

Victor Valley Community Hospital and Victor Valley Registered Nurses' Association, United Nurses' Association of California. Case 31-CA-14296

12 March 1985

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS
HUNTER AND DENNIS

Upon a charge filed by the Union 9 July 1984, the General Counsel of the National Labor Relations Board issued a complaint 13 August 1984 against the Respondent, Victor Valley Community Hospital, alleging that it has violated Section 8(a)(5) and (1) of the National Labor Relations Act.

The complaint alleges that on 11 June 1984, following a Board election in Case 31-RC-5630, the Union was certified as the exclusive collective-bargaining representative of the Respondent's employees in the unit found appropriate. (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), amended Sept. 9, 1981, 46 Fed.Reg. 45922 (1981); *Frontier Hotel*, 265 NLRB 343 (1982).) The complaint further alleges that since 26 June 1984 the Respondent has refused to bargain with the Union. On 24 August 1984 the Respondent filed its answer admitting in part and denying in part the allegations in the complaint.

The General Counsel filed a Motion for Summary Judgment and the Charging Party filed a statement in support of the Motion for Summary Judgment. On 5 October 1984 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 Judgment

In its answer to the complaint and in its opposition to the General Counsel's Motion for Summary Judgment, the Respondent admits its refusal to bargain with the Union, but contends that it did not violate the Act because the certified unit is inappropriate for purposes of collective bargaining. It is the Respondent's contention that the Regional Director improperly excluded certain classifications of employees from the all-professional unit.

The Respondent asserts that the Regional Director erred in finding that the licensed vocational nurses, the staff radiological technologists, and the staff respiratory technologists were not professional employees; in finding that the budget director was a managerial employee; and in excluding these em-

ployees from the all-professional unit. The Respondent urges that the case should be reviewed de novo in light of *St. Francis Hospital (St. Francis II)*, 271 NLRB 948 (1984).¹

The record, including the record in Case 31-RC-5630, shows that the Respondent filed a request for review of the Regional Director's decision. On 1 June 1984 the Board denied the Respondent's request for review, finding no substantial issue which warranted review. The Respondent has raised and fully litigated the professional status of the disputed employees and the managerial status of the budget director.

The Respondent has suggested that the "disparity-of-interests" test set out in *St. Francis II* should be applied in this case. The Respondent contends that the Board should find that the disputed hospital employees are professional employees and include them in the stipulated all-professional unit. We find that application of the "disparity-of-interests" test would not have changed the composition of this all-professional unit. The health care amendments did not change the definition of "professional employee" in Section 2(12). Since the disputed hospital employees are not professional employees they are not within the stipulated unit.² We therefore find no basis on which to reconsider the ruling in the representation case.

It is well settled that in the absence of newly discovered and 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 that were or could have been litigated in a prior representation proceeding. See *Pittsburgh Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941); Secs. 102.67(f) and 102.69(c) of the Board's Rules and Regulations.

All 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 pre-

¹ In *St. Francis II*, supra, the Board adopted the "disparity-of-interests" test to prevent the proliferation of bargaining units in the health care industry. Under this test, the Board will accord health care employees separate representation only when "sharper than usual differences (or 'disparities') between the wages, hours, and working conditions, etc., of the requested employees and those in an overall professional or non-professional unit" are established. Id. at 953.

² The Respondent's argument is addressed to the composition of the unit, not to its appropriateness. Of value in this discussion is the language of Sec. 9(b)(1).

The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof. Provided, That the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in the unit.

viously 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 issue that is properly litigable in this unfair labor practice proceeding. Accordingly, we grant the Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, Victor Valley Community Hospital, is a nonprofit California corporation, engaged in the operation of health care facilities located in Hesperia and Victorville, California. During the past 12 months, the Respondent has received gross revenues in excess of \$250,000 and has purchased and received goods and materials valued in excess of \$5000 directly from suppliers located outside the State of California.³ We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

We also find that the Victor Valley Registered Nurses' Association 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 1 June 1984 the Union was certified on 11 June 1984 as the collective-bargaining representative of the employees in the following appropriate unit:

All full-time and regular part-time professional employees employed by the Employer at its facilities in Hesperia and Victorville, California, including registered nurses, IV team nurses, DRG coordinator, rehabilitation registered nurse, accountant, infection control nurse, in-service coordinator, medical technologists, dieticians, pharmacists, and pharmacy assistants, excluding all managerial employees, guards, all other employees, 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*

Since 15 June 1984 the Union has requested the Respondent to bargain, and since 26 June 1984 the

Respondent has refused. We find that this refusal constitutes an unlawful refusal to bargain in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSIONS OF LAW

By refusing on and after 26 June 1984 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 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).

ORDER

The National Labor Relations Board orders that the Respondent, Victor Valley Community Hospital, Victorville, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with Victor Valley Registered Nurses' Association, United Nurses' Association of California, 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 full-time and regular part-time professional employees employed by the Employer at its

³ See *East Oakland Health Alliance*, 218 NLRB 1270 (1975)

facilities in Hesperia and Victorville, California, including registered nurses, IV team nurses, DRG coordinator, rehabilitation registered nurse, accountant, infection control nurse, in-service coordinator, medical technologists, dieticians, pharmacists, and pharmacy assistants; excluding all managerial employees, guards, all other employees, and supervisors as defined in the Act.

(b) Post at its facilities in Victorville and Hesperia, California, copies of the attached notice marked "Appendix."⁴ Copies of the notice, on forms provided by the Regional Director for Region 31, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt 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.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

⁴ 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"

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 Victor Valley Registered Nurses' Association, United Nurses' Association of California, 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 full-time and regular part-time professional employees employed by the Employer at its facilities in Hesperia and Victorville, California, including registered nurses, IV team nurses, DRG coordinator, rehabilitation registered nurse, accountant, infection control nurse, in-service coordinator, medical technologists, dieticians, pharmacists, and pharmacy assistants; excluding all managerial employees, guards, all other employees, and supervisors as defined in the Act.

VICTOR VALLEY COMMUNITY HOSPITAL