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FOR THE DISTRICT OF COLUMBIA CIRCUIT

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FOR DISTRICT OF COLUMBIA CIRCUIT
FILED FEB 26 2016
CLERK

DURHAM SCHOOL)
SERVICES, LP)

Petitioner)

v.)

NATIONAL LABOR)
RELATIONS BOARD,)

Respondent.)

PETITION FOR REVIEW

16-1074

Durham School Services, LP, by its counsel hereby, pursuant to 29 U.S.C. § 160 and Fed. R. App. P. 15(a), petitions the United States Court of Appeals for the District of Columbia Circuit for review of the Decision and Order of the National Labor Relations Board in the matter of Durham School Services, LP, NLRB Case No. 32-CA-165556, entered on February 19, 2016. A copy of the Decision and Order is attached as Exhibit 1. Pursuant to Fed. R. App. P. 26.1, a corporate disclosure statement is attached as Exhibit 2.

Respectfully submitted,

By: 

BRIAN M. STOLZENBACH
AMANDA A. SONNEBORN (ADMISSION
PENDING)

SEYFARTH SHAW LLP
131 South Dearborn Street, Suite 2400
Chicago, IL 60603
(312) 460-5000- Telephone
(312) 460-7000- Facsimile
bstolzenbach@seyfarth.com
asonneborn@seyfarth.com

Exhibit 1

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.

Durham School Services, L.P. and Teamsters Local 853. Case 32–CA–165556

February 19, 2016

DECISION AND ORDER

BY MEMBERS MISCIMARRA, 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 Teamsters Local 853 (the Union), the General Counsel issued the complaint on December 21, 2015, alleging that Durham School Services, L.P. (the Respondent) has violated Section 8(a)(5) and (1) of the Act by failing and refusing to recognize and bargain with the Union following the Union's certification in Case 32–RC–150090. (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(d). *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 January 11, 2016, the General Counsel filed a Motion for Summary Judgment. On January 13, 2016, 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 motion in opposition to the motion for summary judgment.

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 based on its objections to the election in the representation proceeding, which alleged that the Union and its agents or representatives engaged in objectionable conduct and that the imposition and implementation of the Board's revised representation case procedures, 79 Fed. Reg. 74308 (Dec. 15, 2014), violated the Respondent's procedural due process rights and otherwise prejudiced the Respondent and frustrated employees' Section 7 rights.¹

¹ In denying the Employer's request for review of the Regional Director's Decision and Certification of Representative on the basis that it raised no substantial issues warranting review, the Board stated that it agreed with the Regional Director that the Employer untimely raised its argument challenging the validity of the Board's revised representation

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 or 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.²

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a Delaware corporation with offices and places of business in Hayward, California, and Livermore, California (the facilities), has been engaged in the business of school bus transportation services.

In conducting its operations during the 12-month period ending November 30, 2015, the Respondent derived gross revenues in excess of \$250,000 and purchased and received at its facilities products, goods, and materials valued in excess of \$5000 directly from points outside the State of California.

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 May 8, 2015, the Union was certified on July 29, 2015, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

case procedures. *Durham School Services, L.P.*, Case 32–RC–150090, unpublished Order issued November 4, 2015, at 1 fn. 1.

Member Miscimarra expressed his disagreement with these procedures in his dissent to the Final Rule. 79 Fed. Reg. 74308, at 77430–74460 (Dec. 15, 2014) (dissenting views of Members Miscimarra and Johnson). He would have granted review in the underlying representation proceeding on the basis that it raised substantial questions regarding the effect and application of the Board's Final Rule. See *Pulau Corp.*, 363 NLRB No. 8 (2015) (Member Miscimarra, dissenting). While Member Miscimarra remains of that view, he agrees that the Respondent has not presented any new matters that are properly litigable in this unfair labor practice case. See *Pittsburgh Plate Glass Co. v. NLRB*, supra. In light of this, Member Miscimarra agrees with the decision to grant the Motion for Summary Judgment.

² The Respondent's motion in opposition to the Motion for Summary Judgment is therefore denied.

All full-time and regular part-time routers, payroll department employees, administrative employees, and dispatchers employed by the Employer at its facilities located at 27577 Industrial Boulevard, Suite A, Hayward, California and 72 Rickenbacker Circle, Suite A, Livermore, California; excluding employees represented by a labor organization, professional employees, confidential employees, managers, 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

About November 5, 2015, the Union, by letter, requested that the Respondent recognize and bargain with the Union as the exclusive collective-bargaining representative of the unit with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

About November 24, 2015, the Respondent, by letter, declined to recognize and bargain with the Union as the exclusive collective-bargaining representative of the unit and since that time 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 November 24, 2015, to recognize and bargain with the Union as the exclusive collective-bargaining representative of the 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, Durham School Services, L.P., Hayward and Livermore, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize and bargain with Teamsters Local 853 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 routers, payroll department employees, administrative employees, and dispatchers employed by the Employer at its facilities located at 27577 Industrial Boulevard, Suite A, Hayward, California and 72 Rickenbacker Circle, Suite A, Livermore, California; excluding employees represented by a labor organization, professional employees, confidential employees, managers, guards, and supervisors as defined by the Act.

(b) Within 14 days after service by the Region, post at its facilities in Hayward and Livermore, California, copies of the attached notice marked "Appendix."³ Copies of the notice, on forms provided by the Regional Director for Region 32, 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

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."

DURHAM SCHOOL SERVICE, L.P.

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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 November 24, 2015.

(c) Within 21 days after service by the Region, file with the Regional Director for Region 32 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. February 19, 2016

Philip A. Miscimarra,	Member
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 Teamsters Local 853 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 routers, payroll department employees, administrative employees, and dispatchers employed by us at our facilities located at 27577 Industrial Boulevard, Suite A, Hayward, California and 72 Rickenbacker Circle, Suite A, Livermore, California; excluding employees represented by a labor organization, professional employees, confidential employees, managers, guards, and supervisors as defined by the Act.

DURHAM SCHOOL SERVICES, L.P.

The Board's decision can be found at www.nlr.gov/case/32-CA-165556 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.



Exhibit 2

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and Circuit Rule 26.1, Durham School Services, L.P., certifies that it is a wholly-owned indirect subsidiary of National Express Corporation (NEC), a domestic corporation, and that NEC is a wholly-owned indirect subsidiary of National Express Group plc (NEG), a foreign corporation headquartered in the United Kingdom and publicly traded on the London Stock Exchange

**CERTIFICATE OF SERVICE
OF PETITION FOR REVIEW**

Pursuant to Federal Rule of Appellate Procedure Rule 15(c)(1), the undersigned attorney certifies that a copy of the attached Petition for Review filed was served by first class mail, with postage prepaid, this 26th day of February, 2016, on the individuals whose names appear below:

Deputy Associate General Counsel
Appellate Court Branch
National Labor Relations Board
1099 14th Street, N.W., Room 11600
Washington D.C. 0570-0001

Cynthia Rence
Acting Regional Director
National Labor Relations Board Region 32
1301 Clay Street, Suite 300N
Oakland, CA 94612-5224

Valerie Hardy-Mahoney
Counsel for the General Counsel
National Labor Relations Board
Region 32
Oakland Federal Building
1301 Clay Street, Suite 300N
Oakland, CA 94612

Delisai Nisperos
Beeson, Tayer & Bodine
485 Ninth Street, 2nd Floor
Oakland, CA 94607

A handwritten signature in black ink, appearing to read "Brian M. Stolzenbach", written in a cursive style.

Brian M. Stolzenbach