

Visiting Nurse Health System, Inc. f/k/a Visiting Nurses Association of Metropolitan Atlanta, Inc. and United Food and Commercial Workers, Local No. 1996, Successor to United Food and Commercial Workers, Local Union No. 1063. Case 10-CA-27847

December 8, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING
AND COHEN

Upon a charge and amended charges filed on August 12, 1994, and February 10 and 23, 1995, the General Counsel of the National Labor Relations Board issued a third amended complaint and notice of hearing on August 1, 1995, alleging that the Respondent has violated Section 8(a)(5) and (1) of the National Labor Relations Act by refusing to recognize and bargain with United Food and Commercial Workers, Local Union No. 1063 (Local 1063) and its successor, United Food and Commercial Workers, Local No. 1996 (Local 1996) following Local 1063's July 18, 1994 certification in Case 10-RC-14308 and the subsequent May 10, 1995 amendment thereto in Case 10-AC-49 substituting Local 1996 as the exclusive bargaining representative of the unit staff nurses. (Official notice is taken of the "record" in the representation proceedings as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g); *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent subsequently filed an answer admitting in part and denying in part the allegations in the third amended complaint.

Thereafter, on October 23, 1995, the General Counsel filed a Motion to Transfer Case to and Continue Proceeding before the Board and for Summary Judgment. On October 26, 1995, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. On November 22, 1995, the Respondent 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 and response the Respondent admits Local 1063's certification and the subsequent amendment thereto substituting Local 1996 as the exclusive bargaining representative of the unit staff nurses, but contends that the Board's disposition of a determinative challenged ballot in the representation proceeding was erroneous and that Local 1063's certification was therefore invalid. Further, the Respondent contends that all the unit staff nurses are statutory supervisors under the Supreme Court's decision in *NLRB v. Health*

Care & Retirement Corp., 114 S.Ct. 1778 (1994), that the certification was therefore also improper for that reason, and that there are no employees in the unit inasmuch as the certified unit excludes supervisors. Finally, the Respondent in its answer denies that it has refused to bargain with Local 1063 and its successor, Local 1996, as the exclusive bargaining representative of the unit staff nurses.

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding.¹ The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941).

We also find that there are no issues requiring a hearing with respect to the Respondent's alleged refusal to bargain. Although the Respondent's answer denies this allegation, a copy of the Respondent's August 2, 1994 letter declining to recognize or bargain with Local 1063 on the grounds that the certification was improper is attached as an exhibit to the Motion for Summary Judgment, and the Respondent has not disputed the authenticity of that letter in response to the Notice to Show Cause. Further, the Respondent admits in its answer that it contends that Local 1063's certification was improper, and otherwise affirmatively asserts that the certification was improper. Finally, nowhere in its answer or response does the Respondent assert that it has offered to recognize and bargain with

¹ The Respondent's position regarding the determinative challenged ballot was fully considered by the Board in the representation proceeding. See 314 NLRB 404 (1994). With respect to the Respondent's contention that the unit staff nurses are statutory supervisors under the Supreme Court's May 23, 1994 decision in *Health Care & Retirement*, supra, we note that the Respondent never raised the issue of the supervisory status of the staff nurses in the representation proceeding. Accordingly, in agreement with the General Counsel, we find that the Respondent is barred from raising that issue in this proceeding. See *Flatbush Manor Care Center*, 314 NLRB 702, 703 fn. 4 (1994). See also *Heartshare Human Services of New York*, 317 NLRB 611 fn. 1 (1995). Finally, we note that, although the Respondent in its answer states that it is without knowledge sufficient to form a belief as to whether Local 1063 merged with another local to become Local 1996, the Respondent admits that the Regional Director issued the May 10, 1995 Decision and Amendment of Certification substituting Local 1996 as the exclusive bargaining representative of the unit staff nurses, and has not specifically contended in its answer or response to the Notice to Show Cause that the amendment was improper. In any event, inasmuch as the Respondent made no objection to the requested amendment in the representation proceeding, and did not request review of the Regional Director's decision granting the request and amending the certification, we find that the Respondent is also precluded from raising any issue concerning the amendment in this proceeding. See generally *A. Bonfatti & Co.*, 316 NLRB 623 fn. 1 (1995), and cases cited there.

Local 1063 or its successor, Local 1996.² In these circumstances, we find that the Respondent is in fact refusing to bargain in order to test the certification as alleged in the third amended complaint and the motion. See, e.g., *Indeck Energy Services*, 318 NLRB 321 (1995); and *Biewer Wisconsin Sawmill, Inc.*, 306 NLRB 732 (1992).

Accordingly, we grant the Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a Georgia corporation with an office and place of business located in Atlanta, Georgia, where it is engaged in providing nursing and related services to patients in their homes. The Respondent, during the calendar year preceding issuance of the complaint, received gross revenues in excess of \$500,000 from its Atlanta, Georgia operations and received in excess of \$100,000 from Medicaid and Medicare. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that Locals 1063 and 1996 are labor organizations within the meaning of Section 2(5) of the Act.³

II. ALLEGED UNFAIR LABOR PRACTICES

A. *The Certification*

Following the election held December 18, 1992, Local 1063 was certified on July 18, 1994, as the collective-bargaining representative of the employees in the following appropriate unit:

All regular full-time and regular part-time Staff Nurses employed by the Respondent, excluding all Special Services Nurses, Nurse Practitioner of employee health clinic, Community Liaison Nurse, Community Care Coordinator, Weekend Nurse, Enterostomal Therapy Nurse, AIDS Health Services Coordinator, Data Processing Liaison, Utilization Review/Education Specialist, Friendship Center Nurse, Utilization Review Nurse,

Nurse Trainer, Pediatric Nurses, Infusion Team Nurses, Hospice Nurses, PRN's and Supervisors as defined in the Act.⁴

On May 10, 1995, the certification was amended to designate Local 1996 as the exclusive bargaining representative of the employees in the foregoing unit. Local 1996 continues to be the exclusive representative under Section 9(a) of the Act.

B. *Refusal to Bargain*

Since about August 2, 1994, the Respondent has refused to recognize and bargain with Local 1063 and its successor, Local 1996. We find that this refusal constitutes an unlawful refusal to recognize and bargain in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By refusing on and after August 2, 1994, to recognize and bargain with the Local 1063 and its successor, Local 1996 as the exclusive collective-bargaining representative of employees in the appropriate unit, 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 violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with Local 1996, successor to Local 1063, 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 Respondent begins to bargain in good faith Local 1996. *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); and *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

ORDER

The National Labor Relations Board orders that the Respondent, Visiting Nurse Health System, Inc. f/k/a Visiting Nurses Association of Metropolitan Atlanta, Inc., Atlanta, Georgia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with United Food and Commercial Workers, Local No. 1996, successor to United Food and Commercial Workers, Local Union No.

² Indeed, the Respondent in its response admits that it refused to bargain with Local 1063.

³ The Respondent in its answer asserts that it is without knowledge or information sufficient to form a belief as to whether Locals 1063 and 1996 are labor organizations within the meaning of Sec. 2(5) of the Act. By entering into a Stipulated Election Agreement in the underlying representation proceeding in Case 10-RC-14308, however, the Respondent effectively agreed that Local 1063 was a labor organization. Further, at no time during the representation proceedings in Cases 10-RC-14308 and 10-AC-49 did the Respondent raise a question concerning the labor organization status of Local 1063 or Local 1996. Accordingly, we find that the Respondent is precluded from litigating the issue in this proceeding. See *Biewer Wisconsin Sawmill*, supra at 732 fn.1, and cases cited there.

⁴ As corrected by order dated December 9, 1994.

1063, 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 Local 1996 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 regular full-time and regular part-time Staff Nurses employed by the Respondent, excluding all Special Services Nurses, Nurse Practitioner of employee health clinic, Community Liaison Nurse, Community Care Coordinator, Weekend Nurse, Enterostomal Therapy Nurse, AIDS Health Services Coordinator, Data Processing Liaison, Utilization Review/Education Specialist, Friendship Center Nurse, Utilization Review Nurse, Nurse Trainer, Pediatric Nurses, Infusion Team Nurses, Hospice Nurses, PRN's and Supervisors as defined in the Act.

(b) Post at its facility in Atlanta, Georgia, copies of the attached notice marked "Appendix."⁵ Copies of the notice, on forms provided by the Regional Director for Region 10 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.

⁵If 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."

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

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 United Food and Commercial Workers, Local No. 1996, successor to United Food and Commercial Workers, Local Union No. 1063, 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 regular full-time and regular part-time Staff Nurses employed by us, excluding all Special Services Nurses, Nurse Practitioner of employee health clinic, Community Liaison Nurse, Community Care Coordinator, Weekend Nurse, Enterostomal Therapy Nurse, AIDS Health Services Coordinator, Data Processing Liaison, Utilization Review/Education Specialist, Friendship Center Nurse, Utilization Review Nurse, Nurse Trainer, Pediatric Nurses, Infusion Team Nurses, Hospice Nurses, PRN's and Supervisors as defined in the Act.

VISITING NURSE HEALTH SYSTEM, INC.
F/K/A VISITING NURSES ASSOCIATION OF
METROPOLITAN ATLANTA, INC.