

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE**

HEMPSTEAD PARK NURSING HOME

AND

CASE 29-CA-25339

**NEW YORK STATE NURSES ASSOCIATION,
UAN, AFL-CIO**

Kathy DrewKing Esq., Counsel for the
General Counsel

Morris Tuchman Esq., Counsel for
the Respondent

Richard J. Silber Esq., Counsel for
the Union

DECISION

Statement of the Case

Raymond P. Green, Administrative Law Judge. I heard this matter on March 6, 2003. The charge was filed on December 23, 2002 and the Complaint was issued on January 17, 2003. In pertinent part, the Complaint alleged that on or about March 21, 2002, the Union and the Company reached a complete agreement on a new contract to replace an agreement that ran from March 1, 1998 to February 28, 2001. The Complaint further alleged that since September 10, 2002, the Employer has failed and refused to execute a written collective bargaining agreement despite requests to do so by the Union.

Based on the evidence as a whole, and after consideration of the arguments of counsel, I hereby make the following

Findings and Conclusions

1. Jurisdiction

It is admitted that the Respondent is engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act. It also is admitted that the Union is a labor organization within the meaning of Section 2(5) of the Act.

11. Concluded Findings

Section 8(d) of the Act states:

For the purposes of this section, to bargain collectively is the performance of the mutual

obligation of the employer and representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession....

Prior to the enactment of Section 8(d) the Supreme Court reached essentially the same result in *H.J. Heinz Co. v NLRB* 311 U.S. 514 (1941) In that case the Court held that once the parties have reached an oral agreement, the employer may not refuse to sign it.

The freedom of the employer to refuse to make an agreement relates to its terms in matters of substance and not, once it is reached, to its expression in a signed contract, the absence of which, as experience has shown, tends to frustrate the end sought by the requirement for collective bargaining. A businessman who entered into negotiations with another for an agreement having numerous provisions with the reservation that he would not reduce it to writing or sign it, could hardly be thought to have bargained in good faith. This is even more so in the case of an employer who, by his refusal to honor, with his signature, the agreement which he has made with a labor organization, discredits the organization, impairs the bargaining process and tends to frustrate the aims of the statute to secure industrial peace through collective bargaining.

In *Albertson's Inc. d/b/a Grocery Warehouse* 312 NLRB 394.

We agree with the judge ... that the Respondent violated Section 8(a)(5)... by failing and refusing to assist in the reduction to writing of the November 27, 1991 agreement and to sign the final collective-bargaining agreements. The Union reduced the November 27, 1991 agreement to writing on or about April 2, 1992. The Respondent subsequently mailed corrections to the Union on January 4 and 11 1993 and the Union did not object to these corrections. The judge failed to include all of these documents in her description of the collective-bargaining agreements to be signed by the Respondent. In order to effectuate the policies of the Act, we find that the Respondent must be required to sign the agreements the Union forwarded to the Respondent on or about April 2, 1992 as modified by the Respondent's corrections of January 4 and 11, 1993, that are not disputed by the Union....

In *Amalgamated Clothing Workers of America (Henry I. Siegel Co.) v NLRB* 324 F.2d. 228 (2nd Cir., 1963) the Court held that the duty to bargain under Section 8(d) included "the obligation to assist in reducing the agreement reached to writing."

In *Georgia Kraft Co.*, 258 NLRB 908, 912 (1981), the Board held that some minor deviations and typographical errors in the proposed contract did not demonstrate a lack of agreement, allowing the Respondent to refuse to execute a signed collective bargaining agreement. The Board stated:

A review of this document reflects some minor deviation from the proposals submitted by Respondent and agreed to by the Union.... We nonetheless

conclude that any deviation is not indicative of lack of agreement... but is rather the result of Respondent's own refusal to acknowledge the existence of an agreement, as well as its refusal to assist the Union in reducing the agreement to writing....¹

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The prior collective bargaining agreement ran for a term from March 1, 1998 to February 28, 2001. That agreement covered a unit of:

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All full-time, part-time, per diem and temporary employees licensed or otherwise lawfully entitled to practice as a registered professional nurse employed by the Employer to perform registered professional nursing as a Staff Nurse, Assistant Head Nurse or Nurse Practitioner, excluding the Director of Nursing, Associate Director of Nursing, Unit Directors, Nursing Care Coordinators or Supervisors of Nursing.

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The parties stipulated that they agreed on a new contract, which was executed in the form of a Memorandum of Agreement on March 22, 2002. That Memorandum contained the substantive terms of an agreement but was not a fully integrated contract. In that regard, the opening page states; "Upon ratification, the parties agree to execute a forma document integrating the terms of the MOA and the expired agreement." The Memorandum also states;

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Any and all terms and conditions of employment of the March 1, 1998 to February 28, 2001 agreement, letters of understanding, or otherwise, not specifically addressed by this Memorandum of Agreement shall remain unchanged, and are hereby incorporated into this Memorandum of Agreement.

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Insofar as relevant to the present case, the following two provisions of the Memorandum of Agreement are noted.

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First, at page 9, the parties agreed to delete all references to "clinical-division" in paragraph 5.06 of the previous contract, which dealt with the recall of laid off workers. In the old contract, the relevant language was; "Whenever a vacancy occurs with a clinical division, employees from that clinical division who are on layoff and have the ability and qualification to do the work shall be recalled in accordance with their clinical division seniority in the reverse order in which they were laid off."

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Second, at 17 of the Memorandum of Agreement, which deals with pension contributions, it states:

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Insert new rates as determined by Trustees.

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yr 1 - \$0
 yr 2 - 4968
 yr 3 - 5613

¹ See also *New Orleans Stevedoring Co.*, 308 NLRB 1076, 1081 (1992).

In the previous contract, Paragraph 9.03 describes the Union's Pension Plan and sets forth amounts to be paid by the employer. In pertinent part, that agreement provided that effective commencing March 1, 1998, (the date of the agreement), to December 31, 1998, the employer was to contribute \$2900 per annum, per full-time employee; that effective January 1, 1999 to December 31, 1999, such contributions will be \$0 per annum, per such full-time employee; that effective January 1, 2000 to December 31, 2000, the contribution was to be at a rate to be determined by an actuary up to a \$2000 maximum per full time employee; and that effective January 1, 2001 to February 28, 2001, the contribution was to be at a rate to be determined by an actuary up to a \$2600 maximum per full time employee.

Thus, under the terms of the expired contract, after the first 9 months of the agreement and until December 31, a specific contribution amount was described. Thereafter, and for the remaining term of that agreement, changes in the amounts were to go into effect on the first day of each year, (January 1), and the amounts were flexible in that they were to be determined by an actuary with a maximum agreed upon by the parties.

On or about September 10, 2002, the Union forwarded to the Respondent, a proposed draft of a full contract. On October 18, 2002, the Union sent a follow up letter because the proposed draft previously sent, had not been signed and returned. Another such letter was sent by the Union on November 7, 2002.

On November 12, 2002, the Respondent by its attorneys sent a letter to the Union, which acknowledged receipt of the union's letters and offered the following modifications.

Page 14. Recall. 5.06: Delete the words "bargaining unit."

Page 24. Pension Plan: Par.1. Correct "December 31, 2002" to read "February 28, 2003; Par. 2. Correct "December 31, 2003" to read "March 1, 2003; Par. 3. Correct "January 1, 2004" to read "March 1, 2003"; Correct "December 31, 2004" to read "February 28, 2004".

Once these corrections are made, please send corrected pages only for further review and approval. Client will check "Minimum Hiring Rate" for accuracy.

On November 18, 2002, the Union responded by stating in pertinent part;

The language in Section 5.06 needs to remain the way it is written. At no point in negotiations did we ever agree to delete the words "bargaining unit" from these paragraphs.

The language in Section 9.03 needs to remain the way it is written also. The pension contributions are determined on a calendar year basis, from January 1st through December 31st of each year.

On April, 5, 2002, Michael E. Behan, chief operating officer of the Pension Plan and Benefit Fund wrote to the Respondent, gave his opinion about the intent of the agreement and asked that the proposed contract be signed and returned. He stated, *inter alia*;

The Fund Office has reviewed a copy of the Memorandum of Agreement ... that was executed on March 21 and March 22, 2002.

5 In reviewing the MOA, there is not a clear definition of the effective dates and duration of the contract. The Fund Office’s interpretation is as follows:

	Section 9.03 – NYSNA Pension Plan	
	Effective 03/01/02 - 12/31/02:	\$ 0
10	Effective 01/01/03 – 12/31/03:	\$4968
	Effective 01/01/04 – 12/31/04:	\$5613
	Effective 01/01/05 - 02/28/05:	To be determined by the Trustees

15 Notwithstanding the repeated attempts to have the proposed agreement signed and returned, the Respondent has refused to do so because of its belief that the proffered document does not accurately reflect the agreement that was reached on March 22. However, it appears that in all respects, except for the pension plan payments, the Respondent has complied with all of the other terms of the Memorandum of Agreement, including all other incorporated terms and conditions of employment.

20 With respect to the recall provision, the Respondent’s counsel concedes that the inclusion of the words, “bargaining unit” to replace the words “clinical division” do not detract from the intent of the parties as embodied by the Memorandum of Understanding. That is, by eliminating seniority within each “clinical division,” the parties obviously intended to make seniority applicable within the “bargaining unit.” (Clearly seniority was not to be based on employment outside the bargaining unit). To this extent then, the inclusion of the words “bargaining unit,” merely states the obvious and as counsel acknowledges, is consistent with the intent of the agreement. This objection therefore has no merit.

30 With respect to the pension fund contributions, the Respondent contends that the parties agreed that the Employer would have a zero contribution for the first full year of the agreement, (from March 1, 2002 to February 28, 2003); a \$4968 contribution for the second full year and a \$5613 contribution for the third full year. Respondent also asserts that it never agreed that for a two-month period, from January 1, 2005 to February 28, 2005, the rate was to be determined by the Trustees

40 But the Respondent’s reading of the Memorandum is not, in my opinion, consistent with the words contained in that document. While it is correct that the Memorandum states that in year 1, the rate would be \$0, that in year two it would be \$4968 and that in year 3 it would be \$5613, the document does not define the beginning or ending dates of any given year. Accordingly, in light of the past practice and the terms of the prior contract, which to the extent not specifically modified, were incorporated by reference into the new agreement, it is more than reasonable to conclude that the meaning of words in the Memorandum of Understanding is that from March 1, 2002 and for the remainder of the first year, the rate would be \$0 and then, as in the past, the negotiated rates would go into effect as of the first of each year. Moreover, while it is true that the negotiated rates would not cover the last two months of the contract, the Memorandum of Agreement covers that contingency by stating that rates are to be determined by the Trustees.

In this case, both the Union and the Employer agree that they reached a new contract. What they disagree about is the interpretation of that contract, essentially insofar as it effects only the pension fund contributions. It is my opinion, that the Union's interpretation of the agreement is correct and that the integrated contract tendered to the Employer on September 10, 2002, accurately reflects that agreement. I therefore conclude that the Employer's refusal to execute and return the proffered contract, constituted a violation of Section 8(a)(1) & (5) of the Act.²

Remedy

Having found that the Respondent, Hempstead Park Nursing Home has violated the Act, I shall recommend that it cease and desist and take certain affirmative action designed to effectuate the policies of the Act.

As I have concluded that the Respondent has failed and refused to execute the contract proffered to it on September 10, 2002, I shall recommend that it sign and return this contract to the Union immediately.

To the extent that the Respondent has not made payments to the Pension Fund in accordance with the terms of the 2002 to 2005 collective bargaining agreement, I shall recommend that it make such payments, with interest, to be computed according to the practice set forth in *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended³

ORDER

The Respondent, Hempstead Park Nursing Home, its officers, agents, successor, and assigns, shall cease and desist from

(a) Refusing to execute the collective bargaining agreement tendered to it by the Union on September 10, 2002.

² At the hearing, and apparently for the first time, the Respondent's counsel suggested that the matter would better be resolved by having it decided by arbitration. The Respondent did not indicate in its Answer that it sought to have this matter deferred to arbitration and it did not offer, at any time, to waive the time limitation provisions contained in the grievance/arbitration provisions of the contract. Therefore, I will not defer this case.

The cases cited by the Respondent are not, in my opinion, apposite. Those cases, (*Westinghouse Electric Corporation*, 313 NLRB 452 (1993); *Atwood & Morill Co., Inc.*, 289 NLRB 794, 795 (1988); *Thermo Electron Corporation*, 287 NLRB 820 (1987); *NCR Corp.*, 271 NLRB 1212, 1213 (1984); and *Vickers, Incorporated*, 153 NLRB 561 (1965) all involved cases where it was alleged that companies made unilateral changes in the terms of existing contracts and where there were genuine issues regarding the interpretation of those contracts. None involved situations where it was alleged that a company or union had refused to execute an agreed upon contract.

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.

(b) In any like or related manner, interfering with the rights guaranteed to employees by Section 7 of the Act.

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

(a) Upon request, execute the collective bargaining agreement that was tendered on September 10, 2002.

10 (b) Pay to the Pension fund, with interest, any contributions that it has withheld.

(c) Within 14 days after service by the Region, post at its facility in, Queens, New York, copies of the attached notice marked "Appendix." 4 Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized
15 representative, shall be posted by the Respondent immediately upon receipt 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
20 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 September 10, 2002.

25 (d) 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.

Raymond P. Green
Administrative Law Judge

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⁴ If this Order is enforced by a Judgment of the 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**

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The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

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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**

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WE WILL NOT refuse to execute the collective bargaining agreement that had been agreed to and proffered to us on September 10, 2002.

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WE WILL NOT, in any like or related manner interfere with the rights guaranteed to employees by Section 7 of the Act.

WE WILL upon request, execute the collective bargaining agreement that was tendered to us on September 10, 2002.

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WE WILL make payments to the New York State Nurses Association Pension Fund of any amounts that we have withheld and that are due and owing under the terms of the aforesaid collective bargaining agreement.

Hempstead Park Nursing Home.

(Employer)

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Dated _____ **By** _____
(Representative) **(Title)**

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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.

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One MetroTech Center (North), Jay Street and Myrtle Avenue, 10th Floor, Brooklyn, NY 11201-4201

(718) 330-7713, Hours: 9 a.m. to 5:30 p.m.

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

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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, (718) 330-2862.