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ACE Green, LLC and Service Employees International Union, Local 32BJ. Case 2–CA–39331

March 1, 2011

DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBERS PEARCE
AND HAYES

The Acting General Counsel seeks a default judgment in this case on the grounds that the Respondent has failed to file a legally sufficient and timely answer to the complaint. On a series of charges filed by the Union,¹ the Acting General Counsel issued a complaint on June 29, 2010, against Ace Green, LLC, the Respondent, alleging that it violated Section 8(a)(1), (3), and (5) of the Act. The complaint affirmatively stated that unless an answer was received by July 13, 2010, or postmarked by July 12, 2010, the Board may find, pursuant to a motion for default judgment, that the allegations in the complaint are true. The Region, by letter dated July 17, 2010, notified the Respondent that unless an answer was filed by July 30, 2010, a motion for default judgment would be filed. On July 29, 2010, the Respondent, by and through its counsel, filed an answer denying the allegations in the complaint.

On September 14, 2010, the Acting General Counsel issued an Amended Complaint and Notice of Rescheduled Hearing, repeating the allegations in the original complaint and asserting a new allegation. The amended complaint affirmatively stated that unless an answer was received by the Region by September 28, 2010, or postmarked by September 27, 2010, the Board may find, pursuant to a motion for default judgment, that the allegations in the complaint are true. The Region, by letter dated September 16, 2010, reminded the Respondent of its duty to file an answer specifically addressing the allegations in the amended complaint and advised the Respondent that unless an answer was filed by September 28, 2010, a Motion for Default Judgment would be filed. Thereafter, the Respondent filed its answer dated September 27, 2010, postmarked September 28, 2010, and received September 30, 2010, denying the allegations in the amended complaint.

On October 8, 2010, the Acting General Counsel filed a Motion for Default Judgment with the Board. Thereaf-

¹ The Union filed charges against the Respondent on June 4, 2009, and later amended on July 13, 2009, September 15, 2009, October 28, 2009, and March 25, 2010.

ter, on October 12, 2010, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. On October 25, 2010, the Respondent submitted by facsimile an Objection to the Transference of This Matter to the Board contending that the Board's Order was improper because it was not properly served with the Acting General Counsel's Motion for Default Judgment. By letter dated October 26, 2010, the Associate Executive Secretary informed the Respondent that the Board's Order was properly issued because proper service was achieved by the Acting General Counsel, and therefore the due date for responding to the Notice to Show Cause remained October 26, 2010. The Respondent filed no response.

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

Ruling on Motion for Default Judgment

Section 102.20 of the Board's Rules and Regulations provides that a respondent "shall specifically admit, deny, or explain each of the facts alleged in the complaint, unless the respondent is without knowledge, in which case the respondent shall so state, such statement operating as a denial." Section 102.20 further provides that "any allegation in the complaint not specifically denied or explained in an answer filed, unless the respondent shall state in the answer that he is without knowledge," shall be deemed admitted unless good cause is shown. Both the Respondent's July 29, 2010 answer to the original complaint and September 30, 2010 answer to the amended complaint stated, "The Respondent hereby denies the allegations in the Complaint and leaves the Complainant to their proof. Respondent reserves the right to Amend his Answer." In his Motion, the Acting General Counsel contends that the Respondent's general denial is legally insufficient because it fails to specifically admit, deny, or address any of the factual or legal allegations in the complaints.

We find that the Respondent's general denial, without regard to timeliness, does not constitute a proper answer to the complaint allegations under Section 102.20 of the Board's Rules and Regulations because it fails to address any of the factual or legal allegations of the complaint, and therefore is legally insufficient under the Board's Rules.²

² See *Dunbinclipped, Inc.*, 339 NLRB 1104 (2003) (finding insufficient an answer stating, "The allegations in the Complaint are denied. Respondent demands strict proof thereof"). See also *Service Chemical Supply Corp.*, 325 NLRB No. 111 (1998) (answer by respondent's attorney that respondent "denies any unfair labor practices", found legally insufficient); *Autospa Express, Inc.*, 355 NLRB No. 205 (2010); *K & D Painting, Inc.*, 316 NLRB 1196 (1995), *enfd.* 62 F.3d 1418 (6th Cir. 1995).

In the absence of good cause being shown for the failure to file a legally sufficient answer, we grant the Acting General Counsel's Motion for Default Judgment.

On the entire record, the National Labor Relations Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a Connecticut corporation, with an office and principal place of business in Norwalk, Connecticut, has been engaged in the business of providing cleaning services to commercial buildings.

Annually, the Respondent, in conducting its business operations described above, performed services valued in excess of \$50,000 to clients located 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, Service Employees International Union, Local 32BJ, is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

1. At all material times, the following individuals have held the positions set forth opposite their respective names and have been supervisors within the meaning of Section 2(11) of the Act, and/or agents within the meaning of Section 2(13) of the Act, acting on behalf of the Respondents:

Ricardo Soria	President
Eric Soria	Vice President
Ivan Carranza	Supervisor

2. (a) On about April 24, 2009, the Respondent acquired the cleaning contract of United Service of America (United), to provide cleaning services for Philips' Electronics North America Corporation at its offices located at 345 Scarborough Road, Briarcliff Manor, New York (the Philips' building), located in Westchester County, New York, beginning on May 1, 2009, and since then the Respondent has continued to operate the business of United at the Philips' building in essentially unchanged form.

(b) But for the conduct described below in paragraph 4, the Respondent would have employed, as a majority of its employees, individuals who were previously employees of United at the Philips' building.

(c) Based on the conduct described below in paragraph 4 and the operation described above in paragraphs 2(a) and (b), the Respondent has continued as the employing entity at the Philips' building and is a successor to United.

3. (a) The service employees employed by the Respondent at the Philips' building (called the unit), constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

(b) From about January 2008 until on or about April 30, 2009, the Union had been the exclusive collective-bargaining representative of the unit, and during that period of time the Union had been recognized as such representative by United. This recognition was embodied in a collective-bargaining agreement, effective from January 1, 2008 through December 31, 2011.

(c) Based on the facts described above in paragraphs 3(a) and (b), and Section 9(a) of the Act, the Union has been the designated exclusive collective-bargaining representative of the unit.

(d) Based on the conduct described below in paragraph 4, the operations described above in paragraph 3, and based on Section 9(a) of the Act, at all material times since May 1, 2009, the Union has been the exclusive collective-bargaining representative of the unit.

4. (a) From about May 1, 2009, and continuing to date, the Respondent refused to consider for hire at the Philips' building the following employees who were employed by United at the Phillips' building:

John Mejia	Argenis Lozano
Claudia Paola Ansalas	Irma Murcia
Rosa Sari	Edgar Maita

(b) Beginning around May 1, 2009, and continuing to date, the Respondent refused to hire the employees, listed above in paragraph 4(a), to work at the Philips' building.

(c) The Respondent engaged in the conduct described above in paragraphs 4(a) and (b) because the employees were in the unit, and were members of and supported the Union, and to discourage employees from engaging in these activities.

5. (a) Based on the conduct described above in paragraph 4, any request made by the Union to bargain would have been futile.

(b) Since about May 1, 2009, the Respondent has failed and refused to recognize and bargain with the Union as the exclusive collective-bargaining representative of the unit.

6. (a) Beginning around May 1, 2009, the Respondent changed wage rates, health and welfare and pension contributions, and other benefits for its newly hired employees in the unit.

(b) The subjects set forth in paragraph 6(a) relate to wages, hours, and other terms and conditions of employment of the Unit and are mandatory subjects for the purposes of collective bargaining.

(c) The Respondent engaged in the conduct described above in paragraph 6(a) without providing prior notice to the Union and without affording the Union an opportunity to bargain with the Respondent with respect to this conduct.

7. About April 28, 2009, the Respondent, by Ricardo Soria, on the second floor of the Philips' building, threatened to call and report employees to immigration if the Respondent hired the unit employees at the Philips' building and they subsequently sought the representation of the Union.

CONCLUSIONS OF LAW

1. By threatening to call and report employees to immigration if the Respondent hired the Unit employees at the Philips' building and they subsequently sought the representation of the Union, 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 refusing to consider for hire, and failing and refusing to hire, the above-named employees who were employed by United at the Phillips' building, the Respondent 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)(3) and (1) of the Act.

3. By failing and refusing to recognize and bargain with the Union as the exclusive collective-bargaining representative of the unit and by changing wage rates, health and welfare and pension contributions, and other benefits for its newly hired employees in the Unit without providing prior notice to the Union and without affording the Union an opportunity to bargain with the Respondent with respect to this conduct, the Respondent has been failing and refusing to bargain collectively and in good faith with the exclusive collective-bargaining representative of its employees within the meaning of Section 8(d) of the Act in violation of Section 8(a)(5) and (1) of the Act.

4. The Respondent's unfair labor practices described above 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 unlawfully refused to hire or to consider for hire the individuals named above, we shall order the Respondent to offer to these employees positions for which they would have been hired, absent

the Respondent's unlawful discrimination, or, if those positions no longer exist, to substantially equivalent positions without prejudice to their seniority and other rights and privileges previously enjoyed, discharging if necessary any employees hired in their place. The employees listed above shall be made whole for any loss of earnings they may have suffered due to the discrimination practiced against them. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1187 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010). The Respondent shall also be required to expunge from its files any references to the unlawful refusal to hire or consider for hire and to notify the discriminatees in writing that this has been done.

Further, having found that the Respondent unlawfully refused to bargain collectively with the Union, we shall order that the Respondent, on request, recognize and bargain with the Union concerning wages, hours, benefits, and other terms and conditions of employment, and if an agreement is reached reduce the agreement to a signed written contract. Additionally, the Respondent shall, on request of the Union, rescind any departures from terms of employment that existed before the Respondent's takeover and retroactively restore preexisting terms and conditions of employment, including wage rates and contributions to benefit funds, that would have been paid absent the Respondent's unlawful conduct, until the Respondent negotiates in good faith with the Union to agreement or to impasse. *New Concept Solutions LLC*, 349 NLRB 1136, 1161 (2007). Backpay shall be computed as in *Ogle Protection Service*, 183 NLRB 602 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), plus interest as prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra. The Respondent shall also remit all payments it owes to employee benefit funds in the manner set forth in *Merryweather Optical Co.*, 240 NLRB 1213 (1979), and reimburse its employees for any expenses resulting from the Respondent's failure to make such payments as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981), such amounts to be computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra.³

³ To the extent that an employee has made personal contributions to a fund that are accepted by the fund in lieu of the Respondent's owed contributions, the Respondent will reimburse the employee, but the

The Respondent's backpay liability for both its unlawful discrimination in hiring and its unlawful unilateral changes in employees' preexisting terms and conditions of employment shall be subject to the Respondent's demonstrating in a compliance hearing that, had it lawfully bargained with the Union, it would have, at some identifiable time, lawfully imposed or reached agreement on less favorable terms than those that existed prior to its commencing operations at the Philips' building. See *Planned Building Services*, 347 NLRB 670, 676 fn. 25 (2006).⁴

ORDER

The National Labor Relations Board orders that the Respondent, Ace Green, LLC, Norwalk, Connecticut, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening to call and report employees to immigration if they are hired and subsequently seek union representation.

(b) Refusing to consider for hire or to hire bargaining-unit employees of United Services of America (United), the predecessor employer, because they were members of and supported the Union, and to discourage employees from engaging in these activities.

(c) Refusing to recognize and bargain in good faith with Service Employees International Union, Local 32BJ as the exclusive collective-bargaining representative of its employees in the following appropriate unit:

All service employees employed by the Respondent at the Philips' Electronics North America Corporation building located at 345 Scarborough Road, Briarcliff Manor, New York.

(d) Unilaterally changing wages, hours, and other terms and conditions of employment of the employees in the above-described unit without first giving notice to and bargaining with the Union about these changes.

(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) Notify the Union in writing that it recognizes the Union as the exclusive representative of its unit employees under Section 9(a) of the Act and that it will bargain with the Union concerning terms and conditions of employment for employees in the above-described appropriate unit.

(b) Recognize and, on request, bargain with the Union as the exclusive representative of the employees in the above-described appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

(c) On request of the Union, rescind any departures from terms and conditions of employment that existed immediately prior to the Respondent's takeover of predecessor United's operation, retroactively restoring preexisting terms and conditions of employment, including wage rates and welfare and pension contributions, and other benefits, until it negotiates in good faith with the Union to agreement or to impasse.

(d) Make whole, in the manner set forth in the remedy section of this decision, the unit employees for losses caused by the Respondent's failure to apply the terms and conditions of employment that existed immediately prior to its takeover of predecessor United's operation.

(e) Within 14 days of the date of this Order, offer employment to the following named former unit employees of the predecessor, United, who would have been employed by the Respondent but for the unlawful discrimination against them, in their former positions or, if such positions no longer exist, in substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, discharging if necessary any employees hired in their place.

John Mejia	Argenis Lozano
Claudia Paola Ansalas	Irma Murcia
Rosa Sari	Edgar Maita

(f) Make the employees referred to in paragraph 2(e) whole for any loss of earnings and other benefits they may have suffered by reason of the Respondent's unlawful refusal to hire them, in the manner set forth in the remedy section of the decision.

(g) Within 14 days from the date of this Order, remove from its files any reference to the unlawful refusal to hire the employees named in the paragraph 2(e) and, within 3 days thereafter, notify them in writing that this has been done and that the refusal to hire them will not be used against them in any way.

(h) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place desig-

amount of such reimbursement will constitute a setoff to the amount that the Respondent otherwise owes the fund.

⁴ In the context of a default judgment proceeding, Member Hayes agrees to apply extant remedial precedent for unlawful successorship avoidance. He therefore does not pass on the validity of the *Love's Barbecue* doctrine underlying this remedy (*Love's Barbecue Restaurant No. 62*, 245 NLRB 78, 82 (1979), *enfd.* in part 640 F.2d 1094 (9th Cir. 1981)) or the burden of proof and duration of bargaining discussed in *Planned Building Services*, *supra* at 676.

nated 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.

(i) Within 14 days after service by the Region, post at its Briarcliff Manor, New York facility copies of the attached notice marked "Appendix."⁵ Copies of the notice, on forms provided by the Regional Director for Region 2, 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.⁶ Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 28, 2009.

(j) 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. March 1, 2011

Wilma B. Liebman, Chairman

Mark Gaston Pearce, Member

Brian E. Hayes, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

⁵ 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."

⁶ We have provided 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.

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 threaten to call and report employees to immigration if they are hired and subsequently seek union representation.

WE WILL NOT refuse to consider for hire or to hire bargaining-unit employees of United Services of America (United), the predecessor employer, because they were members of and supported the Union, and to discourage employees from engaging in these activities.

WE WILL NOT refuse to recognize and bargain in good faith with the Union as the exclusive collective-bargaining representative of its employees in the following appropriate unit:

All service employees employed by the Respondent at the Philips' Electronics North America Corporation building located at 345 Scarborough Road, Briarcliff Manor, New York.

WE WILL NOT unilaterally change wages, hours, and other terms and conditions of employment of the employees in the above-described unit without first giving notice to and bargaining with the Union about these changes.

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 notify the Union in writing that we recognize it as the exclusive representative of its unit employees under Section 9(a) of the Act and that we will bargain with it concerning terms and conditions of employment for employees in the above-described appropriate unit.

WE WILL recognize and, on request, bargain with the Union as the exclusive representative of the employees in the above-described appropriate unit concerning terms and conditions of employment and, if an understanding is

reached, embody the understanding in a signed agreement.

WE WILL, on request of the Union, rescind any departures from terms and conditions of employment that existed immediately prior to our takeover of predecessor United's operation, retroactively restoring preexisting terms and conditions of employment, including wage rates and benefit plans, until we negotiate in good faith with the Union to agreement or to impasse.

WE WILL make whole the unit employees for losses caused by our failure to apply the terms and conditions of employment that existed immediately prior to our takeover of predecessor United's operation, subject to our demonstrating in a compliance hearing that, had we lawfully bargained with the Union, we would have, at some identifiable time, lawfully imposed less favorable terms than those that had existed under our predecessor.

WE WILL within 14 days of the date of this Order, offer employment to the following named former unit employees of the predecessor, United, who would have been employed by us but for the unlawful discrimination against them, in their former positions or, if such positions no longer exist, in substantially equivalent posi-

tions, without prejudice to their seniority or any other rights or privileges previously enjoyed, discharging if necessary any employees hired in their place.

John Mejia	Argenis Lozano
Claudia Paola Ansalas	Irma Murcia
Rosa Sari	Edgar Maita

WE WILL make the above-named employees referred whole for any loss of earnings and other benefits they may have suffered by reason of our unlawful refusal to hire them, less any net interim earnings, plus interest, subject to our demonstrating in a compliance hearing that, had we lawfully bargained with the Union, we would have, at some identifiable time, lawfully imposed less favorable terms than those that had existed under our predecessor.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful refusal to hire the above-named employees and WE WILL, within 3 days thereafter, notify them in writing that we have done so and that the refusal to hire them will not be used against them in any way.

ACE GREEN, LLC