

Presbyterian University Hospital d/b/a University of Pittsburgh Medical Center and JNESO District Council 1 a/w International Union of Operating Engineers, AFL-CIO. Case 6-CA-26868

March 12, 1998

DECISION AND ORDER

BY MEMBERS FOX, LIEBMAN, AND HURTGEN

On February 9, 1996, Administrative Law Judge Peter E. Donnelly issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed a limited cross-exception, and the General Counsel and the Charging Party filed 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 conclusions and to adopt the recommended Order as modified and set forth in full below.¹

The judge found, and we agree, that the Respondent violated Section 8(a)(5) and (1) of the Act by hiring supervisors to perform bargaining unit direct patient care work without notice to, or consultation with, the Union. In its exceptions, the Respondent contends, inter alia, that its conduct was lawful because its "creation . . . of [supervisory] positions which perform direct patient care work was entirely consistent with its past practice of so doing."² For the reason set forth below, we find no merit in this contention.

¹We shall correct the recommended Order and notice to conform to language traditionally used by the Board in failure-to-bargain cases. We shall also modify the judge's recommended Order in accordance with our decision in *Indian Hills Care Center*, 321 NLRB 144 (1996). Additionally, in accordance with *Excel Container, Inc.*, 325 NLRB 17 (1997), we shall change the date in par. 2(e) of the recommended Order from November 25, 1994, to September 23, 1994, the approximate date of the first unfair labor practice.

²The Respondent also claims that its conduct was privileged by virtue of the management-rights clause in its collective-bargaining agreement with the predecessor union. It is well established, however, that such a clause is, in effect, a waiver of a union's statutory right to bargain and that "the waiver normally would be limited to the time during which the contract that contains it is in effect." *Holiday Inn of Victorville*, 284 NLRB 916 (1987). Here, at the time of the conduct at issue, the contract containing the management-rights clause had expired.

The Respondent's heavy reliance on *Lustrelon*, 289 NLRB 378 (1988), enfd. 869 F.2d 590 (3d Cir. 1989), is misplaced, because that case is distinguishable on its facts. In *Lustrelon*, the Board adopted without comment the judge's conclusion that the employer did not violate the Act when it unilaterally reduced the workweek of certain employees from 5 days to 4. Although not a model of clarity, the judge's decision appears to have been premised on a finding that the employer's conduct was authorized by the terms of an expired contract that the parties agreed to follow on an interim basis. Thus, the *Lustrelon* judge found that the employer "was committed to follow-

The unit employees, consisting of psychiatric and staff registered nurses, were previously represented by the Pennsylvania Nurses Association (PNA). The last contract between the PNA and the Respondent expired June 30, 1993. In July 1994,³ the Respondent laid off 45 unit registered nurses. The Charging Party Union won an election held September 23. On the very next day, September 24, the Respondent posted positions for assistant nurse clinical managers (ANCM). Although nurses in the ANCM position, which was created in 1985, are supervisors, they also perform direct patient care work, which the judge found is unit work. The Respondent filled the ANCM positions with one new hire, six nurses promoted from within the bargaining unit, and three nurses recalled from layoff. These positions were filled without notice to, or bargaining with, the Charging Party Union.

It is settled that an employer must notify and offer to bargain with a union about removal of bargaining unit work before it may assign such work to newly created supervisory positions. *Hampton House*, 317 NLRB 1005 (1995).

We find that, to the extent that the predecessor union permitted the Respondent to assign what had been bargaining unit work to supervisory personnel, the Respondent could maintain the status quo, after the Charging Party won the Board election, by continuing to assign that work to supervisors. However, the Respondent cannot do what it did here—remove more bargaining unit work from the unit by creating new supervisory positions to perform such work without bargaining with the Charging Party. We note that none of the cases cited by the Respondent⁴ state that just be-

ing the basic terms of [the expired contract with the predecessor union] until it reached agreement [with the newly certified union] on the terms of a new contract." 289 NLRB at 387. The *Lustrelon* judge also appeared to find that the new union agreed with the employer that the terms of the expired contract, or at least those pertaining to the workweek, would remain in effect until agreement was reached on a new collective-bargaining agreement. 289 NLRB at 384, 386.

Therefore, we read *Lustrelon* as standing for the proposition that when an employer and a successor union agree to adopt the terms of a predecessor union's expired contract pending the outcome of their negotiations for a new contract, the employer does not violate Sec. 8(a)(5) when it exercises the rights granted him by that contract. By contrast, in the instant case, there was no agreement by the parties that the predecessor union's expired contract would be followed until a new collective-bargaining agreement was reached in negotiations.

³All subsequent dates are in 1994 unless indicated otherwise.

⁴The cases cited by the Respondent are distinguishable. In *Westinghouse Electric Corp.*, 150 NLRB 1574 (1965), and *Great Western Produce*, 299 NLRB 1004 fn. 2 (1990), the Board found that the respondents were not obligated to bargain over subcontracting decisions in circumstances where there was no adverse impact on employees in the bargaining unit (*Westinghouse*) and no substantial change from past practices (*Westinghouse* and *Great Western*). Here, adverse impact has been shown as well as a substantial and material change in the Respondent's practices. In *Haddon Craftsmen*, 297

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cause an employer has a past practice of, e.g., subcontracting certain work, the employer may unilaterally subcontract as much bargaining unit work as it chooses.

Accordingly, we affirm the judge's finding that the Respondent's unilateral conduct violated Section 8(a)(5).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, Presbyterian University Hospital d/b/a University of Pittsburgh Medical Center, Pittsburgh, Pennsylvania, its officers, agents, successors and assigns, shall

1. Cease and desist from

(a) Hiring supervisors to perform bargaining unit work without notice to or bargaining with the Union.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed by Section 7 of the Act.

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

(a) On request, bargain with JNESO District Council 1 a/w International Union of Operating Engineers, AFL-CIO, as the collective-bargaining representative of the employees in the appropriate unit as to their terms and conditions of employment, including the hiring of supervisors to perform bargaining unit work. The appropriate unit is:

All full-time and regular part-time psychiatric nurses and staff nurses employed by the Employer at its Western Psychiatric Institute and Clinic Building located at 3811 O'Hara Street, Pittsburgh, Pennsylvania, excluding outpatient nurses, all other registered nurses, office clerical employees and guards, other professional employees and supervisors as defined in the Act, and all other employees.

(b) Make whole unit employees for any loss of wages or other benefits they may have suffered as a result of the Respondent's unlawful action, in the manner set forth in the remedy section of the judge's decision.

(c) Rescind the unlawful unilateral action and restore the status quo ante with respect to any reductions in the work performed by unit employees due to the employment of supervisors to perform unit work.

NLRB 462 (1989), the Board essentially found that there was no showing that the work assigned to nonunit employees was traditional bargaining unit work. In this case, we have adopted the judge's finding that the work assigned to the new supervisory positions was bargaining unit work.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its Pittsburgh, Pennsylvania facility copies of the attached notice marked "Appendix."⁵ Copies of the notice, on forms provided by the Regional Director for Region 6, 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 notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 23, 1994.

(f) 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.

MEMBER HURTGEN, concurring.

I concur in the result reached by my colleagues, but I rely on the following rationale.

The Respondent has, in the past, assigned bargaining unit work to newly created supervisory positions. There is no indication, however, that the Respondent did so at a time when there were unit employees in layoff status. By contrast, in the instant case, there were a substantial number of laid-off unit employees who had not been offered recall at the time the Respondent filled the ANCM positions.¹ In these circumstances, I would find that the employees in the bargaining unit suffered a significant detriment over and above that which they had experienced from the Respondent's unilateral actions in the past,² and that the Respondent's hiring of supervisors to perform bargaining unit work under these facts involved a signifi-

⁵ 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."

¹ The Respondent does not claim that it recalled laid-off nurses to all the positions vacated by the nurses promoted.

² Cf. *Amcar Division v. NLRB*, 596 F.2d 1344, 1350 (8th Cir. 1979) (subcontracting had adverse impact on bargaining unit when it resulted in loss of reasonably expected work opportunities for unit employees on layoff).

cant departure from prior practices.³ Accordingly, I would find that the Respondent violated Section 8(a)(5) of the Act.

³ But for the fact of layoff, I would find that the Respondent acted within the past practice. Under that practice, the maximum number of ANCM positions was 35. The Respondent's creation of 10 ANCM positions in the instant case was well within these limits.

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.

WE WILL NOT hire supervisors to perform bargaining unit work without notice to and bargaining with the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, on request, bargain with JNESO District Council 1 a/w International Union of Operating Engineers, AFL-CIO, as the collective-bargaining representative of our employees in the appropriate unit as to their terms and conditions of employment, including the hiring of supervisors to perform bargaining unit work. The appropriate unit is:

All full-time and regular part-time psychiatric nurses and staff nurses employed at our Western Psychiatric Institute and Clinic Building located at 3811 O'Hara Street, Pittsburgh, Pennsylvania, excluding outpatient nurses, all other registered nurses, office clerical employees and guards, other professional employees and supervisors as defined in the Act, and all other employees.

WE WILL make whole the unit employees for any loss of wages or other benefits they may have suffered as a result of our unlawful action.

WE WILL rescind all unlawful unilateral actions and restore the status quo ante with respect to any reductions in the work performed by unit employees due to the employment of supervisors to perform unit work.

PRESBYTERIAN UNIVERSITY HOSPITAL
D/B/A UNIVERSITY OF PITTSBURGH
MEDICAL CENTER

Suzanne C. McGinnis, Esq. and *Donald J. Burns, Esq.*, for the General Counsel.

Joel E. Cohen, Esq., of New York, New York, for the Respondent.

Gerif Carlson, Esq., of Verona, New Jersey, for the Charging Party.

DECISION

STATEMENT OF THE CASE

PETER E. DONNELLY, Administrative Law Judge. Upon charges filed by JNESO District Counsel 1 a/w International Union of Operating Engineers, AFL-CIO (the Union or the Charging Party) against Presbyterian University Hospital d/b/a University of Pittsburgh Medical Center (the Employer or Respondent), a complaint and notice of hearing issued on February 3, 1995, alleging that Respondent violated Section 8(a)(1) and (5) of the Act by increasing the number of supervisory assistant nurse clinical managers (ANCMs) who thereafter performed unit work, without notice or bargaining with the Union. An answer was timely filed by Respondent, and a hearing was held before me on October 23, 1995. Briefs have been timely filed by the General Counsel, Respondent, and the Charging Party, which have been duly considered.

FINDINGS OF FACT

I. EMPLOYER'S BUSINESS

The Employer is a nonprofit corporation with an office and facilities in Pittsburgh, Pennsylvania, where it is engaged in the operation of an acute care hospital providing medical care. During the 12-month period ending October 31, 1994, the Employer derived from its operations gross revenues in excess of \$250,000 and purchased and received at its Pittsburgh, Pennsylvania facilities goods and services valued in excess of \$50,000 directly from points outside the Commonwealth of Pennsylvania. The complaint alleges, the answer admits, and I find that the Employer is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

The complaint alleges, the answer admits, and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Facts

The unit here consisted of about 120 full-time and regular part-time psychiatric nurses and staff nurses (RNs) employed at Western Psychiatric Institute and Clinic (WPIC) in Pittsburgh, Pennsylvania.¹ This RN unit was originally represented by the Pennsylvania Nurses Association (PNA) pursuant to unit certification by the Commonwealth of Pennsylvania in 1973. The last collective-bargaining agreement between the PNA and WPIC ran from July 1, 1990, through June 30, 1993.²

On July 9, 1993, the Union filed a petition to represent the RN unit at WPIC and an election, which included both the PNA and the Union, was conducted on October 8, 1993, which the Union won. However, objections to the election were filed by the Respondent and a second election was held on September 23, 1994. The Union won, and Respondent once again filed objections to the election. However, the

¹ WPIC, one of Respondent's facilities, is a full service psychiatric hospital.

² A 1-year contract extension was agreed to by the parties. However, it was not ratified by the membership.

Board certified on January 31, 1995.³ However, the Respondent elected to test the Board's certification by refusing to bargain with the Union. Upon motion by the General Counsel, the Board found that the refusal to bargain violated Section 8(a)(5) of the Act and, shortly prior to this hearing, Respondent dropped this litigation and agreed to recognize the Union for the RN unit. There was no collective-bargaining agreement between the Union and the Respondent at the date of this hearing.

WPIC operates with three shifts daily, with 24 hours per day coverage. WPIC's operations consist of the 13 in-patient nursing units where various mental illnesses and age groups are attended. Each unit is supervised by a nurse clinical manager (NCM). In addition, there are either one or two ANCMs on each unit. The composition of employees on the various units differs according to the needs of the units.

The RNs in the unit are responsible for direct patient care which includes assisting patients in their daily living activities such as bathing and grooming. Unit RNs also do patient admission assessments. They also do patient observations,⁴ administer medications,⁵ participate in team meetings to assess the progress of patients, and discuss changes in treatment. They also assist in writing treatment plans.⁶ They also transcribe physicians' orders on to patient charts.⁷ They are also assigned as shift "charge nurses"⁸ when ANCMs are not available to perform that job.⁹ Normally, no unit RN will be designated as a charge nurse if there is an ANCM on duty to perform that function.

In addition to the unit RNs, there are several other classifications of employees. Some are organized and some are not organized. Some of these classifications also perform direct patient care, i.e., attending to the daily living needs of patients. These classifications would include milieu therapists, patient care associates (PCAs), psychiatric assistants (PAs), child care workers (CCWs), nursing assistants (NAs), certified occupational therapy assistants (COTAs), and recreational therapists (RAs).

NCMs and ANCMs also perform direct patient care work, although both are classified as supervisory positions. This is not in dispute. The amount of direct patient care work performed by these supervisors will vary depending on the needs of the shift on the particular unit. The record also discloses that ANCMs can and do assign patients to themselves and when they do, they have the same direct patient care responsibilities as the unit RNs, including the special tasks noted above which, by regulation, may only be done by RNs.

With respect to the classification in issue, the ANCMs, it appears that in June 1994 there were 2 ANCMs for each of the 13 units, or a total of 26 ANCMs.

³ All dates refer to 1995 unless otherwise indicated.

⁴ These are done to assure patient needs and safety.

⁵ Pursuant to licensing regulations, only RNs may administer medications or perform certain medical procedures.

⁶ Regulations also require that only RNs write treatment plans.

⁷ Only RNs are allowed to do this transfer.

⁸ The shift-charge nurse is responsible for coordinating the workload on that shift.

⁹ Unit RNs are paid a higher rate for the hours spent performing charge nurse duties.

On the day following the second election, September 24, 1994, and while some unit nurses were still in layoff status,¹⁰ some 8 to 10 positions were posted by Respondent for ANCMs. These positions were filled and by September 1995 Respondent employed a total of 35 ANCMs. Some ANCMs were acquired by promotion from among unit RNs; two had been unit employees on layoff, and one was an outside hire.

It is undisputed that these positions were filled without notice to or bargaining with the Union. Further, these hirings were all accomplished at a time when the Respondent was refusing to bargain with the Union while contesting the results of the election and litigating the Board's certification.

B. Discussion and Analysis

Existing precedent makes it clear, and it is not disputed by the parties, that the creation of supervisory positions and the selection of individuals to fill those positions is not normally a mandatory subject of bargaining. An employer is free to take such action without consulting or bargaining with the Union.

However, another question is raised by the instant case because the supervisory ANCMs in this case performed unit RN direct patient care work in addition to their supervisory functions.

Respondent argues, however, that there is no such thing as "unit work" because, as set out above and in the record in greater detail, the work performed by RNs in the unit was also performed by other classifications of employees. Respondent argues that the direct patient care work performed by the unit RNs cannot be deemed unit RN work any more than it could be considered milieu therapist, PCA, or NA work. This is a ingenious contention. The direct patient care work in issue is unit work simply because it is regularly performed by unit employees. The direct patient care work being done by the newly created ANCMs is still unit work even though some of the direct patient care work they perform is also performed by employees in other classifications.¹¹

Respondent also argues that since ANCMs have in the past, under prior contracts with a predecessor union (PNA), created ANCM positions who performed unit work, a past practice has thus been established which precludes the Union in this case from asserting that creating ANCM positions performing unit work is a mandatory subject of bargaining. I do not agree.

A past practice under a prior collective-bargaining agreement with a different union is not binding on a newly certified union. The Union here cannot be assumed to carry the baggage of prior concessions or agreements as to terms and conditions of employment. Respondent is obliged to bargain anew with the Union for a first contract for all unit employees and for all of their terms and conditions of employment including, and perhaps especially, unit work.

When the employees selected a new Union to represent them, a new relationship was established. Respondent there-

¹⁰ Some 24 unit RNs were laid off on July 1994 as a part of a reduction in force at WPIC.

¹¹ I also note that there are several tasks that, under licensing regulations, must be performed by RNs. Obviously, this type of direct patient care work cannot be performed by other classifications of employees who are not RNs.

after became obliged to bargain in good faith on all the terms and conditions of employment for those unit employees.

Respondent also argues that the work being performed by ANCMs has not reduced the amount of work being done by unit RNs. This argument begs the question. It well may be that unit RNs are performing the same amount of work before the ANCM positions were established. However, where an additional workload creates the need for more unit work to be performed and this is accomplished by hiring ANCM supervisors, this action must nonetheless be bargained with the Union simply because, as I have concluded above, it is unit work. Respondent may not hire ANCM supervisors to perform unit work and then absolve itself by arguing that the unit RNs were doing the same amount of work as they had been doing before the supervisors were hired.

It is absolutely clear that work which would have been done by unit RNs is being done by supervisory ANCMs in these newly created positions. This is especially true as to work which must, by regulation, be performed by an RN; charge nurse work; and work done by ANCMs when they assigned patients to themselves.

In this case, the employees made a decision to obtain new representation. Both the preamble to the Act (Sec. 1) as well as Section 7 and Section 8(a)(5) provide that employees shall have the right to bargain collectively through representatives of their own choosing. It would be a patent subversion of that right to allow employees to select representation and at the same time bind them to practices that may have developed between their prior representatives and an employer. Indeed, those past practices may have in some way contributed to the rejection of representation by that union and the selection of new union representation.¹²

Respondent also argues that it had no obligation to bargain over the creation of the ANCM positions since these positions were budgeted before the Union election. Even assuming that this has been established, it is irrelevant. The issue is not motivation. The only issue is whether the action taken, i.e., the creation of new supervisory positions to perform unit work, should have been bargained with the Union.¹³

Respondent's reliance on *Lustrelon, Inc.*, 289 NLRB 378 (1988), aff'd. 869 F.2d 590 (3d Cir. 1989), is misplaced. In *Lustrelon*, the issue was whether the employer could unilaterally reduce the work hours of unit employees from 5 to 4 days while negotiating on a new contract with a successor union. In *Lustrelon*, the prior contract with the predecessor union explicitly stated that the contract should not be construed as a guarantee of hours of work and there had been no showing that the employer had been barred in the past from reducing the workweek.

In the instant case, unlike *Lustrelon*, the prior contract does not explicitly permit the Employer to hire supervisors to perform unit work, and the issue is not the number of

¹² While, obviously, the Union could have adopted the past practices of its predecessor union, nothing in this record suggests that this was done.

¹³ While it does not appear that the Union requested bargaining on this issue, the record makes it clear that Respondent was refusing to bargain at all until shortly before this hearing, while it was testing the Board's certification of the Union. In these circumstances, I conclude that any request by the Union to bargain on the issue of creating these supervisory positions to perform unit work would have been futile.

hours worked but whether supervisors could be hired to perform unit work without discussing or consulting with the Union.

In short, I conclude, in the circumstances of this case, that Respondent was not privileged to hire supervisors to perform unit work without notice to or consultation with the Union and, to do so, violated Section 8(a)(5) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES ON COMMERCE

The activities of the Respondent set forth in section III above, occurring in connection with Respondent's operations set forth in section I above, have a close and intimate relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action necessary to effectuate the policies of the Act.

I have found that Respondent violated Section 8(a)(5) and (1) of the Act by hiring supervisors to perform bargaining unit work without notice to or consultation with the Union. Accordingly, I shall recommend that the unit employees be made whole for any loss of earnings or other benefits they may have suffered as a result of the Respondent's unlawful action. Any payments to unit employees shall be computed in the manner described in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), and *F. W. Woolworth Co.*, 90 NLRB 289 (1950). I shall not, however, despite the urging of the General Counsel, recommend the imposition of a broad remedial Order as, in my opinion, it is not warranted.

CONCLUSIONS OF LAW

1. The Respondent, Presbyterian University Hospital d/b/a University of Pittsburgh Medical Center, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union, JNESO District Council 1 a/w International Union of Operating Engineers, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. At all times material, the following employees constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time psychiatric nurses and staff nurses employed by the Employer at its Western Psychiatric Institute and Clinic Building located at 3811 O'Hara Street, Pittsburgh, Pennsylvania; excluding outpatient nurses, all other registered nurses, office clerical employees and guards, other professional employees and supervisors as defined in the Act, and all other employees.

4. At all times material, the Union has been and is now the exclusive representatives of the employees in the above-described bargaining unit for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

5. Since September 23, 1994, Respondent hired supervisory employees (ANCMs) who subsequently performed the work of unit employees.

6. By hiring supervisory employees (ANCMs) to perform the work of unit employees, Respondent violated Section 8(a)(5) of the Act.

[Recommended Order omitted from publication.]