

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO BRANCH OFFICE**

KB In & Out, Inc. d/b/a Century Car Wash

and

**31-CA-076280
31-CA-078621
31-CA-078622
31-CA-082049
31-CA-091603**

**Carwash Workers Organizing Committee of the
United Steel, Paper and Forestry, Rubber,
Manufacturing, Energy, Allied-Industrial and Service
Workers International Union, AFL-CIO, CLC**

Yaneth Palencia and Katherine Mankin, Esqs.,
for the General Counsel.

Ryan Spillers, Esq.,
for the Charging Party.

DECISION

STATEMENT OF THE CASE

Dickie Montemayor, Administrative Law Judge. The Carwash Workers Organizing Committee of the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied-Industrial and Service Workers International Union, AFL–CIO, CLC (the Union), filed charges which were consolidated in a complaint issued by the General Counsel on September 30, 2013, alleging violations by KB In & Out, Inc., d/b/a Century Car Wash (Respondent) of Sections 8(a)(3) and (1) of the National Labor Relations Act, as amended (the Act). Respondent filed an answer. Pursuant to notice, the case was set for trial on February 18, 2014, in Los Angeles, California. Prior to the trial date, on January 24, 2014, an Order to Show Cause was issued to Respondent. (GC Exh. 38 (c)). The Order to Show Cause mandated that the Respondent show cause why it’s answer should not be stricken as a sham pursuant to Board Rule. 101.21. At no time did Respondent seek to enlarge the time frame to respond to the Order and/or communicate any circumstance that would have prevented it from responding. Respondent, despite being properly served, failed and/or refused to respond to the Order. On February 14, 2014, 18 calendar days after response to the Order was due, an order striking Respondent’s answer was

issued and the allegations set forth in General Counsel’s complaint were deemed admitted. (GC Exh. 1ddd). Respondent was represented by counsel since shortly after the complaint was filed. After the order striking Respondent’s answer was served upon Respondent’s counsel, he asserted that he never received the initial Order to Show Cause. Thereafter, proof of service was
 5 provided to him. (GC Exh. 38(a-c). On February 17, at 8:27 p.m., the night before the scheduled trial, Respondent’s counsel sent an email again reiterating his contention that the Order to Show Cause was never received and withdrew from the case. In his email, he specifically notified the parties that he would not appear at the scheduled trial. (GC Exh. 37(a)). The matter convened for trial on February 18, 2014. Respondent failed and/or refused to appear.
 10 Prior to the scheduled trial, General Counsel and Charging Party each served a subpoena duces tecum on Respondent. (GC Exh. 45a-zz, CP Exh. 1). Respondent failed to comply with subpoenas issued by both General Counsel and the Charging Party. General Counsel also served a subpoena ad testificandum upon Kenny Gharib, the owner of the business entity. (GC Exh. 45a-zz). Mr. Gharib failed and/or refused to appear at the scheduled trial.¹

Ruling on Motion for Default Judgment

General Counsel moved for a Default Judgment pursuant to Section 102.35(a)(8) of the Board’s Rules and Regulations. See *Asher Candy, Inc.*, 353 NLRB 959, 961 (2009). Its motion was premised upon the order striking Respondent’s answer, and/or Respondent’s failure to appear at the scheduled trial. In the absence of any good cause shown for failing to respond to the Order to Show Cause and its failure and/or refusal to appear at the hearing, General Counsel’s motion for Default Judgment is hereby **GRANTED**. See *Transportation Solutions, Inc.*, 355 NLRB 136 (2010), *TNT Logistics North America*, 344 NLRB 489 (2005).
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Upon the entire record, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is a corporation engaged in business as a car wash in Inglewood, California, where it annually derives gross revenues in excess of \$500,000 and purchases and receives goods valued in excess of \$2000 directly from points outside the State of California. I find, that it 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.
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II. ALLEGED UNFAIR LABOR PRACTICES

¹ Assuming a default judgment had not been entered, a decision unfavorable to Respondent would still be warranted applying the adverse inference rule based upon its failure to comply with the subpoenas. See *McAllister Towing & Transportation*, 341 NLRB 394 (2004); *Carpenters Local 405*, 328 NLRB 788 (1999); and *ADF Inc.*, 355 NLRB 81 (2010).
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1. At all material times, the following individuals held the positions set forth opposite their respective names and have been supervisors of Respondent within the meaning of Section 2(11) of the Act and/or agents of Respondent within the meaning of Section 2(13) of the Act:

5 Kenny Gharib - Owner
Santiago Cornejo - Manager

 Roberto (surname unknown) - Manager
Oscar Cardona - Manager

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2. About March 4, 2012, Respondent, by Kenny Gharib, at Respondent's facility, interrogated an employee about why the employee had not signed the agreement referenced below.

15 3. Respondent, by Santiago Cornejo, at the facility:

 (a) About late November 2011 or early December 2011, informed its employees that it would be futile for them to engage in union or other protected concerted activities.

20 (b) About late November 2011 or early December 2011, impliedly threatened to retaliate against employees who complained about the number of hours they were assigned.

 (c) About January 2012, on two separate occasions, questioned employees about their efforts to assist in the wage and hour investigation conducted by the Department of Labor.

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 (d) About February 24 or 25, 2012, disparaged an employee whom he viewed as a union supporter.

30 (e) About January 2012 or early February 2012, disparaged an employee whom he viewed as a union supporter.

 (f) About late February 2012, questioned employees about their union activities by asking about their attendance at union meetings.

35 (g) About March 1, 2012, created an impression among its employees that their union activities were under surveillance.

 (h) About March 5, 2012, interrogated an employee about the employee's union sympathies and activities, and the sympathies of other employees.

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 (i) About March 5, 2012, instructed or suggested to an employee that the employee should not engage in union and/or other protected concerted activities.

45 (j) About March 10, 2012, disparaged an employee whom he viewed as a union supporter.

4. Respondent, by the individuals named below, about the dates and at the locations opposite their names, solicited or encouraged employees to distribute antiunion flyers to prospective customers:

5 (a) Roberto (surname unknown), mid to late July 2012—mid August 2012, at Respondent’s facility; and

(b) Oscar Cardona, early August 2012, at Respondent's facility.

10 5. About late July 2012 or early August 2012, Respondent, by Roberto (surname unknown), at Respondent's facility, solicited or encouraged employees to wear antiunion T-shirts.

15 6. From about January 1, 2011, to March 3, 2012, Julio Ponce and Isaac Alvarez engaged in concerted activities by participating in a Department of Labor investigation regarding wages, hours, and working conditions of employees at Respondent's facility.

7. About March 3, 2012, Julio Ponce and Isaac Alvarez refused to execute the agreement described below.

20 8. About March 4, 2012, Respondent suspended Julio Ponce.

9. About March 7, 2012, Respondent discharged employees Julio Ponce and Isaac Alvarez.

25 10. Respondent engaged in the conduct described above in paragraphs 8 and 9 above because Julio Ponce and Isaac Alvarez assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities.

30 11. About March 3, 2012, Respondent, by Kenny Gharib, presented an agreement to employees (the agreement). (GC Exh. 1ee).

12. About March 3, 2012, Respondent, by Kenny Gharib, required employees to execute the agreement in response to their exercise of their union and/or other protected concerted activities.

35 13. The following provisions in the agreement interfere with employees' union activities and/or protected concerted activities by prohibiting employees from seeking collective enforcement of applicable wage and hour laws.

40 (a) Paragraph 1.1, paragraph 2.02, and paragraph 2.03, of the agreement are confidentiality provisions that interfere with employees' right to discuss their terms and conditions of employment with others.

(b) Paragraph 1.10 and article 2, of the agreement interfere with employees' access to the National Labor Relations Board.

45 **CONCLUSIONS OF LAW**

1. The Union is a labor organization within the meaning of Section 2(5) of the Act.

2. By the acts and conduct described above, Respondent has interfered with, restrained, and/or coerced employees in the exercise of their rights guaranteed in Section 7 of the Act in violation of Section 8(a) of the Act.
3. Respondent violated Section 8(a)(3) and (1) of the Act by discriminating in regard to the hire, tenure, or terms and conditions of its employees, thereby discouraging membership in a labor organization in violation of Section 8(a)(3) and (1) of the Act.
4. The unfair labor practices found 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, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

The record evidence established that the Respondent suspended Julio Ponce and unlawfully discharged both Julio Ponce and Isaac Alvarez. Respondent shall offer Julio Ponce and Isaac Alvarez immediate reinstatement to their former positions, displacing if necessary any replacements or if their positions no longer exist, substantially equivalent positions without loss of seniority and other privileges previously enjoyed, and to make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them.

Back pay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), plus daily compounded interest as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 6 (2010).

Respondent shall expunge from its files any and all references to the unlawful discharge and suspension issued to the above-named employees and shall notify them in writing that this has been done and that the unlawful discrimination will not be used against them in any way. See *Sterling Sugars, Inc.*, 261 NLRB 472 (1982).

Respondent must not make any reference to the expunged material in response to any inquiry from any employer, employment agency, unemployment insurance office or reference seeker, or use the expunged material against them in any way.

Also having found various provisions in the agreements that Respondent asked employees to sign unlawful, Respondent shall rescind the unlawful agreements and advise its employees in writing that said agreements have been so rescinded.

The Respondent shall be required to post a notice that assures its employees that it will respect their rights under the Act. As Respondent has a large number of its employees whose primary language is Spanish, Respondent shall be required to post the paper notice in both English and Spanish in a manner set forth hereafter.

5 The notice shall also be read to employees during working time both in English and Spanish. Reading the notice to the employees in the presence of a responsible management official serves as a minimal acknowledgement of the obligations that have been imposed by law and provides employees with some assurance that their rights under the Act will be respected into the future. *Whitesell Corp.*, 357 NLRB No. 97, slip op. at 6 (2011). By reading to the employees assembled for that purpose only on company time will enable the employees to fully perceive that the Respondent and his managers are bound by the requirements of the Act. *Federated Logistics*, 340 NLRB 255, 258 (2003). Accordingly, the Respondent shall be required to hold a meeting or meetings scheduled to ensure the widest possible attendance on each shift at which a responsible management official of Respondent will read the notice in English and Spanish and in any additional languages the Regional Director decides appropriate. The notice shall be read in the presence of a Board agent or, at the Respondent's option, a Board agent will read the notice in the presence of a responsible management official of the Respondent. The reading will take place at a time when Respondent would customarily hold meetings and must be completed prior to the completion of the 60-day notice posting period. The date and times of the reading must be approved by the Regional Director. The announcement of the meeting will be in the same manner that Respondent normally announces meetings and must be approved by the Regional Director.

20 Respondent shall complete the appropriate paperwork as set forth in IRS publication 975, and shall notify the Social Security Administration what calendar periods to which the back pay should be allocated.

25 Respondent shall also compensate the above named discriminates for any adverse tax consequences, if any, incurred as a result of receiving one or more lump-sum back pay awards covering periods longer than 1 year. *Latino Express, Inc.*, 359 NLRB No. 44 (2012).

30 On these findings of fact and conclusions of law and on the entire record, I issue the following recommended²

ORDER

35 Respondent, KB In & Out, Inc., d/b/a Century Car Wash, its officers, agents, successors, and assigns, shall

1. Cease and desist from

40 (a) Preventing employees from exercising their Section 7 rights to form, join, or assist a Union, choose a representative to bargain with Respondent on behalf of the employees, act together with other employees for their benefit and protection, or choose not to engage in any of these protected activities.

² If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

- 5
- (b) Making it appear to employees that Respondent is watching out for their union activities and/or other protected concerted activities.
- (c) Asking employees about their support for the union and/or other protected concerted activities.
- (d) Threatening employees because they engage in union activity and/or other protected activity.
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- (e) Soliciting or encouraging employees to distribute antiunion fliers to prospective customers.
- (f) Soliciting or encouraging employees to wear antiunion shirts.
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- (g) Making unlawful comments to employees concerning their union and/or other protected concerted activities, including attempting to humiliate employees, offend employees, or stigmatize employees by calling them such names as union boss, revolutionary, guerilla fighter, union thief, or words to that effect.
- 20
- (h) Telling employees that raising concerns about working hours are futile or implying that workers who raise such concerns will be retaliated against.
- (i) Telling employees or suggesting to employees that they are prohibited from engaging in union and/or other protected concerted activities.
- 25
- (j) Imposing, enforcing, or requiring employees to sign an agreement that unlawfully interferes with their right to engage in union and/or other protected concerted activity, their right to participate in efforts by the Department of Labor to enforce wage and hour laws at the car wash, or their right to seek collective enforcement of applicable wage and hour laws.
- 30
- (k) Imposing, enforcing, or requiring employees to sign any agreement that interferes with the employees' access to the National Labor Relations Board.
- 35
- (l) Imposing, enforcing, or requiring employees to sign an agreement that interferes with their right to discuss terms and conditions of employment with others.
- (m) Circulating unlawful agreements in response to the union and/or other protected concerted activities.
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- (n) Disciplining, suspending, or firing employees because of their union activities and/or other protected concerted activities.
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- (o) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their Section 7 rights.

2. Respondent shall take the following affirmative action necessary to effectuate the policies of the Act within 14 days from the date of the Board's Order

- 5 (a) Offer Julio Ponce and Isaac Alvarez reinstatement to their former jobs, displacing if necessary any replacements or, if those jobs no longer exist, to substantially equivalent positions without prejudice to their seniority or any other rights or privileges previously enjoyed.
- 10 (b) Make whole Julio Ponce and Isaac Alvarez for loss of earnings or other benefits suffered by reason of the discrimination against them by payment to them of the amounts to be determined by the Regional Director, the total amount of back pay and interest owed continues to accrue until the Respondent makes a valid offer of reinstatement to the below-named employees; make appropriate withholdings for each named employee. Back pay shall be in amounts equal to the difference in taxes owed upon receipt of a lump sum payment and taxes that would have been
- 15 owed had there been no discharge. Additionally, the Respondent shall submit the appropriate documentation to the Social Security Administration so that when back pay is paid it will be allocated to the appropriate periods.
- 20 (c) Within 14 days from the date of this order, the Respondent shall remove from its file any reference to the unlawful suspension and discharges and within 3 days thereafter notify the employees in writing that this has been done and that the suspension and discharges will not be used against them in any way.
- 25 (d) Respondent will rescind the agreement presented to employees on or about March 3, 2012, remove from employee files and advise employees in writing that these agreements will be rescinded.
- 30 (e) Respondent shall 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, time cards, personnel records and reports, and all other records, including an electronic copy of such records if stored in an electronic
- 35 form, necessary to calculate the amount of back pay due under the terms of this order.
- 40 (f) Respondent shall hold a meeting or meetings scheduled to ensure the widest possible attendance on each shift at which a responsible management official of the Respondent will read the notice in English and Spanish and in additional languages that the Regional Director decides appropriate. The notice shall be read in the presence of a Board agent or, at the Respondent's option, a Board agent will read the notice in the presence of a responsible management official of the Respondent. The reading will take place at a time when the Respondent would customarily hold meetings and must be completed prior to the completion
- 45 of the 60-day notice posting period. The date and times of the reading must be approved by the Regional Director. The announcement of the meeting will be in

the same manner the Respondent normally announces meetings and must be approved by the Regional Director.

- 5 (g) Within 14 days after service by the region, the Respondent will post at its
Inglewood, California facility copies of the notice, "Appendix." The notice
posted shall be in English and Spanish on the forms provided by the Regional
Director for Region 31. After being signed by the Respondent's authorized
10 representative, the notice 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.
- 15 (h) In addition to physical posting of paper notices, such notices shall be distributed
electronically such as by email, posting on an intranet or Internet site, and/or other
electronic means if the Respondent customarily communicates with its employees
by such means.
- 20 (i) Reasonable steps shall be taken by the Respondent to ensure that the notices are
not altered, defaced, or covered by any material. If the Respondent has gone out
of business or closed the facility involved in these proceedings, 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 2011.
- 25 (j) Within 21 days after service by the region, Respondent shall file with the
Regional Director for Region 31 a sworn certification of a responsible official on
a form provided by the region attesting to the steps the Respondent has taken to
comply.³

30 Dated, Washington, D.C. March 19, 2014



Dickie Montemayor
Administrative Law Judge

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³ If this Order is enforced by a judgment of the 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."

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 threaten you because you engage in union activity and/or other protected activity.

WE WILL NOT solicit or encourage you to distribute antiunion flyers to prospective customers.

WE WILL NOT solicit or encourage you to wear antiunion shirts.

WE WILL NOT make unlawful comments to you concerning your union and/or other protected concerted activities, including attempting to humiliate you, offend you, or stigmatize you by calling you names such as union boss, revolutionary, guerilla fighter, union thief, or words to that effect.

WE WILL NOT tell you that raising concerns about working hours are futile or imply that workers who raise such concerns will be retaliated against.

WE WILL NOT tell you, or suggest to you, that you are prohibited from engaging in union and/or other protected concerted activities.

WE WILL NOT impose, enforce or require you to sign an agreement that unlawfully interferes with your right to engage in union and/or other protected concerted activity; your right to participate in efforts by the Department of Labor to enforce wage and hour laws at the carwash; or your right to seek collective enforcement of applicable wage and hour laws.

WE WILL NOT impose, enforce, or require you to sign any agreement that interferes with your access to the National Labor Relations Board.

WE WILL NOT impose, enforce, or require you to sign an agreement that interferes with your right to discuss terms and conditions of employment with others.

WE WILL NOT circulate unlawful agreements in response to union and/or other protected concerted activities.

WE WILL NOT discipline, suspend, or fire you because of your union activities and/or other protected concerted activities.

WE WILL NOT in any like or related manner interfere with your rights under Section 7 of the Act.

WE WILL pay Julio Ponce for the wages and other benefits he lost because we suspended and discharged him.

WE WILL pay Isaac Alvarez for the wages and other benefits he lost because we discharged him.

WE WILL remove from our files all references to the suspension and discharge of Julio Ponce and notify Julio Ponce in writing that this has been done and that the disciplines will not be used against him.

WE WILL remove from our files all references to the discharge of Isaac Alvarez, and notify him in writing that this has been done and that the discipline will not be used against him in any way.

WE WILL offer Julio Ponce and Isaac Alvarez their jobs back along with their seniority and all other rights or privileges.

WE WILL compensate Julio Ponce and Isaac Alvarez for the adverse tax consequences, if any, of receiving lump-sum back pay awards.

WE WILL file reports with the Social Security Administration allocating the back pay awards to the appropriate calendar quarters.

WE WILL rescind the agreements indicated above and presented to you, on or about March 3, 2012, remove them from your files, and advise you in writing that these agreements have been rescinded.

**KB IN & OUT, INC., DBA CENTURY
CAR WASH**

(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

11500 West Olympic Boulevard, Suite 600, Los Angeles, CA 90064-1824
(310) 235-7352, Hours: 8:30 a.m. to 5 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE
THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE
DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY
OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE
WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S
COMPLIANCE OFFICER, (310) 235-7424.