Catskill Mountain Mechanical Corp. and its alter ego, Plant Maintenance Services, Inc. *and* Iron Workers Local Union No. 12, AFL–CIO. Case 3–CA–26213

June 30, 2008

DECISION AND ORDER

BY CHAIRMAN SCHAUMBER AND MEMBER LIEBMAN

The General Counsel seeks summary judgment in this case on the grounds that Respondents Catskill Mountain Mechanical Corp. (Catskill) and Plant Maintenance Services, Inc. (Plant) have failed to answer the essential allegations in the complaint.

Pursuant to a charge filed by Iron Workers Local Union No. 12, AFL–CIO (the Union) on February 28, 2007,[1] as amended on April 23, the General Counsel issued a complaint and notice of hearing on June 25. The complaint alleged that Respondent Catskill was bound to a 2003–2006 collective-bargaining agreement with the Union, and a May 1, 2006–April 30, 2009 successor to that agreement. The complaint further alleges that the Respondents are alter egos and, as such, have violated: Section 8(a)(5) of the Act by failing to follow or apply the provisions of the 2006–2009 collective-bargaining agreement; repudiating that collective-bargaining agreement; diverting the bargaining unit; and failing to provide necessary and relevant requested information to the Union; Section 8(a)(3) by laying off employees based on their union activities and discriminating in regard to the hire and tenure of their employees; and Section 8(a)(1) by informing employees that they were being laid off due to their union activities and by otherwise interfering with and restraining employees in the exercise of their Section 7 rights.

On July 9, the Respondents filed separate answers to the complaint, addressing each numbered (and lettered) complaint allegation and specifically denying or denying knowledge of the commission of all of the unfair labor practices alleged. In particular, the Respondents denied: repudiating the collective-bargaining agreement; failing to provide information to the Union; operating as alter egos; discriminating against employees in regard to hire and tenure or terms or conditions of employment; laying off employees based on their union involvement; informing employees that they were laid off due to their union activities; and otherwise interfering and restraining employees in the exercise of their Section 7 rights. Each Respondent also denied knowledge of any allegations pertaining to the activities of the other.

[1] All dates hereafter are 2007, unless otherwise indicated.

Thereafter, on March 21, 2008, the Respondents each filed amended answers admitting certain facts not previously admitted and raising affirmative defenses. Specifically, Catskill admitted the charge date; information regarding its corporate structure; its being engaged in commerce; and the Union's status as a labor organization. Catskill also raised certain affirmative defenses, including its status as a legal entity separate and distinct from Plant, its cessation of business and inability to pay any monetary remedy due to financial hardship, and its substantial compliance with the collective-bargaining agreement's jurisdiction requirements.[2] Aside from the admissions and defenses above, Catskill's amended answer did not reassert its original answer's denials of the remaining allegations.

Plant's amended answer admitted the charge date; its gross revenue; being engaged in commerce; and certain individuals' performance of management functions for both Catskill and Plant. Plant's amended answer also raised essentially[3] the same affirmative defenses as Catskill, including its status as a separate and distinct legal entity from Catskill. Plant also asserted as an affirmative defense that it is not a signatory or party to a collective-bargaining agreement with the Union. Plant's amended answer like Catskill's, did not reassert the denials in its original answer to the remaining allegations.

On April 8, 2008, the General Counsel filed a motion to transfer the case to the Board and for summary judgment, and a memorandum in support. The General Counsel contends in his motion that the Respondents' failure, in their amended answers, to address each allegation in the complaint "demonstrates that the[ir] failure to [do so] was a deliberate admission, analogous to a withdrawal of an answer." The General Counsel further argues that the Respondents' affirmative defenses are not legally cognizable.

[2] Specifically, Catskill asserted the following affirmative defenses: (1) it has ceased operations; (2) it ceased operations more than 1 year prior to its amended answer due to Federal and State tax liens, judgments, and threatened existing lawsuits; (3) it is financially unable to comply with any affirmative monetary remedy; (4) it is a separate and distinct legal entity from Plant and, upon information and belief, Plant performs the majority of its work outside of New York; (5) it laid off certain employees because of finances; (6) certain work performed within the Union's jurisdiction was performed by other union trade groups; (7) its work was primarily technical in nature and, upon information and belief, Plant's work within the Capital District was limited and Plant performs more general service primarily outside the Capital District; (8) it is engaged in discussions with the Union's benefit fund; and (9) in light of its cessation of operations and finances, dismissal of the complaint is warranted in the interests of judicial economy.

[3] Whereas Catskill raised as an affirmative defense that it "has ceased operations for all purposes," Plant raised as an affirmative defense that it "has operated at a loss and may cease operations for all purposes."

On April 17, 2008, the Board issued an Order transferring the proceeding to the Board and a Notice to Show Cause why the Motion for Summary Judgment should not be granted. Neither Respondent filed a response.[4]

Ruling on Motion for Summary Judgment[5]

Section 102.56(c) of the Board's Rules provides that unless the respondent states it is without knowledge, any allegation not specifically denied or explained in an answer, "shall be deemed to be admitted to be true, and may be so found by the Board without the taking of evidence supporting such allegation, and the respondent shall be precluded from introducing any evidence controverting the allegation."

In his Motion for Summary Judgment, the General Counsel argues that the Respondents failed to comply with these rules by failing to specifically deny or explain in their amended answers each of the General Counsel's complaint allegations. The General Counsel contends that the Respondents' failure to do so was a deliberate admission, analogous to a withdrawal of their original answers. We disagree.

In accordance with the Board's Rules, the Respondents' original answers sufficiently deny or deny knowledge of each of the unfair labor practice allegations. Indeed, the General Counsel does not contend that the Respondents' original answers were deficient. Rather, the General Counsel contends that, by failing to readdress all of the complaint allegations in their amended answers, the Respondents effectively admitted those allegations. However, Section 102.45(b) of the Board's Rules provides that the record is made up of, among other things, the "answer and any amendments thereto." Thus, the Respondents' original answers remain before us. Further, there is no evidence that the Respondents' amended answers were intended to replace their original answers in their entirety or that, as the General Counsel contends, the Respondents intended to withdraw their original answers.[6]

By their own terms, the Respondents' amended answers do not amount to admissions of unfair labor practice allegations; they only admit certain nonsubstantive allegations such as service of the charge, gross revenue, interstate commerce, and the Union's status as a labor organization. Although Plant's amended answer admits that its supervisors performed management functions at Catskill, this alone does not establish that Plant and Catskill are alter egos.[7] Furthermore, the affirmative defenses in the Respondents' amended answers raise supplementary defenses that are compatible with the Respondents' previous denials, including the defenses that they are separate legal entities and that Plant is not a signatory to a collective-bargaining agreement with the Union.

In sum, the Respondents' original and amended answers should be taken together, and, in combination, they deny with sufficient specificity the allegations in the complaint. Because the Respondents' answers raise questions of fact and law that require resolution through a hearing before an administrative law judge, we shall deny the General Counsel's Motion for Summary Judgment.[8]

ORDER

IT IS ORDERED that the General Counsel's Motion for Summary Judgment is denied and the proceeding is remanded to the Regional Director for Region 3 for the purpose of issuing a notice of hearing and scheduling a hearing before an administrative law judge.

[4] The Respondents' failure to respond to the Notice to Show Cause signifies that the allegations in the General Counsel's motion are undisputed. However, this does not resolve whether summary judgment is appropriate; that depends on the sufficiency of the Respondents' answers. See generally *Caribe Cleaning Services*, 304 NLRB 932 (1991); *Nottingham Restaurant*, 243 NLRB 567 (1979).

[5] 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 Schaumber and Member Liebman 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.

[6] The General Counsel relies on *Countrywide Landfill*, 352 NLRB No. 3 (2008) (not published in Board volumes), to support his contention that the Respondents' failure to readdress the complaint allegations in their amended answers was a deliberate admission. In *Countrywide Landfill*, however, the respondent explicitly withdrew its answer and filed no additional answer. Id. In contrast here, the Respondents did not withdraw their original answers when filing their amended answers and, as noted above, gave no indication that the amended answers were intended to replace rather than supplement their original answers.

[7] The Board will find alter ego status where two entities have "substantially identical" management, business purpose, operations, equipment, customers, supervision, and ownership. *Crawford Door Sales*, 226 NLRB 1144 (1976).

[8] In light of our finding that the Respondents' answers sufficiently raise questions of fact and law, we find it unnecessary to address the General Counsel's additional contention that the Respondents' affirmative defenses are not legally cognizable. That contention depends on the resolution of material issues of fact best resolved at a hearing before an administrative law judge.