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Dycora Transitional Health & Living d/b/a Kaweah Manor *and* Service Employees International Union, Local 2015. Cases 32–CA–206624 and 32–CA–210419

October 18, 2018

DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS MCFERRAN AND KAPLAN

Upon charges filed September 21 and November 22, 2017, by Service Employees International Union, Local 2015 (the Union), and an amended charge filed by the Union on October 16, 2017, the General Counsel issued a consolidated complaint and notice of hearing on December 18, 2017, alleging that Dycora Transitional Health & Living d/b/a Kaweah Manor (the Respondent) violated Section 8(a)(5) and (1) of the Act by failing and refusing to recognize and bargain with the Union and by failing and refusing to furnish the Union with requested information that is necessary for, and relevant to, the Union's performance of its duties as the exclusive collective-bargaining representative of the Respondent's unit employees. On January 17, 2018, the Respondent filed an answer in which it denied the unfair labor practice allegations and asserted various affirmative defenses. On February 12, 2018, the General Counsel issued an amended consolidated complaint. On February 26, 2018, the Respondent filed an answer to the amended consolidated complaint.

On March 9, 2018, the Respondent, the Union, and the General Counsel filed a joint motion to waive a hearing by an administrative law judge and to submit this case to the National Labor Relations Board for a decision based on a stipulated record. On April 19, 2018, the Board granted the parties' joint motion. Thereafter, the Respondent, the Union, and the General Counsel filed briefs, and the Respondent and General Counsel filed answering briefs.[1]

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

On the entire record and briefs, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times herein, the Respondent has been a California corporation with an office and place of business in Visalia, California, and has been engaged in the business of providing rehabilitation and skilled nursing care to individuals. In conducting its business operations during the calendar year ending December 31, 2017, the Respondent derived gross revenues in excess of $100,000, and purchased and received goods or services valued in excess of $5000 directly from points outside the State of California. At all material times, the Respondent has been 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 the Union has been a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Stipulated Facts

On January 25, 2017,[2] the Union filed a petition in Case 32–RC–191811 seeking to represent a bargaining unit of Licensed Vocational Nurses (LVNs) employed by Kaweah Manor, Inc. d/b/a Kaweah Manor Convalescent Hospital (Kaweah) at its facility located at 3710 West Tulare Avenue, Visalia, California. Following a preelection hearing held on February 8, 9, 13, and 15,[3] the Regional Director issued a Decision and Direction of Election on March 23, in which she rejected Kaweah's contention that the petitioned-for LVNs were statutory supervisors under Section 2(11) of the Act and found that the following employees constitute an appropriate unit for purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time Licensed Vocational Nurses employed by [Kaweah] at its facility located at 3710 W. Tulare Avenue, Visalia, CA; excluding Certified Nursing Assistants, Restorative Nursing Assistants, Activity Assistants, Dietary Employees, Housekeeping employees, Laundry employees, confidential employees, office clerical employees, guards and supervisors as defined by the Act.

Kaweah did not request review of the Decision and Direction of Election.

On April 5, an election by secret ballot was conducted. The tally of ballots showed that of approximately 18 eligible voters, 9 ballots were cast for the Union, 4 were cast against representation, and there were no challenged ballots. There were no objections to the election. On April 13, the Regional Director issued a Certification of Representative. There was no request for review of the certification.

[1] In addition, on June 7, 2018, the Union filed a "Joinder in Counsel for the General Counsel's Answering Brief."

[2] All subsequent dates are in 2017 unless otherwise indicated.

[3] Consolidated with Case 32–RC–191811 in that hearing was Case 32–RC–191816 involving another unit of Kaweah's employees, not at issue here.

About May 3, the Union requested that Kaweah bargain collectively with the Union as the exclusive collective-bargaining representative of the certified LVN unit. Kaweah did not respond to the Union's request to bargain.

About July 15, Kaweah ceased doing business and the Respondent began operations at the same facility, employing as a majority of its employees individuals who were previously employed by Kaweah. More specifically, the Respondent employed as a majority of its LVNs individuals who were previously employed by Kaweah as LVNs. Substantial continuity exists between the Respondent's and Kaweah's operations at the Respondent's Visalia, California facility. Indeed, since July 15, the Respondent's operations have remained fundamentally the same as they were before July 15. Based on these facts, the parties have stipulated that since July 15, the Respondent has continued the employing entity and has been a successor employer to Kaweah under *NLRB v. Burns International Security Services, Inc.*, 406 U.S. 272 (1972).

On August 28, orally and in writing, and again on September 8, by email, the Union requested that the Respondent bargain collectively with the Union as the exclusive collective-bargaining representative of the LVN unit. By email dated September 12, the Respondent informed the Union that it declined to engage in bargaining and intended to contest the Board's certification of the Union as the exclusive collective-bargaining representative of the LVN unit.

On August 28, in writing, the Union requested that the Respondent provide it with the following information:

1) RFI No. 1: "For each actively employed bargaining unit employee
   (a) Name;
   (b) Job Classification;
   (c) Job classification code;
   (d) Hourly Base Wage Rate;
   (e) Date of Hire;
   (f) Seniority Date;
   (g) Date of Birth;
   (h) Department;
   (i) Status (Regular Full-Time; Regular Part-Time; Limited Part-Time; Casual; Temporary Supplemental; With or Without Benefits);
   (j) Shift (Days; Evenings; Nights; or Varied);
   (k) Gender;
   (l) Home Telephone Number;
   (m) Home Address;
   (n) Phone Number;
   (o) Email Address; and
   (p) Employee ID Number, Social Security Number or other unique identifier."
2) RFI No. 2: "Total hours and total payroll for the bargaining unit for each of the past three years."
3) RFI No. 3: "All Handbooks and/or Policy Manuals."
4) RFI No. 4: "For all Retirement Plans Covering Bargaining Unit Employees:
   (a) Copy of Current Plan Document and Summary Plan Description;
   (b) Actuarial Valuation, DOL Form 5500, Audited Financial Statement and Trustees' Report for the Three Most Recent Years."

Since August 28, the Respondent has failed and refused to furnish the Union with the requested information.

The parties agree that if the Union is found to be the exclusive collective-bargaining representative of the LVN unit in this proceeding, the Respondent would have been required to respond in good faith to the Union's August 28 request for information. The Respondent has not asserted to the Union at any time that any of the requested information is not relevant to or necessary for the Union's performance of its duties as the exclusive collective-bargaining representative of the LVN unit.

B. The Parties' Contentions

The General Counsel contends that the Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing to recognize and bargain with the Union as the exclusive collective-bargaining representative of the LVN unit, and by failing and refusing to provide the Union with the requested information.[4] The General Counsel asserts that under *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941), the Respondent is precluded from litigating issues related to the underlying representation case. The General Counsel further contends that the failure of Kaweah to request review of the Regional Director's Decision and Direction of Election does not give the Respondent, as Kaweah's successor, the right to contest the Regional Director's findings in that decision in this unfair labor practice proceeding. Rather, the Respondent steps into the shoes of, and has no greater rights than, Kaweah. The General Counsel also observes that the Respondent does not otherwise claim to possess any newly discovered and previously unavailable evidence, or allege any special

[4] In his brief to the Board, the General Counsel explained that although the amended consolidated complaint additionally alleged that the Respondent unlawfully withdrew recognition of the Union, the General Counsel no longer seeks to pursue that allegation. The General Counsel further explained that in light of the withdrawal of that allegation, he no longer seeks the notice-reading remedy requested in the amended consolidated complaint.

circumstances, that would provide a basis to reexamine the Regional Director's decision in the representation proceeding. The General Counsel additionally notes that the Respondent does not assert that there are any differences in the LVNs' duties or working conditions as between Kaweah and the Respondent.

The Respondent points out that it was unable to challenge the appropriateness of the LVN unit at the time of the representation proceeding because it was not the LVNs' employer at that time. The Respondent contends that its inability to challenge the unit's appropriateness during the representation proceedings and Kaweah's failure to request Board review of the Regional Director's finding that the petitioned-for LVN unit was appropriate constitute special circumstances warranting the Board's consideration of that representation issue in this proceeding. The Respondent acknowledges that the Board generally prohibits relitigation of representation matters in subsequent unfair labor practice proceedings. However, citing *Sub-Zero Freezer Co.*, 271 NLRB 47 (1984), and *St. Francis Hospital*, 271 NLRB 948 (1984), the Respondent contends that the Board is not precluded from doing so in order to correct erroneous conclusions from prior proceedings. The Respondent asserts that the Board should find that the previously certified unit is not appropriate, and on this basis should dismiss the complaint.

C. Discussion

The Respondent's sole defense to its refusal to recognize and bargain with, and to furnish requested relevant information to, the Union is its contention that the previously certified LVN unit is not appropriate, and that its previous inability to present this issue to the Board in the underlying representation case coupled with its predecessor's failure to do so warrants allowing it to relitigate the unit issue in this unfair labor practice proceeding. We disagree.

It is well settled that a successor employer "stands in the shoes of its predecessor and may not defend against an allegation that it is unlawfully refusing to recognize and bargain with a certified union by alleging matters that its predecessor could have raised in a prior representation proceeding, absent special circumstances." *Hotel Del Coronado*, 345 NLRB 306, 307 (2005). "The fact that [a respondent] was not a party to the [underlying] Board election does not constitute a 'special circumstance' that would permit it to challenge [a union's] certification." Id.; see also *New London Convalescent Home*, 274 NLRB 1442, 1443 (1985) (successor precluded from relitigating unit scope and alleged objectionable conduct litigated by the predecessor in the underlying representation proceeding); *Windsor Convalescent Center of North Long Beach*, 351 NLRB 975, 978 (2007) (same; unit issue), enf. denied on other grounds sub nom. *S & F Market Street Healthcare LLC v. NLRB*, 570 F.3d 354 (D.C. Cir. 2009).

We find that the Respondent has not demonstrated that any special circumstances exist that would allow it to litigate the appropriateness of the LVN unit. The fact that the Respondent, as Kaweah's successor, was not a party to the prior representation proceeding is not a special circumstance that would permit it to do so. *Windsor Convalescent Center of North Long Beach*, 351 NLRB at 978 fn. 18. Neither is the fact that Kaweah's decision not to request review in the representation proceeding left the Board with no occasion to consider the unit issue. In *Hotel Del Coronado*, supra, the Board found that the fact a predecessor employer had stipulated to the unit in a prior representation proceeding, thereby precluding Board consideration of the unit issue, did not permit the successor employer to litigate the appropriateness of the unit in a subsequent unfair labor practice proceeding. That precedent is directly applicable here because, as in *Hotel Del Coronado*, the Respondent merely seeks to litigate an issue that could have been raised to the Board in the underlying representation proceeding. Accordingly, the Respondent's "special circumstances" defense to the allegation that its refusal to recognize and bargain with the Union violated Section 8(a)(5) is without merit.

Citing *Sub-Zero Freezer Co.*, supra, and *St. Francis Hospital*, supra, the Respondent further contends that, even absent special circumstances, the Board in its discretion may reconsider the representation issue here. Those cases are two of a limited number of cases in which the Board has departed from its longstanding rule against relitigation of representation matters in subsequent unfair labor practice proceedings. Having reviewed the facts and arguments presented by the Respondent, we find no basis for departing from our longstanding rule in this proceeding. See, e.g., *Temple University Hospital Inc.*, 366 NLRB No. 88, slip op. at 2 fn. 4 (2018) (declining to depart from longstanding rule); *Memorial Hospital of Salem County,* 357 NLRB No. 119, slip op. at 1–2 fn. 5 (2011) (not reported in Board volumes) (same). For these reasons, the Respondent's refusal to recognize and bargain with the Union violated Section 8(a)(5).

For the same reasons, we further find that the Respondent violated the Act by refusing to furnish the Union with requested information. With the exception of the Union's requests for employee Social Security numbers[5] and

[5] The Board has held that Social Security numbers are not presumptively relevant. See *Sea–Jet Trucking Corp.*, 304 NLRB 67, 67 (1991). Although the parties stipulated that the Respondent would have been required to respond to the Union's request for this information, the

handbooks and policy manuals (if any) that do not pertain to bargaining-unit employees,[6] the information requested by the Union is presumptively relevant for purposes of collective bargaining, and the Respondent has not asserted any basis for rebutting its presumptive relevance. See, e.g., *CVS Albany, LLC d/b/a CVS*, 364 NLRB No. 122, slip op. at 1 (2016), enfd. mem. 709 Fed. Appx. 10 (D.C. Cir. 2017) (per curiam); *Metro Health Foundation, Inc.*, 338 NLRB 802, 803 (2003).

Accordingly, we find that by refusing to recognize and bargain with the Union, and by failing to furnish the Union with requested relevant information as described above, the Respondent has violated Section 8(a)(5) and (1) of the Act.

CONCLUSIONS OF LAW

By failing and refusing to recognize and bargain with the Union as the exclusive collective-bargaining representative of the employees in the appropriate unit, and by failing and refusing to provide the Union with certain requested information, 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 the Respondent to cease and desist from such conduct. In addition, we shall order the Respondent to bargain with the Union on request and, if an understanding is reached, to embody the understanding in a signed agreement. We shall also order the Respondent to furnish the Union the information it requested, with the exception of employee Social Security numbers and handbooks and policy manuals that do not pertain to employees in the LVN unit.

The General Counsel requests that the Board grant a *Mar-Jac Poultry* remedy, under which the certification year will commence on the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962).[7] We agree that this remedy is warranted. See, e.g., *Petoskey Geriatric Village*, 295 NLRB 800, 803 (1989) ("[W]here an employer or its successor refuse all bargaining, the certification year will not commence until good-faith bargaining occurs."). Indeed, in circumstances comparable to those present here, the Board imposed a *Mar-Jac* remedy and held that the certification year commenced only when the successor began to bargain in good faith. *Corbel Installations, Inc.*, 360 NLRB 10, 10 (2013).[8]

The Union requests additional enhanced remedies. Contrary to the Union's assertions, there has been no showing that the Board's traditional remedies are insufficient to redress the violations found. Accordingly, we deny the Union's request for additional remedies.

ORDER

The National Labor Relations Board orders that the Respondent, Dycora Transitional Health & Living d/b/a Kaweah Manor, Visalia, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize and bargain with Service Employees International Union, Local 2015 (the Union) as the exclusive collective-bargaining representative of the employees in the bargaining unit.

(b) Refusing to bargain collectively with the Union by failing and refusing to furnish it with requested information that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of the Respondent's unit employees.

(c) 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 that understanding in a signed agreement:

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relevance of employee Social Security numbers has not been established. Accordingly, we will not order the Respondent to furnish the Union with employee Social Security numbers.

[6] The Union's request for "[a]ll Handbooks and/or Policy Manuals" could be construed as including handbooks and/or policy manuals that do not apply to employees in the LVN unit. In accordance with Board precedent, however, we shall construe this request to pertain to unit employees. See, e.g., *DirecTV U.S. DirecTV Holdings LLC*, 361 NLRB No. 124, slip op. at 2 (2014) (not reported in Board volumes). So construed, we find this information to be presumptively relevant, and the Respondent's failure to furnish this information as it relates to unit employees was unlawful.

[7] 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).

[8] In *Corbel*, the successor employer took over the predecessor's operations about 2 months after the union's certification, and the successor unlawfully refused to recognize and bargain with the union until about 10 months into the certification year. Finding that the successor began to bargain in good faith with only 2 months remaining in the certification year, the Board, citing *Mar-Jac Poultry*, granted the General Counsel's request for a 10-month extension of the certification year to ensure at least 1 year of good-faith bargaining.

Here, where neither the predecessor nor the Respondent engaged in good-faith bargaining, the full 12-month *Mar-Jac* remedy applies, and the certification year will commence on the date that the Respondent begins to bargain in good faith.

All full-time and regular part-time Licensed Vocational Nurses employed by the Respondent at its facility located at 3710 W. Tulare Avenue, Visalia, CA; excluding Certified Nursing Assistants, Restorative Nursing Assistants, Activity Assistants, Dietary Employees, Housekeeping employees, Laundry employees, confidential employees, office clerical employees, guards and supervisors as defined by the Act.

(b) Furnish to the Union in a timely manner the information requested by the Union on August 28, 2017, with the exception of employee Social Security numbers and handbooks and/or policy manuals that do not pertain to employees in the bargaining unit described above.

(c) Within 14 days after service by the Region, post at its Visalia, California facility copies of the attached notice marked "Appendix."[9] Copies of the notice, on forms provided by the Regional Director for Region 32, 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 August 28, 2017.

(d) Within 21 days after service by the Region, file with the Regional Director for Region 32 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. October 18, 2018

John F. Ring, Chairman

Lauren McFerran, Member

Marvin E. Kaplan, 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 Service Employees International Union, Local 2015 (the Union) as the exclusive collective-bargaining representative of our employees in the bargaining unit described below.

WE WILL NOT refuse to bargain collectively with the Union by failing and refusing to furnish it with requested information that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of our unit employees.

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 in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody that understanding in a signed agreement:

All full-time and regular part-time Licensed Vocational Nurses employed by Respondent at its facility located at 3710 W. Tulare Avenue, Visalia, CA; excluding

[9] 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."

Certified Nursing Assistants, Restorative Nursing Assistants, Activity Assistants, Dietary Employees, Housekeeping employees, Laundry employees, confidential employees, office clerical employees, guards and supervisors as defined by the Act.

WE WILL furnish to the Union in a timely manner the information requested by the Union on August 28, 2017, with the exception of employee Social Security numbers and handbooks and/or policy manuals that do not pertain to employees in the bargaining unit described above.

DYCORA TRANSITIONAL HEALTH & LIVING D/B/A KAWEAH MANOR

The Board's decision can be found at https://www.nlrb.gov/case/32-CA-206624 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.