E. W. Howell Co., LLC *and* Northeast Regional Council of Carpenters and Joiners America. Case 29–CA–195626

January 24, 2019

DECISION AND ORDER REMANDING IN PART

BY CHAIRMAN RING AND MEMBERS MCFERRAN AND EMANUEL

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 on March 27, 2017, by Northeast Regional Council of Carpenters and Joiners America (the Union), the General Counsel issued the complaint on March 29, 2018, alleging that E. W. Howell Co. LLC (the Respondent) has violated Section 8(a)(5) and (1) of the Act by refusing the Union's request to recognize and bargain with it following the Union's certification in Case 29–RC–177927. (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(d). *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 June 19, 2018, the General Counsel filed a Motion for Partial Summary Judgment on Test of Certification8(a)(5) and Request for Issuance of Decision and Order. In the motion, the General Counsel requested that the portions of this case pertaining to the test-of-certification allegations be transferred to the Board and that the remaining unilateral change allegations be held in abeyance pending disposition of the motion.[1] On June 29, 2018, the Respondent filed an opposition to the motion, and on July 2 and July 13, 2018, the Charging Party and the General Counsel, respectively, filed replies to the Respondent's opposition.

On July 30, 2018, the Board issued an order transferring the proceeding to the Board, severing the relevant test-of-certification allegations alleging that the Respondent violated Section 8(a)(5) and (1) by failing to recognize and bargain with the Union from the remaining unilateral change allegations, and it issued a Notice to Show Cause why the motion should not be granted. On August 13, 2018, the Respondent filed a response, with a declaration and exhibits attached.

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

Ruling on Motion for Partial Summary Judgment

The Respondent admits its refusal to bargain but contests the validity of the Union's certification of representative based on its contention that at all relevant times it has had no employees who would qualify as bargaining unit members. In the alternative, the Respondent contends that it had, at most, a stable one-person unit and, as a result, there is no unit for which it is obligated to bargain. It therefore maintains that, because there are no employees in the unit, it has had no duty to bargain with the Union.

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 has it shown any special circumstances that would require the Board to reexamine the decision made in the representation proceeding.[2] We therefore find that

[1] The unilateral change allegations assert that the Respondent violated Sec. 8(a)(5) and (1) by unilaterally transferring unit work and unit positions to nonunit employees and subcontracting bargaining unit work.

[2] The Respondent argues in its response to the Notice to Show Cause that this is a case of first impression regarding whether a bargaining order can issue against a construction industry employer where there was a solitary vote in favor of the union by a nonemployee eligible to vote under the *Daniel/Steiny* formula and no employees of the employer are in the certified unit. It further contends that there were no employees in the unit at the time of the election or at the time of the Union's bargaining request, and that there will be no employees in the unit in the foreseeable future. Consequently, the Respondent maintains that, as there are no employees for whom to bargain, it has no bargaining obligation. In the alternative, the Respondent argues that, at most, there is a stable one-person unit.

During the representation proceeding, the Respondent entered into a stipulated election agreement attesting to the existence of an appropriate bargaining unit. Pursuant to that agreement, it submitted a list that identified two eligible voters. The Respondent did not assert that it had no employees or had only a stable one-person unit. Nor did the Respondent raise these arguments in its objections to the election. Rather, it maintained that because only one vote was cast in a two-person unit, the result was not legally sufficient to create a 9(a) relationship. (See Objection at 1.)

In its request for review of the Regional Director's decision overruling its objection because the Board does not require a minimum number of unit employees to vote to certify election results, the Respondent argued that the Regional Director had misconstrued its objection. According to the Respondent, its objection actually asked, "whether only one vote cast in favor of the [Union] is legally sufficient to create a Section 9(a) relationship between [the] Respondent, a construction industry employer, and the Union . . . where the single vote was cast by a non-employee [of the Respondent] under the *Daniel/Steiny* formula." (Request for review at 1.) The Board subsequently denied the Respondent's request for review. Accordingly, even assuming that the Respondent had properly raised this argument in its request for review, the argument is not properly before the Board in this unfair labor practice proceeding. See 29 C.F.R. §102.67(g) ("Denial of a request for review shall constitute affirmance of the Regional Director's action which shall preclude

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 Partial Summary Judgment on the test-of-certification allegations and remand the unilateral change allegations to the Regional Director for further appropriate action.[3]

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a domestic corporation, with its principal office and place of business located at 245 Newtown Road, Suite 600, Plainview, New York, has been engaged in the construction industry.

During the 12-month period preceding the issuance of the complaint, which period is representative of its annual operations generally, the Respondent, purchased and received goods and materials valued in excess of $50,000 directly from enterprises located outside the State of New York.

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 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 July 8, 2016, the Union was certified on August 1, 2016,[4] as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All full-time and regular part-time journeymen and apprentice carpenter employees employed by the Employer out of its Plainview, New York facility, and working in Nassau and Suffolk counties, but excluding all other employees, confidential employees, guards, and supervisors as defined by the Act.

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 November 11, 2016, the Union, in writing, requested that the Respondent commence negotiations for an initial collective-bargaining agreement regarding the terms and conditions of employment for the Respondent's unit employees. On November 22, 2016, Respondent, in writing, refused the Union's request to commence negotiations for an initial collective-bargaining agreement covering unit employees.

We find that the Respondent's conduct 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 since November 22, 2016, 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.

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 on 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, E.W. Howell Co. LLC, Plainview, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize and bargain with Northeast Regional Council of Carpenters and Joiner

relitigating any such issues in any related subsequent unfair labor practice proceeding.").

Chairman Ring and Member Emanuel did not participate in the underlying representation proceeding. They agree that the Respondent has not raised any litigable issue in this unfair labor practice proceeding and that summary judgment is appropriate, with the parties retaining their respective rights to litigate relevant issues on appeal.

[3] The Respondent's requests that the complaint be dismissed and for attorney's fees are therefore denied.

[4] By unpublished Order dated November 3, 2016, the Board denied the Respondent's request for review of the Regional Director's Report on Objections and Certification of Representative.

America 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 full-time and regular part-time journeymen and apprentice carpenter employees employed by the Employer out of its Plainview, New York facility, and working in Nassau and Suffolk counties, but excluding all other employees, confidential employees, guards, and supervisors as defined by the Act.

(b) Within 14 days after service by the Region, post at its facility in Plainview, New York, copies of the attached notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 29, 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. If 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 November 22, 2016.

(c) Within 21 days after service by the Region, file with the Regional Director for Region 29 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.

IT IS FURTHER ORDERED that the allegations that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally transferring unit work and unit positions to non-unit employees and subcontracting bargaining unit work to subcontractors are remanded to the Regional Director for Region 29 further appropriate action.

Dated, Washington, D.C. January 24, 2019

John F. Ring, Chairman

Lauren McFerran, Member

William J. Emanuel, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

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 the Northeast Regional Council of Carpenters (the Union) as the exclusive collective-bargaining representative of our 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 appropriate bargaining unit:

[5] 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."

All full-time and regular part-time journeymen and apprentice carpenter employees employed by the Employer out of its Plainview, New York facility, and working in Nassau and Suffolk counties, but excluding all other employees, confidential employees, guards, and supervisors as defined by the Act.

E. W. HOWELL CO. LLC

The Board's decision can be found at www.nlrb.gov/case/29-CA-195626 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.