

**Fairmont General Hospital, Inc. and Retail, Wholesale and Department Store Union Council, Local 550, United Food and Commercial Workers International Union.** Case 6–CA–35297

October 31, 2006

DECISION AND ORDER

BY MEMBERS LIEBMAN, SCHAUMBER, AND KIRSANOW

This is a refusal-to-bargain case in which the Respondent is contesting the Board's unit determination in the underlying representation proceeding. The Board in that proceeding clarified the bargaining unit to include employees in the newly-created job classifications of occupational medicine assistant I and occupational medicine assistant II (OMAs).

Pursuant to a charge filed on August 28, 2006, the General Counsel issued the complaint on September 8, 2006, 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 Board's clarification of the unit in Case 6–UC–472. (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 asserting affirmative defenses.

On September 27, 2006, the General Counsel filed a Motion for Summary Judgment. On September 29, 2006, 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.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

The Respondent admits its refusal to bargain, but contends that this refusal is not unlawful on the ground that the Board erred in clarifying the unit in the underlying representation proceeding to include the OMAs.

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). Accord-

ingly, we grant the General Counsel's Motion for Summary Judgment.<sup>1</sup>

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a corporation with an office and place of business in Fairmont, West Virginia (the Respondent's facility), has been engaged in the operation of an acute care hospital providing inpatient and outpatient medical care.

During the 12-month period ending July 31, 2006, the Respondent, in conducting its operations described above, derived gross revenues in excess of \$250,000, and purchased and received at its Fairmont, West Virginia facility goods valued in excess of \$50,000 directly from points outside the State of West Virginia.

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 is a health care institution within the meaning of Section 2(14) of the Act.

In addition, we find that Retail, Wholesale and Department Store Union Council, United Food and Commercial Workers International Union, and its Local 550 (the Union) are labor organizations within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *The Union's Representative Status*

At all material times, the Union has been the exclusive collective-bargaining representative of certain employees of the Respondent (the unit) and has been recognized as the representative by the Respondent.<sup>2</sup> Such recognition has been embodied in successive collective-bargaining

<sup>1</sup> In the underlying representation proceeding, the Board denied the Respondent's request for review of the Regional Director's decision clarifying the existing unit of nonprofessional employees to include the positions of occupational medicine assistant I and II.

Member Schaumber dissented from the Board's denial of the Respondent's request for review. He would have granted review and reversed the Regional Director's clarification of the unit. While Member Schaumber remains of that view, he agrees that the Respondent has not presented any new matters that are properly litigable in this unfair labor practice case. See *Pittsburgh Plate Glass Co. v. NLRB*, supra. In light of this, and for institutional reasons, Member Schaumber agrees with the decision to grant the General Counsel's Motion for Summary Judgment.

<sup>2</sup> The parties stipulated in the underlying representation proceeding that the Union was certified as the collective-bargaining representative of a unit of nonprofessional employees in about 1965. The Regional Director noted in his decision clarifying the bargaining unit that the Regional Office records do not reflect such a certification by the Region.

agreements, the most recent of which is effective by its terms from July 1, 2006 through June 30, 2009.<sup>3</sup>

On December 21, 2005, the unit was clarified by the Regional Director in Case 6–UC–472 to include employees in the job classifications of occupational medicine assistant I and occupational medicine assistant II. On June 7, 2006, the Board denied the Respondent’s request for review of the Regional Director’s decision.

The unit, as set forth in the collective-bargaining agreement, and as clarified by the Decision, Order and Clarification of Bargaining Unit in Case 6–UC–472 (the clarified unit), constitutes an appropriate unit for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

At all material times, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the clarified unit.

### *B. Refusal to Bargain*

On or about August 3 and August 14, 2006, the Union, by letters, requested that the Respondent recognize and bargain with it as the exclusive collective-bargaining representative of the clarified unit. Since on or about August 7, 2006, the Respondent, by letter, has failed and refused to recognize and bargain with the Union as the representative of the clarified unit. 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 failing and refusing on or about August 7, 2006 to recognize and bargain with the Union as the exclusive collective-bargaining representative of employees in the job classifications of occupational medicine assistant I and occupational medicine assistant II who were the subject of the Regional Director’s unit clarification decision, 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.

<sup>3</sup> The unit, as set forth in the parties’ collective-bargaining agreement, is:

All the part-time and full-time nonprofessional employees in the following Hospital departments: Nutrition Services, Engineering, Laundry, Guest Services, X-Ray, Clinical Laboratory, Medical Records, Central Supply, and Patient Services. There is excepted from the above departments all clerical and administrative employees, other than ward secretaries, and all clerical employees (except in the Medical Records department); all department heads and their assistants; student employees; and supervisors.

The term “nonprofessional employees” is intended to exclude those whose occupations require a course of study or an extensive technical training course or apprenticeship, such as laboratory technicians, registered or licensed practical nurses, or dieticians.

### 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 as the exclusive bargaining representative of the clarified unit and, if an understanding is reached, to embody the understanding in a signed agreement.

### ORDER

The National Labor Relations Board orders that the Respondent, Fairmont General Hospital, Inc., Fairmont, West Virginia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with Retail, Wholesale and Department Store Union Council, Local 550, United Food and Commercial Workers International Union as the exclusive representative of the employees in the occupational medicine assistant I and occupational medicine assistant II positions as part of the existing bargaining unit of nonprofessional employees.

(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 occupational medicine assistant I and occupational medicine assistant II positions as part of the existing unit of nonprofessional employees on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

(b) Within 14 days after service by the Region, post at its facility in Fairmont, West Virginia, copies of the attached notice marked “Appendix.”<sup>4</sup> Copies of the notice, on forms provided by the Regional Director for Region 6, 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

<sup>4</sup> 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.”

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 August 7, 2006.

(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

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 bargain with Retail, Wholesale and Department Store Union Council, Local 550, United Food and Commercial Workers International Union, as the exclusive representative of the employees in the occupational medicine assistant I and occupational medicine assistant II positions as part of the existing bargaining unit of nonprofessional employees.

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 as the exclusive representative of our employees in the occupational medicine assistant I and occupational medicine assistant II positions as part of the existing unit of nonprofessional employees on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

FAIRMONT GENERAL HOSPITAL, INC.