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**Spectrum Mechanical Services LLC and Journeymen Plumbers, Steamfitters, and Apprentices, U.A. Local #22 of Western New York.** Case 03–CA–234490

September 30, 2019

DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS MCFERRAN  
AND KAPLAN

The General Counsel seeks a default judgment in this case on the ground that Spectrum Mechanical Services LLC (the Respondent) has failed to file an answer to the complaint. Upon a charge filed by Journeymen Plumbers, Steamfitters, and Apprentices, U.A. Local #22 of Western New York (the Union), on January 23, 2019, the General Counsel issued a complaint and notice of hearing on March 29, 2019, against the Respondent, alleging that it has violated Section 8(a)(5) and (1) of the Act. The Respondent failed to file an answer.

On May 22, 2019, the General Counsel filed with the National Labor Relations Board a Motion for Default Judgment. Thereafter, on May 23, 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 stated that unless an answer was received by April 12, 2019, 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 letter dated April 25, 2019, advised the Respondent that unless an answer was received by May 2, 2019, the Region may pursue a default judgment; and, by letter dated May 10, 2019 (which enclosed a copy of the complaint and the April 25 letter), advised the Respondent that unless an answer was received by May 20, 2019, a motion for default judgment

would be filed. Nevertheless, the Respondent failed to file an answer.<sup>1</sup>

In the absence of good cause being shown for the failure to file an 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, the Respondent has been a corporation with an office and place of business in Buffalo, New York (the Respondent's facility), and has been engaged in the business of installing heating, air conditioning, refrigeration, and plumbing systems for commercial and residential markets.

During the 12-month period ending January 23, 2019, the Respondent, in conducting its business operations described above, provided services valued in excess of \$50,000 for Dash Properties, Inc. d/b/a Dash's Market (Dash Properties), an enterprise within the State of New York.

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<sup>1</sup> The General Counsel's Motion for Default Judgment and attached exhibits indicate that the complaint was served on the Respondent by certified and regular mail. The certified mail copy was returned to the Region as "vacant; unable to forward," with the U.S. Postal Service listing the Respondent's new address on its return card, although the copy sent by regular mail was not returned as undeliverable. The April 25 and May 10 reminder letters were forwarded and sent, respectively, to the Respondent's new address by both certified and regular mail. The attempted delivery by certified mail for both letters was unsuccessful, although the copies sent by regular mail were not returned as undeliverable.

The General Counsel also served, by certified and regular mail, the complaint and the April 25 and May 10 reminder letters on Richard Hundley, who was listed with the New York State Department of State Division of Corporations as designated to receive service of process on the Respondent. According to the U.S. Postal Service tracking system, the certified mail delivery to Hundley for all three documents was successful, and the copies sent by regular mail were not returned.

It is well settled that a respondent's failure or refusal to accept certified mail or to provide for appropriate service cannot serve to defeat the purposes of the Act. See, e.g., *Cray Construction Group, LLC*, 341 NLRB 944, 944 fn. 5 (2004); *I.C.E. Electric, Inc.*, 339 NLRB 247, 247 fn. 2 (2003). Further, the failure of the postal service to return documents served by regular mail indicates actual receipt of those documents by the Respondent. *Id.*; *Lite Flight, Inc.*, 285 NLRB 649, 650 (1987), *enfd. sub nom. NLRB v. Sherman*, 843 F.2d 1392 (6th Cir. 1988). In any event, it is also well established that "[U]nder agency law as well as the Federal Rules of Civil Procedure, service of process on an authorized agent constitutes effective service on the agent's principal." *United Electrical Contractors Assn.*, 347 NLRB 1, 2 (2006) (citing Restatement (Second) of Agency § 268 (1958); Fed. R. Civ. P. 4(h)(1)); see also *Hopkins Hardware*, 280 NLRB 1296, 1297 (1986) (service of a backpay specification on the respondent's attorney-of-record was valid and sufficient service on the respondent).

At all material times, Dash Properties has been a corporation with an office and place of business in Buffalo, New York, and has been engaged in the retail grocery industry. Annually, Dash Properties, in conducting its business operations described above, derives gross revenues in excess of \$500,000, and purchases and receives at its Buffalo, New York facility goods valued in excess of \$5000 directly from points outside the State of New York.

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 have 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:

Colleen Caruso	-	Co-Owner
Louis Caruso	-	Co-Owner

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 employees performing work as set forth in Article III, Sections 3.1 through 3.4 within the geographic area as set forth in Article II of the May 1, 2014 through April 30, 2019 collective-bargaining agreement between the Union and Western New York Association of Plumbing and Mechanical Contractors, Inc.

About May 2014, the Western New York Association of Plumbing and Mechanical Contractors, Inc. (the Association), an organization composed of various employers in the construction industry, one purpose of which is to represent its employer-members in negotiating and administering collective-bargaining agreements, and the Union entered into a collective-bargaining agreement, effective from May 1, 2014, through April 30, 2019 (the 2014–2019 agreement).

About February 24, 2017, the Respondent, an employer engaged in the building and construction industry, entered into a written contract (a Letter of Assent) whereby it agreed to be bound by the 2014–2019 Agreement.

By entering into the 2014–2019 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.

At all material times, based on Section 9(a) of the Act, the Union has been the limited exclusive collective-bargaining representative of the unit.

About July 24, 2018, the Union, in writing, requested that the Respondent adhere to the collective-bargaining agreement described above.

Since about July 24, 2018, the Respondent has refused to adhere to the collective-bargaining agreement described above.

#### CONCLUSION OF LAW

By the conduct described above, the Respondent has been failing and refusing to bargain collectively and in good faith with the limited exclusive collective-bargaining representative of its employees 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 cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent violated Section 8(a)(5) and (1) by failing and refusing, since about July 24, 2018, to adhere to the terms of its 2014–2019 collective-bargaining agreement with the Union, we shall order the Respondent to honor and abide by the terms of the 2014–2019 Agreement, and to rescind any unilateral changes that the Respondent made to unit employees' terms and conditions of employment as a result of not applying the Agreement.<sup>2</sup> We shall also order the Respondent to 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 conduct,<sup>3</sup> in the manner set

<sup>2</sup> The complaint does not allege that the 2014–2019 Agreement includes an automatic renewal or extension clause, and the General Counsel's proposed order does not include a provision requiring the Respondent to comply with any such clause, assuming one exists. There is no justification for including such a provision in the order in these circumstances. See also *Headlands Contracting & Tunneling, Inc.*, 368 NLRB No. 4, slip op. at 3 fn. 3 (2019) (remedial period ended on date that 8(f) agreement expired by its terms).

To ensure a full remedy, Member McFerran would order the Respondent to comply with the terms of the 2014–2019 Agreement and any automatic renewal or extension provisions contained therein.

<sup>3</sup> The Respondent entered into the Association's collective-bargaining agreement with the Union about February 24, 2017, under which it agreed to be bound, pursuant to Sec. 8(f) of the Act, by the collective-bargaining agreement effective May 1, 2014, to April 30, 2019. On these facts, we find that the make-whole remedial period ends April 30, 2019. See *John Deklewa & Sons*, 282 NLRB 1375 (1987), enf. sub nom. *Iron Workers Local 3 v. NLRB*, 843 F.2d 770

forth in *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 July 24, 2018, and April 30, 2019, 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.<sup>4</sup>

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 3, 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, in accordance with *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016).

#### ORDER

The National Labor Relations Board orders that the Respondent, Spectrum Mechanical Services LLC, Buffalo, New York, its officers, agents, successors, and assigns shall

1. Cease and desist from

(a) Failing and refusing to bargain collectively and in good faith with Journeymen Plumbers, Steamfitters, and Apprentices, U.A. Local #22 of Western New York (the Union) as the limited exclusive collective-bargaining representative of employees in the following unit during the term of the parties' Agreement, effective May 1, 2014, to April 30, 2019, by failing and refusing to continue in effect all of the terms and conditions of the 2014–2019 Agreement:

All employees performing work as set forth in Article III, Sections 3.1 through 3.4 within the geographic area as set forth in Article II of the May 1, 2014 through April 30, 2019 collective-bargaining agreement between the Union and Western New York Association of Plumbing and Mechanical Contractors, Inc.

(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) 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 2014–2019 Agreement.

(b) Honor and comply with the terms and conditions of the 2014–2019 Agreement and rescind any and all changes to unit employees' terms and conditions of employment that the Respondent implemented by not applying the Agreement to unit employees.

(c) Make unit employees whole for any loss of earnings or other benefits suffered as a result of the Respondent's failure, between about July 24, 2018, and April 30, 2019, to abide by and apply the terms of the 2014–2019 Agreement to the unit employees, 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 July 24, 2018, and April 30, 2019, 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, 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 3, within 21 days of the date the amount of backpay pay 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. If requested, the originals of

(3d Cir. 1988), cert. denied 488 U.S. 889 (1988); *W.E. Colglazier, Inc.*, 289 NLRB 1219, 1220 (1988).

<sup>4</sup> 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.

such records shall be provided to the Board or its agents in the same manner.

(h) Within 14 days after service by the Region, post at its facility in Buffalo, New York, copies of the attached notice marked "Appendix."<sup>5</sup> Copies of the notice, on forms provided by the Regional Director for Region 3, 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 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 employees and former employees employed by the Respondent at any time since about July 24, 2018.

(i) Within 21 days after service by the Region, file with the Regional Director for Region 3 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. September 30, 2019

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John F. Ring, Chairman

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Lauren McFerran Member

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Marvin E Kaplan, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES  
POSTED BY ORDER OF THE

<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."

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 collectively and in good faith with Journeymen Plumbers, Steamfitters, and Apprentices, U.A. Local #22 of Western New York (the Union) as the limited exclusive collective-bargaining representative of our employees in the following unit during the term of our 2014–2019 Agreement with the Union by failing and refusing to continue in effect all of the terms and conditions of the 2014–2019 Agreement:

All employees performing work as set forth in Article III, Sections 3.1 through 3.4 within the geographic area as set forth in Article II of the May 1, 2014 through April 30, 2019 collective-bargaining agreement between the Union and Western New York Association of Plumbing and Mechanical Contractors, Inc.

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 2014–2019 Agreement (effective May 1, 2014 through April 30, 2019), and WE WILL honor and comply with the terms and conditions of the 2014–2019 Agreement.

WE WILL rescind any and all changes to unit employees' terms and conditions of employment that were implemented by our not applying the 2014–2019 Agreement to the unit employees.

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 July 24, 2018, and April 30, 2019, to abide by and apply the terms of the 2014–2019 Agreement to our unit employees, with interest.

WE WILL make all contractually required contributions to our unit employees' fringe benefit funds that we failed to make between about July 24, 2018, and April 30, 2019, if any, including any additional amounts due the funds, and WE WILL reimburse our 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 3, 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.

SPECTRUM MECHANICAL SERVICES LLC

The Board's decision can be found at [www.nlr.gov/case/03-CA-234490](http://www.nlr.gov/case/03-CA-234490) 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.

