

**The Mount Sinai Hospital and 1199 National Health & Human Service Employees, SEIU, AFL-CIO.**  
Case 2-CA-31825

March 31, 1999

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS  
LIEBMAN AND HURTGEN

Pursuant to a charge filed on November 12, 1998,<sup>1</sup> the General Counsel of the National Labor Relations Board issued a complaint on December 11, 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 2-RC-21684.<sup>2</sup> (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 February 1, 1999, the General Counsel filed a Petition for Summary Judgment and Memorandum in Support. On February 10, 1999, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. 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 the Respondent denies that the Union requested it, and that it refused to bargain<sup>3</sup> and attacks the validity of the certification on the basis of the Board's disposition of the challenged ballot in the representation proceeding. Specifically the Respondent argues that the Board incorrectly counted the ballot of Ana Gonzalez.

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.<sup>4</sup> See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941). Accordingly, we deny the Respondent's request to dismiss the complaint and grant the Motion for Summary Judgment.<sup>5</sup>

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, an acute care health care institution with its office and place of business at One Gustave Levy Place, New York, New York, has been engaged in the business of providing health care services to the public.

Annually, the Respondent, in conducting its business operations, derives gross revenues in excess of \$250,000, and purchases and receives at its facility goods and services valued in excess of \$5000 directly from suppliers located outside the State of New York.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(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*

At all material times, the Union has been the designated exclusive bargaining representative of a unit of technical employees employed by the Respondent,<sup>6</sup> and the Respondent has recognized the Union as the exclusive bargaining representative of the employees in that unit.

Pursuant to a Stipulated Election Agreement, on May 23, 1996, an election was held among the following employees (the voting group):

Included: All full-time and regular part-time cardiac catheterization specialists, employed by the Employer at its facility.

<sup>1</sup> Although the Respondent's answer to the complaint denies having knowledge or information sufficient to form a belief as to whether the charge was filed on November 12, 1998, and served on the Respondent on November 17, 1998, a copy of the charge and affidavit of service are attached to the General Counsel's motion and the Respondent has not challenged the authenticity of those documents.

<sup>2</sup> 325 NLRB 1136 (1998), Member Hurtgen dissenting.

<sup>3</sup> Although the Respondent in its answer to the complaint also denies the complaint's allegations that the Union requested it to bargain on August 21, 1998, and that the Respondent, on August 24, 1998, refused to do so, the General Counsel has submitted with its motion copies of the correspondence between the parties evidencing these facts, and the Respondent has not disputed the authenticity of that correspondence. Indeed, the Respondent referenced this correspondence in its answer. Accordingly, we find that the Respondent's denials do not raise any issues warranting a hearing.

<sup>4</sup> Member Hurtgen, who dissented in the representation case, agrees that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding.

<sup>5</sup> Chairman Truesdale notes that he was not on the panel that considered the underlying representation case. However, he agrees with his colleagues that the Respondent has not raised any new matters warranting relitigation in the instant "technical" 8(a)(5) refusal-to-bargain proceeding, and that summary judgment is therefore appropriate.

<sup>6</sup> While the complaint does not allege the technical unit as the appropriate bargaining unit, it clearly referred to the certification which describes the voting group (cardiac catheterization specialists) as having indicated their "desire to be represented by the Petitioner in the existing unit of technical employees presently represented by the Petitioner." To the extent that Respondent's denial of the appropriateness of the unit is based on this inadvertent error, it does not raise a litigable issue. See, e.g., *Edward J. DeBartolo Corp.*, 315 NLRB 1170 (1994).

Excluded: All other employees, guards, professional employees, and supervisors as defined in the Act.

Pursuant to the Stipulated Election Agreement, the Respondent and the Union agreed that if a majority of the valid ballots were cast in favor of the Union, this would be deemed to indicate the voting group's desire to be included in the existing unit of technical employees already represented by the Union. A majority of the voting group voted in favor of representation by the Union at the May 23, 1996, election, and the Acting Regional Director so certified on August 7, 1998.

The employees in the recognized unit, including the voting group, constitute a unit appropriate for purposes of collective bargaining.

At all times since August 7, 1998, based on Section 9(a) of the Act, the Union has been, and continues to be, the exclusive collective-bargaining representative of the unit, including the voting group.

#### *B. Refusal to Bargain*

On or about August 21, 1998, by letter, the Union has requested the Respondent to bargain, and, since on or about August 24, 1998, by letter, 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 August 24, 1998, to recognize and 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.

#### ORDER

The National Labor Relations Board orders that the Respondent, The Mount Sinai Hospital, New York, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with 1199 National Health & Human Service Employees, SEIU, 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 following group of employees as part of the recognized appropriate unit of technical employees employed by Respondent concerning terms and conditions of employment, and if an understanding is reached, embody the understanding in a signed agreement:

Included: All-time and regular part-time cardiac catheterization specialists, employed by the Employer at its facility.

Excluded: All other employees, guards, professional employees, and supervisors as defined in the Act.

(b) Within 14 days after service by the Region, post at its facility in New York, New York, copies of the attached notice marked "Appendix."<sup>7</sup> Copies of the notice, on forms provided by the Regional Director for Region 2 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 24, 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 1199 National Health & Human Service Employees, SEIU, AFL-CIO, as the exclusive representative of the employees in the bargaining unit.

<sup>7</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."

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 the following group of employees employed as part of the recognized appropriate unit of technical employees:

Included: All full-time and regular part-time cardiac catheterization specialists, employed by us at our facility.

Excluded: All other employees, guards, professional employees, and supervisors as defined in the Act.

THE MOUNT SINAI HOSPITAL