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Manhattan Center Studios, Inc. and Theatrical Stage Employees Local No. One, I.A.T.S.E., AFL-CIO, CLC. Case 2-CA-35394

September 24, 2004

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS WALSH AND MEISBURG

This is a refusal-to-bargain case in which the Respondent is contesting the Union's certification as bargaining representative in the underlying representation proceeding. Pursuant to a charge filed on March 23, 2003, the General Counsel issued the complaint on May 30, 2003, alleging that the Respondent has violated Section 8(a)(5) and (1) of the Act by refusing the Union's request to bargain and to provide information following the Union's certification in Case 2-RC-22677. (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 certain affirmative defenses.

On September 9, 2003, the General Counsel filed a Motion for Summary Judgment and Memorandum in Support. On September 10, 2003, 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 a first amended answer to the complaint.

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

Ruling on Motion for Summary Judgment

The Respondent admits its refusal to bargain and to furnish information, but contests the validity of the certification based on its assertions that it has newly discovered evidence that an alleged supervisor engaged in improper prounion conduct during the union organizing campaign and that the Union may have made improper promises of job opportunities to unit employees.

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. In its response to the Notice to Show Cause, the Respondent asserts that because it "was unaware of the Union's misconduct and could not have raised these issues in the earlier representation proceeding, and because there exist genuine issues of material

fact warranting a hearing, the motion for summary judgment must be denied." In support of this assertion, the Respondent submitted a declaration by its chief executive officer, Russell Arnold. Therein, Arnold stated that in March 2003, subsequent to the Union's February 27, 2003 certification, a nonunit employee named Michael Spony informed Arnold that a supervisor named Gustavo Garces had spearheaded the union campaign.¹

The Respondent also submitted an affidavit from Spony. Therein, Spony states that in November 2002 he spoke with Garces, and that Garces admitted bringing in the Union, stating: "Yeah, and I don't care who knows—I'm trying to bring the Union in. Everybody's getting screwed." Spony further states that Garces said that "he had brought the union card into the workplace and was taking the card around for employees to sign up for the union." Spony asserts that he reminded Garces that he could be fired for such actions, and Garces said: "I don't care . . . Once I get my union card, and with my knowledge of sound, I can go anywhere I want."

We find no merit in the Respondent's contention. First, we note that the Respondent did not file any objections to the conduct of the election. Therefore, the Respondent's affirmative defenses in this unfair labor practice proceeding are essentially an attempt to raise objections to the conduct of the election. However, because the period for filing objections has passed,² the representation proceeding can only be reopened to litigate these issues if the Respondent can establish that it has newly discovered evidence.

The Board has held that "[n]ewly discovered evidence is evidence of facts in existence at the time of [the proceeding in question], which could not be discovered by reasonable diligence. *APL Logistics, Inc.*, 341 NLRB No. 132, slip op. at 1 (2004), citing *Seder Foods, Corp.*, 286 NLRB 215, 216 (1987); *NLRB v. Jacob E. Decker*, 569 F. 2d 357, 363-364 (5th Cir. 1978) ("facts implying

¹ Arnold's declaration further states that Garces had been employed by the Respondent as a technical coordinator. In that position he allegedly was the primary point of contact and immediate supervisor of all of the unit employees. In addition, in the declaration Arnold avers that "upon information and belief, Garces was granted membership in the Union and is currently working Union jobs." (Garces was discharged by the Respondent in February 2003, after the February 19, 2003 election). Arnold's declaration also alleges that "upon information and belief, prior to the election, the Union may have improperly promised Garces as well as unit employees job opportunities and Union cards. Since the election, unit employees have been unavailable to work on MCS jobs because upon information and belief, they have been called to work on other Union jobs."

² Sec. 102.69(a) of the Board's Rules and Regulations provides in relevant part: "Within 7 days after the tally of ballots has been prepared, any party may file with the Regional Director . . . objections to the conduct of the election or to conduct affecting the results of the election."

reasonable diligence must be provided” by the party alleging that the evidence is newly discovered). The Board additionally held that “in order to warrant a further hearing, the newly discovered evidence must be such that if adduced and credited, it would require a different result.” *APL Logistics*, 341 NLRB No. 132, slip op. at 1.

Here, the Respondent has established that the evidence it seeks to present was in existence during the time of the representation proceeding. However, the Respondent has failed to present any information indicating that prior to the expiration of time in which to file objections to the election, it engaged in an attempt to uncover any potential improprieties in that proceeding. Thus, the Respondent has failed to establish that the evidence at issue could not have been discovered earlier through the exercise of reasonable diligence.³

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).

We also find that there are no factual issues warranting a hearing with respect to the Union’s request for information. The complaint alleges, and the Respondent’s amended answer admits, that the Union requested the following information by letter dated March 7, 2003, and further admits that it has refused to provide the requested information:

A list of the names of all stagehands employed by Manhattan Studios from January 1, 2002 to the present, including each person’s date of hire, job classification(s), rate(s) of pay, hours worked on a weekly basis, and copies of any individual contracts or letter agreements of employment.

Copies of all summary plan descriptions (SPDs) for any employee benefit plans that cover or have covered since January 1, 2002, any stagehands employed by Manhattan Center Studios.

Although the Respondent’s answer denies that the information is relevant and necessary to the Union’s duties as the exclusive collective-bargaining representative of the unit employees, it is well established that all of the foregoing types of information are presumptively relevant for purposes of collective bargaining and must be furnished on request. See, e.g., *Cheboygan Health Care Center*, 338 NLRB No. 115 (2003); *Baker Concrete Construction*, 338 NLRB No. 48 (2003), and cases cited

³ Accordingly, we do not need to reach the issue of whether the Respondent has established that the evidence, if adduced and credited, may have required a different result.

therein. The Respondent has not asserted any basis for rebutting the presumptive relevance of the information, apart from its contention, rejected above, that the Union’s certification is invalid.

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 a facility located at 311 West 34th Street, New York, New York, is engaged in the business of providing venues to various clients for events at its facility.

Annually, the Respondent, in the course and conduct of its business operations described above, derives gross revenues in excess of \$500,000 and purchases and receives 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 February 19, 2003, the Union was certified on February 27, 2003, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

INCLUDED: All full-time and regular part-time stagehands, production electricians, production carpenters, audio technicians, audio engineers, riggers, lighting technicians, sound technicians, video projection technicians and prop persons employed by the Employer at 311 West 34th Street, New York, New York 10001.

EXCLUDED: All other employees, including independent contractors, operations employees, office clerical employees, managers, and guards, professional employees and supervisors as defined by the Act.

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

B. *Refusal to Bargain*

By letter dated March 7, 2003, the Union requested that the Respondent meet and bargain and furnish information, and, by letter dated March 20, 2003, the Respondent has failed and refused to do so. We find that the Respondent’s conduct 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 20, 2003, to bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit and to furnish the Union requested information, 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. We also shall order the Respondent to furnish the Union the information requested.

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, Manhattan Center Studios, Inc., New York, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with Theatrical Stage Employees Local No. One, I.A.T.S.E., AFL-CIO, CLC, as the exclusive bargaining representative of the employees in the bargaining unit, and refusing to furnish the Union information that is relevant and necessary to its role as the exclusive bargaining representative of the unit employees.

(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:

INCLUDED: All full-time and regular part-time stagehands, production electricians, production carpenters,

audio technicians, audio engineers, riggers, lighting technicians, sound technicians, video projection technicians and prop persons employed by the Employer at 311 West 34th Street, New York, New York 10001.

EXCLUDED: All other employees, including independent contractors, operations employees, office clerical employees, managers, and guards, professional employees and supervisors as defined by the Act.

(b) Furnish the Union the information it requested on March 7, 2003.

(c) Within 14 days after service by the Region, post at its facility in New York, New York, copies of the attached notice marked "Appendix."⁴ 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 March 20, 2003.

(d) 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., September 24, 2004

Robert J. Battista, Chairman

Dennis P. Walsh, Member

Ronald Meisburg, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

⁴ 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 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 refuse to bargain with Theatrical Stage Employees Local No. One, I.A.T.S.E., AFL-CIO, CLC, as the exclusive representative of the employees in the bargaining unit.

WE WILL NOT refuse to furnish the Union information that is relevant and necessary to its role as the exclusive bargaining representative of the unit employees.

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:

INCLUDED: All full-time and regular part-time stagehands, production electricians, production carpenters, audio technicians, audio engineers, riggers, lighting technicians, sound technicians, video projection technicians and prop persons employed by us at 311 West 34th Street, New York, New York 10001.

EXCLUDED: All other employees, including independent contractors, operations employees, office clerical employees, managers, and guards, professional employees and supervisors as defined by the Act.

WE WILL furnish the Union the information it requested on March 7, 2003.

MANHATTAN CENTER STUDIOS, INC.