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Service Corporation International d/b/a Oak Hill Funeral Home and Memorial Park and Laborers' International Union Of North America, AFL-CIO, Local Union 270. Case 32-CA-22449

April 28, 2006

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 filed on January 19, 2006, the General Counsel issued the complaint on January 30, 2006, 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 32-RC-5235. (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 February 16, 2006, the General Counsel filed a Motion for Summary Judgment. On February 17, 2006, 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 the General Counsel filed a reply.

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 based on 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

¹ In addition to denying that the Union's certification was proper, the Respondent's answer also asserts as an affirmative defense that the complaint fails to state a claim on which relief can be granted. The Respondent has not offered any explanation or evidence to support this bare assertion. Therefore, we find that this affirmative defense is insufficient to warrant denial of the General Counsel's Motion for Summary Judgment. See *Circus Circus Hotel & Casino Reno*, 316 NLRB 1235 fn. 1 (1995).

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.² See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941).

Accordingly, we grant the Motion for Summary Judgment.³

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all times material herein, the Respondent, a California corporation with an office and place of business in San Jose, California, has been engaged in the business of providing funeral and burial services.

During the 12-month period preceding issuance of the complaint, the Respondent, in the course and conduct of its business operations, derived gross revenues in excess of \$500,000, and purchased and received goods valued in excess of \$5000 that originated from outside the State of California.

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 Laborers' International Union of North America, AFL-CIO, Local Union 270 (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 July 16, 2004, the Union was certified on August 27, 2005, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All full-time and part-time cemetery grounds and maintenance employees, including all equipment operators, construction, landscape and gardening, shop, and vehicle repair employees, leadpersons, foremen and jani-

² Chairman Battista dissented in the underlying representation case. Contrary to his colleagues in the majority, he would have found merit in the Respondent's objection concerning the marked sample ballots, and therefore would have set aside the election and ordered a new election. Chairman Battista, however, 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*, 313 U.S. 142, 162 (1941). In light of this, he agrees with the decision to grant the General Counsel's Motion for Summary Judgment.

³ Thus, we deny the Respondent's requests that the complaint be dismissed and that the Respondent be awarded costs and attorneys' fees.

tors, employed by the Employer at its San Jose, California facility, excluding all managerial and administrative employees, salespersons, office clerical employees, bereavement employees, all other employees, guards and supervisors as defined in the Act.⁴

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

B. Refusal to Bargain

On or about September 13, 2005, the Union, by letter, requested that the Respondent recognize and bargain with it as the exclusive collective-bargaining representative of the employees in the unit with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

By letter dated September 16, 2005, to the Union, the Respondent declined to recognize or bargain with the Union. We find that this failure and refusal constitutes an unlawful refusal to bargain in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By refusing since September 16, 2005, to bargain with the Union as the exclusive collective-bargaining representative of the 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).⁵

⁴ The unit description set forth in the complaint contained a minor error and did not precisely describe the certified unit.

⁵ The record in the underlying representation proceeding indicates that notices of election were posted in both English and Spanish. Accordingly, we shall order the notice to employees to be posted in both English and Spanish.

ORDER

The National Labor Relations Board orders that the Respondent, Service Corporation International d/b/a Oak Hill Funeral Home and Memorial Park, San Jose, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with Laborers' International Union of North America, AFL-CIO, Local Union 270, 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 part-time cemetery grounds and maintenance employees, including all equipment operators, construction, landscape and gardening, shop, and vehicle repair employees, leadpersons, foremen and janitors, employed by the Employer at its San Jose, California facility, excluding all managerial and administrative employees, salespersons, office clerical employees, bereavement employees, all other employees, guards and supervisors as defined in the Act.

(b) Within 14 days after service by the Region, post at its facility in San Jose, California, copies of the attached notice marked "Appendix."⁶ Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by the Respondent's authorized representative, shall be translated into Spanish, and both Spanish and English notices 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

⁶ 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."

copy of the notice to all current employees and former employees employed by the Respondent at any time since September 16, 2005.

(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. April 28, 2006

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Robert J. Battista ,	Chairman
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Wilma B. Liebman,	Member
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Peter C. Schaumber,	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 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 Laborers' International Union of North America, AFL-CIO, Local Union 270, 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 part-time cemetery grounds and maintenance employees, including all equipment operators, construction, landscape and gardening, shop, and vehicle repair employees, leadpersons, foremen and janitors, employed by us at our San Jose, California facility, excluding all managerial and administrative employees, salespersons, office clerical employees, bereavement employees, all other employees, guards and supervisors, as defined in the Act.

SERVICE CORPORATION INTERNATIONAL D/B/A
OAK HILL FUNERAL HOME AND MEMORIAL
PARK