Sodexo America LLC *and* Patricia Ortega

Sodexo America LLC; and Keck Hospital of USC, formerly known as USC University Hospital *and* Service Workers United

Keck Hospital of USC, formerly known as USC University Hospital *and* National Union of Healthcare Workers. Cases 21–CA–039086, 21–CA–039109, 21–CA–039328, and 21–CA–039403

November 19, 2014

DECISION AND ORDER

BY MEMBERS HIROZAWA, JOHNSON, AND SCHIFFER

On July 3, 2012, the Board issued a Decision and Order Remanding in Part in this proceeding, which is reported at 358 NLRB No. 79 (2012).[1] Thereafter, the Respondents filed a petition for review in the United States Court of Appeals for the District of Columbia Circuit, and the General Counsel filed a cross-application for enforcement.

At the time of the Decision and Order Remanding in Part, the composition of the Board included two persons whose appointments to the Board had been challenged as constitutionally infirm. On June 26, 2014, the United States Supreme Court issued its decision in *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014), holding that the challenged appointments to the Board were not valid. Thereafter, the court of appeals vacated the Board's Decision and Order Remanding in Part and remanded this case for further proceedings consistent with the Supreme Court's decision.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

In view of the decision of the Supreme Court in *NLRB v. Noel Canning,* supra, we have considered de novo the judge's decision and the record in light of the exceptions and briefs.[2] For the reasons set forth below, we have decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.

This case involves the Respondents' off-duty no-access policy, which states:

> Off-duty employees are not allowed to enter or re-enter the interior of the Hospital or any other work area outside the Hospital except to visit a patient, receive medical treatment or to conduct hospital-related business.
>
> 1. An off-duty employee is defined as an employee who has completed his/her assigned shift.
> 2. Hospital-related business is defined as the pursuit of the employee's normal duties or duties as specifically directed by management.
> 3. Any employee who violates this policy will be subject to disciplinary action.

In *Tri-County Medical Center*, 222 NLRB 1089 (1976), the Board held that an employer's rule barring off-duty employee access to a facility is valid only if it (1) limits access solely to the interior of the facility, (2) is clearly disseminated to all employees, and (3) applies to off-duty access for all purposes, not just for union activity. See *Saint John's Health Center,* 357 NLRB No. 170, slip op. at 3–6 (2011) (explaining the basis for the *Tri-County* rule). At issue here is whether the Respondents' rule violates the third requirement. We find that it does not.

To begin, we agree with the judge that the provisions allowing off-duty employees to visit patients or receive medical care are lawful under *Tri-County*. Off-duty employees entering the hospital under either of these circumstances must do so using public entrances, and must sign in like any other visitor or undergo the admitting process like any other patient. Their purposes for entering the hospital are unrelated to their employment; they seek access not as employees, but as members of the public, and access is granted or denied on the same basis and under the same procedures as for the public. We decline as a matter of policy to require that health care employers limit their employees' access to medical care, or to friends and family members receiving medical care, in order to comply with the *Tri-County* requirements. Accordingly, we hold that the policy's exceptions for off-duty employees visiting patients or seeking medical care do not make the policy unlawful under the third prong of the *Tri-County* standard.

We further find, in agreement with the judge, that the policy's "exception" for conducting hospital-related business also does not render the policy unlawful under *Tri-County*. Crucially, the policy expressly defines hospital-related business narrowly, as "the pursuit of the employee's normal duties or duties as specifically di-

[1] The Board severed and remanded the issue of whether the discipline of four employees violated Sec. 8(a)(1) of the Act, and issued a Supplemental Decision after that remand, reported at 359 NLRB No. 135 (2013). Because we find below that the remand was unnecessary, we now vacate that decision.

[2] On April 8, 2011, Administrative Law Judge William G. Kocol issued the attached decision. The Acting General Counsel filed exceptions and a supporting brief, Respondent Sodexo filed cross-exceptions, and both Respondents filed briefs in support of the judge's decision.

rected by management." The most natural reading of the policy is the one given by the judge: this provision is not really an exception at all, but a clarification that employees who are not on their regular shifts, but are nevertheless performing their duties as employees under the direction of management, may access the facility. Although these employees would be *off* duty by the policy's definition, they are *on* duty under the term's ordinary meaning and within the meaning of *Tri-County*. Thus, the provision allowing access for hospital-related business does not violate the *Tri-County* requirement that a valid no-access rule must apply to off-duty access for all purposes.[3]

The General Counsel contends that if the Respondents had intended the exception for hospital-related business to cover only employees who were in fact on duty, the Respondents would have simply defined "off duty" differently in the policy. But the record shows that Respondent Keck Hospital had crafted the policy in order to make clear that employees were not permitted to work on premises after their shifts. By so doing, Keck Hospital was attempting to avoid a situation in which employees who were not authorized to work beyond their shifts claimed after-shift work under California wage and hour laws. In our view, the policy as written is a reasonable attempt to address those concerns without violating the requirements of *Tri-County*. In these circumstances, we find that the Respondents' off-duty no-access policy does not violate the Act, and we dismiss the complaint.[4]

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

IT IS FURTHER ORDERED that the Supplemental Decision and Order reported at 359 NLRB No. 135 (2013), is vacated.

Dated, Washington, D.C. November 19, 2014

Kent Y. Hirozawa, Member

Harry I. Johnson, III, Member

Nancy Schiffer Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Alice J. Garfield, Esq., for the General Counsel.
Sophia Mendoza, Union Representative, for National Union of Health Care Workers.
Linda Van Winkle Deacon and *Lester F. Aponte, Esqs. (Bate, Peterson, Deacon, Zinn & Young, LLP),* of Los Angeles, California, for the Hospital.
Mark T. Bennett, Esq. (Marks Golia & Finch, LLP), of San Diego, California, for Sodexo.

DECISION

STATEMENT OF THE CASE

WILLIAM G. KOCOL, Administrative Law Judge. This case was tried in Los Angeles, California, on February 28, 2011. The first charge was filed November 4, 2010,[1] and the order consolidating cases, consolidated complaint, and notice of hearing was issued November 24. The complaint as thereafter amended alleges that Sodexo America LLC and USC University Hospital have maintained a no-access rule that violates Section 8(a)(1). The complaint also alleges that the Hospital unlawfully enforced that rule on several occasions. Sodexo and the Hospital filed timely answers that denied that the rule was unlawful.

Before the hearing opened the Hospital filed a Motion for Summary Judgment with the Board. The Board denied the motion without prejudice to its renewal at the hearing; Member Hayes dissented and would have granted the motion.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, Sodexo, and the Hospital, I make the following

[3] The policy here is significantly different from the policy the Board found unlawful in *Saint John's Health Center*, supra, slip op. at 3 (2011). Unlike the policy here, the policy in *Saint John's Health Center* allowed access for "[h]ealth center sponsored events, such as retirement parties and baby showers," and gave no indication that employees would be paid or considered to be working during these events. In effect, it gave the employer unlimited discretion to permit off-duty employee access simply by sponsoring an event. Id., slip op. at 5. Here, as explained above, the "exception" covers only employees who would understand themselves to be on duty.

Member Johnson agrees that the policy at issue here is significantly different from the policy found unlawful in *Saint John's Health Care Center*. He therefore finds no need to address whether the issue in that case was correctly decided.

[4] In the absence of any allegation that the lawful no-access policy has been discriminatorily applied, we find that the discipline issued to four employees for violating the policy was not unlawful. We therefore also find that the remand ordered in the now-vacated decision was unnecessary.

[1] All dates are in 2010 unless otherwise indicated.

FINDINGS OF FACT

I. JURISDICTION

The Hospital, a corporation, operates an acute care hospital at its facility in Los Angeles, California, where it annually derives gross revenues in excess of $500,000 and purchased and received goods valued in excess of $5000 directly from points located outside the State of California. The Hospital admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Sodexo, a corporation, with a place of business in Gaithersburg, Maryland, is engaged in the business of providing food and environmental services. It annually provides services for the Hospital valued in excess of $50,000. Sodexo admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

Facts

The Hospital operates an acute care facility of about 500,000 square feet with about 300 patient beds. It typically has over 200 patients and employs over 1250 workers. Patients and visitors enter the facility through two entrances; each entrance has a staff desk where visitors and patients are required to sign in. The Hospital provides each employee with an identification badge; the badge allows them to enter the Hospital through employee entrances and enter areas inside the Hospital not accessible to nonemployees.

Sodexo operates a cafeteria in the Hospital and prepares and serves food to the patients. Members of the public are not allowed in the cafeteria. Sodexo is required to have its employees follow the same work rules that the Hospital requires of its employees.

At all times material the Hospital has maintained and enforced the following rule:

> Off-duty employees are not allowed to enter or re-enter the interior of the Hospital or any other work area outside the Hospital except to visit a patient, receive medical treatment or to conduct hospital-related business.
>
> 1. An off-duty employee is defined as an employee who has completed his/her assigned shift.
>
> 2. Hospital-related business is defined as the pursuit of the employee's normal duties or duties as specifically directed by management.
>
> 3. Any employee who violates this policy will be subject to disciplinary action.

The Hospital carried over this rule from its predecessor employer. Sodexo also posted the same rule for its employees working at the Hospital. The Hospital has enforced the rule by disciplining employees who gained access to the interior of the hospital in violation of the rule, including, in this case, off-duty employees who entered the Hospital and engaged in union activities.

Mathew F. McElrath is the Hospital's chief human resources officer. McElrath credibly explained that the Hospital needs the rule to assist in providing a safe and efficient environment for on-duty employees, patients, and visitors. The rule allows the Hospital to maintain control of the times that employees have access to patient records and to sensitive areas of the Hospital. In this regard the rule allows the Hospital to assure that employees are accessing that information or are in those areas only when the employees are being properly supervised. McElrath also explained that if off-duty employees enter the facility and began performing work, the Hospital may be required to pay them, perhaps at an overtime rate, even though the Hospital had not authorized the work.

As written, the rule allows off-duty employees to enter the Hospital under three circumstances. First, off-duty employees may enter the Hospital to visit patients. Of course, members of the public are also allowed to visit patients. Off-duty employees visiting patients must do so under the same conditions as all other visitors. That is, they must enter the facility at the entrances used by visitors; they may not enter through employee entrances. The visiting employees must confine their visits to visiting hours, sign in at visitors' desks, obtain and display a visitor badge, and confine their presence in the facility to the area needed to accomplish the visit. Second, off-duty employees may enter the facility to obtain medical treatment. Here too the off-duty employees are treated just as others obtaining medical treatment; they undergo an admitting process, are given a wristband and otherwise treated as a patient. Third, the rule allows off-duty employees to enter the facility to conduct hospital related business, which is defined as "the pursuit of the employee's normal duties or duties as specifically directed by management." In this regard McElrath explained that under this exception employees are always on paid time and under the supervision of the Hospital. In other words, this third "exception" is not really an exception at all and simply amounts to a definition of on-duty employees.

In sum, I conclude that the rule allows off-duty employees to enter the Hospital only under circumstances that members of the public at large are allowed, and then only under the same restrictions and conditions that members of the public are allowed inside.

Analysis

The General Counsel stipulated that he is challenging the facial validity of the rule and that this case does not involve issues of selective enforcement or dissemination of the rule.

In *Tri-County Medical Center,* 222 NLRB 1089 (1976), the Board applied a three prong test to determine whether no-access rules are lawful. First, the rule must limit access of off-duty employees only to the interior of the facility. Second, the rule must be clearly disseminated to all employees. And third, the rule must apply to off-duty employees seeking access for any purpose and not just to employees seeking to engage in union activity. The General Counsel does not challenge the rule on the basis of the first two points; he does, however, contend that the rule is unlawful under *Tri-County* because it does not bar all off-duty employees from re-entering the Hospital. I conclude that this interpretation of *Tri-County* is too literal and results in consequences not intended by that decision. Under the General Counsel's interpretation, for example, a retail business could bar off-duty employees from its store only if it also banned them from shopping there; certainly the Board in *Tri-*

County did not intend such a result. Likewise, in this case I conclude that the Board did not intend that a hospital could bar access only if it also barred its employees from becoming patients or visiting patients.

The General Counsel's reliance on *Baptist Memorial Hospital,* 229 NLRB 45 (1997), enfd. *Baptist Memorial Hospital v. NLRB,* 568 F.2d 1 (6th Cir. 1977), is misplaced. A careful reading of that case shows that the no-access rule at issue there was not limited to the interior of the facility and was not clearly disseminated to the employees; the Board did not find the rule unlawful simply because the hospital there allowed employees to visit patients and pick up their paychecks. Moreover, here the record is clear that when the Hospital's off-duty employees visit patients they must do so as visitors and not as employees. The General Counsel also relies on *Intercommunity Hospital,* 255 NLRB 468 (1981). There the Board stated:

> The Employer's rule states, "When you are off duty, visits to the hospital should be limited to friends or relatives who are patients or on official business with the hospital." The rule on its face does not prohibit access for all purposes. In addition, employees testified that they were permitted to remain in the hospital after work while waiting for rides or carpools. As the Employer's rule does not meet the *Tri-County* standard, it cannot be used to prohibit solicitation by off-duty employees.

Id. at 474. But this statement is not sufficiently clear, at least to me, that the Board was holding that simply allowing off-duty employees to visit patients in a hospital would taint a no access. This is especially so in light of the rule at issue in *Southdown Care Center*, 308 NLRB 225, 232 (1992), which allowed off-duty employees to come to a health care facility if they ". . . [have] family or friends in the home [to] visit . . . but [they] must follow visitor rules." There, Administrative Law Judge Richard Judge Linton held: "On its face, [the home's] limited-access rule complies with the *Tri-County* conditions." And here, unlike *Intercommunity,* the rule's reference to "official business" is clarified on its face to mean "the pursuit of the employee's normal duties or duties as specifically directed by management."

In *San Ramon Medical Center,* ALJD(SF) 83–03 (2003) (2003 WL 22763700) Administrative Law Judge James Kennedy found that a rule similar to the rule in this case was lawful under *Tri-County.* Earlier, in *Garfield Medical Center,* ALJD(SF) 81–02 (2002) (2002 WL 31402769) Administrative Law Judge Lana Parke likewise found a rule similar to the one at issue in this case to be lawful. Although I acknowledge that no exceptions were filed to those decisions and thus they do not have the binding effect of Board decisions, it is of some persuasive value that two of my colleagues independently reached the same result I reach in this case. Finally, in a case apparently still pending before the Board, *Citrus Valley Medical Center,* ALJD(SF) 42–08 (2008), I concluded: "In applying *Tri-County* I believe I should not literally apply its language concerning off-duty employees having access to a facility for 'any purpose."

Finally, the General Counsel presented the testimony of Julio Estrada, who has worked for the Hospital since 1994; he currently works as a lead respiratory therapist. Estrada gets paid every 2 weeks and he does not have his pay deposited directly to his bank account. Sometimes his payday falls on a day when he is not scheduled to work and sometimes, rather than waiting until his next workday to get his check, he enters the facility while off duty and retrieves the check. He does so using his employee badge. Over about a 5-year period on about 10 occasions Estrada's supervisor saw him in the facility while off duty yet the supervisor allowed him to pick up his check. I conclude this evidence does not warrant a different result in this case for several reasons. First, the complaint alleges and the General Counsel stipulated at trial that he was only challenging the facial validity of the rule and was not alleging any violation of the rule as applied. This evidence is contrary to the narrow allegations of the complaint and the stipulation and thus the Hospital has not been accorded due process by allowing it to mount a defense. Second, even if I consider the evidence it is, at most, a de minimis abrogation of the application of the rule. Considering the size of the Hospital and the number of employees, a 100-percent rigid application of the rule cannot be expected.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[2]

ORDER

The complaint is dismissed.

Dated, Washington, D.C., April 8, 2011.

[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.