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**St. Mary's Acquisition Co., Inc. d/b/a St. Mary's
Nursing Home and James Gordon.** Case 7-CA-46544

August 31, 2004

ORDER REMANDING PROCEEDING

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND
WALSH

On January 12, 2004, a hearing was held in this proceeding before Administrative Law Judge Pargen Robertson pursuant to a complaint alleging that the Respondent violated Section 8(a)(1), (3), and (4) by suspending Charging Party James Gordon (Gordon) on August 4, 2003, and discharging him 2 days later on August 6.¹ At the conclusion of the General Counsel's case in chief, the judge granted the Respondent's motion for summary dismissal of the complaint, stating that, in his view, the General Counsel had failed to establish a prima facie case of a violation. The General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel. For the reasons discussed below, we find merit in the General Counsel's exceptions to the dismissal of the complaint, and we remand the case for further proceedings.

The Respondent operates a nursing home. Gordon was employed there as a certified nursing assistant (CNA) and was an active participant in a successful organizing campaign conducted by Local 79, Service Employees International Union, AFL-CIO (the Union) in the summer of 2002.

Gordon was discharged in August 2002. Gordon filed an unfair labor practice charge alleging that his discharge was "in retaliation for his union and other protected activities" in violation of Section 8(a)(3) and (1). This charge and others filed by Gordon resulted in a consolidated complaint issued by the General Counsel on February 3. Thereafter, the Respondent, the Union, and Gordon executed a settlement agreement, which was approved by the Regional Director on June 2.

The settlement agreement provided that Gordon would be reinstated and receive backpay. The settlement agreement also contained a "Scope of the Agreement" clause that stated, in relevant part:

The General Counsel reserves the right to use the evidence obtained in the investigation and prosecution of the [complaint allegations] for any relevant purpose in the litigation of this or any other case[s], and a judge, the Board and the courts may make findings of fact and/or conclusions of law with respect to said evidence.

Gordon returned to work on July 14. He resumed his union activities by participating in contract negotiations with the Respondent as a member of the Union's negotiating committee. Thereafter, the Respondent suspended Gordon on August 4 and discharged him August 6, allegedly for being too rough when providing care to two nursing home residents.

Based on a charge filed by Gordon, the General Counsel issued the instant complaint alleging that the August suspension and discharge of Gordon violated Section 8(a)(3) and (1) by retaliating against him for his support of the Union and by discouraging employees from engaging in protected activities. The complaint also alleged that the suspension and discharge violated Section 8(a)(4) and (1) because they were in response to Gordon's filing of charges against the Respondent a year earlier and in reprisal for participating in the Board-approved settlement of the consolidated complaint stemming from those charges.²

A hearing on the instant complaint took place on January 12, 2004. In it, the General Counsel called Gordon as his only witness. During the course of his direct case, the General Counsel sought to question Gordon about the circumstances involved in the settled case. The Respondent's counsel objected on several grounds, including that the settled allegations were not alleged as unlawful in the instant complaint and were "irrelevant to these proceedings." Notwithstanding the General Counsel's explanation that his purpose in introducing evidence of the settled case was to establish the Respondent's "hostility" toward Gordon's prior union activity, the judge sustained the objection on the basis that the settled allegations were "outside the scope of this complaint." The judge permitted the General Counsel to make an offer of proof, but ultimately rejected the evidence.

Following the conclusion of the Respondent's cross-examination of Gordon, the General Counsel rested his case. The Respondent then made a motion to dismiss the complaint. The judge ruled from the bench and granted the motion, stating that the General Counsel had failed to

² The complaint's 8(a)(4) allegation specifically referenced the settled allegations, but the complaint did not re-allege the settled allegations as separate violations.

¹ All dates are in 2003, unless otherwise indicated.

establish any evidence of the Respondent's union animus to support the complaint allegations.³

In his exceptions to the complaint's dismissal, the General Counsel argues that evidence in the settled case involving Gordon's previous suspension and discharge in 2002 should have been admitted and considered by the judge as evidence of the Respondent's animus in the instant case. The General Counsel contends that the judge not only erred by precluding the introduction of that evidence, but that his error directly resulted in the judge's erroneous conclusion that no evidence of the Respondent's animus was presented in support of the complaint allegations. We agree.

As the General Counsel correctly points out on brief, the Board has long held that "[e]vidence involved in a settled case may properly be considered as background evidence in determining the motive or object of a respondent in activities occurring either before or after the settlement, which are [currently] in litigation." *Black Entertainment Television*, 324 NLRB 1161, 1163 (1997); accord: *Park Manor Nursing Home*, 277 NLRB 197, 199 (1985). As further stated in *Overnite Transportation Co.*,⁴ this principle "is true regardless of whether there was specific reservation language in the settlement agreement."

Here, the General Counsel did not allege in the instant complaint or seek to litigate at the hearing that the conduct in the settled case—that is, Gordon's 2002 suspension and discharge—violated the Act. Rather, the General Counsel sought to introduce the circumstances of the settled case solely to support the instant complaint's allegations that Gordon's subsequent suspension and discharge were unlawfully motivated by the Respondent's union animus. Under the precedent cited above, the judge erred as a matter of law by precluding the General Counsel from introducing relevant facts regarding the settled case for this limited evidentiary purpose. Further, wholly apart from the judge's legal error in excluding evidence from the settled case, his ruling also disregarded the "Scope of the Agreement" clause of the settlement agreement, which specifically reserved to the

³ After the Board ordered the judge to issue either written decision or a bench decision, the judge followed up his oral dismissal of the complaint by issuing a "Certification of Transcript," in which he certified the exhibits and transcript pages of the hearing, including the pages containing his dismissal of the complaint. In his exceptions, the General Counsel argues that the judge's transcript and exhibit certification does not constitute a "written decision" as required by Sec. 102.45 of the Board's Rules and Regulations. We find it unnecessary to pass on this contention, in light of our decision to remand this case for further proceedings and for issuance of a decision that conforms with Sec. 102.45.

⁴ 335 NLRB 372, 376 fn. 18 (2001).

General Counsel the right to use evidence from the settled case "for any relevant purpose in the litigation of . . . any other case[s]," including, as we find here, to establish the Respondent's union animus in this postsettlement case. Although, as noted above, this right existed by law and it was unnecessary for the General Counsel to reserve it in the settlement agreement,⁵ the fact that he did reserve the right and the judge failed to honor the reservation further supports the conclusion that the judge erred by summarily dismissing the complaint.

Accordingly, we reverse the judge's ruling granting the Respondent's motion to dismiss, and we remand the case for a reopening of the hearing to permit the General Counsel to present evidence from the settled case involving Gordon's 2002 suspension and discharge for the purpose of establishing that the suspension and discharge of Gordon in 2003 were unlawfully motivated. The reopened hearing shall further provide an opportunity for the Respondent to present evidence in support of its defenses to the complaint, and for the General Counsel to present rebuttal evidence.⁶

ORDER

It is ordered that this case is remanded to the chief administrative law judge with instructions to reopen the hearing before a different administrative law judge designated by him for the purpose of receiving further evidence. It is further ordered that, following the conclusion of the hearing, the judge shall prepare a decision in

⁵ See *Outdoor Venture Corp.*, 327 NLRB 706, 708–709 (1999).

⁶ The General Counsel asserts that the judge demonstrated prejudice and bias against him during the hearing and should be precluded from presiding over the hearing on remand. In support of his contention of bias and prejudice, the General Counsel cites the judge's ruling excluding the evidence pertaining to the settled case, as well as certain remarks made during the hearing that, according to the General Counsel, indicated the judge's "impatience" and "irritation" with the General Counsel's presentation of his case. Without passing on the General Counsel's allegations, and in order to remove any suggestion of bias and prejudice as to potential issues on remand, we shall order that the case be remanded to a different judge. See, e.g., *Filmation Associates, Inc.*, 227 NLRB 1721, 1722 (1977) ("[I]t is essential not only to avoid actual partiality and prejudgment . . . in the conduct of Board proceedings, but also to avoid even the *appearance* of a partisan tribunal.") (internal questions omitted).

Chairman Battista concludes that the General Counsel has not established the rather serious allegation of bias. The fact that the judge made an erroneous evidentiary ruling surely does not establish bias. And, the General Counsel's subjective perception that the judge showed "impatience" and "irritation" does not establish bias. Since bias is not shown, there is no need or warrant to remand the case to a different judge who, presumably, would have to hear the case anew.

accordance with Section 102.45 of the Board's Rules and Regulations containing credibility resolutions, findings of fact, conclusions of law, and a recommended Order. Following service of the decision on the parties, the provisions of Section 102.46 shall apply.

Dated, Washington, D.C. August 31, 2004

Robert J. Battista, Chairman

Wilma B. Liebman, Member

Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD