

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. Case 07-CA-088519

June 5, 2015

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS HIROZAWA
AND MCFERRAN

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 Local 70, Bakery, Confectionery, Tobacco Workers and Grain Millers International Union (BCTGM), AFL-CIO, CLC (the Union) on September 4, 2012, the Acting General Counsel issued the complaint on October 2, 2012, alleging that Bread of Life, LLC d/b/a Panera Bread (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 07-RC-072022. (Official notice is taken of the "record" in the representation proceeding as defined in the Board's Rules and Regulations, Sections 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 October 23, 2012, the Acting General Counsel filed a Motion for Summary Judgment. On October 24, 2012, 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.

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.

On December 16, 2014, the Board issued a further Decision, Certification of Representative, and Notice to Show Cause in Cases 07-CA-088519 and 07-RC-072022, which is reported at 361 NLRB 1236. Thereafter, the General Counsel issued an amendment to the

complaint in Case 07-CA-088519, and the Respondent filed an answer to the amended complaint and an opposition to entry of summary judgment.¹

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

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 in the underlying representation proceeding that the bargaining unit is inappropriate.

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).

As noted above, the Respondent argues for the first time in its answer to the amended complaint that "[t]he representation election and the certification of the bargaining unit are of no legal force or effect because they were conducted at a time when the Regional Director and the General Counsel were without legal authority to act." In its brief in opposition to the General Counsel's motion for summary judgment, the Respondent makes clear that its challenge to the authority of the Regional Director and General Counsel is based on its argument that Acting General Counsel Lafe Solomon was not properly appointed under the NLRA (29 U.S.C. § 153(d) or the Federal Vacancies Reform Act (5 U.S.C. § 3345(a)). We reject this argument.

First, since the Respondent did not raise this issue previously, we find that the Respondent is estopped from challenging the authority of the Regional Director or the General Counsel at this time. See *Mission Produce*, 362

¹ The amended complaint adds December 16, 2014, as the date the Board certified the Union as the exclusive collective-bargaining representative of the unit employees, alleges that on August 22, 2012, and December 22, 2014, the Union requested the Respondent to recognize and bargain collectively with it, and alleges that since about August 31, 2012, and continuing to date the Respondent has failed and refused to recognize and bargain with the Union. The amended answer admits the factual allegations of the complaint, reiterates the argument made in the underlying representation proceeding that the unit is not appropriate for collective bargaining, and argues for the first time that "[t]he representation election and the certification of the bargaining unit are of no legal force or effect because they were conducted at a time when the Regional Director and the General Counsel were without legal authority to act."

NLRB 79 (2015). Second, the authority of a Regional Director to act in representation case proceedings is derived a 1961 delegation from the Board, not the General Counsel, and that delegation has never been revoked. See *Durham School Services, LP*, 361 NLRB 702 (2014). Thus, the Regional Director was fully empowered to process the representation petition and conduct the election in this matter. Finally, even if the authority of the Acting General Counsel were relevant, we reject the argument that the Acting General Counsel was not properly designated under the Federal Vacancies Reform Act. See *Benjamin H. Realty Corp.*, 361 NLRB 918 (2014).

Accordingly, we grant the Motion for Summary Judgment.²

On the entire record, the Board makes the following:

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a corporation with facilities in St. Joseph, Kalamazoo, Portage, Battle Creek, and Jackson, Michigan, has been engaged in the operation of bakery/café restaurants selling food and beverages.

During the calendar year ending December 31, 2011, the Respondent derived gross revenues in excess of \$500,000, and purchased and received at its Michigan facilities goods and supplies valued in excess of \$5000 directly from points located outside the State of Michigan.

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, Local 70, Bakery, Confectionery, Tobacco Workers and Grain Millers International Union (BCTGM), AFL-CIO, CLC, is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *The Certification*

Following the representation election held on March 22 and 23, 2012, the Union was certified on December 16, 2014, as 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.

The Union continues to be the exclusive collective-bargaining representative of the unit employees under Section 9(a) of the Act.

B. *Refusal to Bargain*

On August 22, 2012 and December 22, 2014, the Union, in writing, requested that the Respondent bargain collectively with it as the exclusive collective-bargaining representative of the unit.

Since about August 31, 2012, and continuing to date, 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 constitutes an unlawful failure and refusal to recognize and bargain with the Union in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By failing and refusing to recognize and bargain with the Union as the exclusive collective-bargaining representative of the 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.³

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 recognize and bargain on request with the Union and, if an understanding is reached, to embody the understanding in a signed agreement.

³ In *Howard Plating Industries*, 230 NLRB 178, 179 (1977), the Board stated:

Although an employer's obligation to bargain is established as of the date of an election in which a majority of unit employees vote for union representation, the Board has never held that a simple refusal to initiate collective-bargaining negotiations pending final Board resolution of timely filed objections to the election is a *per se* violation of Section 8(a)(5) and (1). There must be additional evidence, drawn from the employer's whole course of conduct, which proves that the refusal was made as part of a bad-faith effort by the employer to avoid its bargaining obligation.

No party has raised this issue, and we find it unnecessary to decide in this case whether the unfair labor practice began on the date of the Respondent's initial refusal to bargain at the request of the Union, or at some point later in time. It is undisputed that the Respondent has continued to refuse to bargain since the Union's certification and we find that continuing refusal to be unlawful. Regardless of the exact date on which Respondent's admitted refusal to bargain became unlawful, the remedy is the same.

² The Respondent's request that the complaint be dismissed is therefore denied.

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, Bread of Life, LLC d/b/a Panera Bread, St. Joseph, Kalamazoo, Portage, Battle Creek, and Jackson, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize and bargain with Local 70, Bakery, Confectionery, Tobacco Workers and Grain Millers International Union (BCTGM), AFL-CIO, CLC 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 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 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.

(b) Within 14 days after service by the Region, post at its facilities in St. Joseph, Kalamazoo, Portage, Battle Creek, and Jackson, Michigan, copies of the attached notice marked "Appendix."⁴ Copies of the notice, on forms provided by the Regional Director for Region 7, 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 facilities 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 August 31, 2012.

(c) Within 21 days after service by the Region, file with the Regional Director for Region 7 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.

⁴ 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."

WE WILL NOT fail and refuse to recognize and bargain with Local 70, Bakery, Confectionery, Tobacco Workers and Grain Millers International Union (BCTGM), AFL–CIO, CLC 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 full-time and regular part-time bakers, lead bakers, and lead training bakers employed by us at our 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 employ-

ees, managers and guards and supervisors as defined in the Act and all other bakery/café employees.

BREAD OF LIFE, LLC D/B/A PANERA BREAD

The Board's decision can be found at www.nlr.gov/case/07-CA-088519 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273–1940.

