Park Avenue Investment Advisor, LLC, and Hotel Management Advisors – Troy, LLC d/b/a Metropolitan Group and The Metro Hotel – Troy Single Employer and/or Alter Egos *and* Local 324, International Union of Operating Engineers (IUOE), AFL–CIO. Case 07–CA–098296

January 23, 2014

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS 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 amended charges filed by Local 324, International Union of Operating Engineers (IUOE), AFL–CIO (the Union) on February 13, March 8, and April 16, 2013, respectively, the General Counsel issued the consolidated complaint and compliance specification on April 30, 2013, against Park Avenue Investment Advisor, LLC (Respondent Park), and Hotel Management Advisors – Troy, LLC d/b/a Metropolitan Group and The Metro Hotel – Troy (Respondent Hotel Management, collectively the Respondents), alleging that the Respondents violated Section 8(a)(4), (3), and (1) of the Act. The Respondents filed an answer to the consolidated complaint and compliance specification on May 30, 2013.

Subsequently, on August 19, 2013, the Respondents and the Union entered into an informal Settlement Agreement, Supplemental Settlement Agreement, Notice to Employees, and Confession of Judgment (the settlement agreement), which were approved by the Regional Director for Region 7 on August 21, 2013. Among other things, the settlement agreement required the Respondents to: (1) make discriminatee Gary Roberts whole for his loss of wages and other monetary benefits by paying Roberts a specified amount of backpay and interest; and (2) post appropriate notices.

The settlement agreement also contained the following provision:

> The Charged Parties agree that in case of non-compliance with any of the terms of this Settlement Agreement by the Charged Parties, and after 7 days notice from the Regional Director of the National Labor Relations Board of such non-compliance without remedy by the Charged Parties, the Regional Director will issue an order severing the complaint and compliance specification, and issue the complaint previously issued on April 30, 2013 in the instant case(s) as consolidated with the compliance specification. The Charged Parties further agree that any waiver of reinstatement provided by a discriminatee/ex-employee as part of a settlement in this case is conditioned upon the Charged Parties fully complying with the terms of this Settlement Agreement and the attached Supplemental Settlement Agreement. Any failure to comply with said terms will result in the rescission by the discriminatee/ex-employee of their waiver of reinstatement and that employee will be entitled to immediate reinstatement by the Charged Parties. Thereafter, the General Counsel may file a motion for default judgment with the Board on the allegations of the complaint. The Charged Parties understand and agree that the allegations of the aforementioned complaint will be deemed admitted and their Answer to such complaint will be considered withdrawn. The only issue that may be raised before the Board is whether the Charged Parties 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 Parties 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 to the extent such violations are not remedied in the Supplemental Settlement Agreement referenced above. 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 Parties/Respondents at the last address provided to the General Counsel. During this process the Regional Director may immediately seek payment on and enforce rights provided under the Confession of Judgment referenced above.

By letter dated August 30, 2013, the Regional Director for Region 7 advised the Respondents to take the steps necessary to comply with the terms of the settlement agreement. By letter dated September 27, 2013, the Regional Director for Region 7 reminded the Respondents of their obligations under the settlement agreement and advised the Respondents that although the initial payment of $7500 was received in the Region, the Respondents have failed to submit their first installment payment of $3500 and have failed to return signed and dated notices to employees and confirmation of posting/mailing. The letter also stated that, if the Respondents do not comply within 7 days, (1) the Respondents' failure to

comply may result in the Regional Director severing the complaint and compliance specification and reissuing the complaint; (2) any waiver of reinstatement provided by discriminatee Gary Roberts as part of the settlement agreement will be rescinded; (3) Roberts will be entitled to immediate reinstatement; (4) backpay owed to Roberts will continue to accrue from the date of his termination until a valid unconditional offer of reinstatement is received; and (5) the General Counsel may file a motion for default judgment with the Board.

Accordingly, pursuant to the terms of the noncompliance provisions of the settlement agreement, on November 5, 2013, the Regional Director issued an Order Severing Compliance Specification from Complaint, Answer Requirement and Notice of Consolidated Hearing. On the same date, the Regional Director reissued the complaint. On November 13, 2013, the General Counsel filed a Motion for Default Judgment with the Board. On November 20, 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 Respondents 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 Respondents have 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 Gary Roberts and failing to send to the Regional Office a signed and dated notice to employees along with a certification of posting. Consequently, pursuant to the noncompliance provisions of the settlement agreement set forth above, we find that the Respondents' answer to the original complaint has been withdrawn and that all of the allegations in the reissued complaint are true.[1] 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, Respondent Park, a Delaware company with an office and place of business in Troy, Michigan, has been engaged in the operation of a hotel providing food and lodging.

At all material times, Respondent Hotel Management, a Delaware company with an office and place of business in Troy, Michigan, has been engaged in the operation of a hotel providing food and lodging.

During calendar year 2012, a representative period, the Respondents, in conducting their business operations described above, collectively derived gross revenues in excess of $500,000 and purchased and received at their Troy facility goods valued in excess of $50,000 from other enterprises in the State of Michigan, including Consumers Energy, which other enterprises received these goods directly from points outside the State of Michigan.

We find that Respondent Park and Respondent Hotel Management are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

At all material times, the Respondents have been affiliated business enterprises with common officers, ownership, directors, management, and supervision; have formulated and administered a common labor policy; have shared common premises and facilities; have provided services for and on behalf of each other; have interchanged personnel with each other; have engaged in common purchasing; and have held themselves out to the public as a single-integrated business enterprise.

Based on their operations described above, the Respondents constitute a single integrated business enterprise and a single employer within the meaning of the Act.

At all material times, the Respondents have had substantially identical management, business purposes, operations, equipment, purchases, premises, facilities, customers, and supervision, as well as ownership.

Based on the operations and conduct described above, the Respondents are, and have been at all material times, alter egos within the meaning of the Act.

We find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

1. At all material times, the following individuals held the positions set forth opposite their respective names and have been supervisors of the Respondents within the meaning of Section 2(11) of the Act and agents of the Respondents within the meaning of Section 2(13) of the Act:

Remo Polselli	Owner and Managing Partner
Hanna Karcho	Partner
Michael Witoszynski	General Manager
Robert Soto	Front Desk Manager
Tim Champine	Maintenance Supervisor

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

2. The following employees of the Respondents (the unit) constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All skilled and general maintenance and utility employees.

3. Since at least 1990, and at all material times, the Respondents have 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 by its terms from October 1, 2006, through September 30, 2010. Since about October 1, 2010, the collective-bargaining agreement has remained in effect from year to year because neither party gave timely notice to modify or terminate the agreement.

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

5. In about late November 2012, the Respondents, by their agent, Michael Witoszynski, threatened to schedule Gary Roberts for the midnight shift in retaliation for his union activity and because he was named in a charge in Case 07–CA–076369.

6. On about October 19 and 26, and again on November 23, 2012, the Respondents imposed onerous terms and conditions of employment on Gary Roberts by making him clean grease traps.

7. On about December 30, 2012, the Respondents imposed onerous terms and conditions of employment on Gary Roberts by directing him to remove snow from the parking lot.

8. In about January 2013, the Respondents refused to permit Gary Roberts to exercise his bumping rights.

9. On February 4, 2013, the Respondents drug tested Gary Roberts.

10. On about October 30, 2012, and again on February 8, 2013, the Respondents terminated Gary Roberts.

11. The Respondents engaged in the conduct described in paragraphs 6 through 10 because Gary Roberts engaged in protected concerted and union activities, and to discourage employees from engaging in these activities

12. The Respondents engaged in the conduct described in paragraphs 6 through 10 because Gary Roberts was named in a charge in Case 07–CA–076369.

CONCLUSIONS OF LAW

1. By the conduct described in paragraph 5, the Respondents have been interfering with, restraining, and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act, in violation of Section 8(a)(1) of the Act.

2. By the conduct described in paragraphs 6 through 11, the Respondents have been discriminating in regard to the hire or tenure or terms or conditions of employment of their employees, thereby discouraging membership in a labor organization, in violation of Section 8(a)(3) and (1) of the Act.

3. By the conduct described in paragraphs 6 through 10 and paragraph 12, the Respondents have been discriminating against employees for filing charges or giving testimony under the Act, in violation of Section 8(a)(4) and (1) of the Act.

4. The Respondents' unfair labor practices described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondents have engaged in certain unfair labor practices, we shall order them to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondents have violated Section 8(a)(4), (3), and (1) by discharging Gary Roberts, we shall order the Respondents to make Roberts whole for any loss of earnings and other benefits suffered as a result of the Respondents' unlawful action against him.

In this regard, we find that the backpay due Roberts should not be limited to the amount specified in the settlement agreement. As set forth above, the settlement agreement provided that, in the event of noncompliance, the Board could "issue an order providing a full remedy for the violations found as is appropriate to remedy such violations." Thus, under this language, it is appropriate to provide the "appropriate" remedies, including reinstatement, full backpay and benefits, expungement of the Respondents' personnel records, and notice posting.[2]

Backpay shall be computed in accordance with *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest 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 Respondents to reimburse Roberts 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 there been no discrimination against him. We shall also order the Respondents to submit the appropriate documentation to the Social Security Administration so that when backpay is paid, it will be allocated to the appropriate periods.

[2] See *L. J. Logistics, Inc.*, 339 NLRB 729, 730–731 (2003).

We shall also order the Respondents to offer Roberts full reinstatement to his former job, or if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed. Further, the Respondents shall be required to remove from their files and records all references to Roberts' unlawful discharge and unlawful drug test, and to notify him in writing that this has been done and that the discharge and drug test will not be used against him in any way.

ORDER

The National Labor Relations Board orders that the Respondents, Park Avenue Investment Advisor, LLC, and Hotel Management Advisors – Troy, LLC d/b/a Metropolitan Group and The Metro Hotel – Troy, Troy, Michigan, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening to schedule Gary Roberts for the midnight shift in retaliation for his union activity and because he was named in an unfair labor practice charge (charge).

(b) Imposing onerous terms and conditions of employment on Gary Roberts by making him clean grease traps in retaliation for his union activity and because he was named in a charge.

(c) Imposing onerous terms and conditions of employment on Gary Roberts by directing him to remove snow from the parking lot in retaliation for his union activity and because he was named in a charge.

(d) Refusing to permit Gary Roberts to exercise his bumping rights in retaliation for his union activity and because he was named in a charge.

(e) Drug testing Gary Roberts in retaliation for his union activity and because he was named in a charge.

(f) Terminating Gary Roberts in retaliation for his union activity and because he was named in a charge.

(g) 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) Within 14 days from the date of this Order, offer Gary Roberts full reinstatement to his former job, or if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Gary Roberts whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, with interest, in the manner set forth in the remedy section of this decision.

(c) Compensate Gary Roberts 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.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge and unlawful drug test of Gary Roberts, and within 3 days thereafter, notify him in writing that this has been done and that the discharge and drug test will not be used against him in any way.

(e) 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 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.

(f) Within 14 days after service by the Region, post at its Troy, Michigan facility copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondents' authorized representative, shall be posted by the Respondents 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 Respondents customarily communicate with their employees by such means. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced or covered by any other material. In the event that, during the pendency of these proceedings, the Respondents have gone out of business or closed the facility involved in these proceedings, the Respondents shall duplicate and mail, at their own expense, a copy of the notice to all current employees and former employees employed by the Respondents at any time since October 19, 2012.

(g) Within 21 days after service by the Region, file with the Regional Director for Region 7 a sworn certification of a responsible official on a form provided by the

[3] 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."

Region attesting to the steps that the Respondents have taken to comply.

Dated, Washington, D.C. January 23, 2014

_____
Mark Gaston Pearce, Chairman

_____
Harry I. Johnson, III, Member

_____
Nancy Schiffer, Member

(SEAL) 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 to schedule you for the midnight shift in retaliation for your union activity or because you were named in a charge.

WE WILL NOT impose onerous terms and conditions of employment on you by making you clean grease traps in retaliation for your union activity or because you were named in an unfair labor practice charge (charge).

WE WILL NOT impose onerous terms and conditions of employment on you by directing you to remove snow from the parking lot in retaliation for your union activity or because you were named in a charge.

WE WILL NOT refuse to permit you to exercise your bumping rights in retaliation for your union activity or because you were named in a charge.

WE WILL NOT drug test you in retaliation for your union activity or because you were named in a charge.

WE WILL NOT terminate you in retaliation for your union activity or because you were named in a charge.

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, within 14 days from the date of the Board's Order, offer Gary Roberts full reinstatement to his former job, or if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Gary Roberts whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, with interest.

WE WILL compensate Gary Roberts for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge and unlawful drug test of Gary Roberts, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge and drug test will not be used against him in any way.

PARK AVENUE INVESTMENT ADVISOR, LLC, AND HOTEL MANAGEMENT ADVISORS – TROY, LLC D/B/A METROPOLITAN GROUP AND THE METRO HOTEL – TROY, SINGLE EMPLOYER AND/OR ALTER EGOS