

McLaren Health Care Corporation and Michigan Council 25, American Federation of State, County and Municipal Employees, AFL-CIO and Carol Merritt. Cases 7-CA-42127 and 7-CB-12104(1)

February 6, 2001

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS
HURTGEN AND WALSH

Pursuant to charges and amended charges filed on June 11 and July 19, 1999, the General Counsel of the National Labor Relations Board issued an order consolidating cases, consolidated complaint, and notice of hearing on July 21, 1999. The Respondents filed answers in which they admitted all material factual allegations in the complaint.

On September 14, 1999, the General Counsel filed a Motion to Transfer Case to and Continue Proceedings Before the Board and a Motion for Summary Judgment on the Pleadings and brief in support, with attachments. On September 22, 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 Respondents filed responses and supporting briefs.

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

Ruling on Motion for Summary Judgment

As noted above, the Respondents, in their answers, have admitted all material factual allegations in the complaint. Neither Respondent has asserted, in its response to the Motion for Summary Judgment, that there are any disputed material issues of fact. Accordingly, we find that all material factual allegations of the complaint are true. We therefore grant the General Counsel's Motion for Summary Judgment.¹

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

Respondent McLaren Health Care Corporation (McLaren), operates an acute care hospital located in Flint, Michigan. During the 12-month period ending May 31, 1999, McLaren derived gross revenues in excess of \$500,000 in conducting the operations described above and purchased products, goods, and materials valued in excess of \$50,000 and caused such goods to be shipped directly from points located outside the State of Michigan to its Flint, Michigan facility. McLaren has admitted, and we find, that it is an employer engaged in commerce

within the meaning of Section 2(2), (6), and (7) of the Act.

Respondent Michigan Council 25, American Federation of State, County, and Municipal Employees, AFL-CIO (Union) is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Facts

On about April 9, 1999,² McLaren granted recognition to and began bargaining with the Union as the exclusive collective-bargaining representative of the following unit of employees:

All full-time and regular part-time technical employees, including anesthesia technicians, cardiologic technologists, cardiovascular technologists, certified occupational therapy assistants, clinical dialysis technicians, clinical nurse associates, CT technologists, diagnostic medical sonographers, emergency room technicians, histology technicians, medical laboratory technicians, operating room technicians, licensed practical nurses, physical therapy assistants, radiologic technologists, radiation therapy technologists, special procedures technologists, therapists technicians, and nuclear medicine technologists employed by McLaren at its Flint, Michigan hospital; but excluding all physicians, registered nurses, skilled maintenance employees, office clerical employees, all other non-professional employees represented by the Union, and guards and supervisors as defined in the Act.

On about April 9, the Union accepted recognition from and began bargaining with McLaren as the exclusive collective-bargaining representative of the unit described above.

The Respondents engaged in the conduct described above even though a valid petition was filed in Case 7-RC-21532 on or about March 24, by the International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America (UAW), AFL-CIO, seeking an election in the unit described above.³ On April 23, the Regional Director for Region 7 issued a direction of election for the unit described above, on the basis of the UAW's petition. The Regional Director rejected McLaren's argument that its April 9 recognition of the Union constituted an effective recognition bar with respect to the UAW's petition.

² All dates hereafter are in 1999.

³ We take administrative notice of the proceedings in Case 7-RC-21532, including the Regional Director's determination that the UAW is a labor organization.

¹ *Black Bear Mining, Inc.*, 325 NLRB 960 (1998).

The exhibits attached to the General Counsel's motion disclose that, on April 9, Federal Mediation and Conciliation Service Commissioner Donald F. Power compared signed authorization cards submitted by the Union with a roster of employees submitted by McLaren, and on April 12, Power certified that the Union possessed majority status in the technical unit at McLaren's Flint, Michigan facility. The exhibits further disclose that, pursuant to article XXI of the AFL-CIO constitution, proceedings were instituted by the Union which resulted in a decision by Impartial Umpire Kenneth Young awarding the Union the exclusive right to organize McLaren's Flint technical employees for a period of 1 year.⁴ On May 17, as a consequence of the article XXI ruling in the Union's favor, the UAW withdrew its election petition. On May 18, the Regional Director approved the withdrawal.

B. Positions of the Parties

The General Counsel asserts that McLaren violated Section 8(a)(2) and (1) of the Act, and the Union violated Section 8(b)(1)(A), by granting, and accepting recognition, respectively, in the face of the pending, valid rival petition filed by the UAW. In support of this contention, the General Counsel cites *Bruckner Nursing Home*,⁵ which prohibits employer recognition of a union commanding otherwise-valid majority support where a valid petition has been filed with the Board by a rival union. According to the General Counsel, it is immaterial that, prior to the date on which the UAW petition was filed, the parties allegedly entered into a "pre-recognition agreement," under which McLaren agreed to recognize the Union based on a card check, because the Union's majority status was not established until after the UAW petition was filed. The General Counsel additionally asserts that the UAW's decision to withdraw its petition on May 17 does not constitute a defense under *Bruckner*, citing *NLRB v. Katz's Delicatessen*,⁶ where the court and the Board rejected a similar contention.

McLaren asserts that it lawfully recognized the Union based on the "pre-recognition agreement" described above, and characterizes the actual verification of the union's majority status, on April 9, as a "ministerial" act. McLaren also asserts that the voluntary withdrawal on May 17 of the UAW's petition cured any defect in the voluntary recognition which had been previously extended, and notes that the Regional Director approved the voluntary withdrawal.

The Union similarly asserts that it was voluntarily recognized by McLaren prior to the filing of the UAW's

petition, by virtue of the agreement discussed above, which it terms a "voluntary recognition agreement," and that *Bruckner* is therefore inapplicable. In addition, the Union asserts that the Board should, in any event, defer to the article XXI ruling in its favor, pursuant to which the UAW subsequently withdrew its petition.

C. Discussion

It is well-settled that "secret elections are generally the most satisfactory—indeed the preferred—method of ascertaining whether a union has majority support."⁷ Nevertheless, a Board-conducted election is not the only route by which a union may acquire the status of a bargaining representative; an employer may lawfully recognize a union based upon a showing of majority status by other means—including authorization cards.⁸ However, an employer who recognizes and bargains with a minority union, as the exclusive bargaining representative of a unit of its employees pursuant to Section 9(a), violates Section 8(a)(2) and (1), and the employer's knowledge or ignorance of the union's minority status is irrelevant to the question whether the recognition constitutes an unfair labor practice.⁹ Likewise, a union which accepts recognition as the exclusive bargaining representative of a unit of employees pursuant to Section 9(a), and bargains on behalf of those employees, without majority status, violates Section 8(b)(1)(A).¹⁰

In effectuating these fundamental policies of the Act, the Board held in *Bruckner* that an employer, faced with organizing campaigns by two or more rival unions, may lawfully recognize

a labor organization which represents an uncoerced, unassisted majority, before a valid petition for an election has been filed with the Board. [footnote omitted] However, once notified of a valid petition, an employer must refrain from recognizing any of the rival unions.¹¹

As the Board explained in *Bruckner*, once a rival union has filed a valid petition, i.e. one supported by at least a 30 percent showing of interest, there is a substantial question concerning representation which must be resolved by a Board-conducted election. The representation issue may not lawfully be forestalled by an employer's

⁷ *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 602 (1969).

⁸ *Id.* see also *Linden Lumber v. NLRB*, 419 U.S. 301 (1974) (in the absence of employer unfair labor practices which impair the election process, an employer may lawfully insist on a Board-conducted election before extending recognition).

⁹ *Ladies' Garment Workers (Bernhard-Altman Texas Corp.) v. NLRB*, 366 U.S. 731, 737-739 (1961).

¹⁰ *Id.*; see also *Haddon House Food Products*, 269 NLRB 338 (1984), *enfd.* 764 F.2d 182 (3rd Cir. 1985), *cert. denied* 475 U.S. 1011 (1986).

¹¹ *Bruckner*, *supra*, 262 NLRB at 957.

⁴ A letter setting forth the basis of that decision was issued on June 23.

⁵ 262 NLRB 955 (1982).

⁶ 80 F.3d 755, 768 (2nd Cir. 1996).

voluntary recognition of one of the rival unions, under these circumstances, even if that union has presented evidence of majority status.¹²

Applying these principles to the facts of this case, it is evident that the Respondents' admitted actions in extending, and accepting, recognition were unlawful under *Bruckner*. Thus, the Respondents admit that McLaren granted recognition to the Union, the Union accepted recognition, and the parties began bargaining, on or about April 9. The Respondents further admit that, at the time they engaged in the conduct described above, there was a valid petition on file and pending which sought an election in the same unit in which recognition was granted, and accepted. For the reasons set forth in *Bruckner*, the granting and acceptance of recognition under these circumstances violated Section 8(a)(1) and (2) and 8(b)(1)(A).¹³

The Respondents claim that *Bruckner* is inapplicable because they entered into the alleged "pre-recognition agreement" prior to the date the UAW's petition was filed.¹⁴ We reject this claim. While the parties may have agreed, prior to the UAW's March 24 petition, that McLaren would recognize the Union, at some future date, upon a showing of majority status based on authorization cards, a card check agreement of this character is not equivalent to recognition itself.¹⁵ To the contrary, "voluntary recognition has been found to have occurred when an employer agrees to recognize a union through a card check or some other procedure and subsequently confirms the union's majority status through that procedure."¹⁶ The Board and the courts have refused to find that a binding recognition agreement exists unless both of these requirements are satisfied.¹⁷ Accordingly, we

reject the Respondents' characterization of McLaren's verification of the Union's majority status as a "ministerial act," and we also reject their contention that the alleged recognition or card check agreement nullified their obligation to refrain from entering into a collective-bargaining relationship while the UAW's petition was on file.

We also reject the Respondents' assertion that their unlawful conduct was retroactively made lawful when the UAW withdrew its petition following the issuance of an article XXI ruling in the Union's favor. When notified that an article XXI proceeding has been instituted, it is the Board's policy to suspend processing of the representation case in question for a period not to exceed 40 days or until the article XXI proceeding is concluded, whichever comes sooner. In the event that a union wishes to withdraw an election petition on the basis of the outcome of an article XXI proceeding, the Board will, of course, process the request to withdraw according to its established procedures. However, it is well-settled that the Board's authority and jurisdiction over questions of representation is exclusive; accordingly, the Board will not defer to a private dispute resolution mechanism, including proceedings under the AFL-CIO constitution, in deciding representation cases.¹⁸

The Respondents' related contention that the UAW's post-recognition withdrawal of its petition somehow undid the coercive impact of the Respondents' unlawful conduct is equally without merit. Where, as here, an employer has unlawfully recognized a union as majority representative of its employees, "the union so favored is given 'a marked advantage over any other in securing the adherence of employees.'"¹⁹ Because the continued rec-

¹² Id. The Board's *Bruckner* rule has been consistently approved by reviewing courts. See *NLRB v. Katz's Delicatessen*, 80 F.3d 755, 768 (2nd Cir. 1996); *Human Development Assn. v. NLRB*, 937 F.2d 657, 666-669 (D.C. Cir. 1991), cert. denied 503 U.S. 950 (1992); *Haddon House Food Products v. NLRB*, supra, 764 F.2d at 186-187.

¹³ See also *Haddon House Food Products*, supra.

¹⁴ We note that any claim by the Respondents that recognition took place prior to March 24, would be inconsistent with their admissions, in their answers to the complaint, that recognition occurred on about April 9.

¹⁵ For the purpose of this decision only, we assume, arguing, that the Respondents' assertions concerning the existence and substance of this agreement are accurate.

¹⁶ *Georgetown Hotel v. NLRB*, 835 F.2d 1467, 1470-1471 (D.C. Cir. 1987) (emphasis added), denying enf. to 281 NLRB 357 (1986). In denying enforcement of the Board's decision in this case, the court agreed with the Board concerning the appropriate legal standard to apply and disagreed only with the factual findings made by the Board in support of its conclusion that the employer in that case had recognized the union based on a card check.

¹⁷ Id. (no unlawful withdrawal from recognition agreement where evidence failed to show that employer ever counted cards submitted as proof of majority status); see also *United Buckingham Freight Lines*, 168 NLRB 684 (1967) (same). Cf. *NLRB v. Creative Food Design*, 852 F.2d

1295, 1298 (D.C. Cir. 1988) (holding that employer was bound by recognition agreement where it agreed to a card check "and further acknowledged that the cards represented a majority. At that moment, the bargain was sealed and the company committed.") (emphasis added).

In *NLRB v. Lyon & Ryan Ford*, 647 F.2d 745, 751 (7th Cir. 1981), cert. denied 454 U.S. 894 (1981), cited by the Union, the court stated that

[t]he essence of voluntary recognition is the "commitment of the employer to bargain upon some showing of majority (status). Once that commitment (is) made, (the employer cannot) unilaterally withdraw its recognition and to do so (is) a violation of the Act." [citations omitted]

In finding that the employer in that case had voluntarily extended recognition, however, the court expressly relied on the fact that the employer had checked the union's authorization cards and verified its majority status. Id. at 751. In these circumstances, we do not read the court's opinion to hold that voluntary recognition has been established whenever an employer enters into a card check agreement.

¹⁸ See, e.g., *Anheuser-Busch, Inc.*, 246 NLRB 29, 30 (1979); *Weather Vane Outwear Corp.*, 233 NLRB 414, 415 (1977); *Great Lakes Industries*, 124 NLRB 353, 354 (1959).

¹⁹ *Ladies' Garment Workers' v. NLRB*, supra, 366 U.S. at 738 (quoting *NLRB v. Pennsylvania Greyhound Lines*, 303 U.S. 261, 267 (1938)).

ognition of a union under such circumstances “would in itself be a continuing obstacle to the exercise of the employees’ right of self-organization and to bargain collectively through representatives of their own choosing,”²⁰ the Board’s usual remedy for violations of this character is to require the employer to withdraw recognition from the unlawfully recognized union.²¹

Consistent with these principles, in *Katz’s Deli*,²² the Board held that the employer had unlawfully extended and the union had unlawfully accepted recognition at a time when a valid rival petition was pending, citing *Bruckner*. The Board specifically rejected the respondents’ claim that the principles announced in *Bruckner* were not applicable because the rival union withdrew its petition a few days after the unlawful recognition.²³ In enforcing the Board’s decision, the Second Circuit agreed that the *Bruckner* “‘petition pending’ rule” establishes

a “clearly defined rule of conduct” designed to give a “preference for a Board-conducted election in the face of competing claims.” This clearly defined rule is not altered merely because the parties contemplated withdrawing the election petition or because they ultimately did so after signing the recognition agreement.²⁴

These principles apply with equal force to the similar facts of this case, and establish that the unlawful character of the Respondents’ actions was not affected by the withdrawal of the UAW’s petition on May 17.

CONCLUSIONS OF LAW

1. McLaren Health Care Corporation is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Michigan Council 25, American Federation of State, County, and Municipal Employees, AFL–CIO, and International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL–CIO are, and at all times material herein have been, labor organizations within the meaning of Section 2(5) of the Act.

3. By recognizing the Respondent Union as the exclusive bargaining representative of its Flint, Michigan technical employees, the Respondent Employer has en-

gaged in unfair labor practices within the meaning of Section 8(a)(1) and (2) of the Act.

4. By obtaining recognition as the exclusive bargaining representative of McLaren’s Flint, Michigan technical employees, the Respondent Union has engaged in unfair labor practices within the meaning of Section 8(b)(1)(A) of the Act.

5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondents have engaged in and are engaging in certain unfair labor practices within the meaning of Section 8(a)(1) and (2), and Section 8(b)(1)(A), we shall order them, respectively, to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Specifically, we shall order the Respondent Employer to withdraw and withhold all recognition from the Respondent Union as the collective-bargaining representative of Respondent Employer’s Flint, Michigan technical employees, unless and until the Respondent Union shall have been certified as bargaining representative pursuant to a Board-conducted election among such employees of the Respondent Employer in a unit appropriate for collective bargaining. Furthermore, we shall order the Respondent Union to withdraw from acting as bargaining representative of the aforesaid employees unless and until the Respondent Union shall have been certified as bargaining representative pursuant to a Board-conducted election.

The General Counsel additionally seeks an order requiring the Respondents, jointly and severally, to reimburse employees for “any initiation fees, dues, or other obligations of membership in Respondent Union, plus interest, that may result from any collective-bargaining agreement reached as a result of the unlawful recognition and cease giving any effect to any such agreement.” However, the complaint does not allege any violation of Section 8(a)(3) or Section 8(b)(2), and there is no evidence suggesting either the existence of any collective-bargaining agreement between the parties, or that any payments have been made, or deducted from the wages of any employee, pursuant to such an agreement. In these circumstances, we find that it would not effectuate the policies of the Act to impose the reimbursement remedy sought by the General Counsel.

ORDER

The National Labor Relations Board orders that

²⁰ *NLRB v. Pennsylvania Greyhound Lines*, supra, 303 U.S. at 270.

²¹ See, e.g., *NLRB v. Katz’s Delicatessen*, supra; *Haddon House Food Products, Inc. v. NLRB*, supra.

²² 316 NLRB 318 (1995), enfd. *NLRB v. Katz’s Delicatessen*, supra.

²³ *Id.* at 330–331.

²⁴ *NLRB v. Katz’s Delicatessen*, supra, 80 F.3d at 769, quoting *Katz’s Deli*, supra, 316 NLRB at 330–331.

A. The Respondent, McLaren Health Care Corporation, Flint, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Recognizing or bargaining with Michigan Council 25, American Federation of State, County, and Municipal Employees, AFL–CIO (the Union), as the exclusive collective-bargaining representative of the technical employees employed at the Respondent Employer’s Flint, Michigan facility, unless and until the Union is certified as the exclusive collective-bargaining representative of said employees pursuant to Section 9(c) of the Act.

(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 designed to effectuate the policies of the Act.

(a) Withdraw and withhold all recognition from the Union as the collective-bargaining representative of Respondent Employer’s Flint, Michigan technical employees, unless and until the Union has been duly certified by the National Labor Relations Board as the exclusive representative of such employees.

(b) Within 14 days after service by the Region, post at its Flint, Michigan facility, copies of the attached notice marked “Appendix A.”²⁵ Copies of the notice, on forms provided by the Regional Director for Region 7, 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 any of the facilities 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 April 9, 1999.

(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.

²⁵ 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.”

B. The Respondent, Michigan Council 25, American Federation of State, County, and Municipal Employees, AFL–CIO, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Acting as exclusive bargaining representative of the technical employees employed at the Respondent Employer’s Flint, Michigan facility, for the purposes of collective bargaining, unless and until it shall have been certified by the Board as the collective-bargaining representative of those employees pursuant to Section 9(c) of the Act.

(b) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its locations in Flint, Michigan, copies of the attached notice marked “Appendix B.”²⁶ Copies of the notice, on forms provided by the Regional Director for Region 7, 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 members 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.

(b) Sign and return to the Regional Director sufficient copies of the aforesaid notice for posting by the Respondent Employer at its Flint, Michigan facility, for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted.

(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 A

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.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union

²⁶ See fn. 25, above.

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 recognize or bargain with Michigan Council 25, American Federation of State, County, and Municipal Employees, AFL-CIO (the Union), as the exclusive collective-bargaining representative of the technical employees employed at our Flint, Michigan facility, unless and until that labor organization is certified by the National Labor Relations Board as the exclusive collective-bargaining representative of those employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL withdraw and withhold all recognition from the Union as the collective-bargaining representative of our Flint, Michigan technical employees, unless and until that labor organization has been duly certified by the National Labor Relations Board as the exclusive representative of those employees.

MCLAREN HEALTH CARE CORPORATION

APPENDIX B

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.

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 act as the exclusive bargaining representative of the technical employees employed at McLaren Health Care Corporation's Flint, Michigan hospital, for the purposes of collective bargaining, unless and until we are certified by the National Labor Relations Board as the collective-bargaining representative of those employees.

WE WILL NOT in any like or related manner restrain or coerce employees and/or members in the exercise of the rights guaranteed them by Section 7 of the Act.

MICHIGAN COUNCIL 25, AMERICAN
FEDERATION OF STATE, COUNTY AND
MUNICIPAL EMPLOYEES, AFL-CIO