

Robert W. Lockhart, d/b/a Lockhart Concrete and Local Lodge 1363, District Lodge 54 a/w International Association of Machinists and Aerospace Workers, AFL-CIO. Case 8-CA-31765

October 31, 2001

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS
LIEBMAN
AND WALSH

Upon a charge filed by the Union on July 19, 2000, and an amended charge filed on October 12, 2000, the General Counsel of the National Labor Relations Board issued a complaint on November 27, 2000, against Robert W. Lockhart, d/b/a Lockhart Concrete, the Respondent, alleging that it has violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act. Although properly served copies of the charge, as amended, and the complaint, the Respondent failed to file a timely answer.

On February 5, 2001,¹ the Acting General Counsel filed a Motion for Summary Judgment with the Board. On February 7, 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 February 9, the Respondent, pro se, sent a letter to the Regional Director for Region 8, purporting to answer the allegations of the complaint. On February 20, the Respondent, pro se, filed a motion for leave to file answer and retransfer proceeding for hearing. On March 6, the Acting General Counsel filed an opposition to Respondent's motion for leave to file answer. The Respondent, through counsel, filed an answer on March 22, and a reply to the Acting General Counsel's opposition on March 27.

Ruling on Motion for Summary Judgment

Section 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, unless good cause is shown. In addition, the complaint affirmatively notes that unless an answer is filed within 14 days of service, all the allegations in the complaint will be considered admitted. Further, the undisputed allegations in the Motion for Summary Judgment disclose that the Region, by letter dated January 11, notified the Respondent that unless an answer was received by January 22, a Motion for Summary Judgment would be filed. Thereafter, the Respondent neither filed an answer to the complaint nor requested an extension of time to do so.

Following the Acting General Counsel's February 5 Motion for Summary Judgment and the Board's February 7 Notice to Show Cause, the Respondent, pro se, sent a letter to the Regional Director on February 9, purporting to answer the complaint. This letter contains no explanation as to why it was untimely filed. Nor does this letter explain why the Respondent did not request an extension of time to file an answer.

On February 20, the Respondent, pro se, filed a motion for leave to file an answer. In this motion, the Respondent's president claims that, due to financial constraints, he attempted to handle the case without counsel. The Respondent's president stated that he now recognized the need for counsel and would retain legal representation if given leave to file an answer.

On March 6, the Acting General Counsel filed an opposition to the Respondent's motion for leave to file an answer, contending that the Respondent had failed to establish good cause for its failure to file a timely answer.

In its March 22 answer, the Respondent provided no additional explanation for its failure to file a timely answer. On March 27, however, the Respondent, through counsel, argued for the first time that its failure to file a timely answer was due to excusable neglect. Specifically, the Respondent argues that the Respondent and a company known as Lockhart Construction are separate companies with one counsel. It contends that the Respondent's counsel was busy on a Chapter 11 bankruptcy filing for Lockhart Construction and, as a consequence, the need for filing the Respondent's answer was overlooked.² It argues that the Respondent attempted to answer the complaint pro se on February 9. Further, the Respondent contends that summary judgment is inappropriate because: the pro se Respondent cooperated in the investigation, it has a meritorious defense, and there are material issues of fact. Finally, the Respondent argues that deferral is appropriate. For the following reasons, we find no merit to the Respondent's arguments.

We recognize that the Respondent did not have legal representation until at least late February 2001. We also recognize that, when determining whether to grant a Motion for Summary Judgment, the Board has shown some leniency toward respondents who proceed without benefit of counsel. *Kenco Electric & Signs*, 325 NLRB 1118 (1998); *A.P.S. Production/A. Pimental Steel*, 326 NLRB 1296, 1297 (1998). Thus, the Board will generally not preclude a determination on the merits of a complaint if it finds that a pro se respondent has filed a timely answer,

¹ All dates are in 2001 unless otherwise stated.

² As noted *infra*, it appears that the Respondent did not have counsel until at least late February 2001. The first response filed by counsel was March 22.

which can reasonably be construed as denying the substance of the complaint allegations. *Id.*; *Harborview Electric Construction Co.*, 315 NLRB 301 (1994). Similarly, where a pro se respondent fails to file a timely answer, but provides a “good cause” explanation for such failure, summary judgment will not be entered against it on procedural grounds.³ However, merely being unrepresented by counsel does not establish a good cause explanation for failing to file a timely answer. See, e.g., *Civetta Cousins*, 327 NLRB No. 114 (1999) [not reported in Board volumes]. Where a pro se respondent fails to respond to the complaint allegations until after the Notice to Show Cause has issued—despite having been reminded in writing to do so—and has provided no good cause explanation for its failure to do so, subsequent attempts to answer the complaint will be denied as untimely. *Kenco Electric & Signs*, *supra*.

In this, as in *Kenco*, the Respondent did not respond to the complaint allegations until after the Notice to Show Cause issued on February 7, despite the January 11 reminder letter. Further, it has provided no explanation sufficient to constitute good cause for its failure to file a timely answer. The Respondent offered no explanation for its untimeliness in its February 9 letter to the Regional Director. And, its February 20 explanation is insufficient to establish good cause. In this regard, the Respondent claimed that, because of financial constraints, it sought to handle this case without counsel. But the Respondent does not explain the failure to file any response at all (even an uncounseled one) before February 9. Finally, the justification offered in the Respondent’s March 27 reply—that its counsel was too busy, and that summary judgment should not be granted because it cooperated in the investigation and has meritorious arguments—similarly fail. As to the latter argument, the Board has stated that it will not address a respondent’s assertion that it has a meritorious defense unless good cause has been shown for the tardy response. *Dong-A Daily North America*, *supra*; *Day & Zimmerman Services*, *supra*.

Accordingly, we grant the Acting General Counsel’s Motion for Summary Judgment and deny the Respondent’s motion for leave to file answer.⁴

³ A factor the Board considers in determining whether a respondent has good cause for not filing a timely answer is whether it requested an extension of time for filing. The Board has stated that a party’s “failure to promptly request an extension of time to file an answer is a factor demonstrating lack of good cause.” *Dong-A Daily North America*, 332 NLRB 15, 16 (2000), quoting *Day & Zimmerman Services*, 325 NLRB 1046, 1047 (1998).

⁴ As noted, however, in the remedy section of this Decision and Order, we do not grant the Acting General Counsel’s request that dis-

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent has been owned by Robert W. Lockhart, doing business as Lockhart Concrete, with an office and place of business in Akron, Ohio, where it is engaged in the retail sale and delivery of concrete. Annually, in conducting its normal business operations, the Respondent derives gross revenues in excess of \$1 million and purchases and receives goods valued in excess of \$50,000 from points located outside the State of Ohio. 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 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:

Robert W. Lockhart, President

Richard E. Stanley, Agent

The following employees of the Respondent at its Akron, Ohio facility constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All truckdrivers and load operators, but excluding all office clerical employees, professional employees, guards, and supervisors as defined in the Act.

Since on or before March 1, 1994, and at all material times, the Union has been the designated exclusive collective-bargaining representative of the unit employees and has been recognized as such by the Respondent. This recognition has been embodied in successive collective bargaining agreements, the most recent of which is effective from March 1, 2000, to February 28, 2001.

At all times since March 1994, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of employees in the unit.

Since about February 14, 2000, the Union requested that the Respondent bargain about the recall of employees from seasonal layoff.

About February 14, 2000, and confirmed on February 28, 2000, the Respondent and Union reached an agree-

criminatees be reimbursed for any extra Federal and/or State income taxes that might result from lump sum payments.

ment with regard to the recall of unit employees from seasonal layoff. Contrary to this agreement, the Respondent, on or about March 1, 2000, and continuing thereafter, unilaterally recalled certain employees.⁵

Since about March 1, 2000, the Respondent has failed and refused to recall Curtis B. Hough and John D. Wright and, thereafter, terminated and/or discharged them because they joined and assisted the Union and engaged in concerted activities, and to discourage other employees from engaging in these activities.

Since about April 7, 2000, the Respondent has failed and refused to return the Union's calls, meet with the Union, or otherwise bargain in good faith with the Union over the recall, the agreement concerning the recall, or the unilateral actions taken with respect to the recall. These subjects relate to wages, hours, and other terms and conditions of employment of the unit and are mandatory subjects for the purposes of collective bargaining.

The Respondent engaged in the conduct described above without prior notice to the Union and without affording the Union an opportunity to bargain with the Respondent respecting the unilateral actions taken and the effects of those actions.

CONCLUSIONS OF LAW

1. By the acts and conduct described above, the Respondent has been interfering with, restraining, and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act, and has thereby engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

2. In addition, by the acts and conduct described above, the Respondent has been discriminating in regard to hire or tenure or terms and conditions of employment of its employees, thereby discouraging membership in a labor organization in violation of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act.

3. Further, 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 within the meaning of Section 8(d) of the Act in violation 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 violated Section 8(a)(3)

and (1) by failing and refusing to recall and, thereafter, terminating and/or discharging Curtis B. Hough and John D. Wright, we shall order the Respondent to offer them immediate reinstatement to the positions they had, or if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed. Further, the Respondent shall make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).⁶ The Respondent shall also be required to expunge from its files any and all references to the unlawful failure and refusal to recall and, thereafter, termination and/or discharge of these individuals, and to notify them in writing that this has been done.

In addition, having found that the Respondent has violated Section 8(a)(5) and (1), we shall order the Respondent to meet and bargain with the Union regarding mandatory subjects of bargaining including, but not limited to, the recall of employees from the seasonal layoff, the earlier agreement reached regarding the recall, and the unilateral actions taken by the Respondent regarding the recall.

ORDER

The National Labor Relations Board orders that the Respondent, Robert W. Lockhart, d/b/a Lockhart Concrete, Akron, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recall and then terminating and/or discharging Curtis B. Hough and John D. Wright because they joined and assisted the Union and engaged in concerted activities, and to discourage other employees from engaging in those activities.

(b) Failing and refusing to bargain with the Union regarding the recall of employees from seasonal layoff, the

⁵ With respect to this date, we have corrected the typographical error in the complaint to correspond with the other listed dates.

⁶ In the complaint, the General Counsel seeks an order requiring the Respondent to reimburse any discriminatee entitled to a monetary award in this case for any extra Federal and/or State income taxes that would or may result from the lump sum payment of the award. This aspect of the General Counsel's proposed Order would involve a change in Board law. See, e.g., *Hendrickson Bros.*, 272 NLRB 438, 440 (1985), enfd. 762 F.2d 990 (2d Cir. 1985). In light of this, we believe that the appropriateness of this proposed remedy should be resolved after a full briefing by affected parties. See *Kloepfers Floor Covering, Inc.*, 330 NLRB 811 fn. 1 (2000). Because there has been no such briefing in this no-answer case, we decline to include this additional relief in the Order here. See *Cannon Valley Woodwork*, 333 NLRB No. 97 fn. 3 (2001) (not reported in Board volumes).

agreement reached regarding the recall, or the unilateral actions taken by the Respondent regarding the recall.

(c) 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) Within 14 days from the date of this Order, offer Curtis B. Hough and John D. Wright immediate reinstatement in the same positions they had, or, if those positions no longer exist, to substantially equivalent positions.

(b) Make Curtis B. Hough and John D. Wright whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, with interest, in the manner set forth in the remedy section of this decision.

(c) Within 14 days from the date of this Order, remove from its files any and all references to the unlawful failure and refusal to recall and the subsequent unlawful termination and/or discharge of Curtis B. Hough and John D. Wright, and, within 3 days thereafter, notify them in writing that this has been done, and that the unlawful conduct will not be used against them in any way.

(d) On request, meet and bargain with the Union regarding mandatory subjects of bargaining including but not limited to all truckdrivers and load operators but excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act, the recall of employees from the seasonal layoff, the earlier agreement reached regarding the recall, and the unilateral actions taken by the Respondent regarding the recall.

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

(f) Within 14 days after service by the Region, post at its facility in Akron, Ohio, copies of the attached notice marked "Appendix."⁷ Copies of the notice, on forms provided by the Regional Director for Region 8, after being signed by the Respondent's authorized representa-

tive, 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 March 1, 2000.

(g) 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.

WE WILL NOT fail and refuse to recall and then terminate and/or discharge our employees because they joined and assisted the Union and engaged in concerted activities and to discourage other employees from engaging in those activities.

WE WILL NOT fail and refuse to bargain with the Union regarding the recall of employees from the seasonal layoff, the agreement reached regarding the recall, or the unilateral actions taken by us regarding the recall.

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 offer Curtis B. Hough and John D. Wright immediate reinstatement in the same positions they had, or, if those positions no longer exist, to substantially equivalent positions.

WE WILL make Curtis B. Hough and John D. Wright whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, with interest.

WE WILL remove from our files any and all references to the unlawful failure and refusal to recall Curtis B. Hough and John D. Wright and their subsequent termination and/or discharge, and, within 3 days thereafter, notify them in writing that this has been done, and that

⁷ 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."

DECISIONS OF THE NATIONAL LABOR RELATIONS BOARD

the unlawful conduct will not be used against them in any way.

WE WILL, on request, meet and bargain with the Union regarding mandatory subjects of bargaining including but not limited to all truckdrivers and load operators but excluding all office clerical employees, professional em-

ployees, guards and supervisors as defined in the Act the recall of employees from the seasonal layoff, the earlier agreement reached regarding the recall, and the unilateral actions taken by us regarding the recall.

ROBERT W. LOCKHART, D/B/A
LOCKHART CONCRETE