

Ambassador Health Care, Inc. d/b/a High Street Convalescent Hospital and d/b/a McArthur Convalescent Hospital and Health Care Workers Union Local 250, Service Employees International Union, AFL-CIO. Case 32-CA-13492

May 10, 1994

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS STEPHENS AND COHEN

Upon a charge filed by the Union on October 14, 1993, the Acting General Counsel of the National Labor Relations Board issued a complaint on November 30, 1993, against Ambassador Health Care, Inc. d/b/a High Street Convalescent Hospital and d/b/a McArthur Convalescent Hospital, the Respondent, alleging that it has violated Section 8(a)(1) and (5) of the National Labor Relations Act. Although properly served copies of the charge and complaint¹ the Respondent failed to file an answer.

On March 21, 1994, the General Counsel filed a Motion for Summary Judgment with the Board. On March 22, 1994, 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 no response. The allegations in the motion are therefore undisputed.

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

Ruling on Motion for Summary Judgment

Sections 102.20 and 102.21 of the Board's Rules and Regulations provide that the allegations in the complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint, unless good cause is shown. In addition, the complaint affirmatively notes that unless an answer is filed within 14 days of service, all the allegations in the complaint will be considered to be admitted to be true.

In the absence of good cause being shown for the failure to file a timely answer, we grant the General Counsel's Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a California corporation, with an office and place of business in Leucadia, California,

¹The charge and complaint were served by certified mail but were returned unclaimed. The Respondent's failure to claim certified mail cannot serve to defeat the purposes of the Act. See, e.g., *Michigan Expediting Service*, 282 NLRB 210 fn. 6 (1986).

has been engaged in the operation of convalescent hospitals. During the 12-month period ending November 30, 1993, the Respondent, in the course and conduct of its business operations, derived gross revenues in excess of \$100,000 and purchased and received goods or services valued in excess of \$5,000 which originated outside the State of California. 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 that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The following described employees of the Respondent (the High Street unit) constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

All full-time and regular part-time housekeepers, kitchen helpers, janitors, laundry employees, non-certified nurses' aides/assistants, certified nurses' aides/assistants, cooks, and maintenance employees employed by the Respondent at its 3145 High Street, Oakland, California facility; excluding office clerical employees, licensed nurses, Director of Nursing, Business Office Supervisor, Dietary Department Supervisor, Activities Director, Maintenance/Janitorial Supervisor, professional employees, confidential employees, watchmen, guards, and supervisors as defined in the Act.

Since about 1988, and at all times material, the Union has been the designated exclusive collective-bargaining representative of the employees in the High Street unit, and since that date the Union has been recognized as such representative by the Respondent. Such recognition has been embodied in successive collective-bargaining agreements, the most recent of which, the High Street Agreement, was effective by its terms for the period October 1, 1992, through September 30, 1993. At all times since 1988, the Union, by virtue of Section 9(a) of the Act, has been, and is, the exclusive representative of the employees in the High Street unit, for the purpose of collective bargaining concerning rates of pay, wages, hours of employment, and other terms and conditions of employment.

The following described employees of the Respondent (the McArthur unit) constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time housekeepers, kitchen helpers, janitors, laundry employees, non-certified nurses' aides/assistants, certified nurses' aides/assistants, cooks, and maintenance employees employed by the Respondent at its 309 McArthur Boulevard, Oakland, California facility; excluding office clerical employees, licensed

nurses, Director of Nursing, Business Office Supervisor, Dietary Department Supervisor, Activities Director, Maintenance/Janitorial Supervisor, professional employees, confidential employees, watchmen, guards, and supervisors as defined in the Act.

Since about 1988, and at all times material, the Union has been the designated exclusive collective-bargaining representative of the employees in the McArthur unit, and since that date the Union has been recognized as such representative by the Respondent. Such recognition has been embodied in successive collective-bargaining agreements, the most recent of which, the McArthur Agreement, was effective by its terms for the period October 1, 1992, through September 30, 1993. At all times since 1988, the Union, by virtue of Section 9(a) of the Act, has been, and is, the exclusive representative of the employees in the McArthur unit, for the purpose of collective bargaining concerning rates of pay, wages, hours of employment, and other terms and conditions of employment.

The High Street Agreement and the McArthur Agreement each contain provisions requiring the Respondent to:

(a) Make monthly contributions to a certain Kaiser health plan for eligible unit employees, herein called the Health Plan coverage.

(b) Make monthly payments on behalf of eligible unit employees to a dental insurance fund, herein called the Dental Contributions.

(c) Pay wages to unit employees for services performed, herein called the Wage Provisions.

(d) Pay vacation pay to eligible unit employees, herein called the Vacation Pay Provisions.

(e) On a monthly basis, to deduct Union membership dues and/or fees from Unit employees who have signed dues checkoff authorizations and to remit said deducted monies to the Union, herein called the Dues Checkoff Provisions.

Commencing in October 1992, the Respondent ceased maintaining health plan coverage on behalf of eligible High Street unit and McArthur unit employees. The Union did not learn of these acts and conduct of the Respondent until about September 1, 1993. Commencing by no later than April 18, 1993, the Respondent ceased making the dental contributions on behalf of eligible High Street unit and McArthur unit employees. Commencing by no later than April 18, 1993, the Respondent ceased honoring the dues-checkoff provisions for the High Street unit and the McArthur unit employees who had signed dues-checkoff authorizations, including failing to remit to the Union moneys deducted by the Respondent from employees' paychecks pursuant to the dues-checkoff authorizations. Commencing in late September 1993, the Respondent ceased honor-

ing the wages provisions regarding the High Street unit and the McArthur Street unit employees. Commencing on or about October 25, 1993, the Respondent ceased honoring the vacation pay provisions regarding the High Street unit and the McArthur unit employees. These matters relate to wages, rates of pay, hours of employment, and other terms and conditions of employment of the employees in the High Street unit and the McArthur unit, and are mandatory subjects for the purposes of collective bargaining. The Respondent engaged in these acts and conduct without prior notice to the Union and without having afforded the Union an opportunity to negotiate with the Respondent concerning such acts and conduct and the effects of such acts and conduct, and without the consent or agreement of the Union.

On or about October 1, 1993, the Respondent ceased its operation of the convalescent hospital facilities located at 3145 High Street and 309 McArthur Boulevard, Oakland, California (the closure). The Respondent engaged in the closure without prior notice to the Union and without having afforded the Union an opportunity to negotiate with the Respondent concerning the effects of the closure. On or about October 13, 1993, the Union, by letter, requested the Respondent to bargain collectively with it as the exclusive collective-bargaining representative of the employees in the High Street unit and the McArthur unit concerning the effects of the closure. Since October 14, 1993, the Respondent has failed and refused, and continues to fail and refuse, to bargain with the Union concerning the effects of the closure.

CONCLUSIONS OF LAW

By the acts and conduct described above, the Respondent has failed and refused, and is failing and refusing, to bargain collectively and in good faith with the representative of its employees, and has thereby engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent has violated Section 8(a)(5) and (1) by failing to maintain contractually required health plan and dental insurance for its unit employees, we shall order the Respondent to restore the employees' health plan and dental insurance coverage including the remission of all dental insurance contributions to the dental insurance trust fund from April 1993 until the Respondent's closure, with any additional amounts owing to the fund to be deter-

mined in the manner set forth in *Merryweather Optical Co.*, 240 NLRB 1213, 1216, fn. 7 (1979); and to make the employees whole by reimbursing them for any expenses ensuing from the Respondent's unlawful conduct, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891, fn. 2 (1980), enfd. 661 F.2d 940 (9th Cir. 1981), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Having found that the Respondent has violated Section 8(a)(5) and (1) by failing to deduct union dues for employees who had executed dues-checkoff authorizations and to remit them to the Union, we shall order the Respondent to deduct and remit union dues as required by the agreement and to reimburse the Union for its failure to do so, with interest as prescribed in *New Horizons for the Retarded*, supra. Having found that the Respondent violated Section 8(a)(5) and (1) by failing to pay unit employees contractual wages rates and vacation pay, we shall order the Respondent to make the unit employees whole for any loss of earnings attributable to its unlawful conduct. Backpay shall be computed in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons for the Retarded*, supra.

As a result of the Respondent's unlawful failure to bargain in good faith with the Union about the effects of its decision to close its facilities, the terminated employees have been denied an opportunity to bargain through their collective-bargaining representative. Meaningful bargaining cannot be assured until some measure of economic strength is restored to the Union. A bargaining order alone, therefore, cannot serve as an adequate remedy for the unfair labor practices committed.

Accordingly, we deem it necessary, in order to effectuate the purposes of the Act, to require the Respondent to bargain with the Union concerning the effects of closing its facilities on its employees, and shall accompany our Order with a limited backpay requirement designed both to make whole the employees for losses suffered as a result of the violations and to recreate in some practicable manner a situation in which the parties' bargaining position is not entirely devoid of economic consequences for the Respondent. We shall do so by ordering that the Respondent pay backpay to the terminated employees in a manner similar to that required in *Transmarine Navigation Corp.*, 170 NLRB 389 (1968).

Thus, the Respondent shall pay its terminated employees backpay at the rate of their normal wages when last in the Respondent's employ from 5 days after the date of this Decision and Order until occurrence of the earliest of the following conditions: (1) the date the Respondent bargains to agreement with the Union on those subjects pertaining to the effects of

the closing of its facility on its employees; (2) a bona fide impasse in bargaining; (3) the Union's failure to request bargaining within 5 days of the date of this Decision and Order, or to commence negotiations within 5 days of the Respondent's notice of its desire to bargain with the Union; (4) the Union's subsequent failure to bargain in good faith; but in no event shall the sum paid to these employees exceed the amount they would have earned as wages from the date on which the Respondent terminated its operations, to the time they secured equivalent employment elsewhere, or the date on which the Respondent shall have offered to bargain in good faith, whichever occurs sooner; provided, however, that in no event shall this sum be less than the employees would have earned for a 2-week period at the rate of their normal wages when last in the Respondent's employ. Backpay shall be based on earnings that the terminated employees would normally have received during the applicable period, less any net interim earnings, and shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*, supra.

In view of the fact that the Respondent's facilities are currently closed, we shall order the Respondent to mail a copy of the attached notice to the Union and to the last known addresses of its former employees in order to inform them of the outcome of this proceeding.

ORDER

The National Labor Relations Board orders that the Respondent, Ambassador Health Care, Inc. d/b/a High Street Convalescent Hospital and d/b/a McArthur Convalescent Hospital, Oakland, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to provide unit employees with a certain Kaiser health plan as specified in and required by the collective-bargaining agreement. The units include the following employees:

All full-time and regular part-time housekeepers, kitchen helpers, janitors, laundry employees, non-certified nurses' aides/assistants, certified nurses' aides/assistants, cooks, and maintenance employees employed by the Respondent at its 3145 High Street, Oakland, California facility; excluding office clerical employees, licensed nurses, Director of Nursing, Business Office Supervisor, Dietary Department Supervisor, Activities Director, Maintenance/Janitorial Supervisor, professional employees, confidential employees, watchmen, guards, and supervisors as defined in the Act.

All full-time and regular part-time housekeepers, kitchen helpers, janitors, laundry employees, non-certified nurses' aides/assistants, certified nurses'

aides/assistants, cooks, and maintenance employees employed by the Respondent at its 309 McArthur Boulevard, Oakland, California facility; excluding office clerical employees, licensed nurses, Director of Nursing, Business Office Supervisor, Dietary Department Supervisor, Activities Director, Maintenance/Janitorial Supervisor, professional employees, confidential employees, watchmen, guards, and supervisors as defined in the Act.

(b) Failing and refusing to remit dental insurance trust fund contributions required by the collective-bargaining agreement for the employees in the units.

(c) Failing and refusing to deduct and remit to the Union, dues for unit employees who had signed dues checkoff authorizations, in accord with the collective-bargaining agreement.

(d) Failing and refusing to pay unit employee the wages and vacation pay specified in the collective-bargaining agreement.

(e) Failing and refusing to give prior notice to the Union about the closure of its convalescent hospital facilities or to afford the Union an opportunity to negotiate with it about the effects of the closure.

(f) 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) Provide the employees with the contractually required Kaiser health plan and make the employees whole, as specified in the remedy section of this decision.

(b) Remit all dental insurance contributions to the dental insurance trust fund and other amounts due the fund, and make the employees whole, as specified in the remedy section of this decision.

(c) Remit to the Union all checked off dues moneys collected from April 1993 until the closure of the facilities, with interest, as specified in the remedy section of this decision.

(d) Pay wages to the unit employees in accord with the terms of the collective-bargaining agreement and pay accrued vacation pay to unit employees in accord with the collective-bargaining agreement, all with interest, as specified in the remedy section of this decision.

(e) Pay the unit employees their normal wages for the period set forth in the remedy section of this decision.

(f) On request, bargain collectively with Hospital and Health Care Workers Union Local 250, Service Employees International Union, AFL-CIO concerning the effects on the unit employees of its decision to close its facilities, and reduce to writing any agreement reached as a result of such bargaining.

(g) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, time-cards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(h) Mail an exact copy of the attached notice marked "Appendix"² to the Hospital and Health Care Workers Union Local 250, Service Employees International Union, AFL-CIO and to the unit employees who were employed at the High Street and McArthur Boulevard facilities. 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 mailed immediately upon receipt thereof, as directed.

(i) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

Dated, Washington, D.C. May 10, 1994

William B. Gould IV, Chairman

James M. Stephens, Member

Charles I. Cohen, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

²If 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 fail or refuse to provide unit employees with the Kaiser health plan specified in and required by the collective-bargaining agreement. The units include the following employees:

All full-time and regular part-time housekeepers, kitchen helpers, janitors, laundry employees, non-certified nurses' aides/assistants, certified nurses'

aides/assistants, cooks, and maintenance employees employed by us at our 3145 High Street, Oakland, California facility; excluding office clerical employees, licensed nurses, Director of Nursing, Business Office Supervisor, Dietary Department Supervisor, Activities Director, Maintenance/ Janitorial Supervisor, professional employees, confidential employees, watchmen, guards, and supervisors as defined in the Act.

All full-time and regular part-time housekeepers, kitchen helpers, janitors, laundry employees, non-certified nurses' aides/assistants, certified nurses' aides/assistants, cooks, and maintenance employees employed by us at our 309 McArthur Boulevard, Oakland, California facility; excluding office clerical employees, licensed nurses, Director of Nursing, Business Office Supervisor, Dietary Department Supervisor, Activities Director, Maintenance/Janitorial Supervisor, professional employees, confidential employees, watchmen, guards, and supervisors as defined in the Act.

WE WILL NOT fail or refuse to remit dental insurance trust fund contributions required by the collective-bargaining agreement for the employees in the units.

WE WILL NOT fail or refuse to deduct and remit to the Hospital and Health Care Workers Union Local 250, Service Employees International Union, AFL-CIO dues for unit employees who had signed dues-checkoff authorizations.

WE WILL NOT fail or refuse to pay the wages or vacation pay as specified in the collective-bargaining agreement for unit employees.

WE WILL NOT fail or refuse to give prior notice to the Union about the closure of our convalescent hospital facilities or to afford the Union an opportunity to negotiate with us about the effects of the closure.

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 provide our unit employees with the contractually required Kaiser health plan and make them whole, with interest.

WE WILL remit all dental insurance contributions to the dental insurance trust fund and other amounts due the fund, and make our unit employees whole, with interest.

WE WILL remit to the Union all checked-off dues moneys collected, with interest.

WE WILL pay wages and pay accrued vacation pay to our unit employees in accord with the terms of the collective-bargaining agreement, and make them whole, with interest.

WE WILL pay our unit employees their normal wages, with interest.

WE WILL, on request, bargain collectively with Hospital and Health Care Workers Union Local 250, Service Employees International Union, AFL-CIO concerning the effects on our unit employees of our decision to close our facilities, and reduce to writing any agreement reached as a result of such bargaining.

AMBASSADOR HEALTH CARE, INC.
D/B/A HIGH STREET CONVALESCENT
HOSPITAL AND D/B/A MCARTHUR CON-
VALESCENT HOSPITAL