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**Anthony's Painting, LLC and Painters District Council No. 2.** Case 14-CA-30082

August 25, 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 ground that the Respondent withdrew its answer to the complaint and did not file an answer to the amended complaint. Upon a charge filed by the Union on April 14, 2010, and subsequently amended on April 15 and June 25, 2010, the Acting General Counsel, issued the complaint and amended complaint<sup>1</sup> on August 30, 2010, and March 10, 2011, respectively, against Anthony's Painting, LLC, the Respondent, alleging that it has violated Section 8(a)(5) and (1) of the Act. On September 28, 2010, the Respondent filed an answer to the complaint. However, by letter dated February 24, 2011, the Respondent withdrew its answer and by email message dated March 24, 2011, the Respondent notified the Acting General Counsel that the Respondent would not file an answer to the amended complaint.

On March 30, 2011, the Acting General Counsel filed a Motion for Default Judgment with the Board. Thereafter, on March 31, 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. On May 9, 2011, the Board issued a revised order transferring proceedings to the Board and a Notice to Show Cause why the motion should not be granted. On July 21, 2011, a second revised Notice to Show Cause was served on the Respondent by certified mail. The Respondent filed no response to the Notices to Show Cause. 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 and the amended complaint affirmatively stated that unless an answer was re-

ceived by September 13, 2010, and March 24, 2011, respectively, the Board may find, pursuant to a motion for default judgment, that the allegations in the complaint are true. Although the Respondent filed an answer to the complaint on September 28, 2010, it subsequently withdrew its answer. The Respondent did not file an answer to the amendment to the complaint. The withdrawal of an answer has the same effect as the failure to file an answer, i.e. the allegations in the complaint and the amended complaint must be considered to be true.<sup>2</sup> Accordingly, we grant the Acting General Counsel's Motion for Default Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a Missouri limited liability company with an office and place of business in St. Louis, Missouri, has been engaged in the construction industry as a commercial and residential painting contractor. During the calendar year ending December 31, 2009, the Respondent, in conducting its business operations described above, performed services valued in excess of \$50,000 in states other than the State of Missouri.

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, Painters District Council No. 2, is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

At all material times, the following individuals 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:

Anthony Dattilo	-	Vice President
Heather Dattilo	-	President

At all material times, Patricia Hoffman has held the position of the Respondent's office manager and has been an agent of the Respondent within the meaning of Section 2(13) of the Act.

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

<sup>1</sup> The Regional Director issued an amendment to the complaint to correct a typographical error in subparagraph 6D of the complaint.

<sup>2</sup> See *Maislin Transport*, 274 NLRB 529 (1985).

All journeymen painters, tapers and drywall finishers, paper and wall covering hangers, apprentices, pre-apprentices, summer help and working foreman employed by the Employer.

The Respondent, an employer engaged in the building and construction industry, as described above, has recognized the Union as the exclusive collective-bargaining representative of the unit without regard to whether the majority status of the Union had ever been established under the provisions of Section 9(a) of the Act. Such recognition has been embodied in a collective-bargaining agreement, which the Respondent signed on November 30, 2005, and which was effective through August 31, 2010 (the 2005–2010 agreement). For the period from November 30, 2005, through August 31, 2010, based on Section 9(a) of the Act, the Union has been the limited exclusive collective-bargaining representative of the unit.<sup>3</sup>

Sometime after November 30, 2005, the exact date being within the knowledge of the Respondent, the Respondent failed to continue in effect all the terms and conditions of the 2005–2010 agreement by failing to pay unit employees for their overtime work at the wage rates required by Sections 17 and 18 of the collective-bargaining agreement, and instead, the Respondent credited employees with “banked hours” for such overtime work.

Since about October 14, 2009, the Respondent failed to continue in effect all the terms and conditions of the 2005–2010 agreement by:

- (i) delaying and/or failing to remit dues as required;
- (ii) delaying and/or failing to remit money to the Union’s vacation fund;
- (iii) failing to maintain a surety-bond; and
- (iv) delaying and/or failing to make the following required fringe benefit contributions: (1) Painters District Council No. 2 Welfare Plan; (2) Painters District Council No. 2 Pension Plan; (3) Painters District Council No. 2 Apprenticeship and Journeyman Training Fund; and (4) Labor Management Cooperation Fund.

<sup>3</sup> The complaint alleges that the Respondent is a construction industry employer and that it granted recognition to the Union without regard to whether the Union had established majority status. Accordingly, we find that the relationship was entered into pursuant to Sec. 8(f) of the Act and that the Union is therefore the limited 9(a) representative of the unit employees for the period covered by the contract. See, e.g., *A.S.B. Cloture, Ltd.*, 313 NLRB 1012 fn. 2 (1994), citing *Electri-Tech, Inc.*, 306 NLRB 707 fn. 2 (1992), and *John Deklewa & Sons*, 282 NLRB 1375 (1987), enf. sub nom. *Iron Workers Local 3 v. NLRB*, 843 F.2d 770 (3d Cir. 1988).

Since about November 14, 2009, the Respondent effectively repudiated the 2005–2010 agreement by failing to continue in effect the terms of that agreement including, but not limited to:

- (i) refusing to remit contribution reports to the Union;
- (ii) cancelling a scheduled audit and refusing to re-schedule an audit;
- (iii) refusing to adhere to the union security clause;
- (iv) refusing to withhold and/or remit dues;
- (v) refusing to withhold and/or remit money to the Union’s vacation fund;
- (vi) refusing to maintain a surety-bond;
- (vii) refusing to make the following required fringe benefit contributions: (1) Painters District Council No. 2 Welfare Plan; (2) Painters District Council No. 2 Pension Plan; (3) Painters District Council No. 2 Apprenticeship and Journeyman Training Fund; and (4) Labor Management Cooperation Fund; and
- (viii) refusing to pay employees at the contractual wage rates.

The Respondent engaged in the conduct described above without the Union’s consent. The terms and conditions of employment described above are mandatory subjects for the purposes of collective bargaining.

On about December 1, 2009, the Respondent, by letter, withdrew its recognition of the Union as the exclusive collective-bargaining representative of the unit and stated it was no longer signatory to the 2005–2010 agreement.

#### CONCLUSION OF LAW

By the conduct described above, the Respondent has been failing and refusing to bargain collectively and in good faith with the limited 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 and affecting 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 has violated Section 8(a)(5) and (1) by withdrawing recognition from the Union and by failing to continue in effect and repudiating the 2005–2010 collective-bargaining agreement by, among other things, failing to (1) pay unit employees for their overtime work at the wage rates required by sections 17

and 18 of the collective-bargaining agreement; (2) delaying and/or failing to withhold and/or remit dues as required; (3) delaying and/or failing to remit money to the Union's vacation fund; (4) failing to maintain a surety bond; (5) refusing to remit contribution reports to the Union; (6) cancelling a scheduled audit and refusing to reschedule an audit; (7) refusing to adhere to the union-security clause; (8) refusing to make required fringe benefit contributions to the Union's welfare plan, pension plan, apprenticeship and journeyman training fund, and labor management cooperation fund; and (9) refusing to pay employees at the contractual wage rates, we shall order the Respondent to recognize the Union as the limited exclusive bargaining representative of the unit and to apply the terms and conditions of the 2005–2010 agreement during the term of that agreement. We shall also order the Respondent to make whole the unit employees for any loss of earnings and other benefits they may have suffered as a result of the Respondent's failure to continue in effect all the terms and conditions of the agreement 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 for the Retarded*, 283 NLRB 1173 (1987), and *Kentucky River Medical Center*, 356 NLRB No. 8 (2010).

In addition, we shall order the Respondent to make all contractually required benefit fund contributions that have not been made since October 14, 2009, including any additional amounts due the funds in accordance with *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 6 (1979). The Respondent shall also reimburse unit employees for any expenses ensuing from its failure to make the required contributions, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), *enfd.* mem. 661 F.2d 940 (9th Cir. 1981).<sup>4</sup> All payments to the unit employees shall be computed in accordance with *Ogle Protection Service*, supra, with interest as prescribed in *New Horizons for the Retarded*, supra, and *Kentucky River Medical Center*, supra.

Finally, to remedy the Respondent's refusal, since October 14, 2009, to remit dues to the Union, we shall order the Respondent to remit all dues collected since October 14, 2009, and not previously submitted to the Union, during the 2005–2010 collective-bargaining agreement. To remedy the failure to withhold and/or remit to the union dues beginning on November 14, 2009, we shall

order Respondent to withhold and remit to the union dues which should have been, but were not, deducted from employee paychecks since November 14, 2009, pursuant to valid dues-checkoff authorizations, with interest as prescribed in *New Horizons for the Retarded*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra.

#### ORDER

The National Labor Relations Board orders that the Respondent, Anthony's Painting, LLC, St. Louis, Missouri, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize and bargain in good faith with the Painters District Council No. 2, as the limited exclusive collective-bargaining representative of its unit employees during the term of the 2005–2010 agreement. The unit is:

All journeymen painters, tapers and drywall finishers, paper and wall covering hangers, apprentices, pre-apprentices, summer help and working foreman employed by the Employer.

(b) Repudiating and failing to continue in effect all the terms and conditions of the 2005–2010 collective-bargaining agreement with the Union during the term of the contract.

(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) Recognize and bargain in good faith with Painters District Council No. 2 as the limited exclusive collective-bargaining representative of the unit employees and honor and comply with the terms and conditions of the 2005–2010 collective-bargaining agreement during the term of the agreement.

(b) Make whole the unit employees for any loss of earnings or other benefits they may have suffered as a result of its failure to comply with the provisions of the 2005–2010 agreement, with interest, in the manner set forth in the remedy section of this decision.

(c) Pay unit employees for their overtime work at the wage rates required by section 17 and 18 of the 2005–2010 agreement.

(d) Make all contractually-required benefit fund contributions that have not been made since October 14, 2009, and reimburse unit employees for any expenses ensuing from its failure to make the required payments, with interest, as set forth in the remedy section of this decision.

<sup>4</sup> To the extent that an employee has made personal contributions to a fund that are accepted by the fund in lieu of the employer's delinquent contributions during the period of the delinquency, the Respondent will reimburse the employee, but the amount of such delinquency will constitute a setoff to the amount that the Respondent otherwise owes the fund.

(e) Remit dues that have not been remitted since October 14, 2009, and deduct and remit union dues pursuant to valid dues-checkoff authorizations that have not been deducted since November 14, 2009, with interest, in the manner set forth in the remedy section of this decision.

(f) Maintain a surety bond.

(g) Remit contribution reports to the Union.

(h) Adhere to the union-security clause.

(i) Withhold and remit money to the Union's vacation fund.

(j) Schedule audits.

(k) Pay employees at contractual wage rates.

(l) 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.

(m) Within 14 days after service by the Region, post at its facility in St. Louis, Missouri, copies of the attached notice marked "Appendix."<sup>5</sup> Copies of the notice, on forms provided by the Regional Director for Region 14, 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.<sup>6</sup> 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 November 30, 2005.

<sup>5</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."

<sup>6</sup> 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.

(n) 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. August 25, 2011

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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 or refuse to recognize and bargain in good faith with Painters District Council No. 2, by repudiating our 2005–2010 collective-bargaining agreement with it and by withdrawing recognition from it as the limited exclusive collective-bargaining representative of our employees in the following unit:

All journeymen painters, tapers and drywall finishers, paper and wall covering hangers, apprentices, pre-apprentices, summer help and working foreman employed by us.

WE WILL NOT repudiate and fail to continue in effect all the terms and conditions of the 2005–2010 collective-bargaining agreement.

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

WE WILL recognize and bargain with the Union as the limited exclusive collective-bargaining representative of our unit employees and comply with the terms of the 2005–2010 agreement.

WE WILL make whole our unit employees for any loss of earnings and other benefits that they may have suffered as a result of our failure to continue in effect the terms and conditions of the 2005–2010 collective-bargaining agreement, with interest.

WE WILL continue in effect the terms and conditions of the 2005–2010 agreement including (1) paying unit employees for their overtime work at contractual wage rates,

(2) making all contractually-required benefit fund contributions that have not been made since October 14, 2009, and reimbursing our unit employees for any expenses ensuing from our failure to make the required payments, with interest; (3) remitting dues that have not been remitted since October 14, 2009, and deducting and remitting union dues pursuant to valid dues-checkoff authorizations that have not been deducted since November 14, 2009, with interest; (4) maintaining a surety bond; (5) remitting contribution reports to the Union; (6) adhering to the union-security clause; (7) withholding and remitting money to the Union's vacation fund; (8) scheduling audits; and (9) paying employees at contractual wage rates.

ANTHONY'S PAINTING, LLC