Urban Shelters and Health Care Systems, Inc. *and* Service Employees International Union, Local 722, AFL–CIO. Case 5–CA–23233

May 27, 1994

DECISION AND ORDER

BY MEMBERS STEPHENS, DEVANEY, AND COHEN

On December 10, 1993, Administrative Law Judge John H. West issued the attached decision. The Respondent filed exceptions and a supporting brief, and 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 in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions[1] and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] In its exceptions, the Respondent contends that the certification of Local 722 as the representative of the licensed practical nurses (LPNs) is contrary to the Act because the LPNs are supervisors within the meaning of the Act. We find no merit in this contention. Local 722 filed a petition in May 1988 in Case 5–RC–13061 seeking to represent the Respondent's LPNs. Following a hearing, in his Decision and Direction of Election dated December 18, 1990, the Regional Director found that the Respondent failed to meet its burden of establishing that the LPNs are statutory supervisors. The Regional Director concluded that the LPNs possess neither the authority to evaluate and discipline nursing assistants, nor do they possess any other indicia of supervisory authority. On January 14, 1991, the Board denied the Respondent's request for review and certified Local 722 as the exclusive bargaining representative of the LPNs in June 1992. In its exceptions, the Respondent raises nothing warranting reconsideration of the supervisory issue regarding the LPNs.

Member Cohen notes that Local 82 is the certified representative of the service and maintenance unit as well as the judge's conclusion that ''Local 722 has been . . . designated by Local 82 as the exclusive representative'' of the employees in that unit. In Member Cohen's view, Respondent acquiesced in that designation. He therefore does not pass on the issue of whether Respondent could have lawfully resisted that action ab initio.

Sherrie Black, Esq., for the General Counsel.
Joel Keiler, Esq. (Ammerman & Keiler), of Reston, Virginia, for the Respondent.

DECISION

STATEMENT OF THE CASE

JOHN H. WEST, Administrative Law Judge. Upon a charge filed by Service Employees International Union, Local 722, AFL–CIO (Local 722) on December 31, 1992, a complaint was issued February 8, 1993, alleging that Urban Shelters and Health Care Systems, Inc., Respondent, violated Section 8(a)(1) and (5) of the National Labor Relations Act (Act) by failing and refusing to furnish the Union with information requested by it regarding two specified units and by failing and refusing to meet and bargain with the Union concerning the units.[1] Respondent denies the allegations. It asserts that the unfair labor practice charge is barred by Section 10(b) of the Act, and that Respondent has no duty to bargain with Local 722 over a unit certified to Local 82 of the Service Employees International Union.

A hearing was held in Arlington, Virginia, on September 23 and 24, 1993. Upon the entire record in this case, including my observation of the demeanor of the witnesses and consideration of the briefs filed on October 29, 1993, by General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is engaged in the operation of the J. B. Johnson Nursing Center in the District of Columbia. The complaint alleges, the Respondent admits, and I find that at all times material herein Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

The Facts

Respondent, a health care management company, began operating in 1984. It took over J. B. Johnson Nursing Home within a year.

On May 16, 1983, Service Employees International Union, Local 82, hereinafter referred to as Local 82, filed a petition with the National Labor Relations Board (Board) in Case 5–RC–11997 for certification of representative involving a specified unit of employees of J. B. Johnson Nursing Home in Washington, D.C.[2] (G.C. Exh. 2(a).) By Decision and Di-

[1] The first unit includes the following employees:

All full-time and regular part-time employees, including nursing assistants, nursing assistants/supply clerks, ward clerks, dietary aides, housekeeping employees, maintenance assistants, laundry aides and all other service and maintenance employees, activities assistants and physical therapy aides employed at Respondent's facility, but excluding all clerical employees, professional employees, guards and supervisors as defined in the Act.

And the second unit includes the following employees:

All regular full-time and part-time licensed practical nurses employed at Respondent's facility, but excluding all other employees, clerical employees, guards and supervisors as defined in the Act.

Hereinafter the first unit will be referred to as unit 1 and the second unit will be referred to as unit 2.

[2] The unit includes the following employees:

All full-time and regular part-time employees employed in the nursing department, including LPNs, nurses aids, ward clerks, dietary employees, medical ward clerks, housekeeping employees and maintenance employees, but excluding all clerical employees, professional employees, guards and supervisors as defined in the Act.

rection of Election in 5–RC–11997 dated June 27, 1983 (G.C. Exh. 2(b)), the Board's Regional Director for Region 5 directed an election among the employees in a specified unit.[3] In his Supplemental Decision and Certification of Representative in Case 5–RC–11997 dated August 20, 1987 (G.C. Exh. 2(c)) the Regional Director certified Local 82 as the exclusive collective-bargaining representative of the employees in the unit described in footnote 3 above.[4]

Respondent admits, as alleged in amended paragraph 8 of the complaint herein, that ''since on or about October 13, 1987 Local 82 and the Service Employees International Union, AFL–CIO has selected Marchel Smiley, president of Local 722, as its agent to engage in collective bargaining with respect to the employees in Unit 1, with the understanding that any collective bargaining agreement entered into would be with Local 82.''

Local 82 sent the following mailgram (G.C. Exh. 4) to Roy Littlejohn, president of Respondent, on October 13, 1987:

> THIS LETTER IS TO SERVE AS NOTICE THAT SEIU LOCAL 82 IS READY TO NEGOTIATE IN THE CASE NUMBER 5–RC–11997 WITH THE JB JOHNSON NURSING CENTER.
>
> THE UNION WOULD LIKE TO MEET WITH YOU OR YOUR REPRESENTATIVES IMMEDIATELY TO ESTABLISH THE GROUND RULES AND NEGOTIATION DATE.
>
> OUR CONTACT PERSON IS MARCHEL SMILEY AT 1673 COLUMBIA ROAD NW APARTMENT 101 WASHINGTON DC 20009. HE CAN BE REACHED BY PHONE AT 202–483–6221.
>
> YOUR IMMEDIATE RESPONSE WOULD BE GREATLY APPRECIATED.
>
> SINCERELY
> ARLENE NEAL PRESIDENT SEIU LOCAL 82
> CC: MARCHEL SMILEY
> LOUIS J D'AMICO, NLRB

Smiley testified that he attended preliminary meetings that took place prior to contract negotiations with Respondent and that Littlejohn, who represented Respondent at these preliminary discussions, did not object to him, Smiley, being present as the bargaining agent for Local 82.[5]

On cross-examination Smiley testified that Local 722 ''got jurisdiction over all health care in Washington, D.C.'' and either the president of the International Union or his executive assistant sent correspondence to Local 82 and Local 722 apparently in December 1987. Smiley gave the following testimony regarding the correspondence:

> So the president or his designee, memorialized the agreement that was reached between Local 722 and 82. Basically they said that we will be—we will have full responsibility for—Local 82—for J.B. Johnson Nursing Home, we would negotiate the contract, and once we negotiated, the contract, and if the contract called for dues, which would be submitted to Local 82, they would then submit the funds to Local 722. But we would actually service the unit. We have the memo to anything.

On redirect Smiley testified that Local 722 did not receive dues from the employees who work at the J. B. Johnson Nursing Home.

By letter dated October 29, 1987, from Smiley on stationery with Local 722's letterhead to Joel Keiler, Respondent's attorney (R. Exh. 1), the former requested specified information regarding ''bargaining unit members.'' By letter dated December 8, 1987, from Smiley to Keiler (R. Exh. 2), the former thanked the latter for supplying the requested information and the former requested additional information. This letter refers to a December 1, 1987 meeting between Smiley and Keiler. Keiler's notes of this meeting were received as (R. Exh. 3). They, along with Smiley's aforementioned December 8, 1987 letter, and his December 28, 1987, letter to Keiler (G.C. Exh. 20), reflect that Smiley continued to ask for information. Keiler forwarded to Smiley, ''SEIU Local 722,'' three letters dated December 12, and 20, 1987 and January 4, 1988, (R. Exhs. 4, 5, and 6, respectively), referring, as here pertinent, to the information sought.

By letter dated February 2, 1988, to Keiler on Local 722's letterhead (R. Exh. 7), Smiley reiterated his request for certain information and he requested additional information. Keiler replied by letter dated March 7, 1988 (R. Exh. 8).

On February 22, 1988 Local 722 in Case 5–RC–13032 (G.C. Exh. 16) filed a petition to represent all the following employees:

> All regular full-time and part-time licensed practical nurses employed by the Employer at the J. B. Johnson Nursing Center; excluding registered nurses, employees represented for collective bargaining purposes by S.E.I.U., Local 82, AFL–CIO, as stated in the certification issued in Excluded Case 5–RC–11997, clerical employees, guards and supervisors as defined in the Act.

By letter dated February 28, 1988 (G.C. Exh. 17), Keiler advised Smiley as follows:

> Re: 5–RC–13032
>
> Dear Mr. Smiley:
>
> Please be advised that my client, Urban Shelters & Health Care Systems, Inc., recognizes your union as the collective bargaining agent for the unit you described in the above numbered case.

On February 29, 1988 Smiley forwarded the following letter (G.C. Exh. 14), to Littlejohn on Local 722's letterhead:

> This letter is reference to our conversation of 2/25/88. The Union has no objections to USHCS giving

[3] The unit specified by the Regional Director is the same as that set forth as unit 1 above in fn. 1, except that the Regional Director specifically named the facility and the location, viz, J. B. Johnson Nursing Center, Washington, D.C. At the time Continental Care, Inc. was operating the involved facility.

[4] The Regional Director, in his Supplemental Decision and Certification of Representative, found that Respondent herein was the Party-in-Interest in Case 5–RC–11997; that it met the Board's jurisdictional standards; and that it was a successor.

[5] Smiley testified that the address and telephone number which Littlejohn was given in the above-described mailgram were those of Local 722.

employees covered under 5–RC–11997 their annual pay increase subject to the following conditions:

Prior to the dissemination of these monies USHCS shall furnish to the Union:

A. The names and actual amount of increase to each employee covered under 5–RC–11997 by departments.

B. The date (pay period) when these increases are effective.

C. Whether these proposed increases are annual across the board increases or merit increases based on evaluations.

The Union would much rather see our members get this money as opposed to putting the money in an escrow account which will generate interest income for USHCS.

On March 1, 1988, Littlejohn sent a two-page letter (G.C. Exh. 13) to the District of Columbia's Office of Long Term Care Administration in which he indicated, as here pertinent,

> You also are aware of the fact that we are involved in collective bargaining with the SEIU #722 Union and pursuant to NLRB rules, no salary increases can be granted employees of the bargaining unit without first getting permission from the Union for said increases. The alternative is to place the amount of funds that would be made available in an escrow account for the employees, once a collective bargaining agreement is arrived at.
>
> We requested permission from the Union to raise the wages of employees to a point allowed by our budget. The Union took this matter under advisement and notified me by letter, which arrived yesterday, February 29, 1988, that raises could be given, provided certain conditions are met. A copy of this letter is attached.
>
> It is our intent to move forward to provide salary increases to employees and to notify the Union accordingly, consistent with their letter and consistent with available funds in the budget.

On March 25, 1988 the Board's Regional Director for Region 5 issued an order (G.C. Exh. 18) approving Local 722's request to withdraw the petition in Case 5–RC–13032.

Smiley testified that the first bargaining session he had with Respondent occurred in April 1988, and that Keiler, who represented Respondent at this session, did not raise any objection to him, Smiley, being the representative for Local 82. This session took place at Local 722's offices.[6] Keiler testified that at the April 11, 1988 session he was given a proposed collective bargaining agreement (R. Exh. 9). The cover sheet reads ''BY AND BETWEEN URBAN SHELTERS . . . AND . . . LOCAL 82'' and page 1 under ''*AGREEMENT*'' (emphasis in original) reads ''by and between Urban Shelters . . . and . . . Local 82.'' The term of the proposed agreement was February 1, 1988, to January 31, 1991. According to Respondent's Exhibit 9, the bargaining unit described in the Union's proposal included all LPNs. Page 1 of the Respondent's counterproposal (R. Exh. 10), reads ''between Urban Shelters . . . and . . . Local 82.'' under the topic heading ''*AGREEMENT*.'' Respondent's proposal specifically excluded LPN from the unit.

Keiler sent the following letter, dated April 12, 1988 to Smiley (R. Exh. 11):

> Mr. Marchel Smiley
> SEIU, Local 722
> 1673 Columbia Road, N.W.
> Washington, D. C. 20009
>
> Dear Mr. Smiley:
>
> This is [to] memorialize the negotiating session of April 11, 1988.
>
> After introducing the committee to me, you began negotiations by referring to the front cover of your proposal. You stated that the dates were flexible and that February 1, 1988 was merely the date that the proposal had been prepared. I asked you why, then, you did not supply me with a copy until April 8, 1988, the afternoon of the last business day before negotiations. You made no coherent answer.
>
> I pointed out that the proposal was for Local 82 and you were the president of Local 722. You said you were an agent of Local 82. I asked you if we were also bargaining for Local 722 based on the latest petition for the LPN's. You said you were negotiating for both. I asked you how a Local 82 contract would cover both units. You had no cogent answer but insisted on bargaining for both units at the same time.
>
> I asked if everything was the same as far as employees, supervision, and operations under Urban Shelters as it had been under Continental Care Centers, Inc. You and the committee said it was. I pointed out that the NLRB had held that the LPN's were supervisors and that even your LPN unit in the NLRB petition excluded supervisors. You said we had to bargain for the LPN's even though they were supervisors. I told you that I would not bargain for supervisors. You told me to leave. I said that before I leave I wanted you and the committee to understanding that I would bargain for everyone but supervisors and that bargaining over supervisors was a non-mandatory subject and I would not bargain for them. You told me that you did not want to hear it and said I should leave without making any comments. I said I had one last comment and that was that I would only bargain over non-supervisors and if you insisted on bargaining for supervisors, I would not be present at the scheduled April 19, 1988 meeting. I asked you to call or write and let me know. You stated that neither your nor the committee heard what I said. I asked the committee if they heard me. They laughed and said they did not. I repeated what I had said and ended by stating that no April 19 meeting would take place unless you informed me that you were dropping your demand to negotiate over supervisors. At 3:25 P.M., I left.
>
> If any of this is inaccurate, or you have a different version, please respond by return mail.

By letters dated April 15, 1988 on Local 722's letterhead (G.C. Exhs. 21 and 22, respectively), Smiley advised Keiler as follows:

[6] Tr. 28, reads ''72.'' It is noted, however, that this same typographical error occurs on p. 29 of the transcript.

Dear Mr. Keiler:

This is in response to your letter to me dated 4/12/88. It is very apparent to me from your actions at our meeting of 4/11/88 and your letter dated 4/12/88 that your imagination is only exceeded by your rudeness and unprofessionalism. Medical science has developed a cure for the illness from which you suffer.

The facts relating to the workers at J. B. Johnson are as follows:

1. Local 82 S.E.I.U. was certified to represent workers at J. B. Johnson listed in 5–RC–11997 on August 20, 1987.

2. Roy Littlejohn, President of Urban Shelters, was notified by Arline Neal, President of Local 82 S.E.I.U., that I was appointed as an agent of Local 82 S.E.I.U. with respect to negotiating a collective bargaining agreement for employees covered under 5–RC–11997.

3. On February 22, 1988, I filed a petition on behalf of Local 722, S.E.I.U. with the N.L.R.B. to represent full and part-time LPN's employed at J. B. Johnson in 5–RC–13032.

4. By letter dated February 28, 1988, Urban Shelters and Health Care Systems, Inc. granted recognition to Local 722, S.E.I.U. as the collective bargaining agent for employees listed in 5–RC–13032.

5. I advised you in my letter dated 3/3/88 that we intended to bargain jointly for both units 5–RC–11997 and 5–RC–13032, which were recognized by Urban Shelters. I also proposed that we negotiate on March 11, 14, 16 or 17, 1988. Until you were stricken by your illness at our meeting on 4/11/88, you had not given any oral or written objections concerning bargaining for LPN's.

6. In your letter to me dated 3/9/88, you said, ''The dates that you have proposed provide me with too little notice and are unacceptable. Please propose some dates in April and we will negotiate then.'' As a result of your letter, we agreed to negotiate on 4/11/88 at 3:00 p.m. and 4/19/88 at 10:00 a.m. Again, you did not express any objections concerning negotiations for LPN's. Accordingly, we are prepared to negotiate with you on 4/19/88 at 10:00 a.m. for employees covered under 5–RC–11997.

I also request that you provide me with the information I requested concerning the amount of the most current contributions that Urban Shelters is depositing in the trust fund, per employee per month to pay for medical expenses. This information was requested in my letter to you dated 4/18/88.

Dear Mr. Keiler:

Local 722, S.E.I.U. is prepared to begin contract negotiations for full and part-time LPN's employed by Urban Shelters at the J. B. Johnson Nursing Center. Your client granted our Union recognition for these employees by letter dated February 28, 1988.

Our proposals for these employees are the same proposals that you received for employees covered under N.L.R.B. 5–RC–11997 with the enclosed modifications. We are prepared to negotiate on any dates in the months of April and May of 1988. Please inform us in writing as to which dates you are available.

By letter dated April 25, 1988 (R. Exh. 12), Keiler advised Smiley as follows:

Mr. Michael Smiley
SEIU, Local 722
1673 Columbia Road, N.W.
Washington, D. C. 20009

Dear Mr. Smiley:

This is in response to your two letters dated April 15, 1988, one of which was filled with calumny and referred, in its last sentence to a future letter ''dated 4/18/88'' and the other which was incomplete.

Since you have not denied a single factual statement in my April 12, 1988 letter, that letter is factually correct. To further enhance my argument that you are attempting to negotiate for supervisors, you have altered the proposed LPN unit to remove the exclusion of supervisors. You cannot lawfully negotiate for supervisors and I will not participate in your illegalities.

On May 4, 1988, Local 722 filed a petition with the Board in Case 5–RC–13061 for certification of representative (G.C. Exh. 3(a) involving the following unit:

> All regular full-time and part-time licensed practical nurses employed by the Employer at the J. B. Johnson Nursing Center [but excluding] [a]ll other employees, clerical employees, guards and supervisors as defined in the Act.

By Decision and Direction of Election in Case 5–RC–13061 dated December 18, 1990 (G.C. Exh. 3(b)), the Board's Regional Director for Region 5 directed an election among the employees in the unit described in the next preceding sentence.

On May 5, 1988, Local 722 filed a charge against Urban Shelters in 5–CA–19659 (G.C. Exh. 19), alleging as follows:

> On or about April 11, 1988, the above-named Employer unlawfully withdrew recognition from the Service Employees International Union, Local 722, by refusing to bargain over terms and conditions of employment for a unit of employees at the J. B. Johnson Nursing Center location and since that date, the Employer continues to refuse to bargain with the above-named representative.

Approximately 7 weeks later, the Boards' Regional Director for Region 5 refused to issue a complaint. His letter, included in General Counsel's Exhibit 19, reads in part, as follows:

> The investigation revealed that in February 1988, the Employer voluntarily extended recognition to the Union. Then, on April 11, the Employer refused to bargain with the Union based on a 1983 decision of the Regional Director, in Case 5–RC–11997, in which the LPN's were found to be supervisors under the Act. That decision was certified by the Board on August 20, 1987. Because there is no statutory duty to bargain regarding supervisory personnel, further proceedings are

unwarranted and I am refusing to issue complaint in this matter.

By three-page letter dated June 17, 1988 (R. Exh. 13), Mose Lewis III, attorney for Smiley, advised Keiler as follows:

RE: Urban Shelters and Healthcare Systems, Inc. and (J. B. Johnson Nursing Center) Service Employees International Union, Local 722, AFL–CIO, CLC

Dear Mr. Keiler:

This responds to your proposal of Tuesday, June 14, 1988, wherein you agreed that the employees for whom Local 82, SEIU had been certified as the collective bargaining agent at the J. B. Johnson Nursing Center under Case No. 5–RC–1199 and the licensed practical nurses at that Nursing Center, should all be included in one unit for purposes of collective bargaining with the employer. The bargaining agent shall be Local 722 SEIU, AFL–CIO, CLC. You made the following additional offers:

. . . .

We are prepared to meet with you as soon as possible in an effort to finalize the terms and conditions of an Agreement between Local 722 SEIU and Urban Shelters and Healthcare Systems, Inc. pertaining to the J. B. Johnson Nursing Center.

Please advise when you are available.

On January 24, 1991 Littlejohn forwarded the following letter (G.C. Exh. 15):

Mr. Marchel Smiley
President
SEIU #722
1673 Columbia Road, N.W.
Washington, D.C. 20009

Dear. Mr. Smiley:

As you are probably aware, the contract to manage the J. B. Johnson Nursing Center became effective on January 11, 1991. In accordance with that contract and that the wage determinations of the Service Employees Contract Act, we are proceeding immediately to raise the wages of covered employees in conformity with the Act.

This conforms to our previous conversations regarding the provision of notice to your organization regarding any increases.

By letter dated April 15, 1991 (R. Exh. 14), Keiler advised Smiley as follows:

Your letter of April 1, 1991, to Mr. Roy Littlejohn has been forwarded to me for reply.

It appears that your request for information cannot be complied with at this time because of the confusion over the makeup of the unit. It is your contention that LPN's are included in the unit and it is my client's contention that they are not. If I am in error about your position, please let me know. Further, would you please inform me as to what ''A Alpha listing'' is.

And by letter dated April 25, 1991 (R. Exh. 15), Keiler advised Smiley as follows:

It has come to my attention that you have written to my client again concerning union matters. If you want information, please contact me directly, otherwise, you may have a long wait.

Smiley testified that he had someone on his staff hand deliver to Littlejohn the following letter (G.C. Exh. 5), which is dated November 4, 1991, which he, Smiley, signed as president and which is typed on stationery bearing Local 722's letterhead:

RE: Collective Bargaining Agreement
Urban Shelters and Healthcare Systems, Inc.
(J. B. Johnson Nursing Center) and
Service Employees International Union, Local 82

Dear Mr. Littlejohn:

I enclose a proposed Collective Bargaining Agreement between Urban Shelters and Heath Care Systems, Inc. and Local 722, Service Employees International Union, for certain employees employed at the J. B. Johnson Nursing Center. The Agreement is for bargaining unit employees certified by the National Labor Relations Board in Case No. 5–RC–11997, which job classifications consist of the following:

All full-time and regular part-time employees including nursing assistants, nursing assistants/supply clerks, ward clerks, dietary aides, housekeeping employees, maintenance assistants, laundry aides and all other service and maintenance employees, activities assistants and physical therapy aides employed by the Employer at the J. B. Johnson Nursing Center, Washington, D.C., but excluding all clerical employees, professional employees, guards and supervisors as defined in the Act.

We are prepared to enter into immediate negotiations with the Employer to reach a mutually acceptable agreement that can be executed and implemented without delay. We are prepared to meet with you at a mutually convenient time on the following days: November 8, 12, 13, 14, 18, 22, 25, 26, 27 and 29. Please advise the undersigned if any of these dates are acceptable to you and/or your representative and we will contact you to agree upon a time and place.

A copy of the collective-bargaining agreement (G.C. Exh. 6) was received herein. The cover page indicates that it is a collective-bargaining agreement by and between the Respondent and Local 82 and on the page numbered ''1'' under the topic heading ''AGREEMENT'' (emphasis in original) it is indicated that ''This Agreement . . . is entered into by and between . . . [Respondent] and . . . Local 82 . . . .''

On November 7, 1991, Littlejohn forwarded the following letter (G.C. Exh. 7):

Mr. Marchel Smiley, President
Service Employees International Union
1673 Columbia Road, N.W.
Washington, D.C. 20009

Re: Collective Bargaining Agreement
Urban Shelters and Health Care Systems, Inc.
(J. B. Johnson Nursing Center) and
Service Employees International Union, Local 82

Dear Mr. Smiley:

This is to acknowledge receipt of your letter dated November 4, 1991 with the accompanying new proposed Collective Bargaining Agreement. We are currently reviewing the document and will advise you as soon as this is completed so that we can schedule a date to begin negotiations.

Smiley testified that he did not have any recollection of Littlejohn contacting him after the above-described November 7, 1991 letter.

Then Smiley sent to Littlejohn the following letter (G.C. Exh. 8), dated November 26, 1991, on Local 722's letterhead:

In my letter to you dated November 4, 1991, I submitted to you several dates to begin the process of negotiating a collective bargaining agreement for employees listed under NLRB Case 5–RC–11997. In fact, ten (10) dates were suggested in the month of November (8, 12, 13, 14, 18, 22, 25, 26, 27, and 29).

Whereas you are entitled to thoroughly review and analyze our proposals, I see no reason why the negotiations process is being needlessly delayed. I believe now, as I have in the past, that any difference between us can be resolved through good faith bargaining at the bargaining table.

Again I request that we immediately begin good faith bargaining. Please forward to my office the dates which you are prepared to come to the bargaining table.

On January 10, 1992 Smiley forwarded the following letter (G.C. Exh. 9) to Littlejohn on Local 722 letterhead:

Re: J. B. Johnson
Nursing Center

Dear Mr. Littlejohn:

By letters dated November 4th and November 26th 1991, I requested that we began the process of collective bargaining for employees listed under NLRB Case 5–RC–11997.

We have been attempting to negotiate a collective bargaining agreement with you since December of 1988. I see no legal reason why the negotiation process has been and continues to be needlessly delayed.

I request that we immediately begin good faith bargaining. Please forward to my office the dates which you are prepared to bargain.

On June 1, 1992, Local 722 was certified by the Board in Case 5–RC–13061 as the exclusive collective-bargaining representative of all regular full-time and part-time licensed practical nurses employed by the Employer at the J. B. Johnson Nursing Center but excluding all other employees, clerical employees, guards and supervisors as defined in the Act (G.C. Exh. 3(e)).

On July 2, 1992, Smiley sent the following letter (G.C. Exh. 10), to Littlejohn on Local 722's letterhead:

Re: J. B. Johnson
Nursing Center
5–RC–11997

Dear Mr. Littlejohn:

As the Exclusive Representative of Employees listed under NLRB case 5–RC–11997, I hereby request the following information be supplied to my office:

1. The name, date of hire, job title and department, current rate of pay, home address and telephone number of all employees covered under 5–RC–11997.

2. The name of all employees covered under 5–RC–11997 who are participants in any employer sponsored retirement plan. The name and address of any employer sponsored retirement plan.

3. The name of all employees covered under 5–RC–11997 who are participants in any employer sponsored medical and/or life insurance plans. The name and address of any employer sponsored medical and/or life insurance plans.

I hereby request that you supply me with dates, time, and locations whereby we can begin good faith collective bargaining on behalf of employees listed in NLRB case 5–RC–11997.

Your attention to this request is appreciated.

Smiley also sent the following letter to Littlejohn (G.C. Exh. 11), on July 2, 1992 on Local 722's letterhead:

Re: J. B. Johnson
Nursing Center
5–RC–13061

Dear Mr. Littlejohn:

On June 1, 1992, the NLRB certified our Union as the Exclusive Representative of Employees listed under case 5–RC–13061. I hereby request the following information be supplied to my office.

1. The name, date of hire, job title and department, current rate of pay, home address and telephone number of all employees covered under 5–RC–13061.

2. The name of all employees covered under 5–RC–13061 who are participants in any employer sponsored retirement plan. The name and address of any employer sponsored retirement plan.

3. The name of all employees covered under 5–RC–13061 who are participants in any employer sponsored medical and/or life insurance plans. The name and address of any employer medical and/or life insurance plans.

I hereby request that you supply me with dates, time, and locations whereby we can begin good faith collective bargaining on behalf of employees listed in NLRB case 5–RC–13061.

Your attention to this request is appreciated.

Smiley forwarded the following October 16, 1992 letter (G.C. Exh. 12), on Local 722's letterhead:

> Re: J. B. Johnson
> Nursing Center
> 5–RC–11997 &
> 5–RC–13061
>
> Dear Mr. Littlejohn:
>
> On July 2, 1992 I wrote to you requesting information pursuant to provision of Federal Labor Law. I also requested dates, times and locations whereby our Organizations could begin good faith collective bargaining. As of this writing, I have not received any response from you.
>
> Having been Certified by the National Labor Relations Board as the Exclusive Representative of employees listed under the above referenced citations, I again request the employee information and negotiation availability included in the attached letters.
>
> Your attention to this matter is appreciated.

Smiley attached the two July 2, 1992 letters set forth above.

As noted above, on December 31, 1992 Local 722 filed the charge herein (G.C. Exh. 1(a)).

In mid-January 1993 Keiler telephoned Smiley indicating that Respondent had received a copy of the charge. Keiler asked Smiley to forward to him, Keiler, copies of the July 2, 1992 letters. Smiley testified that he sent Keiler the documents he requested; and that while that was a cover letter forwarded with the copies of the July 2, 1992 letters, he did not have a copy of said cover letter because the letter was lost from the computer used when there was a power failure. Keiler gave the following testimony about the conversation.

> After I received a copy of the unfair labor practice charge from Urban Shelters, I called Mr. Smiley and asked him what it was all about.
>
> Mr. Smiley explained that he had sent Urban Shelters letters requesting documents and he also wanted to negotiate.
>
> I reminded Mr. Smiley that in the past I had asked him to deal directly with me and it would expedite things. Mr. Smiley said he didn't want to deal with me.
>
> I said—I told Mr. Smiley that if he wanted the documents and if he wanted to set up meetings, he should send me copies of the letters and I would take care of him.
>
> Mr. Smiley told me to go to hell and get the documents—excuse me, get the letters from my client.

As noted above, the complaint herein was issued on February 8, 1993.

On April 13, 1993, Keiler forwarded the following letter (R. Exh. 16), to Smiley:

> Enclosed please find the names, addresses, telephone numbers, job titles, rates of pay, and dates of hire of all employees in the unit in 5–RC–13061. Please contact me for a date and time to commence negotiations.

He testified that he only provided information regarding the LPN unit because at that point he thought from the complaint that the Board was taking the position that it was Local 722 that was the certified bargaining agent of the service maintenance unit and he did not think he had to bargain with 722 regarding that unit. Assertedly, he took the Board's complaint possibly in the wrong way and that's why he did not give Smiley the information and did not bargain with him. Before it was amended at the hearing herein, paragraph 8 of the complaint herein alleged that ''[s]ince on or about October 13, 1987, the collective-bargaining responsibilities for Unit 1 have been delegated by Local 82 and the Service International Union, AFL–CIO, to Local 722.

A negotiating session was held on May 14, 1993. Local 722 submitted a proposed collective-bargaining agreement to Keiler (R. Exh. 19), for the employees in Case 5–RC–13061, viz, the licensed practical nurses.

With a cover letter dated June 1, 1993, Respondent's Exhibit 21, Keiler forwarded Respondent's counterproposal to Lewis covering the licensed practical nurses with specified exclusions.

Contentions

On brief, General Counsel contends that it is well settled that an employer must provide information that is needed by the bargaining representative for the proper performance of its duties and in deciding whether information must be turned over, it is necessary for the Union to show only that the information is probably relevant and that it would be of use to the Union; that the Board has found that certain matters including wage rates, job descriptions, and other information pertaining to employees within the bargaining unit are presumptively relevant; that Respondent is not exonerated from a violation with respect to the LPN unit because beginning in June 1993 it provided Local 722 with certain of the requested information and met and exchanged proposals with Local 722; that Respondent still has not provided all the information requested; that Respondent has offered no explanation for its extraordinary delay in meeting its statutory obligation to meet and bargain collectively with the certified representative of its LPN's and its April 1993 overtures to bargain came as too little, too late; that a union which is the bargaining representative of employees may lawfully delegate authority to another entity; that this case can be distinguished from *Newell Porcelain Co.*, 307 NLRB 877 (1992), enfd. 142 LRRM 2515 (1993), where the Board found that under the unusual circumstances which existed there the employer was justified in suspending negotiations pending further clarification of the identity of the party purporting to be the employees' bargaining representative and in the absence of such clarifications, the lawful successor to the certified union failed to make a valid bargaining demand sufficient to trigger employer's bargaining obligation; that here Smiley was designated as the bargaining agent for Local 82 from the outset and remained as a constant throughout negotiations; that any confusion caused by the Union's April 11, 1988 proposal should be view in the light of the facts that at the time Respondent had voluntarily recognized Local 722 as the collective bargaining agent of LPNs and Smiley's April 15, 1988 letters clear up any confusion which may have existed as of April 11, 1988; that the subsequent above-described letters cannot reasonably be interpreted as establishing that Respondent had such serious misgivings about which Union Smiley was representing with regard to either unit, that it was justified in breaking off negotiations or refusing to re-

spond to Smiley's later information requests; that any ambiguity created by Smiley's November 4, 1991 cover letter was eliminated by the Union's proposed contract submitted therewith since the contract covered the service and maintenance unit exclusively and it identifies Local 82 as the labor organization which would be a party to the agreement; that while Smiley did not carefully draft his October 16, 1992 letter, he did attach his two July 2, 1992 letters; that here, unlike the union in Newell, supra, Smiley, after the April 11, 1988 bargaining session, took action to dispel any confusion generated by his proposal to include the voluntarily recognized LPNs in the certified service and maintenance unit; that unlike *Newell*, supra, here the Respondent contributed to the confusion which existed; and that any doubts Respondent may have had about which of the involved two Locals represented which of the involved two units could have been brought to Smiley's attention by Respondent and its silence forecloses it from now raising Smiley's failure to clarify his representational status vis-a-vis each unit status as justification for its refusal to provide information and bargain.

Respondent, on brief, argues, in part, as follows:

> It is apparent from the exchange of correspondence and the Complaint itself, which had to be amended, that Urban Shelters, Lewis, Keiler, and General Counsel were all confused over which union represented which unit. It was not until the hearing when Smiley revealed the Local 722 was awarded jurisdiction over all hospital units did matters become clear. Local 82 was the certified unit in 5–RC–11997. Nevertheless, the International President of the Service Employees International Union gave the unit to Local 722. This was accomplished without notification to or a vote by the unit employees; notification to Urban Shelters; or approval by the NLRB. Confusion reigned because only Smiley knew the true situation. In such circumstances, an employer does not have to supply information to nor bargain with a union. *Newell Porcelain Company, Inc.*, 307 NLRB No. 135 (1992), enf'd [CRRM] (4th Cir. 1993), 124 CCH LC¶ 10,543.

Its brief concludes with the following:

> Based on Urban Shelters record of promptly supplying information and promptly meeting until the union in 1992 bypassed counsel, and the unlawful change of union affiliation, the Complaint should be dismissed in its entirety.

Analysis

In my opinion, Smiley did not in mid-January 1993 mail Keiler copies of his, Smiley's, earlier specified requests for information and bargaining concerning both the service and maintenance and LPN units. When Smiley testified on the first day of the 2-day hearing herein he testified that he mailed copies of the letters, ''the July 2nd letter in particular'' to Keiler; that he prepared the letter that was sent to Keiler; that he did not have a copy of the letter since there was no letter; that he did not have a copy of anything to show that he sent the documents to Keiler; that there was a cover letter but he did not have a copy of it; that his cover letter read ''Per your request, here are the two documents you requested''; that the only explanation he had as to why he did not have a copy of the cover letter was that when it was typed up on the computer, ''I think there was a power failure, and we lost some stuff that was in our memory bank''; and that he was not sure how many days' documents were lost because of the power failure indicating ''[w]e had a storm, and there was some stuff that got knocked out.'' As noted above, on the second day of the trial herein Keiler, at the outset of his testimony, testified that in mid-January 1993 Smiley did not send him documents. Rather, when he called Smiley and asked for the documents Smiley, according to Keiler's testimony, told him that he did not want to deal with him, that he should get the letters from his client, and that he, Keiler, should ''go to hell.'' Smiley did not testify in rebuttal and specifically deny these detailed assertions. Smiley was not even present during the second day of the trial and counsel for General Counsel at the end of the second day indicated as follows: ''I have attempted to contact Mr. Smiley and I have spoken with Mr. Lewis and I apologize for their absences today, but I have no rebuttal.'' Keiler is credited on this point. He was adamant. His testimony was very specific. On the other hand, Smiley did not deny Keiler's testimony. Keiler's cross-examination of Smiley on the first day of the trial herein involved only their January 1993 conversation and whether Smiley did mail the letters to Keiler at that time, and one question about Local 722 receiving dues from the employees at the involved nursing home. Smiley was placed on notice the first day of the trial herein that Keiler was going to make an issue out of whether he, Smiley, sent the letters to Keiler in January 1993. As indicated above, Smiley was not present the second day of the trial herein. Smiley's testimony regarding whether he sent copies of the letters to Keiler in mid-January 1997 can only be described as contradictory and vague. It is not credible. Accordingly, paragraphs 12(c), 14(c), 16(c) and 18(c) of the complaint will be dismissed.

As noted above, on brief Respondent contends that ''[i]t is apparent from the exchange of correspondence and the Complaint itself, which had to be amended, that Urban Shelters, Lewis, Keiler and General Counsel were all confused over which union represented which unit.'' What, if any, confusion existed between Respondent, on the one hand, and Locals 722 and 82, on the other hand, at the time of the July 2, and October 16, 1992 Smiley letters?[9] There may have been some confusion initially between Respondent and the two involved Locals but in my opinion it was cleared up by the time of the July 2, 1992 Smiley letters. In one of the July 2, 1992 letters Smiley indicated that Local 722 was certified as the representative of the LPNs. In the other July 2, 1992 letter, Smiley indicated that Local 722 was the exclusive representative of the service and maintenance employees. He did not at that time indicate that Local 722 was certified as the

[7] In passing it is noted that the amendment of the complaint and counsel for General Counsel's statement at p. 50 of the transcript do not demonstrate that General Counsel was confused over which Union represented which unit. Regarding the former, the amendment was not made to clear up any confusion on the part of General Counsel. Rather, it appears to have been made to get the Respondent to change its answer from a denial to an admission. With respect to the latter, counsel for General Counsel was merely describing the terminology in Smiley's October 16, 1992 letter. She obviously was not asserting that the Board certified Local 722 as the representative for the service and maintenance unit.

representative of the service and maintenance employees. The information sought in the two letters was necessary and relevant to Local 722's performance of its duties as the designated exclusive collective-bargaining agent for Local 82, which is the certified exclusive collective bargaining representative of unit 1, and to Local 722's performance of its duties as the certified exclusive collective bargaining representative of unit 2. And in view of the fact that (1) Littlejohn engaged in an exchange of correspondence with Smiley after Keiler's April 25, 1991 directive to Smiley, namely, ''[i]f you want information, please contact me directly, otherwise, you may have a long wait,'' and (2) Smiley's July 2 and October 16 , 1991 letters might be interpreted as not being limited to requests for ''information'' in that they also included requests to negotiate,[8] the fact that the July 2 and October 16, 1992 letters were sent directly to Littlejohn did not obviate the need for the Respondent to reply thereto within a reasonable time both with respect to the requested information and the request to bargain. While Smiley's October 16, 1992 letter leaves a lot to be desired regarding the terminology utilized, at that point in time it was obvious to all concerned, notwithstanding Smiley's terminology, that Local 722 was acting in a dual capacity, namely, as agent of Local 82 for the service and maintenance employees and in its own right for the LPNs.[9]

How much Keiler's changing position regarding the LPN's may have initially added to the confusion must be taken into consideration.[10] Keiler did not specifically deny the assertion in Lewis' June 17, 1988 letter that he, Keiler, proposed that the service and maintenance employees and the LPN's be included in one unit for purposes of collective bargaining with the employer. From February 1988, when he voluntarily recognized Local 722 as the bargaining agent for LPN's,[11] until April 11, 1988, when he refused to bargain over LPN's indicating that the Board had held that the LPN's were supervisors, Keiler, in effect, led Local 722 to believe that Respondent would bargain with it over the LPN's. Then notwithstanding his April 11, 1988 position Keiler, according to the above-described Lewis letter which Keiler himself introduced, on June 14, 1988, proposed that the LPN's be included in one unit with the service and maintenance employees for purposes of collective bargaining with the Employer. Keiler testified that the ''no'' he placed in the margin next to the paragraphs involved means that he ''did not agree with Local 82 should be the LPN bargaining agent.'' Lewis' letter, however, indicates that the bargaining agent would be Local 722. Additionally, Keiler does not specifically deny that he proposed and agreed that the service and maintenance employees and the LPN's should all be included in one unit for the purposes of collective bargaining with the employer.

Unlike *Newell Porcelain Co.*, supra, this case does not involve a question of whether there was confusion over the identity of the employees' bargaining representative.

As concluded above, in my opinion at the time of the July 2 and October 16, 1992 letters there was no real confusion over which Union represented which of the involved Units. Respondent had an obligation to supply the information sought in the involved letters and it had an obligation to bargain. Respondent did neither before a charge was filed herein. Respondent violated the Act as alleged in the remaining paragraphs of the involved complaint.[12]

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Service Employees International Union, Locals 722 and 82, AFL–CIO are, labor organizations within the meaning of Section 2(5) of the Act.

3. The following employees of Respondent constitute units appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time employees including nursing assistants, nursing assistants/supply clerks, ward clerks, dietary aides, housekeeping employees, maintenance assistants, laundry aides and all other service and maintenance employees, activities assistants and physical therapy aides employed at Respondent's facility, but excluding all clerical employees, professional employees, guards and supervisors as defined in the Act.
>
> All regular full-time and part-time licensed practical nurses employed at Respondent's facility, but excluding all other employees, clerical employees, guards and supervisors as defined in the Act.

4. At all times material, Local 722 has been (A) designated by Local 82 as the exclusive representative of all employees within the first appropriate unit described in the next preceding paragraph and (B) the exclusive representative of all employees within the second appropriate unit described in

[8] More specifically, the July 2, 1992 letters requested Littlejohn to supply the dates, time, and locations ''whereby we can begin good faith collective bargaining.'' While it might be argued that this is ''information,'' in his October 16, 1992 letter Smiley reiterated his ''request [for] the employee information and negotiation availability included in the attached letters.''

[9] All involved knew that contrary to the assertion in the letter, Local 82 was certified to represent the service and maintenance employees. All of the proposed collective bargaining agreements submitted by Smiley to Respondent before July 2, 1992, were between Respondent and Local 82. There was no real confusion on this point. This was a misstatement of a known fact.

[10] It appears that the Regional Director's change in his findings in the RC proceedings regarding whether LPNs were supervisors from 1983 when the involved facility was operated by Continental Care Centers, Inc. to when the facility was operated by Respondent was based on the different approach taken by Respondent with respect to the LPNs. It is noted that in footnote 2 of his brief Keiler indicates that Respondent, ''to preserve the argument for the Court of Appeals,'' contends that the certification of Local 722 to represent the LPN's was violative of the Act since LPNs were found to be supervisors in Case 5–RC–11997 and, therefore, Respondent denies that there is an appropriate unit. It would appear that this is a question which should have been raised and resolved at the time of certification.

[11] This caused Local 722 to withdraw its petition in March 1988 to represent LPNs. Local 722's petition excluded supervisors. As noted above, before Respondent took over the involved operation, the Board had found the LPNs to be supervisors.

[12] Respondent's belated and less than full compliance with the requests assertedly based, in part, on the facts that Keiler ''took [the Board's] complaint possibly in the wrong way'' assertedly thinking ''that the Board was taking the position that . . . [Local] 722 . . . was the certified bargaining agent of . . . Unit [1],'' does not change, in any way, the action which it is necessary to take herein.

the next preceding paragraph for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing to recognize and bargain collectively as requested in both of Local 722's July 2 and its October 16, 1992 letters with Local 722 as (A) the designated exclusive representative of the employees described in the first unit described above in paragraph number 3 and (B) the exclusive representative of the employees described in the second unit described above in paragraph number 3, and by refusing to furnish the information sought in both of its July 2 and its October 16, 1992 letters Respondent violated Section 8(a)(1) and (5) of the Act.

6. These unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

7. Respondent has not violated the Act in any other manner.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[13]

ORDER

The Respondent, Urban Shelters and Health Care Systems, Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively with Service Employees International Union, Local 722, AFL–CIO as the designated exclusive representative and exclusive representative, respectively, of the employees in the two units set out below, and refusing to provide the information Local 722 requested in both of its July 2 and its October 16, 1992 letters. The Units are as follows:

> All full-time and regular part-time employees including nursing assistants, nursing assistants/supply clerks, ward clerks, dietary aides, housekeeping employees, maintenance assistants, laundry aides and all other service and maintenance employees, activities assistants and physical therapy aides employed at Respondent's facility, but excluding all clerical employees, professional employees, guards and supervisors as defined in the Act.
>
> All regular full-time and part-time licensed practical nurses employed at Respondent's facility, but excluding all other employees, clerical employees, guards and supervisors as defined in the Act.

(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 action necessary to effectuate the policies of the Act.

(a) Provide Local 722 with information it requested in both of its July 2 and in its October 16, 1992 letters.

(b) On request bargain in good faith with Local 722 as the designated exclusive bargaining agent and as the exclusive bargaining agent, respectively, of the units of its employees described in paragraph 1(a) above with respect to their wages, hours and other terms and conditions of employment and embody any understanding reached in signed agreements.

(c) Post at its facility in Washington, D.C., copies of the attached notice marked ''Appendix.''[14] Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by the Respondent's 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.

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

[13] 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.

[14] 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

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 fail and refuse to recognize and bargain in good faith with the Service Employees International Union, Local 722 as the designated exclusive bargaining agent and the exclusive bargaining agent, respectively, of our employees in the following appropriate units:

> All full-time and regular part-time employees including nursing assistants, nursing assistants/supply clerks, ward clerks, dietary aides, housekeeping employees, maintenance assistants, laundry aides and all other service and maintenance employees, activities assistants and physical therapy aides employed at Respondent's facility, but excluding all clerical employees, professional employees, guards and supervisors as defined in the Act.
>
> All regular full-time and part-time licensed practical nurses employed at Respondent's facility, but excluding all other employees, clerical employees, guards and supervisors as defined in the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights

guaranteed to them under Section 7 of the National Labor Relations Act.

WE WILL on request bargain in good faith with Local 722 as the designated exclusive bargaining agent and the exclusive bargaining agent, respectively, of the above-described appropriate units of our employees with respect to their wages, hours and other terms and conditions of employment and embody any understanding reached in a signed agreements.

WE WILL provide Local 722 with the information requested in its July and October 1992 letters.

URBAN SHELTERS AND HEALTH CARE SYSTEMS, INC.