

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RANDALLS FOOD AND DRUG, L.P.,)	
)	
Petitioner,)	
)	
v.)	Case No. _____
)	
NATIONAL LABOR RELATIONS)	
BOARD,)	
)	
Respondent.)	

PETITION FOR REVIEW

Pursuant to Rule 15(a) of the Federal Rules of Appellate Procedure, Randalls Food and Drug, L.P. hereby petitions the United States Court of Appeals of the Fifth Circuit for review of an Order of the National Labor Relations Board in the matter styled *Randalls Food and Drug, L.P. and International Brotherhood of Teamsters, Local Union 745*, Case No. 16-CA-251484, reported in an Order of the National Labor Relations Board at 369 NLRB No. 100, dated June 9, 2020. See Exhibit A attached hereto. The Board’s decision is not consistent with applicable law.

This Court has jurisdiction in this matter pursuant to Section 10(f) of the National Labor Relations Act. 29 U.S.C. § 160(f). Petitioner transacts business within this judicial circuit, as defined in 28 U.S.C. § 41, by maintaining a facility in Roanoke, Texas.

Wherefore, Petitioner requests that this Court review and set aside the entire Order of the National Labor Relations Board, which found that Petitioner violated Sections 8(a)(1) and 8(a)(5) of the National Labor Relations Act, 29 U.S.C. § 158, and ordered Petitioner to cease and desist from engaging in unfair labor practices and to take certain affirmative actions to comply with the Board’s Order, and from each and every part of said Order as well as from the whole thereof.

Respectfully submitted this 22nd day of June 2020.

/s/ Jeffrey A. Schwartz

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CERTIFICATE OF SERVICE

I hereby certify that on June 22, 2020, I electronically filed the within and foregoing **PETITION FOR REVIEW** via the Court’s e-filing system and served the following by depositing true and correct copies of the same in the U.S. Mail with sufficient postage thereon to reach their destinations:

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Exhibit A
Decision and Order

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.

Randalls Food and Drug, L.P. and International Brotherhood of Teamsters, Local Union 745.
Case 16-CA-251484

June 9, 2020

DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS KAPLAN
AND EMANUEL

This is a refusal-to-bargain case in which the Respondent, Randalls Food and Drug, L.P., is contesting the Union’s certification as bargaining representative in the underlying representation proceeding. Pursuant to a charge filed on November 12, 2019, by International Brotherhood of Teamsters, Local Union 745 (the Union), the General Counsel issued the complaint on March 30, 2020, alleging that the Respondent has violated Section 8(a)(5) and (1) of the Act by refusing the Union’s request to recognize and bargain with it following the Union’s certification in Case 16-RC-242776. (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 April 14, 2020, the General Counsel filed a Motion for Summary Judgment. On April 16, 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.

Ruling on Motion for Summary Judgment

The Respondent denies its refusal to bargain and contests the validity of the Union’s certification of representative based on its objections to the election in the underlying representation proceeding.¹

¹ In its answer, the Respondent admits the allegations in complaint par. 8, which alleges that the Union requested recognition and bargaining on October 23, 2019, and that the Respondent has failed and refused to recognize and bargain with the Union since about that date, except that it denies any allegation that the Respondent had a duty to recognize and bargain with the Union. The Respondent denies the allegations in pars. 9 and 10, which allege, respectively, that by this conduct the Respondent has been failing and refusing to bargain collectively and in good faith with the Union in violation of Sec. 8(a)(5) and (1) of the Act, and that this unfair labor practice affects commerce within the meaning of Sec. 2(6) and (7) of the Act. However, in its response to the Notice to Show Cause, the Respondent admits that it refused the Union’s request to bargain by letter dated October 28, 2019. This admission is sufficient to establish a violation of the Act. See *Biewer Wisconsin Sawmill, Inc.*, 306

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.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a limited partnership, has maintained an office and place of business in Ranoke, Texas, where it has been engaged in business as a distribution center for its supermarkets.

In conducting its operations as described above, Respondent, during the 12-month period ending December 31, 2019, purchased and received goods, materials, and supplies valued in excess of \$50,000 directly from points located outside the state of Texas.

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*

The following employees of the Respondent (the unit) constitute an appropriate unit for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

Included: All full-time and regular part-time Drivers and Spotters.

NLRB 732 (1992) (despite respondent’s answer denying that it refused to bargain with union, its admission that it intended to test the union’s certification was sufficient to establish a violation). Accordingly, we conclude that the Respondent’s denials of the allegations in complaint pars. 8, 9, and 11 do not raise any issue warranting a hearing.

In its response to the Notice to Show Cause, the Respondent argues that the Board should deny the General Counsel’s motion and renews its objections to the underlying representation proceeding. It is well settled, however, that in a certification-testing unfair labor practice case, issues that had been presented to and decided by the Board in a prior, related representation case cannot be relitigated and will not be reconsidered, absent special circumstances not present here. See, e.g., *Radnet Mgmt. d/b/a La Mirada Imaging*, 368 NLRB No. 89, slip op. at 1 (2019).

Excluded: Dispatchers, Mechanics, Managers, Warehousemen, Human Resource, Personnel, Watchmen and Supervisors, as defined in the Act.

On September 23, 2019, the Union was certified as the exclusive collective-bargaining representative of the unit.² 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

The Union, by email dated October 23, 2019, requested that the Respondent recognize and bargain with it as the exclusive collective-bargaining representative of the unit. Since about October 23, 2019, the Respondent has failed and refused to recognize and bargain with the Union.

We find that the Respondent's conduct constitutes an unlawful failure and refusal to recognize and bargain with the exclusive collective-bargaining representative of its employees within the meaning of Section 8(d) of the Act in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By failing and refusing since October 23, 2019, to recognize and bargain with the Union as the exclusive collective-bargaining representative of the employees in the appropriate unit, 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.

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

² By unpublished order dated March 26, 2020, the Board denied the Respondent's request for review of the Regional Director's Decision and Certification of Representative.

³ If the facility involved in these proceedings is open and staffed by a substantial complement of employees, the notices must be posted within 14 days after service by the Region. If the facility involved in these proceedings is closed due to the Coronavirus pandemic, the notices must be posted within 14 days after the facility reopens and a substantial complement of employees have returned to work, and the notices may not be

ORDER

The National Labor Relations Board orders that the Respondent, Randalls Food and Drug, L.P., Roanoke, TX, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize and bargain with International Brotherhood of Teamsters, Local Union 745, as the exclusive collective-bargaining representative of the employees in the bargaining 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 the employees in the following appropriate unit concerning 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 Drivers and Spotters.

Excluded: Dispatchers, Mechanics, Managers, Warehousemen, Human Resource, Personnel, Watchmen and Supervisors, as defined in the Act.

(b) Post at its facility in Roanoke, Texas, copies of the attached notice marked "Appendix."³ Copies of the notice, on forms provided by the Regional Director for Region 16, 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

posted until a substantial complement of employees have returned to work. Any delay in the physical posting of paper notices also applies to the electronic distribution of the notice if the Respondent customarily communicates with its employees by electronic means. 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."

RANDALLS FOOD & DRUG, L.P.

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employees employed by the Respondent at any time since October 23, 2019.

(c) Within 21 days after service by the Region, file with the Regional Director for Region 16 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. June 9, 2020

John F. Ring, Chairman

Marvin E. Kaplan, Member

William J. Emanuel, Member

Included: All full-time and regular part-time Drivers and Spotters.

Excluded: Dispatchers, Mechanics, Managers, Warehousemen, Human Resource, Personnel, Watchmen and Supervisors, as defined in the Act.

RANDALLS FOOD AND DRUG, L.P.

The Board's decision can be found at www.nlr.gov/case/16-CA-251484 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.



(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 Teamsters, Local Union 745, as the exclusive collective-bargaining representative of our employees in the bargaining unit.

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: