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**Commonwealth Flats Dev. Corp. d/b/a/ Seaport Hotel  
Boston and UNITE HERE Local 26.** Case 01–  
CA–335996

December 10, 2024

**DECISION AND ORDER**

BY CHAIRMAN MCFERRAN AND MEMBERS PROUTY  
AND WILCOX

This is a refusal-to-bargain case in which Commonwealth Flats Development Corporation d/b/a Seaport Hotel Boston (the Respondent) is contesting the Union’s certification as bargaining representative in the underlying representation proceeding. Pursuant to a charge filed on February 16, 2024, by UNITE HERE Local 26 (the Union), the General Counsel issued a complaint on July 19, 2024, 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 01–RC–321092. (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, thereafter amended,

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<sup>1</sup> In its answer to the complaint, as amended, the Respondent denies the paragraphs alleging the appropriateness of the bargaining unit, the Union’s status as the unit employees’ exclusive collective-bargaining representative, that it has violated the Act, and that its unfair labor practices affect commerce. It admits, however, that it has refused to recognize and bargain with the Union to test its certification. Because those issues were fully litigated in the underlying representation proceeding, we conclude that the Respondent’s denials of the allegations in pars. 5(a), 5(c), 8, and 9 of the complaint do not raise any issues warranting a hearing.

The Respondent’s answer also advances additional affirmative defenses, incorporated by reference in its response to the Notice to Show Cause, including that the complaint fails to state a claim upon which relief can be granted, and the remedies sought by the complaint are punitive, inappropriate, nonremedial, and beyond the Board’s authority under Sec. 10(c) of the Act. It further contends that: the Board’s administrative law judges are inferior officers under the Constitution who are unconstitutionally insulated from presidential oversight by three layers of removal protection; that any proceeding before the Board is unconstitutional because of the Board members’ insulation from presidential control, which violates Article II of the Constitution; and that any Board proceeding to determine whether it committed an unfair labor practice violates its Seventh Amendment right to a jury trial. The Respondent has not, however offered any explanation or evidence to support these bare assertions. We therefore find them 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) (citing cases), enfd.

admitting in part and denying in part the allegations in the complaint and asserting affirmative defenses.

On August 19, 2024, the General Counsel filed a Motion for Summary Judgment. On September 24, 2024, 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 October 8, 2024, the Respondent filed a response to the Notice to Show Cause.

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 that it has refused to bargain but asserts that it has no duty to bargain and contests the validity of the Union’s certification of representative based on its contention, raised and rejected in the underlying representation proceeding, that the bargaining unit is not appropriate for collective bargaining under Section 9(c) of the Act.<sup>1</sup>

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

sub nom. *Operating Engineers Local 501 v. NLRB*, 949 F.3d 477 (9th Cir. 2020).

In addition to finding these claims unsupported, we also find no merit to the Respondent’s constitutional claims. With regard to the Respondent’s challenge to Board members’ insulation from presidential control, binding Supreme Court precedent forecloses it. See *SJT Holdings, Inc.*, 372 NLRB No. 82, slip op. at 1–2 (2023) (citing *Humphrey’s Executor v. United States*, 295 U.S. 602 (1935) (Federal Trade Commission Act’s restriction on President’s removal power of FTC commissioners held constitutionally valid)). Also insufficient to warrant denial of the General Counsel’s Motion for Summary Judgment is the Respondent’s one-sentence argument that the Board’s administrative law judges are unconstitutionally insulated from removal. See, e.g., *Decker Coal Co. v. Pehringer*, 8 F.4th 1123, 1133–1136 (9th Cir. 2021) (rejecting claim that ALJs are unconstitutionally protected from removal). In any event, there is no evidence that the Respondent suffered any harm from the Board members’ and administrative law judges’ removal protections. See *SJT Holdings, Inc.*, supra, slip op. at 1 fn. 4 (citing *Collins v. Yellen*, 594 U.S. 220, 257–258 (2021), and *Calcutt v. FDIC*, 37 F.4th 293, 316 (6th Cir. 2022), rev’d per curiam on other grounds 598 U.S. 623 (2023)); *K & R Contractors, LLC v. Keene*, 86 F.4th 135, 148–149 (4th Cir. 2023) (“[R]egardless of how we answer the constitutional question presented by the removal provisions, we would be required to deny the petition because K & R has not asserted any harm resulting from the allegedly unconstitutional statutes[.]”). Finally, the Supreme Court has considered, and rejected, the Respondent’s Seventh Amendment claim. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 48–49 (1937).

proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941). Accordingly, we grant the Motion for Summary Judgment.<sup>2</sup>

On the entire record, the Board makes the following

#### FINDINGS OF FACT

##### I. JURISDICTION

At all material times, the Respondent has operated a private hotel in Boston, Massachusetts (the Respondent's facility), where it has been engaged in the business of providing hospitality services.

Annually, the Respondent, in conducting its business operations described above, derives gross revenues in excess of \$500,000 and purchases and receives at its Boston, Massachusetts facility goods and services valued in excess of \$5000 directly from points 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 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 an election conducted by secret ballot on January 18, 2024, the Regional Director issued a Certification of Representative in Case 01-RC-321092 on January 26, 2024, certifying the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All full-time and regular part-time banquet and convention services employees, banquet servers, banquet bartenders, banquet barbacks, coat check attendants, convention services supervisors, and convention services housemen employed at the Employer's Boston, Massachusetts location; but excluding managers and guards, and professional employees and supervisors as defined in the Act, and all other employees.

On August 23, 2024, the Board denied the Respondent's request for review of the Regional Director's decision. 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*

About February 9, 2024, the Union, by email, requested that the Respondent bargain with the Union as the exclusive collective-bargaining representative of the unit.

Since about February 9, 2024, 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 about February 9, 2024, 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), enf'd. 350 F.2d 57 (10th Cir. 1965); *Lamar Hotel*, 140 NLRB 226, 229 (1962), enf'd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964).<sup>3</sup>

#### ORDER

The National Labor Relations Board orders that the Respondent, Commonwealth Flats Development Corporation d/b/a Seaport Hotel Boston, Boston, Massachusetts, and its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize and bargain with UNITE HERE Local 26 (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.

<sup>2</sup> The Respondent's request that the complaint be dismissed is therefore denied.

<sup>3</sup> Having ordered the customary remedies for test-of-certification cases, we decline to order, in this case, the bargaining schedule requested

by the General Counsel in the complaint because there has not been a showing that such relief is necessary to remedy the Respondent's unfair labor practice.

(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 banquet and convention services employees, banquet servers, banquet bartenders, banquet barbacks, coat check attendants, convention services supervisors, and convention services housemen employed at the Employer's Boston, Massachusetts location; but excluding managers and guards, and professional employees and supervisors as defined in the Act, and all other employees.

(b) Post at its facility in Boston, Massachusetts copies of the attached notice marked "Appendix."<sup>4</sup> 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. 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 February 9, 2024.

(c) Within 21 days after service by the Region, file with the Regional Director for Region 1 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.

<sup>4</sup> 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 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

Dated, Washington, D.C. December 10, 2024

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Lauren McFerran, Chairman

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David M. Prouty, Member

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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 UNITE HERE Local 26 (the Union) as the exclusive collective-bargaining representative of our employees in the bargaining unit.

WE WILL NOT any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

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."

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 banquet and convention services employees, banquet servers, banquet bartenders, banquet barbacks, coat check attendants, convention services supervisors, and convention services housemen employed at the Employer's Boston, Massachusetts location; but excluding managers and guards, and professional employees and supervisors as defined in the Act, and all other employees.

COMMONWEALTH FLATS DEV. CORP. D/B/A  
SEAPORT HOTEL BOSTON

The Board's decision can be found at [www.nlr.gov/case/01-CA-335996](http://www.nlr.gov/case/01-CA-335996) 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.

