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**Indian River Memorial Hospital, Inc. and International Brotherhood of Teamsters Local 769, AFL-CIO.** Case 12-CA-21201

September 30, 2003

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS SCHAUMBER  
AND WALSH

On January 8, 2002, Administrative Law Judge Lawrence W. Cullen issued the attached bench decision. The Respondent filed exceptions, a supporting brief, and a reply brief. The General Counsel filed an answering brief.

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<sup>1</sup> in light of the exceptions and briefs and affirms the judge's rulings, findings, and conclusions, as further explained below, and adopts the recommended Order<sup>2</sup> as modified.

Summary

At issue is whether the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally changing its shift schedules and on-call procedures. As discussed below, we agree with the judge that the Respondent's failure to bargain was unlawful because the change involved a mandatory subject of bargaining, the Respondent implemented it after the Union's recognition, the Respondent failed to prove it decided to make the change before recognizing the Union, and the Union requested bargaining about the change.

Facts

On August 9, 2000,<sup>3</sup> the Respondent, Indian River Memorial Hospital, voluntarily recognized Teamsters Local 769 (the Union) as the exclusive representative of the employees in its facility services department, a unit of about 25 skilled maintenance employees. Soon after the Union was recognized, Union Business Representative Mike Scott received a posted work schedule, faxed

<sup>1</sup> We grant the General Counsel's motion for correction of the transcript where the judge's bench decision inadvertently lists \$25,000 instead of \$250,000 as the Respondent's gross revenue.

<sup>2</sup> We modify the recommended Order to include the unit description and to correct the date of the first unfair labor practice. We substitute a new notice in accordance with our decision in *Ishikawa Gasket America, Inc.*, 337 NLRB No. 29 (2001).

<sup>3</sup> All dates are in 2000 unless otherwise stated.

to him from a unit employee, which indicated a second and third shift. Scott immediately called the Respondent's human resources director, Bob Zomok, and notified him that shift changes would require bargaining. Zomok said he would get back to Scott, and he responded by e-mail the following day, stating, "No schedule change has been implemented. A listing of new 'Teams' was posted due to a Team Leader transferring to another department." Scott testified that at this point he assumed the shift change was a "dead issue" because the Respondent had simply changed teams.

In October, John Spencer, the Respondent's director of facility services, announced to employees in a department meeting that schedule changes were going to be made and it was the department manager's decision to make those changes. On November 13, while negotiations for a collective-bargaining agreement were ongoing, the Respondent announced by written notice to unit employees that on December 4, it would change the unit's hours of work by creating three second-shift positions and one third-shift position, and it solicited employee bids for these positions.<sup>4</sup> The Union received no notice of these changes until November 15, when employee Barry Hurley faxed the November 13 notice to Scott.

On November 15, Scott faxed a letter to Zomok in response to the schedule changes. The letter stated:

This matter is clearly a change in the terms and conditions of employment and as such is a mandatory subject of bargaining. Please be advised that if the Hospital fails to rescind this Notice by the close of business today Teamsters Local Union No. 769 will file Unfair Labor Practice Charges with the National Labor Relations Board.

The same day, Zomok responded to Scott by e-mail, stating:

We are willing to bargain collectively over those items covering wages, hours, and working conditions. In this instance, clearly changing schedules to improve the operations of the organization is a management right. My opinion is this right is not mitigated unless we do so in the collective bargaining environment. Again, this is a subject we are willing to discuss; however, you are

<sup>4</sup> This decision also involved changing the 7-day "on-call" status of unit employees (while the single shift was in place) to on-call status only on Saturday and Sunday (when the second and third shifts were implemented), thus eliminating on-call pay for Monday through Friday. Both parties, as well as the judge, discuss the shift changes and on-call pay changes as components of the same decision (i.e., the addition of shifts enabled the reduction of on-call pay). Thus, we treat references to either of the changes as referring to both addition of shifts and reduction of on-call pay.

very well aware of my position on the management rights clause. Second, this initiative was in process prior to the recognition of the maintenance unit. . . . I am unwilling, at this point, to rescind the notice. . . .<sup>5</sup>

Within the next hour, Scott sent an e-mail reply stating, "We will file the charge and let the NLRB sort it out." The Union then filed a charge resulting in this proceeding.

#### Judge's Decision

The judge issued a bench decision, finding that the Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing to bargain about the changes in shift schedules and on-call procedures. Specifically, the judge found that the change was material and substantial and involved a mandatory subject of bargaining; the Respondent did not make a final decision until after the Union's recognition; the Union made a bona fide demand for bargaining; the Respondent had an obligation to bargain; and the Respondent did not meet this obligation prior to implementation of the changes.

#### Respondent's Exceptions

The Respondent argues it was not required to bargain over this change because the decision was made on February 28, before recognition of the Union, and the Respondent merely waited until later in the year to implement the decision in consideration of the potential impact on employees. In support of this argument, the Respondent points to an internal company e-mail on that date from John Spencer to Human Resources Director Zomok, which states:

Attached is a spreadsheet showing what we presently have and what we are looking at doing. We need to change the call duty and it would probably be best to do it in phases and over an extended period of time. I still have reservations on making changes during this particular time. I suggest we look at the third and four [sic] quarters and tell our people at that time what will happen with the new budget year. This gives them time to adjust their household budgets. We can do what is on spreadsheet page 2 at that time. . . . Let's talk BIG TIME about this before we do anything! [Emphasis in original.]

The spreadsheet included a study of the cost of on-call pay that had been reviewed by the "operations review team," a group of department heads who were looking into possible cost savings. John Spencer testified that this e-mail repre-

<sup>5</sup> On cross-examination, Zomok conceded that his opinion, to which he referred in this e-mail, was that the Union did not have any right to bargain over these changes unless the Respondent had agreed to do so through collective bargaining, and the Respondent had not done so.

sented his decision as to what was going to be done, but how it was going to be accomplished was yet to be decided.

The Respondent also argues that the shift change of one unit employee on July 24 marked the beginning of the implementation of the shift-change decision. Although unit employees had previously worked only the first shift, second and third shifts were in place for other employees due to the hospital's continuous operation. Employee Barry Hurley transferred to the second shift (3:30 p.m.–midnight). He later transferred temporarily to a unique 12–8:30 p.m. shift, which he requested because of family difficulties, and he then returned to the second shift.

Finally, the Respondent contends that the Union did not demand bargaining about the schedule change. The Respondent argues that Scott's e-mails and letters did not mention bargaining or attempt to schedule a bargaining session. Therefore, the Respondent concludes that the Union did not exercise due diligence in pursuing bargaining.

#### Discussion

The Respondent's work schedule change involves a mandatory subject of bargaining. *Pepsi-Cola Bottling Co. of Fayetteville*, 330 NLRB 900, 902 fn. 9 (2000), enfd. mem. in relevant part 24 Fed. Appx. 104 (4th Cir. 2001) (citing *Our Lady of Lourdes Health Center*, 306 NLRB 337, 339 (1992)). We disagree with the Respondent's argument that it had no obligation to bargain here because it decided on the schedule change and began to implement it prior to recognizing the Union. Contrary to the Respondent's assertions, the language in the internal management e-mail to Zomok on February 28, which refers to further discussion of schedule changes before doing anything, does not establish that a final decision had been made at that time. Furthermore, the Respondent's argument is undermined by Zomok's August e-mail to Scott, in which he stated, "No schedule change has been implemented." Thus, the Respondent has not proven that it made a final decision to make the schedule change before it recognized the Union. See *Britt Metal Processing, Inc.*, 322 NLRB 421 (1996), enfd. mem. 134 F.3d 385 (11th Cir. 1997), rehearing en banc denied mem. 137 F.3d 1357 (11th Cir. 1998).<sup>6</sup>

The Union received no formal notice of the schedule changes; rather, the Union was informed of the change

<sup>6</sup> The judge drew an adverse inference regarding the Respondent's failure to furnish documents relating to the decision to change schedules. The Respondent contends that this is not enough to rebut its evidence showing that it made the decision before recognizing the Union. Because we find that the Respondent's evidence does not establish that it made the decision and implemented the schedule change before recognizing the Union, we find it unnecessary to address this issue.

for the first time by an employee on November 15. Once the Union learned of the change, Business Representative Scott immediately notified the Respondent that this was a mandatory subject of bargaining and requested rescission. Scott's letter to Zomok was undoubtedly a request for bargaining, which "need take no special form, so long as there is a clear communication of meaning." *Armour & Co.*, 280 NLRB 824, 828 (1986) (quoting *Scobell Chemical Co. v. NLRB*, 267 F.2d 922, 925 (2d Cir. 1959)) (although the union never used the word "bargain," events left little doubt that the union was interested in bargaining, if necessary). Indeed, Zomok's response indicated he understood Scott was requesting bargaining. Furthermore, Scott previously informed Zomok that any shift changes required bargaining, and Zomok responded that no schedule change had been implemented at that time. Thus, the Union timely requested bargaining about the schedule change prior to implementation. Cf. *AT&T Corp.*, 337 NLRB No. 105, slip op. at 4 (2002) (union's entire course of conduct demonstrated lack of due diligence in pursuing bargaining). We therefore find no merit in the Respondent's assertion that the Union waived its bargaining rights, and we adopt the judge's finding that the Union made a bona fide demand for bargaining.

Because the parties were engaged in overall contract negotiations, which encompassed the mandatory bargaining subject at issue here, the Respondent was obligated not only to give the Union notice and an opportunity to bargain over the schedule change, but also to refrain from implementation until impasse or agreement. *NLRB v. Katz*, 369 U.S. 736, 743 (1962); *Haddon Craftsmen*, 300 NLRB 789, 791 (1990) (citing *Lange Co.*, 222 NLRB 558, 563 (1976)). However, the Respondent denied the Union's request to rescind the changes pending bargaining. Accordingly, we agree with the judge that the Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing to bargain with the Union prior to implementing the schedule change.

#### ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Indian River Memorial Hospital, Inc., Vero Beach, Florida, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(a).

"(a) Unilaterally instituting changes in its unit employees' wages and hours and other terms and conditions of employment without providing notice to the Union of any proposed changes and, upon request, bargain with

the Union concerning these changes on behalf of the employees in the following appropriate unit:

All stationary engineers, journeymen, master craftsmen, craftsmen, and groundskeepers, employed by the Respondent at its Vero Beach, Florida, facility; excluding team leader, senior groundskeeper, CAD operator, engineering data management coordinator, biomedical equipment tech III-III, office coordinator, all other employees, guards, and supervisors as defined in the Act."

2. Substitute the following for paragraph 2(c).

"(c) Within 14 days after service by Region 12, post at its Vero Beach, Florida facility copies of the attached notice marked "Appendix B."<sup>7</sup> Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained by it 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 November 13, 2000."

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

Dated, Washington, D.C. September 30, 2003

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Robert J. Battista, Chairman

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Peter C. Schaumber, Member

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Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

<sup>7</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."

APPENDIX B  
 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 Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist any union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT unlawfully institute unilateral changes in the terms and conditions of employment of our employees by instituting schedule changes and eliminating shifts and on-call pay without providing International Brotherhood of Teamsters, Local 769, AFL-CIO with notice thereof and upon request bargaining with the Union concerning these changes on behalf of the employees in the following appropriate unit:

All stationary engineers, journeymen, master craftsmen, craftsmen, and groundskeepers, employed by the Respondent at its Vero Beach, Florida, facility; excluding team leader, senior groundskeeper, CAD operator, engineering data management coordinator, biomedical equipment tech III-III, office coordinator, all other employees, guards, and supervisors as defined in 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.

WE WILL upon request by the Union, restore the status quo ante by reinstating the shift schedules and on-call pay procedures as they existed prior to November 2000, and WE WILL notify the Union of any proposed changes in the wages, hours and other terms and conditions of employment of the bargaining unit employees and upon request by the Union, bargain with it prior to making any proposed changes and if agreement is reached embody it in a signed agreement.

INDIAN RIVER MEMORIAL HOSPITAL, INC.

*Dallas L. Manuel, II, Esq.* and *Jermaine A. Walker, Esq.*, for the General Counsel.  
*Bradley R. Johnson, Esq.* and *Helen A. Palladeno, Esq.*, for the Respondent.  
*Mike Scott, Business Representative.*, for the Charging Party.

BENCH DECISION

STATEMENT OF THE CASE

LAWRENCE W. CULLEN, Administrative Law Judge. This case was heard before me in Vero Beach, Florida, on December 14, 2001.

I found Respondent Indian River Memorial Hospital, Inc. violated Section 8(a)(5) and (1) of the National Labor Relations Act (the Act) by failing and refusing to bargain with the Charging Party, International Brotherhood of Teamsters Local 769, AFL-CIO, prior to implementing changes in its shift schedules and its on-call procedures.

My bench decision as corrected and amended with the issuance of this decision in final form was delivered in accordance with the authority of Section 102.35(a)(10) of the National Labor Relations Board's Rules and Regulations and in accordance with Section 102.45 thereof, I certify the accuracy of, and attach as "Appendix A" my bench decision, the pertinent part of the trial transcript as corrected and amended.

CONCLUSIONS OF LAW

Based upon the entire record at the hearing, I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act; that Respondent Indian River Memorial Hospital, Inc. violated Section 8(a)(5) and (1) of the Act in the particulars and for the reasons stated at the hearing; and that its violations have affected and unless permanently enjoined will continue to affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

I find that Respondent should be ordered to cease and desist from the foregoing violations of the Act and should be ordered upon request by the Union to restore the status quo ante by reinstating the shift schedules and the on-call pay procedure as they existed prior to Respondent's elimination and changes of them and notify the Union of any proposed changes in the employees' wages, hours, and other terms and conditions of employment and upon request bargain with the Union concerning them and if agreement is reached, reduce it to writing. I note the General Counsel does not seek a make whole remedy and I do not order such a remedy.

I hereby issue the following recommended<sup>1</sup>

ORDER

The Respondent, Indian River Memorial Hospital, Inc., Vero Beach, Florida, its officers, agents, successors, and assigns, shall

<sup>1</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.

1. Cease and desist from

(a) Unilaterally instituting changes in its unit employees' wages and hours and other terms and conditions of employment without providing notice to the Union of any proposed changes and upon request bargaining these changes with 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 actions necessary to effectuate the policies of the Act.

(a) Upon request by the Union, restore the status quo ante by reinstating the shift schedules and on-call pay procedures as they existed prior to the unlawful unilateral changes.

(b) Notify the Union of any proposed changes in the wages, hours, and other terms and conditions of employment of the bargaining unit employees and upon request by the Union, bargain with it concerning any proposed changes and if agreement is reached embody it in a signed agreement.

(c) Within 14 days after service by Region 12, post at its Vero Beach, Florida facility copies of the attached notice to Employees marked "Appendix B."<sup>2</sup> Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained by it 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 August 2000.

(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.

Dated, Washington, D.C. January 8, 2002

"APPENDIX A"

**(Whereupon, a brief recess was taken.)**

**JUDGE CULLEN: on the record.**

I'm going to issue a bench decision in this case. The charge in this proceeding was filed by the International Brotherhood of Teamsters, Local 769, AFL-CIO, hereinafter referred to as the Union. The charge alleged that Indian River Memorial Hospital, Inc., Respondent, has been engaging in unfair labor practices affecting commerce as set forth and defined in the National Labor Relations Act. The charge was filed by the Union on November 20, 2000, and a copy was served by regular mail on Respondent on November 24, 2000.

<sup>2</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."

The complaint alleges, the Respondent admits, and I find that at all material times herein, Respondent has been a Florida corporation with an office and place of business in Vero Beach, Florida, herein called Respondent's Vero Beach facility, and that it has been engaged in the business of operating a hospital. During the past 12 months, preceding the filing of the complaint Respondent, in conducting its business operations, derived gross revenues in excess of \$25,000 and purchased and received at its Vero Beach facility goods valued in excess of \$50,000 directly from points outside the State of Florida. At all material times herein, Respondent has been an employer engaged in commerce within the meaning of Section 2(2) (6) and (7) of the Act.

At all material times, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

At all material times herein, the following individuals held the positions set forth opposite their respective names and have been supervisors of Respondent within the meaning of Section 2(11) of the Act, and agents of Respondent within the meaning of Section 2(13) of the Act:

Rick Jones has been the Engineering manager. Robert Zomok has been the Director of Human Resources. John Spencer has been the Director of Facility Services.

The following employees of Respondent, herein called the Unit, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All stationary engineers, journeymen, master craftsmen, craftsmen, and groundskeepers, employed by Respondent at its Vero Beach, Florida, facility; excluding team leader, senior groundskeeper, CAD operator, Engineering Data Management Coordinator, Biomedical Equipment Tech I-II-III, Office Coordinator, all other employees, guards, and supervisors, as defined in the Act.

Since on or about August 9th 2000, the Union has been the designated exclusive collective bargaining representative of the Unit, and has been recognized as such by Respondent. This recognition has been embodied in a recognition agreement dated August 9, 2000, as set forth in the letter of that date from Robert Zomok to the Union.

The complaint alleges that on or about November 13, 2000, by written notice to the Unit employees, Respondent announced that it would change the hours of work for the Unit by creating three second shift positions and one third shift position, effective December 4, 2000, and that Respondent solicited employee bids for those positions effective immediately and that on or about December 4, 2000, Respondent implemented the changes described above.

It is alleged that the subjects set forth are mandatory subjects for the purpose of collective bargaining. It is also alleged that Respondent engaged in the conduct described above while negotiations for an initial collective bargaining agreement were ongoing, and without prior notice to the Union, and without affording the Union an opportunity to bargain with Respondent with respect to these changes. It is thus alleged that the Respondent has violated Section 8(a)(1) and (5) of the Act.

In February 2000, the Respondent engaged in a review of its wages and costs, including hourly wages and "on call" pay provisions. This review was performed by a management

committee made up of Respondent's managers, including its Human Resources director, Robert Zomok, and the director of its facilities, John Spencer.

As noted above on August 9, 2000, the Respondent granted the union recognition. According to the General Counsel, it was not until after September 1st, 2000 that the Respondent made its initial decision to eliminate certain shifts and to add certain additional shifts for the scheduling of the unit employees for work.

On October 3rd, 2000 according to the Union's Business Manager, Mike Scott, the parties engaged in their first bargaining session. Director of Human Resources Zomok testified that the correct date is November 3rd. For purposes of this hearing, I will assume that the correct date is November 3rd. There was no other direct evidence with respect to this.

On November 13th, the Respondent made an announcement of its intent to implement schedule and shift changes with an effective date of December 4, 2000. The Respondent contends that the decision to go to three shifts actually occurred on February 28, 2000. Respondent contends that the initial implementation of the plan to man the second and third shift was made on July 24, 2000. The Respondent contends that in late 1999, it began to focus on reducing costs including "on call" pay, and that when this area was analyzed, Respondent found with respect to its Maintenance Department employees that less than five percent of the time, employees who were "on call" and received on call pay were actually called. John Spencer, Director of Facility Services, e-mailed Director of Human Resources Zomok a plan and suggested it not be implemented until the third or fourth quarter of 2000. He also indicated that they should discuss this further.

The General Counsel called as its first witness, Mike Scott, who is the business representative of Local 769. The Local also represents a group of Respondent's nurses, approximately 400 employees, in a separate bargaining unit and the parties have entered into a collective bargaining agreement for this unit. As noted the Union also represents the unit of approximately 25 skilled maintenance employees, at issue in this case.

In August of 2000, business manager Scott received notice from unit employees that Respondent was initiating some shift changes. He immediately contacted Zomok and raised this issue with him, contending that it was necessary that any changes be bargained. Zomok e-mailed Scott on the same date on the day later, 9/1/2000, that no schedule change had been implemented. Zomok also stated in the e-mail that Tuesday, September 26, 2000, would be an appropriate day to negotiate the maintenance agreement.

The Union, at a bargaining session on November 3rd, 2000 presented to Respondent's representatives a complete proposed collective bargaining agreement modeled on the nurses agreement that it had earlier entered into with the Respondent.

On November 13th 2000, the Respondent issued a notice to its employees, which was not directed to the Union, stating in pertinent part, that it would be making changes to the department schedules in the next few weeks. Some of the existing first shift positions would be on either the second or third shift. The new assignments would be posted according to the skills needed. The most senior bidder of those qualified for any posi-

tion would be placed on that schedule. Further, it mentioned specifically that three second shift positions were to be filled and one third shift position was to be filled. It also stated that these changes would be effective December 4, 2000, and urged that those who wished to apply for these positions, contact Engineering Manager Rick Jones, by November 17th, 2000.

On November 15, 2000, Business Manager Mike Scott directed a letter to, HR director Zomok and stated that "I've received a copy of the November 13, 2000, notice that was distributed to the skilled maintenance employees. As you know, this memo announces the creation of two new shifts, and the number and type of positions to be assigned to each. This matter is clearly a change in the terms and conditions of employment and, as such, is a mandatory subject of bargaining. Please be advised that if the hospital fails to rescind this notice by the close of business today, Teamsters Local Union Number 769 will file unfair labor practice charges with the National Labor Relations Board."

This letter was responded to, by e-mail, by Zomok to Scott on the same date, November 15th. Zomok stated in his e-mail, "we are willing to bargain collectively over those items concerning wages, hours, and working conditions. In this instance, clearly changing schedules to improve the operations of the organization is a management right. My opinion is this right is not mitigated unless we do so in the collective bargaining environment. Again, this is a subject we are willing to discuss. However, you are very well aware of my position on the management rights clause."

Zomok's E-mail further stated, "Second, this initiative was in process prior to the recognition of the Maintenance unit. Obviously, this is a matter of serious concern to both you and me. Further, we recognize the significant difference of opinion and perspective in this matter. I am unwilling, at this point, to rescind the notice. I am in touch with Brad Johnson (Respondent's attorney) and am awaiting his reply." Scott e-mailed Zomok a reply on the same date which stated simply "we will file the charge and let the NLRB sort it out."

Scott testified that he had verbally informed the company that they were ready to negotiate in August, after the recognition of the Union. While he placed the first date of the first bargaining session as October 3rd, I have found that the correct date was November 3rd, as testified to by Zomok.

Scott testified also that sometime between August 9 and October 3rd, (November 3<sup>rd</sup>) he received a fax from an employee that outlined a schedule change creating the second and third shift. That led to the series of letters to which I have just referred. He testified further that from September 1st to October (November) 3rd, no discussions concerning scheduling changes were had. At the October (November) 3<sup>rd</sup> bargaining session, the Union presented a complete, contract package to Respondent. Many provisions had been taken from the nurses' unit bargaining agreement. This proposal included Article 9, entitled Hours of Work. and Article 4, entitled Seniority which is a proposal for a bidding selection process; and an "on call" proposal. in Article 6. This proposal included the above three contract articles. There was no discussion about specific items of this proposal. Zomok testified that he did not have any difference of opinion with respect to Scott's recollection of that

meeting. There was some discussion of management rights because of the Respondent's concern of problems in the nurses' contract and Respondent was seeking to strengthen the management rights provision, but did not offer any contract language in that regard.

Scott specifically testified that in his conversation of August 30th with Zomok, he had told Zomok that if they were making substantial scheduling changes, this was a mandatory subject of bargaining and they needed to bargain.

Barry Hurley, a 26 year employee, employed as a craftsman in the Engineering Department, also known as the power plant and the Facility Services Department, testified. He maintains pneumatic systems and various equipment, and has other responsibilities. Prior to August 9, 2000, he worked a seven-day on call schedule from 4 p.m. to 7:30 a.m. as did many other employees. He volunteered in late July, 2000, or August 2000, after some discussion which had been initiated by his manager, Rick Jones, to take a shift in the afternoon. He talked with his wife and he talked with John Spencer, the director of Facilities, and they did talk about eliminating "on call" pay for the department. They gave him a document and asked him to look at it. In early September, this schedule was changed again. In early August Hurly spoke to Spencer because he was encountering difficulties with his family in working the new revised hours, and told them that he wanted to work from 12 a.m. to 8 p.m. in September, as they had agreed.

Hurly testified that in an October meeting, Spencer told employees that shift changes were going to be made and that this was a management decision. An employee at that meeting asked whether the employees had anything to say about it and Spencer told them they did not. The target date for the shift changes was December 4. There was no reference made to the Union during that discussion. The new shift changes, were passed out at that meeting. This was a new schedule. On call work was eliminated other than for Saturdays and Sundays.

Zomok, has been Director of Human Resources since October 1999. He testified regarding his responsibilities at the hospital and regarding discussions which were held by the various directors of the hospital, and that they formed a committee along with the Director of Facilities and himself, to consider cost cutting measures. In late 1999, and in February, 2000, they considered the issue of on call pay.

Respondent's Exhibit 2 is an e-mail from Spencer to Zomok sent on February 28, 2000. In that e-mail, Spencer suggests that they look at the third and fourth quarters of the oncoming year to tell the employees, at that time, what will happen with the new budget year. He states in his E-mail "We can do what we have on spreadsheets, Page 2, at that time. Later, we can qualify a group of people to rotate in taking call, and have only one person on call at a time . . . ." He ended this memo with the statement "let's talk BIG TIME about this before we do anything." Attached to that e-mail was a Facility Services engineering on call pay study, and it showed the existing engineering and some changes that they were considering.

Zomok testified that on August 30, Scott called him and informed him that there were schedule changes posted in the Maintenance Department, and he told Scott he would check this matter out and get back to him, which he did. The General

Counsel objected to the lack of the response to its subpoena for records of the committee, which were not furnished, and asked that I draw an adverse inference from this, and as I stated at the hearing I will do so.

John Spencer testified he is The Director of Facilities, and is a contract employee of the Service Management Corp., which is directed to manage the business of Respondent with respect to its Facility Services. He has held this position since September of '99. He reviewed staffing and costs, including labor, overtime and on call pay. He testified that the February 28, 2000 e-mail he sent to Zomok was his decision as to how to handle this problem. He does not have any recollection of, nor did he create any additional document specifically ordering these changes.

#### ISSUES

Respondent states in its brief that there are three principle issues, A) whether Respondent made the decision to end on call pay and institute a second and third shift in the Maintenance Department prior to the existence of a bargaining obligation; B) whether Respondent was obligated to bargain with the newly recognized Union after making the decision to institute additional shifts, but prior to the complete implementation of the shifts; and, C) if the Board finds Respondent was obligated to bargain, whether the hospital refused.

My answer to issue A is in the negative. My answer to issues B and C is in the affirmative. I find the Respondent had an obligation to bargain with respect to the shift changes and the on call pay changes, as it had not made a final decision as of February 2000. Nor had it made a final decision as of June, July, or August 9, 2000. I find the documentation clearly shows, as does the unrefuted testimony of Union Business Manager Scott, that the Union made a bona fide demand for bargaining on these issues, and that the Respondent did not afford it notice and opportunity to bargain, and ultimately did not bargain with it prior to the implementation of these changes.

I find that the letter of the 15th sent by Scott to Zomok clearly was a request to bargain. Although it did not say specifically that the Union was requesting bargaining, It informed Zomok that Respondent had a mandatory obligation to bargain concerning the schedule changes and threatened to file charges with the NLRB if the changes were not rescinded. The Respondent did not rescind these changes.

In *NLRB v. Benny Katz, d/b/a Williamson Steel Products*, 369 U.S. 736, 1962 the Supreme court, held that an employer violates its duty to bargain if when negotiations are sought or are in progress, it unilaterally institutes changes in existing terms and conditions of employment.

With respect to mandatory subjects of bargaining, the Board held in *Miami System Corp.*, 320 NLRB 71, 1995, that the elimination of a shift is a mandatory subject of bargaining, since mandatory subjects of bargaining include wages and underlying hours, and other terms and conditions of employment.

With respect to unilateral changes, it is well-settled that an employer is obligated to maintain the status quo during the initial bargaining with a newly certified union. *General Motors*

*Acceptance Corporation*, 196 NLRB 137, enforced 476, F.2d 850, CA1, 1973.

In *Peerless Food Products, Inc.*, 236 NLRB 161, the Board noted that not every unilateral change constitutes a breach of the bargaining obligation. The change unilaterally imposed must be a material, substantial, and a significant one. And I find in this case that these changes were material, substantial, and significant.

In *Our Lady of Lords Health Center*, 306 NLRB 337, 1992, the Board held that where a union is newly recognized or certified as the employees' bargaining representative, the employer must maintain in effect the current terms and conditions of employment until negotiations result in either an agreement on any proposed changes or bargaining impasse. See also *Bryant and Stratton Business Institute*, 321 NLRB 1007, 1017-1018, 1995.

In *Lady of Lords Health Center* the Board held that where the employer contends that it is merely continuing the status quo that existed at the time of the union's certification by relying upon a particular expired contract term in that case, a mere continuation of the status quo does not occur when the employer has a significant degree of discretion and continues and works on a matter that is a work in progress rather than maintenance of the status quo.

In the instant case before me the newly certified labor union, which had not yet achieved a bargaining agreement, had the right to bargain on any actions that the employer may take that may have an effect on the hours, and terms and conditions of employment. I have issued the bench decision in accordance with the authority of Section 102.35(a)(10) of the Board's Rules and Regulations. Upon my return to the office and receiving the transcript, which is due within 10 days, I will attach the transcript to a more formal Board order, in which I will award the remedy and an order, and I will prepare a notice to be attached to that.

The time for the filing of exceptions will start to run from the date that I issue my decision is issued in that regard. Is there anything further before I close the hearing?

MR. JOHNSON: Not from the Respondent, Your Honor.

MR. MANUEL: Nothing from the General Counsel.

JUDGE CULLEN: All right. The hearing is now closed.

**(Whereupon, at 5:45 p.m., the hearing in the above-entitled matter was concluded.)**

## APPENDIX B

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 and protection
- To choose not to engage in any of these concerted activities

WE WILL NOT unlawfully institute unilateral changes in the terms and conditions of our employees by instituting schedule changes and eliminating shifts and on-call pay without providing International Brotherhood of Teamsters, Local 769, AFL-CIO with notice thereof and upon request bargaining with the Union concerning these changes on behalf of the employees in the following appropriate unit:

All stationary engineers, journeymen, master craftsmen, craftsmen, and groundskeepers, employed by Respondent at its Vero Beach, Florida, facility; excluding team leader, senior groundskeeper, CAD operator, Engineering Data Management Coordinator, Biomedical Equipment Tech I-II-III, Office Coordinator, all other employees, Guards, and supervisors as defined in 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.

WE WILL upon request by the Union rescind the unlawful unilateral changes in work hours and on call pay and restore the status quo ante and will notify and upon request bargain with the Union concerning any proposed changes.

INDIAN RIVER MEMORIAL HOSPITAL, INC.