

**San Miguel Hospital Corp. d/b/a Alta Vista Regional Hospital and National Union of Hospital and Healthcare Employees District 1199NM.** Case 28–CA–21896

May 31, 2011

DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBERS PEARCE  
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 on April 29, 2008, in Case 28–CA–21896, the General Counsel issued the complaint on May 15, 2008, alleging that the Respondent has violated Section 8(a)(5) and (1) of the Act by refusing the Union’s request to bargain following the Union’s certification in Case 28–RC–6518. (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 alleging an affirmative defense.<sup>1</sup>

On June 3, 2008, the General Counsel filed motions to transfer and continue matter before the Board, to strike, and for summary judgment. On June 9, 2008, 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.

On June 30, 2008, the two sitting members of the Board issued a Decision and Order in this proceeding, which is reported at 352 NLRB 809.<sup>2</sup> Thereafter, the Respondent filed a petition for review in the United States Court of Appeals for the District of Columbia Circuit, and the General Counsel filed a cross-application for enforcement.

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

<sup>1</sup> The Respondent’s answer denies knowledge or information sufficient to form a belief concerning the filing and service of the charge. Copies of the charge and affidavit of service of the charge are included in the documents supporting the General Counsel’s motion, showing the dates as alleged, and the Respondent has not challenged the authenticity of these documents.

<sup>2</sup> 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.

Act, in order to exercise the delegated authority of the Board, a delegatee group of at least three members must be maintained. Thereafter, the court of appeals remanded this case for further proceedings consistent with the Supreme Court’s decision.

On September 30, 2010, the Board issued a further Decision, Certification of Representative, and Notice to Show Cause in Cases 28–CA–21896 and 28–RC–6518, which is reported at 355 NLRB 1295. Thereafter, on November 15, 2010, the Respondent filed a response to the Notice to Show Cause. The Acting General Counsel filed an opposition to the Respondent’s response to the Notice to Show Cause on December 1, 2010, and—on December 7, 2010—the Respondent filed a motion to strike, alternatively, reply to Acting General Counsel’s opposition to Respondent/Employer’s response to Notice to Show Cause.

On December 10, 2010, the Union renewed its request to the Respondent for bargaining. The Respondent has not responded to the Union’s request for bargaining.

On December 14, 2010, the Acting General Counsel filed a motion requesting special permission to amend complaint to reflect the Board’s recent certification and Charging Party’s renewed request for bargaining pursuant to the new certification, and the Respondent filed an opposition to the Acting General Counsel’s motion. By Order dated February 7, 2011, and a revised order dated February 11, 2011, the Board granted the Acting General Counsel’s motion and set a schedule for the filing of the amended complaint on or before February 14, 2011, an answer to the amended complaint on or before February 28, 2011, and any further response to the Notice to Show Cause on or before March 7, 2011. Based on these events, the Board also denied the Respondent’s December 7, 2010 motion to strike as moot.

On February 14, 2011, the Acting General Counsel filed an Amended Complaint and Notice of Hearing, alleging that the Respondent has violated Section 8(a)(5) and (1) of the Act, including new allegations regarding the Union’s December 10, 2010 request for the Respondent to bargain. The Respondent filed an answer to the amended complaint, admitting in part and denying in part the allegations of the amended complaint, and alleging affirmative defenses.

On March 4, 2011, the Acting General Counsel filed a Motion to Supplement Motion for Summary Judgment and Record. On March 9, 2011, the Respondent filed its opposition to the Acting General Counsel’s motion and a

cross-motion for summary judgment, and on March 15, 2011, the Acting General Counsel filed a response.<sup>3</sup>

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,<sup>4</sup> but contests the validity of the Union's certification on the basis of its objections to the election in the representation proceeding, and based on certain arguments raised for the first time in this proceeding.

In its response to the September 30, 2010 Notice to Show Cause, the Respondent argues, inter alia, that the Board violated the Respondent's due process rights by expeditiously deciding the case on remand from the court of appeals, that the Acting General Counsel's failure to file an amended complaint as allowed by the Board constitutes either an admission that Respondent has not unlawfully refused to bargain with the Union or a deliberate failure to prosecute warranting dismissal of the complaint, and that the Board's 2010 certification was premature due to certain RM petitions filed on September 27, 2010.<sup>5</sup> We reject these arguments.

The Respondent argues that the Board violated its due process rights by failing to adequately review the record, the exceptions and the briefs before issuing its decision. The Respondent relies heavily on the length of time between the issuance of the court of appeals mandate on September 24, 2010, and the Board's decision on September 30, 2010. However, the Respondent ignores the

<sup>3</sup> It is not clear why the Acting General Counsel found it necessary to file a motion in this respect, since the document was filed within the time period allowed for any further response to the Notice to Show Cause. Nevertheless, since it is styled as a motion, and the Respondent's opposition and the Acting General Counsel response would otherwise be untimely, we grant the Acting General Counsel's motion and accept the responsive pleadings.

<sup>4</sup> In its answer to the amended complaint, the Respondent admits par. 6(d) and (e) of the amended complaint, which sets forth the Respondent's failure to bargain with the Union. The Respondent's original answer and its answer to the amended complaint deny par. 5(a) of the complaint and amended complaint, which sets forth the appropriate unit. The Respondent also denies the appropriateness of the unit and its refusal to bargain in its original and amended responses. The unit issue, however, was litigated and resolved in the underlying representation proceeding. Accordingly, the Respondent's denial of the appropriateness of the unit does not raise any litigable issue in this proceeding.

<sup>5</sup> Citing *Jefferson Chemical*, 200 NLRB 992 (1972), the Respondent also argues that the complaint should be dismissed because the General Counsel exposed it to "administrative prosecutorial double jeopardy" by litigating the original complaint at a time when there were only two sitting members of the Board. We reject this argument. Not only did the Respondent fail to raise this argument in its response to the original Notice to Show Cause, *Jefferson Chemical*, which involved piecemeal litigation of multiple related unfair labor practices, has no application to the facts of this case.

fact that, on July 9, 2010, the Board filed a motion for remand with the court of appeals, and that on July 23, 2010, the Board advised the parties in this proceeding that it had requested the court of appeals to remand this case in light of *New Process Steel*, and that the Board would consider the case and take action as appropriate. Thereafter, on September 20, 2010, the court of appeals vacated the earlier Board decision and remanded this case to the Board for further proceedings. Thus, the Board was aware that it would need to revisit this case long before the issuance of the mandate on September 24, 2010, and it was prepared to act promptly thereafter.<sup>6</sup> See, *Bally's Atlantic City*, 356 NLRB 1150, 1151 (2011).

The Respondent also argues that the Acting General Counsel's initial failure to file an amended complaint constitutes either an admission that Respondent has not unlawfully refused to bargain with the Union or a deliberate failure to prosecute warranting dismissal of the complaint. Whatever arguments might be made about the wisdom of the Acting General Counsel's initial decision to rest on the original pleadings, the fact is that subsequent events prompted the Acting General Counsel to seek and obtain leave to file an amended complaint to incorporate those events, and the Respondent has filed an answer to the amended complaint. Thus, this question is moot. Moreover, it is well settled that Section 3(d) of the Act gives the General Counsel exclusive and final authority over issuance and prosecution of unfair labor practice complaints, and the Respondent has not shown that it was prejudiced by the procedures followed in this case. See e.g., *Beverly California Corp.*, 326 NLRB 232, 236-237 (1998), enfd. in part, vacated in part 227 F.3d 817 (7th Cir. 2000), cert. denied 533 U.S. 950 (2001).

Finally, the Respondent argues that the Board's 2010 certification was premature due to certain RM petitions filed on September 27, 2010. It is well settled that an alleged postelection loss of majority support is not rele-

<sup>6</sup> The Respondent also argues that the Board's prompt disposition of this case "effectively precluded" the Respondent from filing a motion to reopen the record and/or a motion for reconsideration pursuant to Sec. 102.48(d) of the Board's Rules and Regulations. This is not accurate. Sec. 102.48(d)(2) provides:

Any motion pursuant to this section shall be filed within 28 days, or such further period as the Board may allow, after the service of the Board's decision or order, except that a motion for leave to adduce additional evidence shall be filed promptly on discovery of such evidence.

Thus, the Respondent has had ample time within which to file a motion to reopen the record or a motion for reconsideration, yet it has failed to do so. Under these circumstances, the Respondent's argument is not only rejected, the Respondent is precluded from raising arguments in this proceeding that it could but did not raise in the prior representation proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941).

vant to the question of whether a union should be certified as the result of a properly conducted Board election. See *Brooks v. NLRB*, 348 U.S. 96, 104 (1954); *Kane Co.*, 145 NLRB 1068, 1070 (1964), *enfd.* 352 F.2d 511 (6th Cir. 1965); *Sunbeam Corp.*, 89 NLRB 469, 473 (1950), *Teesdale Mfg. Co.*, 71 NLRB 932, 935 (1946). In any event, the Respondent is procedurally barred from raising this issue here, since it had the opportunity to raise this argument, but did not, in the underlying representation proceeding, either directly or through a motion for reconsideration or a motion to reopen the record.

All other 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.<sup>7</sup>

On the entire record, the Board makes the following

#### FINDINGS OF FACT

##### I. JURISDICTION

At all material times the Respondent, a New Mexico corporation, with an office and place of business in Las Vegas, New Mexico (the Respondent's facility), has been engaged in the operation of an acute care hospital.

During the 12-month period ending April 29, 2008, the Respondent, in conducting its business operations described above, derived gross revenues in excess of \$250,000, and purchased and received at the Respondent's facility goods valued in excess of \$50,000 directly from points outside the State of New Mexico.

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, National Union of Hospital and Health Care Employees District 1199NM, is a labor organization within the meaning of Section 2(5) of the Act.

<sup>7</sup> Accordingly, we deny the Respondent's cross-motion for summary judgment, and the General Counsel's motion that the Respondent's affirmative defense be stricken.

## II. ALLEGED UNFAIR LABOR PRACTICES

### A. The Certification

Following the representation election held on June 21 through June 23, 2007, the Union was certified on September 30, 2010, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All full-time and regular part-time professional employees, including registered nurses, registered nurse rotating team leaders, registered nurse case manager, licensed practical nurse case manager, cardiac catheterization laboratory supervisors, medical technologists, nuclear medicine technicians, pharmacists, registered pharmacists, occupational therapists, physical therapists, registered respiratory therapists, speech pathologists, and nonprofessional employees, including all technical employees, skilled maintenance employees, business office employees, and other nonprofessional employees, and per diem employees averaging four or more hours of work per week for the last quarter prior to the eligibility date, employed by the [Respondent] at its hospital located in Las Vegas, New Mexico; excluding all employees employed at clinics, physicians, registered nurse permanent team leaders, house supervisors, human resource assistants, executive assistants, medical staff coordinator, staffing coordinator, confidential employees, guards and supervisors as defined in the Act.

The Union continues to be the exclusive representative under Section 9(a) of the Act.

### B. Refusal to Bargain

By letter dated March 11, 2008, the Union requested that the Respondent recognize and bargain with it as the exclusive collective-bargaining representative of the unit. By letter dated March 12, 2008, the Respondent advised the Union that it was refusing the Union's request to bargain in order to obtain court review of the Board's Decision and Certification of Representative in Case 28-RC-6518. By letter dated December 10, 2010, the Union again requested that the Respondent recognize and bargain with it as the exclusive collective-bargaining representative of the unit. The Respondent has not responded to the Union's December 10, 2010 request. By this conduct the Respondent has failed and refused to recognize and bargain with the Union as the exclusive collective-bargaining representative of the unit.

### CONCLUSION OF LAW

By failing and refusing to recognize and bargain with the Union as the exclusive collective-bargaining repre-

sentative of the unit employees, 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.<sup>8</sup>

#### 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 recognize and 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), *enfd.* 328 F.2d 600 (5th Cir. 1964), *cert. denied* 379 U.S. 817 (1964); and *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), *enfd.* 350 F.2d 57 (10th Cir. 1965).

#### ORDER

The National Labor Relations Board 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

1. Cease and desist from

(a) Refusing to recognize and bargain with National Union of Hospital and Health Care Employees District 1199NM, 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.

<sup>8</sup> In *Howard Plating Industries*, 230 NLRB 178, 179 (1977), the Board stated:

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 held that a simple refusal to initiate collective-bargaining negotiations pending final Board resolution of timely filed objections to the election is a *per se* violation of Section 8(a)(5) and (1). There must be additional evidence, drawn from the employer's whole course of conduct, which proves that the refusal was made as part of a bad-faith effort by the employer to avoid its bargaining obligation.

No party has raised this issue, and we find it unnecessary to decide in this case whether the unfair labor practice began on the date of the Respondent's initial refusal to bargain at the request of the Union, or at some point later in time. It is undisputed that the Respondent has continued to refuse to bargain since the Union's certification and we find that continuing refusal to be unlawful. Regardless of the exact date on which the Respondent's admitted refusal to bargain became unlawful, the remedy is the same.

(a) On request, recognize and bargain with the Union as the exclusive 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 professional employees, including registered nurses, registered nurse rotating team leaders, registered nurse case manager, licensed practical nurse case manager, cardiac catheterization laboratory supervisors, medical technologists, nuclear medicine technicians, pharmacists, registered pharmacists, occupational therapists, physical therapists, registered respiratory therapists, speech pathologists, and nonprofessional employees, including all technical employees, skilled maintenance employees, business office employees, and other nonprofessional employees, and per diem employees averaging four or more hours of work per week for the last quarter prior to the eligibility date, employed by the [Respondent] at its hospital located in Las Vegas, New Mexico; excluding all employees employed at clinics, physicians, registered nurse permanent team leaders, house supervisors, human resource assistants, executive assistants, medical staff coordinator, staffing coordinator, confidential employees, guards and supervisors as defined in the Act.

(b) Within 14 days after service by the Region, post at its facility in Las Vegas, New Mexico, copies of the attached notice marked "Appendix."<sup>9</sup> 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 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.<sup>10</sup> 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 Re-

<sup>9</sup> 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."

<sup>10</sup> For the reasons stated in his dissenting opinion in *J. Picini Flooring*, 356 NLRB 11 (2010), Member Hayes would not require electronic distribution of the notice.

spondent 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 March 12, 2008.

(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.

#### 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 refuse to recognize and bargain with National Union of Hospital and Health Care Employees District 1199NM 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 guaranteed you by Section 7 of the Act.

WE WILL, on request, recognize and 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 professional employees, including registered nurses, registered nurse rotating team leaders, registered nurse case manager, licensed practical nurse case manager, cardiac catheterization laboratory supervisors, medical technologists, nuclear medicine technicians, pharmacists, registered pharmacists, occupational therapists, physical therapists, registered respiratory therapists, speech pathologists, and nonprofessional employees, including all technical employees, skilled maintenance employees, business office employees, and other nonprofessional employees, and per diem employees averaging four or more hours of work per week for the last quarter prior to the eligibility date, employed by us at our hospital located in Las Vegas, New Mexico; excluding all employees employed at clinics, physicians, registered nurse permanent team leaders, house supervisors, human resource assistants, executive assistants, medical staff coordinator, staffing coordinator, confidential employees, guards and supervisors as defined in the Act.

SAN MIGUEL HOSPITAL CORP. D/B/A ALTA  
VISTA REGIONAL HOSPITAL