

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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RECEIVED UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CVS ALBANY, LLC d/b/a CVS,)
)
Petitioner,)
v.)
)
NATIONAL LABOR RELATIONS)
BOARD,)
)
Respondent.)
_____)

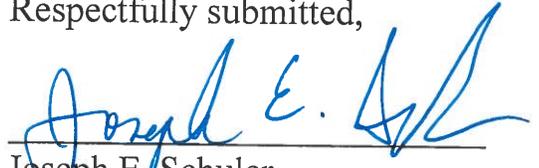
Case No. 16-1332

ORIGINAL

PETITION FOR REVIEW

CVS Albany, LLC d/b/a CVS, hereby petitions the court for review of the Decision and Order of the National Labor Relations Board entered on September 15, 2016, in the matter of CVS Albany, LLC d/b/a CVS and Local 338 Retail, Wholesale and Department Store Union (RWDSU), United Food and Commercial Workers International Union (UFCW), Case 29-CA-179095, which is reported at 364 NLRB No. 122.

Respectfully submitted,



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Counsel for Petitioner

Dated: September 22, 2016

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.

CVS Albany, LLC d/b/a CVS and Local 338 Retail, Wholesale and Department Store Union (RWDSU), United Food and Commercial Workers International Union (UFCW). Case 29–CA–179095

September 15, 2016

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA
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 June 27, 2016, by Local 338, Retail, Wholesale and Department Store Union (RWDSU), United Food and Commercial Workers International Union (UFCW) (the Union), the General Counsel issued the complaint on July 8, 2016, alleging that CVS Albany, LLC d/b/a CVS (the Respondent) has violated Section 8(a)(5) and (1) of the Act by refusing the Union's request to recognize and bargain and to furnish relevant and necessary information following the Union's certification in Case 29–RC–155927. (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 in the complaint, and asserting affirmative defenses.

On July 28, 2016, the General Counsel filed a Motion for Summary Judgment. On August 3, 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.

Ruling on Motion for Summary Judgment

The Respondent admits its refusal to bargain and to provide information but contests the validity of the certification of representative based on the Board's disposition of three challenged ballots in the underlying representation proceeding.¹

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

¹ 364 NLRB No. 21 (2016).

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).²

We also find that there are no factual issues warranting a request for a hearing with respect to the Union's request for information. The complaint alleges, and the Respondent admits, that about June 23, 2016, the Union requested in writing that the Respondent furnish it with the following information: (1) the address, phone number and email address for all current unit employees; (2) work schedules for all unit employees; (3) rate of pay for all unit employees; (4) information regarding benefits received by unit employees, including paid and unpaid time off, insurance, pension, and 401(k); and (5) a copy of all company policies and/or manuals relating to the terms and conditions of employment for unit employees.

It is well established that the foregoing type of information concerning the terms and conditions of employment of unit employees is presumptively relevant for purposes of collective bargaining and must be furnished on request. See, e.g. *Metro Health Foundation, Inc.*, 338 NLRB 802, 803 (2003). The Respondent has not asserted any basis for rebutting the presumptive relevance of the information. Rather, the Respondent denies that the Union was properly certified, and on this basis denies that the Union is entitled to the requested information. We find, therefore, that the Respondent unlawfully refused to furnish the information sought by the Union.

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 domestic corporation with its principal office located at One CVS Drive, Woonsocket, Rhode Island, and with a retail store located at 1070 Flatbush Avenue, Brooklyn, New York, and has been engaged in the retail sale of consumer convenience products, pharmaceuticals, and related goods.

During the year prior to the issuance of the complaint, which period is representative of its operations generally, through the course and conduct of its business operations, the Respondent derived gross revenues in excess of

² Member Miscimarra agrees that summary judgment is appropriate in this unfair labor practice case because the Respondent has not presented any new matters that were not previously resolved in the prior representation case (*supra* fn. 1). Member Miscimarra did not participate in the prior representation case, and does not reach or pass on the merits of the Board's decision in that case.

\$500,000 and purchased and received goods and materials valued in excess of \$5000 directly from points located outside the State of New York.

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 August 7, 2015, the Union was certified on June 20, 2016, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

INCLUDED: All regular full-time and part-time retail employees, including Clerk/Cashiers, Shift Supervisor Bs and Photo Lab Supervisors.

EXCLUDED: All floaters, seasonal employees and pharmacy employees, including pharmacists, pharmacy interns, inventory specialists, and pharmacy technicians, and guards, managers, 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*

About June 23, 2016, the Union, by letter, requested that the Respondent recognize it as the exclusive collective-bargaining representative of the unit and bargain collectively with the Union as the exclusive collective-bargaining representative of the unit. Since about June 24, 2016, the Respondent has failed and refused to recognize and bargain with the Union.

About June 23, 2016, the Union requested in writing that the Respondent furnish it with the information set forth above that is necessary for, and relevant to, the Union's performance of its duties as the exclusive collective-bargaining representative of the unit. Since about June 24, 2016, the Respondent has failed and refused to furnish the Union with the requested information.

We find that these failures and refusals constitute 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 June 24, 2016, to recognize and bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit and to furnish the Union with requested information regarding the terms and conditions of em-

ployment of unit employees, 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. We shall also order the Respondent to furnish the Union with the information it requested.

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), enf. 350 F.2d 57 (10th Cir. 1965); *Lamar Hotel*, 140 NLRB 226, 229 (1962), enf. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964).

ORDER

The National Labor Relations Board orders that the Respondent, CVS Albany, LLC d/b/a CVS, Brooklyn, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize and bargain with Local 338, Retail, Wholesale and Department Store Union (RWDSU), United Food and Commercial Workers International Union (UFCW) as the exclusive collective-bargaining representative of the employees in the bargaining unit.

(b) Failing and refusing to furnish the Union with requested information that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of the Respondent's unit employees.

(c) 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:

CVS ALBANY, LLC D/B/A CVS

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INCLUDED: All regular full-time and part-time retail employees, including Clerk/Cashiers, Shift Supervisor Bs and Photo Lab Supervisors.

EXCLUDED: All floaters, seasonal employees and pharmacy employees, including pharmacists, pharmacy interns, inventory specialists, and pharmacy technicians, and guards, managers and supervisors as defined in the Act.

(b) Furnish the Union in a timely manner the information requested by the Union on June 23, 2016.

(c) Within 14 days after service by the Region, post at its facility in Brooklyn, New York, copies of the attached notice marked "Appendix."³ Copies of the notice, on forms provided by the Regional Director for Region 29, 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 June 24, 2016.

(d) Within 21 days after service by the Region, file with the Regional Director for Region 29 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. September 15, 2016

Mark Gaston Pearce, Chairman

Philip A. Miscimarra, Member

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."

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 Local 338, Retail, Wholesale and Department Store Union (RWDSU), United Food and Commercial Workers International Union (UFCW) as the exclusive collective-bargaining representative of our employees in the bargaining unit.

WE WILL NOT fail and refuse to furnish the Union with requested information that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of our unit employees.

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 appropriate bargaining unit:

INCLUDED: All regular full-time and part-time retail employees, including Clerk/Cashiers, Shift Supervisor Bs and Photo Lab Supervisors.

EXCLUDED: All floaters, seasonal employees and pharmacy employees, including pharmacists, pharmacy interns, inventory specialists, and pharmacy technicians, and guards, managers and supervisors as defined in the Act.

WE WILL furnish the Union in a timely manner the information requested by the Union on June 23, 2016.

CVS ALBANY, LLC D/B/A CVS

The Board's decision can be found at www.nlr.gov/case/29-CA-179095 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.



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 Respondent.)
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Case No. 16-1332

ORIGINAL

**NOTICE OF SERVICE OF PETITION FOR REVIEW
AND LIST OF THOSE SERVED**

Pursuant to Rule 15(c) of the Federal Rules of Appellate Procedure, Petitioner CVS Albany, LLC d/b/a/ CVS, hereby certifies that on September 22, 2016, in conjunction with the filing of its Petition for Review, it caused copies of the Petition and this Notice to be served by mail, U.S. postage prepaid, on each party admitted to participate in the agency proceeding, as follows:

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Respectfully submitted,

DATED: September 22, 2016



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