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Specialty Healthcare and Rehabilitation Center of Mobile, Inc. *and* United Steel, Paper and Forestry, Rubber, Manufacturing, Energy Allied-Industrial and Service Workers International Union, AFL–CIO/CLC. Case 15–CA–68248

December 30, 2011

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS BECKER AND HAYES

This is a refusal-to-bargain case in which the Respondent, Specialty Healthcare and Rehabilitation Center of Mobile, Inc.,[1] is contesting the Union's certification as bargaining representative in the underlying representation proceeding. Pursuant to a charge filed on November 4, 2011, the Acting General Counsel issued the complaint on November 16, 2011, alleging that the Respondent has violated Section 8(a)(5) and (1) of the Act by refusing the Union's request to bargain following the Union's certification in Case 15–RC–8773. (Official notice is taken of the "record" in the representation proceeding as defined in the Board's Rules and Regulations, Sections 102.68 and 102.69(g); *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed an answer, admitting in part and denying in part the allegations in the complaint and asserting affirmative defenses.

On December 7, 2011, the Acting General Counsel filed a Motion for Summary Judgment and a memorandum in support. On December 8, 2011, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed a response.

Ruling on Motion for Summary Judgment

The Respondent admits its failure and refusal to bargain, but contests the validity of the Union's certification based on its contention in the underlying representation proceeding that the bargaining unit is inappropriate.[2]

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding.[3] See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941).

[1] The name of the Respondent has been corrected to reflect the name as stated in its answer.

[2] The Respondent's answer denies paragraph 7 of the complaint, which sets forth the appropriate unit. The unit issue, however, was fully litigated and resolved in the underlying representation proceeding. Accordingly, the Respondent's denial of the appropriateness of the unit does not raise any litigable issue in this proceeding. In addition, the Respondent raises affirmative defenses in its answer, arguing that the Board acted unreasonably and contrary to law by certifying the Union because: when the ballots were cast, the employees did not know the nature and size of the bargaining unit; there has been a significant amount of turnover among employees who were eligible to vote in the election on February 20, 2009, requiring that a new election be held; the unit found appropriate is not supported by case precedent and is contrary to the Act; the Board drastically altered the standards for unit determinations without so acknowledging, rendering the Board's decision arbitrary and capricious; and the process by which the Board adopted the unit determination here is contrary to the Administrative Procedures Act.

These arguments were or could have been raised in the underlying representation proceeding and therefore may not be relitigated in this proceeding. Further, the Board has long held that in unfair labor practice cases such as this, involving an employer's refusal to bargain during the initial year of certification, employee turnover does not constitute "unusual circumstances" relieving an employee of its obligation to bargain. See, e.g., *King Electric, Inc.*, 343 NLRB No. 54, slip op. at 1 fn. 1 (2004) (not reported in Board volumes), enf. denied on other grounds 440 F.3d 471, 474 (D.C. Cir. 2006); *Action Automotive*, 284 NLRB 251, 251 fn. 1 (1987), enfd. 853 F.2d 433 (6th Cir. 1988), cert. denied 488 U.S. 1041 (1989); *Murphy Bros*., 265 NLRB 1574, 1575 fn. 3 (1982) (employee turnover not the kind of "unusual circumstance" that would permit rebuttal of the union's majority status during the certification year).

In addition, in its response to the Notice to Show Cause, the Respondent argues that a new hearing is required in order to accord due process. The Respondent asserts that it should be given an opportunity to present evidence under the Board's new standard—established in the underlying representation proceeding—that allows an employer to show that a unit is inappropriate if there is an overwhelming community of interest among the included and excluded employees. The Respondent contends that, had it been aware of this new standard, it would have supplemented the evidence presented in the representation proceeding and would have met this standard. We find no merit in this argument. The Board's decision in the underlying representation proceeding contains a detailed analysis of the community-of-interest factors between the employees in the petitioned-for unit and those additional employees whom the Respondent sought to include in the unit. The Respondent has not indicated what further evidence it would proffer in support of its position under the standard applied in that proceeding, nor has it indicated how any additional evidence would affect the Board's analysis. Finally, the Respondent did not move to reopen the record in the underlying representation proceeding. Thus, it is improperly trying to raise an issue that could have been litigated in that proceeding. Accordingly, we find that the Respondent's assertions in this regard do not raise any issues of fact warranting a hearing under the Act or the due process clause.

[3] Member Hayes dissented in the underlying representation proceeding, on both procedural and substantive grounds. While he remains of the view that the Board majority inappropriately changed the standard for determining whether a petitioned-for unit is appropriate, he agrees

Accordingly, we grant the Motion for Summary Judgment.[4]

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a corporation, with an office and place of business in Mobile, Alabama, the Respondent's facility, has been engaged in the business of operating a health care facility.[5]

Annually, the Respondent, in conducting its operations described above, derives gross revenues in excess of $100,000, and purchases and receives at its Mobile, Alabama facility products, goods, and materials valued in excess of $5000 directly from points outside the State of Alabama.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and has been a health care institution within the meaning of Section 2(14) of the Act,[6] and that the Union, United Steel, Paper and Forestry, Rubber, Manufacturing, Energy Allied-Industrial and Service Workers International Union, AFL–CIO/CLC, is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Certification

Following the representation election held February 20, 2009, the Union was certified on September 26, 2011, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> Including: All full-time and regular part-time Certified Nursing Assistants (CNAs) employed by the Employer at its Mobile, Alabama facility.
>
> Excluding: All other employees, guards and supervisors as defined in the Act.

The Union continues to be the exclusive collective-bargaining representative of the unit employees under Section 9(a) of the Act.

B. Refusal to Bargain

At all material times, David Grimes held the position of executive director and has been supervisor of the Respondent within the meaning of Section 2(11) of the Act and an agent of the Respondent within the meaning of Section 2(13) of the Act.

On about October 19, 2011, the Union, by letter, requested the Respondent to bargain with it as the exclusive collective-bargaining representative of the unit.

Since about November 3, 2011, the Respondent has failed and refused to bargain with the Union as the exclusive collective-bargaining representative of the Union.

We find that this failure and refusal constitutes an unlawful failure and refusal to bargain with the Union in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By failing and refusing since about November 3, 2011, to bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co*., 136 NLRB 785 (1962); *Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964); *Burnett Construction Co*., 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

ORDER

The National Labor Relations Board orders that the Respondent, Specialty Healthcare & Rehabilitation Center of Mobile, Inc., Mobile, Alabama, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize and bargain with United Steel, Paper and Forestry, Rubber, Manufacturing, Energy Allied-Industrial and Service Workers Inter-

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that the Respondent has not raised any new matters that are properly litigable in this unfair labor practice proceeding.

[4] We therefore deny the Respondent's request that the complaint be dismissed in its entirety.

[5] Although the complaint alleges that the Respondent has been engaged in the business of operating "residential health care facilities," the Respondent's answer admits only that it has been engaged in operating "a health care facility." We find that this distinction is immaterial to the outcome of this proceeding and does not raise any issues of fact warranting a hearing.

[6] The complaint does not specifically allege the Respondent's status under Sec. 2(14) of the Act. However, there is no dispute that the Respondent is a health care institution within the meaning of that Section, and we so find.

national Union, AFL–CIO/CLC, as the exclusive collective-bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> Including: All full-time and regular part-time Certified Nursing Assistants (CNAs) employed by the Employer at its Mobile, Alabama facility.
>
> Excluding: All other employees, guards and supervisors as defined in the Act.

(b) Within 14 days after service by the Region, post at its facility in Mobile, Alabama, copies of the attached notice marked "Appendix."[7] Copies of the notice, on forms provided by the Regional Director for Region 15, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means.[8] Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed its facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since November 3, 2011.

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

Dated, Washington, D.C. December 30, 2011

Mark Gaston Pearce, Chairman

Craig Becker, Member

Brian E. Hayes, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to recognize and bargain with United Steel, Paper and Forestry, Rubber, Manufacturing, Energy Allied-Industrial and Service Workers International Union, AFL–CIO/CLC as the exclusive collective-bargaining representative of the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the following bargaining unit:

[7] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[8] For the reasons stated in his dissenting opinion in *J. Picini Flooring,* 356 NLRB No. 9 (2010), Member Hayes would not require electronic distribution of the notice.

Including: All full-time and regular part-time Certified Nursing Assistants (CNAs) employed by us at our Mobile, Alabama facility.

Excluding: All other employees, guards and supervisors as defined in the Act.

SPECIALTY HEALTHCARE AND REHABILITATION CENTER OF MOBILE, INC.