

Brusco Tug & Barge, Inc. and International Organization of Masters, Mates, & Pilots ILA, AFL-CIO. Case 19-CA-096559

May 20, 2013

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS GRIFFIN
AND BLOCK

This is a refusal-to-bargain case in which the Respondent is contesting the Union's certification as bargaining representative in the underlying representation proceeding. Pursuant to a charge filed by the Union on January 16, 2013, the Acting General Counsel issued the complaint on January 30, 2013, alleging that the Respondent has violated Section 8(a)(5) and (1) of the Act by refusing the Union's request to bargain following the Union's certification in Case 19-RC-013872. (Official notice is taken of the "record" in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g). *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed an answer, admitting in part and denying in part the allegations in the complaint, and asserting affirmative defenses.

On February 7, 2013, the Acting General Counsel filed a Motion for Summary Judgment and Brief in Support of Motion. On February 13, 2013, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed a response.

Ruling on Motion for Summary Judgment

The Respondent admits its refusal to bargain, but contests the validity of the certification on the basis of its contention, raised and rejected in the underlying representation proceeding, that the mates in the unit are supervisors under Section 2(11) of the Act and that the bargaining unit is therefore inappropriate. The Respondent also argues that the Board lacks a quorum because the President's recess appointments to the Board are constitutionally invalid. The Respondent further argues that the complaint was not validly issued because the Acting General Counsel was not a proper recess appointee.¹

In addition, in its response to the Notice to Show Cause, the Respondent contends that the duties of its mates were changed in about 2010, after the Board granted the Employer's request for review of the Regional Director's second supplemental decision but before the Board's Decision on Review issued. The Respondent

asserts that these changes could not have been litigated in the prior representation proceeding because they occurred after 2006, the last opportunity afforded by the Regional Director to submit evidence, and that it should now be permitted to present these facts at a hearing. We find no merit in this argument. The Respondent's attempt to raise alleged changes in mates' duties in this proceeding is procedurally improper. As indicated, the alleged changes occurred *before* the Board issued its Decision on Review affirming the Regional Director's determination that the mates were employees under the Act. Although the Respondent's request for review had been granted and the matter was pending before the Board, the Respondent could have filed a motion to reopen the record. The Respondent did not file such a motion, however, or make any other effort to bring the alleged changes to the Board's attention. Thus, the Respondent is improperly attempting to raise an issue that could have been litigated in the representation proceeding.²

The Respondent additionally contends that the exceedingly long passage of time since the certification in 2000 constitutes a "special circumstance" warranting relitigation of the issues raised in the underlying representation case. In this regard, the Respondent contends that there has been significant employee turnover, such that only 2 employees remain of the 39 employees who were in the putative unit in 2000.³ The Respondent also argues that

² *New Vista Nursing & Rehabilitation, LLC*, 357 NLRB 714, 715 (2011). Cf. *East Michigan Care Corp.*, 246 NLRB 458, 459 (1979), enf. 655 F.2d 721 (6th Cir. 1981) (refusing to consider precertification changes to nurses' duties that allegedly made them supervisors where the employer did not seek to introduce evidence of those changes in the representation proceeding by a motion to reopen the record or otherwise); accord: *TEG/LVI Environmental Services*, 328 NLRB 483, 483 fn. 3 (1999) (observing that employer had failed to explain why asserted change affecting unit was first brought to the Board's attention in the employer's response to the notice to show cause).

³ Although the delay in this case is regrettable, the Board's bargaining orders have been enforced in similar cases by courts which have noted that changed circumstances during intervals of adjudication "have been held irrelevant to the adjudication of enforcement proceedings." *NLRB v. Bakers of Paris, Inc.*, 929 F.2d 1427, 1448 (9th Cir. 1991) (citing *NLRB v. Buckley Broadcasting Corp.*, 891 F.2d 230, 234-235 (9th Cir. 1989)); see also *East Bay Automotive Council v. NLRB*, 483 F.3d 628, 635 (9th Cir. 2007); *NLRB v. Best Products Co.*, 765 F.2d 903, 914 (9th Cir. 1985). Similarly, the Board has uniformly held that employee turnover does not constitute "unusual circumstances" relieving an employer of its obligation to bargain. *Specialty Healthcare & Rehabilitation Center of Mobile, Inc.*, 357 NLRB 2119, 2119 fn. 2 (2011) citing *King Electric, Inc.*, 343 NLRB No. 54, slip op. at 1 fn. 1 (2004) (not reported in Board volumes), enf. denied on other grounds 440 F.3d 471, 474 (D.C. Cir. 2006); *Action Automotive*, 284 NLRB 251 fn. 1 (1987), enf. 853 F.2d 433 (6th Cir. 1988), cert. denied 488 U.S. 1041 (1989); *Murphy Bros.*, 265 NLRB 1574, 1575 fn. 3 (1982); see also *Pearson Education, Inc. v. NLRB*, 373 F.3d 127 (D.C. Cir. 2004)

¹ For the reasons stated in *Bloomington's Inc.*, 359 NLRB No. 113 (2013), and *Belgrove Post Acute Care Center*, 359 NLRB 633 (2013), these arguments are rejected. In any event, the Acting General Counsel is not a recess appointee.

under the equitable doctrine of laches, the certification should not be upheld because the Board did not expeditiously resolve the representation case.⁴ There is no merit in these arguments.

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 Motion for Summary Judgment.⁵

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a Washington corporation with an office and a place of business located in Longview, Washington (the facility), is engaged in the business of operating inland and offshore tugboats on the west coast of the United States.

During the 12-month period preceding issuance of the complaint, a representative period, the Respondent, in conducting its business operations, derived gross revenues in excess of \$50,000 for the transportation of freight from the State of Washington directly to points outside of the State of Washington, and purchased and received at its facility goods valued in excess of \$50,000 directly from points outside the State of Washington.

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 the Union, International Organization of Masters, Mates, & Pilots, ILA, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

(apart from bargaining orders in *Gissel* context, employee turnover does not affect ongoing validity of Board bargaining order); *Scepter, Inc.*, v. *NLRB*, 280 F.3d 1053 (D.C. Cir. 2002) (simple fact of employee turnover would not have been enough to require a different decision by Board).

⁴ This defense has no merit. The Supreme Court and the Board have long held that the defense of laches does not lie against the Board as an agency of the United States government. *Entergy Mississippi, Inc.*, 358 NLRB 907, 908 fn.4 (2012), citing *NLRB v. J. H. RutterRex Mfg. Co.*, 396 U.S. 258 (1969); *NLRB v. Quinn Restaurant Corp.*, 14 F.3d 811, 817 (2d Cir. 1994).

⁵ The Respondent's request that the complaint be dismissed, and the certification of representative be revoked, is therefore denied.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Certification

On September 22, 2000, in Case 19-RC-013872, the Board certified the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All mates, deckhands, and engineer deckhands employed by the Employer on vessels operated by [the Respondent] out of its Longview/Cathlamet, Washington, home port; excluding all guards and supervisors as defined by the Act, including all captains and all other employees.

On October 24, 2001, the Board remanded Case 19-RC-013872 to reopen the record. On December 14, 2012, after two post-remand supplemental decisions, the Board affirmed the Second Supplemental Decision in Case 19-RC-013872, finding the unit appropriate. On January 11, 2013, an order reaffirming the Certification of Representative issued in Case 19-RC-013872. The Union continues to be the exclusive collective-bargaining representative of the unit under Section 9(a) of the Act.

B. Refusal to Bargain

About January 15, 2013, the Union requested in writing that the Respondent bargain collectively with it as the exclusive collective-bargaining representative of the unit. About January 16, 2013, the Respondent, in writing by its unnamed agent, informed the Union that it would not bargain with it as the bargaining representative of the unit. Since about January 16, 2013, the Respondent has failed and refused to recognize and bargain with the Union as the exclusive collective-bargaining representative of the unit. We find that this failure and refusal to recognize and bargain with the Union constitutes a violation of Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By failing and refusing since about January 16, 2013, to recognize and bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit, 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 bargain on request with the Union, and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); accord: *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965); *Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964).

ORDER

The National Labor Relations Board orders that the Respondent, Brusco Tug & Barge, Inc., Longview, Washington, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize and bargain with International Organization of Masters, Mates, & Pilots, ILA, AFL–CIO as the exclusive collective-bargaining representative of the employees in the bargaining unit.

(b) 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) On request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All mates, deckhands, and engineer deckhands employed by the Employer on vessels operated by [the Respondent] out of its Longview/Cathlamet, Washington, home port; excluding all guards and supervisors as defined by the Act, including all captains and all other employees.

(b) Within 14 days after service by the Region, post at its facility in Longview, Washington, copies of the attached notice marked “Appendix.”⁶ Copies of the notice, on forms provided by the Regional Director for Region 19, 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 customarily 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 the facility 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 about January 16, 2013.

(c) 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.

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 and bargain with International Organization of Masters, Mates, & Pilots ILA, AFL–CIO as the exclusive collective-bargaining representative of the employees in the bargaining unit.

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, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the following bargaining unit:

All mates, deckhands, and engineer deckhands employed by us on vessels operated by us out of our Longview/Cathlamet, Washington, home port; exclud-

⁶ 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.”

ing all guards and supervisors as defined by the Act, including all captains and all other employees

BRUSCO TUG & BARGE, INC.