



UNITED STATES COURT OF APPEALS
FOR THE
DISTRICT OF COLUMBIA CIRCUIT

NCR CORPORATION,

Petitioner

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent

15-1230

PETITION FOR REVIEW

NCR Corporation hereby petitions the court for review of the Decision and Order of the National Labor Relations Board entered on July 13, 2015, in the matter of NCR Corporation and International Brotherhood of Electrical Workers, Local 2222, Case 01-CA-150154, which is reported at 362 NLRB No. 146, a copy of which is attached as Exhibit A.

Date: July 15, 2015.

JACKSON LEWIS P.C.
Attorneys for Petitioner

By: 

Howard M. Bloom
75 Park Plaza, 4th Floor
Boston, MA 02116
(617) 367-0025
bloomh@jacksonlewis.com

ORIGINAL

JUL 16 2015

RECEIVED

UNITED STATES COURT OF APPEALS
FOR THE
DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES COURT OF APPEALS
FOR DISTRICT OF COLUMBIA CIRCUIT
JUL 16 2015
CLERK

NCR CORPORATION,

Petitioner

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent

15-1230

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on July 15, 2015, a true and correct copy of the above and foregoing *Petition for Review* was served by certified, first-class United States mail, postage prepaid, upon the following:

Lorenzo Cabantog
Counsel for the General Counsel
National Labor Relations Board
Region One
Thomas P. O'Neill, Jr. Federal Building
Boston, MA 02222-1072

Linda Dreeben, Esq.
Deputy Associate General Counsel
Appellate and Supreme Court Litigation Branch
Office of General Counsel
National Labor Relations Board
1015 Half Street SE
Washington, D.C. 20570-0001

Jonathan B. Kreisberg
Regional Director
National Labor Relations Board
Region One
Thomas P. O'Neill, Jr. Federal Building
Boston, MA 02222-1072

Myles Calvey
Business Manager
IBEW Local 2222
1137 Washington Street
Dorchester, MA 02124


Howard M. Bloom

ORIGINAL

EXHIBIT A

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.

NCR Corporation and International Brotherhood of Electrical Workers Local 2222. Case 01-CA-150154

July 13, 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 International Brotherhood of Electrical Workers Local 2222 (the Union) on April 15, 2015, the General Counsel issued the complaint on April 24, 2015, alleging that NCR Corporation (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 01-RC-130289. (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 affirmative defenses.

On May 14, 2015, the General Counsel filed a Motion for Summary Judgment and 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 Union's certification on the basis of its objection to the conduct of the mail ballot election.

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

¹ In its response to the Notice to Show Cause, the Respondent urges the Board to rule on its motion to take judicial notice of Board docu-

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.²

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent has been a corporation located in Dayton, Ohio, engaged in the operation of providing technological services to companies located throughout the United States, including locations throughout the New England area.

Annually, the Respondent, in conducting its operations described above, performs services valued in excess of \$50,000 directly to customers located outside the State of Ohio.

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 by mail ballot, in which the ballots were mailed to voters on July 21, 2014, and counted on August 5, 2014, the Union was certified on April 2, 2015, as the exclusive collective-bargaining representative of employees in the following appropriate unit:

All full time and regular part time NCR Services Organization customer engineers and customer engineer specialists employed by the Employer in its 113J Territory (which encompasses Massachusetts and Rhode Island except for that part of Rhode Island encompassed by the Employer's 113H Territory), but excluding all other employees; employees employed in any other Territory who perform work in Massachusetts or Rhode Island; employees in the 613 group; managed services contract employees; office clerical employees;

ments or in the alternative to supplement the record, filed on October 14, 2014, during the representation proceeding. While we grant the Respondent's motion, we note that the documents it cites are already part of the record in Case 01-RC-130289, having been appended to the Respondent's brief in support of its exceptions to the Regional Director's Report on Objections, and were duly considered by the Board in that proceeding.

² The Respondent's request that the complaint be dismissed is therefore denied.

confidential employees; managerial employees; and 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

By email dated April 6, 2015, the Union requested that the Respondent bargain collectively with it as the exclusive collective-bargaining representative of the unit. Since about April 9, 2015, the Respondent, in writing, has 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 April 9, 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 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 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), 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, NCR Corporation, Dayton, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize and bargain with International Brotherhood of Electrical Workers Local 2222 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 full time and regular part time NCR Services Organization customer engineers and customer engineer specialists employed by the Employer in its 113J Territory (which encompasses Massachusetts and Rhode Island except for that part of Rhode Island encompassed by the Employer's 113H Territory), but excluding all other employees; employees employed in any other Territory who perform work in Massachusetts or Rhode Island; employees in the 613 group; managed services contract employees; office clerical employees; confidential employees; managerial employees; and guards and supervisors as defined in the Act.

(b) Within 14 days after service by the Region, post at its facilities in its 113J Territory, copies of the attached notice marked "Appendix."³ 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. If 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 April 9, 2015.

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."

NCR CORP.

3

(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. July 13, 2015

Mark Gaston Pearce, Chairman

Kent Y. Hirozawa, Member

Lauren McFerran, 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 Electrical Workers Local 2222 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 our employees in the following bargaining unit:

All full time and regular part time NCR Services Organization customer engineers and customer engineer specialists employed by us in our 113J Territory (which encompasses Massachusetts and Rhode Island except for that part of Rhode Island encompassed by our 113H Territory), but excluding all other employees; employees employed in any other Territory who perform work in Massachusetts or Rhode Island; employees in the 613 group; managed services contract employees; office clerical employees; confidential employees; managerial employees; and guards and supervisors as defined in the Act.

NCR CORPORATION

The Board's decision can be found at www.nlr.gov/case/01-CA-150154 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

