P.E.R.C. NO. 81-129

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

COUNTY OF MIDDLESEX (ROOSEVELT HOSPITAL),

Respondent,

-and-

Docket No. CO-81-142-67

COMMUNICATIONS WORKERS OF AMERICA, LOCAL 1065,

-and-

Charging Party,

-and-

ROOSEVELT HOSPITAL ASSOCIATION, INC.,

Intervenor.

SYNOPSIS

The Commission finds that the public employer violated the Act by conducting negotiations including the reaching of an agreement with an incumbent employee organization during the pendency of a representation petition filed by a rival union which, based on the facts of the case, rasied a question concerning representation. The decision adopts the NLRB's Midwest Piping doctrine as modified by Shea Chemical in that the conduct of negotiations when the employer has a reasonable basis to believe that a question concerning representation exists, has the tendency to influence the free choice of employees and removes the employer from a position of required neutrality.

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Appearances:

For the Respondent, County of Middlesex, New Jersey Office of County Counsel (Robert C. Rafano, Esq.)

For the Charging Party, Kapelsohn, Lerner, Rietman & Maisel, (Jesse H. Strauss, Esq.)

For the Intervenor, Schneider, Cohen, Solomon & DeMarzio, Esqs. (J. Sheldon Cohen, Esq.)

DECISION AND ORDER

On October 29, 1980, the Communications Workers of America, Local 1065 ("C.W.A.") filed an Unfair Practice Charge with the Public Employment Relations Commission alleging that the County of Middlesex ("Roosevelt Hospital" or "Hospital") had engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, as amended, N.J.S.A. 34:13A-1 et seq. (the "Act"). In particular, CWA alleged that Roosevelt Hospital had violated N.J.S.A. 34:13A-5.4(a)(1) and (2) by negotiating a contract with the Roosevelt Hospital Association, Inc. (the "Association") while there was an outstanding question concerning the continued representation of

employees in the unit represented by the Association.[1/] The Association was permitted to intervene in this present action pursuant to N.J.A.C. 19:14-5.1.

Prior to May 16, 1979, the Association represented a unit of employees comprised of all non-professional employees of Roosevelt Hospital. During 1979, the CWA, the Association and the Hospital were involved in administrative and judicial proceedings concerning the employees and the unit then represented by the Association. In May 1979, the judicial proceedings culminated in a settlement stipulation executed by the CWA, the Association and the Hospital; the settlement stipulation was confirmed by a consent order entered by the Honorable Harold A. Ackerman, Judge of the Superior Court. The consent order confirming the settlement stipulation provides that the then-existing unit of all non-professional employees be divided into two units of unequal size -- the larger one being represented by the CWA and the smaller one being represented by the Association.

On May 14, 1980 and prior to any contract negotiations between the Hospital and the Association, CWA filed a Petition for Certification of Public Employee Representative with PERC with respect to a proposed unit comprised of all those non-professional employees represented by the Association, pursuant to the Consent Order, and the Commission's Director of Representation commenced the administrative processing of the representation

1/ N.J.S.A. 34:13A-5.4(a)(1) and (2) prohibits public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this Act. (2) Dominating or interfering with the formation, existence or administration of any employee organization."

petition.[2/]

Subsequent to the filing of the petition the Hospital entered into negotiations with the incumbent Association for a new collective agreement. Once aware of this fact, counsel for CWA in a letter dated August 5, 1980, notified the Hospital that there was a pending question concerning representation of these employees and suggested that any further negotiations would be unlawful until the question had been resolved by an election. The Hospital and the Association continued to negotiate, however, and a collective agreement was reached on September 18, 1980, extending retroactively from January 1, 1980 through December 31, 1981.

Prior to September 18, 1980, all parties were present at preliminary conferences[3/] including a September 9, 1980 meeting which was held after an August 28, 1980 meeting was postponed. The Director of Representation, on October 21, 1980, informed all parties that in the absence of any substantial and material factual issues, he would direct an election and he provided a seven-day time period for the submission of documentary evidence, and in the absence of such, he would issue a decision directing an election.

The instant unfair practice charge was filed by CWA and CWA requested that this charge block the PERC election needed to determine whether CWA or the Association will be the representative

2/ A Petition for Certification of Public Employee Representative will only be processed in the event that it is accompanied by a 30% showing of interest among employees in the unit the petitioner seeks to represent. See N.J.A.C. 19:11-1.2(a)8.

3/ Investigatory, or "consent" conferences are routinely held during the processing of a representation petition for the purposes of executing consent election agreements or to permit a party to assert disputed issues of fact or law.

of those employees currently represented by the Association. Due to the fact that the charge alleged that the Hospital had negotiated an agreement with the Association while a question concerning representation was pending, and that there was a substantial likelihood that the conduct alleged, if true, would impair the employees' free choice in an election, the Director of Representation granted the request that the election be blocked until the charge was resolved.

In this decision the Commission will resolve the question as to whether the Hospital violated N.J.S.A. 34:13A5.4(a)(1) and (2) when it negotiated an agreement with the Association prior to the resolution of the representation question. On January 28, 1981, CWA filed with the Commission a Motion for Summary Judgment and a Supporting Brief. Reply briefs in opposition to the motion were filed by both the Hospital and the Association; the last of which was received on March 3, 1981. It appearing from a study of the parties' pleadings, briefs, and other documents, that there exists no genuine issue of material fact, the Commission will summarily resolve this issue. Accordingly, the Commission will address the issue as to what an employer's posture should be, in the face of a pending question concerning the representation of employees in an existing negotiating unit.

The issue concerning an employer's activity when faced with two competing unions who are both claiming to be the majority representative of a unit of employees is one in which the rights of those employees involved must be carefully protected. Whenever an employee must decide between two rival unions in an election

process, it is essential that that process not be marred by any behavior having a substantial potential to disrupt an employee's ability to clearly and objectively make an assessment as to choice of representative. Concerning the question of majority support, where "the situation has not crystalized" the National Labor Relations Board has applied the principle that an employer may not exert influence which would tend to sway the employees in favoring one union over another;[4/] thus depriving the employees of their right to be able to select their own representative in a pristine election setting.

In 1945, the Board declared that it was an unfair labor practice for an employer to recognize one of two or more competing unions after a representation question had been submitted to the Board by a filing of a petition.[5/] In Shea Chemical Corp., however, the Board modified its "Midwest Piping" doctrine. The Board stated that, "Upon presentation of a rival or conflicting claim which raises a real question concerning representation an employer may not go so far as to bargain collectively with the incumbent (or any other) union unless and until the question concerning representation has been settled by the Board."[6/] In Shea the Board found that the employer had violated §8(a)(2) of the N.L.R.A.[7/] when it entered into a collective bargaining

4/ See Oil Transp. Co. v. NLRB, 440 F.2d 664 82 LRRM 2916 (CA 7 1973).
5/ Midwest Piping Co., Inc., 63 NLRB 1060, 17 LRRM 40 (1945).
6/ Shea Chemical Corporation, 121 NLRB 1027, 1028 42 LRRM 1486 (1958).
7/ §8(a)(2) reads in part: "It shall be an unfair practice for an employer to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it."

agreement while the representation petition was pending before the Board, supported by an adequate showing of interest.

There has been a different view expressed by some Federal Circuit Courts concerning the Board and its modified Midwest Piping doctrine, however. The Third Circuit Court stated in NLRB v. Swift & Co., 294 F.2d 285 (3rd Cir. 1961), 48 LRRM 2699, that the Board must have substantial evidence of a real question concerning representation before it may find that an employer has committed an unfair labor practice by signing a contract with an incumbent union. The tests to follow according to the Swift decision in order to find a violation of §8(a)(2) of the N.L.R.A. are 1) a demonstration by the charging party that substantial evidence exists to show a real question concerning representation, beyond the filing of a petition for certification, and 2) a demonstration by the charging party that the employer has a reasonable basis for believing that the incumbent union no longer represents a majority. There is no dispute that the Act is violated as long as a real question involving representation exists; the only dispute is as to when a real question does exist.

The policy of finding that an employer has violated §8(a)(2) of the N.L.R.A. whenever it seeks to resolve a representation question on its own in the face of two rival unions, during the pendency of the Board's election proceedings, is still in effect.[8/]

8/ See Dillon's Companies, Inc., 237 NLRB No. 114, 99 LRRM 1065 (1978), where the Board claimed that one card coupled with sporadic organizational activity did not raise a "real question concerning representation." This policy has also been followed by the New York Public Employment Relations Board; see County of Rockland, 10 PERB 3168 (1977), where it was said that, "...a public employer is not compelled to, and may not, negotiate with

(Continued)

Although the Swift, supra decision shows that a question exists concerning the Board's policy as to when an employer should maintain a position of neutrality, the Board still maintains that its revamped Midwest Piping doctrine is correct. Additionally, it has been found that the employer must remain neutral as long as the claim of a rival union is not "clearly unsupportable or lacking in substance."[9/] It is apparent that the Board has chosen to protect the rights of the employees to choose their representative free from influence that continued dealing with an incumbent union by the employer would exert on their choice.

In this present case the Hospital was well aware of the fact that the CWA had filed a petition for certification and yet still continued to negotiate with the incumbent Association and eventually reach an agreement while the representation question was still pending before PERC. An employer facilitates the chances for one labor organization to become the majority representative of the employees over another, by recognizing and treating that organization as such. The Hospital recognized the Association as the representative of the employees and reached an agreement with it. An action such as this could exert pressure and influence on the employees and be disruptive to the election process. It is very possible that an employee could be swayed by the fact that his employer had already executed an agreement with one of the organizations currently running for election, to the detriment of the rival union.

8/ (Continued) the incumbent employee organization while a bona fide question concerning representation is pending." 3170.

9/ Playskool, Inc., 145 NLRB 560, 79 LRRM 1507 (1972), rev'd on other grounds, 477 F.2d 66, 82 LRRM 2916 (CA 7, 1973).

The Commission finds the Board's Midwest Piping doctrine, as modified by Shea, to require a finding that "a real question concerning representation" exists to be a sound approach and we adopt the Shea analysis. The Commission rejects the approach adopted by the Court in Swift, supra which would require that the employer also have a reasonable basis for believing that the incumbent union no longer represents a majority before it takes a neutral stance. Such an approach tips the balance in favor of the incumbent organization particularly in those cases where the employer desires to maintain the existing relationship by imposing on the challenging labor organization the burden of establishing the subjective state of mind on the employer. The interests of a fair election where a pending question concerning representation exists can only be served by requiring employer neutrality.

We believe that the proper action to be taken by an employer who is faced with and has knowledge of a pending question concerning representation to avoid the committing of an unfair practice pursuant to N.J.S.A. 34:13A5.4(a)(1) and (2), is not to begin or if begun, to cease negotiations with the incumbent union until the representation issue has been properly determined.[10/]

ORDER

IT IS HEREBY ORDERED that:

A. The Respondent County of Middlesex (Roosevelt Hospital)

10/ This is not to say, however, that an employer cannot have a reasonable basis in believing that there is a real question concerning representation and before a Petition for Certification has been filed by the rival union. There are other incidents which can occur that will create a good faith doubt of continued majority status in the mind of the employer.

shall cease and desist from:

1. Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by the Act, by negotiating with the Roosevelt Hospital Association, Inc., as the representative of the employees until it has demonstrated its majority status in a PERC conducted election.

2. Dominating or interfering with the formation, existence or administration of the Roosevelt Hospital Association, Inc., by negotiating with it as the majority representative of the employees.

B. The Respondent County of Middlesex (Roosevelt Hospital) take the following affirmative action:

1. Maintain a neutral posture as between the Roosevelt Hospital Association, Inc., and the Communication Workers of America, Local 1065, presently and during the pendency of the representation proceeding.

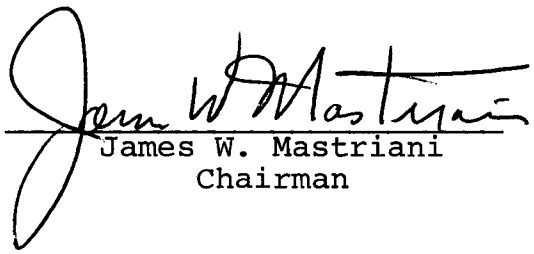
2. Continue to give effect to the terms of the contract between the County of Middlesex (Roosevelt Hospital) and the Roosevelt Hospital Association, Inc., while the question concerning representation is pending.

3. Post at all places where notices to employees are customarily posted, copies of the attached notice marked as "Appendix A". Copies of such notice, on forms to be provided by the Commission, shall be posted immediately upon receipt thereof, and, after being signed by the Respondent's authorized representative, shall be maintained by it for a period of at least sixty (60) consecutive days thereafter. Reasonable steps shall be taken by the Respondent Board to insure that such notices are not altered,

defaced or covered by other material.

4. Notify the Chairman of the Commission within twenty (20) days of receipt what steps the Respondent Board has taken to comply herewith.

BY ORDER OF THE COMMISSION



James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Hartnett, Parcells, Hipp and Newbaker voted in favor of this decision. Commissioner Suskin voted against the decision. Commissioner Graves was not present.

DATED: Trenton, New Jersey
April 24, 1981
ISSUED: April 28, 1981

"APPENDIX A"

NOTICE TO ALL EMPLOYEES

PURSUANT TO

AN ORDER OF THE

PUBLIC EMPLOYMENT RELATIONS COMMISSION

and in order to effectuate the policies of the

NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,

AS AMENDED

We hereby notify our employees that:

WE WILL NOT interfere with, restrain or coerce employees in the exercise of the rights guaranteed to them by the Act, by negotiating with the Roosevelt Hospital Association, Inc., as the representative of the employees until it has demonstrated its majority status in a PERC conducted election.

WE WILL NOT dominate or interfere with the formation, existence or administration of the Roosevelt Hospital Association, Inc., by negotiating with it as the majority representative of the employees.

WE WILL maintain a neutral posture as between the Roosevelt Hospital Association, Inc., and the Communications Workers of America, Local 1065, presently and during the pendency of the representation proceeding.

WE WILL continue to give effect to the terms of the contract between the County of Middlesex (Roosevelt Hospital) and the Roosevelt Hospital Association, Inc., while the question concerning representation is pending.

COUNTY OF MIDDLESEX (ROOSEVELT HOSPITAL)
(Public Employer)

Dated _____ By _____
(Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Public Employment Relations Commission, 429 East State, Trenton, New Jersey 08608 Telephone (609) 292-9830.