County Waste of Ulster *and* Laborers International Union of North America, Laborers Local 108, AFL–CIO and Local 124, R.A.I.S.E., IUJAT. Case 2–CA–37437

July 24, 2009

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBER SCHAUMBER

On May 1, 2009, Administrative Law Judge Raymond P. Green issued the attached supplemental decision. The Respondent filed exceptions and a supporting brief, and the Charging Party filed an answering brief.

The National Labor Relations Board[1] has considered the judge's supplemental decision and the record in light of the exceptions and briefs, and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.

On February 11, 2009, the Board remanded to the judge his finding in this case that the Respondent violated Section 8(a)(1) of the Act by granting its employees a Christmas bonus.[2] Noting the absence of a complaint allegation that the grant of bonus violated Section 8(a)(1), the Board directed the judge to clarify whether he intended to find an unalleged violation and, if so, whether the unalleged violation was "closely connected to the subject matter of the complaint and [was] fully litigated," under *Pergament United Sales*, 296 NLRB 333, 334 (1989), enfd. 920 F.2d 130 (2d Cir. 1990).[3]

On remand, the judge concluded that "any additional findings regarding the [grant of bonus] would not affect the outcome of" either the unfair labor practice case or the previously severed representation case. Accordingly, the judge recommended vacating and dismissing his earlier 8(a)(1) grant of bonus finding.

The Respondent does not except to the recommended dismissal. Rather, it moves to reopen the record to submit emails and other correspondence between the judge and the parties that occurred following the remand of the 8(a)(1) finding.[4] In support, the Respondent contends it requested that the emails and other correspondence be made part of the record and, although initially agreeing, the judge did not do so. The Respondent further contends that the correspondence is relevant "in the same manner that all other records are relevant," and that it may "result" in the Respondent moving to reopen the hearing in the severed representation case.[5] We find the Respondent's contentions unavailing.

Typically, a motion to reopen the record requests the Board to consider whether the additional evidence would require a different result. See generally, Section 102.48(d)(1) of the Board's Rules and Regulations. The Respondent does not, however, contend that a different result is warranted in *this* case. Indeed, the judge noted in his supplemental decision that none of the parties seek a finding that the grant of bonus violated Section 8(a)(1).[6] Thus, the Respondent has not provided a basis upon which to reopen the record. As the Board stated in *Mr. Z's Food Mart,* 325 NLRB 871 fn. 1 (1998), "[t]he evidence that the Respondent seeks to introduce relates to an allegation that the judge dismissed. No party has excepted to that dismissal. Thus, . . [w]e deny the Respondent's motion to reopen the record to introduce the earlier letter as it is not material to the case before us." See also *The Copps Corp.*, 181 NLRB 294 fn. 1 (1970), enfd. 458 F.2d 1227 (7th Cir. 1972) (affirming trial examiner's rejection of offer of proof that, if received, would not affect disposition of case).[7] Accordingly, we

[1] Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Liebman and Member Schaumber constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act. See *Snell Island SNF LLC v. NLRB*, 568 F.3d 410 (2d Cir. 2009); *New Process Steel v. NLRB*, 564 F.3d 840 (7th Cir. 2009), petition for cert. filed 77 U.S.L.W. 3670 (U.S. May 22, 2009) (No. 08-1457); *Northeastern Land Services v. NLRB*, 560 F.3d 36 (1st Cir. 2009), rehearing denied No. 08–1878 (May 20, 2009). But see *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469 (D.C. Cir. 2009), petitions for rehearing denied Nos. 08–1162, 08–1214 (July 1, 2009).

[2] 353 NLRB No. 89 (2009).

[3] The Board also adopted the judge's findings that the Respondent violated Sec. 8(a)(2) of the Act by allowing Local 124, R.A.I.S.E., IUJAT (Local 124), to distribute the bonus to employees, and that it engaged in objectionable conduct by granting the bonus. The Board severed the representation case (Case 2–RC–22858) and remanded it to the Region for the purpose of conducting a second election.

[4] In this correspondence the judge elicited, and the parties gave, their positions regarding the remanded 8(a)(1) issue.

[5] On June 26, 2009, and subsequent to the filing of its exceptions herein, the Respondent filed a motion for reconsideration and to reopen the record in the representation case. On June 29, 2009, the Board denied the motion as untimely and, on July 6, 2009, the Respondent filed a motion requesting the Board to reconsider its determination. That motion is still pending before the Board.

[6] The judge explained that although they initially contended that the remanded 8(a)(1) finding was closely related and fully litigated, the General Counsel and Charging Party thereafter requested withdrawal of the finding.

[7] Further, any contention concerning the relevance of the correspondence to the severed representation case is not applicable to a determination of whether to reopen the record in this proceeding.

find the Respondent's exceptions without merit and shall deny the motion to reopen.

ORDER

The recommended Order of the administrative law judge is adopted and the 8(a)(1) grant of bonus finding is dismissed.

IT IS FURTHER ORDERED that the Respondent's Motion to Reopen the Record is denied.

Dated, Washington, D.C. July 24, 2009

Wilma B. Liebman, Chairman

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

SUPPLEMENTAL DECISION

On February 11, 2009, the Board issued a Decision in the above captioned cases.[1] Although affirming most of my findings and conclusions issued on May 9, 2007, the Board remanded my finding that the Respondent had violated Section 8(a)(1) of the Act by granting a bonus to its employees. Although alleged by Local 108, Laborers in its Objections to the Election, this allegation was not contained in the complaint. The Board remanded the issue to determine, pursuant to *Pergament United Sales*, 296 NLRB 333, 334 (1989), whether the issue was "closely connected to the subject matter of the complaint and [was] fully litigated."

By letter dated February 24, 3009, counsel for County Waste offered his opinion that the hearing should be reopened.

On March 9, 2009, I e-mailed the parties to ask them to advise me as to their respective positions.

On March 19, 2009, the General Counsel stated that he took the position that my findings were closely related to the original charge and that they had been fully litigated. He also opposed reopening the hearing.

On March 20, 2009, counsel for the Charging Party, emailed me and stated, in substance, that he agreed with the General Counsel.

By letter dated March 23, 2009, counsel for County Waste reiterated his position that the "bonus" findings were not alleged in the complaint and were not closely related to the charge. He further pointed out that the theory upon which the finding was made was never raised by any party. See *New York Post,* 353 NLRB No. 30 (2008).

On March 25, 2009, I emailed the parties and among other things, requested the Respondent to indicate what factual issues it would present in the event that I reopened the hearing.

On April 1, 2009, counsel for County Waste stated that he would offer evidence regarding the date that the decision to pay the bonus was made and would offer to prove that employees were aware of that decision prior to its distribution. He further stated that he would offer testimony concerning certain settlement discussion which would be relevant to the timing of the decision to grant the bonuses. (Although relevant, this obviously could raise some evidentiary concerns.)

On April 3, 2009, counsel for the Charging Party stated that Local 108 would prefer to forgo litigation of the remanded issue and therefore desired to withdraw that aspect of the charge. (Since this was not alleged in the charge, he obviously meant to say that he wanted to withdraw this particular allegation and finding in the case).

By email dated April 8, 2009, the General Counsel joined the Charging Party's request for withdrawal of the unalleged 8(a)(1) violation and requested that I remove from the decision the conclusion of law regarding that finding.

Having determined that the Respondent violated Section 8(a)(1) and (2) by allowing Local 124 (the Intervener), to distribute the bonuses, and having ordered that a new election be held, any additional findings regarding the decision to grant the bonuses would not affect the outcome of these cases. Nor would a positive or negative finding on that issue prejudice the rights of any employees.

Therefore, based on the foregoing, and on the entire record, I issue the following recommended amended Order.[2]

ORDER

I hereby withdraw my findings and conclusion that the Respondent violated the Act by granting the bonus. I further recommend that the finding that the Respondent violated Section 8(a)(1) by granting the bonus be vacated and dismissed.

Dated at Washington, D.C. May 1, 2009

[1] Case 2–RC–22858 was severed and remanded to the Region for the purpose of holding a new election. That case is not before me.

[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.