

Tortilleria La Poblanita and Domingo Benitez and Roman Chavez. Cases 02–CA–37935 and 02–CA–038089

July 28, 2011

DECISION AND ORDER

BY MEMBERS BECKER, PEARCE, AND HAYES

The Acting General Counsel seeks default judgment in this case pursuant to the terms of an informal settlement agreement. Upon a charge filed by Domingo Benitez in Case 02–CA–037935 on October 20, 2006, and a charge filed by Roman Chavez in Case 02–CA–038089 on January 30, 2007, the General Counsel issued the original consolidated complaint on April 30, 2007, against Tortilleria La Poblanita, the Respondent, alleging that it had violated Section 8(a)(4), (3), and (1) of the Act. The Respondent filed an answer to the complaint.

Subsequently, the Respondent and the Charging Parties entered into a bilateral informal settlement agreement (the agreement), which was approved by the Regional Director for Region 2 on February 13, 2008. Pursuant to the terms of the agreement, the Respondent agreed, *inter alia*, to make the discriminatees whole by making payments pursuant to a backpay installment agreement, as specified in attachment A of the agreement;¹ to post a notice to employees; and otherwise to comply with the nonmonetary provisions of the agreement.

The settlement agreement also contains the following provisions

The Charged Party/Respondent agrees that in case of non-compliance with any of the terms of this Settlement Agreement by the Charged Party/Respondent, the Regional Director may issue a Complaint based upon the allegations of the charge(s) in the instant case(s) which were found to have merit, and/or reissue the Complaint previously filed in the instant case(s). Thereafter, the General Counsel may file a Motion for Summary Judgment with the Board on the allegations of the just-issued complaint concerning the violations of the Act alleged therein. The Charged Party/Respondent understands and agrees that the allegations of the aforementioned Complaint may be deemed to be true by the Board, that it will not contest the validity of any such allegations, and the Board may enter findings of fact, conclusions of law, and an Order on the allegations of the aforementioned complaint. On

receipt of said Motion for Summary Judgment, the Board shall issue an Order requiring the Charged Party/Respondent to show cause why said Motion of the General Counsel should not be granted. The only issue that may be raised in response to the Board's Order to Show Cause is whether the Charged Party/Respondent defaulted upon 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/Respondent, on all issues raised by the pleadings. The Board may then issue an Order providing a full remedy for the violations found as is customary to remedy such violations, including, but not limited to the remedial provisions of this Settlement Agreement. The parties further agree that the Board's Order may be entered thereon *ex parte* and that, upon application by the Board to the appropriate United States Court of Appeals for enforcement of the Board's Order, judgment may be entered thereon *ex parte* and without opposition from the Charged Party/Respondent.

....

In consideration of the Regional Director granting the installment payment set forth above, Respondent further agrees that in the event of any failure to make a scheduled payment of backpay or interest, and to cure any such failure within fourteen (14) days, the total liquidated back pay shall be increased as set forth [herein], less any amounts paid, and shall become immediately due and payable. Interest on the unpaid back pay shall be calculated using the back pay figures set forth [in Attachment A], and shall become immediately due and payable, less any amounts paid in interest prior to the default. Interest on the unpaid back pay shall accrue until the date the amounts are paid in full in accordance with *New Horizons for the Retarded*, 282 NLRB 1173 (1987).

The Respondent made partial payments in accordance with the backpay installment schedule in attachment A. However, the Respondent ceased making payments before completing its monetary obligations and failed to comply with the nonmonetary provisions of the agreement.

By email dated March 5, 2008, counsel for the General Counsel notified the Respondent that the Region would send a letter about the Respondent's compliance with the agreement and informed the Respondent that the Region

¹ The amounts listed totaled \$17,990.40 in backpay and \$2000 in accrued interest. The total backpay is an agreed-upon reduced amount to make the employees whole for the unlawful discrimination against them.

was returning checks that did not conform to the terms of the agreement. On March 10, 2008, the Regional Director for Region 2 sent a letter to the Respondent requesting that it comply with the agreement and, inter alia, noting the agreement's nonmonetary obligations. On April 22, May 8, June 24, and July 15, 2008, counsel for the General Counsel communicated to the Respondent, inter alia, that it had not met its obligations under the agreement and requested that it do so.

On May 13, 2009, the compliance officer for Region 2 sent the Respondent a letter advising the Respondent of the actions it must take to comply with the agreement, i.e., (1) pay the named employees the specified backpay amounts; (2) sign, date, and post the executed notice to employees; (3) return signed copies of the notice to the Region, as well as an affidavit indicating the steps taken to comply with the agreement; (4) expunge the records of Benitez, Chavez, and discriminatee Luis Cordova of their unlawful discharges, to notify them in writing that this has been done and that no references to the discharges will be made in the future; and (5) provide copies of the expungement letters to the Region. The letter further informed the Respondent that failure to comply by May 29, 2009, would result in a recommendation to the Regional Director to issue a motion for summary judgment. The Respondent failed to comply. Accordingly, pursuant to the terms of the agreement's default provision, the Regional Director for Region 2 issued an order revoking settlement and reissued consolidated complaint, with attachments, on March 28, 2011.²

The Respondent submitted no payments to the Region after April 2008, and as of the date of the Acting General Counsel's motion, has not submitted evidence of compliance with its nonmonetary obligations.

On April 19, 2011, the Acting General Counsel filed with the Board a Motion for Default Judgment and issuance of Decision and Order based on default, with attachments.³ Thereafter, on April 22, 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. 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.

² The Acting General Counsel's motion erroneously states that the consolidated complaint was reissued on March 28, 2010. The correct date is March 28, 2011.

³ The Acting General Counsel initially filed a Motion for Summary Judgment, with attachments, on March 29, 2011. On April 19, 2011, the Acting General Counsel requested that the motion be withdrawn because sensitive personal information was inadvertently included in attachments to the motion. On April 22, the Board granted the request to withdraw the original motion.

Ruling on Motion for Default Judgment

According to the uncontroverted allegations in the Motion for Default Judgment, the Respondent has failed and refused to comply with the terms of the settlement agreement by failing to make all of the installment payments detailed in attachment A of the agreement, and by failing to comply with the nonmonetary provisions of the agreement. In addition, the terms of the agreement clearly state that the Respondent's answer to the consolidated complaint is withdrawn, and that the Respondent has waived its right to file an answer to the reissued consolidated complaint. Consequently, pursuant to the provisions of the agreement, we find that all of the allegations in the reissued consolidated complaint are true.⁴ 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 York corporation with an office and place of business located at 4 Heriot Place, Yonkers, New York (the Yonkers facility), has been making and selling tortillas to wholesale customers. During the calendar year ending December 31, 2006, the Respondent, in conducting its operations described above, sold and shipped from its Yonkers facility goods valued in excess of \$50,000 directly to points outside the State of New York. 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 United Workers of America, Local 660 (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 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.

Pedro Reyes	Owner
Joel Reyes	Owner
Jose Raul Diaz	Accountant

1. On about the dates set forth opposite their names, the Respondent discharged the employees named below

Roman Chavez	October 13, 2006
Luis Cordova	October 16, 2006
Domingo Benitez	October 16, 2006

⁴ See *U-Bee, Ltd.*, 315 NLRB 667 (1994).

2. Since on about October 13, 2006, the Respondent has refused to reinstate Roman Chavez.

3. Since on about October 16, 2006, the Respondent has refused to reinstate Luis Cordova.

4. From about October 16, 2006, until an unknown date,⁵ the Respondent refused to reinstate Domingo Benitez.

5. The Respondent engaged in the conduct in paragraphs 1 and 2 above, because Chavez supported the Union and engaged in union and other protected concerted activities, and to discourage employees from supporting the Union and engaging in such activities, and because Chavez was present to give testimony at a hearing before an administrative law judge as a witness for the General Counsel.

6. The Respondent engaged in the conduct in paragraphs 1 and 3 above, because Cordova supported the Union and engaged in union and other protected concerted activities, and to discourage employees from supporting the Union and engaging in such activities, and because Cordova provided testimony for the General Counsel at a hearing before an administrative law judge.

7. The Respondent engaged in the conduct in paragraphs 1 and 4 above, because Benitez supported the Union and engaged in union and other protected concerted activities, and to discourage employees from supporting the Union and engaging in such activities.

8. From about October 16, 2006, until about November 1, 2006, certain employees of the Respondent represented by the Union and employed at the Respondent's Yonkers facility ceased work concertedly and engaged in a strike.

9. The strike was caused and prolonged by the Respondent's unfair labor practices described above.

10. On about November 1, 2006, the Union, by letter, on behalf of the employees who engaged in the strike described above, including but not limited to the following employees, made an unconditional offer to return to their former positions of employment: Gabino Aquino, Paulino Martinez, Pedro Mejia, Gregorio Morales, Nicandro Olguin, Hipoletto Sotelo, and Antonio Zuniga.

11. By letter, on about November 1, 2006, and continuing to date, the Respondent has failed and refused to reinstate the employees described above to their former positions of employment.

⁵ The consolidated complaint inadvertently states that the Respondent refused to reinstate Benitez from October 16, 2006, until about March 2, 2006. We are unable to determine the precise end date of the Respondent's refusal to reinstate Benitez. However, this does not affect the remedy sought by the Acting General Counsel.

CONCLUSIONS OF LAW

1. By the acts and conduct described in paragraphs 1 through 7, 10, and 11 above, the Respondent has discriminated and is discriminating in regard to the hire, tenure, or terms or conditions of employment of its employees, thereby discouraging membership in the Union, and the Respondent is thereby engaging in unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act.

2. By the acts and conduct described in paragraphs 1, 2, 3, 5, and 6 above, the Respondent has been discriminating against employees for filing charges or giving testimony under the Act, and the Respondent is thereby engaging in unfair labor practices within the meaning of Section 8(a)(4) and (1) of the Act.

3. The Respondent has engaged in unfair labor practices 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, as requested by the Acting General Counsel. Specifically, the Respondent shall be ordered to comply with the terms of the settlement agreement approved by the Regional Director for Region 2 on February 13, 2008.

With respect to the Respondent's backpay obligations, the Respondent agreed in the agreement to make whole employees Chavez, Benitez, Cordova, Aquino, Martinez, Mejia, Morales, Olguin, Sotelo, and Zuniga by paying a total of \$17,999.40 in backpay installment payments and \$2000.60 in accrued interest. The Respondent further agreed that, in the event of any failure to make a scheduled payment of backpay or interest, or to cure any such failure within 14 days, the total liquidated backpay shall be increased as set forth in Attachment A of the agreement, and shall become immediately due and payable, less any amounts previously paid, and that interest on the unpaid backpay shall be calculated using the total increased liquidated backpay figures set forth in Attachment A of the agreement, less any amounts paid in interest prior to the default, and shall accrue until the date the amounts are paid in full, in accordance with *New Horizons*, supra.

Although the Respondent made partial backpay installment payments in accordance with the payment schedule in attachment A of the agreement, the Respondent has made no payments since April 2008. Accordingly, we shall order the Respondent to remit to Region 2 the total increased liquidated backpay for the discriminatees totaling \$55,445, as specified in attachment A of

the agreement, less any amounts already remitted. The backpay due the employees shall be computed with interest, less any amounts paid prior to the default, at the rate prescribed in *New Horizons*, supra,⁶ and minus tax withholdings required by Federal and State laws.⁷

⁶ The Board has declined to apply its new policy, announced in *Kentucky River Medical Center*, 356 NLRB 6 (2010), of daily compounding of interest on backpay awards, in cases such as this, that were already in the compliance stage on the date that decision issued. *Three Rivers Electrical, Inc.*, 356 NLRB 170, 170 fn. 2 (2010).

⁷ Because immigration status is an affirmative defense that may be raised by a respondent under appropriate circumstances at the compliance stage of an unfair labor practice proceeding, see *NLRB v. Domsey Trading Corp.*, 636 F.3d 33, 37 (2d Cir. 2011), the defense is waived if not raised by a respondent at the appropriate time. Here, by entering into the settlement agreement, which included the liquidated damage provision, without conditioning the payment of such damages on proof of immigration status, the Respondent waived the defense. Indeed, the Ninth Circuit has specifically rejected the contrary position of our colleague, asserted below, persuasively reasoning:

Rather than pursuing a comprehensive settlement, [the respondent] could have admitted liability, but contested backpay awards on the grounds that some of the terminated employees were “unavailable” for work during any period when they were not lawfully entitled to be present and employed in the United States. . . . If it had done so, [the respondent] would then have had an opportunity to introduce evidence regarding when those employees were not eligible to be employed in the United States and the Board would not have included any periods of unavailability in its backpay calculations. . . . Instead, [the respondent] waived all defenses, including this one, and agreed to a final settlement in which it would pay specified liquidated sums to each terminated employee. Unlike reinstatement and backpay, liquidated damages do not pose an irreconcilable conflict with ICRA, because they are not predicated on an employee’s availability for work. Rather, they are based on the company’s assessment that paying these sums was preferable to further litigation.

[The respondent] can adhere to the terms of its bargained-for agreement without violating federal or state immigration laws. . . . Having agreed to these [liquidated] sums and waived its opportunity to dispute the amounts owed to each individual, [the respondent] cannot now escape the existing regulatory process for the settlement’s enforcement.

NLRB v. C&C Roofing Supply, Inc., 569 F.3d 1096, 1099 (2009). Precisely the same is true here.

Member Hayes notes that the notice to employees attached to the settlement agreement conditions the reinstatement of all discriminatees other than Domingo Benitez on their providing the Respondent with appropriate documentation regarding eligibility for employment under the Immigration Reform and Control Act (IRCA). By virtue of this notice language, Member Hayes would find that immigration status was sufficiently raised and that the Respondent did not waive the defense. Moreover, the settlement agreement was nonadversarial, entered into voluntarily, and it is unknown whether immigration status would have been raised as a defense in the formal proceeding. More importantly, in *Hoffman Plastic Compounds v. NLRB*, 535 U.S. 137, 151 (2001), the Supreme Court held that the Board is precluded as a jurisdictional matter from remedying unlawful conduct against undocumented discriminatees by awarding them backpay. Given the affirmative indication in the record that a question exists concerning the legal immigrant status of the discriminatees other than Benitez in this compliance proceeding, Member Hayes would find that *Hoffman Plastic Compounds*

In limiting our affirmative remedies to those enumerated above, we are mindful that, as set forth above, the agreement contains a catchall provision that, in the event of noncompliance, the Board could “issue an order providing full remedy for the violations found as is customary to remedy such violations, including but not limited to the remedial provisions of this Settlement Agreement,” and the motion for default judgment requests “that the Board grant such further and other relief as may be appropriate.” However, the motion specifically requests the Board, inter alia, to “make whole the discriminatee[s] named in the complaint by making all payments specified in the table in Attachment A of the Agreement, less any amounts already remitted, and requiring the Respondent to post an appropriate Notice to employees, and [] that the Board grant such other and further relief as may be appropriate.” In light of this language, we have construed the Acting General Counsel’s motion as a request to enforce the provisions of the agreement, and we will not, sua sponte, include other remedies in the affirmative relief ordered.⁸ Accordingly, we shall order the Respondent to make the employees whole by remitting to Region 2 the full increased liquidated backpay set out in Appendix A of the settlement agreement approved by the Regional Director for Region 2 on February 13, 2008, less amounts already paid, on behalf of Domingo Benitez, Roman Chavez, Luis Cordova, Gabino Aquino, Paulino Martinez, Pedro Mejia, Gregorio Morales, Nicandro Olguin, Hipolito Sotelo, and Antonio Zuniga, with interest.

ORDER

The National Labor Relations Board orders that the Respondent, Tortilleria La Poblana, Yonkers, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging and refusing to reinstate employees because they support the Union and engage in union and other protected concerted activities, and to discourage employees from supporting the Union and engaging in such activities.

(b) Discharging employees because they were present to give testimony at a hearing before an administrative law judge.

(c) Discharging employees because they provided testimony for the General Counsel at a hearing before an administrative law judge.

requires conditioning their receipt of liquidated damages on proof that they were eligible to be in the United States during the backpay period. He respectfully disagrees with the 9th Circuit’s suggestion in *C & C Roofing Supply* that a party to a settlement agreement can confer remedial jurisdiction on the Board where none exists.

⁸ *Benchmark Mechanical Co.*, 348 NLRB 576, 578 (2006).

(d) Failing and refusing to reinstate employees because they ceased work concertedly and engaged in an unfair labor practice strike.

(e) 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) Offer Roman Chavez and Luis Cordova full reinstatement to their former jobs, or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, provided that they complete within a reasonable period of time appropriate employment forms and present appropriate documents to allow the Respondent to meet its obligations under the Immigration Reform and Control Act of 1986.

(b) Remove from its files any reference to the unlawful discharges of Domingo Benitez, Roman Chavez, and Luis Cordova, and within 3 days thereafter, notify them in writing that this has been done and that the discharge will not be used against them in any way.

(c) Make Domingo Benitez, Roman Chavez, and Luis Cordova whole for any losses of earnings or other benefits resulting from their discharge, in the manner set out in the remedy section of this Decision.

(d) Offer the following employees full reinstatement to their former jobs, or if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, dismissing, if necessary, any persons hired as their replacements, provided that they complete within a reasonable period of time appropriate employment forms and present appropriate documents to allow the Respondent to meet its obligations under the Immigration Reform and Control Act of 1986: Gabino Aquino, Paulino Martinez, Pedro Mejia, Gregorio Morales, Nicandro Olguin, Hipolito Sotelo, and Antonio Zuniga.

(e) Remove from its files any references to the failure to reinstate Gabino Aquino, Paulino Martinez, Pedro Mejia, Gregorio Morales, Nicandro Olguin, Hipolito Sotelo, and Antonio Zuniga, and within 3 days thereafter, notify them in writing that this has been done, and that the unlawful conduct will not be used against them in any way.

(f) Make whole Domingo Benitez, Roman Chavez, Luis Cordova, Gabino Aquino, Paulino Martinez, Pedro Mejia, Gregorio Morales, Nicandro Olguin, Hipolito Sotelo, and Antonio Zuniga for any losses of earnings or other benefits as set forth in the remedy section of this decision.

(g) Within 14 days after service by the Region, post at its Yonkers, New York facility copies of the attached notice marked "Appendix."⁹ Copies of the notice, in English and in Spanish, on forms provided by the Regional Director for Region 2, 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.¹⁰ Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If 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 October 13, 2006.

(h) 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.

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.

⁹ 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."

¹⁰ For the reasons stated in his dissenting opinion in *J. Picini Flooring*, 356 NLRB 11 (2010), Member Hayes would not require electronic distribution of the notice.

WE WILL NOT discharge employees because they engage in union activities or testify in proceedings before the National Labor Relations Board.

WE WILL NOT fail and refuse to reinstate unfair labor practice strikers to their former positions upon the Union's unconditional offer to return to work.

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

WE HAVE reinstated Domingo Benitez to his former job without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL offer Roman Chavez and Luis Cordova full reinstatement to their former jobs, or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, provided that they complete within a reasonable period of time appropriate employment forms and present appropriate documents to allow us to meet our obligations under the Immigration Reform and Control Act of 1986.

WE WILL make Domingo Benitez, Roman Chavez, and Luis Cordova whole for any losses of earnings and other benefits resulting from their discharge.

WE WILL remove from our files any reference to the unlawful discharges of Domingo Benitez, Roman Chavez, and Luis Cordova, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the discharges will not be used against them in any way.

WE WILL offer the following employees full reinstatement to their former jobs, or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, dismissing, if necessary, any persons

hired as their replacements, provided that they complete within a reasonable period of time appropriate employment forms and present appropriate documents to allow us to meet our obligations under the Immigration Reform and Control Act of 1986:

Gabino Aquino	Nicandro Olguin
Paulino Martinez	Hipolito Sotelo
Pedro Mejia	Antonio Zuniga
Gregorio Morales	

WE WILL make the above listed employees whole, with interest, for any loss of earnings and other benefits suffered as a result of our unlawful action against them.

WE WILL remove from our files any and all references to the failure to reinstate the above listed employees, and WE WILL, within 3 days thereafter, notify them in writing that this has been done, and that the unlawful conduct will not be used against them in any way.

TORTILLERIA LA POBLANITA

ATTACHMENT A

NAME	BACKPAY (less statutory deductions)
Gabino Aquino	\$6,816
Domingo Benitez	6,156
Roman Chavez	4,182
Luis Cordova	9,236
Paulino Martinez	5,020
Gregorio Morales	3,445
Nicandro Olguin	11,700
Hipolito Sotelo	4,090
Antonio Zuniga	4,800
TOTAL	\$55,445