

**Carmody, Inc. and District Council for New York City and Vicinity, United Brotherhood of Carpenters and Joiners of America.** Case 2-CA-31106

March 31, 1999

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS  
LIEBMAN AND BRAME

Upon a charge filed by the Union on December 23, 1997, the General Counsel of the National Labor Relations Board issued a complaint on June 17, 1998,<sup>1</sup> against Carmody, Inc., the Respondent, alleging that it has violated Section 8(a)(1) and (5) of the National Labor Relations Act. Although properly served copies of the charge and complaint, the Respondent failed to file an answer.

On October 20, the General Counsel filed a Motion for Summary Judgment with the Board. On October 26, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. On November 17, the Respondent filed an answer to the complaint, and a request that the Motion for Summary Judgment be withdrawn as moot. On December 4, the Respondent filed a response to the Notice to Show Cause, in the form of an affidavit of Michael Giannasca, self-described as an employee of the Respondent with management responsibilities, in opposition to the Motion for Summary Judgment.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

Sections 102.20 and 102.21 of the Board's Rules and Regulations provide that the allegations in the complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint,<sup>2</sup> unless good cause is shown. In addition, the complaint states that unless an answer is filed within 14 days of service, all the allegations in the complaint shall be deemed to be admitted to be true and shall be so found by the Board. Further, the undisputed allegations in the Motion for Summary Judgment disclose that the Region, by letter dated September 18, notified the Respondent that unless an answer were received by October 2, a Motion for Summary Judgment would be filed.

In his affidavit in opposition to the Motion for Summary Judgment, Giannasca offers the following statement of facts and explanation (summarized here) for why the Respondent did not file a timely answer to the complaint.<sup>3</sup> Giannasca is solely responsible for managing and coordinating the Respondent's legal affairs and for the timely handling, coordination, and disposition of all

required legal filings, including those of the National Labor Relations Board. Although the complaint was served upon the Respondent on June 17, he did not receive personal notice of the complaint until early November,<sup>4</sup> apparently, according to Giannasca, because of his being absent from the Respondent's Mt. Kisco, New York office for "a vast majority of the time" between June and early November. This absence was due to a great number of personal and family problems that he was experiencing, including the death of three grandparents, one in June, and the other two on July 17 and October 30, respectively; the illness and required care of the latter two grandparents, which required him to be out of New York for periods of time; and other illnesses and problems within his family, about which, because of their personal nature, Giannasca has chosen not to elaborate. Giannasca's two grandparents who lived in Florida were very ill prior to their deaths, and required a great deal of care, support, and assistance in their personal affairs, which were predominantly in Florida. Consequently, Giannasca's presence was required in Florida at different periods of time both before and after his grandmother's death on July 17. Following his grandmother's death, his grandfather moved from Florida to live with Giannasca in New York. His grandfather eventually became bed ridden and required daily care and assistance until his death on October 30. Because of the above circumstances, Giannasca's attention and attendance were diverted away from his office and his job, resulting in his not being aware of the complaint and his filing of a late answer to it. Giannasca asserts that because the Respondent has now filed an answer to the complaint, "albeit late with good cause shown," genuine issues of fact have been raised, and the General Counsel's Motion for Summary Judgment should be denied. For the reasons discussed below, we find that the Respondent has not established good cause for failing to file a timely answer.

The Respondent, through Giannasca's affidavit, contends that Giannasca's preoccupation with his personal problems constitutes good cause for the Respondent's failure to file a timely answer to the complaint. We find no merit in this argument. We sympathize with the very difficult personal problems confronting Giannasca between June and November. There is, however, no evidence, or even a contention, that the Respondent was not

<sup>1</sup> All dates are 1998, unless otherwise stated.

<sup>2</sup> The instant complaint was served on June 17.

<sup>3</sup> Neither the General Counsel nor the Union filed a response to Giannasca's affidavit in opposition to the Motion.

<sup>4</sup> The June 17 complaint and the Region's September 18 letter were both served by certified mail at the Respondent's business address, marked "Attention: Biagio Cantisani." In its November 17 answer to the complaint, the Respondent admits that Cantisani was the Respondent's president at all material times herein, but denies, inter alia, that Cantisani has been an agent of the Respondent acting on its behalf. The green certified mail return receipt cards for service of the complaint and service of the letter are dated June 19 and September 21, respectively. Both cards are signed by P. Hickey, who is not further identified in the record.

conducting business throughout the time in question.<sup>5</sup> Indeed, it is undisputed that both the June 17 complaint and the Region's September 18 letter, addressed to the Respondent, attention its president, Biagio Cantisani, at the Respondent's Mt. Kisco place of business, were received by the Respondent. So far as the record shows, the Respondent was engaged in normal, ongoing business operations during the 15-week period between June 17–October 2. During that period it could have made arrangements necessary for the timely filing of an answer to the complaint, or, at the very least, contacted the Regional Office to request an extension of time to file an answer.<sup>6</sup> It did not do so and offers no satisfactory explanation for failing to do so. The Respondent cannot vest its obligations under the National Labor Relations Act in a particular employee and then be absolved of the effects of failing to meet such responsibilities on the ground that that employee has been preoccupied by personal problems.<sup>7</sup>

Thus, we find that the Respondent's explanations do not constitute a showing of good cause for its failure to file a timely answer to the complaint. Accordingly, we

<sup>5</sup> Paragraph 2(a) of the complaint alleges, inter alia, that "[a]t all material times Respondent . . . has been involved in the building and construction industry, including at job sites located in and around New York, New York." In its belated November 17 answer to the complaint, the Respondent admits that it "is a corporation with an office and place of business at Mt. Kisco, New York and has been involved in the building and construction industry," but denies the rest of paragraph 2(a). Nevertheless, in his subsequent December 4 affidavit in opposition to the Motion for Summary Judgment, Giannasca does not explain the Respondent's answer to this paragraph, and does not otherwise assert that the Respondent was not conducting business during the time in question.

<sup>6</sup> It has long been established that an employer must apply no lesser degree of "diligence and promptness" in NLRRA matters than in "other business affairs of importance." *J. H. Rutter-Rex Mfg. Co.*, 86 NLRB 470, 506 (1949).

<sup>7</sup> See *Day & Zimmerman Services*, 325 NLRB 1046 (1998) (critical and near fatal illness and 4-month hospitalization of father of respondent's consultant, and consultant's subsequent erratic schedule do not constitute good cause for failure to file a timely answer to complaints); *U.S. Telefactores*, 293 NLRB 567 (1989) (attorney's illness and unusually heavy workload do not constitute good cause for respondent's failure to file timely answer); *Lee & Sons Tree Service*, 282 NLRB 905 (1987) (preoccupation of respondent's owner with other aspects of respondent's business does not constitute good cause for respondent's failure to file timely answer); *Urban Laboratories, Inc.*, 249 NLRB 867 (1980) (preoccupation of respondent's president with a bitter stockholder dispute that consumed nearly all his time does not constitute good cause for respondent's failure to file timely answer); *PM Cartage Co.*, 216 NLRB 688 (1975) (owner's 15–20 hour daily work schedule does not constitute good cause for respondent's failure to file timely answer); *Ancorp National Services*, 202 NLRB 513 (1973), *enfd. mem.* 502 F.2d 1159 (1st Cir. 1973) (absence of respondent's vice president in charge of labor relations due to illness, and inadvertent filing of unanswered complaint does not constitute good cause for respondent's failure to file timely answer).

The Respondent also argues that it is engaged in settlement efforts. However, the "possible settlement of a case does not provide an exemption from the requirement to file an answer." *Sorenson Industries*, 290 NLRB 1132, 1133 (1988).

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 corporation with an office and place of business in Mt. Kisco, New York, has been engaged in the building and construction industry, including at jobsites located in and around New York, New York. Annually, the Respondent, in conducting its business operations described above, sells goods and services valued at more than \$50,000 to public utilities, transit systems, newspapers, health care institutions, broadcasting stations, commercial buildings, educational institutions, and/or retail concerns which meet a direct standard for the assertion of jurisdiction. 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

The following employees of the Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All carpenters, joiners, and all other covered employees as defined in the Independent Building Construction Agreement, employed by Respondent within the jurisdiction of the Union as defined in the Independent Building Construction Agreement.

On or about November 1, 1996, the Respondent, by its president and agent, Biagio Cantisani, executed an Interim Compliance Agreement (the Agreement) with the Union whereby it agreed to execute the successor agreement to be negotiated by the Union with the Associations (see below) whose members perform work similar to the work performed by the Respondent.

Based on its execution of the Agreement, the Respondent, an employer engaged in the building and construction industry, granted recognition to the Union as the exclusive collective-bargaining representative of the unit employees without regard to whether the majority status of the Union had ever been established under the provisions of Section 9(a) of the Act.

At all times since November 1, 1996, the Union has been the limited exclusive collective-bargaining representative of the unit.

In around October 1996, the Union and the Building Contractors Association, Inc., the Association of Wall-Ceiling & Carpentry Industries of Long Island and New York, Inc., and the Cement League (collectively, the Associations), executed a Building Construction Agreement, effective by its terms from 1996 to 2001.

On or about October 28, 1996, and November 12, 1997, the Union, by letter, requested that the Respondent sign and return the successor agreement executed by the Union and the Associations in around October 1996. Since on or about October 28, 1996, the Respondent has failed and refused to execute the successor agreement described above.

#### CONCLUSION OF LAW

By the acts and conduct described above, the Respondent has been failing and refusing to bargain collectively and in good faith with the limited exclusive collective-bargaining representative of its employees within the meaning of Section 8(d) of the Act, and has thereby engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5) and 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 has failed and refused to execute the collective-bargaining agreement executed by the Union and the Associations, we shall order the Respondent to execute that agreement, give retroactive effect to that agreement, and make its employees whole for any losses attributable to the Respondent's failure to execute the agreement. Backpay shall be computed in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), *enfd.* 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

#### ORDER

The National Labor Relations Board orders that the Respondent, Carmody, Inc., Mt. Kisco, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain in good faith with District Council for New York City and Vicinity, United Brotherhood of Carpenters and Joiners of America, as the limited exclusive representative of the employees in the bargaining unit set forth below, by failing and refusing to execute the successor collective-bargaining agreement executed in or around October 1996 by the Union and the Building Contractors Association, Inc., the Association of Wall-Ceiling & Carpentry Industries of Long Island and New York, Inc., and the Cement League. The unit is:

All carpenters, joiners, and all other covered employees as defined in the Independent Building Construction Agreement, employed by Respondent within the jurisdiction of the Union as defined in the Independent Building Construction Agreement.

(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) Execute and implement the collective-bargaining agreement executed by the Union and the Associations in or around October 1996, give retroactive effect to that agreement, and make the unit employees whole for any losses they have suffered as a result of the Respondent's failure to execute the agreement, with interest, in the manner set forth in the remedy section of this decision.

(b) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Within 14 days after service by the Region, post at its facility in Mt. Kisco, New York, copies of the attached notice marked "Appendix."<sup>8</sup> Copies of the notice, on forms provided by the Regional Director for Region 2, 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 October 28, 1996.

(d) 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.

#### 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 the National Labor Relations Act and has ordered us to post and abide by this notice.

<sup>8</sup> 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 NOT fail and refuse to bargain in good faith with District Council for New York City and Vicinity, United Brotherhood of Carpenters and Joiners of America, as the limited exclusive representative of the employees in the bargaining unit set forth below, by failing and refusing to execute the successor collective-bargaining agreement executed by the Union and the Building Contractors Association, Inc., the Association of Wall-Ceiling & Carpentry Industries of Long Island and New York Inc., and the Cement League in or around October 1996. The unit is:

All carpenters, joiners, and all other covered employees as defined in the Independent Building Construction Agreement, employed by Respondent within the juris-

diction of the Union as defined in the Independent Building Construction Agreement.

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 execute and implement the collective-bargaining agreement executed by the Union and the Associations in around October 1996, give retroactive effect to that agreement, and make the unit employees whole for any losses they have suffered as a result of the Respondent's failure to execute the agreement, with interest.

CARMODY, INC.