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**Testa Construction Company, Inc. and International Union of Operating Engineers, Local 478.** Case 34-CA-12525

November 29, 2010

DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBERS BECKER  
AND HAYES

The Acting General Counsel seeks summary judgment in this case pursuant to the terms of a settlement agreement. Upon a charge and amended charge filed by the International Union of Operating Engineers, Local 478, the Union, on November 20, 2009 and January 25, 2010, respectively, the General Counsel issued the original complaint on February 26, 2010, against Testa Construction Company, Inc., the Respondent, alleging that it had violated Section 8(a)(3) and (1) of the Act.

Subsequently, the Respondent and the Union entered into a settlement agreement, which was approved by the Acting Regional Director for Region 34 on May 7, 2010. Among other things, the settlement agreement required the Respondent to (1) post a notice to employees and (2) pay employees Phillip A. Cooper and Terry Nichols backpay and benefits in the amounts of \$16,268.80 and \$21,149.46, respectively, to be paid in 6 monthly installments of \$2,711.47 to Cooper and \$3,524.91 to Nichols from July 20 to December 20, 2010.

The settlement agreement also contained the following provision:

PERFORMANCE—Performance by the Charged Party with the terms and provisions of this Agreement shall commence as set forth above and after the Agreement is approved by the Regional Director. The Charged Party agrees that in case of non-compliance with any of the terms of this Settlement Agreement by the Charged Party and after 14 days notice from the Regional Director of the National Labor Relations Board of such non-compliance without remedy by the Charged Party, the Regional Director may issue a complaint based upon the allegations set forth in the Notice to Employees. Thereafter, the General Counsel may file a motion for summary judgment with the Board on the allegations of the just-issued complaint concerning the violations of the Act alleged therein. The Charged Party understands and agrees that the allegations of the aforementioned complaint may be deemed to be true by the Board, that it will not contest the validity of any

such allegations, and the Board may enter findings of fact, conclusions of law, and an order on the allegations of the aforementioned complaint. On receipt of said motion for summary judgment the Board shall issue an Order requiring the Charged Party to show cause why said Motion of the General Counsel should not be granted. The only issue that may be raised in response to the Board's Order to Show Cause is whether the Charged Party defaulted upon the terms of this settlement agreement. The Board may then, without necessity of trial or any other proceeding, find all allegations of the complaint to be true and make findings of fact and conclusions of law consistent with those allegations adverse to the Charged Party, on all issues raised by the pleadings. The Board may then issue an order providing a full remedy for the violations found as is customary to remedy such violations. The parties further agree that the Board's order may be entered thereon ex parte and that, upon application by the Board to the appropriate United States Court of Appeals for enforcement of the Board's order, judgment may be entered thereon ex parte and without opposition from the Charged Party.

By letter dated July 23, 2010, the compliance officer for Region 34 advised the Respondent that the Region had not received the first installment of the payment plan for backpay set forth in the settlement agreement. The compliance officer further stated that the letter served as the required 14-day notice of its failure to comply with the terms of the settlement agreement by failing to remit the first backpay installment due July 20, 2010, and stated that unless the Respondent remedied its admitted failure to comply with the settlement agreement within 14 days, a complaint and notice of hearing would issue. The Respondent failed to comply.<sup>1</sup> Accordingly, pursuant to the terms of the noncompliance provisions of the settlement agreement, on August 11, 2010, the Regional Director for Region 34 reissued the complaint.

On September 14, 2010, the Acting General Counsel filed a Motion for Summary Judgment with the Board. Thereafter, on September 16, 2010, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be

<sup>1</sup> By email to the Region dated August 25, 2010, the Respondent's counsel advised that the Respondent "will be closing its doors shortly because of a heavy debt load that the company is unable to address" and that it was considering bankruptcy. In his Motion for Summary Judgment, the Acting General Counsel states that the Respondent has not come forward with any evidence that it has sought bankruptcy protection or is unable to comply with the settlement agreement, and at the time of the motion, had not filed any bankruptcy petitions.

granted. The Respondent filed no response. The allegations in the motion are therefore undisputed.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

#### Ruling on Motion for Summary Judgment

According to the uncontroverted allegations in the Motion for Summary Judgment, the Respondent has failed to comply with the financial terms of the settlement agreement by failing to remit the agreed-upon amounts due employees Phillip A. Cooper and Terry Nichols. Consequently, pursuant to the noncompliance provisions of the settlement agreement set forth above, we find that all the allegations in the reissued complaint are true.<sup>2</sup> Accordingly, we grant the Acting General Counsel's Motion for Summary Judgment.

On the entire record, the Board makes the following

#### FINDINGS OF FACT

##### I. JURISDICTION

At all material times, the Respondent, a Connecticut corporation with its principal offices located in Stamford, Connecticut, and with operations at construction jobsites at other Connecticut locations, has been engaged as a contractor in the building and construction industry.

During the 12-month period ending January 31, 2010, the Respondent, in conducting its operations described above, purchased and received goods at its Stamford facility and Connecticut jobsites valued in excess of \$50,000 directly from points outside the State of Connecticut.

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

At all material times, the following individuals held the positions set forth opposite their respective names and have been supervisors of the Respondent within the meaning of Section 2(11) of the Act and agents of the Respondent within the meaning of Section 2(13) of the Act:

Richard Testa Jr.	—	President, Director
Richard Testa Sr.	—	Vice President, Director
John ____ (last name known to the Respondent)	—	Foreman, Science Park jobsite in Bridgeport, Connecticut

1. About June 3, 2009, the Respondent, by Richard Testa Jr., at its Science Park jobsite:

(a) Informed its employees that it was terminating them for engaging in union and other protected concerted activities.

(b) Threatened its employees with discharge for engaging in union and other protected concerted activities;

(c) In the presence of employees, impliedly threatened an agent of the Union with physical harm.

2. About June 4, 2009, the Respondent, by Richard Testa Sr., at its Science Park jobsite, informed employees that it was terminating them for engaging in union and other protected concerted activities.

3. About June 3, 2009, the Respondent terminated the employment of employee Terry Nichols.

4. About June 5, 2009, the Respondent terminated the employment of employee Phillip A. Cooper.

The Respondent engaged in the conduct described in paragraphs 3 and 4 because the named employees joined, supported, or assisted the Union, and engaged in concerted activities, and to discourage employees from engaging in these activities.

#### CONCLUSIONS OF LAW

1. By the conduct described in paragraphs 1 and 2, the Respondent has been interfering with, restraining, and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act, in violation of Section 8(a)(1) of the Act.

2. By the conduct described in paragraphs 3 and 4, the Respondent has been discriminating in regard to the hire, or tenure, or terms and conditions of employment of its employees, thereby discouraging membership in a labor organization, in violation of Section 8(a)(3) and (1) of the Act.

3. The Respondent's unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

#### REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent has violated Section 8(a)(3) and (1) by terminating employees Terry Nichols and Phillip A. Cooper on June 3 and 5, 2009, respectively, we shall order the Respondent to make them whole for any loss of earnings and other benefits suffered as a result of the Respondent's unlawful actions against them.

In this regard, the Respondent agreed in the settlement agreement to pay Phillip A. Cooper \$16,268.80 and Terry Nichols \$21,149.46 to be distributed into 6 monthly installments of \$2,711.47 to Cooper and \$3,524.91 to Nichols. As indicated above, the Respon-

<sup>2</sup> See *U-Bee, Ltd.*, 315 NLRB 667 (1994).

dent has failed to make any backpay installment payments. The Acting General Counsel's motion states that there is an outstanding balance in the amount of \$16,268.80 owed to Cooper and \$21,149.46 owed to Nichols. Accordingly, we shall order the Respondent to immediately remit these amounts to the Region for payment to Cooper and Nichols, plus daily compound interest as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010).

We shall also provide for the remedies typically imposed for the violations found. As set forth above, the settlement agreement provided that, in the event of non-compliance, the Board could "issue an order providing a full remedy for the violations found as is customary to remedy such violations." Thus, under this language, it is appropriate to provide the "customary" remedies of expungement of the Respondent's personnel records and notice posting.<sup>3</sup> Therefore, the Respondent shall also be required to remove from its files any reference to the unlawful terminations of Phillip A. Cooper and Terry Nichols, and notify them in writing that this has been done and that the unlawful terminations will not be used against them in any way.

#### ORDER

The National Labor Relations Board orders that the Respondent, Testa Construction Company, Inc., Stamford, Connecticut, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Informing employees that they are being terminated for engaging in union or other protected concerted activities.

(b) Threatening employees with discharge because of their union or other protected concerted activities.

(c) Impliedly threatening an agent of the Union with physical harm in the presence of employees.

(d) Terminating or otherwise discriminating against any employee for engaging in protected concerted activities or assisting the International Union of Operating Engineers, Local 478, or any other labor organization, or

<sup>3</sup> See *L.J. Logistics, Inc.*, 339 NLRB 729, 730-731 (2003). The Acting General Counsel states in his Motion for Summary Judgment that because the job in which Cooper and Nichols had been working at the time of their unlawful termination had ended by the time of the settlement agreement, there is no need for a reinstatement order or any additional backpay. Accordingly, we shall not order these customary remedies in this proceeding. In addition, although the settlement agreement required the Respondent to post a notice to employees, the Motion for Summary Judgment is silent regarding the Respondent's compliance with that requirement. Further, the settlement notice differs in material respects from the notice that is warranted in view of our findings and Order herein. Accordingly, we find that a notice-posting remedy is appropriate here.

to discourage employees from engaging in these activities.

(e) 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) Remit to Region 34 the amounts of \$16,268.80 owed to Phillip A. Cooper and \$21,149.46 owed to Terry Nichols to be disbursed in accordance with the May 7, 2010 settlement agreement, plus interest, as set forth in the remedy section of this decision.

(b) Within 14 days from the date of this Order, remove from its files any reference to the unlawful terminations of Phillip A. Cooper and Terry Nichols, and within 3 days thereafter, notify the employees in writing that this has been done and that the unlawful terminations will not be used against them in any way.

(c) Within 14 days after service by the Region, post at its facility in Stamford, Connecticut, copies of the attached notice marked "Appendix."<sup>4</sup> Copies of the notice, on forms provided by the Regional Director for Region 34, 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.<sup>5</sup> Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, 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 June 3, 2009. In addition, pursuant to the terms of the settlement agreement, the notice may include notices in more than one language as deemed appropriate by the Regional Director.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a re-

<sup>4</sup> 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."

<sup>5</sup> For the reasons stated in his dissenting opinion in *J. Picini Flooring*, 356 NLRB No. 9 (2010), Member Hayes would not require electronic distribution of the notice.

sponsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., November 29, 2010

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Wilma B. Liebman, Chairman

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Craig Becker, Member

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Brian E. Hayes, 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 inform you that you are being terminated for engaging in union or other protected concerted activities.

WE WILL NOT threaten you with discharge because of your union or other protected concerted activities.

WE WILL NOT impliedly threaten an agent of the Union with physical harm in your presence.

WE WILL NOT terminate or otherwise discriminate against you for engaging in protected concerted activities or supporting the Union or any other labor organization, or to discourage you from engaging in these activities.

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 remit to Region 34 the amounts of \$16,268.80 owed to Phillip A. Cooper and \$21,149.46 owed to Terry Nichols to be disbursed in accordance with the May 7, 2010, settlement agreement, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful terminations of Phillip A. Cooper and Terry Nichols, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the unlawful terminations will not be used against them in any way.

TESTA CONSTRUCTION COMPANY, INC.