

Michael Konig t/a Nursing Center at Vineland and Communications Workers of America, AFL-CIO. Case 4-CA-22933

August 31, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING
AND TRUESDALE

On May 12, 1995, Administrative Law Judge George Aleman issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed a brief in support of the judge's decision as well as cross-exceptions and a supporting brief, and the Respondent filed a response to the General Counsel's cross-exceptions.

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,¹ and conclusions and to adopt the recommended Order as modified.²

ORDER

The National Labor Relations Board orders that the Respondent, Michael Konig t/a Nursing Center at Vineland, Vineland, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to meet at reasonable times and bargain in good faith with Communications Workers of America, AFL-CIO, Local 1040, as the exclusive bargaining representative of employees in the following bargaining unit:

All full-time and regular part-time Licensed Practical Nurses (LPNs) employed by the Respondent

¹ In affirming the judge's decision, we note that the record fails to establish that the licensed practical nurses (LPNs) at issue are supervisors under any of the criteria set forth in Sec. 2(11) of the Act. Rather, to the extent that LPNs assign and direct the nurses' aides with whom they work, that assignment and direction is routine and is carried out in accord with tasks and by the number of aides that have been predetermined by others. Thus, there is no showing that the LPNs here exercise independent judgment in performing those duties or any others. Consequently, the Supreme Court's decision in *NLRB v. Health Care & Retirement Corp.*, 114 S.Ct. 1778 (1994), is inapplicable in this case.

² In his decision, the judge mistakenly identifies the Charging Party, Communication Workers of America, AFL-CIO, as the certified bargaining representative of the bargaining unit involved in this proceeding. The record, however, indicates that the Communications Workers of America, AFL-CIO, Local 1040 is the bargaining representative. Therefore all references to "the Union" in the judge's decision, aside from identifying the Charging Party, are appropriately in reference to Local 1040. We find merit in the General Counsel's exceptions in this regard, and the judge's recommended Order and notice shall be modified to correct this inadvertent error.

at the Vineland facility, excluding all other employees, registered nurses, quality assurance employees, nurses' aides, clerical employees, housekeeping employees, dietary employees, laundry employees, guards and supervisors as defined in the Act.

(b) Withdrawing recognition from Communication Workers of America, AFL-CIO, Local 1040.

(c) 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, meet at reasonable times and bargain in good faith with the Union as the exclusive representative of the employees in the above-described appropriate bargaining unit concerning terms and condition of employment and, if an understanding is reached, embody the understanding in a signed agreement.

(b) Recognize the Communications Workers of America, AFL-CIO, Local 1040, as the exclusive representative of employees in the above-described appropriate bargaining unit.

(c) Post at its facility in Vineland, New Jersey, copies of the attached notice marked "Appendix."³ Copies of the notice, on forms provided by the Regional Director for Region 4, 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.

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

³ 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 meet at reasonable times and to bargain in good faith with Communications

Workers of America, AFL-CIO, Local 1040, which is the exclusive bargaining representative of our employees in the following bargaining unit:

All full-time and regular part-time Licensed Practical Nurses (LPNs) employed by the Respondent at the Vineland facility, excluding all other employees, registered nurses, quality assurance employees, nurses' aides, clerical employees, housekeeping employees, dietary employees, laundry employees, guards and supervisors as defined in the Act.

WE WILL NOT withdraw recognition from Local 1040.

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, meet at reasonable times and bargain in good faith with the Union, and will put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit described above.

WE WILL recognize Local 1040 as the exclusive bargaining representative of employees in the above-described unit.

MICHAEL KONIG T/A NURSING CENTER AT VINELAND

Henry R. Protas, Esq., for the General Counsel. David Lew, Esq., of River Edge, New Jersey, for the Respondent. Lisa Morowitz, Esq., of Somerset, New Jersey, for the Charging Party.

DECISION

STATEMENT OF THE CASE

GEORGE ALEMAN, Administrative Law Judge. This case was tried before me in Philadelphia, Pennsylvania, on February 6 and 7, 1995. The charge in the case was filed on July 18, 1994,¹ by Communication Workers of America, AFL-CIO (the Union), on which a complaint was issued by the Acting Regional Director for Region 4 of the National Labor Relations Board on November 14, alleging that Michael Konig t/a Nursing Center at Vineland (the Respondent) had violated Section 8(a)(5) and (1) of the National Labor Relations Act (the Act) by failing and refusing to meet and bargain at reasonable times with the Union, and by withdrawing recognition from the Union. The Respondent, by answer dated November 23, admitted some and denied other allegations of the complaint and denied the commission of any unfair labor practices.

On the entire record,² including my observation of the demeanor of the witnesses, and after considering the briefs

¹ All dates are in 1994, unless otherwise indicated.

² The General Counsel's unopposed motion to correct the transcript at p. 143, l. 16 to substitute the word "one" for "no" is granted (see G.C. Br., p.4, fn. 3).

filed by the Respondent and General Counsel, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, at all material times, has been owned by Michael Konig, a sole proprietorship doing business as a Nursing Center at Vineland, and is engaged in the operation of a long-term care nursing home in Vineland, New Jersey. During the past year the Respondent, in the course and conduct of its business operations, received gross revenues in excess of \$500,000, and during the same period purchased and received at its Vineland facility goods valued in excess of \$50,000 directly from points located outside the State of New Jersey. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Respondent also admits, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Factual Background

The Respondent operates a long-term nursing care home in Vineland, New Jersey, where it employs several categories of employees that include registered nurses, nurses' aides, and licensed practice nurses (LPNs). On June 8, 1992, the Union filed a petition for an election with the Board seeking to represent a bargaining unit consisting of only the LPNs. A hearing on that petition was held on July 8, 1992, during which the Respondent took the position that, except for three LPNs whom it claimed were charge nurse supervisors,³ the LPNs were not statutory supervisors. It opposed the unit petitioned for by the Union solely on the basis that any such unit must, at a minimum, include the nurses' aides or, alternatively, all the nurses' aides, as well as dietary and housekeeping employees. The Respondent's arguments, including the alleged supervisory status of the three charge nurses, were found to be without merit and, on October 22, 1992, the Union was duly certified by the Board as the exclusive bargaining representative of all full-time and regular part-time LPNs.

Robert Yaeger, the Union's principal staff representative, credibly and without contradiction testified that following the Union's certification, the parties, during the latter part of November 1992, commenced negotiations, and that he served as the Union's bargaining representative during those negotiations while the Respondent was represented by its former legal counsel, Stewart Bochner. The record is silent as to what, if anything, transpired during those negotiations, or how long the parties continued to bargain. The parties' conduct during that period is not at issue here.

Yaeger further testified that in late March 1994, following the completion on March 21, of an unfair labor practice trial on differing issues involving the same parties, he and Bochner, with assistance from a Federal mediator, agreed to resume negotiations and arranged to conduct bargaining ses-

³ The three individuals were LPNs Caroline Jenkins, Darlene Lindsey, and Carmen Ocasio.

sions on April 21 and 28 and May 4.⁴ As the date for the first scheduled bargaining session approached, however, Bochner, by letter dated April 19, notified Yaeger that he was canceling the April 21 bargaining session because he was purportedly scheduled to appear as a witness in Federal district court in New Haven, Connecticut, on that same date.

The next scheduled bargaining session, as noted, was set for April 28. On April 27, however, Bochner's secretary phoned Yaeger to tell him that the April 28 meeting was being canceled because Bochner would not be able to attend. Yaeger was not given a reason for Bochner's inability to meet as scheduled. Bochner "faxed" Yaeger a letter informing him that the May 4 session was being canceled because the Respondent had decided to retain new legal counsel. That same day, Yaeger wrote to the Respondent informing it that despite having agreed to the above three bargaining sessions, all had been canceled by Bochner. In his letter, Yaeger stressed the need to proceed with negotiations with minimal interruption, noting that the parties had already tentatively agreed to certain noneconomic terms to be included in any agreement and were in the process of discussing economic items.⁵ Yaeger requested that the Respondent have its representative contact him so that arrangements could be made to continue the bargaining process.

On May 6, Respondent's new legal counsel, David Lew, informed the Union that he would be the Respondent's bargaining agent, that Bochner advised him it would take 10–14 days for Lew to obtain the Respondent's negotiating files, and that on receipt and review of the files, which he estimated would take several weeks, negotiations with the Union would resume and would proceed as quickly as possible. Not having heard from Lew by June 2, Yaeger wrote him a letter in which he stressed the need to resume collective bargaining as soon as possible, and expressed confidence that the parties should be able to arrange for an expeditious scheduling in order to achieve a contract. Yaeger, however, cautioned Lew that, if necessary, the Union would resort to the Board's processes to "effectuate the collective bargaining process." Union attorney, Lisa Morowitz, thereafter made followup calls to Lew on June 3 and again on June 10 to reiterate the Union's request for the resumption of bargaining. Lew, however, informed Morowitz that he had not yet obtained the negotiation files from Bochner, and further advised Morowitz that he needed time to review with Respondent what, if any, impact the Supreme Court's decision in *NLRB v. Health Care & Retirement Corp.*, 114 S.Ct. 1778 (1994), might have on the bargaining unit before responding to the Union's request for bargaining. Several weeks passed without any further word from the Respondent. On July 1, Morowitz again called Lew presumably to renew the request for bargaining. This time Lew informed Morowitz that the Respondent was of the opinion, based on the Supreme Court's decision, that the LPNs were supervisors under Section 2(11) and that, consequently, it was under no obligation to bargain with the Union over said employees. As noted, the charge in this matter was filed shortly thereafter.

⁴A decision in that prior unfair labor practice trial issued on May 23, 1994. The General Counsel's motion to include that prior decision into the record in this case was denied on relevancy grounds.

⁵Presumably, agreement on the noneconomic terms was a product of the November 1992 negotiations.

B. *The Supervisory Issue*

Although the Respondent in its answer denies that the Union was certified in October 1992, the record evidence, more particularly General Counsel's Exhibit 6, establishes clearly that the Union was duly certified by the Board as the exclusive bargaining representative of all of Respondent's full-time and regular part-time LPNs at its Vineland, New Jersey facility. Further, at the hearing, the Respondent did not dispute the existence of the certification but rather contested the validity of the certification and its continued relevance on the basis of the Supreme Court's decision in *NLRB v. Health Care & Retirement Corp.*, supra. Thus, it argues that the Court's decision constitutes a "special circumstance" warranting a reconsideration of the 1992 certification. It further argues that as the Board's certification was not a final Board order subject to review by a court, its refusal to bargain in this case was the only means by which it could obtain a final Board order that would then allow it to challenge the validity of that certification.

The General Counsel argues that the Respondent waived its right to assert the alleged supervisory status of the LPNs as a defense to its refusal to bargain by failing to raise the issue during the representation proceeding, and that it has not adduced any newly discovered and previously unavailable evidence, nor did it present any special circumstances, to warrant reexamination of the outcome of the representation proceeding. Finally, the General Counsel contends that the Respondent's reliance on *NLRB v. Health Care & Retirement Corp.* is misplaced.

During the hearing, the Respondent was afforded great latitude in presenting evidence in support of its affirmative defense that the LPNs are supervisory employees. On review of all the evidence of record, however, including arguments made by all parties during the hearing and in the posttrial briefs, I find, in agreement with the General Counsel, that the Respondent is precluded from challenging the validity of the certification in this proceeding. Accordingly, I deem it unnecessary to rule on the status of the LPNs.

The Respondent's assertion that all its LPNs are statutory supervisors, and not just the three charge LPNs contested in the underlying representation case, is being raised for the first time in this unfair labor practice proceeding and was not raised as an issue in the representation hearing. In fact, as noted above, the Respondent took a contrary position during the representation proceeding by asserting that except for the three charge LPNs, its LPNs were nonsupervisory employees who must be included in a broader unit with nurses' aides and other nonsupervisory personnel. It is a well-settled principle of Board law that in the absence of any 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, 162 (1941); Secs. 102.67(f) and 102.69(c) of the Board's Rules and Regulations; see also *Venture Packaging, Inc.*, 294 NLRB 544, 548 (1989). The alleged supervisory status of all LPNs could have been, but was not, raised by the Respondent during the representation hearing. The Respondent instead challenged only the status of three charge LPNs. The Respondent offered no newly discovered or previously unavailable evidence that would justify reexamina-

tion of the Board's decision in that representation case. Indeed, much of the documentary evidence introduced by the Respondent at the hearing in support of its claim that all LPNs are supervisors was clearly available during the underlying representation case. Accordingly, I am bound by the Board's unit determination in that case. *Technicolor Government Services*, 268 NLRB 258 (1983).

The Respondent, as indicated, contends that the Court's recent holding in *NLRB v. Health Care & Retirement Corp.* constitutes "extraordinary circumstances" warranting a reconsideration of the Board's certification. Its contention is without merit. In *NLRB v. Health Care & Retirement Corp.*, supra, the sole issue before the Court was whether the Board's construction of the phrase—"in the interest of the employer"—found in Section 2(11), as applied to the nursing industry, was proper.⁶ The Court found that the Board's "in the interest of the employer" test, used to determine the supervisory status of LPNs, created a false dichotomy, e.g., between acts taken in connection with patient care and acts taken in the interest of the employer, and was similar to that rejected by the Court in *NLRB v. Yeshiva University*, 444 U.S. 672 (1980). This dichotomy, it noted, made no sense because patient care is indeed the business of a nursing home, and it logically follows that attending to the needs of the nursing home patients, who are the employer's customers, is in the interest of the employer." *Id.* at 1782.

Thus, the Court's holding was limited to this very narrow issue and did not affect the Board's authority to interpret or apply the other provisions of Section 2(11) in determining an employee's status. In fact, the Court agreed with the Board that before an employee is found to be a supervisor under Section 2(11), three questions must be answered in the affirmative: (1) does the employee have authority to engage in 1 of the 12 activities listed in Section 2(11), (2) does the exercise of that authority require the use of independent judgment, and (3) does the employee exercise that authority in the "interest of the employer." It went on to note, however, that the issue before it involved "only the third question" pertaining to the Board's "interest of the employer" test. Although it proceeded to find the Board's test to be invalid, the Court noted that the Board would still be able under Section 2(11) to find nurses not to be supervisors without having to address the question of whether such individuals exercised any duties in the "interests of the employer." Thus, it stated that "an examination of [nurses'] duties to determine whether 1 or more of the 12 listed activities is performed in a

⁶Sec. 2(11) defines a supervisor as "any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment." (Emphasis added.)

In applying the language of Sec. 2(11) to nurses, the Board had adhered to the rule that a nurse's direction of less-skilled employees in the exercise of professional judgment incidental to the treatment of patients, was not deemed to be authority that was being exercised "in the interest of employer." Thus, regardless of whether a nurse possessed and exercised any or all of the above-described authority, the nurse would not be viewed as acting in the interest of the employer if such supervisory activity was incidental to the treatment and care of patients.

manner that makes the employee a supervisor is, of course, part of the Board's routine and proper adjudicative function. In cases involving nurses, that inquiry no doubt could lead the Board in some cases to conclude that supervisory status has not been demonstrated." *Id.* at 1785.

Regarding the three charge LPNs alleged to be supervisors by the Respondent in the underlying representation case, the Board found that they performed the same duties as the other nonsupervisory LPNs and did not possess any of the 12 indicia of supervisory authority enumerated in Section 2(11). Contrary to the Respondent's contention in its posttrial brief (p. 34), the Board's determination regarding these three individuals was in no way premised on a finding that they did not exercise independent judgment in the "interest of the employer." Indeed, given its finding that the charge LPNs did not exercise independent judgment or perform any of the 12 enumerated activities of Section 2(11) in a nonroutine manner, there was obviously no need for the Board to have utilized its "interest of the employer" test. As the Court's holding in *NLRB v. Health Care & Retirement Corp.*, dealt solely with the Board's application of its "interest of the employer" test, that holding has no relevance here, and consequently does not constitute an "extraordinary circumstance" warranting a reconsideration of the Board's 1992 unit determination and certification. Regarding the alleged supervisory status of the remaining LPNs, the Respondent, as noted, did not raise this issue at any time prior to or after the Board's certification. Accordingly, its attempt to raise it as a defense to the instant unfair labor practice charge is untimely.

The Respondent correctly points out in its posttrial brief that a Board certification is not directly reviewable under Section 10(f), and that, to obtain judicial review, which it claims as a goal in this case in the event a violation is found, an employer must first refuse to recognize and bargain with the certified union and thereafter raise the propriety of the bargaining unit as a defense to the unfair labor practice charge stemming from the refusal to bargain. Although the Respondent is correct that the above procedure is the proper method by which an employer can obtain judicial review of a unit determination made by the Board, it is equally true that an employer who does not follow this procedure and honors the certification by recognizing the certified union and entering into negotiations with it will be deemed to have waived its right to challenge the validity of the certification. See *Technicolor Government Services v. NLRB*, 739 F.2d 323, 326-327, (8th Cir. 1984), enforcing the Board's decision in *Technicolor Government Services*, supra. It is undisputed that following the October 1992 certification, the Respondent chose not to contest its validity and proceeded instead, just 1 month later, to recognize the Union by engaging in contract negotiations with it, negotiations that apparently led to an agreement by the parties on certain noneconomic terms. The Respondent's conduct in this regard amounted to a waiver of its right to challenge the 1992 certification, and its attempt to do so in this proceeding, some 2 years after the certification, is in any event clearly untimely. See *Opportunity Homes, Inc.*, 315 NLRB 1210 (1994); *NLRB v. International Health Care*, 898 F.2d 501, 504 (6th Cir. 1990).

C. The 8(a)(5) Allegation

The General Counsel alleges that the Respondent violated Section 8(a)(5) and (1) when, from April 21 to on or about July 1, it unlawfully refused to meet and bargain with the Union, and by withdrawing, on or about July 1, recognition from the Union. An employer violates Section 8(a)(5) and (1) of the Act when it refuses to bargain collectively with the representative of its employees. As the Union was at all times following the 1992 certification the lawfully certified bargaining representative of the Respondent's LPNs, the latter was obligated under Section 8(d) to meet at reasonable times and to confer in good faith with the Union regarding the unit employees' terms and conditions of employment. *Viking Connectors Co.*, 297 NLRB 95, 102 (1989). In assessing whether an employer has engaged in good-faith bargaining, the Board examines the parties' overall conduct during negotiations. The Board has found certain conduct, e.g., delaying tactics, unreasonable bargaining demands, unilateral changes in mandatory subjects of bargaining, efforts to bypass a union, failing to designate an agent with sufficient bargaining authority, to be indicative of a lack of good faith. *Id.*

The Respondent concedes that since July 1, it has "declined" to bargain with the Union based on its belief that the Court's holding *NLRB v. Health Care & Retirement Corp.*, somehow relieved it of its obligation to do so. The Respondent, however, offered no explanation or justification for failing to meet and bargain with the Union on the agreed-upon dates of April 21 and 28 and May 6. It clearly cannot rely on the Court's decision in *Health Care & Retirement Corp.* to justify its refusal to meet on the above dates as that decision did not issue until May 23, some 2 weeks after the Respondent unilaterally canceled the last scheduled bargaining session of May 4. Nor is its failure to meet with the Union on the scheduled April 21 and 28 bargaining dates defensible on grounds that its former counsel, Bochner, purportedly had prior commitments that conflicted with those bargaining dates.⁷ An employer's good-faith obligation includes a statutory duty to make its authorized representative available for negotiations at reasonable times and places, *Crane Co.*, 244 NLRB 103, 111 (1979), and an employer acts at its peril when it chooses as a bargaining agent someone who is encumbered by such conflicts. *Caribe Staple Co.*, 313 NLRB 877, 893 (1994); *O & F Machine Products Co.*, 239 NLRB 1013, 1019 (1978); *Imperial Tile Co.*, 227 NLRB 1751, 1754 (1977). While a party is clearly free to select whomever they please as their bargaining representative, the designation should not be such as to collide with the party's obligation under Section 8(d) to meet and confer at reasonable times. *Caribe Staple*, *supra*. Having selected Bochner as its bargaining agent, the Respondent bears the consequence of Bochner's inability to represent it at the scheduled negotiations. See *NLRB v. Exchange Parts Co.*, 339 F.2d 829, 832 (5th Cir. 1965).

Following cancellation of the April 21 and 28 meetings, none of which incidentally it sought to reschedule, the Respondent, for reasons unknown, dismissed Bochner as its bargaining agent, causing Bochner to abruptly cancel the

⁷Bochner as noted, provided a reason for not being able to attend the April 21 session, but gave no reason for canceling the April 28 session.

third and last bargaining session scheduled for May 4. By May 6, the Respondent had retained new legal counsel, in the person of David Lew, to serve as its bargaining representative. The expeditious manner in which the Respondent handled its change of representative, while commendable, did nothing to alter its basic course of conduct. Thus, despite repeated efforts by the Union to restart the negotiations, the Respondent thereafter continued its delaying tactics for almost 2 months by advising the Union that its new counsel needed time to obtain and review the negotiation files from Bochner before scheduling any bargaining sessions. By July 1, the Respondent, apparently unable to further avoid its bargaining obligation, and having again received from Union Attorney Morowitz a telephonic request for the resumption of bargaining, seized upon the recently issued decision in *NLRB v. Health Care and Retirement Corp.*, as a basis for altogether withdrawing recognition from the Union on the theory that all LPNs are deemed to be supervisors under the Court's holding, rendering invalid the unit of LPNs certified by the Board in 1992, and relieving it of any further bargaining obligation.

As noted *supra*, the Respondent has misconstrued the Court's holding in that case. As previously indicated, the Court's holding in *NLRB v. Health Care & Retirement Corp.* is, in my view, limited to the narrow question of whether the Board had properly construed the phrase "in the interest of the employer" when applied to LPNs in the nursing industry. Although the Court rejected the Board's "interest of the employer" test, it left intact the Board's authority to deny supervisory status to LPNs on other grounds, e.g., a lack of independent judgment to engage in any of the 12 activities listed in Section 2(11) in a nonroutine manner. I find nothing in that decision to suggest, as the Respondent does here, that the Court's holding was intended as a sweeping rejection or invalidation of all prior Board certifications involving LPN bargaining units. Indeed, it is patently clear that the Court's decision in no way impacts on any prior unit determinations rendered by the Board involving the supervisory status of LPNs, where such determinations were properly based on grounds other than the "interest of the employer" test invalidated by the Court. As noted, in the underlying representation proceeding, the Board did not rely on the "interests of the employer" test in finding the three charge LPNs not to be supervisors. Consequently, the Court's holding in *NLRB v. Health Care & Retirement Corp.*, has no bearing on this case, and the Respondent was not justified in withdrawing recognition from the Union on the basis of that decision.

In summary, I am persuaded by the foregoing facts that the Respondent has not satisfied its duty under Section 8(d) of meeting at reasonable times and conferring in good faith with the Union. Thus, the Respondent's entire course of conduct, including its unilateral cancellation of all scheduled and agreed-on bargaining sessions, its failure to reschedule any of those meetings despite the Union's repeated requests for a resumption of bargaining, and its eventual, albeit unlawful, withdrawal of recognition on July 1, supports a finding that the Respondent was engaging in dilatory tactics designed to thwart the statutory objective of good-faith bargaining. As noted, the fact that its attorney may have been too busy to meet as scheduled does not serve to excuse the Respondent from its obligation to bargain in good faith. *Lawrence Textile Shrinking Co.*, 235 NLRB 1178, 1179 (1978); see also

Caribe Staple Co., O & F Machine Products Co., and Imperial Tile Co., cited *supra*. I am not unmindful of the fact that the Respondent had apparently reached agreement on certain noneconomic issues. The mere fact, however, that a party bargains on certain issues in an attempt to reach overall agreement while frustrating agreement on other substantial issues does not suffice to fulfill the requirements of good-faith bargaining. *Microdot, Inc.*, 288 NLRB 1015, 1021 (1988). Indeed, it is reasonable to assume that while the Respondent may have been willing to bargain and agree to certain noneconomic terms, when faced with the prospect of bargaining over the more troublesome economic terms, the Respondent elected to delay bargaining over these matters as long as possible. Accordingly, I find that the Respondent's refusal to meet and bargain with the Union on April 21 and 28 and May 4, and its withdrawal of recognition from the Union on July 1, violated Section 8(a)(5) and (1) of the Act.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. The following employees constitute a unit appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time Licensed Practical Nurses (LPNs) employed by the Respondent at the Vineland facility, excluding all other employees, registered nurses, quality assurance employees, nurses' aides, clerical employees, housekeeping employees, dietary employees, laundry employees, guards and supervisors as defined in the Act.

4. At all times since October 27, 1992, the Union has been and is the certified, exclusive bargaining representative of the employees in the above-described unit.
5. By refusing to meet at reasonable times and bargain in good faith with the Union from April 21 to July 1, 1994, and by withdrawing its recognition of the Union on July 1, 1994, 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 engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent shall be required, on request, to meet at reasonable times and to bargain collectively and in good faith with the Union concerning the wages, hours, and other terms and conditions of employment of employees in the bargaining unit and to embody any understanding reached in a signed agreement.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁸

ORDER

The Respondent, Michael Konig t/a Nursing Center at Vineland, Vineland, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain in good faith with Communications Workers of America, AFL-CIO, Local 1040, as the exclusive bargaining representative of employees in the unit described below, by refusing to meet with said Union at reasonable times. The appropriate unit includes:

All full-time and regular part-time Licensed Practical Nurses (LPNs) employed by the Respondent at the Vineland facility, excluding all other employees, registered nurses, quality assurance employees, nurses' aides, clerical employees, housekeeping employees, dietary employees, laundry employees, guards and supervisors as defined in the Act.

(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 above-described appropriate bargaining unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

(b) Post at its facility in Vineland, New Jersey, copies of the attached notice marked "Appendix."⁹ Copies of the notice, on forms provided by the Regional Director for Region 4, 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.

⁸If 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.

⁹If 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."