

**United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL**

Advice Memorandum

DATE: May 26, 2004

TO : Ronald K. Hooks, Regional Director
Region 26

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Fred's, Inc. 530-6067-2010
Case 26-CA-21528 530-8076-3300
530-8081-0100

This case was submitted for advice as to whether the Employer waived its right to test the Union's certification by simultaneously challenging the certification and offering to bargain with the Union.

We conclude that the Employer, by conditioning recognition of the Union on the outcome of the Employer's challenge to the Union's certification, did not recognize and bargain in good faith with the Union. We further conclude that the Employer did not waive its right to test the validity of the Union's certification because it never unconditionally recognized or bargained with the Union.

FACTS

On March 26, 2002, the Union (UNITE) filed a representation petition seeking to represent a unit of the Employer's (Fred's, Inc.) warehouse and maintenance employees. An election was conducted on May 29, 2002, and the Union won. The Employer filed objections, and then exceptions to a hearing officer's report. On November 20, 2003, the Board issued a Decision and Certification of Representative adopting the hearing officer's findings and recommendations and certifying the Union.

By letter of November 24, 2003, the Union requested recognition and bargaining, and renewed previous requests for information about the unit. The parties held a series of "off the record" meetings, at which the Employer asserted that it was reserving its right to "test" the Union's certification. On January 16, 2004,¹ the Union filed the instant charge alleging that since November 24, 2003 the Employer has refused to recognize the Union, to

¹ Herein all dates are 2004 unless otherwise indicated.

bargain for a collective-bargaining agreement, and to provide information necessary for bargaining.

In March, the Union took the position that "formal" negotiations had to begin. By letter of March 15, the Employer wrote the Union that it intended to meet with the Union at the same time that it continued the process of testing the Union's certification. The letter stated:

. . . it is our intent to test UNITE's certification by technically refusing to bargain . . . even though we have initiated the process of testing the certification, we still intend to meet with . . . UNITE representatives and bargaining committee members to see if we can resolve any differences between the parties and reach an agreement satisfactory to both sides.

By letter of March 26, the Employer confirmed a March 30 meeting and also wrote:

Even though we have agreed to meet with you and your committee on Tuesday, Fred's still plans to move forward with our plans to test UNITE's certification by technically refusing to bargain I am enclosing a copy of Fred's initial contract language proposals so that your committee can review our proposals prior to the meeting on Tuesday

Meanwhile, on March 19, the Region issued a consolidated complaint alleging that the Employer had engaged in numerous Section 8(a)(1), (3) and (5) violations.² The Section 8(a)(1) and (3) violations included interrogations, threats of reprisal, imposition of more onerous working conditions, denial of a union representative during an interview, and numerous discharges.³ The Section 8(a)(5) violations entailed numerous unilateral changes in terms and conditions of employment taking place between the Union's election win in May 2002 and March 2003. On April 6, the Employer filed its answer to the consolidated complaint, admitting that the bargaining unit was appropriate and that the Board had certified the Union, but asserting that the certification was improper.

² Cases 26-CA-20782, et al.

³ [FOIA Exemption 5

ACTION

We conclude that the Employer, by conditioning recognition on the outcome of its challenge to the Union's certification, refused to bargain in good faith. Although the Employer entered into negotiations with the Union, it did not waive its right to test the Board certification because it never unconditionally recognized and bargained with the Union.

An employer may secure a review of the validity of an election and the certification of a union by refusing to recognize and bargain with the union after it is certified.⁴ If the union files a Section 8(a)(5) refusal to bargain charge, the employer may then raise the issue as an affirmative defense and obtain judicial review of the certification determination via litigation of the unfair labor practice charge.⁵ An employer that fails to follow this procedural course waives the right to contest certification, i.e., once an employer honors a certification by commencing unconditional bargaining with a union, the employer waives any objection to the validity of the certification.⁶

An employer unlawfully refuses to bargain when it conditions its recognition of the union on the outcome of its certification challenge, even when it simultaneously

⁴ King Radio, 166 NLRB 649 (1967), enfd. 398 F.2d 14, 20-21 (10th Cir. 1968); Technicolor Govt. Services, 739 F.2d 323 (8th Cir. 1984), enfing. 268 NLRB 258 (1983).

⁵ Technicolor Govt. Services, 739 F.2d at 326.

⁶ Technicolor Govt. Services, 739 F.2d at 326-327 (employer waived its right to challenge the Board's certification, where it entered into negotiations with the union following the election and certification, and challenged the certification only as a collateral defense to an unrelated charge filed 3 ½ years later). Accord: King Radio Corp., 166 NLRB at 661, 398 F.2d at 20-21 (employer waived the contention that the election and certification were invalid by honoring the certification, and recognizing and bargaining with the union); Michael Konig, 318 NLRB 901, 904 (1995), enfd. No. 95-3507 (3rd Cir. 1995) (employer precluded from challenging validity of certification where it recognized and bargained with the union and did not challenge the certification until two years later. This conduct amounted to a waiver of its right to challenge the certification).

agrees to meet and negotiate with the union. In such a circumstance, since the employer has not unconditionally recognized and bargained with the union, it has not waived its right to challenge the union's certification. In Terrace Gardens Plaza, Inc.,⁷ for example, the Board found that an employer unlawfully refused to bargain where its letter to the union both offered to meet to discuss outstanding issues, and also stated that the Board "erroneously certified" the union and that it would seek judicial review of the certification.⁸ Since the employer effectively refused to recognize and bargain with the union, the employer did not waive its right to challenge the union's certification. Rather, the D.C. Circuit reviewed the Board's order in the certification-testing proceeding and rejected the employer's contention that an unsigned contract with a previous union served as a contract bar. Similarly, in Overland Transportation,⁹ the Board found that an employer unlawfully refused to bargain where it told the union that it was available to negotiate a contract, but continued to contest the certification by denying the appropriateness of the unit. The Sixth Circuit reviewed the Board's certification determination and rejected the employer's challenge to the Board's single employer finding.¹⁰ Thus, an employer that refuses to bargain in good faith by conditioning recognition on the outcome of its certification challenge does not waive its right to contest certification.¹¹

⁷ 315 NLRB 749 (1994), *enfd.* 91 F.3d 222 (D.C. Cir. 1996).

⁸ *Id.* at 749.

⁹ 323 NLRB 491 (1997), *enfd.* 187 F.3d 637 (6th Cir. 1999) (Table).

¹⁰ See also Specialized Living Center, 286 NLRB 55 (1987), *enfd.* 879 F.2d 1442, 1452-1453 (7th Cir. 1989) (employer's offer to "meet and confer" over changes was conditional, and not a good-faith offer to bargain, in light of its statement that it had no legal obligation to recognize the union. Board considers and rejects employer's argument that it is a political subdivision).

¹¹ Compare Show Industries, 326 NLRB 910 (1998) (an employer's timely notice and limited offer to bargain over only its intent to close, made while a certification challenge was pending, was in good faith because the employer did not condition that limited bargaining on the outcome of the pending challenge. Nor did the employer waive its challenge to the union's certification, given the special need for immediate bargaining over the closure).

In the instant case, the evidence indicates that the Employer agreed to meet with the Union at the same time that it conditioned its bargaining obligation on the outcome of its challenge to the Board certification. Specifically, after the Union requested bargaining in November 2003, the Employer stated that it was reserving its right to "test" the Union's certification. In March 2004, the Employer sent out two letters hinging recognition on the outcome of its certification challenge. In the first letter, the Employer stated its intent to test the Union's certification by technically refusing to bargain. In the second letter, the Employer stated that it would meet with the Union and "move forward with [its] plans to test UNITE's certification by technically refusing to bargain" By thus conditioning recognition of the Union on the outcome of its challenge to the Union's certification, the Employer unlawfully refused to bargain with the Union. Since the Employer never unconditionally recognized or bargained in good faith with the Union, it has not waived its right to obtain review of the Board certification.

Accordingly, absent settlement, the Region should issue a Section 8(a)(5) complaint alleging that the Employer refused to recognize and bargain in good faith with the Union.¹²

B.J.K.

¹² [FOIA Exemption 5