

Bread of Life, LLC d/b/a Panera Bread and Local 70, Bakery, Confectionery, Tobacco Workers and Grain Millers International Union (BCTGM), AFL-CIO, CLC. Cases 07-CA-088519 and 07-RC-072022

December 16, 2014

DECISION, CERTIFICATION OF
REPRESENTATIVE, AND NOTICE TO
SHOW CAUSE

BY CHAIRMAN PEARCE AND MEMBERS HIROZAWA
AND SCHIFFER

On November 21, 2012, the National Labor Relations Board issued a Decision and Order in this proceeding, which is reported at 359 NLRB 273. 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, the court of appeals remanded this case for further proceedings consistent with the Supreme Court's decision.

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 Union's certification as bargaining representative in the underlying representation proceeding. The Board's November 21, 2012 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 proceeding, 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 it 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, the Respondent reiterates its challenge to the composition of the bargaining unit, arguing the certified unit of bakers is not an appropriate unit for bargaining because it includes bakers from only 6 of Respondent's cafes, instead of all 17 cafes in its West Michigan Market.

In view of the decision of the Supreme Court in *NLRB v. Noel Canning*, supra, we have considered de novo the

Respondent's arguments in support of its Request for Review of the Acting Regional Director's Decision and Direction of Election, and we find them without merit. Accordingly, we deny the Request for Review in Case 07-RC-072022 as it raises no substantial issues warranting review.¹

We next consider the question whether the Board can rely on the results of the election. For the reasons stated below, we find that the election was properly held and the tally of ballots is a reliable expression of the employees' free choice.

As an initial matter, had the Board decided not to issue decisions during the time that the composition of the Board included two persons whose appointments to the Board had been challenged as constitutionally infirm, the Acting Regional Director would have conducted the election as scheduled and counted the ballots. In this regard, Section 102.67(b) of the Board's Rules and Regulations states, in relevant part:

The Regional Director shall schedule and conduct any election directed by the [Regional Director's] decision notwithstanding that a request for review has been filed with or granted by the Board. The filing of such a request shall not, unless otherwise ordered by the Board,

¹ The Petitioner seeks to represent bakers working at the Respondent's six I-94 Corridor district cafes. The Respondent contends that the unit should also include bakers working at its stores in its Grand Rapids and Lakeshore districts. In denying the Respondent's Request for Review of the Acting Regional Director's determination that the petitioned-for unit is appropriate, we find that bakers at the I-94 Corridor district cafes share a community of interest that is distinct from bakers in the other districts. As found by the Acting Regional Director, the I-94 Corridor is geographically coherent and distinct from the Grand Rapids and Lakeshore districts; vacancy postings for baker positions do not overlap between the I-94 Corridor and Grand Rapids/Lakeshore districts; and there is little to no interdistrict interaction among the bakers, as demonstrated by the separate celebration meetings. In addition, the Respondent groups bakers at the I-94 Corridor cafes on one schedule, and groups bakers at the Grand Rapids and Lakeshore cafes on another; the lead baker at an I-94 Corridor cafe performs attendance checks only for cafes in the I-94 Corridor; there is a baker training specialist devoted only to the Grand Rapids/Lakeshore districts and another devoted to the I-94 Corridor district; and split shifts are only available within a district. To be sure, as the Respondent states, there are factors that support a West Michigan Market unit. However, all the factors discussed above indicate that the I-94 bakers are at least a de facto grouping. In these circumstances, we agree that the I-94 bakers possess a sufficient community of interest to constitute an appropriate unit. See generally *NLRB v. Carson Cable TV*, 795 F.2d 879, 884 (9th Cir. 1986). Cf. *Bashas', Inc.*, 337 NLRB 710, 711 (2002) (petitioned-for unit found inappropriate where no geographic coherence, lack of conformity to administrative function or organizational grouping, and no shared common supervision separate from employees at other stores). Accordingly, we do not reach the question of whether the Board's test in *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB No. 83 (2011), enfd. *Kindred Nursing Center East, LLC v. NLRB*, 727 F.3d 552 (6th Cir. 2013), applies.

operate as a stay of the election or any other action taken or directed by the Regional Director: *Provided, however,* That if a pending request for review has not been ruled upon or has been granted[,] ballots whose validity might be affected by the final Board decision shall be segregated in an appropriate manner, and all ballots shall be impounded and remain unopened pending such decision. (Emphasis in original).

See also Casehandling Manual, Part 2, Representation Proceedings, Sections 11274 and 11302.1(a) (same).

However, this vote and impound process does not apply when the Board lacks a quorum. In this regard, Section 102.182 of the Board's Rules and Regulations states:

Representation cases should be processed to certification.— During any period when the Board lacks a quorum, the second proviso of § 102.67(b) regarding the automatic impounding of ballots shall be suspended. To the extent practicable, all representation cases should continue to be processed and the appropriate certification should be issued by the Regional Director notwithstanding the pendency of a request for review, subject to revision or revocation by the Board pursuant to a request for review filed in accordance with this subpart.

Thus, it is clear that the decision of the Board to continue to issue decisions did not affect the outcome of the election. With or without a decision on the original Request for Review, the election would have been conducted as scheduled. This result is required by Section 102.67(b) of the Board's rules, and, under *Noel Canning*, the sitting Board Members did not have the authority to issue an order directing otherwise. Thus, the timing of the election was not affected by the issuance of a decision on the request for review, and we find that the determination by the Acting Regional Director to open and count the ballots was appropriate and in accordance with Section 102.182. In any event, the actions of the Acting Regional Director did not affect the tally of ballots. Accordingly, we will rely on the results of the election and issue an appropriate certification.

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for Local 70, Bakery, Confectionery, Tobacco Workers and Grain Millers International Union (BCTGM), AFL–CIO, CLC, and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All full-time and regular part-time bakers, lead bakers, and lead training bakers employed by Respondent at its facilities located at 5119 West Main Street, Kalamazoo, Michigan; 5627 Gull Road, Kalamazoo, Michigan; 5970 South Westnedge Avenue, Portage, Michigan; 2810 Capitol Avenue SW, Battle Creek, Michigan; 1285 Boardman Road, Jackson, Michigan 49202; and 3260 Niles Road, St. Joseph, Michigan; but excluding all clerks, baker training specialists, confidential employees, managers and guards and supervisors as defined in the Act and all other bakery/café 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 December 26, 2014, to conform with the current state of the evidence.

2. The Respondent's answer to the amended complaint is due on or before January 9, 2015.

NOTICE IS HEREBY GIVEN that cause be shown, in writing, on or before January 30, 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.