Southcoast Hospitals Group, Inc. *and* 1199 SEIU, United Healthcare Workers East. Case 01–CA–067303

October 6, 2017

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN MISCIMARRA AND MEMBERS PEARCE AND MCFERRAN

This case is on remand from the United States Court of Appeals for the First Circuit. The issue is whether the Respondent violated Section 8(a)(3) and (1) of the Act by maintaining and enforcing HR 4.06, a hiring/transfer policy under which the Respondent gives preference to unrepresented employees over represented employees when filling positions at its nonunion facilities. In light of the First Circuit's decision, which we accept as the law of the case, we now answer that question in the negative.

On September 16, 2015, the National Labor Relations Board issued a Decision and Order in this proceeding.[1] Applying the analytical framework established by the Supreme Court in *NLRB v. Great Dane Trailers*,[2] the Board found that the Respondent violated Section 8(a)(3) and (1) by maintaining HR 4.06. The Board found that HR 4.06 has at least a "comparatively slight" impact on represented employees' Section 7 rights under *Great Dane* because "it discriminates against the Respondent's represented employees based on their representational status and their having obtained a contractual benefit through collective bargaining—both of which are protected by Section 7."[3] The Board then found that the Respondent failed to meet its burden under *Great Dane* to prove that HR 4.06 serves a "legitimate and substantial business justification." Specifically, the Board rejected the Respondent's two proffered business justifications for the policy: (1) that it prevents complaints by unrepresented employees about being shut out of bargaining-unit positions, and (2) that it helps "level the playing field" between represented and unrepresented workers.[4] Finally, the Board found that the Respondent violated Section 8(a)(3) and (1) by enforcing HR 4.06, namely, by refusing, based on its application of the unlawful policy, to consider and/or hire employees, and by delaying, on the same basis, the hire of an employee.[5]

Subsequently, the Respondent petitioned the United States Court of Appeals for the First Circuit for review of the Board's Order, and the Board cross-applied for enforcement.

On January 20, 2017, the court granted the Respondent's petition and vacated the Board's Order.[6] The court, also applying the *Great Dane* analytical framework, held that substantial evidence did not support the Board's rejection of the Respondent's argument that HR 4.06 served the legitimate and substantial business interest of leveling the playing field between represented and unrepresented employees.[7] The court vacated the Board's Order and remanded the case "for further proceedings consistent with [its] opinion."[8]

On April 18, 2017, the Board notified the parties that it had decided to accept the court's remand and invited them to file statements of position with respect to the issues raised by the court's opinion. Only the Respondent filed a position statement.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.[9]

The court's opinion, which we have accepted as the law of the case, held that substantial evidence did not support the Board's determination that the Respondent failed to meet its burden to establish a legitimate and substantial business justification for HR 4.06. Accordingly, consistent with the court's opinion, we now conclude that the Respondent has established that HR 4.06 serves the legitimate and substantial business justification of leveling the playing field between represented and unrepresented employees.[10]

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[1] 363 NLRB No. 9.

[2] 388 U.S. 26 (1967).

[3] 363 NLRB No. 9, slip op. at 2.

[4] Id. After "[h]aving determined that the Respondent ha[d] failed to establish a business justification defense," the Board found it unnecessary to decide whether HR 4.06 was motivated by antiunion concerns or was inherently destructive under *Great Dane*. Id., slip op. at 2–3 fn. 7.

[5] Dissenting in relevant part, then-Member Miscimarra would have found that although HR 4.06 has a comparatively slight impact on employees' Sec. 7 rights, the Respondent established a legitimate and substantial business justification for the policy, and the General Counsel introduced no evidence that HR 4.06 was motivated by antiunion animus. 363 NLRB No. 9, slip op. at 5–8. Accordingly, then-Member Miscimarra would have found that the Respondent did not violate the Act by maintaining and enforcing HR 4.06.

[6] *Southcoast Hospitals Group, Inc. v. NLRB*, 846 F.3d 448, 458 (1st Cir. 2017).

[7] Id. at 455. In light of this finding, the court found it unnecessary to evaluate the Board's rejection of the Respondent's other proffered reason. Id. at fn. 3.

[8] Id. at 458 (internal quotations omitted).

[9] Member Emanuel is recused and took no part in the consideration of this case.

[10] Chairman Miscimarra agrees that under the law of the case, the Board must find that HR 4.06 serves the legitimate and substantial business justification of leveling the playing field between represented and unrepresented employees. As indicated above in fn. 5, Chairman Miscimarra also agrees with this finding on the merits.

Under *Great Dane*, "when the resulting harm to employee rights is comparatively slight, and a substantial and legitimate business end is served," as the Circuit found here, the employer's conduct is lawful unless the General Counsel makes an affirmative showing of improper motivation.[11] The General Counsel has not made that showing. Indeed, the General Counsel's only litigated theory of violation in this case—before the administrative law judge and the Board—was that the Respondent lacked a business justification for HR 4.06; he did not allege or attempt to prove that HR 4.06 was the product of antiunion motivation.

Nor is there any basis to find a violation on other grounds. The General Counsel has conceded that HR 4.06 is not "inherently destructive" of employees' Section 7 rights under *Great Dane*.[12] Moreover, neither the General Counsel nor the Charging Party filed a position statement on remand arguing that HR 4.06 should be found unlawful on other grounds. Accordingly, we conclude that the Respondent did not violate Section 8(a)(3) and (1) by maintaining HR 4.06.

Based on the above, we further conclude that the Respondent did not violate Section 8(a)(3) and (1) by enforcing HR 4.06, namely, by refusing, based on its application of the policy, to consider and/or hire employees, and by delaying, on the same basis, the hire of an employee.[13]

Accordingly, we shall vacate the Board's Decision and Order in Case 01–CA–067303 and dismiss the complaint.

ORDER

The complaint is dismissed.

Dated, Washington, D.C. October 6, 2017

Philip A. Miscimarra, Chairman

Mark Gaston Pearce, Member

Lauren McFerran, Member

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[11] 388 U.S. at 34.

[12] Under *Great Dane*, if the employer's conduct is "inherently destructive" of employees' rights, a violation may be proved without evidence of improper motive. Id. at 33.

[13] The General Counsel did not allege or argue any other theory of violation with respect to these allegations.