

**Ohio Valley Hospital and Ohio Nurses Association.**  
Case 8-CA-27877

July 24, 1997

**DECISION AND ORDER**

BY CHAIRMAN GOULD AND MEMBERS FOX  
AND HIGGINS

Upon a charge filed December 4, 1995, a first amended charge filed December 14, 1995, and a second amended charge filed February 9, 1996, the Regional Director for Region 8 issued a complaint February 29, 1996, against the Respondent, alleging that the Respondent engaged in certain unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act. Copies of the complaint and notice of hearing were served on the Respondent and Charging Party.

On June 10, 1996, the General Counsel, the Respondent, and the Charging Party filed a stipulation of facts and a joint motion to transfer proceedings directly to the Board. The parties waived a hearing and issuance of a decision by an administrative law judge and indicated their desire to submit this case directly to the Board for findings of fact, conclusions of law, and a decision. The parties also agreed that the stipulation of facts and exhibits would constitute the entire record before the Board.

On July 25, 1996, the Board issued an Order granting the motion, approving the stipulation, and transferring the proceeding to the Board.<sup>1</sup> Thereafter, the General Counsel and Respondent filed briefs, and the Respondent and Charging Party filed reply briefs.

On the entire record and the briefs,<sup>2</sup> the Board makes the following

**FINDINGS OF FACT**

**I. JURISDICTION**

The Respondent, an Ohio not-for-profit corporation engaged in the operation of an acute care hospital in Steubenville, Ohio, annually receives gross revenues exceeding \$250,000 and purchases products valued in excess of \$50,000 which it receives directly from points outside the State of Ohio. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and is a health care institution within the meaning of

Section 2(14) of the Act, and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

**II. ALLEGED UNFAIR LABOR PRACTICES**

*A. Stipulated Facts*

The Respondent is engaged in the operation of an acute care hospital in Steubenville, Ohio. The Respondent is wholly owned and controlled by Tri-State Health Services, Inc. (Tri-State). Since 1975, the Union has been the recognized exclusive collective-bargaining representative of the Respondent's general duty nurses. The most recent collective-bargaining agreement between the Respondent and the Union was effective from December 30, 1993, through November 30, 1995.<sup>3</sup>

St. John Medical Center (SJMC) is another acute care hospital operating in the same geographical area as the Respondent. SJMC is wholly owned and controlled by Franciscan Services Corporation (FSC). SJMC's employees are not represented by a union.

On October 16, the Respondent, SJMC, Tri-State, and FSC entered into an affiliation agreement whereby the Respondent and SJMC would operate as separate corporate subsidiaries of a new holding company, Trinity Health System.

Meanwhile, on October 10, the Respondent and the Union began negotiations for a new collective-bargaining agreement. At the fourth session on October 31, the Respondent informed the Union that, in the future, the Respondent and SJMC might consolidate some of their services, and that as a result of such consolidation, nurses could be laid off from one of the two hospitals and apply for employment at the other hospital. The Respondent further stated its desire to reach agreements with the Union and SJMC that would protect the seniority rights of nurses that, as a result of such consolidations, are laid off at one of the hospitals and rehired by the other hospital. In accordance with this objective, the Respondent proposed, as one part of the solution, that the seniority clause in the collective-bargaining agreement include a provision giving any nurse hired within 60 days after being laid off from SJMC seniority credit for the time the nurse had been continuously employed by SJMC.<sup>4</sup>

<sup>1</sup> In their July 10, 1996 motion, the parties further moved, to the extent that the facts contained in the stipulation or exhibits are deemed contrary to provisions in the complaint or answer, to amend such pleadings to conform to the stipulation. The Board's July 25, 1996 Order grants this motion.

<sup>2</sup> The Respondent has requested oral argument. The request is denied, as the record and briefs adequately present the issues and the positions of the parties.

<sup>3</sup> All dates hereafter are in 1995 unless stated otherwise.

<sup>4</sup> As the other part of its solution to the seniority issue, the Respondent stated that it would enter into a separate contract with SJMC, obligating SJMC to reciprocally recognize and give credit for seniority accrued at the Respondent in circumstances where the Respondent's nurses are laid off due to a consolidation and are hired by SJMC within 60 days of the layoff. This statement was included in the Respondent's December 6 final offer to the Union.

The Respondent insisted on this seniority proposal as a condition for reaching agreement on a new contract. The Union opposed this proposal.<sup>5</sup>

On December 6, the Respondent presented its final offer to the Union on all unresolved contractual issues. The offer included the Respondent's proposal on seniority. The Union rejected the final offer. On December 7, the Respondent advised the Union that it would unilaterally implement the terms of its final offer, effective December 11. The Union responded that it did not believe the parties were at lawful impasse because the Respondent had insisted on inclusion, in the agreement, of a permissive subject of bargaining.

On December 11, the Respondent unilaterally implemented its final offer, which included its proposal on seniority.

### B. The Parties' Contentions

The General Counsel contends that the seniority proposal is a permissive subject of bargaining in that the Respondent is requiring the Union to bargain for a benefit for nonunit employees. Thus, the Respondent's insistence to impasse on that proposal violated Section 8(a)(5) and (1) of the Act. The Charging Party Union agrees that the Respondent's proposal is not a mandatory subject of bargaining, and further contends that the Respondent should not be permitted to insist to impasse on the proposal because acceptance of the proposal by the Charging Party would constitute a breach of its duty of fair representation. The Respondent contends that the seniority proposal is a mandatory subject of bargaining, and thus the parties had reached lawful

<sup>5</sup>The most recent collective-bargaining agreement contained the following seniority clause:

#### Article XIV

##### Seniority

*Section 1.* Seniority is the right of a regular full-time and a regular part-time nurse to continue in the employment of the Hospital and to exercise job rights under the terms and conditions of this Agreement. Seniority is defined as the length of time a nurse has been continuously employed by the Hospital:

(a) With respect to nurses hired prior to January 1, 1979, from her last date of hire or the date of the nurse's registration in the State of Ohio, whichever comes later, and,

(b) With respect to nurses hired on and after January 1, 1979, from her last date of hire; provided in each instance that she has successfully completed her probationary period.

The Respondent proposed adding the following to the above clause:

(c) With respect to any nurse hired within (60) days after being laid off from St. John Medical Center, from her last date of hire, with the additional credit for the length of time such nurse had been continuously employed by St. John Medical Center from her last date of hire at St. John Medical Center.

impasse when the Respondent implemented its final offer.<sup>6</sup>

### C. Discussion

Although parties during negotiations are free to insist to impasse on contractual proposals relating to mandatory subjects of bargaining, a party's insistence to impasse on a contractual clause encompassing a permissive subject of bargaining violates Section 8(a)(5) of the Act. *NLRB v. Wooster Division of Borg-Warner*, 356 U.S. 342, 349 (1958).

It is well settled that issues concerning seniority, and its effect on unit employees' wages, hours, and other terms and conditions of employment, are mandatory subjects of bargaining. See *Ford Motor Co. v. Huffman*, 345 U.S. 330, 337 (1952); *Ladish Co.*, 219 NLRB 354, 356 (1975). However, issues relating to the seniority and conditions of employment of those outside the bargaining unit are not mandatory subjects of bargaining. *Allied Chemical & Alkali Workers of America v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 179 (1971); *Electrical Workers Local 109 (Lewis Tree Service)*, 244 NLRB 124 (1979). We find the Respondent's seniority proposal relates to terms and conditions of employment of unit employees, and thus constitutes a mandatory subject of bargaining.

Just as the clause at issue in *Ford Motor Co. v. Huffman*, supra, which granted seniority credits for preemployment war service, exerted its effect only on those who became employed in the unit represented by the union and only after they had entered the unit, so the Respondent's proposal would confer seniority rights only on unit employees: it would give certain of those employees, i.e., those who are former SJMC nurses, seniority credit for a specific preemployment experience. The seniority proposal neither confers any present benefit upon, nor guarantees future benefits to, nurses presently employed by SJMC. Rather the recipients receive seniority credit only if, in the future, they become unit employees. Thus, just as the clause in *Ford Motor Co. v. Huffman*, was deemed to come within the ambit of the "terms and conditions of employment" referred to in Section 9(a) of the Act (345 U.S. at 336-337), so the proposal here does also.<sup>7</sup>

<sup>6</sup>The parties stipulate that if the seniority clause proposed by the Respondent is a mandatory subject of bargaining, the parties were at lawful impasse.

<sup>7</sup>Although the issue before the Court was whether the union violated its duty of fair representation by favoring a certain class of employees in the unit over another class, the Court commenced its analysis with the observation that the union derived its authority from Sec. 9(a) of the Act, which made it the exclusive representative of the bargaining unit "for the purposes of collective-bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment." The Court rejected the proposition, which had been accepted by the court of appeals, that the Union had exceeded its authority in negotiating the seniority clause in question. *Id.* The Court was thereby rejecting the court of appeals' reasoning

We find no merit to the General Counsel's contention that the instant case is similar to *Electrical Workers, Local 1049 (Lewis Tree Service)*, supra. There, the Board found unlawful a union's insistence to impasse on a clause conferring contractual seniority and bumping rights upon individuals outside the unit who were not employed by the employer of the unit employees. The contractual proposal granted present, tangible benefits, i.e., bumping rights and other benefits flowing from seniority, to nonunit employees. Thus, the proposal amounted to an attempt to expand the scope of the bargaining unit, and as such was a permissive subject of bargaining.

In the instant case, the Respondent's proposal does not expand the scope of the bargaining unit because it does not grant a present, tangible benefit to any SJMC employee. As noted above, to the extent that an SJMC nurse may, in the future, reap some benefit from the Respondent's seniority proposal, the nurse would do so only as a bargaining unit employee of the Respondent. In such circumstances, the former SJMC nurse would be entitled to all of the appropriate contractual benefits afforded to unit employees. Thus, to the extent that the Respondent's proposal confers a contingent benefit upon SJMC employees, that contingent benefit is no more tangible to the SJMC employees than are any of the parties' other contractual proposals, including those pertaining to wages and benefits. However, unlike the proposal at issue in *Lewis Tree*, the Respondent's proposal does not expand the scope of the unit by giving present seniority rights to nonunit employees.<sup>8</sup>

(195 F.2d 170, 175 (6th Cir. 1952)) that the "preferential seniority" accorded veterans who had never worked for Ford before the war had "no relevance to terms and conditions of work or the normal and usual subjects of contracts between union and employer."

<sup>8</sup>Chairman Gould notes that although it is more than arguable that the Respondent's seniority proposal could cause discomfort to the Union and could also engender a sense of grievance and dissatisfaction amongst the incumbent employees, the Union's internal considerations—political or otherwise—are not the Board's concern under extant Federal labor policy in the United States. As a general matter, the Board does not sit in judgment over the parties' contract proposals or the arrived-at agreement itself. These matters are for the parties and the collective-bargaining process and are not the concern of the Board and the Federal judiciary. See, e.g., *NLRB v. Insurance Agents*, 361 U.S. 477, 490 (1960); *NLRB v. American National Insurance Co.*, 343 U.S. 395, 404, 409 (1952); *American Ship Building Co. v. NLRB*, 380 U.S. 300 (1965). See the Board's adherence to these principles in *Management Training Corp.*, 317 NLRB 1355, 1357-1358 (1995).

Member Higgins does not necessarily disagree with the aforementioned concepts. However, he believes that they are legally unnecessary to the resolution of this case.

Finally, the Union contends that the Respondent should not be allowed to insist to impasse on the seniority proposal because the Union's acceptance of such a proposal would violate its duty of fair representation. We find no merit to this contention. A union's ultimate acceptance of a bargaining proposal will constitute a breach of its duty of fair representation "only if it can be fairly characterized as so far outside the 'wide range of reasonableness' [t]hat it is wholly 'irrational' or 'arbitrary.'" *Air Line Pilots v. O'Neill*, 499 U.S. 65, 78 (1991), quoting *Ford Motor Co. v. Huffman*, 345 U.S. at 338. The Union has not explained, and the record does not show, how acceptance of the seniority proposal would be outside the range of reasonableness. Indeed, it is not hard to imagine circumstances where acceptance of the seniority proposal would be quite acceptable, such as a quid pro quo for obtaining or retaining certain benefits for unit employees, or as part of a plan to serve "the interests of [the unit] as a whole." *Rakestraw v. United Airlines*, 981 F.2d 1524, 1533 (7th Cir. 1992).

The Union, however, is under no obligation to accept the Respondent's seniority proposal. Indeed, insofar as the proposal would apparently grant a future benefit to newly hired former SJMC employees at the expense of certain other unit employees, it is understandable that the Union might choose to oppose this provision, as it did here, or to offer alternatives. Moreover, if, after bargaining, the parties fail to reach agreement, they are entitled to resort to lawful economic action over their disagreement. Therefore, it is clear that the Respondent's proposal does not, by its terms, inhibit the Union from carrying out its representation duties, and thus we find the Union's concerns about its duty of fair representation inapplicable to the issue of whether the seniority proposal is a mandatory subject of bargaining over which the Respondent is free to insist to impasse.

In sum, the Respondent's proposal to give seniority credit to unit employees hired after a layoff from SJMC is a mandatory subject of bargaining because it pertains solely to the terms and conditions of unit employees. Therefore, the Respondent's insistence to impasse over this proposal did not violate Section 8(a)(5) and (1) of the Act as alleged. Accordingly, we shall dismiss the complaint.

#### ORDER

The complaint is dismissed.