

Biomedical Resources Corporation of Northern California and Office and Professional Employees Union Local 29, AFL-CIO. Case 32-CA-518

May 17, 1978

DECISION AND ORDER

BY CHAIRMAN FANNING AND MEMBERS JENKINS
AND MURPHY

Upon a charge filed on November 3, 1977, by Office and Professional Employees Union Local 29, AFL-CIO, herein called the Union, and duly served on Biomedical Resources Corporation of Northern California, herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 32, issued a complaint and notice of hearing on November 15, 1977, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge, complaint, and notice of hearing before an Administrative Law Judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on September 27, 1977, following a Board election in Case 20-RC-13427, the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate;¹ and that, commencing on or about October 31, 1977, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. On November 27, 1977, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint.

On January 3, 1978, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment and a brief in support of the Motion for Summary Judgment, with appendices attached. Subsequently, on January 18, 1978, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General

Counsel's Motion for Summary Judgment should not be granted. Respondent thereafter filed a response to Notice To Show Cause.

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.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

In its answer to the complaint and answer to Notice To Show Cause, Respondent contends that the Union was improperly certified because supervisory participation in the organizational campaign and misrepresentations by the Union interfered with the employees' choice in the election. The General Counsel argues that all material issues have been previously decided and that there are no litigable issues of fact requiring a hearing. We agree with the General Counsel.

Review of the record herein, including that in Case 32-RC-10 (formerly 20-RC-13427), discloses that a Board election by secret ballot was conducted on June 4, 1976, pursuant to a Stipulation for Certification Upon Consent Election, in a unit of all medical technologist employees of Respondent at its San Francisco Bay Area locations, including Oakland, San Francisco, Walnut Creek, Concord, and Alamo, California. The tally of ballots showed that 10 votes were cast for the Union, 9 against, with 2 challenged ballots which were sufficient to affect the outcome of the election. Thereafter, Respondent filed timely objections to conduct affecting the results of the election.² On July 30, 1976, the Regional Director for Region 20 issued a complaint and notice of hearing in Case 20-CA-11404 alleging that Respondent had unlawfully discharged the two individuals whose ballots were challenged at the election. On August 18, 1976, the Regional Director for Region 20 issued a Report on Objections and Challenged Ballots, recommending that all of Respondent's objections be overruled and that the two challenged ballots be opened and counted, citing *International Ladies' Garment Workers' Union*, 137 NLRB 1681 (1962). On September 9, 1976, Respondent filed exceptions to that report. On January 19, 1977, the Board issued a

¹ Official notice is taken of the record in the representation proceeding, Case 32-RC-10 (formerly 20-RC-13427), as the term "record" is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems, Inc.*, 166 NLRB 938 (1967), enf'd, 388 F.2d 683 (C.A. 4, 1968); *Golden Age Beverage Co.*, 167 NLRB 151 (1967), enf'd, 415 F.2d 26 (C.A. 5, 1969); *Intertype Co. v. Penello*, 269 F.Supp. 573 (D.C.Va., 1967); *Follett Corp.*, 164 NLRB 378 (1967), enf'd, 397 F.2d 91 (C.A. 7, 1968); Sec. 9(d) of the NLRA, as amended.

² Essentially, the objections were based, as noted above, on the alleged participation of supervisors engaging in campaigning and related activities for the Union, thereby interfering with the employees' free choice in the election; alleged supervisory taint of the Union's showing of interest thereby making the Board's conduct of the election improper; and alleged material misrepresentations of fact concerning the collective-bargaining process, union internal procedure and union-employee relations, and alleged misrepresentations created by the Union's failure promptly to file its revised constitution and bylaws with the Department of Labor.

Decision, Direction and Order in which it adopted the Regional Director's recommendations to overrule the Respondent's objections but directed that the ballots of the challenged voters not be opened and counted until after a determination was made as to their status as employees or supervisors. On May 5, 1977, an Administrative Law Judge issued his Decision in Case 20-CA-11404 in which he found, *inter alia*, that the two individuals whose ballots had been challenged in the election were supervisors within the meaning of the Act. No exceptions were taken to those and other findings and on June 9, 1977, the Board adopted the decision of the Administrative Law Judge, dismissing the complaint in Case 20-CA-11404 in its entirety. On July 5, 1977, Respondent filed a request for reconsideration concerning election objections. On July 18, 1977, the Regional Director for Region 20 issued a Supplemental Report on Challenged Ballots and Order Denying Request for Reconsideration in which she recommended that the two challenged ballots be sustained and the Board issue an appropriate certification. On September 27, 1977, the Board issued a Supplemental Decision and Certification of Representative in the underlying representation matter.

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding. We therefore find that Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding. Accordingly, we grant the Motion for Summary Judgment.

On the basis of the entire record, the Board makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent is a California corporation with its principal facility located in Concord, California, and other facilities located in the vicinity of San Francisco, California, where it is engaged in the business of medical laboratory testing. During the past 12 months Respondent derived gross revenues exceeding \$500,000 and purchased and received supplies valued over \$50,000 directly from suppliers located outside the State of California.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that

it will effectuate the policies of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATION INVOLVED

Office and Professional Employees Union Local 29, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *The Representation Proceeding*

1. **The unit**

The following employees of Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

All medical technologist employees of the Employer at its San Francisco Bay Area locations, including Oakland, San Francisco, Walnut Creek, Concord, and Alamo, California; excluding all the other employees including, but not limited to, cytotechnologists, guards, and supervisors as defined in the Act.

2. **The certification**

On June 4, 1976, a majority of the employees of Respondent in said unit, in a secret-ballot election conducted under the supervision of the Regional Director for Region 20, designated the Union as their representative for the purpose of collective bargaining with Respondent. The Union was certified as the collective-bargaining representative of the employees in said unit on September 27, 1977, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

B. *The Request To Bargain and Respondent's Refusal*

Commencing on or about October 6, 1977, and at all times thereafter, the Union has requested Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit. Commencing on or about October 31, 1977, and continuing at all times thereafter to date, Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit.

Accordingly, we find that Respondent has, since October 31, 1977, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropri-

ate unit, and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of 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.

V. THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit, and, if an understanding is reached, embody such understanding in a signed agreement.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785 (1962); *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (C.A. 5, 1964), cert. denied 379 U.S. 817 (1964); *Burnett Construction Company*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (C.A. 10, 1965).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

CONCLUSIONS OF LAW

1. Biomedical Resources Corporation of Northern California is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Office and Professional Employees Union Local 29, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. All medical technologist employees of the employer at its San Francisco Bay Area locations, including Oakland, San Francisco, Walnut Creek, Concord, and Alamo, California; excluding all the other employees including, but not limited to, cyto-

technologists, guards, and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since September 27, 1977, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about October 31, 1977, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

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

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Biomedical Resources Corporation of Northern California, Oakland, San Francisco, Walnut Creek, Concord, and Alamo, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Office and Professional Employees Union Local 29, AFL-CIO, as the exclusive bargaining representative of its employees in the following appropriate unit:

All medical technologist employees of the Employer at its San Francisco Bay Area locations, including Oakland, San Francisco, Walnut Creek, Concord, and Alamo, California; excluding all the other employees including, but not limited to, cytotechnologists, guards, and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its Oakland, San Francisco, Walnut Creek, Concord, and Alamo, California, facilities copies of the attached notice marked "Appendix."³ Copies of said notice, on forms provided by the Regional Director for Region 32, after being duly signed by Respondent's representative, shall be posted by 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 Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 32, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

³ 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

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Office and Professional Employees Union Local 29, AFL-CIO, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

All medical technologist employees of the Employer at its San Francisco Bay Area locations, including Oakland, San Francisco, Walnut Creek, Concord, and Alamo, California; excluding all the other employees including, but not limited to, cytotechnologists, guards, and supervisors as defined in the Act.

BIOMEDICAL RESOURCES CORPORATION OF
NORTHERN CALIFORNIA