Passavant Memorial Area Hospital *and* Health Care Local Union No. 1401, Laborers International Union of North America, AFL–CIO. Case 38-CA 3242

July 25, 1978

DECISION AND ORDER

BY CHAIRMAN FANNING AND MEMBERS JENKINS AND PENELLO

On March 16, 1978, Administrative Law Judge John P. von Rohr issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief. Counsel for the General Counsel filed limited exceptions, a brief in support of the limited exceptions, and a brief in support of the Administrative Law Judge's Decision.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the parties' exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge only to the extent consistent herewith and to adopt his recommended Order as modified herein.

The complaint alleges two violations by Respondent of Section 8(a)(1) of the Act. The first allegation is that Supervisor George Boehmer unlawfully interrogated employee Roger Metternick regarding his union activities and sympathies. The record indicates that, on May 25, 1977,[1] Boehmer approached Metternick while the employee was at work and asked him what he thought about the Union coming in. After some further discussion about benefits and union dues, Boehmer asked Metternick if he were planning to attend the union meeting that night and Metternick replied that he might. The next day Boehmer again approached Metternick while Metternick was working and asked him if he had attended the union meeting. Boehmer then asked him if he had learned anything at the meeting. Metternick subsequently told a fellow employee about the incident. The Administrative Law Judge found, and we agree, that Supervisor Boehmer's conduct was violative of Section 8(a)(1) of the Act.[2]

The second alleged 8(a)(1) violation involves statements admittedly made by Thomas Whittenberg, Respondent's administrative assistant, at two meetings held on June 10 and 16, and attended by 30 to 40 employees. During these meetings, Whittenberg told employees they would be fired if they participated in an economic strike. On June 24, the Union filed an unfair labor practice charge concerning the discharge threats. On July 27, 2 days before the complaint in this case was issued, Respondent published the following statement in its employee newsletter:

> It has come to my attention that some of our employees, in response to a question, were told that employees who go out on a strike for economic reasons can be fired. This is not correct.
>
> Employees have a legal right to engage in an economic strike; however, management has a duty to continue operation of the hospital and has a right to permanently replace any employees who do go out on an economic strike. If the striker is permanently replaced, he cannot return to his job when he wishes. He will be recalled only when an opening occurs for which he is qualified.
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> [s] William R. Mitchell
> Administrator

Although Whittenberg's statements to employees were plainly unlawful and violative of Section 8(a)(1), the Administrative Law Judge declined to recommend a remedial order therefor. In so doing, the Administrative Law Judge concluded that Respondent's July 27 statement constituted an effective disavowal of Whittenberg's threats to discharge employees if they engaged in an economic strike and obviated the need for additional remedial action by Respondent. We disagree.

It is settled that under certain circumstances an employee may relieve himself of liability for unlawful conduct by repudiating the conduct. To be effective, however, such repudiation must be "timely," "unambiguous," "specific in nature to the coercive conduct," and "free from other proscribed illegal conduct." *Douglas Division, The Scott & Fetzer Company*, 228 NLRB 1016 (1977), and cases cited therein at 1024. Furthermore, there must be adequate publication of the repudiation to the employees involved and there must be no proscribed conduct on the employer's part after the publication. *Pope Maintenance Corporation*, 228 NLRB 326, 340 (1977). And, finally, the Board has pointed out that such repudiation or disavowal of coercive conduct should give assurances to employees that in the future their employer will

[1] Hereafter all dates are 1977 unless otherwise specified.

[2] In his Decision, the Administrative Law Judge intimated that the instances of interrogation described above might properly be characterized as isolated, and Respondent, in its exceptions, urges that these interrogations were both isolated and *de minimis*. We disagree. In our view the repeated and blatant interrogation of an employee concerning his union sympathy and his knowledge of union activity is a serious violation of the Act which warrants the issuance of a remedial order. See *Reliance Universal, Inc.*, 206 NLRB 255 (1973).

not interfere with the exercise of their Section 7 rights. See *Fashion Fair, Inc., et al.*, 159 NLRB 1435, 1444 (1966); *Harrah's Club*, 150 NLRB 1702, 1717 (1965).

Applying these criteria to Respondent's July 27 statement, we find the purported disavowal of Whittenberg's repeated threats was ineffective to relieve Respondent of liability and to obviate the need for further remedial action. First, the attempted disavowal was not timely. Thus, Respondent did not issue the statement until 7 weeks after the first discharge threat. Nor can we ignore the fact that Respondent delayed until very nearly the eve of the issuance of the complaint before publishing its disavowal. Furthermore, the attempted disavowal appeared only once in an employee newsletter and it is unclear from the record how long or exactly where Respondent posted the newsletter containing the statement. This, coupled with the fact that the record indicates Respondent prints only 400 newsletters weekly for a complement of 600 employees, made it far from certain that all employees were adequately informed of Respondent's retraction. And, finally, there is no evidence that Respondent made any additional specific effort to communicate its attempted disavowal to the 30 to 40 employees who attended the meetings where Whittenberg made the unlawful threats.

Moreover, we conclude that the July 27 statement itself was neither sufficiently clear nor sufficiently specific. Thus, Respondent did not admit any wrongdoing but merely informed employees that information given them was "not correct." The statement does not name Whittenberg nor does it mention the circumstances in which Whittenberg made the unlawful threats. And, most importantly, Respondent's statement did not assure employees that in the future Respondent would not interfere with the exercise of their Section 7 rights by such coercive conduct. In fact, Respondent's newsletter statement did little more than emphasize its right to replace economic strikers as opposed to disavowing the threatening and coercive statements uttered by Whittenberg.

We also find that the Administrative Law Judge's reliance on *Kawasaki Motors Corporation USA*, 231 NLRB 1151 (1978),[3] is misplaced inasmuch as *Kawasaki* is clearly distinguishable on its facts from the instant case. Thus, the coercive conduct in issue in *Kawasaki* involved a single instance of employer surveillance, arguably a less serious and blatant violation of Section 8(a)(1) than the repeated threats of discharge made directly to 30–60 employees in the instant case. Furthermore, in *Kawasaki* the employer's remedial action was completely voluntary with no threat of the Regional Director's further action. Finally, in *Kawasaki* the employer specifically assured its employees of their right to engage in or refrain from union activity. In the instant case, on the other hand, Respondent gave employees no such assurances and Respondent admittedly published its statement as a result of the unfair labor practice charge filed in this case, almost 2 months after the threats were uttered.[4]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Passavant Memorial Area Hospital, Jacksonville, Illinois, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order as so modified:

1. Insert the following as paragraph 1(b) and reletter the subsequent paragraph accordingly:

"(b) Threatening employees with discharge for engaging in an economic strike."

2. Substitute the attached notice for that of the Administrative Law Judge.

[3] Chairman Fanning adheres to his dissent in *Kawasaki*, and would not find that a disclaimer such as was published by the respondent therein could serve to cure unlawful conduct or to make unnecessary the issuance of a remedial order. Member Jenkins did not participate in *Kawasaki* and finds it unnecessary to pass on the propriety of the legal conclusions reached therein.

[4] Nor do we find merit in the Administrative Law Judge's suggestion that the Board's general policy in favor of settlement supports acceptance of Respondent's July 27 statement as an effective repudiation of the coercive conduct in question. Thus, the Board has had occasion to point out that its policy is not intended to promote an uncritical, blind, or blanket acceptance of settlements. See, generally, *Lou DeYoung's Market Basket, Inc.*, 197 NLRB 746 (1972).

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had a chance to give evidence, the National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post this notice.

The Act gives all employees these rights rights:

To engage in self-organization
To form, join, or help unions
To bargain collectively through representatives of their own choosing
To act together for collective bargaining or

other mutual aid or protection

To refrain from any or all of these things.

WE WILL NOT interrogate our employees concerning their union activities or sympathies or their attendance at union meetings.

WE WILL NOT threaten our employees with discharge for engaging in an economic strike.

WE WILL NOT in any like or related manner interfere with our employees' exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act, as amended.

PASSAVANT MEMORIAL AREA HOSPITAL

DECISION

STATEMENT OF THE CASE

JOHN P. VON ROHR, Administrative Law Judge: Pursuant to a charge filed on June 24, 1977, the General Counsel of the National Labor Relations Board, herein called the Board, issued a complaint on July 29, 1977, against Passavant Memorial Area Hospital, herein called the Respondent, alleging that it had engaged in certain unfair labor practices in violation of Section 8(a)(1) of the National Labor Relations Act, as amended, herein called the Act. The Respondent filed an answer denying the allegations of unlawful conduct alleged in the complaint.

Pursuant to notice, a hearing was held before me in Jacksonville, Illinois, on September 13, 1977. Briefs were received from the General Counsel and the Respondent on October 14, 1977, and they have been carefully considered.

Upon the entire record in this case, and from my observation of the witnesses, I hereby make the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

The Respondent, an Illinois corporation, is a hospital located at Jacksonville, Illinois, where it is devoted to the care of sick and infirm persons. During the 12 months preceding the hearing herein, Respondent received payments in excess of $25,000 from Federal Government revenue services. During the same period, it purchased goods and services valued in excess of $30,000 from points and places located outside the State of Illinois. Respondent concedes, and I find, that it is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Health Care Local Union No. 1401, Laborers International Union of North America, AFL–CIO, herein called the Union, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *The Facts*

This case involves but two instances of conduct alleged to be in violation of Section 8(a)(1) of the Act which are asserted to have occurred during the course of an organizing campaign during a period from May to September 1977.[1] The first of these concerned an alleged incident between Roger Metternick, an employee in the laundry department, and his supervisor, George Boehmer. According to Metternick, this incident occurred on May 25, 1977, at which time he said Boehmer broached him as he was unloading some trash outside the hospital and asked what he thought about the Union coming in. Continuing with Metternick's testimony, Metternick responded that he did not know. Boehmer then said "something about" his not getting sick days under a union, and added that he would have to pay union dues. Metternick replied that he knew this to be so. Boehmer thereupon asked if he was going to attend a union meeting that night. Metternick said that he might, and with this the conversation ended. However, according to Metternick, Boehmer came up to him again the following morning and at this time asked if he had attended the meeting on the night before. Upon responding that he had, Boehmer asked if he had learned anything. Metternick responded that he did not know.

Boehmer denied the entire testimony of Metternick concerning the foregoing conversations, but instead testified that on May 24 Metternick spoke to him about a family illness and that on May 26 he told Metternick to report to the Norris Hospital to work. From my observation, Metternick impressed me as an honest witness and I do not believe his testimony to have been fabricated. I was not similarly impressed by the denials of Boehmer. Accordingly, I credit the testimony of Metternick as aforesaid.

Turning to the second incident, there is no dispute as to the facts. Thus, on June 10, 1977, Thomas Whittenberg, then Respondent's administrative assistant, held a meeting with the members of the housekeeping department.[2] Whittenberg testified that he called the meeting because he wished to respond to certain misinformation which he felt was being spread among the employees concerning their current benefits. Upon explaining these benefits, Whittenberg, in response to a question, further told the employees that they would be fired if they went out on an economic strike. With respect to this latter statement, it is undisputed that Whittenberg repeated the same thing at a meeting which he held with the laundry department employees on June 16, 1977. The two meetings were attended by approximately 30–40 employees.

B. *Conclusions*

With respect to Whittenberg's telling the employees that they would be fired if they went out on an economic strike, this became a subject of the unfair labor practice charge herein. Upon investigation, Respondent determined that

[1] An election was scheduled to be held shortly after the hearing herein.

[2] Whittenberg is no longer in Respondent's employ.

the statement had in fact been made. Recognizing the unlawfulness of the statement, Respondent published as the *first item* in the July 27, 1977, edition of its weekly employee newsletter, "In-House," the following statement.

> It has come to my attention that some of our employees, in response to a question, were told that employees who go out on a strike for economic reasons can be fired.
>
> Employees have a legal right to engage in an economic strike; however, management has a duty to continue operation of the hospital and has a right to permanently replace any employees who go out on an economic strike. If the striker is permanently replaced, he cannot return to his job when he wishes. He will be recalled only when an opening occurs for which he is qualified.
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> /s/ William R. Mitchell
> Administrator

Respondent asserts that the foregoing was an effective repudiation and disavowal of the unlawful statement made by Whittenberg. The General Counsel contends that it was not. I am in agreement with Respondent on the question. The record reflects that the weekly newsletter is distributed to all the employees and that indeed the issue in question was posted on the employee bulletin board. One hardly need speculate that the employees are just as likely, or more so, to read Respondent's newsletter, which contains items of personal interest, as they are to read any posted Board notice. As to the statement itself, the repudiation of the unlawful statement is couched in such clear language that it should be understandable to any literate employee. Although Respondent went on to state its legal rights should an economic strike occur, this was within the realm of free speech and, in my view, cannot be said to detract from the effectiveness of the repudiation. In sum, I conclude and find that Respondent effectively disavowed Whittenberg's unlawful statement to the employees and that therefore no further remedial action concerning this matter is necessary. The Board has approved this procedure. *Kawasaki Motors Corporation USA*, 231 NLRB 1151 (1977).[3]

As to the remaining incident, namely the unlawful interrogation of employee Metternick by his supervisor, Boehmer, it is noteworthy that this is the only incident of its kind that occurred among Respondent's approximately 600 employees. Assuming the incident involving Metternick to have been unlawful, Respondent argues that the incident, particularly in view of Respondent's large complement of employees, should be regarded as isolated and that the complaint therefore should be dismissed. Whatever the merit of this argument, I am bound by the Board's most recent declaration on the subject which appears in *Carolina American Textiles, Inc.*, 219 NLRB 457 (1975), wherein the Board indicated that its present policy is to issue remedial orders even in cases involving isolated instances of violations. Accordingly, I find that Boehmer's interrogation of Metternick concerning his union sympathies and his attendance at union meetings was in violation of Section 8(a)(1) of the Act and that a remedial order should issue.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

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

V. THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices within the meaning of Section 8(a)(1) of the Act, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. By engaging in the conduct described in section III, above, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.
4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

On the basis of the above findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[4]

Respondent Passavant Memorial Area Hospital, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Interrogating employees concerning their union activities or sympathies or their attendance at union meetings.

(b) In any like or related manner interfering with, re-

[3] The General Counsel argues, *inter alia*, that since the publication did not take place until 2 days prior to the issuance of the complaint, that such action was untimely; and further, that "to allow an Employer to decide its own manner of settlement after threatened with complaint, completely undermines the purposes and effectiveness of the National Labor Relations Act." Assuming the repudiation to have been effective, as I have found it to be, it is pointed out that it is Board policy to encourage the settlement of unfair labor practice cases and that this is true even if settlement is not reached until the hearing stage or at any point prior to decision.

[4] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and the recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

straining, or coercing its employees in the exercise of rights guaranteed them in Section 7 of the Act.

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

(a) Post at its hospital in Jacksonville, Illinois, copies of the attached notice marked "Appendix."[5] Copies of said notice, on forms to be provided by the Officer-in-Charge for Subregion 38, after being duly signed by Respondent's authorized representiative, shall be posted by it immediately upon receipt thereof and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(b) Notify the Officer-in-Charge for Subregion 38, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

[5] In the event that 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."