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Dillon Companies, Inc. d/b/a King Soopers and United Food and Commercial Workers Local 7. Case 27–CA–237098

May 23, 2019

DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS MCFERRAN
AND KAPLAN

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 March 4, 2019, by United Food and Commercial Workers Local 7 (the Union), the General Counsel issued the complaint on March 18, 2019, alleging that Dillon Companies, Inc. d/b/a King Soopers (the Respondent) has violated Section 8(a)(5) and (1) of the National Labor Relations Act by refusing the Union’s request to bargain with it following the Union’s certification in Case 27–RC–215705. (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 April 8, 2019, the General Counsel filed a motion for summary judgment, and on April 11, 2019, the Board issued a Notice to Show Cause why the motion should not be granted. The Respondent filed an opposition to the General Counsel’s motion for summary judgment and a response to the Notice to Show Cause. The General Counsel filed a reply to the Respondent’s opposition to the motion for summary judgment and a reply to the Respondent’s opposition to the Notice to Show Cause.

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 denies its refusal to bargain and contests the validity of the certification on the basis of its contention, raised and rejected in the underlying representation proceeding, that the certification is inappropriate because it would require the Respondent to bargain concerning the delicatessen employees at Store No. 89 in a unit of

meat department employees at Store Nos. 86, 89, and 118, located in Broomfield, Colorado.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 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 hearing. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941).

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent has been a Kansas corporation with facilities and places of business in Broomfield, Colorado (the Respondent’s Broomfield facilities), and has been engaged in the business of operating retail grocery stores.

During the 12 months preceding the complaint, a representative time period, the Respondent, in conducting its operations, derived gross revenues in excess of \$500,000 and purchased and received at its Broomfield facilities goods valued in excess of \$50,000² directly from points outside the State of Colorado.

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

At all material times, Fred Woodward held the position of the Respondent’s Total Rewards/Associate Relations Manager and has been an agent of the Respondent within the meaning of Section 2(13) of the Act.

The following employees of the Respondent (the unit) constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act, as part of an existing bargaining unit of all meat cutters, apprentices, wrappers, butcher block sales persons, and clean-up personnel in the meat market or markets owned or operated by the Respondent in the metropolitan area of Broomfield, Colorado (Store Nos. 86, 89, and 118):

would comprise a separate unit. This issue was litigated in the underlying representation proceeding.

² Although the complaint stated this amount as \$5000, the parties stipulated to the \$50,000 figure in the representation proceeding.

¹ The Respondent argues that the parties had a decades-old agreement that when a store opened in particular metropolitan areas, including Broomfield, the meat department employees would be placed in the multistore unit of meat employees and the delicatessen and retail employees

All full-time and regular part-time delicatessen department employees employed by the Employer at Store No. 89, located in Broomfield, Colorado; excluding all other employees, store manager, assistant store managers, office clerical employees, professional employees, guards, and supervisors as defined in the Act.

Following a self-determination election held on May 11, 2018, the Regional Director on August 2, 2018, certified the Union as the exclusive collective-bargaining representative of the unit as part of the above-referenced existing unit of meat cutters, apprentices, wrappers, butcher block sales persons, and clean-up personnel in the meat market or markets owned or operated by the Respondent at Store Nos. 86, 89, and 118.³

At all times since August 2, 2018, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the unit as part of the existing unit set forth above.

B. Refusal to Bargain

About November 27, 2018, the Union, by letter, requested that the Respondent recognize it and bargain with it as the exclusive collective-bargaining representative of the unit as part of the existing bargaining unit set forth above.

About December 6, 2018, by letter from Total Rewards/Associate Relations Manager Fred Woodward, the Respondent refused to recognize and bargain with the Union as the exclusive collective-bargaining representative of the unit.

CONCLUSION OF LAW

By the conduct described above, the Respondent has been failing and refusing to bargain collectively and in good faith with the exclusive collective-bargaining representative of its employees in violation of Section 8(a)(5) and (1) of the Act. The above unfair labor practices of the Respondent affect commerce within the meaning of 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.⁴

ORDER

The National Labor Relations Board orders that the Respondent, Dillon Companies, Inc. d/b/a King Soopers, Broomfield, Colorado, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize and bargain with United Food and Commercial Workers Local 7 (the Union) as the exclusive collective-bargaining representative of the delicatessen employees at Store No. 89 as part of the existing 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 employees in the following appropriate unit, as part of the existing unit of all meat cutters, apprentices, wrappers, butcher block sales persons, and clean-up personnel in the meat market or markets owned or operated by the Respondent in the metropolitan area of Broomfield, Colorado (Store Nos. 86, 89, and 118):

All full-time and regular part-time delicatessen department employees employed by the Respondent at Store No. 89, located in Broomfield, Colorado; excluding all other employees, store manager, assistant store managers, office clerical employees, professional employees, guards, and supervisors as defined in the Act.

(b) Within 14 days after service by the Region, post at its facility in Broomfield, Colorado, copies of the attached notice marked "Appendix."⁵ Copies of the notice, on forms provided by the Regional Director for Region 27, 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

³ By unpublished Orders dated August 21 and November 20, 2018, respectively, the Board denied the Respondent's requests for review of the Regional Director's Decision and Direction of Election and her Decision and Certification of Results.

⁴ The General Counsel requests that the Board extend the certification year pursuant to the Board's decision in *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962). Such a remedy, however, is inappropriate where, as here, the underlying representation proceeding involved a self-determination

election. See *Winkie Mfg. Co.*, 338 NLRB 787, 788 fn. 3 (2003), aff'd, 348 F.3d 254 (7th Cir. 2003); *White Cap, Inc.*, 323 NLRB 477, 478 fn. 3 (1997) (citing cases).

⁵ 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."

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 December 6, 2019.

(c) Within 21 days after service by the Region, file with the Regional Director for Region 27 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. May 23, 2019

John F. Ring, Chairman

Lauren McFerran, Member

Marvin E. Kaplan, 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 United Food and Commercial Workers Local 7 (the Union) as the exclusive collective-bargaining representative of our delicatessen employees at Store No. 89.

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 unit, as part of the existing unit of all meat cutters, apprentices, wrappers, butcher block sales persons, and clean-up personnel in the meat market or markets owned or operated by the Respondent in the metropolitan area of Broomfield, Colorado (Store Nos. 86, 89, and 118):

All full-time and regular part-time delicatessen department employees employed by us at Store No. 89, located in Broomfield, Colorado; excluding all other employees, store manager, assistant store managers, office clerical employees, professional employees, guards, and supervisors as defined in the Act.

DILLON COMPANIES, INC. D/B/A KING SOOPERS

The Board's decision can be found at www.nlr.gov/case/27-CA-237098 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.

