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Land-O-Sun Dairies, LLC and Bakery, Confectionary, Tobacco Workers and Grain Millers International Union, Local 358, AFL-CIO. Case 5-CA-36199

August 26, 2011

DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBERS BECKER
AND PEARCE

Pursuant to a charge and amended charge filed on October 25 and December 1, 2010, respectively, the Acting General Counsel issued a complaint on December 16, 2010, alleging that the Respondent has violated Section 8(a)(5) and (1) of the Act by refusing the Union's request to recognize the Union as the exclusive collective-bargaining representative of the employees who were the subject of the Respondent's unit clarification petition in Case 5-UC-405 following the Union's certification in Case 5-RC-16284, and by refusing to apply the terms and conditions of the parties' collective-bargaining agreement to these employees.¹ The Respondent filed an answer, admitting in part and denying in part the allegations in the complaint, and asserting affirmative defenses.

On January 5, 2011, the Respondent filed a motion for summary judgment, asserting that the complaint should be dismissed because the underlying charge is time barred by Section 10(b) of the Act. On January 13, 2011, the Acting General Counsel filed a motion for summary judgment asserting that the Board should issue a Decision and Order granting the Acting General Counsel's motion because no genuine issue of fact exists and because the Respondent has not argued that there is newly discovered or previously unavailable evidence or special circumstances that could not have been raised in the underlying representation proceeding. On March 16, 2011, the Board issued a Notice to Show Cause why either motion should not be granted, and the parties filed responses.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on the Motions for Summary Judgment

We agree with the parties that the legal issues presented in this proceeding can be resolved on the basis of

¹ Official notice is taken of the "record" in the representation proceedings as defined in the Board's Rules and Regulations, Sec. 102.68 and 102.69(g); *Frontier Hotel*, 265 NLRB 343 (1982).

the pleadings before the Board. In this regard, we find that there are no genuine issues of fact warranting a hearing. Accordingly, the merits of the parties' arguments are addressed below.

One of the primary issues in this proceeding is whether the unfair labor practice charge filed on October 25, 2010, is barred by Section 10(b) of the Act. In this regard, the following facts are undisputed: Pursuant to a representation petition filed in Case 5-RC-16284, the parties stipulated to an election in a unit that includes plant clerical employees and excludes office clerical employees. Thereafter, the Union was certified as the bargaining representative. The parties engaged in bargaining and entered into a collective-bargaining agreement on March 27, 2010, which is effective from March 28, 2010, through March 31, 2013, and covers employees in the Board certified unit.

During negotiations, the parties disagreed as to whether five individuals should be considered plant clerical employees, who are included in the unit, or office clerical employees, who are excluded from the unit. The Union maintains that the employees are plant clericals, and the Respondent maintains that they are office clericals. The parties failed to resolve this dispute during negotiations. That the issue remained unsettled is evidenced by several provisions of the collective-bargaining agreement which reference wage rates for "Plant Clerical Employees (if any)."

To resolve the dispute over the status of the five clerical employees, on April 6, 2010, the Respondent filed a unit clarification petition in Case 5-UC-405, seeking a determination of whether these employees are plant clericals or office clericals. The Regional Director dismissed the petition on May 28, 2010, stating that as the five clerical employees in dispute were the only clericals employed at the Respondent's facility at the time of the election, and as the Respondent included them on the *Excelsior*² list and permitted them to vote in the election without challenge, "[o]bviously, therefore, you included all five employees as plant clericals." The Regional Director concluded that the Respondent had not shown any new evidence or special circumstances that would satisfy the exception to the Board's rule precluding relitigation of matters that could have been raised in prior representation proceedings.

The Respondent filed a request for review, which the Board denied on August 5, 2010.³ As noted above, the

² *Excelsior Underwear*, 156 NLRB 1236 (1966).

³ The Board denied the request for review holding, in pertinent part:

[W]e agree with the Regional Director that the Employer is precluded from seeking to clarify the unit to exclude its clericals on the basis that they are "office clericals." The Employer explicitly included "plant

Union filed the charge in the instant proceeding on October 25, 2010, alleging that since the Board's August 5 Order the Respondent has refused the Union's request to recognize it as the exclusive collective-bargaining representative of the five disputed employees and has failed to apply to them the terms of the collective-bargaining agreement. The Regional Director subsequently issued the complaint alleging that the Respondent violated Section 8(a)(5) by this conduct.

A. The Section 10(b) issue

The Respondent contends that, because the charge was filed more than 6 months after the Union was on notice of the Respondent's refusal to bargain regarding the 5 disputed employees, it is time barred under Section 10(b) of the Act. Thus, the Respondent argues that the Union knew or should have known in March 2010 (or at the latest April 6, 2010, when the Respondent filed its unit clarification petition) that the Respondent viewed the employees at issue as office clericals and therefore excluded from the unit. The Acting General Counsel asserts in response that the operative date for evaluating the 10(b) period is August 5, 2010, as "[t]he question whether the employees who were the subject of the UC Petition were not unit members was only resolved when the Board processes resolving the UC Petition initiated by the Respondent were exhausted."

We agree with the Acting General Counsel that the instant unfair labor practice charge is not barred by Section 10(b) of the Act. It is undisputed that the parties had not reached final agreement concerning the status of the five clerical employees at issue when they signed the collective-bargaining agreement on March 27, 2010. Instead, as indicated above, they negotiated several wage rate provisions in the collective-bargaining agreement for "Plant Clerical Employees (if any)." Thus, it appears that the parties agreed to disagree regarding whether the five clerical employees were plant clericals or office clericals. On April 6, 2010—only 10 days after the parties entered into the collective-bargaining agreement—

clericals" in the stipulated bargaining unit and the five employees the Employer now seeks to exclude were, at the time of the stipulation, the only "clericals" employed by the Employer at its Richmond location. In seeking now to litigate the status of these employees, the Employer asserts, in effect, that it stipulated to the inclusion of a vacant classification. We find that assertion untenable under the circumstances herein . . . In addition the Employer included all five clericals on its *Excelsior* list and did not challenge these employees' ballots at the election. Finally, the Employer does not allege any changed circumstances affecting clericals, and has presented no newly discovered or previously unavailable evidence. Accordingly, dismissal of this petition is affirmed.

[Footnote omitted.]

the Respondent filed a unit clarification petition seeking a determination of whether the five employees at issue are plant clericals or office clericals. At that point, it cannot be said that the Union had clear and unequivocal notice of the Respondent's refusal to bargain with the Union concerning the five employees. To the contrary, it seems reasonable that the Union would have assumed that the Respondent, by seeking clarification from the Board, would abide by the Board's resolution of the parties' dispute. Accordingly, until such time as the Board had acted on the pending unit clarification petition, the Union could not know whether or not the Respondent would refuse to bargain over the disputed employees or, for that matter, whether such a refusal would be unlawful. As a result, we find that the earliest date on which the Union could have had clear and unequivocal notice of the unlawful conduct alleged in the charge was August 5, 2010, the date that the Board issued its Order denying the Respondent's request for review of the Regional Director's decision to dismiss the Respondent's unit clarification petition concerning the clerical employees.⁴ Accordingly, we find that the unfair labor practice charge at issue was timely filed.

Further, as the Board indicated in its August 5, 2010 Order denying the Respondent's request for review of the Regional Director's dismissal of its unit clarification petition, there is no ambiguity concerning the inclusion of the Respondent's clerical employees in the stipulated bargaining unit, and the Respondent is precluded from litigating this issue, which could have been raised in the representation proceeding.

Accordingly, we deny the Respondent's motion.

B. The Complaint Allegations

Based on our finding that the charge is not time barred by Section 10(b), we now evaluate the parties' arguments regarding the complaint allegations. The complaint alleges, in relevant part, that the Respondent failed to recognize the Union as the collective-bargaining representative of its five clerical employees and failed to apply the parties' collective-bargaining agreement to these employees. The Respondent admits its refusal to recognize the Union as the representative of its clerical employees

⁴ See *Westvaco*, 268 NLRB 1203 (1984), enf. denied on other grounds 795 F.2d 1171 (4th Cir. 1986) (the Board rejected the respondent's 10(b) argument, finding that the union filed its charge 12 days after the Board issued a decision denying a request for review of the underlying decision, pursuant to which the unit was clarified to include a disputed classification of employees). Compare *St. Barnabas Medical Center*, 343 NLRB 1125 (2004) (the Board dismissed the complaint on the grounds that it was barred by Sec. 10(b) where the union failed to file a charge within 6 months of the respondent's refusal to bargain, and the unit-clarification petition concerning disputed employees was not filed until *after* the 10(b) period had run).

and to apply the agreement to the clerical employees, but contests the application of the certification to its clerical employees based on its assertion that the employees are office clericals who are excluded from the unit.

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 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 Acting General Counsel's Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a limited liability company organized under the laws of the State of Delaware, with an office and place of business in Richmond, Virginia (the Respondent's facility), has been engaged in the processing and bottling of milk products and water products. During the 12-month period preceding issuance of the complaint, a representative period, the Respondent, in conducting its business operations described above, purchased and received at its Richmond, Virginia facility goods and services valued in excess of \$50,000 directly from points located outside of the Commonwealth of Virginia.

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 Bakery, Confectionery, Tobacco Workers and Grain Millers International Union, Local 358, AFL-CIO (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

Following the election by secret ballot held on March 19, 2009, the Union was certified on March 31, 2009, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All full-time and regular part-time operators, including filler operators, relief operators, pasteurizer operators, pasteurizer relief operators, crate room operators, forklift operators, forklift relief operators, inventory control employees, utility grounds control employees, maintenance employees, quality control employees, truck drivers (jockeys) and plant clerical employees em-

ployed by Respondent at its Richmond, Virginia facility; but excluding all office clerical employees, managerial employees, professional employees, guards and supervisors as defined in the Act.

On August 5, 2010, as noted above, the Board issued its Order denying the Respondent's request for review of the Regional Director's decision to dismiss the unit clarification petition concerning the Respondent's clerical employees. The Union continues to be the exclusive collective-bargaining representative of the unit employees under Section 9(a) of the Act.

Since August 5, 2010, the Union has requested the Respondent to recognize the Union as the exclusive collective-bargaining representative of the Respondent's clerical employees, and, since August 5, 2010, the Respondent has refused to do so. We find that this failure and refusal constitutes an unlawful failure and refusal to recognize the Union in violation of Section 8(a)(5) and (1) of the Act. In addition, since August 5, 2010, the Respondent has refused to apply the terms and conditions of its 2010–2013 collective-bargaining agreement with the Union to its clerical employees. We find that this failure and refusal constitutes an unlawful failure and refusal to recognize the Union in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By failing and refusing since August 5, 2010, to recognize the Union as the exclusive collective-bargaining representative of the Respondent's clerical employees, and by failing and refusing since August 5, 2010, to apply the terms and conditions of its 2010–2013 collective-bargaining agreement with the Union to its clerical employees, 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 recognize the Union as the exclusive collective-bargaining representative of the Respondent's clerical employees, to apply the terms and conditions of its 2010–2013 collective-bargaining agreement with the Union to its clerical employees, and to make its clerical employees whole for any loss of earnings and other benefits suffered as a result of the Respondent's unlawful conduct. Backpay shall be computed in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), *enfd.* 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010).

ORDER

The National Labor Relations Board orders that the Respondent, Land-O-Sun Dairies, LLC, Richmond, Virginia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize Bakery, Confectionery, Tobacco Workers and Grain Millers International Union, Local 358, AFL-CIO (the Union), as the exclusive collective-bargaining representative of the Respondent's clerical employees.

(b) Failing and refusing to bargain in good faith with the Union, by refusing to apply the terms and conditions of its 2010–2013 collective-bargaining agreement with the Union to its clerical employees.

(c) 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) Recognize the Union as the exclusive collective-bargaining representative of its clerical employees.

(b) Apply the terms and conditions of its 2010–2013 collective-bargaining agreement with the Union to its clerical employees.

(c) Make its clerical employees whole for any loss of earnings and other benefits suffered as a result of the Respondent's unlawful failure to apply the terms and conditions of its 2010–2013 collective-bargaining agreement with the Union to them, with interest, in the manner set forth in the remedy section of this decision.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Richmond, Virginia, copies of the attached notice marked "Appendix."⁵ Copies of the notice, on forms provided by the Regional Director for Region 5, 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 cus-

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."

tomarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. 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 its facilities 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 August 5, 2010.

(f) 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. August 26, 2011

Wilma B. Liebman, Chairman

Craig Becker, Member

Mark Gaston Pearce, 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 fail and refuse to recognize Bakery, Confectionery, Tobacco Workers and Grain Millers In-

ternational Union, Local 358, AFL–CIO (the Union), as the exclusive collective-bargaining representative of our clerical employees.

WE WILL NOT fail and refuse to bargain in good faith with the Union by refusing to apply the terms and conditions of our 2010–2013 collective-bargaining agreement with the Union to our clerical employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL recognize the Union as the exclusive collective-bargaining representative of our clerical employees.

WE WILL apply the terms and conditions of our 2010–2013 collective-bargaining agreement with the Union to our clerical employees.

WE WILL make our clerical employees whole for any loss of earnings and other benefits suffered as a result of our unlawful conduct, with interest.

LAND-O-SUN DAIRIES, LLC