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3H Service System, Inc. and Local 32BJ, Service Employees International Union. Cases 22–CA–236583 and 22–CA–248356

July 9, 2020

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General Counsel seeks a default judgment in this case on the ground that 3H Service System, Inc. (the Respondent) has withdrawn its answer to the complaint. Upon a charge filed by Local 32BJ, Service Employees International Union (the Union) in Case 22–CA–236583 on February 25, 2019, and amended on April 4, May 23, July 25, and August 15, 2019, and a charge filed by the Union in Case 22–CA–248356 on September 16, 2019, the General Counsel issued an order consolidating cases, consolidated amended complaint, and notice of hearing on December 18, 2019, against the Respondent, alleging that it had violated Section 8(a)(5), (3), and (1) of the National Labor Relations Act. On December 30, 2019, the Respondent filed an answer to the complaint. However, on January 29, 2020, the Respondent filed a motion to withdraw its answer, and on January 31, 2020, the Regional Director granted that motion.

On February 7, 2020, the General Counsel filed with the National Labor Relations Board a Motion to Transfer Proceedings to the Board and for Default Judgment. On February 13, 2020, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed no response. The allegations in the motion are therefore undisputed.

Ruling on Motion for Default Judgment

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 January 1, 2020, the Board may find, pursuant to a motion for default judgment, that the allegations in the complaint are true. Although the Respondent filed an answer on December 30, 2019, it later withdrew that answer. The withdrawal of an answer has the same effect as a failure to file an answer, i.e., the

allegations in the complaint must be considered to be true.¹ Accordingly, based on the withdrawal of the Respondent’s answer, we deem the allegations in the complaint to be admitted as true, and grant the General Counsel’s Motion for Default Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a Georgia corporation with an office and place of business in Lincroft, New Jersey, has been engaged in the provision of professional janitorial cleaning services to clients across the United States.

In conducting its operations, annually the Respondent has performed services valued in excess of \$50,000 in states other than the State of New Jersey. During the same period, the Respondent purchased and received at its Lincroft, New Jersey facility goods and supplies valued in excess of \$5000 directly from suppliers located outside the State of New Jersey.

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

1. The following employees of the Respondent (the unit) constitute an appropriate unit for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

All service employees employed in any facility in the State of New Jersey, excluding commercial office buildings under 100,000 square feet, except that economic terms and conditions for residential buildings, hospitals, department stores, schools, charitable, educational and religious institutions, race tracks, nursing homes, theaters, hotels, shopping malls, golf courses, bowling alleys, warehouses, route work, bank branches and industrial facilities shall be set forth in riders negotiated for each location covered by this agreement.

2. From about January 1, 2016 to April 17, 2018, ISS Facility Services, Inc. (ISS), predecessor employer to the Respondent, was engaged in the operation of a professional janitorial company providing services to Brookdale Community College, located at 765 Newman Springs Road, Lincroft, New Jersey.

3. From about January 1, 2016 through April 17, 2018, based on Section 9(a) of the Act, the Union had been the

¹ See *Rock Technologies, Inc.*, 346 NLRB No. 68 (2006) (not reported in Board volumes); *Maislin Transport*, 274 NLRB 529 (1985).

exclusive collective-bargaining representative of the unit employed by ISS.

4. From about January 1, 2016 through April 17, 2018, ISS and the Union were parties to the New Jersey Contractors Agreement (CBA), an areawide agreement which covers the unit employees, and which would expire on December 31, 2019.

5. Sometime around April 17, 2018, the Respondent was awarded a contract to perform the cleaning services formerly performed by ISS at Brookdale Community College and hired a majority of ISS' unit employees.

6. At all times since about April 17, 2018, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the unit employees employed by the Respondent.

7. At all material times, the following individuals held the positions set forth opposite their respective names and have been agents of the Respondent within the meaning of Section 2(13) of the Act:

Russ Wetherington	- Director of Business Development/Contracts
Grace Sims	- Respondent's Representative
Lynda Kim	- Manager
Mike (last name unknown)	- Manager

8. On April 18, 2018, the Respondent's representative Grace Sims signed a Memorandum of Understanding agreeing to recognize the Union as the unit's exclusive collective-bargaining representative and to assume the CBA in effect at that time between the Union and ISS.

9. (a) On September 24 and October 12, 2018, the Respondent, in letters written by Russ Wetherington, advised the Union that it would withdraw recognition effective December 31, 2019.

(b) The conduct described in paragraph 9(a) was done in the absence of evidence that the Union lacked majority status.

10. Since about October 22, 2018, the Union, by Brent Garren, Esq., requested in writing that the Respondent furnish the Union with information necessary for it to resolve

disputes arising under the collective-bargaining agreement.²

11. With the exception of employee social security numbers, the information requested by the Union, as described above in paragraph 10, is necessary for, and relevant to, the Union's performance of its duties as the exclusive collective-bargaining representative of the unit.³

12. Since about October 24, 2018, the Respondent has failed and refused to furnish the Union with the information requested by it as described above in paragraph 10.

13. About October 22, 2018, the Union, by Brent Garren, Esq., requested in writing that the Respondent meet and bargain with the Union, as the exclusive collective-bargaining representative of the unit, concerning grievances.

14. Since about October 22, 2018, the Respondent has failed and refused to meet and bargain with the Union as the exclusive collective-bargaining representative of the unit employees.

15. About September 23, 2018, the Respondent reduced employees' pay through the reduction of their wage rate.

16. Since about August 2018, the Respondent excluded certain employees from coverage of the collective-bargaining agreement, thereby denying them health insurance, paid time off, and other benefits.

17. Since about August 2018, the Respondent denied employees vacation and holiday benefits by imposing a one-year eligibility rule.

18. Since about December 2018, the Respondent, by Manager Lynda Kim, bypassed the Union and dealt directly with its employees in the unit by entering into an agreement settling a grievance.

19. Since about July, August 2019, the Respondent, by Manager Mike (last name unknown), bypassed the Union and dealt directly with its employees by announcing a rule requiring employees to clock in and out for their lunch meal break.

20. About September 23, 2018, the Respondent paid employees it excluded from coverage of the collective-bargaining agreement \$.50 more an hour than the union employees.⁴

² The Union's request sought the following documents:

1. A roster of all bargaining unit employees employed on the Brookdale Community College account ("Employees"), including their names, addresses, job classification, job assignment, social security number, hours of work, present wage rate and hire date.

2. Payroll records for all Employees from the date 3H began operations at the Brookdale account through the present date.

³ In the absence of a showing here of their potential or probable relevance, we deny the General Counsel's motion with respect to the

Respondent's failure to provide social security numbers, and remand that issue to the Region for further appropriate action. See *Perkins Mgmt. Services Co.*, 366 NLRB No. 130, slip op. at 2 (2018); *Bookbinders Seafood House, Inc.*, 341 NLRB 14, 15 fn. 1 (2004)

⁴ The charge in Case 22-CA-326583 alleged that the Respondent paid the employees excluded from the unit \$.50 more per hour than the unit employees. The complaint added the word "cent" after this figure, which we view as an inadvertent typographical error. We correct the error.

21. About July 1, 2019, the Respondent failed to provide some or all of the wage increase due to employees pursuant to the collective-bargaining agreement.

22. The subjects set forth above in paragraphs 15, 16, 17, 20 and 21 relate to wages, hours, and other terms and conditions of employment of the unit and are mandatory subjects for the purposes of collective bargaining.

23. The Respondent engaged in the conduct described above in paragraphs 15, 16, 17, 20, and 21 without prior notice to the Union and without affording the Union an opportunity to bargain with the Respondent with respect to this conduct.

CONCLUSIONS OF LAW

1. By the conduct described above in paragraphs 9, 12, and 14 through 21, the Respondent has been failing and refusing to bargain collectively with the exclusive collective-bargaining representative of its employees in violation of Section 8(a)(5) and (1) of the Act.⁵

2. The unfair labor practices of the Respondent 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.

Having found that the Respondent has violated Section 8(a)(5) and (1) by failing and refusing to bargain collectively with the Union, we shall order the Respondent, on request, to meet and bargain with the Union as the exclusive collective-bargaining representative of the unit employees with respect to wages, hours, and other terms and conditions of employment and, if an understanding is reached, to embody the understanding in a signed agreement.

Having also found that the Respondent violated Section 8(a)(5) and (1) by bypassing the Union and dealing directly with employees and by implementing unilateral changes in the terms and conditions of employment of unit employees, we shall order the Respondent, on request, to rescind the unlawful changes. In addition, we shall order the Respondent, before implementing any changes in wages, hours, and conditions of employment of unit employees, to notify and, on request, bargain with the Union

as the exclusive collective-bargaining representative of unit employees.

We shall also order the Respondent to make the unit employees whole for any loss of earnings and other benefits suffered as a result of the Respondent's unlawful direct dealings and unilateral changes, such amounts to be computed in the manner set 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).

Having found that the Respondent unlawfully excluded certain employees from the bargaining unit, thereby depriving them of health insurance, paid time off, and other benefits, we shall additionally order the Respondent to make the employees whole by making all contractually required benefit fund contributions that have not been made since about August 2018, including any additional amounts due to the funds in accordance with *Merryweather Optical Co.*, 240 NLRB 1213, 1216 *fn.* 7 (1979). The Respondent shall also reimburse the 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.* 661 F.2d 940 (9th Cir. 1981). Such amounts are to 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*.⁶

We shall order the Respondent to compensate the unit employees for any adverse tax consequences of receiving lump-sum backpay awards and to file a report with the Regional Director for Region 22 allocating the backpay award to the appropriate calendar years for each employee, in accordance with *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016).

Having further found that the Respondent has violated Section 8(a)(5) and (1) by failing and refusing to furnish the Union with certain information that is necessary and relevant to the Union's performance of its duties as the exclusive collective-bargaining representative of the unit employees, we shall order the Respondent to furnish to the Union the information requested by the Union on October 22, 2018, with the exception of employees' social security numbers.

⁵ We find it unnecessary to pass on whether the Respondent's grant of a wage increase to employees whom it excluded from the unit also violated Sec. 8(a)(3), as this additional finding would not materially affect the remedy.

⁶ 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.

In addition, we shall order the Respondent to implement the temporary change in the Board's standard notice-posting remedy to adapt to the ongoing Coronavirus Disease 2019 (COVID-19) pandemic.⁷ The standard notice-posting provision requires respondents to post copies of the remedial notice within 14 days after the notice is served on the respondent by the Regional Office. With so many businesses closed due to the pandemic, however, this requirement needs to be modified. It seems likely that many respondents may be unable to comply with the standard 14-day posting deadline. Furthermore, even if the notice could be posted in time, the whole point of the remedy will be defeated if employees (or members in union-respondent cases) are not present to read the notice. Accordingly, for the time being, we will omit from the notice-posting remedy the requirement that the notice be posted "within 14 days after service by the Region." Instead, we will provide that the notice must be posted within 14 days after the facility involved in the proceedings reopens and a substantial complement of employees have returned to work, and that it may not be posted until a substantial complement of employees have returned. In addition, employers that customarily communicate with their employees by electronic means may not be doing so while their businesses remain closed. Thus, any pandemic-related delay in the physical posting of paper notices will also apply to electronic distribution of the notice. These changes do not apply to respondents whose facilities remain open and staffed by a substantial complement of employees despite the pandemic. When conditions warrant, we will reinstate the standard language.

ORDER

The National Labor Relations Board orders that the Respondent, 3H Service System, Inc., Lincroft, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from
 - (a) Failing and refusing to recognize and bargain with Local 32BJ, Service Employees International Union (the Union) as the exclusive collective-bargaining representative of the employees in the bargaining unit.
 - (b) Changing the terms and conditions of employment of its unit employees without first notifying the Union and giving it an opportunity to bargain.
 - (c) Bypassing the Union and dealing directly with unit employees regarding grievances and terms and conditions of employment.
 - (d) Refusing to bargain collectively with the Union by failing and refusing to furnish it with requested

information that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of the Respondent's unit employees.

(e) 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 with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All service employees employed in any facility in the State of New Jersey, excluding commercial office buildings under 100,000 square feet, except that economic terms and conditions for residential buildings, hospitals, department stores, schools, charitable, educational and religious institutions, race tracks, nursing homes, theaters, hotels, shopping malls, golf courses, bowling alleys, warehouses, route work, bank branches and industrial facilities shall be set forth in riders negotiated for each location covered by this agreement.

(b) Before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of employees in the bargaining unit.

(c) On request, rescind the changes in the terms and conditions of employment for its unit employees that were unilaterally implemented in about August and December 2018 and July, August 2019, and on about September 23, 2018, and July 1, 2019.

(d) Make whole the unit employees for any loss of earnings and other benefits suffered as a result of the Respondent's unlawful unilateral changes in the unit employees' terms and conditions of employment made in about August 2018 and on about September 23, 2018, and July 1, 2019, with interest, in the manner set forth in the remedy section of this decision.

(e) Make whole the unit employees for any loss of earnings and other benefits suffered as a result of the Respondent's direct dealing with employees since about December 2018 and July, August 2019, with interest, in the manner set forth in the remedy section of this decision.

(f) Reimburse the unit employees for any expenses ensuing from the Respondent's unilateral denial of health

⁷ *Danbury Ambulance Service, Inc.*, 369 NLRB No. 68 (2020). The Board has broad discretionary authority under Sec. 10(c) of the Act to fashion remedies that will best effectuate the policies of the Act, and

remedial matters are traditionally within the Board's province and may be addressed sua sponte. *Indian Hills Care Center*, 321 NLRB 144, 144 fn. 3 (1996).

insurance coverage/benefits since about August 2018, with interest, as set forth in the remedy section of this decision.

(g) Make all contractually required benefit contributions that have not been made to any unit employee benefit funds since about August 2018, if any, including any additional amounts due any such funds, and reimburse unit employees for any expenses ensuing from its failure to make such payments, with interest, in the manner set forth in the remedy section of this decision.

(h) Compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay award(s), 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(s) to the appropriate calendar year(s) for each employee.

(i) Furnish to the Union in a timely manner the information requested by the Union on October 22, 2018, with the exception of employees' social security numbers.

(j) 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.

(k) Post at its Lincroft, New Jersey facility copies of the attached notice marked "Appendix."⁸ Copies of the notice, on forms provided by the Regional Director for Region 22, 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

⁸ If the facility involved in these proceedings is open and staffed by a substantial complement of employees, the notices must be posted within 14 days after service by the Region. If the facility involved in these proceedings is closed due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notices must be posted within 14 days after the facility reopens and a substantial complement of employees have returned to work, and the notices may not be posted until a substantial complement of employees have returned to work. Any delay in the physical posting

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 August 1, 2018.

(l) 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 the Respondent has taken to comply.

Dated, Washington, D.C. July 9, 2020

John F. Ring, Chairman

Marvin E. Kaplan, Member

William J. Emanuel, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

of paper notices also applies to the electronic distribution of the notice if the Respondent customarily communicates with its employees by electronic means. 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."

WE WILL NOT fail and refuse to recognize and bargain with Local 32BJ, Service Employees International Union (the Union) as the exclusive collective-bargaining representative of our employees in the bargaining unit.

WE WILL NOT change your terms and conditions of employment, including but not limited to your pay, wage rate, health insurance, paid time off, vacation, and holiday benefits, without first notifying the Union and giving it an opportunity to bargain.

WE WILL NOT bypass the Union and deal directly with unit employees regarding grievances and terms and conditions of employment.

WE WILL NOT refuse to bargain collectively with the Union by failing and refusing to furnish it with requested information that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of our unit employees.

WE WILL NOT discriminate against employees based on their union-represented status.

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 with the Union as the exclusive collective-bargaining representative of our employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All service employees employed in any facility in the State of New Jersey, excluding commercial office buildings under 100,000 square feet, except that economic terms and conditions for residential buildings, hospitals, department stores, schools, charitable, educational and religious institutions, race tracks, nursing homes, theaters, hotels, shopping malls, golf courses, bowling alleys, warehouses, route work, bank branches and industrial facilities shall be set forth in riders negotiated for each location covered by this agreement.

WE WILL, before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of our employees in the bargaining unit.

WE WILL, on request by the Union, rescind the changes in the terms and conditions of employment for our unit employees that were unilaterally implemented in about August and December 2018 and July, August 2019, and on about September 23, 2018, and July 1, 2019.

WE WILL make our unit employees whole for any loss of earnings and other benefits suffered as a result of our unlawful unilateral changes in our unit employees' terms and conditions of employment made in about August and

December 2018, and July, August 2019, and on about September 23, 2018, and July 1, 2019, plus interest.

WE WILL make our unit employees whole for any loss of earnings and other benefits suffered as a result of our direct dealing with employees since about December 2018 and July, August 2019, with interest, in the manner set forth in the remedy section of this decision.

WE WILL reimburse you for any expenses ensuing from our unilateral denial of your health insurance coverage/benefits since about August 2018, plus interest.

WE WILL make all contractually required benefit fund contributions that we have failed to make since about August 2018, if any, including any additional amounts due any such funds, and WE WILL reimburse our unit employees for any expenses ensuing from our failure to make such payments, plus interest.

WE WILL compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay award(s), 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(s) to the appropriate calendar year(s) for each employee.

WE WILL furnish to the Union in a timely manner the information it requested on October 22, 2018, with the exception of employees' social security numbers.

3H SERVICE SYSTEM, INC.

The Board's decision can be found at www.nlrb.gov/case/22-CA-236583 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.

