Headlands Contracting & Tunnelling, Inc. and Chardon Concrete, Inc., a single employer and Alter Egos *and* Indiana/Kentucky/Ohio Regional Council of Carpenters, United Brotherhood of Carpenters and Joiners of America. Case 08−CA−212613

June 12, 2019

DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS KAPLAN AND EMANUEL

The General Counsel seeks a default judgment in this case on the ground that the Respondent has failed to file an answer to the complaint. Upon a charge and an amended charge filed by Indiana/Kentucky/Ohio Regional Council of Carpenters, United Brotherhood of Carpenters and Joiners of America (the Union) on January 8 and October 30, 2018, the General Counsel issued a complaint on October 30, 2018, against Headlands Contracting & Tunnelling, Inc. (Respondent Headlands) and Chardon Concrete, Inc. (Respondent Chardon), a single employer and alter egos (collectively, the Respondent), alleging that it has violated Section 8(a)(5) and (1) of the National Labor Relations Act. Although properly served copies of the charges and the complaint, the Respondent failed to file an answer.

On December 19, 2018, the General Counsel filed a Motion for Default Judgment with the Board. On January 3, 2019, 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.

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

Ruling on Motion for Default Judgment

Section 102.20 of the Board's Rules and Regulations provides that the allegations in a complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint, unless good cause is shown. In addition, the complaint affirmatively states that an answer must be received on or before November 13, 2018, and that if no answer is filed, the Board may find, pursuant to a motion for default judgment, that the allegations in the complaint are true. Further, the undisputed allegations in the General Counsel's motion disclose that the Region, by letters dated November 20, 2018, notified Respondent Headlands and Respondent Chardon that each Respondent had failed to file an answer to the complaint by the specified deadline, and unless an answer was received by November 28, 2018, a motion for default judgment would be filed. No answer or request for an extension of time to file an answer was received by that date.

The General Counsel's motion indicates that the Respondent is not represented by counsel in this proceeding. Although the Board has shown some leniency toward respondents who proceed without the benefit of counsel, the Board has consistently held that pro se status alone does not establish a good cause explanation for failing to file an answer. See, e.g., *Patrician Assisted Living Facility*, 339 NLRB 1153, 1153 (2003); *Sage Professional Painting Co*., 338 NLRB 1068, 1068 (2003). Here, the Respondent never filed an answer, and it offered no good cause explanation for its failure to do so, despite being reminded that its answer was due.

In the absence of good cause being shown for the lack of a timely answer, we deem the allegations in the complaint to be admitted as true, and we grant the General Counsel's Motion for Default Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, Respondent Headlands has been an Ohio corporation with an office and place of business in Montville, Ohio (Respondent Headlands' facility), and has been a subcontractor in the construction industry engaged in building reinforced cast-in-place concrete and the use of concrete for applications including sewer tunnels, shafts, retaining walls, headwalls, bridge abutments, water tank foundations, and commercial and residential concrete work.

At all material times, Respondent Chardon has been an Ohio corporation with an office and place of business in Montville, Ohio (Respondent Chardon's facility), and has been a subcontractor in the construction industry engaged in building reinforced cast-in-place concrete and the use of concrete for applications including sewer tunnels, shafts, retaining walls, headwalls, bridge abutments, water tank foundations, and commercial and residential concrete work.

At all material times, Respondent Headlands and Respondent Chardon have been affiliated business enterprises with common officers, ownership, directors, management, and supervision; have administered a common labor policy; have shared common premises and facilities; have provided services for and made sales to each other; have interchanged personnel with each other; have had interrelated operations with common businesses of building

reinforced concrete structures, equipment, administration, purchasing, and payroll; and have held themselves out to the public as a single integrated business enterprise. Based on the operations described above, Respondent Headlands and Respondent Chardon constitute a single integrated business enterprise and a single employer within the meaning of the Act.

At all material times, Respondent Headlands and Respondent Chardon have had substantially identical management, business purposes, operations, equipment, customers, supervision, and ownership. About December 12, 2015, Respondent Headlands established Respondent Chardon as a disguised continuation of Respondent Headlands for the purpose of evading its responsibilities under the Act. Based on the operations and conduct described above, Respondent Headlands and Respondent Chardon are, and have been at all material times, alter egos and a single employer within the meaning of the Act.

During the calendar year ending December 31, 2016, Respondent Headlands, in conducting its business operations described above, provided services valued in excess of $50,000 to Mr. Excavator, Inc., an enterprise within the State of Ohio that is directly engaged in interstate commerce. During the calendar year ending December 31, 2017, Respondent Chardon, in conducting its business operations described above, provided services valued in excess of $50,000 to Fechko Excavating, Inc., an enterprise within the State of Ohio that is directly engaged in interstate commerce.

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, Brian Allen held the position of owner, president, and supervisor of both Respondent Headlands and Respondent Chardon and has been a supervisor of the Respondent within the meaning of Section 2(11) of the Act and an agent of the Respondent within the meaning of Section 2(13) of the Act.

The following employees of Respondent Headlands (the unit) constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All employees who perform the work of Carpenters and Resilient and Soft Floor Layers, Sanders, Carpet Layers and Plastic Tile Workers in Ashland, Ashtabula, Belmont, Carroll, Columbiana, Coshocton, Cuyahoga, Erie, Geauga, Harrison, Holmes, Huron, Jefferson, Knox, Lake, Lorain, Mahoning, Medina, Monroe, Morrow, Portage, Richland, Stark, Summit, Trumbull, Tuscarawas and Wayne Counties in Ohio and by Pile Drivers in all of the foregoing counties except for Jefferson and Columbiana and by Millwrights in all of the foregoing counties plus Hancock, Marshall, Ohio and Brook Counties in West Virginia.

The following events occurred, giving rise to this proceeding.

1(a) About September 19, 2002, Respondent Headlands, an employer engaged in the construction industry, entered into the Carpenters' Agreement, whereby it agreed to be bound by the master collective-bargaining agreement between the Union and The Carpenter Contractors' Association of Cleveland, Ohio; The Ohio Building Chapter−AGC, Cleveland Division; The Construction Employers' Association; The Builders' Association of Eastern Ohio and Western Pennsylvania; The Ohio Valley Construction Employers Council, Inc.; The Akron Division, Ohio Building Chapter, Associated General Contractors of America, Inc.; and The Builders Exchange of East Central Ohio, Labor Relations Division, effective May 1, 2001, to April 30, 2005 (Master), and agreed to be bound to such future agreements unless timely notice of its intent to terminate the agreement was given.

(b) By entering into the Carpenters' Agreement described above in paragraph 1(a), Respondent Headlands 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. Such recognition has been embodied in successive Master collective-bargaining agreements, the most recent of which was effective from June 1, 2013, through April 30, 2018.

(c) Since about September 19, 2002, until timely notice is given of intent to terminate the agreement and based on the facts described above, the Union has been the designated exclusive collective-bargaining representative of the unit.[1]

2(a) Respondent Headlands engaged in its business operations as described above until about May 9, 2016, when it ceased performing its construction operations.

[1] The complaint alleges that the Respondent is a construction-industry employer and that it granted recognition to the Union without regard to whether the Union had established majority status. Accordingly, we find that the relationship was entered into pursuant to Sec. 8(f) of the Act and that the Union is therefore the limited Sec. 9(a) representative of the unit employees for the period covered by the contract. See, e.g., *A.S.B. Cloture, Ltd.*, 313 NLRB 1012, 1012 fn. 2 (1994), citing *Electri-Tech, Inc.*, 306 NLRB 707, 707 fn. 2 (1992), and *John Deklewa & Sons*, 282 NLRB 1375 (1987), enfd sub nom. *Iron Workers Local 3 v. NLRB*, 843 F.2d 770 (3d Cir. 1988).

(b) Respondent Headlands engaged in the conduct above because its employees were represented by the Union and in order to avoid its obligations under the Act and its collective-bargaining agreement with the Union as described in paragraphs 1(a) and (b).

(c) Since about May 9, 2016, Respondent Chardon has continued the business operations of Respondent Headlands, as described above, in disguised form in order to avoid its collective-bargaining obligation to the Union.

(d) At all material times, the Respondent has failed and refused to recognize and bargain with the Union as the exclusive collective-bargaining representative of the unit.

(e) Since about May 9, 2016, and at all material times, the Respondent has failed to abide by the collective-bargaining agreement as described in paragraphs 1(a) and (b) and has failed to apply the provisions of the agreement to the operations of Respondent Chardon.[2]

CONCLUSION OF LAW

By the conduct described above in paragraphs 2(a) through (e), the Respondent has been failing and refusing to bargain collectively and in good faith with the limited 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 affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent has violated Section 8(a)(5) and (1) by failing and refusing to bargain with the Union as the collective-bargaining representative of the unit employees by failing to abide by the terms and conditions of its collective-bargaining agreement with the Union, effective June 1, 2013, through April 30, 2018 (2013−2018 Agreement), and failing to apply the provisions of the 2013−2018 Agreement to the operations of Respondent Chardon, we shall order the Respondent to bargain with the Union as the limited exclusive collective-bargaining representative of the employees in the unit, to recognize the Union as the limited exclusive collective-bargaining representative of the unit employees employed by Respondent Chardon, and to honor the 2013−2018 Agreement. The Respondent shall make the unit employees whole for any loss of earnings and other benefits they may have suffered as a result of the Respondent's unlawful failure between about May 9, 2016, and April 30, 2018, to abide by and apply the terms of the 2013−2018 Agreement to the unit employees.[3] Such amounts shall be computed in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

In addition, we shall order the Respondent to make all contractually-required fringe benefit fund contributions, if any, that were not made between about May 9, 2016, and April 30, 2018, including any additional amounts applicable to such delinquent payments in accordance with *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979). Further, the Respondent shall reimburse the unit employees for any expenses ensuing from its failure to make the required contributions, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891, 891 fn. 2 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981). All payments to the unit employees shall be computed in the manner set forth in *Ogle Protection Service*, supra, with interest as prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra.[4]

We shall also order the Respondent to compensate unit employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards and file with the Regional Director for Region 8, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the

[2] The complaint alleges a failure to abide by the collective-bargaining agreement and to apply the provisions of the agreement to the operations of Respondent Chardon since about May 9, 2016, more than 6 months before the filing of the charge. However, the 6-month limitations period in Sec. 10(b) of the Act is an affirmative defense that is waived if not timely raised. See, e.g., *Newspaper & Mail Deliverers (New York Post)*, 337 NLRB 608, 609 (2002) (citing *Public Service Co.*, 312 NLRB 459, 461 (1993)). As the Respondent has failed to file an answer to the complaint or a response to the notice to show cause and has failed to raise a 10(b) affirmative defense, we find the violations as alleged and shall issue an appropriate remedial order. See, e.g., *Malik Roofing Corp.*, 338 NLRB 930, 931 fn. 3 (2003); *J. F. Morris Co.*, 292 NLRB 869, 870 fn. 2 (1989), enfd. mem. 881 F.2d 1076 (6th Cir. 1989).

[3] Respondent Headlands entered into the Carpenters' Agreement about September 19, 2002, under which it agreed to be bound, pursuant to Sec. 8(f) of the Act, by the Union's master collective-bargaining agreement effective May 1, 2001, to April 30, 2005, and by future Master agreements unless timely notice of intent to terminate the agreement was given. The most recent Master agreement was effective June 1, 2013, through April 30, 2018. On these facts, we find that the make-whole remedial period ends April 30, 2018. See *John Deklewa & Sons*, 282 NLRB 1375 (1987), enfd. sub nom. *Iron Workers Local 3 v. NLRB*, 843 F.2d 770 (3d Cir. 1988), cert. denied 488 U.S. 889 (1988); *W.E. Colglazier, Inc.*, 289 NLRB 1219, 1220 (1988).

[4] To the extent that an employee has made personal contributions to a benefit or other fund that have been accepted by the fund in lieu of the Respondent's delinquent contributions during the period of the delinquency, the Respondent will reimburse the employee, but the amount of such reimbursement will constitute a setoff to the amount that the Respondent otherwise owes the fund.

appropriate calendar years for each employee, in accordance with *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016).

ORDER

The National Labor Relations Board orders that the Respondent, Headlands Contracting & Tunnelling, Inc., and Chardon Concrete, Inc., a single employer and alter egos, Montville, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain with Indiana/Kentucky/Ohio Regional Council of Carpenters, United Brotherhood of Carpenters and Joiners of America (the Union) as the limited exclusive collective-bargaining representative of the unit employees during the term of the parties' Agreement, effective June 1, 2013, through April 30, 2018, by failing to abide by the terms and conditions of the 2013−2018 Agreement, and failing to apply the provisions of the 2013−2018 Agreement to the operations of Respondent Chardon in order to evade the terms of the 2013−2018 Agreement. The unit is:

> All employees who perform the work of Carpenters and Resilient and Soft Floor Layers, Sanders, Carpet Layers and Plastic Tile Workers in Ashland, Ashtabula, Belmont, Carroll, Columbiana, Coshocton, Cuyahoga, Erie, Geauga, Harrison, Holmes, Huron, Jefferson, Knox, Lake, Lorain, Mahoning, Medina, Monroe, Morrow, Portage, Richland, Stark, Summit, Trumbull, Tuscarawas and Wayne Counties in Ohio and by Pile Drivers in all of the foregoing counties except for Jefferson and Columbiana and by Millwrights in all of the foregoing counties plus Hancock, Marshall, Ohio and Brook Counties in West Virginia.

(b) Failing and refusing to recognize the Union as the limited exclusive collective-bargaining representative of the unit employees employed by Respondent Chardon and to apply the terms and conditions of the 2013−2018 Agreement to those employees during the term of that agreement.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain in good faith with the Union as the limited exclusive collective-bargaining representative of the unit employees during the term of the 2013−2018 Agreement, effective June 1, 2013, through April 30, 2018, and adhere to and apply the terms of the 2013−2018 Agreement to the unit employees during the term of that agreement.

(b) Recognize the Union as the limited exclusive collective-bargaining representative of the unit employees employed by Respondent Chardon during the term of the 2013−2018 Agreement.

(c) Make the unit employees whole for any loss of earnings and other benefits they may have suffered as a result of the Respondent's unlawful failure, between about May 9, 2016, and April 30, 2018, to abide by and apply the terms of the 2013−2018 Agreement to the unit employees, with interest, in the manner set forth in the remedy section of this decision.

(d) Make all contractually required contributions to the unit employees' fringe-benefit funds that it failed to make between about May 9, 2016, and April 30, 2018, if any, including any additional amounts due the funds, as set forth in the remedy section of this decision.

(e) Reimburse unit employees for any expenses ensuing from the Respondent's failure to make the required payments to the funds, with interest, in the manner set forth in the remedy section of this decision.

(f) Compensate the unit employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 8, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

(g) 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.

(h) Within 14 days after service by the Region, post at its facility in Montville, Ohio, copies of the attached notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 8, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices

[5] 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."

shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced or covered by any other material. 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 and former employees employed by the Respondent at any time since about May 9, 2016.

(i) Within 21 days after service by the Region, file with the Regional Director for Region 8 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. June 12, 2019

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John F. Ring, Chairman

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Marvin E. Kaplan, Member

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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 fail and refuse to bargain with Indiana/Kentucky/Ohio Regional Council of Carpenters, United Brotherhood of Carpenters and Joiners of America (the Union) as the limited exclusive collective-bargaining representative of our employees in the following unit during the term of our 2013−2018 Agreement with the Union by failing to abide by the terms and conditions of the 2013−2018 Agreement and by failing to apply the provisions of the 2013−2018 Agreement to the operations of Respondent Chardon in order to evade the terms of the 2013−2018 Agreement. The unit is:

> All employees who perform the work of Carpenters and Resilient and Soft Floor Layers, Sanders, Carpet Layers and Plastic Tile Workers in Ashland, Ashtabula, Belmont, Carroll, Columbiana, Coshocton, Cuyahoga, Erie, Geauga, Harrison, Holmes, Huron, Jefferson, Knox, Lake, Lorain, Mahoning, Medina, Monroe, Morrow, Portage, Richland, Stark, Summit, Trumbull, Tuscarawas and Wayne Counties in Ohio and by Pile Drivers in all of the foregoing counties except for Jefferson and Columbiana and by Millwrights in all of the foregoing counties plus Hancock, Marshall, Ohio and Brook Counties in West Virginia.

WE WILL NOT fail and refuse, during the term of the 2013−2018 Agreement, to recognize the Union as the limited exclusive collective-bargaining representative of the unit employees employed by Respondent Chardon, and WE WILL NOT fail and refuse to apply the terms and conditions of the 2013−2018 Agreement to those employees during the term of that agreement.

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, on request, bargain in good faith with the Union as the limited exclusive collective-bargaining representative of the unit employees during the term of the 2013−2018 Agreement (effective June 1, 2013, through April 30, 2018), and WE WILL adhere to and apply the terms of the 2013−2018 Agreement to the unit employees during the term of that agreement.

WE WILL recognize the Union as the limited exclusive collective-bargaining representative of the unit employees employed by Respondent Chardon during the term of the 2013−2018 Agreement.

WE WILL make our unit employees whole for any loss of earnings and other benefits they may have suffered as a result of our unlawful failure, between about May 9, 2016, and April 30, 2018, to adhere to and apply the terms of the 2013−2018 Agreement to the unit employees, with interest.

WE WILL make all contractually required contributions to the unit employees' fringe benefit funds that we failed

to make between about May 9, 2016, and April 30, 2018, including any additional amounts due the funds, and WE WILL reimburse unit employees for any expenses ensuing from our failure to make the required payments, with interest.

WE WILL compensate our unit employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file with the Regional Director for Region 8, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

HEADLANDS CONTRACTING & TUNNELLING, INC. AND CHARDON CONCRETE, INC., A SINGLE EMPLOYER AND ALTER EGOS

The Board's decision can be found at www.nlrb.gov/case/08-CA-212613 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.