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IN BOUND VOLUMES

PGB
New Milford, NJ

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

800 RIVER ROAD OPERATING COMPANY, LLC d/b/a WOODCREST HEALTH CARE CENTER

Employer

and

Case 22-RC-073078

1199 SEIU, UNITED HEALTHCARE WORKERS EAST

Petitioner

ORDER DENYING MOTION

On January 9, 2013, the National Labor Relations Board issued a Decision and Certification of Representative in this proceeding.[1] The Board adopted the hearing officer's recommendation to overrule the Employer's remaining objections to a March 9, 2012 election, including objections alleging that supervisor Israel Vergel de Dios was one of four supervisors who interfered with employee free choice by engaging in prounion conduct. The Board also found that the hearing officer improperly refused to issue six additional subpoenas to the Employer but that the error was harmless: given the Employer's failure to elicit any competent evidence of objectionable conduct from its

[1] 359 NLRB No. 48. The Employer states that it has submitted its motion "without prejudice to (and specifically reserves) its position that the Board had no power to issue its January 9, 2013 Decision and Certification of Representative." We note, however, that the Employer did not assert that position in its exceptions to the hearing officer's report underlying the January 9 decision. As the Employer adds, it later did file a motion to vacate that decision on the ground that the Board lacked a quorum at the time. We denied that motion by unpublished Order dated May 10, 2013, and for the reasons stated therein we continue to reject the Employer's position here.

first 10 witnesses and its inability to make an offer of proof concerning the individuals it sought to subpoena, the Board found it reasonable to conclude that the hearing officer would have refused to allow the additional witnesses to testify had he issued the subpoenas or revoked the subpoenas if presented with a petition to do so.

The Employer has filed a motion to reopen the record, arguing that it has newly discovered evidence that Vergel de Dios engaged in objectionable conduct. It contends that, after the Board issued its decision, it interviewed or re-interviewed several of its employees in another attempt to find evidence to support its objections. One employee, Dawn-Marie Sormani,[2] gave a signed statement that she witnessed Vergel de Dios telling four of the employees whom he supervised[3] that "they should vote in favor of the [U]nion so that they could receive better wages and health benefits," and, on another occasion, that she saw Vergel de Dios "randomly telling people" in the hallway outside the dining room that they should vote for the Union.[4] The Employer contends that the

[2] Sormani worked in a different department than, and was not supervised by, Vergel de Dios.

[3] Sormani identified the four employees by their first names: "Paulette, Felix, Jean, and Myrna." We cannot be certain to whom Sormani refers.

[4] The Employer states that Sormani also said that the hallway was near where many of the employees who worked under Vergel de Dios worked, but her written statement contains no such content.

The Employer also claims that Vergel de Dios continued to intimidate potential witnesses when it conducted its interviews after the Board decision, even though it had fired Vergel de Dios in August 2012. First, the Employer asserts that several employees who had been supervised by Vergel de Dios refused to be interviewed. For example, the Employer relates, it attempted to interview the employees that Sormani had identified, but three refused to be interviewed and it had "a distinct sense" that the fourth was withholding information. Second, the Employer points out that Vergel de Dios had filed an unfair labor practice charge over his discharge, withdrew it, and then re-filed it shortly after the Employer conducted its post-Board-decision interviews. This suggests, the Employer argues, that Vergel de Dios wanted to convey to his former supervisees his intent to return so that they would not speak candidly about his election conduct. Third, the Employer finds it significant that, on the day of the interviews, it

foregoing newly discovered evidence shows that the Board was wrong in finding the hearing officer's error harmless and, therefore, that the Board must reopen the record and allow the Employer to subpoena the testimony of other employees to prove its objection. The Union filed an opposition to the motion.

We deny the Employer's motion for the reasons set forth below.

Under Section 102.65(e)(1) of the Board's Rules and Regulations, the Board will reopen the record for new evidence only when the movant establishes that (1) "the evidence existed but was unavailable to the party before the close of the proceeding" and (2) "the evidence would have changed the result of the proceeding." *Manhattan Center Studios, Inc.*, 357 NLRB No. 139, slip op. at 3 (2011).[5] The Employer establishes neither requirement.

First, evidence is "unavailable" only if the movant proves it was "excusably ignorant" of the evidence at the time it was required to act. Id. In making that determination, the Board asks whether the movant has established that the evidence in question could not have been discovered by "reasonable diligence." Id.[6] Here, the Employer's post-Board-decision interview was not its first with Sormani. The Employer

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"believe[s]" that Vergel de Dios was in the Dunkin' Donuts adjacent to the Employer's facility. Contary to the Employer, we decline to find that any of these assertions or surmises excuses its inability to offer evidence of coercion.

[5] The motion also must be "filed promptly" after discovery of the new evidence. Sec. 102.65(e)(2). The Union asserts that the motion, filed approximately one month after Sormani's signed statement, was untimely. We find it unnecessary to pass on timeliness because the Employer plainly failed to meet the other requirements of Sec. 102.65(e).

[6] In some cases, a movant may prove the evidence could not have been timely discovered even with the exercise of 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" it. Id. For the reasons discussed below, however, the Employer did not act with reasonable diligence.

had interviewed her before the May 2012 objections hearing, and she fully cooperated at that time. The Employer neglected to ask her about Vergel de Dios and instead focused on the allegedly objectionable conduct of the three other supervisors implicated in its objections. We find that the Employer did not exercise reasonable diligence. The Employer could have discovered Sormani's testimony during the earlier interview had it asked her about all four of the supervisors.

We are not persuaded by the Employer's justifications that it interviewed between 100 and 150 employees during the 4 days after the election and that, because Sormani was among the first interviewed, its allegations against Vergel de Dios were not yet well developed at that time. Asking each of the employees about Vergel de Dios would not have unreasonably lengthened the interviews. Furthermore, once the objections were set for hearing, the Employer had 23 additional days before the start of the hearing to gather evidence. Thus, even if the Employer, when it initially interviewed Sormani, did not know enough to ask her about Vergel de Dios—which the Employer does not contend—the Employer could have re-interviewed her and similarly situated employees during that period.

Second, the Employer has failed to establish that, had Sormani testified consistent with her signed statement and the hearing officer credited that testimony, it would have changed the result, i.e., the Board would have found that Vergel de Dios's conduct interfered with employee free choice. See *Manhattan Center*, slip op. at 5. Vergel de Dios's encouraging a small number of employees to vote for the Union, and voicing his opinion that they would receive better wages and benefits if represented by the Union was not, without more, objectionable conduct. The Employer had to prove

that (1) Vergel de Dios's conduct reasonably tended to coerce employees (considering facts such as the nature of his supervisory authority and the context of the conduct) and (2) his conduct materially affected the outcome of the election (considering facts such as the margin of victory and how many employees learned of the conduct). See *Harborside Healthcare, Inc.*, 343 NLRB 906, 909 (2004). Sormani's testimony would not prove either prong, especially in light of the Union's wide margin of victory (a 41-vote margin out of 205 votes cast).

In fact, the Employer tacitly concedes that Sormani's statement alone does not compel a different result, arguing instead that it should now be allowed to subpoena other employees because Sormani's statement gives it a "good faith basis" to contend that Vergel de Dios "very well may have" engaged in objectionable conduct. The Employer fails to even name the employees whom it would subpoena, much less establish that each employee has evidence that was unavailable before the close of the proceeding and that would change the result.[7] We will not reopen the record for the Employer to resume "the manifest fishing expedition" that we described in our underlying decision.

In sum, having duly considered the matter, we find that the Employer's motion fails to present "extraordinary circumstances" warranting reopening the record under Section 102.65(e)(1).

IT IS ORDERED, therefore, that the Employer's motion to reopen the record is denied.

Dated, Washington, D.C., May 31, 2013.

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

Mark Gaston Pearce, Chairman

Richard F. Griffin, Jr., Member

Sharon Block, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD