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Apex Electric Services, Inc. and Apex Industrial Services, Inc. and Apex Industrial Services, as a disguised continuance and alter ego of Apex Industrial Services, Inc. and International Brotherhood of Electrical Workers, Local Union No. 177, AFL-CIO. Cases 12-CA-24200 and 12-CA-24237

June 2, 2011

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBERS PEARCE
AND HAYES

The Acting General Counsel seeks a default judgment in this case on the ground that the Respondents have failed to file an answer to the compliance specification.

On June 21, 2007, the Board issued a Decision and Order¹ that, among other things, found that the Respondents Apex Electric Services, Inc. and Apex Industrial Services, Inc. were alter egos and a single employer and violated Section 8(a)(5), (3), and (1) of the Act. The Board ordered the Respondents, among other things, to make whole discriminatees Ervin A. Paden, Steve Gibbs, Edward J. Cromedy, and Arthur F. Tierney II, for any loss of earnings and other benefits they may have suffered as a result of the Respondents' unfair labor practices. On May 15, 2008, the United States Court of Appeals for the Eleventh Circuit entered its judgment enforcing in its entirety the Board's Decision and Order.²

A controversy having arisen over the amount of back-pay due, the Acting Regional Director issued a compliance specification and notice of hearing on October 29, 2010, alleging the amounts due under the Board's Order. Although not a party to the original unfair labor practice litigation, Respondent Apex Industrial Services was added to the compliance specification and was alleged to have derivative liability for the Respondents' unfair labor practices, as a single employer, an alter ego and disguised continuance of Respondent Apex Industrial Services, Inc.

The compliance specification notified the Respondents that they should file a timely answer complying with the Board's Rules and Regulations. Although properly served with a copy of the compliance specification, the Respondents failed to file an answer. By letter dated November 29, 2010, counsel for the Acting General

Counsel reminded the Respondents of the need to file an answer to the compliance specification, and indicated that if no answer was received by December 6, 2010, a motion for default judgment would be filed. The Respondents again failed to file an answer.

The compliance specification set forth the following allegations. As stated above, the compliance specification alleges that Apex Industrial Services is and has been a disguised continuance of Respondent Apex Industrial Services, Inc., one of the entities previously found liable for the unfair labor practices involved herein. The compliance specification also alleges that: on February 7, 2005, the corporate status of Respondent Apex Electric Services, Inc. was voluntarily dissolved; on July 9, 2005, the corporate status of Respondent Apex Industrial Services, Inc. was administratively revoked by the State of Georgia; and since July 9, 2005, Respondent Apex Industrial Services has operated as a sole proprietorship doing business under the name Apex Industrial Services, with Kenneth B. Holmes Sr. as president and principal officer and director; and that Apex Industrial Services remains in business and continues to operate in an essentially unchanged manner the business of Respondent Apex Industrial Services, Inc.

The compliance specification further alleges that at all material times, Respondent Apex Industrial Services, Inc. and Apex Industrial Services have been affiliated business enterprises with common officers, ownership, directors, management, and supervision; have formulated and administered a common labor policy; have shared common premises and facilities; have provided services for each other; have interchanged personnel with each other; and have held themselves out as a single integrated business enterprise.

On March 1, 2011, the Acting General Counsel filed with the Board a Motion for Default Judgment, with exhibits attached.³ On March 4, 2011, the Board issued an order transferring the proceeding to the Board and Notice to Show Cause why the motion should not be granted. On April 12, 2011, a revised Notice to Show Cause is-

³ The Acting General Counsel's Motion for Default Judgment and attached exhibits indicate that the compliance specification and notice of hearing was served by certified mail on the Respondents and by regular mail on the Respondents' president, Kenneth Holmes Sr., at his home address. The copy of the compliance specification sent by certified mail was returned unclaimed. There is no indication that the documents sent by regular mail were returned. It is well settled that a respondent's failure or refusal to accept certified mail or to provide for receiving appropriate service cannot serve to defeat the purposes of the Act. See, e.g., *I.C.E. Electric, Inc.*, 339 NLRB 247 fn. 2 (2003), and cases cited therein. Further, the failure of the Postal Service to return documents served by regular mail indicates actual receipt of those documents by the Respondent. *Id.*; *Lite Flight, Inc.*, 285 NLRB 649, 650 (1987), *enfd.* 843 F.2d 1392 (6th Cir. 1988).

¹ 350 NLRB 40 (2007).

² No. 08-11563-H.

sued, noting that the original Notice had not been served on Respondent Apex Industrial Service. The Revised Notice was served on this Respondent. The Respondents failed to file a response. The allegations in the motion and in the compliance specification are therefore undisputed.

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

Ruling on the Motion for 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(c) provides that if the respondent fails to file an answer to the specification within the time prescribed by this section, the Board may, either with or without taking evidence in support of the allegations of the specification and without further notice to the respondent, find the specification to be true and enter such order as may be appropriate.

According to the uncontroverted allegations of the motion for default judgment, the Respondents, despite having been advised of the filing requirements, have failed to file an answer 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 Acting General Counsel's Motion for Default Judgment.

Based on the above, the compliance specification alleges, and we find, that Apex Industrial Services was established by Kenneth B. Holmes Sr. for the purpose of evading the Respondent's responsibilities under the Act, and that at all material times Apex Industrial Services is and has been a disguised continuation of Respondent Apex Industrial Services, Inc. Accordingly, we conclude that Apex Industrial Services is a single integrated enterprise with, an alter ego of, and a single employer with Respondent Apex Industrial Services, Inc., and is a disguised continuation of Respondent Apex Industrial Services, Inc. As such, Apex Industrial Services is jointly and severally liable for remedying the Respondents' unfair labor practices. We further conclude that the net backpay due the discriminatees is as stated in the compliance specification, and we will order the Respondents

to pay the amounts to the discriminatees, plus interest accrued to the date of payment.

ORDER

The National Labor Relations Board orders that the Respondents, Apex Electric Services, Inc., Apex Industrial Services, Inc., and Apex Industrial Services, as a disguised continuance and alter ego of Apex Industrial Services, Inc., Sanford and Jacksonville, Florida, its officers, agents, successors, and assigns, shall make whole the discriminatees named below, by paying them the amounts following their names, 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:⁴

DISCRIMINATEE/ CLAIMANTS	NET BACKPAY	FICA MATCH	SUM TOTAL
Ervin A. Paden	\$5,280.00	\$403.92	\$5,683.92
Steve Gibbs	\$3,712.00	\$283.97	\$3,995.97
Edward J. Cromedy	\$ 512.00	\$ 39.17	\$ 551.17
Arthur F. Tierney II	\$ 384.00	\$ 29.38	\$ 413.38
TOTAL AMOUNT DUE:			\$10,644.44

Dated, Washington, D.C. June 2, 2011

Wilma B. Liebman, Chairman

Mark Gaston Pearce, Member

Brian E. Hayes, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

⁴ 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).