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FAA Concord T, Inc., d/b/a Concord Toyota and Machinists Automotive Trades District Lodge No. 190, Machinists Local 1173. Case 32–CA–264162

March 19, 2021

DECISION AND ORDER

BY CHAIRMAN McFERRAN AND MEMBERS KAPLAN
AND EMANUEL

This is a refusal-to-bargain case in which the Respondent, FAA Concord T, Inc., d/b/a Concord Toyota, is contesting the Union’s certification as bargaining representative in the underlying representation proceeding. Pursuant to a charge filed on August 5, 2020, by Machinists Automotive Trades District Lodge No. 190, Machinists Local 1173 (the Union), the General Counsel issued the complaint on October 19, 2020, amended on December 15, 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 32–RC–255130. (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).¹) The Respondent filed an answer, admitting in part and denying in part the allegations in the amended complaint and asserting affirmative defenses.

¹ The record shows that the representation proceeding involved a petition for a self-determination election among a group of unrepresented employees to decide if they wished to be represented by the Union as part of an existing bargaining unit. See *Armour & Co.*, 40 NLRB 1333 (1942); *Globe Machine & Stamping Co.*, 3 NLRB 294 (1937).

² In its answer, the Respondent partially admits the allegations in amended complaint par. 8, that the Union requested and demanded that it recognize and bargain with the Union, but denies that the Union is the lawful bargaining representative of the petitioned-for employees. In addition, the Respondent partially denies the allegations in amended complaint pars. 9 and 10, that since March 18, 2020, the Respondent has failed to recognize and bargain collectively and in good faith with the exclusive collective-bargaining representative of its employees, in violation of Sec. 8(a)(5) and (1) of the Act, but admits that it has refused to bargain with the Union as it “challenges that the Union is the lawful bargaining agent and that the unit is not an appropriate unit.” The Respondent does not contend that its partial denial of amended complaint pars. 8, 9, and 10 raises a genuine issue of material fact warranting a hearing. Rather, in its response to the Board’s Notice to Show Cause, the Respondent makes clear that it is continuing to contest the appropriateness of the unit. Accordingly, for the reasons described above, we conclude that the Respondent’s partial denial of amended complaint pars. 8, 9, and 10 does not raise any issue warranting a hearing.

The Respondent also asserts as affirmative defenses that it has acted for lawful business reasons and justifications and that the amended complaint fails to state a claim upon which relief may be granted. The

On January 6, 2021, the General Counsel filed a Motion for Summary Judgment. On January 8, 2021, 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 to the Board’s Notice to Show Cause, the Acting General Counsel filed a reply to the Respondent’s response, and the Union filed a Joinder to the General Counsel’s motion with a request for additional remedies.

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 on the basis of its contention, raised and rejected in the underlying representation proceeding, that the petitioned-for voting unit is not an identifiable, distinct segment so as to constitute an appropriate voting group that shares a community of interest with the existing unit of technicians and parts employees.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

Respondent, however, 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. See, e.g., *Station GVR Acquisition, LLC d/b/a Green Valley Ranch Resort Spa Casino*, 366 NLRB No. 58, slip op. at 1 fn. 1 (2018) (citing cases); *George Washington University*, 346 NLRB 155, 155 fn. 2 (2005), enfd. 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). The Respondent’s remaining affirmative defenses recapitulate arguments that were raised by the Respondent and rejected by the Board in the underlying representation proceeding. Thus, they 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), enfd. mem. 762 F. App’x 461 (10th Cir. 2019).

Finally, the Respondent denies that the Union and/or the General Counsel is entitled to an Order, as requested in the amended complaint and the Motion for Summary Judgment, requiring the Respondent to bargain in good faith with the Union, on request, as the exclusive bargaining representative of the petitioned-for employees for the period set forth in *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962). The Respondent is correct that such a remedy is inappropriate where, as here, the underlying representation proceeding involved a self-determination election. Citing *Winkie Mfg. Co.*, 338 NLRB 787, 788 fn. 3 (2003), affd. 348 F.3d 254 (7th Cir. 2003); *White Cap, Inc.*, 323 NLRB 477, 478 fn. 3 (1997) (citing cases). Acknowledging these cases, the Acting General Counsel subsequently withdrew his request for this remedy.

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 has been a California corporation with an office and place of business located in Concord, California, and is engaged in the retail sale and service of motor vehicles.

In conducting its operations during the 12-month period ending on August 5, 2020, the Respondent derived gross revenues in excess of \$500,000, and during the same period, it purchased and received goods and services valued in excess of \$5000 directly from businesses located outside the State of California.

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 a self-determination election on March 12, 2020, in Case 32–RC–255130, the Regional Director issued a certification that the Union is the exclusive collective-bargaining representative of all full-time and regular part-time advisors, including the service advisors, floater service advisors, and internal advisors (collectively, Advisors) employed by the Respondent at its Concord, California, facility, as part of the existing bargaining unit of technicians and parts employees that it currently represents.³

Based on this certification, 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 full-time and regular part-time Service Advisors, Floater Service Advisors, Internal Advisors, Repair and Service Technicians, and Parts employees; excluding all other employees, guards, and supervisors as defined in the National Labor Relations Act.

³ By unpublished order dated September 22, 2020, the Board denied the Respondent's request for review of the Regional Director's Decision and Direction of Election and remanded the matter to the Regional Director with a directive to issue a certification of results.

⁴ We find it unnecessary to decide in this case whether the unfair labor practice began on the date of the Respondent's initial refusal to bargain at the request of the Union, or at some point later in time. It is undisputed

The Union continues to be the exclusive collective-bargaining representative of the unit, including the Advisors, under Section 9(a) of the Act.

B. *Refusal to Bargain*

At all material times, the Respondent's attorney, whose name is known to the Respondent, has been an agent of the Respondent within the meaning of Section 2(13) of the Act.

By letter dated March 12, 2020, and emails dated March 18 and 27, May 15 and 28, October 9 and 14, 2020, the Union requested that the Respondent recognize it as the exclusive collective-bargaining representative of the Advisors as part of the existing bargaining unit. By email dated March 18, 2020, and continuing to date, the Respondent has refused to recognize and bargain with the Union as the exclusive collective-bargaining representative of the unit, including the Advisors.⁴

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 March 18, 2020, to recognize and bargain with the Union as the exclusive collective-bargaining representative of the Advisors as part of 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 recognize and bargain on request with the Union and, if an understanding is reached, to embody the understanding in a signed agreement.

The Union requests numerous additional enhanced remedies. We find that there has been no showing that the Board's traditional remedies are insufficient to redress the violations found. Accordingly, we deny the Union's request.

ORDER

The National Labor Relations Board orders that the Respondent, FAA Concord T, Inc., d/b/a Concord Toyota,

that the Respondent has continued to refuse to bargain since the Union's certification, and we find that continuing refusal to be unlawful. Regardless of the exact date on which Respondent's admitted refusal to bargain became unlawful, the remedy is the same. See *Meredith Corp.*, 362 NLRB 792, 793–794 fn. 5 (2015), citing *Howard Plating Industries*, 230 NLRB 178, 179 (1977).

Concord, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize and bargain with Machinists Automotive Trades District Lodge No. 190, Machinists Local 1173 (the Union), as the exclusive collective-bargaining representative of all full-time and regular part-time Advisors employed at the Respondent's Concord facility, as part of the existing bargaining unit of technicians and parts employees.

(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 following group of employees, as part of the existing unit of technicians and parts employees at the Respondent's Concord facility, concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All full-time and regular part-time Advisors employed by the Employer at its facility located at 1090 Concord Avenue, Concord, California; excluding employees represented by a labor organization, office clerical employees, guards, and supervisors as defined in the National Labor Relations Act.

(b) Post at its facility in Concord, California, copies of the attached notice marked "Appendix."⁵ Copies of the notice, on forms provided by the Regional Director for Region 32, 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

⁵ 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 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

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 March 18, 2020.

(c) Within 21 days after service by the Region, file with the Regional Director for Region 32 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. March 19, 2021

Lauren McFerran, 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.

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."

WE WILL NOT fail and refuse to recognize and bargain with Machinists Automotive Trades District Lodge No. 190, Machinists Local 1173 (the Union), as the exclusive collective-bargaining representative of all full-time and regular part-time Advisors employed at our Concord, California, facility, as part of the existing bargaining unit of technicians and parts 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, on request, bargain with the Union as the exclusive collective-bargaining representative of employees in the following group of employees, as part of the existing unit of technicians and parts employees at the Respondent's Concord facility, concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All full-time and regular part-time Advisors employed by the Employer at its facility located at 1090 Concord Avenue, Concord, California; excluding employees

represented by a labor organization, office clerical employees, guards, and supervisors as defined in the National Labor Relations Act.

FAA CONCORD T, INC., D/B/A CONCORD
TOYOTA

The Board's decision can be found at www.nlr.gov/case/32-CA-264162 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.

