Gibbs Contracting, Inc. *and* International Union of Operating Engineers, Local 99. Cases 05–CA–107444 and 05–CA–112497

October 20, 2014

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS JOHNSON AND SCHIFFER

The General Counsel seeks a default judgment in this case on the ground that the Respondent has failed to file an answer to the consolidated complaint. On charges and amended charges filed by International Union of Operating Engineers, Local 99 (the Union), on June 14, August 23, and September 3, 2013, respectively, the General Counsel issued an order consolidating cases, consolidated complaint, and notice of hearing on September 27, 2013, against Gibbs Contracting, Inc. (the Respondent), alleging that it violated Section 8(a)(5) and (1) of the National Labor Relations Act. Although properly served copies of the charges and the consolidated complaint, the Respondent failed to file an answer.

On November 7, 2013, the General Counsel filed a Motion for Default Judgment with the Board. On November 12, 2013, the Board issued an order transferring proceeding to the Board and a Notice to Show Cause why the motion should not be granted, and on November 26, 2013, the Respondent filed a response. The General Counsel filed a reply to the response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Default Judgment

Section 102.20 of the Board's Rules and Regulations provides that the allegations in a complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint, unless good cause is shown. In addition, the consolidated complaint affirmatively stated that unless an answer was received by October 11, 2013, the Board may find, pursuant to a motion for default judgment, that the allegations in the consolidated complaint are true. Further, the undisputed allegations in the General Counsel's motion disclose that the Region, by letter dated October 21, 2013, advised the Respondent that, due to the 16-day closing of the National Labor Relations Board due to a lapse in appropriated funds, the Respondent's answer to the consolidated complaint was now due on October 28, 2013. By letter and email dated October 30, 2013, the Region informed the Respondent that unless an answer was received by November 6, 2013, a motion for default judgment would be filed. However, no answer or request for an extension of time to file an answer was received by that date.

The Respondent's November 26, 2013 response to the Notice to Show Cause indicates that counsel for the Respondent entered a notice of appearance on November 12, 2013. The response also states that the Respondent is prepared to show that the allegations in the charge are factually inaccurate and asserts certain defenses. In addition, the response asserts that counsel for the Respondent is in productive settlement negotiations with counsel for the General Counsel, and seeks an additional 2 weeks in which to continue settlement discussions. In his reply to the Respondent's response, counsel for the General Counsel maintains that the issue before the Board is whether the Respondent has established good cause for its failure to file an answer to the consolidated complaint; that no grounds for finding such good cause have been proffered; and that he opposes the Respondent's request for an additional 2 weeks of time.

For the reasons discussed below, we find that the Respondent has not established good cause for its failure to file a timely answer to the consolidated complaint. The response to the Notice to Show Cause does not address the Respondent's failure to file a timely answer, other than to imply that it was not represented by counsel prior to November 12, 2013. Although the Board has shown some leniency toward respondents who proceed without the benefit of counsel, the Board has consistently held that pro se status alone does not establish a good cause explanation for failing to file a timely answer. See, e.g., *Patrician Assisted Living Facility*, 339 NLRB 1153, 1153 (2003); *Sage Professional Painting Co.*, 338 NLRB 1068, 1068 (2003). Here, the Respondent does not dispute that it failed to respond to complaint allegations until after the Notice to Show Cause issued, despite the General Counsel's numerous reminders. Nor has the Respondent provided a good cause explanation for its failure to file a timely answer. In such circumstances, the Board has held that subsequent attempts to respond to the complaint will be denied as untimely. *Patrician Assisted Living Facility*, 339 NLRB at 1153–1154, citing *Kenco Electric & Signs*, 325 NLRB 1118, 1118 (1998); *Lockhart Concrete*, 336 NLRB 956, 957 (2001). Further, the Board will not address a respondent's assertions that it has a meritorious defense unless good cause has been shown for the late response. *Sage Professional Painting Co.*, 338 NLRB at 1069; *Lockhart Concrete*, 336 NLRB at 957; *Dong-A Daily North America, Inc.*, 332 NLRB 15, 16 (2000).

In the absence of good cause being shown for the failure to file a timely answer to the consolidated complaint, we deem the allegations in the consolidated complaint to be admitted as true, and 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 has been a corporation with an office and place of business in Washington, D.C. (the Respondent's facility), and has been engaged in the business of providing commercial moving and warehousing services to private companies and federal agencies at various facilities throughout the Washington, D.C. metropolitan area.

About April 1, 2013, the Respondent acquired a government service contract, previously held by Marathon, Inc. (Marathon), for moving and warehousing services at the U.S. Department of Housing and Urban Development (HUD). Since then, the Respondent has performed all work which was previously performed by Marathon in basically unchanged form, and has employed, as a majority of its employees, individuals who were previously employees of Marathon.

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

In conducting its operations during the 12-month period ending September 10, 2013, the Respondent performed services valued in excess of $50,000 outside the District of Columbia.

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 have 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:

Regenald Durr	Supervisor
Leon Gibbs	Chief Executive Officer
Chermaine Josey	President/CFO
Bourgh Roberts	Operations Manager
Charles Wiggins	Vice President

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 full-time and regular part-time Moving Van Drivers, Two and one-half ton Truck Drivers, Forklift Operators, Material Handling Laborers, Shipping and Receiving Clerks, and Tractor Truck Drivers employed by the Employer at the HUD Building at 7th & D St. SW in Washington, D.C.; but excluding all other employees, confidential employees, casual employees, office clerical employees, professional employees and guards as defined in the National Labor Relations Act.

Since about 2010 and at all material times, the Union has been the exclusive collective-bargaining representative of the unit, and during that time the Union had been recognized as such representative by Marathon and its predecessor, Victory Van Corporation, Inc. (Victory Van). This recognition was embodied in a collective-bargaining agreement between the Union and Victory Van, effective from March 1, 2010, to February 28, 2013.

On June 14, 2011, Marathon assumed the operations from Victory Van as a successor and recognized the Union as the exclusive collective-bargaining representative of the unit. This recognition was embodied in a bridge agreement between Marathon and the Union, which continued the terms and conditions of the predecessor's collective-bargaining agreement in full force and effect until a new collective-bargaining agreement was negotiated by the parties.

From about June 14, 2011, to April 1, 2013, based on Section 9(a) of the Act, the Union had been the exclusive collective-bargaining representative of the Respondent's employees in the unit employed by Marathon.

At all times since April 1, 2013, 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.

The following events occurred:

(1) About March 30, 2013, the Respondent, by Bourgh Roberts, at its Springfield, Virginia office, told employees that the Respondent was not a union shop and there was no union at the Respondent

(2) About May 22, 2013, the Union, by letter, requested that the Respondent recognize it as the exclusive collective-bargaining representative of the unit and bargain collectively with the Union as the exclusive collective-bargaining representative of the unit.

(3) Since about April 1, 2013, the Respondent has failed and refused to recognize and bargain with the Union as the exclusive collective-bargaining representative of the unit.

(4) About April 1, 2013, the Respondent unilaterally changed terms and conditions of employment for the unit employees, including but not limited to health, welfare and pension contributions, benefits, and other terms and conditions of employment.

(5) The subjects set forth in paragraph 4 above relate to wages, hours, and other terms and conditions of employment of the unit and are mandatory subjects for the purposes of collective bargaining.

(6) The Respondent engaged in the conduct described in paragraph 4 above unilaterally, without prior notice to the Union, and without affording the Union an opportunity to bargain with the Respondent with respect to these changes.

CONCLUSIONS OF LAW

1. By the conduct described in paragraph 1 above, the Respondent has 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 3, 4, and 6 above, the Respondent has been failing and refusing to bargain collectively and in good faith with the exclusive collective-bargaining representative of its employees within the meaning of Section 8(d) of the Act, in violation of Section 8(a)(5) and (1) of the Act.

3. 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 desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent has violated Section 8(a) (5) and (1) by failing and refusing, since about April 1, 2013, to recognize and bargain with the Union, we shall order the Respondent to recognize and, on request, bargain with the Union as the exclusive collective-bargaining representative of the unit employees with respect to wages, hours, benefits, and other terms and conditions of employment and if an understanding is reached, to embody the understanding in a signed agreement.

In addition, having found that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally changing terms and conditions of employment for the unit employees, including but not limited to health, welfare and pension contributions, benefits, and other terms and conditions of employment since about April 1, 2013, without prior notice to the Union and without affording the Union an opportunity to bargain, we shall order the Respondent to rescind these actions, and retroactively restore the status quo, including the unit employees' health, welfare and pension contributions, benefits, and other terms and conditions of employment, including amounts that would have been paid absent the Respondent's unlawful conduct, until the Respondent negotiates in good faith with the Union to agreement or to impasse.[1] Backpay shall be computed as in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), plus interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). The Respondent shall also remit all payments it owes to employee benefit funds in the manner set forth in *Merryweather Optical Co.*, 240 NLRB 1213 (1979), and reimburse its employees for any expenses resulting from the Respondent's failure to make such payments as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981), such amounts to be computed in the manner set forth in *Ogle Protection Service*, supra, with interest as prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra.[2] 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. Further, we shall 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. *Don Chavas, LLC, d/b/a Tortillas Don Chavas*, 361 NLRB 101 (2014).[3]

ORDER

The National Labor Relations Board orders that the Respondent, Gibbs Contracting, Inc., Washington, D.C., its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Telling employees that the Respondent was not a union shop and there was no union at the Respondent.

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[1] *New Concept Solutions, LLC*, 349 NLRB 1136, 1161 (2007). Consistent with his dissenting opinion in *Pressroom Cleaners*, 361 NLRB 643 (2014), Member Johnson would permit the Respondent to demonstrate in a compliance proceeding that, had it lawfully bargained with the Union, it would have, at some identifiable time, lawfully imposed or reached agreement on less favorable terms than those in the Union's contract with the predecessor employers.

[2] To the extent that an employee has made personal contributions to a fund that are accepted by the fund in lieu of the Respondent's owed contributions, the Respondent will reimburse the employee, but the amount of such reimbursement will constitute a setoff to the amount that the Respondent otherwise owes the fund.

[3] The General Counsel also seeks as a remedy an order requiring that the notice be read to employees during working time by the Respondent or a Board agent. The General Counsel has not demonstrated that this measure is needed to remedy the effects of the Respondent's unfair labor practices. See *Chinese Daily News*, 346 NLRB 906, 909 (2006), enfd. mem. 224 Fed.Appx. 6 (D.C. Cir. 2007).

(b) Failing and refusing to recognize and bargain with International Union of Operating Engineers, Local 99 as the exclusive collective-bargaining representative of the employees in the bargaining unit.

(c) Unilaterally changing the terms and conditions of employment of unit employees, including but not limited to health, welfare and pension contributions, benefits, and other terms and conditions of employment.

(d) 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 employees in the following appropriate unit concerning terms and conditions of employment, and, if an understanding is reached, embody the understanding in a signed agreement. The bargaining unit is:

> All full-time and regular part-time Moving Van Drivers, Two and one-half ton Truck Drivers, Forklift operators, Material Handling Laborers, Shipping and Receiving Clerks, and Tractor Truck Drivers employed by the Employer at the HUD Building at 7th & D St. SW in Washington, D.C.; but excluding all other employees, confidential employees, casual employees, office clerical employees, professional employees and guards as defined in the National Labor Relations Act.

(b) Rescind the changes to unit employees' terms and conditions of employment, including health, welfare and pension contributions, benefits, and other terms and conditions of employment that were unilaterally implemented about April 1, 2013, and retroactively restore the status quo that existed prior to the unilateral changes, until negotiating with the Union to agreement or impasse.

(c) Make the unit employees whole, with interest, for any losses sustained due to the unlawfully imposed changes to their health, welfare and pension contributions, benefits, and other terms and conditions of employment in the manner set forth in the remedy section of this decision.

(d) Compensate the unit employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file a report with the Social Security Administration allocating the awards to the appropriate calendar quarters for each employee.

(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 Washington, D.C. facility copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 5, 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. Reasonable steps shall be taken by the Respondent 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 Respondent has gone out of business or closed the facility involved in this proceeding, 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 March 30, 2013.

(g) Within 21 days after service by the Region, file with the Regional Director for Region 5 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

[4] 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."

Choose not to engage in any of these protected activities.

WE WILL NOT tell you that we are not a union shop and there is no union here.

WE WILL NOT fail and refuse to recognize and bargain with International Union of Operating Engineers, Local 99 as the exclusive collective-bargaining representative of our employees in the bargaining unit.

WE WILL NOT change your terms and conditions of employment, including but not limited to health, welfare and pension contributions, benefits, and other terms and conditions of employment without first notifying the Union and giving it an opportunity to bargain.

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

WE WILL, on request, bargain with the Union as the exclusive collective-bargaining representative of our employees in the following appropriate unit concerning terms and conditions of employment, and, if an understanding is reached, embody the understanding in a signed agreement. The bargaining unit is:

> All full-time and regular part-time Moving Van Drivers, Two and one-half ton Truck Drivers, Forklift operators, Material Handling Laborers, Shipping and Receiving Clerks, and Tractor Truck Drivers employed by the Employer at the HUD Building at 7th & D St. SW in Washington, D.C.; but excluding all other employees, confidential employees, casual employees, office clerical employees, professional employees and guards as defined in the National Labor Relations Act.

WE WILL rescind the changes in the terms and conditions of employment for our unit employees, including health, welfare and pension contributions, benefits, and other terms and conditions of employment, that were unilaterally implemented on April 1, 2013, and WE WILL retroactively restore the status quo that existed prior to the unilateral changes, until we negotiate in good faith with the Union to agreement or to impasse.

WE WILL make our unit employees whole for any losses they sustained due to the unlawfully imposed changes to their health, welfare and pension contributions, benefits, and other terms and conditions of employment, with interest.

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

GIBBS CONTRACTING, INC.

The Board's decision can be found at – www.nlrb.gov/case/05-CA–107444 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.