject of bargaining." *Allied Chemical Workers Local 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 185 (1971). Subjects of mandatory bargaining "include only issues that settle an aspect of the relationship between the employer and employees." *Id.* at 178. *Teamsters Local 670 (Stayton Canning Co.) v. NLRB*, 856 F.2d 1250 (9th Cir. 1988).

In *NLRB v. Haberman Construction Co.*, 618 F.2d 288, 303 (5th Cir. 1980), enfg. 236 NLRB 79 (1978), the court noted that "grievance procedures" are contractual terms considered to be mandatory subjects of bargaining.

At this point, I turn to the collective-bargaining agreement to note first the foreword inserted unilaterally by the Union:

FOREWORD

This Agreement is the result of many long, hard hours of collective bargaining between your employer and negotiating committee members from your facility. Our success at the bargaining table is directly related to the degree of strength, commitment, and unity achieved among our members. Our rights, our benefits, and our working conditions must never be taken for granted; we have had to fight for everything that we have achieved.

³For a scholarly review of the cases reciting when the Board will and will not defer, see *Anacondor Co.*, 224 NLRB 1041, 1043-1048 (1976).

We must work to ensure that this contract is enforced each and every day!

Union members should feel free to contact their shop steward at any time concerning any matter within the scope of this contract or any other work-related problems. Stewards are the key to building a strong, democratic labor union. They are the "Union on the Job."

In addition, the Union's professional staff is available to help meet the needs of our members and stewards in addressing worksite problems and concerns.

Working in health care is a very difficult and demanding job. The quality of care that you provide as well as your concern and dedication to your patients make you very special people. Your Union, Health Care Workers' Union, Local 250, is one of the largest health care unions in the United States and the largest health care union in California with over 32,000 members.

Union staff can be contacted at the office of the Health Care Workers' Union listed on the cover of this contract. Local 250's headquarters is located at 560-20th Street, Oakland, California, 94612; the phone number there is (510) 251-1250 or (800) 585-4250.

In Unity,

/s/ Sal Rosselli	/s/ Shirley Ware
Sal Rosselli	Shirley Ware
President	Secretary-Treasurer

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[G.C. Exh. 6(a).]

This document should be compared to the Foreword agreed to by the parties:

FORWARD

THIS AGREEMENT results from collective bargaining between Alta Bates Medical Center and Local 250. It is the objective of the Agreement to establish the best possible relationship between the employees and the Medical Center.

All persons involved with this Agreement—employees, administration, supervisors, and union representatives—must abide by the terms and conditions of the Agreement so that it can be an effective document for the benefit of all.

The Union is available for consultation at all times concerning matters covered by the Agreement. The Medical Center's Human Resources Department can answer questions relating to the Agreement. Staff in the Human Resources Department can be called at (510) 204-1525. Both parties agree that timely communication of complaints generally results in quick and amicable settlement of differences that may arise.

Union representatives can be reached at the Office of Health Care Workers' Union, Local 250, 560-20th Street, Oakland, California 94612. Phone (510) 251-

1250. Office hours are 8 a.m. to 6 p.m. Monday through Friday.

ALTA BATES MEDICAL CENTER	HEALTHCARE WORKERS' UNION, LOCAL 250, AFL- CIO
_____ RUTH ROBINSON VICE PRESIDENT, HUMAN RESOURCES	_____ SAL ROSSELLI PRESIDENT
_____ DATE	_____ DATE

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[G.C. Exh. 6(b).]

And both sections should be considered in context with sections of the labor agreement relative to shop stewards:

32.5 The function of the Shop Steward shall be to assist employees in settling problems arising in connection with the application or interpretations of the provisions of this Agreement directly with the Department Head or such other person as the Medical Center may designate and to participate, at the option of the employee, in Steps One and Two of the Grievance Procedure as set forth in Section 35 of this Agreement.

32.6 The Shop Steward shall perform his/her functions outside of his/her working hours on his/her own time.

32.7 The Shop Steward shall not direct any employee on how to perform or not perform his/her work, shall not countermand the order of any supervisor, and shall not interfere with the normal operations of the Medical Center or any other employee. His/her activities as a Shop Steward shall in no way interfere with his/her assigned duties as an employee.

32.8 No Shop Steward shall be involved in any way in the handling of grievances other than in the department in which he/she works, except that the Chief Steward may act in the place of the departmental steward. The Medical Center's designated representative is only required to meet with one Shop Steward on any grievance.

[G.C. Exh. 6, pp. 39-40.]

I begin my analysis by finding that Respondent changed the collective-bargaining agreement in a material, substantial, and significant manner. *Peerless Food Products*, 236 NLRB 161 (1978). See also *Exxon Research & Engineering Co.*, 317 NLRB 675 (1995). In so finding, I adopt the arguments of the General Counsel and the Employer that the inclusion of General Counsel's Exhibit 6(a) in the labor agreement falsely implies that both parties have agreed to it as part of the contract. In addition, such document creates confusion not just because there are now two Forewords, but also because the two documents contradict each other and contradict the substantive terms of the contract having to do with the role of the shop stewards. That is, General Counsel's Exhibit 6(a) purports to expand the accessibility of union stewards from that clearly indicated by sections 32.5-32.8 quoted above. Such a conflict would lead to the inevitable result of

more grievances and arbitration as the parties argue over the agreement's meaning.

Finally, General Counsel's Exhibit 6(a) suggests a confrontational relationship with the Employer "we have had to fight for everything that we have achieved." Again this creates conflict with General Counsel's Exhibit 6(b) "the objective of the agreement to establish the best possible relationship between the employees and the Medical Center."

In light of the above, I further conclude that General Counsel's Exhibit 6(a) has the potential to affect significant aspects of the contract relating to mandatory subjects of bargaining such as employee access to the stewards.

Turning to legal precedent, I have been unable to find authority directly on point. However, the cases that do exist leave little room for argument. In *Teamsters Local 100 (Moraine Materials)*, 214 NLRB 1094 (1974), the Board found an 8(b)(3) violation where the respondent union effectively made a unilateral alteration of its collective-bargaining agreement with the employer when the union banned work assignments other than the driving and cleaning of trucks. (Until stopped by union order, employer had been assigning one or more truckdrivers to perform concrete work.) See also *NLRB v. Communication Workers Local 1170 (Rochester Telephone)*, 474 F.2d 778, 780-781 (2d Cir. 1972). Cf. *Electrical Workers IBEW Local 1464 (Kansas City Power)*, 275 NLRB 1504, 1505-1506 (1985).

In *Teamsters Local 471 (Superior Coffee)*, 308 NLRB 1 (1992), the employer and respondent reached agreement on a new collective-bargaining agreement subject only to ratification. The agreement was ratified but respondent refused to execute the document on the grounds that its chief executive officer refused to approve the document. Both sides agreed that the employer had never agreed that respondent could condition execution of the agreement on approval of respondent's chief executive officer. The Board approved the finding of an 8(b)(3) violation.

In *Henry Bierce Co.*, 307 NLRB 622, 628-629 (1992), affd. in part and remanded 23 F.3d 1101 (6th Cir. 1994), respondent employer was charged with an 8(a)(5) violation for refusing to execute an agreement. In the Board-approved decision dismissing the allegation, the administrative law judge noted the union had submitted in a new proposed collective-bargaining agreement a number of material items altered from the prior agreement which had never been discussed let alone agreed on. At page 629 of the decision, the judge stated that there had been no meeting of the minds on all material terms of the contract. Moreover, the judge noted, the Board lacks the power to compel a company to agree to any substantive contractual provision of an agreement, citing *H. K. Porter Co. v. NLRB*, 397 U.S. 99 (1970). See also *Ohio Car & Truck Leasing*, 149 NLRB 1423, 1429 (1964).

Finally, I note the very recent Board decision of *E-Systems, Inc.*, 318 NLRB No. 104 (Sept. 8, 1995), which is virtually on "all fours" with the instant case, except the employer was the respondent. In that case, respondent made certain postagreement unilateral changes in the health benefits provision in the new labor agreement, and the administrative law judge, with Board approval, found a violation of Section 8(a)(5) of the Act.

Based on the analysis and precedent cited above, I find that Respondent violated Section 8(b)(3) of the Act when it

unilaterally changed the collective-bargaining agreement by including a Foreword which the Employer had not agreed to.

CONCLUSIONS OF LAW

1. The Employer, Alta Bates Medical Center, is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Respondent, Healthcare Workers Union, Local 250, a/w Service Employees International Union, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.
3. Respondent violated Section 8(b)(3) of the Act as alleged in the complaint.

THE REMEDY

Having found that Respondent engaged in unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and that Respondent be ordered to republish the entire 1993-1996 collective-bargaining agreement, after having removed from the document, the first page captioned "FOREWORD," and that Respondent be further ordered to distribute the revised agreement to unit employees, with a written explanation that the FOREWARD signed by Sal Rosselli, as president, and by Shirley Ware, as secretary-treasurer, has been ordered deleted by the Board, and that Respondent be further ordered to furnish the Employer with 300 copies of the newly printed collective-bargaining agreement.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁴

⁴If 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.

ORDER⁵

The Respondent, Healthcare Workers Union, Local 250, a/w Service Employees International Union, AFL-CIO, its officers, agents, and representatives, shall

1. Cease and desist from
 - (a) Refusing to bargain collectively with the Employer, Alta Bates Medical Center, by unilaterally changing the collective-bargaining agreement by including a FOREWARD without the consent of the Employer.
 - (b) 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.

(b) 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 32, 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.

(c) Sign and return to the Regional Director sufficient copies of the notice for posting by Alta Bates Medical Center, if willing, at all places where notices to employees are customarily posted.

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

⁵If the parties are unable to agree on the allocation of costs of compliance with this Order, I recommend the matter be deferred to compliance.

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."