

UC Health and UC Health Public Safety Union. Case
09–CA–110508

March 31, 2014

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS HIROZAWA
AND SCHIFFER

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 August 5, 2013, the Acting General Counsel issued the complaint on August 7, 2013, 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 09–RC–099728. (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 26, 2013, the Acting General Counsel filed a Motion for Summary Judgment and a Memorandum in Support of Motion for Summary Judgment.¹ On August 27, 2013, 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, asserting that the President's recess appointments of Richard F. Griffin, Jr. and Sharon Block were unconstitutional, and thus the Board lacked a quorum on April 24, 2013, when the Regional Director certified the Union. 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. 2013), cert. granted 133 S. Ct. 2861 (June 24, 2013).²

¹ On August 27, 2013, the Acting General Counsel filed a Motion to Correct Memorandum in Support of Motion for Summary Judgment. We grant the motion.

² The Respondent's arguments are without merit. As an initial matter, this case does not raise a quorum issue because neither party sought review from the Board and thus the Regional Director, not the Board, certified the Union. Further, even if the Board lacked a quorum at the time the Regional Director certified the Union, that circumstance would not impair the Regional Director's authority to process the instant petition. The Board has delegated decisional authority in representation

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.³

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent has been a non-profit corporation with an office and place of business in Cincinnati, Ohio, and has been engaged in operating a hospital providing inpatient and outpatient medical care.

In conducting its operations annually, the Respondent derived gross revenues in excess of \$250,000, and purchased and received at its Cincinnati, Ohio facilities goods valued in excess of \$50,000 directly from points outside the State of Ohio.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and

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 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).

³ The Respondent's requests that the complaint be dismissed and that it be awarded any other relief that is just and proper are therefore denied.

(7) of the Act, and has been a health care institution within the meaning of Section 2(14) of the Act.

We find that UC Health Public Safety Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *The Certification*

Following the election held on April 16, 2013, the Union was certified on April 24, 2013, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All full-time and regular part-time security officers II employed by the Respondent at its Drake Center, located at 151 West Galbraith Road, Cincinnati, Ohio; the UC Health Business Center located at 3200 Burnet Avenue, Cincinnati, Ohio; the University of Cincinnati Medical Center, located at 234 Goodman Avenue, Cincinnati, Ohio; and the West Chester Hospital located at 7700 University Drive, West Chester, Ohio, but excluding all other employees, and all professional employees 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*

About June 26, 2013, the Union, by email, requested that the Respondent bargain collectively with it as the exclusive collective-bargaining representative of the unit. Since about July 15, 2013, the Respondent has failed and refused to 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 July 15, 2013, to 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, UC Health, Cincinnati, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize and bargain with UC Health Public Safety Union 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 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 security officers II employed by the Respondent at its Drake Center located at 151 West Galbraith Road, Cincinnati, Ohio; the UC Health Business Center located at 3200 Burnet Avenue, Cincinnati, Ohio; the University of Cincinnati Medical Center, located at 234 Goodman Avenue, Cincinnati, Ohio; and the West Chester Hospital located at 7700 University Drive, West Chester, Ohio, but excluding all other employees, and all professional employees and supervisors as defined in the Act.

(b) Within 14 days after service by the Region, post at its facilities in Cincinnati, Ohio, copies of the attached notice marked "Appendix."⁴ Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and main-

⁴ 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."

tained 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 facilities 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 July 15, 2013.

(c) Within 21 days after service by the Region, file with the Regional Director for Region 9 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 fail and refuse to recognize and bargain with UC Health Public Safety Union 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 security officers II employed by us at our Drake Center, located at 151 West Galbraith Road, Cincinnati, Ohio; the UC Health Business Center located at 3200 Burnet Avenue, Cincinnati, Ohio; the University of Cincinnati Medical Center, located at 234 Goodman Avenue, Cincinnati, Ohio; and the West Chester Hospital located at 7700 University Drive, West Chester, Ohio, but excluding all other employees, and all professional employees and supervisors as defined in the Act.

UC HEALTH