

Colonial Gardens Care Center, Inc. and United Food & Commercial Workers Union Local 698, AFL-CIO. Case 8-CA-16093-2

24 January 1984

DECISION AND ORDER

BY MEMBERS ZIMMERMAN, HUNTER, AND DENNIS

Upon a charge filed by the Union 20 September 1982, the General Counsel of the National Labor Relations Board issued a complaint 10 November 1982 against the Company, the Respondent, alleging that it has violated Section 8(a)(5) and (1) of the National Labor Relations Act.

The complaint alleges that on 28 July 1982, following a Board election in Case 8-RC-12675, the Union was certified as the exclusive collective-bargaining representative of the Company's employees in the unit found appropriate. (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), amended Sept. 9, 1981, 46 Fed.Reg. 45922 (1981); *Frontier Hotel*, 265 NLRB 343 (1982).) The complaint further alleges that since 30 July 1982 the Company has refused to bargain with the Union. On 17 November 1982 the Company filed its answer admitting in part and denying in part the allegations in the complaint.

On 25 April 1983 the General Counsel filed a Motion for Summary Judgment. On 28 April 1983 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 Company filed a response.

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

Ruling on Motion for Summary Judgment

In its answer to the complaint, the Respondent denies the Union's status as the exclusive collective-bargaining representative of the employees in the unit found appropriate in Case 8-RC-12675. The Respondent's answer also contests the validity of the Union's certification. Specifically, it asserts that the Union sent false and defamatory information to employees during the campaign, posted "false propaganda," and improperly waived initiation fees. The Respondent further contends, both in its answer and the response to Notice to Show Cause, that the Regional Director did not properly investigate the Respondent's election objections, and that the Senior Executive Service has rendered unconstitutional any actions by the Regional Direc-

tor (such as ordering the election, supervising the election, reporting on the election, issuing findings and making recommendations, and processing the instant unfair labor practice case). The General Counsel asserts that the Respondent seeks to relitigate issues that were raised or could have been raised and decided in the representation case. We agree with the General Counsel.

Our review of the record, including the record in Case 8-RC-12675, reveals that pursuant to a Stipulation for Certification Upon Consent Election, an election was conducted 5 May 1982 among employees in the stipulated unit. The tally of ballots showed that of approximately 118 eligible voters, 69 cast ballots for, and 12 against, the Union, with 5 challenged ballots. The challenged ballots were not sufficient to affect the results of the election. On 11 May 1982, the Respondent filed timely objections to conduct affecting the results of the election alleging, inter alia, that the Union made material misrepresentations of facts, distributed defamatory material to employees, and improperly waived initiation fees. After conducting an investigation, the Regional Director for Region 8 issued his Report on Objections in which he recommended that the Respondent's objections be overruled. The Respondent then filed with the Board exceptions to the Regional Director's report. In its exceptions the Respondent contended, inter alia, that the Regional Director erred in failing to conduct an evidentiary hearing on the election objections, and in finding that certain campaign literature the Union had distributed and a document a certain employee had posted did not warrant setting aside the election. On 28 July 1982, the Board issued a Decision and Certification of Representative in which it adopted the Regional Director's recommended disposition of the objections, and certified the Union as the collective-bargaining representative of the employees in the stipulated unit.¹

It thus appears that the Respondent is attempting to raise issues that were raised in the underlying representation case.

¹ The Respondent's Objections 1, 2, and 4 in the underlying representation case alleged, inter alia, that the Union made material misrepresentations of fact during the campaign. The Board adopted the Regional Director's findings that the alleged misrepresentations were not objectionable under the standard set forth in *General Knit of California*, 239 NLRB 619 (1978), and *Hollywood Ceramics Co.*, 140 NLRB 221 (1962). After the Union was certified, the Board issued its decision in *Midland National Life Insurance Co.*, 263 NLRB 127, 133 (1982), overruling *General Knit* and *Hollywood Ceramics*, and held that the Board "will no longer probe into the truth or falsity of the parties' campaign statements, and that [the Board] will not set elections aside on the basis of misleading campaign statements." In keeping with fn. 24 of that opinion, stating that the new standard would be applied "to all pending cases in whatever stage," we conclude that the Respondent's misrepresentation allegations are without merit on their face.

It is well settled that in the absence of newly discovered and previously unavailable evidence or special circumstances, a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues that were or could have been litigated in a prior representation proceeding. See *Pittsburgh Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941); Secs. 102.67(f) and 102.69(c) of the Board's Rules and Regulations.

All issues raised by the Company were or could have been litigated in the prior representation proceeding.² The Company 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 re-examine the decision made in the representation proceeding. We therefore find that the Company has not raised any issue that is properly litigable in this unfair labor practice proceeding. Accordingly we grant the Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Company, an Ohio corporation, operates a nursing care facility in Tallmadge, Ohio, where it annually derives gross revenues in excess of \$100,000, and receives goods valued in excess of \$5000 directly from points located outside the State of Ohio. We find that that the Company is an employer engaged in commerce within the meaning of Section 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 election held 5 May 1982 the Union was certified 28 July 1982 as the collective-bargaining representative of the employees in the following appropriate unit:

All full-time and permanent part-time nurses aides, laundry employees, housekeeping employees and maintenance employees employed at the Employer's 563 Colony Park Drive,

² The Respondent's contention regarding the impact of the Senior Executive Service upon the Regional Director's actions was raised for the first time in its answer to the complaint and response to the Notice to Show Cause in this proceeding. This issue could have been litigated in the prior representation proceeding and the Respondent does not contend that it has newly discovered or previously unavailable evidence concerning this matter. Accordingly, we find that this issue may not be litigated in this unfair labor practice proceeding. We note that even if the Respondent's contentions were properly litigated in this proceeding they would be found lacking in merit. See *French Hospital Medical Center*, 254 NLRB 711 fn. 3 (1981).

Tallmadge, Ohio location, but excluding all casual and temporary employees, dietary employees, maintenance supervisor, technical employees, office clerical employees, professional employees, guards and supervisors as defined in the Act.

B. *Refusal to Bargain*

Since 30 July 1982 the Union has requested the Company to bargain, and since 30 July 1982 the Company has refused. We find that this refusal constitutes an unlawful refusal to bargain in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSIONS OF LAW

By refusing on and after 30 July 1982 to bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit, the Company 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); *Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964); *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

ORDER

The National Labor Relations Board orders that the Respondent, Colonial Gardens Care Center, Inc., Tallmadge, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with United Food & Commercial Workers Union Local 698, AFL-CIO, as the exclusive 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 representative of the employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All full-time and permanent part-time nurses aides, laundry employees, housekeeping employees and maintenance employees employed at the Employer's 563 Colony Park Drive, Tallmadge, Ohio location, but excluding all casual and temporary employees, dietary employees, maintenance supervisor, technical employees, office clerical employees, professional employees, guards and supervisors as defined in the Act.

(b) Post at its facility in 563 Colony Park Drive, Tallmadge, Ohio, copies of the attached notice marked "Appendix."³ Copies of the notice, on forms provided by the Regional Director for Region 8, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

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 the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain with United Food & Commercial Workers Union Local 698, AFL-CIO, as the exclusive 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 guaranteed you by Section 7 of the Act.

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 bargaining unit:

All full-time and permanent part-time nurses aides, laundry employees, housekeeping employees and maintenance employees employed at the Employer's 563 Colony Park Drive, Tallmadge, Ohio location, but excluding all casual and temporary employees, dietary employees, maintenance supervisor, technical employees, office clerical employees, professional employees, guards and supervisors as defined in the Act.

COLONIAL GARDENS CARE CENTER,
INC.