

JPH Management, Inc. d/b/a Mid-Wilshire Health Care Center and Health Care Workers Union, Service Employees International Union, Local 399, AFL-CIO. Case 31-CA-24055

August 15, 2000

DECISION AND ORDER GRANTING IN PART AND DENYING IN PART MOTION FOR SUMMARY JUDGMENT AND REMANDING

BY MEMBERS FOX, LIEBMAN, AND BRAME

On a charge filed by the Union on August 16, 1999,¹ and an amended charge filed by the Union on October 26, the General Counsel of the National Labor Relations Board issued a complaint on October 28 against JPH Management, Inc. d/b/a Mid-Wilshire Health Care Center, the Respondent, alleging that it has violated Section 8(a)(5) and (1) of the National Labor Relations Act. The Respondent is acting pro se in this proceeding. Although copies of the charge, amended charge, and complaint were properly served on the Respondent, it failed to file an answer to the complaint within the 14-day time period set forth in Section 102.20 of the Board's Rules and Regulations. On December 13 the Respondent submitted to the Region a letter purporting to answer the allegations of the complaint. On January 24, 2000, the General Counsel filed a Motion for Summary Judgment with the Board. On January 28, 2000, 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 February 14, 2000, the Respondent filed with the Board a response to the Notice to Show Cause.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

Sections 102.20 and 102.21 of the Board's Rules and Regulations provide that the allegations in the complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint, unless good cause is shown. In addition, the complaint affirmatively states that unless an answer is filed within 14 days of service, all the allegations in the complaint will be considered admitted. The undisputed allegations in the Motion for Summary Judgment disclose (1) that the Region, by letter dated December 9, notified the Respondent that unless an answer to the complaint were received by December 17, a Motion for Summary Judgment would be filed; and (2) that the Respondent, by Tad Yokoyama, administrator, sent a letter to the Region, dated December 13, stating, in relevant part: "I totally disagree with the Compl[a]int filed against us" and "[a]ny other responses to the Complaint [have] been fully accounted for in correspondence [to the Region] dated September 7, 1999." In his Motion for Summary Judgment, the Gen-

eral Counsel stated, inter alia, "[a]lthough the Respondent replied to the December 9, 1999 [letter from the Region], with a letter dated December 13, 1999, the Respondent, to date, has failed to file any Answer to the Complaint as required by the Rules."

In its response to the Notice to Show Cause the Respondent states, in relevant part:

My primary reason [as to why the General Counsel's Motion for Summary Judgment should not be granted] is that there was some serious miscommunication 2-3 weeks prior to [the] filing of the motion by the General Counsel. The General Counsel left at least a couple of messages for me to return her call but, unfortunately, I never received those messages. If the General Counsel had a chance to communicate whatever she was going to, I feel, we would have had a[n] outcome where our responses would have been more adequately responded to.

We find that the alleged "miscommunication" to which the Respondent refers does not constitute sufficient cause for failure to file a complete, timely answer to the complaint. As stated above, the Respondent's deadline for filing an answer to the complaint was December 17. The General Counsel filed his Motion for Summary Judgment on January 19, 2000. Therefore, "[m]iscommunication" occurring "2-3 weeks prior to the filing of the motion" could only refer back to December 29, 1999, 10 days after the Respondent's deadline for filing an answer to the complaint.

We now examine the Respondent's December 13 letter to the Region purporting to answer the allegations of the complaint. Paragraphs 10(a), (b), and (c) of the complaint set forth the operative facts of the alleged unfair labor practices and allege that the Respondent violated Section 8(a)(5) and (1) of the Act by (a) failing and refusing to sign a collective-bargaining agreement that reflected the terms of an agreement reached between the Respondent and the Union on June 22, 1999; (b) bypassing the Union and dealing directly with employees in the unit about their wages and terms and conditions of employment; and (c) unilaterally rescinding wage increases granted to unit employees pursuant to the June 22, 1999 collective-bargaining agreement, without giving the Union advance notice or an opportunity to bargain about this matter. The Respondent's December 13 letter to the Region states in pertinent part:

As a representative of Mid-Wilshire Health Care Facility, I totally disagree with the Compl[a]int filed against us. Since May, 1999 the management team of Mr. Gary Jarvis and I [have bargained] collectively in good faith as [the] representative of the owners of JPH Management, Inc.

After the completion of [the] new contract on or about June 24, 1999, and after that period, I submitted the contract to . . . the owner for her approval

¹ All dates refer to 1999 unless otherwise indicated.

and signature. Even though [the owner] did not agree on two areas of the contract, we never refused to bargain collectively. In fact, we have tried continuously to contact the Union through a third party . . . but they have not responded. The Union's position is that the new contract has been finalized and there is no "re-negotiation" for [a] collective bargaining agreement.

Any other responses to the Complaint [have] been fully accounted for in correspondence to [the Board Agent], dated September 7, 1999.

The Respondent's September 7 letter to the Region, incorporated by reference into its December 13 letter to the Region, was the Respondent's statement of position submitted to the Region in response to the August 16 unfair labor practice charge. The September 7 letter states in pertinent part:

The tentative agreement, by its own definition, not fully worked out or developed, which was a product of the June 22, 1999 meetings was to be voted on by the members and also voted on or approved by the owner of the company. This was made clear from the onset and has been precedent from the last bargaining agreement that the owner had the final approval, not the management team who attended the meeting. During a telephone conversation with [Union negotiator] Mr. David Estrada on June 29, 1999, it was made clear that the product of the June 22 meeting would need final approval by the owner of the company. The membership could vote for their approval and if there were changes, they could be rectified before presenting to the owner. The employer has not unilaterally altered the terms and conditions of the agreement due to the fact there is no approved agreement by both parties. In fact, Mr. Estrada in a private telephone conversation was asked what are the key deal points to get a consensus, [and] he verbalized three (3), and these were brought back to the owner. At the June 22 meeting Mr. Estrada reneged on the private agreement, and presented an altered proposal. Obviously, this would need to be approved by the Owner, which she did not do. . . .

The employer has not interfered with, restrained, or coerced with any employee. In fact, management clarified the misunderstanding of the proposal to the events of the negotiations and perhaps some misrepresentation of the facts. It is clear that portions of the proposal are inconsistent with the format of the previous agreement and some sections do not make sense. These areas were explained to the membership, stewards were present, and they agreed it did not make sense and they could understand why the owner was not in agreement.

The Board typically has shown some leniency toward a pro se litigant's efforts to comply with our procedural rules. See, e.g., *Sam Mikva Management*, 329 NLRB 387 (1999); *A.P.S. Production*, 326 NLRB 1296 (1998). Under this approach, it is sufficient for a pro se respondent to respond effectively in the negative to the complaint allegations containing the operative facts of the alleged unfair labor practices. *Carpentry Contractors*, 314 NLRB 824, 825 (1994).

Here, the Respondent's September 7 letter is merely its precomplaint statement of position in response to the August 16 initial unfair labor practice charge. As such, and standing alone, it would not constitute a sufficient answer to the subsequent October 28 complaint. *Central States Xpress*, 324 NLRB 442, 443-444 (1997). But the Board carefully and strictly scrutinizes postcharge, pre-complaint statements of position submitted by pro se respondents in lieu of the formal answers to complaints required by Section 102.20 of the Board's Rules and Regulations. *Id.* *Central States Xpress* presented circumstances very similar to those presented here, and the Board found a postcharge, precomplaint statement of position acceptable in lieu of an answer to the complaint. Specifically, (1) the respondent in *Central States Xpress* was acting pro se; (2) it resubmitted its postcharge statement of position with its subsequent informal answer to the complaint and expressly intended its postcharge statement of position to serve as an answer to the subsequent complaint; and (3) the postcharge statement of position constituted a sufficiently clear denial of the allegations of the complaint containing the operative facts of the alleged unfair labor practices. *Id.*

We find that *Central States Xpress* is controlling here. Thus, the Respondent is acting pro se, and it expressly incorporated by reference its September 7 postcharge, precomplaint statement of position in its subsequent December 13 informal answer to the complaint. Further, as discussed below, its September 7 postcharge statement of position, together with its December 13 informal answer to the complaint, constitutes a sufficiently clear denial of the allegations in complaint paragraphs 10(a) (refusal to execute contract) and (c) (unilaterally rescinding wage increases) to warrant denial of the General Counsel's Motion for Summary Judgment on those paragraphs.

More specifically, in its December 13 letter, excerpted above, the Respondent asserted that the alleged collective-bargaining agreement of June 22 was subject to the approval and signature of the Respondent's owner, and that although the owner did not agree with two "areas" of the contract, the Respondent "never refused to bargain collectively." Additionally, in the Respondent's September 7 letter, incorporated by reference into its December 13 letter, the Respondent asserted that the June 22 agreement was tentative, subject to the approval of the Respondent's owner, and that "[t]his was made clear from the onset and has been precedent from the last bar-

gaining agreement that the owner had the final approval, not the management team who attended the meeting.” Consequently, the Respondent also asserted in its September 7 letter that it “has not unilaterally altered the terms and conditions of the agreement due to the fact there is no approved agreement by both parties. . . . At the June 22 meeting Mr. Estrada reneged on the private agreement, and presented an altered proposal. Obviously, this would need to be approved by the owner, which she did not do.”

These sufficiently detailed responses constitute an effective denial of the allegations in paragraphs 10(a) and (c) of the complaint. Significantly, with respect to complaint paragraph 10(a), the Respondent has supplied an answer for why it did not sign the allegedly agreed-upon collective-bargaining agreement, and with respect to paragraph 10(c), the Respondent stated that it “has not unilaterally altered the terms and conditions of the agreement.” The Respondent’s effective denials of the substance of these complaint allegations raise substantial and material issue of fact warranting a hearing before an administrative law judge. Therefore, we deny the General Counsel’s Motion for Summary Judgment as to complaint paragraphs 10(a) and (c).

However, in its correspondence of December 13 and September 7, the Respondent has not effectively denied complaint paragraphs 1–9, 10(b), and 11–14. Accordingly, in the absence of good cause² being shown for the failure to file a sufficient answer as to complaint paragraphs 1–9, 10(b), and 11–14, we grant the General Counsel’s Motion for Summary Judgment with respect to those paragraphs.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, JPH Management, Inc., a California corporation, has owned and operated its subsidiary, Mid-Wilshire Health Care Center, a nursing home for the elderly located in Los Angeles, California. Annually, in the course and conduct of operating Mid-Wilshire Health Care Center, the Respondent purchases and receives goods valued in excess of \$40,000 from other enterprises located in California, each of which other enterprises has received such goods in substantially the same form directly from points located outside the State of California. Annually, in the course and conduct of operating Mid-Wilshire Health Care Center, the Respondent derives gross revenues in excess of \$100,000. 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, Health Care Workers Union, Service Employees Interna-

tional Union, Local 399, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

At all material times, the following individuals held the following positions and have been agents of the Respondent within the meaning of Section 2(13) of the Act and supervisors of the Respondent within the meaning of Section 2(11) of the Act: Jeoung Lee, president; II Hie Lee, vice president; Gary L. Jarvis, consultant and negotiator; and Tad Yokoyama, administrator and negotiator.

The following employees of the Respondent constitute a unit (the unit) appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

Included: All full-time and regular part-time dietary employees, housekeeping employees, nursing employees, clerical employees, laundry employees, maintenance employees and activity assistants employed by the Respondent at its facility located at 676 South Bonnie Brea Street, Los Angeles, California.

Excluded: Bookkeeper, professional employees, guards, and supervisors, including supervisory LVNs, as defined in the Act.

Since at least 1996, and at all material times, the Union has been the designated exclusive collective-bargaining representative of the unit, and since at least 1996 the Union has been recognized as the representative by the Respondent. This recognition has been embodied in successive collective-bargaining agreements, the most recent of which was effective by its terms from July 1, 1996, through June 30, 1999. This collective-bargaining agreement covered rates of pay, wages, hours of employment, and other terms and conditions of employment of the Respondent’s employees employed in the unit. Commencing on or before May 1999, and continuously thereafter, the Union has requested, and is requesting, the Respondent to bargain collectively with respect to rates of pay, wages, hours of employment and other terms and conditions of employment as the exclusive collective-bargaining representative of all employees in the unit.

Commencing on or about June 24, 1999, and continuously thereafter, the Respondent has failed and refused to bargain collectively with the Union as the exclusive collective-bargaining representative of the unit by, on or about August 9, 1999, bypassing the Union and dealing directly with employees about their wages and terms and conditions of employment, which constitute mandatory subjects of bargaining.

CONCLUSION OF LAW

By bypassing the Union and dealing directly with employees in the unit about their wages and terms and conditions of employment on or about August 9, 1999, the Respondent has failed and refused to bargain collectively with the exclusive collective-bargaining representative of its employees, and has thereby engaged in unfair labor

² See discussion, *supra*.

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 engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent has violated Section 8(a)(5) and (1) of the Act by, on or about August 9, 1999, bypassing the Union and dealing directly with employees in the Unit about their wages and terms and conditions of employment, we shall order it to cease and desist from dealing directly with employees in the Unit about their wages and terms and conditions of employment.

ORDER

The National Labor Relations Board orders that the Respondent, JPH Management, Inc. d/b/a Mid-Wilshire Health Care Center, Los Angeles, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain collectively with SEIU, Local 399, by bypassing the Union and dealing directly with employees in the following appropriate unit:

Included: All full-time and regular part-time dietary employees, housekeeping employees, nursing employees, clerical employees, laundry employees, maintenance employees and activity assistants employed by the Respondent at its facility at 676 South Bonnie Brea Street, Los Angeles, California.

Excluded: bookkeeper, professional employees, guards, and supervisors, including supervisory LVNs, as defined in the Act.

(b) Interfering with, restraining, and coercing its 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) Within 14 days after service by the Region, post at its facility in Los Angeles, California, copies of the attached notice marked "Appendix."³ Copies of the notice, on forms provided by the Regional Director for Region 31, 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

³ 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."

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 9, 1999.

(b) 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.

IT IS FURTHER ORDERED that the General Counsel's Motion for Summary Judgment is denied with respect to the allegations set forth in complaint paragraphs 10(a) and (c), and that this proceeding is remanded to the Regional Director for Region 31 for the purpose of arranging a hearing before an administrative law judge limited to the allegations set forth in complaint paragraphs 10(a) and (c). The administrative law judge shall prepare and serve on the parties a decision containing findings of fact, conclusions of law, and recommendations based on all of the record evidence. Following service of the administrative law judge's decision on the parties, the provisions of Section 102.46 of the Board's Rules shall be applicable.

MEMBER BRAME, concurring in part and dissenting in part.

I would deny the General Counsel's Motion for Summary Judgment in toto. Here, in response to the Region's request for an answer to the complaint, the Respondent's administrator, Yokoyama, timely submitted a letter on December 13, 1999, to the Region stating that "I totally disagree with the Compl[a]int against us." Contrary to the majority, I find that this letter is a sufficient denial of all of the complaint allegations to put them at issue and require the General Counsel to prove them at a hearing, not just the allegations concerning complaint paragraphs 10(a) and (c). Accordingly, consistent with my dissenting position in *Kloepfers Floor Covering, Inc.*, 330 NLRB 811, 813-814 (2000),¹ I would not preclude this pro se Respondent from an opportunity to defend against all of the complaint allegations at a hearing.

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.

¹ See also *Eckert Fire Protection Co.*, 329 NLRB 920 (1999) (Members Hurtgen and Brame dissenting).

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT fail and refuse to bargain collectively with Health Care Workers Union, Service Employees International Union, Local 399, AFL-CIO by bypassing the Union and dealing directly with our employees in the following appropriate unit:

Included: All full-time and regular part-time dietary employees, housekeeping employees, nursing employees, clerical employees, laundry employees, maintenance employees and activity assistants employed by us at our facility located at 676 South Bonnie Brea Street, Los Angeles, California.

Excluded: Bookkeeper, professional employees, guards, and supervisors, including supervisory LVNs, as defined in the Act.

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.

JPH MANAGEMENT, INC. D/B/A MID-WILSHIRE HEALTH
CARE CENTER