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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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MANOR AT ST. LUKE VILLAGE FACILITY OPERATIONS, LLC d/b/a THE MANOR AT ST. LUKE VILLAGE AND THE PAVILION AT ST. LUKE VILLAGE FACILITY OPERATIONS, LLC d/b/a THE PAVILION AT ST. LUKE VILLAGE, *Petitioner*, v. NATIONAL LABOR RELATIONS BOARD, *Respondent*.	Case No. 15-3636

PETITION FOR REVIEW OF DECISION AND ORDER OF THE NATIONAL LABOR RELATIONS BOARD

The Manor at St. Luke Village Facility Operations, LLC d/b/a The Manor at St. Luke Village and The Pavilion at St. Luke Village Facility Operations, LLC d/b/a The Pavilion at St. Luke Village, together "Petitioner", hereby petition the United States Court of Appeals for the Third Circuit for review of, and respectfully request that the Court modify or set aside in its entirety, the Decision and Order entered by Respondent National Labor Relations Board on July 24, 2015, in Case 04-CA-114317 ("Decision and Order").

A copy of the Decision and Order, reported at 362 NLRB No. 150, is attached as Exhibit A.

Dated: October 22, 2015

Respectfully submitted,

Jedd Mendelson
N.J. Bar No. 038131993

Littler Mendelson, P.C.
One Newark Center, 8th Floor
Newark, NJ 07102
T: 973-848-4758
F: 973-556-1612
Email: jmendelson@littler.com

Counsel for Petitioner

CERTIFICATE OF SERVICE

A true and correct copy of the foregoing Petition for Review of Decision and Order of the National Labor Relations Board was served via Federal Express, overnight delivery, on this date and addressed to:

Linda Dreeben, Deputy Associate General Counsel
Appellate and Supreme Court Litigation Branch
National Labor Relations Board
1099 14th Street NW
Washington, DC 20570

Counsel for Respondent

Alaine S. Williams, Esq.
Law Offices of Willig, Williams & Davidson
1845 Walnut Street, 24th Floor
Philadelphia, PA 19103

Counsel for American Federation of State, County and Municipal Employees, District Council 87, AFL-CIO

Dated: October 22, 2015

Respectfully submitted,

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Littler Mendelson, P.C.
One Newark Center, 8th Floor
Newark, NJ 07102
T: 973-848-4758
F: 973-556-1612
Email: jmendelson@littler.com

Counsel for Petitioner

EXHIBIT A

NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

Manor at St. Luke Village Facility Operations, LLC d/b/a The Manor at St. Luke Village and The Pavilion at St. Luke Village Facility Operations, LLC d/b/a The Pavilion at St. Luke Village *and* American Federation of State, County and Municipal Employees, District Council 87, AFL–CIO. Case 04–CA–114317

July 24, 2015

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS HIROZAWA AND MCFERRAN

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 September 27, 2013, by American Federation of State, County and Municipal Employees, District Council 87, AFL–CIO (the Union), the General Counsel issued the complaint on October 28, 2013, alleging that Manor at St. Luke Village Facility Operations, LLC d/b/a The Manor at St. Luke Village (Respondent Manor) and The Pavilion at St. Luke Village Facility Operations, LLC d/b/a The Pavilion at St. Luke Village (Respondent Pavilion) (collectively referred to as the Respondent) have violated Section 8(a)(5) and (1) of the Act by failing and refusing the Union's request to bargain following the Union's certification in Case 04–RC–101711. (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 of the complaint, and asserting affirmative defenses.

On November 19, 2013, the General Counsel filed a Motion for Summary Judgment and a memorandum in support. On November 22, 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. On December 5, 2013, the Respondent filed a letter in response to the Notice to Show Cause and an amended answer to the complaint. On the same date, the Union filed a brief in support of the General Counsel's Motion for Summary Judgment.

On December 16, 2014, the Board issued a Decision, Certification of Representative, and Notice to Show Cause in Cases 04–CA–114317 and 04–RC–101711, which is reported at 361 NLRB No. 99. As later corrected, that Decision provided leave to the General Counsel to amend the complaint on or before February 2, 2015, to conform with the current state of the evidence, including whether the Respondent had agreed to recognize and bargain with the Union after the December 16, 2014 certification of representative issued.

On January 27, 2015, the General Counsel filed a motion to amend the complaint to allege that by letter dated January 13, 2015, the Union requested that the parties schedule negotiations and that the Respondent failed to respond to this request. However, no amended complaint was attached to the motion.

On February 17, 2015, the Respondent filed an answer to the "amended" complaint, as if it had been amended by the General Counsel's motion. In its answer, the Respondent admits that it has not responded to any requests by the Union to bargain, arguing that it has no legal duty to do so. The Respondent further raised certain affirmative defenses.[1] On March 9, 2015, the Respondent submitted a letter to the Executive Secretary, stating that notwithstanding the defenses it raised in its February 17, 2015 answer, it "agrees that summary judgment is appropriate herein."

Thereafter, on March 13, 2015, the General Counsel filed a second motion to amend the complaint, with an amended complaint attached. On May 29, 2015, the Board issued an Order Granting Motion to Amend Complaint and Further Notice to Show Cause in which it accepted the amended complaint, directed that the Respondent file any additional answer to the amended complaint on or before June 12, 2015, and ordered that cause be shown, in writing, on or before June 19, 2015, as to why the General Counsel's Motion for Summary Judgment should not be granted by the Board. On June 19, 2015, the Respondent filed a Response to the Notice to Show Cause in which it reaffirmed and incorporated the defenses raised in its February 17, 2015 answer and reiterated its statement that it "agrees that summary judgment is appropriate herein."

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

[1] The Respondent reiterated its prior arguments challenging the authority of the Regional Director for Region 4 and the hearing officer to act at a time when the Board lacked a quorum. These arguments were considered and rejected in the Board's December 16, 2014 Decision, Certification of Representative, and Notice to Show Cause. 361 NLRB No. 99, slip op. at 1–2. In addition, the Respondent argued that the allegations of the amended complaint are barred by Sec. 10(b) of the Act. We reject this argument for the same reasons that we previously rejected the Respondent's 10(b) defense regarding the allegations in the original complaint. Id., slip op. at 1, fn. 1.

Ruling on Motion for Summary Judgment

The Respondent admits its refusal to bargain but contests the validity of the Union's certification on the basis of issues it raised 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 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

FINDINGS OF FACT

I. JURISDICTION

At all material times, Respondent Manor has been an Ohio limited liability corporation and has operated a skilled nursing home at 1711 East Broad Street, Hazleton, Pennsylvania.

During the 12-month period preceding issuance of the amended complaint, Respondent Manor received gross revenues in excess of $100,000, and purchased and received at the Hazleton, Pennsylvania facility goods valued in excess of $5000 directly from points outside the Commonwealth of Pennsylvania.

We find that Respondent Manor 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.

At all material times, Respondent Pavilion, an Ohio limited liability corporation, has operated a skilled nursing home at 1000 Stacie Drive, Hazleton, Pennsylvania.

During the 12-month period preceding issuance of the amended complaint, Respondent Pavilion received gross revenues in excess of $100,000 and purchased and received at the Pavilion facility goods valued in excess of $5000 directly from points outside the Commonwealth of Pennsylvania.

We find that Respondent Pavilion 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.

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

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Certification

Following a representation election held on June 15, 2013, the Union was certified on December 16, 2014, as the exclusive collective-bargaining representative of employees in the following appropriate unit:

> All full-time and regular part-time LPNs, including pool LPNs (who work an average of four or more hours per week) and MDS Nurse-LPNs, employed by the Employer at its 1000 Stacie Drive and 1711 East Broad Street Hazelton, Pennsylvania facilities; excluding all Registered Nurses, Certified Nursing Assistants, restorative aides, activity aides, beauticians, maintenance employees, clerical employees, confidential 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 June 25, 2013, and January 13, 2015, the Union requested that the Respondent bargain collectively with it as the exclusive collective-bargaining representative of the unit. Since about June 25, 2013, and continuing to date, the Respondent has failed and refused to do so.

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 to recognize and bargain with the Union as the exclusive collective-bargaining representative of 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.[2]

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[2] 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

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 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 that 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, Manor at St. Luke Village Facility Operations, LLC d/b/a The Manor at St. Luke Village and The Pavilion at St. Luke Village Facility Operations, LLC d/b/a The Pavilion at St. Luke Village, Hazleton, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize and bargain with American Federation of State, County and Municipal Employees, District Council 87, AFL–CIO, as the exclusive collective-bargaining representative of 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 and regular part-time LPNs, including pool LPNs (who work an average of four or more hours per week) and MDS Nurse-LPNs, employed by the Employer at its 1000 Stacie Drive and 1711 East Broad Street Hazelton, Pennsylvania facilities; excluding all Registered Nurses, Certified Nursing Assistants, restorative aides, activity aides, beauticians, maintenance employees, clerical employees, confidential employees, guards, and supervisors as defined in the Act.

(b) Within 14 days after service by the Region, post at its facility in Hazleton, Pennsylvania, copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 4, 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. If 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 25, 2013.

(c) Within 21 days after service by the Region, file with the Regional Director for Region 4 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. July 24, 2015

Mark Gaston Pearce, Chairman

Kent Y. Hirozawa, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

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 Respondent's admitted refusal to bargain became unlawful, the remedy is the same.

[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."

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 American Federation of State, County and Municipal Employees, District Council 87, 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 as the exclusive collective-bargaining representative of our employees and put in writing and sign any agreement reached on terms and conditions of employment for the following bargaining unit:

All full-time and regular part-time LPNs, including pool LPNs (who work an average of four or more hours per week) and MDS Nurse-LPNs, employed by us at our 1000 Stacie Drive and 1711 East Broad Street Hazelton, Pennsylvania facilities; excluding all Registered Nurses, Certified Nursing Assistants, restorative aides, activity aides, beauticians, maintenance employees, clerical employees, confidential employees, guards, and supervisors as defined in the Act.

MANOR AT ST. LUKE VILLAGE FACILITY OPERATIONS, LLC D/B/A THE MANOR AT ST. LUKE VILLAGE AND THE PAVILION AT ST. LUKE VILLAGE FACILITY OPERATIONS, LLC D/B/A THE PAVILION AT ST. LUKE VILLAGE

The Board's decision can be found at www.nlrb.gov/case/04-CA-114317 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.