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Fedex Home Delivery, an Operating Division of Fedex Ground Package Systems, Inc. and International Brotherhood of Teamsters, Local Union, No. 671. Case 34–CA–12735

October 29, 2010

DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBERS PEARCE
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 and an amended charge filed by the Union on June 24 and July 7, 2010, respectively, the Acting General Counsel issued the complaint on July 8, 2010, 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 34–RC–2205. (Official notice is taken of the “record” in the representation proceeding as defined in the Board’s Rules and Regulations, Sections 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.

On August 3, 2010, the Acting General Counsel filed a Motion for Summary Judgment and Memorandum in Support of Motion. On August 12, 2010, 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.

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 grounds that: the certified unit is comprised of independent contractors and not employees within the meaning of the Act; evidence of independent contractor status was improperly excluded from the underlying representation proceeding; new evidence of independent contractor status has arisen since the record in the representation proceeding closed; and the May 27, 2010 certification decision is based on an invalid two-member Board decision.¹ In addition, the

¹ The two-member decision of which the Respondent complains is a September 29, 2008 Decision and Order Remanding the representation proceeding in Case 34–RC–2205 to the administrative law judge on the

Respondent maintains that the issuance of a decision by the court of appeals for the District of Columbia in *FedEx Home Delivery v. NLRB*, 563 F.3d 492 (2009), constitutes a special circumstance that warrants the denial of the Acting General Counsel’s motion and dismissal of the complaint.

With respect to the contentions that the certified unit is not appropriate, evidence was improperly excluded from the record, and the issuance of the District of Columbia Circuit’s decision in *FedEx Home Delivery v. NLRB*, supra, requires the reexamination of the Board’s unit determination in the underlying representation proceeding, we find that these issues were raised and rejected in the underlying representation proceeding, and cannot be relitigated here.² In addition, we find that the Respondent has not presented any special or unusual circumstances requiring the Board to reexamine the findings made in the representation proceeding.³

basis of the Respondent’s objections to the election. Accordingly, it is difficult to determine how the Respondent was prejudiced by this decision. Nevertheless, on August 27, 2010, the Board issued an unpublished Order in which a three-member panel of the Board specifically reaffirmed the two-member Board’s September 29, 2008 Decision and Order Remanding. Member Hayes did not participate in the underlying representation proceedings. However, he agrees that the Respondent has not raised any new matters or special circumstances warranting a hearing in this proceeding or reconsideration of the decisions and orders in the representation proceedings.

² The Respondent first raised to the Board the impact of the D.C. Circuit’s decision in *FedEx Home Delivery v. NLRB* on March 17, 2010, almost 11 months after the court’s decision had issued. Although styled as a “motion to dismiss petition,” the substance of the motion requested that the Board revisit the issues addressed in the Regional Director’s April 11, 2007 Decision and Direction of Election. In the Board’s August 27, 2010 Order in Case 34–RC–2205, the Board found that to the extent that the Employer was seeking reconsideration of the Regional Director’s April 11, 2007 Decision and Direction of Election based on the court’s decision, that portion of its Amended Motion for Reconsideration (which, inter alia, sought to have the Board grant its motion to dismiss petition) was untimely. The Board further stated that it adhered to the Regional Director’s decision finding that the drivers at issue are statutory employees, and that it found no merit in the Employer’s position. Order at 2, fn. 2.

In addition, we find that to the extent that the Respondent’s March 17, 2010 motion seeks to have the Board review the Regional Director’s failure to dismiss the petition as requested in the Respondent’s letters of May 4, 2009 and January 4, 2010, its motion is also untimely in this respect. The Respondent’s motion was not filed until over 10 months after its initial request, over 2 months after its “renewed” request, and 40 days after the Respondent claims that it was advised that the Region “was not in a position to act on the request to dismiss at that time because the case was pending before the Board” See Respondent’s Response to the Notice to Show Cause, p. 8. In any event, the March 17, 2010 motion was the first formal pleading in which the Respondent raised the court’s decision; accordingly, it was untimely filed.

³ The Respondent argues, inter alia, that new evidence establishes that at the time of the election in May 2007, there were 20 “single-work area” contactors at the Hartford facility who were in the petitioned-for

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.⁴

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a Delaware corporation with a place of business in Windsor, Connecticut, the Respondent's facility, has operated a home package delivery service.⁵

During the 12-month period ending June 30, 2010, the Respondent, in conducting its operations described above, derived gross revenues in excess of \$500,000 and purchased and received at its facility goods valued in excess of \$50,000 directly from points located outside the State of Connecticut.

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, International Brotherhood of Teamsters, Local Union, No. 671, is a labor organization within the meaning of Section 2(5) of the Act.

unit, and as of March 2010, there were only 3 "single-work area" contractors in the unit. However, the number of individuals who were "single work area" drivers was only one of several factors considered by the Regional Director and the Board in determining that the drivers were employees and not independent contractors. The reduction of the number of employees in the unit, without more, does not establish special or unusual circumstances warranting reconsideration of the representation proceedings. See, e.g., *Super K-Mart*, 322 NLRB 583, 583 fn. 3 (1996), enf. 132 F.3d 1481 (D.C. Cir. 1997) (table) (posthearing reduction in number of unit employees from 11 to 3 did not warrant reconsideration of certification in a test-of-certification proceeding where the number of unit employees was one of several factors considered in the representation proceedings).

⁴ The Respondent's request that the complaint be dismissed in its entirety is therefore denied.

⁵ In its answer to the complaint, the Respondent admits that FedEx Ground Package System, Inc. is a Delaware corporation with a place of business in Windsor, Connecticut, and that the corporation has a home delivery service offering.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Certification

Following the representation election held on May 11, 2007, the Union was certified on May 27, 2010, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All contract drivers employed by Respondent at its Hartford terminal, but excluding drivers and helpers hired by contract drivers, temporary drivers, supplemental drivers, multiple-route contract drivers, package handlers, office clerical employees, and guards, professional employees 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

By letters dated June 2 and 11, 2010, the Union requested that the Respondent bargain collectively with it as the exclusive collective-bargaining representative of the unit. Since about June 2, 2010, 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 since about June 2, 2010, to recognize and bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit, 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.

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.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by the 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), enf. 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, FedEx Home Delivery, an Operating Division of FedEx Ground Package Systems, Inc., Windsor, Connecticut, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize and bargain with International Brotherhood of Teamsters, Local Union, No. 671 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 collective-bargaining 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 contract drivers employed by Respondent at its Hartford terminal, but excluding drivers and helpers hired by contract drivers, temporary drivers, supplemental drivers, multiple-route contract drivers, package handlers, office clerical employees, and guards, professional employees and supervisors as defined in the Act.

(b) Within 14 days after service by the Region, post at its facility in Windsor, Connecticut, copies of the attached notice marked "Appendix."⁶ Copies of the notice, on forms provided by the Regional Director for Region 34, 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 em-

ployed by the Respondent at any time since on or about June 2, 2010.

(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. October 29, 2010

Wilma B. Liebman, Chairman

Mark Gaston Pearce, 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 International Brotherhood of Teamsters, Local Union, No. 671 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.

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."

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 contract drivers employed by us at our Hartford terminal, but excluding drivers and helpers hired by contract drivers, temporary drivers, supplemental driv-

ers, multiple-route contract drivers, package handlers, office clerical employees, and guards, professional employees and supervisors as defined in the Act.

FEDEX HOME DELIVERY, AN OPERATING
DIVISION OF FEDEX GROUND PACKAGE
SYSTEMS, INC.