

**Wellington Hall Nursing Home, Inc. and Local 1115,
Joint Board Nursing Home and Hospital Employees
Division, Case 22-CA-7619**

February 7, 1979

DECISION AND ORDER

BY CHAIRMAN FANNING AND MEMBERS JENKINS
AND PENELLO

On October 17, 1978, Administrative Law Judge Thomas A. Ricci issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

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.

The Board has considered the record and the attached Decision in light of the exceptions and brief¹ and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Wellington Hall Nursing Home, Inc., Hackensack, New Jersey, its officers, agents, successors, and assigns, shall take the action set forth in said recommended Order.

¹ We find no merit in Respondent's contention that it is entitled to a hearing *de novo* because the Administrative Law Judge who conducted the hearing died before she could issue her Decision. The Chief Administrative Law Judge's action in assigning this case to another Administrative Law Judge for purposes of issuing a Decision was a proper exercise of his discretion when, as here, there is no conflict in the testimony and no credibility resolutions are necessary.

DECISION

STATEMENT OF THE CASE

THOMAS A. RICCI, Administrative Law Judge: A hearing in this proceeding was held on August 22, 1977, at Newark, New Jersey, on complaint of the General Counsel against Wellington Hall Nursing Home, Inc., here called the Respondent or the Company.¹ The complaint issued on May

¹ The hearing was held before Administrative Law Judge Anne S. Schlezinger; she died before issuing a decision. On October 4, 1978, the Board's Chief Administrative Law Judge ordered that I be substituted for Adminis-

trative Law Judge Schlezinger for purposes of issuing a decision on the existing record. There is no conflict in the oral testimony and no occasion for making any credibility resolutions.

26, 1977, upon a charge filed by Local 1115, Joint Board Nursing Home and Hospital Employees Division, here called the Union, on April 22, 1977. The issue presented is whether the Respondent violated Section 8(a)(5) of the Act—refusal to bargain—when it refused, at the Union's request, to furnish information concerning the employees included in the bargaining unit. Briefs were filed after the close of the hearing by all parties.

Upon the entire record, and from my observation of the witnesses, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

The Respondent maintains its place of business in Hackensack, New Jersey, where it is engaged in the business of providing and performing health care services and related services. In the course of its business during the preceding 12 months, a representative period, the Respondent received gross revenues valued in excess of \$100,000 and received goods valued in excess of \$5,000 which were transported to its place of business in interstate commerce directly from out-of-state sources. I find that the Respondent is engaged in commerce within the meaning of the Act.

II. THE LABOR ORGANIZATION INVOLVED

I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. The Question Presented

This is another case where an employer, on request, refused to divulge, to the Board-certified exclusive bargaining agent of its total employment complement, the addresses of the individual employees. It has long been held by the Board, with court agreement, that such information is relevant to the collective-bargaining process; indeed it is necessary if the bargaining agent is to fulfill its overall representative status under the statute. "The kind of information requested by the union in this case has an even more fundamental relevance than that considered presumptively relevant." *The Prudential Insurance Company of America v. N.L.R.B.*, 412 F.2d 77, 84 (2d Cir. 1969), *enfd.* 173 NLRB 792 (1968). Situations vary from case to case, and a diversity of tangential matters have been considered from time to time. Indeed there have been special circumstances where, the relevancy of the information notwithstanding, it has been held that it need not be supplied to the union by the employer. *W.L. McKnight, d/b/a Webster Outdoor Advertising Company*, 170 NLRB 1395 (1968).

Here too, the employer advances an affirmative defense, or a special legal argument, to justify its refusal. The question of the case at bar must therefore be understood in its

trative Judge Schlezinger for purposes of issuing a decision on the existing record. There is no conflict in the oral testimony and no occasion for making any credibility resolutions.

very exact nature. And because the Respondent seeks exculpation for a very special reason, the precise issue is best seen as it is stated by the Respondent itself. The opening statement in its brief reads:

Question at Issue

Was it an unfair labor practice for the Employer to refuse to present employee addresses to the union after being presented with a petition signed by a clear majority of the employees which specifically and directly requested that those addresses not be given to the Union?

Two concepts are blurred in this statement, as in fact they were intermixed by counsel for the Respondent at the hearing. Is it the fact that named employees express a desire that their addresses not be furnished the union that permits the employer's refusal? If that be so, the employer could honor such a request by only one, or two, or ten, or more than half of his employees, and the number of such apparent dissidents would have nothing to do with the merits of the asserted defense. In fact, on such a theory, there could be no defense to the refusal by the employer to furnish the addresses of those employees who did not request secrecy. Here the employer refused to furnish any addresses. Or is it, as the Company brief phrases its defense, the fact that "a majority" of the employees represented by the Union signed a petition asking the employer to withhold the information that excuses the refusal? In that event the defense crumbles before the stone wall of *Ray Brooks v. N.L.R.B.*, 348 U.S. 96 (1954). If, during the certification year, an out-and-out petition rejecting union representation altogether, signed by an absolute majority, can in no event constitute a defense to any kind of an 8(a)(5) violation, certainly no milder indication of disaffection could excuse a refusal to bargain at all.

B. The Pertinent Facts

It is a long story, starting in April 1975, when the Union filed a petition with the Board for an election; there were then about 100 employees in the unit. The election took place on June 25 that year, and the vote was 28 for and 32 against the Union. The Union filed objections, contending management representatives had done things which improperly interfered with a fair election; there were also some challenged ballots. The Regional Director in due course investigated everything; he resolved the challenges and decided there should be a formal hearing about the alleged preelection misconduct by the supervisory agents. His decision issued on October 24, 1975. From him the matter went to the Board, which agreed to open the challenged ballots and hold the hearing if necessary. The challenged ballots did not resolve the election, a formal hearing had to be held, and, finally, on April 9, 1976, a hearing officer issued a decision setting aside the results of the election because of the Respondent's improper interference. Another month passed, the Board agreed in May that a new election was warranted, and it was held on June 2, 1976.

This time the Union won—40 to 24. Now the Company

filed objections, saying the Union had misbehaved and improperly influenced the employees. Again there had to be an investigation. This time the Regional Director found that there was no merit in the Company's position and that the results of the election should be honored. The Company then brought the matter to the Board once more, filing exceptions to the Regional Director's conclusion. At long last, the Board ruled the election had been perfectly fair and, on October 1, 1976, certified the Union as exclusive bargaining agent of all the employees.

Six days later the Union wrote a letter asking the Respondent to start bargaining. The answer, a week later, from the Company's lawyer, said "no," because "my client does not believe the certification . . . is valid."

The next thing that happened is that the Union filed unfair labor practice charges against the Respondent late in October, saying it had illegally discharged the union activists. Many months later, on March 15, 1977, that case was settled. Five former employees were given backpay. They waived reinstatement and the Company agreed to post notices saying that it would not thereafter violate the statute. The settlement agreement expressly stated that it did not constitute any admission of violation of the Act by the Respondent.

The complaint which issued in that discharge case also alleged the Respondent had refused to bargain in violation of Section 8(a)(5). A more important part of the March 15 settlement, therefore, was that the Company promised to bargain in good faith and agreed the certification year should start all over again on that date.

There followed correspondence between the parties, the Union inviting direct bargaining sessions and requesting information of various kinds. This included rates of pay, hours of work, job titles, fringe benefits being paid, and the addresses of all bargaining unit employees of the moment. Much of the requested data was produced but not the addresses of the employees. In a letter of April 5 the Company told the Union it would not give that information because it had furnished the Excelsior list before the election.² The Union repeated this request again by letter of April 12 and again on April 13 counsel for Respondent repeated the refusal for the same reason—the old Excelsior list.

On April 15 the Respondent posted, near the timeclock and in the employees' dining room, the 60-day notice provided for in the settlement agreement mentioned above. Next to each of these notices it posted another, reading as follows:

As you know, Local 1115 is the designated bargaining representative of some of our employees. The union has requested that we furnish it with the home addresses of those employees. We have asked our attorney to determine whether we are required to do so.

In case we are required to furnish your home addresses, you may be contacted at home by representatives of Local 1115, which they are entitled to do.

² *Excelsior Underwear Inc. and Saluda Knitting Inc.*, 156 NLRB 1236 (1966). Before each of the two elections the Respondent sent to the Union a list of employees and their addresses.

Both notices remained posted for 60 days.

Upon learning from the Company's notices that the Union was seeking their addresses and that there was a legal question whether the employer had to satisfy that request, several employees conceived the notion of signing a petition requesting the Company to withhold that information. A number signed the petition, I think a majority of the current complement. With this the Respondent wrote to the Union again, on April 23, now saying it would refuse to give the addresses because of the signatures by "an overwhelming majority of the employees."

C. Analysis and Conclusion

On consideration of all the pertinent facts I find that the refusal to furnish employee addresses in this instance constituted an illegal refusal to recognize the Union's exclusive majority representative status and therefore an unfair labor practice under Section 8(a)(5). The relevance of the information sought is not only clear, as already stated, but the Respondent here does not even dispute that fact. The question, rather, is whether the Respondent has come forth with sufficient reason to excuse what would otherwise be its violation of the statute. Minor assertions apart, the essential basis of its justification—expressly stated in the rejection letter of April 23 and repeatedly argued at the hearing—is that the Union had lost its majority support among the employees. The argument was not stated in precisely those words, but the total position of the employer here amounts to no less than that.

Had the Respondent bargained without delay after the Union established its majority status in the election—back in June 1976—the fact of its having furnished an *Excelsior* list only the month before would have borne a certain significance to a refusal to furnish addresses anew at that time. Instead, the Respondent filed objections which had no merit. As time went on the employee complement expanded, there was a turnover, and the old *Excelsior* list became less and less adequate to satisfy the statutory requirement that the Company give this information on request. While the numbers were not clearly established on the record, it does appear that by April 1977 about 25 jobs and incumbents had been added to the approximately 100 that were there the previous June. After saying "about 124" employees were at work at the time of the hearing, August of 1977, Ronald Squillace, administrator of the home, said there were "90, 100" employees in April of 1975, when the first election was held. When the second election took place, he said, there were "around 100." Moreover, even among the old cadre there was a turnover, and it was a substantial one. An exhibit received in evidence responds to one of the Union's requests for wage data; it lists 90 employees and gives their date of hire. This was sent to the Union at about the end of March 1977. Of these 90 alone, 59 were hired after the last *Excelsior* list was given to the Union in 1976. It was also stated at the hearing, without contradiction, that the employees are dispersed over a wide area; indeed, they live throughout three separate counties. In such circumstances it will not do for the Respondent to say, as it does in its brief, that if the Union would like to have the addresses, all it need to do is "a little work."

Board law is not to be so easily swept away.

Julie Hernandez, a nurse's aide called by the Respondent, testified it was she who initiated the petition-signing activity. She started by recalling her reaction when she first saw the notice about addresses posted by the Company. "We did not even know that the Union was in, unless we were misadvised on what the paper said up there. . . . [W]e were discussing it and the girls said do we have a union here, we don't want to be represented by a union." No other employee was called to testify.

On the face of Hernandez' testimony, it appears clear that she took this opportunity to make a record of her desire not to be represented in collective bargaining by the Union. In fact she had long been opposed, for she also said two union agents had once come to visit her but she "refused to talk" to them. It may even be, in view of the continuing delays before the Union achieved even ostensible recognition by the Company, that Hernandez did not know the Union still existed, although I very much doubt that.

In any event, another argument now made by the Respondent upon the basis of this sole employee's testimony is not supported by any persuasive evidence. The Company says it had a right to refuse the addresses because of danger the employees might be "harassed," and cites the circuit court decision in *Shell Oil Company v. N.L.R.B.*, 457 F.2d 615 (9th Cir. 1972). The court disagreed with the Board's finding in that case. But even in *Shell Oil* the Court spoke of physical violence and other forms of harassment which had in fact been carried on by union sympathizers. There is no evidence at all in this record indicating even the possibility of such danger.

If the Respondent's stated position be taken together with Hernandez' admissions, it must be seen that the real contention here, albeit obliquely phrased, is that there had been such a mass rejection of the Union that it had lost its previously established representative status. Asked "Can you tell me exactly why you did not want the Union to have your address?" Hernandez replied: "Because I feel I do not want to be a member of a Union." This is a far cry from any mere desire to preserve home privacy as distinguished from in-plant, or near-the-plant union activity. This is pure expression of a change of heart. Hernandez, it was also shown, had once upon a time signed a membership application and checkoff authorization in favor of the Union. Maybe by the time of the second election she had already changed her mind, but maybe it was the Respondent's posted notice of April 15 that planted the seed in her mind of starting an antiunion campaign among the rest of the employees. It must also be remembered that when the Union's majority status could not have been clearer—right after its certification by the Board on October 1, 1976—the Respondent simply refused to extend recognition upon request. It gave no reason then for its outright refusal, and it has given no reason since to explain away that plain denial of its statutory obligation.

Fairly appraised, the Respondent's real defense is that it did not have to produce the relevant data because the Union had lost its majority representative status. The repeated references to the fact that a "majority" had signed the April petition clearly prove the point. The initial letter

of rejection, on April 23, stresses the fact "an overwhelming majority" had decided the addresses should not be forwarded. The Respondent's brief starts by asking whether "a petition signed by a clear majority" suffices to justify the refusal. And in the argument that then follows, the employee activity—this would be Hernandez and her friend who circulated throughout the nursing home soliciting signatures—is called "self-organization by the employees."

On the accepted scheme of the statute it was not the time for dissident employees to engage in self-organization activities aimed at unseating the certified union. And it was not the moment for the employer to refuse to bargain in any respect on the ground that the employees were not backing the Union in sufficient numbers. Whether the certification year be deemed to have started on October 1, the day of formal certification, or on March 15 next, when by settlement of another case the Respondent agreed to bargain and to start it all over again, the demand and refusal of April 1977 fell within the 12-month period, and any question about the Union's majority status was therefore impermissible under Section 8(a)(5). *Ray Brooks v. N.L.R.B.*, *supra*.

This business of injecting the employees between itself and the Union as a technique for curtailing the bargaining rights which the statute assures the established bargaining agent harks back to a somewhat comparable situation also decided by the Supreme Court. In *N.L.R.B. v. Wooster Division of Borg-Warner Corporation*, 356 U.S. 342 (1958), the employer argued it had a right to insist that the union surrender its right to call a strike short of a vote by the employees agreeing to such action. The Board, and the Court, held the employer may not intrude in the relationship between the exclusive bargaining agent and the employees on whose behalf it speaks. The net effect of what the Respondent was doing in this case was to tell the Union it could not exercise the full gamut of its statutory authority unless it could convince a majority of the employees of what it wished to do on their behalf.

IV. THE REMEDY

In view of its illegal refusal in the past, the Respondent must be ordered to furnish the Union the names and addresses of all its employees in the bargaining unit on request hereafter. And in light of the long delays that have already put off correct collective bargaining, it must be ordered to bargain in good faith from now on. Moreover, also in view of the history of the case, the certification year will start anew again the day the Respondent starts complying with this remedial order. *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785 (1962).

In her brief the General Counsel asks that the Respondent be ordered to reimburse both the Board and the Union for all expenses they incurred in connection with each and every Board proceeding involving these parties, starting with the original election petition filed in 1975. The request rests upon the assertion that every position taken by the Respondent was "frivolous," and analogizes this situation with that considered by the Board in *Tiidee Products, Inc.*, 194 NLRB 1234 (1972). Although the General

Counsel does not specify, an implication is that the 1976-77 complaint that was settled must be considered as part of the Respondent's cavalier disregard of the law throughout the events. She even says the fact the Company got rid of the leaders of the union movement is added reason why it must furnish new addresses now. However the Respondent's conduct in the past be evaluated, I do not think that particular proceeding, which was settled amicably, may be counted in what the General Counsel calls frivolous defenses. To start with, this record does not prove unlawful discharges at all, for that case was never tried. But more important, the Government agreed in the settlement papers that that entire proceeding was not to be deemed evidence of any unfair labor practice by the Respondent. For the rest, there is no previous record of Board findings against this Company, and whatever else happened was not too great a variance from what the Board deals with in cases without number. I do not believe this case warrants the special remedy asked for.

V. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of the Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

CONCLUSIONS OF LAW

1. By failing and refusing to provide the Union with the names and addresses of all employees in the bargaining unit, under the circumstances described above, the Respondent has engaged in and is engaging in unfair labor practices in violation of Section 8(a)(5) of the Act.

2. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER³

The Respondent, Wellington Hall Nursing Home, Inc., Hackensack, New Jersey, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Failing and refusing, upon request, to furnish Local 1115, Joint Board Nursing Home and Hospital Employees Division, with a list of the names and addresses of all em-

³ In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

ployees in the bargaining unit, or otherwise refusing to bargain in good faith with that Union as the exclusive bargaining agent of its 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 designed to effectuate the policies of the Act:

(a) Upon request, furnish to the forenamed Union a written list of the names and addresses of all employees in the bargaining unit.

(b) Upon request, bargain in good faith with the Union in the bargaining unit found appropriate in the outstanding Board certification.

(c) Post at its place of business in Hackensack, New Jersey, copies of the attached notice marked "Appendix."⁴ Copies of said notice, on forms provided by the Regional Director for Region 22, after being duly signed by its representative, shall be posted by the Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 22, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

⁴ In the event that 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 having found, after a hearing that we violated the Federal law by refusing to furnish necessary information to the Union:

WE WILL NOT refuse, on request, to furnish Local 1115, Joint Board Nursing Home and Hospital Employees Division, a list of the names and addresses of all our employees in the following appropriate bargaining unit:

All full-time and regular part-time service and maintenance employees, including licensed practical nurses and all clerical employees other than business office clerical employees, employed at our Hackensack, New Jersey, place of business, excluding all registered nurses, professional employees, guards and all supervisors as defined in the Act.

WE WILL NOT refuse to bargain in good faith with this Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the right to self-organization, to join or assist Local 1115, Joint Board Nursing Home and Hospital Employees Division, or any other labor organization, or to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities.

WELLINGTON HALL NURSING HOME, INC.