NOTICE: This opinion is subject to formal revision before publication in the Board volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

VIP Health Services, Inc. *and* Local 2, Federation of Nurses, United Federation of Teachers, American Federation of Teachers, AFL–CIO. Case 29–CA–20921

August 25, 1997

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND HIGGINS

Pursuant to a charge filed on April 17, 1997, the General Counsel of the National Labor Relations Board issued an amended complaint on June 13, 1997, alleging that the Respondent has violated Section 8(a)(5) and (1) of the National Labor Relations Act by refusing the Union's request to bargain following the Union's certification in Case 29–RC–8262. (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 amended complaint.

On July 14, 1997, the General Counsel filed a Motion to Strike Portion of Respondent's Answer and for Summary Judgment. On July 17, 1997, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. On July 28, 1997, the Union filed a letter in support of the General Counsel's Motion for Summary Judgment and requesting that the Respondent's answer be stricken in its entirety and that it be granted attorneys' fees and costs. On August 13, 1997, the Respondent filed a response.

Ruling on Motion for Summary Judgment

In its answer and response, the Respondent attacks the validity of the certification in the underlying representation proceeding on the ground that its registered field nurses are supervisors within the meaning of Section 2(11) of the Act and that the certified unit is therefore inappropriate.[1]

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). Accordingly, we grant the Motion for Summary Judgment.[2]

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a New York corporation engaged in providing skilled nursing care to sick and infirm and aged persons.[3] During the 12-month period preceding the issuance of the complaint, the Respondent, in the course and conduct of business, derived gross revenues valued in excess of $100,000 and purchased and received at its Richmond Hill, New York facility goods and materials valued in excess of $5000 directly from points located outside the State of New York.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that 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 November 6, 1996, the Union was certified on November 27, 1996, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:[4]

> All registered nurses authorized to practice as an RN, including intake nurses, senior clinical coordinator, clinical coordinators, and field nurses; excluding all other employees, office clerical employees, supervisory field nurses, quality assur-

[1] Although the Respondent also filed objections to conduct allegedly affecting the results of the election in the underlying representation proceeding, and those objections were overruled, the Respondent does not reassert those objections in the instant test-of-certification proceeding as a basis for its refusal to bargain.

[2] Having granted the General Counsel's Motion for Summary Judgment, we find it unnecessary to pass on the motions made by the Charging Party Union and the General Counsel to strike all or portions of the Respondent's answer.

Member Higgins notes that he was not on the panels that ruled on the Respondent's requests for review and reconsideration of the Regional Director's determination that the Respondent's field nurses are not supervisors. Nevertheless, he agrees with his colleagues that the Respondent has raised nothing new in this ''technical'' 8(a)(5) proceeding warranting a hearing, and that summary judgment is therefore appropriate.

[3] The Respondent stipulated to the foregoing description of Respondent's business in the underlying representation proceeding.

[4] Although the Respondent's answer denies the allegations in the complaint regarding the election and certification, the Respondent's response to the Motion for Summary Judgment indicates that the answer denies these allegations based solely on the Respondent's contention that the unit is inappropriate. In any event, the allegations are fully supported by the exhibits from the underlying representation proceeding which are attached to the General Counsel's motion.

> ance supervisor, compliance supervisor, assistant supervisor-clinical coordinator, assistant supervisor-education, supervisor-public health nurse, director/administrator, guards, and supervisors as defined in the Act.

The Union continues to be the exclusive representative under Section 9(a) of the Act.

B. *Refusal to Bargain*

About December 16, 1996, and on various dates thereafter, the Union requested the Respondent to bargain, and, since December 16, 1996, the Respondent has refused.[5] We find that this refusal constitutes an unlawful refusal to bargain in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By refusing on and after December 16, 1996, to bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit, 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.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by the 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).[6]

ORDER

The National Labor Relations Board orders that the Respondent, VIP Health Services, Inc., Richmond Hill and Queens, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with Local 2, Federation of Nurses, United Federation of Teachers, American Federation of Teachers, AFL–CIO, as the exclusive bargaining representative of the employees in the bargaining unit.

(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, 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 registered nurses authorized to practice as an RN, including intake nurses, senior clinical coordinator, clinical coordinators, and field nurses; excluding all other employees, office clerical employees, supervisory field nurses, quality assurance supervisor, compliance supervisor, assistant supervisor-clinical coordinator, assistant supervisor-education, supervisor-public health nurse, director/administrator, guards, and supervisors as defined in the Act.

(b) Within 14 days after service by the Region, post at its facilities in Richmond Hill and Queens, New York, copies of the attached notice marked ''Appendix.''[7] Copies of the notice, on forms provided by the Regional Director for Region 29 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. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event

[5] Although the Respondent's answer denies the allegations that the Union requested bargaining, a copy of the Union's letters are attached as exhibits to the General Counsel's motion, and the Respondent has not disputed their authenticity in response to the Motion for Summary Judgment. Although the Respondent's answer also denies the allegation that the Respondent has refused the Union's requests to bargain, nowhere in its answer or response does the Respondent contend that it has offered to meet and bargain with the Union since its initial, December 16, 1996 request. On the contrary, it is clear from the other denials in Respondent's answer and the arguments in Respondent's response, that the Respondent is in fact refusing to bargain with the Union in order to test the certification. Accordingly, we find that no issues warranting a hearing are raised by the Respondent's denials of the foregoing allegations. See *Indeck Energy Services*, 318 NLRB 321 (1995).

[6] As indicated above, the Charging Party Union has also requested that it be granted attorneys' fees and costs in this proceeding. We deny the Union's request inasmuch as we do not find that the Respondent's position regarding the certification is frivolous. See generally *Frontier Hotel & Casino*, 318 NLRB 857 (1995), enf. denied in relevant part 155 LRRM 2833 (D.C. Cir. July 18, 1997).

[7] 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.''

that, during the pendency of these proceedings, the Respondent has gone out of business or closed the 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 April 17, 1997.

(c) 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. August 25, 1997

William B. Gould IV,	Chairman
Sarah M. Fox,	Member
John E. Higgins, Jr.,	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 the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain with Local 2, Federation of Nurses, United Federation of Teachers, American Federation of Teachers, AFL–CIO, as the exclusive representative of the employees in the bargaining unit.

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

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

> All registered nurses authorized to practice as an RN, including intake nurses, senior clinical coordinator, clinical coordinators, and field nurses; excluding all other employees, office clerical employees, supervisory field nurses, quality assurance supervisor, compliance supervisor, assistant supervisor-clinical coordinator, assistant supervisor-education, supervisor-public health nurse, director/administrator, guards, and supervisors as defined in the Act.

VIP HEALTH SERVICES, INC.