Semper Fi Plumbing and Heating, Inc. *and* Journeymen Plumbers and Gas Fitters Local Union No. 3. Case 27−CA−177225

March 1, 2019

DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS KAPLAN AND EMANUEL

The General Counsel seeks a default judgment in this case pursuant to the terms of an informal settlement agreement. Upon a charge and an amended charge filed by Journeymen Plumbers and Gas Fitters Local Union No. 3 (the Union) on May 31 and August 29, 2016, respectively, the General Counsel issued a complaint and notice of hearing on September 30, 2016, against Semper Fi Plumbing and Heating, Inc. (the Respondent), alleging that the Respondent violated Section 8(a)(5), (3), and (1) of the Act. The Respondent filed an answer to the complaint on October 13, 2016, admitting in part and denying in part the allegations of the complaint and asserting affirmative defenses.

On December 19, 2016, the Regional Director for Region 27 issued an Order approving the Union's request to withdraw one of the charge allegations because the parties had voluntarily reached a private settlement regarding that allegation.[1] Also on December 19, 2016, the Regional Director approved a bilateral informal settlement agreement, which incorporated a Notice to Employees and a Backpay Installment Payment Agreement, as a resolution of the outstanding allegations contained in the complaint. Among other things, the settlement agreement required the Respondent to: (1) make whole employee Mark Willis for expenses he incurred as a result of the Respondent's failure to make contractually required contributions in the amount of $500, plus interest in the amount of $11; (2) pay employee Jairo Reyes backpay in the amount of $3000, plus interest in the amount of $112 and excess tax in the amount of $17, pursuant to the provision in the settlement agreement entitled "Backpay Installment Payment Agreement"; and (3) post the settlement agreement's incorporated Notice to Employees.

The settlement agreement also contained the following provision:

> The Charged Party agrees that in case of non-compliance with any of the terms of this Settlement Agreement by the Charged Party, and after 14 days notice from the Regional Director of the National Labor Relations Board of such non-compliance without remedy by the Charged Party, the Regional Director will issue a Complaint that includes the allegations covered by the Notice to Employees, as identified above in the Scope of Agreement section, as well as filing and service of the charge(s), commerce facts necessary to establish Board jurisdiction, labor organization status, appropriate bargaining unit (if applicable), and any other allegations the General Counsel would ordinarily plead to establish the unfair labor practices. Thereafter, the General Counsel may file a Motion for Default Judgment with the Board on the allegations of the complaint. The Charged Party understands and agrees that all of the allegations of the Complaint will be deemed admitted and that it will have waived its right to file an Answer to such Complaint. The only issue that the Charged Party may raise before the Board will be whether it defaulted on the terms of this Settlement Agreement. The General Counsel may seek, and the Board may impose, a full remedy for each unfair labor practice identified in the Notice to Employees. 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 Party 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. 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 Charged Party at the last address provided to the General Counsel.[2]

By letter dated December 21, 2016, the Region's compliance officer sent the Respondent a copy of the approved settlement agreement, with a cover letter advising the Respondent to take the steps necessary to comply with it.[3] Between January 18 and February 6, 2017, the acting compliance officer communicated by email with the Respondent's counsel regarding the status of the Re-

[1] Specifically, the Union withdrew the allegation that the Respondent violated Sec. 8(a)(5) and (1) of the Act by failing to remit contractually required monthly contributions to the health and welfare fund, pension fund, training fund, substance abuse fund, and international training fund. The Regional Director further ordered the withdrawal of the corresponding complaint allegation (original complaint par. 7).

[2] The approved settlement agreement inadvertently does not reflect that a complaint issued on September 30, 2016.

[3] Also on December 21, 2016, the compliance officer sent a copy of this letter to the Respondent's counsel, by both regular mail and email.

spondent's compliance with the terms of the settlement agreement, and the counsel indicated that the Respondent had failed to respond to counsel's inquiries regarding compliance.[4]

By letter and email dated March 8, 2017, the Regional Director notified the Respondent that it had failed to comply with the remedial terms of the settlement agreement, and that it must provide evidence of compliance within 14 days, or the Regional Director would reissue the complaint and take other steps to secure a remedy in the case. The Respondent failed to comply.

Accordingly, pursuant to the terms of the noncompliance provisions of the settlement agreement, on March 29, 2017, the Regional Director issued a Complaint Based on Breach of Affirmative Provisions of Settlement Agreement (the reissued complaint). On March 30, 2017, the General Counsel filed a Motion for Default Judgment with the Board. On April 4, 2017, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed no response. The allegations in the motion are therefore undisputed.

Ruling on Motion for Default Judgment

According to the uncontroverted allegations in the motion for default judgment, the Respondent has failed to comply with the terms of the settlement agreement by, among other things, failing to: (1) make whole employee Mark Willis for expenses he incurred as a result of the Respondent's failure to make contractually required contributions in the amount of $500, plus interest; (2) make whole employee Jairo Reyes by paying him backpay in a lump-sum payment in the amount of $3000, plus interest and reimbursement in the amount equal to the difference in taxes owed upon receipt of a lump-sum payment and taxes that would have been owed had there been no discrimination; and (3) post copies of the Notice to Employees incorporated with the settlement agreement. Consequently, pursuant to the noncompliance provisions of the settlement agreement set forth above, we find that the Respondent's answer to the original complaint has been withdrawn, and that all of the allegations in the reissued complaint are true.[5] 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, the Respondent, a Colorado corporation with an office and place of business located in Morrison, Colorado (the Respondent's Morrison facility), has been a contractor in the construction industry engaged in providing plumbing, heating, and HVAC services.

Annually, in conducting its operations described above, the Respondent has purchased and received at its Morrison facility goods valued in excess of $50,000 directly from points outside the State of Colorado.

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 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:

Eric Atcheson	–	President
Kristi Atcheson		Office Manager

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 journeymen plumbers, apprentice plumbers, plumber tradesmen, utility plumbers, plumber foremen, and plumber general foreman.

---

[4] On February 6, 2017, the Respondent's counsel notified the acting compliance officer that he was withdrawing his representation of the Respondent.

[5] See *Katz Metals Fabricators, Inc.*, 362 NLRB No. 67, slip op. at 2, fn. 1 (2015); *Dreamclinic, LLC*, 361 NLRB No. 112, slip op. at 2 (2014) (citing *U-Bee, Ltd.*, 315 NLRB 667, 668 (1994)). We note that the informal settlement agreement here includes standard pre-complaint noncompliance language even though the informal settlement agreement was actually executed after the General Counsel had issued a complaint and the Respondent had filed an answer. Thus, the agreement states that the Respondent "will have waived its right to file an Answer" rather than stating that a previously filed answer "will be considered withdrawn." Consistent with *Katz* and *Dreamclinic*, which involved similar circumstances, we find the entry of default judgment to be appropriate. Among other provisions in the informal settlement agreement, the parties here agreed that, in the event of the Respondent's noncompliance, the General Counsel "may file a Motion for Default Judgment," "the allegations of the Complaint will be deemed admitted," the Respondent "will have waived its right to file an Answer," and the Board may "without necessity of trial or any other proceeding, find all allegations of the Complaint to be true" and issue an appropriate order. Through the agreement, the parties objectively manifested assent to the entry of a default-judgment order in the event of the Respondent's noncompliance and to the withdrawal of any previously filed answer. As stated above, it is undisputed that the Respondent is in noncompliance. Because the agreement objectively manifested assent to the entry of a default-judgment order in the event of the Respondent's noncompliance, and the Respondent is undisputedly noncompliant, entry of default judgment is appropriate.

About August 6, 2015, the Respondent, an employer engaged in the building and construction industry, executed the collective-bargaining agreement previously entered into by the Union, Pipefitters Local Union No. 208, and the Mechanical Contractors Association of Northeastern Colorado, effective from August 1, 2014, to May 31, 2019.

By entering into the agreement described above, the Respondent recognized the Union as the exclusive collective-bargaining representative of the unit without regard to whether the Union's majority status had ever been established under Section 9(a) of the Act.

The following events occurred, giving rise to these proceedings.

1. (a) Sometime between about February 1 and February 12, 2016, the Respondent, by its President Eric Atcheson, at the Respondent's Morrison facility, told employees that he was no longer working with the Union and that they could continue working for the Respondent without Union benefits or be laid off if they wanted to continue working under the Union contract.

(b) By the conduct described above in paragraph 1(a), the Respondent caused the termination of its employees Natasha Williams, Mark Willis, and Jairo Reyes.[6]

(c) The Respondent engaged in the conduct described above in paragraph 1(a) because the named employees of the Respondent formed, joined, or assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities.

2. About February 10, 2016, the Respondent repudiated the collective-bargaining agreement described above, and withdrew its recognition of the Union as the exclusive collective-bargaining representative of the unit.[7]

CONCLUSIONS OF LAW

By the conduct described in paragraph 1(a)—(c), the Respondent has been discriminating in regard to the hire or tenure or terms or conditions of employment of its employees, thereby discouraging membership in a labor organization in violation of Section 8(a)(3) and (1) of the Act.

By the conduct described above in paragraph 2, 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.

The Respondent's unfair labor practices described above 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 take certain affirmative action designed to effectuate the policies of the Act. Specifically, we shall order the Respondent to comply with the unmet terms of the settlement agreement approved by the Regional Director for Region 27 on December 19, 2016.

Accordingly, we shall order the Respondent to make whole employee Mark Willis for the expenses he incurred as a result of the Respondent's failure to make contractually required contributions in the amount of $500, plus interest of $11, as provided for in the settlement agreement under the heading "Expenses." We shall also order the Respondent to make whole employee Jairo Reyes by paying him backpay in a lump-sum payment in the amount of $3000, plus interest in the amount of $112 and excess tax in the amount of $17, as set forth in the settlement agreement under the heading "Backpay Installment Payment Agreement."[8] Finally, we shall order the Respondent to post the settlement agreement's incorporated Notice to Employees.

In limiting our affirmative remedies to those enumerated above, we are mindful that the General Counsel is empowered under the default provision of the settlement agreement to seek "a full remedy for the violations found as is appropriate to remedy such violations."[9] However, in his Motion for Default Judgment, the General Counsel has not sought such additional remedies and we will not, sua sponte, include them.[10]

---

[6] The Notice to Employees incorporated with the settlement agreement indicates that Natasha Williams, Mark Willis, and Jairo Reyes have waived their right to reinstatement.

[7] The Notice to Employees incorporated with the settlement agreement indicates that the Union has agreed to release the Respondent from its obligation to abide by the terms of the August 1, 2014 through May 31, 2019 collective-bargaining agreement, and has disclaimed interest in representing the bargaining unit described above.

[8] The Backpay Installment Payment Agreement specified that in the event the Respondent failed to make a scheduled payment, or to cure any such failure within 14 days, the total amount of backpay, less any amounts paid, would become immediately due and payable.

[9] As set forth above, the settlement agreement provided that, in case of noncompliance, the Board may issue such a full remedy.

[10] See, e.g., *Benchmark Mechanical, Inc*., 348 NLRB 576 (2006). The General Counsel specifically requested in his motion for default judgment that the Board's Order include "requiring Respondent to comply with the unmet terms of the Settlement Agreement by ordering the Respondent to make whole employee Mark Willis in the amount of $500 plus interest; to pay employee Jairo Reyes backpay in a lump-sum payment in the amount of $3,000 plus interest and reimbursement in the amount equal to the difference in taxes owed upon receipt of a lump-sum payment and taxes that would have been owed had there been no discrimination; to post the Notice to Employees incorporated with the Settlement Agreement . . . ; and by granting other relief as may be just and proper to remedy the violations in the Complaint." Therefore, we construe the General Counsel's motion as seeking enforcement of the unmet provisions of the settlement agreement.

ORDER

The National Labor Relations Board orders that the Respondent, Semper Fi Plumbing and Heating, Inc., Morrison, Colorado, its officers, agents, successors, and assigns, shall take the following affirmative action necessary to effectuate the policies of the Act.

1. Remit $500 for expenses Mark Willis incurred as a result of the Respondent's failure to make contractually required contributions, plus $11 in interest, to Region 27 of the National Labor Relations Board to be disbursed to Mark Willis, in accordance with the terms of the settlement agreement approved by the Regional Director on December 19, 2016.

2. Remit $3000 in back wages, plus $112 in interest and $17 in excess tax, to Region 27 of the National Labor Relations Board to be disbursed to Jairo Reyes, in accordance with the terms of the settlement agreement approved by the Regional Director on December 19, 2016.

3. Post copies of the approved Notice to Employees (the attached notice marked "Appendix") immediately after they have been signed and dated by a responsible official of the Respondent, at the Respondent's facility located at 17431 Highway 8, Morrison, Colorado, in prominent places including all places where the Respondent normally posts notices to employees. The Respondent will keep all Notices posted for 60 consecutive days after the initial posting. If the Respondent has gone out of business or closed the facility involved in these proceedings, 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 February 1, 2016.

4. Within 21 days after service by the Region, file with the Regional Director for Region 27 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.

Dated, Washington, D.C. March 1, 2019

_____

John F. Ring, Chairman

_____

Marvin E. Kaplan, Member

_____

William J. Emanuel 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 do anything to prevent you from exercising the above rights.

WE WILL NOT repudiate and fail to honor the August 1, 2014 through May 31, 2019 collective-bargaining agreement with the Journeymen Plumbers and Gas Fitters Local Union No. 3 (Local 3) and the Pipefitters Local Union No. 208 (Local 208), during the term of the agreement.

WE WILL NOT refuse to recognize Local 3 as the exclusive collective-bargaining representative of employees in the following unit, during the term of the August 1, 2014, through May 31, 2019 agreement:

> All journeymen plumbers, apprentice plumbers, plumber tradesmen, utility plumbers, plumber foremen, and plumber general foreman.

WE WILL NOT fire you or cause you to quit because of your union membership or support.

WE WILL NOT in any like or related manner interfere with your rights under Section 7 of the Act.

WE HAVE been informed that Local 3 has agreed to release us from our obligation to abide by the terms of the August 1, 2014, through May 31, 2019 collective-bargaining agreement.

WE HAVE been informed that Local 3 has disclaimed interest in representing the bargaining unit described above.

WE HAVE been informed that Natasha Williams, Mark Willis, and Jairo Reyes have waived their right to reinstatement.

WE WILL pay Mark Willis and Jairo Reyes for the wages and other benefits they lost because we caused them to quit.

WE WILL remove from our files all references to the constructive discharge of Natasha Williams, Mark Willis, and Jairo Reyes, and WE WILL notify them in writing that this has been done and that the constructive discharge will not be used against them in any way.

SEMPER FI PLUMBING AND HEATING, INC.

The Board's decision can be found at www.nlrb.gov/case/27-CA-177225 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.