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MJ Mueller, LLC d/b/a Benjamin Franklin Plumbing and Michael J. Mueller and United Association of Plumbers and Gasfitters, Local Union No. 34. Cases 18–CA–18216, 18–CA–18419, and 18–CA– 18504

February 25, 2011

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBERS PEARCE AND HAYES

The Acting General Counsel seeks partial default judgment in this case on the ground that the Respondents MJ Mueller, LLC d/b/a Benjamin Franklin Plumbing (MJM) and Michael J. Mueller (Mueller) have failed to file answers to the compliance specification.

On May 30, 2008, the Board issued a Decision and Order¹ that, among other things, ordered Respondent MJM to make whole discriminatees Steven LaMont and Donald Doty for any loss of earnings or other benefits they may have suffered as a result of MJM's unfair labor practices in violation of Section 8(a)(1) of the Act. On February 27, 2009, the United States Court of Appeals for the Eighth Circuit entered its Consent Judgment² enforcing the Board's Order.³

A controversy having arisen regarding the amount of backpay due the discriminatees, the Regional Director issued a compliance specification and notice of hearing on October 29, 2009. The compliance specification alleged that Respondent MJM had not offered employees LaMont or Doty reinstatement, that Mueller is personally liable for the unfair labor practices committed by Respondent MJM, and set forth the amount of backpay due

² No. 08-3385. The court entered a Judgment enforcing in full the Board's Order and a Stipulation for Entry of Consent Judgment agreed to by Respondent MJM.

under the Board's Order. The specification notified the Respondents that they should file an answer by November 19, 2009, complying with the Board's Rules and Regulations. Although properly served with a copy of the compliance specification, the Respondents failed to file answers.

On December 18, the General Counsel filed with Administrative Law Judge George Aleman a Motion for Partial Default Judgment.⁵ On January 8, 2010, the judge issued an order transferring to the Board the General Counsel's Motion for Partial Default Judgment. On February 2, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondents filed no response.

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

Ruling on Motion for Partial Default Judgment

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

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

As stated, the compliance specification alleges that Respondent Mueller is personally liable for MJM's un-

¹ 352 NLRB 525 (2008).

³ Although this case was decided by only two Board Members, the court's order and mandate upholding that decision became final prior to the Supreme Court's decision in *New Process Steel, L.P. v. NLRB*, 560 U.S. __, 130 S.Ct. 2635 (2010), holding that a two-member group may not exercise delegated authority when the membership of the group falls below three. In these circumstances, we regard the matters finally resolved by the court of appeals as res judicata in this proceeding. See *Chicot County Drainage District v. Baxter State Bank*, 308 U.S. 371, 374–378 (1940); *Nemaizer v. Baker*, 793 F.2d 58, 65 (2d Cir. 1986) (cited with approval in *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. __, 130 S.Ct. 1367, 1377 (2010)).

⁴ The specification originally alleged that another entity was the alter ego of Respondent MJM and also liable for its unfair labor practices. However, all allegations regarding that entity were settled and the General Counsel does not seek default judgment as to it. We have amended the case caption accordingly.

⁵ Subsequently, this motion was inadvertently transferred to the Board for ruling. On December 29, the Board granted the General Counsel's motion to rescind the Order Transferring the Proceeding to the Board, and remanded the Motion for Partial Default Judgment to the administrative law judge for ruling.

fair labor practices because he controlled the day-to-day management, labor relations policies, business operations and financial resources of MJM; commingled MJM's assets with his personal assets and other assets within his control; and participated in the creation of a new corporate entity in order to avoid MJM's legal obligations under the Act. Accordingly, we conclude that Respondent Mueller is personally liable for the unfair labor practices committed by Respondent MJM. See *White Oak Coal*, 318 NLRB 732 (1995), enfd. mem. 81 F. 3d 150 (4th Cir. 1996) (personal liability imposed where (1) the shareholder and corporation have failed to maintain separate identities, and (2) adherence to the corporate form would sanction a fraud, promote injustice, or lead to an evasion of legal obligations).

We further find that the net backpay due LaMont and Doty is as stated in the compliance specification. Thus, we will order Respondents MJ Mueller, LLC d/b/a Benjamin Franklin Plumbing and Michael J. Mueller to pay those amounts to LaMont and Doty, plus interest accrued to the date of payment.

ORDER

The National Labor Relations Board orders that the Respondents, MJ Mueller, LLC d/b/a Benjamin Franklin Plumbing and Michael J. Mueller, North Branch, Minnesota, their officers, agents, successors, and assigns, shall make whole the discriminatees named below, by paying

them the amounts following their names,⁶ plus interest accrued to the date of payment, as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), minus tax withholdings required by Federal and State Laws:⁷

Steven LaMont \$50,302.00
Donald Doty \$11,783.00
TOTAL BACKPAY DUE: \$62,085.00

Dated, Washington, D.C. February 25, 2011

Wilma B. Liebman,	Chairman
Mark Gaston Pearce,	Member
Brian E. Hayes,	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

⁶ As set forth in the compliance specification, the discriminatees' backpay period is ongoing until they receive a valid offer of reinstatement; the backpay amount listed for LaMont above has been calculated through October 23, 2009, and the amount for Doty through February 22, 2008, in order to ascertain a definitive backpay period for purposes of this proceeding.

⁷ The Board has declined to apply its new policy, announced in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010) of daily compounding of interest on backpay awards, in cases such as this, that were already in the compliance stage on the date that decision issued. *Three Rivers Electrical, Inc.*, 356 NLRB No. 38, slip op. at 1 fn. 2 (2010).