

**Terrace Gardens Plaza, Inc. and Local 32B-32J,
Service Employees International Union, AFL-
CIO. Case 29-CA-18268**

December 14, 1994

DECISION AND ORDER

BY MEMBERS STEPHENS, DEVANEY, AND
BROWNING

On June 30, 1994, the General Counsel of the National Labor Relations Board issued a complaint and notice of hearing alleging that the Respondent has violated Section 8(a)(5) and (1) of the National Labor Relations Act by refusing the Union's request to bargain following the Union's certification in Case 29-RC-7996. (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); *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed an answer admitting in part and denying in part the allegations in the complaint.

On October 11, 1994, the General Counsel filed a Motion for Summary Judgment and Issuance of Decision and Order. On October 13, 1994, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. On November 3, 1994, the Respondent filed a response.¹

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

¹ In its response, the Respondent contends that the General Counsel's motion should be rejected as untimely filed under Sec. 102.24(b) of the Board's Rules inasmuch as it was filed with the Board less than 28 days prior to the scheduled November 1, 1994 hearing date. In addition, the Respondent moves that counsel for the General Counsel be disqualified from acting in that capacity in this proceeding inasmuch as she served as the hearing officer in the underlying representation case and also investigated contemporaneous charges brought by the Employer against the Union that had previously represented the employees. We reject the Respondent's contentions. With respect to timeliness, the General Counsel's motion was postmarked October 5, 1994, 27 days before the hearing date, and was therefore filed only one day over the deadline. Further, the scheduled hearing date has already been postponed pursuant to the Board's Notice to Show Cause. In these circumstances, and as it is clear, for the reasons discussed infra, that the Respondent is seeking to test the Board's certification of the Union in the court of appeals, we find that no rational purpose would be served by requiring the General Counsel to refile the Motion for Summary Judgment.

As for the Respondent's motion to disqualify counsel, we deny the motion as without merit. As the Respondent acknowledges, the Regional Director previously rejected its argument that counsel could not serve as the hearing officer in the representation proceeding because she had investigated the contemporaneous unfair labor practice charges. Nor do we now find any basis to disqualify counsel from prosecuting the instant case because she acted as the hearing officer in that case. See *Willow Ridge Living Center*, 314 NLRB No. 12 (June 15, 1994) (not printed in Board volumes).

Ruling on Motion for Summary Judgment

In its answer, the Respondent denies or claims insufficient knowledge of various allegations of the complaint, including the allegations regarding the filing of the representation petition and the filing and service of the unfair labor practice charge, the allegations that the Union is a labor organization and is the exclusive bargaining representative of the unit employees, and the allegations that the Union requested the Respondent to bargain and that the Respondent refused. We find that none of these denials raise any issues warranting a hearing. The Respondent's denials of the allegations regarding the filing of the representation petition, the Union's status as a labor organization, and the Union's certification as exclusive bargaining representative of the unit employees all raise issues which were or could have been litigated in the prior representation proceeding. See, e.g., *Biewer Wisconsin Sawmill*, 306 NLRB 732 (1992). 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).

As for the allegations regarding the filing and service of the unfair labor practice charge, and the allegations that the Union requested bargaining and that the Respondent refused, all of these allegations are supported by the documentary evidence attached to the Motion for Summary Judgment, and the Respondent has not disputed the authenticity of that evidence in response to the Notice to Show Cause. Although the Respondent contends that its letters responding to the Union's request to bargain offered to meet with the Union to discuss outstanding issues and merely reserved the right to seek judicial review of the certification, we reject that contention. The Respondent's March 23, 1994 letter to the Union's attorney, which the Respondent attached to its response to the notice to show cause, clearly states that the Respondent "continues to believe that the NLRB erroneously certified" the Union, and that the Respondent "will" seek judicial review of the certification. Further, in its subsequent May 16, 1994 letter to the Union's attorney, the Respondent clearly stated in regard to any discussions which took place, that any conclusions or agreements would "have to be made subject to the final judgment of the federal courts." In these circumstances, we find that the Respondent has effectively refused to bargain with the Union as alleged in the complaint. See, e.g., *Biewer Wisconsin Sawmill*, supra.

Accordingly, we grant the General Counsel's Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all times material, the Respondent, a New York corporation, with its principal office and place of business located at 920 East 17th Street in the Borough of Brooklyn, City and State of New York, has been engaged in the ownership of a cooperative residential apartment house located at the same address.

During the year preceding issuance of the complaint, which period is representative of its business operations generally, the Respondent, in the course and conduct of its operations, has collected gross revenues from rentals and maintenance fees in the building in excess of \$500,000, and has purchased and caused to be transported and delivered to its New York place of business, oil, cleaning supplies, and equipment, and other goods and materials valued in excess of \$50,000, which goods and materials were transported and delivered to it and received from other enterprises located in the State of New York, each of which other enterprises had received these goods and materials in interstate commerce directly from points outside the State of New York.

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 rerun election held January 27, 1994, the Union was certified on February 17, 1994, as the collective-bargaining representative of the employees in the following appropriate unit:

All full-time building service employees including doormen, porters, handyman and the assistant superintendent employed by the Employer at its 1615 Avenue I, 915 East 17th Street and 920 East 17th Street, Brooklyn, New York locations, but excluding the superintendent, guards, and supervisors as defined in the Act.

The Union continues to be the exclusive representative under Section 9(a) of the Act.

B. *Refusal to Bargain*

On or about March 9 and May 10, 1994, the Union requested the Respondent to bargain, and, since in or around the latter part of March 1994, the exact date being uncertain, the Respondent 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.

CONCLUSION OF LAW

By refusing on and after March 1994 to bargain with the Union as the exclusive collective-bargaining representative of 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 the 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, Terrace Gardens Plaza, Inc., Brooklyn, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with Local 32B-32J, Service Employees International Union, 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 building service employees including doormen, porters, handyman and the assistant superintendent employed by the Employer at its 1615 Avenue I, 915 East 17th Street and 920 East 17th Street, Brooklyn, New York locations, but excluding the superintendent, guards, and supervisors as defined in the Act.

(b) Post at its facility in Brooklyn, New York, copies of the attached notice marked "Appendix."² Copies of the notice, on forms provided by the Regional Director for Region 29, 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.

²If 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 Local 32B-32J, Service Employees International Union, 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 building service employees including doormen, porters, handyman and the assistant superintendent employed by us at our 1615 Avenue I, 915 East 17th Street and 920 East 17th Street, Brooklyn, New York locations, but excluding the superintendent, guards, and supervisors as defined in the Act.

TERRACE GARDENS PLAZA, INC.