

NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

New Jersey State Opera and American Federation of Musicians, Local 16. Case 22–CA–029526

September 30, 2013

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA
AND HIROZAWA

The Acting General Counsel seeks a default judgment in this case pursuant to the terms of a bilateral informal settlement agreement. A charge was filed by American Federation of Musicians, Local 16 (the Union), on July 8, 2010, against New Jersey State Opera (the Respondent), alleging that the Respondent violated Section 8(a)(5) and (1) of the Act. On October 29, 2010, prior to the issuance of a complaint, the Regional Director for Region 22 approved a bilateral informal settlement agreement. Thereafter, having concluded that the informal settlement agreement should be vacated and set aside, the Acting General Counsel issued a complaint, notice of hearing and order revoking informal settlement agreement on February 11, 2011, and an amended complaint, notice of hearing and order revoking informal settlement agreement on March 8, 2011. The Respondent filed an answer to the amended complaint on April 14, 2011.

Subsequently, the Respondent and the Union executed a new bilateral informal settlement agreement, which was approved by the Regional Director for Region 22 on May 22, 2012. Among other things, the settlement agreement required the Respondent to: (1) remit back wages in specified amounts owed to its unit employees under the terms of its collective-bargaining agreement with the Union; (2) remit a specified amount of contractual dues to the Union on behalf of its unit employees; and (3) post appropriate notices.

The settlement agreement also contained the following provision:

The Charged Party agrees that in case of non-compliance with any of the terms of this Settlement Agreement by the Charged Party, and after 14 days notice from the Regional Director of the National Labor Relations Board of such non-compliance without remedy by the Charged Party, the Regional Director will reissue the complaint previously issued on March 8, 2011 in the instant case. Thereafter, the General Counsel may file a motion for default judgment with the Board on the allegations of the complaint. The Charged Party understands and agrees that the allegations of the aforementioned complaint will be deemed

admitted and its Answer to such complaint will be considered withdrawn. The only issue that may be raised before the Board is whether the Charged Party defaulted on the terms of this Settlement Agreement. The Board may then, without necessity of trial or any other proceeding, find all allegations of the complaint to be true and make findings of fact and conclusions of law consistent with those allegations adverse to the Charged Party on all issues raised by the pleadings. The Board may then issue an order providing a full remedy for the violations found as is appropriate to remedy such violations. The parties further agree that a U.S. Court of Appeals Judgment may be entered enforcing the Board order *ex parte*, after service or attempted service upon the Charged Party/Respondent at the last address provided to the General Counsel.

By letter dated September 13, 2012, the Regional Director for Region 22 notified the Respondent that it was in noncompliance by failing to pay back wages and remit dues, as specified in the settlement agreement. The letter stated that unless the Regional Office received full backpay and dues remittance by September 27, 2012, the Regional Director would revoke the settlement agreement and reissue the complaint. The Respondent failed to comply.

Accordingly, pursuant to the terms of the noncompliance provisions of the settlement agreement, on April 29, 2013, the Regional Director reissued the amended complaint and the Acting General Counsel filed a Motion for Default Judgment with the Board. On May 1, 2013, 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.¹ 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

According to the uncontroverted allegations in the motion for default judgment, the Respondent has failed to comply with the terms of the settlement agreement by

¹ By letter dated May 10, 2013, counsel for the Union advised the Board that the Union and the Respondent were meeting to discuss the terms of a new settlement, and requested that the Board hold this matter in abeyance until the parties determined whether a new settlement agreement could be reached. Thereafter, the Board was administratively advised by the Regional Attorney for Region 22 that the Region had heard nothing further from the parties, and that the Region was requesting that the Board resume processing the motion for default judgment. By letter dated August 19, 2013, counsel for the Union advised the Board that no settlement had been reached or appeared possible and requested that the matter no longer be held in abeyance.

refusing to fully remit back wages owed to its unit employees and refusing to remit dues on behalf of its unit employees to the Union. Consequently, pursuant to the noncompliance provisions of the settlement agreement set forth above, we find that the Respondent's answer to the original amended complaint has been withdrawn and that all of the allegations in the reissued amended complaint are true.² 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 New Jersey corporation, with an office and place of business in Newark, New Jersey, has been engaged in the operation of producing and performing operas.

At all material times, the Respondent derived gross revenues, excluding contributions which, because of the limitations by the grantor, are not available for operating expenses, in excess of \$1 million, and purchased and received at its Newark facility goods valued in excess of \$5000 directly from points outside of the State of New Jersey.

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 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 within the meaning of Section 2(11) of the Act and agents within the meaning of Section 2(13) of the Act:

Bernard J. D'Avella, Jr.	Chairman
Jason Tramm	Musical Director

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:

All musicians and related crafts employed by Respondent in its musical productions, including in its May 21 and 23, 2010 production of *Porgy and Bess*.

Since about May 17, 2009, and at all material times, the Union has been the designated exclusive collective-bargaining representative of the unit and has been recognized as such by the Respondent. Such recognition has

been embodied in a collective-bargaining agreement, effective from May 17, 2009 through December 31, 2010.

At all material times, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the unit.

Additionally, the following events took place:

1. Since about May 21, 2010, the Respondent has engaged in the following conduct in relation to its May 21 and May 23, 2010 performances of *Porgy and Bess*:

(a) Refused to pay its unit employees' contractual wages;

(b) Refused to remit contractual dues on behalf of its unit employees to the Union.

2. The subjects set forth in paragraph 1 relate to wages, hours, and terms and conditions of employment of the unit and are mandatory subjects for purposes of collective bargaining.

3. The Respondent engaged in the conduct described in paragraph 1 without prior notice to the Union and without affording the Union an opportunity to bargain with Respondent with respect to this conduct.

4. In disposition of Case 22-CA-029526, the Respondent and the Union entered into informal Board settlement agreements, the most recent of which was approved by the Regional Director on May 22, 2012.

5. Since about September 27, 2012, and continuously thereafter, the Respondent has refused to fully comply with the settlement agreement described in paragraph 4 by refusing to fully remit back wages owed to its unit employees and by refusing to remit dues on behalf of its unit employees to the Union.

CONCLUSIONS OF LAW

1. By the conduct described above in paragraphs 1, 3, and 5, the Respondent has been failing and refusing to bargain collectively with the exclusive collective-bargaining representative of its employees within the meaning of the Act, in violation of Section 8(a)(5) and (1) of the Act.

2. The Respondent's unfair labor practices 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, we shall order the Respondent to honor and comply with the terms and conditions of the May 17, 2009 through December 31, 2010 collective-bargaining agreement with the Union by paying unit employees the unpaid contrac-

² See *U-Bee, Ltd.*, 315 NLRB 667, 668 (1994).

DECISIONS OF THE NATIONAL LABOR RELATIONS BOARD

tual wages for the May 21 and 23, 2010 performances of *Porgy and Bess*, and to make the unit employees 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), *enfd.* 444 F. 2d 502 (6th Cir. 1971), with interest as 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). In addition, in accordance with our decision in *Latino Express, Inc.*, 359 NLRB No. 44 (2012), we shall order the Respondent to reimburse the unit employees in an amount equal to the differences in taxes owed upon receipt of a lump-sum backpay payment and taxes that would have been owed had there been no discrimination against them. We shall also order the Respondent to submit the appropriate documentation to the Social Security Administration so that when backpay is paid, it will be allocated to the appropriate periods.

Further, having found that the Respondent has violated Section 8(a)(5) and (1) of the Act by failing to remit contractual dues on behalf of its unit employees to the Union, we shall order the Respondent to remit the contractual dues to the Union, with interest as prescribed in *New Horizons for the Retarded*, *supra*, compounded daily as prescribed in *Kentucky River Medical Center*, *supra*.³

ORDER

The National Labor Relations Board orders that the Respondent, New Jersey State Opera, Newark, New Jersey, its officers, agents, successors and assigns, shall take the following affirmative action necessary to effectuate the policies of the Act.

1. Cease and desist from

(a) Failing and refusing to bargain collectively and in good faith with American Federation of Musicians, Local 16, the Union, as the exclusive collective-bargaining representative of the employees in the following unit by failing and refusing to pay all contractual wages owed to unit employees under the terms of its May 17, 2009 through December 31, 2010 collective-bargaining agreement with the Union, in relation to the Respondent's May 21 and May 23, 2010 performances of *Porgy and Bess*:

³ In his motion for default judgment, the Acting General Counsel requests that the Board "[i]ssue a Decision and Order against Respondent containing findings of fact and conclusions of law based on, and in accordance with, the allegations of the [reissued complaint], and provide a full remedy for the unfair labor practices alleged." Because it is unclear whether the amounts set forth in the settlement agreement (\$37,690.70 in backpay and interest, and \$1,049.24 in dues) constitute a full make-whole remedy, we leave to compliance a determination of the amount due the unit employees and the Union.

All musicians and related crafts employed by Respondent in its musical productions, including in its May 21 and 23, 2010 production of *Porgy and Bess*.

(b) Failing and refusing to remit contractual dues on behalf of its unit employees to the Union in relation to the Respondent's May 21 and May 23, 2010 performances of *Porgy and Bess*.

(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) Honor and comply with the terms and conditions of the May 17, 2009 through December 31, 2010 collective-bargaining agreement with the Union, by paying the unit employees the unpaid contractual wages for the hours they worked, in relation to the Respondent's May 21 and May 23, 2010 performances of *Porgy and Bess*, that have not been paid since May 21, 2010, with interest, in the manner set forth in the remedy section of this decision.

(b) 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.

(c) Compensate the unit employees for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters.

(d) Remit contractual dues on behalf of its unit employees to the Union, in relation to the Respondent's May 21 and May 23, 2010 performances of *Porgy and Bess*, in the manner set forth in the remedy section of this decision.

(e) 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.

(f) Within 14 days after service by the Region, post at its Newark, New Jersey facilities copies of the attached notice marked "Appendix."⁴ Copies of the notice, on

⁴ 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 for the Third Circuit."

forms provided by the Regional Director for Region 22, 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. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(g) Within 21 days after service by the Region, file with the Regional Director for Region 22 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. September 30, 2013

Mark Gaston Pearce, Chairman

Philip A. Miscimarra, Member

Kent Y. Hirozawa, 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

ment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.”

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 American Federation of Musicians, Local 16, the Union, as the exclusive collective-bargaining representative of our employees in the following unit by failing and refusing to pay all contractual wages owed to unit employees under the terms of our May 17, 2009 through December 31, 2010 collective-bargaining agreement with the Union, in relation to our May 21 and May 23, 2010 performances of *Porgy and Bess*:

All musicians and related crafts employed by us in our musical productions, including in our May 21 and 23, 2010 production of *Porgy and Bess*.

WE WILL NOT fail and refuse to remit contractual dues on behalf of our unit employees to the Union in relation to our May 21 and May 23, 2010 performances of *Porgy and Bess*.

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 honor and comply with the terms and conditions of our May 17, 2009 through December 31, 2010 collective-bargaining agreement with the Union, by paying the unit employees contractual wages for the hours they worked in relation to our May 21 and May 23, 2010 performances of *Porgy and Bess*, that have not been paid since May 21, 2010, with interest.

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

WE WILL compensate our unit employees for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters.

WE WILL remit contractual dues on behalf of our unit employees to the Union in relation to our May 21 and May 23, 2010 performances of *Porgy and Bess*, with interest.