Air 2 LLC *and* Local Union No. 222, International Brotherhood of Electrical Workers (IBEW). Case 12–CA–23898

September 30, 2004

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

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 and a first amended charge filed on June 4 and 10, 2004, respectively, the General Counsel issued the complaint on June 18, 2004, alleging that the Respondent has violated Section 8(a)(5) and (1) of the Act by refusing the Union's request to bargain following the Union's certification in Case 12–RC–8721. (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, with affirmative defenses, admitting in part and denying in part the allegations in the complaint.

On July 8, 2004, the General Counsel filed a Motion for Summary Judgment. On July 12, 2004, 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.

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, but contests the validity of the certification on the basis of the Board's disposition of three determinative challenged ballots in the representation proceeding.[1]

All representation issues raised by the Respondent are ones which 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 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.[2]

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a Florida limited liability corporation with offices and a place of business located in Miami, Florida (the Respondent's facility), has been engaged in the business of providing specialized services, including power line inspections, and maintenance and repair to transmission power companies throughout the United States.

During the 12 months preceding issuance of the complaint, the Respondent, in conducting its business operations described above, derived gross revenues in excess of $500,000, and purchased and received at its Florida facility goods and materials valued in excess of $50,000 directly from points outside the State of Florida.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act[3], and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

---

[1] The determinative challenges in Case 12–RC–8721 were consolidated for hearing with related unfair labor practice allegations in Cases 12–CA-21946–1, 12-21946–2, 12–21946–4, 12–21946–5, and 12–22043. On January 31, 2004, the Board issued its decision in the consolidated proceeding affirming the administrative law judge's decision finding, inter alia, that the Union's challenge to the ballot of Tracy Blackwell should be sustained, that Marty Lyons' ballot should be voided, and that the Respondent's challenge to the ballot of Jeff Laslovich should be overruled and the ballot opened and counted. 341 NLRB No. 23. The Respondent has filed a petition for review of the Board's decision with the Eleventh Circuit. The petition is still pending.

The Respondent's answer also denies that the certified unit is appropriate. The certified unit includes all of the Respondent's full-time and regular part-time linemen, line crew foremen, and apprentices at "its main office" in Miami, Florida. The Respondent stipulated to the appropriateness of the unit in the representation case. The only apparent change in the Respondent's operation since then is the closure or relocation of its Miami office. The Respondent's answer states that it has only one office in Florida, and that it is in Tampa, not Miami. The Respondent, however, has not challenged the appropriateness of the unit on the ground that the Respondent no longer has a Miami office, nor does the Respondent contend that a bargaining order is not warranted on that ground. See generally *Lanco*, 277 NLRB 85, 94 (1985); *Westwood Import Co.*, 251 NLRB 1213 (1980), enfd. 681 F.2d 664 (9th Cir. 1982). Accordingly, we find that the Respondent's denial in this regard does not raise any issue warranting a hearing in this proceeding, and that the certified unit remains appropriate. See, e.g., *Trans Tech Logistics, Inc*., 339 NLRB No. 133 fn. 1 (2003).

[2] Member Liebman concurred with her colleagues' decision in the underlying consolidated case. She would have found it unnecessary to decide whether Tracy Blackwell is a statutory supervisor or to resolve the challenge to his ballot. However, she agrees that the Respondent has not raised any new matters that are properly litigable in this unfair labor practice case. See *Pittsburgh Plate Glass Co. v. NLRB*, supra. She therefore agrees with the decision to grant the General Counsel's Motion for Summary Judgment.

[3] The Respondent's answer denies in part the jurisdiction and commerce allegations in the complaint. The Respondent, however, stipulated to the Board's jurisdiction in the underlying representation proceeding and it has not alleged any alteration in its operations that would warrant a finding that it is no longer subject to the Board's jurisdiction.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Certification

Following the mail ballot election conducted during the period November 20 through December 19, 2001, the Union was certified on March 5, 2004, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All full-time and regular part-time linemen, line crew foremen, and apprentices employed by the Employer at its main office located at 12515 North Kendall Drive, Miami, Florida; excluding all other employees, including helicopter pilots, mechanics, professional employees, and office clerical employees, 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 May 5, 2004, by letter, the Union requested the Respondent to bargain, and since on or about May 17, 2004, the Respondent has refused. 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 May 17, 2004, 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).

Finally, in view of the fact that the Respondent's Miami, Florida facility is apparently closed, we shall order the Respondent to mail a copy of the attached notice to the Union and to the last known addresses of unit employees employed by the Respondent on or after May 17, 2004, in order to inform them of the outcome of this proceeding.

ORDER

The National Labor Relations Board orders that the Respondent, Air 2 LLC, Miami, Florida, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with Local Union No. 222, International Brotherhood of Electrical Workers (IBEW), 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 linemen, line crew foremen, and apprentices employed by the Employer at its main office located at 12515 North Kendall Drive, Miami, Florida; excluding all other employees, including helicopter pilots, mechanics, professional employees, and office clerical employees, guards and supervisors as defined in the Act.

(b) Within 14 days after service by the Region, duplicate and mail, at its own expense and after being signed by the Respondent's authorized representative, signed and dated copies of the attached notice marked "Appendix"[4] to the Union and to all unit employees employed on or after May 17, 2004.

(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.

Accordingly, the Respondent has raised no material issues of fact warranting a hearing. See *Gateway Motor Lodge*, 222 NLRB 851 (1976); *Pollack Electric Co.*, 214 NLRB 970 fn. 4 (1974).

[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
Mailed 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 mail 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 Local Union No. 222, International Brotherhood of Electrical Workers (IBEW), 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 following appropriate unit:

> All full-time and regular part-time linemen, line crew foremen, and apprentices employed by us at our main office located at 12515 North Kendall Drive, Miami, Florida; excluding all other employees, including helicopter pilots, mechanics, professional employees, and office clerical employees, guards and supervisors as defined in the Act.

AIR 2 LLC