

Ozburn-Hessey Logistics, LLC and United Steel, Paper & Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers. Case 15–CA–109236

June 15, 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 United Steel, Paper & Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers (the Union) on July 16, 2013, the Acting General Counsel issued the complaint on July 30, 2013, alleging that Ozburn-Hessey Logistics, LLC (the Respondent) has violated Section 8(a)(5) and (1) of the Act by refusing the Union's request to recognize and bargain following the Union's certification in Case 26–RC–008635.¹ (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 and an amended answer, admitting in part and denying in part the allegations in the complaint, and asserting affirmative defenses.

On August 22, 2013, the Acting General Counsel filed a Motion for Summary Judgment and a memorandum in support of Motion for Summary Judgment. On August 23, 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.

Previously, on May 2, 2013, the Board issued a Decision, Order, and Direction in a consolidated unfair labor practice and representation proceeding involving Case 26–RC–008635, which is reported at 359 NLRB 1025.² 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, Order, and Direction in the consolidated proceeding involving Case 26–RC–008635, the composition of the Board included two per-

sons 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. On June 27, 2014, the Board issued an order setting aside its Decision, Order, and Direction in the consolidated proceeding involving Case 26–RC–008635, and retained this case on its docket for further action as appropriate.

On November 17, 2014, the Board issued a Decision, Order and Certification in the consolidated unfair labor practice and representation proceeding involving Case 26–RC–008635, which is reported at 361 NLRB 921. There, the Board adopted the administrative law judge's rulings, findings, and conclusions, including the judge's resolution of 10 challenged ballots at issue, found that the tally of ballots issued on May 14, 2013, accurately presents the results of the election in which the majority of valid ballots had been cast for the Union, and, in an abundance of caution, issued a new Certification of Representative.³

On January 20, 2015, the Board issued a supplemental Notice to Show Cause in this proceeding. That notice provided leave to the General Counsel to amend the complaint on or before January 30, 2015, 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 17, 2014 certification of representative issued.

On January 30, 2015, the General Counsel filed an amended complaint alleging that following the issuance of the November 17, 2014 certification of representative, the Union requested that the Respondent bargain collectively with it as the exclusive collective-bargaining representative of the unit and that since about January 13, 2015, the Respondent has failed and refused to do so. On February 13, 2015, the Respondent filed an answer to the amended complaint in which it admitted the factual allegations of the complaint, reiterated many of the arguments made in the consolidated unfair labor practice and representation proceeding, and argued that the complaint should be dismissed because no new or amended charge was filed after the Board issued the November 17, 2014 certification of representative.

¹ As set forth at fn. 1 of the Acting General Counsel's memorandum in support of Motion for Summary Judgment, Region 26 was merged into Region 15 on December 10, 2012. All documents that pertain to this case filed before that date are listed as originating in Region 26 and all documents that pertain to this case filed after that date are listed as originating in Region 15.

² That consolidated proceeding involved Cases 26–CA–024057, 26–CA–024065, 26–CA–024090, and 26–RC–008635.

³ The Respondent filed a petition for review of the Board's unfair labor practice findings, the Union filed a motion to intervene, and the Board filed a cross-petition for enforcement. In an unpublished order filed on May 1, 2015, the United States Court of Appeals for the District of Columbia Circuit denied Respondent's petition for review and granted the Board's cross-petition for enforcement. *Ozburn-Hessey Logistics, LLC v. NLRB*, --- Fed.Appx. ---, 2015 WL 3369876, D.C. Cir., May 01, 2015 (No. 11–1482, 12–1063).

On March 6, 2015, the Respondent filed a response to the supplemental notice to show cause, and on March 12, 2015, the General Counsel filed a reply.

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 recognize and bargain, but contests the validity of the certification on the basis of voter eligibility issues and objections alleged to have affected the results of the election in the representation proceeding. Many of these arguments were litigated in the consolidated unfair labor practice and representation proceeding involving Case 26-RC-008635. To the extent that the Respondent's arguments involve unfair labor practice issues that were resolved in that proceeding, those arguments are rejected. The court's disposition of these issues is final and they are barred from further litigation by the doctrine of *res judicata*.

As to issues not addressed in the prior proceeding, the Respondent argues that the amended complaint is somehow deficient because no new unfair labor practice charge was filed after the Board, in an abundance of caution, issued a new certification of representative on November 17, 2014. This argument is also rejected. The allegations in the amended complaint are part of a continuum of events that begin with the filing of a petition for a representation election in Case 26-RC-008635 and culminate with the Respondent's ongoing refusal to recognize and bargain with the Union for the purpose of testing the Board's certification of representative. These events are sufficiently related to the original charge in this matter to be included in the amended complaint. Indeed, as described above, the Board specifically granted the General Counsel leave to file an amended complaint 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 17, 2014 certification of representative issued.

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 has been a limited liability company with an office and place of business in Memphis, Tennessee (the Respondent's facilities), and has been engaged in providing transportation, warehousing, and logistics services.

In conducting its operations annually, the Respondent performed services valued in excess of \$50,000 in states other than the State of Tennessee, and purchased and received at its Memphis, Tennessee facilities goods valued in excess of \$50,000 directly from points outside the State of Tennessee.

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 July 27, 2011, the Union was certified on November 17, 2014, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All full time custodians, customer service representatives, senior customer service representatives, cycle counters, inventory specialists, maintenance, maintenance techs, material handlers, operators 1, operators 2, operators 3, quality assurance coordinators, returns clerks, and team leads employed by the Employer at its Memphis, Tennessee facilities located at 5510 East Holmes Road, 5540 East Holmes Road, 6265 Hickory Hill Road, 6225 Global Drive, 4221 Pilot Drive, and 5050 East Holmes Road. Excluded: All other employees, including office clerical and professional employees, guards, 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 June 3, 2013, and December 9, 2015, the Union, by letter, requested that the Respondent bargain collectively with it as the exclusive collective-bargaining representative of the unit. Since about June 17, 2013,

⁴ The Respondent's request that the complaint be dismissed with prejudice is therefore denied.

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.⁵

We find that the Respondent's conduct 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 to recognize and bargain with the Union as the exclusive collective-bargaining representative of the employees in the 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.⁶

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.

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

⁵ Although the amended complaint does not refer to the Union's June 3, 2013 written bargaining request or to the Respondent's June 17, 2013 refusal to bargain, those allegations are contained in the original complaint which is attached to the General Counsel's Motion for Summary Judgment as Exh. E. In addition, the Union's June 3, 2013 letter and the Respondent's June 17, 2013 refusal letter are attached to the General Counsel's memorandum in support of the Motion for Summary Judgment as Exhs. O and P, respectively.

⁶ 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.

(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, Ozburn-Hessey Logistics, LLC, Memphis, Tennessee, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize and bargain with United Steel, Paper & Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers 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 concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All full time custodians, customer service representatives, senior customer service representatives, cycle counters, inventory specialists, maintenance, maintenance techs, material handlers, operators 1, operators 2, operators 3, quality assurance coordinators, returns clerks, and team leads employed by the Employer at its Memphis, Tennessee facilities located at 5510 East Holmes Road, 5540 East Holmes Road, 6265 Hickory Hill Road, 6225 Global Drive, 4221 Pilot Drive, and 5050 East Holmes Road. Excluded: all other employees, including office clerical and professional employees, guards, and supervisors as defined in the Act.

(b) Within 14 days after service by the Region, post at its facilities in Memphis, Tennessee, copies of the attached notice marked "Appendix."⁷ Copies of the notice, on forms provided by the Regional Director for Region 15, 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

⁷ 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."

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 June 17, 2013.

(c) Within 21 days after service by the Region, file with the Regional Director for Region 15 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.

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 Steel, Paper & Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers as the exclusive collective-bargaining representative of our 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 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 custodians, customer service representatives, senior customer service representatives, cycle counters, inventory specialists, maintenance, maintenance techs, material handlers, operators 1, operators 2, operators 3, quality assurance coordinators, returns clerks, and team leads employed by us at our Memphis, Tennessee facilities located at 5510 East Holmes Road, 5540 East Holmes Road, 6265 Hickory Hill Road, 6225 Global Drive, 4221 Pilot Drive, and 5050 East Holmes Road. Excluded: all other employees, including office clerical and professional employees, guards, and supervisors as defined in the Act.

OZBURN-HESSEY LOGISTICS, LLC

The Board's decision can be found at www.nlr.gov/case/15-CA-109236 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.

