NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

Fused Solutions, LLC *and* United Food and Commercial Workers, District Union Local One. Case 03–CA–098461

May 28, 2015

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS HIROZAWA AND MCFERRAN

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 by United Food and Commercial Workers, District Union Local One (the Union) on February 15, 2013, the Acting General Counsel issued the complaint on February 22, 2013, alleging that Fused Solutions, LLC (the Respondent) has violated Section 8(a)(5) and (1) of the Act by refusing the Union's requests to recognize and bargain and to furnish relevant and necessary information following the Union's certification in Case 03–RC–083193. (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 March 21, 2013, the Acting General Counsel filed a Motion for Summary Judgment. On March 25, 2013, 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 May 6, 2013, the Board issued a Decision and Order in this proceeding, which is reported at 359 NLRB No.118. Thereafter, the Respondent filed a petition for review in the United States Court of Appeals for the District of Columbia Circuit.

At the time of the Decision and Order, the composition of the Board included two persons whose appointments to the Board had been challenged as constitutionally infirm. On June 26, 2014, the United States Supreme Court issued its decision in *NLRB v. Noel Canning,* 134 S. Ct. 2550 (2014), holding that the challenged appointments to the Board were not valid. Thereafter, the Board issued an order setting aside the Decision and Order, and retained this case on its docket for further action as appropriate.

On November 26, 2014, the Board issued a further Decision, Certification of Representative, and Notice to Show Cause in Cases 03–CA–098461 and 03–RC–083193, which is reported at 361 NLRB No. 119. That Decision provided leave to the General Counsel to amend the complaint on or before December 8, 2014, to conform with the current state of the evidence, including whether the Respondent had agreed to recognize and bargain with the Union after the November 26, 2014 certification of representative issued. Notice was also given for the parties to show cause by January 12, 2015, why the motion should not be granted.

On January 12, 2015, the Respondent filed an opposition to the General Counsel's motion, reiterating its position that the decision to overrule the election objections and certify the Union was made in error.

On January 22, 2015, the General Counsel filed a motion to amend the complaint, under Section 102.17 of the Board's Rules and Regulations. Thereafter, on February 10, 2015, the Board issued an Order Granting Motion to Amend Complaint and Further Notice to Show Cause in which it accepted the amended complaint, and directed that the Respondent file an answer to the amended complaint on or before February 24, 2015, and that cause be shown, in writing, on or before March 3, 2015, as to why the General Counsel's Motion for Summary Judgment should not be granted by the Board. On February 24, 2015, the Respondent filed an answer to the amended complaint, and on March 3, 2015, the General Counsel filed a response in support of the Motion for Summary Judgment.[1]

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 and to provide information, but contests the validity of the certification on the basis of the issues raised in the representation proceeding.

[1] The amended complaint adds "November 26, 2014" as the date the Board certified the Union as the exclusive collective-bargaining representative of the unit employees, alleges that about January 30, 2013, and January 9, 2015, the Union requested that the Respondent recognize and bargain with it as the exclusive collective-bargaining representative of the unit employees, and alleges that since February 15, 2013, the Respondent has refused, and continues to refuse, to do so. The amended complaint repeats the allegations from the original complaint that the Respondent has failed, since February 15, 2013, to provide the Union with information it requested on January 15 and 30, 2013.

The amended answer admits the factual allegations of the complaint, reiterates the arguments made in the underlying representation proceeding that the Union engaged in conduct interfering with the results of the election, and argues for the first time that the Regional Director lacked authority to conduct the election at a time when the Board lacked a quorum.

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).

We also find there are no factual issues warranting a hearing with respect to the Union's request for information. The complaint alleges, and the Respondent admits, that by letter dated January 15, 2013, the Union requested the following information:

A. (1) Employee's Name
(2) Employee's Rate of Pay
(3) Employee's Job Classification
(4) Employee's date of hire
(5) Employee's date of birth
(6) Employee's status (full time and part time)

B. (1) Total hours worked per employee over the last 12-month period.
(2) Overtime Hours worked over the last 12-month period.

C. (1) A copy of all current company personnel policies, practices or procedures including any statements or descriptions regarding such personnel policies, practices or procedures.
(2) A copy of all company fringe benefit plans including, pension, profit sharing, severance, stock incentive, vacation, health and welfare, 401k Plan, legal services, child care or any other plans which relate to the employees.
(3) Copies of all current job descriptions.

D. Copies of any Company Wage or Salary Plans.

E. Identify each employee's choice of health care.

F. Cost per month per employee to the employee who selects Health Insurance.

G. Cost per month per employee to the employer to provide Health Insurance.

The complaint further alleges, and the Respondent admits, that by letter dated January 30, 2013, the Union requested a list of all current employees along with home addresses and phone numbers, and work schedules for the next 2 weeks.

It is well established that the foregoing type of information concerning the terms and conditions of employment of unit employees is presumptively relevant for purposes of collective bargaining and must be furnished on request. See, e.g. *Metro Health Foundation, Inc*., 338 NLRB 802 (2003). The Respondent has not asserted any basis for rebutting the presumptive relevance of the information. Rather, the Respondent admits that it continues to refuse to provide the requested information and raises as an affirmative defense its contention, rejected above, that the Union was improperly certified. We find that the Respondent unlawfully refused to furnish the information sought by the Union.

As noted above, the Respondent also argues for the first time that the Regional Director lacked authority to conduct the election at a time when the Board lacked a quorum. We reject this argument. First, since the Respondent did not raise this issue previously, we find that the Respondent is estopped from challenging the authority of the Regional Director at this time. See *Mission Produce,* 362 NLRB No. 15, slip op. at 1 (2015). Moreover, the authority of a Regional Director to act in representation case proceedings is derived from a 1961 delegation from the Board, and that delegation has never been revoked. Thus, the Regional Director was fully empowered to process the representation petition and conduct the election in this matter without regard to the presence or absence of a Board quorum. Id. See also *Durham School Services, LP*, 361 NLRB No. 66 (2014).

Accordingly, we grant the Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent has been a limited liability company with an office and place of business in Potsdam, New York (the facility) where it operates a call center.

Annually, the Respondent, in conducting its operations described above, purchases and receives at its Potsdam, New York facility goods valued in excess of $50,000 directly from points outside the State of New York.

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, United Food and Commercial Workers, District Union Local One, is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Certification

Following the representation election held on July 26, 2012, the Union was certified on November 26, 2014, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All full-time and regular part-time Level 1, Level 2, and Level 3 customer service support technicians employed by Respondent at its Potsdam, New York location; excluding all office clerical employees, confidential employees, guards, and 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

On about January 30, 2013, and January 9, 2015, the Union, in writing, requested that the Respondent bargain collectively with it as the exclusive collective-bargaining representative of the unit. Since about February 15, 2013, and continuing to date, the Respondent has failed and refused to recognize and bargain with the Union as the unit employees' exclusive collective-bargaining representative.

About January 15 and 30, 2013, the Union, by letters, requested that the Respondent furnish it with the information set forth above that is necessary for, and relevant to, the Union's performance of its duties as the exclusive collective-bargaining representative of the unit. Since about February 15, 2013, and continuing to date, the Respondent has failed and refused to furnish the Union with the requested information.

We find that these failures and refusals constitute an unlawful failure and refusal to recognize and bargain with the Union 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 employees in the unit and to furnish the Union with requested information regarding the terms and conditions of employment of 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.[2]

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. We shall also order the Respondent to furnish the Union with the information it requested.

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); accord *Burnett Construction Co*., 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965); *Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964).

ORDER

The National Labor Relations Board orders that the Respondent, Fused Solutions, LLC, Potsdam, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize and bargain with United Food and Commercial Workers District Union Local One as the exclusive collective-bargaining representative of the employees in the bargaining unit.

(b) Failing and refusing to furnish the Union with requested information that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of the Respondent's unit employees.

(c) 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 concerning 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 Level 1, Level 2, and Level 3 customer service support technicians em-

[2] 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.

ployed by Respondent at its Potsdam, New York location; excluding all office clerical employees, confidential employees, guards, and professional employees and supervisors as defined in the Act.

(b) Furnish to the Union in a timely manner the information requested by the Union on January 15 and 30, 2013.

(c) Within 14 days after service by the Region, post at its facility in Potsdam, New York, copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 3, 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 its 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 February 15, 2013.

(d) Within 21 days after service by the Region, file with the Regional Director for Region 3 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. May 28, 2015

Mark Gaston Pearce, Chairman

Kent Y. Hirozawa, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[3] 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."

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 United Food and Commercial Workers, District Union Local One as the exclusive collective-bargaining representative of our employees in the bargaining unit.

WE WILL NOT fail and refuse to furnish the Union with requested information that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of our unit employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, on request, bargain with the Union as the exclusive collective-bargaining representative of our employees in the following appropriate unit concerning 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 Level 1, Level 2, and Level 3 customer service support technicians employed by us at our Potsdam, New York location; excluding all office clerical employees, confidential employees, guards, and professional employees and supervisors as defined in the Act.

WE WILL furnish to the Union in a timely manner the information requested by it on January 15 and 30, 2013.

FUSED SOLUTIONS, LLC

The Board's decision can be found at www.nlrb.gov/case/03-CA-098461 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.