

Americana Nursing Home and Convalescent Center, Inc., and Service Employees International Union, Local 536, AFL-CIO. Case 5-CA-4956

March 12, 1971

DECISION AND ORDER

BY MEMBERS FANNING, BROWN, AND JENKINS

Upon a charge filed on October 28, 1970, by Service Employees International Union, Local 536, AFL-CIO, herein called the Union, and duly served on Americana Nursing Home and Convalescent Center, Inc., herein called the Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 5, issued a complaint on November 23, 1970, 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 a Trial Examiner were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on or about October 8, 1970, following a Board election in Case 5-RC-7233 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 23, 1970, 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 2, 1970, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint.

On December 11, 1970, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment, alleging that the Respondent's answer to the complaint raises no question of fact or law necessitating an evidentiary hearing, and, accordingly, requesting the Board to grant the Motion for Summary Judgment. Subsequently, on January 4, 1971, 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 an opposition as its 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 powers in connection with this case 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 response to the Notice To Show Cause, as in its answer to the complaint, the Respondent contends that the certification of the Union is invalid by reason of the failure of the Regional Director and the Board to afford the Respondent the opportunity for a hearing on its objections to the election. In support of this contention, the Respondent advances the same arguments which it presented to the Board in its exceptions to the Regional Director's Report on Objections. More particularly, the Respondent argues that the presence and electioneering by discharged employees, their relatives, and alleged union agents in the vicinity of the polling area, during the voting period, interfered with the employees' free choice in the election and constituted objectionable conduct within the rule established by the Board in the *Milchem* case.² The Respondent also contends that union misrepresentation as to dues and supervisory assistance in union organization interfered with the election. For the reasons related below, we find no merit in the Respondent's contentions and arguments.

The election in Case 5-RC-7233 was conducted pursuant to a Stipulation for Certification Upon Consent Election, and following the election the Respondent filed timely objections. After an investigation, the Regional Director issued and served on the parties his Report on Objections, in which he found that the Respondent's objections did not raise substantial or material issues with respect to the election, and recommended that the objections be overruled in their entirety. Upon the Respondent's exceptions, the Board, having considered the entire record, including the objections, the Regional Director's report, and the Respondent's exceptions, found no reason to overturn the findings, conclusions, and recommendations of the Regional Director and, accordingly, certified the Union as the collective-bargaining agent of the employees in the unit herein found appropriate. The contentions and arguments advanced by the Respondent in this unfair labor practice proceedings are identical to the contentions and arguments which it advanced in the underlying representation case, and which the

¹ Official notice is taken of the record in the representation proceeding, Case 5-RC-7233, as the term "record" is defined in Secs. 102.68 and 102.69(f) of the Board's Rules and Regulations, Series 8, as amended. See *LTV ElectroSystems, Inc.*, 166 NLRB 938, enf'd. 388 F.2d 683 (C.A. 4, 1968); *Golden Age Beverage Co.*, 167 NLRB 151; *Inertype Co. v. Penello*, 269 F. Supp. 573 (D.C. Va., 1967), *Follett Corp.*, 164 NLRB 378, enf'd 397 F.2d 91 (C.A. 7, 1968), Sec. 9(d) of the NLRA.

² *Milchem Inc.*, 170 NLRB No. 46.

Board has previously considered and denied.

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 the Respondent in this proceeding were or could have been raised in the prior representation proceeding, and the Respondent does not offer 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 the Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding.⁴ We shall, accordingly, 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 THE RESPONDENT

Respondent is, and at all times material herein has been, a corporation duly organized under and existing by virtue of the laws of the State of Maryland, with its office and principal place of business located at Clinton, Maryland, where it is engaged in the operation of a nursing and convalescent home.

Respondent, in the course and conduct of its business operations as described above, during the preceding 12 months, a representative period, derived gross revenues valued at in excess of \$200,000 and purchased and received goods and materials from directly outside the State of Maryland valued at in excess of \$5,000.

We find, on the basis of the foregoing, that Respon-

dent 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

Service Employees International Union, Local 536, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III UNFAIR LABOR PRACTICES

A. *The Representation Proceeding*

1. The unit

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

All non-professional employees employed by Respondent at its Clinton, Maryland, location; but excluding registered nurses, licensed practical nurses, office clerical employees, physical therapist, physical therapist's aide, social director, guards and supervisors as defined in the Act, as amended.

2. The certification

On June 12, 1970, 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 5, designated the Union as their representative for the purpose of collective bargaining with the Respondent. The Union was certified as the collective-bargaining representative of the employees in said unit on October 8, 1970, 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 9, 1970, and at all times thereafter, the Union has requested the 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 23, 1970, and continuing at all times thereafter to date, the 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 the Respondent has, since October 23, 1970, and at all times thereafter,

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 its answer the Respondent denies paragraphs 8 and 9 of the complaint which allege that the Union has requested and the Respondent has refused to bargain. Attached to and made parts of the General Counsel's Motion for Summary Judgment are two letters dated October 9 and 23, 1970. The letter dated October 9, 1970, purports to be a request by the Union on the Respondent for bargaining, and appears to have been sent to the Respondent by certified mail. The letter dated October 23, 1970, which appears to have been signed by J. Kennedy Sills, president of the Respondent, purports to be its reply to the Union's letter, and recites the Respondent's refusal to bargain. In its response to the Notice To Show Cause the Respondent neither alludes to nor seeks to controvert the contents or receipt of the Union's letter of October 9, nor does the Respondent deny that the letter of October 23 is its reply and refusal to the Union's request to bargain. Accordingly, we find that the Respondent's denials of paragraphs 8 and 9 of the complaint are frivolous, and we deem these delegations to be admitted. *William L. Bonnell Co., Inc.*, 187 NLRB No. 124, and cases cited therein.

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 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; *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229, enfd. 328 F.2d 600 (C.A. 5), cert. denied 379 U.S. 817; *Burnett Construction Company*, 149 NLRB 1419, 1421, enfd. 350 F.2d 57 (C.A. 10).

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

CONCLUSIONS OF LAW

1. Americana Nursing Home and Convalescent Center, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Service Employees International Union, Local 536, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. All nonprofessional employees employed by Respondent at its Clinton, Maryland, locations; but excluding registered nurses, licensed practical nurses, office clerical employees, physical therapist, physical therapist's aide, social director, guards and supervi-

sors as defined in the Act, as amended, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since October 8, 1970, 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 23, 1970, 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 had 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 to 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 Respondent, Americana Nursing Home and Convalescent Center, Inc., 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 Service Employees International Union, Local 536, AFL-CIO, as the exclusive bargaining representative of its employees in the following appropriate unit:

All non-professional employees employed by Respondent at its Clinton, Maryland, location; but excluding registered nurses, licensed practical nurses, office clerical employees, physical therapist, physical therapist's aide, social director, guards and supervisors as defined in the Act, as amended.

(b) In any like or related manner interfering with, restraining, or coercing employees in 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 Clinton, Maryland, operation copies of the attached notice marked "Appendix."⁵ Copies of said notice, on forms provided by the Regional Director for Region 5, 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 5, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

⁵ 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 be changed to 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 Service Employees International Union, Local 536, 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 non-professional employees employed by Respondent at its Clinton, Maryland, location; but excluding registered nurses, licensed practical nurses, office clerical employees, physical therapist, physical therapist's aide, social director, guards and supervisors as defined in the Act, as amended.

AMERICANA NURSING HOME AND
CONVALESCENT CENTER, INC.
(Employer)

Dated

By

(Representative)

(Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Federal Building, Room 1019, Charles Center, Baltimore, Maryland 21201, Telephone 301-962-2822.