

San Miguel Hospital Corp. d/b/a Alta Vista Regional Hospital and National Union of Hospital and Healthcare Employees District 1199NM. Case 28–CA–21896

June 30, 2008

DECISION AND ORDER

BY CHAIRMAN SCHAUMBER AND MEMBER LIEBMAN

This is a refusal-to-bargain case in which the Respondent is contesting the Union's certification as bargaining representative in the underlying representation proceeding. Pursuant to a charge filed on April 29, 2008 the General Counsel issued the complaint on May 15, 2008, alleging that the Respondent has violated Section 8(a)(5) and (1) of the Act by refusing the Union's request to bargain following the Union's certification in Case 28–RC–6518. (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 complaint, and alleging an affirmative defense.¹

On June 3, 2008, the General Counsel filed Motions to Transfer and Continue Matter Before the Board, to Strike, and for Summary Judgment. On June 9, 2008, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed a response.

Ruling on Motion for Summary Judgment²

In its answer and response, the Respondent admits its refusal to bargain, but contests the validity of the Union's certification on the basis of its objections to the election in the representation proceeding.³

¹ The Respondent's answer denies knowledge or information sufficient to form a belief concerning the filing and service of the charge. Copies of the charge and affidavit of service of the charge are included in the documents supporting the General Counsel's motion, showing the dates as alleged, and the Respondent has not challenged the authenticity of these documents.

² Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Schaumber and Member Liebman constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act.

³ The Respondent's answer denies par. 5(a) of the complaint, which sets forth the appropriate unit. The Respondent also denies the appropriateness of the unit in its response. The unit issue, however, was litigated and resolved in the underlying representation proceeding. Accordingly, the Respondent's denial of the appropriateness of the unit does not raise any litigable issue in this proceeding.

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.⁴

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times the Respondent, a New Mexico corporation, with an office and place of business in Las Vegas, New Mexico, (the Respondent's facility), has been engaged in the operation of an acute care hospital.

During the 12-month period ending April 29, 2008, the Respondent, in conducting its business operations described above, derived gross revenues in excess of \$250,000, and purchased and received at the Respondent's facility goods valued in excess of \$50,000 directly from points outside the State of New Mexico.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and a health care institution within the meaning of Section 2(14) of the Act, and that the Union, National Union of Hospital and Health Care Employees District 1199NM, is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *The Certification*

Following the representation election held on June 21 through June 23, 2007, the Union was certified on March 4, 2008, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

In addition, the Respondent also argues as an affirmative defense that the Board's Certification of Representative is not valid and is unenforceable as a matter of law in light of the failure of the General Counsel to issue a complaint in connection with an unfair labor practice charge filed by Respondent on August 16, 2007, against the Union. This defense is without merit and raises no litigable issues. It is well settled that Sec. 3(d) of the Act gives the General Counsel exclusive and final authority over issuance and prosecution of unfair labor practice complaints, independent of Board review and supervision. See, e.g., *Beverly California Corp.*, 326 NLRB 232, 236–237(1998).

⁴ Accordingly, we deny the Respondent's request that the complaint be dismissed in its entirety, and the General Counsel's motion that the Respondent's affirmative defense be stricken.

All full-time and regular part-time professional employees, including registered nurses, registered nurse rotating team leaders, registered nurse case manager, licensed practical nurse case manager, cardiac catheterization laboratory supervisors, medical technologists, nuclear medicine technicians, pharmacists, registered pharmacists, occupational therapists, physical therapists, registered respiratory therapists, speech pathologists, and nonprofessional employees, including all technical employees, skilled maintenance employees, business office employees, and other nonprofessional employees, and per diem employees averaging four or more hours of work per week for the last quarter prior to the eligibility date, employed by the [Respondent] at its hospital located in Las Vegas, New Mexico; excluding all employees employed at clinics, physicians, registered nurse permanent team leaders, house supervisors, human resource assistants, executive assistants, medical staff coordinator, staffing coordinator, confidential employees, 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

By letter dated March 11, 2008, the Union requested that the Respondent recognize and bargain with it as the exclusive collective-bargaining representative of the unit. By letter dated March 12, 2008, the Respondent advised the Union that it was refusing the Union's request to bargain in order to obtain court review of the Board's Decision and Certification of Representative in Case 28-RC-6518. Since March 12, 2008, the Respondent has failed and refused to recognize and bargain with the Union as the exclusive collective-bargaining representative of the unit.

CONCLUSION OF LAW

By failing and refusing since March 12, 2008, to recognize and bargain with the Union as the exclusive collective-bargaining representative of the unit employees, 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 recognize and 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 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); and *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), *enfd.* 350 F.2d 57 (10th Cir. 1965).

ORDER

The National Labor Relations Board orders that the Respondent, San Miguel Hospital Corp. d/b/a Alta Vista Regional Hospital, Las Vegas, New Mexico, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to recognize and bargain with National Union of Hospital and Health Care Employees District 1199NM, as the exclusive collective-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, recognize and 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 full-time and regular part-time professional employees, including registered nurses, registered nurse rotating team leaders, registered nurse case manager, licensed practical nurse case manager, cardiac catheterization laboratory supervisors, medical technologists, nuclear medicine technicians, pharmacists, registered pharmacists, occupational therapists, physical therapists, registered respiratory therapists, speech pathologists, and nonprofessional employees, including all technical employees, skilled maintenance employees, business office employees, and other nonprofessional employees, and per diem employees averaging four or more hours of work per week for the last quarter prior to the eligibility date, employed by the [Respondent] at its hospital located in Las Vegas, New Mexico; excluding all employees employed at clinics, physicians, registered nurse permanent team leaders, house supervisors, human resource assistants, executive assistants, medical staff coordinator, staffing coordinator, confidential employees, guards and supervisors as defined in the Act.

(b) Within 14 days after service by the Region, post at its facility in Las Vegas, New Mexico, copies of the at-

tached notice marked "Appendix."⁵ Copies of the notice, on forms provided by the Regional Director for Region 28, 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 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 March 12, 2008.

(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.

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 Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

⁵ 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."

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to recognize and bargain with National Union of Hospital and Health Care Employees District 1199NM as the exclusive collective-bargaining 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, recognize and bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the following bargaining unit:

All full-time and regular part-time professional employees, including registered nurses, registered nurse rotating team leaders, registered nurse case manager, licensed practical nurse case manager, cardiac catheterization laboratory supervisors, medical technologists, nuclear medicine technicians, pharmacists, registered pharmacists, occupational therapists, physical therapists, registered respiratory therapists, speech pathologists, and nonprofessional employees, including all technical employees, skilled maintenance employees, business office employees, and other nonprofessional employees, and per diem employees averaging four or more hours of work per week for the last quarter prior to the eligibility date, employed by us at our hospital located in Las Vegas, New Mexico; excluding all employees employed at clinics, physicians, registered nurse permanent team leaders, house supervisors, human resource assistants, executive assistants, medical staff coordinator, staffing coordinator, confidential employees, guards and supervisors as defined in the Act.

SAN MIGUEL HOSPITAL CORP. D/B/A ALTA
VISTA REGIONAL HOSPITAL