Grapetree Shores, Inc. d/b/a Divi Carina Bay Resort *and* Virgin Islands Workers Union. Case 24–CA–11101

December 7, 2010

DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBERS BECKER AND PEARCE

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 January 14, 2009, the General Counsel issued the complaint on January 28, 2009, alleging that 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 24–RC–8566. (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(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.[1]

On February 19, 2009, the General Counsel filed a Motion for Summary Judgment. On February 24, 2009, 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 April 10, 2009, the two sitting members of the Board issued a Decision and Order in this proceeding, which is reported at 353 NLRB No. 131 (2009) (not reported in Board volumes).[2] Thereafter, the General Counsel filed an application for enforcement in the United States Court of Appeals for the Third Circuit, and the Respondent filed a cross-petition for review.

On June 17, 2010, the United States Supreme Court issued its decision in *New Process Steel, L.P. v. NLRB*, 130 S.Ct. 2635, holding that under Section 3(b) of the Act, in order to exercise the delegated authority of the Board, a delegee group of at least three members must be maintained. Thereafter, the court of appeals remanded this case for further proceedings consistent with the Supreme Court's decision.

On September 28, 2010, the Board issued a further Decision and Notice to Show Cause in Cases 24–CA–11101 and 24–RC–8566, which is reported at 355 NLRB No. 194. Thereafter, the Acting General Counsel filed an amended complaint and notice of hearing in Case 24–CA–11101. The Respondent failed to file an answer to the amended complaint.

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 objections to conduct alleged to have affected the election and the Board's disposition of a challenged ballot in the representation proceeding.

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.[3] See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941). Accordingly, we grant the Motion for Summary Judgment.[4]

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times the Respondent, a U.S. Virgin Islands corporation, with an office and place of business in Christiansted, St. Croix, U.S. Virgin Islands, herein

[1] The Respondent's answer denies sufficient knowledge concerning the filing and service of the charge. Copies of the charge and affidavit of service thereof are attached as exhibits to the General Counsel's motion, showing the dates as alleged, and the Respondent does not challenge the authenticity of these documents. Accordingly, we find that the Respondent's denials in this regard do not raise any issue of fact warranting a hearing.

[2] 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 powers of the National Labor Relations Board in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Thereafter, pursuant to this delegation, the two sitting members issued decisions and orders in unfair labor practice and representation cases.

[3] We find no merit in the Respondent's affirmative defense that "[t]o the extent that any allegations of the Complaint are outside the six-month statute of limitations for unfair labor practice charges," those allegations are barred by the 6-month statute of limitations set forth in Sec. 10(b) of the Act. The Respondent has not presented any factual or legal basis in support of its asserted defense, and the unfair labor practice charge and complaint allegations are consistent with the time provisions of Sec. 10(b).

[4] Thus, the Respondent's requests that the complaint be dismissed and that it recover costs and attorneys' fees are denied.

called the hotel, has been engaged in the operation of a hotel and casino. During the 12-month period preceding issuance of the complaint, the Respondent, in conducting its business operations described above, derived gross revenues in excess of $500,000 and purchased and received at its hotel goods valued in excess of $50,000 directly from points outside the U.S. Virgin Islands.

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.[5]

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Certification

Following the representation election held on June 12, 2007, the Union was certified on September 28, 2010, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All full-time and regular part-time production and maintenance employees, including food and beverage, kitchen, housekeeping, maintenance, front desk, communications, bell and guest services, gift shop, activities and grounds; excluding all other employees, office, clerical 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

About December 17, 2008, the Union, by letter, by requesting the Respondent to provide information concerning bargaining unit employees, requested the Respondent to recognize and bargain collectively with it as the exclusive collective-bargaining representative of the unit.[6] About December 22, 2008, by letter, the Respondent failed and refused to recognize and bargain with the Union as the exclusive collective-bargaining representative of the unit. About September 29, 2010, by letter, the Union again requested that the Respondent recognize it and bargain.

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 bargain 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 unit employees, 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.[7]

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.

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.

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[5] The Respondent's answer denies sufficient knowledge regarding the Union's status as a labor organization. The Respondent, however, stipulated in the underlying representation proceeding that the Union is a labor organization within the meaning of the Act. In addition, the Respondent denies that it operates a casino, stating that the casino is operated by Treasure Bay. On July 30, 2008, by unpublished Decision, the Board adopted in relevant part the findings of the administrative law judge asserting jurisdiction over the Respondent "as a corporation with an office and place of business in Christiansted, St. Croix, U.S. Virgin Islands, which operates a hotel and casino." A three-member panel adopted this July 30, 2008 Decision on September 28, 2010. 355 NLRB No. 194. Further, regardless of which entity actually operates the casino, there is no dispute that the Respondent is the employer of the employees in the certified bargaining unit. Accordingly, we find that the Respondent's answer does not raise any issues of fact warranting a hearing with respect to these allegations. See *All American Services & Supplies,* 340 NLRB 239 fn. 2 (2003).

[6] The Board has held that "a request for relevant information constitutes a request for bargaining." *Pak-Well*, 206 NLRB 260, 261 (1973), citing *Rod Ric Corp*., 171 NLRB 922, enfd. 428 F.2d 948 (5th Cir. 1970); cert. denied 401 U.S. 937 (1971).

[7] 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 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.

denied 379 U.S. 817 (1964); and *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, Grapetree Shores, Inc. d/b/a Divi Carina Bay Resort, Christiansted, St. Croix, U.S. Virgin Islands, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to recognize and bargain with Virgin Islands Workers Union 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 production and maintenance employees, including food and beverage, kitchen, housekeeping, maintenance, front desk, communications, bell and guest services, gift shop, activities and grounds; excluding all other employees, office, clerical employees, guards, and supervisors as defined by the Act.

(b) Within 14 days after service by the Region, post at its facility in Christiansted, St. Croix, U.S. Virgin Islands, copies of the attached notice marked "Appendix."[8] Copies of the notice, on forms provided by the Regional Director for Region 24, 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 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 December 22, 2008.

(c) 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 attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. December 7, 2010

Wilma B. Liebman,	Chairman
Craig Becker,	Member
Mark Gaston Pearce,	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 refuse to recognize and bargain with Virgin Islands Workers Union 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 guaranteed you by Section 7 of the Act.

[8] 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, 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 production and maintenance employees, including food and beverage, kitchen, housekeeping, maintenance, front desk, communications, bell and guest services, gift shop, activities and grounds; excluding all other employees, office, clerical employees, guards, and supervisors as defined by the Act.

GRAPETREE SHORES, INC. D/B/A DIVI CARINA BAY RESORT