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Signman, Inc., and its alter ego Jay's Sign Company, Inc., d/b/a Jay's Sign Services and Jay's Sign Company Inc. d/b/a Jay's Sign Services and Jay Jolley and Local Union No. 481, International Brotherhood Of Electrical Workers, AFL-CIO.
Case 25-CA-28650

October 29, 2009

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBER SCHAUMBER

The General Counsel seeks a default judgment in this case on the ground that the Respondents Signman, Inc. (Signman) and Jay Jolley (Jolley) have failed to file answers to the amended compliance specification. The General Counsel also seeks summary judgment against Respondent Jay's Sign Company, Inc., d/b/a Jay's Sign Services (Jay's Sign) on the ground that admissions made by Jay's Sign in bankruptcy proceedings establish that there are no material issues of fact warranting a hearing on its liability for backpay owed according to the amended compliance specification.

On October 15, 2003, the Board issued an unpublished Order¹ that, among other things, directed Respondent Signman, to make whole employee Donald Lupfer for any loss of earnings and other benefits suffered as a result of his unlawful discharge in violation of Section 8(a)(1) and (3) of the Act. On April 8, 2004, the United States Court of Appeals for the Seventh Circuit entered an unpublished judgment enforcing the Board's Order.²

A controversy having arisen over the amount of backpay due Donald Lupfer, on September 27, 2005, the Regional Director for Region 25 issued a compliance specification and notice of hearing alleging the amount due under the Board's Order. Although not a party to the original unfair labor practice litigation, Respondent Jay's Sign was added to the compliance specification and was alleged to have derivative liability for Respondent Signman's unfair labor practices as an alter ego, a single employer, and/or a *Golden State*³ successor. Prior to issuance of the compliance specification, Signman filed a voluntary Chapter 7 bankruptcy petition.

Respondent Signman failed to file an answer to the compliance specification. By letter dated November 1,

¹ In the absence of exceptions, the Order automatically adopted the underlying decision of Administrative Law Judge John T. Clark (JD-91-03).

² Case No. 04-1301.

³ *Golden State Bottling Co. v. NLRB*, 414 U.S.168 (1973).

2005, the Region advised Signman and the bankruptcy trustee that no answer to the compliance specification had been received and unless an answer was filed by November 8, 2005, a motion for default judgment would be filed. By letter dated November 3, 2005, Signman informed the Region that it would "not be filing a response to the Board's Compliance Specification and Notice of Hearing issued on September 27, 2005." Signman further stated that it had "no objection to the Board's claim."

On October 18, 2005, Respondent Jay's Sign filed an answer to the compliance specification. The answer admitted some allegations, but denied others including allegations of its derivative liability for Respondent Signman's unfair labor practices. For the remainder of the allegations, Jay's Sign claimed that it lacked information sufficient to provide an answer. Jay's Sign filed a voluntary Chapter 11 bankruptcy petition in 2006.⁴

On May 29, 2009, the Regional Director issued an amended compliance specification and notice of hearing, again naming Signman and Jay's Sign as Respondents and adding Respondent Jolley as an individual, alleging that all Respondents are jointly and severally liable for the backpay owed Donald Lupfer and for contributions owed to certain benefit funds. As to Respondent Jay's Sign, the allegations of the amended compliance specification adds that, on January 24, 2007, the U.S. Bankruptcy Court for the Southern District of Indiana approved an agreed entry on claim in which Jay's Sign admitted that it was the alter ego of, and *Golden State* successor to, Respondent Signman, and liable for remedying the unfair labor practices adjudicated against Signman.⁵

As to Respondent Jolley, the allegations of the amended compliance specification state that: he has been president, owner, supervisor, and agent of Respondent Jay's Sign at all material times, and as such has controlled all of its daily operations and financial resources; he used his personal assets in the operation of Respondent Jay's Sign; and, since the commencement of operations, he has diverted assets of Jay's Sign to render it

⁴ Although Respondents Signman and Jay's Sign are in bankruptcy, it is well established that the institution of bankruptcy proceedings does not deprive the Board of jurisdiction or authority to entertain and process an unfair labor practice case to its final disposition. See, e.g., *Cardinal Services*, 295 NLRB 933 fn. 2 (1989), and cases cited there. Board proceedings fall within the exception to the automatic stay provisions for proceedings by a governmental unit to enforce its police or regulatory powers. See *id.*, and cases cited therein; *NLRB v. 15th Avenue Iron Works, Inc.*, 964 F.2d 1336, 1337 (2d Cir. 1992).

⁵ Case No. 06-01113-AJM-11.

insolvent and make it incapable of fulfilling its obligations. Based on this conduct, the amended compliance specification alleges that Respondent Jolley is individually liable, as an alter ego of Respondent Jay's Sign, to remedy the unfair labor practices of Respondent Signman.

The amended compliance specification notified the Respondents that they should file an answer within 21 days from the date of the specification, pursuant to the Board's Rules and Regulations. None of the Respondents filed answers. By letters dated June 26, 2009, the Region advised the Respondents that no answers to the amended compliance specification had been received and unless answers were filed by July 10, 2009, a motion for default judgment would be filed. To date, the Respondents have failed to file answers.⁶

On July 17, 2009, the General Counsel filed with the Board a Motion for Default Judgment and Motion for Summary Judgment, with exhibits attached. On July 22, 2009, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motions should not be granted. The Respondents did not file responses. The allegations in the motions and in the amended compliance specification are therefore undisputed.

⁶ The copies of the amended compliance specification were served by certified mail on Respondents Jay's Sign and Jolley at their last known addresses in Indianapolis, Indiana, but were returned and marked "RETURN TO SENDER, MOVED LEFT NO ADDRESS, UNABLE TO FORWARD, RETURN TO SENDER." The Region subsequently determined that Respondent Jolley had likely moved to Ormond Beach, Florida, and attempted service on him by leaving a copy of the amended compliance specification at his new place of employment (Dave's Pest Control), his mother's house, and his mother-in-law's house. The Region was able to confirm that Jolley was, in fact, employed at Dave's Pest Control and living at his mother's address. The Region's followup letters of June 26, 2009, were again sent to the Respondents' last known addresses in Indianapolis, Indiana, but were returned, and they were sent to Respondent Jolley's Florida addresses and were not returned. The Region has satisfied the Board's Rules for service. See *Environmental Construction, Inc.*, 333 NLRB No. 10 fn. 1 (2001) (not reported in Board volumes) (a respondent's failure to provide for receiving appropriate service of documents cannot serve to defeat the purposes of the Act). The Region did not attempt to serve Respondent Signman because it had ceased operations in 2008. See *Signman Consulting, Inc.*, Case No. 04-17663-BHL-7A. In any event, as found herein, Respondent Jay's Sign is an alter ego of Respondent Signman. It is well established that where two companies are alter egos, service on one is sufficient to constitute service on the other. E.g., *Somerville Construction Co.*, 338 NLRB 1178, 1178 fn. 2 (2003).

Ruling on Motions for Default Judgment and Summary Judgment⁷

Section 102.56(a) of the Board's Rules and Regulations provides that the Respondent shall file an answer within 21 days of service of a compliance specification. Section 102.56(c) provides that if the respondent fails to file an answer to the specification within the time prescribed by this section, the Board may, either with or without taking evidence in support of the allegations of the specification and without further notice to the respondent, find the specification to be true and enter such order as may be appropriate.

According to the uncontroverted allegations of the motion for default judgment, Respondents Signman and Jolley, despite having been advised of the filing requirements, have failed to file answers to the amended compliance specification. In the absence of good cause for Respondent Signman's failure to file an answer, we deem the allegations in the amended compliance specification to be admitted as true, and we therefore grant the General Counsel's Motion for Default Judgment as to Respondent Signman.

However, we deny the Motion for Default Judgment as to Respondent Jolley. As stated, the amended compliance specification seeks to impose personal liability on Jolley, as an alter ego of Jay's Sign, for the unfair labor practices of Respondent Signman. The General Counsel essentially seeks to pierce the corporate veil to impose personal liability on a corporate owner/officer as a result of his alter ego status. The test for imposing personal liability, however, is set forth in *White Oak Coal*, 318 NLRB 732 (1995), enfd. mem. 81 F.3d 150 (4th Cir. 1996). Pursuant to *White Oak Coal*, the Board will

⁷ Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Liebman and Member Schaumber constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act. See *Snell Island SNF LLC v. NLRB*, 568 F.3d 410 (2d Cir. 2009), petition for cert. filed 78 U.S.L.W. 3130 (U.S. September 11, 2009) (No. 09-328); *New Process Steel v. NLRB*, 564 F.3d 840 (7th Cir. 2009), petition for cert. filed 77 U.S.L.W.3670 (U.S. May 22, 2009)(No. 08-1457); *Northeastern Land Services v. NLRB*, 560 F.3d 36 (1st Cir. 2009), petition for cert. filed 78 U.S.L.W. 3098 (U.S. august 18, 2009) (No. 09-213). But see *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469 (D.C. Cir. 2009), petition for cert. filed sub nom. *NLRB v. Laurel Baye Healthcare of Lake Lanier, Inc.*, __ U.S.L.W. __ (U.S. September 29, 2009) (No. 09-377).

pierce the corporate veil when: (1) there is such unity of interest, and lack of respect given to the separate identity of the corporation by its shareholders, that the personalities and assets of the corporation and the individuals are indistinct; and (2) adherence to the corporate form would sanction a fraud, promote injustice, or lead to an evasion of legal obligations. Here, we find that the allegations of the amended compliance specification do not set forth a sufficiently clear or specific factual basis to support a finding of personal liability under a veil-piercing theory.⁸ Accordingly, we will remand these allegations and the issue of personal liability to the Regional Director for further amendment of the compliance specification⁹ or a hearing.

Although Respondent Jay's Sign denied having any derivative backpay liability in its answer to the original compliance specification, the amended compliance specification alleges that Jay's Sign admitted in its bankruptcy case that it is the alter ego of, and *Golden State* successor to, Respondent Signman and liable to remedy the unfair labor practices adjudicated against Signman. Jay's Sign did not file an answer to the amended compliance specification.¹⁰ In the absence of good cause for its failure to file an answer, we deem the allegations in the amended compliance specification to be admitted as true. Therefore, there are no factual issues warranting a hearing in this matter and we grant the General Counsel's Motion for Summary Judgment as to Respondent Jay's Sign.

⁸ Chairman Liebman does not interpret the compliance specification as seeking to impose liability on Jolley directly for unfair labor practices he committed as an agent for the other Respondents. See *Flat Dog Productions, Inc.*, 347 NLRB 1180, 1189 (2006) (dissent of then—Member Liebman).

⁹ See, e.g., *Spencer Group, Inc.*, 345 NLRB No. 58 (2005) (not reported in Board volumes) (granting default judgment and imposing personal liability based on allegations that individual respondent Robinson commingled funds with corporate respondent Spencer and participated in the creation of a new corporate entity to avoid respondent Spencer's backpay liability).

¹⁰ Respondent Jay's Sign's denial of derivative backpay liability in its answer to the original compliance specification would have been sufficient to warrant a hearing on this issue. See, e.g., *Pallazola Electric*, 312 NLRB 569, 571 fn. 6 (1993) (citing *Best Roofing Co.*, 304 NLRB 727, 728 (1991)) (a general denial of alter ego status is sufficient to warrant a hearing). However, Jay's Sign's denial in the original compliance specification is insufficient because this allegation regarding derivative liability has substantively changed in the amended compliance specification based on Jay Sign's admissions in the bankruptcy case. Cf. *Kolin Plumbing Corp.*, 337 NLRB 234, 235 (2001) (Board will not grant default judgment on an allegation denied in a timely-filed answer to a compliance specification, even though the respondent later fails to timely answer an amended specification repeating the allegation, provided that the repeated allegation is not substantively changed from the original).

Based on the foregoing, we conclude that the amount of backpay due to the discriminatee Donald Lupfer and the contributions due to the specified fringe benefit funds are as stated in the amended compliance specification and we will order Respondents Signman and Jay's Sign to pay those amounts, plus interest accrued to the date of payment as prescribed in the Order. We will remand the issue of Respondent Jay Jolley's personal liability to the Regional Director to take further appropriate action consistent with this Decision.

ORDER

The National Labor Relations Board orders that Respondent Signman, Inc., and its alter ego Jay's Sign Company, Inc., d/b/a Jay's Sign Services, and Respondent Jay's Sign Company, Inc., d/b/a Jay's Sign Services, Indianapolis, Indiana, their officers, agents, successors, and assigns, shall jointly and severally make whole Donald Lupfer by paying him the amount following his name, plus interest accrued to the date of payment, as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), minus tax withholdings required by Federal and State laws, and by making the payments due the benefit funds named below in the amounts set forth, plus interest accrued to the date of payment as prescribed in *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979):

Donald Lupfer	\$31,769
Electrical Workers Pension Fund	1,089
National Electric Benefit Fund	817
Money Purchase Trust Fund	1,362
Total	\$35,037

IT IS FURTHER ORDERED that the issue of Respondent Jay Jolley's individual liability is remanded to the Regional Director for further appropriate action consistent with this decision.

Dated, Washington, D.C. October 29, 2009

Wilma B. Liebman, Chairman

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD