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1621 Route 22 West Operating Company, LLC d/b/a Somerset Valley Rehabilitation and Nursing Center and 1199 SEIU United Healthcare Workers East, New Jersey Region. Case 22-CA-64426

December 30, 2011

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS BECKER
AND HAYES

This is a refusal-to-bargain case in which the Respondent is contesting the Union's certification as bargaining representative in the underlying representation proceeding. Pursuant to a charge filed on September 13, 2011, the Acting General Counsel issued the complaint on October 18, 2011, alleging that the Respondent has violated Section 8(a)(5) and (1) of the Act by refusing the Union's request to bargain following the Union's certification in Case 22-RC-13139. (Official notice is taken of the "record" in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g); *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed an answer admitting in part and denying in part the allegations in the complaint, and asserting an affirmative defense.

On November 10, 2011, the Acting General Counsel filed a Motion for Summary Judgment. On November 14, 2011, 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 a response.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.¹

¹ Chairman Pearce, who is recused and did not participate in the underlying decision, is a member of the present panel but did not participate in deciding the merits of this proceeding.

In *New Process Steel v. NLRB*, ___ U.S. ___, 130 S. Ct. 2635 (2010), the Supreme Court left undisturbed the Board's practice of deciding cases with a two-member quorum when one of the panel members has recused himself. Under the Court's reading of the Act, "the group quorum provision [of Sec. 3(b)] still operates to allow any panel to issue a decision by only two members if one member is disqualified." *New Process Steel*, 130 S. Ct. at 2644; see also *Correctional Medical Services*, 356 NLRB No. 48, slip op. at 1 fn. 1 (2010).

Ruling on Motion for Summary Judgment

The Respondent's answer denies that it has refused to bargain with the Union and to furnish information that is relevant and necessary to the Union's role as bargaining representative, and further states that in light of its motion for reconsideration in the underlying representation proceeding, it "specifically reserves and does not waive its right to refuse to bargain to test certification in the event Respondent's Motion for Reconsideration should be denied."² In addition, in its response to the Notice to Show Cause, the Respondent contends that a material issue of fact exists warranting a hearing regarding the validity of the Union's request for bargaining. Specifically, the Respondent maintains that the August 31, 2011 letter sent by the Union's attorney to the Respondent does not constitute a valid request for bargaining because the letter was sent directly to the Respondent, rather than its attorney, in violation of the rules of professional ethics and therefore it is invalid and void from its inception.

We find that neither the Respondent's denial of the allegation that it has refused to bargain with the Union nor its assertion that the Union's request for bargaining is invalid raises a genuine issue of material fact in warranting a hearing. It is undisputed that the Respondent and its attorney were put on notice by the Union's August 31, 2011 letter that the Union sought to meet and bargain over terms and conditions of employment for the bargaining unit employees pursuant to the Union's certification as the collective-bargaining representative of those employees.³ Further, despite the Respondent's denial in its answer of the allegation that it has refused to bargain, and its contention that it "specifically reserves" its right to test certification, nowhere in its answer or response to the Notice to Show Cause does the Respondent assert that it has offered to meet and bargain with the Union. On the contrary, it is clear from the other denials in the Respondent's answer and its argument in its response

² Respondent's answer, p. 3. On November 16, 2011, the Board issued an Order denying the Respondent's motion for reconsideration in Case 22-RC-13139. (An Order correcting the November 16 Order issued on November 17, 2011.) The Respondent also filed a motion for special permission to appeal the Regional Director's decision to process Case 22-CA-64426, arguing that the case should not have been processed until the pending motion for reconsideration was resolved. By letter dated November 21, 2011, the Associate Executive Secretary informed the Respondent that its request for special permission to appeal was moot.

³ The Respondent's assertion that the Union's attorney violated State rules of professional conduct by sending this letter directly to the Respondent rather than to its attorney is immaterial in this proceeding because the Board has no jurisdiction over such matters.

that the Respondent is in fact refusing to bargain with the Union in order to test its certification.⁴

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941).⁵

We also find that there are no factual issues warranting a hearing with respect to the Union's request for information. By letter dated August 31, 2011, the Union requested the following information from the Respondent:

1. The names, job title, date of hire, regular hours of work, hourly rate of pay and home address for all employees in the collective-bargaining unit certified by the NLRB; and
2. Copies of daily work schedules for all nursing units for the month of August 2011.

It is well established that information concerning the terms and conditions of employment of unit employees is presumptively relevant for purposes of collective bargaining and must be furnished on request. See, e.g., *Metro Health Foundation, Inc.*, 338 NLRB 802 (2003). The Respondent has not asserted any basis for rebutting the presumptive relevance of this information.⁶ Accordingly, we grant the Motion for Summary Judgment, and will order the Respondent to bargain with the Union and to furnish the Union the information requested.

On the entire record, the Board makes the following

⁴ See, e.g., *Sprain Brook Manor Nursing Home*, 348 NLRB 851, 852 fn. 5 (2006) and *Indeck Energy Services of Turners Falls*, 318 NLRB 321, 321 (1995).

⁵ Member Hayes dissented from the Board's Decision and Certification of Representative in the underlying representation proceeding. He would have sustained the Employer's Objection 1, and set aside the election results. While Member Hayes remains of that view, he agrees that the Respondent has not presented any new matters that are properly litigable in this unfair labor practice case. See *Pittsburgh Plate Glass Co. v. NLRB*, supra. In light of this, and for institutional reasons, Member Hayes agrees with the decision to grant the motion for summary judgment.

⁶ In so finding, we construe the Union's request for the information in paragraph 2 of its request as pertaining to unit employees, although the request is not specifically described as such. See *Metro Health Foundation*, supra, 338 NLRB at 803 fn. 2.

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent has been engaged in the business of operating a rehabilitation center and nursing facility in Bound Brook, New Jersey (the Bound Brook facility), providing health care and related services.⁷ During the 12-month period preceding the issuance of the complaint, the Respondent, in conducting its business operations described above, derived gross revenues in excess of \$100,000 and during the same period of time, purchased and received at its Bound Brook facility goods and services valued in excess of \$50,000 directly from suppliers located outside the State of New Jersey. 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.

We find that 1199 SEIU United Healthcare Workers East, New Jersey Region, the Union, is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Certification

Following the election held September 2, 2010, the Union was certified on August 26, 2011, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All full-time and regular part-time and per diem non-professional employees including licensed practical nurses, certified nursing assistants, housekeepers, rehabilitation technicians, dietary cooks, dietary aides, laundry aides, recreation assistants, unit secretaries, medical records coordinators, maintenance workers, porters and receptionists employed by the Employer at its Bound Brook, New Jersey location, but excluding all office clerical employees, registered nurses, dietitians, physical therapists, physical therapy assistants, occupational therapists, occupational therapy assistants, speech therapists, social workers, staffing coordinators, payroll/benefits coordinators, all other professional employees, guards and supervisors as defined in the Act.

The Union continues to be the exclusive collective-bargaining representative of the unit employees under Section 9(a) of the Act.

⁷ The Respondent denies the allegation in complaint par. 2(a) that it is a corporation. However, it admits that it is engaged in commerce within the meaning of the Act. Accordingly, this denial does not raise any issue of fact warranting a hearing.

B. Refusal to Bargain

Since August 31, 2011 and September 12, 2011, the Union has requested the Respondent to bargain, and since August 31, 2011, the Union has requested the Respondent to furnish information. Since August 31, 2011, the Respondent has refused to do so. We find that this failure and refusal constitutes an unlawful failure and refusal to recognize and bargain with the Union in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By refusing since August 31, 2011, to recognize and bargain with the Union as the exclusive collective-bargaining representative of the employees in the appropriate unit and to furnish the Union requested information, the 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.

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union, and, if an understanding is reached, to embody the understanding in a signed agreement. We shall also order the Respondent to furnish the Union the information requested.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); *Lamar Hotel*, 140 NLRB 226, 229 (1962), *enfd.* 328 F.2d 600 (5th Cir. 1964), *cert. denied* 379 U.S. 817 (1964); *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), *enfd.* 350 F.2d 57 (10th Cir. 1965).

ORDER

The National Labor Relations Board orders that the Respondent, 1621 Route 22 West Operating Company, LLC d/b/a Somerset Valley Rehabilitation and Nursing Center, Bound Brook, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize and bargain with 1199 SEIU United Healthcare Workers East, New Jersey Region, as the exclusive collective-bargaining representative of the employees in the bargaining unit, and refusing to furnish the Union information that is relevant and necessary to its role as the exclusive bargaining representative of the unit employees.

(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.

(a) On request, recognize and bargain with the Union as the exclusive representative of the employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All full-time and regular part-time and per diem non-professional employees including licensed practical nurses, certified nursing assistants, housekeepers, rehabilitation technicians, dietary cooks, dietary aides, laundry aides, recreation assistants, unit secretaries, medical records coordinators, maintenance workers, porters and receptionists employed by the Employer at its Bound Brook, New Jersey location, but excluding all office clerical employees, registered nurses, dieticians, physical therapists, physical therapy assistants, occupational therapists, occupational therapy assistants, speech therapists, social workers, staffing coordinators, payroll/benefits coordinators, all other professional employees, guards and supervisors as defined in the Act.

(b) Furnish the Union with the information it requested on August 31, 2011.

(c) Within 14 days after service by the Region, post at its facility in Bound Brook, New Jersey, copies of the attached notice marked "Appendix."⁸ Copies of the notice, on forms provided by the Regional Director for Region 22, 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. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means.⁹ Reasonable steps shall be taken by the Respon-

⁸ 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."

⁹ As stated in his dissenting opinion in *J. Picini Flooring*, 356 NLRB No. 9 (2010), Member Hayes disagrees with the Board's decision to require electronic distribution of the notice. He acknowledges, however, that extant Board law requires it. Accordingly, for institutional reasons, and in the circumstance of this proceeding, he joins with Member Becker in ordering this remedy.

dent 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 its 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 August 31, 2011.

(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.

Dated, Washington, D.C. December 30, 2011

Craig Becker, Member

Brian E. Hayes, Member

(SEAL) 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 and bargain with 1199 SEIU United Healthcare Workers East, New Jersey Region, as the exclusive collective-bargaining representative of the employees in the bargaining unit, and WE WILL NOT refuse to furnish the Union information that is relevant and necessary to its role as the exclusive bargaining representative of the unit employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, on request, recognize and bargain with the Union and put in writing and sign any agreement reached

on terms and conditions of employment for our employees in the following bargaining unit:

All full-time and regular part-time and per diem non-professional employees including licensed practical nurses, certified nursing assistants, housekeepers, rehabilitation technicians, dietary cooks, dietary aides, laundry aides, recreation assistants, unit secretaries, medical records coordinators, maintenance workers, porters and receptionists employed by us at our Bound Brook, New Jersey location, but excluding all office clerical employees, registered nurses, dieticians, physical therapists, physical therapy assistants, occupational therapists, occupational therapy assistants, speech therapists, social workers, staffing coordinators, payroll/benefits coordinators, all other professional employees, guards and supervisors as defined in the Act.

WE WILL furnish the Union the information it requested on August 31, 2011.

1621 ROUTE 22 WEST OPERATING COMPANY,
LLC D/B/A SOMERSET VALLEY REHABILITATION AND NURSING CENTER