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Capay, Inc. d/b/a Farm Fresh to You and Bakery, Confectionery, Tobacco Workers and Grain Millers International Union, Local 85. Case 20–CA–166233

March 4, 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 on December 16, 2015, by Bakery, Confectionery, Tobacco Workers and Grain Millers International Union, Local 85 (the Union), the General Counsel issued the complaint on December 22, 2015, alleging that Capay, Inc. d/b/a Farm Fresh to You (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 20–RC–153475. (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 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 objections in the underlying representation proceeding.¹

¹ In denying the Respondent’s request for review of the Regional Director’s Decision Regarding Objections to Election and Certification of Representative, the Board found that the Respondent did not timely raise its allegations that the Union engaged in electioneering and surveillance, but noted that in any event, the Respondent’s arguments concerning those allegations lacked merit. Member Miscimarra would have found that the Respondent sufficiently and timely raised its electioneering and surveillance arguments in its objections, but agreed that the Respondent failed to raise substantial and material issues

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.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent has been a California corporation with an office and place of business in West Sacramento, California (the facility) and has been engaged in the growing, packaging, shipping and retail sale of produce.

During the 12-month period preceding November 30, 2015, the Respondent, in conducting its operations described above, received gross revenues at its facility in excess of \$500,000 and purchased and received goods at its facility valued in excess of \$5,000 from sources directly 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 July 1, 2015, the Union was certified on July 30, 2015, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

Included: All full-time and regular part-time warehouse employees employed by the Employer at its facility located at 3880 Seaport Blvd., West Sacramento, California, including packers, lead packers, prepping, and lead prepping.

Excluded: Maintenance, shippers, clerical, supervisors, and guards 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.

regarding either argument. *Capay, Inc. d/b/a Farm Fresh to You*, Case 20–RC–153475, unpublished Order issued October 28, 2015, at 1 fn.1.

B. Refusal to Bargain

In September 2015, the Union verbally requested that the Respondent recognize and bargain collectively with the Union as the exclusive collective-bargaining representative of the unit.²

Since about November 10, 2015, 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 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 about November 10, 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, Capay, Inc. d/b/a Farm Fresh to You, West Sacramento, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

² The Respondent avers in its answer to the complaint that the Union originally demanded to bargain in writing on July 8, 2015, and again demanded to bargain in writing on December 15, 2015. In light of the Respondent's admission of the complaint allegations that the Union requested bargaining and it refused that request, we find that any dispute regarding the specific date of the request fails to raise a material issue of fact warranting a hearing.

(a) Failing and refusing to recognize and bargain with Bakery, Confectionery, Tobacco Workers and Grain Millers International Union, Local 85 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:

Included: All full-time and regular part-time warehouse employees employed by the Employer at its facility located at 3880 Seaport Blvd., West Sacramento, California, including packers, lead packers, prepping, and lead prepping.

Excluded: Maintenance, shippers, clerical, supervisors, and guards as defined by the Act.

(b) Within 14 days after service by the Region, post at its facility in West Sacramento, California, copies of the attached notice marked "Appendix."³ Copies of the notice, on forms provided by the Regional Director for Region 20, 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 November 10, 2015.

(c) Within 21 days after service by the Region, file with the Regional Director for Region 20 a sworn certifi-

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."

cation 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. March 4, 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 Bakery, Confectionery, Tobacco Workers and Grain Millers International Union, Local 85 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:

Included: All full-time and regular part-time warehouse employees employed by us at our facility located at 3880 Seaport Blvd., West Sacramento, California, including packers, lead packers, prepping, and lead prepping.

Excluded: Maintenance, shippers, clerical, supervisors, and guards as defined by the Act.

CAPAY, INC. D/B/A FARM FRESH TO YOU

The Board's decision can be found at www.nlr.gov/case/20-CA-166233 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.

