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GADecatur SNF LLC d/b/a East Lake Arbor and Retail, Wholesale & Department Store Union—Southeast Council. Case 10–CA–262818

October 15, 2020

DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS KAPLAN
AND EMANUEL

This is a refusal-to-bargain case in which the Respondent, GADecatur SNF LLC d/b/a East Lake Arbor, is contesting the Union's certification as bargaining representative in the underlying representation proceeding. Pursuant to a charge filed on July 9, 2020, by Retail, Wholesale & Department Store Union—Southeast Council (the Union), the General Counsel issued the complaint on July 17, 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 10–RC–249998. (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 August 3, 2020, the General Counsel filed a Motion for Summary Judgment. On August 5, 2020, the Board issued an order transferring the proceeding to the Board

¹ In its answer, the Respondent admits the allegations in complaint pars. 6, 7, 9, and 10, but “avers” in these admissions that the Union was improperly certified. The Respondent's averments are merely expressions of the position that it raised, and the Board rejected, in the underlying representation proceeding. Thus, the averments do not raise any issue warranting a hearing.

Further, in its answer, the Respondent denies the allegations in complaint pars. 8, 11, and 12. The Respondent's denials do not raise any issues warranting a hearing. First, the Respondent denies the allegation in complaint par. 8 that at all times since February 4, 2020, based on Sec. 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the unit employees. However, the Respondent admits the allegation in complaint par. 7 that the Union was certified as the unit employees' collective-bargaining representative on February 4, 2020. Next, the Respondent denies the allegations in complaint pars. 11 and 12, which allege, respectively, the legal conclusions that the Respondent has been refusing to bargain collectively with the Union in violation of Sec. 8(a)(5) and (1), and that the unfair labor practices affect commerce within the meaning of Sec. 2(6) and (7) of the Act. These denials also do not raise any issues warranting a hearing. The Respondent admits the allegation in complaint par. 10 that about June 26, 2020, the Respondent notified the Union that it refused to recognize and bargain with the Union, and the Respondent admits the allegation in

and a Notice to Show Cause why the motion should not be granted. The Respondent filed a response, and the General Counsel filed a reply to the Respondent's response.

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 admits its refusal to bargain but contests the validity of the Union's certification of representative based on its objection to the election in the underlying representation proceeding.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 proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941).

Accordingly, we grant the Motion for Summary Judgment.²

On the entire record, the Board makes the following

FINDINGS OF FACT

I JURISDICTION.

At all material times, the Respondent has been a Delaware corporation with an office and place of business in Decatur, Georgia, and has been engaged in the business of operating a skilled nursing facility.

complaint par. 4 that at all material times it has been an employer engaged in commerce within the meaning of Sec. 2(2), (6), and (7). (The Respondent also avers, within these denials, that the Union was improperly certified. Those averments, like the ones discussed above, do not raise any issues warranting a hearing.)

The Respondent asserts as affirmative defenses in its answer that the complaint fails to state a claim upon which relief may be granted, that the Respondent has acted in good faith and has not violated the Act, and that the allegations are barred in whole or in part by the doctrine of unclean hands. However, the Respondent has not offered any explanation of or evidence to support these bare assertions. Thus, we find that these affirmative defenses are insufficient to warrant denial of the General Counsel's Motion for Summary Judgment in this proceeding. See, e.g., *George Washington University*, 346 NLRB 155, 155 fn. 2 (2005), enf. mem. per curiam No. 06–1012, 2006 WL 4539237 (D.C. Cir. Nov. 27, 2006); *Circus Circus Hotel*, 316 NLRB 1235, 1235 fn. 1 (1995). Finally, the Respondent's remaining affirmative defenses, which merely recapitulate arguments raised by the Respondent and rejected by the Board in the underlying representation proceeding, also do not raise any issue warranting a hearing. See *Wolf Creek Nuclear Operating Corp.*, 366 NLRB No. 30, slip op. at 1 fn. 2 (2018).

² The Respondent's requests that the complaint be dismissed and the certification of representative be revoked are therefore denied.

During the year preceding issuance of the complaint, the Respondent, in conducting its business operations described above, derived gross revenue in excess of \$100,000 and has received goods at its Decatur, Georgia facility in excess of \$5000 directly from points outside the State of Georgia.

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

Following the representation election held on November 12, 2019, the Union was certified on February 4, 2020,³ as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All regular part-time and full-time employees including CNAs, LPNs, Activity and Maintenance employees employed by the Employer at its facility located at 304 5th Avenue, Decatur, Georgia; excluding all other employees, office clerical employees, managers, guards, and supervisors as defined in the Act.

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 June 10, 2020, the Union, by email and certified mail, requested that the Respondent recognize the Union and bargain collectively with it as the exclusive collective-bargaining representative of the employees in the unit. Since about June 26, 2020, 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 Union in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By failing and refusing since about June 26, 2020, 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.

³ By unpublished Order dated June 2, 2020, the Board denied the Respondent's request for review of the Acting Regional Director's Decision and Certification of Representative.

⁴ 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

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).

ORDER

The National Labor Relations Board orders that the Respondent, GADecatur SNF LLC d/b/a East Lake Arbor, Decatur, Georgia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize and bargain with Retail, Wholesale & Department Store Union – Southeast Council (the Union) 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:

All regular part-time and full-time employees including CNAs, LPNs, Activity and Maintenance employees employed by the Employer at its facility located at 304 5th Avenue, Decatur, Georgia; excluding all other employees, office clerical employees, managers, guards, and supervisors as defined in the Act.

(b) Post at its Decatur, Georgia facility copies of the attached notice marked "Appendix."⁴ Copies of the

proceedings is closed due to the Coronavirus Disease 2019 (COVID-19) 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 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

notice, on forms provided by the Regional Director for Region 10, 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. The Respondent shall take reasonable steps 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 June 26, 2020.

(c) Within 21 days after service by the Region, file with the Regional Director for Region 10 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. October 15, 2020

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.

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

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 Retail, Wholesale & Department Store Union – Southeast Council (the Union) as the exclusive collective-bargaining representative of our employees in the East Lake Arbor 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:

All regular part-time and full-time employees including CNAs, LPNs, Activity and Maintenance employees employed by the Employer at its facility located at 304 5th Avenue, Decatur, Georgia; excluding all other employees, office clerical employees, managers, guards, and supervisors as defined in the Act.

GADECATUR SNF LLC D/B/A EAST LAKE ARBOR

The Board’s decision can be found at www.nlrb.gov/case/10-CA-262818 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.



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.”