

Schnurmacher Nursing Home and 1199 National Health and Human Service Employees Union, SEIU, AFL-CIO. Case 34-CA-8486

November 30, 1998

DECISION AND ORDER

BY MEMBERS FOX, LIEBMAN, AND BRAME

Pursuant to a charge filed on August 7, 1998,¹ the Acting General Counsel of the National Labor Relations Board issued a complaint on September 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 34-RC-1509. (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).)² The Respondent filed an answer, with affirmative defenses, admitting in part and denying in part the allegations in the complaint.

On October 21, 1998, the Acting General Counsel filed a Motion for Summary Judgment and Memorandum in Support. On October 23, 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. 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 it has refused to bargain,³ but attacks the validity of the certification on the basis of its objections to the Board's unit determinations in the representation proceeding.

¹ Although the Respondent's answer to the complaint denies that the charge was filed on August 7, 1998, and served on the Respondent on August 12, 1998, a copy of the charge and letter notifying the Respondent of the charge is attached to the Motion for Summary Judgment, and the Respondent has not challenged the authenticity of those documents in its response to the Notice to Show Cause.

² In its response to the Notice to Show Cause, the Respondent contends that the motion must be denied because the General Counsel failed to serve it with a copy of the documents in the representation case that the General Counsel transmitted to the Board. We find no merit in this contention. The documents in question were served on the Respondent in connection with the proceedings in Case 34-RC-1509. Further, the General Counsel compiled an index of these documents and attached it as an appendix to his Motion for Summary Judgment, which was served on the Respondent. (Although the index is erroneously styled as "Record of Proceedings in Case No. 34-RC-1431," it is clear from the General Counsel's motion and from the list of documents that the correct case number is Case 34-RC-1509. The Respondent has not alleged that it was prejudiced by the General Counsel's use of the index in lieu of service of the documents themselves.)

³ The Respondent's answer asserts that it lacks sufficient information to respond to the allegation that the Union requested bargaining and denies that it has refused to bargain. Neither assertion warrants a hearing because both the General Counsel and the Respondent submitted copies of the correspondence between the parties which evidences the request and refusal.

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.⁴

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). The Respondent's reliance on the adverse decisions of the Third, Fourth, Sixth, and Seventh Circuits in charge nurse cases fails to consider that the Board's position has been upheld by the Eighth, Ninth, and District of Columbia Circuits. *Lynwood Health Care Center v. NLRB*, 148 F.3d 1042 (8th Cir. 1998), enfg. 323 NLRB No. 200 (July 3, 1997) (not reported in Board volumes); *Grandview Health Care Center v. NLRB*, 129 F.3d 1269 (D.C. Cir. 1997), enfg. 322 NLRB No. 54 (Oct. 15, 1996) (not reported in Board volumes); and *Providence Alaska Medical Center v. NLRB*, 121 F.3d 548 (9th Cir. 1997), enfg. 321 NLRB No. 100 (July 10, 1996) (not reported in Board volumes). The decision of the Third Circuit in *Passavant Retirement & Health Center v. NLRB*, 149 F.3d 243 (3d Cir. 1998), denying enf. 323 NLRB 598 (1997), which is relied on by the Respondent, is factually distinguishable. The Third Circuit specifically held that it was not creating a per se rule as to the supervisory status of licensed practical nurses. The nurses there had disciplinary authority to send aides home for flagrant misconduct and had authority to resolve minor problems over matters covered by the aides' collective-bargaining agreement. In the instant case, the Acting Regional Director found that the charge nurses' purported disciplinary authority is reportorial only or involves, at most, low level counseling, and that there is no evidence of authority to suspend employees or adjust their grievances.

Accordingly, we grant the Motion for Summary Judgment.

On the entire record, the Board makes the following

⁴ In response to the Notice to Show Cause, the Respondent asserts that there are special circumstances which warrant another hearing on the status of 15 charge nurses who the Respondent contends are supervisors and therefore, should not have been permitted to vote. The Respondent further requests that this hearing "encompass all issues which pertain to the appropriateness of the unit certifications issued by the Board." The Board previously denied the Respondent's request for review of the Regional Director's decision finding the charge nurses to be employees and thereafter denied the Respondent's request for reconsideration and reopening of the record. The Respondent acknowledges that it is requesting "the Board to examine new evidence postdating the representation hearing." Such evidence is neither newly discovered nor does it amount to a special circumstance warranting a reopening of the record. *Indeck Energy Services*, 318 NLRB 321 fn. 5 (1995).

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a New York corporation with an office and place of business in White Plains, New York, has been engaged in the operation of a skilled nursing facility providing health care services to the general public.

During the 12-month period ending July 31, 1998, the Respondent, in conducting its operations, derived gross revenues in excess of \$100,000 and purchased and received at its facility goods valued in excess of \$50,000 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(2), (6), and (7) of the Act, and a health care institution within the meaning of Section 2(14) 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 elections held January 8, 1998, the Union was certified on June 23, 1998, as the exclusive collective-bargaining representative of the employees in the following appropriate units:

Unit A:

All full-time and regular part-time professional employees, including registered nurses, charge nurses (RN), social workers, occupational therapists, occupational therapist assistants, physical therapists, physical therapist assistants, speech therapists, geriatric nurse practitioner, rehabilitation therapists, recreation therapists, and recreational assistants; but excluding licensed practical nurses, charge nurses (LPN), medical records coordinators, clinic coordinators, information systems clerks, the administrative assistant to the social services department, the administrative assistant to the administrator, the administrative assistant to the director of nursing, receptionists, unit clerks, the nursing staffing coordinator, the materials management coordinator, certified nurses assistants, orderlies, dietary employees, housekeeping employees, maintenance mechanic, painter/handyman, the payroll clerk, administrator, assistant administrator, controller, director of nursing, associate director of nursing, nurse managers, physician assistants, director of building services, assistant director of building services, maintenance department head, medical director, associate medical director, human resources manager, director of social services, director of food service, director of recreation, director of rehabilitation services, director of volunteer services, the controller, and guards, and other supervisors as defined in the Act.

Unit B:

All full-time and regular part-time licensed practical nurses, charge nurses (LPN), medical records coordinators, clinic coordinators, information systems clerks, the administrative assistant to the social services department, receptionists, unit clerks, the nursing staffing coordinator, the materials management coordinator, the maintenance mechanic, and the painter/handyman; but excluding registered nurses, charge nurses (RN), social workers, occupational therapists, occupational therapist assistants, physical therapists, physical therapist assistants, speech therapists, geriatric nurse practitioner, rehabilitation therapists, recreation therapists, recreation assistants, the administrative assistant to the administrator, the administrative assistant to the director of nursing, certified nurses assistants, orderlies, dietary employees, housekeeping employees, payroll clerk, administrator, assistant administrator, controller, director of nursing, associate director of nursing, nurse managers, physician assistants, director of building services, assistant director of building services, maintenance department head, medical director, associate medical director, human resources manager, director of social services, director of food service, director of recreation, director of rehabilitation services, director of volunteer services, the controller, and guards, other professional employees and other 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*

By letter dated June 30, 1998, the Union requested the Respondent to bargain, and, since about July 27, 1998, the Respondent has, by letter, failed and refused. We find that this failure and refusal constitutes an unlawful refusal to bargain in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By failing and refusing since on and after July 27, 1998, to bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate units, 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 cer-

tification 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, Schnurmacher Nursing Home, White Plains, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with 1199 National Health and Human Service Employees Union SEIU, AFL-CIO, as the exclusive bargaining representative of the employees in the bargaining units.

(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 units on terms and conditions of employment, and if an understanding is reached, embody the understanding in a signed agreement:

Unit A:

All full-time and regular part-time professional employees, including registered nurses, charge nurses (RN), social workers, occupational therapists, occupational therapist assistants, physical therapists, physical therapist assistants, speech therapists, geriatric nurse practitioner, rehabilitation therapists, recreation therapists, and recreational assistants; but excluding licensed practical nurses, charge nurses (LPN), medical records coordinators, clinic coordinators, information systems clerks, the administrative assistant to the social services department, the administrative assistant to the administrator, the administrative assistant to the director of nursing, receptionists, unit clerks, the nursing staffing coordinator, the materials management coordinator, certified nurses assistants, orderlies, dietary employees, housekeeping employees, maintenance mechanic, painter/handyman, the payroll clerk, administrator, assistant administrator, controller, director of nursing, associate director of nursing, nurse managers, physician assistants, director of building services, assistant director of building services, maintenance department head, medical director, associate medical director, human resources manager, director of social services, director of food service, director of recreation, director of rehabilitation services, director of volunteer services, the con-

troller, and guards, and other supervisors as defined in the Act.

Unit B:

All full-time and regular part-time licensed practical nurses, charge nurses (LPN), medical records coordinators, clinic coordinators, information systems clerks, the administrative assistant to the social services department, receptionists, unit clerks, the nursing staffing coordinator, the materials management coordinator, the maintenance mechanic, and the painter/handyman; but excluding registered nurses, charge nurses (RN), social workers, occupational therapists, occupational therapist assistants, physical therapists, physical therapist assistants, speech therapists, geriatric nurse practitioner, rehabilitation therapists, recreation therapists, recreation assistants, the administrative assistant to the administrator, the administrative assistant to the director of nursing, certified nurses assistants, orderlies, dietary employees, housekeeping employees, payroll clerk, administrator, assistant administrator, controller, director of nursing, associate director of nursing, nurse managers, physician assistants, director of building services, assistant director of building services, maintenance department head, medical director, associate medical director, human resources manager, director of social services, director of food service, director of recreation, director of rehabilitation services, director of volunteer services, the controller, and guards, other professional employees and other supervisors as defined in the Act.

(b) Within 14 days after service by the Region, post at its facility in White Plains, New York, copies of the attached notice marked "Appendix."⁵ Copies of the notice, on forms provided by the Regional Director for Region 34 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 July 27, 1998.

⁵ 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."

(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.

MEMBER BRAME, dissenting.

I dissented from the denial of the Employer's request for review of the Regional Director's Decision and Direction of Election in which he found that the charge nurses were not supervisors and from the denial of the Employer's request for reconsideration of that denial. For the reasons set out in my dissent in *Troy Hills Nursing Home*, 326 NLRB No. 159 (Sept. 30, 1998), I dissent here. The issues presented, are significant and warrant careful consideration by the Board. Accordingly, and in light of the close scrutiny given by the courts of appeal to the Board's decisions in this area, simply granting summary judgment is not an adequate substitute for the Board's full and careful examination of the record through a grant of review in the underlying representation proceeding.

Accordingly, I dissent from the granting of the General Counsel's Motion for Summary Judgment in this certification-testing proceeding and the findings that the Employer violated Section 8(a)(5) and (1) of the Act.

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 and Human Services Employees Union, SEIU, AFL-CIO, as the exclusive representative of the employees in the bargaining units.

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 following bargaining units:

Unit A:

All full-time and regular part-time professional employees, including registered nurses, charge nurses (RN), social workers, occupational therapists, occupational therapist assistants, physical therapists, physical therapist assistants, speech therapists, geriatric nurse

practitioner, rehabilitation therapists, recreation therapists, and recreational assistants; but excluding licensed practical nurses, charge nurses (LPN), medical records coordinators, clinic coordinators, information systems clerks, the administrative assistant to the social services department, the administrative assistant to the administrator, the administrative assistant to the director of nursing, receptionists, unit clerks, the nursing staffing coordinator, the materials management coordinator, certified nurses assistants, orderlies, dietary employees, housekeeping employees, maintenance mechanic, painter/handyman, the payroll clerk, administrator, assistant administrator, controller, director of nursing, associate director of nursing, nurse managers, physician assistants, director of building services, assistant director of building services, maintenance department head, medical director, associate medical director, human resources manager, director of social services, director of food service, director of recreation, director of rehabilitation services, director of volunteer services, the controller, and guards, other professional employees and other supervisors as defined in the Act.

Unit B:

All full-time and regular part-time licensed practical nurses, charge nurses (LPN), medical records coordinators, clinic coordinators, information systems clerks, the administrative assistant to the social services department, receptionists, unit clerks, the nursing staffing coordinator, the materials management coordinator, the maintenance mechanic, and the painter/handyman; but excluding registered nurses, charge nurses (RN), social workers, occupational therapists, occupational therapist assistants, physical therapists, physical therapist assistants, speech therapists, geriatric nurse practitioner, rehabilitation therapists, recreation therapists, recreation assistants, the administrative assistant to the administrator, the administrative assistant to the director of nursing, certified nurses assistants, orderlies, dietary employees, housekeeping employees, payroll clerk, administrator, assistant administrator, controller, director of nursing, associate director of nursing, nurse managers, physician assistants, director of building services, assistant director of building services, maintenance department head, medical director, associate medical director, human resources manager, director of social services, director of food service, director of recreation, director of rehabilitation services, director of volunteer services, the controller, and guards, other professional employees and other supervisors as defined in the Act.

SCHNURMACHER NURSING HOME