

**Bristol Nursing Home and Joseph Baldiga, Trustee in  
Bankruptcy and Michelle Gagnon.** Case 1–CA–  
39195

November 22, 2002

DECISION AND ORDER

BY MEMBERS LIEBMAN, COWEN, AND BARTLETT

The General Counsel seeks summary judgment in this case on the ground that the Respondent has failed to file an answer to the amended complaint and compliance specification. Upon a charge and an amended charge filed by Michelle Gagnon on July 11 and September 10, 2001, respectively, the General Counsel issued an amended complaint, compliance specification, and amended notice of hearing on April 12, 2002, against Bristol Nursing Home, the Respondent, alleging that it has violated Section 8(a)(1) and (3) of the Act.<sup>1</sup> Although properly served copies of the charge, the amended charge, the complaint and the amended complaint, compliance specification and amended notice of hearing, the Respondent failed to file an answer.<sup>2</sup>

<sup>1</sup> The original complaint was issued and served on November 27, 2001. No answer was filed within the prescribed period. On March 1, 2002, the General Counsel informed the Respondent that unless an answer was received by March 8, 2002, a Motion for Summary Judgment would be filed. By letter dated March 13, 2002, the Region was informed by counsel for the bankruptcy trustee that the Respondent had filed a Chapter 7 Bankruptcy proceeding, and that Joseph Baldiga had been appointed trustee. The letter further asserted that the automatic stay provisions of the United States Bankruptcy Code prohibited continued litigation against the Respondent's alleged unfair labor practices without prior approval of the Bankruptcy Court, and requested that the Region cease and desist from all litigation.

It is well established that the institution of bankruptcy proceedings does not deprive the Board of jurisdiction or authority to entertain and process an unfair labor practice case to its final disposition. See, e.g., *Cardinal Services*, 295 NLRB 933 fn. 2 (1989), and cases cited there. Board proceedings fall within the exception to the automatic stay provisions for proceedings by a governmental unit to enforce its police or regulatory powers. See *id.*, and cases cited therein. *NLRB v. 15th Avenue Iron Works, Inc.*, 964 F.2d 1336, 1337 (2d Cir. 1992). Accord: *Aherns Aircraft, Inc. v. NLRB*, 703 F.2d 23 (1st Cir. 1983).

<sup>2</sup> On April 12, 2002, the General Counsel served the amended complaint and compliance specification by certified mail on the Respondent at its last known address, and on the trustee in bankruptcy at the address provided by its counsel. The General Counsel's Motion for Summary Judgment states that the envelope containing the amended complaint and compliance specification sent to the Respondent's last known address was returned to the Regional Office with the notation "Moved, Left No Address." The General Counsel's motion also states that the return receipt for the envelope sent to the bankruptcy trustee is not available. The General Counsel further states that, presumably, the trustee did not claim this document, although the envelope was not returned to the Regional Office.

Service is accomplished when the documents are mailed to a respondent's last known address. A respondent's failure to provide for receiving appropriate service of documents or to claim certified mail cannot defeat the purposes of the Act. *National Automatic Sprinklers*,

On July 26, 2002, the General Counsel filed a Motion for Summary Judgment with the Board. On July 31, 2002, 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 no response. The allegations in the motion are therefore undisputed.

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 amended complaint and compliance specification affirmatively states that unless an answer is filed within 14 days of service, all the allegations in the amended complaint and compliance specification will be considered admitted. Further, the undisputed allegations in the Motion for Summary Judgment disclose that the Region, by letter dated June 5, 2002, notified the bankruptcy trustee that unless an answer to the amended complaint and compliance specification was received by June 12, 2002, a Motion for Summary Judgment would be filed.<sup>3</sup>

In the absence of good cause being shown for the failure to file a timely answer, we grant the General Counsel's Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a corporation, with an office and place of business located in Attleboro, Massachusetts, has been engaged in the operation of a private nursing home. Since about November 28, 2001, Joseph A. Baldiga has been designated by a United States Bankruptcy Court as the trustee in bankruptcy of the Respondent, with full authority to exercise all powers necessary to the liquidation of the Respondent's business. Annually, the Respondent, in conducting its operations described above, derives gross revenues in excess of \$100,000, and purchases and receives at its Attleboro

307 NLRB 481, 482 fn. 1 (1992), and *Michigan Expediting Service*, 282 NLRB 210 fn. 6 (1986).

<sup>3</sup> This letter also enclosed a copy of the amended complaint and compliance specification. On June 13, counsel for the bankruptcy trustee again asserted to the Region that the automatic stay provisions of the U.S. Bankruptcy Code prohibited continued litigation against the Respondent. On June 17, the Regional Office orally informed the trustee's counsel that the current proceedings are not subject to the automatic stay provisions of the Bankruptcy Code. The Region then extended the deadline for filing an answer to June 19, 2002. No answer was filed.

facility goods valued in excess of \$5000 directly from points outside the Commonwealth of Massachusetts.

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.<sup>4</sup>

## II. ALLEGED UNFAIR LABOR PRACTICES

At all material times, the following individuals held the positions set forth opposite their respective names and have been supervisors of the Respondent within the meaning of Section 2(11) of the Act and agents of the Respondent within the meaning of Section 2(13) of the Act:

Deborah Griffin	Executive Administrator
Kathy Salomaa	Director of Nursing
Cheryl Michel	Staff Development Coordinator
Sonya Langlois	Schedule Coordinator

The Respondent, at its Attleboro facility:

(a) By Deborah Griffin, about the third week in March 2001: interrogated employees regarding their union activities by asking them why they wanted a union and who the leader was; solicited grievances from employees by asking why they did not come to talk to her about their concerns; created the impression of surveillance of its employees' union activities by telling them that she knew who the leader trying to organize a union was; and threatened to change its employees' work rules if they sought to elect a union.

(b) By Kathy Salomaa, about the third week in March 2001, threatened employees with closure of the nursing home and with job loss if they engaged in union activities.

(c) By Cheryl Michel, about the third week in March 2001, solicited grievances from employees by stating that employees should try to organize a grievance committee instead of a union.

(d) By Deborah Griffin, about March 30, 2001: harassed employees by watching them while they worked and by stating to the employees that they did not care about the residents and that if they did not like working

<sup>4</sup> The amended complaint alleges that "at all material times, the Union has been a labor organization within the meaning of Section 2(5) of the Act." The amended complaint, however, does not name any particular union, nor does the General Counsel's motion or the supporting documents refer to any union by name. Accordingly, in the absence of the requisite specificity, we decline to make a finding on this allegation of the amended complaint. The allegation that "the Union" is a Sec. 2(5) labor organization, however, is not material to any of the substantive allegations of the amended complaint, and therefore our failure to pass on this allegation does not affect our findings regarding jurisdiction or the violations alleged in the amended complaint.

at the nursing home, they should just leave;<sup>5</sup> created the impression of surveillance of employees' union activities by telling employees that a particular employee was the ring leader and was starting trouble; and interrogated employees about their union activities and the union activities of other employees by asking what the employees wanted and how many people were planning on voting the union in.

About March 30 and April 4, 2001, the Respondent changed employee Michelle Gagnon's work schedule to a less desirable schedule.

About May 26, 2001, the Respondent implemented a new uniform policy for certified nursing assistants.

<sup>5</sup> Member Cowen finds that this complaint allegation fails to set out a violation of Sec. 8(a)(1) of the Act. In this regard, Member Cohen notes that watching employees while they work, without more, does not violate the National Labor Relations Act. Although this complaint allegation characterizes this watching as "harassment," the complaint does not allege that this "harassment" was related in any way to the employees' protected activity. Absent such a relationship to protected activity, watching employees while they work—even if unsettling to the point of "harassment"—does not violate the Act.

He further notes that each allegation in par. 7 of the complaint but for this harassment allegation specifically references union activities or can be read to do so, without reference to the "context" referred to by his majority colleagues. In that regard, Member Cowen believes his colleagues confuse the issue. While the Board may review the "context" in which a statement is made to assess its legality, that is not the yardstick to be used to determine whether a complaint allegation actually alleges a violation. That must be determined on the face of the allegation itself and, on that basis, this harassment allegation fails as a matter of law. In sum, the question is not whether the evidence in "context" could establish a violation but whether the complaint sufficiently alleges a violation. Adopting the majority's approach ignores the General Counsel's responsibility to adequately allege violations by supplying analysis (the "context" concept) that the General Counsel has not offered. This, in turn, de facto puts the Board in an advocacy role vis-à-vis the complaint that is inappropriate for a decision maker.

Our dissenting colleague argues that the harassment complaint allegation "fails to set out a violation of Sec. 8(a)(1)" because it does not expressly link the harassment to the employees' protected activities. We disagree. This complaint allegation cannot be viewed in isolation, but must be considered in its context. See *AJM Printing Co.*, 334 NLRB No. 112 fn. 2 (2001) (not published in Board volumes). Here, as set forth above, the complaint alleges, and the Respondent admits, that on numerous occasions during the same general time period, the Respondent violated the Act by interrogating employees, soliciting their grievances, creating the impression of surveillance, and threatening them with adverse consequences, all because of their union activities. Given this context, we have little difficulty in finding that the complaint implicitly links the harassment to the employees' union activities.

In sum, the dissent would look only to the "face" of the harassment allegation, while we would construe it in the context of the complaint as a whole. As is so often the case in Board proceedings, this is an issue over which reasonable people can differ. Our honest disagreement with our dissenting colleague affords no basis whatsoever for his injudicious accusation that we have "de facto" abandoned our role as neutral decision makers and have instead assumed "an advocacy role vis-à-vis the complaint."

About May 30, 2001, the Respondent issued a written warning to Gagnon pursuant to the new uniform policy described above.

During a particular week in June 2001, the Respondent assigned Gagnon to work alone in the B wing of its Attleboro facility.

In about early June 2001, the Respondent changed its uniform policy with regard to Gagnon by telling her to wear scrubs or not work.

About June 12, 2001, the Respondent issued a written warning to Gagnon.

In about the third week of June 2001, the Respondent harassed Gagnon by following her and watching her while she worked, and by wetting a resident Gagnon had recently cleaned and ordering her to reclean the resident.

In about late June 2001, the Respondent refused to reinstate Gagnon's first-shift hours.

About June 25, 2001, the Respondent issued a written notice of disciplinary action against Gagnon.

About June 28, 2001, the Respondent, by the conduct described above, caused the termination of Gagnon.

The Respondent engaged in the conduct described above because Michelle Gagnon and other employees of the Respondent formed, joined, and assisted the Union and engaged in other concerted activities, and to discourage employees from engaging in these activities.

#### CONCLUSION OF LAW

By the acts and conduct described above, the Respondent has been interfering with, restraining, and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act, in violation of Section 8(a)(1) of the Act, by interrogating, harassing, and threatening employees; soliciting grievances; and creating the impression of surveillance. In addition, by discriminatorily changing employee Michelle Gagnon's work schedule and work assignments, discriminatorily issuing written warnings to her, harassing her while she worked, refusing to reinstate her first-shift hours, and causing her termination, the Respondent and has been discriminating in regard to the hire or tenure or terms or conditions of employment of its employees, and has thereby discouraged membership in a labor organization, in violation of Section 8(a)(1) and (3) of the Act. The Respondent's unfair labor practices affect commerce within the meaning of 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)(1)

and (3) by, inter alia, causing the termination of Michelle Gagnon, issuing a written notice of disciplinary action against her, refusing to reinstate her first-shift hours, issuing written warnings to her, and making changes to her shift, we shall order the Respondent to offer Gagnon full reinstatement to her former job, or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed, and to make her whole for any loss of earnings and other benefits suffered as a result of the discrimination against her. Further, we shall order the Respondent to make Gagnon whole by paying her the amount set forth in the compliance specification, with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). The Respondent shall also be required to remove from its files any and all references to the unlawful discharge and the other discrimination against her, and to notify Gagnon in writing that this has been done and that the discharge and other discipline will not be used against her in any way.<sup>6</sup>

#### ORDER

The National Labor Relations Board orders that the Respondent, Bristol Nursing Home, Attleboro, Massachusetts, its officers, agents, successors, and assigns, shall

##### 1. Cease and desist from

(a) Interrogating employees regarding their union activities by asking them why they want a union, who the leader is, what the employees wanted, and how many people were planning on voting the union in.

(b) Soliciting grievances from employees by asking why they do not talk to the Respondent regarding their concerns, and by stating that employees should try to organize a grievance committee instead of a union.

(c) Creating the impression of surveillance of employees' union activities by telling them that it knows the identity of the leader trying to organize the union, and by telling employees that a particular employee was the ring leader and was starting trouble.

<sup>6</sup> In the amended complaint and compliance specification, the General Counsel requests, in addition to the Board's customary expunction remedy, that the Board's Order also prohibit the Respondent "from stating to any employer, prospective employer, or responding to any credit, reference, character, or similar inquiry, that Michelle Gagnon was discharged for cause or otherwise had an unsatisfactory work record." The additional remedy requested by the General Counsel would be an extension of the Board's standard remedial language. See, e.g., *Sterling Sugars, Inc.*, 261 NLRB 472 (1982). We believe that requiring this additional remedy would only be appropriate after full briefing by affected parties. See *Kloepfers Floor Covering, Inc.*, 330 NLRB 811 fn. 1 (2000). Because there has been no such briefing in this no-answer case, we decline to include this additional relief in the Order.

(d) Threatening to change employees' work rules if they sought to elect a union and threatening them with closure of the nursing home and with job loss if they engaged in union activities.

(e) Harassing employees by watching them while they work and by stating to the employees that the employees do not care about the residents and that if they do not like working at the nursing home, they should leave.

(f) Discriminatorily changing employees' work schedules to less desirable schedules.

(g) Discriminatorily implementing a new uniform policy for certified nursing assistants, and then issuing written warnings to employees pursuant to the new uniform policy.

(h) Discriminatorily assigning employees to work alone in the B wing of its Attleboro facility.

(i) Discriminatorily changing its uniform policy with regard to employees by telling them to wear their scrubs or not to work.

(j) Discriminatorily issuing written warnings to employees.

(k) Harassing employees by following them and watching them while they work, wetting residents who had been recently cleaned, and then ordering employees to reclean those residents.

(l) Discriminatorily refusing to reinstate employees' first-shift hours.

(m) Discriminatorily issuing written notices of disciplinary action against employees.

(n) Discriminatorily causing employees to be terminated.

(o) 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) Within 14 days from the date of this Order, offer Michelle Gagnon full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights and privileges previously enjoyed.

(b) Make Michelle Gagnon whole by paying her \$7,299.84, plus interest as prescribed in *New Horizons for the Retarded*, supra, minus tax withholdings required by Federal and State laws.

(c) Within 14 days from the date of this Order, remove from its files any and all references to the unlawful termination of Michelle Gagnon and the unlawful written warnings issued to her, and within 3 days thereafter, notify her in writing that this has been done, and that the unlawful conduct will not be used against her in any way.

(d) Within 14 days after service by the Region, post at its facility in Attleboro, Massachusetts, copies of the attached notice marked "Appendix."<sup>7</sup> Copies of the notice, on forms provided by the Regional Director for Region 1, 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 March 2001.

(e) 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 Federal labor law and has ordered us to post and obey this notice.

#### FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT interrogate employees regarding their union activities by asking them why they want a union, who the leader is, what the employees wanted, and how many people were planning on voting the union in.

WE WILL NOT solicit grievances from employees by asking why they do not talk to us regarding their concerns and by stating that employees should try to organize a grievance committee instead of a union.

<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 create the impression of surveillance of employees' union activities by telling them that we know the identity of the leader trying to organize the union and by telling them that a particular employee was the ring leader and was starting trouble.

WE WILL NOT threaten to change employees' work rules if they seek to elect a union or threaten them with closure of the nursing home and with job loss if they engaged in union activities.

WE WILL NOT harass employees by watching them while they work and by stating to the employees that they do not care about the residents and that if they do not like working at the nursing home, they should leave.

WE WILL NOT discriminatorily change employees' work schedules to less desirable schedules.

WE WILL NOT discriminatorily implement a new uniform policy for certified nursing assistants and then issue written warnings to employees pursuant to the new uniform policy.

WE WILL NOT discriminatorily assign employees to work alone in the B wing of our Attleboro facility. WE WILL NOT discriminatorily change our uniform policy with regard to employees by telling them to wear their scrubs or not to work.

WE WILL NOT discriminatorily issue written warnings to employees.

WE WILL NOT harass employees by following them and watching them while they work, wetting residents who

had been recently cleaned, and then ordering employees to reclean those residents.

WE WILL NOT discriminatorily refuse to reinstate employees' first-shift hours.

WE WILL NOT discriminatorily issue written notices of disciplinary action against employees.

WE WILL NOT discriminatorily cause employees to be terminated.

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, within 14 days from the date of the Board's Order, offer Michelle Gagnon full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights and privileges previously enjoyed.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any and all references to the unlawful termination of Michelle Gagnon and the unlawful written warnings issued to her, and WE WILL, within 3 days thereafter, notify her in writing that this has been done, and that the unlawful conduct will not be used against her in any way.

WE WILL make Michelle Gagnon whole by paying her \$7,299.84, plus interest, minus tax withholdings required by Federal and State laws.

BRISTOL NURSING HOME