Wyandanch Day Care Center, Inc. *and* Local 340A, New York Joint Board, Union of Needletrades Industrial and Textile Employees, AFL–CIO, CLC. Case 29–CA–20600

March 28, 1997

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND HIGGINS

Pursuant to a charge filed on January 8, 1997,[1] the General Counsel of the National Labor Relations Board issued a complaint on January 31, 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 29–RC–8654. (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 submitting affirmative defenses.

On February 27, 1997, the General Counsel filed a Motion for Summary Judgment. On February 28, 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 March 13, 1997, the Respondent filed a response.

Ruling on Motion for Summary Judgment

In its answer and response, the Respondent attacks the validity of the certification on the basis of the Board's unit determination and disposition of certain challenged ballots in the representation proceeding. In addition, the Respondent asserts that it has obtained newly discovered and previously unavailable evidence that during the election campaign the Union misinformed employees by telling them that the purpose of the authorization card was for more benefits and higher wages, not for union representation. Finally, the Respondent denies that the Union has made a valid request to bargain.

It is well established that a respondent is not entitled to litigate in a refusal-to-bargain proceeding issues which were or could have been litigated in the underlying representation proceeding, absent newly discovered and previously unavailable evidence or special circumstances that would require the Board to reexamine the decision made in the representation proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941). Here, the only alleged newly discovered and previously unavailable evidence offered by the Respondent is an unsolicited statement which the Respondent asserts employee Barbara Adams gave to its executive director on October 30, 1996, after the election. The employee's statement states that she was approached and asked if she "would be interested in trying to get health [medical] insurance benefits and a raise"; that she was asked "to sign [the] paper if she was interested in acquiring these benefits"; and that she was not asked or told anything about a union at that time. We find that, even assuming arguendo that this evidence is newly discovered and previously unavailable, it is insufficient to warrant a hearing in this proceeding as there is no indication in the statement whether the alleged objectionable conversation occurred during the critical, preelection period or that the solicitor made any direct promise of benefits in exchange for signing the card.[2]

We also find that there are no issues warranting a hearing with respect to the Union's request to bargain. Copies of the Union's November 6 and 26, 1996 letters to the Respondent (including certified mail receipts indicating service) are attached to the General Counsel's motion. Contrary to the Respondent's contention, the letters specifically requested "dates for the purposes of negotiating a collective bargaining agreement" and "the commencement of contract negotiations," and thus clearly constituted a valid request to bargain. Further, the Respondent does not dispute the authenticity of the letters or that it received them. We therefore find that the Union made a valid request to bargain as alleged.

Accordingly, as it is also clear that the Respondent is refusing to bargain, we grant the Motion for Summary Judgment.

On the entire record, the Board makes the following

[1] Although the Respondent's answer states that the Respondent is without information or knowledge sufficient to answer the allegation that the charge was served on the Respondent, the Respondent admits that the charge was filed, and a copy of the certified mail receipt indicating service is attached to the General Counsel's motion.

[2] As a general rule, only conduct occurring during the period between the filing of the petition and the date of the election—the so-called "critical period"—may serve as a basis for setting aside an election. *Ideal Electric & Mfg. Co.*, 134 NLRB 1275 (1961). The Board in a few cases has applied an exception to this rule where the conduct involved direct promises of benefits to employees in exchange for signing an authorization card. See *Royal Packaging Corp.*, 284 NLRB 317 (1987) (prepetition offer to obtain reinstatement of employee's daughter); and *Gibson's Discount Center*, 214 NLRB 221 (1974) (prepetition offer to waive union initiation fees). Here, however, the employee's statement indicates that the solicitor merely stated that the card was for the purpose of "trying" to get better benefits and higher wages; it does not indicate that the solicitor made a direct promise of benefit in exchange for signing the card.

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a New York not-for-profit corporation, has maintained its principal office and place of business at 50 Commonwealth Drive, Wyandanch, New York (the Wyandanch facility), where it is engaged in the business of providing child care services. During the 12-month period preceding the issuance of the complaint, the Respondent, in the course and conduct of its business operations, received gross revenues valued in excess of $250,000, and purchased and received at its Wyandanch facility products, goods, and materials valued in excess of $5000 from enterprises located within the State of New York, each of which other enterprises had received these goods directly from 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.[3]

II. ALLEGED UNFAIR LABOR PRACTICES

A. *The Certification*

Following the election held October 3, 1996, the Union was certified on October 18, 1996, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All full-time non-professional employees including head teachers, master teachers, teachers, assistant teachers, teachers' aides, transportation employees including the driver, custodial employees, and nutritional employees, including the cook and her helper, employed by the Employer at its 50 Commonwealth Drive, Wyandanch, New York, location, excluding all other employees, professional employees, office clerical employees, guards and supervisors as defined in Section 2(11) of the Act.[4]

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

B. *Refusal to Bargain*

By letters dated November 6 and 26, 1996, the Union requested the Respondent to bargain and, since about November 6, 1996, the Respondent has refused. We find that this refusal 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 November 6, 1996, 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, Wyandanch Day Care Center, Inc., Wyandanch, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with Local 340A, New York Joint Board, Union of Needletrades Industrial and Textile Employees, AFL–CIO, CLC 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:

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[3] The Respondent's answer states that the Respondent is without information or knowledge sufficient to answer the allegation that the Union is a labor organization. However, having failed to raise any issue concerning the Union's labor-organization status in the representation proceeding, the Respondent is precluded from doing so in this proceeding. See *Biewer Wisconsin Sawmill*, 306 NLRB 732 fn. 1 (1992).

[4] Although the unit set forth in the complaint reads somewhat differently, we conclude, in the absence of any explanation to the contrary, that this was inadvertent. Accordingly, the unit is set forth here as set forth in the Regional Director's Decision and Direction of Election and Supplemental Decision on Challenges and Certification of Representative.

All full-time non-professional employees including head teachers, master teachers, teachers, assistant teachers, teachers' aides, transportation employees including the driver, custodial employees, and nutritional employees, including the cook and her helper, employed by the Employer at its 50 Commonwealth Drive, Wyandanch, New York location, excluding all other employees, professional employees, office clerical employees, guards and supervisors as defined in Section 2(11) of the Act.

(b) Within 14 days after service by the Region, post at its facility in Wyandanch, New York, copies of the attached notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 29 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 January 8, 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.

[5] 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 the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain with Local 340A, New York Joint Board, Union of Needletrades Industrial and Textile Employees, AFL–CIO, CLC 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 non-professional employees including head teachers, master teachers, teachers, assistant teachers, teachers' aides, transportation employees including the driver, custodial employees, and nutritional employees, including the cook and her helper, employed by us at our 50 Commonwealth Drive, Wyandanch, New York location, excluding all other employees, professional employees, office clerical employees, guards and supervisors as defined in Section 2(11) of the Act.

WYANDANCH DAY CARE CENTER, INC.