

Valley West Health Care, Inc. d/b/a Driftwood Convalescent Hospital a/k/a Scenic Circle Care Center and Hospital and Health Care Workers Union, Local 250, Service Employees International Union, AFL-CIO. Case 32-CA-10539

April 17, 1991

DECISION AND ORDER

BY MEMBERS DEVANEY, OVIATT, AND RAUDABAUGH

On September 28, 1990, Administrative Law Judge Frederick C. Herzog issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed a reply brief.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Driftwood Convalescent Hospital, Modesto, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Gary M. Connaughton, Esq., for the General Counsel.
Ronald J. Knox, Esq. (Williams, Kastner & Gibbs), of Seattle, Washington, for the Respondent.
Paul D. Supton, Esq. (Van Bourg, Weinberg, Roger & Rosenfeld), of San Francisco, California, for the Charging Party.

DECISION

STATEMENT OF THE CASE

FREDERICK C. HERZOG, Administrative Law Judge. This case was heard by me in Modesto, California, on December 5, 1989,¹ and is based on a charge filed by Hospital and Health Care Workers Union, Local 250, Service Employees International Union AFL-CIO (Union) on August 23, 1989, alleging generally that Valley West Health Care, Inc., d/b/a Driftwood Convalescent Hospital, a/k/a Scenic Circle Care Center (Respondent) committed certain violations of Section 8(a)(1),² Section 8(a)(5),³ and Section 8(d)⁴ of the National

¹Unless otherwise stated, all dates refer to the calendar year 1989.
²Sec. 8(a)(1) of the Act provides that, "It shall be an unfair labor practice for an employer . . . to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7."

Sec. 7 of the Act provides that, "Employees shall have the right to . . . bargain collectively through representatives of their own choosing . . ."

³Sec. 8(a)(5) of the Act provides that, "It shall be an unfair labor practice for an employer . . . to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a) . . ."

Labor Relations Act (the Act).⁵ On September 29, 1989, the Regional Director for Region 32 of the National Labor Relations Board (the Board) issued a complaint and notice of hearing alleging violations of Section 8(a)(1) and (5) of the Act. Respondent thereafter filed a timely answer to the allegations contained within the complaint, denying all wrongdoing.

All parties appeared at trial, were given full opportunity to participate, introduce relevant evidence, examine and cross-examine witnesses, argue orally, and file briefs. Based on the record, consideration of the briefs filed by counsels for the General Counsel and Respondent, and my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

The complaint alleges, the answer admits, and I find that Respondent is a California corporation, with an office and place of business in Modesto, where at all times material herein it has been engaged in business, i.e., operating a nursing home, and providing medical and professional services; that based upon a projection of its operations since it commenced operations in March, Respondent in the course and conduct of its operations will annually derive gross revenues in excess of \$100,000, and will annually receive funds from the Medicare and Medi-Cal programs in excess of \$5,000.

Accordingly, I also find and conclude, in accordance with the parties' stipulation at trial, that Respondent is now, and at all times material herein has been, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION

The complaint alleges, and the undisputed evidence presented at trial demonstrated, that the Union is an organization in which employees participate, by, inter alia, their attendance at unit meetings, district meetings, and individual meetings; that employees elect the leaders of the Union's local constituents; and that the Union exists for the purpose of dealing with employers concerning employees' grievances, labor disputes, wages, and rates and hours of pay, including the negotiation of collective-bargaining agreements with employers on behalf of employees.

Accordingly, I find and conclude that, at all times material herein, the Union has been, and is, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. General Background and Labor Relations History

This case involves one nursing home facility located in Modesto, California. The Respondent became its owner in early 1989, and began operating it under the name shown above in March.

⁴Sec. 8(d) of the Act provides that, "For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet . . . and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement . . ."

⁵Proof of service of the charge upon Respondent, though denied, was shown by postal receipts received into evidence at trial.

Evidently, possibly upon the theory that Respondent constituted a successor to the previous owner-operator, the Union soon thereafter claimed the right to recognition by Respondent, as the exclusive collective-bargaining representative of its employees at the nursing home. Apparently meeting with silence or refusal by Respondent, the Union filed an unfair labor practice charge against Respondent in Case 32-CA-10202, alleging, among other things, an illegal refusal to engage in collective bargaining on the part of Respondent.

On May 22 the parties reached agreement upon an informal settlement agreement, which contained a nonadmissions clause. The settlement recited certain undertakings by Respondent. Among them were the following:

WE WILL NOT refuse to recognize and bargain collectively with HOSPITAL & HEALTH CARE WORKERS, LOCAL 250, SEIU, AFL-CIO, as the exclusive bargaining representative of our employees in the following appropriate unit:

All licensed vocational nurses, nurse aides, house-keeping, laundry, cook, dietary aid, and rehabilitation aide employees employed by the Employer at its Modesto, California facility; excluding all other employees including registered nurses, office clerical employees, activity workers, guards, administrative personnel, assistant supervisors and supervisors as defined in the Act.

WE WILL, upon request, bargain with HOSPITAL & HEALTH CARE WORKERS, LOCAL 250, SEIU, AFL-CIO, as the exclusive collective-bargaining representative of all employees in the appropriate unit with respect to rates of pay, wages, hours of employment and, if an understanding is reached, embody such understanding in a signed agreement.

B. *The Delay in Starting Negotiations*

By letter of June 13, the Union requested commencement of bargaining by Respondent. The Union's letter recited a list of ten suggested meeting dates. Included in the list was one which Respondent accepted, i.e., July 12. Unfortunately, Respondent's acceptance letter was sent to the Union's offices in San Francisco, rather than the office of the Union's negotiator, who happened to be stationed in Sacramento. Thus, efforts to contact by mail were apparently delayed, and efforts to telephone went unanswered for a time.

Whether such delay in the commencement of bargaining should be viewed by me as due to dilatory tactics by the Union, as claimed by Respondent, or merely due to mishap, seems indemonstrable from this record (and largely irrelevant, as discussed at a later point herein). Much of the evidence Respondent had on this matter remained in the mind of its owner, Bryan Jennings. For Respondent asserted that he was too ill to attend the trial and testify. Rather than wait my ruling as to whether or not the trial site would be moved to accommodate, Respondent chose to put Jennings' recollection on record as hearsay, i.e., Jennings' "notes" of the progress of negotiations, admitted by stipulation with Counsel for the General Counsel, and over the objection of the Union.

That Jennings' illness was real seems both unfortunate and conceded. That said, it remains my view that, even were I to incline (as I am not), to accord such evidence the full deference due that of testimony presented in open court, there still is no reason to go further and credit it over the testimonial demeanor of the Union's representative. For I did see and hear the Union's representative, Nick Jones. And I found him credible.

I see no reason to accept Respondent's argument that the beginning of negotiations was unreasonably delayed, by the Union or anyone else. Instead, I find that such delays as were experienced here are common in labor relations, and, in any event, have not been shown to have ever been the subject of any objection by Respondent before the date of this trial. As a result, I find them to have no legal significance in this case.

Thus, I am free here only to state that the Union's negotiator and Respondent's negotiator reached agreement sometime later upon the date to begin meeting to discuss and consider one another's bargaining proposals. That date was July 18.

C. *Other Related Matters*

While all this was going on, other things were occurring which bear mention here.

First, it is true, as argued by Respondent, that the unfair labor practice case referred to above was, in ordinary fashion, closed on compliance by the Regional Office on August 1. Yet, its closure was not unconditional, for as was stated in the closure letter, as is usual, "the closing is conditioned upon continued observance of the terms of the Settlement Agreement and does not preclude further proceedings should subsequent violations occur." Thus, since the events urged as violative in this case had not yet occurred, I see no relevance in the Region's administrative closure. The Region could as easily reopen, at some unspecified later date.

Second, and on the other hand, the Union urges my consideration of the contents of still another unfair labor practice charge, filed on May 24, and settlement between these same parties. The settlement, in Case 32-CA-10355, was reached only on August 11, mere days before the occurrence of the facts alleged as an unfair labor practice in this case. However, I note that this informal settlement, like the settlement which is the predicate of this case, similarly includes a non-admissions clause. Accordingly, I conclude that I am not permitted to draw any conclusion about Respondent's conduct in this case based upon the mere showing of the existence of such a charge and settlement. I decline to speculate into Respondent's reasons for entering into such a settlement, except to note that they may well have had nothing to do with the merits of the charges.⁶

D. *The Two Meetings*

As scheduled, the Union's representative, Nick Jones, met with Respondent's representative, Bryan Jennings, on July

⁶This particular issue is not free from doubt, however. The position advanced by Respondent is that post-settlement unfair labor practices may be considered only if they are "designed to," and do, have an "appreciable effect" upon the employees' rejection of the union. I deem such a standard as too restrictive. See, for example, *Premier Cablevision*, 293 NLRB 931, 932 fn.5 (1989), in which the Board's words appear to conflict with Respondent's position.

18, beginning around 1 p.m., at the Union's offices in Sacramento. As is indicated by the notes of Jennings,⁷ the entirety of the first meeting was taken up by the Union's exposition of its demands, rather than any actual give-and-take of negotiations. Apparently no substantive discussion at all took place.

Corroborative of my view in this regard was the testimony of Respondent's attorney, Dennis. He testified that,

the employer, Bryan Jennings, and I first talked about this. I know that he told me that the Union wanted to get together with him. I told him to do it.

He asked if it was necessary for me to be there at the first negotiating session. I told him probably not, that that would probably be more of a get acquainted session and an opportunity for the Union to put their position on the table."

I draw the inference from the above (which was obviously intended to lend credence to Jennings' notes,) that, whatever actual "bargaining" has occurred in this case, took place subsequent to this first, "get-acquainted," meeting.

The second meeting was on August 1. Dennis was in attendance. He testified that the parties accomplished a great deal, though the meeting may not have continued as long as he would have liked. Nonetheless, the record reveals that the first, last, and only substantive negotiations which the parties have conducted were at this meeting. Indeed, in accord with the General Counsel's failure to attack Respondent's conduct during the table bargaining, Respondent's own position, stated by its trial counsel during trial, was that, as of the conclusion of this second meeting,

The parties were negotiating in good faith. The parties were sitting down, the parties were moving along the negotiation process—. . . Okay. They were moving along and working this problem as best they could. However, at some point, you have to sit back and say okay—.

And, while Dennis testified that Jones had to cut the meeting short, because of a competing appointment, the record is devoid of even a suggestion that Respondent ever objected to the Union's actions, or inaction, as it may be viewed. Instead, the parties agreed to meet again on August 15.

E. The Decertification Petition and the Refusal to Bargain Since

Donna Ferguson, Respondent's administrator, credibly testified that on or about August 14 she was shown a paper by one of the facility's employees. According to her, it was a handwritten petition signed by 38 of the facility's 54 employees. She said their request, set forth in the petition, was that the Union be decertified.

Ferguson related that this led to her having a telephone conversation with Respondent's lawyer, Dennis, that same day. She related to him what she had seen, including the nature of the document, and the numbers of employees who

had apparently signed it vis-a-vis the total number of employees in the work force.

On August 14 Respondent's counsel, Dennis, wrote to the Union that, "we feel it may be an unfair labor practice for management to proceed with negotiations scheduled for August 15." At trial, Respondent effectively conceded that it has refused to bargain collectively since, and has, in fact, withdrawn recognition from the Union (R. Br. at 4).

Subsequently, a decertification petition, Case 32-RD-949, was filed with the Board. It was administratively dismissed by the Region, on the grounds that the parties had met on only one occasion to negotiate an agreement since the signing of the settlement, and that no reasonable time had elapsed between the time when the duty to bargain had been recognized and the time when the decertification petition was filed. The dismissal was administratively affirmed. The record is void as to the reasons for the denial of the administrative appeal.

E. Analysis and Conclusions

Counsel for the General Counsel's contention is that Respondent had an obligation to abide by the terms of the settlement agreement and has failed to live up to that obligation. Respondent conversely asserts that it did, in fact, live up to its agreement, and that, in any event, the particular facts of this case warranted any alleged failure in that respect.

This issue is governed generally by the principles announced in *Poole Foundry & Machine Co.*, 95 NLRB 34 (1951). The Board stated there:

It is well settled that after the Board finds that an employer has failed in his statutory duty to bargain with a union, and orders the employer to bargain, such an order must be carried out for a reasonable time thereafter with out regard to whether or not there are fluctuations in the majority status of the union during that period. Such a rule has been considered necessary to give the order to bargain its fullest effect, i.e., to give the parties to the controversy a reasonable time in which to conclude a contract. *Similarly, a settlement agreement containing a bargaining provision, if it is to achieve its purpose, must be treated as giving the parties thereto a reasonable time in which to conclude a contract. . . . The test of the legality of the refusal to bargain in a case of this nature is whether or not a reasonable time has elapsed between the execution of the settlement agreement and the refusal to bargain, not whether or not the employer believed in good faith that a question concerning representation might exist.* [Footnotes omitted and emphasis added.]

Counsel for the General Counsel contends that its burden of proof is merely to show the execution of the settlement agreement and the refusal to bargain within an unreasonably short time. Respondent contends that the particular facts of this case take it outside the *Poole* rule, and privilege its refusal to bargain further. It relies primarily on the rules enunciated in the cases of *Brennan's Cadillac, Inc.*, 231 NLRB 225 (1977), and *Tajon, Inc.*, 269 NLRB 327 (1984).

This case appears to fit squarely within the *Poole* rule. That there was a settlement agreement obligating Respondent

⁷I reiterate that, despite my reference to them here, I find that no there is no "special reliability" attending Jennings' notes, which are clearly hearsay. Thus, I do not rely on them in any area of controversy.

to bargain collectively with the Union is beyond dispute. And, that Respondent refused to bargain further, after but 83 days, in which there were only two meetings (only one of which could be accurately termed “negotiations”) is likewise beyond argument. Respondent appears to concede, and I find, that the first meeting was nothing more than a “get acquainted” session, and that the second meeting witnessed significant progress.

The General Counsel does not even contend that Respondent engaged in bad-faith bargaining at the table. Yet, I have examined what occurred at the table, as well as how the parties managed to get to the table, because the cases say that I must, in order to determine just what constitutes a “reasonable time,” within the meaning of *Poole*, supra. See, for example, *Brennan’s Cadillac*, supra at 226, where the Board stated, “the issue turns on what transpired during those meetings and what was accomplished therein.”

Since I have found earlier herein that (a) the “delay” in beginning negotiations does not appear unreasonable on its face, and was not objected to by Respondent when it occurred (even assuming arguendo that it was all due to the Union’s failings), and (b) the way the second meeting ended, with the Union’s representative leaving to keep another appointment, also is not “self-proving” as to any dilatory intent, or effect, upon negotiations, and also went by without objection, I see no merit in Respondent’s arguments that these events take this case outside the *Poole* rationale.

It is true that both *Tajon* and *Brennan’s* found no violation in cases where there were some quite similar circumstances. However, it is also true that each of these cases hewed to the line of many other cases in stating that (quoting from *Tajon*, as it quotes *Brennan’s*):

There are no rules as to what constitutes a reasonable period of time, as each case must rest upon its own individual facts. . . . Reasonable time does not depend upon either the passage of time or the number of calendar days on which the parties met. Rather, the issue turns on what transpired during those meetings and what was accomplished therein.”

Accordingly, disavowing any intent to be understood here as saying that there are any specific number of days or meetings which would demonstrate a per se violation under *Poole*, I nevertheless find that the Respondent here did not afford the negotiations a reasonable time to succeed. Therefore, I find that Respondent has violated Section 8(a)(5) and (1) of the Act. While I have considered the factors of elapsed time and number of meetings, they have not been dispositive.

Additionally, I have considered factors such as the fact that these parties were negotiating their first contract together, that the first of the two meetings was a mere “get-acquainted” session, and that the second (and last) not only produced no impasse but made significant progress. These additional factors convince me that neither *Tajon* nor *Brennan’s* is controlling here. That I am permitted to consider these additional factors is demonstrated by such cases as *King Soopers, Inc.*, 295 NLRB 35 (1989); *American Fleet Maintenance*, 289 NLRB 764 (1988); and *VIP Limousine, Inc.*, 276 NLRB 871 (1985).

In light of my finding above that the Respondent did not allow a “reasonable time” for the bargaining, I make no findings regarding the Respondent’s justification for breaking

off bargaining. See *Tajon, Inc.*, supra at 327, where the Board stated:

the Board first evaluates whether a reasonable period of time for bargaining had elapsed at the time the employer withdrew recognition, and only upon an affirmative finding as to that question does the Board consider the employer’s proffered justification for withdrawal. “Absent a reasonable period of time for bargaining following recognition, the actual majority status of a union is immaterial.”

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. The following employees of Respondent constitute a unit appropriate for the purposes of collective bargaining:

All licensed vocational nurses, nurse aides, house-keeping, laundry, cook, dietary aid, and rehabilitation aide employees employed by Respondent at its Modesto, California facility; excluding all other employees including registered nurses, office clerical employees, activity workers, guards, administrative personnel, assistant supervisors and supervisors as defined in the Act.

4. The Respondent, by failing and refusing to recognize and bargain with the Union, as the collective-bargaining representative of the unit employees violated Section 8(a)(5) and (1) of the Act.
5. The aforesaid labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

On these findings and conclusions and on the entire record, I issue this recommended⁸

ORDER⁹

The Respondent, Valley West Health Care, Inc., d/b/a Driftwood Convalescent Hospital, a/k/a Scenic Circle Care Center, its officers, agents, successors, and assigns, shall

1. Cease and desist from
 - (a) Refusing to recognize and bargain with the Union as the exclusive bargaining representative of its employees in the appropriate bargaining unit set forth below.
 - (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, recognize and bargain collectively with Hospital and Health Care Workers Union, Local 250, Service Employees International Union AFL-CIO as the exclusive collective-bargaining representative of its employees in the

⁸All outstanding motions inconsistent with the results of this decision, if any, are hereby overruled.

⁹If no exceptions are filed as provided by Sec. 102.46 of the Board’s Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

unit described below, regarding wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement. The appropriate unit is:

All licensed vocational nurses, nurse aides, house-keeping, laundry, cook, dietary aid, and rehabilitation aide employees employed by Respondent at its Modesto, California facility; excluding all other employees including registered nurses, office clerical employees, activity workers, guards, administrative personnel, assistant supervisors and supervisors as defined in the Act.

(b) Post at its facility copies of the attached notice marked "Appendix."¹⁰ Copies of the notice, on forms provided by the Regional Director for Region 32, 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 Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

¹⁰If 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.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to recognize and, upon request, bargain collectively with the labor organization named below in the appropriate bargaining unit set forth below.

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 collectively with Hospital and Health Care Workers Union, Local 250, Service Employees International Union AFL-CIO as the exclusive bargaining representative, for our employees in the unit described below, with respect to wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed contract. The appropriate unit is:

All licensed vocational nurses, nurse aides, house-keeping, laundry, cook, dietary aid, and rehabilitation aide employees employed by us at our Modesto, California facility; excluding all other employees including registered nurses, office clerical employees, activity workers, guards, administrative personnel, assistant supervisors and supervisors as defined in the Act.

VALLEY WEST HEALTH CARE, INC., D/B/A
DRIFTWOOD CONVALESCENT HOSPITAL, A/K/A
SCENIC CIRCLE CARE CENTER