Benjamin H. Realty Corp. *and* Residential Construction and General Service Workers, Laborers Local 55. Cases 22–CA–110689 and 22–RC–087792

November 13, 2014

DECISION, CERTIFICATION OF REPRESENTATIVE, AND NOTICE TO SHOW CAUSE

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA AND HIROZAWA

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 Residential Construction and General Service Workers, Laborers Local 55 (the Union) on August 6, 2013, the then Acting General Counsel issued the complaint on August 19, 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 22–RC–087792. The Respondent filed an answer admitting in part and denying in part the allegations in the complaint, and asserting affirmative defenses.

On September 10, 2013, the then Acting General Counsel filed a Motion for Summary Judgment and a memorandum in support. On September 11, 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.

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

As an initial matter, the Respondent argues that the complaint is ultra-vires and should be dismissed because the then Acting General Counsel was not validly designated and therefore lacked the authority to issue the complaint in this case. In support of this argument, the Respondent asserts that the Federal Vacancies Reform Act (Vacancies Act) does not apply to the office of the General Counsel because there is a specific procedure under the National Labor Relations Act (NLRA) for filling the vacancy. Contrary to the Respondent's assertion, the express terms of the Vacancies Act make it applicable to all executive agencies, with one specific exception inapplicable here, 5 U.S.C. § 3345(a); see 5 U.S.C. § 105 ("Executive agency" defined to include independent agencies), and to all offices within those agencies, such as the office of the General Counsel, that are filled by presidential appointment with Senate confirmation, 5 U.S.C. § 3345(a).

The Respondent's assertion is also contrary to Section 3347 of the Vacancies Act, which makes the Vacancies Act the exclusive means for designating an acting official for a covered position except when another statutory provision, such as Section 3(d) of the NLRA, provides for such designation. In that event, the Vacancies Act provides a valid "alternative procedure." S. Rep. No. 105–250, at 17 (1998). Finally, the enforcement provision of the Vacancies Act, 5 U.S.C. § 3348, which deems an office "vacant" and actions taken by its occupant of "no force or effect" if it was temporarily filled in a manner inconsistent with the Vacancies Act, is expressly and specifically inapplicable to the office of the Board's General Counsel. 5 U.S.C. § 3348(e)(1). The Acting General Counsel was properly appointed under the Vacancies Act, and the complaint is not subject to attack based on the circumstances of his appointment. See *Muffley v. Massey Energy Co.*, 547 F.Supp. 2d 536, 542–543 (S.D.W. Va. 2008), affd. 570 F.3d 534 (4th Cir. 2009) (upholding authorization of 10(j) injunction proceeding by Acting General Counsel designated pursuant to the Vacancies Act).

With regard to the merits of the motion for summary judgment, the Respondent admits its refusal to bargain but contests the validity of the certification on the basis of its contention in the underlying representation proceeding that it did not have a "substantial and representative complement" of employees in the bargaining unit at the time of the election, and that the Board improperly counted the ballot of a statutory supervisor as a vote in favor of the Union. The Respondent also argues that the Board lacked a quorum when it originally considered these arguments in Case 22–RC–087792 and, therefore, the Board's prior determinations in the underlying representation proceeding are not valid.[1]

[1] The Respondent additionally argues that the Acting General Counsel's motion for summary judgment should be denied for failing to comply with Sec. 10282.2 of the NLRB Casehandling Manual, Part I, ULP Proceedings (CHM), which provides a list of documents that should be included with the motion. The Respondent notes that the Acting General Counsel included with the motion a duplicate copy of the Board's Decision and Direction when it should have included a copy of the Regional Director's Decision and Direction of Election and the Respondent's corresponding request for review. Initially, we observe that the Casehandling Manual is intended as a guide for Agency staff, and is not binding on the Board. *Superior Industries*, 289 NLRB 834 fn. 13 (1983), enfd. 902 F.2d 40 (9th Cir. 1990). Further, we note that the Respondent has failed to allege, much less establish, that it was prejudiced in any way by this error. Indeed, we have fully considered the omitted documents. Accordingly, we decline to deny the motion for summary judgment on this basis. See *Willamette Industries*, 323 NLRB 739 fn. 1 (1997), enf. denied on other grounds 144 F.3d 877 (D.C. Cir. 1998) (absent a showing of prejudice, failure to include documents pursuant to CHM Sec. 10282.2 not a basis for denial of motion for summary judgment).

In a typical unfair labor practice proceeding, a respondent is precluded from raising representation issues that were or could have been litigated in the prior representation proceeding. However, at the time of the Board's October 18, 2012 Order denying the Employer's request for review of the Acting Regional Director's Decision and Direction of Election, and the Board's June 19, 2013 Decision and Direction in Case 22–RC–087792, the composition of the Board included two persons whose appointments to the Board had been challenged as constitutionally infirm. On June 26, 2014, the United States Supreme Court issued its decision in *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014), holding that the challenged appointments to the Board were not valid. Under these circumstances, we do not give preclusive effect to the Board's prior denial of the Respondent's request for review and the Board's Decision and Direction, and we consider anew the Respondent's arguments raised in the representation proceeding.

In the representation proceeding, the Respondent argued that it anticipated substantial turnover among its superintendents due to increased enforcement of a local ordinance requiring that building superintendents have a license from the city. The Respondent maintained that many of its superintendents could not be licensed and they would have to be replaced. The Regional Director found that the anticipated change to the unit (replacing unlicensed superintendents with licensed superintendents) did not constitute a fluctuating work force under Board law, and that since both the size and composition of the work force would remain the same, an immediate direction of election was warranted. The Respondent filed a request for review, arguing that a "substantial and representative complement of employees does not exist." We deny the Respondent's request for review as it raises no substantial issues warranting review.

An election was held on November 8, 2012, pursuant to the Acting Regional Director's Decision and Direction of Election. The tally showed 6 votes for and 6 against the Petitioner, with 1 challenged ballot. With regard to the challenged ballot of the alleged supervisor, we have considered the challenge and the hearing officer's report recommending disposition of it, and reviewed the record in light of the exceptions and brief. We adopt the hearng officer's findings[2] and recommendation that the challenge to the ballot be overruled.[3]

Having resolved the only determinative challenged ballot, our normal practice would be to direct the Regional Director to open and count the challenged ballot, to prepare and serve on the parties a revised tally of ballots, and to issue an appropriate certification. However, the Regional Director has already performed these ministerial tasks in response to the Board's original Decision and Direction in Case 22–RC–087792, and we see no purpose to be served by requiring the Regional Director to repeat them. Thus, the Revised Tally of Ballots that issued on June 27, 2013, accurately presents the results of the election, and the Certification of Representative issued by the Acting Regional Director on July 2, 2013, is based upon the valid votes cast. The revised tally shows 7 for and 6 against the Petitioner, with no challenged ballots. There is no question that a majority of valid ballots was cast for the Union, and there is no question that the Certification issued by the Regional Director is substantively correct. Nevertheless, in an abundance of caution and in an effort to avoid further litigation that would only serve to further delay this matter, we will issue a new Certification of Representative.

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[2] The Employer has excepted to some of the hearing officer's credibility findings. The Board's established policy is not to overrule a hearing officer's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Stretch-Tex Co.*, 118 NLRB 1359, 1361 (1957). We have carefully examined the record and find no basis for reversing the findings.

[3] In adopting the hearing officer's recommendation to overrule the challenge to the ballot of Justo Pastor Perea, we find no merit to the Employer's contention that the hearing officer misplaced the burden of proof on the Employer. The Employer argues that, because the parties stipulated that Perea was a statutory supervisor before the Employer hired Moshe Weiss as its manager in March 2012, the burden of proof is on the Petitioner to affirmatively establish that Perea lost his supervisory authority. Contrary to the Employer's contention, the burden of proof here is on the Employer, as the party asserting supervisory status. *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 711–712 (2001). The Board does not apply a burden-shifting analysis to determine whether an individual is a statutory supervisor. *Dean & Deluca*, 338 NLRB 1046, 1047 (2003). Indeed, similar supervisory status stipulations have not changed the Board's placement of the burden of proof, belying the Employer's contention that this factual situation is unique. See *We Can, Inc.*, 315 NLRB 170, 173–174 (1994); *International Metal Co.*, 286 NLRB 1106, 1115 (1987). As the hearing officer correctly found, the record shows that after the Employer hired Weiss, there was a substantial change in Perea's duties and responsibilities and that the Employer failed to carry its burden of proving that Perea was a supervisor.

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for Residential Construction and General Service Workers, Laborers Local 55, and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All full-time and regular part-time superintendents, maintenance employees, porters and painters employed by the Employer at its facilities located at 370 Central Avenue, Orange, New Jersey; 245 Reynolds Terrace, Orange, New Jersey; 500 South Harrison Street, Orange, New Jersey; 466 Highland Avenue, Orange, New Jersey; 447-49 Prospect Street, East Orange, New Jersey; 36 South Munn Street, East Orange, New Jersey; 40 South Munn Street, East Orange, New Jersey; 46 North Arlington Avenue, East Orange, New Jersey; 52 North Arlington, East Orange, New Jersey; 50 South Arlington Avenue, East Orange, New Jersey; 52-54 South Arlington Avenue, East Orange, New Jersey; 67-76 Melmore Gardens, East Orange, New Jersey; 106 North Arlington, East Orange, New Jersey; 111 Halsted Street, East Orange, New Jersey; 83-85 Halsted Street, East Orange, New Jersey; 268 North Oraton Parkway, East Orange, New Jersey; 288 4th Avenue, East Orange, New Jersey; 161 Prospect Street, East Orange, New Jersey and 91 Prospect Street, East Orange, New Jersey, the only facilities involved herein excluding all clerical employees, security employees, engineering employees, inspectors and managerial employees.

NOTICE TO SHOW CAUSE

As noted above, the Respondent has refused to bargain for the purpose of testing the validity of the certification of representative in the U.S. Courts of Appeals. Although the Respondent's legal position may remain unchanged, it is possible that the Respondent has or intends to commence bargaining at this time. It is also possible that other events may have occurred during the pendency of this litigation that the parties may wish to bring to our attention.

Having duly considered the matter,

1. The General Counsel is granted leave to amend the complaint on or before November 24, 2014, to conform with the current state of the evidence.

2. The Respondent's answer to the amended complaint is due on or before December 8, 2014.

3. NOTICE IS HEREBY GIVEN that cause be shown, in writing, on or before December 29, 2014 (with affidavit of service on the parties to this proceeding), as to why the Board should not grant the General Counsel's motion for summary judgment. Any briefs or statements in support of the motion shall be filed by the same date.