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Greyston Bakery, Inc. and Local 3, Bakery, Confectionery and Tobacco Workers International Union. Case 2-CA-30635

October 31, 1997

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND HIGGINS

Pursuant to a charge filed on July 23, 1997, the General Counsel of the National Labor Relations Board issued a complaint on August 6, 1997, 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 2-RC-21727. (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, and asserting affirmative defenses.

On September 23, 1997, the General Counsel filed a Motion for Summary Judgment. On September 26, 1997, 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 October 17, 1997, the Respondent filed a response.

Ruling on Motion for Summary Judgment

In its answer and response the Respondent admits its refusal to bargain, but attacks the validity of the certification on the basis of its objections to the election in the representation proceeding.¹

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

¹The Respondent in its answer also asserts as affirmative defenses that the allegations of the complaint are barred by the 6-month limitations period set forth in Sec. 10(b) of the Act, and that the Union no longer represents a majority of the unit employees due to extensive and substantial turnover since the date of the election. Both defenses are clearly without merit. With respect to the 10(b) defense, the Respondent's answer admits that the charge was filed and served on July 23, 1997, which was well within 6 months of the Respondent's admitted April 22, 1997 refusal to bargain. With respect to the turnover defense, it is well established that employee turnover is not a valid basis for refusing to bargain in the instant circumstances. See, e.g., *HeartShare Human Services of New York*, 317 NLRB 611 (1995), enf. 108 F.3d 1358 (2d Cir. 1997), and cases cited therein.

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, a corporation, with an office and place of business at 114 Woodworth Avenue, Yonkers, New York, has been engaged in the wholesale production of baked goods. Annually, the Respondent, in the course and conduct of its business operations described above, purchases and receives at its Yonkers, New York facility goods and supplies valued in excess of \$50,000 directly from points located outside the State of New York. We find that the Respondent 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 October 2, 1996, the Union was certified on March 31, 1997, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:²

All full-time and regular part-time production and maintenance employees, including bakers and baker trainees, employed by Respondent at its facility located at 114 Woodworth Avenue, Yonkers, New York, excluding all other employees, including managers, assistant managers, the controller, the marketing director, the human resources director, office clerical employees and guards, professional employees 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*

About April 22, 1997, the Union requested the Respondent to bargain and, since about the same date, the Respondent has refused. We find that this refusal con-

²Although the Respondent's answer denies the appropriateness of the unit, the Respondent stipulated to the appropriateness of the unit in the underlying representation proceeding. Accordingly, the Respondent is barred from litigating the appropriateness of the unit in the instant proceeding.

stitutes 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 April 22, 1997, 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, Greyston Bakery, Inc., Yonkers, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with Local 3, Bakery, Confectionery and Tobacco Workers International Union, 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 regular part-time production and maintenance employees, including bakers and baker trainees, employed by Respondent at its facility located at 114 Woodworth Avenue, Yonkers, New York, excluding all other employees, including managers, assistant managers, the controller, the marketing director, the human resources director, office clerical employees and

guards, professional employees and supervisors as defined in the Act.

(b) Within 14 days after service by the Region, post at its facility in Yonkers, New York, copies of the attached notice marked "Appendix."³ Copies of the notice, on forms provided by the Regional Director for Region 2 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. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, 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 July 23, 1997.

(c) Within 21 days after service by the Region, file with the Regional Director 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 31, 1997

William B. Gould IV, Chairman

Sarah M. Fox, Member

John E. Higgins, Jr., 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 the National Labor Relations Act and has ordered us to post and abide by this notice.

³If 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 refuse to bargain with Local 3, Bakery, Confectionery and Tobacco Workers International Union, 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 regular part-time production and maintenance employees, including bakers and baker trainees, employed by us at our facility located at 114 Woodworth Avenue, Yonkers, New York, excluding all other employees, including managers, assistant managers, the controller, the marketing director, the human resources director, office clerical employees and guards, professional employees and supervisors as defined in the Act.

GREYSTON BAKERY, INC.