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Snell Island SNF LLC d/b/a Shore Acres Rehabilitation and Nursing Center, LLC and HGOP, LLC d/b/a Cambridge Quality Care, LLC and United Food and Commercial Workers Union, Local 1625. Case 12–CA–25854

November 9, 2010

DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBERS BECKER
AND HAYES

This is a refusal-to-bargain case in which the Respondents are contesting the Union’s certification as bargaining representative in the underlying representation proceeding. Pursuant to a charge filed on May 16, 2008, the General Counsel issued the complaint on May 28, 2008, alleging that Snell Island SNF, LLC d/b/a Shore Acres Rehabilitation and Nursing Center, LLC (Respondent Shore Acres) and HGOP, LLC d/b/a Cambridge Quality Care, LLC (Respondent HGOP), the Respondents, have 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 12–RC–9281. (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 Respondents filed an answer admitting in part and denying in part the allegations in the complaint, and asserting an affirmative defense.

On June 18, 2008, the General Counsel filed a Motion for Summary Judgment. On June 19, 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 Respondents filed a response.

On July 18, 2008, the two sitting members of the Board issued a Decision and Order in this proceeding, which is reported at 352 NLRB No. 106.¹ Thereafter, the Respondents filed a petition for review in the United States Court of Appeals for the Second Circuit, and the General Counsel filed a cross-application for enforce-

¹ 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 powers of the National Labor Relations Board in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Thereafter, pursuant to this delegation, the two sitting members issued decisions and orders in unfair labor practice and representation cases.

ment. On June 17, 2009, the court enforced the Board’s Decision and Order.²

On June 17, 2010, the United States Supreme Court issued its decision in *New Process Steel, L.P. v. NLRB*, 130 S.Ct. 2635, holding that under Section 3(b) of the Act, in order to exercise the delegated authority of the Board, a delegee group of at least three members must be maintained. On June 28, 2010, the Supreme Court granted the petition for certiorari in the instant proceeding, vacated the underlying judgment, and remanded the case to the court of appeals. Thereafter, the court of appeals remanded this case to the Board for further proceedings consistent with the Supreme Court’s decision.

On August 27, 2010, the Board issued a further Decision, Certification of Representative, and Notice to Show Cause in Cases 12–CA–25854 and 12–RC–9281, which is reported at 355 NLRB No. 143. Thereafter, the Acting General Counsel filed an amended complaint in Case 12–CA–25854, the Respondents filed an amended answer, and the Acting General Counsel filed a brief in support of his motion for summary judgment.

The National Labor Relations Board has consolidated these proceedings and delegated its authority in both proceedings to a three-member panel.

Ruling on Motion for Summary Judgment

The Respondents admit the Union’s request for bargaining and their refusal to bargain, but contest the validity of the Union’s certification. The Respondents allege as an affirmative defense that they are refusing to bargain in order to secure judicial review of the certification issued by the Board in Case 12–RC–9281.³

All representation issues raised by the Respondents were or could have been litigated in the prior representation proceeding. The Respondents do not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor do they allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondents have 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

² *Snell Island SNF v. NLRB*, 568 F.3d 410 (2d Cir. 2009).

³ In their original answer, the Respondents inadvertently referred to the representation proceeding as Case 12–RC–8576. The Board’s original decision notes the correct case number is Case 12–RC–9281, and the Respondents refer to the case number, as corrected, in their amended answer.

⁴ Thus, we deny the Respondents’ motion that the complaint be dismissed in its entirety.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, Respondent Shore Acres, a Florida limited liability company with its principal office and place of business located in St. Petersburg, Florida, has been engaged in the operation of a nursing home providing long-term health care and related services to elderly and disabled adults located at 4500 Indianapolis Street NE, St. Petersburg, Florida.

During the 12-month period preceding the issuance of the complaint, Respondent Shore Acres, in conducting its business operations described above, derived gross revenues in excess of \$100,000, and purchased and received at its St. Petersburg, Florida facility goods valued in excess of \$50,000 directly from points outside the State of Florida.

We find that Respondent Shore Acres 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.

At all material times, Respondent HGOP, a New York limited liability company with its principal office and place of business located in Brooklyn, New York, has been engaged in the business of providing employee staffing services to operators of nursing homes and other health care facilities, including Respondent Shore Acres, located at 4500 Indianapolis Street NE, St. Petersburg, Florida.

During the 12-month period preceding the issuance of the complaint, Respondent HGOP, in conducting its business operations described above, derived gross revenues in excess of \$500,000, and performed services valued in excess of \$50,000 in States other than the State of New York.

We find that Respondent HGOP is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

At all material times, Respondent Shore Acres has possessed control over the labor relations policy of Respondent HGOP and has administered a common labor policy with Respondent HGOP with respect to employees on the payroll of Respondent HGOP who are employed at the St. Petersburg, Florida facility.

At all material times, Respondent Shore Acres and Respondent HGOP have been joint employers of the employees on the payroll of Respondent HGOP who are employed at the St. Petersburg, Florida facility.

We find 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 representation election held on December 12, 2007, the Board certified the Union on August 27, 2010, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All full-time, regular part-time and PRN Certified Nursing Assistants, restorative aides, staffing coordinators, ward clerks, central supply clerks, cooks, dietary aides, housekeeping assistants, laundry aides, maintenance assistants, activity assistants and receptionists employed by the joint Employers at Shore Acres Rehabilitation and Nursing Center facility located at 4500 Indianapolis Street, NE, St. Petersburg, Florida, excluding all other employees, including MDS Coordinator, registered nurses, licensed practical nurses, therapists, managerial employees, guards and supervisors as defined in the Act.

The Union continues to be the exclusive collective-bargaining representative of the unit employees under Section 9(a) of the Act.

B. Refusal to Bargain

On about March 24, 2008, and September 2, 2010, the Union, by letters, requested that the Respondents recognize and bargain with it as the exclusive collective-bargaining representative of the unit. Since about March 24, 2008, and at all times thereafter, the Respondents have failed and refused to recognize and bargain with the Union as the exclusive collective-bargaining representative of the unit. We find that this failure and refusal constitutes an unlawful refusal to recognize and bargain in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By failing and refusing to recognize and bargain with the Union as the exclusive collective-bargaining representative of the unit employees, the Respondents have 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.⁵

⁵ In *Howard Plating Industries*, 230 NLRB 178, 179 (1977), the Board stated:

Although an employer's obligation to bargain is established as of the date of an election in which a majority of unit employees vote for union representation, the Board has never held that a simple refusal to initiate collective-bargaining negotiations pending final Board resolution of timely filed objections to the election is a *per se* violation of Section 8(a)(5) and (1). There must be ad-

REMEDY

Having found that the Respondents have violated Section 8(a)(5) and (1) of the Act, we shall order them 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 Respondents begin 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 Respondents, Snell Island SNF LLC d/b/a Shore Acres Rehabilitation and Nursing Center, LLC and HGOP, LLC d/b/a Cambridge Quality Care, LLC, St. Petersburg, Florida, and Brooklyn, New York, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize and bargain with United Food and Commercial Workers Union, Local 1625, 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:

ditional evidence, drawn from the employer's whole course of conduct, which proves that the refusal was made as part of a bad-faith effort by the employer to avoid its bargaining obligation.

No party has raised this issue, and we find it unnecessary to decide in this case whether the unfair labor practice began on the date of the Respondents' initial refusal to bargain at the request of the Union, or at some point later in time. It is undisputed that the Respondents have continued to refuse to bargain since the Union's certification and we find that continuing refusal to be unlawful. Regardless of the exact date on which the Respondents' admitted refusal to bargain became unlawful, the remedy is the same.

All full-time, regular part-time and PRN Certified Nursing Assistants, restorative aides, staffing coordinators, ward clerks, central supply clerks, cooks, dietary aides, housekeeping assistants, laundry aides, maintenance assistants, activity assistants and receptionists employed by the joint Employers at Shore Acres Rehabilitation and Nursing Center facility located at 4500 Indianapolis Street, NE, St. Petersburg, Florida, excluding all other employees, including MDS Coordinator, registered nurses, licensed practical nurses, therapists, managerial employees, guards and supervisors as defined in the Act.

(b) Within 14 days after service by the Region, post at their facilities in St. Petersburg, Florida, and Brooklyn, New York, copies of the attached notice marked "Appendix."⁶ Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Respondents' authorized representatives, shall be posted by the Respondents and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondents customarily communicate with its employees by such means.⁷ Reasonable steps shall be taken by the Respondents 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 Respondents have gone out of business or closed the facilities involved in these proceedings, the Respondents shall duplicate and mail, at their own expense, a copy of the notice to all current employees and former employees employed by the Respondents at any time since March 24, 2008.

⁶ 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."

⁷ For the reasons stated in his dissenting opinion in *J. Picini Flooring*, 356 NLRB No. 9 (2010), Member Hayes would not require electronic distribution of the notice.

(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 Respondents have taken to comply.

Dated, Washington, D.C. November 9, 2010

Wilma B. Liebman, Chairman

Craig Becker, Member

Brian E. Hayes, 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 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 fail and refuse to recognize and bargain with United Food and Commercial Workers Union, Local 1625, 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, regular part-time and PRN Certified Nursing Assistants, restorative aides, staffing coordinators, ward clerks, central supply clerks, cooks, dietary aides, housekeeping assistants, laundry aides, maintenance assistants, activity assistants and receptionists employed by us at Shore Acres Rehabilitation and Nursing Center facility located at 4500 Indianapolis Street, NE, St. Petersburg, Florida, excluding all other employees, including MDS Coordinator, registered nurses, licensed practical nurses, therapists, managerial employees, guards and supervisors as defined in the Act.

SNELL ISLAND SNF LLC D/B/A SHORE ACRES REHABILITATION AND NURSING CENTER, LLC AND HGOP, LLC D/B/A CAMBRIDGE QUALITY CARE, LLC