800 River Road Operating Company LLC, d/b/a Woodcrest Health Care Center *and* 1199 SEIU, United Healthcare Workers East. Cases 22–CA–097938 and 22–RC–073078

November 26, 2014

DECISION, CERTIFICATION OF REPRESENTATIVE, AND NOTICE TO SHOW CAUSE

BY CHAIRMAN PEARCE AND MEMBERS HIROZAWA AND SCHIFFER

On July 10, 2013, the National Labor Relations Board issued a Decision and Order in this proceeding, which is reported at 359 NLRB No. 129 (not reported in Board volumes). Thereafter, the Respondent filed a petition for review in the United States Court of Appeals for the District of Columbia Circuit.

At the time of the Decision and Order, 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. Thereafter, on June 27, 2014, the Board issued an order setting aside the Decision and Order, and retained this case on its docket for further action as appropriate.

The National Labor Relations Board has consolidated the underlying representation proceeding with this unfair labor practice proceeding and delegated its authority in both proceedings to a three-member panel.

This is a refusal-to-bargain case in which the Respondent is contesting the certification of 1199 SEIU, United Healthcare Workers East (the Union) as bargaining representative in the underlying representation proceeding. The Board's July 10, 2013 decision states that the Respondent is precluded from litigating any representation issues because, in relevant part, they were or could have been litigated in the prior representation proceedings. The prior proceedings, however, also occurred at a time when the composition of the Board included two persons whose appointments to the Board had been challenged as constitutionally infirm, and we do not give them preclusive effect. Accordingly, we consider below the representation issues that the Respondent has raised in this proceeding.

In its response to the Notice to Show Cause issued on March 13, 2013, the Respondent argued that the Board wrongly certified the Union "for the reasons set forth in [its] Exceptions to the June 18, 2012 Report of the Hearing Officer that the Board adopted in its September 13, 2012 Decision and Direction of Election," and further argued that the Board must reopen the record and vacate the Decision for the reasons set forth in its March 2, 2013 Motion to Reopen the Record.

As to the Respondent's first argument, it appears that the Respondent has confused this case with some other matter. The election in this case was conducted on March 9, 2012, pursuant to a Stipulated Election Agreement. Thus, there were no "Exceptions to the June 18, 2012 Report of the Hearing Officer" and there was no "September 13, 2012 Decision and Direction of Election." Nevertheless, based on the Respondent's reference to a hearing officer's report, we presume that the Respondent is attempting, albeit inartfully, to assert its objections to the election that were the subject of the hearing officer's Report on Objections that issued on June 4, 2012, and about which the Respondent filed exceptions on June 26, 2012.

In view of the decision of the Supreme Court in *NLRB v. Noel Canning*, supra, we have considered de novo the record in light of the Respondent's objections to the election held March 9, 2012, and the hearing officer's report recommending disposition of them, as well as the Respondent's exceptions to the hearing officer's report. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 122 for and 81 against the Union, with 2 challenged ballots, an insufficient number to affect the results. We have also considered the January 9, 2013 Decision and Certification of Representative, and we agree with the rationale set forth therein. Accordingly, we adopt the hearing officer's findings and recommendations, and find no merit to the Respondent's exceptions, to the extent and for the reasons stated in the January 9, 2013 Decision and Certification of Representative, reported at 359 NLRB 522, which is incorporated herein by reference.

Next, the Respondent argues that the Board must reopen the record and vacate the Decision for the reasons set forth in its March 2, 2013 Motion to Reopen the Record, which the Respondent filed pursuant to Section 102.65(e) of the Board's Rules and Regulations. In this motion, the Respondent argued that it had newly discovered evidence in support of its objections to the election and its exceptions to the hearing officer's report. Thereafter, the Union filed an opposition to the Respondent's motion. On May 31, 2013, the Board issued an order denying the Respondent's motion.

In view of the decision of the Supreme Court in *NLRB v. Noel Canning*, supra, we have also considered de novo the Respondent's Motion to Reopen the Record, and the Petitioner's opposition thereto. We have also considered the Board's May 31, 2013 Order Denying Motion, and we agree with the rationale set forth therein. According-

ly, we find that the Respondent's motion fails to present "extraordinary circumstances" warranting reopening the record under Section 102.65(e)(1) of the Board's Rules and Regulations, and we deny Respondent's Motion to Reopen the Record for the reasons stated in the May 31, 2013 Order Denying Motion, which is incorporated herein by reference.

Having resolved the representation issues raised by the Respondent in this proceeding, we find that the election was properly held and the tally of ballots is a reliable expression of the employee's free choice. Accordingly, we will issue an appropriate certification.[1]

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for 1199 SEIU, United Healthcare Workers East, and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All full time and regular part time non-professional employees including licensed practical nurses, certified nursing aides, dietary aides, housekeepers, laundry aides, porters, recreation aides, restorative aides, rehabilitation techs, central supply clerks, unit secretaries, receptionists and building maintenance workers employed by the Employer at its New Milford, New Jersey facility, but excluding all office clerical employees, cooks, registered nurses, dietitians, physical therapists, physical therapy assistants, occupational therapists, occupational therapy assistants, speech therapists, social workers, staffing coordinators/schedulers, payroll/benefits coordinators, MDS specialists, MDS data clerks, account payable clerks, account receivable clerks, all other professional employees, guards and supervisors as defined in the Act.

NOTICE TO SHOW CAUSE

The complaint alleges that the Respondent has refused to recognize and bargain with the Union and has refused to provide the Union with information necessary for, and relevant to, the Union's performance of its duties as the exclusive collective-bargaining representative of the unit employees. 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.[2] Although Respondent's legal position may remain unchanged, it is possible that the Respondent has or intends to commence bargaining or to provide information 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 December 8, 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 22, 2014.

3. NOTICE IS HEREBY GIVEN that cause be shown, in writing, on or before January 12, 2015 (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.

---

[1] In view of our decision to issue a new Certification of Representative based upon the arguments raised in this proceeding, we deny as moot the Respondent's motion to vacate the Board's January 9, 2013 Decision and Certification of Representative.

[2] In its answer to the complaint, the Respondent asserts without further elaboration that the Regional Director and Acting General Counsel were and are without authority to issue and prosecute the instant complaint. We reject this argument for the reasons stated in *Pallet Companies, Inc.*, 361 NLRB 339, 339 (2014).