Laurel Baye Healthcare of Lake Lanier, LLC *and* United Food and Commercial Workers Union, Local 1996. Case 10–CA–35752

December 28, 2005

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

This is a refusal-to-bargain case in which the Respondent is contesting the Charging Party's status as the certified bargaining representative. Pursuant to a charge filed on July 18, 2005, the Acting General Counsel issued the complaint on July 27, 2005, alleging that the Respondent has violated Section 8(a)(1) and (5) of the Act by refusing the Charging Party's request to bargain and to furnish information following the Charging Party's certification in Case 10–RC–15475. (Official notice is taken of the "ecord" in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 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.

On August 16, 2005, the Acting General Counsel filed a Motion for Summary Judgment. On August 18, 2005, 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 reply. The Respondent attached to its reply an amended answer, admitting in part and denying in part the allegations of the complaint, and asserting affirmative defenses.[1] The Acting General Counsel filed a brief in response to the Respondent's reply, and the Charging Party filed a brief in support of the General Counsel's motion.[2]

[1] Sec. 102.23 of the Board's Rules permits a respondent to "amend his answer at any time prior to the hearing." Accordingly, we have accepted the Respondent's amended answer to the complaint.

[2] As discussed infra, the Respondent contends that, in light of the July 29, 2005 disaffiliation of the United Food and Commercial Workers from the AFL–CIO, the Charging Party "may not be a valid successor to the labor organization that was certified" in the underlying representation proceeding. The Acting General Counsel and the Charging Party filed briefs responding to the Respondent's contention.

On September 15, 2005, the Respondent filed a motion for leave to file a surreply brief, arguing that it should have the opportunity to respond to the arguments advanced by the Acting General Counsel and the Charging Party. In *D. L. Baker, Inc.*, 330 NLRB 521 fn. 4 (2000), however, the Board held that in consideration of the need for administrative finality, surreply briefs are not generally permitted, except where there are circumstances warranting special leave to file such a brief. In this case, the Respondent failed to show that the circumstances warrant departure from the Board's general practice; therefore, the Respondent's motion is denied.

Member Schaumber would grant the Respondent's motion because the issue the Respondent raises is of some moment and such issues are best decided on a full record of argument and counterargument.

Ruling on Motion for Summary Judgment

The Respondent contends that the Charging Party's certification is invalid because the Board erred in overruling its objections to the election in the representation proceeding. In addition, the Respondent argues that the July 29, 2005 disaffiliation of the United Food and Commercial Workers Union from the AFL–CIO "raises issues as to whether a disaffiliation vote was held and, if so, whether such a vote was conducted with adequate due process safeguards." Further, the Respondent contends that the "organizational changes mandated by the disaffiliation . . . are arguably sufficient to destroy any substantial continuity with the previously affiliated Union." Under these circumstances, the Respondent asserts that the "Charging Party may not be a valid successor to the labor organization that was certified to represent the Respondent's employees in Case 10–RC–15475." Therefore, the Respondent requests that the General Counsel's Motion for Summary Judgment be denied and that the case be remanded for a hearing. As explained below, we find no merit in the Respondent's contentions.

A. The Representation Issues

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding.[3] 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).

B. The Disaffiliation Issue

A review of the record herein, including the record in Case 10–RC–15475, reveals that the petition was filed on August 31, 2004, by "UFCW Local 1996."[4] The Decision and Direction of Election issued on October 29, 2004, and identified the Petitioner as "United Food and Commercial Worker's Union, Local 1996." The election

[3] The Respondent's amended answer denies par. 6 of the complaint, which sets forth the appropriate unit. The unit issue, however, was litigated in the underlying representation proceeding. (The Regional Director found the petitioned-for unit to be appropriate in his Decision and Direction of Election, and on November 24, 2004, the Board issued an Order denying the Respondent's request for review.) Accordingly, the Respondent's denial does not raise any litigable issue in this proceeding.

[4] The petition form asks for the full name of the national or International labor organization of which the petitioner is an affiliate. In this section of the form, UFCW Local 1996 listed "UFCW International Union[,] AFL–CIO."

was held on November 26, 2004, and the tally of ballots issued the same day showed that a majority of the valid votes had been cast for the Petitioner, i.e., "United Food and Commercial Worker's Union, Local 1996." The Certification of Representative issued by the Board on June 27, 2005, also identified the Petitioner as "United Food and Commercial Workers Union, Local 1996."[5]

By letter dated July 5, 2005, the executive assistant to the president of "UFCW Local 1996" requested that the Respondent recognize and bargain with it and that the Respondent provide it with specific information. By letter dated July 7, 2005, the Respondent refused to enter into negotiations and or furnish the requested information on the ground that the Respondent "does not believe that the NLRB election . . . was conducted pursuant to the [necessary] laboratory conditions."[6] Thereafter, as stated above, on July 29, 2005, the United Food and Commercial Workers disaffiliated from the AFL–CIO.

The issue before us is not novel. In prior cases, the Board and the courts have considered and rejected the contention that a labor organization's disaffiliation from the AFL–CIO, without more, is sufficient to call into question the continuity of the identity of the certified bargaining representative.[7]

In *M & M Bakeries*, *Inc.*, 121 NLRB 1596, 1602 (1958), enfd. 271 F.2d 602 (1st Cir. 1959), the Board held that the expulsion of an International union from the AFL–CIO did not affect the status of the local union as the bargaining representative, and was not a defense to the refusal-to-bargain charge allegations of the complaint. The Board observed that the certification of the bargaining representative ran to the local union, and that the relationship between the local and the international union had not been changed or otherwise affected by the split between the International and the AFL–CIO. In sum, the Board found that there was no schism or other internal dispute within the local, and the expulsion of the International from the organization with which it was affiliated did not create any confusion "as to the identity of the organization designated by the employees to represent them." Id., citing *Louisiana Creamery, Inc*., 120 NLRB 170 (1958) (expulsion of the petitioner and its parent international from the AFL–CIO did not create confusion as to the identity of the organization selected by the employees, so no new showing of interest was required).[8]

Similarly, in *Ace Folding Box Corp*., 124 NLRB 23, 26–27 (1959), enfd. sub nom. *NLRB v. Weyerhaeuser* Co., 276 F.2d 865 (7th Cir. 1960), the Board held that the disaffiliation of the certified union from the AFL–CIO did not relieve the employer from its obligation to bargain. The Board reasoned that "disaffiliation, unaccompanied by evidence or offer of evidence of change in organic structure, composition, or leadership of a labor organization, does not tend to affect the identity of the organization."[9] The court agreed with the Board, stating that a "mere change of name or disaffiliation with the AFL–CIO is not sufficient" to establish a change in the identity of a labor organization. 276 F.2d at 873 (citing, inter alia, *Continental Oil Co. v. NLRB*, 113 F.2d 473, 477 (10th Cir. 1940) (union's shift in affiliation from the American Federation of Labor to the Committee for In-

[5] As the Acting General Counsel asserts, the instant case is distinguishable from the Board's recent decision in *Woods Quality Cabinetry Co*., 340 NLRB 1355 (2003), in which the notice of election and the ballot incorrectly designated the petitioner as affiliated with the AFL–CIO. The Board majority found that the affiliation issue was material to the election campaign, as evidenced by the fact that both parties made a point of informing employees that the petitioner was no longer affiliated with the AFL–CIO. Under these circumstances, the Board majority concluded that the "discrepancy between the parties' message, and the conflicting notice and ballot language, reasonably would tend to confuse employees with respect to the affiliation status of the union that they were being asked to vote on as their bargaining representative." Id. at 1356.

Here, as discussed above, the election documents were clear and consistent in identifying the Petitioner as United Food and Commercial Workers, Local 1996. Further, there is no indication that the disaffiliation of the United Food and Commercial Workers from the AFL–CIO, which occurred some 8 months *after* the election, was material to the election campaign or had any effect on employee free choice. Although the Respondent contends, as one of its affirmative defenses, that the employees should have been informed of the pending change in affiliation prior to the election, this amounts to nothing more than an untimely election objection and therefore will not be considered.

Member Liebman, who dissented in *Woods Quality Cabinetry*, agrees that it is distinguishable.

[6] In its amended answer, the Respondent denies the complaint allegations that by letter dated July 5, 2005, the Charging Party requested that the Respondent recognize and bargain with it, and that since about July 7, 2005 (inadvertently misstated as 2004), the Respondent has refused. However, the General Counsel has attached as exhibits to his Motion for Summary Judgment copies of the July 5 and 7, 2005 letters described above. In its reply to the Notice to Show Cause, the Respondent has not contested the authenticity of these documents, and in its amended answer, the Respondent acknowledges receiving the July 5 letter. Accordingly, we find that the Respondent's denials raise no genuine issue of material fact warranting a hearing.

[7] The cases cited by the Respondent are not on point, as they do not address this issue. *RCN Corp*., 333 NLRB 295 (2001) (employer violated Sec. 8(a)(5) by withdrawing recognition after independent union affiliated with the Communications Workers of America); *Syscon International, Inc*., 322 NLRB 539 (1996) (employer violated Sec. 8(a)(5) by refusing to bargain following merger of sister locals of the same international union); *Sullivan Bros. Printers*, 317 NLRB 561 (1995) (same), enfd. 99 F.3d 1217 (1st Cir. 1996).

[8] Alternatively, the Board held that the employer could not rely on the International's expulsion as a defense to the 8(a)(5) allegation because the expulsion occurred after the refusal to bargain.

[9] Alternatively, the Board held that the employer could not rely on the disaffiliation as a defense to the 8(a)(5) allegation because the disaffiliation occurred after the refusal to bargain.

dustrial Organization did not represent "such [a] disruption or change of identity as to affect in any manner the validity of the parts of the order requiring [the employer] to bargain collectively with the union")).

Here, in opposing the General Counsel's Motion for Summary Judgment, the Respondent cites only the disaffiliation of the United Food and Commercial Workers from the AFL–CIO. Under the precedent discussed above, however, disaffiliation from the AFL–CIO, standing alone, is insufficient to raise a genuine issue as to the identity of the certified labor organization. Therefore, a union's decision to disaffiliate from the AFL–CIO, by itself, is not the kind of change in circumstance that the Board has traditionally required to be subject to a vote of union members. Cf. *NLRB v. Food & Commercial Workers Local 1182 (Seattle-First National Bank)*, 475 U.S. 192, 198–200 (1986) (describing the Board's practice where an independent union decides to affiliate with a national or international organization). Although the Respondent alleges generally that as a result of the disaffiliation the Charging Party "is a materially different organization," the Respondent fails to support its conclusory assertions with any specifics. For example, the Respondent does not propose to adduce at a hearing evidence indicating that the disaffiliation created any confusion concerning the identity of the certified representative. Indeed, the Respondent's position rests essentially on the assertion that the Charging Party "*may* not be a valid successor to the labor organization that was certified." (Emphasis added.) Such speculation, however, is insufficient to establish that there are genuine issues of material fact warranting a hearing.

Moreover, as in *M & M Bakeries,* supra, and *Ace Folding Box*, supra, the disaffiliation occurred after the refusal to bargain. Thus, as discussed above, the record shows that the Respondent has refused to bargain with the Charging Party since July 7, 2005. The disaffiliation of the United Food and Commercial Workers from the AFL–CIO did not take place until July 29, 2005. As recognized by the courts, there is "no useful purpose served by permitting the employer to defend the propriety of an earlier refusal to bargain by relying on subsequent events that had nothing to do with the refusal." *NLRB v. Springfield Hospital*, 899 F.2d 1305, 1315 (2d Cir. 1990), quoting *NLRB v. Fall River Dyeing & Finishing Corp.*, 775 F.2d 425, 433 (1st Cir. 1985), affd. on other grounds 482 U.S. 27 (1987).

C. The Information Issue

There are no factual issues warranting a hearing with respect to the Charging Party's request for information. The record shows that by letter dated July 5, 2005, the Charging Party requested the following information:

a. Name, address, telephone number, date of hire, classification, rate of pay, date of birth, sex.

b. Job descriptions and responsibilities for each job classification.

c. Copy of all company policies.

d. Copy of all employee handbook(s).

e. Copy of all disciplinary policies.

f. Copy of all employee benefits, including but not limited to, medical, hospitalization and pension, sick leave, vacation, ESOP, 401-K, holidays with pay, etc.

g. Summary Plan descriptions for all benefits provided requiring a "SPD".

h. Name, date of birth, gender, marital status of bargaining unit employees who participate in each benefit program including the names, date of birth, and gender of their dependents. Indicate what type of coverage has been selected by the bargaining unit employee, i.e., individual, family, etc.

i. Actuary valuation for any Pension Plan provided to employees.

j. Cost of each benefit referenced in paragraph (f) above to the employer, along with the cost to employees, if any.

k. The date employees received a wage increase and the amount of the increase for the years 2001, 2002, 2003, 2004, and through 2005.

Although the Respondent's amended answer generally denies that the information requested is necessary for and relevant to the Charging Party's duties as the exclusive collective-bargaining representative of the unit employees, it is well established that all of the foregoing types of information are presumptively relevant for purposes of collective bargaining and must be furnished on request. See, e.g., *Mission Foods*, 345 NLRB 788 (2005); *Metro Health Foundation*, 338 NLRB 802 (2003); *Stanford Hospital & Clinics*, 338 NLRB 1042 (2003); *American Logistics, Inc*., 328 NLRB 443 (1999), enfd. 214 F.3d 935 (7th Cir. 2000), and cases cited therein. The Respondent has not asserted any basis for rebutting the presumptive relevance of the information.

Conclusion

Accordingly, for all of the above reasons, we grant the Acting General Counsel's Motion for Summary Judgment, and will order the Respondent to bargain and to furnish the information requested by the Charging Party.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a South Carolina corporation, with an office and place of business in Buford, Georgia, has been engaged in the business of providing skilled care nursing services.

During the calendar year preceding issuance of the complaint, a representative period, the Respondent, in conducting its business operations described above, derived gross revenues in excess of $100,000. During this same period, the Respondent purchased and received at its Buford, Georgia facility goods valued in excess of $50,000 directly from points outside the State of Georgia.

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 United Food and Commercial Workers Union, Local 1996 (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 election held November 26, 2004, the Union was certified on June 27, 2005, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All full-time and part-time service and maintenance employees, CNA's, restorative aids [sic], activity assistants, medical record clerks, central supply clerks, and unit secretaries, but excluding all employees employed by Healthcare Services Group, Inc., including RN's, LPN's and charge nurses, confidential employees, professional employees, guards and supervisors as defined in the Act.

The Union continues to be the exclusive representative under Section 9(a) of the Act.

B. Refusal to Bargain

By letter dated July 5, 2005, the Union requested that the Respondent recognize and bargain collectively with it as the exclusive collective-bargaining representative of the certified unit and that the Respondent provide it with specific information. The information requested by the Union is necessary for, and relevant to, the Union's performance of its duties as the exclusive collective-bargaining representative of the unit.

Since on or about July 7, 2005, the Respondent has failed and refused to bargain with the Union and to furnish it with the requested information. We find that this failure and refusal constitutes an unlawful refusal to bargain in violation of Section 8(a)(1) and (5) of the Act.

CONCLUSION OF LAW

By failing and refusing since July 7, 2005, to recognize and bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit, and to provide the Union with requested information, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5) 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. We also shall order the Respondent to furnish the Union the information it requested by letter dated July 5, 2005.

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); *Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964); *Burnett Construction Co*., 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

ORDER

The National Labor Relations Board orders that the Respondent, Laurel Baye Healthcare of Lake Lanier, LLC, Buford, Georgia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with United Food and Commercial Workers Union, Local 1996 as the exclusive bargaining representative of the employees in the bargaining unit, and refusing to furnish the Union information that is relevant and necessary to its role as the exclusive bargaining representative of the unit employees.

(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 part-time service and maintenance employees, CNA's, restorative aids [sic], activity assistants, medical record clerks, central supply clerks, and unit secretaries, but excluding all employees employed by Healthcare Services Group, Inc., including RN's, LPN's and charge nurses, confidential employees, professional employees, guards and supervisors as defined in the Act.

(b) Furnish the Union with the information requested by the Union in its letter dated July 5, 2005.

(c) Within 14 days after service by the Region, post at its facility in Buford, Georgia, copies of the attached notice marked "Appendix."[10] Copies of the notice, on forms provided by the Regional Director for Region 10, 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. 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 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 July 7, 2005.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region at testing to the steps that the Respondent has taken to comply.

[10] 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."

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 refuse to bargain with United Food and Commercial Workers Union, Local 1996 as the exclusive bargaining representative of the employees in the bargaining unit, and WE WILL NOT refuse to furnish the Union information that is relevant and necessary to its role as the exclusive bargaining representative of the unit employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

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 bargaining unit:

> All full-time and part-time service and maintenance employees, CNA's, restorative aids, activity assistants, medical record clerks, central supply clerks, and unit secretaries, but excluding all employees employed by Healthcare Services Group, Inc., including RN's, LPN's and charge nurses, confidential employees, professional employees, guards and supervisors as defined in the Act.

WE WILL furnish the Union with the information requested by the Union in its letter dated July 5, 2005.

LAUREL BAYE HEALTHCARE OF LAKE LANIER, LLC