



UNITED STATES GOVERNMENT

**NATIONAL LABOR RELATIONS BOARD**

**OFFICE OF THE GENERAL COUNSEL**

Washington, D.C. 20570

June 27, 2019

Marcia M. Waldron, Esquire  
Clerk, United States Court of  
Appeals for the Third Circuit  
21400 U.S. Courthouse  
601 Market Street  
Philadelphia, PA 19106-1790

Re: *NLRB v. Able Building Maintenance  
and its successor Empire Facility Solutions,  
LLC*, Board Case No. 22-CA-194688

Dear Ms. Waldron:

I am enclosing an original of the Board's application for summary entry of a judgment enforcing the Board's order in this case, and a copy of a proposed judgment.

Please serve a copy of the application on Respondents, whose addresses appear on the service list. I have served a copy of the Board's application and proposed judgment on each party admitted to participate in the Board proceedings, and their names and addresses also appear on the service list.

I am counsel of record for the Board, and all correspondence should be addressed to me. I would appreciate your furnishing the Board's Regional Director, whose name and address also appear on the service list, with a copy of all correspondence the Court sends to counsel in this case, and a copy of the judgment issued.

Very truly yours,

/s/ David Habenstreit

David Habenstreit  
Acting Deputy Associate General Counsel  
NATIONAL LABOR RELATIONS BOARD  
1015 Half St., S.E.  
Washington, D.C. 20570  
(202) 273-2960

cc & documents to: Service List

## SERVICE

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### RESPONDENT COUNSEL:

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### REGIONAL DIRECTOR:

David Leach, Rgn'l Dir.  
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UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

NATIONAL LABOR RELATIONS BOARD	:	
	:	
Petitioner	:	No.
v.	:	
	:	Board Case No.:
ABLE BUILDING MAINTENANCE AND ITS	:	22-CA-194688
SUCCESSOR EMPIRE FACILITY SOLUTIONS, LLC	:	
	:	
Respondent	:	

APPLICATION FOR SUMMARY ENTRY OF A JUDGMENT  
ENFORCING AN ORDER OF  
THE NATIONAL LABOR RELATIONS BOARD

To the Honorable, the Judges of the United States  
Court of Appeals for the Third Circuit:

The National Labor Relations Board, pursuant to Section 10(e) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 160(e)), applies to this Court for summary entry of a judgment enforcing its order against Able Building Maintenance and its successor Empire Facility Solutions, LLC (“Respondents”). The Board is entitled to summary enforcement of its order because Respondents did not respond to the Board’s Notice to Show Cause and the Board entered an order by default. In support, the Board shows:

**A. Jurisdiction of this Court**

This Court has jurisdiction over this application under Section 10(e) of the

Act (29 U.S.C. § 160(e)). Venue is proper in this Circuit because the unfair labor practices occurred in New Jersey. The Board's final order issued on May 16, 2019, and is reported at 367 NLRB No. 134.

## **B. Proceedings Before the Board**

1. On October 30, 2017, and February 15, 2018, the Board's General Counsel issued a complaint and first amended complaint, respectively, and notice of hearing in Case No. 22-CA-194688, alleging that Respondents violated Sections 8(a)(1) of the National Labor Relations Act. Respondent Empire and Respondent Able filed answers to the complaint.

2. Subsequently the parties entered into an informal settlement agreement which was approved by the Regional Director for Region 22 on May 7, 2018. The settlement agreement required the Respondents to take certain affirmative actions including paying backpay and posting appropriate notices. The settlement agreement 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 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.

3. By letter dated May 10, 2018, the Region's compliance officer sent the Respondents a copy of the conformed settlement agreement along with a cover letter explaining the remedial actions required to be taken to comply with the agreement.

4. On June 12, 2018, the compliance officer notified Respondents that they had failed to comply with the terms of the informal settlement agreement and reminded the Respondents of the obligations under the agreement. The letter also stated that failure to comply by June 26, 2018, would result in the Regional Director setting the settlement agreement aside and reissuing the complaint, followed thereafter by filing a motion for default judgment with the Board.

5. The Respondents partially complied, satisfying the backpay component of the settlement agreement.

6. By email dated July 19, 2018, the compliance officer issued a final

request that Respondents fully comply with the terms of the settlement agreement which included the posting and mailing requirements of the notice and submitting the required compliance documentation. The compliance officer warned that, absent full compliance by July 23, 2018, the Region would initiate default proceedings.

7. The Respondents failed to comply.

8. Pursuant to the noncompliance provisions of the settlement agreement, by order dated October 17, 2018, the Regional Director vacated the settlement and reissued the complaint. On October 19, 2018, the General Counsel filed a Motion for Default Judgment with the Board.

9. By order dated December 18, 2018, the Board transferred the case to itself and issued a Notice to Show Cause, giving Respondents until January 2, 2019, to file with the Board in Washington, D.C., a response to the Motion for Default Judgment

10. Respondents did not file a response. Accordingly, the allegations in the motion were undisputed.

11. In the absence of a response and pursuant to the noncompliance provisions of the settlement agreement, on May 16, 2019, the Board issued its

Decision and Order granting the Motion for Default Judgment and entering an appropriate order against Respondents.

**C. The Board Is Entitled to Summary Enforcement of Its Order**

On these facts, the Board is entitled to summary enforcement of its order against Respondents. Respondents did not dispute before the Board that they had breached the settlement agreement. Therefore Respondents cannot dispute before this Court the Board's finding that they had breached the settlement agreement. Under Section 10(e) of the Act (29 U.S.C. § 160(e)), no objection that has not been urged before the Board shall be considered by a court of appeals "unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." This limitation is jurisdictional and its application is mandatory. *Woelke & Romero Framing v. NLRB*, 456 U.S. 645, 666-67 (1982). Interpreting that requirement, courts have consistently held that a respondent's failure to assert any defense before the Board entitles the Board, absent extraordinary circumstances, to summary enforcement of its order. *See, e.g., Oldwick Materials, Inc. v. NLRB*, 732 F.2d 339, 341 (3d Cir. 1984). *See also Father and Sons Lumber v. NLRB*, 931 F.2d 1093, 1095-96, 1097 (6th Cir. 1991); *NLRB v. Continental Hagen Corp.*, 932 F.2d 828, 830 (9th Cir. 1991); *NLRB v. Dane County Dairy*, 795 F.2d 1313, 1319-21 (7th Cir. 1986); *NLRB v. Aaron Convalescent Home*, 479 F.2d

736, 738-39 (6th Cir. 1973). No such circumstances have been alleged or shown here.

WHEREFORE, the Board respectfully requests that the Court, after serving notice of the filing of this application on Respondents, enter judgment summarily enforcing the Board's order in full. A proposed judgment is attached.

/s/ David Habenstreit  
David Habenstreit  
Acting Deputy Associate General Counsel  
National Labor Relations Board  
1015 Half St., S.E.  
Washington, D.C. 20570

Dated in Washington, D.C.  
this 27th day of June, 2019

UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

NATIONAL LABOR RELATIONS BOARD :  
 :  
 :  
 Petitioner : No.  
 v. :  
 : Board Case No.:  
 ABLE BUILDING MAINTENANCE AND ITS : 22-CA-194688  
 SUCCESSOR EMPIRE FACILITY SOLUTIONS, LLC :  
 :  
 Respondents :

JUDGMENT ENFORCING AN ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD

Before:

This cause was submitted upon the application of the National Labor Relations Board for summary entry of a judgment against Respondent, Able Building Maintenance and its successor Empire Facility Solutions, LLC, their officers, agents, and representatives, enforcing its order dated May 16, 2019, in Case No. 22-CA-194688, and the Court having considered the same, it is hereby

ORDERED AND ADJUDGED by the Court that the Respondent, Able Building Maintenance and its successor Empire Facility Solutions, LLC, their officers, agents, and representatives, shall abide by said order (see attached order and appendix).

Mandate shall issue forthwith.

BY THE COURT

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Circuit Judge

DATED:

NATIONAL LABOR RELATIONS BOARD

v.

ABLE BUILDING MAINTENANCE  
AND ITS SUCCESSOR EMPIRE FACILITY SOLUTIONS, LLC

**ORDER**

A. 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. Copies of the notice in English and in Spanish, on forms provided by the Regional Director for Region 22, after being signed by Respondent 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. 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." 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.

## APPENDIX A

### NOTICE TO EMPLOYEES

POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES  
COURT OF APPEALS ENFORCING AN 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 PURSUANT TO A JUDGMENT OF THE UNITED STATES  
COURT OF APPEALS ENFORCING AN 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.

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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

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.



UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

NATIONAL LABOR RELATIONS BOARD :  
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 :  
 Petitioner : No.  
 v. :  
 : Board Case No.:  
 ABLE BUILDING MAINTENANCE AND ITS : 22-CA-194688  
 SUCCESSOR EMPIRE FACILITY SOLUTIONS, LLC :  
 :  
 Respondent :

CERTIFICATE OF SERVICE

The undersigned certifies that one copy each of the Board's application for summary entry of judgment and proposed judgment, in the above-captioned case, has this day been served by first class mail upon the following parties at the addresses listed below:

Richard Hughes, Div. Mgr.  
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San Francisco, CA 94107

Robert Nagel, Operations  
Empire Facility Solutions  
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Steuart Tower  
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James Allen, Esq.  
National Labor Relations  
Advocates  
312 Walnut St., Ste 1600  
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/s/ David Habenstreit

David Habenstreit  
Acting Deputy Associate General Counsel  
National Labor Relations Board  
1015 Half St., S.E.  
Washington, D.C. 20570

Dated at Washington, D.C.  
this 6th day of June, 2019