The Brooklyn Hospital Center *and* New York State Nurses Association. Case 29–CA–26044

March 31, 2005

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On September 30, 2004, Administrative Law Judge Eleanor MacDonald issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel and the Charging Party filed answering briefs.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to adopt the judge's rulings, findings,[1] and conclusions and recommended Order as modified.

The judge properly found that the Respondent violated Section 8(a)(5) and (1) of the Act by: (1) unilaterally changing its malpractice insurance for unit employees from a plan obtained through a consortium of hospitals, known as "CCC," to a self-funded plan;[2] and (2) failing to provide the Union with requested malpractice insurance information.

To remedy the Respondent's unlawful unilateral change, the judge issued a restorative order conditioned on the desires of the affected employees as represented by the Union:

> [T]he Union shall then have 60 days from the date the complete information is turned over by Respondent to decide whether to demand reinstatement of the CCC coverage, or a similar plan if CCC is unwilling to reinstate coverage, or continuation of the self-funded plan . . . The Respondent should also make whole any employees who have suffered losses as a result of its unilateral action in changing the level of insurance coverage, if such is found to be the case.

We have decided to adopt the judge's remedy, except that the make-whole component of the remedy shall not apply if the Union chooses continuation of the Respondent's self-funded malpractice insurance plan.[3]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, The Brooklyn Hospital Center, Brooklyn, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Modify paragraph 2(c) to read as follows:

"(c) If the Union gives written notice to reinstate the CCC medical malpractice insurance or similar coverage, make whole all employees who have suffered losses as a result of unilateral changes in the medical malpractice insurance coverage."

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT change the medical malpractice insurance coverage for employees in the following unit represented by The New York State Nurses Association without notice to the Union and an opportunity to bargain with respect to the change and the effects of the change:

> Each full-time and part-time employee licensed or otherwise lawfully entitled to practice as a registered pro-

[1] The Respondent has effectively excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products,* 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] In rejecting the Respondent's affirmative defense that the Union waived its right to bargain over malpractice insurance the judge applied the Board's "clear and unmistakable" waiver standard. See *Metropolitan Edison Co. v. NLRB,* 460 U.S. 693, 708 (1983). In *NLRB v. Postal Service,* 8 F.3d 832 (D.C. Cir. 1993), in contrast, the court set forth a "contract coverage" analysis, finding appropriate that analysis rather than a "clear and unmistakable" waiver analysis where the contract covers the issue in dispute. Chairman Battista and Member Schaumber find it unnecessary to pass on which standard is appropriate, because the Respondent would not prevail under either standard. Further, they observe that no party has excepted to the judge's application of the waiver standard here.

[3] Member Liebman would adopt the judge's remedy in its entirety, providing make-whole relief to the unit employees even if the Union selects continuation of the self-funded malpractice insurance plan.

fessional nurse employed by the Employer at its facilities to perform registered professional nursing as a staff nurse, senior staff nurse, assistant patient care coordinator, clinician and clinical nurse specialist, excluding patient care coordinators, assistant supervisors, supervisors, associate patient care coordinators, instructors, IV team supervisors, quality assurance research analysts, assistant and associate directors of nursing, senior vice president of nursing, ambulatory care administrator and supervisors as defined in the Act.

WE WILL NOT fail to furnish the Union with information it requested about medical malpractice insurance coverage for unit employees.

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

WE WILL furnish the Union with the information it requested on December 8 and 18, 2003, concerning medical malpractice insurance.

WE WILL, upon written notice from the Union, reinstate the former medical malpractice insurance or similar coverage or continue the self-funded plan instituted in May 2003.

WE WILL if the Union gives written notice to reinstate the former medical malpractice insurance or similar coverage, make whole all employees who have suffered losses as a result of unilateral changes in the medical malpractice insurance coverage.

THE BROOKLYN HOSPITAL CENTER

Tara A. O'Rourke, Esq., for the General Counsel.
Nicole Cuda Perez, Esq. (Spivak, Lipton, Watanabe, Spivak & Moss LLP), of New York, New York, for The New York State Nurses Association.
Joel E. Cohen, Esq. and *Brett J. Schneider, Esq. (McDermott Will & Emery LLP),* of New York, New York, for the Respondent.

DECISION

STATEMENT OF THE CASE

ELEANOR MACDONALD, Administrative Law Judge. This case was tried in Brooklyn, New York, on April 13, 2004. The complaint alleges that Respondent, in violation of Section 8(a)(5) of the Act, changed the malpractice insurance covering unit members without notice to and bargaining with the Union concerning the change and its effects and refused to furnish information about the change to the Union. The Respondent denies that it has engaged in any violations of the Act and it asserts that the complaint is barred by Section 10(b) of the Act. The initial charge was filed by The New York State Nurses Association on December 31, 2003, and it was served on January 4, 2004. An amended charge was filed on January 16, 2004.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the parties in July 2004, I make the following[1]

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a domestic corporation, with an office and place of business at 121 DeKalb Avenue, Brooklyn, New York, is engaged in the operation of an acute care hospital. Respondent annually derives gross revenues in excess of $250,000 and purchases goods and materials valued in excess of $5000 directly from suppliers located outside the State of New York. The parties agree, and I find, that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and a health care institution within the meaning of Section 2(14) of the Act and that The New York State Nurses Association is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The New York State Nurses Association and Respondent are parties to a collective-bargaining agreement with a term of July 1, 2002, to June 30, 2005. The unit defined in the collective-bargaining agreement is:

> Each full-time and part-time employee licensed or otherwise lawfully entitled to practice as a registered professional nurse employed by the Employer at its facilities to perform registered professional nursing as a staff nurse, senior staff nurse, assistant patient care coordinator, clinician and clinical nurse specialist, excluding patient care coordinators, assistant supervisors, supervisors, associate patient care coordinators, instructors, IV team supervisors, quality assurance research analysts, assistant and associate directors of nursing, senior vice president of nursing, ambulatory care administrator and supervisors as defined in the Act.

The collective-bargaining agreement contains the following management-rights clause:

> Except as in this agreement otherwise provided, Employer retains the sole and exclusive right to promulgate rules and regulations; direct, designate, schedule and assign duties to the work force; plan, direct and control the entire operation of the Hospital; discontinue, consolidate or reorganize any department or branch; transfer any or all operations to any other location or discontinue the same in whole or in part; merge with any other institution; make technological improvements; install or remove equipment regardless of whether or not any such action causes a reduction of any kind in the number of employees, or transfers in the work force, requires the assignment of additional or different duties or causes the elimination or addition of nursing titles or jobs; and carry out the ordinary and customary functions of management whether or

[1] The record is corrected so that at p. 19, L. 19, the word "bribing" should read "bargaining"; at p. 85, L. 20, the word "qualm" should read "calm"; at p. 91, L. 4 the words "General Counsel wanted" should be replaced by "General Counsel 1 is"; at p. 99, L. 13, the name of the case is *Bannon Mills*.

not possessed or exercised by the Hospital prior to the execution of this agreement, except as limited herein. All the rights, powers, discretion, authority and prerogatives possessed by Employer prior to the execution of this agreement, whether exercised or not, are retained by and are to remain exclusively with the Employer, except as limited herein.

A. Background

The New York State Nurses Association, (NYSNA), has represented the unit at Brooklyn Hospital for 15 years. The unit consists of about 600 employees of which the majority are registered nurses and the rest are nurse practitioners and nurse anesthetists.

Respondent's view of this case is that it actually results from collective bargaining between the committee of interns and residents (CIR) and Brooklyn Hospital. At the hearing, I ruled that I would permit litigation of the question when NYSNA first learned of the change in medical malpractice insurance affecting its unit members, but I would not permit litigation of the facts relating to Respondent's negotiations with CIR on behalf of residents employed at Brooklyn Hospital. Respondent made an offer of proof on the record which dealt with negotiations between Respondent and CIR beginning in 2001, the facts surrounding the filing of two charges by CIR and the withdrawal of the CIR cases. The offer of proof also included Respondent's belief that NYSNA was not interested in the issue of malpractice insurance and had no legitimate purpose in filing its charge on behalf of the nurses. As will be seen below, NYSNA's witness testified with respect to the issue of NYSNA's interest in malpractice insurance for nurses generally and the motivation for requesting information about Respondent's maintenance of such insurance for its unit members. Counsel for Respondent cross-examined NYSNA's witness concerning his discussions with agents of CIR about the CIR charges, his interest in malpractice insurance for nurses, his motivation in asking Respondent for information about such insurance and many other related topics.

According to Respondent, an impasse in the bargaining with CIR resulted when CIR adhered to its position that the residents should be covered by the CIR health insurance program and the Hospital adhered to its position that residents should remain in the Hospital health program. Counsel for Respondent stated that CIR filed various charges against Respondent to further its tactical position relating to medical coverage for residents. On February 25, 2003, CIR filed unfair labor practice charges in Case 29–CA–25448 relating to a request for information about medical malpractice insurance coverage maintained by the Hospital for the residents and relating to unilateral changes in medical and disability benefits for CIR unit members. That case was apparently settled. On July 8, 2003, CIR filed a charge in Case 29–CA–25707–1 concerning a unilateral change in malpractice insurance policies for CIR unit members. Counsel for Respondent explained that for a number of years Brooklyn Hospital had participated in a consortium of hospitals called CCC which was established to purchase commercial malpractice insurance. According to Counsel for Respondent, the Hospital believed that fraud had been committed in running the CCC program and served notice on CCC that it would bring suit. As a result, CCC canceled the Hospital's malpractice insurance. In May 2003, the Hospital set up a self-funded malpractice insurance program. I note that Respondent presented a witness on the dealings between CCC and Brooklyn Hospital. The testimony of this witness is set forth below.

According to counsel for Respondent, CIR eventually withdrew its charges for institutional reasons. Respondent urges that The New York State Nurses Association is acting as the agent for CIR and that the NYSNA charge in the instant case is time barred because the CIR knowledge of the malpractice insurance change should be imputed to NYSNA. Counsel for Respondent argued on the record that the evidence would show that the Nurses Association has "no interest in medical malpractice, this is not their issue."

B. Testimony of the Witnesses

James Ferris is employed by NYSNA and has been assigned since January 2003 as the NYSNA nursing representative for the unit at Brooklyn Hospital.[2] Ferris handles contract administration, grievances and negotiations.

Ferris, who is himself a registered nurse, testified that under the law a nurse can commit medical malpractice. Ferris testified that as a matter of course hospitals cover their nursing staff with medical malpractice insurance. This is a subject of common knowledge in the field. Registered nurses may purchase malpractice insurance individually. NYSNA recommends that its members purchase such insurance to cover themselves for incidents that arise outside the hospital where they are employed, for instance if they act in the capacity of a good Samaritan. Further, private insurance provides the covered nurse with her or his own attorney.

Ferris testified that before Thanksgiving 2003 he received an e-mail from his boss, Ann Parrish, the Union's senior director, instructing him to contact the CIR concerning information for malpractice insurance. This note, dated November 20, 2003, states:

> We have a quasi partnership with CRI [presumably CIR] and are willing to help each other where we can.
>
> They are still negotiating an initial agreement at Bklyn, and found out that the employer has ceased the malpractice insurance. They have made info requests and have a board hearing in Dec.
>
> This could have a tremendous impact on our nurses, so we should do an info request as well.
>
> Also, CRI may contact you in an attempt to strategize about a joint effort. The contact would be Linda.
>
> Thanks.

On cross-examination by counsel for Respondent, Ferris testified that Parrish sent him the November 20 e-mail after a meeting held on that day with Mark Levy, director of the CIR. Levy had informed Parrish that there was an issue concerning malpractice insurance at the hospital. This was not an item on the agenda of the meeting, it was an aside. Ferris stated that there had also been a meeting between the NYSNA and CIR on

[2] Ferris was hired on September 11, 2000.

October 14 or 15 but it was not possible to clarify the agenda of that meeting.

After the Thanksgiving holiday Ferris tried to track down the CIR representative and around the beginning of December he was given his name and cell phone number.[3] The CIR representative is Phil Andrews. Ferris spoke to Andrews on the telephone. Andrews told Ferris that the CIR had been in negotiations with the hospital for some time and that it had information that the hospital had changed its malpractice insurance but that Andrews did not know whether the new plan was self-funded or some other plan. Ferris testified that he had not heard of a change in the hospital's malpractice plan before November 20, 2003.

Around December 4, 2003, after his conversation with Andrews, Ferris met with Respondent's vice president of nursing, Ann Goonan. Ferris asked Goonan for information saying that he had heard that the nurses were not covered by malpractice insurance. Goonan replied that she was not familiar with that and she proceeded into the office of Thomas Grosso, senior vice president of human resources. Grosso came out to speak to Ferris. Grosso told Ferris that the hospital used to obtain insurance through an entity named CCC. Grosso said the prior plan was too costly and that the hospital had changed to a self-funded plan. Ferris requested some documentation. Ferris then asked how the hospital was able to self-fund an insurance plan in view of its bad financial circumstances. The record does not disclose Grosso's answer to this question. The record does not support the assertion in Respondent's brief that Grosso replied that the nurses were fully insured.

Ferris followed up with a written request dated December 4. The letter, which was titled "Malpractice Insurance Information Request: FIRST REQUEST", stated:

> Pursuant to our conversation about the above topic, I am requesting the following information concerning the change of malpractice insurance to a self-funded plan. These documents shall include, but are not limited to:
>
> These documents shall include, but are not limited to:
>
> Copies of all information, essential facts and documents the Employer has concerning the cancellation of malpractice insurance
>
> Copies of all information, essential facts and documents the Employer has concerning the formation of a self-funded malpractice insurance plan that covers all Registered Nurses employed by the Hospital.
>
> The method of distribution of these policies to this particular NYSNA member.
>
> Any other documents or facts pertaining to this matter.

Ferris testified that when he spoke to Andrews he had questions that the latter could not answer. Andrews suggested that Ferris call Ralph DeRosa, Esq., deputy general counsel of CIR. On December 5, Ferris spoke to DeRosa and discussed the malpractice issue and what CIR was doing with respect to it. Ferris told DeRosa that he had sent a request for information to the hospital and DeRosa offered to show Ferris the CIR request for information letter.

On December 5, Ferris received an e-mail from DeRosa which stated:

> Good to talk to you today about Brooklyn Hospital and its malpractice policy (or lack of one). As promised, attached please find the information demand we served on the hospital this summer.
>
> Please feel free to call me with any questions. . . .

Once Ferris saw the CIR information request he decided to use a lot of the language from the CIR demand because it had been drawn by attorneys. Ferris testified that he did not consult his own attorney at this point.

On December 8, 2003, Ferris sent Grosso a "SECOND REQUEST" which was much more detailed and very specific in its listing of information requested. This letter asked for a copy of the trust agreement and other documents, scope and limits of insurance, names of trustees, details of coverage under a commercial general liability policy, details of malpractice actions filed against the hospital since January 2003 where a registered nurse was a named defendant, details of previous malpractice coverage, details of any "tail coverage" for claims made after converting to the self-funded plan, amount of funds in the self-insurance trust fund, details of prior malpractice claims, copies of actuary documents describing the level of funding required for the self-insured plan at the hospital, and the costs of administering the self-funded plan. A third and "FINAL REQUEST" was sent by Ferris on December 18.

On December 19 Grosso wrote to Ferris. The substantive body of the letter states:

> Until May 17, 2003, The Brooklyn Hospital Center was insured by Combined Coordinating Council (CCC), for medical malpractice and general liability insurance. Effective May 18, 2003, The Brooklyn Hospital Center exited the CCC insurance program and became self-insured for *hospital* medical malpractice exposures including those of non-attending physician hospital employees. We have recently purchased *commercial* general liability coverage as well. [Emphasis in original.]

This is the only response to the information request ever received by NYSNA. Grosso was not called to testify herein.

In late December 2003, Ferris spoke to Andrews again and asked where the CIR was in the unfair labor practice proceeding. Andrews said CIR would withdraw the charge because the union did not wish to risk the outcome of a case where its right to bargain might be taken away. Andrews asked about the NYSNA demand for information. Ferris replied that he had sent a third request and contacted the Union's attorney and that the Union was planning to file charges if it did not receive full documentation.

Ferris testified that he was the person who spoke to the NYSNA lawyers about the malpractice insurance issue; they had not known of the problem before he informed them in mid-December 2003.

Ferris testified that it was widely known that Brooklyn Hospital was in dire financial straits. Ferris had participated in

[3] The person named Linda, cited in Parrish's e-mail, was not further referred to in the record.

resolving issues resulting from the closing of one of Respondent's facilities known as the Caledonian Hospital campus. Ferris had heard that there was $40 million in debt. Layoffs had occurred. Ferris stated that he was concerned that a hospital that was in such bad shape financially could not afford to self-fund an insurance plan. Although the hospital has been in bad shape financially for some time, Ferris had not previously asked abut malpractice insurance because he did not know that it was a problem.

Ferris knew generally that to create a self-funding plan there must be a bank account, there must be a plan administrator and papers must be filed with the State Insurance Board.[4]

Ferris stated that it was important for an expert to examine the documents relating to the Respondent's self-funded plan to see whether the nurses were adequately covered. If the hospital should file for bankruptcy it might be relieved from lawsuits and the liability might be put on nurses individually. Further, the documents would show whether the fund was insulated from being included in a bankruptcy settlement with creditors of Respondent. Finally, NYSNA wanted to know whether the self-funded plan gave similar coverage to nurses as a commercial plan would provide.

On February 10, 2004, the CIR withdrew its charge in Case 29–CA–25707–1, citing delays and the Board's unwillingness to seek injunctive relief. The CIR informed the Regional Office that it had initiated an investigation by the New York State attorney general into Brooklyn Hospital's malpractice insurance plan instead of pursuing the unfair labor practice proceeding.

Ferris testified that on March 30, 2004, he attended three membership meetings at the hospital with the three shifts of NYSNA members. Nursing Vice President Goonan came to two of these meetings. At one meeting some nurses asked Goonan whether they were covered under malpractice insurance. Goonan gave a reply but the nurses did not understand what she was describing. Then the nurses asked Ferris whether they had malpractice insurance. Ferris told them that he had not seen the documents and he could not give a definite answer. Goonan was not called to testify herein.

The parties agree that from January 2003 to December 2003 NYSNA did not make any bargaining proposal regarding medical malpractice at Brooklyn Hospital. Although Respondent sought a stipulation from NYSNA that never in 15 years had the Union sought information or made a proposal concerning malpractice insurance, Counsel for the Union stated, "[W]e don't want to stipulate we've never ever." When counsel for the Respondent pressed for his version of the stipulation the Union agreed to seek more information and the administrative law judge stated on the record that the matter would be dealt with again. In the event, the Union did not present any further information and it did not agree to Respondent's proposed stipulation. Ferris testified that he could not say whether any of his predecessors representing nurses at Brooklyn Hospital had ever raised the issue of malpractice insurance. Contrary to its stated intention on the record Respondent did not present any witness concerning the history of bargaining between NYSNA and the hospital. Thus, there is no support in the record for the statement in Respondent's brief that "NYSNA had *never* broached the subject of medical malpractice insurance coverage." (Emphasis in original.)

Harry Franklin, Esq., general counsel of CIR, made an appearance herein to answer a subpoena served by Respondent. Franklin stated on the record that a search of the CIR files indicated that CIR had first learned of the change in medical malpractice insurance by Respondent on June 25, 2003. The files do not show any communication between CIR and NYSNA before June 25 on the issue of malpractice and they do not show any communication between CIR and NYSNA between June 25 and July 1, 2003.[5] The CIR files show that it did not communicate with its members or hand out flyers concerning malpractice insurance before July 1, 2003. At the hearing the CIR turned over material to Respondent that was responsive to the subpoena.

Richard Braun Jr. has been the executive vice president of administration and finance of Respondent for about 2 years. He explained the CCC malpractice insurance policy which was in effect until May 19, 2003. Braun stated that Brooklyn Hospital was one of eight partners in a pool to buy commercial insurance. CCC was the name of the pool. The idea behind CCC was that the partners would gain efficiencies if they purchased insurance as a group to cover the hospitals, residents, nurses, and attending physicians. Braun gave many details of the operations of CCC which are not necessary to be repeated here. According to Braun, the operations of CCC were not conducted in the manner that Respondent had believed to be the case. Braun testified in response to questions from counsel for Respondent that part of the CCC coverage was funded through a commercial insurance policy from National Union Fire Insurance Company of Pittsburgh. There were "other layers of reinsurance or no insurance. So the payments there [to malpractice victims] would be made by CCC Insurance Company and then either taken out of CCC's captive insurance company or a bill sent to a reinsurer or after all that . . . a piece allocated back to us and ask us to write a check." Eventually, Respondent believed that CCC was providing coverage to the extent of the premiums paid by Respondent but would bill Respondent for the cost of any payments made to malpractice victims that were in excess of the actual premium payments. When Respondent found out the state of affairs there were 9 or 10 months of meetings and eventually litigation. During those 9 or 10 months, Braun stated, the hospital wanted to change the structure of CCC but CCC was only interested in "us leaving the program." Braun stated that CCC was asking Respondent to pay $14 million for the current year and $27 million for 1999 and prior years. Braun testified that the hospital did not have the money. On May 2, 2003, CCC terminated Respondent's malpractice insurance effective May 17. The reasons given in the notice were:

> breach of agreement, termination from Program, and adverse loss experience under the expiring terms and conditions.

[4] Ferris knows this due to his knowledge of car insurance requirements.

[5] The NYSNA filed its charge on December 31, 2003, so July 1 of that year is significant in terms of Sec. 10 (b) of the Act.

Braun was not able to give a complete description of the CCC coverage and compare it to the self-funded malpractice insurance because he has not seen all the documents.[6] The present hospital administration does not have all the relevant documents in its possession. In effect, Braun said that he did not know exactly what the CCC coverage provided. Braun stated that under the CCC scheme, if a nurse were sued for malpractice then any amounts payable would be entirely paid by CCC. If the amount to be paid exceeded the premiums paid by Respondent then CCC would bill the Respondent for the excess amount. In addition, Braun testified, there was a question whether the pooled resources from the other hospitals in CCC also covered Brooklyn Hospital's liability for the excess amount. Braun did not know the answer to this question. However, Braun said that under the present self-insured plan "I have seven less hospitals' vicarious liabilities that I'm responsible for."[7]

Braun stated that the hospital had been self-insured before 1985 and when the CCC policy was terminated the hospital used the same trust instrument and irrevocable trust fund that had been in use formerly to begin a self-funded program.

Braun stated that he "believed" that the nurses had the same malpractice coverage under the CCC coverage as under the present self-funded arrangement. Braun said there was no limit on the present coverage for nurses. Thus, Braun concluded that the nurses had unlimited coverage. The most recent bank statement for the self-funded insurance trust indicates a balance of $5,406,486. This amount represents all the malpractice insurance maintained by the hospital for itself, nurses, and residents.[8] Braun stated that he "believed" that the present self-funded plan was solvent. Braun said that if a judgment against the hospital were in an amount over the sum in the trust account the hospital does not have the funds to pay that judgment.

C. Discussion and Conclusions

It is undisputed that Respondent did not give the Union notice of and an opportunity to bargain about the change in malpractice insurance for members of the unit. Respondent's answer admits that it failed and refused to furnish the Union with the information it requested concerning malpractice insurance.

I shall deal with Respondent's defenses as they are presented in its brief.

Respondent's brief argues that "the evidence adduced at the Hearing demonstrates that the Complaint is time-barred . . . because NYSNA was aware of the Hospital's change in medical malpractice insurance coverage more than six months prior to filing its charge."[9]

This contention is not supported by the record. Ferris testified that he first learned of the Brooklyn Hospital malpractice insurance issue on November 20, 2003, in an e-mail from Parrish who had met with Levy of the CIR on that very day. Counsel for the CIR, in response to Respondent's subpoena, stated on the record that the CIR files show that it learned of the change in malpractice insurance on June 25, 2003. The CIR files do not show that CIR communicated in any way with NYSNA between June 25 and July 1 and they do not show any communication by CIR with NYSNA on the issue of malpractice insurance before June 25. The CIR files show that it did not issue any communication to its members concerning malpractice insurance before July 1, 2003. Although Respondent's brief speaks of CIR flyers circulated in the hospital in May or June, Respondent did not introduce any such flyers nor produce a witness who saw such flyers. Thus, NYSNA could not have learned of the issue before July 1 by being told by a CIR unit member employed by Brooklyn Hospital or by obtaining a supposed CIR flyer. Moreover, the terms of Parrish's November 20 e-mail to Ferris suggest that she had just learned of the medical malpractice issue herself from an agent of CIR and that she was informing the NYSNA representative at Brooklyn Hospital.

I note that Respondent did not request on the record that the ALJ order Parrish to appear and testify nor did it request an adjournment in order to serve her or anyone other member of NYSNA's management with a subpoena.[10]

Respondent's brief argues that "even if NYSNA did not have actual knowledge of the . . . change in medical malpractice insurance coverage more than six months before filing its charge . . . NYSNA filed its charge at the behest of and as an agent of the . . . CIR . . . an entity that had knowledge of the . . . change in medical malpractice insurance coverage more than six months prior . . . NYSNA acted as CIR's agent in filing its charge, NYSNA had constructive knowledge of the . . . change in medical malpractice insurance coverage."

This contention is not supported by the record. Parrish's note to Ferris, quoted above, states that CIR and NYSNA are willing to help each other where they can and concludes that an agent of CIR named "Linda" might contact Ferris to strategize

[6] Braun did not provide the complete CCC policy in response to General Counsel's subpoena. He stated he was sure the hospital had this document "somewhere." Braun then explained that the entire policy would consist of voluminous documents and that he was not sure what it was and what it said. Counsel for Respondent agreed that Braun "doesn't know what the insurance policy is." Braun did not provide the complete self-insurance fund actuary report in response to General Counsel's subpoena because he decided that parts of it were not relevant. Braun is not an attorney.

[7] In evaluating Braun's testimony I have taken into consideration that some of his answers given in response to counsel for Respondent's leading questions were inaccurate and were inconsistent with testimony he gave in response to other questions. I cautioned counsel on the record that he could not supply Braun's testimony by asking leading questions.

[8] Attending physicians are insured under another policy.

[9] I note that Respondent bears the burden of proof with respect to showing that NYSNA was aware of the change in malpractice insurance at a time 6 months before the filing of the charge.

[10] Respondent requested that the Union designate a representative pursuant to Sec. 30(b)(6) of the Fed. R. Civ. P. to testify about the subject of contacts between CIR and NYSNA during which CIR purportedly asked NYSNA to file a charge on its behalf. First, the Board has never held that this rule should be applied by its ALJ's. Second, Respondent consented to Ferris making a telephone call to the NYSNA office to inquire about any contacts between CIR and NYSNA. Ferris then responded to counsel for Respondent's questions, stating that he believed he had inquired about anyone who would have been involved in a Brooklyn Hospital matter on behalf of NYSNA.

about a joint effort. The record contains no evidence at all that "Linda" ever contacted Ferris and the record contains no evidence that he strategized with anyone from CIR with an object of helping CIR. Ferris testified freely about his conversations with Andrews and DeRosa. In its extensive cross-examination of Ferris, Respondent did not elicit any testimony that he was taking any actions with an aim to helping CIR in its bargaining with Respondent. Respondent did not elicit any testimony from Ferris that would show that CIR asked or authorized Ferris to be its agent in the matter of malpractice insurance. Ferris was the NYSNA agent who had charge of the unit at Brooklyn Hospital and he is the person who first contacted the NYSNA attorneys to inform them that he was involved in a controversy regarding malpractice insurance. Ferris explained his reasons for pursuing the matter on the record. There is no testimony that Ferris held himself out as the agent of CIR nor that management of the hospital believed that he had apparent authority to act for CIR. The record shows that Ferris sent his first information request to the Respondent in his own words. After that he obtained a copy of the CIR attorney's form of information request and he used some of that language in his second information request. The mere use of legal verbiage from a prior document does not create an agency relationship with the drafter of the document.

Furthermore, contrary to the assertion of counsel for Respondent, NYSNA does have an interest in medical malpractice and this is very much an issue that concerns NYSNA. Parrish's e-mail to Ferris points out that the change in medical malpractice insurance "could have a tremendous impact on our nurses, so we should do an info request as well." This shows that the motivation for the NYSNA request was concern for its own unit members. The record shows that nurses may be held to have committed medical malpractice and that NYSNA routinely recommends that its members purchase their own insurance for incidents arising outside the hospital. The record shows that NYSNA was concerned that Respondent, whose financial difficulties were well known, had decided to undertake a self-funded program. NYSNA was understandably concerned that this insurance might not protect its members. The record shows that the nurses themselves were concerned about whether they were covered by malpractice insurance and that they asked both Goonan and Ferris about this subject. It would be a pernicious doctrine that held that a union which dealt with management about an issue of concern to its members became an agent of every other union at the same employer which might have an interest in the same subject.

The fact that NYSNA had not raised the malpractice insurance issue in the year 2003 does not show that such insurance is not important to the Union and its members. Ferris' testimony shows that it is common knowledge in the industry that hospitals cover their nurses for medical malpractice. Of course, such coverage benefits the hospital as well as its nurses. No significance should be attached to the failure to inquire about malpractice insurance for 1 year. There are doubtless many subjects that are of importance but are not discussed for a year or more between labor and management.

Respondent's brief argues that the Union waived its right to negotiate concerning medical malpractice insurance coverage, stating its belief that NYSNA had never raised this subject in the past and citing the broad management-rights clause of the collective-bargaining agreement.

The failure by NYSNA to inquire about malpractice insurance in 2003 did not constitute a waiver of a its right to bargain about this change in terms and conditions of employment. The case cited by Respondent is inapposite. In *American Diamond Tool, Inc.*, 306 NLRB 570 (1992), the Board found that the union had actual notice of certain layoffs but had not sought to bargain about them. In the instant case, the Union acted as soon as it received notice of a change in medical malpractice insurance.

Further, the management-rights clause of the collective-bargaining agreement does not waive the Union's right to bargain over malpractice insurance. The language quoted above does not contain a clear and unequivocal waiver of the Union's right to demand bargaining over a change in medical malpractice insurance coverage for the nurses. Nor does the contract contain a "zipper clause" which might have operated as such a waiver.

Respondent's brief argues that the change in coverage was caused by circumstances outside the hospital's control because the policy was cancelled with 2 weeks notice. Thus, Respondent was not required to bargain with the Union concerning the change.

This argument is without merit. Braun testified that Respondent negotiated with CCC for 9 or 10 months over the issue of malpractice insurance. CCC was asking the hospital for many millions of dollars which Braun testified it did not have. It was clear to Braun during this time that CCC wanted Brooklyn Hospital to leave the program. At the end of this period of negotiations the policy was cancelled. Although 2 weeks written notice was provided, Braun's testimony makes clear that this was not a surprise to Respondent. This is not a case where an unforeseen emergency necessitated immediate action by an employer. Respondent had many months notice that a change in malpractice insurance coverage for nurses would probably occur because CCC was asking the hospital for payments that it could not afford and because CCC would not agree to change its structure in ways demanded by Brooklyn Hospital. Even during the 2-week period it could have given notice to the Union that the change would take place by a date certain.

Angelica Healthcare Services, 284 NLRB 844 (1987), cited by Respondent, does not support its position. In that case the Board found that the employer had several months notice that it might lose an important account and was then given 2 weeks notice of cancellation. The Board found that the employer's unilateral changes after it lost the account were unlawful. Similarly, in *Hankins Lumber*, 316 NLRB 837 (1995), cited by Respondent, the Board held that a unilateral change was not due to "compelling economic considerations" where a problem had been known to the employer for months and did not occur precipitately. The Board found that the unilateral change violated the Act.

Christopher Street Owners Corp., 294 NLRB 277 (1989), cited by Respondent, does not support its position. In that case the Board found that the employer violated the Act by failing to notify the union that the employees' medical insurance was

canceled and by failing to bargain with the union over the effects of the cancellation. Further, the Board held that if the employer then decided to act as a self-insurer that unilateral action would have violated the Act. Thus, *Christopher Street Owners* supports the General Counsel's position in the instant case. Nor does *Clear Pine Mouldings,* 238 NLRB 69 (1978), cited by Respondent, support its position. In that case no violation was found for ceasing to make contributions to a pension fund and a health/welfare fund that would not continue to accept the rate agreed to by management and the union in the expiring collective-bargaining agreement. The parties had been bargaining over these subjects, among others, and the employer then deposited the pension contributions in an escrow account with the knowledge of the union. However, the Board also found that the employer violated the Act by unilaterally purchasing a substitute health/welfare plan without consulting the union. In the instant case, the hospital did not bargain with the Union about the malpractice insurance issue and it did not provide notice that the old insurance would cease and that it was substituting a self-insured plan.

Respondent argues that it had no duty to respond to the Union's request for information because the request was made in bad faith and only to assist CIR. Further, according to Respondent's brief, the hospital has produced all the information in its possession in response to the information request. I note that this position contradicts Respondent's answer herein.

The allegation of bad faith has no merit and I will not discuss it further. Moreover, the statement in Respondent's brief that it has produced all the information in its possession is contrary to fact. First, it is undisputed that Grosso did not produce any information in response to the Union's request. Grosso replied to Ferris with one paragraph in a letter quoted above. Certain documents were subpoenaed by the General Counsel at the hearing. Braun testified that he had not produced complete copies of the material requested because he deemed certain subjects not relevant to the Union's concerns and because some documents were in the hands of Respondent's lawyers handling litigation with CCC. Manifestly, Respondent is able to obtain copies of documents in the possession of its own lawyers. It is undisputed that Respondent did not provide any of the documents to NYSNA that were later produced in response to subpoena at the instant hearing. It is also undisputed that Braun did not provide complete documents even in response to the subpoena. Further, the production of documents in response to a subpoena at an unfair labor practice hearing does not fulfill Respondent's duty to bargain with the Union and provide information to the Union.

Respondent argues that it was not required to bargain with NYSNA concerning the change in malpractice insurance because the change was not a material, substantial and significant change affecting terms and conditions of bargaining unit employees, citing *United Technologies Corp.*, 278 NLRB 306, 308 (1986). To sustain this argument Respondent urges that the insurance coverage for nurses did not change when CCC ceased to cover them and the self-funded program was instituted. This is contrary to Braun's testimony. Braun stated that he was not able to give a complete description of the CCC coverage and compare it to the self-funded scheme because he has not seen all the documents relating to CCC. Manifestly, if Braun did not know the actual provisions of CCC coverage of nurses he could not state definitively that the CCC coverage was the same as the self-funded plan now in effect. Braun did not know whether all the partners in CCC were liable for judgments against the hospital in excess of the premium payments or whether CCC would bill only Brooklyn Hospital for the excess. Moreover, it is clear from Braun's testimony that CCC would pay the amount of a judgment against a nurse and then bill the hospital for the excess. Thus, the hospital would be liable for the excess to CCC. Under the present plan if a judgment came in against a nurse for more than the sum in the self-funded trust fund, Braun said, the hospital does not have the money to pay the judgment. This leaves open the possibility that the nurse would be sued for the excess over the amount in the trust fund.

CONCLUSIONS OF LAW

1. At all material times the New York State Nurses Association has been the exclusive representative of the following appropriate unit of employees of Respondent by virtue of Section 9 (a) of the Act:

> Each full-time and part-time employee licensed or otherwise lawfully entitled to practice as a registered professional nurse employed by the Employer at its facilities to perform registered professional nursing as a staff nurse, senior staff nurse, assistant patient care coordinator, clinician and clinical nurse specialist, excluding patient care coordinators, assistant supervisors, supervisors, associate patient care coordinators, instructors, IV team supervisors, quality assurance research analysts, assistant and associate directors of nursing, senior vice president of nursing, ambulatory care administrator and supervisors as defined in the Act.

2. By changing its medical malpractice insurance coverage for unit employees without notice to the Union and an opportunity to bargain with respect to the change and the effects of the change Respondent violated Section 8(a)(5) and (1) of the Act.

3. By failing to furnish the Union with information it requested about medical malpractice insurance coverage for unit employees Respondent violated Section 8(a)(5) and (1) of the Act.

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.

The General Counsel, citing *Carrier Corp.*, 319 NLRB 184, 199 (1995), requests that a restorative order conditioned on the affirmative desires of the affected employees as expressed through their bargaining agent should be issued, with a 60-day period to consider whether to request reinstatement under the old plan or a similar plan. In the instant case, I do not believe that it would be appropriate to order reinstatement to the CCC plan, without more. First, the Union did not receive the information it requested about the CCC coverage and the new coverage under the self-funded plan and the Union would therefore find it impossible to decide what coverage to seek on behalf of unit employees. Further, it is undisputed that Respondent and

CCC are engaged in litigation which followed about 9 months of negotiations between them in an attempt to resolve the issues relating to the medical malpractice coverage. Thus, it is not clear that CCC would agree to reinstate the coverage for the unit employees even if Respondent were ordered to pay for such coverage. I will therefore recommend that the Respondent be ordered to provide the information requested by the Union in the letters dated December 8 and 18, 2003, within 30 days of the date of the Board Decision herein or a court of appeals decision enforcing the Board Decision if Respondent refuses to comply. I will further recommend that the Union shall then have 60 days from the date the complete information is turned over by Respondent to decide whether to demand reinstatement of the CCC coverage, or a similar plan if CCC is unwilling to reinstate coverage, or continuation of the self-funded plan which was instituted by Respondent in May 2003. The Respondent should also make whole any employees who have suffered losses as a result of its unilateral action in changing the level of insurance coverage, if such is found to be the case.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[11]

ORDER

The Respondent, The Brooklyn Hospital Center, Brooklyn, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Changing its medical malpractice insurance coverage for employees in the unit described above represented by The New York State Nurses Association without notice to the Union and an opportunity to bargain with respect to the change and the effects of the change.

(b) Failing to furnish the Union with information it requested about medical malpractice insurance coverage for unit employees.

(c) 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) In the manner set forth in the remedy section above, furnish the Union with the information it requested about medical malpractice insurance coverage for unit employees.

(b) In the manner set forth in the remedy section above, and upon written notice from the Union, reinstate the CCC medical malpractice insurance or similar coverage or continue the self-funded plan instituted in May 2003.

(c) Make whole any employees who have suffered losses as a result of unilateral changes in the medical malpractice insurance coverage.

(d) Within 14 days after service by the Region, post at its facility in Brooklyn, New York, copies of the attached notice marked "Appendix."[12] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 17, 2003.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

[11] 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.

[12] 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."