

Gun Hill Road Meat Corp. d/b/a Associated Supermarket and Pablo de la Cruz Suero and Francisco Regalado and Alcibiades Contreras and United Food and Commercial Workers Local 342, AFL-CIO. Cases 2-CA-34286, 2-CA-34308, 2-CA-34309, and 2-CA-34463

February 11, 2003

DECISION AND ORDER

BY MEMBERS LIEBMAN, SCHAUMBER, AND ACOSTA

The complaint alleges that the Respondent violated Section 8(a)(1) and (3) of the National Labor Relations Act by discriminating against and discharging employees because of their union activities. The General Counsel has moved for summary judgment on the ground that the Respondent failed to file a timely answer to the complaint. For the reasons discussed below, we shall grant the motion.¹

Procedural Background

Upon charges filed by Pablo de la Cruz Suero on January 14, 2002,² by Francisco Regalado and Alcibiades Contreras on January 18, and by the United Food and Commercial Workers Local 342, AFL-CIO on March 21, the General Counsel issued a consolidated complaint on April 30 against Associated Supermarket, the Respondent, alleging that it has violated Section 8(a)(1) and (3). Although properly served copies of the charges and complaint, the Respondent failed to file a timely answer.

On June 27, the General Counsel filed a Motion for Summary Judgment, with exhibits attached. The Respondent filed an answer to the complaint with the Board's Regional Office on June 28. On July 3, 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. On August 8, the Respondent filed a response to the Notice to Show Cause, with affidavits attached. On August 18, the General Counsel filed a reply brief and motion to strike the answer to the complaint.

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

Ruling on Motion for Summary Judgment

Section 102.20 of the Board's Rules and Regulations provides 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 explicitly states that unless an answer is filed within 14 days of service, all the allegations in the complaint will be deemed admitted and will be so found by the Board.

The complaint was served by certified mail on the Respondent on April 30. The complaint affirmatively states that the Respondent had 14 days (or until May 14) to file an answer. No answer was submitted by the May 14 deadline. On May 22, counsel for the General Counsel sent a certified letter to the Respondent. That letter quoted in full Section 102.20 of the Board's Rules and Regulations, stated that no answer had been submitted by the May 14 deadline, and gave the Respondent until May 31 to file an answer. The letter also warned that if the Respondent failed to file an answer by May 31, counsel would recommend to the Regional Director that a Motion for Summary Judgment be filed. On May 23, another copy of the complaint was sent to the Respondent, together with a second warning that failure to file an answer by May 31 would lead to a recommendation that a Motion for Summary Judgment be filed. The Respondent did not file an answer by the May 31 extended deadline.

On June 27, the General Counsel filed a Motion for Summary Judgment. On June 28, the Respondent retained counsel to represent it in this matter. That same day, the Respondent's counsel prepared and mailed an answer to the complaint, which was received by the Region on July 1. On June 28 and July 2, in conversations with counsel for the General Counsel, the Respondent's counsel pointed out that an answer had been filed and asked the Region to withdraw the Motion for Summary Judgment. On July 3, counsel for the General Counsel suggested that the Respondent's counsel submit the withdrawal request in writing and he did so. On July 9, the Respondent's counsel was informed that the Regional Director had rejected the request for withdrawal but had extended the time to file a response to the Notice to Show Cause until August 9. The Respondent filed that response on August 8.

In defense of its failure to file a timely answer to the complaint, the Respondent contends that its owner, Damian Castillo, is an immigrant whose first language is not English, that he is unsophisticated in legal matters and labor relations, and that he believed his submission during the Region's investigation of this matter was an adequate answer.

Contrary to the Respondent, we find that those considerations do not support a showing of good cause. The Regional Office mailed two copies of the complaint to the Respondent, and the record reflects that the Respondent received both. The complaint stated clearly that failure to respond in a timely fashion would result in the

¹ The General Counsel has also moved to strike the Respondent's untimely filed answer. Because of our disposition of the case, we find it unnecessary to address the motion to strike.

² All dates hereafter are in 2002.

allegations therein being deemed admitted and found to be true. Moreover, in the May 22 and 23 letters, counsel for the General Counsel again notified the Respondent of its obligation to file an answer. Despite repeated warnings, Castillo did not supply an answer to the complaint until some 6 weeks after the original deadline and 4 weeks after the extended deadline. The Respondent never advised the Region that it did not understand what it was required to do. Nor did he request an extension of time to file an answer. See *Lockhart Concrete*, 336 NLRB 956, 958 fn. 3 (2001); *Day & Zimmerman Services*, 325 NLRB 1046, 1047 (1998) (“A failure to promptly request an extension of time to file an answer is a factor demonstrating lack of good cause.”).³ The Board has held that such a pattern of repeatedly ignoring the Board’s procedures and warnings is incompatible with a showing of good cause. *Odaly’s Management Corp.*, 292 NLRB 1283, 1284 (1989).⁴

The Board rejected strikingly similar excuses for the employer’s failure to file a timely answer in *Printing Methods, Inc.*, 289 NLRB 1231, 1231 (1988):

Regarding its failure to file a timely answer, the Respondent asserts that its owner, who was not born in this country and who has lived here for many years but speaks with an accent, is unfamiliar with Board proceedings and has never been involved in an unfair labor practice case before; that on several occasions after the complaint issued, the Respondent presented the Board with both a meritorious defense to the complaint and oral statements of its position and, in light of ongoing discussions to resolve this case, thought the oral statements were sufficient; that the Respondent was not represented by an attorney in this matter and, as soon as it retained an attorney, it filed an answer.

³ In connection with its suggestion that Castillo’s capacity to understand and comply with the Board’s requirements was impaired by the fact that he is not a native English speaker, the Respondent asserts that the Board should have provided him, the owner of a small business, with translation services. We find that, under the circumstances of this case, the lack of provision of any language services does not give rise to good cause, as it is evident that the Respondent owner’s comprehension of the English language (or the alleged lack thereof) was not the cause of the Respondent’s failure to file a timely answer. Castillo’s written submissions to the Board demonstrate an understanding of the English language. Furthermore, Castillo, in his various telephone calls (as recounted in Castillo’s affidavit) to counsel for the General Counsel in conjunction with his receipt of the complaint and the General Counsel’s letters of May 22 and 23, acknowledged that he understood the need to take some additional action in response to the complaint and subsequent letters, yet he failed to do so.

⁴ “It has long been established that an employer must apply no lesser degree of ‘diligence and promptness’ in NLRA matters than in ‘other business affairs of importance.’” *Carmody, Inc.*, 327 NLRB 1230, 1231 fn. 6 (1999), citing *J. H. Rutter-Rex Mfg. Co.*, 86 NLRB 470, 506 (1949). The Respondent has not met this standard.

The Board found these purported justifications for failure to file an answer to be insufficient:

[I]t is undisputed that the General Counsel repeatedly served copies of the complaint on the Respondent, including one that counsel for the General Counsel personally served on its owner. The complaint indicated the need to file an answer and that all allegations in the complaint were to be deemed to be admitted to be true unless an answer was filed. Further, the General Counsel, in its September 24 letter to the Respondent, expressly noted that “[n]otwithstanding the fact that we have entered into settlement discussions, you are still required to file” an answer and the General Counsel set September 30 as the last date to file an answer. The Respondent has not offered a sufficient explanation for its failure to act until about 4 weeks after the extended deadline for filing a timely answer. *Id.* at 1231.

In this case we also are unpersuaded by Castillo’s contention that he thought his investigative submission constituted a sufficient answer to the complaint. Even if Castillo was convinced of the adequacy of those submissions prior to his receipt of the May 22 and 23 letters from the counsel for the General Counsel, those letters made it clear that those submissions were inadequate.⁵ Despite the warnings contained in those letters, Castillo neither informed the Region that he believed his earlier submissions constituted an answer nor resubmitted those position statements intending them to serve as an answer.

Finally, we reject the Respondent’s argument that the Motion for Summary Judgment should be denied because the General Counsel was not prejudiced by the Respondent’s failure to file a timely answer. It is not necessary to show prejudice to the General Counsel to require the Respondent to comply with the Board’s Rules. *South Atlantic Trucking*, 327 NLRB 534, 535 (1999).

For these reasons, we find that the Respondent has not shown good cause for its failure to file a timely answer. We therefore grant the General Counsel’s Motion for Summary Judgment.

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a New York corporation, with an office and place of business at 320 East Gun Hill Road, Bronx, New York, engages in the operation of a retail grocery store. In the course and conduct of its business

⁵ The Board has consistently held that informal statements of position in response to a charge, such as the one submitted by Castillo prior to the complaint’s issuance here, are insufficient to constitute answers. See, e.g., *Unlimited Security, Inc.*, 338 NLRB 500, 500 (2002).

operations just described, it annually derives gross revenues in excess of \$500,000 and purchases and receives at its Bronx, New York facility products, goods, and materials valued in excess of \$5000 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 United Food and Commercial Workers Local 342, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

About January 12, the Respondent reduced the hours of employment of Francisco Regalado and thereafter subjected him to more onerous working conditions. About January 7, 12, and 23, the Respondent discharged Pablo de la Cruz Suero, Alcibiades Contreras, and Francisco Regalado, respectively, and since those dates has failed and refused to reinstate or offer to reinstate them to their former positions of employment. The Respondent engaged in this discrimination because de la Cruz, Regalado, and Contreras engaged in concerted activities for the purpose of collective bargaining and to discourage employees from engaging in such activities.

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.

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.

Having found that the Respondent unlawfully reduced the hours of employment of Francisco Regalado and subjected him to more onerous work conditions, and has discharged Regalado, Pablo de la Cruz Suero, and Alcibiades Contreras, we shall order it to offer them immediate and full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and to make them whole for any loss of earnings they may have

suffered as a result of the unlawful discrimination. Regalado shall be employed at the hours and under the conditions that prevailed before January 12. Backpay shall be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest to be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). In addition, the Respondent will, within 14 days of the issuance of the enclosed Order, remove from its files any reference to the unlawful discrimination directed against Pablo de la Cruz Suero, Francisco Regalado, and Alcibiades Contreras, and within 3 days thereafter notify them in writing that this has been done and that the discrimination will not be used against them in any way.

ORDER

The National Labor Relations Board orders that the Respondent, Gun Hill Road Meat Corp. d/b/a Associated Supermarket, Bronx, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Reducing the hours of, imposing more onerous working conditions on, and discharging employees because they engage in concerted activities for the purpose of collective bargaining and to discourage employees from engaging in any such protected concerted activities.

(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) Within 14 days from the date of this Order, offer Pablo de la Cruz Suero, Francisco Regalado, and Alcibiades Contreras full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed. Regalado shall be offered employment at the hours and under the conditions that prevailed before January 12, 2002.

(b) Make the discriminatees whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, 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 reference to the unlawful discrimination directed against Pablo de la Cruz Suero, Francisco Regalado, and Alcibiades Contreras, and within 3 days thereafter notify them in writing that this has been done and that the discrimination will not be used against them in any way.

(d) 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.

(e) Within 14 days after service by the Region, post at its facility at 320 East Gun Hill Road, Bronx, New York, copies of the attached notice marked "Appendix."⁶ 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 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 January 7, 2002

(f) 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

⁶ 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."

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 reduce employees' hours, subject them to more onerous working conditions, or discharge them because they engage in concerted activities for the purpose of collective bargaining or to discourage them from engaging in such activities.

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, within 14 days from the date of the Board's Order, offer Pablo de la Cruz Suero, Francisco Regalado, and Alcibiades Contreras immediate and full reinstatement to their former positions, or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed. Regalado will be offered employment at the hours and under the conditions that prevailed before January 12, 2002.

WE WILL make the employees whole for any loss of earnings and other benefits resulting from the discrimination against them, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discrimination, and WE WILL, within 3 days thereafter, notify the discriminatees in writing that this has been done and that we will not use the discrimination against them in any way.

GUN HILL ROAD MEAT CORP. d/b/a ASSO-
CIATED SUPERMARKET