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Jen Holdings, Inc. d/b/a Mike Quinn Pumping Company, also known as Mike Quinn Concrete Pumping Co. and Quinn Concrete Pumping, Inc. and International Union Of Operating Engineers, Local 12, AFL-CIO. Case 28-CA-23364

July 11, 2011

DECISION AND ORDER

BY MEMBERS BECKER, PEARCE, AND HAYES

The Acting General Counsel seeks a default judgment in this case on the ground that the Respondent has failed to file an answer to the complaint. Upon a charge and amended charge filed by the Union on February 9 and March 23, 2011, the Acting General Counsel issued the complaint on March 30, 2011, against Jen Holdings, Inc. d/b/a Mike Quinn Pumping Company, also known as Mike Quinn Concrete Pumping Co. and Quinn Concrete Pumping, Inc. (the Respondent), alleging that it has violated Section 8(a)(5), (3), and (1) of the Act. The Respondent failed to file an answer.

On May 3, 2011, the Acting General Counsel filed a Motion for Default Judgment with the Board. Thereafter, on May 5, 2011, 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 Respondent filed no response. The allegations in the motion are therefore undisputed.

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

Ruling on Motion for Default Judgment

Section 102.20 of the Board's Rules and Regulations provides that the allegations in a complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint, unless good cause is shown. In addition, the complaint affirmatively stated that unless an answer was received by April 13, 2011, the Board may find, pursuant to a motion for default judgment, that the allegations in the complaint are true. Further, the undisputed allegations in the Acting General Counsel's motion disclose that the Region, by letter dated April 15, 2011, notified the Respondent that unless an answer was received by April 22, 2011, a motion for default judgment would be filed.¹

¹ The Acting General Counsel's motion for default judgment and attached exhibits indicate that the amended charge and the complaint were served on the Respondent by certified mail and by regular U.S. mail on March 23 and 30, 2011, respectively, and the documents sent by certified mail were returned marked "undeliverable as addressed." There is no indication that the documents sent by regular mail were returned. The Acting General Counsel's motion also indicates that several copies of the complaint were sent to the Respondent's officers by regular U.S. mail to several different addresses, and the Respondent's owner, on April 15, 2011, informed the Region by telephone that he was "thinking" about whether to file an answer. Further, by email dated April 27, 2011, the Respondent informed the Acting General Counsel that it was "unable to respond to the false allegations made by a disgruntled employee due to lack of funds for representation and the fact the company is closed as of December 20, 2010." 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, 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). In any event, based on the undisputed assertions in the motion regarding the telephone call and the email from the Respondent, it appears that the Respondent received a copy of the complaint.

In the absence of good cause being shown for the failure to file an answer, we deem the allegations in the complaint to be admitted as true, and we grant the Acting General Counsel's Motion for Default Judgment.²

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a Nevada domestic corporation with an office and place of business in Las Vegas, Nevada (the Respondent's facility), has been engaged as a concrete pumping contractor in the construction industry doing commercial construction. During the 12-month period ending February 9, 2011, the Respondent, in conducting its business operations described above, provided services valued in excess of \$50,000 for Aggregate Industries, Bombard Electric, and Frehner Construction within the State of Nevada, each of which enterprises is directly engaged in interstate commerce. 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 International Union of Operating Engineers, Local 12, AFL-CIO (the Union), 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 of the Respondent within the meaning of Section 2(11) of the Act and agents of the Respondent within the meaning of Section 2(13) of the Act:

Mike Quinn Isley	-	President/Operations Manager
Fred Simonetti	-	Dispatch

As indicated above, the Respondent informed the Acting General Counsel by email dated April 27, 2011, that it had closed the company and lacks funds for representation. It is well established that a respondent's cessation of operations and asserted lack of financial resources does not relieve it of the obligation to file an answer. See, e.g., *OK Toilet & Towel Supply*, 339 NLRB 1100, 1101 (2003); *Dong-A Daily North America*, 332 NLRB 15, 15-16 (2000).

² As indicated above, the Respondent informed the Acting General Counsel by email dated April 27, 2011, that it had closed the company and lacks funds for representation. It is well established that a respondent's cessation of operations and asserted lack of financial resources does not relieve it of the obligation to file an answer. See, e.g., *OK Toilet & Towel Supply*, 339 NLRB 1100, 1101 (2003); *Dong-A Daily North America*, 332 NLRB 15, 15-16 (2000).

Jim Sittler - Salesman

2. At all material times, Associated General Contractor Las Vegas (the AGC) has been an organization composed of various employers engaged in general contract construction work in Southern Nevada, one purpose of which is to represent its employer-members in negotiating and administering collective-bargaining agreements with various labor organizations, including the Union.

3. At all material times since about July 2007, the Respondent has been an employer-member of the AGC and has authorized the AGC to represent it in negotiating and administering collective-bargaining agreements with various labor organizations, including the Union.

4. The employees of the Respondent (the unit), described in Appendix A of the collective-bargaining agreement referred to below, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

5. At all material times since at least about July 1, 2007, the Union has been the designated exclusive collective-bargaining representative of the unit and since then the Union has been recognized as the representative by the Respondent. This recognition has been embodied in a collective-bargaining agreement effective from July 1, 2007 to June 30, 2010 (the Agreement), which was extended from July 1, 2010 to June 30, 2011, by the Union and the AGC, through a Memorandum of Understanding.

6. At all times material since at least about July 1, 2007, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the unit.

7. About September 15, 2010, the Respondent, by Mike Quinn Isley, at the Respondent's facility, threatened its employees with discharge by inviting them to quit because they engaged in union activities.

8. About December 6, 2010, the Respondent, by Fred Simonetti, at the Respondent's facility:

(a) threatened its employees with discharge if they supported the Union;

(b) threatened its employees that the Respondent would close its facility because they engaged in union activities; and

(c) disparaged the Union in order to discourage employees from supporting or assisting the Union by telling its employees that a union pumping company could not make it in this economy.

9. Since about October 18, 2010, the Respondent has denied its employee Josh Klingenberg work opportunities.

10. The Respondent engaged in the conduct described in paragraph 9 because Klingenberg formed, joined, or assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities.

11. Since about August 2010, a more precise date being unknown to the Acting General Counsel, the Respondent has failed to continue in effect all the terms and conditions of the Agreement by paying its employees in the unit for half of the hours they worked.

12. Since about August 2010, a more precise date being unknown to the Acting General Counsel, the Respondent has failed to continue in effect all the terms and conditions of the Agreement by failing to pay its employees travel pay.

13. The Respondent engaged in the conduct described in paragraphs 11 and 12 without the Union's consent.

14. The terms and conditions of employment described in paragraphs 11 and 12 are mandatory subjects for the purpose of collective bargaining.

15. About September 2010, a more precise date being unknown to the Acting General Counsel, the Respondent bypassed the Union and dealt directly with unit employees by requiring them to report only half of the hours they worked.

16. About December 16, 2010, the Respondent closed its facility and failed to bargain over the effects of the closure with the Union.

17. The subjects set forth in paragraphs 15 and 16 relate to wages, hours, and other terms and conditions of employment of the unit and are mandatory subjects for the purpose of collective bargaining.

18. The Respondent engaged in the conduct described in paragraphs 15 and 16 without prior notice to the Union and without affording the Union an opportunity to bargain with the Respondent with respect to this conduct or the effects of this conduct on the employees in the unit.

CONCLUSIONS OF LAW

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

2. By the conduct described in paragraphs 9 and 10, the Respondent has been discriminating in regard to the hire or tenure or terms and conditions of employment of its employees, thereby discouraging membership in a labor organization in violation of Section 8(a)(3) and (1) of the Act.

3. By the conduct described in paragraphs 11 through 18, the Respondent has failed and refused 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 unfair labor practices of the Respondent 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, to remedy the Respondent's unlawful failure to bargain with the Union about the effects of its decision to close its facility and cease operations on December 16, 2010, we shall order the Respondent to bargain with the Union, on request, about the effects of that decision. As a result of the Respondent's unlawful conduct, however, the unit employees have been denied an opportunity to bargain through their collective-bargaining representative at a time when the Respondent might still have been in need of their services and a measure of balanced bargaining power existed. Meaningful bargaining cannot be assured until some measure of economic strength is restored to the Union. A bargaining order alone, therefore, cannot serve as an adequate remedy for the unfair labor practices committed.

Accordingly, we deem it necessary, in order to ensure that meaningful bargaining occurs and to effectuate the policies of the Act, to accompany our bargaining order with a limited backpay requirement designed both to make whole the unit employees for losses suffered as a result of the violations and to recreate in some practicable manner a situation in which the parties' bargaining position is not entirely devoid of economic consequences for the Respondent. We shall do so by ordering the Respondent to pay backpay to the unit employees in a manner similar to that required in *Transmarine Navigation Corp.*, 170 NLRB 389 (1968), as clarified by *Melody Toyota*, 325 NLRB 846 (1998).³

Thus, the Respondent shall pay its unit employees backpay at the rate of their normal wages when last in the Respondent's employ from 5 days after the date of this Decision and Order until the occurrence of the earliest of the following conditions: (1) the date the Respondent bargains to agreement with the Union on those subjects pertaining to the effects of its decision to cease operating its Las Vegas, Nevada facility on the unit employees; (2) a bona fide impasse in bargaining; (3) the Union's failure to request bargaining within 5 business days after receipt of this Decision and Order, or to commence negotiations within 5 business days after receipt of the Respondent's notice of its desire to bargain with the Union; or (4) the Union's subsequent failure to bargain in good faith.

³ See also *Live Oak Skilled Care & Manor*, 300 NLRB 1040 (1990). Neither the complaint nor the motion specifies the impact, if any, on the unit employees of the Respondent's decision to close. Thus, we do not know whether, or to what extent, the refusal to bargain about the effects of this decision had an impact on the unit employees. In these circumstances, we shall permit the Respondent to contest the appropriateness of a *Transmarine* backpay remedy at the compliance stage. See, e.g., *Buffalo Weaving & Belting*, 340 NLRB 684, 685 fn. 3 (2003); and *ACS Acquisition Corp.*, 339 NLRB 736, 737 fn. 2 (2003).

In no event shall the sum paid to these employees exceed the amount they would have earned as wages from the date on which the Respondent ceased its operations to the time they secured equivalent employment elsewhere, or the date on which the Respondent shall have offered to bargain in good faith, whichever occurs sooner. However, in no event shall this sum be less than the employees would have earned for a 2-week period at the rate of their normal wages when last in the Respondent's employ.⁴ Backpay shall be based on earnings which the unit employees would normally have received during the applicable period, less any net interim earnings, and 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 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010).

Additionally, having found that the Respondent violated Section 8(a)(3) and (1) of the Act by denying employee Josh Klingenberg work opportunities, we shall order the Respondent to make Klingenberg whole for any loss of earnings and other benefits suffered as a result of the Respondent's unlawful conduct. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, supra, with interest at the rate prescribed in *New Horizons for the Retarded*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra.

Further, having found that the Respondent violated Section 8(a)(5) and (1) of the Act by failing to continue in effect all the terms and conditions of the most recent collective-bargaining agreement by failing to: 1) pay unit employees for half of the hours they worked, and 2) pay employees travel pay, we shall order the Respondent to honor the terms and conditions of its collective-bargaining agreement with the Union by paying its unit employees for the unpaid half of the hours they worked and paying its employees travel pay that has not been paid since August 2010, and to make them whole for any loss of earnings and other benefits suffered as a result of the Respondent's unlawful conduct. Backpay shall be computed in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), enf. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons for the Retarded*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra.⁵

⁴ In accordance with his dissenting view in *Kadouri International Foods*, 356 NLRB No. 148, slip op. at 1 fn. 1 (2011), Member Hayes would delete that portion of the remedy requiring that the minimum backpay due employees should not be less than 2 weeks' pay, without regard to actual losses incurred, and would limit the remedy only to those employees who were adversely affected by the Respondent's unlawful action.

⁵ The Acting General Counsel's motion seeks an order requiring reimbursement of amounts equal to the difference in taxes owed upon receipt of a lump-sum payment and taxes that would have been owed had there been no discrimination. Further, the Acting General Counsel

Finally, in view of the fact that the Respondent's facility is closed, we shall order the Respondent to mail a copy of the attached notice to the Union and to the last known addresses of its former unit employees who were employed at any time since August 2010, in order to inform them of the outcome of this proceeding.

ORDER

The National Labor Relations Board orders that the Respondent, Jen Holdings, Inc. d/b/a Mike Quinn Pumping Company, also known as Mike Quinn Concrete Pumping Co. and Quinn Concrete Pumping, Inc., Las Vegas, Nevada, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain collectively and in good faith with International Union of Operating Engineers, Local 12, AFL-CIO, as the exclusive collective-bargaining representative of the unit employees described in Appendix A of the collective-bargaining agreement effective from July 1, 2007 to June 30, 2010, which was extended from July 1, 2010 to June 30, 2011, by the Union and the AGC, through a Memorandum of Understanding, about the effects of its decision to close its Las Vegas, Nevada facility on about December 16, 2010.

(b) Threatening employees with discharge by inviting them to quit because they engaged in union activities.

(c) Threatening employees with discharge if they supported the Union.

(d) Threatening employees with closure of the Respondent's Las Vegas, Nevada facility because they engaged in union activities.

(e) Disparaging the Union in order to discourage employees from supporting or assisting the Union by telling employees that a union pumping company could not make it in this economy.

(f) Denying employees work opportunities because they formed, joined, or assisted the Union or engaged in concerted activities, or to discourage employees from engaging in these activities.

(g) Failing to continue in effect all the terms and conditions of its collective-bargaining agreement with the Union by paying unit employees for only half of the hours they worked.

(h) Failing to continue in effect all the terms and conditions of its collective-bargaining agreement with the Union by failing to pay its employees travel pay.

requests that the Respondent be required to submit the appropriate documentation to the Social Security Administration so that when backpay is paid, it will be allocated to the appropriate periods. Because the relief sought would involve a change in Board law, we believe that the appropriateness of this proposed remedy should be resolved after a full briefing by the affected parties, and there has been no such briefing in this case. Accordingly, we decline to order this relief at this time. See, e.g., *Ishikawa Gasket America, Inc.*, 337 NLRB 175, 176 (2001), enfd. 354 F.3d 534 (6th Cir. 2004), and cases cited therein.

(i) Bypassing the Union and dealing directly with unit employees by requiring them to report only half of the hours they worked.

(j) 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 with the Union about the effects of its decision to close its Las Vegas, Nevada facility on about December 16, 2010, and reduce to writing and sign any agreements reached as a result of such bargaining.

(b) Pay to the unit employees their normal wages for the period set forth in the remedy section of this decision, with interest.

(c) Make Josh Klingenberg whole for any loss of earnings and other benefits suffered as a result of the Respondent's unlawful conduct, with interest, in the manner set forth in the remedy section of this decision.

(d) Honor the terms and conditions of its collective-bargaining agreement with the Union by paying the unit employees for the remaining half of the hours they worked that have not been paid since August 2010, with interest, in the manner set forth in the remedy section of this decision.

(e) Honor the terms and conditions of its collective-bargaining agreement with the Union by paying the unit employees travel pay that has not been paid since August 2010, with interest, in the manner set forth in the remedy section of this decision.

(f) Make the unit employees whole for any loss of earnings and other benefits suffered as a result of the Respondent's unlawful conduct, with interest, in the manner set forth in the remedy section of this decision.

(g) 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 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.

(h) Within 14 days after service by the Region, duplicate and mail, at its own expense and after being signed by the Respondent's authorized representative, copies of the attached notice marked "Appendix"⁶ to the Union and to all unit employees who were employed by the Respondent at any time since August 2010. In addition to physical mailing of paper notices, notices shall be dis-

⁶ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Mailed by Order of the National Labor Relations Board" shall read "Mailed Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

tributed 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.⁷

(i) 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. July 11, 2011

Craig Becker,	Member
Mark Gaston Pearce,	Member
Brian E. Hayes,	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD
 APPENDIX
 NOTICE TO EMPLOYEES
 MAILED 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 mail 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 with International Union of Operating Engineers, Local 12, AFL-CIO, as the exclusive collective-bargaining representative of our unit employees described in Appendix A of our collective-bargaining agreement with the Union effective from July 1, 2007 to June 30, 2010, which was extended from July 1, 2010 to June 30, 2011, about the effects of our decision to close our Las Vegas, Nevada facility on about December 16, 2010.

WE WILL NOT threaten employees with discharge by inviting them to quit because they engaged in Union activities.

WE WILL NOT threaten employees with discharge if they supported the Union.

WE WILL NOT threaten employees with closure of our Las Vegas, Nevada facility because they engaged in Union activities.

WE WILL NOT disparage the Union in order to discourage employees from supporting or assisting the Union by telling employees that a union pumping company cannot make it in this economy.

WE WILL NOT deny employees work opportunities because they formed, joined, or assisted the Union or engaged in concerted activities, or to discourage employees from engaging in these activities.

WE WILL NOT fail to continue in effect all the terms and conditions of our collective-bargaining agreement with the Union by paying unit employees for only half of the hours they worked.

WE WILL NOT fail to continue in effect all the terms and conditions of our collective-bargaining agreement with the Union by failing to pay employees travel pay.

WE WILL NOT bypass the Union and deal directly with unit employees by requiring them to report only half of the hours they worked.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, on request, bargain with the Union about the effects of our decision to close our Las Vegas, Nevada facility on about December 16, 2010, and WE WILL reduce to writing and sign any agreements reached as a result of such bargaining.

WE WILL pay to the unit employees their normal wages for the period set forth in the Decision and Order of the National Labor Relations Board, with interest.

WE WILL make Josh Klingenberg whole for any loss of earnings and other benefits suffered as a result of our unlawful conduct, with interest.

WE WILL honor the terms and conditions of our collective-bargaining agreement with the Union by paying the unit employees for the remaining half of the hours they worked that have not been paid since August 2010, with interest.

WE WILL honor the terms and conditions of our collective-bargaining agreement with the Union by paying employees travel pay that has not been paid since August 2010, with interest.

WE WILL make the unit employees whole for any loss of earnings and other benefits suffered as a result of our unlawful conduct, with interest.

JEN HOLDINGS, INC. D/B/A MIKE QUINN PUMPING COMPANY, ALSO KNOWN AS MIKE QUINN CONCRETE PUMPING CO. AND QUINN CONCRETE PUMPING, INC.

⁷ For the reasons stated in his dissenting opinion in *J. Picini Flooring*, 356 NLRB No. 9 (2010), Member Hayes would not require electronic distribution of the notice.