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CG's Lawn & Janitorial Service, LLC a*nd* Industrial Technical and Professional Employees Union, OPEIU Local 4873. Cases 15–CA–18985 and 15–CA–19144

January 4, 2010

DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBER SCHAUMBER

The General Counsel seeks a default judgment in this case on the ground that the Respondent has failed to file an answer to the consolidated complaint. Upon charges and amended charges filed by the Union, the General Counsel issued the consolidated complaint on August 31, 2009, against CG's Lawn & Janitorial Service, LLC, the Respondent, alleging that it has violated Section 8(a)(5) and (1) of the Act. The Respondent failed to file an answer.

On October 15, 2009, the General Counsel filed a Motion for Default Judgment with the Board. Thereafter, on October 20, 2009, 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[1]

Section 102.20 of the Board's Rules and Regulations provides that the allegations in the 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 consolidated complaint affirmatively stated that the answer must be received by the Regional Office on or before September 14, 2009, and that, if no answer was filed, the Board may find, pursuant to a motion for default judgment, that the allegations in the consolidated complaint are true. Further, the undisputed allegations in the General Counsel's motion disclose that the Region, by letter dated September 15, 2009, notified the Respondent that unless an answer was received by September 22, 2009, a motion for default judgment would be filed.

In the absence of good cause being shown for the failure to file an answer or a response to the Notice to Show Cause, we deem the allegations in the consolidated 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, a limited liability company with an office and place of business in Ft. Rucker, Alabama, has been engaged in the business of providing grounds maintenance services to the Federal Government at Ft. Rucker, Alabama. Annually, the Respondent, in conducting its operations described above, has provided services to the United States Government valued in excess of $50,000. Based on these business operations, the Respondent has a substantial impact on the national defense of the United States.

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 Industrial Technical and Professional Employees Union, OPEIU Local 4873, 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 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:

Curtis McDaniel	—	Owner and President
Robert Williams	—	Project Manager

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:

> Including all grounds maintenance employees employed by the Respondent at its facility located in Ft.

[1] Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Liebman and Member Schaumber constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act. See *Narricot Industries, L.P. v. NLRB*, ___ F.3d ___, 2009 WL 4016113 (4th Cir. Nov. 20, 2009); *Snell Island SNF LLC v. NLRB*, 568 F.3d 410 (2d Cir. 2009), petition for cert. filed 78 U.S.L.W. 3130 (U.S. Sept. 11, 2009) (No. 09-328); *New Process Steel v. NLRB*, 564 F.3d 840 (7th Cir. 2009), cert. granted ___ S.Ct. ___, 2009 WL 1468482 (U.S. Nov. 2, 2009); *Northeastern Land Services v. NLRB*, 560 F.3d 36 (1st Cir. 2009), petition for cert. filed 78 U.S.L.W. 3098 (U.S. Aug. 18, 2009) (No. 09-213); *Teamsters Local 523 v. NLRB*, ___ F.3d ___, 2009 WL 4912300 (10th Cir. Dec. 22, 2009). But see *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469 (D.C. Cir. 2009), petition for cert. filed 78 U.S.L.W. 3185 (U.S. Sept. 29, 2009) (No. 09-377).

Rucker, Alabama. Excluding all office clerical employees, professional employees, managerial employees, guards and supervisors as defined in the Act.

Since about 2006 and at all material times, the Union has been the designated exclusive collective-bargaining representative of the unit and, since then, the Union has been recognized as the representative by the Respondent. This recognition has been embodied in successive collective-bargaining agreements, the most recent of which was effective from April 1, 2006, until March 31, 2009.

At all times since 2006, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the unit.

1. The Respondent, by Curtis McDaniel, at the Respondent's facility:

(a) About March 2009, informed its employees that it would be futile for them to select the Union as their bargaining representative by telling them that McDaniel could do what he wanted to and the Union could not do anything to him;[2]

(b) About April 2009, solicited employees to sign a piece of paper to get rid of the Union.

2. About April or May 2009, the Respondent, by Curtis McDaniel, at the Respondent's facility, bypassed the Union and dealt directly with its employees in the unit by telling them that the Union was robbing them blind and offering to pay the employees directly the $3 an hour for their health and welfare that it was giving to the Union.

3. The Respondent, by Curtis McDaniel, at the Respondent's facility:

(a) About March 2009, told employees that the Respondent was implementing a drug-testing policy that subjected employees to termination if they refused to participate.

(b) About March, April, or May 2009, told employees that the Respondent was implementing a drug-testing policy.

(c) About April 27, and again in April or May 2009, told employees that the Respondent was giving them 1 percent of its corporation and a bonus at the end of the year.

(d) About April or May 2009, told employees that the Respondent would pay to them directly the $3 an hour for health and welfare that the Respondent was giving to the Union.

The subjects set forth above in paragraphs 2 and 3 relate to wages, hours, and other terms and conditions of employment of the unit and are mandatory subjects for the purposes of collective bargaining.

The Respondent engaged in the conduct described in paragraphs 2 and 3 without prior notice to the Union and without affording the Union an opportunity to bargain with respect to this conduct and the effects of this conduct on the unit.

CONCLUSIONS OF LAW

1. By the conduct described above in paragraph 1, the Respondent has interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act, in violation of Section 8(a)(1) of the Act.

2. By the conduct described above in paragraphs 2 and 3, the Respondent has failed and refused to bargain collectively with the exclusive collective-bargaining representative of its employees, in violation of Section 8(a)(5) and (1) of the Act.[3]

3. 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 violated Section 8(a)(5) and (1) of the Act by telling unit employees that it was implementing a drug-testing policy, that it was giving them 1 percent of its corporation and a bonus at the end of the year, and that it would pay to them directly the $3 an hour for health and welfare that it was giving to the Union, we shall order the Respondent, before implementing any changes in wages, hours, or other terms and conditions of employment, to notify and, on request, bargain in good faith with the Union as the exclusive collective-bargaining representative of the unit employees. We shall also order the Respondent to rescind the drug-testing policy that it announced about March, April, or May 2009 that it was implementing; to restore the status quo ante; and to offer any unit employees who were discharged pursuant to the policy full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to

[2] Member Schaumber notes that the Respondent's statement was made when it was contemporaneously telling employees it was implementing unilateral changes. See pars. 3(a) and (b) below.

[3] The consolidated complaint additionally alleged that the Respondent independently violated Sec. 8(a)(1) by the conduct described in par. 3. We find it unnecessary to decide whether the Respondent independently violated Sec. 8(a)(1) by this conduct, because the finding of such additional violations, being grounded on the identical facts that support the 8(a)(5) and (1) violations, would be cumulative and would not materially affect the remedy.

their seniority or any other rights or privileges previously enjoyed. Further, we shall order the Respondent to make any unit employees who were disciplined pursuant to the policy whole for any loss of earnings and other benefits suffered as a result of the Respondent's unlawful conduct, with interest. Backpay shall be computed in accordance with *F. W. Woolworth Co.,* 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). To the extent that discipline did not result in employees being separated from employment, any make-whole remedy shall be in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971). See, e.g., *Hansen Aggregates*, 353 NLRB No. 28, slip op. at 4 (2008). However, the Respondent is entitled to show, at compliance, that it would have disciplined those employees even in the absence of the unilateral implementation of the drug-testing policy, avoiding as to those employees any backpay and reinstatement obligation.[4]

The Respondent shall also be required to remove from its files and records any and all references to the unlawful discipline, and to notify the employees in writing that this has been done and that the unlawful discipline will not be used against them in any way. Although the Respondent is required to remove any record of its discipline of an employee under a changed new policy, should the Respondent establish at compliance that it would have disciplined the employee even in the absence of the unilateral implementation of the drug-testing policy, it may maintain a record of the employee's discipline. See *Uniserv*, supra.[5]

ORDER

The National Labor Relations Board orders that the Respondent, CG's Lawn & Janitorial Service, LLC, Ft. Rucker, Alabama, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Informing employees that it would be futile for them to select the Union as their bargaining representative by telling them that it can do what it wants to and the Union cannot do anything to it.

(b) Soliciting employees to sign a piece of paper to get rid of the Union.

(c) Bypassing the Union and dealing directly with unit employees on the subject of health and welfare contributions.

(d) Telling unit employees that it is implementing a drug-testing policy, that it is giving them 1 percent of its corporation and a bonus at the end of the year, and that it will pay to them directly the $3 an hour for health and welfare that it is giving to the Union, without providing the Union notice and without affording the Union an opportunity to bargain with respect to this conduct or the effects of this conduct.

(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) Before implementing any changes in wages, hours, or other terms and conditions of employment, notify and, on request, bargain in good faith with Industrial Technical and Professional Employees Union, OPEIU Local 4873, the Union, as the exclusive collective-bargaining representative of the employees in the following appropriate unit. The appropriate unit is:

> Including all grounds maintenance employees employed by the Respondent at its facility located in Ft. Rucker, Alabama. Excluding all office clerical employees, professional employees, managerial employees, guards and supervisors as defined in the Act.

(b) Rescind the drug-testing policy announced about March, April, or May 2009, and restore the status quo ante.

(c) Offer any unit employees who were discharged pursuant to the drug-testing policy full reinstatement to their former positions, or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(d) Make any unit employees who were disciplined pursuant to the drug-testing policy whole for any loss of earnings and other benefits suffered as a result of the unlawful discipline, in the manner set forth in the remedy section of the decision.

(e) Remove from its files any reference to any unlawful discipline, and within 3 days thereafter notify the employees in writing that this has been done and that the unlawful discipline will not be used against them in any way.

(f) 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, so-

[4] *Uniserv*, 351 NLRB 1361 fn. 1 (2007); *Allied Aviation Fueling of Dallas, LP*, 347 NLRB 248 fn. 3 (2006), enfd. 490 F.3d 374 (5th Cir. 2007).

[5] Because, as stated above, the Respondent will have the opportunity at compliance to show that it would have discharged or disciplined employees even absent the unilateral implementation of the drug-testing policy, the Order and notice shall not include the requirement that the expunction or reinstatement offers be completed "within 14 days of the date of the Board's Order." *Allied Aviation Fuel*, supra at 248 fn. 3.

cial 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 amounts of backpay due under the terms of this Order.

(g) Within 14 days after service by the Region, post at its facility in Ft. Rucker, Alabama, copies of the attached notice marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director for Region 15, 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. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, 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 March 2009.

(h) Within 21 days after service the Region, file with the Regional Director 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. January 4, 2010

Wilma B. Liebman, Chairman

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO MEMBERS
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 inform our employees that it would be futile for them to select the Union as their bargaining representative by telling the employees that we can do what we want to and the Union cannot do anything to us.

WE WILL NOT solicit our employees to sign a piece of paper to get rid of the Union.

WE WILL NOT bypass the Union and deal directly with our unit employees on the subject of health and welfare contributions.

WE WILL NOT tell our unit employees that we are implementing a drug-testing policy, that we are giving them 1 percent of our corporation and a bonus at the end of the year, or that we will pay to them directly the $3 an hour for health and welfare that we are giving to the Union, without providing the Union notice and without affording the Union an opportunity to bargain with respect to this conduct or the effects of this conduct.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, before implementing any changes in wages, hours, or other terms and conditions of employment, notify and, on request, bargain in good faith with the Industrial Technical and Professional Employees Union, OPEIU Local 4873, the Union, as the exclusive collective-bargaining representative of the employees in the following appropriate unit. The appropriate unit is:

Including all grounds maintenance employees employed by us at our facility located in Ft. Rucker, Alabama. Excluding all office clerical employees, professional employees, managerial employees, guards and supervisors as defined in the Act.

WE WILL rescind the drug-testing policy that we announced about March, April, or May 2009, and restore the status quo ante.

WE WILL offer any unit employees who were discharged pursuant to the drug-testing policy full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make any unit employees who were disciplined pursuant to the drug-testing policy whole for any

[6] 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."

loss of earnings and other benefits suffered as a result of the unlawful discipline, with interest.

WE WILL remove from our files any reference to any unlawful discipline and, WE WILL within 3 days thereafter notify the employees in writing that this has been done and that the unlawful discipline will not be used against them in any way.

CG'S LAWN & JANITORIAL SERVICE, LLC