

Rick's Painting and Drywall and Anthony McGrath.
Case 30–CA–15309–1

April 30, 2003

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN
AND ACOSTA

The General Counsel seeks a default judgment¹ in this case on the ground that the Respondent has failed to file an answer to the complaint. Upon a charge filed by Anthony McGrath on October 4, 2000, the General Counsel of the National Labor Relations Board issued a complaint on December 28, 2000, against Rick's Painting and Drywall, the Respondent, alleging that it has violated Section 8(a)(1) and (3) of the National Labor Relations Act. Although properly served with copies of the charge and complaint, the Respondent failed to file a timely answer.

On February 22, 2001, the General Counsel filed a Motion for Summary Judgment with the Board. On March 5, 2001, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent, on March 19, 2001, filed a Response to the Notice to Show Cause.²

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

Ruling on Motion for Default 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. The complaint itself states that unless an answer is filed within 14 days of service, "all of the allegations in the Complaint shall be considered to be admitted to be true and shall be so found by the Board." Further, exhibits attached to the motion indicate that counsel for the General Counsel for Region 30, by certified letter dated January 26, 2001, notified Respondent that, unless an answer was received by February 5, 2001, a motion for

default judgment would be filed. The Respondent did not file an answer by February 5, 2001.

The Board's well-settled standard for granting summary judgment as a result of default is that the allegations in the complaint shall be deemed admitted unless good cause is shown. *Windward Roofing & Construction Co.*, 333 NLRB 658 (2001); *South Atlantic Trucking*, 327 NLRB 534 (1999).

The Respondent initially argues that when the Board considers the propriety of a Default Summary Judgment Motion it should use the test set forth in *Livingston Powdered Metal v. NLRB*, 669 F.2d 133 (3d Cir. 1982). We reject this argument. The Board has not previously adopted the *Livingston* standard, *Bricklayers Local 31*, 309 NLRB 970, 972 (1992) (then-Chairman Stephens, concurring), and does not do so today.³

In *Livingston*, the United States Court of Appeals for the Third Circuit considered the Board's entry of default summary judgment against the respondent according to standards employed by Federal appellate courts in determining whether to open default judgments in the district courts: whether the respondent willfully caused the default, whether the respondent had presented a facially meritorious defense, and whether the General Counsel or the charging party would be prejudiced as a result of a delayed decision on the merits. *Id.* at 136–137.

One of the considerations motivating the Third Circuit in that case was its perception that the Board's Rules concerning filing and service dates were not clearly spelled out. Subsequent to the *Livingston* decision, and in reaction to several decisions of the courts, the Board "substantially revis[ed]" those Rules. 51 FR 23744 (1986). The relevant Rules, which have not materially changed in the intervening years, have met with general acceptance from the courts. See, e.g., *Father & Sons Lumber & Bldg. Supplies v. NLRB*, 931 F.2d 1093 (6th Cir. 1991); *NLRB v. Dane County Dairy*, 795 F.2d 1313, 1316–1321 (7th Cir. 1986). Moreover, despite ample notice of the applicable Rules and the grant of an extension of time from the General Counsel, the Respondent's first appearance in this case, its response to the Notice to Show Cause, was not filed until well over a month after the extended deadline for filing its answer.

The Respondent also argues that its pro se status and its inexperience with Board procedures led to its good-

¹ The General Counsel's motion requests summary judgment on the ground that the Respondent has failed to file an answer to the complaint. Accordingly, we construe the General Counsel's motion as a motion for default judgment.

² The General Counsel moves for leave to file a reply to the Respondent's response to the Notice to Show Cause. Because the General Counsel's motion and the Respondent's response to the show cause notice are sufficient to decide the matter, and we have, in any event, granted the General Counsel's motion, we find it unnecessary to consider the General Counsel's reply brief and therefore deny the motion for leave to file a reply.

³ Chairman Battista does not pass on the *Livingston* standard. In his view, even under that standard, default judgment is appropriate. In this regard, he notes particularly that the remedy here is far less sweeping than the one in *Livingston*. The remedy in *Livingston* was to reopen a closed plant and rehire the employees. The remedy here is to reinstate and make whole one employee.

faith belief that filing an answer was not necessary and that the charge would be deferred to arbitration.

However, the Respondent's pro se status does not constitute good cause for utter failure to file a timely answer. See *Calyer Architectural Woodworking Corp.*, 338 NLRB 315 (2002) (“[M]erely being unrepresented by counsel does not constitute good cause for the failure to file a timely answer.”); *Karel of Cumberland*, 313 NLRB 1237 (1994) (“The lack of legal counsel is not a legally sufficient ground for failing to file a timely answer.”); *Printing Methods, Inc.*, 289 NLRB 1231 (1988) (finding, inter alia, that pro se respondent's unfamiliarity with Board proceedings is insufficient to constitute good cause). Although the Board may show leniency to a respondent proceeding without the benefit of counsel if that respondent files a timely answer that can reasonably be construed as denying the substance of the complaint's allegations, where as here, the Respondent has not filed any form of answer, the Board does not extend the same forbearance. *Calyer*, supra.

The Respondent finally argues that the General Counsel failed to explain to the Respondent “in plain and understandable language” the consequences of a failure to answer. The complaint, however, clearly stated that failure to file a timely answer would result in the complaint allegations being deemed admitted and found to be true. Moreover, in a January 26, 2001 letter, the General Counsel sent the Respondent an additional warning that summary judgment would be sought if the Respondent did not file an answer by February 5, 2001, and that if summary judgment were granted the Respondent would be found by the Board to have admitted the complaint allegations. The Respondent still did not attempt to answer the complaint or request an extension of time to do so. Such a pattern of disregarding the Board's procedures and its warnings of possible consequences is incompatible with a showing of good cause. *Ravid Artistic Designs, Inc.*, 300 NLRB 1121, 1121–1122 (1990).

For these reasons, we find that the Respondent's explanations do not constitute a showing of good cause for the failure to file a timely answer. Accordingly, we grant the General Counsel's Motion for Default 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 Eagle River, Wisconsin, has been engaged in business as a painting and drywall contractor. Annually, the Respondent, in conducting its business operations described above, purchases and receives goods valued in excess of \$50,000

from other enterprises located within the State of Wisconsin, who in turn purchased these same goods and materials directly from points located outside the State of Wisconsin. 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 Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

About the first week of June 2000, the Respondent, by its agent, Rick Strobel, threatened the employment of employees involved in union activities. Subsequently, on or about June 27, 2000, the Respondent, by Strobel, interrogated an employee by telephone regarding a meeting between the Union's business agents and the Respondent's employees. About July 11, 2000, the Respondent, by Strobel, interrogated an employee about that employee's vote in the election. Also on about July 11, 2000, the Respondent, by its supervisor, Fred Verde, interrogated an employee about that employee's vote in the election. By engaging in the above interrogations, the Respondent created the impression that the employees' union activities were under surveillance. Also, the Respondent, by Strobel, on July 19, 2000, requested an employee to engage in surveillance of other employees' union activities. On July 21, 2000, the Respondent, by Strobel, stated that ongoing contract talks were futile and that no contract would be reached. We find that by engaging in the above acts, the Respondent violated Section 8(a)(1) of the Act.

On August 3, 2000, the Respondent, by Supervisor Verde, laid off employee Anthony McGrath because he had joined, supported, or assisted the Union and engaged in concerted activity for the purposes of collective bargaining or other mutual aid or protection, and in order to discourage employees from engaging in such activities for the purposes of collective bargaining or other mutual aid or protection. We find that the Respondent violated Section 8(a)(1) and (3) of the Act by this treatment of McGrath.

CONCLUSIONS OF LAW

1. By threatening the employment of employees involved in union activities, by interrogating employees regarding their own or other employees' union activities, sympathies, or desires, by creating the impression that the employees' union activities were under surveillance, by requesting an employee to engage in surveillance of other employees' union activities, and by stating that contract talks were futile, the Respondent has 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. By laying off Anthony McGrath because he had joined, supported, or assisted the Union and engaged in concerted activity for the purposes of collective bargaining or other mutual aid or protection, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(3) and (1) and Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent unlawfully laid off employee Anthony McGrath, we shall order it to offer him immediate and full reinstatement to his former position or, if this position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and to make him whole for any loss of earnings he may have suffered as a result of the Respondent's unlawful conduct. 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). Further, we shall require the Respondent to remove from its files any references to the unlawful layoff, and to notify Anthony McGrath in writing that this has been done and that the layoff will not be used against him in any way.

ORDER

The National Labor Relations Board orders that the Respondent, Rick's Painting and Drywall, Eagle River, Wisconsin, its officers, agents, successors, and assigns, shall

1. Cease and desist from
 - (a) Threatening the employment of employees involved in union activities.
 - (b) Coercively interrogating any employee about union support or union activities.
 - (c) Creating the impression that the employees' union activities were under surveillance.
 - (d) Requesting employees to engage in surveillance of other employees' union activities.
 - (e) Telling employees that ongoing contract talks were futile.
 - (f) Laying off or otherwise discriminating against any employee for supporting the Union.
 - (g) 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 Anthony McGrath full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Anthony McGrath whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, 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 reference to the unlawful layoff of Anthony McGrath, and within 3 days thereafter, notify him in writing that this has been done, and that the unlawful conduct will not be used against him in any way.

(d) 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 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 in Eagle River, Wisconsin, copies of the attached notice marked "Appendix."⁴ Copies of the notice, on forms provided by the Regional Director for Region 30, 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 employed by the Respondent since June 1, 2000.

(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.

⁴ 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."

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 Federal labor law and has ordered us to post and obey by 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 threaten the employment of employees engaged in union activities.

WE WILL NOT interrogate employees regarding employees' union activities.

WE WILL NOT create the impression that the union activities of employees are under surveillance.

WE WILL NOT request employees to engage in surveillance of other employees' union activities.

WE WILL NOT tell employees that ongoing contract talks are futile and that no contract will be reached.

WE WILL NOT discharge or otherwise discriminate against any of you for supporting the Northern Wisconsin Regional Council of Carpenters or any other labor organization.

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 Anthony McGrath full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Anthony McGrath whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, with interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any references to the unlawful layoff of Anthony McGrath, and WE WILL, within 3 days thereafter, notify him in writing that this has been done, and that our unlawful conduct will not be used against him in any way.

RICK'S PAINTING AND DRYWALL