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Longmont United Hospital and National Nurses Organizing Committee/National Nurses United (NNOC/NUU). Case 27-CA-296153

September 30, 2022

DECISION AND ORDER

BY CHAIRMAN MCFERRAN AND MEMBERS KAPLAN AND WILCOX

This is a refusal-to-bargain case in which the Respondent Longmont United Hospital, Inc. is contesting the Union's certification as bargaining representative in the underlying representation proceeding. Pursuant to a charge filed on May 19, 2022, by the National Nurses Organizing Committee/National Nurses United (the Union), the General Counsel issued a complaint on June 15, 2022, alleging that the Respondent has violated Section 8(a)(5) and (1) of the Act by failing and refusing to recognize and bargain with the Union following the Union's certification in Case 27-RC-275868. (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

On July 12, 2022, the General Counsel filed a Motion for Summary Judgment. On July 22, 2022, the Respondent filed an Opposition to the General Counsel's Motion for Summary Judgment, and the Board issued an Order Transferring the Proceeding to the Board and a Notice to Show Cause why the motion should not be granted.² On July 29, 2022, the General Counsel and the Union filed

¹ The Respondent's answer denies paragraphs five and seven of the complaint, which set forth the appropriate unit and state that the Union was certified as the unit's exclusive collective-bargaining representative on April 5, 2022. The Respondent also asserts as an affirmative defense that the Board's April 5, 2022 certification order was erroneous and contrary to law and affirmative defenses relying on the Board's decisions in *Thompson Roofing, Inc.*, 291 NLRB 743 (1988) and *Professional Transportation Inc.*, 370 NLRB No. 132 (2021). These issues, however, were fully litigated and resolved in the underlying representation proceeding. Accordingly, the Respondent has not raised litigable issues in this proceeding.

The Respondent's answer also advances various other affirmative defenses, including that the complaint fails to state a claim upon which relief can be granted and is based on material misrepresentations of fact. The Respondent also asserts that it was denied due process. The Respondent has not, however, offered any explanation or evidence to support these bare assertions. Thus, we find that these affirmative defenses are insufficient to warrant denial of the General Counsel's Motion for Summary Judgment. See, e.g., *Station GVR Acquisition, LLC d/b/a*

separate replies to the Respondent's July 22 opposition. On August 5, 2022, the Respondent filed its timely response to the Notice to Show Cause. The Board granted an extension of time for replies, which the General Counsel and the Union both filed on August 26, 2022.³

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 Union's certification of representative based on its objections to the election in the underlying 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 has it established 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, the Respondent Longmont United Hospital has been a non-profit corporation with an office and place of business located in Longmont, Colorado, where it is engaged in the operation of an acute-care hospital providing inpatient and outpatient medical care.

During the 12-month period preceding issuance of the complaint, the Respondent derived gross revenues

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), enfd. mem. per curiam No. 06-1012, 2006 WL 4539237 (D.C. Cir. Nov. 27, 2006); *Circus Circus Hotel*, 316 NLRB 1235, 1235 fn. 1 (1995).

² The Respondent's July 22 opposition asserts that summary judgment is not appropriate because the General Counsel's request for relief turns on disputed allegations about the Respondent's future conduct. This is a misapprehension of the General Counsel's argument, which is that the remedies requested are necessary to remedy the Respondent's admitted past and present refusal to bargain. Because the remedies granted are appropriate to remedy the Respondent's past and present conduct, there is no merit to its July 22 opposition.

³ On August 29, 2022, the General Counsel and the Union filed separate motions to withdraw their procedural argument that the Board should strike the Respondent's August 5 response. Each motion to withdraw is granted and only the parties' substantive responses to the Respondent's August 5 response have been considered.

exceeding \$250,000. During the same period, the Respondent purchased and received goods or services exceeding \$5000 directly from points located outside the State of Colorado.

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 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 the representation election, conducted by mail between June 15 and July 7, 2021, the Regional Director issued a Decision on Challenged Ballots and Objection and a Supplemental Decision on Challenges and Direction on Challenges in Case 27–RC–275868. On March 24, 2022, the Board denied the Respondent’s request for review of the Regional Director’s decisions. On April 5, 2022, the Union was certified as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All full-time, regular part-time, and per diem registered nurses, including clinical coordinators, clinical documentation specialists, RN Wound Ostomy employees, house supervisors, education instructors II, RN unit educators, and RN educators, employed by the Employer at its facility located in Longmont, CO 80501; but excluding all RNs employed by other entities, registries or agencies providing outside labor to the Employer, office clerical employees, nurse administrators, managerial employees, confidential employees, guards, and supervisors as defined by the National Labor Relations 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*

On May 2, 2022, by certified mail and email to the Respondent’s Director of Human Resources Jennifer Anderson, the Union requested that the Respondent bargain with the Union as the exclusive collective-bargaining representative of the unit. Since May 10, 2022, and continuing to date, the Respondent has failed and refused to recognize and bargain with the Union as the exclusive collective-bargaining representative of the unit.

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 May 10, 2022, to recognize and 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 on 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).

In addition, the General Counsel requests that we adopt a compensatory remedy requiring the Respondent to make its employees whole for the lost opportunity to bargain at the time and in the manner contemplated by the Act. To do so would require overruling *Ex-Cell-O Corp.*, 185 NLRB 107 (1970), and outlining a methodological framework for calculating such a remedy. The Board has decided to sever this issue and retain it for further consideration to expedite the issuance of this decision regarding the remaining issues in this case.⁴ The Board will issue a supplemental decision regarding a make-whole remedy at a later date.⁵ See *Kentucky River Medical Center*, 355 NLRB 643, 647 fn. 13 (2010); *Kentucky River Medical Center*, 356 NLRB 6 (2010).

ORDER

The National Labor Relations Board orders that the Respondent Longmont United Hospital, Longmont, Colorado, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize and bargain with the National Nurses Organizing Committee/National

⁴ Member Kaplan would not sever this issue. Instead, he would apply *Ex-Cell-O Corp.* and deny the General Counsel’s request for a make-whole remedy.

⁵ Having ordered the customary remedies for test-of-certification cases and severed the *Ex-Cell-O Corp.* matter for future consideration, we decline to order, in this case, the additional remedies sought by the General Counsel in her Motion for Summary Judgment.

Nurses United (the 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 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, regular part-time, and per diem registered nurses, including clinical coordinators, clinical documentation specialists, RN Wound Ostomy employees, house supervisors, education instructors II, RN unit educators, and RN educators, employed by the Employer at its facility located in Longmont, CO 80501; but excluding all RNs employed by other entities, registries or agencies providing outside labor to the Employer, office clerical employees, nurse administrators, managerial employees, confidential employees, guards, and supervisors as defined by the National Labor Relations Act.

(b) Within 14 days after service by the Region, post at its facility in Longmont, Colorado, copies of the attached notice marked "Appendix."⁶ Copies of the notice, on forms provided by the Regional Director for Region 27, 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

⁶ If the facility involved in these proceedings is open and staffed by a substantial complement of employees, the notices must be posted within 14 days after service by the Region. If the facility involved in these proceedings is closed or not staffed by a substantial complement of employees due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notices must be posted within 14 days after the facility reopens and a substantial complement of employees have returned to work, and the notices may not be posted until a substantial complement of employees have returned to work. If, while closed or not staffed by a substantial complement of employees due to the pandemic, the Respondent is

employees employed by the Respondent at any time since May 10, 2022.

(c) Within 21 days after service by the Region, file with the Regional Director for Region 27 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. September 30, 2022

Lauren McFerran, Chairman

Marvin E. Kaplan, Member

Gwynne A. Wilcox, 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.

communicating with its employees by electronic means, the notice must also be posted by such electronic means within 14 days after service by the Region. If the notice to be physically posted was posted electronically more than 60 days before physical posting of the notice, the notice shall state at the bottom that "This notice is the same notice previously [sent or posted] electronically on [date]." 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."

WE WILL NOT fail and refuse to recognize and bargain with the National Nurses Organizing Committee/National Nurses United (the Union) as the exclusive collective-bargaining representative of our 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 appropriate bargaining unit:

All full-time, regular part-time, and per diem registered nurses, including clinical coordinators, clinical documentation specialists, RN Wound Ostomy employees, house supervisors, education instructors II, RN unit educators, and RN educators, employed by the Employer at its facility located in Longmont, CO 80501; but excluding all RNs employed by other entities, registries or agencies providing outside labor to the Employer, office

clerical employees, nurse administrators, managerial employees, confidential employees, guards, and supervisors as defined by the National Labor Relations Act.

LONGMONT UNITED HOSPITAL

The Board's decision can be found at www.nlr.gov/case/27-CA-296153 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.

