

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

TEMPLE UNIVERSITY HOSPITAL,
INC.

Petitioner,

v.

NATIONAL LABOR RELATIONS
BOARD,

Respondent.

Case No. 18-1150

PETITION FOR REVIEW

Pursuant to Rule 15(a) of the Federal Rules of Appellate Procedure and 29 U.S.C. § 160(f), Petitioner Temple University Hospital, Inc. hereby petitions this Court for review of the Decision and Order issued by the Respondent, National Labor Relations Board, in NLRB Case No. 04-CA-174336, which was reported at 366 NLRB No. 88 and entered on May 11, 2018, and requests that said Decision and Order be set aside, modified, and/or remanded for further proceedings. Petitioner requests that the Court review the Board’s Certification of Representative that issued on February 18, 2016 and the related Board decisions in the underlying representation proceeding in Case No. 04-RC-162716 as part of its review of the Board’s May 11, 2018 Decision and Order.

The Board’s May 11, 2018 Decision and Order is attached hereto as Exhibit A, along with a Corporate Disclosure Statement.

Respectfully submitted,



Dated: May 30, 2018

Shannon D. Farmer

Meredith Swartz Dante

Christopher T. Cognato

Katherine J. Atkinson

farmers@ballardspahr.com

dantem@ballardspahr.com

cognatoc@ballardspahr.com

atkinsonk@ballardspahr.com

BALLARD SPAHR LLP

1735 Market Street, 51st Floor

Philadelphia, PA 19103-7599

(215) 665-8500

Attorneys 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.

Temple University Hospital, Inc. and Temple Allied Professionals, Pennsylvania Association of Staff Nurses And Allied Professionals (PASNAP).
Case 04–CA–174336

May 11, 2018

DECISION AND ORDER

BY MEMBERS PEARCE, MCFERRAN, AND EMANUEL

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 amended charge filed on April 15 and April 25, 2016, respectively,¹ by Temple Allied Professionals/Pennsylvania Association of Staff Nurses and Allied Professionals (the Union), the General Counsel issued the complaint on January 19, 2018, alleging that Temple University Hospital, Inc. (the Respondent) has violated Section 8(a)(5) and (1) of the Act by refusing the Union's request to recognize and bargain with it following the Union's certification in Case 04–RC–162716.² (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(d). *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.

¹ Although the Respondent in its answer denies knowledge regarding portions of par. 1(a) and (b) of the complaint, alleging filing and service of the charge and amended charge, the Respondent admits that the charge and amended charge were filed on the alleged dates and that they were served on the Respondent.

On January 17, 2018, the Acting Regional Director approved withdrawal of the portion of the charge alleging that the Respondent refused to provide information to the Union in violation of Sec. 8(a)(5) and (1) of the Act.

² By letter dated February 23, 2016, the Union referenced the certification and requested that the Respondent agree to schedule negotiations. Although the Respondent's answer denies the complaint's allegation that the Union's letter requested recognition and bargaining with the Union as the representative of the professional medical interpreters and transplant financial coordinators, the Respondent admits that the Union's letter referenced the Board's letter certifying the Union as those employees' representative and asked the Respondent to confirm its availability to bargain on one of four stated dates. Further, the Respondent admits that, since February 23, 2016, it has failed and refused to recognize and bargain with the Union as the exclusive collective-bargaining representative of the professional medical interpreters and transplant financial coordinators. We find that there is no factual dispute that the Union's letter constituted a request for recognition and bargaining regarding those employees.

On February 9, 2018, the General Counsel filed a Motion for Summary Judgment and a brief in support of its motion. On February 13, 2018, 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 and the Union filed responses.

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 Acting Regional Director for Region 4's certification of the Union on the basis of its contentions, raised and rejected in the underlying representation proceeding, that the Board lacks jurisdiction over the Respondent because of its association with Temple University; that, even assuming the Board has jurisdiction over the Respondent, it should exercise its discretion and decline to assert that jurisdiction; that the Board should find that the preexisting unit certified by the Pennsylvania Labor Relations Board (PLRB) does not warrant comity; and that the Union should be estopped from arguing that the Board has jurisdiction because of its prior reliance on PLRB's jurisdiction.³

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

³ The Respondent advances an affirmative defense that could not have been raised in the representation proceeding: that the complaint fails to state a claim under the Act upon which relief can be granted. In addition, the Respondent advances the affirmative defense that the union's request for NLRB jurisdiction is barred by the Supreme Court's decision in *New Hampshire v. Maine*, 532 U.S. 742 (2001), and by the doctrines of laches, estoppel, and/or waiver. The Respondent has not offered any explanation or evidence to support these bare assertions, beyond its previously litigated contentions that the Union has impermissibly changed its position regarding the Board's jurisdiction. Thus, we find that these affirmative defenses are insufficient to warrant denial of the General Counsel's motion for summary judgment in this proceeding. See, e.g., *Station GVR Acquisition, LLC d/b/a Green Valley Ranch Resort Spa Casino*, 366 NLRB No. 58, slip op. at 1 fn. 1 (2018); *George Washington University*, 346 NLRB 155, 155 fn. 2 (2005), enf'd, 2006 WL 4539237 (D.C. Cir. 2006); *Circus Circus Hotel*, 316 NLRB 1235, 1235 fn. 1 (1995). In addition, insofar as the Respondent's laches argument may relate to delays in the Board's proceedings, the Board and the courts have long held that the defense of laches does not lie against the Board as an agency of the United States Government. *Entropy Mississippi, Inc.*, 361 NLRB 892, 893 fn. 5 (2014), aff'd in relevant part 810 F.3d 287 (5th Cir. 2015), citing *NLRB v. J.H. Rutter-Rex Mfg. Co.*, 396 U.S. 258 (1969); see *NLRB v. Quinn Restaurant Corp.*, 14 F.3d 811, 817 (2d Cir. 1994).

issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941).⁴ Accordingly, we grant the Motion for Summary Judgment.⁵

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent has been a corporation engaged in the operation of an acute-care hospital in Philadelphia, Pennsylvania.⁶

During the year preceding the issuance of the complaint, in conducting its operations described above, the Respondent derived gross revenues in excess of \$500,000 and purchased and received goods and materials valued in excess of \$50,000 directly from points located outside the Commonwealth of Pennsylvania.

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

⁴ In its response to the Notice to Show Cause, the Respondent acknowledges that generally, in the absence of newly discovered or previously unavailable evidence or special circumstances, a respondent is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding. This principle is longstanding and endorsed by the Supreme Court. See *Pittsburgh Plate Glass*, 313 U.S. at 162. The Respondent argues, however, that the Board is not precluded from reconsidering such previously litigated issues in order to correct erroneous conclusions from prior proceedings, citing *St. Francis Hospital*, 271 NLRB 948, 949 (1984), and *Sub-Zero Freezer Co.*, 271 NLRB 47, 47 (1984). *St. Francis Hospital* and *Sub-Zero Freezer* are two of a limited number of cases in which the Board has departed from the rule that, in a certification-testing unfair labor practice case, issues that had been presented to and decided by the Board in a prior, related representation case cannot be relitigated and will not be reconsidered. Having reviewed the facts and arguments presented by the Respondent in its response to the Notice to Show Cause, we find no basis for departing from our longstanding rule or disturbing our Decision on Review and Order affirming the Acting Regional Director's decision in the underlying representation case. See *Memorial Hospital of Salem County*, 357 NLRB No. 119, slip op. at 1–2 fn. 5 (2011); cf. *Local 340, New York New Jersey Regional Joint Board*, 365 NLRB No. 61 (2017).

⁵ The Respondent's request that the complaint be dismissed is therefore denied.

Member Emanuel did not participate in the underlying representation proceeding. He expresses no opinion on the merits of the Board's decision in that proceeding. Nonetheless, he agrees with his colleagues that the Respondent has not raised any new matters that are properly litigable in this unfair labor practice proceeding and that summary judgment is appropriate, with the parties retaining their respective rights to litigate relevant issues on appeal.

⁶ In its answer, the Respondent denies the complaint allegation that “[a]t all material times, Respondent, a corporation, has operated an acute-care hospital with four locations in Philadelphia, Pennsylvania.” It admits, however, that the Respondent “is a corporation and has operated an acute care hospital in Philadelphia, Pennsylvania since 1996.” It further states that, for 125 years before the Respondent's 1996 incorporation, it operated as an unincorporated subsidiary of Temple University.

(7) and a health care institution within the meaning of Section 2(14), and that the Union is a labor organization within the meaning of Section 2(5) of the Act.⁷

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Certification

At all material times John Lasky, Chief Human Resources Officer of Temple University Health System, has been a supervisor of the Respondent within the meaning of Section 2(11) of the Act and an agent of the Respondent within the meaning of Section 2(13) of the Act.⁸

Following a self-determination election held on January 28, 2016, the Acting Regional Director for Region 4 issued a certification of representative on February 18, 2016, certifying that the Union is the exclusive collective-bargaining representative of “all full-time and regular part-time professional medical interpreters and all full-time and regular part-time transplant financial coordinators employed by the Employer” (the Voting Group) as part of the existing unit of professional and technical employees it currently represents.⁹

A subdivision of Temple University Health System's unit working at Temple University Hospital and Temple University Children's Medical Center comprised of all full-time and regular part-time professional and

⁷ The Respondent in its answer denies the conclusory allegations in pars. 2(c) and 3 of the complaint that it is an employer engaged in commerce within the meaning of Sec. 2(2), (6), and (7) of the Act and a health care institution within Sec. 2(14) of the Act, and that the Union is a labor organization within the meaning of Sec. 2(5) of the Act. However, the Respondent's answer admits the underlying factual allegations that, during the year preceding issuance of the complaint, the Respondent derived gross revenues in excess of \$500,000, and purchased and received goods and materials valued in excess of \$50,000 directly from points located outside the Commonwealth of Pennsylvania. These admissions are sufficient to establish that the Respondent is engaged in commerce. See *Siemons Mailing Service*, 122 NLRB 81 (1958). Further, in the underlying representation proceeding, the Respondent stipulated that the Union is a labor organization within the meaning of the Act. Accordingly, we find that the Respondent's denials in its answer do not raise any issue warranting a hearing regarding these allegations. See, e.g., *Spruce Co.*, 321 NLRB 919, 919 fn. 2 (1996), and cases cited there.

⁸ The Respondent in its answer denies the complaint's allegation that Lasky has been employed by the Respondent as its Chief Human Resources Officer but states that he holds that position as an employee of Temple University Health System (TUHS). The General Counsel concedes that Lasky is employed by TUHS, rather than the Respondent, and notes that he was alleged as TUHS's employee in the underlying representation case. The Respondent does not dispute that Lasky acts as the Respondent's representative through his position with TUHS.

⁹ The existing unit was certified by the PLRB on July 24, 2006. Although the Complaint alleged a different certification date, the General Counsel acknowledges that the correct date is July 24, 2006, as stated by the Respondent.

The Acting Regional Director's certification substitutes the spelling “employees” wherever the PLRB certification uses “employes.”

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technical employees [employed by the Respondent], excluding [all other employees,] physicians, nurses, pharmacists, office clerical employees, students, and employees on temporary visas, management level employees, supervisors, first level supervisors, confidential employees and guards as defined in the Act.

The Acting Regional Director further certified that the professional employees wished to be included with nonprofessional employees in a unit for the purposes of collective bargaining.¹⁰ The Union continues to be the exclusive collective-bargaining representative of the unit, including the employees in the voting group, under Section 9(a) of the Act.

B. Refusal to Bargain

By letter dated February 23, 2016, the Union requested that the Respondent recognize it as the exclusive collective-bargaining representative of the Voting Group and bargain collectively with the Union as the exclusive collective-bargaining representative of the professional medical interpreters and transplant financial coordinators. Since about February 23, 2016, the Respondent has failed and refused to do so.

We find that the Respondent's conduct 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 February 23, 2016, to recognize and bargain with the Union as the exclusive collective-bargaining representative of the professional medical interpreters and transplant financial coordinators as part of 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 recognize and bargain on request with the Union and, if an understanding is reached, to embody the understanding in a signed agreement.¹¹

¹⁰ The professional medical interpreters voted on whether they wished to be included in a unit with nonprofessional employees, as well as voting on whether they wanted to be represented by the Union for purposes of collective bargaining. The transplant financial coordinators voted only on the latter question.

¹¹ The Charging Party's brief in support of the General Counsel's motion requests that the Board require the Respondent to bargain in good faith with the Union as the exclusive representative of the unit for the period set forth in *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962). Such a remedy, however, is inappropriate where, as here, the underly-

ORDER

The National Labor Relations Board orders that the Respondent, Temple University Hospital, Inc., Philadelphia, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize and bargain with Temple Allied Professionals, Pennsylvania Association of Staff Nurses and Allied Professionals (PASNAP) (the Union) as the exclusive collective-bargaining representative of all full-time and regular part-time professional medical interpreters and all full-time and regular part-time transplant financial coordinators employed by the Respondent as part of 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 all full-time and regular part-time professional medical interpreters and all full-time and regular part-time transplant financial coordinators employed by the Respondent as part of the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

A subdivision of Temple University Health System's unit working at Temple University Hospital and Temple University Children's Medical Center comprised of all full-time and regular part-time professional and technical employees [employed by the Respondent], excluding [all other employees,] physicians, nurses, pharmacists, office clerical employees, students, and employees on temporary visas, management level employees, supervisors, first level supervisors, confidential employees and guards as defined in the Act.

(b) Within 14 days after service by the Region, post at its facilities in Philadelphia, Pennsylvania, copies of the attached notice marked "Appendix."¹² Copies of the notice, on forms provided by the Acting Regional Director for Region 4, after being signed by the Respondent's

ing representation proceeding involved a self-determination election. See *Winkie Mfg. Co.*, 338 NLRB 787, 788 fn. 3 (2003), aff'd. 348 F.3d 254 (7th Cir. 2003); *White Cap, Inc.*, 323 NLRB 477, 478 fn. 3 (1997), and cases cited there.

¹² 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."

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 any of 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 February 23, 2016.

(c) Within 21 days after service by the Region, file with the Acting 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. May 11, 2018

Mark Gaston Pearce, Member

Lauren McFerran, Member

William J. Emanuel, 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 Temple Allied Professionals, Pennsylvania Association of Staff Nurses and Allied Professionals (PASNAP) (the Union) as the exclusive collective-bargaining representative of our professional medical interpreters and our transplant financial coordinators 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 professional medical interpreters and our transplant financial coordinators as part of the following bargaining unit:

A subdivision of Temple University Health System's unit working at Temple University Hospital and Temple University Children's Medical Center comprised of all full-time and regular part-time professional and technical employees [employed by the Respondent], excluding [all other employees,] physicians, nurses, pharmacists, office clerical employees, students, and employees on temporary visas, management level employees, supervisors, first level supervisors, confidential employees and guards as defined in the Act.

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The Board's decision can be found at <https://www.nlr.gov/case/04-CA-174336> 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.



CERTIFICATE OF SERVICE

I hereby certify that, on this date, a true and correct copy of the foregoing Petition for Review, Decision and Order, and Corporate Disclosure Statement was served via first-class mail on the following:

Linda J. Dreeben, Esquire
Deputy Associate General Counsel
Appellate and Supreme Court Litigation Branch
National Labor Relations Board
1015 Half Street SE
Washington, D.C. 20570-0001

Lea F. Alvo-Sadiky, Esquire
Counsel for the General Counsel
National Labor Relations Board, Region 4
615 Chestnut Street, 7th Floor
Philadelphia, PA 19106

Harold Maier
Acting Regional Director
National Labor Relations Board, Region 4
615 Chestnut Street, 7th Floor
Philadelphia, PA 19106

Jonathan Walters, Esquire
Markowitz & Richman
123 South Broad Street, Suite 2020
Philadelphia, PA 19109
Attorney for Charging Party

Dated: May 30, 2018



Christopher T. Cognato