Freedom Electrical Construction LLC *and* International Brotherhood of Electrical Workers, AFL–CIO, Local 237. Case 03–CA–323884

May 31, 2024

DECISION AND ORDER

BY CHAIRMAN MCFERRAN AND MEMBERS KAPLAN AND WILCOX

The General Counsel seeks a default judgment in this case on the ground that Freedom Electrical Construction LLC (the Respondent) has failed to file an answer to the complaint. Upon a charge filed by International Brotherhood of Electrical Workers, AFL–CIO, Local 237 (the Union) on August 16, 2023, the General Counsel issued a complaint and notice of hearing on January 30, 2024, against the Respondent, alleging that it has violated Section 8(a)(5) and (1) of the Act.[1] The Respondent failed to file an answer.

On February 28, 2024, the General Counsel filed with the National Labor Relations Board a Motion for Default Judgment. On February 29, 2024, 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 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 states that unless an answer is received on or before February 13, 2024, the Board may find, pursuant to a motion for default judgment, that the allegations in the complaint are true. Further, the undisputed allegations in the General Counsel's motion disclose that the Region, by letter dated February 16, 2024, advised the Respondent that unless an answer was received by February 23, 2024, a motion for default judgment would be filed. Nevertheless, the Respondent failed to file an answer.

In the absence of good cause being shown for the failure to file an answer, we deem the allegations of the 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 has been a limited liability corporation with an office and place of business located at 6161 Karen Avenue, Newfane, New York, and has been an electrical contractor in the construction industry engaged in commercial and residential projects.

Annually, the Respondent, in conducting its business operations described above, purchases and receives at its Newfane, New York facility goods valued in excess of $50,000 directly from points outside the State of New York.

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

At all material times, the following individuals held the position 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:

Mike Morris	-	Partner
Nick Rounds	-	Foreman
Brandon Walker	-	Owner

2. 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 employees performing electrical construction work as defined in the Constitution of the International Brotherhood of Electrical Workers and as set forth in the May 30, 2022 to May 31, 2026 collective bargaining agreement between the Union and the Niagara Division, Western New York State Chapter, National Electrical Contractors Association, Inc.

3(a) At all material times, the Respondent has recognized the Union as the exclusive collective-bargaining representative of the unit. This recognition has been embodied

[1] We note that the complaint caption contains a typographical error in the Charging Party Union's name. Although the Union is properly identified in the body of the complaint as "International Brotherhood of Electrical Workers, AFL–CIO, Local 237," and the caption for both the Motion for Default Judgment and the Notice to Show Cause use this name, the complaint's caption states that the Union is "Local 337." We correct this inadvertent error here.

in successive collective-bargaining agreements, the most recent of which is effective from May 30, 2022 to May 31, 2026 (the 2022–2026 Agreement).

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

4(a) In the alternative to paragraph 3, at all material times, the Niagara Division, Western New York State Chapter, National Electrical Contractors Association, Inc. (the Association) has been an organization composed of various employers in the construction industry, one purpose of which is to represent its employer-members in negotiating and administering collective-bargaining agreements with various labor organizations, including the Union.

(b) About May 30, 2022, the Association and the Union entered into the 2022–2026 Agreement recognizing the Union as the exclusive collective-bargaining representative of the unit without regard to whether the Union's majority status had ever been established under Section 9(a) of the Act.

(c) About October 18, 2019, the Respondent, an employer engaged in the building and construction industry, signed a Letter of Assent whereby it agreed to be bound by the collective-bargaining agreement between the Union and the Association effective from May 28, 2018, to May 29, 2022 (the 2018–2022 Agreement), and agreed to be bound to such future agreements unless timely notice was given.

(d) By entering into the agreement described above in paragraph 4(c), the Respondent recognized the Union as the exclusive collective-bargaining representative of the unit without regard to whether the Union's majority status had ever been established under Section 9(a) of the Act. Such recognition has been embodied in successive collective-bargaining agreements, the most recent of which is the 2022–2026 Agreement.

5. (a) Since about summer 2021, the Respondent has failed and refused to apply the terms and conditions of the collective-bargaining agreement by failing to apply the contractual wage and fringe benefit provisions to the unit employees when they performed work for the Respondent that is covered by the collective-bargaining agreement.[2]

(b) The terms and conditions of employment described in paragraph 5(a) are mandatory subjects for the purposes of collective bargaining.

(c) The Respondent engaged in the conduct described in paragraph 5(a) without the Union's consent.

CONCLUSION OF LAW

By the conduct described above, the Respondent has been failing and refusing to bargain collectively and in good faith with 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 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) by failing and refusing, since about summer 2021, to apply the contractual wage and fringe benefit provisions of the 2018–2022 Agreement and the 2022–2026 Agreement to the unit employees when they performed work for the Respondent that is covered by the collective-bargaining agreements, we shall order the Respondent to honor and abide by the terms of the 2022–2026 Agreement, and to rescind any unilateral changes that the Respondent made to unit employees' terms and conditions of employment as a result of not applying the agreements. We shall also order the Respondent to make the unit employees whole for any loss of earnings and other benefits they may have suffered as a result of the Respondent's unlawful conduct, 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).

In addition, we shall order the Respondent to make all contractually-required fringe benefit fund contributions, if any, that were not made since summer 2021, including any additional amounts applicable to such delinquent payments in accordance with *Merryweather Optical Co.*, 240

[2] The complaint alleges a failure to continue in effect all terms and conditions of the collective-bargaining agreement since about summer 2021, more than 6 months before the filing of the charge on August 16, 2023. However, the 6-month limitations period in Sec. 10(b) of the Act is an affirmative defense that is waived if not timely raised. See, e.g., *Newspaper & Mail Deliverers' Union of New York (New York Post)*, 337 NLRB 608, 609 (2002) (citing *Public Service Co.*, 312 NLRB 459, 461 (1993)). As the Respondent has failed to file an answer to the complaint or a response to the notice to show cause and has failed to raise a 10(b) affirmative defense, we find the violation as alleged and shall issue an appropriate remedial order. See, e.g., *Malik Roofing Corp.*, 338 NLRB 930, 931 fn. 3 (2003); *J.F. Morris Co.*, 292 NLRB 869, 870 fn. 2 (1989) ("Because the Respondent failed to file any answer to the complaint, specifically one pleading the affirmative defense of Sec. 10(b) [of the Act], it obviously cannot meet what would have been its burden—to show that the Union had knowledge of the alleged unfair labor practices more than 6 months before it filed the charge. Accordingly, the violations and remedy shall be found to have commenced with the Respondent's failure to abide by the contract."), enfd. mem. 881 F.2d 1076 (6th Cir. 1989).

NLRB 1213, 1216 fn. 7 (1979). Further, the Respondent shall reimburse the unit 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. mem. 661 F.2d 940 (9th Cir. 1981). All payments to the unit employees shall 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.[3]

We shall also order the Respondent to compensate unit employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards and file with the Regional Director for Region 3, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee, in accordance with *AdvoServ of New Jersey, Inc.*, 363 NLRB 1324 (2016). In addition to the backpay allocation report, we shall order the Respondent to file with the Regional Director for Region 3 a copy of each backpay recipient's corresponding W-2 form(s) reflecting the backpay award(s). *Cascade Containerboard Packaging—Niagara*, 370 NLRB No. 76 (2021), as modified in 371 NLRB No. 25 (2021).

ORDER

The National Labor Relations Board orders that the Respondent, Freedom Electrical Construction LLC, Newfane, New York, its officers, agents, successors, and assigns shall:

1. Cease and desist from

(a) Failing and refusing to bargain collectively and in good faith with International Brotherhood of Electrical Workers, AFL–CIO, Local 237 (the Union) as the exclusive bargaining representative of its employees in an appropriate unit, by refusing to apply the terms of the 2018–2022 and 2022–2026 collective-bargaining agreements with the Union to employees in the following appropriate bargaining unit:

> All employees performing electrical construction work as defined in the Constitution of the International Brotherhood of Electrical Workers and as set forth in the May 30, 2022 to May 31, 2026 collective bargaining agreement between the Union and the Niagara Division, Western New York State Chapter, National Electrical Contractors Association, Inc.

(b) 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 in good faith with the Union as the exclusive collective-bargaining representative of the unit employees during the term of the 2022–2026 Agreement.

(b) Honor and comply with the terms and conditions of the 2022–2026 Agreement and rescind any and all changes to the unit employees' terms and conditions of employment that the Respondent implemented by not applying the 2018–2022 and 2022–2026 Agreements to the unit employees.

(c) Make the unit employees whole for any loss of earnings or other benefits suffered as a result of the Respondent's failure, since about summer 2021, to abide by and apply the terms of the 2018–2022 and the 2022–2026 Agreements to the unit employees, in the manner set forth in the remedy section of this decision.

(d) Make all contractually required contributions to the unit employees' fringe-benefit funds that it failed to make since about summer 2021, if any, including any additional amounts due the funds, as set forth in the remedy section of this decision.

(e) Reimburse the unit employees for any expenses ensuing from the Respondent's failure to make the required payments to the funds, in the manner set forth in the remedy section of this decision.

(f) Compensate the unit employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 3, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

(g) File with the Regional Director for Region 3, within 21 days of the date the amount of backpay is fixed by agreement or Board order or such additional time as the Regional Director may allow for good cause shown, a copy of each backpay recipient's corresponding W-2 forms reflecting the backpay award.

(h) 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

[3] 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.

copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(i) Post at its facility in Newfane, New York, copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 3, 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. The Respondent shall take reasonable steps 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 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 summer 2021.

(j) Within 21 days after service by the Region, file with the Regional Director for Region 3 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. May 31, 2024

Lauren McFerran, Chairman

Marvin E. Kaplan, Member

Gwynne A. Wilcox, 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.

WE WILL NOT fail and refuse to bargain collectively and in good faith with International Brotherhood of Electrical Workers, AFL–CIO, Local 237, as the exclusive representative of our employees in an appropriate bargaining unit, by failing to apply the terms of our 2018–2022 and 2022–2026 collective-bargaining agreements with the Union to employees in the following appropriate bargaining unit:

> All employees performing electrical construction work as defined in the Constitution of the International Brotherhood of Electrical Workers and as set forth in the May 30, 2022 to May 31, 2026 collective bargaining agreement between the Union and the Niagara Division, Western New York State Chapter, National Electrical Contractors Association, Inc.

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 apply the terms of the 2022–2026 Agreement with the Union to our unit employees when they perform work for us that is covered by the agreement and WE WILL, on request, bargain in good faith with the Union as the exclusive collective-bargaining representative of our unit employees during the term of the 2022–2026 Agreement.

[4] If the facility involved in these proceedings is open and staffed by a substantial complement of employees, the notice must be posted within 14 days after service by the Region. If the facility involved in these proceedings is closed or not staffed by a substantial complement of employees due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notice must be posted within 14 days after the facility reopens and a substantial complement of employees has returned to work. If, while closed or not staffed by a substantial complement of employees due to the pandemic, the Respondent is communicating with its employees by electronic means, the notice must also be posted by such electronic means within 14 days after service by the Region. If the notice to be physically posted was posted electronically more than 60 days before physical posting of the notice, the notice shall state at the bottom that "This notice is the same notice previously [sent or posted] electronically on [date]." 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 rescind any and all changes to our unit employees' terms and conditions of employment that were implemented by our not applying the 2018–2022 and 2022–2026 Agreements to the unit employees.

WE WILL make our unit employees whole for any loss of earnings and other benefits they may have suffered as a result of our unlawful failure, since summer 2021, to abide by and apply the terms of the 2018–2022 and 2022–2026 Agreements to our unit employees, with interest.

WE WILL make all contractually required contributions to our unit employees' fringe-benefit funds that we failed to make since summer 2021, if any, including any additional amounts due the funds, and WE WILL reimburse our unit employees for any expenses ensuing from our failure to make the required payments, with interest.

WE WILL compensate our unit employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file with the Regional Director for Region 3, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

WE WILL file with the Regional Director for Region 3 copies of your W-2 forms reflecting the backpay awards.

FREEDOM ELECTRICAL CONSTRUCTION LLC

The Board's decision can be found at https://www.nlrb.gov/case/ 03-CA-323884 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