

**Lower Bucks Hospital and Nurses Association of
Lower Bucks Hospital/PSEA. Case 4-CA-25106**

November 18, 1996

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING
AND FOX

Pursuant to a charge filed on July 17, 1996, the General Counsel of the National Labor Relations Board issued a complaint on July 26, 1996, alleging, inter alia, 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 following the Union's certification in Case 4-RC-18751. (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, on August 12, 1996, admitting in part and denying in part the allegations in the complaint. On August 16, 1996, the Union filed an amended charge and on August 19, 1996, the General Counsel issued an amended complaint and notice of hearing reflecting the Union's correct name. On August 30, 1996, the Respondent filed its answer to the amended complaint.

On September 13, 1996, the General Counsel filed a Motion for Summary Judgment. On September 16, 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 October 7, 1996, 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 its refusal to bargain, but attacks the validity of the certification on the basis of its objections 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. 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).

Incorporated in the Respondent's response is a motion to revoke certification. That motion is denied for the same reasons the Motion for Summary Judgment is granted, i.e., the Respondent does not offer to adduce any newly discovered or previously unavailable

evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. The Respondent argues that it was denied due process because the Board adopted the Regional Director's report and recommendations without examining all of the evidence that the Regional Director relied on in reaching his decision. The Respondent relies on the Seventh Circuit's decision in *Cross Pointe Paper Corp. v. NLRB*, 89 F.3d 447 (July 15, 1996), petition for rehearing en banc denied October 8, 1996, in which the court held that the Board may not adopt the Regional Director's recommendations without reviewing all of the documentary evidence that the Regional Director relied upon in arriving at those recommendations. We find no merit in the Respondent's argument for several reasons.

Although the Respondent argued in the representation proceeding that the Regional Director disregarded evidence and failed to investigate the objections fully and fairly, and that the Regional Director's Report was incomplete, the Respondent did not specifically raise the issue of the Regional Director's failure to include evidence that he relied on in the record before the Board. We therefore find that the Respondent's argument concerning the incomplete record was waived when it delayed raising the issue until the General Counsel moved for summary judgment during the unfair labor practice proceeding. See *Van Leer Containers, Inc. v. NLRB*, 841 F.2d 779, 783 (7th Cir. 1988).

Moreover, even were we to find that the Respondent did not waive the incomplete record argument, we do not believe that the Seventh Circuit's holding in *Cross Pointe* would require that the certification be set aside. In *Cross Pointe*, the court found that the Regional Director relied on evidence that she collected during her ex parte investigation and questioned how the Regional Director arrived at a finding that certain facts were "uncontroverted" in the face of the company's evidence to the contrary. In the instant case, however, the Regional Director, with the possible exception of his recommendations concerning Objection 1, discussed *infra*, assumed the facts to be as described by the Respondent's witnesses and concluded that the objections lacked merit. In these circumstances, it is clear that the Regional Director did not rely on any information obtained during his ex parte investigation and not submitted to the Board. Indeed, the court in *Cross Pointe* stated that its decision is not intended to lessen the burden on the objecting party to show that alleged unlawful acts occurred and "that those acts interfered with the employees' exercise of free choice to such an extent that they materially affected the results of the election." *Id.* at 452. The Board agreed with the Regional Director that the Respondent did not meet that burden.

In its Objection 1, the Respondent objected to the Union's placing an advertisement in a local newspaper the day before the election, claiming that the language used, "Let's continue our proud tradition of Nursing at Lower Bucks Hospital," together with a ballot marked "yes," misled the employees into believing that the unidentified ad had been placed by the Board or by the Respondent. In finding that the objection lacked merit, the Regional Director found that the ad does not resemble the Board's official ballot and that any employees who saw the ad would not reasonably have believed that it was placed by the Board. He also found that employees would not reasonably have believed that the ad was placed by the Respondent for the following reasons: the Respondent presented no evidence that it used the sentence which appeared in the ad, or a substantially identical sentence, in its campaign material; the Respondent conducted a campaign against the Union and urged its employees to vote against the Union; and the ad contained the phrase "Together we can make a difference," which was a slogan that the Union used in its campaign literature. Although the Regional Director provided no supporting evidence for this last finding, the Respondent did not question the finding that the Union used the phrase in its campaign or that the Respondent conducted a campaign to defeat the Union. In addition, the newspaper ad was submitted to the Board as an attachment to the Regional Director's report. The fact that the Regional Director did not submit documentary evidence in support of his statement that the Union utilized a certain phrase in its campaign is insignificant, since we would find that the placing of the ad was not objectionable conduct whether or not the Union used the phrase in its campaign.

Accordingly, we grant the Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a Pennsylvania not-for-profit corporation, with a facility in Bristol, Pennsylvania, has been engaged in the operation of an acute care hospital. During the 12-month period preceding the issuance of the amended complaint, the Respondent, in conducting its business operations described above, received gross revenues in excess of \$500,000 and purchased and received goods valued in excess of \$50,000 directly from points outside the Commonwealth of Pennsylvania. 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 January 18, 1996, the Union was certified on May 20, 1996, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All full-time, regular part-time and per diem Registered Nurses employed by the Employer at its 501 Bath Road, Bristol, Pennsylvania campus, excluding all other employees and managers, guards and supervisors as defined in the Act, including the Director of Nursing, Nurse Managers, Charge Nurses, Nursing Supervisors, Team Leaders, Director of Hospital Education and Standards, Director of Perioperative Services, Director of Home Care, Director of Mental Health Unit, Director of Quality Management, Assistant Director of Quality Management, Employment Manager, Senior Enterostomal Therapist, Material Control Nurse, Ambulatory Surgical Center Nurse Manager, Nurse Practitioner Coordinator, Nursing QA Coordinator, Psychiatric Emergency Services Manager, Occupational Health Supervisor and Risk Manager.

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 since June 17, 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 17, 1996, to bargain with the Union 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 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 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, Lower Bucks Hospital, Bristol, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with Nurses Association of Lower Bucks Hospital/PSEA 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, regular part-time and per diem Registered Nurses employed by the Employer at its 501 Bath Road, Bristol, Pennsylvania campus, excluding all other employees and managers, guards and supervisors as defined in the Act, including the Director of Nursing, Nurse Managers, Charge Nurses, Nursing Supervisors, Team Leaders, Director of Hospital Education and Standards, Director of Perioperative Services, Director of Home Care, Director of Mental Health Unit, Director of Quality Management, Assistant Director of Quality Management, Employment Manager, Senior Enterostomal Therapist, Material Control Nurse, Ambulatory Surgical Center Nurse Manager, Nurse Practitioner Coordinator, Nursing QA Coordinator, Psychiatric Emergency Services Manager, Occupational Health Supervisor and Risk Manager.

(b) Within 14 days after service by the Region, post at its facility in Bristol, Pennsylvania, copies of the attached notice marked "Appendix."¹ 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 and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps

¹If 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."

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 17, 1996.

(c) 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.

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 Nurses Association of Lower Bucks Hospital/PSEA 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, regular part-time and per diem Registered Nurses employed by us at our 501 Bath Road, Bristol, Pennsylvania campus, excluding all other employees and managers, guards and supervisors as defined in the Act, including the Director of Nursing, Nurse Managers, Charge Nurses, Nursing Supervisors, Team Leaders, Director of Hospital Education and Standards, Director of Perioperative Services, Director of Home Care, Director of Mental Health Unit, Director of Quality Management, Assistant Director of Quality Management, Employment Manager, Senior Enterostomal Therapist, Material Control Nurse, Ambulatory Surgical Center Nurse Manager, Nurse Practitioner Coordinator, Nursing QA Coordinator, Psychiatric Emergency Services Manager, Occupational Health Supervisor and Risk Manager.

LOWER BUCKS HOSPITAL