UNITED STATES GOVERNMENT
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29

CONFIDENCE MANAGEMENT SYSTEMS, INC.

Employer

and Case No. 29-RC-9203

144, A DIVISION OF 1199, NATIONAL
HEALTH AND HUMAN SERVICE
EMPLOYEES UNION, AFL-CIO

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, herein called the Act, as amended, a hearing was held before Tracy Belfiore, a Hearing Officer of the National Labor Relations Board, herein called the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned:

Upon the entire record in this proceeding, the undersigned finds:

1. The Employer contends that the Region's decision to conduct the hearing on March 1, 1999, 11 days after the petition was filed, constituted a "denial of due process." It appears that sometime during the week ending February 26,[1] the Employer's counsel verbally informed the Board Agent initially assigned to the matter that he was unavailable until March 9 or 10. He asserted he was unavailable on March 1, 3 and 4, because of scheduled contract negotiations,

[1] All dates are in 1999, unless otherwise noted.

March 2 due to a fund trustee meeting, March 5 because of a Federal District Court trial conference, and March 8 due to an arbitration. However, he never formally requested an adjournment, and no request in writing was ever submitted by the Employer's counsel. The Petitioner's counsel requested a postponement from March 1 to March 2 due to a state court proceeding. The request was denied and the hearing was held on March 1 as scheduled. The Employer did not appear at the hearing. Testimony was taken from witnesses for the Petitioner, and the hearing was closed that day.

I find that the Region acted properly in denying the adjournment request. The Board has long stressed the importance of resolving questions concerning representation that arise during representation proceedings expeditiously. Tropicana Products, 122 NLRB 121 (1959). Undue delays, even of relatively short duration, can place into jeopardy the Section 7 rights of employees. Thus, the Board requires parties to follow certain procedures when requesting postponements, and it will only grant adjournments "for good cause shown." Casehandling Manual, Representation Proceedings, Section 11142. The obligations of a party seeking an adjournment include putting the request in writing, and serving the other parties with the request. In addition, the request should contain detailed cause, should suggest alternative dates, and should be filed at least three days prior to the date set for hearing. CHM Section 11142.1. The parties were notified of these requirements by service of Form NLRB-4338 which accompanied the Notice of Hearing. Form NLRB-4338 also advised the parties that "except in extreme circumstances" no postponement that exceeded

seven days from the hearing's scheduled date would be granted. The Employer failed to follow any of the procedures outlined in the Casehandling Manual and Form NLRB-4338. In the instant case, however, the Region was made aware of the Employer's other commitments, and its refusal to postpone the hearing was not based solely upon its failure to comply with the procedural requirements set forth above. Rather, the Board has long recognized that parties to its proceedings often have various other obligations, and the Board attempts to accommodate them where possible. However, in the Board's view, in representation cases, the damage to employees' Section 7 rights that would result from significantly postponing its proceedings outweighs the inconvenience or harm a party may suffer from having to reschedule trustee meetings, contract negotiations, state court proceedings or arbitrations. Moreover, in view of the size of the Employer's law firm, it is not clear that making himself available prior to March 9, would have required that the Employer's counsel reschedule one of his other engagements, or, alternatively, that another practitioner in the firm could not have appeared on the Employer's behalf. Nor can it be said that the Region displayed any bias against the Employer in refusing to reschedule the hearing. In this regard, I note that the Petitioner's request for an adjournment was also denied. Accordingly, I find that the Region acted within its discretion in conducting the hearing on the scheduled date.

As will be discussed further, during the hearing the Petitioner, which had been seeking an election at three facilities, substantially amended the petition to limit the scope of the unit to one location. On March 2, following the close of the

hearing, the Employer was provided with written notice of this amendment, and was given the opportunity to file a brief concerning the appropriateness of the petitioned-for unit. The Employer's counsel responded by letter dated March 5.[2] Although he contended that the record should be reopened, he declined to take a position regarding the appropriateness of the unit. Rather, he contended that the issues were "still unknown to me," and that a hearing was necessary to develop a complete record "on the issues of commerce, jurisdiction and the like."

I find that the facts of this case do not warrant reopening the record. The Board has recognized that a refusal by a party to take a position while insisting that the matter be litigated may reflect a design to frustrate the Board in its efforts to expeditiously develop a record on genuine issues. Bennett Industries, Inc. 313 NLRB 1363 (1994). In the instant case, it appears that the March 5 letter from the Employer's counsel reflects such a design. He has refused to proffer a position regarding the appropriateness of the unit. His contention that a hearing is necessary to establish the Board's jurisdiction is disingenuous. As will be discussed further, in another recent representation proceeding involving this Employer, he stipulated that the Employer met the Board's discretionary standards for the assertion of jurisdiction. At no time since or during the pendency of this proceeding has he asserted that its operations no longer fall within those standards. His assertion that all issues raised by the Petitioner "remain unknown to me" is also disingenuous. As earlier noted, he was given written notice of the Petitioner's request to amend the unit.

[2] The Hearing Officer's March 2 letter is hereby received as Board Exhibit 3 and the Employer's March 5 response is received as Board Exhibit 4.

Thus, notwithstanding the Employer's refusal to appear at the hearing, and its continuing refusal to take a position concerning jurisdiction, labor organization status, the unit, or any other matter, I find that the record is adequate to render a decision. Accordingly, in view of the above, and the Employer's refusal to raise any issues that were not addressed during the hearing, its request to reopen the record is denied.

Further, I find the Hearing Officer's rulings made at the hearing are free from prejudicial error and they hereby are affirmed.

2. As noted above, due to the Employer's failure to appear at the hearing, testimony was taken concerning jurisdiction, labor organization status and the unit. I find that the record, in addition to the past history of the case, is adequate to establish the Board's jurisdiction.

The Board has long recognized that in representation proceedings, "time is of the essence." In Tropicana Products, supra, the Board noted that when an employer refuses to voluntarily provide information concerning its operations, establishing whether it meets the Board's discretionary jurisdictional standards could involve the time consuming task of initiating enforcement proceedings to compel the Employer's compliance, or that of its customers or suppliers, with subpoenas. The delays inherent in such proceedings can reward recalcitrant employers and endanger the Section 7 rights of employees. Accordingly, when an employer refuses to provide jurisdictional information, it has been the Board's policy to forgo the time consuming task of establishing whether the employer meets its discretionary standards, and to assert jurisdiction if the evidence shows

that it meets statutory jurisdictional standards. Tropicana Products, 122 NLRB 121, 123 (1959).

In the instant case, I note that in early 1997, during a proceeding in *Confidence Management Systems, Inc., Case No. 29-RC-8682,* involving the same parties, the parties stipulated that the Employer, a New York corporation with its principal office and place of business located at 1055 63rd Street, Brooklyn, New York, is engaged in providing housekeeping and laundry services to various nursing homes, including Ditmas Park Care Center.[3] In that matter, the parties stipulated that during the preceding 12 month period, the Employer had purchased and received at its Brooklyn facility goods and materials valued in excess of $50,000 directly from companies located outside the State of New York. In that matter, testimony was adduced which established that the Employer provided housekeeping and laundry services for at least 7 locations in Queens and one in Staten Island, New York. None of the parties to the instant proceeding asserted that the Employer's operations no longer fall within the Board's discretionary standards. Nor is there any evidence that there has been a significant change in the scope of the Employer's operations since the proceedings in Case No. 29-RC-8682. Rather, it appears that the Employer continues to perform housekeeping and laundry services for various nursing homes. Isaac Nortey, the Petitioner's Vice President, was personally aware of at least two nursing homes, Meadowbrook Nursing Home (Meadowbrook) and Union Plaza Nursing Home (Union Plaza), at which the Employer is performing

[3] Administrative notice is taken of the record and the Decision and Direction of Election issued on March 7, 1997.

these services. Approximately 30 of the Employer's employees perform this work at Union Plaza and 10 employees perform these services at Meadowbrook. In past proceedings, both Union Plaza and Meadowbrook have been found to meet the Board's standards for the assertion of jurisdiction of nursing homes.[4] Given the number of employees that the Employer's employs at each facility, I find that the value of the services the Employer has performed at these nursing homes exceeds $50,000 and that the Employer meets the Board's discretionary standards with respect to indirect outflow.

In any event, based upon the testimony adduced at the hearing and the above noted facts, I am satisfied that the Employer's operations meet statutory jurisdictional standards.

Accordingly, I find that the Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. Nortey testified that the Petitioner is an organization which exists for the purpose of dealing with employers concerning rates of pay, hours, and other conditions of employment. In this regard, the Petitioner has negotiated collective bargaining agreements with the League of Voluntary Hospitals, an association of employers whose members include Beth Israel Hospital, Brooklyn Hospital, Mary Immaculate Hospital, Jamaica Hospital, and various other hospitals. In addition,

[4] Administrative notice is taken of the Stipulated Election Agreement in Meadowbrook Care Center, 29-RC-8660, approved on August 27, 1996, and the Decision and Direction of Election in Union Plaza Nursing Home, Case No. 29-RC-8721 dated January 16, 1997.

the Petitioner has negotiated contracts with various other employers, including Cabrini Nursing Home.

Nortey also testified that the Petitioner meets with employees and files and arbitrates grievances on their behalf. Recent grievances that the Petitioner has processed have included complaints regarding scheduling, vacation benefits and uniform allowances.

It is well established that to qualify as a labor organization under Section 2(5) of the Act, employees must participate in that organization's affairs, and the organization must exist, in whole or in part, for the purpose of dealing with employers concerning wages, hours, and other terms and conditions of employment. Alto Plastics Mfg. Corp., 136 NLRB 850 (1962); Litton Business Systems, 199 NLRB 354 (1972); JCO Food Corp., d/b/a C-Town, 281 NLRB 458 (1986). Inasmuch as the record establishes that the Petitioner satisfies these criteria, I find that it is a labor organization within the meaning of Section 2(5) of the Act.

4. In its original petition, the Petitioner sought an election in a unit of "all full-time and regular part-time housekeeping and laundry employees employed by the Employer at Union Plaza Nursing Home, Bronx Center for Rehab. and Health Care and Ditmas Park Care Center." During the hearing, the Petitioner amended its petition to limit the scope of the petitioned-for unit to those housekeeping and laundry employees employed at Union Plaza Nursing Home. In support of its amendment the Petitioner argued the contract had not been enforced at the Union Plaza location and that a single location unit was

appropriate. On March 2, 1999, following the close of the hearing, the Employer's counsel, who did not appear at the hearing, was provided with written notice of the amendment and was given the opportunity to submit a brief concerning the appropriateness of the unit. In her letter to the Employer's counsel, the Hearing Officer noted that during earlier conversations between the Employer's counsel and the Board Agent initially assigned to the case, the Employer's counsel had contended that the Petitioner should have filed a separate petition for each location rather than one petition for all three locations. She thus concluded that, "it appears you might not have an objection to the amendment." The Employer's counsel responded by letter dated March 5, 1999. Therein, he declined to brief the appropriateness of the unit, contended that the Region had acted improperly in proceeding with the hearing in his absence and he requested that the record be reopened.

This unit was the subject of prior proceedings involving the Employer, Local 1115 – New York, Service Employees International Union, AFL-CIO (Local 1115), and the two labor organizations, 1199, National Health and Human Service Employees Union, SEIU, AFL-CIO (1199), and Local 144, Hotel, Nursing Home and Allied Services Union, SEIU, AFL-CIO (144), that later merged to become the Petitioner. The record shows that Employer and Local 1115 are parties to a collective bargaining agreement effective from January 1, 1996 through December 31, 1999. The unit is described in Section 1(A) of the contract as follows:[5]

[5] Employer Exhibit 1 in Case No. 29-RC-8682.

> The Employer recognizes the Union as the sole and exclusive bargaining agent of all laundry and housekeeping workers employed by the Employer or by a contractor or agency utilized by the Employer at any location or facilities where 1115 does or does not represent other employees at which the Employer renders laundry and housekeeping services, whether the facility is owned by the Employer or not, excluding all other employees, guards and supervisors, as defined in the National Labor Relations Act, as amended.

It appears that since at least early 1997, the petitioned-for employees have been included in the above described unit. On January 31, 1997, 1199 filed a petition in Case No. 29-RC-8755 seeking to represent the employees covered by the instant petition, and Local 144 intervened. On February 4, 1997, Local 1115 submitted a written disclaimer of interest. The Employer objected to Local 1115's attempt to disclaim interest. Thereafter, on February 20, 1997, 1199 withdrew its petition. On the following day, 1115, in writing, stated that it no longer disclaimed interest in representing these employees. On March 3, 1997, Local 144 filed a petition in Case No. 29-RC-8785 and 1199 intervened. On November 12, 1998, following an administrative investigation, an Order issued in which it was found that the above contract was a bar and the petition was dismissed.[6] Therein, it was noted that the "disclaimer" was of brief duration, and that during the two and a half week period that 1115 had disclaimed interest, the Employer had complied with the contract. Visitainer Corp., 237 NLRB 257 (1978). It was further noted that following this period, the Employer and Local 1115 had held numerous discussions regarding wages and other working conditions. In addition, since the contract covered a multi-location unit, it appeared that the

[6] Board Exhibit 2.

brief disclaimer, over the Employer's objection, constituted an attempt by Local 1115 to reshape the composition of the unit when it could not otherwise do so. Estate of Bella Moses, 247 NLRB 144 (1980). The disclaimer was thus found to be invalid, and the contract was ruled a bar.

The instant petition was filed in February 18, 1999. On February 23, in response to the petition, counsel for Local 1115 submitted the following letter:

> Please be advised that our client, Local 1115-New York, SEIU, AFL-CIO, does not intend to intervene on the petition filed in the referenced matter or participate in any election conducted by the Region. We further acknowledge that our client's agreement, which is not a contract bar, will cease to be operative upon the certification of the election conducted by the Board.

Notwithstanding their past inclusion in a multilocation unit, the Petitioner contends that the history of collective bargaining with respect to the petitioned-for employees should be accorded little weight because the contract is not enforced at the Union Plaza location. The extent, if any, to which the contract is enforced was difficult to determine from the record. Indranee Bickram, a housekeeper, testified that she had never seen any representatives of 1115 at the facility. With regard to the union security clause in the contract, she asserted that although she had never signed a dues checkoff form, dues were at one time deducted from her pay. However, at the time of the hearing, dues were no longer being withheld. It was not clear whether membership in 1115, and the concomitant payment of dues, was being required as a condition of her employment or that of other unit employees. She asserted that she was not receiving any medical benefits. However, it was not clear whether the Employer was making the

contractually required contributions to 1115's health benefits fund. She was receiving one week of paid vacation, rather than the two weeks that the contract would have provided for an employee with her tenure. However, it appeared that in July 1998, all the petitioned-for employees received the 25 cent per hour wage increase required by the contract.

The Petitioner also appears to contend that the lack of interchange between unit employees and employees of other locations and their separate supervision favor a single location unit. With regard to supervision, Bickram testified that there are two supervisors or managers, Mr. Wright and Mr. Ebanks, who appear to work at Union Plaza on a full time basis. She stated that Wright hired her and is responsible for approving requests for time off. However, she also testified that she occasionally sees two other managers who may work at other locations. One of these managers, Nelson Bailey, works at the facility on weekends, and the other, Tony (LNU), appears to visit on a weekly basis. She testified that Tony appears to inspect the work, asks the employees what jobs they are working on and carries a notebook.

With regard to interchange, she testified that she had never been asked to work elsewhere, and that she knew of just one employee who had been transferred to Union Plaza in about 1997. She testified that Mr. Ebanks, who now appears to work at Union Plaza on a full time basis, had been transferred there from another nursing home.

In making unit determinations, the Board accords substantial weight to the history of collective bargaining. Generally, the Board will not disturb established

historical units "unless required to do so by the dictates of the Act or other compelling circumstances." The Great Atlantic & Pacific Tea Company, Inc., 153 NLRB 1549, 1550 (1965). The Board has found that bargaining history in a multi-location unit of as little as one year may preclude an election in a single location unit. Arrow Uniform Rental, 300 NLRB 246, 248 (1990); Anheuser-Busch, Inc., 246 NLRB 29, 31-32 ((1979). Lack of interchange and separate supervision do not constitute the type of "compelling circumstances" that would warrant the disruption of a historical bargaining unit. Arrow Uniform Rental, supra at 248; Trident Seafoods, Inc., 318 NLRB 738 (1995). Moreover, the Petitioner has failed to establish that the contract is not enforced at the Union Plaza location. As earlier noted, it appears that the contract has been enforced with regard to wages. Visitainer, supra. Nor does it appear that 1115 has abandoned that location. Rather, it appears from its February 23 letter that it remains willing and able to continue to represent the employees in the petitioned-for unit. Brower's Moving and Storage, Inc., 297 NLRB 207, fn. 11 (1989).

Accordingly, because the Petitioner is seeking to carve a single location out of a multi-location unit during the term of a contract, I find that the petitioned-for unit is inappropriate. Great Atlantic and Pacific Tea, supra, Anheuser-Busch, supra.

Inasmuch as the Petitioner has indicated a willingness to proceed to an election in any unit found appropriate by the Board, I will direct an election in the multi-location contractual unit. This Direction of Election will be conditioned upon the Petitioner's ability to demonstrate that it has an adequate showing of interest

to warrant an election in such a unit. In order to enable me to determine whether the Petitioner has obtained an adequate showing of interest, I will direct the Employer to furnish an alphabetized payroll, sorted by location, showing the names and job classifications of employees employed in the below described contractual unit during the payroll period immediately preceding the date of the filing of the petition. Such list must be received by no later than March 25, 1999. No extension of time to file the list may be granted, nor shall the filing of a request for review operate to stay the filing of such list except in extraordinary circumstances. In the event that the Employer fails or refuses to furnish this list by March 25, 1999, the Petitioner's estimate of the number of employees in the unit shall be utilized to determine whether its showing of interest is adequate to warrant an election. *Casehandling Manual, Representation Proceedings*, Sec. 11030.1. If the administrative investigation of the Petitioner's evidence of interest leads me to conclude that it is insufficient, the Petitioner will, upon being notified thereof, be given 14 days to procure the additional showing of interest. *CHM*, Sec. 11030.5.

Accordingly, I find that the following unit is appropriate for the purposes of collective bargaining:

> All laundry and housekeeping workers employed by the Employer at the various locations presently covered by the collective bargaining agreement between the Employer and Local 1115-New York, Service Employees International Union, AFL-CIO, excluding all other employees, guards and supervisors, as defined in the National Labor Relations Act, as amended.

DIRECTION OF ELECTION

An election by secret ballot shall, subject to the conditions set forth above, be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently subject to the Board's Rules and Regulations. Eligible to vote are employees in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation or temporarily laid off. Also eligible are employees engaged in an economic strike that commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States who are employed in the unit may vote if they appear in person or at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible to vote shall vote whether they desire to be represented for collective bargaining purposes by 144, a Division of 1199, National Health and Human Service Employees Union, AFL-CIO, AFL-CIO.

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LIST OF VOTERS

In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of the statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear, Inc*., 156 NLRB 1236 (1966); *N.L.R.B. v. Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within 7 days of the date of this Decision, four (4) copies of an election eligibility list, containing the full names and addresses of all the eligible voters and sorted by location, shall be filed by the Employer with the undersigned. *North Macon Health Care Facility*, 315 NLRB 359 (1994). In order to be timely filed, such list must be received in the Regional Office, One MetroTech Center North-10th Floor (Corner of Jay Street and Myrtle Avenue), Brooklyn, New York 11201 on or before March 22, 1999. No extension of time to file the list may be granted, nor shall the filing of a request for review operate to stay the filing of such list except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

NOTICES OF ELECTION

Please be advised that the Board has adopted a rule requiring that election notices be posted by the Employer at least three working days prior to an election. If the Employer has not received the notice of election at least five working days prior to the election date, please contact the Board Agent assigned to the case or the election clerk.

A party shall be estopped from objecting to the nonposting of notices if it is responsible for the non-posting. An Employer shall be deemed to have received copies of the election notices unless it notifies the Regional office at least five working days prior to 12:01 a.m. of the day of the election that it has not

received the notices. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure of the Employer to comply with these posting rules shall be grounds for setting aside the election whenever proper objections are filed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570. This request must be received by March 29, 1999.

Dated at Brooklyn, New York, this 15th day of March, 1999.

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Alvin Blyer
Regional Director, Region 29
National Labor Relations Board
One MetroTech Center North (10th Floor)
Brooklyn, New York 11201

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