JT Bay, LLC d/b/a Performance Cleaning Group *and* Local 32BJ, Service Employees International Union. Case 12–CA–075591

May 2, 2014

DECISION AND ORDER

BY MEMBERS HIROZAWA, JOHNSON, AND SCHIFFER

The General Counsel seeks a default judgment in this case pursuant to the terms of an informal settlement agreement. Upon a charge and an amended charge filed by Local 32BJ, Service Employees International Union (the Union) on February 27 and October 11, 2012, respectively, the General Counsel issued the complaint on December 31, 2012, against JT Bay, LLC d/b/a Performance Cleaning Group (the Respondent), alleging that the Respondent violated Section 8(a)(5) and (1) of the Act. The Respondent filed an answer to the complaint on January 14, 2013.

Subsequently, on March 13, 2013, the Respondent and the Union entered into an informal settlement agreement, which was approved by the Regional Director for Region 12 on March 26, 2013. Among other things, the settlement agreement required the Respondent to: (1) make discriminatees Jorge Hernandez, Isolina Recio, Maria Reyes, Dayami Rodriguez, and Manuel Zambrano whole for their loss of wages and other monetary benefits by paying them specified amounts of backpay and interest; (2) recognize and bargain with the Union and put in writing and sign any agreement reached with respect to wages, hours, and other terms and conditions of employment for the 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 [date] [sic] in the instant case(s). 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allegations of the aforementioned complaint will be deemed admitted and its Answer to such complaint will be considered withdrawn.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 Charged Party/Respondent at the last address provided to the General Counsel.

By letter dated March 28, 2013, the Regional Director for Region 12 advised the Respondent to take the steps necessary to comply with the terms of the settlement agreement. By letter dated May 15, 2013, the Regional Director for Region 12 reminded the Respondent of its obligations under the settlement agreement and advised the Respondent that although the Region received the certification of posting and signed notices in English, the Respondent has failed to (1) remit backpay; (2) return signed and dated notices in Spanish or any information concerning whether the Respondent electronically posted or distributed the notices; and (3) notify the Region of the steps it has taken to recognize and bargain with the Union and otherwise comply with the settlement agreement. The letter also stated that, if the Respondent did not comply within 14 days, (1) the Respondent's failure to comply may result in the Regional Director reissuing the complaint; and (2) the Acting General Counsel may file a motion for default judgment with the Board. The Respondent failed to comply.

Accordingly, pursuant to the terms of the noncompliance provisions of the settlement agreement, on August 2, 2013, the Regional Director reissued the complaint. By letter dated November 5, 2013, the Regional Director for Region 12 again reminded the Respondent of its obligations under the settlement agreement and advised the Respondent of its noncompliance, extending the opportunity to comply with the settlement agreement or file an answer to the reissued complaint to November 12, 2013. The Respondent failed to respond.[1] On November 21,

[1] The motion for default judgment indicates that the Region sent its correspondence to the Respondent by certified and regular mail, as well as electronic mail, to multiple addresses, including the address listed in the Respondent's 2013 Annual Report filed with the State of Florida Department of State, but many of the mailings were returned as undeliverable. It is well settled that a respondent's failure or refusal to accept certified mail or to provide for receiving appropriate service

2013, the General Counsel filed a Motion for Default Judgment with the Board. On November 25, 2013, the Board issued an order transferring the proceeding to the Board and 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

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 failing to remit the full amount of the agreed-upon backpay and interest to Jorge Hernandez, Isolina Recio, Maria Reyes, Dayami Rodriguez, and Manuel Zambrano and failing to send to the Regional Office a signed and dated Notice to Employees in Spanish along with a certification of posting. Consequently, pursuant to the noncompliance provisions of the settlement agreement set forth above, we find that the Respondent's answer to the original complaint has been withdrawn and that all of the allegations in the reissued complaint are true.[2] Accordingly, we grant the General Counsel's Motion for Default Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

About October 1, 2011, pursuant to a contract with the City of Miami Beach, Florida, the Respondent began operations at Scott Rakow Youth Center, North Shore Recreation and Tennis Center, and Flamingo Park Baseball and Football Stadium and Softball Field restrooms in the City of Miami Beach, Florida, all of which work had previously been performed by Vista Building Maintenance Services, Inc. (Vista); since then, the Respondent has performed that work in basically unchanged form; and the Respondent has employed as a majority of its employees individuals who were previously employees of Vista.

Based on its operations described above, the Respondent has continued the employing entity and is a successor to Vista.

At all material times, the Respondent, a Florida corporation with an office and place of business in Tampa, Florida, has been engaged in the business of providing commercial cleaning services in various locations in the State of Florida.

During the calendar year preceding issuance of the complaint, in conducting its business operations described above, the Respondent derived gross revenues in excess of $1 million and provided services valued in excess of $50,000 to customers in the State of Florida that are 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 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 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:

Daniel Gorritz	Partner in Business Development
Luis Ortega	Senior Project Manager

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 employees employed at the Scott Rakow Youth Center, North Shore Recreation and Tennis Center, and Flamingo Park Baseball and Football Stadium and Softball Field Restrooms in the City of Miami Beach, excluding supervisors, managers, clerical, administrative, and confidential employees as defined in the Act.

From about May 6 until about September 30, 2011, the Union was the exclusive collective-bargaining representative of a unit of employees employed by Vista, which included the employees described above, and during that period of time the Union had been voluntarily recognized as such representative by Vista. This recognition was embodied in a collective-bargaining agreement, effective by its terms from May 6, 2011 to May 5, 2015, between the Union and Vista.

Since about October 1, 2011, at which time the Respondent took over as a successor to Vista performing commercial cleaning services pursuant to a contract with the City of Miami Beach, Florida, the Union has been the

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cannot serve to defeat the purposes of the Act. See *Cray Construction Group, LLC*, 341 NLRB 944, 944 fn. 5 (2004); *I.C.E. Electric, Inc.*, 339 NLRB 247, 247 fn. 2 (2003). 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 addition, we note that the settlement agreement provides for entry of a court judgment "after service or attempted service upon Charged Party/Respondent at the last address provided to the General Counsel."

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

exclusive collective-bargaining representative of the unit employed by the Respondent.

From about May 6 to about October 1, 2011, based on Section 9(a) of the Act, the Union was the exclusive collective-bargaining representative of a unit of employees employed by Vista, which included the employees described above.

At all material times, and since about October 1, 2011, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the Respondent's employees in the unit.

By letters dated May 26, July 18, and November 1, 2011, the Union requested that the Respondent recognize it as the exclusive collective-bargaining representative of the unit and bargain collectively with it as the collective-bargaining representative of the unit.

Since about October 1, 2011, the Respondent has failed and refused to recognize and bargain with the Union as the exclusive collective-bargaining representative of the unit.

On about October 1, 2011, the Respondent unilaterally implemented initial terms and conditions of employment, which included changes to the unit's work schedules and cessation of benefits such as holiday pay and health insurance.

The subjects set forth above relate to wages, hours, and other terms and conditions of employment of the unit and are mandatory subjects of bargaining for the purposes of collective bargaining.

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

CONCLUSION OF LAW

By the conduct described above, the Respondent has been failing and refusing to bargain collectively and in good faith with the exclusive collective-bargaining representative of its employees, in violation of Section 8(a)(5) and (1) of the Act. The Respondent's unfair labor practices 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, the Respondent shall comply with the terms of the settlement agreement approved by the Regional Director for Region 12 on March 26, 2013, by recognizing and bargaining with the Union as the exclusive collective-bargaining representative of the unit employees; rescinding the unilateral changes in terms and conditions of employment and restoring the status quo ante with regard to work schedules and cessation of benefits such as holiday pay and health insurance, until such time as the Respondent and the Union reach an agreement for a new collective-bargaining agreement or a lawful impasse based on good-faith negotiations; and making discriminates Jorge Hernandez, Isolina Recio, Maria Reyes, Dayami Rodriguez, and Manuel Zambrano whole by the payment of backpay and interest provided for in the settlement agreement, plus interest accrued to the date of payment 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).

In addition, 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 the Respondent not violated Section 8(a)(5) as concluded above. 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.

In limiting our affirmative remedies to those enumerated above, we are mindful that the General Counsel is empowered under the default provision of the settlement agreement to seek "a full remedy for the violations found as is appropriate to remedy such violations," including backpay beyond that specified in the agreement.[3] However, in his Motion for Default Judgment, the General Counsel has not sought such additional remedies and we will not, sua sponte, include them within this remedy.[4]

ORDER

The National Labor Relations Board orders that the Respondent, JT Bay, LLC d/b/a Performance Cleaning, Tampa, Florida, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize and bargain with Local 32BJ, Service Employees International Union (the

[3] As set forth above, the settlement agreement provided that, in case of noncompliance, the Board could "issue an order providing a full remedy for the violations found as is appropriate to remedy such violations."

[4] See, e.g., *Benchmark Mechanical, Inc.*, 348 NLRB 576 (2006). The General Counsel specifically requested in his motion for default judgment that the Board "make whole unit employees . . . for the losses they suffered because of the elimination of their paid holidays and health insurance coverage option, and changes to their work schedules, by the payment to those employees of the backpay and interest amounts provided for in the Settlement Agreement [and by requiring additional interest on backpay]."

Union) as the exclusive collective-bargaining representative of the employees in the bargaining unit. The appropriate unit is:

> All employees employed at the Scott Rakow Youth Center, North Shore Recreation and Tennis Center, and Flamingo Park Baseball and Football Stadium and Softball Field Restrooms in the City of Miami Beach, excluding supervisors, managers, clerical, administrative, and confidential employees as defined in the Act.

(b) Making unilateral changes of initial terms and conditions of employment, including changes to the unit's work schedules and cessation of benefits such as holiday pay and health insurance.

(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) On request, bargain with the Union as the exclusive collective-bargaining representative of the unit employees concerning terms and conditions of employment, and, if an understanding is reached, embody the understanding in a signed agreement.

(b) Rescind the unilateral changes in terms and conditions of employment and restore the status quo ante with regard to work schedules and cessation of benefits such as holiday pay and health insurance, until such time as the Respondent and the Union reach an agreement for a new collective-bargaining agreement or a lawful impasse based on good-faith negotiations.

(c) Make whole the employees named below for any loss of earnings and other benefits suffered as a result of the unlawful actions against them, by payment to each of them of the backpay and interest amounts shown, with interest accrued to the date of payment, in accordance with the terms of the settlement agreement approved by the Regional Director on March 26, 2013:

	Backpay	Interest	Total
Jorge Hernandez	$487	$14	$501
Isolina Recio	$797	$16	$813
Maria Reyes	$797	$16	$813
Dayami Rodriguez	$797	$16	$813
Manuel Zambrano	$797	$16	$813
Total Amount due			$3753

(d) Compensate the unit employees for the adverse tax consequences, if any, of receiving a lump-sum backpay award, in the manner set forth in the remedy section of this decision, and file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters.

(e) Within 21 days after service by the Region, file with the Regional Director for Region 12 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., May 2, 2014

Kent Y. Hirozawa, Member

Harry I. Johnson, III, Member

Nancy Schiffer, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD