J.S. Carambola, LLP, d/b/a Carambola Beach Resort *and* Our Virgin Islands Labor Union (OVILU). Case 24–CA–10951

November 10, 2010

DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBERS BECKER AND HAYES

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 July 1, 2008, the General Counsel issued the complaint on July 15, 2008, 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–8577. (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 August 12, 2008, the General Counsel filed a Motion Submitting Motion for Summary Judgment and Attachments, and Motion for Summary Judgment. On August 14, 2008, 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 no response.

On September 17, 2008, the two sitting members of the Board issued a Decision and Order in this proceeding, which is reported at 353 NLRB No. 8.[2] Thereafter, the Respondent filed a petition for review in the United States Court of Appeals for the Third Circuit, and the General Counsel filed a cross-application for enforcement.

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 August 6, 2010, the Board issued a further Decision, Certification of Representative, and Notice to Show Cause in Cases 24–CA–19151 and 24–RC–8577, which is reported at 355 NLRB No. 69. Thereafter, the Acting General Counsel filed an amended complaint in Case 24–CA–10951, the Respondent filed an amended answer, and the Acting General Counsel filed a statement in support of Motion for Summary Judgment.

The National Labor Relations Board has consolidated these proceedings and delegated its authority in both proceedings to a three-member panel.

Ruling on Motion for Summary Judgment

The Respondent admits its refusal to bargain, but contests the validity of the Union's certification on the basis of its objections to the election 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. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941). Accordingly, we grant the Motion for Summary Judgment.[3]

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 Davis Bay, St. Croix, U.S. Virgin Islands, has been engaged in the operation of a hotel and resort.

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 facility in Davis Bay, St. Croix, U.S. Virgin Islands,

[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.

[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 also deny the Respondent's request that the complaint be dismissed and that the Board award it attorneys' fees.

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, Our Virgin Islands Labor Union (OVILU), is a labor organization within the meaning of Section 2(5) of the Act.[4]

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Certification

Following the representation election held on October 25, 2007, the Union was certified on August 6, 2010, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All full time and regular part time employees, including cooks, bartenders, housekeeping and laundry workers, receptionists, waiters, waitresses, and maintenance workers who are employed by the Employer at its facility in St. Croix, USVI; but excluding all other employees, guards, and supervisors as defined in 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 June 16, 2008, by electronic mail, the Union requested that the Respondent bargain collectively with it as the exclusive collective-bargaining representative of the unit. Since about June 25, 2008, and continuing after the Union's certification, 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.[5]

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. 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, J.S. Carambola, LLP, d/b/a Carambola Beach Resort, Davis Bay, St. Croix, U.S. Virgin Islands, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize and bargain with Our Virgin Islands Labor Union (OVILU) 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, recognize and 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:

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[4] The Respondent's answer denies sufficient knowledge regarding the Union's status as a labor organization and the appropriateness of the certified unit. In the underlying representation proceeding, the Respondent stipulated that the unit was appropriate and did not challenge the Union's labor organization status. Accordingly, we find that the Respondent's answer does not raise any issue warranting a hearing with respect to these allegations. See *All American Service & Supplies*, 340 NLRB 239 fn. 2 (2003).

[5] 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.

All full time and regular part time employees, including cooks, bartenders, housekeeping and laundry workers, receptionists, waiters, waitresses, and maintenance workers who are employed by the Employer at its facility in St. Croix, USVI; but excluding all other employees, guards, and supervisors as defined in the Act.

(b) Within 14 days after service by the Region, post at its facility in Davis Bay, St. Croix, U.S. Virgin Islands, copies of the attached notice marked "Appendix."[6] 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.[7] 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 June 25, 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. November 10, 2010

Wilma B. Liebman, Chairman

Craig Becker, Member

Brian E. Hayes, 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 Our Virgin Islands Labor Union (OVILU) 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.

WE WILL, on request, recognize and 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 employees, including cooks, bartenders, housekeeping and laundry workers, receptionists, waiters, waitresses, and maintenance workers who are employed by us at our facility in St. Croix, USVI; but excluding all other employees, guards, and supervisors as defined in the Act.

J.S. CARAMBOLA, LLP, D/B/A CARAMBOLA BEACH RESORT

[6] 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."

[7] For the reasons stated in his dissenting opinion in *J. Picini Flooring*, 356 NLRB No. 9 (2010), Member Hayes would not require electronic distribution of the notice.