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R.J. Houle Mechanical Contractors and Kenneth Modlin. Case 5-CA-31343

July 29, 2004

DECISION AND ORDER

BY MEMBERS LIEBMAN, SCHAUMBER, AND MEISBURG

The General Counsel seeks summary judgment in this case pursuant to the terms of a settlement agreement. Upon charges filed by employee Kenneth Modlin on July 14, 2003, the General Counsel issued the complaint and the amended complaint on October 27 and December 31, 2003, respectively, against the Respondent, R.J. Houle Mechanical Contractors, alleging that it has violated Section 8(a)(1) of the Act by terminating Modlin because he engaged in concerted activities. The Respondent filed an answer to the complaint and to the amended complaint.

Thereafter, the Charging Party, the Respondent, and counsel for the General Counsel entered into a settlement agreement, which was approved by Administrative Law Judge Richard A. Scully on January 30, 2004. The settlement required the Respondent to: (1) make Modlin whole by payment to him of \$20,000, with \$5000 due on March 20, 2004, and 13 payments of \$1154 due on a biweekly basis thereafter;¹ and (2) post a notice to employees regarding the complaint allegations. The agreement also contained the following further provisions:

In consideration of the Administrative Law Judge approving this Settlement Agreement, Respondent agrees that, in the event of any non-compliance to make required payments on the date specified, or to cure any such failure within fourteen (14) days of the specified payment date, the total amount of backpay (\$28,000) plus interest to date of payment shall become immediately due and payable. Respondent agrees after fourteen (14) days notice from the Regional Director of the National Labor Relations Board, on motion for summary judgment by the General Counsel, Respondent's Answer and Amended Answer to the instant Amended Complaint shall be considered withdrawn. Thereupon, the Board may issue an order requiring Respondent to show cause why said Motion of the General Counsel should not be granted. The Board may, without the necessity of trial, find all allegations of the Amended Complaint to be true, make findings of fact and conclu-

¹ The lump-sum payment of \$5000 and the 13 installment payments of \$1154 add up to \$20,002, rather than \$20,000 as indicated in the settlement.

sions of law consistent with those allegations adverse to Respondent on all issues raised by the pleadings. The Board may then issue an Order providing full remedy as specified in the Amended Complaint. The parties further agree that a Board Order and U.S. Court of Appeals Judgment may be entered thereon *ex parte*.

By letter dated March 29, 2004, the compliance officer for Region 5 advised the Respondent that it was in default of the settlement agreement because it had failed to perform any of its obligations under the agreement. The letter further advised the Respondent that to cure its default, it should, by April 2, 2004, remit the first scheduled payment of \$5000; post the notice to employees; complete and return a certificate of posting indicating where and for how long the notice was posted; expunge all references to Modlin's unlawful termination from its files; and notify Modlin that it had done this and that his unlawful termination would not be used against him in any way.

By letter dated April 6, 2004, the compliance officer again requested the Respondent to comply with the settlement agreement. The compliance officer extended the date for compliance to April 9, 2004.

By letter dated April 14, 2004, the compliance officer once again requested the Respondent to comply with the agreement, and advised that the Region would initiate summary judgment proceedings in accordance with the terms of the agreement unless the Respondent complied by April 16, 2004.

By facsimile transmission dated April 16, 2004, the Respondent returned to the Region a certificate of posting and a copy of a letter to Modlin informing him that all references to his unlawful termination were removed from its files and would not be used against him in any way. The Respondent stated that it intended to remit payments due under the settlement agreement on or about May 15, 2004.

On May 17, 2004, the Region sent a courtesy copy of the Motion for Summary Judgment to the Respondent's counsel of record, along with a letter advising that unless the Respondent complied with the settlement agreement by remitting payments due under the agreement by May 24, 2004, the motion would be filed with the Board. On the same date, the Respondent's counsel of record or her office returned the motion to the Region.

On May 19, 2004, the Region sent a courtesy copy of the Motion for Summary Judgment to the Respondent at its place of business in Rockville, Maryland, along with a letter indicating that a copy of the motion had been sent to the Respondent's legal counsel of record but was returned, and notifying the Respondent that unless it com-

plied with the settlement agreement by remitting payments due under the agreement by May 24, 2004, the motion would be filed with the Board. The Respondent did not comply.

Having received no payment from the Respondent, on May 28, 2004, the General Counsel filed a Motion for Summary Judgment with the Board. The General Counsel submits that the Respondent defaulted on the settlement agreement by failing to make required payments and that its answers should therefore be considered withdrawn. On June 4, 2004, 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 Summary Judgment

According to the uncontroverted allegations in the Motion for Summary Judgment, although the Respondent initially submitted an answer to the complaint and amended complaint, it subsequently entered into a settlement agreement, which provided for the withdrawal of the answers in the event of noncompliance with the settlement agreement. The Respondent has failed to comply with the settlement agreement by failing to pay any moneys toward the backpay, plus interest to date, which is now due and owed to the Charging Party. We therefore find that the Respondent's answers have been withdrawn by the terms of the January 30, 2004 settlement agreement, and that, as further provided in that settlement agreement, all the allegations of the complaint and amended complaint are true.²

Accordingly, we grant the General Counsel's Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a Maryland corporation with an office and place of business in Rockville, Maryland (the Respondent's facility), has been engaged in the business of mechanical contracting providing heating, air conditioning, and ventilation services and units.

During the 12-month period preceding issuance of the amended complaint, the Respondent, in conducting its business operations, sold and shipped from its Rockville, Maryland facility goods and supplies valued in excess of \$50,000 directly to points located outside the State of

Maryland and performed services valued in excess of \$50,000 in states other than the State of Maryland. During the same period, the Respondent, in conducting its business operations, sold and shipped from its Rockville, Maryland facility goods valued in excess of \$50,000 directly to International Builders, Inc., an enterprise located within the District of Columbia.

At all material times, International Builders, Inc., a Maryland corporation with an office and place of business in Washington, D.C., has been engaged in the construction industry as a general contractor.

During the 12-month period preceding issuance of the amended complaint, the Respondent, in conducting its business operations described above, provided services valued in excess of \$50,000 for International Builders, Inc., an enterprise located within the District of Columbia. During the same period, International Builders, Inc., in conducting its business operations, purchased goods and supplies at its Washington, D.C. facility in excess of \$50,000 directly from points located outside the District of Columbia, and purchased services valued in excess of \$50,000, which were furnished to it at its Washington, D.C. facility directly from points located outside the District of Columbia.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) 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:

| | | |
|-----------------|---|------------------|
| Robert J. Houle | - | President |
| George Mills | - | Superintendent |
| Troy Sakraida | - | Plumbing Foreman |

Since on or about June 6, 2003, Kenneth Modlin, the Charging Party, engaged in protected, concerted activities by discussing the Respondent's failure to pay employees overtime pay with other coworkers, and was selected by them as their spokesman to bring their complaints regarding this matter to the Respondent.

On or about June 6, 2003, the Charging Party concertedly presented employee complaints to the Respondent regarding the Respondent's failure to pay employees overtime pay.

On June 6, 2003, the Respondent terminated the employment of Modlin.

² See *U-Bee, Ltd.*, 315 NLRB 667 (1994).

The Respondent terminated Modlin because he engaged in the conduct set forth above and to discourage employees from engaging in protected concerted activities.

CONCLUSION OF LAW

By the acts and conduct described above, the Respondent has interfered with, restrained, and coerced employees in the exercise of the rights guaranteed them by Section 7 of the Act, in violation of Section 8(a)(1) of the Act. 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 take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent has violated the Act by terminating Kenneth Modlin, we shall order the Respondent to make him whole for any loss of earnings and other benefits suffered as a result of his unlawful discharge by paying him the liquidated damages amount set forth in the noncompliance clause of the settlement agreement. As described above, the settlement agreement provided that in the event of noncompliance, "the total amount of backpay (\$28,000) plus interest to date of payment shall become immediately due and payable." Accordingly, we shall order the Respondent immediately to remit to the Region \$28,000, plus interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), for payment to Modlin.

The standard Board remedies for the violation found here ordinarily also include a cease-and-desist order, reinstatement and full make-whole relief, expungement, and notice posting. However, the General Counsel's motion indicates that the Respondent has already complied with the notice posting provisions of the settlement, expunged the illegal discharge from its files, and notified Modlin that it has done so and that the discharge will not be used against him in any way. In addition, Modlin has declined the Respondent's offer of reinstatement.

Moreover, the noncompliance clause in the settlement agreement is ambiguous with regard to whether any relief is warranted beyond the payment of liquidated damages. Thus, the noncompliance clause, in addition to providing for the payment of \$28,000 plus interest in liquidated damages, provides that the Board may "issue an Order providing full remedy as specified in the Amended Complaint." However, the amended complaint does not specify any remedy. In these circumstances, we conclude that the Respondent is obligated only to pay the liquidated damages specified in the settlement agree-

ment.³ See *Bartlett Heating & Air Conditioning*, 339 NLRB No. 131 (2003)(remedy limited to liquidated damages specified in breached settlement agreement; noncompliance clause was ambiguous regarding whether other remedies would be warranted). Compare *L. J. Logistics, Inc.*, 339 NLRB No. 84 (2003)(remedy not limited to backpay amount specified in breached settlement agreement; noncompliance clause specified that the Board could issue an Order "providing a full remedy for the violations so found as is customary to remedy such violations, not limited to provisions of this Settlement Agreement").

ORDER

The National Labor Relations Board orders that the Respondent, R.J. Houle Mechanical Contractors, Rockville, Maryland, its officers, agents, successors, and assigns, shall

1. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Immediately remit \$28,000 plus interest to Region 5 to be disbursed to employee Modlin, in accordance with the terms of the settlement agreement.

³ This is consistent with the limited relief requested in the General Counsel's motion. The General Counsel requests that the Board "issue an order requiring Respondent to comply with the remaining terms of the settlement agreement by immediately paying twenty-eight thousand dollars (\$28,000), plus interest to date, to the Charging Party."

Member Liebman agrees that the limited relief requested in the General Counsel's motion is appropriate here where, as the General Counsel's motion indicates, the Respondent already has otherwise complied with the Board's full standard remedies. Compare *Bartlett Heating & Air Conditioning*, 339 NLRB No. 131 (2004), slip op. at 4-5 (dissenting opinion).

(b) Within 21 days after service by 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. July 29, 2004

Peter C. Schaumber, Member

Ronald Meisburg, Member

Wilma B. Liebman, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD