East End Bus Lines, Inc. and Floyd Bus Company, Inc., a Single Employer *and* International Brotherhood of Teamsters Local 1205. Cases 29–CA–188517 and 29–CA–194097

April 3, 2018

DECISION AND ORDER

BY CHAIRMAN KAPLAN AND MEMBERS PEARCE AND MCFERRAN

The General Counsel seeks a default judgment in this case pursuant to the terms of an informal settlement agreement. Upon a charge and amended charges filed by the International Brotherhood of Teamsters Local 1205 (the Union) on November 21, 2016, December 21, 2016, and January 12, 2017, respectively, the General Counsel issued a complaint and notice of hearing on January 30, 2017, against East End Bus Lines, Inc. and Floyd Bus Company, Inc., as a single employer (collectively, the Respondent). On March 10, 2017, based upon a second charge filed by the Union against the Respondent on March 2, 2017, the General Counsel issued an order consolidating cases, amendment to the complaint (the consolidated complaint), alleging that the Respondent violated Section 8(a)(5), (3), and (1) of the Act by, among other things, unilaterally transferring work and employees from the Respondent's Medford, New York bus yard, where employees are represented by the Union, to its Brookhaven/Yaphank, New York yard, where employees are outside of the bargaining unit.

On March 16, 2017, the Respondent and the Union entered into, and the Regional Director for Region 29 approved, a bilateral informal settlement agreement of the allegations in the consolidated complaint (the Settlement Agreement).

The Settlement Agreement contained the following provisions:

> RESTORE THE STATUS QUO — Respondent will transfer back all bus routes … charter, mid-day, and late runs that were performed by East End Bus Lines, Inc. ("East End") out of the Respondent's Medford yard ("Medford work"). Respondent agrees to follow the following schedule in effectuating the transfer of this work:
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> By March 20, 2017, Respondent will inform all current employees of Floyd Bus Company, Inc. ("Floyd") that all former Medford work will be transferred back to East End and will be performed out of the Medford yard. Respondent will solicit volunteers to transfer and perform this work as employees of East End. The employees who volunteer will begin working as employees of East End by March 27, 2017.
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> Beginning March 20, 2017, Respondent will transfer back the prior mid-day, late runs and charter work to the Medford yard. This work will only be performed by Floyd employees to the extent East End employees are not willing or available to perform the work.
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> By April 10, 2017, Respondent will fill remaining East End positions by transferring Floyd employees to East End in order of reverse seniority. Employees who were employed by First Student Inc., immediately prior to working for Floyd will be exempt from any mandatory transfer. Respondent may then fill any remaining open positions at East End with new hires. In the circumstance that Respondent is unable to fill all open positions at East End with new hires, it shall bargain in good faith with the Union. No employee transferred from Floyd to East End will have their wage rates reduced.
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> …
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> PERFORMANCE — … Respondent agrees that in case of non-compliance with any of the terms of this Settlement Agreement by the Respondent, and after 14 days' notice from the Regional Director of the National Labor Relations Board of such non-compliance without remedy by Respondent, the Regional Director will reissue the complaints previously issued on January 30, 2017, and March 10, 2017, in the instant case(s). Thereafter, the General Counsel may file a motion for default judgment with the Board on the allegations of the complaint. Respondent understands and agrees that the allegations of the aforementioned complaint will be deemed admitted and its Answer to such complaint will be considered withdrawn. The only issue that may be raised before the Board is whether Respondent defaulted on the terms of this Settlement Agreement. The Board may then, without necessity of trial or any other proceeding, find all allegations of the complaint to be true and make findings of fact and conclusions of law consistent with those allegations adverse to the Respondent on all issues raised by the pleadings. The Board may then issue an order providing for a full remedy for the violations found as is appropriate to remedy such violations. The parties further agree that a U.S. Court of Appeals Judgment may be entered enforcing the Board order ex parte, after service or attempted ser-

vice upon Respondent/Respondent at the last address provided to the General Counsel.

On May 24, 2017, the Regional Director for Region 29 informed the Respondent that it had not complied with the Settlement Agreement, listed the actions needed for compliance, and warned that, if the Respondent did not cure its noncompliance, the complaint would be reissued in accordance with the performance clause of the Settlement Agreement. In a June 8, 2017 response, the Respondent denied that it was in noncompliance, noting that although it had not returned 26 big bus routes and 14 van routes to the Medford yard, it had made every effort to solicit Floyd employees who worked out of the Brookhaven/Yaphank yard to voluntarily transfer to the Medford yard, hire new employees to fill the remaining open positions at the Medford yard, and bargain in good faith with the Union regarding the transfer of work to the Medford yard.

On July 7, 2017, the General Counsel issued a Complaint Based on Breach of Affirmative Provisions of Settlement Agreement. On July 10, 2017, in accordance with the Settlement Agreement, the General Counsel filed a Motion to Transfer Proceedings to the Board and Motion for Default Judgment with the Board. On July 13, 2017, the Board issued an Order Transferring Proceeding to the Board and Notice to Show Cause why the motion should not be granted. On July 27, 2017, the Respondent filed a Response to Notice to Show Cause and Memorandum in Support, disputing the allegation that it had breached the Settlement Agreement. On August 3, 2017, the General Counsel filed a reply to Respondent's Response to Notice to Show Cause.

The Board has delegated its authority in this proceeding to a three-member panel.[1]

Ruling on Motion for Default Judgment

The General Counsel contends that the Respondent has not returned all of the big bus and van routes to the Medford yard nor has it complied with the fourth paragraph of the "Restore the Status Quo" portion of the Settlement Agreement to transfer Floyd employees in order of reverse seniority to the Medford yard. The Respondent admits that it has not returned 26 big bus routes and 14 van routes to the Medford yard. It argues, however, that it has not failed to comply with the Settlement Agreement because some Floyd employees refused to accept transfers to the Medford yard and it was unable to hire a sufficient number of new employees to perform the work due to a general shortage of bus drivers on Long Island. In support, it submitted exhibits which show that, on March 20, 2017, it informed the Floyd employees that it would be transferring work back to the Medford yard and that it sought and obtained some volunteers for that transfer. It also submitted the following exhibits: (1) 42 "Yard Transfer Acceptance/Refusal Acknowledgement Forms" from 30 Floyd employees who refused a transfer to the Medford yard despite a warning on the form that "refusal of assigned route/transfer is equal to a voluntary resignation;"[2] (2) printouts of job postings on indeed.com advertising a $1250 signing bonus; (3) a picture of a "NOW HIRING" banner that appears to offer the same $1250 signing bonus as the online job postings;[3] and (4) a flyer offering current employees $1000 for referring a successful applicant to work at East End.

The Respondent's reliance on the refusal of the Floyd employees to accept transfers to the Medford yard is misplaced for several reasons. First, the Respondent failed to follow the terms established in the "Restore the Status Quo" portion of the Settlement Agreement, which provided that if an insufficient number of employees volunteered to transfer to the Medford yard, the Respondent "will" transfer Floyd employees in order of reverse seniority. The Respondent argues that it tried to effect those transfers but that the employees refused. A more accurate description is that the Respondent solicited volunteers to transfer and then, when that failed, decided to disregard its obligations under the Settlement Agreement. The Respondent did not transfer its least senior employees to begin working at the Medford yard as required under the Settlement Agreement; it merely asked them if they would transfer.[4]

The Respondent claims that many of its employees would have sooner quit than be transferred to the Medford yard, and if it had attempted to force the transfers as required by the Settlement Agreement and the employees did in fact resign, it would then be faced with a shortage of East End and Floyd drivers, potentially jeopardizing its ability to perform on its school bus contracts. This

[1] Member Emanuel took no part in the consideration of this case.

[2] The record shows that, on two separate occasions, the Respondent requested that 12 employees transfer to the Medford yard. The 12 employees refused the Respondent's transfer request both times. The transfer forms state that company policy treats a refusal to transfer as a voluntary resignation, but the Respondent clearly did not enforce that policy against these 12 employees after the first time they refused the Respondent's transfer request. Otherwise, the Respondent never could have requested that they transfer a second time. Moreover, even after the second refusal, there is no indication in the record that the Respondent enforced that policy.

[3] The photograph of the banner is very low resolution and most of the writing is indiscernible. The words "NOW HIRING!" and "$1250" are legible, and an image of a school bus is apparent in the picture.

[4] Because the Respondent did not actually treat refusal to transfer as resignation as the transfer forms stated, the attempted transfers were for all practical purposes voluntary, not mandatory.

assertion is highly speculative as the Respondent never attempted to fully comply with the Settlement Agreement's requirement to transfer the Floyd employees.[5] However, even if its assertion were true, it was a situation of the Respondent's own making as it voluntarily executed the Settlement Agreement in which it agreed to implement the transfers. In addition, the Settlement Agreement only came about because of the Respondent's unlawful transfer of work to Floyd and the Brookhaven/Yaphank yard in the first place.[6] It cannot now evade its obligations under the Settlement Agreement by pointing to the precariousness of a situation that is of its own creation.

In addition, the Respondent did not even comply with the timeline laid out in the Settlement Agreement, which required it to finish the process of transferring employees to the Medford yard by April 10, 2017. The Respondent's own evidence shows that it did not begin the process until more than 2 weeks after that deadline. The earliest any employees signed the forms refusing to transfer was on April 27, 2017, which was also the first day that the Regional Office contacted the Respondent for an update about its compliance with the Settlement Agreement. The Respondent provided no evidence that, prior to April 27, it made any effort to transfer employees to the Medford yard, and certainly not during the timeline it explicitly agreed to in the Settlement Agreement. Additionally, the Respondent's evidence of its attempt to hire new drivers does not render it in compliance with its obligations because the Settlement Agreement provided for filling positions with new hires only if the mandatory transfers—which the Respondent never effectuated—were insufficient.[7]

Finally, it is no defense that the Respondent complied with certain other provisions of the Settlement Agreement, such as returning the charter, mid-day, and late runs to the Medford yard. See *Midwestern Video Personnel, Inc.*, 363 NLRB No. 120 (2016) (employer defaulted when it paid only one of two required installments of backpay to a terminated employee and failed to make a required interest payment). The Settlement Agreement explicitly provides that "in case of noncompliance with any of the terms," the General Counsel will reissue the complaints and file a motion for default judgment. In addition, the noncompliance provision in the Settlement Agreement provides that "[t]he only issue that may be raised before the Board is whether Respondent defaulted on the terms of this Settlement Agreement." As described above, the Respondent has failed to comply with the Settlement Agreement. The Settlement Agreement further provides that "[t]he Board may then, without necessity of trial or any other proceeding, find all allegations of the complaint to be true and make findings of fact and conclusions of law consistent with those allegations adverse to the Respondent on all issues raised in the pleadings." Accordingly, we grant the General Counsel's Motion for Default Judgment and find, pursuant to the noncompliance provisions of the Settlement Agreement set forth above, that all of the allegations in the reissued complaint are true.[8]

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, East End has been a domestic corporation with an office and place of business located at 3601 Horseblock Road, Medford, New York, and has provided school bus transportation services for children in Suffolk County, New York.

During the 12-month period preceding reissuance of the complaint, which is representative of its annual operations in general, East End has provided services valued in excess of $250,000 to the South Country Central School District, Suffolk County, New York, an entity which is directly engaged in interstate commerce.

We find that East End has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

At all material times, Floyd has been a domestic corporation with an office and place of business at 3 Grucci Lane, Brookhaven, New York, and has been engaged in providing school bus transportation services for children in Suffolk County, New York.

Based on a projection of its operations since about August 2016, at which time Floyd commenced operations, Floyd, in conducting its business operations described above, will annually provide services valued in excess of $250,000 to the Floyd District, Suffolk County, New York, and the South Country Central School District,

[5] One could similarly speculate that the employees would have accepted the transfers rather than lose their jobs if they believed that the Respondent would actually enforce its stated policy of treating a refusal to transfer as a voluntary resignation.

[6] The Settlement Agreement did not include a nonadmissions clause.

[7] Although the Respondent submitted evidence of an attempt to hire new drivers, none of that evidence is dated. The indeed.com postings bear the date "5/31/2017" on the bottom, but that appears to be the date that the Respondent printed the ads that it submitted as evidence of compliance and not necessarily the date on which they were posted to the website. The banner and flyer are undated.

[8] See *U-Bee, Ltd.*, 315 NLRB 667, 668 (1994). Also, pursuant to the noncompliance provisions, we find that the Respondent's answer to the original consolidated complaint has been withdrawn.

Suffolk County, New York, entities which are directly engaged in interstate commerce.

We find that Floyd has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

At all material times, East End and Floyd have had substantially identical management, business purposes, operations, equipment, customers, supervision, and ownership.

At all material times, East End and Floyd have been affiliated business enterprises with common officers, ownership, directors, management, and supervision; have administered a common labor policy; have shared common premises and facilities; have provided services for each other; have interchanged personnel with each other; have interrelated operations and provide transportation to common school districts; and have held themselves out to the public as a single integrated business enterprise.

Based on the operations and conduct described above, we find that East End and Floyd constitute a single integrated business enterprise and a single employer within the meaning of the Act.

We find that, at all material times, the Union has been 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:

John Mensch (Mensch) – Owner and President
Jerri Alexander (Alexander) – Human Resources Representative

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 full-time and regular part-time drivers, monitors, mechanics, dispatchers, and maintenance workers employed by Respondent at its facility located at 3601 Horseblock Road, Medford, New York, but excluding all other employees, guards, watchmen, office clerical employees, professional employees, confidential employees, and supervisors as defined in Section 2(11) of the Act.

On February 26, 2016,[9] Region 29 of the National Labor Relations Board conducted an election in Case No. 29–RC–168266, in which a majority of the employees in the Unit selected the Union as their representative for the purposes of collective bargaining. On August 3, pursuant to a Decision and Certification of Representative issued by the Regional Director of Region 29, the Union was certified as the exclusive collective-bargaining representative of the employees in the Unit employed by the Respondent. At all material times, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the Unit.

On about January 26, the Respondent won the bid to provide bus transportation services for the William Floyd Union Free District School (Floyd School District). On about May 23, the Respondent filed for a certificate of incorporation with the New York State Department of State. On about August 11, Floyd School District and East End entered into an Indemnification Agreement whereby the Floyd School District agreed to allow East End to subcontract school bus driver services from East End to Floyd.

The Respondent engaged in the following conduct:

1. On about August 11, the Respondent, by Mensch, at a safety refresher course held in the Bellport Middle School, informed its employees that it would be futile for them to select the Union as their bargaining representative by telling unit employees that they were nonunion.

2. On about September 6, the Respondent, by Alexander, at the Medford yard, told employees that it was changing the time of employees' safety refresher course and dry-run payments because they had selected the Union as their collective-bargaining representative.

3. (a) In or around August, the Respondent transferred bargaining unit work (certain bus routes) previously performed by the Medford yard bargaining unit employees out of the Unit to Floyd's nonunit Brookhaven/Yaphank yard employees.

(b) In or around August, the Respondent transferred certain bargaining unit employees from the Medford yard out of the Unit to Floyd's nonunit Brookhaven/Yaphank yard.

(c) By the conduct described above, the Respondent has unilaterally altered the scope of the Unit

(d) The Respondent engaged in the conduct described above in paragraph 3(a) and 3(b) without the consent of the Union.

(e) Within the 6 months prior to the issuance of the Complaint Based on Breach of Affirmative Provisions of Settlement Agreement, the Respondent subcontracted

[9] Dates hereafter are in 2016, unless otherwise indicated.

certain bus routes that constitute bargaining unit work previously performed by Medford yard unit employees out of the Unit to Suffolk Transportation Corp.

4. In or around August, the Respondent reduced the work hours of the Medford yard bargaining unit employees by transferring the charter, late, and mid-day runs from the Medford yard to the Brookhaven/Yaphank yard.

5. The Respondent engaged in the conduct described above in paragraphs 3(a), 3(b), and 4 because its employees joined and supported the Union and engaged in concerted activities, and to discourage them from engaging in those or other concerted activities.

6. On or about September 9, the Respondent unilaterally changed its past practice regarding the timing of employees' dry-run and safety refresher course payments.

7. On or about September 30, the Respondent granted a 2-percent wage increase to its employees at the Medford yard.

8. The subjects set forth above in paragraphs 3(a), 3(b), 3(e), 4, 6, and 7 relate to wages, hours, and other terms and conditions of employment of the Unit and are mandatory subjects for the purposes of collective bargaining.

9. The Respondent engaged in the conduct described above in paragraphs 3(a), 3(b), 3(e), 4, 6, and 7 without prior notice to the Union and without affording the Union an opportunity to bargain with the Respondent with respect to this conduct and its effects.

CONCLUSIONS OF LAW

By telling employees that selecting the Union as their exclusive collective-bargaining representative would be futile and that the Respondent was changing the timing of payment for the safety refresher course and dry runs because the employees had selected the Union as their exclusive collective-bargaining representative, as described above in paragraphs 1 and 2, the Respondent has been interfering with, restraining, and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act in violation of Section 8(a)(1) of the Act.

By transferring bargaining unit work and employees to the nonunit Brookhaven/Yaphank yard and reducing the work hours of unit employees at the Medford yard, as described above in paragraphs 3(a), 3(b), and 4, the Respondent has been discriminating in regard to the hire or tenure or terms or conditions of employment of its employees, thereby discouraging membership in the Union in violation of Section 8(a)(3) and (1) of the Act.

By unilaterally transferring bargaining unit work and employees to the nonunit Brookhaven/Yaphank yard, altering the scope of the Unit, subcontracting bargaining unit work out of the Unit to Suffolk Transportation Corp., reducing the work hours of unit employees at the Medford yard, changing its past practice regarding the timing of employees' dry-run and safety refresher course payments, and granting a 2-percent wage increase to the employees at the Medford yard, as described above in paragraphs 3(a)-(e), 4, 6, and 7, the Respondent has been failing and refusing to bargain collectively and in good faith with the Union as the 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 take certain affirmative action designed to effectuate the policies of the Act. Specifically, we shall order the Respondent to comply with the unmet terms of the Settlement Agreement approved by the Regional Director for Region 29 on March 16, 2017.[10]

Accordingly, we shall order the Respondent to transfer back all big bus routes and van routes (South Country School District and Longwood School District) that were performed by East End out of the Respondent's Medford yard. We shall also order the Respondent to fill the East End positions by requiring the Floyd employees to transfer to East End in order of reverse seniority, except for those employees employed by First Student, Inc. immediately prior to working for Floyd. Furthermore, we shall order the Respondent to not reduce the wage rates of any employee transferred from Floyd to East End and to provide the Region with updates on the progress of the transferred work on a weekly basis until completed.

In addition, we shall order the Respondent, on request by the Union, to rescind any or all unilateral changes to employees' terms and conditions of employment.

As provided in the Settlement Agreement, to ensure that the bargaining unit employees are accorded the services of their selected bargaining agent for the period

[10] In a letter to the Respondent dated May 24, 2017 (attached as Exhibit 7 to the General Counsel's Motion for Default Judgment), the Regional Director for Region 29 notified the Respondent that it was in default of key terms of the Settlement Agreement and that, as of that date, the Respondent had failed to comply or provide evidence of its compliance with the following terms in the Settlement Agreement:(i) bargain in good faith with the Union; (ii) rescind any or all unilateral changes made to terms and conditions of employment; and (iii) transfer the work to the Medford yard in accordance with the terms of the "Restore the Status Quo" section of the Settlement Agreement. The General Counsel has indicated that the Respondent had complied with its obligation under the Settlement Agreement to restore the charter, mid-day, and late runs.

provided by law, we shall order the Respondent to bargain with the Union, and we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962) (extending the certification year for one additional year because of the employer's refusal to bargain with the union); accord *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965); *Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964).

In limiting our affirmative remedies to those enumerated above, we are mindful that the General Counsel is empowered under the default provision of the Settlement Agreement to seek "a full remedy for the violations found as is appropriate to remedy such violations."[11] However, in his Motion for Default Judgment, the General Counsel has not sought such additional remedies and we will not, sua sponte, include them.[12]

ORDER

The National Labor Relations Board orders that the Respondent, East End Bus Lines, Inc. and Floyd Bus Company, Inc., a single employer, Medford, New York, its officers, agents, successors, and assigns, shall take the following affirmative actions necessary to effectuate the policies of the Act.

1. Transfer back all bus routes (South Country School District and Longwood School District) that were performed by East End out of the Respondent's Medford yard.

2. Fill East End positions by requiring the Floyd employees to transfer to East End in order of reverse seniority, except for those employees employed by First Student, Inc. immediately prior to working for Floyd.

3. Not reduce the wage rates of any employee transferred from Floyd to East End.

4. Provide the Region with updates on the progress of the transferred work on a weekly basis until completed.

5. On request, rescind any or all changes to employees' terms and conditions of employment that were made without bargaining with the Union and reaching a good faith, valid impasse.

6. 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:

> All full-time and regular part-time drivers, monitors, mechanics, dispatchers, and maintenance workers employed by Respondent at its facility located at 3601 Horseblock Road, Medford, New York, but excluding all other employees, guards, watchmen, office clerical employees, professional employees, confidential employees, and supervisors as defined in Section 2(11) of the Act.

7. Within 21 days after service by the Region, file with the Regional Director for Region 29 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. April 3, 2018

Marvin E. Kaplan, Chairman

Mark Gaston Pearce, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[11] As set forth above, the Settlement Agreement provided that, in case of noncompliance, the General Counsel may seek, and the Board may issue "a full remedy for the violations found as is appropriate to remedy such violations."

[12] See, e.g., *Midwestern Video Personnel,* 363 NLRB No. 120, slip op. at 2–3 (2016); *Benchmark Mechanical, Inc*., 348 NLRB 576, 577 and fn. 3 (2006). The General Counsel specifically requested in his Motion for Default Judgment that the Board issue "a Decision containing findings of fact and conclusions of law based on, and in accordance with, the allegations of the Complaint, remedying such unfair labor practices, including requiring Respondent to comply with the terms of the Settlement Agreement, and granting such other relief as may be just and proper to remedy the violations described in the Complaint." We construe the General Counsel's Motion as seeking enforcement of the unmet provisions of the Settlement Agreement.