

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

HOSPITAL METROPOLITANO YAUCO
DR. TITO MATTEI

and

Case 24-CA-9640

UNIDAD LABORAL DE ENFERMERAS(OS)
Y EMPLEADOS DE SALUD

Miguel Nieves-Mojica, Esq.,
for the General Counsel.
Jose R. Gonzalez, Esq.,
for the Respondent.
Harold E. Hopkins, Esq.,
for the Union.

DECISION

Statement of the Case

WILLIAM G. KOCOL, Administrative Law Judge. The parties stipulated to the facts in this case and waived their right to have a hearing. The charge and amended charge were filed July 3 and August 29, 2003, and the complaint was issued November 28, 2003. The complaint alleges that Hospital Metropolitano Yauco Dr. Tito Mattei (Respondent) is a successor to Southern Medical Center d/b/a Bella Vista Yauco, Inc. (Bella Vista) and that Respondent has failed and refused to recognize and bargain with the Unidad Laboral de Enfermeras(os) y Empleados de la Salud (the Union). Respondent filed a timely answer that admitted the allegations in the complaint concerning the filing and service of the charge, jurisdiction, labor organization status, and that the Union requested recognition. The answer denied that Respondent was a successor to Bella Vista, the appropriate unit, the 9(a) status of the Union, and that it refused to recognize the Union.¹

On the entire record and after considering the briefs filed by the General Counsel and Respondent, I make the following

Findings of Fact

I. Jurisdiction

Respondent, a corporation, operates a hospital providing medical, surgical, and related health care services at its facility in Yauco, Puerto Rico, where it annually derives gross revenues in excess of \$250,000 and purchases and receives at that facility equipment, goods, and materials valued in excess of \$50,000 from suppliers located outside the Commonwealth of

¹ I grant Respondent's motion submitting translations for certain exhibits.

Puerto Rico. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

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II. Alleged Unfair Labor Practices

Bella Vista operated a not-for-profit health care facility in Yauco, Puerto Rico; it was owned by the Adventist Health Systems Sunbelt Healthcare Corporation. Bella Vista was operated in a manner consistent with the religious beliefs and mission of the Adventist Church. For example, Bella Vista's cafeteria did not serve meat products, coffee, or tea. It observed the Sabbath between sundown on Friday and sundown on Saturday by reducing its activities to a minimum. Outpatient services, medical and administrative offices, elective services, and the cafeteria were closed during this time period. Bella Vista's president and chief executive officer was an ordained minister of the Adventist Church. Other officers were members of the church, as were a majority of its board of directors. Bella Vista employed a full-time chaplain. All employees hired at Bella Vista went through a 2-day seminar during which they were taught the mission, beliefs, policies, and practices of the church and the hospital. Employees had to accept those practices in order to work at Bella Vista. Employees began the workday with prayers.

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On December 15, 1999, the Board conducted an election for employees of Bella Vista in the following unit:

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Included: All skilled and unskilled service and maintenance employees including those employees employed by the employer in the maintenance, housekeeping, purchasing, warehouse and diet departments and all other nonprofessional employees.

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Excluded: All technical employees, business office clericals, professional employees, guards and supervisors as defined in the Act.

The Union won the election by a vote of 21 to 20 and on June 13, 2001, the Board certified it as the exclusive collective-bargaining representative of the unit employees.

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Respondent purchased the hospital, including the land, facilities, equipment, and assets, from Bella Vista on December 17, 2002. As part the purchase agreement Respondent agreed to offer employment 63.5 percent of Bella Vista's employees employed as of August 9, 2002. As of December 16, 2002, Bella Vista employed about 425 employees; 50 were employed in the unit described above. Thereafter Respondent continued to operate the hospital as an acute care facility providing health care and medical services to the community. In doing so, Respondent used the same facilities and most of the equipment that Bella Vista had used. In essence, the hospital/medical services provided by Respondent are the same that were provided by Bella Vista. In addition, however, Respondent provides emergency specialist doctor services, orthopedic surgery, ERCP services, Saturday ambulatory services, and more ample cafeteria services to the public, including meat products and coffee. Respondent plans to open new medical services, including emergency room pediatric care, MRI, and urology services. Respondent purchased new equipment for its diet department. Respondent is licensed to operate with 186 beds, but at the time the parties signed the stipulation of facts it operated only 121 beds. Unlike Bella Vista, Respondent is a for-profit business and it also does not follow the precepts of the Adventist Church or any other religious denomination while providing services. Accordingly, the hospital no longer followed the practices, described in the preceding paragraph, of the Adventist Church. Respondent issued new policy manuals, revised

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job descriptions, and changed its organizational structure. It appointed a new executive director and a new human resources director.

Turning to the unit employees, on December 17, 2002, Respondent hired 17 employees in the maintenance, warehouse and purchasing, diet, and laundry departments, 16 of them were former unit employees of Bella Vista. By August 11, 2003, Respondent had hired five additional employees in those departments none of whom came from Bella Vista.² But Respondent did not hire any of Bella Vista's more skilled maintenance department employees performing engineering, mechanical, electrical, plumbing, and delivery functions because on December 7, 2002, Respondent entered into a service contract with an outside contractor to perform those services for Respondent. Nor did Respondent hire any unit employees from Bella Vista's housekeeping department because on December 12 it entered into a service contract for an outside contractor to perform those services too. The Union did not seek to represent either of those two groups of employees. On December 16, 2002, Bella Vista had job descriptions for the classifications of gardener and ebonist in its maintenance department, warehouse office clerk, and purchasing office clerk in its warehouse and purchasing department, and food services worker and cook in its diet department. Since December 17, 2002, Respondent has had job descriptions for the classifications of gardener, ebonist, and worker in its maintenance department, warehouse office clerk, purchasing office clerk, and general worker in its warehouse and purchasing department, and food services worker, cook, and warehouse keeper in its diet department. Respondent also has a job description for the classification of worker in its laundry department. Maria J. Velez Barradas and Amanda Caraballo Nieves worked as supervisors for the warehouse and purchasing department at Bella Vista; Respondent hired Velez Barradas as a supervisor in its warehouse and purchasing department but it did not hire Caraballo Nieves. On December 17, 2002, Respondent hired Octavia Oliveras Orengo, Aurea Quinones Irizzary, and Doria Quinones Lugo as supervisors in its diet department; these persons had worked for Bella Vista as unit employees in the same department. Nilda Velasquez Rodriguez worked as a supervisor for Bella Vista in the diet department; Respondent hired her to continue as a supervisor in the same department.

On March 25, 2003, the Union requested Respondent to meet and bargain for the employees in the certified unit. On April 7, 2003, Respondent refused to do so asserting that the unit was not appropriate.

III. Analysis

An employer is a successor to the collective-bargaining obligation of its predecessor if it has maintained a substantial continuity of operations with the predecessor and if a majority of the successor's employees in the bargaining unit came from the predecessor's bargaining unit. *NLRB v. Burns International Security*, 406 U.S. 272 (1972); *Fall River Dyeing Corp. v. NLRB*, 482 U.S. 27 (1998). That the bargaining unit has been reduced in size and scope does not undermine these principles. *Bronx Health Plan*, 326 NLRB 810 (1998).

² The parties stipulated that Respondent hired Frances Feliciano Torres, Elvin Rodriguez, and Carmen L. Fortes Perez as temporary employees to work in the diet department and that they are not part the unit. These employees did not work at Bella Vista. Respondent also hired Maria E. Martinez Roura as the diet department director; that too is not a unit position. Maria Olan Batalla worked at Bella Vista as a professional dietician, a non unit position. She continued to work in that position for Respondent.

Turning first to the matter of continuity of operations, I have concluded above that both Respondent and Bella Vista operated an acute care hospital. There was no change of location nor was there a hiatus in the operation of the hospital. The jobs in the unit remained essentially the same as did some of the supervisors of the unit employees. Respondent used essentially the same equipment as Bella Vista. Respondent points to the changes that occurred as a result of the transition from Bella Vista's adherence to the precepts of the Adventist Church to Respondent's more secular operations. Indeed significant changes, described above, did occur. However, these changes were insufficient to alter the fact that the employees continued to do essentially the same work that they had performed at Bella Vista. Respondent also points out that it purchased some new equipment in addition to the equipment it purchased from Bella Vista. But this only serves to highlight the fact that Respondent used most its equipment and machinery that Bella Vista had used. I conclude that there is a substantial continuity of operations between Respondent and Bella Vista.

Respondent argues that the certified bargaining unit was not appropriate because it did not conform to the Rule the Board had issued concerning units for acute care hospitals. It argues that skilled maintenance employees should not have been included with unskilled employees, citing *Barnes Hospital*, 306 NLRB 201(1992), and *St. Margaret Memorial Hospital*, 303 NLRB 923 (1991). However, in those cases, the unions sought to represent only a unit of skilled maintenance employees and the Board concluded that those units were appropriate. Those cases do not forbid a combined unit of skilled maintenance employees and other nonprofessional, nontechnical employees if the union seeks such a unit. I find nothing inappropriate in the stipulated Bella Vista unit. Respondent also argues that the bargaining unit was not appropriate after it took over the hospital because it contracted out the skilled maintenance and house keeping functions. However, the fact that some unit work was transferred to other employers does not necessarily render the remainder of the unit inappropriate. *Stewart Granite Enterprises*, 255 NLRB 569 (1981). Here, the remaining unit employees share a history of being represented by the Union. They continued to perform essentially the same work at the same facility under familiar supervision. I conclude that the certified unit was appropriate and the portion of that unit that was hired by Respondent likewise remained appropriate.

I now turn to matter of whether a majority of Respondent's employees in the unit were former unit employees of Bella Vista. Initially 16 of the 17 unit employees had worked for Bella Vista. As of August the unit had grown to 22 employees; 16 came from Bella Vista. Respondent argues that this is not the proper time to test majority status because it has not yet hired a substantial and representative complement of unit employees when the Union demanded recognition on March 25. To support this contention, Respondent points to the fact that although it has a license for 186 hospital beds it only operated with 121 beds. But missing from this argument is any evidence that Respondent intends to use all its beds and if it does so when that might happen. Also missing is any evidence concerning how many additional unit employees might be needed to staff any additional beds and whether additional classifications will be needed. *Myers Custom Products*, 278 NLRB 636 (1986), cited by Respondent, actually serves to highlight the evidence that is missing in this case to justify a delay in assessing Respondent's bargaining obligation to the Union. There the successor employer commenced operations by employing 13 of the predecessor employer's unit employees. But the evidence showed that the successor employer planned to take 2-3 months to hire its full complement of employees and that within 2 months the size of the unit had nearly doubled at which time the former employees no longer constituted a majority. As mentioned, there is no such evidence in this case. I therefore conclude that a majority of the employees hired by Respondent in the unit were formerly unit employees of Bella Vista who had been represented by the Union.

It follows from the foregoing that Respondent violated Section 8(a)(5) and (1) by failing and refusing to recognize the Union as the collective- bargaining representative of the unit employees.

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Conclusion of Law

By failing and refusing to recognize the Union as the collective bargaining representative of the unit employees 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.

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Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. The Board has recently reaffirmed that an affirmative bargaining order is the traditional and appropriate remedy for a refusal to bargain case. *Mimbres Memorial Hospital*, 342 NLRB No. 33 (2004), citing *Caterair International*, 322 NLRB 64 (1996). Respondent, however, argues that a bargaining order should not issue in this case but instead an election should be ordered. Respondent points out that the Union won the election at Bella Vista by one vote and that only 16 employees in the original unit still work for Respondent. Respondent also accurately indicates that there is no evidence that Respondent has otherwise violated the Act or exhibited antiunion animus. But the closeness of the election does not detract from the fact that a majority of the employees voted to select the Union as their collective-bargaining representative. Once the Union won the election there was a presumption that a majority of employees continued to desire union representation; employee turn over does not rebut that presumption. *Levitz Furniture Co.*, 333 NLRB 717, 728 fn. 60 (2001). For reasons described in *Mimbres* and *Caterair* I conclude that an affirmative bargaining order is an appropriate remedy in this case. On these findings of fact and conclusions of law and on the entire record, I issue the following recommended³

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ORDER

The Respondent, Hospital Metropolitano Yauco Dr. Tito Mattei, Yauco, Puerto Rico, its officers, agents, successors, and assigns, shall

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1. Cease and desist from

(a) Failing and refusing to recognize the Union as the collective-bargaining representative in the following unit of employees:

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Included: All skilled and unskilled service and maintenance employees including those employees employed by the employer in the maintenance, housekeeping, purchasing, warehouse and diet departments and all other nonprofessional employees.

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³ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

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Excluded: All technical employees, business office clericals, professional employees, guards and supervisors as defined in the Act.

5 (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.

10 (a) On request, bargain with the Union as the exclusive representative of the employees in the appropriate unit described above concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

15 (b) Within 14 days after service by the Region, post at its facility in Yauco, Puerto Rico, copies of the attached Notice marked "Appendix."⁴ Copies of the notice, on forms provided by the Regional Director for Region 24, 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 25, 2003.

25 (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.

30 Dated, Washington, D.C., August 18, 2004.

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William G. Kocol
Administrative Law Judge

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⁴ 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."

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 fail and refuse to recognize the Unidad Laboral de Enfermeras(os) y Empleados de la Salud as the collective-bargaining representative in the following unit of employees:

Included: All skilled and unskilled service and maintenance employees including those employees employed by the employer in the maintenance, housekeeping, purchasing, warehouse and diet departments and all other nonprofessional employees.

Excluded: All technical employees, business office clericals, professional employees, guards and supervisors as defined in the Act.

WE WILL NOT in any like or related manner 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 in the unit described above and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit.

HOSPITAL METROPOLITAN YAUCO DR. TITO
MATTEI

(Employer)

Dated _____

By _____

(Representative)

(Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

525 F. D. Roosevelt Avenue, La Torre de Plaza, Suite 1002, San Juan, PR 00918-1002

(787) 766-5347, Hours: 8:30 a.m. to 5 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (787) 766-5377.