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Frenchtown Acquisition Company, Inc. d/b/a Fountain View of Monroe and Council 25, American Federation of State, County and Municipal Employees (AFSCME), AFL-CIO, and its affiliated Local 1548. Cases 7-CA-52888 and 7-CA-53309

March 2, 2011

DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBERS BECKER
AND HAYES

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 denied the Respondent's unit clarification petition, finding that the Respondent's registered nurses, licensed practical nurses, and charge nurses were not statutory supervisors and that therefore, these positions continue to be included in the unit.

Pursuant to charges filed on April 28, 2010, in Case 7-CA-52888 and on November 18, 2010, in Case 7-CA-53309, the Acting General Counsel issued the Order consolidating cases and consolidated complaint in this proceeding on November 19, 2010, alleging that the Respondent has violated Section 8(a)(5) and (1) of the Act by refusing the Union's requests to bargain and to provide information following the Respondent's filing of the unit clarification petition in Case 7-UC-628. (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 consolidated complaint, and asserting affirmative defenses.

On December 7, 2010, the Acting General Counsel filed Motions to Transfer Case to the Board and for Summary Judgment on the Pleadings. On December 13, 2010, 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, and the Acting General Counsel filed a response in opposition to the Respondent's 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 and to furnish information, but contends that this refusal is not unlawful on the ground that the Board erred in denying

the Respondent's unit clarification petition, asserting that the unit, which includes registered nurses, licensed practical nurses, and charge nurses, consists entirely of statutory supervisors not covered by the Act.

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.

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 facility in Monroe, Michigan, has been engaged in the operation of a nursing home.

During calendar year 2009, a representative period, the Respondent, in conducting its operations, derived gross revenues in excess of \$100,000 and purchased and received at its Monroe facility goods and materials valued in excess of \$50,000 directly from points outside the State of Michigan.

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 Council 25, American Federation of State, County and Municipal Employees (AFSCME), AFL-CIO (the Union), and its affiliated Local 1548 (Local 1548),¹ are labor organizations within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *The Certification*

Following a representation election, the Union was certified on April 15, 2003, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All full-time, regular part-time, and contingent registered nurses and licensed practical nurses, including charge nurses, afternoon and midnight supervisors, and house supervisors, employed by Respondent at its

¹ At all times since April 15, 2003, the Union has designated Local 1548 as its servicing representative of the bargaining unit.

Monroe, Michigan facility; but excluding CENAs and all other employees represented by another labor organization, and guards and supervisors as defined by the Act.

On June 8, 2009, the Respondent filed the petition in Case 7–UC–628, seeking a determination that the unit consisted entirely of statutory supervisors.² On April 30, 2010, the Regional Director denied the Respondent’s unit clarification petition. On November 1, 2010, the Board denied the Respondent’s request for review of the Regional Director’s decision.

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

At all material times, Glenn Lowery has held the position of the Respondent’s administrator and has been a supervisor of the Respondent within the meaning of Section 2(11) of the Act and an agent of the Respondent within the meaning of Section 2(13) of the Act.

About December 23, 2009, and January 27, 2010, respectively, the Union, by separate letters, requested the Respondent to furnish information necessary for and relevant to the Union’s performance of its duties as the exclusive collective-bargaining representative of the unit. In addition, about November 15, 2010, the Union, by letter, requested that the Respondent bargain collectively with the Union as the exclusive collective-bargaining representative of the unit. Since about December 23, 2009, and January 27, 2010, respectively, the Respondent has refused the Union’s requests to furnish information, and since about November 16, 2010, the Respondent has specifically refused the Union’s request to bargain. We find that the Respondent’s conduct constitutes an unlawful failure and refusal to bargain in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By failing and refusing since December 23, 2009, to bargain with the Union as the exclusive collective-bargaining representative of the employees in the unit and furnish the Union with requested information, 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.

² The Respondent contends in its answer to the consolidated complaint that its unit clarification petition sought only a determination that its charge nurses were statutory supervisors based on its assertion that the position of “charge nurse” was the only position in the unit when it filed the petition.

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. We also shall order the Respondent to furnish the Union the information it requested.

ORDER³

The National Labor Relations Board orders that the Respondent, Frenchtown Acquisition Company, Inc. d/b/a Fountain View of Monroe, Monroe, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain with Council 25, American Federation of State, County and Municipal Employees (AFSCME), AFL–CIO, and its affiliated Local 1548, as the exclusive collective-bargaining representative of the employees in the bargaining unit.

(b) Failing and refusing to bargain collectively and in good faith with the Union by failing and refusing to furnish the Union with information that is necessary and relevant to the performance of its functions as the collective-bargaining representative of the Respondent’s unit employees.

(c) 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 collective-bargaining 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, regular part-time, and contingent registered nurses and licensed practical nurses, including charge nurses, afternoon and midnight supervisors, and house supervisors, employed by Respondent at its Monroe, Michigan facility; but excluding CENAs and all other employees represented by another labor organization, and guards and supervisors as defined by the Act.

(b) Furnish to the Union in a timely manner the information requested by the Union on about December 23, 2009, and January 27, 2010.

³ Consistent with our recently issued decision in *J. Picini Flooring*, 356 NLRB No. 9 (2010), we have ordered the Respondent to distribute the notice electronically if it is customarily communicating with employees by such means. For the reasons stated in his dissenting opinion in *J. Picini Flooring*, 356 NLRB No. 9, Member Hayes would not require electronic distribution of the notice.

(c) Within 14 days after service by the Region, post at its Monroe, Michigan facility copies of the attached notice marked "Appendix."⁴ Copies of the notice, on forms provided by the Regional Director for Region 7, 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. 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 Respondent customarily communicates with its employees by such means. 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 December 23, 2009.

(d) Within 21 days after service by the Region, file with the Regional Director for Region 7 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. March 2, 2011

 Wilma B. Liebman, Chairman

 Craig Becker, Member

 Brian E. Hayes, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

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 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 bargain with Council 25, American Federation of State, County and Municipal Employees (AFSCME), AFL-CIO, and its affiliated Local 1548, as the exclusive collective-bargaining representative of our employees in the bargaining unit.

WE WILL NOT fail and refuse to bargain collectively and in good faith with the Union by failing and refusing to furnish it with information necessary and relevant to the Union's performance of its functions as the collective-bargaining representative of our unit employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

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 following bargaining unit:

All full-time, regular part-time, and contingent registered nurses and licensed practical nurses, including charge nurses, afternoon and midnight supervisors, and house supervisors, employed by us at our Monroe, Michigan facility; but excluding CENAs and all other employees represented by another labor organization, and guards and supervisors as defined by the Act.

WE WILL furnish to the Union in a timely manner the information requested by the Union on about December 23, 2009, and January 27, 2010.

FRENCHTOWN ACQUISITION COMPANY, INC.
 D/B/A FOUNTAIN VIEW OF MONROE