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Ashland Facility Operations, LLC, d/b/a Ashland Nursing & Rehabilitation Center and United Food and Commercial Workers International Union, Local 400. Case 5–CA–60739

September 16, 2011

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS BECKER
AND HAYES

This is a refusal-to-bargain case in which the Respondent is contesting the Union’s certification as bargaining representative in the underlying representation proceeding. Pursuant to a charge filed by the Union on June 30, 2011,¹ the Acting General Counsel issued the complaint on July 14, 2011, alleging that the Respondent has violated Section 8(a)(5) and (1) of the Act by refusing the Union’s request to recognize and bargain following the Union’s certification in Case 5–RC–16580. (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 August 4, 2011, the Acting General Counsel filed a Motion for Summary Judgment. On August 8, 2011, 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

The Respondent admits its refusal to bargain, but contests the validity of the certification on the basis of its objections to conduct alleged to have affected the results of the election in the representation proceeding.

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

¹ The Respondent’s answer denies the allegation in the complaint regarding the date of the filing of the charge, asserting that it is without knowledge regarding this date. A copy of the charge is attached as an exhibit to the Acting General Counsel’s motion showing the date as alleged, and the Respondent does not challenge the authenticity of this document.

therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding.² See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941).

Accordingly, we grant the Motion for Summary Judgment.³

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a Virginia corporation with an office and place of business in Ashland, Virginia, has been engaged in the business of providing rehabilitative and skilled nursing services.

During the 12-month period preceding issuance of the complaint, a representative period, the Respondent, in conducting its business operations described above, derived gross revenues in excess of \$100,000 and purchased and received at its Ashland, Virginia facility goods, supplies, and materials valued in excess of \$5000 directly from points located outside the Commonwealth of Virginia.⁴

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 has been a health care institution within the meaning of Section 2(14) of the Act, and that the Union, United Food and Commercial Workers International Union, Local 400, 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 November 3, 2010, the Union was certified on May 31, 2011, as

² Member Becker did not participate in the underlying representation proceeding. He agrees, however, that the Respondent has not raised any new matters or special circumstances warranting a hearing in this proceeding or reconsideration of the decision in the representation proceeding, and that summary judgment is therefore appropriate.

³ The Respondent’s request that the complaint be dismissed with prejudice and that it be awarded litigation costs and attorney’s fees is therefore denied.

⁴ The Respondent’s answer to the complaint denies knowledge or information to form a belief concerning the allegations in par. 2(c) of the complaint regarding goods purchased and received at its Ashland, Virginia facility. However, the Respondent admitted these facts in the Stipulated Election Agreement, which is included in the documents attached to the Acting General Counsel’s motion. The Respondent has not challenged the authenticity of this document. Accordingly, we find that the Respondent’s denial of the factual basis for asserting jurisdiction under the Act does not raise any factual issues warranting a hearing.

the exclusive collective-bargaining representative of the employees in the following appropriate unit:⁵

All regular full-time and part-time CNAs, restorative aides, activity aides, and maintenance employees; excluding all RNs, PRNs, dietary employees, office clerical employees, confidential employees, and 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*

At all material times, the following individuals have held the positions set forth opposite their respective names and have been supervisors of the Respondent within the meaning of Section 2(11) of the Act and agents of the Respondent within the meaning of Section 2(13) of the Act.

Gregory Ashley - Executive Director

Debra Mason - Vice-President of Human Resources

On about June 6, 2011, the Union requested that the Respondent bargain with it as the exclusive collective-bargaining representative of the unit. Since about June 24, 2011, the Respondent has failed and refused to recognize and bargain with the Union as the exclusive collective-bargaining representative of the employees.⁶ We find that this failure and refusal constitutes an unlawful failure and refusal to recognize and bargain with the Union in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By failing and refusing since about June 24, 2011, to recognize and bargain with the Union as the exclusive

⁵ The Respondent's answer denies par. 5(a) of the complaint, which sets forth the appropriate unit. However, the Respondent stipulated that the unit was appropriate in the underlying representation proceeding.

In its answer, the Respondent also denies the allegations in complaint pars. 5(c), (8), and (9), which allege, respectively, that the Union was certified as the exclusive collective-bargaining representative of the unit, that the Respondent's failure and refusal to bargain violates Sec. 8(a)(5) and (1) of the Act, and that its unfair labor practices affect commerce within the meaning of Sec. 2(6) and (7) of the Act. The Acting General Counsel has attached to his motion copies of the tally of ballots dated November 3, 2010, and the Board's Decision and Certification of Representative dated May 31, 2011. The Respondent does not contest the authenticity of these documents.

Accordingly, the Respondent's denials with respect to these allegations do not raise any litigable issues in this proceeding.

⁶ The complaint states that the Respondent refused to bargain on or about June 27, 2011. However, in its answer, the Respondent admits that by letter dated June 24, 2011, it has refused to recognize and bargain with the Union. In his motion for summary judgment, the Acting General Counsel acknowledges that June 24, 2011, is the correct date.

collective-bargaining representative of the 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), enf. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964); *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), enf. 350 F.2d 57 (10th Cir. 1965).

ORDER

The National Labor Relations Board orders that the Respondent, Ashland Facility Operations, LLC, d/b/a Ashland Nursing & Rehabilitation Center, Ashland, Virginia, its 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 International Union, Local 400, 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, 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 regular full-time and part-time CNAs, restorative aides, activity aides, and maintenance employees; excluding all RNs, PRNs, dietary employees, office clerical employees, confidential employees, and guards and supervisors as defined in the Act.

(b) Within 14 days after service by the Region, post at its facility in Ashland, Virginia, copies of the attached

notice marked "Appendix."⁷ Copies of the notice, on forms provided by the Regional Director for Region 5, 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.⁸ 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 June 24, 2011.

(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.

Dated, Washington, D.C. September 16, 2011

Mark Gaston Pearce, Chairman

Craig Becker, Member

Brian E. Hayes, Member

⁷ 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."

⁸ 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.

(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 International Union, Local 400 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 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 regular full-time and part-time CNAs, restorative aides, activity aides, and maintenance employees; excluding all RNs, PRNs, dietary employees, office clerical employees, confidential employees, and guards and supervisors as defined in the Act.

ASHLAND FACILITY OPERATIONS, LLC D/B/A
ASHLAND NURSING & REHABILITATION
CENTER