

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.

FedEx Freight, Inc. and International Brotherhood of Teamsters, Local 71. Case 10–CA–145378

April 20, 2015

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS HIROZAWA
AND JOHNSON

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 International Brotherhood of Teamsters, Local 71 (the Union) on January 30, 2015, and amended on February 11, 2015, the General Counsel issued the complaint on February 13, 2015, alleging that FedEx Freight, Inc. (the Respondent) has violated Section 8(a)(5) and (1) of the Act by refusing the Union’s request for recognition and to bargain following the Union’s certification in Case 10–RC–136185. (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 of the complaint, and asserting certain affirmative defenses.

On March 6, 2015, the General Counsel filed a Motion for Summary Judgment. On March 10, 2015, 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, in which it requested that the Board clarify the record to include additional evidence. The Union filed a statement in support of the General Counsel’s motion, and the General Counsel filed an opposition to the Respondent’s request to clarify the record.

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 arguments, raised and rejected in the representation proceeding, that the certified bargaining unit is inappropriate because it excludes the Respondent’s dockworkers.

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.¹ 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.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent has been a corporation with an office and place of business in Charlotte, North Carolina, and has been engaged in the business of interstate and intrastate transportation of freight.

In conducting its operations annually, the Respondent derived gross revenues in excess of \$50,000 for the

¹ The Respondent requests that the Board “clarify” the record in the representation proceeding by admitting into evidence a report purportedly detailing the hours worked by city drivers, road drivers, and dockworkers at other “non-domiciled” locations for the time period of February 1, 2014, to July 31, 2014. This request, which we shall treat as a motion to reopen the representation proceeding record, is denied. The proffered information does not constitute newly discovered and previously unavailable evidence, nor would the evidence, if adduced, establish special circumstances.

A party seeking to introduce new evidence after the record of a representation proceeding has closed must establish that (1) the evidence existed but was unavailable to the party before the close of the hearing; (2) the evidence would have changed the result of the proceeding; and (3) it moved promptly upon discovery of the evidence. *Manhattan Center Studios*, 357 NLRB No. 139, slip op. at 3 (2011); Rules and Regulations, Sec. 102.65(e). To qualify as newly discovered evidence, such evidence must have been in existence at the time of the representation hearing and could not have been discovered by reasonable diligence. *Crew One Productions*, 362 NLRB No. 8, slip op. at 1, fn. 1 (2015); *Manhattan Center Studios*, 357 NLRB No. 139, slip op. at 3. The evidence the Respondent proffers is merely an expansion of the same class of information (i.e., dock work performed by the city drivers and road drivers during the period of February 1, 2014, to July 31, 2014) that the Respondent presented during the representation case proceeding. Here, the proffered evidence concerns facts that were in existence at the time of the representation hearing and it is offered in support of the same arguments by the Respondent that were fully litigated at the hearing and subsequently rejected. The Respondent has not submitted any reason why this additional evidence was unavailable during the course of the hearing or why it could not have been discovered with reasonable diligence. Further, the Respondent has failed to establish that the proffered evidence, if adduced, would change the result in the representation proceeding and has additionally failed to establish that it moved promptly to present this evidence.

transportation of freight from the State of North Carolina directly to points outside the State of North Carolina.

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 a representation election held on November 19, 2014, the Union was certified on December 12, 2014, as the exclusive collective-bargaining representative of employees in the following appropriate unit:

All full-time and regular part-time Road Drivers and City Drivers employed by the Employer at its 4349 Scott Futrell Drive, Charlotte, North Carolina terminal; excluding all other employees, Dockworkers/Driver Apprentices, Supplemental Dockworkers, Mechanics, building maintenance and custodial employees, office clerical employees, and guards and supervisors as defined by 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 letter dated December 19, 2014, the Union requested that the Respondent bargain collectively with it as the exclusive collective-bargaining representative of the unit. Since about January 16, 2015, the Respondent has failed and refused to do so.

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 January 16, 2015, 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 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 that 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), enf. 350 F.2d 57 (10th Cir. 1965); *Lamar Hotel*, 140 NLRB 226, 229 (1962), enf. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964).

ORDER

The National Labor Relations Board orders that the Respondent, FedEx Freight, Inc., Charlotte, North Carolina, 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 71 as the exclusive collective-bargaining representative of 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 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 and regular part-time road drivers and city drivers employed by the Employer at its 4349 Scott Futrell Drive, Charlotte, North Carolina terminal; excluding all other employees, Dockworkers/Driver Apprentices, Supplemental Dockworkers, Mechanics, building maintenance and custodial employees, office clerical employees, and guards and supervisors as defined by the Act.

(b) Within 14 days after service by the Region, post at its facility in Charlotte, North Carolina, copies of the attached notice marked "Appendix."² Copies of the notice, on forms provided by the Regional Director for Region 10, 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

² 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."

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 January 16, 2015.

(c) Within 21 days after service by the Region, file with the Regional Director for Region 10 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. April 20, 2015

Mark Gaston Pearce, Chairman

Kent Y. Hirozawa, Member

Harry I. Johnson, III, 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 71 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.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for the following bargaining unit:

All full-time and regular part-time Road Drivers and City Drivers employed by us at our 4349 Scott Futrell Drive, Charlotte, North Carolina terminal; excluding all other employees, Dockworkers/Driver Apprentices, Supplemental Dockworkers, Mechanics, building maintenance and custodial employees, office clerical employees, and guards and supervisors as defined by the Act.

FEDEX FREIGHT, INC.

The Board's decision can be found at www.nlr.gov/case/10-CA-145378 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.

