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Macy's, Inc. *and* Local 1445 of the United Food and Commercial Workers International Union. Case 01–CA–137863

January 7, 2015

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA AND HIROZAWA

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 Local 1445 of the United Food and Commercial Workers International Union (the Union) on October 1, 2014,[1] the General Counsel issued the complaint on October 14, alleging that Macy's, Inc. (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 01–RC–091163. (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 October 30, the General Counsel filed a Motion for Summary Judgment. On October 31, 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 Charging Party filed a statement in support of the General Counsel's motion. The Respondent did not file 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 Union's certification on the basis of its argument, raised and rejected in the representation proceeding,[2] that the unit of certain employees in the cosmetics and fragrances department of the Respondent's Saugus, Massachusetts store (the Saugus store) is inappropriate because it comprises an arbitrary segment of the Respondent's employees and is inconsistent with Board precedent holding that a wall-to-wall retail department store unit is presumptively appropriate. In addition, in its answer to the complaint, the Respondent alleges as an affirmative defense that the unit has experienced a 50 percent employee turnover since the December 7, 2012 election, and that 75 percent of unit employees signed a petition disavowing a desire for union representation.[3]

It is well settled that an alleged postelection loss of majority support is not relevant to the question of whether a union should be certified as the result of a properly conducted Board election. See *Brooks v. NLRB,* 348 U.S. 96, 104 (1954); *Alta Vista Regional Hospital*, 356 NLRB No. 167, slip op. at 3 (2011), enfd. 697 F.3d 1181, 1187 (D.C. Cir. 2012) ("post-election assertion that a union has lost majority support has no bearing on the validity of an election that has already occurred"); *Kane Co.*, 145 NLRB 1068, 1070 (1964), enfd. 352 F.2d 511 (6th Cir. 1965); *Sunbeam Corp.*, 89 NLRB 469, 473 (1950); *Teesdale Mfg. Co.*, 71 NLRB 932, 935 (1946). In any event, the Respondent is procedurally barred from raising this issue here, as it had the opportunity to raise this argument, but did not, in the underlying representation proceeding, either directly or through a motion for reconsideration or a motion to reopen the record.[4]

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 cir-

[1] All subsequent dates are in 2014, unless otherwise indicated.

[2] 361 NLRB No. 4 (2014).

[3] On October 7, the Respondent sent a letter to the Region stating that it was refusing to bargain with the Union in order to test the Union's certification. There, the Respondent also asserted the same arguments regarding employee turnover and dissatisfaction as set forth in its answer to the complaint, and attached two documents purporting to be employee petitions reflecting a loss of majority support for the Union. The first document, entitled "Petition NOT to Unionize" (emphasis in original), lists the names of 17 individuals whom it states it hired between the election and the Board's July 22, 2014 Decision on Review and Order and shows the date August 4, 2014, next to each name. The document further states, "In accordance with the National Labor Relations Act, we petition for our right to vote in this matter, and we hereby expressly vote NO" (emphasis in original). A second petition, which includes 28 names and the same date, states, "We the undersigned, as employees of the of the Cosmetics and Fragrances Department at Macy's in Saugus, Massachusetts, hereby petition NOT to be represented by a Union" (emphasis in original). August 4, 2014, fell after the Board's July 22, 2014 Decision on Review and Order in the representation proceeding but before the Union's August 11, 2014 certification.

[4] See Sec. 102.65(e)(1) of the Board's Rules and Regulations (motion to reopen the record must be filed promptly upon discovery of the evidence sought to be adduced).

cumstances 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.[5]

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent has been a corporation engaged in the operation of retail department stores throughout the United States, including a store located in Saugus, Massachusetts.

In conducting its operations described above, the Respondent annually derives gross revenues in excess of $500,000, and purchases and receives at the Saugus store goods valued in excess of $50,000 directly from points located outside the Commonwealth of Massachusetts.

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.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Certification

Following the representation election held on December 7, 2012, the Union was certified on August 11, 2014, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All full-time, regular part-time, and on-call employees who have worked an average of four hours per week during the calendar quarter immediately preceding the eligibility date, employed by Macy's in the cosmetics and fragrances department at its Saugus, Massachusetts store, including counter managers, beauty advisors, and all selling employees in cosmetics, women's fragrances, and men's fragrances, but excluding MAC employees, sprayers, the cosmetics fragrances manager, the store manager and assistant store managers, account coordinators, selling floor supervisor, merchandise team managers, receiving team manager, visual manager, administrative team manager, human resource manager, operations manager, loss prevention manager, clerical employees, guards, and supervisors as defined in the Act.

The Union continues to be the collective-bargaining representative of the unit employees under Section 9(a) of the Act.

B. Refusal to Bargain

By letter dated August 12, 2014, the Union requested that the Respondent bargain collectively with it as the exclusive collective-bargaining representative of the unit. Since about August 12, 2014, 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 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 since about August 12, 2014, to 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 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, Macy's, Inc., Saugus, Massachusetts, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize and bargain with Local 1445 of the United Food and Commercial Workers International Union (Union), as the exclusive collective-

[5] Member Miscimarra would have granted review in the underlying representation proceeding and found that the smallest appropriate unit would include all salespeople in the Saugus store. He agrees, however, that the Respondent has not raised any new matters that are properly litigable in this unfair labor practice proceeding, and that summary judgment is appropriate, with the parties retaining their respective rights to litigate relevant issues on appeal.

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 full-time, regular part-time, and on-call employees who have worked an average of four hours per week during the calendar quarter immediately preceding the eligibility date, employed by Macy's in the cosmetics and fragrances department at its Saugus, Massachusetts store, including counter managers, beauty advisors, and all selling employees in cosmetics, women's fragrances, and men's fragrances, but excluding MAC employees, sprayers, the cosmetics fragrances manager, the store manager and assistant store managers, account coordinators, selling floor supervisor, merchandise team managers, receiving team manager, visual manager, administrative team manager, human resource manager, operations manager, loss prevention manager, clerical employees, guards, and supervisors as defined in the Act.

(b) Within 14 days after service by the Region, post at its facility in Saugus, Massachusetts, copies of the attached notice marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director for Region 1, 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 August 12, 2014.

(c) Within 21 days after service by the Region, file with the Regional Director for Region 1 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. January 7, 2015

Mark Gaston Pearce,	Chairman
Philip A. Miscimarra,	Member
Kent Y. Hirozawa,	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 Local 1445 of the United Food and Commercial Workers International Union ("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 listed above.

[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 full-time, regular part-time, and on-call employees who have worked an average of four hours per week during the calendar quarter immediately preceding the eligibility date, employed by Macy's in the cosmetics and fragrances department at its Saugus, Massachusetts store, including counter managers, beauty advisors, and all selling employees in cosmetics, women's fragrances, and men's fragrances, but excluding MAC employees, sprayers, the cosmetics fragrances manager, the store manager and assistant store managers, account coordinators, selling floor supervisor, merchandise team managers, receiving team manager, visual manager, administrative team manager, human resource manager, operations manager, loss prevention manager, clerical employees, guards, and supervisors as defined in the Act.

MACY'S, INC.

The Board's decision can be found at www.nlrb.gov/case/01-CA-137863 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.