Transdev Services, Inc. *and* Amalgamated Transit Union Local 689, associated with Amalgamated Transit Union, AFL-CIO. Case 05–CA–195364

June 19, 2019

DECISION AND ORDER

BY MEMBERS MCFERRAN, KAPLAN, AND EMANUEL

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 21, 2017,[1] by Amalgamated Transit Union Local 689, associated with Amalgamated Transit Union, AFL–CIO (the Union), the General Counsel issued the complaint on June 23, alleging that Transdev Services, Inc. (the Respondent) has violated Section 8(a)(5) and (1) of the National Labor Relations Act by failing and refusing to recognize and bargain with the Union following the Union's certification in Case 05–RC–137335.[2] (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 and an amended answer admitting in part and denying in part the allegations of the complaint and asserting affirmative defenses.

On July 10, the General Counsel filed a Motion for Summary Judgment. On July 13, 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.

On the entire record in this case, the National Labor Relations Board makes the following

Ruling on Motion for Summary Judgment

The Respondent denies that it has failed and refused to bargain with the Union and contests the validity of the Union's certification of representative on the basis of its contentions, raised and rejected in the underlying representation proceeding, that the Board improperly included supervisory positions in the unit and therefore that the unit is inappropriate.[3] Specifically, in denying complaint paragraph 5, which alleges the appropriateness of the unit and the Union's status as the exclusive collective-bargaining representative, the Respondent "denies that the Board properly certified the Charging Party as the exclusive collective-bargaining representative of the Unit." In addition, the Respondent denies the allegations in complaint paragraph 6(d) that since about January 23, it has failed and refused to bargain with the Union "on the grounds that Paragraph 6(d) asserts that the Respondent had an obligation to bargain with the Charging Party." Similarly, the Respondent's affirmative defenses and its response to the Notice to Show Cause reiterate its position that the unit is inappropriate.

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). Thus, we grant the General Counsel's motion with respect to all representation issues.[4]

[1] All dates are 2017 unless otherwise indicated.

[2] After the Board issued its Decision on Review in *Veolia Transportation Services, Inc.*, 363 NLRB No. 188 (2016), the Employer notified the Regional Office that its legal name had changed to Transdev Services, Inc., and the Regional Director issued a Supplemental Decision and Certification of Representative reflecting the change. Members Kaplan and Emanuel did not participate in the representation proceeding.

[3] In its amended answer to the complaint, the Respondent also states that it lacks sufficient knowledge to admit or deny that the Union is a labor organization under Sec. 2(5) of the Act and therefore denies the allegation. In the underlying representation proceeding, however, the Respondent stipulated that the Union is a labor organization within the meaning of Sec. 2(5). Therefore, we find that the Respondent's denial does not raise an issue warranting a hearing in this proceeding. *American Service & Supplies*, 340 NLRB 239, 239 fn. 2 (2003).

The Respondent asserts as affirmative defenses, inter alia, that the complaint fails to state a claim upon which relief can be granted; that the complaint lacks specificity and therefore the Respondent has been denied due process; and that its alleged conduct is permissible under Sec. 8(a)(1), (2), (3), (5), and 8(c). The Respondent has not offered any explanation or evidence to support these bare assertions. Thus, we find that these affirmative defenses do not preclude summary judgment in this proceeding. See, e.g., *George Washington University*, 346 NLRB 155, 155 fn. 2 (2005), enfd. 2006 WL 4539237 (D.C. Cir. 2006); *Circus Circus Hotel*, 316 NLRB 1235, 1235 fn. 1 (1995).

[4] In support of its argument that genuine issues of material fact exist warranting a hearing, the Respondent relies on *Garlock Equipment Co. v. NLRB*, 709 F.2d 722 (D.C. Cir. 1983). There, the court held that the Board need not conduct a hearing before amending a certification to reflect the formal affiliation of the bargaining representative with another union, but that the Board may not then summarily dispose of a subsequent refusal-to-bargain complaint without resolving factual issues raised by the respondent concerning continuity of representation. However, the same court has found *Garlock* distinguishable from refusal-to-bargain cases—as here—in which the respondent's arguments have been considered at a preelection hearing or the respondent has failed to meet its substantial burden of producing "specific evidence which prima facie would warrant setting aside the election." *Sitka Sound Seafoods, Inc. v.*

In its answer to the complaint, the Respondent also denies, without explanation, the allegations set forth in paragraph 6(a) through (c). Those paragraphs allege that the Union made three separate requests—on or about January 23, March 1, and March 24—asking the Respondent to bargain with it as the exclusive collective-bargaining representative of the unit employees. In its response to the Notice to Show Cause, the Respondent denies "that the Union requested bargaining in a timely or appropriate manner." The Respondent does not explain how the manner of the Union's requests was inappropriate. The Respondent also contends that even if the complaint allegations were true, the Union "slept on its rights" by delaying the requests until January and March. We find no merit in the Respondent's contention. It is well established that after a union is certified as the exclusive collective-bargaining representative of a bargaining unit, it enjoys an irrebuttable presumption of majority status for a period of 1 year. *Brooks v. NLRB*, 348 U.S. 96, 103–104 (1954); *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 37–39 (1987). During that period, an employer's refusal to bargain with the certified union is per se an unfair labor practice. *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 777–778 (1990).

To the extent that the Respondent denies that it received any of the Union's requests for bargaining, a hearing is necessary. We note that the Union sent its January 23 and March 1 letters requesting bargaining by certified mail to the Respondent's address as shown on the participant's list for this proceeding. However, the Postal Service returned the Union's letters with notations stating: "Unable to deliver item, problem with address" and "Forward Expired." The record does not show whether the Union sent the same letters by regular mail.[5] The Respondent also summarily denied that it received the Union's March 24 email transmitting its bargaining demand, although no record evidence indicates that the email was undeliverable.

We find that a genuine issue of material fact exists solely concerning the issue of whether the Respondent received any of the Union's requests to bargain. Accordingly, we deny the General Counsel's Motion for Summary Judgment in part and remand the proceeding to the Regional Director for a hearing limited to that issue. We grant the motion in all other respects.

ORDER

IT IS ORDERED that the General Counsel's Motion for Summary Judgment is granted in part and denied in part.

IT IS FURTHER ORDERED that this proceeding is remanded to the Regional Director for Region 5 for the purpose of issuing a notice of hearing before an administrative law judge, limiting such proceeding to the determination of whether the complaint should be dismissed on the ground that the Respondent never received the Union's requests for bargaining.

Dated, Washington, D.C. June 19, 2019

Lauren McFerran, Member

Marvin E. Kaplan, Member

William J. Emanuel, Member

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NLRB, 206 F.3d 1175, 1182 (D.C. Cir. 2000) (citation omitted). Like the D.C. Circuit in *Sitka*, we find this case distinguishable.

[5] The Union sent its bargaining requests to the same address to which the General Counsel successfully sent the complaint by certified mail. The Board also served the Notice to Show Cause by regular mail at that address, and the record does not show that it was returned. The Respondent offers no explanation as to why there was a problem with its address for the Union's requests to bargain, but no similar problem for the General Counsel's mailings to the same address.

Similarly, the Respondent complains that the July 13 Notice to Show Cause was sent to its counsel by U.S. mail, rather than by email, and that its counsel did not receive it until July 17, and it suggests that it was prejudiced by the delay. However, the record shows that the Board served the Notice to Show Cause on the Respondent's counsel by regular and certified mail, both of which constitute proper methods of service under Sec. 102.4(c) of the Board's Rules and Regulations. Therefore, the date of service was July 13. See Sec. 102.3 of the Board's Rules. In any event, the Board granted the Respondent an extension of time until August 1 to file its response.