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**Sidhal Industries, LLP and Local 813, International Brotherhood of Teamsters.** Cases 29–CA–29608 and 29–CA–29637

December 30, 2010

DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBERS PEARCE  
AND HAYES

On April 26, 2010, Administrative Law Judge Steven Davis issued the attached decision. The Respondent filed exceptions and a supporting brief.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge’s rulings, findings,<sup>1</sup> and conclusions, to modify his remedy,<sup>2</sup> and to adopt the recommended Order as modified.<sup>3</sup>

<sup>1</sup> The Respondent has excepted to some of the judge’s credibility findings. The Board’s established policy is not to overrule an administrative law judge’s credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 1083 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

<sup>2</sup> In accordance with our decision in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010), we modify the judge’s recommended remedy by requiring that backpay and other monetary awards shall be paid with interest compounded on a daily basis.

We agree with the judge that the remedy should include full backpay for Samuel Gonzalez, but we find that the backpay period shall begin on the date of the Respondent’s unlawful discrimination against Gonzalez, and not on September 16, 2009, as cited by the judge. In selecting September 16, the judge relied on *L.J. Logistics, Inc.*, 339 NLRB 729, 731 (2003), where the Board found that backpay would begin on the date of the regional director’s approval of a settlement agreement, in order to prevent an unintended “double recovery” for the period between the date of the discrimination and the date of that agreement. However, while it may have been clear in *L.J. Logistics*, and cases citing it, that the amounts paid pursuant to settlement agreements were the equivalent of full backpay for the pre-settlement agreement period, here the record does not establish whether this is the case. Accordingly, to ensure that Gonzalez receives an appropriate make-whole remedy for the discrimination against him, we shall modify the judge’s recommended remedy to provide that the backpay period shall commence on the date of the unlawful discrimination against Gonzalez, with any amounts already paid to be deducted from the Respondent’s backpay liability. In this regard, we find it unnecessary to rely on *Vishal Construction*, 354 NLRB No. 43 (2009), cited by the judge.

<sup>3</sup> We shall modify the judge’s recommended Order to provide for the posting of the notice in accord with *J. Picini Flooring*, 356 NLRB No. 9 (2010). For the reasons stated in his dissenting opinion in *J. Picini Flooring*, Member Hayes would not require electronic distribution of the notice.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Sidhal Industries, LLP, its officers, agents, successors, and assigns, shall take the action set forth in the recommended Order as modified.

1. Substitute the following for paragraph 2(b).

“(b) Make Samuel Gonzalez whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in this Decision and Order.”

2. Substitute the following for paragraph 2(f).

“(f) Within 14 days after service by the Region, post at its Hempstead, New York facility, copies of the attached notice marked “Appendix.”<sup>4</sup> Copies of the notice, on forms provided by the Regional Director for Region 29, 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. 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 April 6, 2009.”

Dated, Washington, D.C. December 30, 2010

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Wilma B. Liebman, Chairman

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Mark Gaston Pearce, 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 FAIL and refuse to bargain collectively and in good faith, by failing and refusing to meet and bargain with Local 813, International Brotherhood of Teamsters, as the exclusive collective-bargaining representative of the employees in the following unit:

All full-time and part-time drivers and warehouse employees employed at our Hempstead facility, excluding office clerical employees and supervisors as defined in the National Labor Relations Act.

WE WILL NOT FAIL refuse to hire or consider for hire Samuel Gonzalez as a warehouse employee.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL on request, bargain collectively and in good faith with Local 813, International Brotherhood of Teamsters as the exclusive collective-bargaining representative of the unit employees and, if an understanding is reached, embody the understanding in a signed agreement.

WE WILL make Samuel Gonzalez whole for any loss of earnings and other benefits resulting from our refusal to hire him or consider him for hire, less any net interim earnings, plus interest.

WE WILL within 14 days from the date of the Board's Order, offer Samuel Gonzalez employment in the warehouse position he applied for, without prejudice to his seniority or any other rights or privileges previously enjoyed, dismissing, if necessary, any employees hired to fill the position for which he applied. His waiver of reinstatement is no longer in WE WILL, within 14 days from the date of the Board's Order, if we have not already done so, remove from our files any reference to our

unlawful refusal to hire or consider for hire Samuel Gonzalez, and within 3 days thereafter, notify him in writing that this has been done and that our refusal to hire him or consider him for hire will not be used against him in any way.

SIDHAL INDUSTRIES, LLP

*Tara O'Rourke, Esq.*, for the General Counsel.  
*Jane Lauer Barker, Esq. (Pitta & Giblin, LLP)*, of New York, New York, for the Union.  
*Jeffery A. Meyer, Esq. (Kaufman, Dolowich, Voluck, & Gonzo, LLP)*, of Woodbury, New York, for the Respondent.

DECISION

STATEMENT OF THE CASE

STEVEN DAVIS, Administrative Law Judge. Based upon charges filed by Local 813, International Brotherhood of Teamsters (Union) in Cases 29-CA-29608 and 29-CA-29637, on May 12 and July 9, 2009, respectively, the Regional Director issued an Order Consolidating Cases and consolidated amended complaint in the above cases, alleging that Sidhal Industries, LLP (Respondent) (a) failed and refused to meet and bargain with the Union and (b) refused to hire or consider for hire Samuel Gonzalez. The Respondent's answer denied the material allegations of the complaint.

On September 16, 2009, the Regional Director approved a bilateral settlement agreement (settlement) executed by the Respondent, resolving the allegations made in the amended complaint.

On January 26, 2010, the Director issued an Order Revoking Settlement and reissuance of consolidated amended complaint and notice of hearing. The Order stated that the Respondent has failed to comply with certain aspects of the settlement, essentially by failing and refusing to offer to meet and bargain with the Union at least four times per month until such time that a contract has been reached, a lawful impasse is reached or the Union indicates that it does not want to meet any further.

The Order concluded that inasmuch as the Respondent failed to comply with certain terms of the settlement or cure its default, the Regional Director revoked the settlement and asserted that the allegations in the amended complaint may be deemed to be true by the Board.

The Order directed that the Respondent file an answer limited to those paragraphs of the Order which set forth its alleged failure to comply with certain terms of the settlement. The Respondent filed an answer which denied that it failed to comply with those terms, and on March 16, 2010, a hearing was held before me in Brooklyn, New York.

On the entire record, including my observation of the demeanor of the witnesses, I make the following<sup>1</sup>

<sup>1</sup> Counsel for the Respondent made an opening statement, and the General Counsel made closing argument. No party filed a brief.

I. THE SETTLEMENT AGREEMENT<sup>2</sup>*A. Procedural Terms*

The settlement agreement provides, as material herein:

The Respondent agrees that in case of non-compliance with any of the terms of this Settlement Agreement by the Respondent, the Regional Director may . . . reissue the complaint previously filed. 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 herein. The Respondent 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, including a full and complete traditional backpay remedy for all violations of the Act, and any appropriate special remedies sought. The only issues that may be raised in response to the Board's Order to Show Cause [as to why the Motion for Summary Judgment should not be granted] is whether the Respondent defaulted upon the terms of the Settlement Agreement and/or if it received notice to cure said default. 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 Respondent, 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, including, but not limited to the remedial provisions of this Settlement Agreement and liquidated damages.

The settlement agreement also provided that any payments of any amounts due under the terms of the settlement "shall not constitute the full remedy of the allegations set forth in the complaint."

Inasmuch as the Respondent filed an answer to the Order Revoking Settlement Agreement, a motion for summary judgment was not filed, and a hearing was held on the disputed issue of whether the Respondent failed to comply with the settlement.

*B. Substantive Terms*

As material here, the settlement agreement states that the Respondent agrees as follows:

WE WILL meet and bargain with the Union at 5:30 p.m. on September 16, 2009 (at the offices of Employer's Counsel) and at 3:00 p.m. on October 21, 2009 (at the Union's office), for a minimum of two hours each time, absent agreement by the parties that the meetings be curtailed.

WE WILL offer the Union future bargaining sessions at a minimum of four days per month, for a minimum of two hours each time, absent agreement by the parties that the meetings be curtailed, until such time that a collective bargaining agreement is reached, a lawful impasse is reached or

the Union indicates that it does not want to meet any further. For at least half of these dates, we will offer bargaining sessions that will begin no later than 3:00 p.m.

WE WILL negotiate in good faith as to the locations of each meeting.

## II. THE ALLEGED FAILURE TO COMPLY WITH THE TERMS OF THE SETTLEMENT

*A. The Meetings of September 16 and October 21*

The settlement was approved by the Regional Director on September 16, 2009.

As set forth in the settlement, the parties agreed to meet on September 16. They did not because Jane Lauer Barker had a court ordered deposition with a discovery deadline that day. She advised Jeffrey Meyer, the Respondent's counsel, that she could not attend the bargaining session, and it was canceled.

The next meeting specified in the settlement was scheduled for October 21 at 3 p.m. at the Union's office. On October 20, Meyer emailed Barker asking her to confirm that they would be meeting the following day at 5 p.m. at his office. Barker replied that the meeting was confirmed, and asked for directions from the Union's office.

Barker testified that although the settlement provided that the meeting would be at the Union's office, she and Lewis agreed that rather than have a dispute as to where to meet, she agreed to Meyer's request that the session be held at his office.

Barker testified that she and Union Representative Cliff Lewis arrived at Meyer's office on October 21 at 3:20 p.m. They announced themselves to the receptionist and waited. At about 4:10 p.m., Meyer told them that his client was en route. They waited until 5:30 p.m., and Lewis decided that he would not wait any longer. This was confirmed in Barker's November 3 letter to Meyer. No response was received to that letter.

Barker testified that she understood that the meeting was to be held at Meyer's office. She stated that in confirming the meeting with Meyer, she did not note that Meyer's email stated that the session would begin at 5 p.m. In fact, she testified that the meeting was, in fact, scheduled for 3 p.m. because the settlement set the meeting for 3 p.m. She stated that, nevertheless she was at Meyer's office at 5 p.m., the time Meyer had asked her to confirm, and stayed until 5:30 p.m., not having seen the Employer or Meyer during that 30-minute period of time.

Jeffrey Fein, one of the owners of the Respondent, testified that he arrived at Meyer's office at about 5:05 p.m. that day. He walked through the lobby and did not observe anyone sitting there. He was told by the receptionist that Barker and Lewis had just left. Fein looked for them but did not see them on Meyer's floor, in the lobby, or outside the building.

*B. The Requirement That the Respondent Offer Four Meeting Days Per Month*

As set forth in the settlement, the Respondent agreed, and was required, to offer the Union "in the future" four bargaining sessions per month until a contract is reached, a lawful impasse is reached, or until the Union indicates that it does not want to meet any further.

Accordingly, since the settlement mandated specific meet-

<sup>2</sup> The settlement is in evidence as GC Exh. 1(q).

ings on September 16 and October 21, the four “future” sessions per month referred to meetings in November and thereafter.

1. The Meetings in November and December

On October 22, Barker wrote to Meyer, requesting bargaining on the following dates and times “pursuant to the NLRB Settlement and Notice”:

November 13, 3:00 p.m. at Meyer’s office.  
 November 24, 5:00 p.m. at the Union’s office.  
 November 30, 3:00 p.m. at Meyer’s office.  
 December 2, 5:00 p.m. at the Union’s office.  
 December 7, 3:00 p.m. at Meyer’s office.  
 December 16, 5:00 p.m. at the Union’s office.  
 December 21, 3:00 p.m. at Meyer’s office.

Barker’s letter requested certain information including a current list of unit employees, their dates of hire, current rate of pay, job classification, residence address and phone number. She noted that such information was previously requested at their meeting on July 28, 2009, and asked that it be provided on or before October 30.

On November 6, the Regional Office wrote to Meyer, advising that on November 3, Barker requested that the settlement be revoked because of the events of October 21, set forth above. The letter also advised that the Union told the Regional Office that the Respondent had not responded to its letter of October 22 in which it offered seven dates and times for future bargaining sessions. The Regional Office advised Meyer that the settlement requires that the *Employer offer* (emphasis in original) to meet and bargain with the Union at least four times per month, and that it is the Regional Office’s understanding that the Employer did not respond to that letter, offer any dates to the Union for bargaining, and has made no additional attempts to meet and bargain with the Union, as is required.

The letter concluded that the Regional Office believed that the Employer’s conduct, as alleged by the Union is inconsistent with the express terms and spirit of the settlement, and that the letter was the Region’s only request that the Employer cure its default of the terms of the agreement as soon as possible, but no later than noon on November 10 (later extended to the close of business on November 11). The letter outlined ways in which the Employer could cure its default by complying with the terms of the settlement:

Either agreeing to the Union’s proposed dates or offering a minimum of four alternate dates on which the Employer is available to meet and bargain with the Union in the manner specifically set forth in the agreement. If the Employer fails to comply with this affirmative obligation, I will recommend that the Region revoke the Settlement, reissue the complaint and seek summary judgment on all of the allegations in the complaint, including the reinstatement of Sam Gonzalez and any additional backpay to which he may be entitled.

Meyer did not respond to Barker’s October 22 letter until November 11. On that date he wrote to Barker, advising that the Employer is available to bargain as follows:

November 24, 5:00 p.m. at Meyer’s office.

or  
 December 2, 3:00 p.m. at the Union’s office.

AND

December 10, 5:00 p.m. at Meyer’s office or 3:00 p.m. at the Union’s office, depending on the time and location of the earlier meeting referenced above.

or

December 14, 3:00 p.m. at the Union’s office or 5:00 p.m. at Meyer’s office, depending on the time and location of the earlier meeting referenced above.

Please confirm which of the above dates are acceptable.

It should be noted that the Respondent offered to bargain on only one date in November, that being November 24.

On November 13, Barker wrote to Meyer, reminding him that the Respondent was required to bargain with the Union for a minimum of 4 days per month. The letter further stated that “we are only willing to agree to less than four days per month for the month of November, 2009, and only because you did not respond to my October 22 letter in a timely manner. We offered you three dates in November, but you only accepted one date, November 24. We accept that date, but your client will need to bargain at the Union’s office since we went to your office last time (at which your client did not show up before we left at 5:30 p.m., more than two hours after we arrived). . . . If your client is not willing to bargain on November 30, as we proposed, please provide two additional dates in November when your client is willing to bargain.”

Barker testified that she agreed to meet fewer than 4 days in the month of November, but she did not agree to 1 day only. She stated that her letter asked Meyer for additional dates in November.

Barker agreed to bargain on November 24 at 3 or 5 p.m. Barker’s letter also stated that she accepted the Employer’s offer to bargain on December 2 and 10 as proposed by Meyer. However, there was some confusion as to which locations and times she was agreeing to. As Meyer’s November 11 letter stated that he offered to bargain on December 2 at 3 p.m. at the Union’s office, her agreement was to bargain at 3 p.m. that day at Meyer’s office. Similarly, as Meyer had offered to bargain on December 10 at 5 p.m. at his office or at 3 p.m. at the Union’s office, she agreed to bargain that day at 5 p.m. at the Union’s office.

Barker asked Meyer for two more dates to bargain in December, and set forth the dates previously offered in her October 22 letter: December 16 and 21. She stated that if those dates were not acceptable, Meyer should propose other dates in December, so that there are four dates in December to bargain.

Barker’s letter further stated that she expected Meyer to provide four dates for bargaining in January in his response to this letter, noting that she was available every day in January except January 11 and 19. She concluded by reminding Meyer that he had not responded to the Union’s request for information contained in her October 22 letter, and asked that the data be provided before the November 24 session.

Barker testified that the Respondent did not accept either the December 16 or the 21 date for bargaining which she offered in

her November 13 letter.

On November 23, Meyer confirmed the negotiation session for the following day. The next day, November 24, Meyer's office cancelled the session due to his illness, and noted that they would meet for bargaining on December 2.

On December 1, Meyer wrote to Barker confirming that the meeting would be held the following day at the Union's office at 5 p.m., and asked her to confirm that arrangement.

That day, Barker wrote, asking that Meyer immediately supply the information she requested previously. She also asked Meyer to immediately respond to her letters offering four dates in each of the months of December and January.

The next day, December 2, Meyer responded, asking that Barker confirm that their meeting would take place at 5 p.m. that day at the Union's office, adding that the information would be provided at their session that day. He further stated that, "as for additional dates, we have already proposed December 2, 10 and/or 14. I will discuss one additional date in December with my client."

Barker replied that day that "you never confirmed any of the dates. Please confirm now the following dates that we offered: December 10, 16, 21. We are not available on December 10." She added "we need the information we requested asap no later than noon today."

The same day, December 2, Meyer wrote to Barker, attaching his prior letter of November 11, offering to meet on November 24, December 2, 10, and 14. He stated that he was not available on December 16 or 21. He asked that Barker clarify her letter in which she stated that she was both available and not available on December 10. He also asked if she was available on December 14. Finally, Meyer noted that he and his client would be at the Union's office that night at 5 p.m., and asked that she advise if she and her client would be present. He concluded by stating that certain requested information would be provided that evening.

Barker replied that day, stating that she is available on December 10, but not on December 14, adding that "right now you are only confirming December 10 as mutually agreed. We need two additional dates in December from you now." Barker asked that Meyer "e-mail the employee info now that we asked for in July."

On December 4, Meyer wrote to Barker, stating that he and his client were at the Union's office on December 2 at 5 p.m. for negotiations, but neither Barker nor her client, Cliff Lewis, were present. He further stated that the Union's secretary advised him that neither Barker nor her client were present, nor did she expect them to be there, and that she attempted to call Barker and Lewis with no success. Meyer wrote that he and Barker exchanged multiple emails on December 2 in which he sought confirmation that the meeting would take place that evening at the Union's office at 5 p.m., and that although Barker responded to the messages she did not address the negotiation session. He noted that Barker did not inform him that she would not be present or that negotiations were canceled by the Union. He noted that her emails were unclear as to which of his proposed dates the Union has accepted, if any, noting that she both accepted and rejected the December 10 date proposed by him. He concluded by asking her to confirm that she was

available on December 10, at 5 p.m., and asked that that session be held at his office at 5 p.m. since he was at the Union's office on December 2.

Respondent's official Fein testified that while he and Meyer waited in the Union's office, the Union's secretary told them that she did not know anything about the negotiations and she was trying to contact Lewis. She later told them that Lewis would not be present, and that no one else was available to conduct the negotiations. They then left.

Barker conceded that neither she nor her client appeared for negotiations on December 2. Her testimonial explanation of the agreed-upon December 2 meeting was that she had an outstanding request for information which was first made in July which included names of employees, their job classifications, rates of pay, addresses and phone numbers. She stated that she had repeatedly insisted on the information and it had not been forthcoming. She further stated that she gave various deadlines to the Employer for her receipt of the data which were not met. She sought this information in order to propose agreement concerning issues relating to the information sought, and then proceed with other issues. She noted that in order to address the basic information sought such as wages she needed that data in order to speak with employees to prepare proposals or counter-proposals. The Union was "adamant that they had to have that information before negotiating further." Barker stated that she insisted in her communications with Meyer that she needed that information "in advance of negotiating" on December 2, and did not receive it.

Barker added that "we never confirmed the session that day . . . I never confirmed that the negotiations would go forward" while conceding that Meyer and his client appeared that day for bargaining at the Union's office. She added that she did not believe that it was necessary for her to notify the Employer or its counsel that the Union would not appear at the December 2 session because "it was clear in my e-mails that we needed the information . . . I asked for the information in advance of the negotiation and [Meyer] never provided it." She further stated that Meyer asked for confirmation that the session would take place and she did not provide that confirmation. Her attendance was an "open issue." She further stated that she did not want to cancel the December 2 session. Rather, she wanted the information and wanted to go forward with the negotiations.

Barker testified that Meyer's offer to provide the information that evening was not acceptable because she and Lewis needed to use the data to prepare for the meeting. She had intended to speak to the employees and assemble a proposal with the information. She stated that she had not received the information notwithstanding that it had been requested in July, and she "wanted to make progress in the session," and therefore needed the information in advance of the meeting.

On December 4, Barker wrote Meyer that he had not provided four dates in December and four dates in January. She also advised that she had not received the information, set forth above, that was requested in July. Barker testified that she did not receive a response to her request that Meyer supply four dates for bargaining in December and January.

The December 10 session was scheduled for 5 p.m. at Meyer's office. As Meyer later explained in his letter of Janu-

ary 7, 2010 to the Regional Office, Barker advised him by email that she and her client were running late but expected to arrive at 5:30 p.m. At about 5:30 p.m., Barker phoned Meyer from her car, telling him her location on the Long Island Expressway. Meyer calculated that they were about 25 miles and at least 1 hour from his office. Inasmuch as the negotiations could not begin before at least 7 p.m., 2 hours after they were scheduled to begin, he canceled the session.

Barker testified that she left the Union's office in Long Island City, Queens at about 4:30 p.m. and called Meyer's office at about 5:15 p.m., advising that she was on her way, but was delayed in terrible traffic, adding that she was not certain when she would arrive. She gave her location and Meyer said that it would take her too long to get to his office, and that he would not have his client wait for her. Meyer said that he would call her the next day to schedule further dates for bargaining. Meyer did not call her the next day.

Respondent official Fein testified that, if he was driving from Long Island City, he would have left 2 hours to drive to Meyer's office. Fein stated that when Meyer told him where she was located, Meyer cancelled the session because it would have taken Barker too long to get to Meyer's office. Fein stated generally that he believed that his time was being wasted because he is present at the sessions "and they don't show up and it's just a horrible waste of time." He gave his opinion that he did not believe that the Union has legitimately indicated that it wants to negotiate with the Employer.

On December 11, Barker wrote to Meyer advising that the Union offered to bargain on December 16 at 5 p.m., at the Union's office, and December 21 at 3 p.m., at Meyer's office. She asked that Meyer accept those dates or provide alternative dates in December, by the close of business December 14. She also noted that she had not received the information requested previously, and asked that it be sent by email that day.

On December 14, Meyer replied that "we are unavailable on the dates proposed by the Union." Barker replied that day, stating that he did not provide alternative dates to those she proposed, and she asked that he do so. Barker testified that Meyer did not offer any alternative dates.

Barker testified that on December 21, Meyer provided the documents requested. She noted that, although he promised to bring them to the December 2 session, he did not leave them at the Union's office when he was there that day.

## 2. The events in January 2010

On January 4, 2010, the Regional Office advised Meyer that the Union asked it to revoke the settlement on the ground that the Employer "failed to comply with the express terms of the agreement which requires that it offer the Union future bargaining sessions at a rate of four times per month, until such time that a contract is reached, a lawful impasse is reached or the union indicates that it does not want to meet any further."

The letter stated that based on the evidence presented by the Union "it appears that the Employer failed to offer the required number of bargaining sessions for both November and December, 2009. It also appears that the Employer failed to offer any dates thus far for January, 2010. If the information presented by the Union is accurate, the Employer is in breach of the Settle-

ment." The letter asked Meyer to advise the Regional Office by January 7 if this information was correct.

On January 7, Meyer wrote to the Regional Office, advising that the Union has "obfuscated, ignored and blatantly disregarded Sidhal's attempts to negotiate in good faith with the Union," adding that the parties have discussed at least 10 dates in November and December for the purposes of scheduling negotiations. The letter attached the communications set forth above, specifically, the letters of November 11 and the emails of December 1 and 2. Meyer further wrote that he had not yet offered dates in January because the Employer's principals had been on vacation and just returned, and others had been in the hospital and had just been discharged therefrom, but he expected to "offer the required four dates within the coming days."

Meyer's letter concluded by stating that "based upon the Union's willful disregard for Sidhal and its good faith efforts to negotiate, the Union's request to revoke the Settlement should be denied." He added that "the Union, not Sidhal, has caused negotiations to stall. Sidhal has made every reasonable effort, given the Union's conduct, to meet in good faith and to abide by the terms of the Settlement. Moreover, no decision should be made based upon January dates as any alleged breach would be speculative."

On January 26, the Regional Director issued the Order Revoking the Settlement and reissuing complaint.

## 3. The scheduled meetings in February and March

Barker testified that on about February 2, Meyer offered four dates to meet in February. The Union accepted one date, February 24. The parties did not meet on that day because Meyer cancelled the session. He did not offer any alternate dates in February.

On March 3, Meyer wrote to Barker, advising that the Employer is available to bargain as follows:

March 8, 5:00 p.m. at Meyer's office.  
or  
March 9, 3:00 p.m. at the Union's office.

AND

March 22, 5:00 p.m. at Meyer's office or 3:00 p.m. at the Union's office, depending on the time and location of the earlier meeting referenced above.

or

March 23, 3:00 p.m. at the Union's office or 5:00 p.m. at Meyer's office, depending on the time and location of the earlier meeting referenced above.

Please confirm which of the above dates are acceptable.

On March 9, Barker wrote to Meyer, accepting his offer to negotiate on March 22, at 3 p.m., at the Union's office, and March 23, at 5 p.m., at Meyer's office. As of the date of the hearing, March 16, those meetings had not yet occurred, but Barker testified that she had not received Meyer's confirmation of the two dates that Barker was available.

## III. THE RESPONDENT'S ARGUMENTS

The Respondent concedes that the settlement requires that it

offer four dates per month for negotiations. However it argues that its obligation may be “waived” if the Union indicates that it does not want to meet any further.

The Employer states that there were at least three instances where negotiations were scheduled when either the Union left negotiations, failed to appear or notify the Employer that it would not be present, or was intentionally late and/or had no intention of appearing. The Respondent argues that such conduct created a “sham” of the negotiations indicating its intent not to meet any further with the Employer. Accordingly, the Employer argues that it has not breached the settlement, but rather the “underlying facts here were based upon the Union’s malfeasance or nonfeasance.”

#### Analysis and Discussion

Pursuant to the express terms of the settlement agreed to by the Respondent, it was required to “offer the Union future bargaining sessions at a minimum of four days per month, for a minimum of two hours each time, absent agreement by the parties that the meetings be curtailed, until such time that a collective bargaining agreement is reached, a lawful impasse is reached or the union indicates that it does not want to meet any further. . . .”

The “future” bargaining sessions were clearly intended to mean after the month of October 2009, inasmuch as specific bargaining dates were set in September and October.

The General Counsel argues that the Respondent failed to comply with the settlement by not offering four dates to bargain in November and December 2009, and four dates in January, 2010.

As set forth above, on October 22, Barker offered Meyer three dates in November and four dates in December. The Regional Office wrote to Meyer stating that inasmuch as he had not responded to the Union’s letter or offered any dates for bargaining, that the Respondent’s actions constituted noncompliance with the settlement. The letter requested that it cure its default by either agreeing to the Union’s proposed dates or offering a minimum of four alternate dates.

Instead, the Respondent, agreed to meet on November 24 *or* December 2. In addition, the Respondent offered to meet on December 10 *or* 14.

Accordingly, the Respondent did not meet its obligation to offer to meet on four dates in November and December. It agreed to meet on 1 day in November *or* another in December, and, in addition, agreed to meet on either December 10 *or* 14. Thus, the Respondent did not offer to meet on four dates in either November or December 2009.

On January 4, 2010, the Regional Office advised Meyer that the Respondent was in breach of the settlement by not offering to bargain on four dates in November and December. There is no evidence that the Respondent offered any dates to bargain in January 2010.

Based on the evidence set forth above, it is clear that the Respondent has not offered the Union four dates to bargain in the months of November and December 2009 and January 2010. It has therefore failed to comply with the terms of the settlement.

The Respondent argues the settlement’s provision requiring that it offer four dates to bargain in each month was waived by

the Union, pointing to the provision that the Respondent’s obligation ends when the “Union indicates that it does not want to meet any further.” Such indication may be made by word or actions.

The Respondent does not claim that the Union told it that it did not want to meet any further. Rather, it relies on certain conduct by the Union during the course of these unsuccessful meetings.

However, there is no evidence that any of the Union’s actions indicated that it did not want to meet any further. The Union understandably cancelled the first, September 16, meeting due to Barker’s need to attend a court ordered deposition. The next scheduled meeting was supposed to take place at the Union’s office on October 21, and Barker, in an effort to accommodate the Employer, agreed to its suggestion that they meet at Meyer’s office instead. She mistakenly believed that the meeting was scheduled to begin at 3 p.m., and arrived at 3:20 p.m. The meeting, in fact, had been set to start at 5 p.m. Apparently not being advised while they waited until at least 5 p.m. that the meeting had actually been set for 5 p.m., and having been told by Meyer that his client was not yet there, Barker and Lewis apparently left at about 5 p.m. The mistake in noting the meeting time is understandable, and in any event, Barker and her client were present until at least 5 p.m. when the meeting was supposed to have begun.

In addition, although the Employer asked to meet on December 2, and Meyer and his client appeared at the Union’s office that day, the Union reasonably did not appear because, as Barker testified, she needed certain basic information concerning the employees which had not been received although it had been requested since July. She credibly testified that such information was a prerequisite to intelligent bargaining.

On December 10, Barker was delayed in driving to Meyer’s office due to traffic, and advised that she would be late. Meyer determined that it would take too long for her to arrive and cancelled the session while she was en route.

None of these events support a finding that the Union indicated that it did not want to meet any further. The Union cancelled a meeting due to a court ordered deposition, but Meyer cancelled a meeting due to his illness. Barker incorrectly noted the start time at the October 21 meeting and arrived 1-1/2 hours early, but nevertheless was present at the 5 p.m. scheduled meeting time. Further, the Union correctly believed that unless it had the requested information, bargaining would not be productive on December 2. Finally, Barker may have miscalculated the time necessary to travel to Long Island during rush hour.

None of these actions by the Union were intended to delay or postpone bargaining. In fact, the Union made extra efforts throughout this period of time to encourage the Respondent to agree to meet. Thus, after no meetings took place in September and October, Barker offered three dates in November and four in December. Instead, Meyer agreed only to meet on November 24 *or* December 2, and on December 10 *or* 14. Thus, in response to Barker’s offer of seven dates, Meyer agreed to meet on only two dates. She asked him to provide two more dates in November.

Further, after agreeing to meet on one date in November and

two in December, Barker asked for another two dates in December and January. She repeatedly reminded Meyer of the Respondent's obligation to offer to meet four dates each month. She also asked him to provide additional dates, even noting that she was available every day in January except two.

Accordingly, the Respondent has not shown that the Union has indicated that it did not want to meet any further. On the contrary, the evidence establishes that the Union offered dates to meet although it was not obligated to do so, traveled to meetings, and demanded that the Respondent offer additional dates for bargaining.

Based on the above, I find that the Respondent failed to comply with the terms of the settlement by not offering the Union four dates per month to meet in the months of November and December 2009, and January 2010, and that the Respondent has not cured its default.

The settlement provides that in the event of the Respondent's noncompliance with its terms, the amended complaint be reissued, and that the Respondent waives any answer thereto and the right to raise any defenses to the allegations of the amended complaint, and that the allegations in the amended complaint may be deemed to be true by the Board.

#### Ruling on the Order Revoking Settlement

##### FINDINGS OF FACT

I find that all of the allegations of the amended complaint are deemed to be true, as set forth below

##### I. JURISDICTION

The Respondent, a domestic limited liability corporation, having its principal office and place of business located at 176 Front Street, Hempstead, New York, has been engaged in the wholesale distribution of janitorial and service supplies. During the past 12-month period, the Respondent has purchased and received at its Hempstead facility, goods and materials valued in excess of \$50,000 directly from points outside New York State. At all material times, the Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. I find that at all material times the Union has been a labor organization within the meaning of Section 2(5) of the Act.

##### II. THE ALLEGED UNFAIR LABOR PRACTICES

1. (a) The charge in Case 29-CA-29608 was filed by the Union on May 12, 2009, and served by regular mail on Respondent on or about May 14, 2009.

(b) The charge in Case 29-CA-29637 was filed by the Union on June 3, 2009, and served by regular mail on Respondent on or about June 9, 2009.

2. The following employees of the Respondent, herein called the unit, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and part-time drivers and warehouse employees employed at Respondent's Hempstead facility, excluding office clerical employees and supervisors as defined in the National Labor Relations Act.

3. On February 29, 2008, the Union was certified as the exclusive collective-bargaining representative of the unit. At all material times, the Union has been the designated collective-bargaining representative of the unit.

4. At all material times, the Union, by virtue of Section 9(a) of the Act, has been the exclusive representative of the unit, for the purposes of collective bargaining.

5. In or about May, 2008, Respondent and the Union commenced negotiations for an initial collective-bargaining agreement to cover the employees in the unit described above in paragraph 1.

6. On or about April 6, 10, 14, 23, and 29 and May 5, 2009, by electronic mail, and on or about April 6 and 10, 2009, verbally, the Union requested further bargaining for an initial contract to cover the unit described above in paragraph 2.

7. Since about April 6, 2009, Respondent has failed and refused to meet and bargain with the Union as the exclusive collective-bargaining representative of the unit described above in paragraph 2.

8. (a) On or about April 8 and 9, 2009, Samuel Gonzalez, who had previously worked for Respondent as a driver, requested that Respondent employ him as a warehouse employee.

(b) Since on or about April 8 and 9, 2009, Respondent has refused to hire or consider for hire Gonzalez as a warehouse employee.

9. Respondent engaged in the conduct described above in paragraph 8(b) because Gonzalez joined and assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities.

##### CONCLUSION OF LAW

By the conduct described above, the Respondent has been failing and refusing to bargain collectively with the representative of its employees in violation of Section 8(a)(1) and (5) of the Act, and has been discriminating in regard to the hire or tenure or terms or conditions of employment of its employees, thereby discouraging membership in a labor organization in violation of Section 8(a)(1) and (3) of the Act.

The unfair labor practices of Respondent, described above, affect commerce within the meaning of Section 2(6) of the Act.

##### REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily refused to hire or consider for hire Samuel Gonzalez as a warehouse employee, it must make him whole for any loss of earnings and other benefits suffered as a result of the Respondent's unlawful actions against him.

The Board has decided a number of cases, cited below, in which its reinstatement and backpay orders were based on the identical remedial terms set forth in the settlement involved herein.

As set forth above, the settlement provided, that in the event of noncompliance with any of its terms, the Board could "issue an Order providing a full remedy for the violations found as is

customary to remedy such violations, including, but not limited to the remedial provisions of this Settlement and liquidated damages.” Thus, it is appropriate to provide the “customary” remedies of reinstatement, full backpay, expungement of the Respondent’s personnel records, and notice posting. *L.J. Logistics, Inc.*, 339 NLRB 729, 730 (2003).

Regarding backpay due to Gonzalez, I note that certain letters in evidence state that the Respondent has paid Gonzalez the sum of \$2700, less deductions, under the terms of the settlement covering backpay due from the date of the Respondent’s refusal to hire or consider him for hire to the effective date of the settlement. To the extent that the Respondent has paid this sum, the Respondent will be credited with any amount already paid. *Vishal Construction, Inc.*, 354 NLRB No. 43, slip op. at 3 fn. 4. (2009).

In addition, because I shall order the Respondent to provide the customary remedy of full backpay, the applicable backpay period will commence on September 16, 2009, the day the Regional Director approved the settlement. It is necessary to impose this limitation to prevent an unintended double recovery for the period running from the date that Samuel Gonzalez was not hired or considered for hire to the effective date of the settlement. *Manhattan Health Clean*, 353 NLRB 1037, 1039 fn. 4 (2009); *BSC Development Buf, LLC*, 353 NLRB No. 63, slip op. at 5 (2008) (not reported in Board volumes).

The additional backpay due Samuel Gonzalez shall be computed as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest thereon to be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). In the Order Revoking Settlement Agreement, the General Counsel seeks interest computed on a compounded, quarterly basis for any backpay or other monetary awards. I deny the General Counsel’s request as that is not the current law. *Cox Ohio Publishing*, 354 NLRB No. 32, slip op. at fn. 5 (2009); *Glen Rock Ham*, 352 NLRB 516, 516 fn. 1. (2008), citing *Rogers Corp.*, 344 NLRB 504 (2005).

Although the settlement indicates that Gonzalez waived his right to reinstatement, the settlement agreement has been set aside, and therefore the waiver of reinstatement is no longer in effect. *Manhattan Health Clean*, above. Thus, I shall order the Respondent to offer Gonzalez immediate employment as part of the customary remedy for the Respondent’s unlawful refusal to hire or consider him for hire. I shall order the Respondent to offer Samuel Gonzalez immediate employment in the warehouse job for which he applied, or if such job no longer exists, in a substantially equivalent job, without prejudice to his seniority or other rights and privileges, dismissing, if necessary, any employees hired to fill the position for which he applied.

Further, having found that the Respondent violated Section 8(a)(5) of the Act by failing and refusing to bargain collectively and in good faith with the Union as the exclusive collective-bargaining representative of the unit employees, by failing to meet and bargain with the Union, I will order that the Respondent, on request, meet and bargain collectively and in good faith with the Union with respect to wages, hours, and other terms and conditions of employment, and if an understanding is reached, to embody the understanding in a signed agreement.

There is evidence that the Respondent issued an expunge-

ment letter and has posted a notice to employees. To the extent that this has been done, an additional expungement letter need not be sent. However, inasmuch as the settlement has not been complied with, the notice to employees must be posted again because the notice in the settlement differs in material respects from the notice that is warranted in view of my above findings and Order. *Phoenix Finishing, Inc.*, 354 NLRB No. 64, slip op. at 3 fn. 4 (2009).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>3</sup>

#### ORDER

The Respondent, Sidhal Industries, LLP, Hempstead, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain collectively and in good faith, by failing and refusing to meet and bargain with Local 813, International Brotherhood of Teamsters, as the exclusive collective-bargaining representative of the employees in the following unit:

All full-time and part-time drivers and warehouse employees employed at Respondent’s Hempstead facility, excluding office clerical employees and supervisors as defined in the National Labor Relations Act.

(b) Refusing to hire or consider for hire Samuel Gonzalez as a warehouse employee.

(c) 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 collectively and in good faith with the Union as the exclusive collective-bargaining representative of the unit employees and, if an understanding is reached, embody the understanding in a signed agreement.

(b) Make Samuel Gonzalez whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the Decision.

(c) Within 14 days from the date of the Board’s Order, offer Samuel Gonzalez employment in the warehouse position he applied for, without prejudice to his seniority or any other rights or privileges previously enjoyed, dismissing, if necessary, any employees hired to fill the position for which he applied. His waiver of reinstatement is no longer in effect.

(d) Within 14 days from the date of the Board’s Order, if it has not already done so, remove from its files any reference to the unlawful refusal to hire or consider for hire Samuel Gonzalez, and within 3 days thereafter notify him in writing that this has been done and that the refusal to hire him or consider him for hire will not be used against him in any way.

(e) Preserve and, within 14 days of a request, or such addi-

<sup>3</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board’s Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

tional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its facility in Hempstead, New York, copies of the attached notice marked "Appendix."<sup>4</sup> Copies of the notice, on forms provided by the Regional Director for Region 29, 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. 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 April 6, 2009.

(g) Within 21 days after service by the Region, file with the Regional Director 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, D.C. April 26, 2010

#### 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

<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."

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 bargain collectively and in good faith, by failing and refusing to meet and bargain with Local 813, International Brotherhood of Teamsters, as the exclusive collective-bargaining representative of the employees in the following unit:

All full-time and part-time drivers and warehouse employees employed at Respondent's Hempstead facility, excluding office clerical employees and supervisors as defined in the National Labor Relations Act.

WE WILL NOT refuse to hire or consider for hire Samuel Gonzalez as a warehouse employee.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL on request, bargain collectively and in good faith with Local 813, International Brotherhood of Teamsters as the exclusive collective-bargaining representative of the unit employees and, if an understanding is reached, embody the understanding in a signed agreement.

WE WILL, if we have not already done so, pay Samuel Gonzalez \$2700, less deductions, in accordance with the September 16, 2009 settlement agreement, and make him whole for any loss of earnings and other benefits suffered since September 16, 2009, as a result of our refusal to hire him or consider him for hire as a warehouse employee.

WE WILL within 14 days from the date of the Board's Order, offer Samuel Gonzalez employment in the warehouse position he applied for, without prejudice to his seniority or any other rights or privileges previously enjoyed, dismissing, if necessary, any employees hired to fill the position for which he applied. His waiver of reinstatement is no longer in effect.

WE WILL, within 14 days from the date of the Board's Order, if we have not already done so, remove from our files any reference to our unlawful refusal to hire or consider for hire Samuel Gonzalez, and within 3 days thereafter notify him in writing that this has been done and that our refusal to hire him or consider him for hire will not be used against him in any way.

SIDHAL INDUSTRIES, LLP