

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

FALCON TRUCKING, LLC and
RAGLE, INC., A SINGLE EMPLOYER
and/or JOINT EMPLOYERS

Respondents

and

CHAUFFEURES, TEAMSTERS AND HELPERS
LOCAL UNION NO. 215 A/W INTERNATIONAL
BROTHERHOOD OF TEAMSTERS

Cases: 25-CA-132518
25-CA-135316
25-CA-135335
25-CA-159531

**RESPONDENTS' OPPOSITION TO GENERAL COUNSEL'S
MOTION TO TRANSFER AND FOR DEFAULT JUDGMENT**

Respondents, Falcon Trucking, LLC ("Falcon") and Ragle, Inc. ("Ragle"), by counsel, file this Response to the Counsel for The General Counsel's ("CGC") Motion to Transfer Case to And Continue Proceedings Before the Board and for Default Judgment.

I.

STATEMENT OF MATERIAL FACTS

A. Negotiation of The Informal Settlement Agreement

On June 17, 2015, NLRB Field Examiner, Jessica L. Knipper, sent a letter to Respondents' Counsel ("RC") to which was attached a proposed informal settlement agreement prepared by the Regional office (the "Region") to settle three unfair labor practice charges ("ULP") brought by the Chauffeurs, Teamsters and Helpers, Local Union No. 215 A/W International Brotherhood of Teamsters (the "Union" or "Charging Party"). (Respondents' Exhibit 1; Counsel for the General Counsel's Exhibits A-H).¹ The proposed drafted notice to be

¹ Herein after Respondents' Exhibits will be referred to as "R Ex" and the Counsel for the General Counsel, Rebekah Ramirez, will be referred to as "CGC" and the Exhibits she attached to her Motion to Transfer and for Default Judgment will be referred to as "CGC Ex".

printed by Respondents and posted on an official NLRB notice form (“Notice”) contained in pertinent part the following language:

WE WILL resume making driving assignments to Falcon employees

Id.

On June 26, 2015, RC sent an eletter to the Region discussing the backpay issues being negotiated by the parties and, noting the Region’s consideration to compare “the amount of trucking work performed by Falcon drivers in 2013 with that performed in 2014.” (R Ex 2) On these issues RC explained:

. . . a simple comparison of 2013 trucking work and 2014 trucking work would not be appropriate because no 2 years are identical in terms of the amount of trucking work that is performed. Falcon’s workload is whole dependent on the number and kind of construction projects that are available from year to year that require a need for trucking services. Moreover, as we have discussed previously many road and construction projects require the use of DBE or WBE trucking concerns of which Falcon Trucking is not. In terms of the 5 individuals in question several of the employees gave notice to Falcon Trucking that they had quit and found other employment and/or refused Falcon Trucking efforts to call them in to perform available work and these facts should be taken into account. . .

Id.

On July 10, 2015, the Region sent a revised informal settlement agreement proposal to RC which included the insertion of alleged backpay numbers and a non-admission clause. (R Ex 3) The proposed Notice still contained the following language:

WE WILL resume making driving assignments to Falcon employees

Id.

On or about August 12, 2015, RC sent a position letter to the Region that disputed some of the assumptions underlying the terms of the Region's proposed informal settlement agreement. (R Ex 4) In this nine page position letter, exclusive of exhibits, RC explained at length how Falcon's workload is wholly dependent on the number and kind of construction projects that are available from year to year that require a need for trucking services. RC explained how work was assigned to Falcon drivers in 2013 and 2014 and the effect the Disadvantaged Business Enterprise ("DBE") and Women-owned Business Enterprise ("WBE") requirements in construction contracts had on the assignment of work. *Id.*

In early September, 2015, the Union filed a new ULP charge in Case No. 25-CA-159531 along with a UC petition in Case No. 25-UC-159568. (CGC Ex I-L) With the filing of these additional cases settlement discussions between the parties stalled.

In February of 2016 RC sent an eletter to CGC inquiring about settlement. On February 10, 2016, CGC sent RC a proposed informal settlement agreement to settle all pending ULP charges filed by the union. (R Ex 5) The proposed Notice still contained the language requiring Respondents to "resume making driving assignments to Falcon Trucking unit employees" but it also had the following new language added:

WE WILL, upon request, bargain in good faith with [the Union] as the exclusive collective-bargain representative of Falcon Trucking unit employees described above. . .

WE WILL resume Falcon Trucking's operations and assignment practices for the work previously performed by Falcon Trucking employees represented by [the Union] in order to restore Falcon Trucking as it existed prior to July 8, 2014, and WE WILL offer to Michael Sachs, Kenneth Slaughter, Michael Thomas Jr., Daniel J. Mabrey, and Rachelle R. Boop immediate and full reinstatement to their former or substantially equivalent positions without prejudice to their seniority or other rights and privileges.

Id.

On February 19, 2016, CGC emailed RC and notified him that four of the five alleged discriminatees had found other employment and were uninterested in employment with Respondent Falcon and, were willing to waive any reinstatement rights as part of the informal settlement. (R Ex 6) The fifth alleged discriminatee, Daniel Mabrey, who remained employed by and working for Falcon would continue to be employed by and work for Falcon. That same day, RC sent an eletter to CGC with a redlined draft of the proposed informal settlement agreement. (R Ex 6) RC redlined the Notice as follows:

WE WILL upon request, bargain in good faith with [the Union] as the exclusive collective-bargaining representative of Falcon Trucking unit employees described above.

WE WILL make ~~resume-making~~ driving assignments to Falcon Trucking unit employees as work is available.

WE WILL resume Falcon Trucking's operations and assignment practices for the work previously performed by Falcon Trucking employees represented by [the Union] in order to restore Falcon Trucking as it existed prior to July 8, 2014, and WE WILL offer to ~~Michael Sachs, Kenneth Slaughter, Michael Thomas Jr., Daniel J. Mabrey, and Rachel R. Boop~~, immediate and full reinstatement to his their former or a substantially equivalent positions without prejudice to his their seniority or other rights and privileges. Michael Sachs, Kenneth Slaughter, Michael Thomas, Jr. and Rachelle R. Boop each have waived reinstatement to their former positions.

Id.

On April 5, 2016, CGC sent RC and the Union's Counsel an email with an attached revised proposed settlement agreement. (R Ex 7) With regard to the changes made to the Notice, CGC explained:

. . . You will notice that on the proposed Board Notice there is one tracked change, the 2nd "We Will" paragraph that reflects the Employer proposal and the Region's initial proposal. This is the

paragraph that we think is key to the settlement. It is the Region's position that we cannot approve the S/A without the Union signing off/agreeing to this paragraph.

Id. The change CGC was referring to was the added language of "as work is available" to the requirement that Respondents will make driving assignments to Falcon Trucking unit employees.

Id. RC's other changes to the settlement agreement, namely, striking out four of the discriminatees' names in the third "We Will" paragraph and only keeping the requirement to employ Daniel J. Mabrey was accepted by the Region. *Id.*

The next day, April 6, 2016, the parties had a phone discussion regarding the proposed settlement agreement after which CGC sent an email to Counsel for the parties setting forth 4 points of concern regarding settlement, namely:

1. There is a question to the Union about whether the parties can reach an agreement now since there is only one outstanding issues (retirement benefits).
2. There is a question to the ER about whether the ER will go back to the bargaining table and bargain for an obligation because there is a one-man unit.
3. There is a question to the ER about whether Mabrey has been working much in the recent past and whether there is work available to him at the moment that the SA is approved (in other words, is there work for him in April and May, or upcoming summer months?)
4. There is a question to the ER about whether there is foreseeable work for one other driver that can be hired into the Unit by Falcon in the April/May timeframe or for summer projects?

(R Ex 8)

With the above questions in mind, on April 12, 2016, the Union's Counsel, in person, gave RC a single page that contained proposed language that the Union wanted to have included in the Notice calling for bargaining in good faith with the Union as representative of Falcon employees "for a reasonable time not to be less than 6 months." (R Ex 9)

Then, presumably thinking specifically about the one-man unit issue, on April 13, 2016, the Union's Counsel emailed RC, with a copy to CGC, asking that additional language be added to the aforementioned revision so that it would provide that bargaining would be for a reasonable time not to be less than 6 months "regardless of the number of employees in the employee complement during that time." (R Ex 10) RC replied by eletter affirming that if this was the only revision to the Notice needed to bring resolution to the four ULPs, he would recommend to Respondents that they agree to this additional language. *Id.*

On April 15, 2016 at approximately 1:25 p.m., CGC sent an email to RC presenting a new clause be added to the Notice that the Union's Counsel was proposing be added, namely, that Respondents will not "direct trucking work to other vendors or non-unit employees in order to avoid assigning it to bargaining unit employees." (R Ex 11)

Then, CGC and RC talked after which, at approximately 5:09 p.m. on the same day, CGC sent an email to RC to which was attached an informal settlement agreement that Union's Counsel would sign and which was "what [she and RC] talked about." (R Ex 12) The Notice did not have in it the Union's proposed language that Respondents will not "direct trucking work to other vendors or non-unit employees in order to avoid assigning it to bargaining unit employees" and, the language requiring Respondents to "make driving assignments to Falcon Trucking unit employees as work is available" was deleted. *Id.* Respondents and the Union signed this agreement (the "Settlement Agreement") on that same day. (CGC Ex U) The Regional Director for Region 25 approved this Settlement Agreement on April 19, 2016. *Id.*

B. Compliance With The Settlement Agreement And The Union's Subsequent UPLs

On May 6, 2016, the Region sent a letter and conformed copy of the Settlement Agreement to Respondents and advised them to take the steps necessary to comply with the

Agreement. (CGC Ex V)

On August 4, 2016, Respondents certified to the Region that it had complied with all affirmative and negative terms of the Settlement Agreement. (CGC Ex W). Specifically, Respondents certified that on June 20, 2016, it again had work for Falcon employee Daniel Mabrey so it was on this date that Respondents said Falcon “resumed operations and assignment practices for the work previously performed” by Falcon employees so as to “restore Falcon Trucking as it existed prior to July 8, 2014.” *Id.*

On October 20, 2016, the Union filed a new ULP charge, Case 25-CA-188022, alleging that since on or about May 15, 2016, Respondents engaged in “contracting out bargaining unit work to avoid the Union”. (CGC Ex X). The Union requested abrogation of the Settlement Agreement and that a complaint be issued. *Id.*

On December 15, 2016, RC sent a formal sixty (60) page Statement of Position, inclusive of exhibits, to CGC in response to the Union’s new charge. (R Ex 13) Respondents denied the Union’s allegations and denied that the Settlement Agreement had been violated. *Id.* In addition, RC notified CGC that on December 14, 2016, Falcon informed the Union that inasmuch as the bargaining unit consisted of only one employee, it decided to withdraw recognition of the Union as bargaining representative.² *Id.* The reasoning for this decision was explained to CGC:

² With regard to the parties bargaining history, before the signing of the Settlement Agreement, the parties’ very first face-to-face negotiation session took place on or about September 30, 2014. (R Ex 13, pp. 2-3) The parties then on or about the dates of November 12, 2014, December 2, 2014, January 9, 2015, January 20, 2015, February 6, 2015, March 31, 2015 and August 4, 2015, reaching agreement on all issues but retirement benefits. *Id.* This is why during the parties April 6, 2016, telephone conference with the CGC, the question directed to the Union was “whether the parties can reach an agreement now since there is only one outstanding issue (retirement benefits).” (R Ex 8) Consistent with the requirement in the Settlement Agreement that Respondents “bargain in good faith” with the Union “for a reasonable time not to be less than 6 months, regardless of the number of employees in the employee complement during that time”, Respondents bargained with the Union on May 6, 2016, May 20, 2016, July 25, 2016, August 22, 2016 and October 20, 2016. (R Ex 13, pp. 2-3) As was the case before the signing of the Settlement Agreement, the parties reached an agreement on all issues with the exception of retirement. *Id.* The Union continued to propose that Falcon participate in either the Central States Pension Fund or the

The Board has long held that it will not effectuate the purposes of the Act to require an employer to bargain in a unit consisting of only one employee. (Citations omitted) As you know, other than Daniel Mabrey all of Falcon Trucking's employees left employment with the company many months ago and waived any claim for reinstatement.

Id.

On December 20, 2016, the Union filed another new ULP charge, Case 25-CA-190267, alleging Respondents violated the Act by refusing to bargain and by withdrawing recognition. (R Ex 14). On January 17, 2017, RC sent a Statement of Position to CGC in response to the Union's charge. (R Ex 15)

C. The Region's Notice of Noncompliance

On March 14, 2017, by letter referencing only one of the new Union ULP charges, Case 25-CA-188022, CGC notified Respondents that the Region found "merit to the Union's allegations that [Respondents] are in breach of" the Settlement Agreement. (CGC Ex Z). However, instead of citing the reason relied upon by the Union in Case 25-CA-188022 to allege a breach of the Agreement and request abrogation of the same, namely, Respondents contracted "out bargaining unit work to avoid the Union" or, citing the reason relied upon by the Union in Case 25-CA-190267 to allege that Respondents unlawfully withdrew recognition from the Union based on having only one-man bargaining unit, the CGC simply said, without explanation, that the Respondents violated the Settlement Agreement because the "operations at Falcon Trucking have not been restored as they existed prior to July 8, 2014." *Id.*

After receiving the CGC's notice of noncompliance, RC sent her an eletter asking "what specifically is it that the Region asserts must be done in order [for Respondents] to be compliant

Western Conference of Teamsters Pension Trust. *Id.* Falcon had concerns about the financial woes of the Funds and the potential for withdrawal liability under the Multiemployer Pension Plan Amendment Act of 1980 so it continued to propose that bargaining unit employee retirement benefits be in the form of a defined contribution plan. *Id.* at p. 3, Ex E.

with the Settlement Agreement?” (R Ex 16) On March 22, 2016 CGC responded to RC’s question:

. . . To be in compliance with the Settlement Agreement, the Employer will need to show that Falcon Trucking’s business goes back to somewhere closer to 54% of Ragle’s total trucking needs. Additionally, the Employer will need to recognize the Union and go back to the bargaining table. The Region would also need to get the Union involved to determine whether compliance has been achieved after the Employer takes any necessary steps to get Falcon Trucking’s operations to resemble pre-July 2014 conditions, i.e., > 2 drivers that are getting assigned about 50% of Ragle’s trucking needs.”

(R Ex 17) CGC alleged the following “facts” in support of the Region’s demands:

- Falcon had 5 truck drivers as of the date of the union election on June 27, 2014;
- Falcon had between 3-4 drivers from February to April 2014 and 5 drivers in May of 2014;
- In 2013 Falcon had between 3-5 full-time truck drivers employed;
- In 2013 Ragle spent almost \$500,000 in trucking services with 54% of that business going to Falcon;
- From January 2013 to May 2014 Ragle paid Falcon over \$500K in services;
- After June of 2014 most of Ragle’s trucking work was given to Starnes Trucking and R&J Trucking; and
- After June of 2014 Ragle supervisor formed SAMM Trucking who hired an employee that previously worked for Falcon and Ragle immediately started using the services of SAMM trucking.

Id.

On March 28, 2016, RC responded to the Region’s demands by supplementing Respondents’ December 15, 2016, Position Statement. (CGC Ex AA). Respondents again denied and disputed that a violation of the Settlement Agreement had occurred and asserted that the Region’s interpretation of the language in the Settlement Agreement requiring Falcon to be

“restored as it existed prior to July 8, 2014” was based on the Region’s misunderstanding and lack of appreciation “for the nature of the construction and trucking industry in Southwestern Indiana and the business conditions in which Falcon and Ragle operate when working for governmental entities.” *Id.* at p. 1. Specifically, RC explained:

Falcon is a tri-axle trucking company that hauls for Ragle when there is a need for work within a one (1) hour haul time from its Newburgh, Indiana location. Falcon has normally not performed tri-axle hauling work outside this one (1) hour radius of Newburgh as it is not financially prudent to do so. Ragle, on the other hand, is a multi-state heavy highway construction company that has numerous projects each year that are not dependent upon being within a one (1) hour radius of Newburgh, Indiana. In other words, Ragle deals with numerous trucking companies to satisfy their hauling needs both within and without a one (1) hour radius of Newburgh, Indiana and has never relied solely on the use of Falcon.

Because of the DBE, MBE, and WBE requirements in nearly all state or federal heavy highway construction contracts performed by Ragle, its trucking needs vary greatly from year to year and from contract to contract. . .

Id. at pp. 1-2. RC continued by detailing the fluctuations in the number and kinds of construction contracts Ragle had from 2013 to March of 2017, the DBE, MBE and WBE requirements of these contracts, and the need for hauling services dictated by the contracts.³ *Id.*

Respondent also corrected the Region on its misstatement of facts concerning SAAM Trucking and took exception to the Region’s claim that Ragle uses MBE firms at a much higher percentage than what is contractually required. *Id.* Finally, with respect to the Region’s demand that Falcon recognize and go back to the bargaining table with the Union, Respondent explained:

. . . it is difficult to understand the rationale or basis for this demand. As noted in the December 15, 2016 Position Statement, the NLRB has long held that it does not effectuate the purpose of the Act

³ The information RC was providing to CGC was not anything new given RC had detailed at much more length the same type of information to CGC in August of 2015 well before the parties negotiated and signed the Settlement Agreement. (See R Ex 4)

to require an employer to bargain in a unit consisting of only one employee. The other employees who used to be employed by Falcon left of their own accord and waived any request to be reinstated.

Moreover, as recounted in some detail previously . . . Falcon bargained in good faith with the Union whereas the Union failed to bargain in good faith. Falcon bargained earnestly with the Union in an effort to reach final agreement on a collective bargaining agreement only to have the Union delay and prevent the culmination of an agreement by taking an unreasonable and self-serving posture with respect to the issue of retirement benefits.

Id.

II.

ARGUMENT

A. Respondents Did Not Violate the Settlement Agreement

The Region is using its interpretation of the language in the Settlement Agreement that the operations of Falcon be “restored as they existed prior to July 8, 2014” as a “catch all” to try and gain through litigation before the Board what it and the Union could not get the Respondents to agree to in the negotiation of the Settlement Agreement.

It is CGC’s opinion that, among other things, in order for Respondents to be in compliance with the Settlement Agreement, Falcon’s hauling for Ragle must “go back to somewhere closer to 54% of Ragle’s total trucking needs” and Falcon must hire at least two (2) new employees, in addition to keeping Daniel Mabrey employed, who work at least 50% of the time fulfilling Ragle’s trucking needs. (R Ex 17) Not once during the negotiation of the Settlement Agreement however did CGC or the Union discuss, state, or infer that the language “WE WILL resume Falcon Trucking’s operations and assignment practices” in order to restore Falcon “as it existed prior to July 8, 2014” meant that 54% or more of Ragle’s trucking needs had to be fulfilled by Falcon and, Falcon had to hire and keep employed at least three (3)

employees who are to be assigned 50% or more of Ragle's trucking needs. The Settlement Agreement simply does not say or mean what CGC has argued.

It is indisputable that both prior to and after July 8, 2014, Ragle's use of Falcon employees for hauling assignments was dictated by the construction contracts Ragle entered into, the hauling needs required to perform the work dictated by these contracts, and the DBE, WBE and MBE requirements in these contracts. (R Ex 4, 13; CGC Ex AA) It is for these reasons that RC revised the language the Region proposed be put in the Notice as follows:

WE WILL make resume-making driving assignments to Falcon Trucking unit employees as work is available.

WE WILL resume Falcon Trucking's operations and assignment practices for the work previously performed by Falcon Trucking employees represented by [the Union] in order to restore Falcon Trucking as it existed prior to July 8, 2014, and WE WILL offer to ~~Michael Sachs, Kenneth Slaughter, Michael Thomas Jr., Daniel J. Mabrey, and Rachel R. Boop~~, immediate and full reinstatement to his their former or a substantially equivalent positions without prejudice to his their seniority or other rights and privileges. Michael Sachs, Kenneth Slaughter, Michael Thomas, Jr. and Rachelle R. Boop each have waived reinstatement to their former positions.

(R Ex 6) It is also why Respondents rejected the Union's last minute proposal to include in the Notice a requirement that Respondents will not "direct trucking work to other vendors or non-unit employees in order to avoid assigning it to bargaining unit employees."⁴ (R Ex 11; CGC Ex U, p. 4)

The revisions to the first paragraph above turned what was otherwise a nonspecific and vague requirement into a specific, understandable and workable requirement. The revisions to

⁴ Although the parol evidence rule prohibits the consideration of evidence which varies or contradicts a writing, it does not prohibit the consideration of evidence outside the document itself for the purpose of interpreting the writing. *Sansla, Inc.*, 323 NLRB 107, 109 (1997); *Inter-Lakes Engineering Co.*, 217 NLRB 148, 149 (1975).

the second paragraph took into consideration what RC specifically discussed with CGC and the Union on April 6, 2016, nine (9) days before the Settlement Agreement was signed, which was Falcon had a one-man bargaining unit and there was no foreseeable work for another driver to be hired. Thus, after the use of the conjunctive “and” to connect the first requirement in the paragraph with the second, RC struck the names of all employees but Daniel Mabrey and then add that these employees whose names were struck waived reinstatement to their former positions. RC wanted to make clear that “resuming Falcon operations and assignment practices” as they “existed prior to July 8, 2014” did not include a requirement that Falcon offer reinstatement or a job to anyone other than Daniel Mabrey who was actually still employed by Falcon anyway. Finally, rejection of the Union’s last minute proposal gave Respondent Ragle the discretion to direct work to other vendors if it deemed it in the best interest of its operations.

Ultimately, the parties could not agree on the language RC added requiring Falcon to “make” driving assignments “as work is available” so the entirety of the requirement was stricken from the Notice. (CGC Ex U, p. 4) This was fine with Respondents because the revisions RC proposed to the second paragraph were accepted and written into Notice as follows:

WE WILL resume Falcon Trucking’s operations and assignment practices for the work previously performed by Falcon Trucking employees represented by [the Union] in order to restore Falcon Trucking as it existed prior to July 8, 2014, and WE WILL offer Daniel J. Mabrey immediate and full reinstatement to his former or substantially equivalent position without prejudice to his seniority or other rights and privileges.

WE WILL, jointly and severally, make Michael Sachs, Kenneth Slaughter, Michael Thomas Jr., and Rachelle R. Boop, who do not desire reinstatement, and Daniel J. Mabrey, whole for the wages and other benefits they lost because we stopped assigning them work.

(CGC Ex U, p. 4) This clear and unambiguous language only requires Respondents to operate Falcon and make work assignments to unit employees as Falcon operated and assigned work “prior to July 8, 2014”, it does not require, as CGC argues, Falcon to employ a specific number of employees or assign a certain percentage of Ragle’s hauling work to Falcon employees.

Given the facts that prior to July 8, 2014, Falcon’s workload and the number of employees it used to service the workload was wholly dependent on the number and kind of construction projects that were available from year to year that required a need for trucking services and specifically, the number and kind of contracts Ragle entered into, the language in the Notice upon which CGC relies to argue Respondents have not complied with the Settlement Agreement simply does not support CGC’s argument. “Restoring operations at Respondent Falcon Trucking as they existed *prior to July 8, 2014*”⁵ poses no steadfast rule or requirement that Respondents have to assign any specific percentage of work to Falcon employees or have more than one employee employed to do the work. If CGC wanted to impose such specific requirements on Respondents, she should have spelled them out in the language of the Notice or perhaps, she should have proposed language that required Respondents to restore operations at Falcon as they existed *on July 8, 2014* or, as they existed *during the months of January through July 8, 2014*.

The point is the language “existed *prior to*” refers to all the time Falcon operated up to July 8, 2014 and CGC’s focus on, and comparison of, Falcon’s operations and work assignments for the years 2013 and 2014 are arbitrary and self-serving. (See R Ex 17) The literal meaning of the language gives Respondents broad discretion to operate Falcon and assign work based on the number and kind of construction projects that are available that require a

⁵ CGC’s Motion, p. 5, ¶ 8.

need for trucking services as well as considering any WBE, DBE and MBE requirements. (R Ex 4) This is what Respondents have done for years and years and years. (R Ex 4, CGC Ex AA) In fact, it is what they have done for all the years Falcon has operated *prior to* July 8, 2014. *Id.*

B. Factual Disputes Exists as to Whether Respondents Complied With The Settlement Agreement

In the alternative, if the Board finds that the language in the Notice that Falcon will resume “operations and assignment practices” in order to restore Falcon “as it existed prior to July 8, 2014” is ambiguous or, should somehow find that the CGC’s interpretation of the language is correct, there exists factual disputes concerning exactly what Falcon’s operations and assignment practices were “prior to” July 8, 2014.⁶ If Respondent’s assertion that Falcon operated and assigned work after July 8, 2014, just as it did before July 8, 2014, are proven, dismissal of CGC’s Motion and the Complaint filed is warranted. *Vocell Bus Company*, 357 N.L.R.B. No. 148, 192 LRRM 1361, 1363 (Dec. 21, 2011). This response to CGC’s Motion, at the very least, is sufficient to require a hearing on the question of whether Respondents fully complied with the terms of the Settlement Agreement and if not, what is the remedial action an ALJ can order that the Board can enforce.⁷ Accordingly, at the very least, this Board should

⁶ The language “existed *prior to*” refers to all the time Falcon operated up to July 8, 2014 and CGC’s focus on, and comparison of, Falcon’s operations and work assignments for the years 2013 and 2014 are arbitrary and self-serving. (See R Ex 17) The literal meaning of the language gives Respondents board discretion to operate Falcon and assign work based on the number and kind of construction projects that are available that require a need for trucking services as well as considering any WBE, DBE and MBE requirements. (R Ex 4) This is what Respondents have done for years and years and years. (R Ex 4, CGC Ex AA) In fact, it is what they have done for all the years Falcon has operated *prior to* July 8, 2014. *Id.*

⁷ CGC asked this Board to grant her Motion and order that Falcon operate and make work assignments like it did “prior to July 8, 2014”. What would such an Order say? What was the “status quo ante” with respect to Falcon’s work load and work assignment decisions prior to July 8, 2014 and what was Ragle’s? Assuming *arguendo* a status quo ante could be determined, for what length of time could the Board order Falcon to maintain such status quo? Can an ALJ order Falcon to resume operations, rescind its withdrawal of recognition from the Union and bargain with the Union again? See *Douglas Food Court v. NLRB*, 251 F.3d 1056 (DC Cir. 2001).

deny CGC's Motion and remand this proceeding to the Regional Director for Region 25 for further appropriate action. *Id.*; see also *Thyssen Krupp Stainless USA, LLC*, 362 N.L.R.B. No. 71, 203 LRRM 1130, 1132 (April 22, 2015);

C. CGC Cannot Litigate the Union's New ULP Charges in This Proceeding

The procedures CGC would have to follow if the Region is alleging the Union's new ULP charges, Case Nos. 25-CA-188022⁸ and 25-CA-190267⁹, constituted a breach of the Settlement Agreement are succinctly outlined in *GC Memorandum 14-48* (April 10, 2014):

1. Issue complaints in new ULP cases (Case 2[& 3]).
2. Send a letter in Case 1 (settlement case) saying it is the Region's intent upon obtaining a favorable ALJD in Case 2 [and 3] to file for Default Judgment in Case 1.
3. Litigate Case 2 [and 3] to favorable ALJD.
4. Issue a complaint in Case 1 without a notice of hearing or language about filing an Answer.
5. After the time for filing exceptions in Case 2 [and 3] have expired, file a motion for default judgment with the Board in Case 1, following the template of a technical 8(a)(5) case and, if exceptions are filed to the conduct in Case 2 [and 3] that is the basis for seeking a default judgment in Case 1, the motion for default judgment should include a motion to consolidate Cases 1, 2 [and 3].
6. In the motion for default judgment, the Region should:
 - a. Mention that Case 2 [and 3 are] related to Case 1, which is pending before the Board.
 - b. Indicate that the Respondent was made aware in Case 2 [and 3] that it would be used as a basis for demonstrating a settlement breach in Case 1.
 - c. Specify the precise remedy the Region is seeking (either a "full remedy" on the reissued complaint allegations, or enforcement of the settlement provisions that have not been complied with).
 - d. Specify the affirmative provision of the settlement

⁸ CGC Ex X.

⁹ R Ex 14.

that have been satisfactorily complied with.

Since the Region has not followed these procedures, any Motion for Default Judgment for breach of the Settlement Agreement based on the Union's new ULP charges are premature.

The Region has not issued complaints in Case Nos. 25-CA-188022 and 25-CA-190267 but given the specific allegations in CGC Motion¹⁰ and most importantly, GCG's answer to RC's question asking "what specifically is it that the Region asserts must be done in order [for Respondents] to be compliant with the Settlement Agreement" it is clear the Region is trying to bootstrap resolution of these cases into this proceeding making an end run around the Board's established ULP Casehandling procedures. (R Ex 16, 17) CGC told RC that Falcon "will need to recognize the Union and go back to the bargaining table" and Respondents would need to "get the Union involved" to determine whether Falcon restored its operations to resemble pre-July 2014 conditions" in order for Respondent to be in compliance with the Settlement Agreement. (R Ex 17) Such demands are directly related to the Union's allegations in Case Nos. 25-CA-188022 and 25-CA -190267 but these cases have not been tried to an ALJ and the Union's allegations cannot simply be deemed admitted because CGC is of the opinion they "have merit."

In the notice of noncompliance CGC sent to RC on March 14, 2017, she specifically references the Union's ULP charge, Case No. 25-CA-188022, and affirmatively states that the Region found "merit to the Union's allegations that [Respondents] are in breach of" the Settlement Agreement. (CGC Ex Z). However, instead of citing the reason relied upon by the Union in Case No. 25-CA-188022 to allege a breach of the Agreement, namely, Respondents

¹⁰ CGC averred Respondents "have continued to subcontract work previously performed by unit members" and Falcon withdrew recognition from the Union inferring such action is somehow unlawful and a breach of the Settlement Agreement. (CGC's Motion, pp. 5-6, ¶s8-9)

contracted “out bargaining unit work to avoid the Union” the CGC said that the Respondents violated the Settlement Agreement because the “operations at Falcon Trucking have not been restored as they existed prior to July 8, 2014.” *Id.* Using this “catch all” reasoning should not give CGC a basis for ignoring and bypassing Board procedure.

Also, by referring to Falcon’s withdraw of recognition from the Union in her Motion and demanding that Falcon “recognize the Union and go back to the bargaining table” and have “> 2 drivers” employed in order to be compliant with the Settlement Agreement, CGC obviously is trying to give the Union a favorable outcome to the ULP charge it filed in Case No. 25-CA-190267 without first trying the issues to an ALJ. During negotiations of the Settlement Agreement the parties specifically discussed Falcon being a one-man unit. (R Ex 8) CGC and the Union knew withdrawal of recognition by Falcon was a very real possibility if Falcon and the Union could not agree on the terms of a CBA after bargaining in good faith for a period of time not less than six month. *Id.* Exactly what CGC and the Union discussed with RC happened, that is, Respondents bargained in good faith with the Union for a period of six months and did not reach agreement on a contract because the Union was insistent on its retirement benefits proposal and thereafter, Falcon withdrew recognition of the Union on the basis of the NLRB’s long-standing policy regarding a one-man bargaining unit. (R Ex 8, 13, 5) If CGC and the Union believe Falcon’s actions violate the Act then they should be made to prove the same at a hearing before an ALJ. CGC should not be allowed to resolve such a case with her Motion for Default.

III.

CONCLUSION

For all the foregoing reasons, Respondents, by counsel, respectfully request that the Board enter an Order:

- A. Denying CGC’s Motion finding that Respondents have not violated the Settlement Agreement; or

- B. In the alternative, deny CGC's Motion finding that Respondents' response herein is sufficient to require a hearing on the question of whether Respondents fully complied with the terms of the Settlement Agreement and if not, what would be the appropriate remedial action; and
- C. For all other relief that is just and appropriate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned counsel for one of the Respondents hereby certifies that on June 9, 2017, a true copy of the foregoing pleading and attachments were emailed and mailed by regular first class, United States Mail, postage prepaid, to the following:

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