Manhattan Center Studios, Inc. *and* Theatrical Stage Employees Local No. One, I.A.T.S.E., AFL–CIO, CLC. Case 2–CA–35394

December 14, 2011

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS BECKER AND HAYES

This case is before us on remand from the U.S. Court of Appeals for the District of Columbia Circuit.[1] The court found a lack of clarity in the Board's original decision[2] and certain other Board decisions regarding the standard for determining when the record can be reopened in a representation case to receive newly discovered evidence.[3] The court remanded the case to the Board to articulate and explain the standard to be applied. In accordance with the court's order, we have reviewed and explain the applicable law concerning this issue. Based on this review and for the reasons discussed below, we affirm the Board's prior decision.

I.

A. Facts

The Respondent (also referred to here as MCS) rents its facility for theatrical and musical productions. On February 19, 2003,[4] the Respondent's stagehands and production staff, by a vote of 5 for and 1 against, with 1 challenged ballot, selected Theatrical and Stage Employees Local No. One (the Union or Local One) as their collective-bargaining representative. The Respondent did not file objections within the prescribed 7-day period, and the Board certified the Union on February 27. On March 7, the Union requested that the Respondent provide dates to begin bargaining, as well as information concerning terms and conditions of employment for use in drafting proposals. On March 20, the Respondent refused to bargain or furnish the requested information. The Respondent's letter stated in part:

> It has recently come to our attention that [a] supervisor was improperly involved in organizational activities on behalf of Local One. As a result, it appears that Local One is not validly and lawfully certified as the bargaining representative of an uncoerced majority of MCS's stagehands and production employees.

The Union filed charges and, on May 30, the Board issued a complaint alleging that the Respondent's conduct violated Section 8(a)(5) and (1). In its answer to the complaint, filed on June 26, the Respondent admitted its refusal to bargain and to provide the information but asserted for the first time, as an affirmative defense, that the "election petition was tainted by unfair labor practices, including improper supervisory involvement in the organizing campaign." No other details or allegations were provided regarding this defense.

On September 9, the General Counsel moved for summary judgment finding the alleged violation. In its September 24 opposition to the motion, the Respondent provided a declaration by its chief executive officer, Russell Arnold, and an affidavit from a nonunit employee, Michael Spony. According to the Spony affidavit, in November 2002, Technical Coordinator Gustavo Garces, who the Respondent asserts was the "primary point of contact and immediate supervisor" of the unit employees, confirmed rumors that he was trying to bring the Union into MCS. Garces added, "I don't care who knows—I'm trying to bring the Union in. Everybody's getting screwed." The Spony affidavit further stated that Garces said that he had brought "the union card" into the facility and was soliciting employees to sign up for the Union. When Spony warned that Garces could be fired for his activity, Garces replied, "I don't care . . . Once I get my union card, and with my knowledge of sound, I can go anywhere I want." According to the Arnold declaration, Spony informed Arnold sometime in March that Garces had boasted that he had "spearheaded" the Union's campaign. Arnold's declaration also reiterated the statements attributed to Garces by Spony. The Respondent contended that, because it did not learn of Garces's involvement until after the period for filing objections, it was entitled to litigate the issue raised by Garces's alleged conduct in the unfair labor practice case.

B. The Board's Decision

In its September 28, 2004 decision in this proceeding, the Board granted the General Counsel's motion for summary judgment and found that the Respondent had violated Section 8(a)(5) and (1) by refusing to bargain with the Union as the exclusive collective-bargaining representative of its unit employees and by refusing to furnish requested information to the Union. The Board rejected the Respondent's defenses, which, among other things, asserted that newly discovered evidence revealed improper prounion conduct by an alleged supervisor during the organizing campaign. The Board found that the is-

[1] 452 F.3d 813 (D.C. Cir. 2006).
[2] 342 NLRB 1264 (2004).
[3] 452 F.3d 813 (D.C. Cir. 2006).
[4] All dates are 2003, unless otherwise indicated.

sues raised by the Respondent were or could have been litigated in the representation proceeding, and that the Respondent had failed to establish the due diligence required to reopen the record in that proceeding for the introduction of newly discovered evidence.[5] The Board determined that, because the Respondent had taken no steps to uncover possible election improprieties during the period for filing timely objections, it failed to demonstrate that the evidence could not have been uncovered with due diligence.[6] The Board accordingly concluded that the Respondent's objections to the representation election and certification were not litigable in the unfair labor practice proceeding.

C. The Court's Decision

The Respondent filed a petition for review of the Board's Order with the United States Court of Appeals for the District of Columbia Circuit, and the Board cross-petitioned for enforcement. On June 23, 2006, the court held that the Board in this case had misapplied the due diligence standard for acceptance of untimely election objections based on newly discovered evidence.[7] Moreover, the court concluded that Board precedent includes at least two formulations of the due diligence standard. The first, which the court called the "conducted investigation" standard, requires the moving party to show that it acted with reasonable diligence to discover and introduce the evidence. The second formulation, which the court referred to as the "hypothetical investigation" standard, requires a movant to demonstrate that it could not have uncovered the evidence within the window for filing objections, even with the exercise of due diligence.

The court stated that the Board, historically, has not clearly identified which formulation it has applied, and that in this case the Board confused the two iterations, treating them as if they were the same. The court remanded the case to the Board, identifying four issues that should be addressed: (1) the relationship between the "conducted investigation" and "hypothetical investigation" formulations of the due diligence standard; (2) which iteration the Board applies in this case and why; (3) if the Board applies the "conducted investigation" formulation, whether a party, in the absence of notice, must conduct a minimum investigation or make specific inquiries and how it should do so without coercing employees; and (4) if the Board is applying the "hypothetical investigation" version, how a party without notice shows that the evidence could not have been discovered with due diligence.

D. Post-Remand Proceedings

By letter dated October 19, 2006, the Board notified the parties that it had accepted the remand. On August 29, 2008, the Board issued a notice to show cause why the General Counsel's motion for summary judgment should not be granted because the Respondent failed to show that it conducted an investigation of potential election irregularities before the deadline for filing objections; failed to show that the "newly discovered evidence" could not have been timely discovered through due diligence; failed to demonstrate that, if adduced and credited, the "newly discovered evidence" would have required a different result under then-current law; and failed to file a motion to reopen the record in accordance with Section 102.65(e)(2) of the Board's Rules and Regulations or otherwise exercise due diligence in presenting the evidence. The Respondent filed a response to the notice.

Having considered the issues raised by the court, as discussed below, we find that the Respondent violated Section 8(a)(5) and (1) by refusing to bargain with the Union and furnish it with requested information.

II.

It has long been established that a party may not relitigate in an unfair labor practice proceeding any issue that was or could have been raised in the underlying representation proceeding.[8] The defense asserted by the Respondent based on alleged supervisory "taint" is a representation-case issue that would properly have been raised as an objection in the representation proceeding following the election.[9] If the objection could not have been timely asserted because the objecting party was unaware of the factual basis for the objection, the proper course would have been to file a motion to reopen the record in the representation case upon learning of the objectionable conduct. Accordingly, we treat the Respondent's defense as a motion to reopen the record in Case 2–RC–22677.

Section 102.69(a) of the Board's Rules and Regulations (R&R) provides that objections must be filed within 7 days after the tally of ballots, and evidence to support the objections must be provided within 7 days thereafter, unless the Regional Director permits additional time. When, as in this case, no party to a representation proceeding files timely election objections or challenges a

[5] The Board cited, inter alia, *APL Logistics*, 341 NLRB 994 (2004) (erroneously cited as 341 NLRB 955).

[6] Sec. 102.65(e)(1) and (2) of the Board's Rules and Regulations.

[7] 452 F.3d 813 (D.C. Cir. 2006).

[8] See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941); Sec. 102.67(f) of the Board's Rules and Regulations.

[9] E.g., *Fidelity Healthcare & Rehab Center,* 349 NLRB 1372 (2007); *SNE Enterprises,* 348 NLRB 1041 (2006).

determinative number of ballots, the Regional Director is to "issue a certification of the results of the election, including certifications of representative where appropriate, . . . and the proceeding will thereupon be closed." R&R § 102.69(b).

Section 102.65(e)(1) permits a party to move to reopen the record to introduce additional evidence, including newly discovered evidence, "because of extraordinary circumstances."[10] The rule specifies the requirements for such a motion:

> A motion for rehearing or to reopen the record shall specify briefly . . . the additional evidence sought to be adduced, why it was not presented previously, and what result it would require if adduced and credited. Only newly discovered evidence—evidence which has become available only since the close of the hearing—or evidence which the Regional Director or the Board believes should have been taken at the hearing will be taken at any further hearing.

R&R § 102.65(e)(1). The rule further requires that a movant act without delay to introduce newly discovered evidence, stating in relevant part:

> A motion to reopen the record shall be filed promptly on discovery of the evidence sought to be adduced.

R&R § 102.65(e)(2).

A party seeking to introduce new evidence after the record of a representation proceeding has been closed must therefore establish (1) that the evidence existed but was unavailable to the party before the close of the proceeding; (2) that the evidence would have changed the result of the proceeding; and (3) that it moved promptly upon discovery of the evidence.[11] The Respondent failed to establish any of these three requirements.

A.

In order to establish that the evidence for which reopening of the record is sought was unavailable before the close of the proceeding, the moving party must prove that it was "excusably ignorant" of the evidence at the time it was required to act.[12] As the court observed in *NLRB v. Jacob E. Decker & Sons,* the Board's disposition of this kind of motion is "controlled by the same considerations that control motions for a new trial or to reopen a case under [Rule] 60(b)(2) of the Federal Rules of Civil Procedure,"[13] which requires a showing that the proffered evidence, "with reasonable diligence, could not have been discovered in time" to take the required action in a timely manner.[14] Thus, in order to determine whether the movant was excusably ignorant of the proffered evidence, the Board asks whether the movant has established that the evidence "could not be discovered by reasonable diligence."[15] For example, in *Prudential Insurance Co.,*[16] the respondent in a technical refusal-to-bargain case sought to attack the certification in the underlying representation proceeding through a proffer of evidence that "employees were offered a financial inducement in the form of a dues waiver for their support of the Union."[17] The Board ruled that the respondent was precluded from litigating the issue: "[T]here is no showing that, with due diligence, the Respondent could not have uncovered the evidence in time to file timely objections."[18]

Of course, a movant may prove that the proffered evidence could not have been discovered in a timely manner even with reasonable diligence by establishing that it did in fact act with reasonable diligence to uncover evidence of objectionable conduct and that despite those efforts it failed to discover the proffered evidence. A movant's failure to exercise due diligence, however, will foreclose

[10] Sec. 102.65(e) is among the rules which address preelection hearings but are incorporated by reference for application to postelection proceedings. R&R § 102.69(e).

[11] The Rules provide virtually identical requirements for motions to reopen the record in an unfair labor practice proceeding. Sec. 102.48(d) states in relevant part:

> (1) . . . A motion to reopen the record shall state briefly the additional evidence sought to be adduced, why it was not presented previously, and that, if adduced and credited, it would require a different result. Only newly discovered evidence, evidence which has become available only since the close of the hearing, or evidence which the Board believes should have been taken at the hearing will be taken at any further hearing.
>
> (2) . . . [A] motion to adduce additional evidence shall be filed promptly on discovery of such evidence.

[12] *Superior Protection, Inc.,* 341 NLRB 614, 614 (2004) (internal quotation marks omitted); *Fitel/Lucent Technologies, Inc.,* 326 NLRB 46, 46 fn. 1 (1998) (internal quotation marks omitted); *Seder Foods Corp.,* 286 NLRB 215, 216 (1987); *Owen Lee Floor Service,* 260 NLRB 651, 651 fn. 2 (1980); *Mary Thompson Hospital,* 241 NLRB 766, 766 (1979); see also *NLRB v. Jacob E. Decker & Sons,* 569 F.2d 357, 363 (5th Cir. 1978) (internal quotation marks omitted).

[13] *NLRB v. Jacob E. Decker & Sons*, supra at 363.

[14] Fed. R. Civ. P. 60(b)(2).

[15] *APL Logistics, Inc.,* 341 NLRB at 994.

[16] 215 NLRB 66 (1974).

[17] Id. at 66.

[18] Id. at 67; see also *Jason/Empire, Inc.,* 212 NLRB 137, 138 (1974) (respondent failed "to show that with due diligence it could not have uncovered the evidence in time to file timely objections"); *Muscogee Lumber Co.,* 188 NLRB 869 (1971) ("it cannot be said that the information now being advanced constitutes newly discovered or previously unavailable evidence which, with the exercise of reasonable diligence, could not have been presented during the representation proceeding").

that avenue of establishing excusable ignorance of the proffered evidence.[19]

In the instant case, the Respondent has failed to establish excusable ignorance by demonstrating that it exercised reasonable diligence. It has not offered evidence that it made efforts of any kind to uncover evidence of objectionable conduct prior to the deadline for filing objections. Doing nothing at all cannot be deemed reasonable diligence. Nor has the Respondent established that the evidence would not have been discovered even if it had exercised reasonable diligence. The evidence it sought belatedly to introduce was of a conversation that took place in November 2002, well over 2 months prior to the February 19, 2003 election. The purported admissions by alleged Supervisor Garces were made to a nonunit employee, Spony, who was evidently on speaking terms with the Respondent's chief executive officer. Moreover, there is nothing in Spony's account of the conversation to suggest that it was confidential in nature: to the contrary, Garces appears to have been boasting openly to Spony about his involvement in the organizing effort and his support for the Union, and he explicitly declared that he did not care whether he got fired because of his support for the Union. Indeed, according to Spony, rumors of Garces's prounion activity had been circulating even before the November 2002 conversation. Nothing in Spony's account suggests that the Respondent, with reasonable diligence and without questioning any employees in the voting unit, could not have discovered Garces's activity in time to file a timely objection. As the asserted primary supervisor in the very small unit at issue (with only seven ballots cast), he would certainly have been among the first potential witnesses interviewed by any reasonably diligent employer. The question of whether Garces or any other supervisor was involved in the solicitation of cards would have been asked by any reasonably diligent party since supervisory taint is a well-known and common basis for objection. See, e.g., *Chinese Daily News*, 344 NLRB 1071 (2005); *Harborside Healthcare Inc*., 343 NLRB 906 (2004). Garces remained in Respondent's employ and available to the Respondent after the election and, in fact, the Respondent interacted with him immediately after the election when it terminated him in February 2003, days after the February 19 election. The Respondent provided no other evidence bearing on whether it might have learned of Garces's conduct before the late February deadline for filing objections. We find that the Respondent has failed to establish that, with reasonable diligence, it could not have discovered evidence of Garces's conduct in time to file a timely objection.

[19] E.g., *Fitel/Lucent Technologies*, 326 NLRB at 46; *Superior Protection*, 341 NLRB at 614.

B.

We now address the court of appeals' questions concerning the standard we have applied.[20] First, as to the appearance of multiple versions of the standard, we emphasize that the Board has never applied more than one standard for determining whether a party was excusably ignorant of evidence that it seeks to add to the record of a closed representation proceeding. There is but a single standard for establishing excusable ignorance: the proponent of the evidence must show that, with reasonable diligence, the evidence could not have been discovered in time to take appropriate and timely action in the representation proceeding.[21]

The inquiry called for by this standard is highly fact-intensive, and admits of as many variations as the circumstances presented by the facts of the various cases. As discussed above, a party may make the required showing by proving that it did in fact exercise reasonable diligence in seeking evidence of objectionable conduct and that despite those efforts it failed to find the proffered evidence. In such a case, the Board must determine whether the party's investigative conduct exhibited reasonable diligence. This inquiry, however, does not amount to a different standard or iteration of a standard;

[20] The court directed the Board to address the following questions on remand:

> On remand, the Board should explain (1) the relationship between the "conducted investigation" and "hypothetical investigation" iterations of the due diligence standard, (2) which iteration it is applying here and why it chose that iteration under the facts of this case, (3) if the Board is applying the "conducted investigation" iteration of the standard, whether there is a minimum level of investigation in the absence of notice of a violation or, alternatively, whether that standard requires specific inquiries in the absence of some notice of misconduct, and, if so, what these inquiries must be and how they are to be conducted without engaging in coercive and unlawful interrogation or interfering with the election in violation of § 8(a)(1) or § 8(b)(1) and (4) if the Board is applying the "hypothetical investigation" iteration, how a party in MCS's position-that is, an employer without notice-shows that the information sought to be admitted as new could not have been discovered in the exercise of due diligence.

Manhattan Center Studios, Inc. v. NLRB, 452 F.3d at 821.

[21] While there may not ultimately be a substantive difference, we prefer "reasonable diligence" to "due diligence" as the articulation of the standard. "Due" begs the question of the degree of diligence required. "Reasonable" describes the requirement that we apply: the party's investigation must be reasonably thorough under the circumstances of the case and in light of both the relatively short time frame for filing objections in a representation proceeding and the Act's policies favoring expeditious and and definitive resolution of questions concerning representation. See, e.g., *NLRB v. A.J. Tower Co.,* 329 U.S. 324, 330–331 (1946); *Northeastern University,* 261 NLRB 1001, 1002 (1982).

it is simply the analysis demanded by the facts advanced by the party in seeking to meet the reasonable diligence standard. This, then, is the answer to the court's question concerning the relationship between the so-called "hypothetical investigation" and "conducted investigation" "iterations" of the standard: the former reflects the standard applied by the Board, and the latter reflects the application of that standard when a party introduces evidence of an actual, unsuccessful search for evidence of objectionable conduct. To the extent that an appearance of multiple standards or iterations has been created by some of the Board's prior decisions, it has been the result of the elision of analytical steps leading to the absence of a clear statement of the well-known general standard. We take this opportunity to clarify that there is only one standard applied by the Board, and it is as articulated above.

The answer to the court's second question follows from the above explanation and our ruling set forth above in Part A: We have in this case applied the single, reasonable diligence standard, which the court referred to as addressing a "hypothetical investigation." As to the third question, we hold that a party need not question employees in a way that might arguably constitute interference with rights protected by the Act or objectionable conduct, in order to be found to have exercised reasonable diligence.

Finally, the fourth question posed by the court is how can a party that has no notice of the facts supporting a potential objection show that evidence proving those facts could not have been discovered in the exercise of reasonable diligence? Certainly, if the party has notice of a fact but fails to take reasonable action to locate the evidence to prove it, the determination concerning reasonable diligence is greatly simplified. However, there are many facts that a party exercising reasonable diligence would discover even in the absence of notice of those facts. This is because reasonable diligence certainly entails making inquiry of available potential witnesses, such as asserted supervisor Garces, concerning their knowledge of common forms of objectionable conduct, such as supervisory taint. Whether evidence could not have been discovered even through the exercise of reasonable diligence depends on the circumstances of the particular case, such as the nature of the evidence, the number of persons with knowledge of the evidence and their relationship to the party, and how well known the potential objection is, among many others. Whether the party had notice of the significant fact is just one of many factors for the Board to consider. Accordingly, we decline to create a blanket exception to the requirement of reasonable diligence for issues of which the proponent of additional evidence had no notice.

As noted above, the judgment to be made under the Board's standard is essentially the same as the judgment exercised by a trial court under Rule 60(b)(2) of the Federal Rules of Civil Procedure. It would be no more appropriate to impose a no-notice exception to the reasonable diligence requirement of Rule 60(b)(2). In fact, the considerations favoring a firm rule of repose are even stronger in representation cases under the Act than in civil litigation. As discussed below, there is a strong statutory interest in the prompt and definitive resolution of questions concerning representation. Those resolutions, moreover, unlike court judgments, do not bind the parties for all time. In the absence of employer unfair labor practices, a Board certification of a representative will bar a new election for only 1 year if no contract is agreed to, and for no more than an additional 3 years if an agreement is reached. The provisional and perishable nature of the consequences of the Board's decisions in representation proceedings heightens the importance of finality.

C.

In addition to showing that the evidence was unavailable at the time it was required to act, a party seeking to reopen the record of a representation proceeding under Section 102.65(e) to present newly discovered evidence must establish that the evidence would have compelled a different result.[22] By definition, objectionable election conduct is conduct "affecting the results of the election." R&R § 102.69(a). The Board finds conduct objectionable if it "has the tendency to interfere with the employees' freedom of choice" and it "could well have affected the outcome of the election."[23] The objecting party must submit evidence sufficient to establish a prima facie case in support of its objection.[24]

Here, the evidence that the Respondent seeks to introduce as newly discovered does not establish that Garces' actions constituted objectionable conduct. According to Spony's affidavit, Garces told him that "he had brought the union card into the workplace and was taking the card around for employees to sign up for the union." This evidence does not establish the number of employees solicited or whether any of Garces' solicitations were successful.[25] In fact, the vague language used, "taking the card around for employees to sign up for the union,"

[22] See, e.g., *APL Logistics*, 341 NLRB at 994; *Superior Protection*, 341 NLRB at 614.

[23] *Cambridge Tool & Mfg. Co.*, 316 NLRB 716 (1995).

[24] *Park Chevrolet-Geo*, 308 NLRB 1010 (1992).

[25] As noted above, the election tally showed 5 votes for the Union, 1 vote against the Union, and 1 challenged ballot.

could encompass giving cards to one employee to circulate among the others. The Respondent has therefore failed to show that the proffered evidence would have changed the result of the representation proceeding. Compare *Chinese Daily News*, supra at 1072–1073 (elections results overturned where seven of eight employees solicited signed cards and election decided by four votes).

D.

Finally, in order to succeed in reopening the representation case record the Respondent must also establish that it moved "promptly on discovery of the evidence sought to be adduced."[26] The imperative of prompt action is particularly strong in representation cases in light of "the Act's policy of expeditiously resolving questions concerning representation."[27] The Board's Rules require objections to be filed within 7 days after the tally of ballots,[28] and "strict adherence" to the Board's Rules in this area is "essential."[29]

Here, the Respondent learned of the evidence no later than March 20, 2003, 3 weeks after the deadline for filing objections. Yet it did not disclose to the Board the existence of a possible basis for objections until over 14 weeks later, in its answer to the complaint in this matter, and it did not file anything approximating a motion to reopen the record until almost 27 weeks later, in its opposition to the summary judgment motion. The Respondent has provided no explanation for its 27-week delay in seeking to reopen the record. It has utterly failed to establish that it moved promptly on discovery of the evidence. For this reason, independently of the other reasons discussed above, the Respondent's evidence may not be received, and the issue it seeks to raise may not be litigated.

ORDER

The National Labor Relations Board affirms its original Decision and Order, 342 NLRB 1264 (2004).

Dated, Washington, D.C. December 14, 2011

Mark Gaston Pearce, Chairman

Craig Becker, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER HAYES, concurring.

In agreement with my colleagues, I grant the General Counsel's motion for summary judgment. I do so simply because, by any reasonable interpretation of the Board's Rules, the Respondent did not promptly come forward with its newly discovered evidence relative to a claim of previously unalleged objectionable conduct in the underlying representation proceeding. The Respondent learned of possible prounion supervisory involvement in the election campaign less than a month after the deadline for filing objections, but did not even suggest the existence of newly discovered evidence to the Board until 3 months later, and did not actually submit this evidence for several more months in opposition to the General Counsel's motion. I therefore find no need to pass on whether the Respondent proved that the evidence which it sought to adduce in a reopened representation proceeding was unavailable prior to the close of that proceeding, or whether the evidence would have compelled a different result.[1]

Dated, Washington, D.C. December 14, 2011

Brian E. Hayes, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[26] R&R § 102.65(e)(2).
[27] *Northeastern University,* supra, 261 NLRB at 1002 (1982).
[28] R&R § 102.69(a).
[29] *Heritage Nursing Center, Inc.,* 207 NLRB 826, 827 (1973).

[1] I recognize that the court of appeals stated that the Board "should" explain its original rationale and remanded for "further proceedings consistent with this opinion." *Manhattan Center Studios, Inc. v. NLRB*, 452 F.3d 813, at 821 (D.C. Cir. 2006). In my view, this mandate does not preclude the Board from reaching the same result on a different rationale. *City of Charlottesville, Va. v. FERC*, 774 F.2d 1205, 1212 (D.C. Cir. 1985) ("As a general proposition, an administrative tribunal is free on remand to reach the same result on different grounds."), cert denied, 475 U.S. 1108 (1986).