

Affiliated Midwest Hospital Incorporated d/b/a Riveredge Hospital and Warehouse, Mail Order, Office, Technical and Professional Employees Local 743, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Case 13-CA-22691

13 March 1985

ORDER DENYING MOTION

**BY CHAIRMAN DOTSON AND MEMBERS
HUNTER AND DENNIS**

On 3 August 1983 the National Labor Relations Board issued a Decision and Order in this proceeding,¹ in which it found that the Respondent had violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union which was certified by the Board on 30 September 1982.²

On 14 September 1983 the Respondent filed a motion for reconsideration asserting that the Board did not have before it the entire record compiled by the Regional Office when it overruled the Respondent's exceptions to the Regional Director's Supplemental Report on Objections and Certification of Representative. The Respondent contends that the Board's certification of the Union was defective and that the Board's ruling that the Respondent had unlawfully refused to bargain with the Union constituted a material error of law. Specifically, the Respondent claims that the Board could not have "meaningfully" reviewed the Regional Director's supplemental report because it did not have before it the evidence of employee confusion referred to by the Regional Director when he recommended that the Respondent's Objections 1 and 2 be overruled. Those objections respectively concerned the Board's refusal to allow an employee to vote because her name was not on the *Norris-Thermador*³ list and the discrepancies between the units set forth in the notices of elections and the units stipulated to in the election agreements.

The Respondent has raised nothing in its motion in connection with Objection 1 that would warrant our reconsidering our adoption of the Regional Director's recommendation to overrule that objection. The Board agent's refusal to allow Green to vote was not objectionable because she was an ineligible voter. The Respondent has proffered no evidence to show that that finding was erroneous. In fact, it would be hard pressed to do so because it stipulated to her ineligibility. Further, the Respondent has

not established that the Board agent's disallowing Green a ballot caused confusion among the voters, nor has it presented any cogent arguments to show how a Board agent's acting in accordance with his election responsibilities could cause confusion among the eligible voters. In any event, any confusion caused, while unfortunate, would be incidental to the Board agent's properly carrying out his duties. We perceive no basis for finding objectionable conduct in a Board agent's proper performance of election duties. Indeed, to entertain such an allegation would frustrate the Board's conduct of elections by opening the door to many frivolous objections.

Similarly, the Respondent has not submitted any evidence that warrants our reconsidering our determination that the Respondent's second objection, i.e., alleged voter confusion resulting from the discrepancies between the units described in the *Norris-Thermador* list and the notices of elections, was without merit. There were no employees employed in the three job classifications omitted from the *Norris-Thermador* list; and the one employee employed in the job classification listed on the *Norris-Thermador* list and not on the notices of elections voted in the correct unit. Accordingly, there is no evidence that the discrepancies caused the disenfranchisement of any employee, let alone voter confusion.

In *Frontier Hotel*, 265 NLRB 343 (1982), the Board found that, as recently set forth in Section 102.69(g)(1)(ii) of its Rules and Regulations, the record in objection cases in which no hearing has been held consists of the objections, the Regional Director's report, all documentary evidence relied on by the Regional Director, except statements of witnesses, the parties' briefs or other legal memoranda, and any other motions, rulings, or orders of the Regional Director. The Board also noted that the Supreme Court in *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214 (1978), upheld the Board's policy of expressly excluding from the record investigatory affidavits of witnesses who have not testified at a hearing in order to protect their confidentiality.⁴ The Board further stated that Section 102.69(g)(3) of the Rules and Regulations grants the parties an opportunity to supplement the record before the Board with any and all documents, including affidavits, previously submitted to the Regional Director which have not been forwarded to the Board. As pointed out by the Board, this is consistent with the burden on the objecting

¹ 266 NLRB 1198 (1983)

² 264 NLRB 1094 (1982)

³ Named for *Norris-Thermador Corp.*, 119 NLRB 1301 (1958)

⁴ In *NLRB v. Northeastern University*, 707 F.2d 15 (1st Cir. 1983), the court upheld the Board's refusal to review the Region's investigatory file on the basis of confidentiality

party to demonstrate to the Board that the evidence it submitted to the Regional Director, if credited, would warrant setting aside the election.⁵

In a case with facts similar to those presented here, the Seventh Circuit, in *L. C. Cassidy & Son v. NLRB*, 745 F.2d 1059 (7th Cir. 1984), recently noted that the Board's new regulations had put the employer on notice that the affidavits received in the Regional Director's administrative investigation were not part of the record, that it was the employer's responsibility to file supporting affidavits with the Board, and that the employer failed to avail itself of the Board's procedures for supplementing the record with the affidavits.⁶ The court further stated (*id.* at 1065-66):

Its objections to the Regional Director's report, moreover, do not contest any of the factual findings of the Director, nor did Cassidy at that time make any claim that the Director erred in not holding a hearing to resolve disputed factual issues. It merely contested the Regional Director's application of Board precedent to the facts found. To require the Board to review the affidavits collected by the Regional Director in a case such as this would force the Board "to assume the objecting party's burden and conduct a 'fishing expedition' into the investigatory file for evidence which the objecting party has failed to identify." *Summa Corp.*, *supra* at 344. See *NLRB v. Michigan Rubber Products*, 738 F.2d 111 (6th Cir. 1984) (no prejudice from failure to forward record to Board where employer's objections even if true present insufficient grounds for setting aside election). Accordingly, we hold that the Board did not err in adopting the Regional Director's report without reviewing the affidavits.

The Respondent here did not contest any of the Regional Director's factual findings, and those factual findings did not raise any grounds which would warrant setting aside the election. Further, the Respondent should have been on notice that the affidavits were not part of the record reviewed by the Board. At the end of both the Regional Director's report and his supplemental report, a foot-

note, numbered 2 in each report, states that the affidavits and other documents that a party has submitted to the Regional Director would not be part of the record transmitted to the Board. If this did not constitute sufficient notice for the Respondent to raise the issue in the representation proceeding, the Respondent knew or should have known before the Board's decision in the representation case issued (30 September 1982) that the affidavits had not been transmitted to the Board. By that time, Section 102.69(g)(1)(ii) and (3) of the Board's Rules and Regulations had been in effect over a year.⁷ Yet, there was no objection to the Board's procedures while the case was pending before the Board and no motion for reconsideration on that basis. Further, by the time the complaint was filed in this unfair labor practice proceeding, the Board's decision in *Frontier Hotel* had issued. The Respondent, however, failed to raise the issue in either its answer to the complaint or in response to the Notice to Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. The Respondent's failure to timely raise the issue of the inadequacy of the record transmitted to the Board in either the representation proceeding or in the unfair labor practice case constitutes a waiver precluding it from raising the issue now.⁸

Accordingly, we find that the Respondent's motion has no merit and we therefore deny the Respondent's motion for reconsideration.

⁷ The rules were issued 9 September 1981.

⁸ Although the Seventh Circuit in *Prairie Tank Southern, Inc v. NLRB*, 710 F.2d 1262 (7th Cir. 1983), rejected the Board's waiver argument, the instant case is distinguishable. In *Prairie Tank*, the court of appeals permitted the employer to raise the objections to the Board's procedure for the first time in the unfair labor practice proceeding because of two extraordinary circumstances (1) the Board's rules failed to make clear that the affidavits gathered by the Regional Director would not be forwarded to the Board, so that the Employer had no opportunity to object to the "incomplete record" until the Board's decision on certification issued, and (2) the Seventh Circuit's decision in *NLRB v. Allis-Chalmers Corp.*, 680 F.2d 1166 (7th Cir. 1982), which provided the employer with a "powerful defense," had not been decided while *Prairie Tank* was still in the representation proceeding 710 F.2d at 1262-67. (In *Prairie Tank*, the Respondent also raised the issue in its answer to the complaint.) Neither ground is present here. To the contrary, the Board issued revised rule Sec. 102.69(g)(1)(ii) on 9 September 1981, thereby making it clear that affidavits gathered by the Regional Director would not be forwarded to the Board, and the decision in *NLRB v. Allis-Chalmers Corp.* issued on 16 June 1982. Thus, the underlying representation case was pending before the Board both when the revised rules issued and *Allis-Chalmers* was decided by the court. Indeed, the final decision in the underlying representation case involving the Respondent did not issue until 30 September 1982. Yet, the Respondent did not raise its objections to the Board's procedure during the pendency of the representation case before the Board, and did not raise the issue either in its answer to the complaint or its response to the Notice to Show Cause.

Member Dennis relies solely on the waiver rationale and finds it unnecessary to reach any other issues.

⁵ See also *Ohio Plate Glass Co.*, 271 NLRB 694 (1984). There, the Board noted that the Regional Director is not permitted to rely on facts outside the scope of the objecting party's evidence to overrule the objection, if otherwise a prima facie showing of objectionable conduct exists.

⁶ This view is in accord with the holdings of several other circuits: *NLRB v. Northeastern University*, *supra* (1st Cir.), *National Posters v. NLRB*, 720 F.2d 1358 (4th Cir. 1983), and *NLRB v. Knickerbocker Food*, 715 F.2d 509 (11th Cir. 1983).