UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

DELEK REFINING, LTD.	)	
	)	
Petitioner,	)	
	)	
v.	)	CASE NO. _____
	)	
NATIONAL LABOR RELATIONS BOARD,	)	
	)	
Respondent.	)	
	)	

PETITION FOR REVIEW OF DECISION AND ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Delek Refining, Ltd. ("Delek" or "Petitioner") hereby petitions the Court for review of the entire Decision and Order of the National Labor Relations Board ("Respondent") issued and entered on November 13, 2015 in Case 16-CA-158842. A copy of the referenced Decision and Order, reported at 363 NLRB No. 41, is attached hereto as Exhibit A. Delek respectfully urges the Court to vacate the Decision and Order in its entirety, and otherwise deny its enforcement in whole or in part.

This Petition for Review, which also includes all phases of the underlying representation proceeding and resulting certification of the Union as the bargaining representative, is brought pursuant to Federal Rule of Appellate Procedure 15. Venue is proper before this Court, as contemplated by 29 U.S.C. § 160(f), because the alleged unfair labor practice(s) and underlying certification proceedings all occurred exclusively in Texas, where Delek transacts business.

Dated: November 16, 2015

Respectfully submitted,

CHAFFE McCALL, L.L.P.

/s/ H. Michael Bush
H. Michael Bush (La. 23430)
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Attorneys for Petitioner, Delek Refining, Ltd.

CERTIFICATE OF INTERESTED PERSONS

In compliance with Federal Rule of Appellate Procedure 26.1, and Local Rule 26.1.1, the undersigned counsel of record certifies that the following list of persons and entities as described in the fourth sentence of Local Rule 28.2.1 have an interest in the outcome of this case. These representations are made so that the Judges of this Honorable Court may evaluate whether recusal is appropriate in this cause:

1. Delek Refining, Ltd., Petitioner;
2. H. Michael Bush, and the law firm of Chaffe McCall, L.L.P., attorneys for Petitioner;
3. The National Labor Relations Board, Respondent;
4. Martha Kinard, Regional Director, National Labor Relations Board, Region 16;
5. Jonathan M. Elifson, Esquire, Counsel for the General Counsel, National Labor Relations Board, attorneys for Respondent;
6. United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO;
7. Delek Refining, Inc.

Dated: November 16, 2015

Respectfully submitted,

CHAFFE McCALL, L.L.P.

/s/ H. Michael Bush
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Attorneys for Petitioner, Delek Refining, Ltd.

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing *Petition for Review of Decision and Order of the National Labor Relations Board* with the United States Court of Appeals for the Fifth Circuit, utilizing the Court's ECF system, resulting in timely service of same. Service by electronic mail was also made, on the same date as filing, as follows:

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Dated: November 16, 2015

/s/ H. Michael Bush
H. Michael Bush

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.

Delek Refining, LTD. *and* United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL–CIO. Case 16–CA–158842

November 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 on August 27, 2015, by United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL–CIO (the Union), the General Counsel issued the complaint on August 31, 2015, alleging that Delek Refining, LTD (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 16–RC–149865. (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 September 15, 2015, the General Counsel filed a Motion for Summary Judgment. On September 17, 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.

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 certification on the basis of its contention, raised and rejected in the underlying representation proceeding, that the storeroom attendants do not share a community of interest with the unit employees currently represented by the Union and, therefore, that they should not be included in the bargaining unit.

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.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent has been a Texas limited partnership with an office and place of business in Tyler, Texas (the facility), and has been engaged in the business of refining petroleum.[1]

In conducting its business operations during the 12-month period ending July 31, 2015, the Respondent purchased and received at its Tyler, Texas facility goods valued in excess of $50,000 directly from points outside the State of Texas.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

We further find 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 June 12, 2015 self-determination election, the Board issued a certification of representative on June 22, 2015, certifying that the Union may bargain for the employees in the voting group described below as a part of the existing unit of maintenance, production, operating, and hourly safety employees[2] it currently represents:

Included: All storeroom attendants.

Excluded: All supervisory employees as defined in the Act, technical, clerical, safety, plant protection and se-

[1] The complaint alleges that the Respondent is a Texas corporation. In its amended answer, the Respondent denies this allegation and states that it is a Texas limited partnership. We have adopted the Respondent's description of its business. The disagreement between the complaint allegation and the Respondent's amended answer as to the description of the Respondent's business is not material to this proceeding and does not present an issue warranting a hearing.

[2] This description of the existing unit is included in the complaint, the amended answer, and the parties' current collective-bargaining agreement. We note that the certification of representative in Case 16–RC–149865 states that the existing unit is comprised of maintenance, production, and lab employees. However, there is no assertion in this proceeding that the description of the existing unit in the complaint and amended answer is incorrect.

curity, marketing terminal, loading rack and its employees and professional employees.

At all material times since June 22, 2015, the Union has been and continues to be the exclusive collective-bargaining representative of the unit, including the voting group of storeroom attendants, under Section 9(a) of the Act.

B. Refusal to Bargain

On August 7, 2015, the Union requested that the Respondent recognize and bargain with it as the exclusive collective-bargaining representative of the bargaining unit employees inclusive of the voting group of storeroom attendants.

Since August 11, 2015, the Respondent has failed and refused to recognize and bargain with the Union as the exclusive collective-bargaining representative of the bargaining unit employees inclusive of the voting group of storeroom attendants.

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 since August 11, 2015, to recognize and bargain with the Union as the exclusive collective-bargaining representative of the unit employees inclusive of the storeroom attendants, 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.

ORDER

The National Labor Relations Board orders that the Respondent, Delek Refining, LTD., Tyler, Texas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize and bargain with United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL–CIO 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 following group of employees as part of the recognized unit of maintenance, production, operating, and hourly safety employees on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

Included: All storeroom attendants.

Excluded: All supervisory employees as defined in the Act, technical, clerical, safety, plant protection and security, marketing terminal, loading rack and its employees and professional employees.

(b) Within 14 days after service by the Region, post at its facility in Tyler, Texas, copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 16, 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 August 11, 2015.

(c) Within 21 days after service by the Region, file with the Regional Director for Region 16 a sworn certification of a responsible official on a form provided by the

[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."

Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. November 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 the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL–CIO 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 as the exclusive collective-bargaining representative of the following group of employees as part of the recognized unit of maintenance, production, operating, and hourly safety employees, and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the following bargaining unit:

Included: All storeroom attendants.

Excluded: All supervisory employees as defined in the Act, technical, clerical, safety, plant protection and security, marketing terminal, loading rack and its employees and professional employees.

DELEK REFINING, LTD.

The Board's decision can be found at www.nlrb.gov/case/16-CA-158842 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.