

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

WILLIS ROOF CONSULTING, INC.

and

Case 28-CA-20852

**UNITED UNION OF ROOFERS,
WATERPROOFERS and ALLIED
WORKERS, LOCAL 162, AFL-CIO**

**GENERAL COUNSEL'S BRIEF IN OPPOSITION TO RESPONDENT'S
EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

I. INTRODUCTION

Counsel for the General Counsel (CGC) contends that the Board should reject the Respondent's purported exceptions for the reasons set forth below for each of the Respondent's arguments. As discussed below, each of the Respondent's arguments are without merit and should be rejected.

II. ARGUMENT

1. The Respondent contends that it cannot be bound by the underlying Board Order, reported at 349 NLRB No. 24 (2007), and the subsequent enforcement by the United States Court of Appeals for the Ninth Circuit, because the Respondent had not received notice. (Respondent's Exceptions Brief (R. Exc.), p. 4). The Respondent's contention that it had not received notice is false. As set forth in the General Counsel's Motion for Default Judgment, the Respondent received notice of the original complaint. Moreover, after the Board issued the underlying Order, the Respondent posted the Notice to Employees required by the Board Order, thereby reflecting that it had an opportunity to seek review of that Order. Finally, and most

importantly, the Respondent presented absolutely no evidence in support of its baseless contention that it had not received notice of the complaint, the motion for default judgment, and the Board's petition for enforcement of the Order.

2. The Respondent contends that *res judicata* does not apply when the underlying judgment is a default. (R. Exc., p. 5). In making this contention, the Respondent incorrectly cites *Arizona v. California*, 530 U.S. 392, 414 (2002), for the proposition that *res judicata* does not apply in default judgments. In that decision, the Court held that "issue preclusion" does not apply to a consent judgment but that "claim preclusion," *i.e. res judicata*, would. The Court mentioned default judgment only with regard to claim preclusion; and that is not pertinent here because: a) General Counsel and the Union contend that the Respondent is bound by the Board's judgment in this matter; and b) the Court's mention of default was dicta inasmuch as the judgment at issue in *Arizona v. California* was a consent judgment and not a default judgment. Contrary to the Respondent's contention, it is well settled that "[a] judgment of a court having jurisdiction of the parties and of the subject matter operates as *res judicata*, in the absence of fraud or collusion, even if obtained upon a default." *Morris v. Jones*, 329 U.S. 545, 550-51 (1947) (citations omitted).

The Respondent essentially contends that the ALJ should have held that the parties had not entered into a collective-bargaining agreement. The Board, however, is without power to do so inasmuch as the Board's Order of January 31, 2007, was enforced by the United States Court of Appeals for the Ninth Circuit.

Issues litigated and decided in an unfair labor practice proceeding may not be relitigated in the ensuing backpay proceeding. *Paolicelli*, 335 NLRB 881, 883 (2001) (citing *Aroostook County Regional Ophthalmology Center*, 332 NLRB 1616, 1617 (2001); *Arctic Framing*, 313 NLRB 798, 799 (1994)). Moreover, even assuming no relitigation bar, we are powerless in any event to revisit the merits and alter our Order accordingly. That Order has been enforced by the

court of appeals. Under Section 10(e) of the Act, we are without jurisdiction to modify a court-enforced Board Order. *Scepter Ingot Castings, Inc.*, 341 NLRB 997 (2004) (citing *Grinnell Fire Protection Systems Co.*, 337 NLRB 141, 142 (2001); *Regional Import & Export Trucking*, 323 NLRB 1206, 1207 (1997); *Haddon House Food Products*, 260 NLRB 1060 (1982)).

Convergence Communications, Inc., 342 NLRB 918, 919 (2004). *Accord Triple A Fire Protection, Inc.*, 353 NLRB No. 88, slip op. at 3 (2009).

3. The Respondent's contention that the Board's Order and the 9th Circuit enforcement thereof are "void for vagueness" (R. Exc., pp. 6-7) is groundless. It is common for the Board to issue an order holding that a party had violated the Act and leave the amount of the remedy to compliance. That is what has occurred here; although the ALJ, as fully discussed in CGC's exceptions and brief in support, failed to rule correctly on the extent of compliance to be ordered.

4. The Respondent contends that CGC did not meet his burden of proving the backpay and that the ALJ's award of \$2.4 million is unreasonable and arbitrary. (R. Exc., pp. 7-8). To the contrary, CGC met his burden with the testimony of compliance officer Miguel Rodriguez, who explained the basis for his compliance specification. The Respondent failed to meet its burden by failing to present the amount that it contended was due. Instead, the Respondent merely contended, as it does here, that the ALJ should ignore the Board Order and find that no agreement existed. The Respondent's argument that the ALJ's award is arbitrary is laughable inasmuch as the ALJ relied upon the Respondent's figures, to which CGC and the Union stipulated, in arriving at his decision. The ALJ's mistake was not in application of those figures for 2006 but in failing to adopt the Respondent's figures for 2007 and 2008, as well.

5. Finally, the Board should reject the Respondent's contention that it cannot abide by the Ninth Circuit enforcement of the Board's Order because the Ninth Circuit did not put the

III. CONCLUSION

For all of the reasons set forth above and in CGC's brief in support of his exceptions, the Board should reject the Respondent's purported exceptions.

Dated at Las Vegas, Nevada, this 4th day of August 2009.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the **GENERAL COUNSEL'S BRIEF IN OPPOSITION TO RESPONDENT'S EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE** in Case 28-CA-20852, was served via E-Gov, E-Filing and facsimile (with permission) on this 4th day of August 2009, on the following:

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