

**Bishop Mugavero Center for Geriatric Care, Inc.
and Local 144, Hotel, Hospital, Nursing Home
& Allied Service Employees International
Union, AFL-CIO. Case 29-CA-20615**

May 5, 1997

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND
HIGGINS

Pursuant to a charge and a first amended charge filed on January 8 and 28, 1997, respectively, the General Counsel of the National Labor Relations Board issued a complaint on January 29, 1997, 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 following the Union's certification in Case 29-RC-8537. (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.

On March 10, 1997, the General Counsel filed a Motion for Summary Judgment. On March 11, 1997, 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 April 11, 1997, the Respondent filed a response. On April 21, 1997, the General Counsel and the Charging Party each filed a reply to the Respondent's response.

Ruling on Motion for Summary Judgment

In its answer the Respondent admits that it declined to recognize the Union as the representative of the Respondent's service and maintenance employees, but attacks the validity of the certification on the basis of the Board's disposition of a determinative challenged ballot in the representation proceeding. Specifically, the Respondent contends that the Board erred by deciding that a ballot which was marked with a single diagonal line in the "Yes" box and an "X" in the "No" box was a void ballot and by not including it as a "No" vote. In addition, in its response, the Respondent asserts that newly discovered, previously unavailable evidence demonstrates that, at the election, the Region failed to post Form NLRB-4897, which, inter alia, instructs voters to mark an "X" in one square only and to return the ballot to the Board agent if the voter makes any other mark. The Respondent argues that the failure to post Form NLRB-4897 interfered with the mechanics of a fair election, and, under the circumstances, the Board should reconsider the underlying representation case de novo.

All representation issues raised by the Respondent were or could have been litigated in the prior represen-

tation proceeding.¹ 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).

With respect to the additional contention raised in the Respondent's response that the Region failed to post Form NLRB-4897, we agree with the General Counsel and the Charging Party that the Respondent's failure to object in the representation proceeding to the adequacy or quality of the instructions given during the election precludes it from raising the objection in the instant proceeding.² Although the Respondent contends that its evidence is newly discovered and previously unavailable, we reject the Respondent's contention. Form NLRB-4897 has been in existence since 1983 and was previously available, and the Region's failure to post the form during the election could have been objected to in a timely manner. Moreover, as indicated in the General Counsel's opposition, the instructions provided to the voters contained instructions similar to those in Form NLRB-4897 and there is no formal requirement for the posting of Form NLRB-4897.

Accordingly, we grant the 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, a New York not for profit corporation, with an office and place of business in Brooklyn, New York, has been engaged in providing health care and related services to the elderly and infirm. During the 12-month period preceding the issuance of the complaint, the Respondent in conducting its business operations described above, received gross revenues in excess of \$250,000 and purchased and received at its Brooklyn facility, goods and supplies valued at more than \$5000 directly from points outside the State of New York. 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.

¹ See 322 NLRB 209 (1997). See also *TCI West, Inc.*, 322 NLRB 928 (1997), for further discussion of the ballot issue.

² See Sec. 102.69(g)(3) of the Board's Rules and Regulations.

³ Chairman Gould dissented in the underlying representation case and adheres to the view that the voter clearly indicated an intent to cast a "No" vote, and that the ballot should have been counted. Member Higgins did not participate in the underlying proceeding. However, both agree that the Respondent has raised no new or properly litigable issues in this "technical" 8(a)(5) proceeding warranting a hearing.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *The Certification*

Following the election held January 25, 1996, the Union was certified on September 27, 1996, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All full-time and regular part-time non-professional employees employed by the Employer at its facility located at 155 Dean Street, Brooklyn, New York, but excluding all RNs, LPNs, social workers, receptionists, business office clerical employees (including admission clerk), executive secretaries to the Director of Nursing, administrative assistant to the Administrator, assistant to the Director of Personnel, physical therapist, occupational therapist, confidential employees, managerial 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 December 9, 1996, the Union has requested the Respondent to bargain, and, since December 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 December 11, 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, Bishop Mugavero Center for Geriatric Care, Inc., Brooklyn, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with Local 144, Hotel, Hospital, Nursing Home & Allied Service Employees International Union, AFL-CIO 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 non-professional employees employed by the Employer at its facility located at 155 Dean Street, Brooklyn, New York, but excluding all RNs, LPNs, social workers, receptionists, business office clerical employees (including admission clerk), executive secretaries to the Director of Nursing, administrative assistant to the Administrator, assistant to the Director of Personnel, physical therapist, occupational therapist, confidential employees, managerial employees, professional employees, guards and supervisors as defined in the Act.

(b) Within 14 days after service by the Region, post at its facility in Brooklyn, New York, copies of the attached notice marked "Appendix."⁴ Copies of the notice, on forms provided by the Regional Director for Region 29 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

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."

employees and former employees employed by the Respondent at any time since January 8, 1997.

(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 Local 144, Hotel, Hospital, Nursing Home & Allied Service Employees International Union, AFL-CIO 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 non-professional employees employed by us at our facility located at 155 Dean Street, Brooklyn, New York, but excluding all RNs, LPNs, social workers, receptionists, business office clerical employees (including admission clerk), executive secretaries to the Director of Nursing, administrative assistant to the Administrator, assistant to the Director of Personnel, physical therapist, occupational therapist, confidential employees, managerial employees, professional employees, guards and supervisors as defined in the Act.

BISHOP MUGAVERO CENTER FOR GERI-
ATRIC CARE, INC.