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**Sub-Acute Rehabilitation Center at Kearny, LLC
d/b/a Belgrove Post Acute Care Center and Dis-
trict 1199J NUHHCE, AFSCME, AFL-CIO.
Case 22-CA-093626**

March 13, 2013

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS GRIFFIN
AND BLOCK

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 November 23, 2012, the Acting General Counsel issued the complaint on December 4, 2012, 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 22-RC-080916. (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 December 21, 2012, the Acting General Counsel filed a Motion for Summary Judgment. On December 26, 2012, 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 contention in the underlying representation proceeding that the licensed practical nurses in the unit are supervisors and the bargaining unit is therefore inappropriate.¹

¹ The Respondent contends that the complaint should be dismissed or a hearing held because the initial charge was not properly served upon the Respondent. We find no merit to this contention. First, it is uncontested that the Region served the charge on the Respondent's attorney of record in the underlying representation proceeding. This same attorney entered a notice of appearance on behalf of the Respondent 4 days after being served with the charge, and filed a timely answer to the complaint and a response to the Notice to Show Cause. The affidavit of service of the charge is included in the documents supporting the Acting General Counsel's motion, showing the date as alleged, and the Respondent has not challenged the authenticity of these docu-

ments. Accordingly, we find that the Respondent had notice of the filing of the charge. See *Pasco Packing Co.*, 115 NLRB 437, 438 (1956) (adequate notice given to respondent by service of documents on attorney of record in representation proceeding, from which the unfair labor practice proceeding emanated). Second, it is also uncontested that the Region served the charge on the Respondent by facsimile. The Board has held that technical defects in the form of service will not necessarily invalidate the service. See *Control Services*, 303 NLRB 481, 481 (1991) ("when charges have in fact been received, technical defects in the form of service do not affect the validity of the service"), *enfd. mem.* 961 F.2d 1568 (3d Cir. 1992). Third, the complaint was properly served on the Respondent (and its attorney of record) within the 10(b) period. Thus, even assuming the charge was not properly served on the Respondent in a timely manner, such a failure "will be cured by timely service within the 10(b) period of a complaint on the respondent, absent a showing that the respondent is prejudiced by [the] circumstances." *Buckeye Plastic Molding*, 299 NLRB 1053, 1053 (1990). Here, there has been no assertion, much less a showing, of prejudice to the Respondent in this proceeding.

The Respondent also contends that the Board lacks a quorum because the President's recess appointments are constitutionally invalid. We reject this argument. We recognize that the United States Court of Appeals for the District of Columbia Circuit has concluded that the President's recess appointments were not valid. See *Noel Canning v. NLRB*, ___ F.3d ___ (D.C. Cir. 2013). However, as the court itself acknowledged, its decision conflicts with rulings of at least three other courts of appeals. See *Evans v. Stephens*, 387 F.3d 1220 (11th Cir. 2004), *cert. denied* 544 U.S. 942 (2005); *U.S. v. Woodley*, 751 F.2d 1008 (9th Cir. 1985); *U.S. v. Allocco*, 305 F.2d 704 (2d Cir. 1962). This question remains in litigation, and pending a definitive resolution, the Board is charged to fulfill its responsibilities under the Act.

The Respondent's final argument is that the complaint should be dismissed because the Acting General Counsel could not properly be appointed under the Federal Vacancies Reform Act (Vacancies Act) and therefore lacked authority to issue the complaint in this case. In support of this argument, the Respondent asserts, without citation of any authority, that the Vacancies Act does not apply to the office of General Counsel because there is a specific procedure under the National Labor Relations Act for filling the vacancy. Contrary to the Respondent's assertion, the express terms of the Vacancies Act make it applicable to all executive agencies, with one specific exception inapplicable here, 5 U.S.C. § 3345(a); see 5 U.S.C. § 105 ("Executive agency" defined to include independent agencies), and to all offices within those agencies, such as the office of General Counsel, that are filled by presidential appointment with Senate confirmation, 5 U.S.C. § 3345(a). The Respondent's assertion is also contrary to section 3347 of the Vacancies Act, which makes the Vacancies Act the exclusive means for designating an acting official for a covered position except when another statutory provision, such as Sec. 3(d) of the NLRA, provides for such designation. In that event, as the Respondent acknowledges, the Vacancies Act provides a valid "alternative procedure." S. Rep. No. 105-250, at 17 (1998). The President may elect either the Vacancies Act or Sec. 3(d) as the means to temporarily fill the vacancy. Therefore, the Acting General Counsel was properly appointed under the Vacancies Act. See *Muffley v. Massey Energy Co.*, 547 F. Supp. 2d 536, 542-543 (S.D.W. Va. 2008), *affd.* 570 F.3d 534 (4th Cir. 2009) (upholding authorization of 10(j) injunction proceeding by Acting General Counsel designated pursuant to the Vacancies Act).

Finally, even if the appointment had not been proper under the Vacancies Act, that defect would not constitute grounds for attacking the complaint. It is the enforcement provision of the Vacancies Act, 5 U.S.C. § 3348, that deems an office "vacant" and actions taken by its occupant of "no force or effect" if it was temporarily filled in a manner inconsistent with the Vacancies Act. This provision, by its terms, is

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.²

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a New Jersey limited liability company with an office and place of business in Kearny, New Jersey, has been engaged in the operation of a 120-bed long-term care and sub-acute nursing facility.

During the 12-month period preceding issuance of the complaint, the Respondent has derived gross revenues in excess of \$100,000, and purchased and received at its Kearny, New Jersey facility goods and supplies valued in excess of \$50,000 directly from suppliers located outside the State of New Jersey.

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 that the Union, District 1199J NUHHCE, AFSCME, AFL-CIO, 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 July 26, 2012, the Union was certified on September 19, 2012, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All full-time, regular part-time, and per-diem Licensed Practical Nurses employed by the Employer at its Kearny, New Jersey facility, excluding all other employees, guards and supervisors as defined by the Act.

expressly and specifically inapplicable to the office of the Board's General Counsel. 5 U.S.C. § 3348(e)(1). Thus, regardless whether the Acting General Counsel was properly appointed under the Vacancies Act, the complaint is not subject to attack based on the circumstances of his appointment.

² Therefore, the Respondent's request to dismiss the complaint is denied.

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*

About October 22, 2012, verbally, and by letter dated November 16, 2012, the Union requested that the Respondent recognize and bargain with it as the exclusive collective-bargaining representative of the unit. Since about October 22, 2012, the Respondent has failed and refused to recognize and bargain with the Union. 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 October 22, 2012, to recognize and bargain with the Union as the exclusive 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); accord *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), *enfd.* 350 F.2d 57 (10th Cir. 1965); *Lamar Hotel*, 140 NLRB 226, 229 (1962), *enfd.* 328 F.2d 600 (5th Cir. 1964), *cert. denied* 379 U.S. 817 (1964).

ORDER

The National Labor Relations Board orders that the Respondent, Sub-Acute Rehabilitation Center at Kearny, LLC d/b/a Belgrove Post Acute Care Center, Kearny, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize and bargain with District 1199J NUHHCE, AFSCME, AFL-CIO, 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 concerning 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 per-diem Licensed Practical Nurses employed by the Employer at its Kearny, New Jersey facility, excluding all other employees, guards and supervisors as defined by the Act.

(b) Within 14 days after service by the Region, post at its Kearny, New Jersey facility copies of the attached notice marked "Appendix."³ Copies of the notice, on forms provided by the Regional Director for Region 22, 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 October 22, 2012.

(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. March 13, 2013

Mark Gaston Pearce, Chairman

Richard F. Griffin, Jr., Member

Sharon Block, 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 District 1199J NUHHCE, AFSCME, AFL-CIO 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 full-time, regular part-time, and per-diem Licensed Practical Nurses employed by us at our Kearny, New Jersey facility, excluding all other employees, guards and supervisors as defined by the Act.

SUB-ACUTE REHABILITATION CENTER AT
 KEARNY, LLC D/B/A BELGROVE POST ACUTE
 CARE CENTER

³ 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."