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UPS Supply Chain Solutions, Inc. and International Brotherhood of Teamsters, Local 439. Case 32–CA–309933

August 4, 2023

DECISION AND ORDER

BY CHAIRMAN McFERRAN AND MEMBERS KAPLAN
AND WILCOX

This is a refusal-to-bargain case in which the Respondent UPS Supply Chain Solutions, Inc. is contesting the Union’s certification as bargaining representative in the underlying representation proceeding. Pursuant to a charge filed on December 30, 2022, and amended on February 9, 2023, by International Brotherhood of Teamsters, Local 439 (the Union), the General Counsel issued a complaint on May 3, 2023, alleging that the Respondent has violated Section 8(a)(5) and (1) of the Act by failing and refusing to recognize and bargain with the Union following the Union’s certification in Case 32–RC–293756. (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 June 1, 2023, the General Counsel filed a Motion for Summary Judgment. On June 5, 2023, the Board issued an Order Transferring the Proceeding to the Board and a Notice to Show Cause why the motion should not be granted. On June 19, 2023, the Respondent filed its opposition. The General Counsel filed a timely reply.

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 contention, raised and rejected in the representation proceeding, that the Union engaged in objectionable electioneering at and near the polling area during the election.¹

¹ In its opposition to the Motion for Summary Judgment, the Respondent admits that this issue was fully litigated and resolved in the underlying representation hearing, but argues that the facts of this case trigger the exception to the rule against relitigation set forth in *Sub-Zero Freezer Co.*, 271 NLRB 47 (1984), and affirmed in *RadNet Mgmt., Inc. v. NLRB*, 992 F.3d 1114, 1128 (D.C. Cir. 2021). However, because the allegations in this case are materially different from the threats to employees and property damage found in *Sub-Zero Freezer*, this case does not present the “extreme circumstances” required for the Board to depart from its rule against relitigation. See *RadNet Mgmt., Inc.*, 992 F.3d at 1128.

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 has it established 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 UPS Supply Chain Solutions, Inc., a Delaware corporation with places of business located in Tracy, California, has been engaged in the business of healthcare logistics and warehouse services.

During the 12-month period ending December 31, 2022, the Respondent has provided services valued in excess of \$50,000 directly to customers 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 the representation election, conducted on May 11, 2022, the Regional Director issued a decision on December 6, 2022, overruling the Respondent’s objections to the election and certifying the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All full-time and regular part-time Warehouse Workers II, Warehouse Workers III, Senior Warehouse Workers, Ops Admin Assistants II, Ops Admin Assistants III, and Inventory Control Associates II employed by the Employer at its facilities located at 5849 W. Schulte

The Respondent’s answer asserts several affirmative defenses. None of these defenses—save the ones pertaining to the General Counsel’s request for a compensatory remedy requiring the Respondent to make its employees whole for the lost opportunity to bargain at the time and in the manner contemplated by the Act—are supplemented with any additional argument or support. Therefore, they are insufficient to warrant denial of the General Counsel’s Motion for Summary Judgment. See, e.g., *Sysco Central California, Inc.*, 371 NLRB No. 95, slip op. at 1 fn. 1 (2022); *Station GVR Acquisition, LLC d/b/a Green Valley Ranch Resort Spa Casino*, 366 NLRB No. 58, slip op. at 1 fn. 1 (2018). Because the issue of compensatory relief will be severed for future consideration, the Respondent’s arguments on that matter are no barrier to granting summary judgment.

² The Respondent’s request that the complaint be dismissed is therefore denied.

Rd., Suite 107, Tracy, CA 95377 and 1150 E. Arbor Avenue, Suite 101, Tracy, CA 95304; excluding all other employees, temporary employees, confidential employees, guards, and supervisors as defined by 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

By emails dated May 17, August 19, December 7, and 13, 2022, and by letter dated April 21, 2023, the Union requested that the Respondent recognize and bargain with the Union as the exclusive collective-bargaining representative of the unit. By letters dated August 25, 2022, and April 20, 2023, and continuing to date, the Respondent has failed and refused to recognize and bargain with the Union as the exclusive collective-bargaining representative of the unit.

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 August 25, 2022, 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).

Finally, the General Counsel requests that we adopt a compensatory remedy requiring the Respondent to make its employees whole for the lost opportunity to bargain at the time and in the manner contemplated by the Act. To do so would require overruling *Ex-Cell-O Corp.*, 185 NLRB 107 (1970), and outlining a methodological framework for calculating such a remedy. The Board has decided to sever this issue and retain it for further con-

sideration to expedite the issuance of this decision regarding the remaining issues in this case.³ The Board will issue a supplemental decision regarding a make-whole remedy at a later date.⁴ See *Kentucky River Medical Center*, 355 NLRB 643, 647 fn. 13 (2010); *Kentucky River Medical Center*, 356 NLRB 6 (2010).

ORDER

The National Labor Relations Board orders that the Respondent UPS Supply Chain Solutions, Inc., Tracy, California, and 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 439 (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 full-time and regular part-time Warehouse Workers II, Warehouse Workers III, Senior Warehouse Workers, Ops Admin Assistants II, Ops Admin Assistants III, and Inventory Control Associates II employed by the Employer at its facilities located at 5849 W. Schulte Rd., Suite 107, Tracy, CA 95377 and 1150 E. Arbor Avenue, Suite 101, Tracy, CA 95304; excluding all other employees, temporary employees, confidential employees, guards, and supervisors as defined by the Act.

(b) Within 14 days after service by the Region, post at its facilities in Tracy, California, copies of the attached notice marked "Appendix."⁵ Copies of the notice, on

³ Member Kaplan would not sever this issue. Instead, he would apply *Ex-Cell-O Corp.* and deny the General Counsel's request for a make-whole remedy.

⁴ Having severed the *Ex-Cell-O Corp.* matter for future consideration and ordered the customary remedies for test-of-certification cases, which include a notice posting and distributing the notice electronically should the Respondent customarily communicate with its employees by such means, we find no need to order a notice mailing as requested by the General Counsel in her Motion for Summary Judgment.

⁵ If the facilities involved in these proceedings are open and staffed by a substantial complement of employees, the notices must be posted within 14 days after service by the Region. If the facilities involved in these proceedings are closed or not staffed by a substantial complement of employees due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notices must be posted within 14 days after the facilities reopen and a substantial complement of employees have returned to

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. 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 facilities 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 August 25, 2022.

(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. August 4, 2023

Lauren McFerran, Chairman

Marvin E. Kaplan Member

Gwynne A. Wilcox, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

work, and the notices may not be posted until a substantial complement of employees have returned to work. If, while closed or not staffed by a substantial complement of employees due to the pandemic, the Respondent is communicating with its employees by electronic means, the notice must also be posted by such electronic means within 14 days after service by the Region. If the notice to be physically posted was posted electronically more than 60 days before physical posting of the notice, the notice shall state at the bottom that "This notice is the same notice previously [sent or posted] electronically on [date]." 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."

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 439 (the Union) 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:

All full-time and regular part-time Warehouse Workers II, Warehouse Workers III, Senior Warehouse Workers, Ops Admin Assistants II, Ops Admin Assistants III, and Inventory Control Associates II employed by us at our facilities located at 5849 W. Schulte Rd., Suite 107, Tracy, CA 95377 and 1150 E. Arbor Avenue, Suite 101, Tracy, CA 95304; excluding all other employees, temporary employees, confidential employees, guards, and supervisors as defined by the Act.

UPS SUPPLY CHAIN SOLUTIONS, INC.

The Board's decision can be found at www.nlr.gov/case/32-CA-309933 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.

