Siren Retail Corporation d/b/a Starbucks *and* Workers United, affiliated with Service Employees International Union. Case 19–CA–299478

November 30, 2022

DECISION AND ORDER

BY CHAIRMAN MCFERRAN AND MEMBERS KAPLAN AND WILCOX

This is a refusal-to-bargain case in which the Respondent Siren Retail Corp. d/b/a Starbucks is contesting the Union's certification as bargaining representative in the underlying representation proceeding. Pursuant to a charge filed on July 15, 2022, and amended on August 16, 2022, by Workers United, affiliated with Service Employees International Union (the Union), the General Counsel issued a complaint on August 17, 2022, 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 19–RC–290608. (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 September 7, 2022, the General Counsel filed a Motion for Summary Judgment. On September 9, 2022, 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 September 23, 2022, the Respondent filed its response to the Notice to Show Cause.[1] 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 Regional Director erred in directing an election by mail.[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 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.[3]

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent Siren Retail Corp. d/b/a Starbucks has been a corporation with an office and place of business located at 1124 E. Pike St. in Seattle, Washington, where it is engaged in operating public restaurants selling food and beverages.

During the 12-month period preceding issuance of the complaint, the Respondent derived gross revenues exceeding $500,000. During the same period, the Respondent purchased and received goods or services ex-

[1] The Respondent's request that the Board take judicial notice of a letter that the Board received and that was attached to the Respondent's response is denied. The Board does not take judicial notice of hearsay statements "absent a showing or basis to conclude that the statements properly fall within an exception to the hearsay rule and/or are free from reasonable dispute." *Casino Pauma*, 362 NLRB 421, 423 (2015).

[2] In its answer, the Respondent largely admits the complaint allegations, including the allegation that it is refusing to recognize and bargain with the Union, but denies par. 5(k), which asserts that the Union is the exclusive collective-bargaining representative; par. 7, which alleges that the Respondent's refusal to bargain violates Sec. 8(a)(5) and (1); and par. 8, which states that the alleged unfair labor practices affect commerce. The mail election issue, however, was fully litigated and resolved in the underlying representation hearing. Accordingly, the Respondent's denials do not raise any litigable issue in this proceeding.

The Respondent also asserts as an affirmative defense that the Regional Director's certification of representative is invalid and that Members Wilcox and Prouty should have recused themselves from any involvement in the representation proceeding. Because Member Wilcox participated in the representation case, the Respondent could have and failed to raise the issue at that time. The Respondent's recusal argument is moot as to Member Prouty, who was not on the panel in this or the representation proceeding. Accordingly, this affirmative defense does not raise a litigable issue in this proceeding.

The Respondent's answer further asserts as an affirmative defense that unspecified irregularities or misconduct could have occurred during the election and could have impacted its outcome. The Respondent has not alleged that any specific conduct occurred in this case or offered any evidence to support its vague 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., *Sysco Cent. 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).

[3] The Respondent's request that the complaint be dismissed is therefore denied.

ceeding $50,000 directly from points located outside the State of Washington.

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 by mail between March 31 and April 21, 2022, the Regional Director issued a decision on May 17, 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:

> Included: All full-time and regular part-time baristas, operation leads, bakers, and mixologists employed by the Employer at its Reserve Roastery store located at 1124 Pike Street, Seattle, Washington.
>
> Excluded: Office clericals, managers, and 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

On June 30, 2022, by e-mail, the Union requested that the Respondent recognize and bargain with the Union as the exclusive collective-bargaining representative of the unit. Since July 14, 2022, 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 July 14, 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 from failing and refusing to recognize and bargain with the Union, 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 consideration to expedite the issuance of this decision regarding the remaining issues in this case.[4] The Board will issue a supplemental decision regarding a make-whole remedy at a later date.[5] 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 Siren Retail Corporation d/b/a Starbucks, Seattle, Washington, and its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize and bargain with Workers United, affiliated with Service Employees International Union (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 employ-

[4] 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.

[5] Having ordered the customary remedies for test-of-certification cases and severed the *Ex-Cell-O Corp*. matter for future consideration, we decline to order, in this case, the additional remedies sought by the General Counsel in her Motion for Summary Judgment.

ees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> Included: All full-time and regular part-time baristas, operation leads, bakers, and mixologists employed by the Employer at its Reserve Roastery store located at 1124 Pike Street, Seattle, Washington.
>
> Excluded: Office clericals, managers, and guards and supervisors as defined in the Act.

(b) Within 14 days after service by the Region, post at its facility in Seattle, Washington, copies of the attached notice marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director for Region 19, 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 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 July 14, 2022.

(c) Within 21 days after service by the Region, file with the Regional Director for Region 19 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, DC November 30, 2022

Lauren McFerran, Chairman

Marvin E. Kaplan, Member

Gwynne A. Wilcox, 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.

WE WILL NOT fail and refuse to recognize and bargain with Workers United, affiliated with Service Employees International Union (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:

[6] 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 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 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 has 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."

Included: All full-time and regular part-time baristas, operation leads, bakers, and mixologists employed by us at the Reserve Roastery store located at 1124 Pike Street, Seattle, Washington.

Excluded: Office clericals, managers, and guards and supervisors as defined in the Act.

SIREN RETAIL CORP. D/B/A STARBUCKS

The Board's decision can be found at www.nlrb.gov/case/19-CA-299478 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.