

**Spectrum Healthcare Services, Inc. d/b/a Correctional Medical Services and American Federation of State, County and Municipal Employees (AFSCME), Council 31, AFL-CIO.** Case 33-CA-12559

July 8, 1998

DECISION AND ORDER

BY MEMBERS FOX, LIEBMAN, AND HURTGEN

Pursuant to a charge filed on February 20, 1998, the Acting General Counsel of the National Labor Relations Board issued a complaint on March 13, 1998, 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 33-RC-4171. (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 submitting an affirmative defense.

On April 13, 1998, the Acting General Counsel filed a Motion for Summary Judgment. On April 15, 1998, 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 29, 1998, 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

On July 15, 1997, pursuant to a stipulated election agreement, the employees of Correctional Health Care Solutions, Inc., in the unit described below, voted for representation by the Union. No timely objections were filed to that election and on July 23, 1997, the Regional Director certified the Union (See sec. IIA, *infra*).

The complaint alleges, and the Respondent admits, that about January 1, 1998, the Respondent was awarded a contract by the State of Illinois formerly awarded to Correctional Healthcare Solutions, Inc. to provide health care services at the Western Illinois Correctional Center located in Mount Sterling, Illinois, and since then the Respondent has continued to provide the health care services formerly provided by Correctional Healthcare Solutions, Inc. in basically unchanged form, and has employed as a majority of its employees individuals who were previously unit employees of Correctional Healthcare Solutions, Inc. The complaint also alleges that the Respondent has continued as the employ-

ing entity of the unit employees and is a successor to Correctional Health Care Solutions, Inc.

The Respondent denies the latter allegation and the allegation that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, contending that "the operation of the health care unit at Western Illinois Correctional Center, Mt. Sterling, Illinois, is managed, administered, and directed by the Illinois Department of Corrections, an entity exempt from the Act." The Respondent also denies the complaint allegations that the certified unit is appropriate for purposes of collective bargaining and that the Union is the exclusive bargaining representative of the Respondent's employees. As an affirmative defense, the Respondent states that "the NLRB improperly asserted jurisdiction over the health care unit, and employees working in it, at Western Illinois Correctional Center, as the individuals responsible for administering, supervising, managing, and directing the health care unit and the employees in it, are public officials employed by the Illinois Department of Corrections, and serve at the pleasure of public officials."

All representation issues raised by the Respondent were or could have been litigated by its predecessor 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).<sup>1</sup>

The Respondent's affirmative defense that the Board lacks jurisdiction appears to be based on a claim that its employees who provide the health care services under its contract at the Western Illinois Correctional Center work under the direction of "public officials employed by the Illinois Department of Corrections" who are "responsible for administering, supervising, managing, and directing the health care unit." Even accepting as true the facts alleged by the Respondent in its answer to the complaint and its opposition to the

<sup>1</sup> Member Hurtgen does not necessarily agree that a successor employer is precluded from challenging determinations made as to the predecessor employer in the underlying case. However, the Respondent does not offer any specific evidence that the unit determinations in that case were incorrect or that significant changes have since occurred.

As to jurisdiction, Member Hurtgen notes that jurisdiction was asserted over the Respondent in *Correctional Medical Services*, 325 NLRB No. 84.

Member Hurtgen does not pass on the validity of *Management Training*, 317 NLRB 1355, which reversed *Res Care*, 280 NLRB 670. However, he notes that the Respondent does not offer any specific evidence that would suggest that it would be exempt from discretionary jurisdiction even under the *Res-Care* test.

General Counsel's Motion for Summary Judgment, we cannot find that the Employer is exempt from the Board's jurisdiction. To the extent the Respondent may be appealing to the exemption in Section 2(2) of the Act for "any State or political subdivision thereof," its factual allegations fail under the test of *NLRB v. Natural Gas Utility District of Hawkins County*, 402 U.S. 600 (1971), because it asserts only that its operation at the correctional facility is supervised by state government officials, not that the Respondent itself—a Missouri corporation that is "in the business of providing medical and health care services to inmates at correctional facilities"—is "administered by individuals who are responsible to public officials or to the general electorate." *Hawkins County*, supra, 402 U.S. at 604–605. Given the Respondent's reference to control over the operations by public employees, the Respondent may be invoking the test announced by the Board in *Res-Care, Inc.*, 280 NLRB 670 (1986), under which the Board would decline to assert jurisdiction over private entities operating under contracts with government bodies if the government control over the operation was so extensive that the private employer lacked final authority over wages and benefits of the unit employees. The Board, however, overruled *Res-Care* in *Management Training*, 317 NLRB 1355 (1995). Under *Management Training*, if the private employer itself is within the Board's jurisdiction under the statute, it is irrelevant whether the daily work of its employees or other terms and conditions of employment under the relevant government contract are determined by public employees.<sup>2</sup>

We note also that the Respondent raised the issue of the Board's jurisdiction over it in a prior case involving a bargaining unit at a different correctional facility in Illinois, *Correctional Medical Services*, 325 NLRB No. 84 (March 26, 1998), and the Board rejected an affirmative defense, identical to that which the Respondent raises here, that the Board's assertion of jurisdiction was improper. The Board noted that the jurisdictional issue was or could have been litigated by the Respondent in the underlying representation proceeding (Case 33–RC–4199). In that underlying proceeding, the Regional Director rejected the Respondent's *Hawkins County* jurisdictional argument, as we have here, on the grounds that the factual proffer did

<sup>2</sup>The Board suggested in *Correctional Medical Systems*, 289 NLRB 810, 813–814 fn. 2 (1988), by reference to *Resident Home for the Mentally Retarded*, 239 NLRB 3 (1978), that the "Board has long extended the exemption for political subdivisions to entities that are . . . administered by individuals who are responsible to public officials" and that "[a]dministration in this context is construed as responsibility for day-to-day operations." However, in both of those cases the Board's decision whether to assert jurisdiction turned on the extent of control over terms and conditions of employment exercised by the governmental body and the extent left to the private entity. As noted above, the Board abandoned that analysis in *Management Training*.

not establish an exemption under either *Hawkins County* or *Management Training*. The Respondent has suggested no reason that it should not be bound by that finding.

Accordingly, we grant the Acting General Counsel's 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 Missouri corporation, with an office and a place of business located, inter alia, in Mount Sterling, Illinois, has been engaged in the business of providing medical and health care services to inmates at correctional facilities. Based on a projection of its operations since January 1, 1998, at which time the Respondent commenced its operations, the Respondent, in conducting its business operations described above, will annually derive gross revenues in excess of \$250,000 and will annually purchase and receive at its Mount Sterling, Illinois facility goods valued in excess of \$50,000 directly from points outside the State of Illinois.

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. We also find that the Respondent has continued as the employing entity of the unit employees and is a successor to Correctional Health Care Solutions, Inc. Thus, the Respondent admits that a majority of its unit employees are former unit employees of the predecessor and that it has continued to provide health care services in basically unchanged form. See *NLRB v. Burns International Security Services*, 406 U.S. 272 (1972). It does not proffer any evidence that would militate against a finding of successorship.

### II. ALLEGED UNFAIR LABOR PRACTICES

#### A. *The Certification*

Following the election held July 15, 1997, the Union was certified on July 23, 1997, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All full-time and regular part-time employees employed by the Employer at its Mount Sterling, Illinois location, including administrative assistants, dental assistants, dental hygienists, licensed practical nurses, medical records personnel, registered nurses and x-ray technicians; but excluding confidential employees, all other 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 January 26, 1998, the Union has requested the Respondent to bargain and, since February 5, 1998, 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 February 5, 1998, 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, Spectrum Healthcare Services, Inc. d/b/a Correctional Medical Services, Mount Sterling, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with American Federation of State, County and Municipal Employees (AFSCME), Council 31, 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 employees employed by the Employer at its Mount Sterling, Illi-

nois location, including administrative assistants, dental assistants, dental hygienists, licensed practical nurses, medical records personnel, registered nurses and x-ray technicians; but excluding confidential employees, all other professional employees, guards and supervisors as defined in the Act.

(b) Within 14 days after service by the Region, post at its facility in Mount Sterling, Illinois, copies of the attached notice marked "Appendix."<sup>3</sup> Copies of the notice, on forms provided by the Regional Director for Region 33 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 February 5, 1998.

(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 American Federation of State, County and Municipal Employees (AFSCME), Council 31, 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:

<sup>3</sup>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."

All full-time and regular part-time employees employed by us at our Mount Sterling, Illinois location, including administrative assistants, dental assistants, dental hygienists, licensed practical nurses, medical records personnel, registered nurses and x-ray technicians; but excluding con-

fidential employees, all other professional employees, guards and supervisors as defined in the Act.

SPECTRUM HEALTHCARE SERVICES, INC.  
D/B/A CORRECTIONAL MEDICAL SERVICES