

Roy Harmon d/b/a Postmark Station and Hotel Employees and Restaurant Employees Union, Local 2, AFL-CIO. Case 20-CA-24562

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND RAUDABAUGH

On April 21, 1992, the General Counsel of the National Labor Relations Board issued a complaint alleging that the Respondent has violated Section 8(a)(5) and (1) of the National Labor Relations Act by refusing the Union's request to bargain following the Union's certification in Case 20-RC-16748. (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(g); *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed its answer admitting in part and denying in part the allegations in the complaint.

On June 7, 1993, the General Counsel filed a Motion for Summary Judgment and Memorandum in Support, with exhibits attached. On June 9, 1993, 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 no response.

Ruling on Motion for Summary Judgment

In its answer the Respondent admits its refusal to bargain, but attacks the validity of the certification on the basis of the Board's assertion of jurisdiction in the underlying representation case.

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.¹

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, Roy Harmon d/b/a Postmark Station, a sole proprietorship, with an office and place of business in San Francisco, California, has been en-

¹ Member Raudabaugh did not participate in the underlying representation proceeding.

gaged in the operation of a cafeteria and vending machines within the United States Postal Service General Mail Facility.

During the 12-month period ending December 31, 1991, the Respondent derived gross revenues in excess of \$500,000 and purchased and received at its San Francisco, California facility products, goods, and materials valued in excess of \$1500 which originated from points 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 election held February 27, 1992, the Union was certified on March 18, 1992, as the collective-bargaining representative of the employees in the following appropriate unit:

All full-time and regular part-time food service employees, including cook I's, cook II's, front service line worker, saladmaker/dishwasher, busboy/janitor, cashiers and vending machine stocker employed by the Employer at the United States Postal Service General Mail Facility located at 1300 Evans Avenue, San Francisco, California; excluding office clerical employees, managers, tour managers, tour supervisors, 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

Since March 20, 1992, the Union has requested the Respondent to bargain and, since March 25, 1992, the Respondent has refused. We find that this refusal constitutes an unlawful refusal to bargain in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By refusing on and after March 25, 1992, to bargain with the Union as the exclusive collective-bargaining representative of 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 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, Roy Harmon d/b/a Postmark Station, San Francisco, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with Hotel Employees and Restaurant Employees Union, Local 2, AFL-CIO, as the exclusive 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 representative of the employees in the following appropriate unit on 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 food service employees, including cook I's, cook II's, front service line worker, saladmaker/dishwasher, busboy/janitor, cashiers and vending machine stocker employed by the Employer at the United States Postal Service General Mail Facility located at 1300 Evans Avenue, San Francisco, California; excluding office clerical employees, managers, tour managers, tour supervisors, guards and supervisors as defined in the Act.

(b) Post at its facility in San Francisco, California, copies of the attached notice marked "Appendix."² Copies of the notice, on forms provided by the Regional Director for Region 20, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken

²If 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."

by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

Dated, Washington, D.C. July 19, 1993

James M. Stephens, Chairman

John Neil Raudabaugh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER DEVANEY, dissenting.

In the underlying representation proceeding, I dissented from the Board's denial of the Employer's request for review of the Regional Director's decision asserting jurisdiction over the Employer. I therefore dissent from my colleagues' finding here that the Employer has violated Section 8(a)(5) of the Act by refusing to recognize and bargain with the Union.

Dated, Washington, D.C. July 19, 1993

Dennis M. Devaney, Member

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 the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain with Hotel Employees and Restaurant Employees Union, Local 2, AFL-CIO, as the exclusive representative of the 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 guaranteed you by Section 7 of the Act.

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 bargaining unit:

All full-time and regular part-time food service employees, including cook I's, cook II's, front service line worker, saladmaker/dishwasher, busboy/janitor, cashiers and vending machine

stocker employed by us at the United States Postal Service General Mail Facility located at 1300 Evans Avenue, San Francisco, California; excluding office clerical employees, managers, tour

managers, tour supervisors, guards and supervisors as defined in the Act.

ROY HARMON D/B/A POSTMARK STATION