

Good Shepherd Home, Inc. and United Food and Commercial Workers Local 911, AFL-CIO and CLC. Case 8-CA-28378

September 30, 1996

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING
AND HIGGINS

Pursuant to a charge and amended charge filed on July 11 and 25, 1996, respectively, the General Counsel of the National Labor Relations Board issued a complaint on August 12, 1996, alleging that the Respondent has violated Section 8(a)(5) and (1) of the National Labor Relations Act by refusing the Union's request to bargain and to furnish information following the Union's certification in Case 8-RC-15298.¹ (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 Respondent filed an answer admitting in part and denying in part the allegations in the complaint and asserting affirmative defenses.

On September 3, 1996, the General Counsel filed a Motion for Summary Judgment. On September 4, 1996, 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 September 18, 1996, the Respondent filed a response and Cross-Motion for Summary Judgment and the Charging Party filed a brief in support of the General Counsel's motion.

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 its refusal to bargain and to furnish the Union with information, but attacks the validity of the certification on the basis of its objection to the election in the representation proceeding.

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. 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.² 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 warranting a hearing with respect to the Union's request for information. The complaint alleges that the Union requested the following information from the Respondent: a current list of classifications, rates of pay and breakdown of all costs of fringe benefits. Although the Respondent's answer denies that this information is necessary and relevant to the Union's duties as the exclusive collective bargaining representative of the unit, it is clear that it does so based solely on the Respondent's contention that the Union's certification was improper. In any event, it is well established that such information is presumptively relevant and must be furnished on request. See *Trustees of Masonic Hall*, 261 NLRB 436

mental submission in support of its exceptions in the representation case which addressed the Board's then-recent decision in *Sunrise Rehabilitation Hospital*, 320 NLRB 212 (1995), which overruled the previously controlling precedent relevant to the issue raised in the Respondent's objection and which did not come to the Respondent's attention until after the exceptions were filed or due; and (2) the fact that a Federal district court judge in *Perdue Farms, Inc. v. NLRB*, 927 F.Supp. 897 (E.D.N.C. 1996), recently stated that he found the Board's reasoning in the instant representation case "unpersuasive." We find neither of these circumstances sufficient to warrant reconsideration of the Board's decision. With respect to the first, we find that the Associate Executive Secretary's determination was proper and in accordance with Board policy. As indicated in the Associate Executive Secretary's letter to the Respondent, like the Federal courts (see, e.g., Rule 28(j) of the Federal Rules of Appellate Procedure), the Board generally does not permit argument based on case decisions issued subsequent to the deadline for filing exceptions, but such case citations will be noted. Here, as indicated in the Associate Executive Secretary's letter, although the Respondent's supplemental submission was rejected, the Board's attention was directed to the Board's *Sunrise* decision in response to that submission in accordance with the Board's policy described above. Moreover, we note that the Respondent has not been deprived of the opportunity to fully address that decision in the instant proceeding, and in fact has done so in its response to the Notice to Show Cause. We have fully considered the Respondent's arguments and concluded that they do not warrant reconsideration of the Board's decision. Finally, we also do not agree that the district court judge's opinion in the recent *Perdue* case constitutes a special circumstance warranting reconsideration. The district court judge's statements in that case regarding the Board's decision in the instant representation case were clearly dicta and have no precedential effect on the instant case which involves a different employer and circumstances and arises in a different circuit and is properly reviewable only by the courts of appeals.

Member Higgins did not participate in the underlying representation case. However, he agrees with the general principle that issues that were resolved in the underlying representation case cannot be raised in the subsequent "technical" 8(a)(5) case. Further, he agrees with his colleagues that there are no special circumstances warranting a departure from this general rule. In this regard, he notes that the district court judge in *Perdue Farms* agreed with the position of former Member Cohen in the instant case. Member Cohen agreed that the certification herein was proper. In these circumstances, Member Higgins agrees that there is a refusal to honor a valid certification, and that such refusal violates Sec. 8(a)(5).

¹ 321 NLRB No. 56 (May 31, 1996).

² In its response, the Respondent contends that there are two "special circumstances" warranting reconsideration of the Board's decision in the representation case: (1) the fact that the Associate Executive Secretary rejected the Respondent's March 21, 1996 supple-

(1982); and *Mobay Chemical Corp.*, 233 NLRB 109 (1977).

Accordingly, we grant the General Counsel's Motion for Summary Judgment.³

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times the Respondent, an Ohio corporation, with an office and place of business in Fostoria, Ohio, has been engaged in the operation of a nursing home. Annually the Respondent, in conducting its business operations described above, derives gross revenues in excess of \$100,000 and receives goods valued in excess of \$50,000 directly from points outside the State of Ohio.

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 the Union is 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 November 2, 1995, the Union was certified on May 31, 1996, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All full-time and part-time licensed practical nurses, nurses aides, dietary employees, house-keeping employees, maintenance employees, activities employees, barber/beauty shop employees, clerical employees, laundry employees, medical records employees and receptionists excluding all registered nurses, supervisory LPN's, confidential employees, professional employees, 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 June 10, 1996, the Union has requested the Respondent to bargain and to furnish necessary and relevant information, and, since June 11, 1996, the Respondent has 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 June 11, 1996, to bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit and

³ We therefore deny the Respondent's Cross-Motion for Summary Judgment.

to furnish the Union requested information, 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 the Union, and, if an understanding is reached, to embody the understanding in a signed agreement. We also shall order the Respondent to furnish the Union the information requested.

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 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 Respondent, Good Shepherd Home, Inc., Fostoria, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with United Food and Commercial Workers Local 911, AFL-CIO and CLC as the exclusive bargaining representative of the employees in the bargaining unit, and refusing to furnish the Union information that is relevant and necessary to its role as the exclusive bargaining representative of the unit employees.

(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 concerning terms and conditions of employment, and if an understanding is reached, embody the understanding in a signed agreement:

All full-time and part-time licensed practical nurses, nurses aides, dietary employees, house-keeping employees, maintenance employees, activities employees, barber/beauty shop employees, clerical employees, laundry employees, medical records employees and receptionists excluding all registered nurses, supervisory LPN's, confidential employees, professional employees, guards and supervisors as defined in the Act.

(b) Furnish the Union with the information that it requested on June 10, 1996.

(c) Within 14 days after service by the Region, post at its facility in Fostoria, Ohio, copies of the attached notice marked "Appendix."⁴ Copies of the notice, on forms provided by the Regional Director for Region 8 after being signed by the Respondent's authorized representative, shall be posted by the Respondent 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. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 11, 1996.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

⁴If 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 United Food and Commercial Workers Local 911, AFL-CIO and CLC as the exclusive representative of the employees in the bargaining unit, and WE WILL NOT refuse to furnish the Union information that is relevant and necessary to its role as the exclusive bargaining representative of the unit employees.

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 part-time licensed practical nurses, nurses aides, dietary employees, house-keeping employees, maintenance employees, activities employees, barber/beauty shop employees, clerical employees, laundry employees, medical records employees and receptionists excluding all registered nurses, supervisory LPN's, confidential employees, professional employees, guards and supervisors as defined in the Act.

WE WILL furnish the Union with the information that it requested on June 10, 1996.

GOOD SHEPHERD HOME, INC.