STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

LOCAL #150, SERVICE & HOSPITAL EMPLOYEES INTERNATIONAL UNION, AFL-CIO, Et Al, Complainant, vs. MEMORIAL HOSPITAL ASSOCIATION, Burlington, Wisconsin, Respondent.	Case VII No. 14196 Ce-1326 Decision No. 10010-A
LOCAL #150, SERVICE & HOSPITAL EMPLOYEES INTERNATIONAL UNION, AFL-CIO, Et Al, Complainant, vs. MEMORIAL HOSPITAL ASSOCIATION, Burlington, Wisconsin, Respondent.	Case VIII No. 14197 Ce-1327 Decision No. 10011-A

Appearances:
Schwartz and Schwartz, Attorneys at Law, by Mr. Jay Schwartz, appearing on behalf of the Complainants.
Quarles, Herriott, Clemons, Teschner & Noelke, Attorneys at Law, by Mr. James C. Mallien, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Complaints of unfair labor practices having been filed with the Wisconsin Employment Relations Commission in the above entitled matters and the Commission having issued an Order 1/ consolidating said complaints and appointing George R. Fleischli, a member of the Commission's staff, to act as Examiner, and to make and issue Findings of Fact, Conclusions of Law and Order as provided in Section 111.07(5) of the Wisconsin Employment Peace Act; and hearing on said complaints having been held at Racine, Wisconsin, on December 21, 1970, and Burlington, Wisconsin, on December 22 and 30, 1970, before the Examiner; and the Examiner having considered the evidence and arguments of Counsel and being fully advised in the premises makes and files the following Findings of Fact, Conclusions of Law, and Order.

FINDINGS OF FACT

1. That Local #150, Service and Hospital Employees International Union, AFL-CIO, hereinafter referred to as the Complainant Union, is

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1/ Memorial Hospital Association (10010, 10011) 11/70

a labor organization having its principal office at 135 West Wells Street, Milwaukee, Wisconsin.

2. That the Memorial Hospital Association, Burlington, Wisconsin, hereinafter referred to as the Respondent, is an employer within the meaning of Section 111.02(2) of the Wisconsin Employment Peace Act having its principal place of business at Burlington, Wisconsin.

3. That the following 19 individuals are employes of the Respondent and individual Complainants herein:

Complainant	Division	Seniority Date 2/
Eva Birky	Nurses' Aide	July 9, 1967
Margaret Brown	Nurses' Aide	January 29, 1967
Patricia Cox	Housekeeping	March 23, 1970 *
Emily Cyncor	Dietary	December 6, 1965
Betty Gill	Nurses' Aide	April 14, 1968
Ruby Gobel	Nurses' Aide	October 14, 1962
Dorothy Hensgen	Nurses' Aide	May 16, 1961
Jim Hensgen	Maintenance	June 2, 1969 *
Hazel Keilty	Nurses' Aide	December 21, 1964
Bernice Klein	Nurses' Aide	August 16, 1965
Mildred Kominiak	Nurses' Aide	January 21, 1963
Florence Lenz	Nurses' Aide	January 21, 1963
Delores Lorenz	Nurses' Aide	May 2, 1967
Genevive Prailes	Nurses' Aide	September 11, 1961
Irma Reuss	Nurses' Aide	December 19, 1966 *
Robert Smith	Maintenance	April 24, 1968
Elizabeth Svatek	Nurses' Aide	February 3, 1963
Barbara Victor	Nurses' Aide	February 3, 1970
Gladys Zerneke	Dietary	December 31, 1966 *

4. That the Complainant Union is the exclusive bargaining representative of certain employes of the Respondent, including the 19 individual Complainants, employed in four separate bargaining units in its Dietary, Housekeeping, Maintenance and Nurses' Aide Divisions in Burlington, Wisconsin, having been certified as such by this Commission on December 19, 1969; 3/ that pursuant to its status as the exclusive bargaining representative in said bargaining units, representatives of the Complainant Union met on numerous occasions from December 19, 1969, until June 1, 1970, with representatives of the Respondent for the purpose of negotiating collective bargaining agreements concerning wages, hours and working conditions in said bargaining units; that during the course of the negotiations an impasse was reached and a strike was called by representatives of the Complainant Union in support of its demands in bargaining; that said strike began on April 28, 1970, and ended on or before May 29, 1970.

5. That the Complainant Union and Respondent entered into a strike settlement agreement on May 29, 1970, which reads as follows:

2/ Those seniority dates marked with an asterisk (*) were not clearly established in the record and were taken from Appendix A of the Respondent's brief.

3/ Memorial Hospital Association (9218-B), 12/69.

"STRIKE SETTLEMENT AGREEMENT

The Hospital and the Union agree that the strike will be terminated forthwith and that all strikers who unconditionally offer to return to work not later than 5 o'clock P.M. of May 29, 1970 will thereafter be re-employed by the Hospital on the following basis:

(1) Initially, and to the extent that there are job openings, the Hospital will recall employees on an overall seniority basis on each shift in their respective collective bargaining unit, except for those jobs that require a particular skill. In filling vacancies requiring a particular skill, the vacancies will be filled in each shift on a seniority basis as between those employees possessing the particular skill or skills for the job to be filled.

(2) Where all jobs in the bargaining unit on a particular shift are filled, an employee in that bargaining unit will be given preference in filling vacancies on other jobs in that bargaining unit on other shifts, taking into consideration the factors of skill, demonstrated ability and seniority.

(3) Regardless of the seniority of any striker, the Hospital need not lay off or discharge any employee who worked during the strike.

(4) Strikers for whom no job openings exist immediately will be placed on a preferential hiring list for that bargaining unit and the Hospital will not hire any new employees in that bargaining unit until it has first offered re-employment (on the basis of seniority, skill and demonstrated ability) to all such employees on the preferred hiring list. The preferred hiring list will not remain in effect for more than one year from the date of this Strike Settlement Agreement.

(5) In all other respects re-employed strikers will retain their original seniority in their bargaining unit, it being understood however, that from the date that an employee went on strike to the date that the employee returns to work the employee does not accrue additional seniority.

(6) The Union and its members agree that they will not take any retaliatory action or coerce or harass in any way any employee who worked during the strike. The Hospital and the Union agree to use their best efforts to restore and retain harmonious relationships between all employees, and between the employees and the Hospital, regardless of membership or non-membership in the Union, and regardless of participation or non-participation in the strike. The Union agrees that it will not fine or otherwise discipline any employee who worked during the strike or who crossed through the picket line.

(7) No action or proceeding or arbitration will be taken by the parties hereto for any matter arising during the course of contract negotiations and/or the strike. The Hospital shall not be required to pay any employee any wage or fringe benefit except for work actually performed during the strike.

(8) The attached proposed contract has been tentatively agreed to by the Negotiation Committee for the Hospital and the

Union and the Union Bargaining Committee and the Union President will unanimously recommend acceptance of all of the terms and provisions of the proposed contract."

6. That on June 1, 1970, Complainant Union and Respondent entered into four collective bargaining agreements covering the four collective bargaining units referred to above, each of which contains the following terms which are material herein:

"Article III - Non-discrimination. Neither the Hospital nor the Union shall discriminate against any employee for reasons of race, religion, sex, age, National origin or Union status or membership. Employees do not have to belong to a Union in order to be employed by the Hospital."

. . .

"Article V - Seniority. Seniority is defined as the length of time that the employee has worked for the Hospital, computed from his most recent hiring date, excluding unpaid absences.

Promotions and transfers will be based upon the employer's evaluation of the employee's competence, skill and ability to perform all of the duties of the job up to the accepted standard. Where competence, skill and ability are relatively equal, the employee with the greatest seniority will be given preference. Layoff and recall after layoff will be based on seniority.

In January and July of each year that this contract is in force, the Hospital will prepare and give to the Union a list of employees covered by this agreement, setting forth their names in alphabetical order, their addresses from the records, their job classification or job title, and their date of seniority as adjusted for unpaid absences.

Regular part-time employees will accrue seniority on the basis of the number of hours that they have worked during the year as compared to a norm of 2,000 hours for regular full-time employees."

"Article XI - Holidays.

Section 1. After completion of the probationary period, full-time employees and part-time employees who have worked an average of at least thirty (30) hours per week during the immediately preceeding twelve (12) months will thereafter receive seven (7) paid holidays each year. The holidays are New Year's Day, Memorial Day, Independence Day, Labor Day, Thanksgiving Day, Christmas Day, and such day as the employee selects, provided that date is approved beforehand by the Hospital.

Section 2. Eligible employees required to work on a holiday shall have the option of an alternate day off with pay or receive pay for time actually worked plus holiday pay.

Section 3. Part-time employees who have averaged at least thirty (30) hours worked per week during the immediately preceeding twelve (12) months will receive six (6) hours pay as

holiday pay for each of the holidays. Regular part-time employees who averaged less than thirty (30) hours per week worked during the preceeding twelve (12) months shall receive three (3) holidays with eight (8) hours pay each year. Temporary and probationary employees will not receive holiday pay.

Section 4. Employees who fail to work their scheduled hours on the holiday or on the day before or the day after the holiday shall not receive holiday pay unless such absence or absences is due to illness, supported (if requested) by a written doctor's certificate.

Section 5. Holiday pay shall not be paid for any day for which the employee receives sick pay, Workmen's Compensation, or while on leave, layoff, or unexcused period of absence. Employees scheduled to work must work the holiday as scheduled for holiday pay."

"Article XII - Vacation.

Section 1. Full time employees receive ten (10) days vacation with pay after one (1) year of seniority; fifteen (15) days vacation with pay after five (5) years of seniority; twenty (20) days vacation with pay after ten (10) years of seniority. If a paid holiday should occur during an employee's vacation, the employee will be given an additional day off with pay in lieu of the holiday. Regular part-time employees who average twenty (20) hours per week but less than thirty (30) hours shall receive one-half the vacation benefits. Regular part-time employees who average more than thirty (30) but less than forty (40) hours per week will receive three-fourths vacation benefits. Work average will be based on the immediately preceeding twelve (12) months.

Section 2. Employees may request the time for taking their vacation. The Hospital will make every effort to grant the vacation at the time requested provided the vacation will not interfere with the Hospital operation. All vacations must be approved by the Department Head. In case of conflict on times selected, the employee with greatest seniority shall receive preference.

Section 3. Vacations are not accumulative. Where full vacation is not earned at the time of termination of employment, the percentage earned will be allowed if the employee has at least one (1) year of seniority.

Section 4. If a pay day occurs during the employee's scheduled vacation, that check may be requested (in writing) two (2) weeks prior to departure."

. . .

"Article XIX - Grievance Procedure.

Section 1. If an employee has a grievance pertaining to the employee's work, or working conditions, or pertaining to the meaning or application of this Agreement, the grievance will be dealt with first through the employee's immediate supervisor, then through the head of the department, and in

case of failure to resolve the grievance within five (5) working days after submission to the head of the department, then in order to proceed further the grievance must, within the next three (3) succeeding working days, be put in writing and be submitted to the Administrator. The Administrator shall give his decision within seven (7) days of the time that the written grievance is presented to him.

Section 2. Grievances involving a claimed breach of the agreement may, if they have not been resolved pursuant to the foregoing paragraph, be handled pursuant to Section 111.07, Wisconsin Statutes."

. . .

"Article XXI - Management. The Hospital has the sole and exclusive right to determine the number of employees to be employed, the duties of each and the manner, nature and place of their work, whether or not any of the work will be contracted out, and all other matters pertaining to the management and operation of the Hospital. This clause will not be used for the purpose of destroying the Bargaining Unit."

7. That prior to the strike, the Respondent on or about April 17, 1970, accepted and approved applications from 14 girls for the position of Nurses' Aide Trainee which read as follows:

"I understand and agree to the following contract if I am accepted:

I am to become a Senior starting with the school year in Sept. 1970.

I have my own transportation and do not have to depend on being scheduled with another person in or outside of the hospital.

I will work part-time, as necessary, during the school year, as well as full-time during the summer of 1970 and 1971."

8. That the Respondent has in previous years accepted and approved similar applications from high school juniors for the position of Nurses' Aide Trainee; that the Respondent, in accordance with an established practice, advised said 14 Nurses' Aide Trainees that the acceptance and approval of their applications did not constitute an employment contract or a commitment on the part of the Respondent to offer them employment at the termination of the Nurses' Aide Training Program.

9. That said 14 Nurses' Aide Trainees began the Nurses' Aide Training Program on Friday, May 1, 1970, and successfully completed said program on or after June 1, 1970; that the Nurses' Aide Training Program consisted of two hours of instruction, four days per week for one month; that on Monday, May 11, 1970, the Respondent, consistent with an established practice, prepared and posted a work schedule in the Nurses' Aide Division for the 28 day period beginning on Sunday, May 17, 1970, and ending on Saturday, June 13, 1970; that the names of all 14 Nurses' Aide Trainees appeared on said schedule indicating that they were to begin working as Nurses' Aides in the Nurses' Aide Division on June 8, 1970; that on or about May 11, 1970, the Respondent informed all 14 Nurses' Aide Trainees that their names would appear on said schedule; that 13 of the 14 Nurses' Aide Trainees began working as Nurses' Aides on June 8, 1970, and the one remaining Nurses' Aide began

working as a Nurses' Aide on June 9, 1970; that none of the Nurses' Aide Trainees performed any work for the Respondent prior to June 8, 1970; that the Respondent's business records reflect that an employe's date of hire for record keeping purposes is the date on which he actually begins work and seniority begins to accrue on that date.

10. That all of the above named 14 Nurses' Aides who are individual Complainants herein were employes of the Respondent prior to going on strike on April 28, 1970 and were eligible for recall under the terms of the strike settlement agreement in accordance with their respective seniority dates; that with the exception of Dorothy Hensgen, who was recalled and returned to work on June 7, 1970, none of said Nurses' Aides had been recalled on June 8 and 9, 1970; that after June 8 and 9, 1970 and before the hearing herein, six of said Nurses' Aides had been recalled and had returned to work on the following dates:

Margaret Brown	October 4, 1970
Ruby Gobel	August 9, 1970
Mildred Kominiak	August 9, 1970
Genevive Prailes	July 25, 1970
Irma Reuss	August 8, 1970
Elizabeth Svatek	August 8, 1970

11. That Complainant Florence Lenz was employed as a Nurses' Aide by the Respondent before she went on strike on April 28, 1970, and was eligible for recall under the terms of the strike settlement agreement; that on or about July 27, 1970, the Respondent offered Lenz a position as a Nurses' Aide in the Nurses' Aide Division on a different shift than the shift on which she had worked prior to the strike; that Lenz refused said position, stating that she wanted a Nurses' Aide position on the same shift on which she had worked prior to the strike; that the Respondent has not subsequently offered employment to said Lenz.

12. The Complainant Hazel Keilty was employed as a Nurses' Aide by the Respondent before she went on strike on April 28, 1970, and was eligible for recall under the terms of the strike settlement agreement; that on or about July 31, 1970, the Respondent offered Keilty a position as a Nurses' Aide in the Nurses' Aide Division on a different floor and a different shift than the floor and shift on which she had worked prior to the strike; that Keilty refused said position, stating that she wanted a Nurses' Aide position on the same floor and shift on which she had worked prior to the strike; that the Respondent has not subsequently offered employment to Keilty.

13. That the Respondent has hired new employes in its Housekeeping, Dietary and Maintenance Divisions since May 29, 1970, the effective date of the strike settlement agreement; that the Respondent did not offer employment in the Housekeeping, Dietary or Maintenance Divisions to any of the Nurses' Aides who had been on strike and were eligible for recall but had not yet been recalled at the time the new employes were hired.

14. That there is a bookkeeping entry on the attendance cards of all 14 of the Nurses' Aides who are Complainants herein indicating the word "strike" in the column where notations concerning total hours worked or on vacation are normally put; that the word "strike" also appears on the attendance cards of seven Nurses' Aides who are not Complainants herein; that the purpose of the entry of the word "strike"

was to account for the absence of the 14 Nurses' Aide Complainants which is not otherwise accounted for on the cards and that there is no evidence of record that it was used for any other purpose.

15. That an employe by the name of Allen Castleberg was employed in the Maintenance Division prior to going on strike on April 28, 1970, and was also a union steward; that on or about May 21, 1970, the Respondent recalled an employe by the name of James Bigley, a person having less seniority than Castleberg, before it recalled said Castleberg on or about May 22, 1970, to begin work on May 25, 1970; that the recall of both Bigley and Castleberg took place prior to the effective date of the strike settlement agreement; that Castleberg did not file a grievance and is not a Complainant herein.

16. That Complainant Robert Smith had a full time position in the Respondent's Maintenance Division prior to going on strike on April 28, 1970 and was eligible for recall in accordance with the strike settlement agreement; that Smith was recalled and began work in the Maintenance Division on September 25, 1970; that sometime before November 9, 1970 Smith signed the grievance which was attached to one of the complaints herein, wherein he stated that he was not recalled until three months after the strike settlement agreement, alleging that he should have been called back immediately, and asking for back pay; that there is no evidence of record to indicate that the call back of Robert Smith violated the terms of the strike settlement agreement.

17. That the Respondent has hired two new employes in its Maintenance Division since May 29, 1970, the effective date of the strike settlement agreement; that Complainant Jim Hensgen had a full time position on the afternoon shift in the Respondent's Maintenance Division prior to going on strike and was eligible for recall in accordance with the strike settlement agreement; that on or about October 21, 1970, the Respondent offered Hensgen a part time position on the day shift in the Maintenance Division; that at the time that said Hensgen was offered said position the Respondent knew that Hensgen had a full time job with the Soo Line Railroad during the day; that said Hensgen objected to being offered a part time position on the day shift, contending that it was contrary to the provisions of the strike settlement agreement and advised the Respondent on or about October 23, 1970, that he would not accept the position; that the Respondent did not subsequently hire an employe to fill the position offered to Hensgen and did not subsequently offer employment to Hensgen; that on October 28, 1970, the Respondent hired Harold Piper, the first of two new employes in the Maintenance Division and advised him that he would be employed full time on the night shift to replace an employe by the name of Larry Reinertson who was scheduled to retire on January 1, 1971; that Piper was allowed to work on the afternoon shift under the training supervision of Complainant Robert Smith until November 5, 1970, when Smith became ill and his doctor indicated that he would not be able to continue working; that on November 5, 1970, Piper was assigned, at his request, to a full time position on the afternoon shift to replace said Smith; that on December 21, 1970, the Respondent hired Raymond Dahl, the second of the two new employes in the Maintenance Division and advised him that he would be employed full time on the night shift to replace Reinertson; that Dahl was assigned directly to the night shift and has continued to work on the night shift since December 21, 1970.

18. That neither Complainant Robert Smith or Complainant Jim Hensgen was offered employment in the Housekeeping or Dietary Division of the Hospital at any time prior to the hearing herein.

19. That certain employes in the Dietary Division named Helen Rittman, Florence Grunewald, Eva Bucholtz and Helen Kurtenbach were recalled prior to May 29, 1970, the effective date of the strike settlement agreement, their dates of recall being May 21, 21, 25 and 26, 1970, respectively; that said Rittman has less seniority than said Bucholtz and Kurtenbach and an employe by the name of Frances Eichhorn who was recalled on or about June 3, 1970, after the effective date of the strike settlement agreement; that said Eichhorn did not file a grievance and is not a Complainant herein.

20. That Complainant Emily Cyncor was a part time assistant cook in the Dietary Division prior to going on strike on April 28, 1970 and was eligible for recall in accordance with the strike settlement agreement; that Cyncor was recalled and began work in the Dietary Division on June 4, 1970 as a part time general worker because Cyncor's former job had been given to another employe during the course of the strike; that Cyncor agreed to accept the position as a part time general worker even though the hours were initially shorter than she had worked prior to the strike; that since her recall Cyncor has asked for and received more hours so that she was working full time at the time of the hearing herein.

21. That Complainant Gladys Zerneke was employed as a general worker in the Dietary Division by the Respondent before she went on strike on April 28, 1970, and was eligible for recall under the terms of the strike settlement agreement; that on or about June 3, 1970, the Respondent recalled Frances Eichhorn, an employe having less seniority than Zerneke, for a position as a general worker and that said Zerneke was not recalled until after Eichhorn; that the position of general worker for which Eichhorn was recalled requires more bending and physical exertion than the position of general worker which Zerneke held prior to the strike, which position was eliminated; that said Zerneke is over 65 years of age and is a person of very heavy stature and is physically incapable of performing the duties of a general worker to which Eichhorn was recalled; that Zerneke was recalled and began work as a general worker having different duties than Eichhorn on June 24, 1970.

22. That Complainant Patricia Cox worked in the Respondent's Housekeeping Division prior to going on strike on April 28, 1970; that Cox filed a written grievance sometime before September 8, 1970 stating that she had not been recalled in accordance with the strike settlement agreement; that sometime after September 8, 1970 Cox was recalled and there is no evidence of record that her recall violated the provisions of the strike settlement agreement.

23. That sometime in early June 1970, certain employe grievances were brought to the attention of Don Beatty, President of the Complainant Union; that on or about June 16, 1970, Beatty met with Donald A. Kincade, the Respondent's Hospital Administrator, for the purpose of discussing certain grievances which had arisen concerning the application of the terms of the strike settlement agreement and the four collective bargaining agreements; that sometime prior to July 1, 1970, probably at the June 16, 1970, meeting, Beatty requested that the Respondent provide the Complainant Union with a list of the employes who were working in each of the four collective bargaining units and their seniority dates; that at the time Beatty requested said list he did not know the names or the dates of hire of the 14 Nurses' Aide Trainees; that on or about July 1, 1970, the Respondent provided the Complainant Union with a list of employes who were working in the four collective bargaining units on July 1, 1970,

which list contained the following names and seniority dates:

Maintenance

James Bigley	5/8/67
Allen Castleberg	9/1/66
Earnest Cupp	4/29/70
George Granger	5/15/70
Kenneth Himebauch	5/18/70
Lawrence Reinertson	11/2/67

Dietary

Eva Bucholtz	8/23/62
Lillian Carney	3/24/67
Frances Eichhorn	6/23/67
Mary Erickson	7/2/61
Florence Grunewald	4/24/55
Marguerite Keyes	12/11/64
Helen Kurtenbach	10/17/62
Dorothy Nelson	10/13/64
Mildred Overson	11/20/62
Helen Rittman	11/3/67
Edna Umnus	1/1/59
Virginia Wincek	5/14/70
Gladys Zerneke	12/3/66

Housekeeping

Manuela Aguilar	6/27/66
Senovia Benavides	4/28/70
Florence Fitch	9/8/68
Eugenia Mitsch	11/23/62
Lydia Mitsch	9/25/66
Mary Muller	8/5/57
Louise Prill	8/22/66
Irene Rausch	4/13/70
Margaret Rueter	6/3/67
Dorothy Sutton	3/12/64
Mary Wolf	8/31/60

Nurses Aides

Linda Amend	6/15/69
Nancy Clark	6/29/66
Norma Cupp	2/6/61
Lynda Dammeir	12/2/69
Jane Forney	5/12/70
Dorothy Hensgen	6/16/61
Bonnie Holst	1/1/65
Geraldine Hopkins	1/25/70
Nancy Jira	9/17/60
Nola Kull	3/14/57
Margaret Lancour	3/28/70
Alta Marzahl	8/1/62
A. Marilyn Pieters	9/30/54
Betty Pihringer	8/20/63
Antoinette Rhoads (on leave)	11/8/57
Alice Roech (on leave)	3/16/53
Irene Schranz	6/4/62
Ruth Sundberg	9/15/53
Katherine Tigges	6/2/68

24. That the list of employes who were working in the four collective bargaining units on July 1, 1970 that was given to the Complainant Union by the Respondent did not contain the names of any of the 14 Nurses' Aide Trainees who began working as Nurses' Aides in the Nurses' Aide Division on June 8 and 9, 1970 and that such information was intentionally omitted by Kincade; that Beatty received information to the effect that said list did not contain the names of all of the employes who were working on July 1, 1970 and called Kincade for the purpose of setting up a meeting to discuss the list and call back procedures; that Beatty and Kincade agreed to meet August 25, 1970, but the meeting was postponed until August 27, 1970; that Kincade refused to meet with Beatty on August 27, 1970, because Beatty was accompanied by legal counsel and the Respondent's legal counsel was not present; that on August 28, 1970 Kincade sent the Complainant Union's legal counsel a letter which reads as follows:

> "I have discussed the matter of a meeting next week of you and the representatives of Local 150 with the hospital attorney, Mr. James Mallien of Milwaukee. I told him the purpose of the meeting; i.e. the discussion of some grievances. It is felt that employee grievance procedures, as spelled out in our contract, should be followed. Of course, if there are other matters which you wish to discuss at a meeting with me and our attorney, it would be appreciated if such arrangements were made directly with Mr. Mallien.
>
> A copy of the contract between Memorial Hospital and Local 150 is enclosed indicating the agreed upon procedure."

25. That sometime prior to September 8, 1970, Beatty sent Kincade a letter dated September 2, 1970, which was received by Kincade on or before September 8, 1970, with 19 grievances attached thereto; that said grievances were signed by the following 17 employes, 13 of whom are Complainants herein:

	Nature of Grievance		
	Call-back Procedure	Discrimination	Vacation or Holiday Pay
Complainants			
Eva Birky	X		
Patricia Cox	X		
Emily Cyncor	X		
Betty Gill	X		
Ruby Gobel (2)	X		X
Jim Hensgen	X		
Hazel Keilty	X	X	
Bernice Klein (2)	X		X
Mildred Kominiak	X		
Delores Lorenz	X	X	
Genevive Prailes	X		
Irma Reuss	X		X
Elizabeth Svatek	X		X
Other Grievants			
Harry Fleming	X		
Karen French	X		
Evelyn Mix	X		
Vera Quast	X		

26. That sometime between September 2, 1970 and September 18, 1970 Florence Koch, the Respondent's Director of Nursing, discussed some of

the grievances with eleven of the above named grievants individually without a representative of the Complainant Union being present; that on September 18, 1970 Kincade sent Beatty a letter which reads as follows:

"I am in receipt of the 19 signed grievances you sent to me earlier this month. The situation is:

A. Eleven of these represent people now back to work. They were contacted individually. Only two of the eleven wish to discuss a grievance on their vacation days. The balance are quite satisfied now that they are back to work. They are:--

1. Ruby Gobel)
2. Elizabeth Svatek) Coming in to discuss vacation.
3. Emily Cyncor
4. Irma Reuss
5. Evelyn Mix
6. Karen French
7. Harry Fleming
8. Patricia Cox
9. Vera Quast
10. Mildred Kominiak

B. Three were called and refused the aid job offered.

1. Bernice Klein - has another job.
2. G. Prailes - started work but quit with resignation.
3. Hazel Keilty - offer a job, but refused until her previous job was available.

C. Four still not called back:--1. D. Lorenz, B. Gill and E. Birky are still on our hiring list and will be contacted when opening occurs. J. Hensgen in maintenance has lowest seniority and will be contacted when opening occurs, but is not next in line.

The above takes care of the 19 grievances (two people had 2 grievances each), sent to me. However, if you still feel that we should meet on any of those still not called back, please let me know. Mr. Mallien does not feel the necessity to meet on these I have outlined, so if you plan to have an attorney present, I shall not meet without the hospital attorney.

I would like to have a current list of stewards including a chief steward as requested in July. Some of those in attendance August 27th were not qualified to be stewards."

27. That on September 23, 1970 Complainant Union's legal counsel sent Kincade a letter asking about the status of the 19 grievances which had been submitted to Kincade; that on September 28, 1970 Kincade sent Complainant Union's legal counsel a reply stating that the grievances had been answered and that Kincade presumed that they were settled and that Kincade enclosed a copy of his letter to Beatty of September 18, 1970 along with the reply.

28. That on November 9, 1970 the Complainant Union and the 19 individual Complainants filed the two complaints herein with 21 grievances attached thereto and made a part thereof; that 15 of the grievances were

the same grievances as those signed by the 13 individual Complainants set out above and that 6 of the grievances were signed by the remaining 6 individual Complainants and dealt with the following subjects:

Complainant	Nature of Grievance		
	Call-back Procedure	Raise in Pay	Vacation or Holiday Pay
Margaret Brown	X		
Dorothy Hensgen	X		X
Florence Lenz	X		X
Robert Smith	X		
Barbara Victor	X		
Gladys Zerneke	X	X	

Based on the above and foregoing Findings of Fact, the Examiner makes the following

CONCLUSIONS OF LAW

1. That the Memorial Hospital Association hired 14 Nurses' Aide Trainees to work in its Nurses' Aide Division on June 8 and 9, 1970 and that the 14 Nurses' Aide Trainees hired by the Memorial Hospital Association on June 8 and 9, 1970 were not employes on May 29, 1970; that the hiring of said 14 Nurses' Aide Trainees on June 8 and 9 was a violation of the strike settlement agreement entered into between the Memorial Hospital Association and Local No. 150, Service and Hospital Employees International Union, AFL-CIO which violation delayed or prevented the recall of Complainants Eva Birky, Margaret Brown, Betty Gill, Ruby Gobel, Hazel Keilty, Bernice Klein, Mildred Kominiak, Florence Lenz, Delores Lorenz, Genevive Prailes, Irma Reuss, Elizabeth Svatek and Barbara Victor and was an unfair labor practice within the meaning of Section 111.06(f) of the Wisconsin Statutes.

2. That the Memorial Hospital Association did not violate the terms of the strike settlement agreement or commit an unfair labor practice within the meaning of Section 111.06(f) of the Wisconsin Statutes when it offered Complainant Florence Lenz a position as a Nurses' Aide in the Nurses' Aide Division on a different shift than the shift on which she had worked prior to the strike; that Burlington Memorial Hospital Association did not violate the terms of the strike settlement agreement or commit an unfair labor practice within the meaning of Section 111.06(f) of the Wisconsin Statutes when it offered Complainant Hazel Keilty a position as a Nurses' Aide in the Nurses' Aide Division on a different shift and floor than the shift and floor on which she had worked prior to the strike.

3. That the Memorial Hospital Association did not violate the terms of the strike settlement agreement and did not commit an unfair labor practice within the meaning of 111.06(f) of the Wisconsin Statutes when it failed to offer employment in the Housekeeping, Dietary and Maintenance Division to the Nurses' Aides, who had been on strike and were eligible for recall but had not yet been recalled at the time that the new employes were hired in those Divisions.

4. That the Memorial Hospital Association did not violate the terms of the strike settlement agreement and did not commit an unfair

labor practice within the meaning of Section 111.06(f) of the Wisconsin Statutes when it recalled Allen Castleberg ahead of James Bigley prior to the effective date of the strike settlement agreement.

5. That the Memorial Hospital Association did not violate the terms of the strike settlement agreement and did not commit an unfair labor practice within the meaning of Section 111.06(f) of the Wisconsin Statutes when it did not recall Complainant Robert Smith until September 25, 1970.

6. That the Memorial Hospital Association violated the terms of the strike settlement agreement and committed an unfair labor practice within the meaning of Section 111.06(f) of the Wisconsin Statutes when it failed to offer Complainant Jim Hensgen a full time job on the afternoon shift to replace Robert Smith.

7. That the Memorial Hospital Association did not violate the terms of the strike settlement agreement and did not commit an unfair labor practice within the meaning of Section 111.06(f) of the Wisconsin Statutes when it failed to offer Complainants Robert Smith and Jim Hensgen employment in the Housekeeping and Dietary Divisions of the Hospital.

8. That the Memorial Hospital Association did not violate the terms of the strike settlement agreement and did not commit an unfair labor practice within the meaning of Section 111.06(f) of the Wisconsin Statutes when it recalled Helen Rittman prior to the effective date of the strike settlement agreement.

9. That the Memorial Hospital Association did not violate the terms of the strike settlement agreement and did not commit an unfair labor practice within the meaning of Section 111.06(f) of the Wisconsin Statutes when it recalled Complainant Emily Cyncor to a part time position as a general worker in the Dietary Division.

10. That the Memorial Hospital Association did not violate the terms of the strike settlement agreement and did not commit an unfair labor practice within the meaning of Section 111.06(f) of the Wisconsin Statutes when it recalled Frances Eichhorn, ahead of Complainant Gladys Zerneke even though Zerneke had greater seniority than Eichhorn.

11. That the Memorial Hospital Association did not encourage or discourage membership in the Complainant labor organization by discriminating against any of its employes and did not commit an unfair labor practice within the meaning of Sections 111.06(c) and 111.06(a) of the Wisconsin Statutes through its recall or failure to recall them in accordance with the terms of the strike settlement agreement.

12. That the Memorial Hospital Association did not violate the holiday pay, vacation pay or wage provisions of the collective bargaining agreement and did not commit unfair labor practices within the meaning of Section 111.06(f) of the Wisconsin Statutes in the case of the grievances of Complainants Ruby Gobel, Dorothy Hensgen, Bernice Klein, Florence Lenz, Irma Reuss, Elizabeth Svatek and Gladys Zerneke.

13. That the Memorial Hospital Association did not violate the terms of the strike settlement agreement and did not commit an unfair labor practice within the meaning of Section 111.06(f) of the Wisconsin Statutes with regard to the recall of Complainant Patricia Cox.

14. That the Memorial Hospital Association did not bargain collectively with the representatives of less than a majority of its employes within the meaning of Section 111.07(e) of the Wisconsin Statutes.

15. That the Memorial Hospital Association refused to bargain collectively with Local #150, Service and Hospital Employees International Union, AFL-CIO when it failed and refused to provide said Union with accurate information which was reasonably necessary to carry out its responsibilities as the certified bargaining representative in violation of Section 111.06(d) of the Wisconsin Statutes and such failure and refusal interfered with the rights of Complainants Eva Birky, Margaret Brown, Betty Gill, Ruby Gobel, Hazel Keilty, Bernice Klein, Mildred Kominiak, Florence Lenz, Delores Lorenz, Genevive Prailes, Irma Reuss, Elizabeth Svatek and Barbara Victor to such representation within the meaning of Section 111.06(a) of the Wisconsin Statutes.

16. That the Memorial Hospital Association did not commit an unfair labor practice within the meaning of Section 111.06(d) or 111.06(a) of the Wisconsin Statutes by its refusal to meet with the Complainants' attorney without the presence of the Hospital's attorney, by its insistence that the Complainants follow the grievance procedure, by the acts of its agent, Florence Koch, in discussing 10 grievances with individual grievants, or by the acts of its agent, Donald A. Kincade, in arranging to discuss two grievances involving alleged violations of the collective bargaining agreement with individual grievants.

17. That the Memorial Hospital Association did not initiate, create, dominate or interfere with the formation of a labor organization within the meaning of Section 111.06(b) of the Wisconsin Statutes.

18. That the Memorial Hospital Association did not commit an unfair labor practice within the meaning of Section 111.06 of the Wisconsin Statutes by placing the word "strike" on the attendance cards of the 14 individual Complainants who are Nurses' Aides.

Based on the above and foregoing Findings of Fact and Conclusions of Law, the Examiner makes the following

ORDER

IT IS ORDERED that the Respondent, Memorial Hospital Association, its officers and agents, shall immediately:

1. Cease and desist from refusing to bargain with the representatives of Local #150, Service and Hospital Employees International Union, AFL-CIO and interfering with the rights of its employes by failing and refusing to provide accurate information reasonably necessary for the effective representation of its employes.

2. Take the following affirmative action which the Examiner finds will effectuate the policies of the Act:

(a) To the extent that it has not already done so, offer employment to Eva Birky, Margaret Brown, Betty Gill, Ruby Gobel, Hazel Keilty, Bernice Klein, Mildred Kominiak, Florence Lenz, Delores Lorenz, Genevive Prailes, Irma Reuss, Elizabeth Svatek and Barbara Victor in its Nurses' Aide Division in the positions that were given to the 14 Nurses' Aide Trainees on June 8 and 9, 1970, or substantially equivalent positions in

accordance with paragraphs numbered (1) and (2) of the strike settlement agreement, without prejudice to their seniority or other rights and privileges.

(b) Pay Eva Birky, Margaret Brown, Betty Gill, Ruby Gobel, Hazel Keilty, Bernice Klein, Mildred Kominiak, Florence Lenz, Delores Lorenz, Genevive Prailes, Irma Reuss, Elizabeth Svatek and Barbara Victor a sum of money equal to the amount of all back wages and fringe benefits lost as a result of its failure to recall them to the positions of employment in its Nurses' Aide Division which were given to the 14 Nurses' Aide Trainees on June 8 and 9, 1970, less the amount of any earnings they may have received since those dates to the date of the offer of employment in the positions of employment given to the 14 Nurses' Aide Trainees or substantially equivalent positions and less the amount of unemployment compensation, if any, received by them during said period, and in the event that they received unemployment compensation benefits, reimburse the Unemployment Compensation Division of the Wisconsin Department of Industry, Labor and Human Relations in such amount.

(c) Upon timely written request provide Local #150, Service and Hospital Employees International Union, AFL-CIO with all information reasonably necessary for the performance of its duties as the certified bargaining representative in administering and enforcing the strike settlement agreement including but not limited to the names and dates of hire of all employes in the four bargaining units who were employed on April 28, 1970 or who have been hired since that date.

(d) Offer employment to Jim Hensgen in its Maintenance Division in the position that was given to Harold Piper on November 5, 1970, or a substantially equivalent position, without prejudice to his seniority or other rights and privileges, and make him whole for any loss of pay he may have suffered by payment of a sum of money equal to the amount of all back wages and fringe benefits lost as a result of its failure to recall him to the position that was given to Harold Piper on November 5, 1970, less the amount of any earnings he may have received in employment other than his day time position with the Soo Line Railroad.

(e) Notify the Wisconsin Employment Relations Commission in writing within twenty (20) days of the receipt of a copy of this Order what steps it has taken to comply herewith.

Dated at Madison, Wisconsin, this 16th day of August, 1971.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By George R. Fleischli
George R. Fleischli, Examiner

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

LOCAL #150, SERVICE & HOSPITAL EMPLOYEES INTERNATIONAL UNION, AFL-CIO, Et Al, Complainant, vs. MEMORIAL HOSPITAL ASSOCIATION, Burlington, Wisconsin, Respondent.	Case VII No. 14196 Ce-1326 Decision No. 10010-A
LOCAL #150, SERVICE & HOSPITAL EMPLOYEES INTERNATIONAL UNION, AFL-CIO, Et Al, Complainant, vs. MEMORIAL HOSPITAL ASSOCIATION, Burlington, Wisconsin, Respondent.	Case VIII No. 14197 Ce-1327 Decision No. 10011-A

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The Complainants filed two complaints on November 9, 1970, each alleging that the Respondent has committed certain alleged unfair labor practices as alleged in a total of 19 grievances which were attached to, and made a part of, the two complaints. Specifically the Complainants allege that the conduct of the Respondent violated Sections 111.06(a), 111.06(b), 111.06(d), 111.06(e) and 111.06(f) of the Wisconsin Statutes. Because the facts alleged in the two complaints were essentially the same, the two complaints were consolidated for hearing and the undersigned was appointed Examiner to make and issue Findings of Fact, Conclusions of Law and Order as provided in Section 111.07 of the Wisconsin Statutes. 1/

On December 7, 1970 the Respondent filed an answer to the two complaints, admitting that the Complainant Union was the duly authorized representative of the 19 individual Complainants who are employes of the Respondent and that Donald A. Kincade is the Respondent's Hospital Administrator but denying the balance of the matter alleged. The pleadings join the following issues:

1/ Memorial Hospital Association (10010, 10011) 11/70.

1. Whether the Respondent has violated the terms of a collective bargaining agreement within the meaning of Section 111.06(f).

2. Whether the Respondent has bargained collectively with the representatives of less than a majority of its employes within the meaning of Section 111.07(e) of the Wisconsin Statutes.

3. Whether the Respondent has refused to bargain collectively with the Complainant Union within the meaning of Section 111.06(d) of the Wisconsin Statutes.

4. Whether the Respondent has initiated, created, dominated or interfered with the formation of a labor organization within the meaning of Section 111.06(b) of the Wisconsin Statutes.

5. Whether or not the Respondent has interfered, restrained or coerced its employes by the commission of any of the other unfair labor practices alleged or by other conduct within the meaning of Section 111.06(a).

At the hearing the Complainants failed to introduce any evidence that would tend to establish that the Respondent bargained with the representatives of less than a majority of its employes or that it initiated, created, dominated or interfered with the formation of a labor organization within the meaning of Sections 111.06(e) and 111.06(b) of the Wisconsin Statutes and therefore no further discussion of those allegations is necessary. Most of the evidence and arguments deal with the question of whether or not the Respondent has violated the terms of a collective bargaining agreement in violation of Section 111.07(f), so that issue will be dealt with at the outset.

Alleged Violations of a Collective Bargaining Agreement

There are a number of allegations contained in the 21 grievances which were signed by the 19 individual Complainants and filed along with the complaints in these cases. All of the individual Complainants allege that the call back procedure contained in the strike settlement agreement was violated insofar as they are concerned either because they were not called back in accordance with the agreement or because they were called back later in time than other employes who had less seniority or no seniority. Six of the individual Complainants allege that the Respondent violated the collective bargaining agreement which applies to them with regard to the vacation pay provision and/or the holiday pay provision and one alleges that she did not receive a 5¢ increase in wages. Two of the individual Complainants alleged that the Respondent's alleged violation of the call back procedure was also an act of discrimination in their case because of their steward activity on behalf of the Complainant Union and the evidence and arguments presented by the Complainants raises the question of discrimination with regard to several of the other individual Complainants.

Since no evidence was introduced at the hearing which would tend to establish that the Respondent violated the holiday pay or vacation pay provisions of the collective bargaining agreements or that Complainant Zerneke was entitled to a 5¢ increase in wages no further discussion of those allegations is necessary. The alleged discrimination because of steward activity and strike activity is discussed along with the alleged violations of the call back procedures because the Complainants

rely on essentially the same facts to support both claims. If there were evidence of such discrimination it would constitute a violation of Sections 111.06(c) and 111.06(a) of the Wisconsin Statutes as well as Article III of the collective bargaining agreements.

(1) Nurses' Aide Trainees

The alleged violations of the call back procedures contained in the strike settlement agreement involve several actions taken by the Respondent which warrant separate treatment. The most significant of those actions was the hiring of 14 Nurses' Aide Trainees who began work as Nurses' Aides on June 8 and 9, 1970. The Complainant Union contends that the 14 Trainees were not employed prior to the effective date of the strike settlement agreement and therefore the Respondent violated the agreement when it allowed the 14 Trainees to begin working as Nurses' Aides. The Respondent contends that it had obligated itself to employ the 14 Trainees as early as May 11, 1970 when it notified the Trainees that they were scheduled to work on the work schedule posted that day. The Complainant Union relies on the legal obligations incurred by an employer to make deductions and contributions on behalf of employes as of the date that they begin work, as well as the bookkeeping practice of the Respondent to establish that they were not hired and did not become employes until they actually began work. The Respondent, on the other hand, relies on the fact that it notified the 14 Trainees on May 11, 1970 that they were scheduled to work on June 8, 1970 to establish that they were hired and became employes as of that date.

The agreement speaks of "job openings" and "vacancies" in describing the initial recall procedures in paragraphs numbered (1) and (2). Paragraph numbered (3), which seeks to protect those who worked during the strike from the operation of the seniority rule on initial recall, speaks of "employes". Paragraph numbered (4) obligates the Respondent not to "hire" any "new employes" until all the eligible strikers who were not called back initially and were therefore put on a preferential hiring list had been offered re-employment.

The language employed in the agreement to describe the Respondent's obligations does not make clear what the Respondent's intentions were regarding the 14 Trainees on May 29, 1970. There is no reason to assume that the Complainant Union was aware of the Respondent's conversations with the Trainees or the contents of the schedule that was posted on May 11, 1970. The Union adherents were on strike and not privy to such conversations or in a position to read notices posted inside the hospital. The actions of the Complainant Union's representatives after the signing of the strike settlement agreement support this conclusion. Beatty requested a list of employes in June 1970 because he had received complaints that the hospital was not abiding by the strike settlement agreement and he was given a list that significantly did not include the names of the 14 Trainees. Beatty requested a meeting in August to discuss the list but the meeting never occurred. In fact it was not until the records of the hospital were subpoenaed at the hearing that the Complainant Union obtained the names of the 14 Trainees and their beginning dates of employment.

Because of this disparity of knowledge at the time that the agreement was signed the Complainant Union would be reasonable in assuming that the references to "job openings", "vacancies" and "employes who worked during the strike" referred to openings, vacancies and employes as of that date, May 29, 1970. An objective reading of the contract requires such an approach. Whatever subjective interpretation the Respondent may

have placed on the meaning of the words employed because of its knowledge of the discussions it had had with the Trainees and the schedule it had posted during the strike cannot be imputed to the Complainant Union. The question then becomes what was the employment status of the 14 Trainees on May 29, 1970.

In answering the question of whether or not the Trainees became employes prior to the effective date of the strike settlement agreement it is necessary to consider when they were eligible to become employes within the meaning of Section 111.02(3) of the Wisconsin Statutes. They were employes within the meaning of 111.02(3) if it can be said that they were doing the same work that the bargaining unit employes were doing and had a reasonable prospect of permanent employment. 2/

Here the facts indicate that the Trainees were receiving two hours of instruction, four days per week, in exchange for which they received no pay. The person in charge of the Nurses' Aide Division specifically stated that the Trainees did not "work" during the strike. They were initially advised that the Respondent was not obligated to give them employment even if they completed the training program. There was no evidence introduced regarding the percentage or number of such Trainees who were hired in previous years.

On the record presented it is clear that the Trainees were not eligible to be treated as employes within the meaning of Section 111.02(3) during their period of training. Although their participation in the training program might be considered work in a general sense, the Director of Nursing's statement is taken to mean that they did no work that was normally done by Nurses' Aides. Significantly they were not paid any money during this period of time, a further indication of the fact that they were not yet performing any bargaining unit work. There was some prospect that they might become employes in light of the fact that the hospital had in previous years hired some of the girls who successfully completed the training program and the fact they were scheduled to begin work on June 8, 1970. But that prospect, which was not necessarily enhanced by the existence of the strike since the terms of the settlement were as yet unknown, is not enough to conclude that the Trainees were already "employes" within the meaning of Section 111.02(3) since they were not doing any work.

The Respondent argues that the Trainees should be treated as employes beginning on the date that they were told that they would begin work in June. This argument, which is premised on an individual employment contract theory, is not supported by the facts. There is insufficient evidence of an exchange of promises or mutuality of obligation to support a finding that the Trainees were bound by individual employment contracts. There were too many uncertainties present to justify the conclusion that the Respondent agreed to hire the Trainees on May 11, 1970. First of all, they had only begun the training program and it was uncertain which, if any, would complete the program successfully. Secondly, a strike was in progress and the terms of the settlement were not yet established. The schedule which was posted on May 11, 1970 necessarily assumed that the strike would not be over on June 8 but it must have been modified or ignored when the strike ended on May 29, 1970 in order to accomodate the initial

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2/ W.H. Kranz Company (4135) 1/56.

recall. Thirdly, there is no evidence that the Trainees promised to begin work on June 8 or 9. The law of contracts requires a clear exchange of promises in order to support a finding that either party is bound to a contract.

Assuming arguendo that the Respondent had entered into binding individual contracts with the Trainees, such agreements were merely agreements to hire and did not change the status of the Trainees to that of employes. They did not become employes until June 8 and 9 when they actually began work. In the Lakeside Industries 3/ case this Commission held that an individual who entered into an individual employment contract before the eligibility cut off date but did not actually begin to work until after that date was not an employe on the eligibility cut off date and therefore ineligible to vote in a representation case. Here the Trainees did not begin to work until June 8 and 9 which is after the effective date of the strike settlement agreement. They were not employes on May 29, 1970 and agreements to hire them, if such existed, would not change their status on that date.

There were 14 "job openings" or "vacancies" in the Nurses' Aide Division on May 29, 1970 and the Respondent violated the terms of the strike settlement agreement on June 8 and 9, 1970 when it filled them with Trainees who had no seniority even if it did so in compliance with individual agreements to hire. Employers who hire or agree to hire strike replacements during the course of a strike do so with the knowledge that they may be required to breach their agreements with such replacements if the strike is settled on terms which require such a breach. The Respondent was obviously aware of this latter possibility when it got the Complainant Union to agree to paragraph numbered (4). That paragraph protects employes who worked during the strike, however it affords no protection to the Trainees who were not employes on May 29, 1970 and did not work during the strike.

(2) Florence Lenz and Hazel Keilty

Certain other actions were taken by the Respondent in the Nurses' Aide Division after the initial recall had been accomplished and the remaining Nurses' Aides had been placed on the preferential hiring list, which actions the Complainants allege were also in violation of the strike settlement agreement. On July 27, 1970 Complainant Lenz was offered a job in the Nurses' Aide Division on a different shift than the one on which she had worked prior to the strike; on July 31, 1970 Complainant Keilty was offered a job in the Nurses' Aide Division on a different floor and on a different shift than the floor and shift on which she had worked prior to the strike. The Complainants contend that the Respondent was under an obligation to offer Complainants Lenz and Keilty "the same or substantially equivalent employment" and that it failed to do so when it offered to recall Lenz and Keilty to jobs on different shifts or floors. The Respondent contends that it complied with its obligations under the strike settlement agreement when it offered Lenz and Keilty jobs in the same bargaining unit and their refusal to accept those jobs released it from any further obligation to offer them employment. The Complainants cite several NLRB cases in support of their argument and the Respondent cites two Commission cases.

The difference between the cases cited by the parties lies in the fact that the cases cited by the Complainants deal with the obligation

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3/ (4438-B) 4/56.

of an employer to reinstate workers after an unfair labor practice strike. The case of Griffin Wheel Co., 4/ does deal with the recall of economic strikers, but in that case the employer's insistence on granting superseniority to nonstrikers and replacements in spite of the strikers unconditional offer to return to work converted the strike into an unfair labor practice strike thereby obligating the employer to reinstate the affected employes.

Here the Respondent was not obligated to reinstate all of the strikers but only to recall them in a non-discriminatory manner to the extent that it had openings. 5/ The provisions embodied in the strike settlement agreement are consistent with that obligation. Without a showing that the Respondent committed an unfair labor practice by insisting on including discriminatory provisions in the strike settlement agreement the Respondent is not obligated to do more than abide by its terms, without engaging in unlawful discrimination.

The strike settlement agreement here does not appear to have any terms which work to discriminate against strikers or Union officials. The basic rule set out is recall according to seniority within the four separate bargaining units. There is no substantial evidence to support a finding that the Respondent's offer of jobs that were considered to be undesirable by Lenz and Keilty was motivated by a desire to discriminate. The record does disclose that Keilty was one of three Union Stewards but there is no evidence that her steward activities precipitated the action nor is there any evidence to establish that there was an opening on Keilty's floor and shift on July 27 and 31, 1970.

The question that remains is whether or not the Complainants have established by a clear and satisfactory preponderance of the evidence, that the Respondent's offers of July 27 and 31, 1970 violated the strike settlement agreement in the case of Lenz and Keilty. Clearly they have not. Lenz and Keilty were not recalled initially under paragraphs numbered (1) and (2). Therefore they were entitled to be placed on the preferential hiring list referred to in paragraph numbered (4) and the Respondent could not hire in the Nurses' Aide Division until it had "first offered re-employment (on the basis of seniority, skill and demonstrated ability)" to them. On initial recall they were entitled to insist on their old shift provided there were openings and they had sufficient seniority, but the initial recall had been completed by July 27 and 30. If the Complainants were able to establish that the Respondent had vacancies on Lenz's and Keilty's old shifts and floor at the time that it offered to recall them and that it subsequently filled those vacancies with less senior employes or new employes they would have a much more persuasive claim. When Lenz and Keilty turned down the offer of recall the Respondent was otherwise free to hire less senior aides on the preferential hiring list for those jobs. 6/

4/ 136 NLRB 1669, 50 LRRM 1049 (1963).

5/ Dad's Root Beer Bottling Co. (1891) 10/48; City Dray (7262) 9/65.

6/ J. Oster Mfg. Co. (6781) 6/64; Bucyrus-Erie Co. (8377-C) 10/68. Of course this did not free the Respondent from all obligations to Lenz and Keilty due to its prior breach. Whether the offers of July 27 and 31, 1970 were substantially equivalent to the offers they would have received had the Respondent not breached the agreement was not established by the evidence. If they were, the Respondents liability for its prior breach may have terminated in whole or in part on those dates.

(3) New Hires in Housekeeping, Dietary and Maintenance Divisions

The Respondent hired three new employes in the Housekeeping Division on September 14, November 2 and December 11, 1970 and two new employes in the Maintenance Division on October 28 and December 21, 1970. New hires were also made in the Dietary Division but the record does not disclose the dates or number. The Complainants contend that none of the individual Complainants who are Nurses' Aides were considered for these positions even though the Nurses' Aides were presumably capable of performing work in the Housekeeping Division and may have been capable of performing the work in the Maintenance Division. The Respondent admits that the Complainant Nurses' Aides were not considered for these vacancies but argues that the strike settlement agreement only required that the Hospital recall strikers within their respective bargaining unit.

The Respondent's reading of the agreement is correct. Paragraphs numbered (1) and (2) make it clear that the rule of seniority on recall applies within bargaining units. This rule is not dissimilar from other collective bargaining agreements which provide for recall from lay offs within departments. The Complainant Nurses' Aides had no right under the agreement to use their seniority in other bargaining units. If the Complainants had indicated that they were willing to work in other units after the preferential hiring list had been exhausted for such units and they were turned down because they were strikers, the Respondent would be guilty of an act of discrimination if not a violation of the express terms of the strike settlement agreement. It is true that the preferential hiring lists had, in the judgment of the Respondent, been exhausted in these three divisions when the new hires were made but there is no evidence to establsih that any of the Complainant Nurses' Aides applied for work in those Divisions much less that they were turned down for improper reasons.

(4) Allen Castleberg

The Complainants allege that Allen Castleberg, a Union steward, was called to work in the Maintenance Division on May 25, 1970, a few days after James Bigley was called to work even though Castleberg had more seniority than Bigley. Castleberg is not an individual Complainant herein and there is no evidence that he filed a grievance.

Clearly, the recall of Castleberg after Bigley did not violate the strike settlement agreement which did not become effective until May 29, 1970, four days after Castleberg's recall. There is no evidence other than the bare fact that Castleberg was a steward which would tend to support the Complainant Union's claim that the Respondent was improperly motivated in recalling Castleberg a few days after Bigley. On the other hand the Respondent introduced testimony which remains unrebutted that there was no opening on Castleberg's old shift when Bigley was recalled.

(5) Robert Smith

Complainant Robert Smith's grievance deals with the question of whether the Respondent's failure to recall him for over three months violated the strike settlement agreement. The record discloses that the Respondent had hired at least three new employes in the Maintenance

Division during the course of the strike. It is therefore not surprising that Smith was not recalled until September 25, 1970. Smith had a right to be recalled to the extent that there were openings, not a right to be recalled immediately. The hiring of strike replacements during the course of an economic strike is not an act of unlawful discrimination. 7/

(6) Jim Hensgen

On October 21, 1970 the Respondent offered Complainant Jim Hensgen a part time position on a different shift than the one on which he had worked prior to the strike which offer Hensgen turned down on October 25, 1970 because he held a full time job during the day. The Complainants contend that this offer did not comply with the Respondent's obligation under the agreement since the Respondent knew that Hensgen would not accept the position because of his other job and only offered him the position in order to eliminate him from the preferential hiring list. As evidence of this the Complainant points out that the Respondent hired a full time employe named Piper five days later to replace an employe by the name of Reinertson who was not due to retire until January 1, 1971 and assigned Piper to work with Smith on the afternoon shift. When Smith became ill the Respondent assigned Piper to take his place on the afternoon shift and hired a new employe named Dahl on December 21, 1970. The Respondent contends that it fulfilled its obligation to Hensgen when it offered him a part time job on the day shift and so advised him when he turned the job down.

The first question that needs to be answered is whether or not the Respondent has complied with its obligation to "first offer re-employment" to Hensgen before it hired Piper and Dahl. The offer to Hensgen did not comply with that obligation. It was a foregone conclusion that Hensgen would turn down the part time position. The offer of employment under the conditions present did not constitute a good faith offer of re-employment, it was a mere formality. This offer was made only five days before Piper was hired, to replace a man that the Respondent knew or should have known was due to retire. Although the Respondent claimed that Reinertson did not give notice until after Hensgen had turned the part time day shift job down it was unable to produce evidence of that claim at the hearing. If the Respondent desired to hire a part time maintenance man on the day shift why did it not do so when Hensgen turned the job down? Instead it hired Piper for a full time job on the night shift and temporarily assigned him to the afternoon shift for training. When Hensgen turned the job down why did the Respondent insist that he had burned his bridges? It could easily have offered Hensgen the job it gave to Piper five days later since there was no one else below Hensgen on the preferential list and it would not have needed to put Hensgen through a training period. One possible conclusion that can be drawn from the sequence of events is that the Respondent desired for reasons that are not established in the record to eliminate Hensgen from the possibility of recall. If the Respondent's action was motivated by the fact that Hensgen was a striker, the Respondent's conduct would be a violation of Section 111.06(c) and Article III of the collective bargaining agreement. The action is certainly suspicious, but the absence of any evidence regarding the Respondent's motivation precludes

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7/ City Dray (7262) 9/65.

a finding that the Respondent's action was discriminatory. There is nothing in the evidence that indicates why Hensgen might have been singled out among the strikers in the Maintenance Division for discriminatory treatment. Several other strikers with more seniority were properly recalled in the Maintenance Division.

Even so the Respondent's action was a violation of the terms of the strike settlement agreement because it was not in compliance with its obligation to "first offer re-employment" to Hensgen. The offer in this case was not a bona fide offer of re-employment and Hensgen was improperly excluded from consideration for the jobs that were subsequently given to Piper and Dahl.

(7) Failure to Recall Smith and Jim Hensgen to Other Units

The Complainants claim that the Respondent's failure to recall Complainants Smith and Jim Hensgen in the Housekeeping and Dietary Divisions violated the strike settlement agreement. Little need be said about this claim which, like the claim of the Nurses' Aides described in (3) above, is without merit. Nor was the failure to recall Smith and Hensgen an act of discrimination. There is no evidence of record that would establish that Smith or Hensgen indicated a desire to work in the Housekeeping or Dietary Divisions, much less that they were denied an opportunity to do so for reasons which were improper.

(8) Recalls in Dietary

Four employes, Helen Rittman, Florence Grunewald, Eva Bucholtz and Helen Kurtenbach were recalled in the Dietary Division prior to May 29, 1970. At least one of those employes, Rittman, had less seniority than Frances Eichhorn, who was recalled after May 29, 1970. In addition, some of the recalls in the Dietary Division prior to May 29, 1970 may not have been in strict order of seniority. None of the above named employes are Complainants herein nor did they file grievances.

Just as the recall of Castleberg after Bigley did not violate the terms of the strike settlement agreement, none of the recalls in the Dietary Division prior to May 29, 1970 were in violation of the strike settlement agreement. The record does not disclose why there were recalls in the Dietary and Maintenance Divisions before the effective date of the strike settlement agreement. The testimony of Kincade and statements made in the grievances attached to the complaints suggest that the strike ended informally before it ended officially on May 29, 1970. Regardless of when the strike ended, the Respondent complied with the terms of the agreement when it recalled Eichhorn. The agreement provided that Eichhorn was entitled to be recalled to the extent that there were "job openings" or "vacancies" on May 29, 1970. Employes that had returned to work prior to that date were protected from bumping by paragraph numbered (3) regardless of whether their return was in response to a recall or on their own initiative.

(9) Emily Cyncor

The recall of Complainant Emily Cyncor to a different job than the job she held prior to the strike was the result of the fact that her old job had been given to someone else in the Dietary Division while she was on strike. When the Respondent called Cyncor back she

was advised that she was being offered a different job and she agreed to take it. The strike settlement agreement providing that on initial recall that the strikers would be recalled by seniority on their old shift within their respective bargaining unit. Cyncor was recalled in accordance with paragraph numbered (1) of the agreement. She was recalled to her old shift and bargaining unit. She had no right to claim her old job back since there was no "job opening" in that classification at the time of her recall.

(10) Gladys Zerneke

Complainant Gladys Zerneke, who also worked in the Dietary Division prior to the strike, is a person of very heavy stature and is over 65 years of age. According to the Respondent, Frances Eichhorn was called into work on June 3, 1970 ahead of Zerneke because the Respondent believed that Zerneke could not perform the specific tasks that were assigned to Eichhorn because of Zerneke's physical limitations. The Complainants contend that the only exception to the seniority rule on recalls is for jobs requiring a "particular skill" and that physical limitations are not an example of a lack of a "particular skill".

It is true that the normal use of the word "skill" refers to an acquired knowledge, ability or proficiency especially involving the use of the hands. However it is unreasonable to assume that the parties used the word skill in that strict sense when referring to distinctions among unskilled workers. The physical ability to perform the work in question is reasonably included within the phrase "particular skill" when it is read in the context in which it was used, and the evidence of record established that Zerneke was not capable of performing the work in question.

Refusal to Bargain Collectively

There is evidence of record that will support the allegation in the complaints that the Respondent refused to bargain collectively with the Complainant Union. The difficulty experienced by Beatty in obtaining an accurate list of employes who were working in the four bargaining units, the Respondent's refusal to meet with the representatives of the Complainant Union without its own attorney being present and the Respondent's discussion of grievances with individual employes are all acts that merit separate discussion in this regard.

(1) Refusal to Submit an Accurate List of Employes

There can be no doubt that the Respondent's submission of an inaccurate list of employes who were working in the four bargaining units on July 31, 1970 was intentional. It excluded the names of the 14 Nurses' Aide Trainees who were working in the Nurses' Aide Division. At the time that the list was submitted the Trainees constituted 45% of the work force in that bargaining unit (if the two Nurses Aides who were on leave are excluded). Such an omission could hardly be attributed to an oversight especially in light of the Respondent's contention that they were hired during the course of the strike. The names of the other strike replacements were included on the list along with their dates of hire.

It was reasonably necessary for the Complainant Union to have an accurate list in order to carry out its obligations as the representative of the 13 Complainant Nurses' Aides. Consequently, the refusal to provide an accurate list of employes constituted a refusal to bargain collectively with the Complainant Union and an act of interference with the rights of the employes represented by the Complainant Union who were affected by the refusal. 8/

(2) Refusal to meet with Union's attorney without Hospital's attorney and insistence on following Grievance Procedure

The Respondent's refusal to meet with the chosen representative of the Complainant Union in the absence of the Respondent's attorney was not a refusal to bargain under the circumstances present on August 27, 1970. 9/ The arrangements for the meeting had been made between Beatty and Kincade so that Kincade had no reason to suppose that the Complainaint Union would be represented by legal counsel. Kincade did not refuse to meet with the Union's attorney, he merely refused to meet with the Union's attorney until he had an opportunity to arrange for the presence of the Hospital's attorney.

Kincade's suggestion of August 28, 1970 that the grievance procedure contained in the collective bargaining agreements be followed resulted in further delay but that suggestion in itself was not a refusal to bargain collectively. In fact, some of the grievances which Beatty sought to discuss dealt with alleged violations of the collective bargaining agreements which were subject to the contractual grievance procedure and the Complainant Union appeared to go along with the suggestion. 10/

(3) Discussion of grievances with individual Grievants

In response to Kincade's letter of August 28, 1970 Beatty sent Kincade copies of all the written grievances he had as of September 2, 1970. Florence Koch, Director of Nursing, discussed the grievances with 11 of the grievants individually without giving representatives of the Complainant Union an opportunity to be present and Kincade arranged to discuss two grievances over vacation pay with two of those 11.

The action of the Respondent's agent, in discussing and attempting to discuss the grievances without a representative of the Complainant Union being present even though the Respondent was aware that the Complainant Union's legal counsel was handling those grievances is very questionable.

8/ Boynton Cab Co. (5001) 11/58; Oates Bros. Inc. 135 NLRB 1295, 49 LRRM 1676 (1962).

9/ C.A. Starkweather & Son Inc. (4360) 9/56.

10/ The Respondent implied at the hearing, but did not argue in its brief, that the contractual grievance procedure had mandatory application to the alleged violations of the strike settlement agreement. Clearly it does not, but even if it did, it would be unreasonable to require the Complainants to follow that procedure when the Respondent had refused to give them sufficient information to process their grievances.

If it were not for the ambiguity of the events which preceded those discussions it would be appropriate to find that this was a further violation of the Respondent's duty to bargain collectively and an act of interference. By submitting written grievances to Kincade, Beatty was apparently going along with Kincade's suggestion that the contractual grievance procedure be followed. The second step of the grievance procedure calls for putting a grievance in writing and submitting it to the Administrator. Koch's discussion of the grievances with the individual grievants could be interpreted as a belated attempt to comply with the first step of the grievance procedure, rather than a deliberate effort to avoid the certified bargaining representative. There is no evidence that the Respondent's discussions were coercive or otherwise interfered with the individual grievants in their efforts to adjust their grievances through their certified bargaining representative.

Interference, Restraint and Coercion

The last issue joined by the pleadings deals with the question of whether or not the Respondent has interfered with, restrained or coerced its employes within the meaning of Section 111.06(a). The Respondent's refusal to provide the Complainant Union with accurate information reasonably necessary for representing the 13 Complainant Nurses' Aides interfered with the rights of those employes and is a derivative violation of Section 111.06(a).

The only other evidence of possible interference, coercion and restraint found in the record is the placing of the notation "strike" on the attendance cards of the 14 Complainant Nurses' Aides. The record discloses that this notation also appeared on the attendance cards of 7 Nurses' Aides who are not Complainants herein. No evidence was introduced tending to establish that these notations were shown to the Complainants or used for any purpose other than to account for the absence of the Nurses' Aides on the dates involved. It would have been possible for the Respondent to have simply entered the letter "A" on each of the dates that the Nurses' Aides were absent due to the strike; the form employed states that the letter "A" indicates a day of absence without pay. In fact this was done for a few days in the case of all 14 cards but the practice was apparently discontinued as the strike continued. It appears that the word "strike" was entered for the purpose of simply and accurately describing the continued absence of the 21 Nurses' Aides and was not used for the purpose of interfering with or discriminating against the 14 Complainant Nurses' Aides.

The Violations and their Remedy

The Respondent violated the provisions of the strike settlement agreement when it hired the 14 Nurses' Aide Trainees on June 8 and 9, 1970 and when it failed to offer Jim Hensgen re-employment before it hired new employes in the Maintenance Division. These acts constitute violations of Section 111.06(f). In addition, the Respondent violated Sections 111.06(d) and 111.06(a) when it refused to provide the Complainant Union with an accurate list of employes who were working in the Nurses' Aide Division on July 1, 1970.

The appropriate make whole remedy for the two violations of the strike settlement agreement is to order the Respondent to put the 13 Complainant Nurses' Aides and Complainant Jim Hensgen in the position

they would have enjoyed if the Respondent had not breached the agreement. In the case of the 13 Complainant Nurses' Aides they should be offered employment in the positions that were given to the 14 Trainees or substantially equivalent positions with back pay for all wages lost as a result of the Respondent's failure to offer them the positions on June 8 and 9, 1970. The back pay due and owing to the 13 Complainant Nurses' Aides should be reduced by the amount of pay that any of the 13 may have received in positions subsequently offered and accepted or in other employment. If the offers to Lenz and Keilty were substantially equivalent to the offers that they would have received on June 8 or 9, 1970 the Respondent's obligation to them may have been extinguished as of July 27 and 31, 1970; however the facts are not sufficient to establish what offers they would have received on June 8 or 9, 1970. If the positions offered were not substantially equivalent to the jobs they would have received the Respondent is still obligated to offer them those positions or substantially equivalent positions.

In the case of Jim Hensgen the appropriate remedy is to attempt, to the extent possible, to put him in the position he would have enjoyed if the Respondent had not violated the agreement by failing to offer him re-employment before hiring new employes. If the Respondent had not improperly removed Hensgen's name from the preferential hiring list and had offered him the position held by Reinertson it probably would not have done so until shortly before December 21, 1970. This is so because Hensgen did not require a period of training. When Robert Smith became too sick to work on November 5, 1970, the Respondent would have been obligated to offer Hensgen that position which became available prior to Reinertson's position. Therefore the Respondent should be required to offer Hensgen the position on his old shift which was ultimately given to Piper or a substantially equivalent position with back pay from the date of the job opening, November 5, 1970.

The Respondent's failure and refusal to provide an accurate list of employes in the four bargaining units cannot be totally rectified at this late date. However, the Respondent can and should be ordered to cease and desist from failing and refusing to provide accurate information and ordered to provide accurate information in the future. While it is true that the strike settlement agreement has expired there may be other violations that occurred during the term of the agreement that are not time barred under Section 111.07(14).

Dated at Madison, Wisconsin, this 16th day of August, 1971.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By George R. Fleischli
George R. Fleischli, Examiner