

**ARBITRATION PROCEEDING
BEFORE MARGARET M. KERN**

YALE-NEW HAVEN HOSPITAL

and

**Index Nos. 061(c)
061(d)
078**

**NEW ENGLAND HEALTH CARE
EMPLOYEES, DISTRICT 1199, SEIU**

Bill Aseityne, Esq., General Counsel, and Susan Robfogel, Nixon Peabody LLP, for Yale-New Haven Hospital

John M. Creane, Esq., Law Firm of John M. Creane, for New England Health Care Employees, District 1199, SEIU

Statement of the Case

MARGARET M. KERN, Arbitrator. These cases were submitted for resolution on December 9, 2006 (Index No. 61(d)), January 17, 2007 (Index No. 61(c)), and February 7, 2007 (Index No. 078) pursuant to the terms of the Election Principles Agreement (agreement) entered into between Yale-New Haven Hospital (employer) and New England Health Care Employees, District 1199, SEIU (union) on April 13, 2006.

Hearings were held on January 29 and February 12, 2007 at which all parties were present. Witnesses were examined and cross-examined under oath and documents were admitted into evidence (Appendix A).

A. The Facts

1. The events leading up to the hearing on January 29

On December 9, 2006, the union submitted a number of cases for resolution pursuant to the terms of the agreement. Among the charges filed was the claim that on December 7, 2006, building services manager Elmer Gonzalez conducted a mandatory meeting of employees on work time to discuss the union and during the course of that meeting threatened employees with reprisals if they supported the union (Index No.

061(d)). Mary Carr, an environmental associate, was one of the employees who attended that meeting.

On January 17, 2007, counsel for the union advised counsel for the employer in writing that at the hearing scheduled for January 29, 2007 the union intended to offer the testimony of Carr regarding two matters. The first matter was the December 7, 2006 meeting involving Gonzalez (Index No. 061(d)). The second matter, raised for the first time by the union, involved conduct allegedly engaged in by Marna Borgstrom, CEO, on December 8, 2006 (Index No. 061(c)). Counsel for the union wrote in relevant part:

Employee Mary Carr will testify about 2 incidents. The first incident occurred on or about December 7th on floor 7-2. Ms. Carr witnessed Marna Borgstrom, CEO of Yale-New Haven Hospital, question employees about their views on the Union. When one employee said, "I'm for the Union," Ms. Borgstrom responded, "You shouldn't be." The second incident occurred on or about December 8th and involves Building Services Manager Elmer Gonzalez. Mr. Gonzalez told employees that if the Union won, employees would lose overtime and that Union dues are increasing in 2007.

On January 25, 2007, counsel for the employer moved to dismiss the two cases involving Carr claiming, inter alia, they were untimely filed.

On the morning of January 29, 2007, the date of the scheduled hearing, Carr arrived for work at 7:00 a.m. She told Hector Mendez, a lead person in the department, that she had to "go across the street" at 10:00 a.m. Mendez said they should go to see Walston to tell him. En route they met John Pagano, another manager, and told him that Carr had to go to a meeting across the street. Pagano said they should tell Walston and that Walston would be in the office shortly. When Walston arrived, Carr told him that she had to go "across the street" and Walston asked, "Go across the street for what?" Carr answered, "For a meeting," and showed him a piece of paper that had the information about the hearing that day. After seeing the paper, Walston said, "Oh yeah, you need to go over there."

Carr left the office and reported to her work assignment on the seventh floor. She stocked her cleaning cart with clean rags and chemicals and began working. At 9:50 a.m., a union representative called her and told her it was time to go across the street to the hearing.

At 10:00 a.m. the parties and I convened to conduct the hearing. Counsel for the employer renewed his objections to Carr being allowed to testify. The objection was sustained as to Carr's testifying about the alleged conduct in Index No. 061(c), but was overruled with respect to her testifying in Index No. 061(d). Ms. Carr was called by the union and she proceeded to testify regarding the December 8, 2006 meeting she attended with manager Gonzalez.

2. Carr's testimony

Carr testified that on December 8, 2006, she was told by Walston that she was to attend a department meeting at 9:00 a.m. She went to the environmental services break room in the basement of the south pavilion at the designated time. Present for the meeting were Gonzalez, Walston, Carr, and two other eligible employees. The meeting was held on work time.

Gonzalez began the meeting by thanking the employees for their work in keeping the hospital clean and said that good performance would make their PIP bonus higher. He then started to talk about the union. According to Carr, Gonzalez did not tell the employees at that point that the meeting was "voluntary," nor did he say that employees were free to leave. Gonzalez said "we work here like a family" and the employees did not need a union. He said if the union came in employees would lose their PIP benefits and their prescription coverage. He said the union would take away employees overtime and that as of January 1, 2007, union dues were going to go up. Finally, Gonzalez said "as soon as a union gets in here you get a strike and you can't live off \$30 a week."

Carr was excused from the witness stand at around 11:00 a.m. The employer did not call Gonzalez or Walston to testify and no further evidence was adduced in connection with Index No. 061(d).

3. Carr's return to work on January 29

After testifying, Carr returned to the seventh floor where her cart was located. She resumed her work, pushing her cart and cleaning, when she noticed a piece of paper under the rags that had not been there when she left to testify. The paper was taped to the cart, turned face down, partially hanging over the side. "Whoever put it there, they had to move my rags...and tape it there and put the rags neat right back on top. That's how it was because my cart was neat." She removed the paper, turned it over and saw the following image:



\$18

Size



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Carr immediately looked around but saw no one in the area. She folded the paper, placed it in her pocket, and continued working. After thinking about it for a few minutes, she decided the paper was meant as harassment and she went to speak to her supervisor, Kent Zergeibel, director of environmental services. She went to his office and asked him if he had a minute. He answered that he did, but that he was very busy. She said, "This is harassment." Zergeibel began discussing a prior incident in which Carr was involved. Carr briefly defended her actions in the prior incident that Zergeibel was referring to, but decided that rather than discuss the immediate incident with him, she would return to work. As Carr was leaving work that day she met a union representative, told him what had occurred, and gave him the paper that had been taped to her cart.

4. The events of January 30

Carr arrived for work the following day, January 30, at about 7:00 a.m., clocked in and went to the environmental services break room to pick up her work beeper. The beepers are usually located on a long table in the break room and when she walked into the room that morning Mendez was sitting at the head of the table. A copy of the same flyer, with the image of Vladimir Putin and the "Stop Snitching" sign, was taped to the table, approximately two feet from where Mendez was sitting. When she saw the paper she moved back and said, "Oh no." Mendez asked her what she was doing and told her she should take her beeper. Carr said, "Look at that crazy thing." Mendez replied, "Oh."

Carr left to go to her locker. The locker room has benches and when she got to her locker, a third copy of the same paper was taped to the bench in front of her designated locker. She removed the paper from the bench, folded it and put it in her pocket. When she left the locker room she walked past Mendez who asked her what was wrong. She kept walking and went to work.

4. The union's charge

On February 2, 2007, the union filed a rapid response charge regarding the Stop Snitching flyer.

5. The employer's investigation

David D'Agostino is an administrative lieutenant in the employer's department of protective services. He was notified of the union's charge on the afternoon of February 2. He called Carr at home and arranged to meet with her the following day.

Johnson testified that on February 2 he interviewed Zergeibel as well as a number of the managers and supervisors in the building services department. All denied any knowledge of who taped the flyer to Carr's cart, or who taped the flyer on the break room table, or who taped the flyer to the bench in front of Carr's locker.

On February 3, 2007, D'Agostino and Alvin Johnson, vice-president, met with Carr to interview her regarding the events of January 29 and 30. At Carr's request, also

present for the meeting were Walston, Mendez, and Zergeibel. After Carr related what had happened to her, Zergeibel apologized for not having taken the time to listen to her when she came to his office on January 29. D'Agostino offered to provide security for her from her home to work and/or from where she parked her car to the hospital. D'Agostino gave Carr his business card, wrote his cell phone number on it, and told her she had access to him seven days a week, twenty four hours a day. He also told her that if she observed anything suspicious, that she should also report it to the New Haven Police Department. Sometime after that meeting, D'Agostino saw Carr in the cafeteria and asked her how things were going. She said that things were fine and that she felt safe. She also told him she still had his card.

The employer's management information systems department identified two computer terminals on the sixth floor of the hospital that had been used to access the website www.putinstopsnitching.com. One computer was used to access the website on January 26, 2007 at 8:12 a.m., and the second computer was used to access the website on January 30, 2007 at 7:06 a.m. Neither computer, however, was password protected and it could not be determined which staff member of the hospital used the computers at these times.

At a management meeting on February 8, Johnson reiterated the employer's policy regarding workplace aggression. The employer also redistributed a copy of the policy throughout all departments.

B. Analysis

1. Index No. 061(c)

In this case the union claims CEO Marna Borgstrom violated the terms of the election principles agreement when she engaged in certain conduct on December 7, 2006. The union did not seek to submit this case to arbitration, however, until January 17, 2007, well beyond the filing deadline set forth in the election principles agreement. For this reason, the claim is dismissed.

2. Index No. 061(d)

a. Mandatory nature of the December 8 meeting

On December 8, 2006, employees were mandated to attend a departmental meeting and at that meeting manager Elmer Gonzalez talked about the union. Paragraph 3B of the election principles agreement provides that hospital supervisors, managers, and agents shall not initiate conversations with formal or informal groups regarding the subject of unionization of eligible voters at mandatory meetings. By conducting the December 8 the employer, by Elmer Gonzalez, violated this provision of the agreement.

b. December 8 meeting held on work time

The purpose of the December 8 meeting was to persuade employees to vote against the union and therefore constituted solicitation. *Washington Fruit and Produce Co.*, 343 NLRB No. 125 (2004). As previously discussed in prior decisions, the employer violated its own no-solicitation/no-distribution rule by conducting this meeting, and violated previous arbitration rulings forbidding such conduct.

c. Unlawful and objectionable comments made by Elmer Gonzalez

Mary Carr's testimony regarding the December 8 meeting was uncontradicted. Elmer Gonzalez was apparently no longer employed at the time of the hearing and was not called to testify. James Walston was still employed at the time of the hearing and was at work on the morning of the hearing. When Carr showed him the piece of paper stating that she needed to appear to testify at 10:00 a.m., Walston responded, "Oh yeah, you need to go over there." Yet the employer failed to call Walston as a witness.

It is settled "that when a party fails to call a witness who may reasonably be assumed to be favorably disposed to the party, an adverse inference may be drawn regarding any factual question on which the witness is likely to have knowledge." *International Automated Machines*, 285 NLRB 1122, 1123 (1987), enfd. mem. 861 F.2d 720 (6th Cir. 1988). I draw an adverse inference against the employer for its failure to call Walston to testify about the December 8 meeting, and I conclude that had Walston testified, he would have corroborated Carr's testimony.

The credible and uncontradicted testimony of Mary Carr establishes that on December 8 the employer, by Elmer Gonzalez, threatened employees with the loss of wages and benefits if the union were selected as their collective bargaining representative. These statements constituted unlawful threats in violation of Section 8(a)(1) of the National Labor Relations Act and also violated Section 3A of the election principles agreement.

Carr's testimony further establishes that Gonzalez threatened employees that if they selected the union as their representative a strike would be inevitable. The Board construes this type of statement as a threat by an employer that it will refuse to bargain in good faith in order to insure that employees will have to strike. *See, Devon Gables Lodge & Apartments*, 237 NLRB 775 (1978), enfd. 615 F.2d 509 (9th Cir. 1980). By making this statement, the employer, by Elmer Gonzalez, threatened employees in violation of Section 8(a)(1) of the Act and also violated Section 3A of the election principles agreement.

Carr's testimony finally establishes that Gonzalez misrepresented to employees that union dues were going up as of January 1, 2007.¹ This statement violated Section 3A of the election principles agreement.

¹ For a full discussion of the dues increase issue, see the decision in Index. No. 068 issued today.

3. Index No. 078

There is insufficient evidence that an agent of the employer was responsible for the placement of the threatening flyers on Mary's Carr's work cart, on the table in the environmental services break room, or in the employee locker room. The evidence does, however, establish that the flyers were placed by an employee of the employer, and the issue is whether the employer condoned this conduct.

The Act imposes an affirmative duty upon an employer to insure that its obligation to maintain discipline in the plant and to provide its employees with the opportunity to work without interference from their coworkers is not delegated or surrendered to any union or antiunion group. *Newport News Shipbuilding*, 236 NLRB 1499, 1506-1507 (1978). An employer who participates in, ratifies, approves, or condones threats of physical violence or assaults by employees on other employees because of their union or anti-union sympathies violates the Act, *Newton Brothers Lumber Co.*, 103 NLRB 564, 569 (1953); *Fred P. Weissman Co.*, 69 NLRB 1002 (1946), *enfd.* 170 F.2d 952 (6th Cir. 1948), *cert. denied* 336 U.S. 972 (1949). Responsibility does not depend on the employer having advance knowledge that the conduct will be engaged in, but does arise if the employer is immediately advised of the conduct and does nothing to prevent its continuance. *Detroit Gasket and Manufacturing*, 78 NLRB 670 (1948). There is no *per se* criteria for determining whether an employer has ratified or condoned misbehavior, and it is the totality of circumstances that must be considered. *The Cross Co.*, 143 NLRB 1005, 1012 (1963), *enfd.* 344 F.2d 171 (D.C. Cir. 1965).

I conclude that under all of the circumstances, the employer did not ratify or condone the actions of the employee or employees who were responsible for threatening Mary Carr because she testified against the employer's interests on January 29. As soon as Alvin Johnson became aware of the situation, he took steps to assure Carr that the matter was being taken seriously. Carr was offered around-the-clock security protection, and Johnson re-emphasized to managers and supervisors the seriousness of workplace violence and threats of violence. Importantly, there were no further incidents. For these reasons, the union's claim is dismissed.

C. Remedy

I am reserving ordering a remedy in Index No. 061(d) until a later date.

Dated: June 7, 2007
Chappaqua, New York


Margaret M. Kern
Arbitrator

Appendix A

Exhibits

Index No. 061(c)

- Joint Exhibit 1 Letter dated January 17, 2007 from John M. Creane to Ernest J. Collazo re: hearings January 19 and 29
- Joint Exhibit 2 Employer's motion to dismiss

Index No. 061(d)

- Joint Exhibit 1 Union's omnibus filing dated December 12, 2006
- Joint Exhibit 2 Letter dated January 17, 2007 from John M. Creane to Ernest J. Collaza re: hearings January 19 and 20
- Joint Exhibit 3 Employer's motion to dismiss

Index No. 078

- Joint Exhibit 1 Letter and fax cover sheet dated February 7, 2007 from John M. Creane invoking arbitration
- Joint Exhibit 2 Letter dated February 2, 2007 from John M. Creane to Alvin R. Johnson
- Joint Exhibit 3 Putin flyer
- Joint Exhibit 4 Letter dated February 6, 2007 from Richard D'Aquila to John M. Creane

- Employer Exhibit 1 Initial Report of Department of Protective Services
- Employer Exhibit 2(a) Handwritten notes
- Employer Exhibit 2(b) Handwritten notes
- Employer Exhibit 2(c) Handwritten notes
- Employer Exhibit 3 Supplemental Report of Department of Protective Services
- Employer Exhibit 4 Report of R.J. Heffernan Associates Inc.
- Employer Exhibit 5 Notes of Alvin R. Johnson
- Employer Exhibit 6 February 10, 2007 submission from employer to arbitrator
- Union Exhibit 1 February 9, 2007 submission from union to arbitrator