

Walnut Mountain Care Center and District 1199, National Union of Hospital and Health Care Employees, RWDSU, AFL-CIO. Case 3-CA-8226

May 22, 1978

DECISION AND ORDER

BY CHAIRMAN FANNING AND MEMBERS PENELLO
AND MURPHY

Upon a charge filed on November 7, 1977, and an amended charge filed on November 16, 1977, by District 1199, National Union of Hospital and Health Care Employees, RWDSU, AFL-CIO, herein called the Union, and duly served on Walnut Mountain Care Center, herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 3, issued a complaint and notice of hearing on December 2, 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 9, 1977, following a Board election in Cases 3-RC-6894 and 3-RC-6895,¹ the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate;² and that, commencing on or about October 4, 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 December 12, 1977, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint.

On December 27, 1977, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on January 6,

¹ The Union originally filed two petitions for separate units, but at a consolidated hearing the parties stipulated as to the single unit herein found appropriate.

² Official notice is taken of the record in the representation proceeding. Cases 3-RC-6894 and 3-RC-6895, 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. 388 F.2d 683 (C.A. 4, 1968); *Golden Age Beverage Co.*, 167 NLRB 151 (1967), enf. 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. 397 F.2d 91 (C.A. 7, 1968); Sec. 9(d) of the NLRA, as amended.

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 its response to the Notice To Show Cause Respondent admits its refusal to bargain but in effect denies that it thereby violated Section 8(a)(5) and (1) of the Act. Specifically, Respondent attacks the Union's certification on the ground that the Regional Director erred in processing the Union's petition and the underlying representation case despite alleged supervisory participation in the collection of the Union's showing of interest and because it had been denied a hearing on the issue of supervisory participation which it had also raised in its objections. Further, Respondent contends that the Union's certification was invalid in that the certified unit included charge licensed practical nurses and health services supervisors who, it contends, are supervisors within the meaning of the Act. The General Counsel contends that all material issues have been decided and that there are no litigable issues of fact warranting a hearing herein. We agree with the General Counsel.

Our review of the record, including that in Cases 3-RC-6894 and 3-RC-6895, shows that prior to the hearing in the representation case Respondent requested a postponement based on its allegation that alleged supervisors had solicited, induced, and coerced employees to sign authorization cards on behalf of the Union. The Regional Director denied Respondent's postponement request but agreed to investigate Respondent's allegation regarding the authorization cards in a collateral investigation. At a hearing held March 29, 1977, Respondent moved to adjourn the hearing and/or withhold issuance of a decision, pending investigation of its allegations of supervisory participation in obtaining the requisite showing of interest. On April 7, 1977, after an administrative investigation, the Regional Director, in his Decision and Direction of Election, denied Respondent's motion, finding that the Union's showing of interest warranted proceeding to an election. On April 20, 1977, after an administrative investigation of evidence submitted by Respondent after the April

7, 1977, hearing, the Regional Director informed Respondent that the Region remained administratively satisfied with the Union's showing of interest. On April 21, 1977, Respondent filed with the Board a request for review of the aforementioned Decision and Direction of Election. However, on April 26, 1977, the Board informed Respondent that its request for review, having been due in Washington, D.C., by April 20, 1977, was untimely submitted, and would therefore not be considered by the Board.

On May 6, 1977, an election by secret ballot was conducted pursuant to the Regional Director's Decision and Direction of Election. The tally was 55 for and 13 against the Union; there were 11 challenged ballots, a number insufficient to affect the results of the election. On May 12, 1977, Respondent filed timely objections to conduct affecting the results of the election. Respondent's Objection 1 again alleged that the Union had received improper aid and assistance by supervisory participation in its collection of its showing of interest. After an investigation, the Regional Director issued a report on objections in which he recommended, *inter alia*, that Objection 1 be overruled. The Regional Director noted that the validity of the showing of interest is a matter for administrative determination.

On June 27, 1977, Respondent filed exceptions to the Regional Director's recommendations regarding certain objections, including Objection 1. On September 9, 1977, the Board issued a Decision and Certification of Representative, wherein the Board adopted the Regional Director's findings and recommendations and certified the Union as the collective-bargaining representative of Respondent's employees in the unit found appropriate. Thus, the Board previously ruled in the representation case as to Respondent's allegation of supervisory participation in the Union's obtaining its showing of interest.

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.³

All issues raised by Respondent in this proceeding were or could have been litigated in the prior representation proceeding,⁴ and Respondent does not of-

fer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that any special circumstances exist herein which would require the Board to reexamine the decision made in the representation proceeding. We therefore find that Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding.⁵ 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 Walnut Mountain Care Center is a partnership with its principal place of business in Liberty, New York, where it is engaged as a health care institution in the operation of an extended-care nursing facility. During the past 12 months, Respondent received gross revenues in excess of \$100,000 from its operations and purchased goods valued in excess of \$50,000 shipped to it in New York State directly from points outside the State of New York. At all times material herein, Respondent is and has been an employer as defined in Section 2(2) of the Act, engaged in commerce and in operations affecting commerce as defined in Section 2(6) and (7) of the Act, respectively.

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.

al Director's Decision and Direction of Election, it is now precluded from relitigating any issue that could thereby have been raised in the representation proceeding; see Sec. 102.67(f) of the Board's Rules and Regulations.

To the extent that Respondent may have raised the issue of alleged supervisory status of charge licensed practical nurses and health services supervisors by use of the challenge procedure—we note that there were 11 challenges at the election—such unresolved placement of certain individuals does not constitute a valid defense to the complaint. It is clear that, however the question of supervisory status of any challenged charge licensed practical nurses or health services supervisors might ultimately be resolved, its resolution cannot affect the basic appropriateness of the certified unit, the Union's majority therein, or the ability of the parties to bargain in the certified unit. There is nothing to preclude the parties from agreeing on the status and unit placement of challenged charge licensed practical nurses or health services supervisors or from filing a petition seeking to resolve that issue, pursuant to Sec. 102.60(b) of the Board's Rules and Regulations, Series 8, as amended. See *Sierra Pacific Hospitals, Inc., d/b/a Riverside Hospital for Extended Care*, 226 NLRB 767 (1976); *Landis Tool Company, Division of Litton Industries*, 203 NLRB 1025 (1973); *The May Department Stores Company*, 186 NLRB 86 (1970).

⁵ See *P.A.F. Equipment Co., Inc.*, 216 NLRB 271 (1975).

³ See *Pittsburgh Plate Glass Co. v. N.L.R.B.*, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

⁴ In regard to Respondent's contention that the certified unit includes charge licensed practical nurses and health services supervisors who, it alleges, are supervisors within the meaning of the Act, we note that the Regional Director directed the election in the unit stipulated by the parties to be appropriate for collective bargaining.

The unit description properly excludes "supervisors as defined in the Act." As Respondent failed to file a timely request for review to the Region-

II. THE LABOR ORGANIZATION INVOLVED

District 1199, National Union of Hospital and Health Care Employees, RWDSU, 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 full-time and regular part-time non-professional employees of the Employer at its Liberty, New York nursing home; excluding all professional employees, registered nurses, office clerical employees, guards and supervisors as defined in the Act.

2. The certification

On May 6, 1977, 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 3, 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 9, 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 September 26, 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 4, 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 4, 1977, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate 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 Walnut Mountain Care Center 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. Walnut Mountain Care Center is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. District 1199, National Union of Hospital and Health Care Employees, RWDSU, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. All full-time and regular part-time nonprofessional employees of the Employer at its Liberty, New York, nursing home; excluding all professional employees, registered nurses, office clerical employees, 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 9, 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 4, 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, Walnut Mountain Care Center, Liberty, New York, 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 District 1199, National Union of Hospital and Health Care Employees, RWDSU, AFL-CIO, as the exclusive bargaining representative of its employees in the following appropriate unit:

All full-time and regular part-time non-professional employees of the Employer at its Liberty, New York nursing home; excluding all professional employees, registered nurses, office clerical employees, 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 Liberty, New York, facility copies of the attached notice marked "Appendix." ⁶ Copies of said notice, on forms provided by the Regional Director for Region 3, 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 3, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

⁶ 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 District 1199, National Union of Hospital and Health Care Employees, RWDSU, 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 full-time and regular part-time non-professional employees of the Employer at its

Liberty, New York nursing home; excluding all professional employees, registered nurses,

office clerical employees, guards and supervisors as defined in the Act.

WALNUT MOUNTAIN CARE CENTER