

10/24/84
RECEIVED

DEC 06 1984

BOARD OF PERSONNEL APPEALS

1 IN THE DISTRICT COURT
2 OF THE FIRST JUDICIAL DISTRICT
3 OF THE STATE OF MONTANA,
4 IN AND FOR THE COUNTY OF CASCADE

4 SILVER BOW GENERAL HOSPITAL
5 AND NURSING HOME, a department
6 and agency of BUTTE-SILVER BOW,
7 a municipal government of the State
8 of Montana,
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
Petitioner,
-vs-
BOARD OF PERSONNEL APPEALS, an
agency of the State of Montana; and
BUTTE TEAMSTERS UNION, LOCAL NO. 2,
a labor organization,
Respondents.

NO. 47053

STIPULATION TO DISMISSAL OF
ACTION TO FILE SETTLEMENT
AGREEMENTS AND RELEASES
AND TO DEPOSIT FUNDS
EXCEPTING CLAIM OF
CHRISTINA KNIGHT

14 IT IS HEREBY STIPULATED AND AGREED by and between the parties hereto,
15 through their respective counsel of record, that the above-entitled action
16 may be dismissed, with prejudice, as fully settled on its merits, except as
17 the case pertains to Christina Knight who cannot be located, each party to
18 pay his, her or its own costs and attorneys' fees.

19 IT IS FURTHER STIPULATED that the attached Settlement Agreements,
20 Stipulations and Releases, executed by the parties hereto and the individual
21 employees of Silver Bow General Hospital, shall be filed with the Court as
22 exhibits to this Stipulation to evidence the full and final payments of all
23 sums due to any and all members of the bargaining unit of employees represented
24 by Butte Teamsters Union Local No. 2, except Christina Knight, arising out of
25 an unfair labor practice charge filed by said Union, with the Board of
26 Personnel Appeals of the State of Montana on June 26, 1979, alleging that
27 on or about June 21, 1979, the Employer, Silver Bow General Hospital refused
28 to bargain in good faith in violation of Section 39-31-401, et seq., M.C.A.

29 The parties further stipulate that the attached exhibits to this
30 Stipulation shall be filed of record to show the satisfaction of the
31 obligations of Butte-Silver Bow, a municipal government, a department and
32 agency thereof, Silver Bow General Hospital, and Butte Teamsters Union, Local

FILED
84 DEC -5 PM 1.40
CLARA GILREATH
CLERK OF DISTRICT COURT
BY DARLENE K. GALLAGHER

1 2, in effectuating payment in full of all claims arising out of said unfair
2 labor practice proceedings, as follows:

3 Exhibit "A" Letter itemizing the employees entitled to payment,
4 and amounts;
5 Exhibit "B" Settlement Agreement, Stipulation and Release, by
6 Butte Teamsters Union, Local No. 2, and Addendum A;
7 Exhibit "C-1" Settlement Agreement, Stipulation and Release, by
8 Patricia Sevores (\$1,824.00);
9 Exhibit "C-2" Settlement Agreement, Stipulation and Release, by
10 Janet (Starin) Truzzolino (\$1,712.40);
11 Exhibit "C-3" Settlement Agreement, Stipulation and Release, by
12 Doris Groves (\$1,654.00);
13 Exhibit "C-4" Settlement Agreement, Stipulation and Release, by
14 Jody Sisneros (\$2,468.40);
15 Exhibit "C-5" Settlement Agreement, Stipulation and Release, by
16 Charlotte Boggs (\$1,117.40);
17 Exhibit "C-6" Settlement Agreement, Stipulation and Release, by
18 Dorothy (Holverson) Sparks (\$4,201.00);
19 Exhibit "C-7" Settlement Agreement, Stipulation and Release, by
20 Roi Lee Cotter (\$1,004.40);
21 Exhibit "C-8" Settlement Agreement, Stipulation and Release, by
22 Marie (Brown) Des Rosier (\$1,341.40);
23 Exhibit "C-9" Settlement Agreement, Stipulation and Release, by
24 Susan Jackson (\$1,819.40);
25 Exhibit "C-10" Settlement Agreement, Stipulation and Release, by
26 Sandy Jovanovich (\$1,819.40).

27 WHEREAS, after attempts by Butte Teamsters Union Local No. 2 to locate
28 Christina M. Knight, it was determined that the said employee or her where-
29 abouts could not be ascertained; and

30 WHEREAS, the parties desire by this stipulation to deposit the amount
31 due in this Court, pursuant to Rule 67 of the Montana Rules of Civil Procedure;
32 now, therefore,

IT IS FURTHER STIPULATED that Payroll Warrant No. 28849 made payable
to said Christina M. Knight in the amount of \$702.39 shall be deposited with
the Clerk of Court, along with a copy of the receipt therefor, and the
original Settlement Agreement, Stipulation and Release which has not been
executed by said claimant, which documents are attached hereto as Exhibit
"D-1" (warrant), "D-2" (receipt), and "D-3" (Settlement Agreement, Stipulation

1 and Release); and

2 IT IS FURTHER STIPULATED that upon notification by the Clerk of Court
3 given to all of the parties that said Christina M. Knight has approved said
4 Settlement and Release and requested delivery to her of said sum and satis-
5 factory proof of identification of said claimant being presented, the Clerk
6 of Court shall be authorized to deliver to her the sum of \$702.39 in exchange
7 for her execution of Exhibit "D-3" attached hereto, certified copies of which
8 shall be delivered to the parties.

9 DATED this 9th day of October, 1984.

10 POORE, ROTH & ROBINSON, P.C.

11 By Donald C. Robinson
12 Donald C. Robinson
13 Attorneys for Petitioner
14 1341 Harrison Avenue
15 Butte, Montana 59701-4898

16 MCKITTRICK LAW FIRM

17 By D. Patrick McKittrick
18 D. Patrick McKittrick
19 Attorneys for the Union
20 Suite 622, Strain Building
21 410 Central Avenue
22 P. O. Box 1184
23 Great Falls, Montana 59403

24 BOARD OF PERSONNEL APPEALS

25 By James E. Gardner, Jr.
26 James E. Gardner, Jr.
27 Attorney for the Board of Personnel
28 Appeals
29 P. O. Box 202, Capitol Station
30 Helena, Montana 59620

31 ORDER

32 The parties having entered into the foregoing stipulation, and good
cause appearing therefore, it is hereby

ORDERED, AND THIS DOES ORDER, that the above-entitled action, shall be
dismissed with prejudice, as fully settled on its merits, except as this case
pertains to Christina Knight, each party to pay his, her or its own costs and

1 attorneys' fees; and it is further

2 ORDERED, AND THIS DOES ORDER, that the exhibits attached hereto shall
3 be filed herewith, and the terms of this stipulation as to the payment of
4 Christina M. Knight, upon her written approval and consent, shall be
5 effectuated in accordance with the terms of the stipulation and this order.

6 DATED this 24th day of October, 1984.

7 HENRY LOBLE

8

DISTRICT JUDGE

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

29

30

31

32

SETTLEMENT AGREEMENT, STIPULATION AND RELEASE

THIS AGREEMENT, made and entered into by and between the BUTTE TEAMSTERS UNION, LOCAL NO. 2, hereafter referred to as "Union", and SILVER BOW GENERAL HOSPITAL and NURSING HOME, a department and agency of BUTTE-SILVER BOW, a municipal government of the State of Montana, hereafter "Silver Bow General".

W I T N E S S E T H :

WHEREAS, the Union is a party to an Unfair Labor Practice, No. 29-79, filed against Silver Bow General alleging that Silver Bow General has refused to bargain collectively in good faith and has violated Sections 39-31-401(1)-(5) and 39-31-305(2), M.C.A., by the (1) acts of calling and conducting meetings of nurses' aides for the purposes of discussing wages, hours, and other terms and conditions of employment without the approval of the exclusive bargaining representative, and (2) by threatening to lay off nurses' aides and assigning unit work covered by the collective bargaining contract, to non-unit employees; and that by the above and other acts and conduct, has interfered with, restrained and coerced its employees in the exercise of the rights guaranteed them by law;

WHEREAS, Silver Bow General filed a Petition for Judicial Review, Cause No. 47053 in the District Court of the First Judicial District of the State of Montana in and for the County of Lewis and Clark, of the Board of Personnel Appeals' final order in the above-described Unfair Labor Practice, No. 29-79;

WHEREAS, the parties have entered into a lump-sum settlement of Twenty Thousand (\$20,000.00) Dollars of said Unfair Labor Practice, No. 29-79 and said Petition for Judicial Review, Cause No. 47053;

WHEREAS, the Union has evaluated the respective claims of its allegedly wronged members for purposes of distributing the lump-sum settlement to those members so wronged;

NOW, THEREFORE,

(A) FOR AND IN CONSIDERATION of the payment to the undersigned at this time of the lump-sum payment of Twenty Thousand and no/100ths (\$20,000.00) Dollars, lawful money of the United States of America, the receipt and adequacy of which is hereby acknowledged, and subject to the terms of Addendum "A", attached hereto, the Butte Teamsters Union, Local No. 2, by and through its representative, Jim Roberts, Secretary-Treasurer, does hereby,

REMISE, RELEASE, ACQUIT and forever discharge Silver Bow General Hospital and Nursing Home, a department and agency of Butte-Silver Bow, a municipal government of the State of Montana, its Council of Commissioners, administrators, executors, personal representatives, agents, servants and assigns, and all other persons, firms, and corporations whomsoever of and from any and all actions, claims, demands, damages, costs, expenses, and compensation on account of or in any way growing out of any and all known, except for those claims of Christina Knight, and unknown claims which the undersigned Union may now have or may hereafter have resulting from, arising out of, or in any way connected to the Unfair Labor Practice, No. 29-79, or the Petition for Judicial Review, Cause No. 47053, in the District Court of the First Judicial District of the State of Montana in and for the County of Lewis and Clark, which were filed on or about the 26th day of June, 1979, and the 21st day of August, 1981, respectively, and for all claims or demands, except for those claims and demands of Christina Knight, whatsoever in law or in equity which the undersigned, her heirs, executors, administrators, personal representatives, Union membership, officers or agents, or assigns can, shall, or may have by reason of any matter whatsoever prior to the date hereof.

(B) The Union acknowledges that the lump-sum settlement absolves Silver Bow General Hospital of any liability to any and all Union members, except Christina Knight, that are parties to this dispute. The Union accepts sole responsibility for the allocation and distribution of settlement monies to the Complainants and others listed by the Hospital in documents given to the Union during settlement negotiations.

(C) IT IS FURTHER UNDERSTOOD AND AGREED that the Union has, and hereby acknowledges having, full, complete and sole responsibility to satisfy the claims of any person, member of the bargaining unit, Union member, firm or entity, private or public who was listed in documents given to the Union during settlement negotiations, with the exception of Christina Knight, who may have any right to receive or claim all or part of the proceeds of this release agreement. The Union hereby agrees to hold harmless and indemnify Silver Bow General Hospital and Nursing Home, a department and agency of Butte-Silver Bow, a municipal government of the State of Montana, and its attorneys, Poore, Roth & Robinson, P.C., with the exception of the claims of Christina Knight, from any and all claims or losses relating to or in any way arising out of the undersigned and his attorneys' performance or failure to perform this agreement in any respect, including this paragraph.

(D) IT IS FURTHER UNDERSTOOD AND AGREED that the acceptance of the said amount is in full accord and satisfaction of and in compromise of a doubtful and disputed claim, and that the payment thereof is not to be construed as an admission of liability or responsibility on the part of Silver Bow General Hospital and Nursing Home, a department and agency of Butte-Silver Bow, a municipal government of the State of Montana, or any other persons, firms, or corporations released hereby, by whom liability is expressly denied.

(E) IT IS FURTHER UNDERSTOOD AND AGREED that the undersigned Union will fully allow the Petition for Judicial Review to be dismissed with prejudice as fully settled on its merits, except as this case pertains to Christina Knight, that the said Unfair Labor Practice charge and the Petition for Judicial Review, in which the Butte Teamsters Union, Local No. 2 is the Complainants/Defendants and Silver Bow General Hospital and Nursing Home, a department and agency of Butte-Silver Bow, a municipal government of the State of Montana, is the Defendant/Petitioner; each party thereto to pay its own costs and attorneys' fees. The pending litigation before Peter Meloy, District Judge, First Judicial District, State of Montana, shall be dismissed with prejudice, except as it pertains to Christina Knight.

(F) THE UNDERSIGNED states that he has read this Settlement Agreement, Stipulation, Release, and Addendum "A" and knows the contents thereof, and that he signs the same as his own free act and with the advice of his counsel.

IN WITNESS WHEREOF, we hereunto set our hands and seals this 9th day of October, 1984.

BUTTE TEAMSTERS UNION, LOCAL NO. 2

By Jim Roberts
Jim Roberts, Secretary-Treasurer

SILVER BOW GENERAL HOSPITAL and NURSING HOME, a department and agency of BUTTE-SILVER BOW, a municipal government of the State of Montana

By Donald R. Peoples
Donald R. Peoples, Chief Executive,
Butte-Silver Bow Municipal Government

A D D E N D U M "A"

IT IS UNDERSTOOD, AGREED AND ACKNOWLEDGED by the parties signatory to the Settlement Agreement, Stipulation and Release marked as Exhibit "B" and referred to in the Stipulation To Dismissal Of Action, To File Settlement Agreements and Releases, and To Deposit Funds in the Unfair Labor Practice No. 29-79 and Petition for Judicial Review, Cause No. 47053, that an interested party, namely, Christina M. Knight, cannot be located. It is further agreed that the Settlement Agreement, Stipulation and Release, referred to above, shall not and will not apply to Christina M. Knight.

IT IS FURTHER AGREED that Employer, Silver Bow General Hospital and Nursing Home, shall deposit with the Clerk of Court of the First Judicial District, in and for the County of Lewis and Clark, the sum of \$702.34, net, which represents the amount due and owing Christina M. Knight under the terms of the Settlement Agreement, Stipulation and Release.

IT IS FURTHER AGREED that upon notification by the Clerk of Court given to all of the parties that Christina M. Knight has approved said Settlement and Release and requested delivery to her of said sum and satisfactory proof of identification of said Claimant being presented, the Clerk of the Court shall be authorized to deliver to her the sum of \$702.39 in exchange for her execution of Exhibit "D-3" attached to the Stipulation To Dismissal of Action, To File Settlement Agreements and Releases, and To Deposit Funds.

IN WITNESS WHEREOF, we hereunto set our hands and seals this 9th day of

October, 1984.

BUTTE TEAMSTERS UNION, LOCAL NO. 2

By Jim Roberts,
Jim Roberts, Secretary-Treasurer

SILVER BOW GENERAL HOSPITAL and
NURSING HOME, a department and agency
of BUTTE-SILVER BOW, a municipal
government of the State of Montana

By Donald R. Peoples
Donald R. Peoples, Chief Executive,
Butte-Silver Bow Municipal Government

2/23/82

RECEIVED

FEB 24 1982

BOARD OF PERSONNEL APPEALS

1 IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF
2 MONTANA, IN AND FOR THE COUNTY OF LEWIS & CLARK.

3
4 SILVER BOW GENERAL HOSPITAL No. 47053
5 and NURSING HOME, a department
6 and agency of BUTTE-SILVER BOW,
7 a municipal government of the
8 State of Montana,
9
10 Petitioner

11 vs. ORDER AND OPINION

12 BOARD OF PERSONNEL APPEALS, an
13 agency of the State of Montana;
14 and BUTTE TEAMSTERS UNION, LOCAL
15 No. 2, a labor organization,
16
17 Respondents.

18 The above-entitled petition for judicial review came on
19 regularly for oral argument on January 28, 1982, upon petitioner's
20 motion for partial summary judgment. Petitioner was represented by
21 Mr. Donald C. Robinson, Respondent, Board of Personnel Appeals, was
22 represented by Mr. James E. Gardner, Jr., and Respondent, Butte
23 Teamsters Union, was represented by Mr. D. Patrick McKittrick.

24 On June 26, 1979, Respondent-Union filed an unfair labor
25 practice charge against Petitioner. There was a formal contested
26 case hearing held by the Respondent-Board by its hearing examiner, and
27 on March 21, 1980, post-hearing briefs were submitted. On July 31,
28 1980, the hearing examiner entered a proposed order to defer a
29 decision on the unfair labor practice charge and have the parties
30 submit to binding arbitration. On October 31, 1980, the Board
31 reserved ruling on the issue of whether it had jurisdiction to defer
32 a pending unfair labor practice charge to arbitration, and remanded
the case to the hearing examiner for a decision on the merits of the
charges.

The hearing examiner filed Findings of Fact, Conclusions of Law

1 and a Recommended Order on May 21, 1981. She found Petitioner
2 guilty of at least three unfair labor practices and also recommended
3 that the Board order payment of back pay awards to members of the
4 Respondent-Union. The Board entered a final order on July 24, 1981,
5 which adopted the Findings of Fact, Conclusions of Law and
6 Recommended Order of the hearing examiner.

7 Petitioner contends that 39-31-406, MCA, requires the Board
8 to issue a final order in an unfair labor practice proceeding within
9 five months after a complaint is submitted to the hearing examiner.
10 Petitioner further contends that the Board lost jurisdiction of this
11 matter because it took 17 months to issue its final order after the
12 post-hearing briefs had been submitted to the hearing examiner.

13 Section 39-31-406, MCA, reads in pertinent part:

14 "(6). . . The board shall issue a final
15 order within 5 months after a complaint is
submitted to the hearing officer."

16 [emphasis added]

17 Respondents contend that the word "shall," as used in the
18 statute simply relates to the creation of the remedy of mandamus to
19 compel the Board to issue an order if it has not done so within 5
20 months.

21 The issue is whether "shall, " as used in 39-31-406, MCA, is
22 merely directory, or whether it is mandatory so that the Board will
23 lose jurisdiction of a matter if it fails to issue a final order
24 within 5 months after a complaint is submitted to the hearing officer.

25 Respondents cite Edwards v. Steele, 158 Cal. Rptr. 662, 599
26 P. 2d 1365 (1979), wherein the California court considered this issue
27 as it applied to zoning appeals before the Board of Permit Appeals.
28 In that case, the court held that the probable intent underlying a
29 city ordinance requiring the board of appeals to fix the time for
30 hearing on appeal and requiring the board to act upon the appeal with-
31 in a certain time period, was to assure the aggrieved party
32 reasonably timely hearing of, and decision on, his administrative

1 appeal. Therefore the time limits were intended to have only
2 directory effect, and the board was entitled to exercise jurisdiction
3 over zoning appeals by homeowners in cases in which the board's
4 actions caused neither time limit to be met.

5 The statute in Edwards provided in pertinent part:

6 "On filing of any appeal, the Board of
7 Permit Appeals . . . shall fix the time and
8 place of hearing, which shall not be less than
9 five (5) nor more than fifteen (15) days after
the filing of said appeal, and shall act thereon
not later than forty (40) days after such
filing."

10 San Francisco Municipal Code, pt. III, Art. I, §8.

11 In construing this ordinance, the Edwards court held:

12 "Generally, requirements relating to the
13 time within which an act must be done are
14 directory rather than mandatory or juris-
dictional, unless a contrary intent is
expressed."

15 Edwards at 665. See also, People v. Pacini, 120 Cal. App. 3d 877, 174
16 Ca. Rptr. 820, ___ P.2d ___ (1981); Zoning Board of Adjustment of City of
17 El Paso v. Knapp, 618 S.W. 2d 137 (Texas, 1981).

18 The court then applied two tests and determined that the re-
19 quirements of the above ordinance were merely directory. In the
20 first test the focus is "directed at the likely consequences of
21 holding a particular time limitation mandatory, in an attempt to
22 ascertain whether those consequences would defeat or promote the
23 purpose of the enactment."

24 Id. The second test is that "a time limitation is deemed merely
25 directory unless a consequence or penalty is provided for failure to
26 do the act within the time commanded. Id.

27 In applying the first test to the instant action, the purpose
28 of 39-31-406, MCA, and the purpose of the Collective Bargaining for
29 Public Employees Act, must be determined. The title of the Act, as
30 enacted by the Montana legislature in 1973, reads:

31 An act granting public employers and
32 public employees the right to bargain
collectively; providing that the board of

1 personnel appeals may designate labor
2 organizations to be exclusive representative
3 of employees in certain units; and may also
4 call elections by employees for the same
5 purpose; providing the board of personnel
6 appeals shall establish remedies for unfair
7 labor practices; and providing procedures for
8 carrying out the act.

9 [emphasis added]

10 In the Act, the Legislature provided the Board with exclusive
11 jurisdiction to hear unfair labor practice complaints, and provided
12 a detailed hearing process for such complaints. One of the main
13 purposes of the Act, then, was to have the Board hear and decide the
14 outcome of unfair labor practice complaints.

15 It would contravene such legislative purposes to hold that the
16 five-month time limitation in 39-31-406, MCA, is mandatory so that
17 the Board loses jurisdiction if it does not act within 5 months.
18 Therefore, petitioner's argument that the statute is mandatory and
19 the Board has lost jurisdiction in this case, defeats the purposes of
20 the Act and so fails the first test set forth in Edwards.

21 Petitioner's argument that the statute is mandatory also
22 fails the second test of Edwards. It is clear from a reading of
23 39-31-406, MCA, and other sections of the Act, that "no consequence
24 or penalty is provided" for failure of the Board to issue a final
25 order within 5 months. Therefore, the time limitation is merely
26 directory.

27 While the Montana Supreme Court has not addressed this issue,
28 Judge Gordon R. Bennett of the First Judicial District, in Carey v.
29 Dept. of Natural Resources, No. 43556, in an order issued June 27,
30 1979, held the 60-day time limit within which the DNR was required
31 to hold a hearing on objections to water use applications, as
32 provided in 85-2-309, MCA, was merely directory. In that case, the
petitioner alleged that the DNR had lost jurisdiction because it had
exceeded the time limits. Judge Bennett stated that the emphasis
of the statute should not be on the time limit, but rather on the

1 duty of the DNR to hold hearings to consider valid objections to
2 water use applications. The time period specified was to insure that
3 the water use applications are acted upon reasonably quickly and it
4 created a cause of action for the applicant to enforce the DNR's duty.

5 As in Carey, the emphasis of 39-13-406, MCA, in this case,
6 should not be on the 5 month time limit, but on the consideration and
7 disposition of unfair labor practice complaints by the Board.

8 Petitioner cites the California case of People v. O'Rourke,
9 124 Cal. App. 752, 13 P. 2d 989 (1932), for the proposition that
10 "shall" must be given a mandatory meaning. There the court construed
11 a statute which required that the division of motor vehicles shall
12 revoke drivers' licenses upon conviction of certain crimes, one of
13 which was drunken driving. The court looked to the intent of the
14 statute and held, "The public interests and the public safety demand
15 giving to the word "shall," . . . a mandatory and imperative meaning."
16 Id., 992. The O'Rourke case involves public safety, which is not
17 present in the case at hand and thus the O'Rourke case is distinguish-
18 able. In the present action the legislative intent supports
19 construing the language of 39-13-406, MCA, to be directory in nature.

20 As used in 39-31-406, MCA, "shall" merely directs the Board
21 of Personnel Appeals to issue a final order within five months after
22 an unfair labor practice complaint is submitted to the hearing
23 examiner. Should the Board fail to comply with the time limit, it
24 does not lose jurisdiction over the complaint, but it becomes subject
25 to an action to compel its performance. Therefore petitioner's
26 motion for partial summary judgment is denied.

27 IT IS SO ORDERED.

28 Dated this 23 day of February, 1982.

29
30 PETER G. MELOY
31 District Judge

32 cc: Counsel of record

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32

STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE NO. 29-79:

BUTTE TEAMSTERS UNION,)
LOCAL NO. 2,)
Complainant,)
- vs -)
SILVER BOW COUNTY, MONTANA,)
ON BEHALF OF SILVER BOW)
GENERAL COUNTY HOSPITAL,)
BUTTE, MONTANA,)
Defendant.)

FINAL ORDER

* * * * *

The Findings of Fact, Conclusions of Law and Recommended Order were issued by Hearing Examiner Clarette C. Martin on May 21, 1981.

Exceptions to the Findings of Fact, Conclusions of Law and Recommended Order were filed by Donald C. Robinson, Attorney for Defendant, on June 5, 1981.

After reviewing the record and considering the briefs and oral arguments, the Board orders as follows:

1. IT IS ORDERED, that the Exceptions of Defendant to the Findings of Fact, Conclusions of Law and Recommended Order are hereby denied.

2. IT IS ORDERED, that this Board therefore adopts the Findings of Fact, Conclusions of Law and Recommended Order of Hearing Examiner Clarette C. Martin as the Final Order of this Board.

DATED this 24th day of July, 1981.

BOARD OF PERSONNEL APPEALS

By John Kelly Addy
John Kelly Addy
Chairman

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32

CERTIFICATE OF MAILING

The undersigned does certify that a true and correct copy of this document was mailed to the following on the 27 day of July, 1981:

D. Patrick McKittrick
Attorney at Law
Suite 315
Davidson Building
Great Falls, MT 59401

Donald C. Robinson,
POORE, ROTH, ROBISCHON & ROBINSON, P.C.
1341 Harrison
Butte, MT 59701



STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE NO. 29-79

BUTTE TEAMSTERS UNION,)
LOCAL NO. 2,)
)
Complainant,)
)
-vs.-)
)
SILVER BOW COUNTY, MONTANA)
ON BEHALF OF SILVER BOW)
GENERAL COUNTY HOSPITAL,)
BUTTE, MONTANA,)
)
Defendant.)

CONCURRING OPINION

I concur with the majority vote of the Board on July 24, 1981 to sustain the Findings of Fact, Conclusions of Law, and Recommended Order of the Hearing Examiner. I abstained from voting on the appeal because only one management representative was present, but I discussed the oral argument with the other employee representative, Lloyd Markell, and we agreed on the vote to sustain. The purpose of this concurring opinion is to address the issue of deferring unfair labor practices to arbitration.

The Board, on September 30, 1980, reserved ruling on the issue of whether or not it had jurisdiction to defer a pending unfair labor practice charge to arbitration for another case. But the issue has remained at the heart of this case and has been the central issue from the original hearing through the appeal process.

The Montana Supreme Court has upheld the position that private sector (NLRB) precedents are controlling in the interpretation of the Montana statute in State Department of

Highways v. Public Employee's Craft Council, 165 Mont. 549,
87 LRRM 2101 (1974)

The two cases most often cited to support deferring unfair labor practices to arbitration are: Collyer Insulated Wire, 192 NLRB 150, 77 LRRM 193 (1971); and Speilberg Manufacturing Co., 112 NLRB 1080, 36 LRRM 1152. (1955)

However, the impact of both cases has been severely cut back by the National Labor Relations Board in its General American Transportation Corp. decision (228 NLRB No. 102) in 1977. The majority of the Board held that it would no longer defer cases to arbitration unless they were exclusively alleged violations of Section 8(A)5 of the Labor Management Relations Act, 1947 as Amended.

In the GATC case the majority of the members of the NLRB said:

"Although we agree with the Administrative Law Judge that this case should not be deferred to arbitration, our rejection of deferral is predicated on our long-standing opposition to the policy established by Collyer and its progeny, and is not based merely on the particular circumstances of the instant case. As we pointed out initially in our dissenting opinions in Collyer, and thereafter reiterated in dissenting from the extension of the Collyer policy to cases involving alleged violations of sections of the Act other than Section 8(A)5, we believe that the Board has a statutory duty to hear and to dispose of unfair labor practices and that the Board cannot abdicate or avoid its duty by seeking to cede its jurisdiction to private tribunals."

The Board also said:

"...But even in the instance of an explicit prescription of arbitration, the Board's attempt to remit jurisdictional disputes to private tribunals by refusing to decide, as it is now doing in Collyer, was cut short by the Supreme Court. (NLRB v. Radio Engineers Union (CBS), 364, U.S. 573..."

and...

"This case is also instructive insofar as it

illustrates the uncertainty, indeed the outright confusion, that has attended the efforts of the Collyer advocates to stretch their original justification for deferral to cover nearly every conceivable situation. ... In so doing, they so blurred the announced guidelines and criteria under which the Collyer policy was to be applied as to make almost any case in which they found a contract and an arbitration clause a likely candidate for deferral."

Finally...

"As we noted in similar cases, the Collyer adherents, by indicating that they would defer in any case where the contract incorporates sections of the Act and contains an arbitration clause, in effect invited parties to seek to contract themselves out of the Act, thus stripping employees of the protection afforded by the Act..."

In the Findings of Fact, Conclusions of Law, and Recommended Order in ULP No. 29-79, the Complainant charges the Defendant has violated Section 59-1605, RCM, 1947, 1 (a, b, c, e, and 3); Sections 39-31-401, 1, 2, 3, 5 and 39-31-305, 2 MCA.

In the Conclusions of Law the Hearing Examiner said the Defendant violated Sections 39-31-401 (1), (3), and (5) MCA.

Only Section 39-31-401 (5) is identical to Section 8(A)5 of the Labor Management Relations Act.

I think the Montana Board of Personnel Appeals should follow a course similar to the one established by the NLRB in the GATC case. Only if the charge is an alleged violation of 39-31-401(5) exclusively, should the BPA defer to arbitration. The BPA has a statutory duty to hear and decide unfair labor practices and should not defer its jurisdiction to private tribunals.

If the BPA were to defer in all cases that had arbitration clauses in the contracts, it would strip public employees of their protection under the Montana Public Employees Collective Bargaining Law and force them to follow the more expensive

route of arbitration.

Also, when deferring an unfair labor practice to arbitration, the Board should consider the right of the initiating party to choose the route it wishes to take. In the private sector there is concurrent jurisdiction in most instances, and the initiating party has the choice.

For all of the above reasons I urge the BPA not to defer its jurisdiction in unfair labor practices to arbitration unless they meet the criteria cited.



John Astle, Employee Member
Board of Personnel Appeals

STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

RECEIVED
AUG - 1 1981
BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE NO. 29-79:

BUTTE TEAMSTERS UNION,)
LOCAL NO. 2,)
)
Complainant,)
)
- vs. -)
)
SILVER BOW COUNTY, MONTANA,)
ON BEHALF OF SILVER BOW)
GENERAL COUNTY HOSPITAL,)
BUTTE, MONTANA,)
)
Defendant.)

D I S S E N T I N G O P I N I O N

I respectfully dissent from majority vote in this case and vote against the Motion To Sustain the Findings Of Fact, Conclusions Of Law and Recommended Order of the Hearing Examiner. This vote and dissent are based upon the state of the law, the evidence presented and the oral arguments by the parties.

As a conclusion, I would substitute the following as a recommended order:

1. Recognize Butte Teamsters' Union, Local #2 as the exclusive bargaining representative and thereby bargain with the local union about the effects of the lay offs set out in Finding Of Fact 12 on pages 13 and 14;
2. Submit the underlying dispute to compulsory and binding arbitration in accordance with the Collective Bargaining Agreement referenced in Finding Of Fact 2 on pages 2 and 3;
3. Defer ultimate decision on the alleged unfair labor practices until the arbitration is completed and reviewed in accordance with the tests set forth in Speilberg Manufacturing Co., 112 NLRB 1080, 36 LRRM 1152.

At the threshold of this dissent is the need to resolve the issue as to whether or not the Board Of Personnel Appeals should defer to the process of binding arbitration as contained in the Collective

Bargaining Agreement. I conclude that we should have deferred.

We have long held that private sector precedents are not only relevant but controlling in the interpretation of the Montana statute. The Supreme Court upheld that position in State Department Of Highways v. Public Employee's Craft Council, 165 Mont. 349, 87 LRRM 210 (1974). Accordingly we must examine the precedential decisions available to the Board in deciding this case. That precedent is found in Collyer Insulated Wire, 192 NLRB 150, 77 LRRM 193 (1971). This seminal case involved an alleged violation of Section 8(a)(5) of the LMRA by an employer by making assertedly unilateral changes in working conditions. Implicit in the unilateral aspects of the change was the refusal to discuss the changes with the union. There was an existing Collective Bargaining Agreement between the parties.

Section 39-31-401(5) is identical in wording an intent with Section 8(a)(5) of NMRA.

The Labor Board held that it would not hear the case on its merit, but rather would defer to the arbitration provisions of the agreement.

In exercising its discretion, the Board held that:

"...the dispute in its entirety arises from the contract between the parties, and from the parties' relationship under the contract, it ought to be resolved in the manner which that contract prescribes. We conclude that the Board is vested with the authority to withhold its processes in this case and that the contract here made available a quick and fair means for the resolution of this dispute including a fully effective remedy."

(Emphasis added)

In giving its rationale for this position, the Board said:

"... experience has demonstrated that Collective Bargaining Agreements that provide for final and binding arbitration of grievances 'as a substitute for industrial strife' contribute significantly to the attainment of the purpose of the Act."

"... Thus, we believe that where the contract clearly provides for grievance and arbitration machinery, where the unilateral action taken is not designed to undermine the union and is not patently erroneous but rather is based on a substantial claim for contractual privilege and it appears that the arbitral interpretation of the contract will resolve both the unfair labor practice issue and the contract interpretation issue in a manner compatible with the purposes of the Act, then the Board should defer to arbitration."

I have attached a complete copy of the Collyer Decision and commended in its entirety for its review as to the basis and conditions of the deferral.

I find that the selective reliance on private sector precedent in absence of any reliance on Collyer to require a disclaimer of the proposed order. Further the cases cited to support the Hearing Examiner's proposal and my colleagues' decision either came before Collyer, e.g. NLRB v. Sands Manufacturing Co., 306 US 332 (1939), deal with situations where there was no Collective Bargaining Agreements in effect, Awrey Bakery, Inc. v. NLRB, 217 NLRB 127, 89 LRRM 1224 or where egregious conduct by the employer made the deferral impossible, Garland Distributing Co., 234 NLRB 188, 98 LRRM 1197 (1978). As such, any discussions of the reasoning set forth in the pre-1971 cases is rendered moot by that decision.

To reject this precedent - one long held by the Board Of Personnel Appeals - lends uncertainty, delay and multiple appeals to a process that has developed speedy, effective and final remedies to disputes. One need only examine the history of this case to reach that conclusion. The charges were filed in June, 1979 for alleged violations occurring contemporaneously with the charge. Now in July, 1981 we are making an order that can be rightfully appealed into the court system. When is there a final, enforceable decision? A grievance processed through the arbitration proceeding would have long since been resolved

summarily. The twin ironies of the Board's decision in this case is that another contract has been negotiated in the interim between the charge and the decision and the facility has been sold and will close before this decision is filed. So much for justice delayed being justice denied.

I would therefore defer to arbitration on all charges.

As to the substantive conclusions wherein the Board Of Personnel Appeals substitutes itself for an arbitrator familiar with the industrial common law applied to the settlement of contractual disputes, I would conclude that no unfair labor practices occurred either on the decision to lay off 18 nurses aides, or the manner in which the decision was announced.

For some time now there has been confusion within the private sector and among the various circuit courts as to whether or not an employer had to bargain with the agents of its' employees about the managerial decisions that have substantial impact on the continued availability of employment. Simply stated, this is the so-called decision bargaining issue.

A careful analysis of the cases which have held that there is a bargaining duty as to the decision to close a part of the business or subcontract the work disclosed that there was usually independent prohibited activity that formed the basis of violations of Section 8(a)(3) or 8(a)(1) of the LMRA. These would be analogous to Section 31-31-401 (1) and (3) of the MCA. See Textile Workers' v. Darlington Co., 380 U.S. 283, 58 LRRM 2657 (1965), Morrison Cafeterias Consolidated, Inc., v. NLRB, 431 F2d 254, 74 LRRM 3048 (CA8, 1970).

In this instance and for the reasons stated below, there were no independent violations of the law. Rather the layoffs as potentially unfair labor practices dealt with the entrepreneurial decisions of the employer on how to manage its business and how to reduce its economic losses and survive. I conclude that the majority erred in finding that there is a free standing obligation to bargain about that decision outside the contractual relationship mentioned above and outside the existence of anti-union animus.

On June 22, 1981, the Supreme Court of the United States formalized that conclusion in First National Maintenance Corp. v. NLRB, _____ U.S. _____, 107 LRRM 2705. I have attached a copy of that opinion and support it also in its entirety for application to this case. Let me point out relevant parts of the court's reasoning.

Mr. Justice Blackmun speaking for the seven member majority states that:

"... Congress had no expectation that the elected union representative would be an equal partner in the running of the business enterprise in which the union members are employed ..."

"... The present case concerns a (type) of management decision - one that had a direct impact on the employment since jobs were inexorably eliminated by the termination but had as its focus only the economic profitability... a concern wholly apart from the employment relationship."

The Court goes on to conclude that the decision to partially close a business is not and should not be a mandatory subject of Collective Bargaining as required by Section 8(a)(5) of the Act. It states:

"Management must be free from the constraints of the bargaining process to the extent essential for the running of a profitable business. It must also have some degree of certainty beforehand as to when it may proceed to reach decisions without fear of later evaluations labeling its conduct and unfair labor practice."

"... Nevertheless ... bargaining over management decisions that have a substantial impact on the continued availability of employment should be required only if the benefit for labor - management relations and the Collective Bargaining Process outweighs the burden on the conduct of the business."

Even the Court in the oft cited Fibreboard case (Fibreboard v. NLRB, 379 U.S. 213, implicitly engaged in that analysis. No such subcontracting occurred in this case as in Fibreboard. Rather more duties were assumed by fewer people. At worst, it was a violation of the Collective Bargaining Agreement - not a unfair labor practice.

Accordingly, I conclude that there was no duty to bargain over the decision to re-distribute the duties. Ample evidence was introduced to show the economic necessity for that decision and that conclusion is premised upon meeting the tests in First National Maintenance Co.

Certainly the employer has a duty to bargain about the effects of that decision and I would find that the employer in this instance be required to discharge that responsibility. See NLRB v. Royal Plating and Polishing Co., 350, F2 191, 60 LRRM 2033 (CA3 1965), NLRB v. Adams Dairy, Inc., 350 F2 108, 60 LRRM 2084 (CA8 1965). Lastly, on the majority's acceptance of the proposition that an unfair labor practice can be found as decision bargaining without anti-union purpose, much reliance has been placed on the Great Dane Trailers, Inc. case (NLRB v. Great Dane Trailers, Inc.), 65 LRRM 2466 (1967), and specifically the weight placed on the adverse effect of the inherently destructive conduct on important employee rights.

It would seem that if the conduct is inherently destructive - such as this case where 25% of the bargaining unit was terminated - then the inquiry stops and the conclusion is reached that decision bargaining must occur.

I do not think the case stands for that premise and that the Hearing Examiner's reliance on it does not go far enough. Rather I would conclude that the Court instruct the parties that there is a shifting of the burden to the employer if the conduct is inherently destructive, regardless of motive.

Note that this is a Section 8(a)(3) case - one that deals with allegations of destroying union majority status in discouraging membership.

The Court states as follows:

"But ... in asserted Section 8(a)(3) violations, some conduct is so inherently destructive of employee interest that it may be deemed without the need for proof of an underlying and proper motive...that is some conduct carries with it unavoidable consequences which the employer not only foresaw but which he must have intended. If the conduct (is such), the employer has the burden of explaining a way, justifying or characterizing his actions as something different than they appear on their face."

I submit even in this "motive instance", establishment of conduct merely shifts the burden to the employer to show a valid purpose and in this instance there was a proper motive - the attempt to cut costs through flexible assignments of work and reduction of payroll costs.

The public employer has a legal duty to the taxpayer that is at least coexistent with the private employer's duty to his shareholders. That duty not only requires the prudent expenditures of revenue and efficient use of personnel, but also the obligation to stay in operation to provide the need it services.

Lastly, I must disagree with the majority acceptance of the Hearing Examiner's conclusion that the meeting on June 19, 1979 constituted an unfair labor practice. See Findings Of Fact 11, pages 12 and 13 and Discussion, page 27.

I see nothing in the Findings Of Fact that leads to any other conclusion than certain decisions and their effects were announced. No bargaining took place, no solicitation of employees' opinions or waivers were sought. The critical distinction here is between the terms "announcement" and "discussion". It is the former that is permissible and the latter problematic.

By common meaning, an announcement implies a declaration of a fact or position previously taken. There is little that the audience can do to interact and influence the subject matter. The communication is at best one sided.

A discussion implies a give and take, the consideration of alternatives, perhaps even bargaining.

I find that the meeting did nothing more than announce decisions already reached. There is nothing in the records that will support the existence of a discussion or bargaining.

If we support these Findings and Discussions referenced above, we are condoning a decision that will require a representative of the Collective Bargaining Agent to be present any time the employer wishes to announce a work rule change to the rank and file. That is not the law now nor is it the rule of the work place.

For the reasons set out above, I dissent from the majority opinion on the Order and substitute the Order stated at the beginning of this Dissent.



Francis J. Raucci, Management Member
Board Of Personnel Appeals

STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE NO.29-79;

1			
2			
3	BUTTE TEAMSTERS UNION,)	
4	LOCAL NO. 2.)	
5	Complainant,)	FINDINGS OF FACT,
6	vs.)	CONCLUSIONS OF LAW,
7)	AND RECOMMENDED ORDER
8	SILVER BOW COUNTY, MONTANA)	
9	ON BEHALF OF SILVER BOW)	
10	GENERAL COUNTY HOSPITAL,)	
11	BUTTE, MONTANA)	
12	Defendant.)	

* * * * *

I. INTRODUCTION

This unfair labor practice charge was filed by the Butte Teamsters Union, Local #2, against Silver Bow General County Hospital on June 26, 1979. The Complainant requests the Board of Personnel Appeals to remedy the alleged violations by issuing an order requiring the Defendant to:

- 1) Cease and desist in the actions alleged as violations;
- 2) Reinstate with back pay the employment of those nurses' aides laid off by the Defendant's actions;
- 3) Restore the work in contention back to the bargaining unit;
- 4) Any other remedy deemed just and proper.

A pre-hearing conference in this matter was held at 9:30 a.m., September 11, 1979, in the committee room of Silver Bow General Hospital, 2500 Continental Drive, Butte, Montana, before Clarette C. Martin, Hearing Examiner. The purpose of this conference was to clarify issues, identify witnesses, discuss procedures, and to identify possible remedies. During this conference, the Defendant made a motion for a more definite statement. After considering an objection by the Complainant on grounds of timeliness and



1 considering discussion regarding the hearing process, it was
2 ruled that the motions and the procedure within the hearing
3 itself and the relevance will dictate the admissibility and
4 the weight. Stipulations entered into by the parties at
5 this time were that the parties had the right to call additional
6 witnesses not listed as proposed and to offer additional
7 exhibits if warranted. The Defendant made a motion to
8 dismiss the unfair labor practice due to lack of jurisdiction
9 of the Board and due to the merits of the case and the laws
10 governing this case, which were believed to come under the
11 collective bargaining agreement and its administration. The
12 Hearing Examiner took the motion under advisement in making
13 a decision.

14 A formal hearing in this matter was held on two separate
15 days, on September 11, 1979, and on November 30, 1979, in
16 the committee room of Silver Bow General Hospital, 2500
17 Continental Drive, Butte, Montana, before Clarette C. Martin,
18 Hearing Examiner. The hearing was conducted under authority
19 of Section 39-31-405 MCA and as provided by the Montana
20 Administrative Procedure Act (Title 2, Chapter 4, MCA).

21 The purpose of the formal hearing was to determine if
22 the Defendant had committed the alleged violations.

23 Post hearing briefs were submitted by both parties on
24 March 21, 1980.

25 The Complainant was represented by D. Patrick McKittrick,
26 Attorney, Great Falls, Montana. The Defendant was represented
27 by Michael D. Zeiler, Attorney, Edina, Minnesota.

28 The Hearing Examiner issued a Recommended Order July 31,
29 1980. It was ordered:

30 1. This complaint be remanded to the grievance-arbitra-
31 tion procedure in the collective bargaining agreement between
32 the parties. The Respondent will, within ten days of receipt

1 of this Recommended Order, file a written statement with
2 this Board indicating that it is willing 1) to arbitrate the
3 issues, 2) to waive the procedural defense that this grievance
4 is not timely filed;

5 2. The parties will then process this grievance in
6 accordance with the procedures outlined in Article 22 and 23
7 of the Joint Exhibit 1. It was further ordered that this
8 Board retains jurisdiction for the purposes of hearing this
9 complaint as an unfair labor practice if:

10 a. The Respondent does not, within ten days of receipt
11 of this Recommended Order, file a written statement
12 with this Board indicating that it is willing to arbitrate
13 this issue and to waive the procedural defense that
14 this grievance is not timely filed;

15 b. An appropriate and timely motion adequately demon-
16 strates that this dispute has not, with reasonable
17 promptness after the issuance of this Recommended
18 Order, been resolved in the grievance procedure or by
19 arbitration; or

20 c. An appropriate and timely motion adequately demon-
21 strates that the grievance or arbitration procedures
22 were not conducted fairly.

23 On August 22, 1980, Butte Teamsters Union, Local #2,
24 filed exceptions to the Hearings Examiner's Recommended
25 Order. On September 30, 1980, oral arguments were presented
26 by the parties to the Board of Personnel Appeals. The Board
27 deferred ruling on the issue of whether or not it has jurisdic-
28 tion to defer a pending unfair labor practice charge to
29 arbitration. The Board reserved ruling on this issue for
30 another case. The Board remanded the matters at issue in
31 Unfair Labor Practice No. 29-79 back to the Hearing Examiner
32 to render a determination on the merits of the unfair labor

1 practice charges as filed by the Complainant.

2 II. ISSUES

3 The Complainant's charges allege that on or about June
4 21, 1979, the Defendant, by its officers, agents, and represen-
5 tatives has refused to bargain in good faith, and has violated
6 Section 59-1605, RCM, 1947, 1 (a, b, c, e, and 3); Sections
7 39-31-401, 1, 2, 3, 5 and 39-31-305, 2 MCA by the following
8 acts:

9 1. By calling and conducting meeting of nurses' aides
10 for purposes of discussing wages, hours, and other terms and
11 conditions of employment without the approval of the exclusive
12 collective bargaining representative, Butte Teamsters Union,
13 Local #2.

14 2. By threatening to lay off nurses' aides and assign-
15 ing unit work, covered by the contract, to non-unit employees.
16 The Complainant alleges that the Defendant, by the above
17 acts and by other acts and conduct, has interfered with,
18 restrained, and coerced its employees in the exercise of the
19 rights guaranteed them by law.

20 III. ADMINISTRATIVE NOTICE AND MOTIONS,
21 RULINGS ON WHICH HAVE BEEN RESERVED
22 OR TAKEN UNDER ADVISEMENT

23 The motion made by the Defendant to dismiss the unfair
24 labor practice charge due to lack of jurisdiction of the
25 Board and due to the merits of the case and the laws govern-
26 ing this case which were felt to come under the collective
27 bargaining agreement and its administration is dismissed.

28 The motion made by the Complainant to conform the
29 pleadings to the evidence is sustained.

30 Administrative Notice, as requested by the Complainant,
31 is taken that Mr. Kelley testified as an adverse witness
32 when called by the Complainant.

1 Administrative Notice, as requested by the Complainant,
2 is taken of the allegation that Mr. Robinson approached a
3 witness, Mr. Kelley, while a subject was being discussed.
4 The Complainant believed Mr. Robinson may have whispered
5 something to Mr. Kelley.

6 Administrative Notice, as requested by the Complainant,
7 is taken that Janice Silver testified as a member of management
8 rather than as a representative of the Montana Nurses Associa-
9 tion.

10 Administrative Notice, as requested by the Complainant,
11 is taken that Ms. Christina Knight, a witness for the Defendant,
12 testified that certain nurses' aides called off work because
13 they did not feel like going, or they did not care to give
14 nursing care to the patients. This testimony was given in
15 response to Mr. Zeiler's question, "Have you ever heard
16 anyone speak of their intent to not come to work because
17 they don't like the way the nursing service is managed?".
18 Under cross examination Ms. Knight refused to name the
19 individuals who made such statements.

20 IV. FINDINGS OF FACT

21 After a thorough review of the record, including the
22 sworn testimony of witnesses and submitted exhibits, these
23 are my findings of fact:

24 1. The Butte Teamsters Union, Local #2, is the sole
25 recognized and exclusive bargaining representative with
26 respect to wages, hours, and other terms and conditions of
27 employment for persons employed at Silver Bow General Hospital
28 in the capacity and classification of nurses' aides, orderlies,
29 operating room technicians, and physical therapy aides
30 (Joint Exhibit #1, TR 11).

31 2. The extant collective bargaining agreement between
32 Silver Bow General Hospital and Butte Teamsters Union, Local

1 #2, is effective from July 1, 1978, through June 30, 1980.

2 3. The pertinent agreements contained in the collective
3 bargaining agreement are as follows:

4 "Now, Therefore, in consideration of the mutual benefits
5 accruing to the respective parties, it is agreed as follows:

- 6 1. Article I, Union Cooperation:
7 The Union recognizes the responsibilities
8 imposed upon it as the exclusive bargaining
9 agent for the employees under its jurisdiction,
10 and realizes that in order to provide maximum
11 opportunities for continuing employment, good
12 working conditions, and a high standard of
13 wages, Employer must be able to manage and
14 operate its hospital efficiently and economic-
15 ally, consistent with fair labor standards.
16 The Union, through its bargaining agency,
17 agrees to cooperate in the attainment of
18 these goals.
- 19 2. Article 2, Union Recognition And Membership:
20 (B) The classification as contained herein
21 and the duties relating thereto, shall be
22 outlined in "Job Description for Hospitals"
23 as prepared by the Federal Department of
24 Labor and the United States Employment Service
25 in cooperation with the American Hospital
26 Association, pertinent condensation of which
27 is attached hereto and made a part hereof.
- 28 3. Article 5, Work Day and Work Week:
29 (A) The normal work day shall consist of
30 eight (8) hours and the normal work week
31 shall consist of forty (40) hours. The
32 normal work week for these employees classi-
fied as nurses aides and orderlies shall be
so arranged that two (2) consecutive days off
shall be granted each week and days off shall
be rotated ahead one day each week... Work
Schedules as provided herein may be changed,
on a permanent basis, upon notice to the Union
and approval of the majority of the employees
affected by such change. (underlined emphasis
supplied)....
(E) Any employee desiring to lay off shall
request permission from the Employer's Nursing
Director the previous day. In such cases,
due consideration must be given to the schedul-
ing program and to the availability of accept-
able relief.
4. Article 6, Hours of Work and Overtime:
...(B) Call Outs: (1) Full time employees
called out to work on a regular scheduled day
off or on any day on which the employee is
granted off as a low census day shall be paid
one and one half (1½) times their regular
rate of pay and shall be guaranteed eight (8)
hours work or pay and shall not be required
to take another day off. (emphasis supplied).
5. Article 9, Health and Welfare:
...(B) Eligibility for coverage of employees
under this article shall be limited to employees

1 who work eighty (80) hours or more in the
2 preceding month.

3 6. Article 15, Management Rights:

4 (A) The Employer reserves the right of manage-
5 ment to make and promulgate all rules, regula-
6 tions, and policies not inconsistent herewith
7 which in its judgment are necessary to maintain
8 an effective and efficient patient care
9 program and to maintain the status of its
10 hospital as an accredited institution. The
11 Employer will maintain such work force as, in
12 its judgement may be necessary to accomplish
13 this objective in accordance with the standards
14 and approval of the National Commission on
15 Hospital Accreditation. (emphasis supplied)

16 (B) The General Hospital personnel policies,
17 as stated in the booklet adopted by the Board
18 of County Commissioners June 1, 1960, shall
19 be recognized.

20 (C) The Union will be notified of any change
21 in the personnel policies of the Hospital
22 when Union members are effected. (emphasis
23 supplied)

24 7. Article 17, Seniority:

25 (A) Seniority, by classification, shall be
26 recognized after 3 months of full-time contin-
27 uous service. In case of reduction of forces,
28 the last hired will be the first laid off,
29 the last laid off will be the first to be
30 re-hired. Employees to be re-hired will be
31 notified by registered mail sent to the last
32 known address of such employee. The Employer
reserves the right to be the sole judge of
the competence and acceptability of its
employees during the first 3 months probation-
ary period.

(B) In order to maintain effective and efficient
continuity of operation, the Employer may
change shift assignments. However, except in
cases of emergency, the employee shall be
consulted, and due consideration shall be
given to the right of seniority as set forth
in this Article. Conversely, the employee's
application to change shifts shall receive
equal consideration. Such application shall
be made by registering such desire with the
Director of Nursing prior to the time a
vacancy may occur.

(C) In accordance with hospital practice and
procedures, floor or area assignments cannot
be considered to be permanent and inflexible.
If transfer is necessary, or if a shortage of
work develops in one department, floor or
area, the least senior employee may be trans-
ferred to another department, floor, or area
of the hospital in order to maintain adequate
service for the welfare of the patients and
to insure economy of operation for the hospital.
The Employer agrees to make such transfer
where failure to do so might result in lay
off or loss of time for the employee.

(D) TERMINATION OF EMPLOYMENT: The reasons
for termination of employment, other than
force reduction shall be the same as outlined

1 in present appropriate General Hospital
2 policies.

3 (E) After the first 3 months of employment,
4 when such employment is terminated for a
5 reason other than force reduction, full
6 explanation shall be given to the employee
7 and except in cases of misconduct, the employee
8 shall be given seven (7) days notice. All
9 terminations shall be subject to the grievance
10 procedures at the option of the employee.
11 Such option shall be exercised within five
12 (5) days following termination.

13 8. Article 18, Assignment of Bargaining Unit Work:
14 Bargaining unit work shall be assigned by
15 classification as contained herein. Any
16 person not in the bargaining unit covered by
17 the Agreement shall not regularly (emphasis
18 supplied) perform any of the work of the
19 employees in the bargaining unit. Nothing
20 contained herein is intended to prevent the
21 normal lap-over of job duties in nursing
22 service positions (Nurses Aides, L.P.N.'s,
23 Orderlies, R.N.'s): nothing herein shall
24 supercede any federal or state laws or regula-
25 tions which may require supervisory personnel
26 to personally perform that which might be
27 considered bargaining unit work (emphasis
28 supplied).

29 9. Article 22, Grievance Procedure:
30 ...(B) In the event of any dispute or difficulty
31 arising under the terms of this Agreement, it
32 will be handled by the Conference Committee.
33 If the Conference Committee is unable to
34 reach an agreement the matter will be handled
35 by a duly authorized representative of the
36 Union with the administrator of the hospital,
37 provided the appeal is made within ten (10)
38 days from the date of the decision of the
39 Conference committee. If the controversy
40 cannot be settled within an additional fourteen
41 (14) days, the matter shall then be referred
42 to the Chief Executive of Butte Silver Bow,
43 Montana.

44 10. Article 23, Arbitration Procedure:
45 ...The parties agree that any differences
46 involving the interpretation of this Agreement,
47 which cannot be settled amongst themselves
48 may be submitted to arbitration upon the
49 request of either party.
50 ...(C) The Board of Arbitration shall have
51 authority only to deal with differences
52 between the parties involving the interpretation
53 of this Agreement, and shall not have the
54 authority to alter or add to the terms of
55 this Agreement... and any case referred to
56 the Board by either party on which the Board
57 has no power or authority to rule shall be
58 referred back to the parties without decision.

59 11. Article 25, Term of Agreement:
60 (A) This Agreement shall become effective on
61 the first day of July, 1978 and shall continue
62 in full force and effect until June 30, 1980
63 when it automatically renews itself and
64 continues in full force and effect from year

1 to year thereafter, unless written notice is
2 given by either party to the other, not less
3 than sixty (60) days prior to the expiration
4 date that changes are described in its provisions.
5 Provided, however, that if any changes are to
6 be proposed in employee wages or other provisions
7 which may reasonably be expected to increase
8 hospital costs, such proposed changes shall
9 be made known to the Employer, by written
10 notice, at least sixty (60) days prior to the
11 30th of May in any year.

(B) The written notice, as provided for in
Part (A) shall contain the proposals to be
desired to be written into the new or amended
Agreement.

(C) This Agreement shall be and remain in
full force and affect during any period of
negotiation."

10 All the above quoted Articles and Parts are excerpts
11 from the 1978-1980 contract as found in Joint Exhibit #1.

12 4. In Article 21 of the contract, the parties agreed there
13 would be no strike or lock-out for the duration of this
14 Agreement.

15 5. Article 18 is a new contract provision. Such an agreement
16 had not been included in the previous contract between the
17 parties (See Joint Exhibit #1 as compared to Joint Exhibit
18 #2).

19 6. The duties and responsibilities of the nurses' aides
20 are found in Job Descriptions provided in Defendant Exhibit
21 #3. They are: "Responsible, as a member of the health care
22 team to perform simple, direct, patient care, and other
23 related activities under the direction of licensed personnel.

24 A. Provide assigned personal care to meet the needs
25 of the patient such as bathing, hair, mouth, and skin
26 care and other nursing efforts necessary to the general
27 comfort of the patient.

28 B. Give constant attention to the safety of the
29 patient and his environment by careful application of
30 the hospital policies and procedures regarding bed
31 rails, restraints, assistance where required, etc.

32 C. Perform basic nursing arts such as taking tempera-

1 ture, pulse, respiration, admitting and dismissing,
2 giving enemas etc., as indicated on the orientation
3 check list distributed by the Director of Education.

4 D. Participate in patient care conferences, in-service
5 education programs, etc., which will maintain and/or
6 increase nursing knowlege and skills.

7 E. Participate in nursing service standing committee
8 concerned with making recommendations concerning patient
9 policy and procedure.

10 F. Be aware of hospital organization, nursing service
11 philosophy, policies and procedures through use of policy
12 and procedure books at the nurses station.

13 G. Report signs of change to the appropriate person.

14 H. Assist in maintaining the unit in a sanitary
15 condition

16 I. Record and report accomplishments in appropriate
17 place and/or to appropriate person.

18 J. Contribute to a calm orderly atmosphere conducive
19 to efficient performance on the unit.

20 7. Past practice at Silver Bow General Hospital has been
21 to provide nursing services under a Team Patient Care concept.
22 This fact is clearly supported by Mr. Robert's testimony (TR
23 315). Mrs. Kotan's testimony (TR 211), and Mr. Kelley's
24 testimony (TR 159). It is difficult to ascertain the specific
25 type and amount of nursing care duties performed under the
26 Team Patient Care concept by nurses' aides as opposed to
27 those performed by L.P.N.'s and/or R.N.'s. However, Mrs.
28 Kotan's testimony (TR 211) that "... Um, we did use the team
29 method of nursing and the functional method of nursing care
30 and that fragmented nursing. A certain group gave one care,
31 a certain group gave another kind of care, and a certain
32 group gave another type of care..." conclusively demonstrates

1 that under the Team Patient Care concept nurses' aides,
2 L.P.N.'s, and R.N.'s each had certain types of patient care
3 for which they were primarily responsible and which they
4 performed for the most part, exclusively. I find that basic
5 nursing care, such as, "personal care of patient, and passing
6 trays and feeding, temps, pulses, and just taking care of
7 them...", (TR 105) and as specifically outlined, in Finding
8 of Fact #6, were the primary work responsibilities of nurses'
9 aides and were essentially performed exclusively by nurses'
10 aides. This finding is further substantiated in the collective
11 bargaining agreement, Article 2, as found in Joint Exhibit 1
12 and noted in Finding of Fact #3.

13 8. The collective bargaining agreement was signed by Silver
14 Bow General Hospital with full knowledge and intent that the
15 status quo, regarding nursing services provided by nurses'
16 aides, was preserved. This finding is clearly supported by
17 Mr. Murphy's testimony that, "...our interpretation of this
18 language in conjunction with language in other sections of
19 the contract led us to conclude that this language did not
20 affect, in essence the, the ability of the, did not affect
21 management's rights ah, did not ah, ah, proscribe any practice
22 that was or policy that was presently enforced in the hospital.
23 Ah, it,... really pre, preserved the status quo and for that
24 reason we elected to approve and sign off this particular
25 ah, contract section change" (TR 127). Mr. Murphy was
26 employed as the hospital's Administrator from July of 1977
27 through February 19, 1979. During the negotiating sessions
28 which resulted in the contract Mr. Murphy was head of the
29 hospital's bargaining team. The above quoted testimony was
30 in answer to a question from Mr. Zeiler regarding Article
31 18.

32 9. During the negotiations which resulted in the contract,

1 there was no discussion regarding the implementation of a
2 Total Patient Care Plan in nursing services at Silver Bow
3 General Hospital (TR 246).

4 10. Traditional staffing practices during low census periods
5 are as follows:

6 A. Notice of an impending need for nursing staff to
7 take low census days was given in written and oral
8 form, seeking volunteers. If there was not a sufficient
9 number of volunteers, then the low census days were
10 assigned on a seniority basis. (TR 128, 129).

11 B. The manner in which low census days were distributed
12 among the nursing services depended on the seriousness
13 of the low census problem. If there was only a modest
14 decline in the census, the needed low census days were
15 assigned to the nurses' aides. If the low census
16 problem was more serious, low census days were given
17 across all classifications (TR 129, 130).

18 C. There had not previously been layoffs during low
19 census periods (TR 137).

20 D. If such a layoff were to occur during a low census
21 period, such as the summer months, notice of such
22 layoff would affect all the personnel (TR 137).

23 E. Time given off during the low census periods was
24 not for an extended period of time, such as the entire
25 summer. Typically, an individual might take "two
26 weeks" or "four days" (TR 140). As a general rule, low
27 census days were given on a day to day basis (TR 79).

28 11. A meeting was held on June 19, 1979, by the management
29 of Silver Bow General Hospital with the nurses' aides.
30 Notice of this meeting was posted approximately June 15,
31 1979, (TR 219, Defendants Exhibit #1). At this meeting, the
32 management of Silver Bow General Hospital was represented by

1 Mrs. Kotan, Director of Nursing, who conducted the meeting.
2 Also present for management was Mrs. Lester, Day Shift
3 Supervisor (TR 13, 220, 266). This meeting was sanctioned
4 by Mr. Kelley, Administrator of Silver Bow General Hospital
5 (TR 13). At this meeting Mrs. Kotan announced that it would
6 be necessary to furlough approximately 21 nurses' aides.
7 She announced this would be done according to seniority but
8 that those with seniority could elect to take the furlough
9 if such request was submitted in writing to the nursing
10 service office. Mrs. Kotan also informed the nurses' aides
11 that the benefits would continue for those on the furlough
12 until the time of another decision. According to Mrs.
13 Kotan's testimony such benefits would include insurance
14 premiums and pension (114). She further announced that the
15 furloughed nurses' aides could apply for unemployment and
16 the hospital would not contest it (TR 220).

17 Mrs. Lester testified the nurses' aides were told the
18 layoff was necessary because of the low census (266, 267).
19 Mrs. Lester also testified that the nurses' aides were told
20 that during the low census period management "would be
21 trying the low, the total patient care concept." (TR 270).
22 Mrs. Lester also testified that she and Mrs. Kotan had
23 explained what the Total Patient Care concept was and that
24 under this concept patient care formerly provided by nurses'
25 aides would be shifted to L.P.N.'s and R.N.'s (TR 270).
26 Mrs. Lester further testified that at this meeting the
27 nurses' aides were told that the layoff would continue until
28 the low census period ended and that they did not know when
29 that would be (TR 272). She testified that the nurses'
30 aides were told that they would be called back "...as we
31 needed them." (TR 272).

32 12. Eighteen nurses' aides were laid off (TR 238, 272).

1 The layoff was initiated July 1, 1979 (TR 238).

2 13. The Butte Teamsters Union, Local #2, was not notified
3 of the June 19, 1979, meeting (TR 44).

4 14. Mr. Roberts, then President of Teamsters Union Joint
5 Council #2 and Local #2, responsible for administering and
6 negotiating their labor agreements, was not present at the
7 June 19, 1979, meeting (presumably due to lack of notification
8 as noted in Finding of Fact #13) and became aware of the
9 contents of that meeting after being contacted and receiving
10 complaints from bargaining unit members who had attended the
11 meeting (TR 68, 69).

12 15. Management of Silver Bow General Hospital drafted and
13 mailed a letter to Mr. Leo Lynch, then Business Representa-
14 tive of Butte Teamsters Union, Local #2, to notify the Union
15 of the impending layoff due to low census in the summer
16 months. This letter, which was testified as being mailed
17 June 18, 1979, appears not to have reached Mr. Lynch (TR 71,
18 177, 178, See Defendant Exhibit 2).

19 16. A meeting was held June 22, 1979, in response to a
20 telephone call from Mr. Roberts, Mr. Roberts wished to ask
21 some question concerning the impending action of the Hospital
22 (TR 163). Present at this meeting were Mr. Kelley, Mr.
23 Roberts, Mrs. Kotan, and others (TR 17). The major events
24 which transpired at this meeting are as follows:

25 A. Mr. Roberts asked Mrs. Kotan to inform him of the
26 reasons why the hospital's management held the June
27 19th meeting (Complainant Exhibit 5) and requested she
28 explain what she was going to do with regard to the
29 nurses' aides (TR 222).

30 B. Mrs. Kotan informed Mr. Roberts that the hospital
31 intended to meet the patients' needs utilizing the
32 Total Patient Care Concept (TR 223) and that there

1 would be a layoff of approximately 21 nurses' aides due
2 to the low census.

3 C. Mr. Roberts strongly objected to the hospital's
4 following actions:

5 1) By passing the exclusive bargaining representa-
6 tive and discussing contract changes directly
7 with the nurses' aides. He informed Mrs.
8 Kotan that such action constituted an Unfair
9 Labor Practice (Complainant Exhibit 5).

10 2) Having unit work done by others under the
11 Total Patient Care concept. He informed Mrs.
12 Kotan that the Union would do whatever was
13 necessary, including unfair labor practice
14 action, to protect the members of the bargain-
15 ing unit (Complainant Exhibit 5).

16 D. Mrs. Kotan informed Mr. Roberts of her understanding
17 that the action was permissible under their management
18 rights clause and that she intended to go ahead and
19 implement the Total Patient Care concept (Complainant
20 Exhibit 5, TR 245).

21 17. R.N.'s and L.P.N.'s are currently working under the
22 Total Patient Care concept and are performing work which was
23 formerly performed by nurses' aides (TR 16,46,47).

24 18. R.N.'s and L.P.N.'s are not in the same bargaining unit
25 as the nurses' aides (TR 47).

26 19. Past practice has been that L.P.N.'s were responsible
27 for giving medication and treatments. The giving of patient
28 care was not part of their normal work (TR 142).

29 20. Since August 1979, the patient census has steadily
30 increased and no staffing changes were made in response to
31 the additional patient load (TR 237). Mr. Kelley testified
32 that, in his estimation, the low census period ended in

1 October of 1979 (TR 195).

2 21. None of the 18 full time nurses' aide positions which
3 were laid off have been re-added to the nursing services
4 staff. Also, according to Mr. Kelley, those individuals who
5 were laid off either have found other employment or have
6 come back on staff to replace openings which occurred through
7 attrition (TR 176, 237).

8 22. On June 22, 1979, Janice Silver, head nurse of second
9 floor and ICU, held a meeting of nurses' aides during which
10 she announced that a new type of patient care was to be
11 delivered, the Total Patient Care concept, and identified
12 the roles of the R.N., L.P.N. and nurses' aide in the new
13 patient care concept. The lay offs were also discussed at
14 this meeting (TR 279, 280).

15
16 The Defendant has submitted no specific proposed findings
17 of fact. The Defendant discussed many alleged facts in his
18 Post Hearing Brief and concluded by requesting, "Findings of
19 Fact: That the facts as presented in the foregoing Respondent's
20 Post Hearing Brief be adopted with all the referenced supporting
21 evidence from the record". In response to the Defendant's
22 general request to adopt his unspecified proposed findings
23 of fact, I have arrived at the above findings of fact after
24 a careful review of the record, including sworn testimony
25 and evidence contained therein. All alleged findings of
26 fact inconsistent with my findings of fact are hereby expressly
27 denied.

28 V. DISCUSSION

29 The record clearly establishes that it has been the
30 past practice at Silver Bow General Hospital to provide
31 nursing services under a Team Patient Care concept (Finding
32 of Fact 7). It is also clear that, under the Team Patient

1 Care concept, nurses' aides, for the most part, exclusively
2 performed basic patient care as set forth in Finding of Fact
3 6 and 7. The nurses' aides' right to perform this work, as
4 had been past practice, was formalized as a contract right
5 for the first time in the 1978-80 contract. The Union
6 bargained for and obtained a work preservation clause,
7 Article 18 (Finding of Fact 3(8)).

8 The legality of such a clause cannot be disputed since
9 it has been established in NLRB v. National Woodwork Manufac-
10 turers Association et. al., 386 U.S. 612 (1967), and Fireboard
11 Paper Corp. v. NLRB, 379 U.S. 203 (1964), that work preserva-
12 tion clauses are a mandatory subject of bargaining concerning
13 "terms and conditions of employment". Therefore, the implemen-
14 tation of a new method of providing nursing services which
15 would take work traditionally performed by the nurses' aides
16 and guaranteed by Article 18, and transfer such work to
17 R.N.'s and L.P.N.'s who are not in the bargaining unit,
18 causing the elimination of full-time staff nurses' aides
19 positions, without negotiating with the Union and obtaining
20 the necessary agreed upon changes in the contract from the
21 Union by the hospital's management would constitute a unilat-
22 eral change by management of the bargaining units terms and
23 conditions of employment under the contract.

24 It is undisputed that Silver Bow General Hospital did
25 implement the Total Patient Care concept of providing nursing
26 services and that R.N.'s and L.P.N.'s are performing work
27 previously performed by nurse's aides (Finding of Fact 17).
28 It is also undisputed that 18 full-time nurses' aides were
29 layed off and that the lay off was initiated July 1, 1979
30 (Finding of Fact 12). None of those full-time positions
31 have been re-added the nursing services staff. Those nurses'
32 aides who were layed off have either found employment elsewhere

1 or have come back on staff to replace openings which occurred
2 through attrition (Finding of Fact 21).

3 The Defendant argued that its actions in laying off the
4 nurses' aides was proper under its management right to
5 maintain such work force as is necessary to maintain an
6 effective and efficient patient care program. The Defendant
7 also argued that the lay off was consistent with past practice
8 during low census periods, such as the summer months.

9 Regarding the Defendant's former argument, the Hearing
10 Examiner notes that Article 15, managements rights, states,
11 "(A) The employer reserves the right to make and promulgate
12 all rules, regulations, and policies, not inconsistent
13 herewith..." (emphasis supplied). The underlined wording
14 makes it clear that management's rights are limited by the
15 terms of the contract and that management cannot take actions
16 which are inconsistent with or violate other terms of the
17 agreement. Article 18 provides that "...Any person not in
18 the bargaining unit covered by this agreement shall not
19 regularly (emphasis supplied) perform any of the work of the
20 employees in the bargaining unit... Therefore, management's
21 right regarding the maintenance of the work force and possible
22 reduction of such work force has been limited in that a
23 reduction of the work force must be implemented in such a
24 manner that L.P.N.'s and R.N.'s would not regularly perform
25 the work of nurses' aides. The Defendant argues that the
26 performance of the nurses' aides' work by R.N.'s and L.P.N.'s
27 is not proscribed because Article 18 also states that,
28 "...Nothing contained herein is intended to prevent the
29 normal lap-over of job duties in nursing service positions
30 (nurses' aides, L.P.N.'s, orderlies, R.N.'s); ...". The
31 Defendant contends that part of the R.N.'s and L.P.N.'s
32 duties is to provide direct patient care and that they have

1 routinely provided such care. The Defendant contends that
2 provisions for such care are provided for in the R.N. and
3 L.P.N. job descriptions. The Defendant further argues that
4 the "normal lap-over of job duties" is understood in terms
5 of the above. Therefore, the R.N.'s and L.P.N.'s would not
6 be precluded from performing basic patient care as is normally
7 performed by nurses' aides.

8 Review of the record indicates that while it is true
9 that R.N.'s and L.P.N.'s duties have included the performance
10 of some basic patient care normally provided by nurses'
11 aides, in past practice, this has not been considered as
12 part of their normal work (Finding of Fact 19). Mr. Murphy,
13 Administrator of Silver Bow General Hospital and Chief
14 Negotiator for the hospital when the contract was negotiated,
15 testified, in essence, that the lap-over occurs when the
16 census is unstable, when staff has been scheduled for a
17 certain patient load and an influx of patients occurs,
18 then, "... people have to pitch in and do the work and that's
19 where the overlap generally occurred..." (TR 142). Therefore,
20 although the Defendant is correct in asserting that R.N.'s
21 and L.P.N.'s may at times provide basic nursing care, past
22 practice is that this is not part of their usual work and
23 that the normal lap-over occurs in the situation described
24 by Mr. Murphy.

25 I must also conclude that the Defendant's contention
26 that the lay off was consistent with past practice during
27 low census periods, such as the summer months, is also
28 incorrect. As outlined in Finding of Fact 10, low census
29 days were temporary in nature and did not constitute a
30 permanent lay off of full-time positions. Low census days
31 were given essentially on a day-to-day basis although an
32 employee might take, for example, "two weeks" or "four days"

1 off during such periods (TR 129, 130). There had not previously
2 been a lay off, as such, during a low census period and if
3 such lay off were to occur, it would have affected all
4 personnel. Therefore, since such a lay off did occur and
5 the lay off was of a permanent nature since the 18 full-time
6 staff nurses' aide positions were not later re-added to the
7 staff, and since the lay off affected only nurses' aides, it
8 must be concluded that the lay off was not consistent with
9 past practice during low census periods.

10 Finally, it must be noted that at the June 19, 1979,
11 meeting, wherein the nurses' aides were notified of the
12 impending lay off, the nurses' aides were also informed that
13 during the lay off the hospital would be trying the Total
14 Patient Care concept. Mrs. Kotan, Director of Nursing,
15 informed them that the Total Patient Care concept would
16 entail a transfer of patient care formerly performed by
17 nurses' aides to R.N.'s and L.P.N.'s (Finding of Fact 11).

18 Therefore, I must conclude, based on the preceding
19 discussion, that on July 1, 1979, the management of Silver
20 Bow General Hospital implemented a new approach to providing
21 nursing services, the Total Patient Care concept. The implementa-
22 tion of the Total Patient Care concept was done under the
23 pretext of a normal low census lay off. This action violates
24 Article 18 of the 1978-80 Agreement and constitutes a unilateral
25 change in the terms and conditions of bargaining units
26 employment by management.

27 Since it is well established in the State of Montana
28 that private sector precedents are relevant in interpreting
29 our statute when its language and that of the NLRA are
30 similar (See Montana Supreme Court in State Department of
31 Highways v. Public Employees Craft Council, 165 Mont. 349,
32 87 LRRM 2101 (1974) and that with respect to the scope of

1 bargaining they are almost identical, the following cases
2 will provide conclusive precedent in the instant case.

3 There is a long history of cases where it has been held
4 a violation of the duty to bargain collectively, when an
5 Employer, without first consulting with the Union, makes
6 unilateral changes in wages, hours, and other terms and
7 conditions of employment of an existing contract unless
8 there exists a waiver by the party to whom the duty to
9 bargain is owed. It is also well established that neither
10 party is required to discuss or agree to any modification of
11 the contract if such modification is to become effective
12 prior to the reopening time of the contract. Failure to
13 adhere to the above by one of the parties constitutes a
14 refusal to bargain and violates Section 8(a)(5)(1) of the
15 NLRA and its counterpart, Section 39-31-401, (5)(1) MCA.

16 The case of NLRB v. Sands Manufacturing Co., 306 U.S.
17 332 (1939) was the initial landmark case precedent regarding
18 unilateral changes in an existing contract. The Court
19 stated,

20 "But we assume that the Act imposes upon the
21 employer the further obligation to meet and bargain
22 with his employees' representatives respecting
23 proposed changes of an existing contract and also
24 to discuss with them its true interpretation if
25 there is any doubt as to its true meaning"

26 The cases of Rapid Roller Co., v. NLRB, 126 F 2d. 452 (1942)
27 and Carroll Transfer Co., 56 NLRB 935 (1944) cite and follow
28 the Sands Manufacturing Co. case closely. The decision of
29 the NLRB in the Carroll Transfer Co., case illustrates the
30 solidarity of opinion on this issue wherein it states,

31 "It is now well settled that the statutory duty to
32 bargain does not cease with the execution of the
collective agreement. The employer is under the
further duty to negotiate with the accredited
bargaining agency concerning the modification,
interpretation, and adjustment of the existing
agreement."

In the case of the NLRB v. Huttig Sash and Door Co., 151

1 NLRB 470 (1965), 377 F 2d. 964 (1967), the NLRB was held
2 warranted in finding that the Employer violated Section
3 8(a)(5) of the NLRA by unilaterally reducing the wages of
4 employees without first bargaining with the Union. This
5 finding was held warranted even though the Employer informed
6 the Union of its intent to reduce wages and held conversation
7 with the Union representatives prior to putting the reductions
8 into effect, since the Employer precluded bargaining by its
9 insistence that the reductions would occur on the date
10 designated regardless of the Union's protests. In the case
11 of C & S Industries, Inc., 158 NLRB 454 (1966) the NLRB
12 found that the Employer violated the NLRA by unilaterally
13 instituting an incentive wage system regardless of whether
14 the Employer made sufficient offer to bargain with the Union
15 since the Employer's action operated as a "modification" of
16 the contract terms within the meaning of Section 8(d) of the
17 Act (39-31-305, (2) MCA). This Section expressly provides
18 that neither party is required to discuss or agree to any
19 modification of the contract terms if such modification is
20 to become effective before the reopening of the contract.
21 Further case precedent is found in Awrey Bakeries, Inc. v.
22 NLRB, 548 2d. 138, 217 NLRB No. 127 (1975), 89 LRRM 1224,
23 (6 CA) 94 LRRM 3152 (1976); Garland Distributing Company,
24 234 NLRB No. 188, 98 LRRM 1197 (1978); Brotherhood of Locomotive
25 Firemen and Enginemen, 168 NLRB No. 93 (1967).

26 Since it has been established that:

- 27 (1) The assignment of bargaining unit work is a mandatory
28 subject of bargaining within the statutory phrase
29 "terms and conditions of employment";
- 30 (2) The Defendant unilaterally, without negotiation
31 with nor agreement of the duly certified bargaining
32 representative, modified the terms and conditions

1 of the 1978-80 contract by laying off 18 full-time
2 nurses' aide positions and assigning bargaining
3 unit work, formerly performed by the aforesaid
4 nurses' aides, to employees not included in the
5 bargaining unit;

6 I conclude that Defendant's action constitutes a refusal to
7 bargain in good faith and thereby a violation of Section
8 39-31-401, (5) MCA. I further conclude that the Defendant's
9 action interferes with, restrains, and coerces the employees
10 and is a violation of Section 39-31-401, (1) MCA.

11 The Defendant has argued that an offer to follow the
12 grievance procedure satisfies any duty to bargain over a
13 matter to which that procedure may apply. Timken Roller
14 Bearing Co. v. NLRB, 70 NLRB 500 (1946), enf. den. 161 F. 2d
15 949, 20 LRRM 2204 (1947). The Hearing Examiner concludes
16 that the Defendant's argument fails to establish a contractual
17 defense to the charges for the following reasons. First,
18 there is no evidence on the record that the Defendant attempted
19 to bargain or made such an offer to follow the grievance-
20 arbitration procedure. The meeting held on June 22, 1979,
21 was clearly informational in nature and neither party subsequently
22 attempted to utilize the grievance-arbitration procedure.
23 Second, the existence of an agreed upon grievance-arbitration
24 procedure does not, in itself, preclude the finding of an
25 unfair labor practice where an employer has unilaterally
26 modified the terms and conditions of an existing contract.
27 See NLRB v. C & C Plywood Corp., 385 U.S. 421 (1967); NLRB
28 v. Huttig Sash & Door Co., 377 F. 2d 964 (1967); C & S
29 Industries, Inc., 158 NLRB 454 (1966).

30 The Defendant has argued that the Board should defer
31 jurisdiction in this case to the agreed-upon method of
32 resolving disputes under the 1978-80 contract. The Board

1 reserved ruling on this issue for another case. Addressing
2 the Defendant's contention, the Hearing Examiner would point
3 out that there exists clear precedent that the presence of a
4 problem of contractual interpretation would not, in itself,
5 deprive the Board of jurisdiction in such cases. NLRB v.
6 C & C Plywood Corp., 385 U.S. 421 (1967); NLRB v. Acme
7 Industrial Co., 385 U.S. 432 (1967); NLRB v. Mastro Plastics
8 Corp., 350 U.S. 270 (1956).

9 The NLRB specifically stated in the C & S Industries, Inc.,
10 supra, case that,

11 "While it is true that a breach of contract is not
12 ipso facto an unfair labor practice, it does not
13 follow from this that where given conduct is of a
14 kind otherwise condemned by the Act, it must be
15 ruled out as an unfair labor practice simply
16 because it happens also to be a breach of contract.
17 Of course, the breadth of 8(d) is not such as to
18 make any default in a contractual obligation an
19 unfair labor practice, for that section, to the
20 extent relevant here, is in terms confined to the
21 "modification" or "termination" of a contract.
22 But there can be little doubt that where an employer
23 unilaterally effects a change which has a continuing
24 impact on a basic term or condition of employment,
25 wages for example, more is involved than just a
26 simple default in a contractual obligation. Such
27 a change manifestly constitutes a "modification"
28 within the meaning of 8(d), and if not made in
29 compliance with the requirements of that section
30 it violates a statutory duty the redress of which
31 becomes a matter of concern to the Board (NLRB)."

32 The NLRB did not defer to arbitration in this case as the
Respondent had urged. Further precedent that the existence
of an agreed upon grievance-arbitration procedure does not
deprive the Board of jurisdiction in such cases is found in
the NLRB v. Huttig Sash & Door Co. case. Here, relying
heavily on the United States Supreme Court's decisions in
C & C Plywood Corp. and Acme Industrial Co., cases, the
Court held the following. The NLRB was warranted in finding
that the Employer violated Section 8(a)(5) of the NLRA
despite the assertion of the Employer that it has relied
upon interpretation of the collective bargaining agreement

1 to justify its action. Relying upon the Supreme Court's
2 decisions, the Court stated that the presence of a problem
3 of contractual interpretation did not, in itself, deprive
4 the NLRB of jurisdiction even though the contract contained
5 a grievance-arbitration provision, and that the NLRB had not
6 exceeded its jurisdiction in such evaluation as it made of
7 the Employer's contractual defense. The Court further held
8 that the NLRB had jurisdiction to determine whether or not
9 the Employer had violated Section 8(a)(5) of the NLRA even
10 though the Union had not utilized the contract's grievance-
11 arbitration procedure. The Court held that the grievance-
12 arbitration procedure was not exclusive here and that there
13 is no automatic mutual exclusiveness as between the contractual
14 remedy and the unfair labor practice remedy. It is my
15 opinion that the above cited cases would be controlling in
16 the instant case.

17 The second major question raised was whether or not the
18 Defendant, by its action, violated 39-31-401, (2) MCA. The
19 purpose of this provision is to insure that the duly certified
20 bargaining representative of the employees will not be
21 controlled by an Employer or dependent on the Employer's
22 favor and thereby unable to provide wholehearted, undivided
23 representation to the employees it purports to represent.
24 There is no evidence on the record or the Findings of Fact
25 derived therefrom that the Defendant, by its actions, attempted
26 to dominate, interfere, or assist in the formation or administration
27 of the Union in the manner this provision was implemented to
28 prevent.

29 The third major question to be resolved is whether the
30 Defendant, by its actions, violated Section 39-31-401, (3)
31 MCA. What is at issue here is whether the Employer intended
32 to encourage or discourage membership in the Union. It is

1 unit. I conclude that the Employer's action was "inherently
2 destructive" of important employee rights, that such action
3 severely undermined union membership, and that if the action
4 was not corrected, it would undermine the Union constituent's
5 confidence in the union, thereby discouraging Union membership.
6 Therefore, since the Defendant's actions were "inherently
7 destructive", I conclude that a violation of 39-31-401(3),
8 MCA has occurred and that the proper remedy must be implemented
9 to restore the proper balance between the asserted business
10 justifications and the employee rights guaranteed by Montana
11 Statute.

12 The final question to be resolved is whether the Defendant
13 has committed a violation by calling and conducting meetings
14 of the nurses' aides for the purposes of discussing wages,
15 hours, and other terms and conditions of employment without
16 the approval of the exclusive bargaining agent, Butte Teamsters
17 Union, Local #2.

18 The record clearly establishes that on at least two
19 occasions the hospital held meetings with the nurses' aides
20 wherein the impending lay off of nurses' aides; the implementa-
21 tion of the Total Patient Care concept; and the ramifications
22 of the Total Patient Care concept on bargaining unit work
23 were discussed (Finding of Fact 11, 22). The record further
24 establishes that at the June 19, 1979 meeting, the continuance
25 of benefits provided for in the 1978-80 contract and the
26 possible additional benefit of unemployment insurance were
27 discussed in regard to the nurses' aides affected by the lay
28 off (Finding of Fact 11). Since it is well established that
29 the assignment of bargaining unit work and the benefits
30 discussed at the aforesaid meetings are mandatory subjects
31 of bargaining within the meaning of the phrase "wages,
32 hours, and other terms and conditions of employment" and

1 generally accepted that the Employer's purpose is the deter-
2 mining factor in ascertaining whether an unfair labor practice
3 of this sort has occurred when an Employer discriminates
4 among its employees. However, it is also well established
5 that specific anti-union purpose need not be demonstrated in
6 certain cases. Controlling principles where anti-union
7 purpose need not be specifically demonstrated are,

8 "First, if it can be reasonably be concluded that the
9 Employer's discriminatory conduct was "inherently
10 destructive" of important employee rights, no proof of
11 an anti-union motivation is needed and the Board (NLRB)
12 can find an unfair labor practice even if the employer
13 introduces evidence that the conduct was motivated by
14 business considerations. Second, if the adverse effect
15 of discriminatory conduct on employees' rights is
16 "comparatively slight", an anti-union motivation must
17 be provided to sustain the charge if the employer has
18 come forward with evidence of legitimate and substantial
19 business justification for the conduct." NLRB v. Great
20 Dane Trailers Inc., 87 S. Ct. 1792, 1798.

21 "If the conduct in question falls within the "inherently
22 destructive" category, the employer had the burden of
23 explaining away, justifying, or characterizing "his
24 actions as something different than they appear on
25 their face", and if he fails, "an unfair labor practice
26 charge is made out." NLRB v. Erie Resistor Corp., 83
27 S. Ct. at 1145.

28 "And even if the Employer does come forward with counter
29 explanations for his conduct in this situation, the
30 Board (NLRB) may nevertheless draw an inference of
31 improper motive from the conduct itself and exercise
32 its duty to strike the proper balance between the
33 asserted business justifications and the employees'
34 right in light of the Act and its policy." NLRB v.
35 Erie Resistor Corp. 83 S. CT. at 1145

36 Applying the above principles to this case, the major ques-
37 tion is whether the employer's conduct was "inherently
38 destructive" or "comparatively slight". While it is true
39 that the Defendant presented evidence of substantial legiti-
40 mate business justification, this consideration must be
41 weighed against the fact that the Employer's action constituted
42 a unilateral change in the terms and conditions of employment
43 of the existing contract and resulted in the permanent lay
44 off of 18 full-time staff bargaining unit positions which,
45 according to the Complainant constitutes 25% of the bargaining

1 since the Union was not notified of such meetings, nor
2 present at such meetings, nor gave its express or implied
3 approval of the discussion of such matters by the hospital
4 with the employees for whom it is the exclusive bargaining
5 representative, I conclude that the Defendant bypassed the
6 exclusive bargaining in the discussion of these mandatory
7 subjects of bargaining. Therefore, the Defendant has failed
8 in its duty to bargain in good faith and has violated Section
9 39-31-401, (5) MCA. NLRB v. Insurance Agents Intl. Union,
10 361 U.S. 477, 45 LRRM 2705 (1960).

11 VI. CONCLUSIONS OF LAW

12 The Defendant violated Sections 39-31-401 (1), (3) and
13 (5) MCA by making unilateral changes in the terms and conditions
14 of employment of the Complainant under the 1978-80 contract.

15 The Defendant violated Sections 39-31-401 (1) and (5)
16 MCA by calling and conducting meetings with the nurses'
17 aides for the purpose of discussing wages, hours, and other
18 terms and conditions of employment, thereby bypassing the
19 exclusive bargaining agent.

20 VII. RECOMMENDED ORDER

21 It is ORDERED that Silver Bow General County Hospital,
22 its officers, agents, and representatives shall:

- 23 1. Cease and desist from making unilateral changes in
24 the terms and conditions of the bargaining unit's
25 employment and to bargain with the exclusive
26 bargaining representative with regard to the
27 implementation of the Total Patient Care concept
28 and/or any changes in the conditions of employment
29 which would affect the agreed upon bargaining unit
30 work.
- 31 2. Recognize Butte Teamsters Union, Local #2, as the
32 exclusive bargaining representative and thereby

1 cease and desist from calling and conducting
2 meetings of nurses' aides in which wages, hours,
3 and other terms and conditions of employment
4 without the approval of said exclusive bargaining
5 representative.

- 6 3. Offer reinstatement to the same or substantially
7 equivalent positions, with back pay to the eighteen
8 (18) nurses' aides who were affected by the July
9 1, 1979, lay off. In accordance with the principles
10 set forth in F.W. Woolworth Co., 26 LRRM 1184,
11 back pay shall be computed on the basis of each
12 separate calendar quarter or portion thereof from
13 the date of lay off to a proper offer of reinstatement
14 and/or commencement of work from said offer. Loss
15 of pay shall be determined by deducting from a sum
16 equal to what the nurses' aides would normally
17 have earned during each such quarter, or portion
18 thereof, their net earnings, if any, in other
19 employment during that period. Earnings in one
20 particular quarter shall have no effect upon the
21 back pay liability for any other quarter. Such
22 payments to compensate for loss of wages shall be
23 for "wages" within the meaning of the Social
24 Security Act. In order to insure expeditious
25 compliance with the Board's reinstatement and
26 back-pay order, the Defendant shall be ordered,
27 upon reasonable request to make all pertinent
28 records available to the Board and its agents.
- 29 4. Rescind the establishment of the Total Patients
30 Care concept as implemented during the 1978-80
31 contract and restore the work in contention back
32 to the bargaining unit.

VIII. NOTICE

1
2 Exceptions to these Findings of Fact, Conclusions of
3 Law, and Recommended Order may be filed within twenty days
4 of service thereof. If no exceptions are filed, the Recommended
5 Order shall become the Final Order of the Board of Personnel
6 Appeals. Exceptions shall be addressed to the Board of
7 Personnel Appeals, Capitol Station, Helena, Montana 59620.

8 Dated this 21st day of May, 1981.

9
10 BOARD OF PERSONNEL APPEALS

11
12 
13 Clarette C. Martin
14 Hearing Examiner

15 * * * * *

16 CERTIFICATE OF MAILING

17 The undersigned does certify that a true and correct copy of
18 this document was mailed to the following on the 21 day of May,
19 1981:

20 D. Patrick McKittrick
21 Attorney At Law
22 Suite 315
23 Davidson Building
24 Great Falls, MT 59401

Silver Bow General Hospital
2500 Continental Drive
Butte, Montana 59701

26 Donald C. Robinson
27 POORE, ROTH, ROBISCHON & ROBINSON, P.C.
28 1341 Harrison
29 Butte, Montana 59701

30 Jim Roberts
31 Secretary-Treasurer
32 Butte Teamsters Union Local No. 2
P.O. Box 3745
Butte, Montana 59701



PAD5:K/30

STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE CHARGE NO. 29-79:

BUTTE TEAMSTERS, LOCAL #2,)
Complainant,)
- vs -)
SILVER BOW COUNTY, MONTANA, ON)
BEHALF OF SILVER BOW COUNTY)
HOSPITAL, BUTTE, MONTANA,)
Defendant.)

ORDER

* * * * *

On July 31, 1980, the Hearing Examiner in this matter issued an order directing the matter of the unfair labor practice be sent to arbitration pursuant to the agreement between the two parties. On August 22, 1980, the Teamsters filed exceptions to the Hearing Examiner's Recommended Order. On September 30, 1980, oral arguments were presented to this Board concerning the exceptions filed by the Teamsters.

The Defendant argued in favor of the Hearing Examiner's Order. The Teamsters argued that this Board had neither statutory authority nor authority through its rules to defer this matter to arbitration.

This Board, however, does not wish to rule on the issue of whether or not it has the jurisdiction to defer a pending unfair labor practice to arbitration. It will reserve that ruling for a different case. Rather this Board, finding that the parties have been put to the expense of presenting a factual hearing to the hearing examiner, remands this matter back to the hearing examiner to issue a decision on the merits of the unfair labor practice charges as filed by Complainant Teamsters.

DATED this 30 day of October, 1980.

BOARD OF PERSONNEL APPEALS

By Brent Cromley
Brent Cromley, Chairman

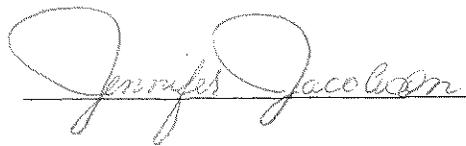
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32

CERTIFICATE OF MAILING

I, Jennifer Jacobson, do hereby certify and state that I mailed a true and correct copy of the above ORDER to the following persons on the 31 day of October, 1980:

D. Patrick McKittrick
Attorney at Law
315 Davidson Building
P.O. Box 1184
Great Falls, MT 59403

Don Robinson
POORE, ROTH, ROBISCHON & ROBINSON, P.C.
1341 Harrison Avenue
Butte, MT 59701



1 The hearing was begun on September 11, 1979 and continued on
2 November 30, 1979 in the Committee Room of the Silver Bow General
3 Hospital, 2500 Continental Drive; Butte, Montana.

4 Post hearing briefs were submitted by both parties on March
5 21, 1980.

6 The Board of Personnel Appeals in its AFSCME-Laurel decision,
7 ULP No. 13-78, adopted the Collyer Doctrine, wherein, deferrals to
8 appropriate collective agreement processes are considered justified
9 where specific criteria are met. In the 1971 landmark Collyer
10 decision of the National Labor Relations Board (NLRB) the reasoning
11 of the NLRB in setting such precedent, stated in part, that

12 The courts have long recognized that an industrial relations
13 dispute may involve conduct which, at least arguably, may
14 contravene both the collective agreement and our statute.

15 When the parties have contractually committed themselves to
16 mutually agreeable procedures for resolving their disputes
17 during the period of the contract, we are of the view that
18 those procedures should be afforded full opportunity to
19 function.¹

20 The criteria used in the Collyer case have since been relied
21 on when deferral questions arise; generally, the policy is to
22 defer provided:

23 - The Dispute must arise within the confines of a stable
24 collective bargaining agreement, without any assertion of
25 enmity by the respondent toward the charging party.

26 "...there is effective dispute-solving machinery available,
27 and if the combination of past and presently alleged misconduct
28 does not appear to be of such character as to render the use
29 of that machinery unpromising or futile..."²

30 and, in the absence of:
31
32

¹ Collyer Insulated Wire, 192 NLRB 837, 77 LRM 1931 (1971).
² United Aircraft Corp., 204 NLRB 879, 83 LRRM 1411 (1972)

1
2 1) charges alleging no stable collective bargaining relationship,
3 2) conduct by the respondent constituting a rejection of the
4 principles of the Act, 3) charges alleging that employer's
5 conduct was in retaliation or reprisal for the employees
6 exercise of rights under grievance procedures or otherwise
7 attempted undermining the grievance arbitration mechanism, 4)
8 employer interference with grievance arbitration procedure
9 use.³

10 - The respondent must be willing to arbitrate and/or willing
11 to waive the procedural defense that the grievance is not
12 timely filed

13 and

14 - the issue is arbitrable . . . the dispute must be clearly
15 arbitrable or at least arguably covered by the contract and
16 its arbitration provision; and - a final and binding procedure
17 must exist.⁴

18 A. The factors considered minimum for deferral action are evident
19 in this case by the following facts:

20 1) The dispute issues center on a labor contract in existence
21 at the time of the dispute. . . .

22 a) Admittedly - in complainant's post hearing brief,
23 applicable articles (2, 7, 15, 18, 24) within the
24 Joint Exhibit No. 1 (Agreement 7/1/78-6/30/80) are
25 referenced freely

26
27
28 ³ American Bar Association, The Developing Labor Law,
29 Cumulative Supplement 1971-78 (Washington, D.C.: Bureau of
30 Affairs, Inc., 1976), p. 275-77.
31 1976 Supplement (Washington, D.C. : Bureau of National Affairs,
32 Inc., 1977) p. 136-37.
1977 Supplement (Washington, D.C.: Bureau of National Affairs,
Inc., 1978) p. 161-62.

⁴ Ibid. 1971-75 Supplement, p. 277-79; 1976 Supplement, p. 137;
1977 Supplement, p. 162-163.

1
2 b) Arguably - as the agreement is a joint exhibit, on
3 which testimony was elicited from witnesses of both
4 parties, AND language in the complaint relating to
5 layoffs, unit work and the meetings has direct
6 language and evidence correlation in Articles 1, 2,
7 15, 17 and 18. . .

8 (and its interpretation);

9 where there was no claim of enmity by Respondent
10 to employees' exercise of protected rights

11 c) Conclusively - no argument nor evidence was presented
12 to support an objection on the basis of: respondent's
13 conduct constituting a rejection of the principles
14 of collective bargaining or the organizational
15 rights of employees, employees resorting to grievance
16 mechanism resulting in employer's conduct of a
17 retaliatory or reprisal nature OR the employer's
18 interference in the use of the grievance arbitration
19 procedure.

20 2) The respondent is willing to arbitrate the issue.

21 a) as evident in Defendant's written answer to complaint,
22 initial and final motions in hearing proceedings
23 and post hearing pleadings. . .

24 which is arbitrable

25 b) the complaint issues are covered by the contract as
26 in 1) a) and b) above.

27 3) An existence of a final and binding procedure. . .

28 as in Joint Exhibit No. 1 Articles 22 and 23

29 B. The absence of factors which would result in the board declining
30 to defer cases: 1) contract language which on its face is
31 illegal or may have compelled the arbitrator to reach a
32 result inconsistent with the Act (National Labor Relations
Act) 2) The respondent's arguments construing the contract
language to justify its conduct was "patently erroneous" --
3) The contract language was unambiguous (and therefore, the

1 special competence of an arbitrator not necessary to interpret
2 the contract). . .⁵

3 . . . when combined with the existence of those minimum
4 factors which support such action, would not permit a refusal
5 of the defendant's pleading for deferral.

6 Even in cases alleging a refusal to bargain, the NLRB will
7 not defer where the employer's conduct amounts to a complete
8 rejection of collective bargaining principles or of the
9 bargaining relationship itself.⁶

10 BUT HAS DEFERRED in refusal-to-bargain cases involving . . .
11 change of work duties, assignment of work to non-unit employees,
12 unilateral subcontracting of work.⁷

13 THIS BOARD HAS the authority to hear or to defer this complaint
14 under the provisions of 39-31-403, through 408, 2-15-1705 and
15 39-31-103, 104 MCA and as set forth by fundamental labor relations
16 principles outlined in the National Labor Relations Act as interpreted
17 by the National Labor Relations board and adopted by the Montana
18 Board of Personnel Appeals.

19 IT IS THEREFORE ORDERED:

20 -This complaint be remanded to the grievance-arbitration
21 procedure outlined in the collective bargaining agreement
22 between the parties to this matter.

23 The respondent will, within ten days of receipt of this
24 Order, file a written statement with this Board indicating
25 that it is willing 1)to arbitrate the issues and 2)to waive
26 the procedural defense that this grievance is not timely
27 filed.

28 -The parties will then process this grievance in accordance
29 with the procedures outlined in Artcles 22 and 23 of the
30 joint Exhibit No. 1.

31
32

⁵ Op. Cit, American Bar Association, 1971-78 Supplement, p. 279-282;
1976 Supplement, p. 137-138; 1977 Supplement, p. 163-164

^{6, 7} Federal Regulation in Employment Services (FRES) (NLRA SCOPE)
Chapter 47:30

1 This Board retains jurisdiction for the purposes of hearing this
2 complaint as an unfair labor practice if:

- 3 1. The respondent does not, within ten days of receipt of
4 this Order, file a written statement with this board
5 indicating that it is willing to arbitrate this issue
6 and to waive the procedural grievance that this grievance
7 is not timely filed;
- 8 2. An appropriate and timely motion adequately demonstrates
9 that this dispute has not, with reasonable promptness
10 after the issuance of this Order, been resolved in the
11 grievance procedure or by arbitration; or
- 12 3. An appropriate and timely motion adequately demonstrates
13 that the grievance or arbitration procedures were not
14 conducted fairly.

15 DATED this 31st day of July, 1980.

16
17 BOARD OF PERSONNEL APPEALS

18 BY: Clarette C. Martin
19 Clarette C. Martin
20 Hearing Examiner

21 NOTICE

22 Exceptions to this order may be filed within twenty days service
23 thereof. Exceptions shall be addressed to the Board of Personnel
24 Appeals, Box 202, Capitol Station, Helena, Montana 59601

25 CERTIFICATE OF MAILING

26 I, Jennifer Jacobson, do hereby
27 certify and state that I did on the 7th day of
28 August, 1980, mail a true and correct copy of
29 the above ORDER to the following:

30 Michael D. Zeiler
31 Employee Relations Associates, Inc.
32 7101 York Avenue South
Edina, Minnesota 55435

Mr. D. Patrick McKittrick
Attorney at Law
Suite 315 - Davidson Bldg.
Great Falls, MT 59401

Edwin E. Dahlberg, Administrator
Silver Bow General Hospital
2500 Continental Drive
Butte, MT 59701

Jim Roberts
Butte Teamsters Local #2
P.O. Box 3745
Butte, MT 59701