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**Able Building Maintenance and its successor Empire Facility Solutions, LLC and Mercedes Escate.**  
Case 22–CA–194688

May 16, 2019

DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS MCFERRAN  
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 first amended charge filed by Mercedes Escate on March 13 and May 22, 2017, respectively, the General Counsel issued a complaint on October 30, 2017, against Able Building Maintenance, alleging that it violated Section 8(a)(1) of the Act. Upon a second amended charge filed by Escate on November 7, 2017, the General Counsel issued a first amended complaint (the complaint) on February 15, 2018, against Able Building Maintenance and its successor Empire Facility Solutions, LLC, alleging that the Respondents violated Section 8(a)(1) of the Act.<sup>1</sup> On February 28, Respondent Empire filed an answer to the complaint, and Respondent Able filed an answer on March 5.

Subsequently, the Respondents and Charging Party Escate executed an informal settlement agreement, which the Regional Director for Region 22 approved on May 7. Pursuant to the terms of the settlement agreement, the Respondents agreed to make Escate whole by paying her an agreed-upon amount of backpay. Respondent Empire also agreed to post the appropriate Board notice in English and in Spanish at 9 Polito Avenue, Lyndhurst, New Jersey (the Lyndhurst facility), and Respondent Able agreed to mail the appropriate Board notice in English and in Spanish to the homes of all employees who worked from August 22, 2016, through August 13, 2017. The settlement agreement also contained the following provision:

The Charged Parties agree that in case of non-compliance with any of the terms of this Settlement Agreement by the Charged Parties, and after 14 days' notice from the Regional Director of the National Labor Relations Board of such noncompliance without remedy by the Charged Parties, the Regional Director will reissue the complaint previously issued on October 30, 2017 in the instant case. Thereafter, the General Counsel may

<sup>1</sup> All subsequent dates are in 2018 unless otherwise indicated.

file a motion for default judgment with the Board on the allegations of the complaint. The Charged Parties understand and agree that the allegations of the aforementioned complaint will be deemed admitted and their Answers to such complaint will be considered withdrawn. The only issue that may be raised before the Board is whether the Charged Parties defaulted on the terms of this Settlement Agreement. The Board may then, without necessity of trial or any other proceeding, find all allegations of the complaint to be true and make findings of fact and conclusions of law consistent with those allegations adverse to the Charged Parties on all issues raised by the pleadings. The Board may then issue an order providing a full remedy for the violations found as is appropriate to remedy such violations. 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 Parties/Respondents at the last addresses provided to the General Counsel.

By letter dated May 10, the Region's compliance officer sent the Respondents a copy of the conformed settlement agreement, with a cover letter explaining the remedial actions they were required to take to comply. Thereafter, by letter dated June 12, the compliance officer notified the Respondents that they had failed to comply with the terms of the settlement agreement and that unless compliance was achieved within 14 days (by June 26), the Regional Director would revoke the agreement, reissue the complaint, and seek a default judgment from the Board.

On June 25, Respondent Able delivered a backpay check to the Region, thereby satisfying the backpay component of the settlement agreement. By email dated July 19, the compliance officer issued a final request that the Respondents fully comply with the terms of the settlement agreement, including the notice posting/ mailing requirements and the submission of compliance documentation. She further informed them that absent full compliance by July 23, the Region would initiate default proceedings. The Respondents failed to comply. Accordingly, pursuant to the terms of the noncompliance provisions of the settlement agreement, on October 17, the Regional Director reissued the complaint and vacated the settlement agreement.

On October 19, the General Counsel filed a Motion for Default Judgment with the Board, requesting that the Board issue a Decision and Order against the Respondents containing findings of fact and conclusions of law based on the allegations in the reissued complaint, and that the Board provide "a full remedy of the unfair labor practices alleged." On December 18, the Board issued an order transferring the proceeding to the Board and a No-

tice to Show Cause why the motion should not be granted. The Respondents did not file a response. The allegations in the motion are therefore undisputed.

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

#### Ruling on Motion for Default Judgment

According to the uncontroverted allegations in the motion for default judgment, the Respondents have failed to comply with the terms of the settlement agreement. Consequently, pursuant to the noncompliance provisions of the settlement agreement set forth above, we find that the Respondents' answers to the original complaint have been withdrawn and all of the allegations in the reissued complaint are true. Accordingly, we grant the General Counsel's Motion for Default Judgment.

On the entire record, the Board makes the following

#### FINDINGS OF FACT

##### I. JURISDICTION

At all material times, Respondent Able has been a corporation with its main office located in San Francisco, California, and has been engaged in providing janitorial services in commercial office buildings, including the Lyndhurst facility. During the calendar year preceding issuance of the complaint, Respondent Able, in conducting the business operations described above, purchased and received goods and services in excess of \$50,000 directly from points outside the State of New Jersey.

At all material times Respondent Empire has been a limited liability corporation with its main office located in Brooklyn, New York, and has been engaged in providing janitorial services in commercial office buildings, including the Lyndhurst facility. During the calendar year preceding issuance of the complaint, Respondent Empire, in conducting the business operations described above, purchased and received goods and services in excess of \$50,000 directly from points outside the State of New Jersey. We find that the Respondents are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Service Employees International Union 32BJ (the Union) has been a labor organization within the meaning of Section 2(5) of the Act.

At all material times until August 13, 2017, Respondent Able and 9 Polito LLC (formerly Copper Ridge LLC) have been parties to a contract for the provision of janitorial services at the Lyndhurst facility.

At all material times until August 13, 2017, Respondent Able and the Union were parties to a collective bargaining agreement covering wages, hours and other terms and conditions of employment of employees employed at the Lyndhurst facility.

Effective August 13, 2017, Respondent Able's contract to provide janitorial services to the Lyndhurst facility was terminated, and effective August 14, 2017, Respondent Empire became party to a contract to provide janitorial services at that location. Since that date, Respondent Empire has performed the janitorial services previously performed by Respondent Able in basically unchanged form and has assumed the collective-bargaining agreement between Respondent Able and the Union.

Before it began providing janitorial services at the Lyndhurst facility, Respondent Empire had circumstantial knowledge of the unfair labor practices in this case and was put on actual notice of Respondent Able's potential liability by letters dated September 27 and October 11, 2017, from the Regional Director for Region 22.

We find that Respondent Empire has continued to provide the janitorial services previously provided by Respondent Able at the Lyndhurst facility with notice of Respondent Able's potential liability to remedy its unfair labor practices and that Respondent Empire is a successor to Respondent Able.

##### II. ALLEGED UNFAIR LABOR PRACTICES

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

Richard Hughes      Division Manager

Dickson Mancebo      Lead Employee

About August 25, 2016, employee Escate concertedly complained to Dickson Mancebo regarding the wages, hours, and working conditions of Respondent Able's employees by suggesting a more equitable manner of distributing work.

About September 27, 2016, Respondent Able laid off Escate. Since that date and until about November 20, 2017, the Respondents failed to recall Escate to work as a fill-in employee because of her protected concerted complaint and to discourage employees from engaging in these or other concerted activities.

##### CONCLUSION OF LAW

By the conduct described above, the Respondents have been interfering with, restraining, and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act in violation of Section 8(a)(1) of the Act. 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 Respondents have engaged in certain unfair labor practices, and in accordance with the General Counsel's request for a "full remedy" for the violations found, we shall order the Respondents to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondents violated Section 8(a)(1) of the Act by failing to recall Mercedes Escate between September 27, 2016 and November 20, 2017, we shall order the Respondents, jointly and severally, to make Escate whole for any loss of earnings and other benefits suffered as a result of the unlawful action against her, to the extent that the Respondents have not already done so.<sup>2</sup> Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). In accordance with our decision in *King Soopers, Inc.*, 364 NLRB No. 93 (2016), enfd. in relevant part, 859 F.3d 23 (D.C. Cir. 2017), we shall also order the Respondents, jointly and severally, to compensate Escate for her search-for-work and interim employment expenses regardless of whether those expenses exceed interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra.<sup>3</sup>

We shall further order the Respondents to compensate Escate for any adverse tax consequences of receiving a lump-sum backpay award, to the extent that the Respondents have not already done so, and to file with the Regional Director for Region 22 a report allocating the backpay award to the appropriate calendar years. *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016).

Finally, given that Respondent Able no longer provides janitorial services at the Lyndhurst facility, we shall order Respondent Able to mail a copy of the attached notice to the last known address of all employees

<sup>2</sup> Because it is unclear whether the total amount set forth in the settlement agreement constitutes a full make-whole remedy, we leave to compliance a determination of the proper amount due to Escate.

<sup>3</sup> The General Counsel additionally seeks reasonable consequential damages incurred as a result of the Respondents' unfair labor practices. This issue, which was not briefed, would involve a change in Board law. We are not prepared at this time to deviate from our current remedial practice. Accordingly, we decline to order this relief at this time. See, e.g., *Laborers International Union of North America, Local Union No. 91 (Council of Utility Contractors)*, 365 NLRB No. 28, slip op. at 1 fn. 2 (2017).

who worked for Respondent Able at that facility during the period of August 22, 2016, through August 13, 2017.

## ORDER

A. The National Labor Relations Board orders that Respondent Able Building Maintenance, San Francisco, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing to recall employees from layoff in response to their protected concerted activities and to discourage other employees from engaging in these or other protected concerted activities.

(b) 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) Jointly and severally with Respondent Empire, and to the extent the Respondents have not already done so, make Mercedes Escate whole for any loss of earnings and other benefits suffered as a result of the unlawful failure to recall her between September 27, 2016, and November 20, 2017, in the manner set forth in the remedy section of this decision, plus reasonable search-for-work and interim employment expenses.

(b) Jointly and severally with Respondent Empire, and to the extent the Respondents have not already done so, compensate Mercedes Escate for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 22, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.

(c) 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.

(d) Within 14 days after service by the Region, mail copies of the attached notice marked "Appendix A" to the extent it has not done so.<sup>4</sup> Copies of the notice in English and in Spanish, on forms provided by the Regional Director for Region 22, after being signed by Re-

<sup>4</sup> 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."

spondent Able's authorized representative, shall be mailed by Respondent Able to the last known address of all employees who worked for Respondent Able at the Lyndhurst facility during the period of August 22, 2016, to August 13, 2017.

(e) Within 21 days after service by the Region, file with the Regional Director for Region 22 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent Able has taken to comply.

B. The National Labor Relations Board orders that Respondent Empire Facility Solutions, LLC, Brooklyn, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing to recall employees from layoff in response to their protected concerted activities.

(b) 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) Jointly and severally with Respondent Able, and to the extent the Respondents have not already done so, make Mercedes Escate whole for any loss of earnings and other benefits suffered as a result of the unlawful failure to recall her between September 27, 2016, and November 20, 2017, in the manner set forth in the remedy section of this decision, plus reasonable search-for-work and interim employment expenses.

(b) Jointly and severally with Respondent Able, and to the extent the Respondents have not already done so, compensate Mercedes Escate for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 22, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.

(c) 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.

(d) Within 14 days after service by the Region, and to the extent that Respondent Empire has not already done so, post at the building located at 9 Polito Avenue, Lyndhurst, New Jersey, copies of the attached notice marked

"Appendix B."<sup>5</sup> Copies of the notice in English and in Spanish, on forms provided by the Regional Director for Region 22, after being signed by Respondent Empire's authorized representative, shall be posted by Respondent Empire 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 Respondent Empire customarily communicates with its employees by such means. Reasonable steps shall be taken by Respondent Empire to ensure that the notices are not altered, defaced, or covered by any other material. If Respondent Empire has gone out of business or closed the facility involved in these proceedings, Respondent Empire shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed at any time since August 14, 2017.

(e) Within 21 days after service by the Region, file with the Regional Director for Region 22 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent Empire has taken to comply.

Dated, Washington, D.C. May 16, 2019

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John F. Ring, Chairman

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Lauren McFerran, Member

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William J. Emanuel Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

<sup>5</sup> 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."

APPENDIX A  
 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 fail to recall you from layoff in response to your protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, jointly and severally with Empire Facility Solutions, LLC, and to the extent we have not already done so, make Mercedes Escate whole for any loss of earnings and other benefits suffered as a result of the unlawful failure to recall her from layoff between September 27, 2016, and November 20, 2017, plus interest, plus reasonable search-for-work and interim employment expenses.

WE WILL, jointly and severally with Empire Facility Solutions, LLC, and to the extent we have not already done so, compensate Mercedes Escate for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file with the Regional Director for Region 22, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.

ABLE BUILDING MAINTENANCE

The Board's decision can be found at [www.nlrb.gov/case/22-CA-194688](http://www.nlrb.gov/case/22-CA-194688) 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.



APPENDIX B

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 fail to recall you from layoff in response to your protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, jointly and severally with Able Building Maintenance, and to the extent we have not already done so, make Mercedes Escate whole for any loss of earnings and other benefits suffered as a result of the unlawful failure to recall her from layoff between September 27, 2016, and November 20, 2017, plus interest, plus reasonable search-for-work and interim employment expenses.

WE WILL, jointly and severally with Able Building Maintenance, and to the extent we have not already done so, compensate Mercedes Escate for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file with the Regional Director for Region 22, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.

EMPIRE FACILITY SOLUTIONS, LLC

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decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

