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San Miguel Hospital Corp. d/b/a Alta Vista Regional Hospital and District 1199NM, National Union of Hospital and Healthcare Employees. Case 28–CA–22280

August 2, 2011

DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBERS BECKER
AND PEARCE

On June 11, 2010, the Board issued a Decision and Order in this proceeding, which is reported at 355 NLRB No. 43. That decision relied, in part, on a Decision and Certification of Representative in Case 28–RC–6518, which was issued by the two sitting members of the Board on March 4, 2008, and the decision of the two sitting members of the Board in *Alta Vista Regional Hospital*, 352 NLRB 809 (2008), order vacated No. 08–1245, 08–1300 (unpublished) (D.C. Cir. 2010).¹

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. The Respondent subsequently filed a petition for review of the Board’s June 11, 2010 Decision and Order in the United States Court of Appeals for the District of Columbia Circuit. Thereafter, the Board issued an order setting aside the above-referenced decision, and retained this case on its docket for further action as appropriate.

On September 30, 2010, the Board issued a further Decision, Certification of Representative, and Notice to Show Cause in Cases 28–RC–6518 and 28–CA–21896, which is reported at 355 NLRB No. 212. On May 31, 2011, the Board issued a Decision and Order, which is reported at 356 NLRB No. 167, finding that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union in order to test the certification. The Board having addressed the impact of the Court’s decision in *New Process Steel* as it relates to Cases 28–RC–6518 and 28–CA–21896, we have resumed processing this case.

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.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.²

The Board has considered the judge’s decision and the record in light of the exceptions and briefs and has decided to affirm the judge’s rulings, findings, and conclusions, to modify the remedy, and to adopt the recommended Order to the extent and for the reasons stated in the decision reported at 355 NLRB No. 43, which is incorporated herein by reference, as modified below.³

In incorporating the above-referenced decision, we make the following modification of the rationale. In affirming the judge’s findings that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally changing its practice concerning Fit Tests, discharging employee Bernice Abeyta pursuant to the unlawful unilateral change, and failing and refusing to provide requested information to the Union, we no longer rely on the March 4, 2008 Decision and Certification of Representative in Case 28–RC–6518 or the Board’s decision reported at 352 NLRB 809. Rather, we rely on the certification issued by the Board on September 30, 2010, and the Board’s May 31, 2011 Decision and Order in Cases 28–RC–6518 and 28–CA–21896, which is reported at 356 NLRB No. 167.

We also rely on the following well-established principles. Sections 8(a)(5) and (d) of the Act obligate an employer to bargain with the representative of its employees in good faith with respect to “wages, hours and other terms and conditions of employment.” *NLRB v. Borg-Warner Corp.*, 356 U.S. 342, 349 (1958); *Fiberboard Corp. v. NLRB*, 379 U.S. 203, 210 (1964). Section 8(a)(5) also obligates an employer to notify and consult with a union concerning changes in terms and conditions of employment before imposing such changes. *NLRB v. Katz*, 369 U.S. 736, 743 (1962). When a majority of the unit employees have selected the union as their representative in a Board-conducted election, the obligation to bargain, at least with respect to changes in terms and

² Consistent with the Board’s general practice in cases remanded from the courts of appeals, and for reasons of administrative economy, the panel includes the remaining members who participated in the June 11, 2010 decision. Furthermore, under the Board’s standard procedures applicable to all cases assigned to a panel, the Board Member not assigned to the panel had the opportunity to participate in the adjudication of this case at any time up to the issuance of this decision.

³ In accordance with our decision in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010), we modify the judge’s recommended remedy by requiring that backpay and other monetary awards shall be paid with interest compounded on a daily basis. In addition, we shall modify the judge’s recommended Order to provide for the posting of the notice in accord with *J. Picini Flooring*, 356 NLRB No. 9 (2010).

In substituting a limited bargaining order for the affirmative bargaining order recommended by the judge, we find it unnecessary to rely on *Tecumseh Packaging Solutions, Inc.*, 352 NLRB 694, 694 fn. 2 (2008).

conditions of employment, commences not on the date of certification, but as of the date of the election. *Mike O' Connor Chevrolet-Buick-GMC Co.*, 209 NLRB 701 (1974), enf. denied on other grounds 512 F.2d 684 (8th Cir. 1975).

The Board has long held that, absent compelling economic considerations for doing so, an employer acts at its peril in making changes in terms and conditions of employment during the period that objections to an election are pending and the final determination has not yet been made. And where the final determination on the objections results in the certification of a representative, the Board has held the employer to have violated Section 8(a)(5) and (1) for having made such unilateral changes. Such changes have the effect of bypassing, undercutting, and undermining the union's status as the statutory representative of the employees in the event a certification is issued. To hold otherwise would allow an employer to box the union in on future bargaining positions by implementing changes of policy and practice during the period when objections or determinative challenges to the election are pending.

Id. at 703 (footnotes omitted).

The Board has also held that an employer assumes the risk if it refuses to provide relevant information requested by a union following a Board election in which a majority of the unit employees select the union as their representative, even though the request is made prior to certification. *Sundstrand Heat Transfer, Inc. (Triangle Division)*, 221 NLRB 544, 545 (1975), enf. in relevant part 538 F.2d 1257, 1259 (7th Cir. 1976). See also 1 American Bar Association, Section of Labor & Employment Law, *The Developing Labor Law* 958 (5th ed. John E. Higgins Jr., 2006) ("An employer acts at its peril if it refuses to provide requested information following a Board election, even though the request is made prior to certification and while objections are pending.").

The Respondent admits that, in October 2008, it changed its practice regarding Fit Tests without providing the Union with notice and an opportunity to bargain and that, on November 14, 2008, it discharged Abeyta pursuant to the change. The record contains no evidence that the change was necessitated by compelling economic considerations. The Respondent further admits that the Union, by letter dated January 12, 2009, requested a list of all unit employees and an updated list of employees who have been separated since the March 4, 2008 certification, and that it failed and refused to pro-

vide the information.⁴ In so doing, the Respondent assumed the risk. Because the final determination in the representation proceeding resulted in the certification of the Union, the Respondent violated Section 8(a)(5) and (1) of the Act.⁵

AMENDED REMEDY

The Respondent, having unlawfully discharged Bernice Abeyta, must offer her reinstatement and make her whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus daily compound interest as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full in 355 NLRB No. 43 and as further modified below, and 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 take the action set forth in the recommended Order as modified.

1. Substitute the following paragraph for paragraph 2(f).

"(f) Within 14 days after service by the Region, post at its Las Vegas, New Mexico facility, copies of the attached notice marked "Appendix".⁶ 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

⁴ The judge found, and we agree, that the requested information is presumptively relevant. Moreover, the requested information appears to be relevant to determine whether employees other than Abeyta were discharged pursuant to the unlawful unilateral change in terms and conditions of employment.

⁵ The Board's decision in *Howard Plating Industries*, 230 NLRB 178 (1977), does not suggest a contrary result. In *Howard Plating*, the Board observed that, 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 found unlawful a refusal to initiate collective bargaining pending final Board resolution of timely filed objections absent additional evidence that the employer sought to avoid its bargaining obligation. Id. at 179. The unfair labor practices found in this case involve unilateral changes in terms and conditions of employment, not a simple refusal to initiate plenary bargaining. Accordingly, *Howard Plating* is inapposite.

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."

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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 October 1, 2008.”

Dated, Washington, D.C. August 2, 2011.

Wilma B. Liebman, Chairman

Craig Becker, Member

Mark Gaston Pearce, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD