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FedEx Home Delivery, A Separate Operating Division of FedEx Ground Package System, Inc. and International Brotherhood of Teamsters, Local Union 25. Cases 1-CA-44037 and 1-CA-44038

September 28, 2007

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN
AND KIRSANOW

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. Pursuant to charges filed on July 12, 2007,¹ in Cases 1-CA-44037 and 1-CA-44038, the General Counsel issued the consolidated complaint on July 26, 2007,² alleging that the Respondent has violated Section 8(a)(5) and (1) of the Act by refusing the Union's request to bargain following the Union's certifications in Cases 1-RC-22034 and 1-RC-22035. (Official notice is taken of the "record" in the representation proceeding as defined in the Board's Rules and Regulations, Sections 102.68 and 102.69(g); *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed an answer, alleging affirmative defenses, admitting in part and denying in part the allegations in the complaint.

On August 13, 2007, the General Counsel filed a Motion for Summary Judgment. On August 15, 2007, 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.

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 contentions, raised and rejected in the representation proceedings, that the contractors and swing contractors included in the unit are not employees as defined in

¹ The Respondent's answer to the consolidated complaint states that it is without knowledge as to when the charges were filed, but admits that the charges were served about July 12, 2007. Copies of the charges and the certificates of service are included in the documents supporting the General Counsel's motion, and they show the filing date as alleged. The Respondent does not contest the authenticity of these documents.

² The August 26, 2007 date as stated in the Consolidated Complaint is corrected to read July 26, 2007, consistent with the Amendment to Consolidated Complaint.

the Act, and that the Union engaged in objectionable conduct prior to the election that had the tendency to mislead voters.

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceedings. 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.³ See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941). Accordingly, we grant the Motion for Summary Judgment.⁴

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a separate operating division of FedEx Ground Package System, Inc., with offices and places of business at 375 Ballardvale Street and 8 Jewel Drive in Wilmington, Massachusetts (the Wilmington facilities), has been engaged in the business of interstate package pick-up and delivery services.

Annually, the Respondent, in conducting its business operations described above, purchases and receives at its Wilmington facilities goods valued in excess of \$50,000 directly from points located outside the Commonwealth of Massachusetts.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act⁵ and that the International Brotherhood of

³ In the underlying representation proceeding, Chairman Battista dissented from the Board's denial of the Respondent's request for review of the Regional Director's decision that the Respondent's route drivers and swing drivers are employees and not independent contractors. Contrary to his colleagues, he would have granted review of the refusal to permit the Respondent to introduce systemwide evidence concerning the number of route sales and the profits on these sales because such evidence may be relevant to whether the drivers have an entrepreneurial interest in their positions. While he remains of the view that review was warranted, he agrees that the Respondent has not raised any new matters that are properly litigable in this unfair labor practice case. See *Pittsburgh Plate Glass v. NLRB*, 313 U.S. 146, 162 (1941).

⁴ We therefore deny the Respondent's request that the complaint be dismissed.

⁵ The Respondent in its answer denies the conclusory allegations in par. 4 of the amended consolidated complaint that it is an employer engaged in commerce within the meaning of Sec. 2(2), (6), and (7) of the Act. However, the Respondent's answer admits the underlying factual allegations that annually it purchases and receives at its Wilmington facilities goods valued in excess of \$50,000 directly from points located outside the Commonwealth of Massachusetts. These

Teamsters, Local Union 25, 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 elections held on October 20, 2006, the Union was certified on June 18, 2007, as the exclusive collective-bargaining representative of the employees in the following appropriate units:

The Ballardvale Street unit:

All full-time and regular part-time contractors and swing contractors employed by Respondent at its 375 Ballardvale Street facility in Wilmington, Massachusetts, but excluding temporary drivers, helpers employed by contractors, package handlers, guards, and supervisors as defined in the Act.

The Jewel Drive unit:

All full-time and regular part-time contractors and swing contractors employed by Respondent at its 8 Jewel Drive facility in Wilmington, Massachusetts, but excluding temporary drivers, helpers employed by contractors, package handlers, guards, and supervisors as defined in the Act.

The Union continues to be the exclusive representative under Section 9(a) of the Act.

B. *Refusal to Bargain*

By separate letters dated June 22, 2007, the Union requested that the Respondent bargain with it as the exclusive collective-bargaining representative of the Ballardvale Street unit and the Jewel Drive unit. Since about June 28, 2007, the Respondent has refused to recognize and bargain with the Union. We find that this failure and refusal constitutes an unlawful refusal to recognize and bargain in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By failing and refusing since June 28, 2007, to recognize and bargain with the Union as the exclusive collective-bargaining representative of employees in the Ballardvale Street unit and the Jewel Drive 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.

admissions are sufficient to establish that the Respondent is engaged in commerce. See *Simons Malling Service*, 122 NLRB 81 (1959). Further, in the underlying representation proceedings, the Respondent did not contest the finding that it was an employer engaged in commerce. Accordingly, we find that the Respondent's denial in its answer does not raise any issues warranting a hearing regarding this allegation. See, e.g., *Spruce Co.*, 321 NLRB 919 fn. 2 (1996), and cases cited there.

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 the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); *Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964); *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

ORDER

The National Labor Relations Board orders that the Respondent, FedEx Home Delivery, a Separate Operating Division of FedEx Ground Package System, Inc., Wilmington, Massachusetts, 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 25, as the exclusive collective-bargaining representative of the employees in the Ballardvale Street unit and the Jewel Drive 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 representative of the employees in the following appropriate units on terms and conditions of employment, and, if an understanding is reached, embody the agreement in a signed agreement:

The Ballardvale Street unit:

All full-time and regular part-time contractors and swing contractors employed by Respondent at its 375 Ballardvale Street facility in Wilmington, Massachusetts, but excluding temporary drivers, helpers employed by contractors, package handlers, guards, and supervisors as defined in the Act.

The Jewel Drive unit:

All full-time and regular part-time contractors and swing contractors employed by Respondent at its 8 Jewel Drive facility in Wilmington, Massachusetts, but excluding temporary drivers, helpers em-

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ployed by contractors, package handlers, guards, and supervisors as defined in the Act.

(b) Within 14 days after service by the Region, post at its Ballardvale Street and Jewel Drive facilities in Wilmington, Massachusetts, copies of the attached notice marked "Appendix."⁶ Copies of the notice, on forms provided by the Regional Director for Region 1, 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. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, 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 28, 2007.

(c) Within 21 days after service by the Region, file with the Regional Director 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. September 28, 2007

Robert J. Battista, Chairman

Wilma B. Liebman, Member

Peter N. Kirsanow, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD
APPENDIX
NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE

⁶ 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."

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 25, as the exclusive collective-bargaining representative of the employees in the Ballardvale Street and Jewel Drive bargaining units.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, recognize and 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 bargaining units:

The Ballardvale Street unit:

All full-time and regular part-time contractors and swing contractors employed by Respondent at its 375 Ballardvale Street facility in Wilmington, Massachusetts, but excluding temporary drivers, helpers employed by contractors, package handlers, guards, and supervisors as defined in the Act.

The Jewel Drive unit:

All full-time and regular part-time contractors and swing contractors employed by Respondent at its 8 Jewel Drive facility in Wilmington, Massachusetts, but excluding temporary drivers, helpers employed by contractors, package handlers, guards, and supervisors as defined in the Act.

FEDEX HOME DELIVERY, A SEPARATE
OPERATING DIVISION OF FEDEX GROUND
PACKAGE SYSTEM, INC.