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**McLaren Macomb and Local 40, RN Staff Council,
Office and Professional Employees International
Union (OPEIU), AFL-CIO.** Case 07-CA-
254640

February 2, 2021

DECISION AND ORDER

BY MEMBERS KAPLAN, EMANUEL, AND RING

This is a refusal-to-bargain case in which the Respondent, McLaren Macomb, is contesting the Union's certification as bargaining representative in the underlying representation proceeding. Pursuant to a charge filed on January 15, 2020, by Local 40, RN Staff Council, Office and Professional Employees International Union (OPEIU), AFL-CIO (the Union), the General Counsel issued the complaint on July 14, 2020, amended on July 31, 2020, alleging that 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 07-RC-243228.¹ (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 amended complaint and asserting affirmative defenses.

On August 17, 2020, the General Counsel filed a Motion for Summary Judgment. On August 20, 2020, 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 and the General Counsel filed a reply to the Respondent's response.

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

¹ The Respondent in its answer to the amended complaint neither admits nor denies the filing and service date of the charge. Copies of the charge and affidavit of service are attached as Exhs. A-B to the General Counsel's motion and the Respondent has not contested the authenticity of these documents in its response to the Notice to Show Cause. Accordingly, we find that the Respondent has not raised any issue regarding filing and service of the charge warranting a hearing. See, e.g., *U-Haul Co. of Nevada*, 345 NLRB 1301, 1301 fn. 1 (2005), enf'd. 490 F.3d 957 (D.C. Cir. 2007); *Shore Club Condominium Assn.*, 340 NLRB 700, 700 fn. 1 (2003), enf'd. 400 F.3d 1336 (11th Cir. 2005), cert. denied 546 U.S. 820 (2005).

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.²

As affirmative defenses,³ the Respondent asserts that (i) all or part of the allegations involved are barred by Section 10(b) of the Act; (ii) the certified bargaining unit is not an appropriate unit; (iii) the certification of representative is invalid because the Board failed to follow its own procedures in certifying the bargaining unit and failed to provide appropriate due process; (iv) a majority of employees in the proposed unit do not wish to be represented by the Union; (v) the remedies requested are overbroad, impermissibly punitive, and inapplicable to the alleged violations, and improper because the Respondent has not violated the Act; (vi) the complaint fails to state facts sufficient to pursue a claim; (vii) the General Counsel is not substantially justified in engaging in litigation against the Respondent; (viii) the proceeding is barred by waiver; and (ix) unfair labor practices of the Union excuse any conduct on the part of the Respondent.⁴

² In its answer, the Respondent "neither admits nor denies" the allegations in pars. 11 and 12 of the amended complaint, which allege, respectively, the legal conclusions that the Respondent has been failing and refusing to bargain collectively with the Union in violation of Sec. 8(a)(5) and (1), and that the unfair labor practices affect commerce within the meaning of Sec. 2(6) and (7) of the Act. However, in its answer, the Respondent admits the allegation in amended complaint par. 9 that about December 11, 2019, by letter sent by regular mail, email, and hand delivery, the Union requested that the Respondent recognize and bargain with the Union as the exclusive bargaining representative of the unit. The answer also admits the allegation in amended complaint par. 10 that since December 11, 2019, the Respondent has failed and refused to recognize and bargain with the Union. In addition, the answer admits the allegation in amended complaint par. 4 that at all material times the Respondent has been an employer engaged in commerce within the meaning of Sec. 2(2), (6), and (7) and has been a health care institution within the meaning of Sec. 2(14). Accordingly, we conclude that the Respondent's responses to pars. 11 and 12 of the amended complaint do not raise any issue warranting a hearing.

Further, in its answer, the Respondent denies the allegation in par. 7 of the amended complaint, which sets forth the appropriate unit. The unit issue, however, was fully litigated and resolved in the underlying representation proceeding. Accordingly, the Respondent's denial of the appropriateness of the unit does not raise any litigable issue in this proceeding.

³ In its answer to the amended complaint, the Respondent asserted 12 separate affirmative defenses. Some related defenses have been combined in this paragraph and for discussion in footnote 4, infra.

⁴ As to the first affirmative defense that all or part of the allegations involved are barred by Sec. 10(b), we find no merit to this contention. The Union was certified as the exclusive collective-bargaining representative of the unit on December 9, 2019, the Respondent admits it has refused to recognize and bargain with the Union since about December

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.⁵

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 Mount Clemens, Michigan (Mount Clemens facility), and has been engaged in the operation of a hospital providing inpatient and outpatient medical care.

During the calendar year ending on December 31, 2019, the Respondent, in conducting its operations described above, derived gross revenues in excess of \$250,000, and purchased and received goods at its Mount Clemens facility valued in excess of \$5000 directly from sources located outside of the State of Michigan.

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 a healthcare institution within the

11, 2019, and the charge was filed and served on the Respondent on January 15, 2020.

Turning to the second, third, and fourth affirmative defenses, these contentions simply recapitulate arguments raised by the Respondent and rejected by the Board in the underlying representation proceeding and therefore do not raise any issue warranting a hearing.

Regarding the affirmative defenses concerning remedial matters, the Respondent has not demonstrated, by arguments in its response to the Notice to Show Cause, that the traditional remedies requested by the General Counsel raise any issue warranting a hearing or are otherwise inappropriate to order here.

As to the sixth affirmative defense, the amended complaint does indeed state claims upon which relief can be granted insofar as it alleges that the Respondent violated the Act by refusing to recognize and bargain with the Union. See, e.g., *George Washington University*, 346 NLRB 155, 155 fn. 2 (2005), enfd. per curiam 2006 WL 4539237 (D.C. Cir. Nov. 27, 2006) (unpublished decision). Finally, as to the remaining affirmative defenses, the Respondent has not offered any explanation or evidence to support these bare assertions. We thus find that these affirmative defenses are insufficient to warrant denial of the Motion for Summary Judgment in this proceeding. See *id.*; see also *Circus Hotel*, 316 NLRB 1235, 1235 fn. 1 (1995).

⁵ The Respondent's requests that the complaint, as amended, be dismissed and that it be awarded costs and attorneys' fees are therefore denied.

meaning of Section 2(14) 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 held on August 28, 2019, the Union was certified on December 9, 2019,⁶ as the exclusive collective-bargaining representative of the employees in the following appropriate unit within the meaning of Section 9(b) of the Act:

INCLUDED: All full-time and regular part-time bed control specialists; administrative assistants, imaging assistants; clerical associate-1s; clerical associate-2s; gift shop clerks; clinical care systems coordinators; office coordinators; dispatchers; couriers; EEG techs; operators; patient liaison meta bariatric; schedulers; surgical boarders; surgical supply specialists; cardiographic techs, critical care techs, lab assistants, perioperative techs, pharmacy tech-1s; pharmacy tech-2s; patient access representative-1s; patient access representative-2s; patient access representative-3s; patient experience representatives; respiratory equipment techs; staffing coordinators; patient bed sitter-2s, patient safety coordinators and systems specialists.

EXCLUDED: All biomedical tech-1s; biomedical tech-2s; biomedical tech-3s; Accountant II; cardiovascular invasive specialist reg; case manager RN; clinical information specialist; clinical pharmacy specialist; clinical specialty coordinator; computer tomography techno; coordinated emergency preparedness; computer tomography techno lead; clinical transformation specialist; coordinated metabolic bariatric; coordinated surgical board; cytotechnologist; educator diabetes RN; educator patient care services; educator patient care service lead; executive assistant; executive assistant senior; exercise physiologist; imaging services instructor; infection preventionist; laboratory marketing rep; lactation consultant; librarian; mammography techno; mammography techno lead; marketing communication specialist; medical staff credentialing specialist; media relations specialist; medical laboratory tech; medical assistant; MRI technologist; MTQIP clinical reviewer; medical technologist; nurse extern; nurse intern; nuclear medicine technologist; nurse navigator breast health;

⁶ By unpublished Order dated April 14, 2020, the Board denied the Respondent's request for review of the Regional Director's Decision and Direction of Election, and of the Decision on Objections 1 and 4. By unpublished Order dated July 2, 2020, the Board denied the Respondent's request for review of the Regional Director's Decision and Certification of Representative.

nurse practitioner specialty; OB technician II; occupational therapist; pathologist assistant; pharmacist; pharmacist lead; pharmacy buyer; pharmacy intern; physical therapist; physical therapist assistant; physical therapist assistant lead; physician liaison; polysomnographic technologist; polysomnographic technologist lead; preadmission testing techs; program managers; clinical risk patient safety; quality improvement specialist; radiology technologist; RN first assistant; respiratory intern; respiratory therapist reg; respiratory reg lead; social worker MSW; sonographer; sonographer cardiac; sonographer cardiac lead; sonographer lead; sonographer vascular reg; special procedure technologist; speech language pathologist; surgical tech; trauma data analyst; trauma performance IMP specialist; utilization review AP specialist RN; utilization review specialist; all other employees, managerial employees, temporary employees, contracted 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*

About December 11, 2019, the Union, by letter sent by regular mail, email, and hand delivery, requested that the Respondent recognize and bargain with it as the exclusive collective-bargaining representative of the unit. Since about December 11, 2019, 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 exclusive collective-bargaining representative of its employees in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By failing and refusing since about December 11, 2019, 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 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, McLaren Macomb, Mount Clemens, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize and bargain with Local 40, RN Staff Council, Office and Professional Employees International Union (OPEIU), AFL-CIO (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:

INCLUDED: All full-time and regular part-time bed control specialists; administrative assistants, imaging assistants; clerical associate-1s; clerical associate-2s; gift shop clerks; clinical care systems coordinators; office coordinators; dispatchers; couriers; EEG techs; operators; patient liaison meta bariatric; schedulers; surgical boarders; surgical supply specialists; cardiographic techs, critical care techs, lab assistants, perioperative techs, pharmacy tech-1s; pharmacy tech-2s; patient access representative-1s; patient access representative-2s; patient access representative-3s; patient experience representatives; respiratory equipment techs; staffing coordinators; patient bed sitter-2s, patient safety coordinators and systems specialists.

EXCLUDED: All biomedical tech-1s; biomedical tech-2s; biomedical tech-3s; Accountant II; cardiovascular invasive specialist reg; case manager RN; clinical in-

formation specialist; clinical pharmacy specialist; clinical specialty coordinator; computer tomography techno; coordinated emergency preparedness; computer tomography techno lead; clinical transformation specialist; coordinated metabolic bariatric; coordinated surgical board; cytotechnologist; educator diabetes RN; educator patient care services; educator patient care service lead; executive assistant; executive assistant senior; exercise physiologist; imaging services instructor; infection preventionist; laboratory marketing rep; lactation consultant; librarian; mammography techno; mammography techno lead; marketing communication specialist; medical staff credentialing specialist; media relations specialist; medical laboratory tech; medical assistant; MRI technologist; MTQIP clinical reviewer; medical technologist; nurse extern; nurse intern; nuclear medicine technologist; nurse navigator breast health; nurse practitioner specialty; OB technician II; occupational therapist; pathologist assistant; pharmacist; pharmacist lead; pharmacy buyer; pharmacy intern; physical therapist; physical therapist assistant; physical therapist assistant lead; physician liaison; polysomnographic technologist; polysomnographic technologist lead; preadmission testing techs; program managers; clinical risk patient safety; quality improvement specialist; radiology technologist; RN first assistant; respiratory intern; respiratory therapist reg; respiratory reg lead; social worker MSW; sonographer; sonographer cardiac; sonographer cardiac lead; sonographer lead; sonographer vascular reg; special procedure technologist; speech language pathologist; surgical tech; trauma data analyst; trauma performance IMP specialist; utilization review AP specialist RN; utilization review specialist; all other employees, managerial employees, temporary employees, contracted employees, confidential employees, guards and supervisors as defined in the Act.

(b) Post at its facility in Mount Clemens, Michigan, copies of the attached notice marked "Appendix."⁷ Cop-

⁷ 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 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. Any delay in the physical posting of paper notices also applies to the electronic distribution of the notice if the Respondent customarily communicates with its employees by electronic means. 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

ies of the notice, on forms provided by the Regional Director for Region 7, 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 December 11, 2019.

(c) Within 21 days after service by the Region, file with the Regional Director for Region 7 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. February 2, 2021

Marvin E. Kaplan, Member

William J. Emanuel, Member

John F. Ring, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

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 Local 40, RN Staff Council, Office and Professional Employees International Union (OPEIU), AFL-CIO (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 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 the understanding in a signed agreement:

INCLUDED: All full-time and regular part-time bed control specialists; administrative assistants, imaging assistants; clerical associate-1s; clerical associate-2s; gift shop clerks; clinical care systems coordinators; office coordinators; dispatchers; couriers; EEG techs; operators; patient liaison meta bariatric; schedulers; surgical boarders; surgical supply specialists; cardiographic techs, critical care techs, lab assistants, perioperative techs, pharmacy tech-1s; pharmacy tech-2s; patient access representative-1s; patient access representative-2s; patient access representative-3s; patient experience representatives; respiratory equipment techs; staffing coordinators; patient bed sitter-2s, patient safety coordinators and systems specialists.

EXCLUDED: All biomedical tech-1s; biomedical tech-2s; biomedical tech-3s; Accountant II; cardiovascular invasive specialist reg; case manager RN; clinical information specialist; clinical pharmacy specialist; clinical specialty coordinator; computer tomography tech-

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MCLAREN MACOMB

The Board's decision can be found at <https://www.nlr.gov/case/07-CA-254640> 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.

