

**Flatbush Manor Care Center and Fair Management Consulting Corp. and 1199 National Health and Human Services Employees Union**  
Case 29-CA-17645

August 11, 1994

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS STEPHENS  
AND DEVANEY

On November 23, 1993, the General Counsel of the National Labor Relations Board issued a Complaint and notice of hearing alleging that Respondent Flatbush Manor Care Center (individually Respondent Flatbush) and Fair Management Consulting Corp., Inc. (individually Respondent Fair, and collectively the Respondents) have violated Section 8(a)(5) and (1) of the National Labor Relations Act by refusing the Union's request to bargain following the Union's certification in Case 29-RC-7764. (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); *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondents filed an answer admitting in part and denying in part the allegations in the complaint.

On June 7, 1994, the General Counsel filed a Motion for Summary Judgment. On June 9, 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 Respondents 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

In its answer the Respondents deny their refusal to bargain and attack the validity of the certification on the basis of their objections to the election and the Board's unit determination in the representation proceeding. In addition, in its answer to the complaint the Respondents allege that the complaint is barred by Section 10(b) of the Act as the Union was certified by the Regional Director in Case 29-RC-7764 on August 5, 1992, and the charge was not filed and served until September 22, 1993.<sup>1</sup>

The Respondents deny that Respondent Flatbush and Respondent Fair have been affiliated business enterprises with common officials, owners, directors, man-

<sup>1</sup>We reject the Respondents' contention that the underlying charge in this proceeding is barred by Sec. 10(b) of the Act. As set forth in the General Counsel's Motion for Summary Judgment, requests for review were pending until August 19, 1993. Neither Sec. 10(b) nor the certification year is involved here and neither requires that a union request bargaining while an employer's request for review of a Regional Director's certification is pending.

agement and supervision; have formulated and administered a common labor policy affecting employees of these operations; have shared common premises and facilities; have provided services for and made sales to each other; have interchanged personnel with each other; and have held themselves out to the public as a single integrated business enterprise. The Respondents further deny that they constitute a single integrated business enterprise and are a single employer within the meaning of the Act. In addition, the Respondents deny that they are now, and have been employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and are health care institutions within the meaning of Section 2(14) of the Act. The Respondents do not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor do they allege any special circumstances that would require the Board to reexamine its decision as to these matters in the representation proceeding. We therefore find that Respondent Flatbush and Respondent Fair constitute a single integrated business enterprise and a single employer within the meaning of the Act.

The Respondents deny that the Union is now and has been a labor organization within the meaning of Section 2(5) of the Act,<sup>2</sup> that the unit is appropriate for purposes of collective bargaining, that an election by secret ballot was conducted, that the Union was certified as the exclusive collective-bargaining representative of the Respondents' employees, and that the Union is the collective-bargaining representative of the employees in the unit with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment. Each of these issues were or could have been litigated in the underlying representation case.

The Respondents also deny that the Union has requested that the Respondents recognize and bargain with it as the exclusive collective-bargaining representative of the employees. Counsel for the General Counsel attached to the Motion for Summary Judgment two letters to the Respondents from the Union dated August 23 and November 8, 1993. These letters constitute requests to bargain. The Respondents do not dispute the receipt or authenticity of these letters.<sup>3</sup> Accord-

<sup>2</sup>Although the Respondents deny the complaint's allegation that the Union is a labor organization, we do not find this denial raises an issue warranting a hearing. As noted by the General Counsel, the Board has previously found the Union to be a labor organization. See *Miscellaneous Warehousemen Local 986*, 145 NLRB 1511, 1514 (1964). In any event, having failed to raise this issue in the underlying representation proceeding, the Respondents are now precluded from raising it in this proceeding. See *Wickes Furniture*, 261 NLRB 1061, 1062 fn. 4 (1982).

<sup>3</sup>We also reject the Respondents second affirmative defense, viz "by requiring inclusion in the bargaining unit classifications excluded from the Board certified unit in Case No. 29-RC-7764." The Union's letter of November 8, 1993, clearly evidences that the

ingly, we find that the Union has requested bargaining with the Respondents.

The Respondents' answer further denies that they have refused to recognize and bargain with the Union. However, by letter dated November 22, 1993, counsel for the Respondents clearly refused to bargain with the Union. The General Counsel attached this letter to the Motion for Summary Judgment and the Respondents do not dispute its authenticity. Nor does the Respondents' response to the Notice to Show Cause state a willingness to meet and bargain with the Union. Accordingly, we find that the Respondents have failed and refused to recognize and bargain with the Union.

All representation issues raised by the Respondents were or could have been litigated in the prior representation proceeding. The Respondents do not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor do they allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding.<sup>4</sup> We therefore find that the Respondents have not raised any representation issues that are properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941). Accordingly, we grant the Motion for Summary Judgment.

On the entire record, the Board makes the following

#### FINDINGS OF FACT

##### I. JURISDICTION

At all times material, Respondent Flatbush, a partnership, with its office and place of business located at 2107 Ditmas Avenue, in the Borough of Brooklyn, city and State of New York, has been the licensed operator of a nursing home, providing health care services and related services. During the year preceding issuance of the complaint, Respondent Flatbush, in the course and conduct of its business operations, derived gross revenues in excess of \$100,000 and purchased and received at its Brooklyn facility, medical supplies and other products, goods, and materials valued in excess of \$50,000, directly from other enterprises located outside the State of New York.

At all times material, Respondent Fair, a New York Corporation, with its principal office and place of busi-

ness located at 2107 Ditmas Avenue, in the Borough of Brooklyn, city and State of New York, has been engaged in the business of providing employee staffing, payroll, and other related services to Respondent Flatbush. During the past 12 months preceding issuance of the complaint, Respondent Fair, in the course and conduct of its business operations, derived gross revenues in excess of \$100,000, and purchased and received at its Brooklyn facility medical supplies and other products, goods, and materials valued in excess of \$50,000 directly from other enterprises located outside the State of New York.

ness located at 2107 Ditmas Avenue, in the Borough of Brooklyn, city and State of New York, has been engaged in the business of providing employee staffing, payroll, and other related services to Respondent Flatbush. During the past 12 months preceding issuance of the complaint, Respondent Fair, in the course and conduct of its business operations, derived gross revenues in excess of \$100,000, and purchased and received at its Brooklyn facility medical supplies and other products, goods, and materials valued in excess of \$50,000 directly from other enterprises located outside the State of New York.

At all times material, Respondent Flatbush and Respondent Fair, in the course and conduct of its business operations, derived gross revenues in excess of \$100,000 and purchased and received at its Brooklyn facility medical supplies and other products, goods, and materials valued in excess of \$50,000, directly from other enterprises located outside the State of New York.

At all times material, Respondent Flatbush and Respondent Fair have been affiliated business enterprises with common officers, owners, directors, management, and supervision; have formulated and administered a common labor policy affecting employees of these operations; have shared common premises and facilities; have provided services for and made sales to each other; have interchanged personnel with each other, and have held themselves out to the public as a single integrated business enterprise.

By virtue of their operations the Respondents constitute a single integrated business enterprise and a single employer within the meaning of the Act. We find that the Respondents are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and are health care institutions within the meaning of Section 2(14) of the Act. The Union is now, and has been at all times material, 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 March 12, 1992, the Union was certified on August 19, 1993, as the collective-bargaining representative of the employees in the following appropriate unit:

All full-time and regular part-time employees employed by Respondents at their Brooklyn, New York locations, including aides, recreational aides, orderlies, dietary employees and licensed practical nurses, excluding all "pool" licensed practical nurses, housekeeping employees, registered nurses, social workers, occupational therapists, physical therapists, speech therapists, office clerical and business office clerical employees, Medi-

Union is not demanding bargaining in a unit broader than that certified.

<sup>4</sup>In its response to the Notice to Show Cause the Respondents argue that the Board should remand the representation proceeding to the Regional Director because the unit here includes licensed practical nurses. The Respondents never raised the issue of supervisory status of LPNs in the representation proceeding and are thus barred from raising it here. Moreover, we note that while the Respondents assert that the matter should be remanded in light of the Supreme Court's decision in *NLRB v. Health Care & Retirement Corp. of America*, 114 S.Ct. 1778 (1994), (1994), it does not specifically assert that the LPNs here are supervisors.

cal Directors, Nursing Supervisors, In-Service Directors, Rehabilitation Supervisors, Infection Control Nurses, Administrators, Assistant Administrators, Bookkeeping Supervisors, Directors of Nursing, Plant Maintenance Directors, Dietary Directors, Recreation Directors, Purchasing Directors, Admissions Directors, Medical Records Directors, guards 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 on or about August 23, 1993, and on or about November 8, 1993, the Union has requested the Respondents to bargain, and since August 23, 1993, the Respondents have refused. We find that this refusal constitutes an unlawful refusal to bargain in violation of Section 8(a)(5) and (1) of the Act.

#### CONCLUSION OF LAW

By refusing on and after August 23, 1993, to bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit,<sup>5</sup> the Respondents have 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 Respondents have violated Section 8(a)(5) and (1) of the Act, we shall order them 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 the law, we shall construe the initial period of the certification as beginning the date the Respondents begin 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 Respondents, Flatbush Manor Care Center and Fair

<sup>5</sup> As noted in the General Counsel's motion, the Union's letter also sought certain information from the Respondents. That request is the subject of a separate charge in Case 29-CA-17899, which is not now before us.

Management Consulting Corp., Brooklyn, New York, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with 1199 National Health and Human Services Employees Union, 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:

All full-time and regular part-time employees employed by Respondents at their Brooklyn, New York locations, including aides, recreational aides, orderlies, dietary employees and licensed practical nurses, excluding all "pool" licensed practical nurses, housekeeping employees, registered nurses, social workers, occupational therapists, physical therapists, speech therapists, office clerical and business office clerical employees, Medical Directors, Nursing Supervisors, In-Service Directors, Rehabilitation Supervisors, Infection Control Nurses, Administrators, Assistant Administrators, Bookkeeping Supervisors, Directors of Nursing, Plant Maintenance Directors, Dietary Directors, Recreation Directors, Purchasing Directors, Admissions Directors, Medical Records Directors, guards and supervisors as defined in the Act.

(b) Post at their facility in Brooklyn, New York, copies of the attached notice marked "Appendix."<sup>6</sup> Copies of the notice, on forms provided by the Regional Director for Region 29 after being signed by the Respondents' authorized representative, shall be posted by the Respondents 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 Respondents 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 Respondents have taken to comply.

<sup>6</sup> 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 1199 National Health and Human Services Employees Union, 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 full-time and regular part-time employees employed by us at our Brooklyn, New York locations, including aides, recreational aides, orderlies, dietary employees and licensed practical nurses, excluding all "pool" licensed practical nurses, housekeeping employees, registered nurses, social workers, occupational therapists, physical therapists, speech therapists, office clerical and business office clerical employees, Medical Directors, Nursing Supervisors, In-Service Directors, Rehabilitation Supervisors, Infection Control Nurses, Administrators, Assistant Administrators, Bookkeeping Supervisors, Directors of Nursing, Plant Maintenance Directors, Dietary Directors, Recreation Directors, Purchasing Directors, Admissions Directors, Medical Records Directors, guards and supervisors as defined in the Act.

FLATBUSH MANOR CARE CENTER AND  
FAIR MANAGEMENT CONSULTING CORP.