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SSC Mystic Operating Company, LLC d/b/a Pendleton Health & Rehabilitation Center and New England Health Care Employees Union, District 1199, SEIU. Case 01–CA–120161

March 31, 2014

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS HIROZAWA
AND JOHNSON

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 and an amended charge filed on January 6 and 14, 2014, respectively, by New England Health Care Employees Union, District 1199, SEIU (the Union), the General Counsel issued the complaint on January 17, 2014, alleging that the Respondent has violated Section 8(a)(5) and (1) of the Act by refusing the Union’s requests to recognize and bargain following the Union’s certification in Case 01–RC–098982. (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.

On February 6, 2014, the General Counsel filed a Motion for Summary Judgment and a Memorandum in Support of Motion for Summary Judgment. On February 7, 2014, 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.

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, but contests the validity of the certification on the basis of its objections to the election in the underlying representation proceeding, including its assertion that the Board lacked a quorum on April 4, 2013, when the Regional Director conducted the representation election. The Respondent further asserts that this matter should be held in abeyance until the United States Supreme Court issues its decision

in *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir.), cert. granted 133 S.Ct. 2861 (2013).¹

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.² 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

¹ The Respondent’s arguments are without merit. As an initial matter, this case does not raise a quorum issue because the current Board, which includes five Board Members who were confirmed by the United States Senate, certified the Union. Further, even if the Board lacked a quorum at the time the Regional Director conducted the election, that circumstance would not impair the Regional Director’s authority to process the instant petition. The Board has delegated decisional authority in representation cases to Regional Directors, 26 Fed.Reg. 3911 (1961), pursuant to the 1959 amendment of Sec. 3(b) of the National Labor Relations Act expressly authorizing the delegation, Pub. L. 86-257, 86th Cong., 1st Sess., § 701(b), 73 Stat. 519, 542; see *Magnesium Casting Co. v. NLRB*, 401 U.S. 137, 142 (1971) (by Sec. 3(d) Congress allowed the Board to make a delegation of its authority over representation elections to the regional director). Pursuant to this delegation, NLRB Regional Directors remain vested with the authority to conduct elections and certify their results, regardless of the Board’s composition at any given moment.

Further, in *New Process Steel v. NLRB*, 560 U.S. 674 (2010), the Supreme Court expressed doubt about a contention that the lack of a Board quorum voids the previous delegations of authority to nonmembers, such as Regional Directors. Although the Supreme Court did not expressly rule on the question, it noted that its “conclusion that the delegee group ceases to exist once there are no longer three Board members to constitute the group does not cast doubt on the prior delegations of authority to nongroup members, such as the regional directors or the general counsel.” 560 U.S. at 684 fn. 4. Further, since *New Process*, all of the courts of appeals that have considered this issue have upheld the principle that Board delegations of authority to nonmembers remain valid during a loss of quorum by the Board. See *Kreisberg v. Healthbridge Management, LLC*, 732 F.3d 131 (2d Cir. 2013); *Frankl v. HTH Corp.*, 650 F.3d 1334, 1354 (9th Cir. 2011), cert. denied 132 S.Ct. 1821 (2012); *Osthus v. Whitesell Corp.*, 639 F.3d 841, 844 (8th Cir. 2011); *Overstreet v. El Paso Disposal, LP*, 625 F.3d 844, 853 (5th Cir. 2010).

² The Respondent alleges as a special circumstance that its arguments are supported by the reasoning in *Hooks v. Kitsap Tenant Support Services*, 2013 WL 4094344 (W.D. Wash., August 13, 2013), a case that issued after the Respondent had filed exceptions to the hearing officer’s report, and which it argues that no Board decision has fully analyzed. We find that the issuance of *Hooks v. Kitsap* does not constitute a special circumstance warranting reexamination of the representation proceeding, and we observe that the Board has previously rejected the court’s reasoning in *Hooks v. Kitsap* and has found that the Acting General Counsel was validly selected. See *Avenue Care & Rehabilitation Center*, 360 NLRB No. 24, slip op. at 2 (2014).

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent has been a corporation with an office and place of business located at 44 Maritime Drive, Mystic, Connecticut, and has been engaged in the operation of a nursing home (the Mystic facility).

Annually, the Respondent, in conducting its operations described above, derives gross revenues in excess of \$100,000 and purchases and receives at its Mystic facility goods valued in excess of \$5000 directly from points located outside the State of Connecticut.

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 a health care institution within the meaning of Section 2(14) of the Act, and that the Union, New England Health Care Employees Union, District 1199, SEIU, 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 April 4, 2013, the Union was certified on December 3, 2013, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All full-time and regular part-time employees working in the following classifications at Respondent's Mystic, CT facility: Licensed Practical Nurse, Resident Care Specialist, Resident Care Advisor, Food Service Aide, Cook, Maintenance Technician, Rehab Aid, Activities Assistant, Central Supply Coordinator, Unit Assistant and Health Information/Medical Records Clerk; but excluding all other employees, Housekeeping and Laundry employees, Occupational Therapist, Occupational Therapy Assistant, Speech Therapist, Registered Nurses, Physical Therapist, Physical Therapist Assistant, Unit Coordinators, Registered Dietitians, Social Workers, MDS Coordinators, Business Office employees, Admissions employees, Scheduler, Receptionists, Department Managers, and other professional 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*

By letters dated December 10 and 17, 2013, the Union requested that the Respondent bargain collectively with it as the exclusive collective-bargaining representative of the unit, and, since about December 10, 2013, the Re-

spondent has 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 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 December 10, 2013, 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), enf. 350 F.2d 57 (10th Cir. 1965); *Lamar Hotel*, 140 NLRB 226, 229 (1962), enf. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964).

ORDER

The National Labor Relations Board orders that the Respondent, SSC Mystic Operating Company, LLC d/b/a Pendleton Health & Rehabilitation Center, Mystic, Connecticut, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize and bargain with New England Health Care Employees Union, District 1199, SEIU, 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 full-time and regular part-time employees working in the following classifications at Respondent’s Mystic, CT facility: Licensed Practical Nurse, Resident Care Specialist, Resident Care Advisor, Food Service Aide, Cook, Maintenance Technician, Rehab Aid, Activities Assistant, Central Supply Coordinator, Unit Assistant and Health Information/Medical Records Clerk; but excluding all other employees, Housekeeping and Laundry employees, Occupational Therapist, Occupational Therapy Assistant, Speech Therapist, Registered Nurses, Physical Therapist, Physical Therapist Assistant, Unit Coordinators, Registered Dieticians, Social Workers, MDS Coordinators, Business Office employees, Admissions employees, Scheduler, Receptionists, Department Managers, and other professional employees, guards, and supervisors as defined in the Act.

(b) Within 14 days after service by the Region, post at its facility in Mystic, Connecticut, copies of the attached notice marked “Appendix.”³ Copies of the notice, on forms provided by the Regional Director for Region 1, 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 10, 2013.

(c) Within 21 days after service by the Region, file with the Regional Director for Region 1 a sworn certifi-

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.”

cation 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 31, 2014

Mark Gaston Pearce, Chairman

Kent Y. Hirozawa, Member

Harry I. Johnson, III, 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 New England Health Care Employees Union, District 1199, SEIU, 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 and regular part-time employees working in the following classifications at Respondent’s Mystic, CT facility: Licensed Practical Nurse, Resident Care Specialist, Resident Care Advisor, Food Service Aide,

Cook, Maintenance Technician, Rehab Aid, Activities Assistant, Central Supply Coordinator, Unit Assistant and Health Information/Medical Records Clerk; but excluding all other employees, Housekeeping and Laundry employees, Occupational Therapist, Occupational Therapy Assistant, Speech Therapist, Registered Nurses, Physical Therapist, Physical Therapist Assistant, Unit Coordinators, Registered Dieticians, Social

Workers, MDS Coordinators, Business Office employees, Admissions employees, Scheduler, Receptionists, Department Managers, and other professional employees, guards, and supervisors as defined in the Act.

SSC MYSTIC OPERATING COMPANY, LLC D/B/A
PENDLETON HEALTH & REHABILITATION
CENTER