

Canterbury Villa of Waterford, Inc. and New England Health Care Employees Union, District 1199, RWDSU, AFL-CIO. Case 39-CA-1797

10 July 1984

DECISION AND ORDER

BY MEMBERS ZIMMERMAN, HUNTER, AND DENNIS

Upon a charge filed by the Union 1 September 1983 and amended 14 October 1983,¹ the General Counsel of the National Labor Relations Board issued a complaint 14 October 1983 against the Company, alleging that it has violated Section 8(a)(5) and (1) of the National Labor Relations Act.

The complaint alleges that on 11 August 1983, following a Board election in Case 39-RC-318, the Union was certified as the exclusive collective-bargaining representative of the Company's employees in the unit found appropriate. (Official notice is taken of the "record" in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g), amended Sept. 9, 1981, 46 Fed.Reg. 45922 (1981); *Frontier Hotel*, 265 NLRB 343 (1982).) The complaint further alleges that since 23 August 1983 the Company has refused to bargain with the Union. On 26 October 1983 the Company filed its answer admitting in part and denying in part the allegations in the complaint.

On 12 January 1984 the General Counsel filed a Motion for Summary Judgment. On 19 January 1984 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 Company filed a response.

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

Ruling on Motion for Summary Judgment

The Company's answer admits its refusal to bargain and to furnish information that is necessary and relevant to the Union's role as bargaining representative, but raises certain affirmative defenses. Thus the Company contends that it is not the successor to the previous owner Mary Kenny Nursing Home, Inc. in whose name the Board's Decision and Certification of Representative issued.² The Company further contends that if it is a successor, the Union's certification is invalid because the Union had engaged in objectionable conduct. Fi-

nally, the Company requests a hearing before an administrative law judge to properly assess the validity of the certification. The General Counsel argues that the Company has admitted in its answer sufficient facts to establish that it is a successor to Mary Kenny and that the Company's "pro forma" denial raises no material issues of fact warranting a hearing. The General Counsel further contends that all material issues in the representation case have been previously decided. We agree with the General Counsel.

The record, including the record in Case 39-RC-318, reveals that an election was held 12 May 1982 pursuant to a Stipulated Election Agreement. The tally of ballots shows that of approximately 92 eligible voters, 45 cast valid ballots for and 38 against the Union; there were 5 challenged ballots, an insufficient number to affect the results of the election. After conducting a hearing on Mary Kenny's objections, the hearing officer on 30 July 1982 issued his report recommending that the objections be overruled. The Company filed exceptions to the recommendation. On 11 August 1983 the Board adopted the hearing officer's recommendations and certified the Union as the exclusive bargaining representative of the employees in the stipulated unit.

By letter, mailgram, and telephone on 23, 24, and 31 August 1983 the Union requested the Company to bargain and to furnish it certain information about the terms and conditions of employment of the unit employees. Since 26 August and 9 September 1983 the Company has failed and refused to respond to the Union's request for information and has failed to recognize and acknowledge the Union's bargaining demand.

Regarding the Company's contention that it is not a successor to Mary Kenny, the Company's answer reveals that up until 28 February 1983 Mary Kenny owned and operated the nursing home and that on 1 March the Company purchased the real property, improvements, and equipment from Mary Kenny and since that date has operated the nursing home providing in-patient medical and professional care for geriatric patients. The Company also admits that it has continued to care for "substantially the same patients cared for by Mary Kenny" and that at the time it took over the operation of the nursing home a majority of its employees were former Mary Kenny employees.

The Board's traditional test for successorship status is "whether there is a continuity in the employing enterprise."³ The Supreme Court affirmed

¹ The amended complaint alleged that the Company had continued as the employing entity and is a successor of Mary Kenny.

² Not included in bound volumes.

³ *Lincoln Private Police*, 189 NLRB 717 (1971); *NLRB v. Lunder Shoe Corp.*, 211 F.2d 284 (1st Cir. 1954); *Northwest Glove Co.*, 74 NLRB 1697,

Continued

the Board's test in *NLRB v. Burns Security Services*, 406 U.S. 272, 279 (1972), and stated that "a mere change of employers or of ownership in the employing industry is not such an 'unusual circumstance' as to affect the force of the Board's certification within the normal operative period if a majority of employees after the change of ownership or management were employed by the preceding employer [cited cases omitted]." We find that the Company has admitted facts sufficient to show "substantial continuity." Thus the Company admits that (1) it purchased the property and equipment of Mary Kenny; (2) it has continued to operate the same business at the same location; (3) it has provided the same services to the same customers without any interruptions; and (4) it retained a majority of the Mary Keeny work force. Accordingly, we conclude that the Company is a successor to Mary Kenny and therefore had a duty to recognize and bargain with the certified collective-bargaining representative of its employees on and since 26 August 1983.⁴

It is well settled that in the absence of newly discovered and previously unavailable evidence or special circumstances, a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues that were or could have been litigated in a prior representation proceeding. See *Pittsburgh Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941); Secs. 102.67(f) and 102.69(c) of the Board's Rules and Regulations.

Except for the successorship issue, all other issues raised by the Company were or could have been litigated in the prior representation proceeding. The Company 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 re-examine the decision made in the representation proceeding.⁵ There are no factual issues regarding

1700 (1947); *Premium Foods*, 260 NLRB 708 (1982), enf'd. 709 F.2d 623 (9th Cir. 1983).

⁴ In concluding that the Respondent is a successor to the former employer, Mary Kenny, Member Hunter finds it unnecessary to rely on the cases cited at fn. 3, above.

⁵ We note that the Company was the owner of Mary Kenny for 6 months during the time that Mary Kenny's exceptions to the hearing officer's Report on Objections were pending before the Board. We find no merit in the Company's contention that a special circumstance exists warranting dismissal of the motion because of its allegation that fewer than 30 percent of the original Mary Kenny employee complement are currently employed by it. It is well settled that the time frame for determining what percentage of a purchaser's employees are former employees of a predecessor is when a representative complement of an employer's work force is first on the job. *Hudson River Aggregates*, 246 NLRB 192 (1979). Here, the Respondent has admitted that a majority of its employees were those of its predecessor on 1 March 1983, the date the Company took over. Therefore, the Respondent cannot rely on unit changes 6 months to a year later to justify its refusal to bargain. See, e.g., *L.A.X. Medical Clinic*, 248 NLRB 861, 864 (1980).

the Union's request for bargaining or information because the Respondent by its answer to the complaint admitted that it refused to bargain and to furnish the information. Therefore, since the Company has admitted its refusal to bargain with the Union contesting only its obligation to do so, we find that the Company has not raised any issue that is properly litigable in this unfair labor practice proceeding. Accordingly we grant the Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Company, a Connecticut corporation, has been engaged in the operation of a nursing home providing in-patient medical and professional services for geriatric patients at its facility in Waterford Connecticut, where it annually will purchase goods and materials valued over \$50,000 directly from outside the State. We find that the Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *The Certification*

Following the election held 12 May 1982 the Union was certified 11 August 1983 as the collective-bargaining representative of the employees in the following appropriate unit:

All service and maintenance employees, including nurses aides, orderlies, therapeutic recreation directors, inservice aides, housekeepers, housekeeping aides, porters, maintenance men, laundry aides, cooks, kitchen aides, dishwashers, receptionists, beauticians, and medical records secretaries employed by Mary Kenny at its Waterford, Connecticut facility, excluding licensed practical nurses, registered nurses, business office employees, and guards, other professional employees and supervisors as defined in the Act.

The Union continues to be the exclusive representative under Section 9(a) of the Act.

B. *Refusal to Bargain*

Since 23 August the Union has requested the Company to bargain. Since 24 August the Union has requested the Company to furnish it with information necessary and relevant to the Union's role

as collective-bargaining agent, and since 9 September the Respondent has refused. We find that this refusal constitutes an unlawful refusal to bargain in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSIONS OF LAW

By refusing on and after 9 September to supply necessary and relevant information and to bargain with the Union as the exclusive collective-bargaining representative of the employees in the appropriate unit, the Company 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 and to provide the Union, on request, information necessary for collective bargaining.

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, Canterbury Villa of Waterford, Inc., Waterford, Connecticut, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with New England Health Care Employees Union, District 1199, RWDSU, AFL-CIO as the exclusive 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 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 and provide the Union, on request, information necessary for collective bargaining:

All service and maintenance employees, including nurses aides, orderlies, therapeutic recreation directors, inservice aides, housekeepers, housekeeping aides, porters, maintenance men, laundry aides, cooks, kitchen aides, dishwashers, receptionists, beauticians, and medical records secretaries employed by Mary Kenny at its Waterford, Connecticut facility, excluding licensed practical nurses, registered nurses, business office employees, and guards, other professional employees and supervisors as defined in the Act.

(b) Post at its facility in Waterford, Connecticut, copies of the attached notice marked "Appendix."⁶ Copies of the notice, on forms provided by the officer in charge for Subregion 39, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the officer in charge in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

⁶ 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."

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 the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain with New England Health Care Employees Union, District 1199, RWDSU, AFL-CIO as the exclusive 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 guaranteed you by Section 7 of the Act.

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 bargaining unit:

All service and maintenance employees, including nurses aides, orderlies, therapeutic recreation directors, inservice aides, housekeepers, housekeeping aides, porters, maintenance men, laundry aides, cooks, kitchen aides, dishwashers, receptionists, beauticians, and medical records secretaries at the Waterford,

Connecticut facility, excluding licensed practical nurses, registered nurses, business office employees, and guards, other professional employees and supervisors as defined in the Act.

WE WILL, on request, furnish the Union as it requested in its 24 August 1983 letter, the information that is relevant and necessary to its role as the exclusive bargaining representative of the employees in the bargaining unit.

CANTERBURY VILLA OF WATERFORD,
INC.