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Smith's Food and Drug Centers, Inc. and Bakery Workers and Grain Millers BCTGM Local #351, AFL-CIO-CLC. Case 28-CA-235776

December 11, 2019

DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS KAPLAN
AND EMANUEL

The General Counsel seeks a default judgment in this case on the ground that Smith's Food and Drug Centers, Inc. (the Respondent) has failed to file an answer to the complaint. Upon a charge filed by Bakery, Confectionery, Tobacco Workers and Grain Millers BCTGM Local #351, AFL-CIO-CLC (the Union) on February 11, 2019,¹ the General Counsel issued a complaint on June 4 against the Respondent, alleging that it has violated Section 8(a)(5) and (1) of the National Labor Relations Act. The Respondent failed to file an answer.

On July 2 and 3, respectively, the General Counsel filed with the National Labor Relations Board a Motion for Default Judgment and second Motion for Default Judgment.² On July 3, 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 no response. The allegations in the motion are therefore undisputed.

The Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Default Judgment

Section 102.20 of the Board's Rules and Regulations provides that the allegations in a complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint, unless good cause is shown. In addition, the complaint affirmatively states that unless an answer was received by June 18, the Board may find, pursuant to a motion for default judgment, that the allegations in the complaint are true. Further, the undisputed allegations in the General Counsel's motion disclose that the Region, by letter dated June 20, notified the Respondent that unless an answer was received by June 28, a

motion for default judgment would be filed. Nevertheless, the Respondent failed to file an answer.³

In the absence of good cause being shown for the failure to file an answer, we deem the allegations in the complaint to be admitted as true, and we grant the General Counsel's second Motion for Default Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent has been a corporation with offices and places of business in various locations throughout the State of New Mexico and has been engaged in the retail sale of groceries, meat, and related products.

In conducting its operations during the 12-month period ending February 11, 2019, the Respondent purchased and received at its facilities goods valued in excess of \$50,000 directly from points outside the State of New Mexico, and derived gross revenues in excess of \$500,000.

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

1. At all material times, the following individuals held the positions set forth opposite their names and have been supervisors of the Respondent within the meaning of Section 2(11) of the Act and agents of the Respondent within the meaning of Section 2(13) of the Act:

Elbert Cordova	Labor Relations Specialist
Cheryl Hedquist	Human Resources Manager

2. (a) 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:

All bakery managers, bakers, cake decorators, cake icers, and cake finishers employed by Respondent at its Store Numbers 423, 427, 432, 439, 443, 446, 448, 450, 459, 463, 485, 494, 496, 498, and 571 in Albuquerque, New Mexico, Store Number 424 in Edgewood, New

relations specialist. U.S. Postal Service tracking information indicates that the letter was delivered, and there is no indication that the Region's email to the Respondent's labor relations specialist was undeliverable. It is well settled that a respondent's failure or refusal to accept certified mail or to provide for receiving appropriate service cannot serve to defeat the purposes of the Act. See *Cray Construction Group, LLC*, 341 NLRB 944, 944 fn. 5 (2004); *I.C.E. Electric, Inc.*, 339 NLRB 247, 247 fn. 2 (2003).

¹ Unless otherwise indicated, all the following dates are in 2019.

² The General Counsel's second motion attached two exhibits not included in the original Motion but is otherwise essentially identical.

³ The motion for default judgment and attached exhibits indicate that the Region served the complaint by certified mail on the Respondent at its facility. Tracking information provided by the U.S. Postal Service shows that the document was unclaimed. The Region sent the June 20 letter reminding the Respondent of its obligation to answer the complaint by certified mail and emailed the letter to the Respondent's labor

Mexico, Store Number 409 in Farmington, New Mexico, Store Number 415 in Grants, New Mexico, Store Number 467 in Los Alamos, New Mexico, Store Number 414 in Los Luna, New Mexico, Store Number 413 in Rio Rancho, New Mexico, Store Number 491 at Santa Fe, New Mexico, Store Number 499 in Socorro, New Mexico, and Store Number 426 in Taos, New Mexico; excluding all other grocery and meat department employees, dry goods employees, office clericals, janitors, guards, watchmen, and supervisors as defined by the National Labor Relations Act.

(b) Since about 1995, and at all material times, the Union has been the designated exclusive collective-bargaining representative of the unit and, since then, the Union has been recognized as the representative by the Respondent. This recognition has been embodied in successive collective-bargaining agreements, the most recent of which was effective from April 11, 2015, through April 13, 2019.

(c) At all times since about 1995, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the unit.

3. (a) On about January 30, 2019, the Union, in writing, requested that the Respondent furnish it with the following information:

- (1) Proof of seniority dates for all BCTGM members at store #424;
- (2) Proof of classification of all BCTGM members at store #424;
- (3) Proof of all disciplinary action issued to Diliah Markey dating back to February 27, 2018;
- (4) Proof of Diliah Markey's inability to perform any of the classifications covered in the collective-bargaining agreement;
- (5) Proof of all bakery schedules dating back to February 27, 2018;
- (6) Proof of Diliah Markey's offer to work in a different classification;
- (7) Proof of Diliah Markey's refusal to work in a different classification;

(8) Proof of Diliah Markey's action plan;

(9) Proof of adequate staffing to complete assigned workload in the bakery department at store #424; and

(10) Proof of just cause for the discipline of Diliah Markey on or about January 24, 2019 including proof of all substantial evidence of guilt, proof of all investigatory notes, proof of all investigative files, proof of all reports, proof of all witness statements, proof of all photographs, proof of all audio or video footage, proof of all correspondence, proof of all Company meeting minutes, and proof of all Supervisor's or Store Director's notes.

(b) The information requested by the Union, as described above, is necessary for, and relevant to, the Union's performance of its duties as the exclusive collective-bargaining representative of the unit.

(c) Since about January 30, 2019, the Respondent has refused to provide the Union with the information requested as described above in paragraphs 3(a)(1-9).

(d) From about January 30, 2019, until February 22, 2019, the Respondent unlawfully delayed in providing the Union with the information requested as described above in paragraph 3(a)(10).⁴

CONCLUSION OF LAW

By the conduct described above in paragraph 3, 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 unfair labor practices of the Respondent described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent violated Section 8(a)(5) and (1) by failing and refusing to furnish the Union with requested information that is relevant and necessary to its role as the exclusive collective-bargaining representative of the unit employees and by unlawfully delaying in providing the Union with other such requested information, we shall order the Respondent to furnish the Union with the information it requested on about January 30, 2019, that has not

⁴ To the extent the request in par. 3(a)(10) encompasses witness statements, we note that the concerns regarding the duty to disclose witness statements articulated by then-Members Miscimarra and Johnson in their dissenting opinions in *Piedmont Gardens*, 362 NLRB 1135, 1141-1151 (2015), enfd. on other grounds 858 F.3d 612 (D.C. Cir. 2017), warrant

careful consideration in a future appropriate case. However, in the absence of any answer to the complaint or response to the Board's Notice to Show Cause, we find that the Respondent unlawfully delayed in providing that information.

already been provided and is set forth above in paragraph 3(a)(1-9) of this decision.

ORDER

The National Labor Relations Board orders that the Respondent, Smith's Food and Drug Centers, Inc., Albuquerque, New Mexico, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively with Bakery, Confectionery, Tobacco Workers and Grain Millers BCTGM Local #351, AFL-CIO-CLC by failing and refusing to furnish it 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.

(b) Refusing to bargain collectively with the Union by unreasonably delaying in providing it 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) Furnish to the Union in a timely manner the information it requested on January 30, 2019, that has not already been provided and is set forth above in paragraph 3(a)(1-9) of this decision.

(b) Within 14 days after service by the Region, post at its facilities in various locations throughout the State of New Mexico copies of the attached notice marked "Appendix."⁵ Copies of the notice, on forms provided by the Regional Director for Region 28, 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 January 30, 2019.

(c) Within 21 days after service by the Region, file with the Regional Director for Region 28 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. December 11, 2019

John F. Ring, Chairman

Marvin E. Kaplan, Member

William J. Emanuel, 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 refuse to bargain collectively with Bakery, Confectionery, Tobacco Workers and Grain Millers BCTGM Local #351, AFL-CIO-CLC by failing and refusing to furnish it with requested information that is relevant and necessary to the performance of its functions as the collective-bargaining representative of our unit employees.

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

WE WILL NOT refuse to bargain collectively with the Union by unreasonably delaying in providing it with requested information that is relevant and necessary to the 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 furnish to the Union in a timely manner the information it requested on January 30, 2019, that we have not already provided.

SMITH'S FOOD AND DRUG CENTERS, INC.

The Board's decision can be found at www.nlr.gov/case/28-CA-235776 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.

