

Metropolitan Regional Council of Philadelphia and Vicinity of the United Brotherhood of Carpenters and Joiners of America and R.M. Shoemaker Co. Cases 4–CC–2203–2, 4–CC–2220–2, 4–CC–2241–1, and 4–CC–2241–3

December 5, 2000

ORDER

R.M. Shoemaker Co.’s Rule 102.111(c) Motion to Consider as Timely its Answering Brief to the General Counsel’s Exceptions to the Decision of the Administrative Law Judge is denied.

The Board’s so-called “postmark rule” expressly sanctions the filing of documents by delivery service, even if they do not arrive on the due date, *provided* that the documents are deposited with the delivery service no later than the day before the due date. In this case, however, under the rubric of the so-called “excusable neglect” Rule, the Charging Party requests that we accept its answering brief, which was deposited with a delivery service on the day it was due, and did not arrive until the next day. This interpretation of “excusable neglect” undermines the “postmark rule” as it applies to filing by delivery service.

The facts, as set forth in the affidavit in support of the Charging Party’s motion, are straightforward. The General Counsel filed timely cross-exceptions to the administrative law judge’s decision on October 3, 2000. Pursuant to Section 102.46(d)(1) of the Board’s Rules and Regulations, any answering brief to those cross-exceptions was due 14 days later, or October 17, 2000. The Charging Party’s counsel delivered the answering brief to the U.S. Airways PDQ service at Philadelphia National Airport at approximately 11:45 am on October 17, 2000, for placement on a 12:49 p.m. flight to Washington, D.C., where it was to be picked up by a ground delivery service upon the flight’s scheduled arrival at 2 p.m., for delivery to the Board’s offices by the close of business that day. For some reason, however, the document did not make it to Washington on the flight that arrived at 2 p.m. Instead, it arrived on another flight at 5:05 p.m., after the close of business of the Board’s Washington office, and was not delivered until 9:20 am the next day, October 18, 2000, 1 day after the document was due.

The Board’s general Rule is that “[w]hen the Act or any of these Rules require the filing of a motion, brief, exception, or other paper in any proceeding, such document must be received by the Board or officer or agent designated to receive such matter before the official closing time of the receiving office on the last day of the time limit, if any, for such filing” NLRB Rules and

Regulations, § 102.111(b). This general Rule is modified by what has become known as the “postmark rule,” which provides that “[i]n construing this section of the rules, the Board will accept as timely filed any document which is hand delivered to the Board on or before the official closing time of the receiving office on the due date *or* postmarked on the day before (or earlier than) the due date; documents which are postmarked on or after the due date are untimely. “Postmarking” shall include timely depositing the document with a delivery service that will provide a record showing that the document was tendered to the delivery service in sufficient time for delivery by the due date, *but in no event later than the day before the due date.*” *Id.* (Emphasis added.)

The “postmark rule” was issued in 1986, and it was, in fact, a codification of longstanding practice that was based on the Board’s decision in *Rio de Oro Uranium Mines, Inc.*, 119 NLRB 153 (1957). See 51 F.R. 23744, 23745 (July 1, 1986). In *Rio de Oro*, the Board accepted objections to an election that the employer deposited for mailing by airmail, registered, special delivery, on the day before the due date, but that did not arrive until the day after the due date. The Board held that, in those circumstances, the employer “took every precaution necessary” to assure that the objections would be received by the due date. *Id.*, 119 NLRB at 154. The Board thereafter continued to accept documents that were postmarked the day before the due date, but the practice was not codified in the Rules. In 1984, the District of Columbia Circuit, noting that the Board’s Rules did not clearly define what constitutes timely “filing” of a document, reversed the Board’s decision to reject exceptions to an administrative law judge’s decision which were mailed on the date that they were due. *NLRB v. Washington Star Co.*, 732 F.2d 974. The court held that “[i]f the Board articulates its reasons for a strict rule that requires filings to be in hand on the due date and announces that it will apply this rule uniformly or with specific stated exceptions then this court would be obliged to defer to the Board’s discretion and authority.” *Id.* at 977. The Board issued Section 102.111(b) in 1986, in direct response to this invitation by the D.C. Circuit in the *Washington Star* case to “specifically define what constitutes filing.” 51 F.R. at 23745.

It is abundantly clear that Section 102.111(b) was intended to comply with the D.C. Circuit’s suggestion to put in place a “strict rule that requires filings to be in hand on the due date . . . with specific stated exceptions,” one of those exceptions being the so-called “postmark rule.” The Board adopted this Rule in order to avoid what the Court called the Board’s “sometimes-yes, sometimes-no, sometimes-maybe policy of due dates,” i.e., its

inconsistent application of Rules regarding when documents are due and when they are not (*NLRB v. Washington Star*, supra, 732 F.2d at 977), and to provide parties with clear guidance as to when their documents are due. In 1991, the Board further modified the “postmark rule” to define the phrase “postmarking” to mean timely depositing documents with a delivery service that will provide a record showing that the document was tendered to the delivery service in sufficient time for filing by the due date, but in no event any later than the day before the due date. 56 F.R. 49141, 49142 (Sept. 27, 1991). See *John I. Haas, Inc.*, 301 NLRB 300, 301 fn. 6 (1991).

When the Board added this delivery service gloss to the “postmark rule,” it was undoubtedly aware of the existence of “same day” air delivery services like that used by the Charging Party in this case. Nevertheless, it chose to include explicit language which states that a document delivered to a delivery service will “in no event” be considered to be timely filed if it is either not received on the due date or if it is not delivered to the delivery service at least one day before it is due. The Rule could not be more clear, and only one conclusion can be drawn from this very explicit language: a party acts at its peril if it delivers a document to a delivery service on the same day that it is due. If it arrives before the close of business on that day, it will be accepted as timely, but if it does not, it will not be considered timely. This Rule serves the laudable purpose of discouraging parties, or their attorneys, from waiting, almost literally, until the eleventh hour to file documents. The provision also affords parties the certainty and consistency requested by the D.C. Circuit as to when a document will and will not be considered timely if it is filed by way of a delivery service.

Given the express language and the origins of this provision, the “excusable neglect” Rule does not govern this case. Under that Rule, certain documents (including the answering brief filed by the Charging Party in this case) “may be filed within a reasonable time after the time prescribed by these rules only upon good cause shown based on excusable neglect and when no undue prejudice would result.” Section 102.111(c) of the Rules and Regulations. In this case, the Charging Party’s answering brief was not placed on the intended flight, and thus did not arrive as scheduled. Certainly, that “neglect” was not the Charging Party’s fault, and thus was “excusable” in that sense. But, the *Charging Party did* neglect to deliver the answering brief to a delivery service at least a day before it was due. The Charging Party has not argued, or offered any reason to conclude, that its failure to deposit the answering brief with the delivery service on the day before the due date was based on excusable ne-

glect. The Charging Party, which is charged with knowledge of all of our Rules, therefore acted at its peril and assumed the risk that the “same-day” delivery service would not deliver the answering brief by close of business on the due date. Thus, we cannot accept that answering brief as a timely filed document because it was neither received by close of business on the due date nor deposited with a delivery service at least one day prior to that due date.

MEMBER HURTGEN, dissenting.

I would grant the Charging Party’s request for a 1-day extension of the due date for the receipt of its answering brief. No party opposes this request. Despite this, my colleagues reject the request. I disagree.

In brief, the facts are as follows. The brief was due on October 17 at 5 p.m. The Charging Party delivered it to the delivery service at 11:45 a.m. on October 17. The delivery service was to place the brief on a plane scheduled to arrive in Washington at 2 p.m., i.e., in time for delivery to the Board before 5 p.m. For unexplained reasons, but through no fault of the Charging Party, the brief did not reach the Board until 9:20 a.m. the next morning.

My colleagues reject the brief because the Charging Party did not comply with the “postmark rule,” i.e. the brief was not delivered to the delivery service on the day before the due date.

The Charging Party asks the Board to accept the brief. The Charging Party relies expressly on Section 102.111(c) of the Board’s Rules, the “excusable neglect” provision. For the reasons set forth below, I would accept the brief.

I believe that my colleagues have effectively ignored the “excusable neglect” Rule. I have applied it in the instant case. Under that analysis, I assume arguendo that the Charging Party’s failure to give the brief to the delivery service before the due date was “neglectful.” However, under the “excusable neglect” Rule, that is not the end of the inquiry. Rather, the Board must consider whether that neglect was “excusable.” I conclude that it was excusable. The Charging Party gave the brief to the delivery service at a time when it could reasonably be expected that the brief would be received by the Board on time. Indeed, but for the failure of others, the brief would have been received on time. In these circumstances, I would find that the Charging Party’s “neglect” was excusable.

My colleagues say that there can be no excuse in this case because the Charging Party failed to give the document to the delivery service prior to October 17. But that analysis makes no sense. If the document had been given to the delivery service before October 17, the

document would have been received as timely; the “excusable neglect” rule would not come into play at all. Obviously, the “excusable neglect” rule only comes into play where there is a *failure* to comply with NLRB Rules. My colleagues therefore err when they fail to apply the “excusable neglect” rule to the instant case.

My conclusion is not inconsistent with *NLRB v. Washington Star*, 732 F.2d 979 (1984). In that case, the court told the Board that it could choose to have a strict “due date” requirement. However, the Board subsequently chose to have an exception to its “due date” requirement, i.e., the Board has chosen to receive late documents if the filing thereof is the result of excusable neglect. My colleagues nonetheless ignore the exception in this case, and thereby flout the Board’s own Rule.

Further, my position does not render the “postmark” rule a nullity as it applies to delivery services. If a party delivers a document to a delivery service so late that it cannot reasonably be expected to arrive at the Board on time, the document should be rejected as untimely. That is not this case.

Finally, as noted above, no party opposes the request for an extension of time. In my view, that fact reflects a practice of civility among these attorneys, which civility ought to be encouraged. My colleagues effectively undercut that practice.

Based on all of the above, I dissent.