Key Handling Systems, Inc. *and* UFCW Local 1245, United Food and Commercial Workers, AFL–CIO. Case 22–CA–105632

July 15, 2014

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA 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 UFCW Local 1245, United Food and Commercial Workers, AFL–CIO (the Union), on May 22 and July 26, 2013, respectively, the General Counsel issued the complaint on September 20, 2013, against Key Handling Systems, Inc. (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 October 17, 2013.

Subsequently, the Respondent and the Union entered into an informal settlement agreement, which was approved by the Acting Regional Director for Region 22 on December 5, 2013.[1] Among other things, the settlement agreement required the Respondent to: (1) copy and mail, at its own expense, a copy of the notice to all current bargaining unit employees and former employees who were employed at any time since November 22, 2012, and (2) make whole employees Angel Agudo, José Almedia, Luis Castillo, Marcos Rodriguez, Sigfredo Javier, Victor Javier, Anthony Quiles, Wilson Vargas, Raymond Clouse, and James Renfro with regard to their unused sick and vacation leave by paying them specified amounts of backpay.

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 September 20, 2013 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allegations of the aforementioned complaint will be deemed admitted and its Answer to such complaint will be considered withdrawn.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.

On January 29, 2014, the compliance officer for Region 22, by email, notified the Respondent's counsel that the Respondent was in danger of defaulting on the settlement agreement as the Respondent had neither notified the Region that it had mailed the required notices nor submitted to the Region the agreed upon payments to distribute to the employees named in the agreement. The compliance officer advised the Respondent's counsel that failure to comply with the agreement could result in the Regional Director revoking his approval of the agreement, reissuing the complaint, and seeking default judgment. By further email to the Respondent's counsel also dated January 29, 2014, the compliance officer requested confirmation of a telephone conversation during the intervening period in which the Respondent's counsel had advised the compliance officer that the Respondent was unable to fulfill its obligations under the settlement agreement as it had ceased operations and would soon be filing for bankruptcy. The Region's email documented that the compliance officer had informed the Respondent's counsel that given the Respondent's inability to comply, she would recommend that the Regional Director revoke the agreement, reissue the complaint and seek default judgment. By email dated January 31, 2014, the Respondent's counsel confirmed the contents of the January 29 emails and stated again that the Respondent was no longer operating and did not have the ability to fund the settlement agreement.

Accordingly, pursuant to the terms of the noncompliance provisions of the settlement agreement, on May 14,

[1] Also on December 5, 2013, the Acting Regional Director issued an Order Dismissing Complaint and Notice of Hearing stating that the remaining complaint allegations not subject to the settlement agreement were deferred to collections in accordance with the Board's deferral policy regarding collections cases.

2014, the Acting Regional Director reissued the complaint based only upon the allegations as set forth in the parties' settlement agreement, and the General Counsel filed a Motion for Default Judgment with the Board. On May 19, 2014, 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.[2]

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 mail the required notices and failing to make whole employees Angel Agudo, José Almedia, Luis Castillo, Marcos Rodriguez, Sigfredo Javier, Victor Javier, Anthony Quiles, Wilson Vargas, Raymond Clouse, and James Renfro with respect to their unused sick and vacation leave by paying them specified amounts as set forth in the settlement agreement. 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.[3] 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

At all material times, the Respondent, a New Jersey corporation with an office and place of business in Moonachie, New Jersey, has been engaged in the business of designing, engineering, and installing conveyor systems.

During the 12-month period preceding reissuance of the complaint, the Respondent provided services valued in excess of $50,000 directly to customers located outside 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

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 production, maintenance, installation employees and truck drivers employed by Key Handling Systems, Inc. at its Moonachie, New Jersey facility, but excluding executives, supervisors, office employees, draftsmen, engineers and such other classifications of employees not here included.

Since about 1977 and at material times, the Respondent has recognized the Union as the exclusive collective-bargaining representative of the unit. This recognition has been embodied in successive collective-bargaining agreements, the most recent of which was effective from March 1, 2012, to February 28, 2013, and was thereafter extended by mutual agreement of the parties from February 1, 2013, until April 29, 2013 (the 2012–2013 Agreement).

At all times since about 1977, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the unit.

Since about January 4, 2013, the Respondent has failed to continue in effect all the terms and conditions of the 2012–2013 Agreement by failing to make payments to certain bargaining unit employees with respect to their unused sick leave and vacation leave.

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

The Respondent engaged in the conduct described above without the Union's consent.

CONCLUSION OF LAW

By the conduct described above, 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. 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

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[2] As mentioned above, the settlement agreement provides that in case of noncompliance the complaint allegations will be deemed admitted and the only issue that may be raised before the Board is whether the Respondent defaulted on the terms of the settlement agreement. The Respondent's counsel's email admits that the Respondent has defaulted. The Respondent's financial situation is not a legitimate defense for failing to comply with the terms of a settlement agreement. Nor is it otherwise a basis for denying the motion for default judgment. See, e.g., *Peregrine Co.,* 356 NLRB No. 179, slip op. at 1 fn. 2 (2011); *Judd Contracting*, *Inc.*, 338 NLRB 676, 676 fn. 3 (2002), enfd. 76 Fed. Appx. 651 (6th Cir. 2003).

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

desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent violated Section 8(a)(5) and (1) of the Act by ceasing, since about January 4, to honor and comply with the terms and conditions of the 2012–2013 Agreement with the Union by failing to make payments to certain unit employees with respect to their unused sick and vacation leave, we shall order the Respondent to make the unit employees whole for any loss of earnings and other benefits attributable to its unlawful conduct. All amounts due to employees 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, 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) and (1) 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 calendar quarters.[4]

ORDER

The National Labor Relations Board orders that the Respondent, Key Handling Systems, Inc., Moonachie, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain collectively and in good faith with UFCW Local 1245, United Food and Commercial Workers, AFL–CIO as the exclusive collective-bargaining representative of the employees in the following unit by failing, since about January 4, 2013, to continue in effect all the terms and conditions of the 2012–2013 Agreement by failing to make payments to employees Angel Agudo, José Almedia, Luis Castillo, Marcos Rodriguez, Sigfredo Javier, Victor Javier, Anthony Quiles, Wilson Vargas, Raymond Clouse, and James Renfro with respect to their unused sick and vacation leave. The bargaining unit is:

> All production, maintenance, installation employees and truck drivers employed by Key Handling Systems, Inc. at its Moonachie, New Jersey facility, but excluding executives, supervisors, office employees, draftsmen, engineers and such other classifications of employees not here included.

(b) 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 2012–2013 Agreement by paying Angel Agudo, José Almedia, Luis Castillo, Marcos Rodriguez, Sigfredo Javier, Victor Javier, Anthony Quiles, Wilson Vargas, Raymond Clouse, and James Renfro the contractual amounts due with regard to their unused sick and vacation leave, with interest, in the manner set forth in the remedy section of this decision.

(b) Make Angel Agudo, José Almedia, Luis Castillo, Marcos Rodriguez, Sigfredo Javier, Victor Javier, Anthony Quiles, Wilson Vargas, Raymond Clouse, and James Renfro 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 lump-sum backpay awards, in the manner set forth in the remedy section of this decision, and file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each employee.

(d) 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, 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.

(e) 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"[5] to the Union

[4] In his motion for default judgment, the 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 [r]eissued [c]omplaint, and provide a full remedy for the unfair labor practices alleged." Because it is unclear whether the total amount set forth in the settlement agreement ($12,696.89) constitutes a full make-whole remedy, we leave to compliance a determination of the amount due the specified unit employees.

[5] 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."

and to all employees who were employed by the Respondent at its Mooachie, New Jersey facility at any time since about January 2013 until it ceased operations there. 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.

(f) 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. July 15, 2014

Mark Gaston Pearce, Chairman

Philip A. Miscimarra, Member

Nancy Schiffer, 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 UFCW Local 1245, United Food and Commercial Workers, AFL–CIO (the Union) as the exclusive collective-bargaining representative of our employees in the following unit by failing and refusing to make payments to unit employees under the terms of our 2012–2013 collective-bargaining agreement with the Union, with respect to their unused sick and vacation leave:

> All production, maintenance, installation employees and truck drivers employed by us at our Moonachie, New Jersey facility, but excluding executives, supervisors, office employees, draftsmen, engineers and such other classifications of employees not here included.

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 2012–2013 collective-bargaining agreement with the Union, by paying our unit employees the contractual amounts due for their unused sick and vacation leave, which we have not paid since January 4, 2013, 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 lump-sum backpay awards, and WE WILL file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters.

KEY HANDLING SYSTEMS, INC.

The Board's decision can be found at www.nlrb.gov/case/22-CA-105632 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.