

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
WASHINGTON D.C.**

LONG MECHANICAL, INC.

Respondent

and

Case 7-CA-52917

7-CA-53146

7-CA-53200

**LOCALS 98 AND 636, UNITED ASSOCIATION OF
JOURNEYMEN AND APPRENTICES OF THE
PLUMBING AND PIPE FITTING INDUSTRY OF THE
UNITED STATES AND CANADA, AFL-CIO**

Charging Parties

**COUNSEL FOR THE ACTING GENERAL COUNSEL'S OPPOSITION TO
RESPONDENT'S MOTION FOR RECONSIDERATION OF DECISION AND ORDER
OF THE NATIONAL LABOR RELATIONS BOARD**

Now comes Patricia A. Fedewa and Jennifer Y. Brazeal, Counsel for the Acting General Counsel, responding to Respondent's Motion for Reconsideration of the Board's Decision and Order, dated August 31, 2012 (Motion).

1. On August 9, 2012, the Board issued its Decision and Order (Decision and Order)¹, granting the Acting General Counsel's Motion for Default Judgment, which the Acting General Counsel filed on October 10, 2011. The Board found that Respondent failed to specifically respond to the Board regarding allegations that it breached the settlement agreement in Cases 07-CA-052917, 07-CA-053146, and 07-CA-053200 (Settlement Agreement). The Board held

¹ *Long Mechanical, Inc.*, 358 NLRB No. 98 (August 9, 2012).

that Respondent's general denials of non-compliance were insufficient to raise material issues of fact warranting a hearing. (*Long Mechanical, Inc.*, 358 NLRB No. 98 at page 2)

2. On August 31, 2012, Respondent filed its Motion.

3. In its Motion, Respondent argues that it complied with the Settlement Agreement and that it sufficiently responded to Region Seven of the National Labor Relations Board (Region Seven) regarding its compliance with the Agreement. Thus, according to Respondent, the Board erred in granting the Motion for Default Judgment. Respondent does not argue, nor can it, that it presented any of its alleged specific responses to the Motion for Default Judgment to the *Board*.

Particularly, in Respondent's Statement in Opposition to the Acting General Counsel's Motion for Default Judgment (Statement in Opposition), filed October 28, 2011, Respondent contended, in error, that the Acting General Counsel's was improperly using allegations that were settled in Cases 7-CA-53473, 7-CA-53572, and 7-CA-60379³ as a basis for filing its Motion for Default Judgment. Nowhere in its Statement in Opposition does the Respondent specifically address the issues related the breach of the terms of the Settlement Agreement and raised in the Motion for Default Judgment.

In Respondent's Reply to the Acting General Counsel's Response to Respondent's Statement in Opposition (Reply), filed December 2, 2011, Respondent acknowledges the settled allegations in Case 7-CA-53473, et al are unrelated to the Motion for Default Judgment. Respondent fails to address, however, the underlying assertions made in the Motion for Default Judgment, which is that it failed to comply with the terms of the Settlement Agreement. Finally,

³ The formal settlement stipulation approved in 7-CA-53473 et al is pending Board approval.

Respondent argues that settlement agreements in cases 7-CA-52917 et al or 7-CA-53473 et al do not constitute findings that Respondent committed any of the unfair labor practices alleged in the underlying complaints. Again, this argument does not address the allegations raised in the Motion for Default Judgment that Respondent breached the terms of the Settlement Agreement.

Finally, Respondent's Response to Order and Notice to Show Cause, filed December 28, 2011, merely incorporates by reference its earlier filings and demands dismissal pursuant to *New Process Steel v NLRB*, 560 U.S. ___, Case No 08-1457 (2010), wherein the Court held that two Board members do not represent a sufficient quorum to decide disputed cases before the Board. Again, Respondent failed to specifically address the allegations raised in the Motion for Default Judgment.

Section 102.48(d)(1) of the Board's Rules and Regulations permits a party in "extraordinary circumstances" to move for reconsideration of a Board decision. The Board finds extraordinary circumstances where a party submits evidence that is newly discovered or previously unavailable in support of a motion for reconsideration. See e.g. *Superior Protections, Inc.*, 341 NLRB 614 (2004), *enfd.* 401 F.3d 282 (5th Cir. 2005). In the instant case, Respondent bases its argument for reconsideration on certain documents it presented to Region, not the Board, during the investigation of related charges that were filed against it. Respondent asserts that these documents prove that there was compliance with the Settlement Agreement, and that it specifically responded to allegations of non-compliance.

For instance, Respondent relies on a July 7, 2011 email that it sent to the Region's investigator in Case 07-CA-060379. (Exhibit Q to Acting General Counsel's Motion for Default Judgment, and Exhibit B to Respondent's Motion). Respondent also relies on the affidavit of

James Long, Respondent's President, dated March 17, 2011, which he provided in Case 07-CA-053473. (Exhibit U to the Acting General Counsel's Motion for Default Judgment and Exhibit D of Respondent's Motion) Respondent further relies on emails that were exchanged in August 2011 between the Region's investigator and Respondent. (Exhibit X to the Acting General Counsel's Motion for Default Judgment and Exhibit E of Respondent's Motion.⁴) Additionally, Respondent states that certain personnel reports it provided during the investigation of the various charges against it, proved that there was compliance. (Exhibits Y, Z, and AA to the Acting General Counsel's Motion for Default Judgment)

Although these documents were attached to the Acting General Counsel's Motion for Default Judgment, Respondent's Motion for Reconsideration is the first time Respondent makes these arguments to the Board. As noted above, none of these documents were relied upon by Respondent in its responses to the Board regarding the Motion for Default Judgment. Clearly, this evidence is not new, nor was it unavailable to Respondent. In fact, many of the documents Respondent is now relying on for its arguments were authored or originated by Respondent's principals. Respondent had the opportunity to present these arguments and evidence in its three previous submissions to the Board regarding Motion for Default Judgment, but chose not to do so. Accordingly, the Board should find that there are no "extraordinary circumstances" that warrants the Board to overturn its Decision and Order.

4. Even if the Board considers Respondent's Motion's new arguments and evidence, Respondent has not shown that a material issue of fact exists warranting a hearing. In its Motion for Default Judgment, the Acting General Counsel asserted that Respondent failed to immediately reinstate Brady, Dietrich, Garant, and Labar to the position of non-supervisory

⁴ There is no indication on these emails to which unfair labor practice charge the emails were related.

foremen, as required by the Settlement Agreement. The Settlement Agreement required that Respondent reinstate these individuals to the foreman positions by January 25, 2011. Respondent failed to do so. In that regard, Respondent asserts that in a July 7, 2011 email, it advised the Region that the lack of work prevented some employees from being immediately recalled as foremen, and that it provided the Region with dates certain employees were recalled. Importantly, the July 7 email was in response to the investigation of Case 07-CA-060379, and not in response to the Region's request for compliance of the Settlement Agreement in the instant case.⁵

In any event, the July 7 email, read alone, is an imperfect document. The July 7 email responds to questions posed by the Region's investigator in a related charge. The original questions are not stated in the email, or in any other exhibit attached to the filings in this matter. Therefore, only mere inferences can be drawn regarding Respondent's email statements. Nevertheless, the email contains critical admissions. For instance, Respondent admits that Labar, Dietrich, and Garant were not reinstated to foreman positions by January 25, 2011. According to the email, Labar was reinstated to foreman on May 16, 2011; Dietrich was reinstated to foreman on April 25, 2011, and Garant was reinstated to foreman on May 23, 2011. Nothing is stated regarding when, if ever, Brady was reinstated to foreman. The July 7 email indicates that these individuals (except Brady) were recalled to work months before they were assigned foremen positions as required by the terms of the Settlement Agreement. Indeed, the language regarding when the employees should be reinstated to their foreman position is absolute, and does not contain any contingencies. Thus, Respondent's self-serving argument in

⁵ On May 19 and June 7, 2011, the Region requested that Respondent take immediate action to comply with the Settlement Agreement and provide responses as to its steps to ensure compliance. Both letters warned that the Region may reissue the Complaint and seek default judgment from the Board in the case of an insufficient compliance and response. Respondent did not reply to the June 7, 2011 letter.

its Motion that lack of work prevented some employees from being installed as foreman does not cure its failure to comply with the Settlement Agreement. Accordingly, Respondent does not raise any issue of material fact regarding Respondent's failure to reinstate Labar, Dietrich, Brady, and Garant, to foreman by January 25, 2011, as required by the terms of the Settlement Agreement.

In its Motion for Default Judgment, the Acting General Counsel asserted that Respondent failed to reinstate health insurance benefits for Brady and Labar until April 18, 2011, rather than immediately after execution of the Settlement Agreement as required. In its Motion, Respondent states that the July 7 email explains why Brady and Labar were not provided insurance. Respondent's explanation is not relevant to the issue that the insurance was not provided until April 2011. Again, the July 7 email contains critical admissions by Respondent on this issue. Respondent admits that Labar and Brady were reinstated on January 26, 2011, and that Brady and Labar requested insurance on February 10 and 7, 2011 respectively. Respondent further admits that, despite their requests, insurance was not provided until April 18, 2011. Respondent's own admissions show that no issue of material fact exists regarding whether insurance was provided in accord with the Settlement Agreement.

In its Motion for Default Judgment, the Acting General Counsel asserted that Respondent failed to recall Stark, Simcheck, and Baran from the preferential recall list as required by the Settlement Agreement and that Respondent failed to reinstate Ratcliffe until June 6, 2011, instead recalling other employees not on the preferential recall list. In its Motion, Respondent states that the July 7 email and an affidavit from owner James Long state that Ratcliffe was recalled as soon as work became available and that the other three could not be recalled because of lack of work. Despite Respondent's claims, neither the July 7 email nor Long's affidavit

explain why individuals who were not on the preferential recall list were recalled prior to those on the preferential recall list.⁶ Once again, Respondent raises no issue of material fact regarding this issue.

In its Motion for Default Judgment, the Acting General Counsel asserts that Respondent failed and refused to provide complete payroll records as required by the terms of the Settlement Agreement. In its Motion, Respondent asserts it explained its compliance with this requirement in an August 23, 2011 email to the Region's investigator, and that it did provide the payroll documents. As explained in the Motion for Default Judgment and even more specifically in the Region's June 7, 2011 letter to Respondent regarding the payroll records received by the Region, the documents were deficient. Respondent never provided complete payroll records as required by the Settlement Agreement prior to the filing of the Motion for Default Judgment. Thus, Respondent does not raise an issue of material fact pertaining to the compliance with the Settlement Agreement on this issue.

In the alternative, if the Board finds that a material issue of fact exists as to one breach of the settlement agreement, no material issue of fact exists as to the other breaches of the Settlement Agreement. In that regard, the Settlement Agreement provides for a Board Order when the Charged Party has not complied with **any** of the terms of the Settlement Agreement. Thus, even if Respondent proves an issue of material fact regarding one of the incidents of noncompliance, the other incidents of noncompliance are sufficient to support the relief ordered in the Board's August 9, 2012 Decision and Order.

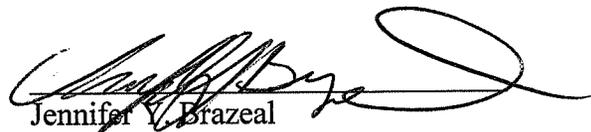
⁶ Number 9 of the July 7 email states: "We cannot return these 3 individuals until we have sufficient work." However, there is no indication to which three individuals Respondent is referring. Standing alone, and without any context, the relevancy of this statement cannot be ascertained.

5. The Board correctly found that Respondent's general denial that it breached the Settlement Agreement does not raise any issue of material fact warranting a hearing. In its Motion, Respondent cites *Vocell Bus Co.*, 357 NLRB. No. 148 (2011), for the proposition that a denial of an allegation that the settlement agreement was breached sufficiently raises an issue of material fact. The facts in *Vocell Bus Co.*, are distinguishable from the facts in the instant case. In *Vocell Bus Co.*, the General Counsel filed a motion for default judgment alleging that the company failed to comply with an informal board settlement agreement. After the Board issued a notice to show cause why the motion should not be granted, the company submitted a response asserting that it complied with each specific provision of the settlement agreement the General Counsel claimed that it did not. The Board found that these specific denials warranted a hearing. *Id.* at 2. Contrary to the facts in *Vocell Bus Co.*, Respondent never specifically explained in its October 28, 2011 Statement in Opposition, December 2, 2011 Reply, or in its December 28 Response to Notice to Show Cause, how it actually complied with the terms of the settlement agreement. Rather, in these filings, Respondent only stated one general denial of breaching the settlement agreement. The Board correctly concluded that this general denial failed to raise any material issues of fact warranting a hearing.

6. Based on the above, the Acting General Counsel requests that Respondent's Motion be denied in its entirety.

Dated this 14th day, of September 2012.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I certify that on the 14th day of September, 2012, I e-filed Copy of the Acting General Counsel's Opposition to Respondent's Motion for Reconsideration of Decision and Order of the National Labor Relations Board, and served a copy electronically on the following parties of record:

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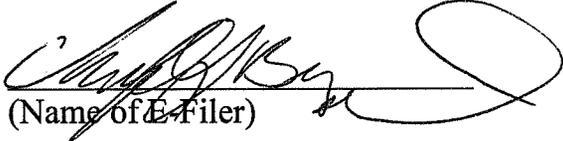
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