

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

CHAUFFEURS, 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

Charging Union

COUNSEL FOR THE GENERAL COUNSEL'S
BRIEF IN SUPPORT OF MOTION FOR DEFAULT JUDGMENT

On June 6, 2017, the Executive Secretary of the National Labor Relations Board (Board) issued an Order Transferring Proceedings to the Board and Notice to Show Cause in connection with counsel for the General Counsel's Motion to Transfer Case to and continue Proceedings Before the Board and for Default Judgment (MDJ), filed with the Board on June 2, 2017.

On June 9, 2017, Respondents Falcon Trucking, LLC (Respondent Falcon) and Ragle, Inc. (Respondent Ragle) (and together "Respondents") filed its Opposition to General Counsel's Motion to Transfer and for Default Judgment (Opposition). In its Opposition, Respondents argue that the settlement agreement was not violated and, in the alternative, that there is a factual dispute concerning whether Respondents complied with the settlement agreement. Further, Respondents argue that counsel for the General Counsel is attempting to litigate new charges through the MDJ.

As set forth in the MDJ, on April 15, 2016, Respondents entered into an informal Settlement Agreement, which was approved by the Regional Director for Region 25 on April 19, 2016. After an investigation was conducted by Region 25, Respondents were notified by letter dated March 14, 2017, that they were in default with the terms of the Settlement Agreement. Specifically, the Region found Respondents did not comply with the Settlement Agreement's affirmative provision requiring Respondents to "resume Respondent Falcon Trucking's operations and assignment practices for the work previously performed by Falcon Trucking employees represented by Chauffeur's, Teamsters and Helpers, Local Union No. 215 a/w International Brotherhood of Teamsters (Union) in order to restore Falcon Trucking as it existed prior to July 8, 2014." The MDJ and exhibits establish that Respondents have not resumed assigning work as it existed prior to July 8, 2014.

I. ARGUMENT

A. Respondents Defaulted On The Terms Of The Settlement Agreement

As reflected in the MDJ, a Consolidated Complaint and Notice of Hearing (Complaint) issued on January 28, 2016, alleging, *inter alia*, that since June 2014, Respondents refused to assign work to and thereby effectively discharged five named employees; that on July 8, 2014, the Union was certified as the exclusive collective-bargaining representative of a unit of truck drivers; and that since about July 8, 2014, Respondents have subcontracted work previously performed by unit members, altered the manner in which it assigned unit employees to perform unit work, removed unit work which was previously assigned to unit employees and transferred it to Respondent Ragle, reduced its complement of unit employees, and closed portions of its operations. (See MDJ, Ex. O). In order to settle this case and avoid a hearing, the parties entered into a Settlement Agreement that included specific provisions addressing the Complaint

allegations described herein. The Settlement Agreement included cease and desist provisions where Respondents agreed that they would not refuse to assign work to Falcon employees; would not unilaterally subcontract the work of the bargaining unit, change the way they assigned work to unit employees, reduce their compliment of employees in the unit, remove and transfer work from the unit, and/ or close portions of their trucking operations. The counter-part affirmative provision to the above cease and desist provision was that Respondents would resume Falcon Trucking's operations and assignment practice as it existed prior to July 8, 2014, the certification date. (See MDJ, Ex. U). The failure to comply with this affirmative provision is the basis of the MDJ.

Respondents argue that on June 20, 2016 they assigned work to Respondent Falcon employee Daniel Mabrey and that by doing so, Respondents complied with the Settlement Agreement's affirmative provision in dispute. Respondents acknowledge that the only truck driver that has worked for Respondent Falcon since June 20, 2016 to date has been Mabrey and that all other hauling needs have been satisfied by other entities. (See Opposition, Ex. 13). Further, Respondents claim that Respondent Falcon does not usually perform hauling work for Respondent Ragle when the work is more than one hour away from Newburgh, Indiana. (See MDJ, Ex. AA). Respondents further acknowledged that Respondent Ragle has satisfied its hauling needs by dealing with "numerous trucking companies." (*Id.*). Clearly, assigning work to the sole employee who did not waive reinstatement while continuing to assign all other trucking work to outside entities is undisputed evidence that Respondents are in default with the affirmative provision requiring that Respondent Falcon's operations and assignments resume as they existed prior to July 8, 2014.

Respondent is being disingenuous in interpreting the affirmative provision in question out of context with the rest of the Settlement Agreement provisions and the related Complaint allegations. The main focus of the Settlement Agreement was to remedy the allegations that Respondents effectively discharged the whole bargaining unit right before the July 8, 2014 Union election by assigning hauling work that had historically been assigned to Respondent Falcon truck drivers to other entities. The Settlement Agreement clearly included nothing about Respondents being allowed to unilaterally subcontract trucking work for hauling needs outside of a one-hour radius. In fact, the one-hour radius guideline was never mentioned during Settlement Agreement discussions or at any time prior to Respondents' March 28, 2017 letter. (See MJD, Ex. AA). In addition, the Settlement Agreement clearly did not include any agreement inferring that assigning work solely to Daniel Mabrey would satisfy Respondents' obligation to restore operations to the way they were prior to the certification date. In fact, a review of the Settlement Agreement makes it clear that five truck drivers were being made whole by Respondents because that was the number of employees employed as of the certification date.

In claiming that it complied with the affirmative provision in question, Respondents argue that the Board should consider parole evidence reflecting the parties' back and forth negotiations prior to reaching the Settlement Agreement. Respondent cites Sansla, Inc., 323 NLRB 107 (1997) in support of its position. In *Sansla* the ALJ cited 30 Am. Jur. 2d § 1016 and § 1069 (1967) to explain the parole evidence rule: "The well-established general rule is that where the parties to a contract have deliberately put their engagement in writing in such terms as import a legal obligation without any uncertainty as to the object or extent of such engagement, it is conclusively presumed that the entire engagement of the parties, and the extent and manner of their undertaking, have been reduced to writing, and all parole evidence of prior or

contemporaneous conversations or declarations tending to substitute a new and different contract from the one evidence by the writing is incompetent.” However, “whenever the terms of a written contract or other instrument are susceptible of more than one interpretation, or an ambiguity arises, or the intent or object of the instrument cannot be ascertained from the language employed therein, parole or extrinsic evidence may be introduced to show what was in the minds of the parties at the time of making the contract or executing the instrument, and to determine the object for or on which it was designed to operate.” Thus, parole evidence is only allowed if there is uncertainty or ambiguities in the agreement. In the case at hand, the language used in the affirmative provision in question is clear and unambiguous. Respondent admits as much in its Opposition. (See Opposition, page 14). When there is nothing ambiguous in the agreement, parole evidence is not allowed.¹

Respondents admit that they have only assigned work to Mabrey and that all other hauling work has been assigned to other entities. Moreover, Mabrey remained employed by and continued to work for Respondent Falcon, even before Respondents signed the Settlement Agreement. (See Opposition, page 4). Additionally, Respondents admit that after signing the Settlement Agreement they continued to use their “broad discretion to operate Falcon, assign

¹ Even if, *arguendo*, parole evidence was considered with respect to the interpretation of the affirmative provision in question, the evidence clearly shows that the language in the agreement concerning resuming operations and assignment practices as they existed prior to July 8, 2014 did not take into consideration a “one-hour radius” condition; nor did it state that assigning work to Mabrey was all that was needed to comply; and certainly does not state that Respondents are allowed to continue to unilaterally assign the work to other entities. Respondents attempt to muddle their affirmative obligation to resume operations by stating that when they agreed to the Settlement Agreement the use of the word “and” in between the first “WE WILL resume... operations” and the second “WE WILL offer... Mabrey... reinstatement...” meant that they were not required to do anything more than to reinstate Mabrey (“who was actually still employed anyway” See Opposition, page 13). This interpretation of the provision is simply incredible. Why include this provision at all if Mabrey was already employed and nothing else was required of Respondents? In addition, Respondents argue that the fact that the parties agreed to leave out of the final Settlement Agreement the Union’s proposal that the Notice include a requirement that Respondents “will not direct trucking work to other vendors or non-unit employees in order to avoid assigning work to bargaining unit employees” somehow meant that Respondents were at liberty to direct work to other entities. The fact is that this language was left out because it was redundant as it’s clearly reflected in the final Notice, which includes cease and desist provisions requiring that, *inter alia*, Respondents not subcontract bargaining unit work, change the way they assign work, reduce their compliment of employees, and/or remove and transfer work from the unit.

work” as they had done for “years and years and years” including “since prior to July 8, 2014.” (See Opposition, pages 14-15). Thus, it is undisputable that Respondents have done absolutely nothing to comply with the affirmative provision in question.

B. There are No Genuine Issues of Fact Which Warrant A Hearing

Respondents argue that a hearing should be held because a factual dispute exists concerning what Respondent Falcon’s operations and assignment practices were prior to July 8, 2014, citing Vocell Bus Company, 357 NLRB No. 148 (2011). In *Vocell*, the Board denied a motion for summary judgment and remanded the case to the region for the limited purpose of holding a hearing on the question of whether the respondent fully complied with the terms of a settlement agreement. In *Vocell*, respondent was pro-se and argued that it reinstated an employee but that the employee refused work assignments on many different occasions while the acting general counsel argued that the reinstatement offer was for less advantageous work in terms of times and quantities. Unlike *Vocell*, here Respondents have not presented any evidence that they have complied or attempted to comply with the affirmative provision in dispute. Respondents have not specifically asserted how they complied with their obligation to resume Respondent Falcon’s operations as they existed prior to July 8, 2014. Instead, Respondents have argued that the affirmative provision in question required them to do nothing more than to continue to assign work to Mabrey. Thus, a hearing on this matter would be premature since Respondents have not even attempted to comply with the plain meaning of the words “resume... operations and assignment practices...as it existed prior to July 8, 2014.” See, e.g., Long Mechanical, Inc., 2012 WL 4471134 (NLRB, September 27, 2012), where the Board refused to rely on *Vocell*.

Similarly, Respondents argument that a hearing is needed before the Board can grant the MDJ because the remedy to be ordered is not clear, is premature. Without the necessity of a

hearing, and on the basis of the MDJ and its Exhibits alone, the Board can order that Respondents resume operations at Respondent Falcon as they existed prior to July 8, 2014. The undisputed evidence is that Respondents had five truck drivers prior to July 8, 2014 and that since entering the Settlement Agreement there has only been one truck driver. Respondents have broadly argued that there are business reasons for having just one truck driver (*i.e.*, not enough work within a one-hour radius, contracts with DBE requirements, and fluctuations in construction contracts). As argued above, Respondents never raised the one-hour radius criteria during settlement agreement discussions. Further, the evidence indicates that Respondents had contracts with DBE requirements and fluctuations in business prior to July 8, 2014, when it had a complement of five employees. Moreover, Respondents have uncontrovertibly acknowledged that the real reason Respondent Falcon has only one driver is because they believe the settlement agreement only required them to keep Mabrey working.

In the alternative, if the Board finds that there is a factual dispute as to whether Respondents have complied with the terms of the Settlement Agreement, the Board can order a hearing on the sole question of whether Respondents have complied with their obligation to resume operations as they existed prior to July 8, 2014, without denying counsel for General Counsel's MDJ.

Finally, Respondents argue that in filing the MDJ, counsel for General Counsel did not follow Memorandum OM 14-48 concerning Additional Guidance Regarding Default Judgments. Respondents mistakenly believe that because the Union filed two new charges against Respondents, the Region first needs to issue a complaint on the new charges, litigate and receive a favorable decision in those cases, prior to filing a MDJ in the cases that fall under the Settlement Agreement. OM 14-48 provides guidelines in cases where the breach of a settlement

agreement consists of failure to comply with a cease and desist provision that also constitutes a new unfair labor practice. In those cases, the region should issue complaint in the new unfair labor practice case and litigate it to a favorable ALJ decision before seeking a motion for default judgment in the prior cases. However, in the instant case, Respondents were not found to be in default of a cease and desist provision of the Settlement Agreement. Additionally, Respondents have not been found to have engaged in conduct that constitutes both a violation of the provisions of the Settlement Agreement and a new unfair labor practice. Instead, counsel for General Counsel asserts that Respondents have breached an affirmative provision of the Settlement Agreement based on the evidence that Respondents have done nothing to comply with the “We Will resume operations...” provision. That finding is different from what the Union alleges in the two new charges, *i.e.*, that Respondents contracted out bargaining unit work and withdrew recognition from the Union.²

C. Default Judgment is Appropriate

Default Judgment is appropriate in this case where Respondents have acknowledged that they have done nothing other than assign work to one employee in response to the Settlement Agreement’s provision that they resume operations as they existed prior to July 8, 2014. Further, work assignments to this employee were ongoing even prior to the Settlement Agreement and Respondents acknowledge that the work that was previously performed by Respondent Falcon is being performed by numerous

² In its Opposition, Respondents argue that prior to the Settlement Agreement the parties were concerned that Respondents would withdraw recognition after bargaining for 6 months without reaching an agreement on the basis of the Board’s one-man unit rules. The MDJ does not attempt to litigate nor does it have anything to do with the withdrawal of recognition issue or the one-man unit issue. The Board’s one-man unit rules do not apply in the face of unresolved unfair labor practices, and specifically in this case, where the unit has not been restored and where, under these specific circumstances, the unit is not a stable unit. See, e.g., SAS Electrical Services, 323 NLRB 1239, (1997) and McDaniel Electric, 313 NLRB 126, 127 (1993).

trucking companies. Finally, Respondents have failed to provide a detailed explanation reflecting how their actions and conduct comply with the affirmative provision in dispute.

Accordingly, it is respectfully requested that the Board grant the MDJ and make findings of fact and conclusions of law, finding that Respondents violated the Act as alleged in the Consolidated Complaint, and that an appropriate Remedial Order be issued to include, among other things, that Respondents be ordered to restore operations at Respondent Falcon as they existed prior to July 8, 2014.

Respectfully submitted this 20th day of June, 2017.



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Certificate of Service

I certify that on the 20th day of June, 2017, I emailed copies of the counsel for the General Counsel's Brief in Support of Motion for Default Judgment to the following parties of record:

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