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Atlantic City Electric Company and International Brotherhood of Electrical Workers Local 210.
Case 04–CA–224253

February 26, 2020

DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS 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.¹ Pursuant to a charge and an amended charge filed on July 20 and August 3, 2018, respectively, by International Brotherhood of Electrical Workers Local 210 (the Union), the General Counsel issued the complaint on December 11, 2019, alleging that Atlantic City Electric Company (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 04–RC–221319. (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 7, 2020, the General Counsel filed a Motion for Summary Judgment. On January 10, 2020, 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.

¹ Chairman Ring, who is recused, is a member of the panel but did not participate in this decision on the merits.

In *New Process Steel v. NLRB*, 130 S.Ct. 2635 (2010), the Supreme Court left undisturbed the Board’s practice of deciding cases with a two-member quorum when one of the panel members has recused himself. Under the Court’s reading of the Act, “the group quorum provision [of Sec. 3(b)] still operates to allow any panel to issue a decision by only two members if one member is disqualified.” *New Process Steel*, 130 S.Ct. at 2644; accord *NLRB v. New Vista Nursing & Rehabilitation*, 870 F.3d 113, 127–128 (3d Cir. 2017); *D.R. Horton*, 357 NLRB 2277, 2277 fn. 1 (2012), *enfd.* in relevant part, 737 F.3d 344, 353 (5th Cir. 2013); *1621 Route 22 West Operating Co.*, 357 NLRB 1866, 1866 fn. 1 (2011), *enfd.* 725 Fed. Appx. 129, 136 fn. 7 (3d Cir. 2018).

² On December 13, 2018, the Board (Members Kaplan and Emanuel, Member McFerran dissenting in part), granted the Respondent’s request for review of the Acting Regional Director’s Decision and Direction of Election with respect to whether the system operators and senior system

Ruling on Motion for Summary Judgment

The Respondent admits its refusal to bargain but contests the validity of the Union’s certification based on its contention, raised and rejected in the underlying representation proceeding, that its System Operators and Senior System Operators, employees in the newly certified unit, are statutory supervisors under Section 2(11) of the Act.²

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 proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941). Accordingly, we grant the Motion for Summary Judgment.³

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent has been a public utility corporation with an office and place of business in Mays Landing, New Jersey, and has been engaged in the transmission and distribution of electric services.

During the 12-month period preceding issuance of the complaint, in conducting its operations described above, the Respondent derived gross revenues in excess of \$250,000 and purchased and received goods valued in excess of \$50,000 directly from points outside the state of New Jersey.

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.

operators possess the authority to assign employees to places and responsibly direct employees using independent judgment within the meaning of Sec. 2(11) of the Act; the Board denied the request for review in all other respects. On November 18, 2019, the Board (Members McFerran and Kaplan, Member Emanuel dissenting) issued its Decision on Review, affirming the Acting Regional Director and finding that the Respondent failed to meet its burden of proving that the system operators or senior system operators possess supervisory authority to assign or responsibly direct employees using independent judgment.

³ Member Emanuel dissented from the Board’s Decision on Review in the underlying representation proceeding and would have found that the Company’s system operators and senior system operators are statutory supervisors because they assign employees using independent judgment. While he remains of that view, Member Emanuel agrees that the Respondent has not presented any new matters that are properly litigable in this unfair labor practice proceeding and that summary judgment is therefore appropriate.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *The Certification*

The following employees of the Respondent (the Unit employees) constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act as part of a unit of operation, production, and maintenance employees already represented by the Union:

INCLUDED: All full-time and regular part-time System Operators and Senior System Operators employed by the Employer at its 5100 Harding Highway, Mays Landing, New Jersey facility.

EXCLUDED: All other employees, guards, and supervisors as defined in the Act.

Following a self-determination election held on June 25, 2018, the Regional Director on July 9, 2018, certified the Union as the exclusive collective-bargaining representative of the Unit employees as part of the existing bargaining unit represented by the Union. 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 July 9, 2018, the Respondent informed the Union that it would not recognize the Union as the exclusive collective-bargaining representative of the Unit employees. About July 12, 2018, the Union, by e-mail and letter, requested that the Respondent recognize and bargain with the Union as the exclusive collective-bargaining representative of the Unit employees. About July 19, 2018, the Respondent, by e-mail and letter, stated that it would not recognize or bargain with the Union as the exclusive collective-bargaining representative of the Unit employees. Since about July 9, 2018, the Respondent has failed and refused to recognize and bargain with the Union as the exclusive collective-bargaining representative of the Unit employees.

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 July 9, 2018, to recognize and bargain with the Union as the exclusive collective-

bargaining representative of the 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 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, Atlantic City Electric Company, Mays Landing, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize and bargain with International Brotherhood of Electrical Workers Local 210 as the exclusive collective-bargaining representative of the Unit employees as part of the existing bargaining unit represented by the Union.

(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, as part of the existing bargaining unit represented by the Union, 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 System Operators and Senior System Operators employed by the Employer at its 5100 Harding Highway, Mays Landing, New Jersey facility.

EXCLUDED: All other employees, guards, and supervisors as defined in the Act.

(b) Within 14 days after service by the Region, post at its facility in Mays Landing, New Jersey, copies of the attached notice marked "Appendix."⁵ Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized

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."

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 July 9, 2018.

(c) Within 21 days after service by the Region, file with the Regional Director for Region 4 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. February 26, 2020

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 fail and refuse to recognize and bargain with International Brotherhood of Electrical Workers Local 210 as the exclusive collective-bargaining representative of our System Operator and Senior System Operator employees at our Mays Landing, New Jersey facility, as part of the existing bargaining unit represented by the Union.

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 the following employees, as part of the existing bargaining unit represented by the Union:

INCLUDED: All full-time and regular part-time System Operators and Senior System Operators employed by the Employer at its 5100 Harding Highway, Mays Landing, New Jersey facility.

EXCLUDED: All other employees, guards, and supervisors as defined in the Act.

ATLANTIC CITY ELECTRIC COMPANY

The Board's decision can be found at www.nlr.gov/case/04-CA-224253 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.

