

Lakeview Subacute Care Center and Health Professional and Allied Employees, AFT, AFL-CIO.
Case 22-CA-21625

December 31, 1997

DECISION AND ORDER

BY MEMBERS FOX, LIEBMAN, AND HURTGEN

Pursuant to a charge filed on October 18, 1996, the General Counsel of the National Labor Relations Board issued a complaint on July 11, 1997, alleging that the Respondent has violated Section 8(a)(5) and (1) of the National Labor Relations Act by refusing to participate in the arbitration of a grievance filed by the Union on behalf of members of the unit under the terms of a collective-bargaining agreement between the Union and the Respondent. The complaint alleges that by such conduct, the Respondent has failed and refused, and continues to fail and refuse, to bargain collectively with the exclusive collective-bargaining representative of its employees¹ following the denial of its petition for unit clarification in Case 19-UC-593 (formerly 22-UC-227).² (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 November 4, 1997, the General Counsel filed a Motion for Summary Judgment. On November 6, 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 November 26, 1997, the Respondent filed a response and a cross motion for summary judgment.

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 that it is refusing to participate in the arbitration of the grievance, but asserts that despite the decisions of the Board and the Regional Director regarding the Respondent's petitions for unit clarification, the majority

¹ The Union was certified in 1977 in Case 22-RC-7190 in the following unit:

All full-time and regular part-time Registered Nurses and Licensed Practical Nurses, including charge nurses, employed by the Employer at its Wayne, New Jersey location, but excluding all office clerical employees, guards and supervisors as defined in the Act, and all other employees.

² The Respondent subsequently filed a second unit clarification petition covering the same unit of employees and raising the same issues, Case 22-UC-247. That petition was dismissed by the Acting Regional Director, and no appeal of that dismissal was taken to the Board.

of employees in the unit are supervisors within the meaning of the Act and are not appropriate for inclusion in the unit, and therefore any grievance filed on their behalf is not appropriate for the application of any collective-bargaining agreement which may exist between the Respondent and the Union.

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).³

Although the complaint alleges as a violation only the Respondent's failure to process a single grievance, it is clear from the Respondent's answer, its position paper submitted in response to the charge, and its opposition to the General Counsel's Motion for Summary Judgment, that its defense to the complaint allegation is based solely on its contention that a majority of, if not all, unit members are supervisors within the meaning of the Act. Thus, by refusing to arbitrate a grievance and comply with the terms of the collective-bargaining agreement on the basis that the unit is inappropriate, a position which has been rejected by the Board, the Respondent's action is tantamount to a withdrawal of recognition of the Union in the certified unit. Accordingly, we grant the General Counsel's Motion for Summary Judgment.⁴

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a New Jersey corporation, with a facility in Wayne, New Jersey, has been engaged in the provision of inpatient health care services. During the 12-month period preceding the issuance of the complaint, the Respondent in conducting its business operations described above, derived gross revenues in excess of \$100,000 and purchased and caused to be delivered to its New Jersey facility, goods valued in excess of \$5000 directly from points

³ Member Hurtgen was not a member at the time of the decision in the underlying representation case. If he had participated in that case, he would not have agreed with its result. However, he agrees with his colleagues that Respondent has not raised any issue that is properly litigable in the instant case. Accordingly, he joins his colleagues in granting summary judgment.

⁴ Consequently, we deny the Respondent's Cross Motion for Summary Judgment, which simply reiterates the Respondent's contention, rejected in the representation proceeding, that all or most of the unit members are statutory supervisors.

outside the State of New Jersey. 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*

The Union was certified on September 12, 1977, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All full-time and regular part-time Registered Nurses and Licensed Practical Nurses, including charge nurses, employed by the Employer at its Wayne, New Jersey location, but excluding all office clerical employees, guards and supervisors as defined in the Act, and all other employees.

The Union continues to be the exclusive representative under Section 9(a) of the Act.

B. *Refusal to Bargain*

On July 19, 1995, the Union filed a grievance with the Respondent on behalf of members of the unit, and, since August 30, 1996, the Respondent has refused to participate in the arbitration of the grievance.⁵ 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 August 30, 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 participate in the arbitration of the grievance referred to above, to recognize and bargain on request with the Union as the exclusive bargaining representative of the unit employees, and if an understanding is reached, to embody the understanding in a signed agreement.

ORDER

The National Labor Relations Board orders that the Respondent, Lakeview Subacute Care Center, Wayne,

New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to recognize and bargain with Health Professional and Allied Employees, AFT, 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, recognize and 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 Registered Nurses and Licensed Practical Nurses, including charge nurses, employed by the Employer at its Wayne, New Jersey location, but excluding all office clerical employees, guards and supervisors as defined in the Act, and all other employees.

(b) Participate in the arbitration of the grievance filed by the Union on July 19, 1995.

(c) Within 14 days after service by the Region, post at its facility in Wayne, New Jersey, copies of the attached notice marked "Appendix."⁶ Copies of the notice, on forms provided by the Regional Director for Region 22, 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 August 30, 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.

⁵At all material times, the Respondent and the Union were parties to a collective-bargaining agreement covering the unit set forth above and containing a grievance-arbitration provision. The parties' most recent agreement expired on December 31, 1995.

⁶If 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 recognize and bargain with Health Professional and Allied Employees, AFT, 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, recognize and 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 Registered Nurses and Licensed Practical Nurses, including charge nurses, employed by us at our Wayne, New Jersey location, but excluding all office clerical employees, guards and supervisors as defined by the Act, and all other employees.

WE WILL participate in the arbitration of the grievance filed by the Union on July 19, 1995.

LAKEVIEW SUBACUTE CARE CENTER