

**Calyer Architectural Woodworking Corp. and United Brotherhood of Carpenters and Joiners of America, AFL-CIO, New York District Council of Carpenters.** Case 29-CA-24762

September 30, 2002

DECISION AND ORDER

BY MEMBERS LIEBMAN, COWEN, AND BARTLETT

On June 3, 2002, Administrative Law Judge Raymond P. Green issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order as modified and set forth in full below.

The issue raised in this case is whether the judge properly granted the General Counsel's Motion for Default Summary Judgment. The General Counsel argues that summary judgment was appropriate because the Respondent neither answered the complaint nor filed an extension of time to do so. The Respondent argues that summary judgment was improper, despite its nonanswer, because it ultimately appeared pro se at the hearing and was prepared at that time to defend against the allegations of the complaint. We find that the judge properly granted the General Counsel's Motion for Summary Judgment.<sup>1</sup>

The Respondent is a woodworking firm wholly owned and operated by proprietor Rino Buschemi. The com-

plaint alleges that Buschemi unlawfully interrogated employees regarding their union activities and unlawfully discharged one employee because of that employee's union activity.<sup>2</sup> The Respondent failed to answer the General Counsel's complaint. Buschemi did, however, appear at the hearing pro se. When asked by the judge about his failure to answer the complaint, Buschemi responded that he had instructed his then-secretary to respond in writing to the complaint, but could not produce such a letter at the hearing because the secretary is no longer in his employ and she "[took] all the paperwork." The judge explicitly discredited Buschemi's explanation for the absence of any document that could be construed as a responsive pleading.<sup>3</sup> The judge then granted the General Counsel's Motion for Summary Judgment based on the Respondent's failure to file an answer to the General Counsel's complaint.

The Respondent, now represented by counsel, excepts to the entry of summary judgment, and argues that even though it failed to answer the complaint, Buschemi appeared at the hearing pro se and was prepared to defend against the allegations in the complaint. The Respondent essentially argues that its pro se status, coupled with Buschemi's ultimate appearance at the hearing, constitute good cause for his failing to file a timely answer. The Respondent further argues that no prejudice would befall either the Charging Party or the discriminatee if this matter was remanded for further proceedings. We find no merit in the Respondent's exceptions.

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 no answer is filed within 14 days from service of the complaint, unless good cause is shown. In considering a party's noncompliance with the Board's Rules, the Board has shown some leniency toward respondents who proceed without the benefit of counsel. However, these cases generally involve respon-

<sup>1</sup> Contrary to the view of our dissenting colleague, the Board's Rules and Regulations clearly permit the judge to entertain and rule on Motion for Summary Judgment, default or otherwise. Pursuant to Sec. 102.35(a)(8), an administrative law judge has the authority, without qualification, to "dispose of procedural requests, motions, or similar matters, including . . . motions for summary judgment." Similarly, Sec. 102.24(a) states that motions made at the hearing are to be made to the administrative law judge either in writing or orally on the record. Although the record before us is incomplete as to the General Counsel's actual Motion for Summary Judgment, the General Counsel's brief to the Board indicates that such motion was made at the opening of the hearing, and the judge's decision, entitled "Decision on Motion for Summary Judgment," indicates that he took such motion under consideration. Under these circumstances, we think it apparent that such a motion was, in fact, made to the judge, and we will presume the regularity of the acts of public officials in the absence of clear evidence to the contrary. See, e.g., *Lutheran Home at Moorestown*, 334 NLRB 340, 341 (2001); and *Crow Gravel Co.*, 168 NLRB 1040, 1044 fn. 24 (both relying on *U.S. v. Chemical Foundation, Inc.*, 272 U.S. 1, 14-15 (1926) (presumption of regularity attaches to official acts of public officers in the absence of clear evidence to the contrary)). Such a presumption is especially warranted in this case, where the Respondent, now represented by counsel before the Board, filed no exceptions to the judge's decision based on the procedural irregularity alleged by our dissenting colleague.

<sup>2</sup> The complaint and notice of hearing was issued by the Regional Director on March 15, 2002, and required the Respondent to file an answer by March 29, 2002. The complaint explicitly provided that if the Respondent failed to file an answer, all of the allegations of the complaint shall be deemed to be true, and summary judgment may be entered against the Respondent by the Board. The complaint also advised the Respondent that a hearing was set on the matter for May 13, 2002. After the Respondent failed to answer the complaint in a timely fashion, on April 9, 2002, counsel for the General Counsel sent a letter to Respondent admonishing it to file an answer to the allegations in the complaint by 5:30 p.m. on April 23, 2002, in order to avoid summary judgment against it, and reminding the Respondent of the May 13 hearing date. The record contains postal return receipts of both the complaint and the April 9 letter.

<sup>3</sup> The Respondent concedes in its brief to the Board that such "letter was never was never received by the [Regional Office]" and therefore it has "fail[ed] to formally answer the Complaint at an earlier stage of the proceedings[.]"

dents that have timely filed some written response that can reasonably be construed as denying the substance of the allegations contained in the complaint,<sup>4</sup> or that have offered as good cause an explanation other than simply their pro se status.<sup>5</sup> The Board, however, has not extended that forbearance to uncounseled respondents that have filed untimely answers, for instance, after the Board has issued a Notice to Show Cause why summary judgment should not be granted.<sup>6</sup> This is true even in cases in which the respondent asserts that it has cooperated in the investigation or will ultimately put on a meritorious defense.<sup>7</sup> Finally, the Board has held that a party's "failure to promptly request an extension of time to file an answer is a factor demonstrating lack of good cause."<sup>8</sup>

In this case, the record demonstrates that while proceeding pro se, the Respondent failed to file *any* document, timely or untimely, that could reasonably be construed as denying the complaint's allegations. Nor has it shown good cause for failing to do so. It is undisputed that the Respondent received both the General Counsel's March 15, 2002 complaint as well as the April 9, 2002 followup letter reminding it to answer the complaint and warning that summary judgment may issue in the absence of an answer. Upon receipt of both the complaint and the warning letter, it is further undisputed that Respondent filed neither an answer nor a request for an extension of time to do so. We consider that Buschemi's

ultimate appearance at the hearing with an offer to testify on his own behalf, following these substantial procedural defects, is akin to an attempt to answer the complaint in a untimely fashion, which requires showing of good cause. Under the precedent cited above, merely being unrepresented by counsel does not constitute good cause for the failure to file a timely answer, and the other explanations proffered by the Respondent are also insufficient.<sup>9</sup> Therefore, under these circumstances, we shall adopt the judge's recommendation to grant the General Counsel's Motion for Summary Judgment.<sup>10</sup>

#### ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below, and orders that the Respondent, Calyer Architectural Woodworking Corp., Brooklyn, New York, its officers, agents, successors, and assigns, shall

##### 1. Cease and desist from

(a) Discharging employees because they engage in union activity or other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

(b) Coercively interrogating employees about union support or union activities.

(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.

<sup>4</sup> See, e.g., *Harborview Electric Construction Co.*, 315 NLRB 301, 302 (1994) (respondent's president, acting pro se, timely submitted letter that was not in proper form, but could reasonably be construed as denying the allegations in the complaint, thus raising substantial and material issues of fact warranting a hearing and precluding the entry of summary judgment); and *A.P.S. Production/A. Pimental Steel*, 326 NLRB 1296, 1297 (1998) (although pro se respondent filed answer that did not comply with the signature and service requirements of Sec. 102.21 of the Board's Rule and Regulations, clear and specific denials of complaint allegations in the timely answer preclude summary judgment).

<sup>5</sup> The Board has held that "merely being unrepresented by counsel does not establish a good cause explanation for failing to file a timely answer." *Lockhart Concrete*, 336 NLRB 956, 957 (2002).

<sup>6</sup> See, e.g., *Lockhart Concrete*, supra at 956-957 (pro se letter purporting to answer the complaint filed after the Notice to Show Cause issued failed to explain failure to timely answer or request extension of time to do so, and therefore did not cure the procedural defect); *Supreme Trucking Co.*, 337 NLRB No. 21, slip op at 1-2 (2001) (not reported in bound volume) (filing, pro se, first response after issuance of Notice to Show Cause is not by itself good cause for failing to file a timely answer); *Kenco Electric & Signs*, 325 NLRB 1118 (1998) (same).

<sup>7</sup> *Lockhart*, 336 NLRB supra at 956-957 (the Board 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*, 332 NLRB 15, 16 (2000) (same); *Day & Zimmerman Services*, 325 NLRB 1046, 1047 (1998) (same).

<sup>8</sup> *Dong-A Daily North America*, supra at 16 (2000) (citing *Day & Zimmerman Services*, 325 NLRB 1046, 1047 (1998)).

<sup>9</sup> We cannot agree with the Respondent's assertion that its failure to file a timely answer should be excused on the ground that it verbally denied the allegations of the charge in a telephone call with the General Counsel prior to the issuance of the complaint. Even assuming this conversation took place, "[t]o permit this to constitute good cause would effectively nullify the requirements of Section [102].20 [of the Board's Rules]. . . ." *Sorenson Industries*, 290 NLRB 1132, 1133 (1988).

We also reject the Respondent's claim that remanding this matter to the judge for hearing will not prejudice the Charging Party or the alleged discriminatee. Under the Board's Rules, whether to excuse the failure to file a timely answer depends not on prejudice to a party or an alleged discriminatee, but on whether a respondent has demonstrated good cause.

<sup>10</sup> Member Bartlett agrees that a respondent who chooses to proceed pro se must file some *written* statement that can be reasonably construed as raising litigable issues with respect to complaint allegations. The Respondent has failed to establish that it did so, and thus summary judgment is appropriate. However, in future cases, when dealing with pro se respondents that have failed to timely answer the complaint, Member Bartlett believes that the best practice for regional Board offices to follow would be both (1) to send a "warning letter" to the respondent notifying it that summary judgment will be sought if an answer is not filed, and (2) to attempt to contact the respondent by telephone in order to repeat the obligation to file an answer and to clarify any possible misunderstanding about what will satisfy this obligation. Although neither the Act nor the Board's Rules and Regulations require this practice, Member Bartlett believes that it would best serve the public's interests and assure that parties with a viable legal claim have the opportunity to present it.

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 Walter E. Clayton Jr. 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 Walter E. Clayton Jr. whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the judge's decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of Walter E. Clayton Jr., and within 3 days thereafter notify him in writing that this has been done and that the discharge will not be used against him 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 facilities in Brooklyn, New York, copies of the attached notice marked "Appendix."<sup>11</sup> Copies of the notice, on forms provided by the Regional Director for Region 29, 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 February 11, 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.

<sup>11</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."

MEMBER COWEN, dissenting.

I disagree with my colleagues' decision to adopt the judge's ruling to grant summary judgment in favor of the General Counsel. The General Counsel never filed a Motion for Default Summary Judgment with the Board as contemplated by Section 102.24(a) and (b) of the Board's Rules and Regulations. Therefore, I would reverse the judge's ruling and remand the case for hearing.

Pursuant to Section 102.24(a) and (b),<sup>1</sup> a request for default summary judgment should be submitted, by the party seeking such relief, in the form of a written motion to the Board itself, normally no later than 28 days prior to the scheduled hearing. Such motions often result in the issuance of a Notice to Show Cause and the postponement of the scheduled hearing before the judge. Here, without explanation, the General Counsel failed to follow these established procedures to the detriment of a pro se respondent prepared to respond to the complaint allegations at the hearing. As a further consequence, the hearing was not postponed, and the considerable expense and loss of productive time incurred by the parties and the judge could have been avoided if the General Counsel had followed the requirements of Section 102.24(a) and (b).

Prior to the hearing, the General Counsel notified the Respondent that he would seek summary judgment on the complaint allegations unless an answer was filed by April 23, 2002. Yet, it is undisputed that the General Counsel never filed a written Motion for Default Summary Judgment with the Board prior to the hearing held on May 13, 2002. In his answering brief to the Respondent's exceptions, the General Counsel claims that at the opening of the trial he made a Motion for Summary Judgment on the basis of the Respondent's alleged failure to file a timely answer. However, the record before us does not support this claim. The formal hearing exhibits submitted by the General Counsel contain no written motion seeking sum-

<sup>1</sup> Sec. 102.24(a) and (b) provide, in pertinent part:

(a) All motions for summary judgment or dismissal made prior to the hearing shall be *filed in writing with the Board* pursuant to the provisions of section 102.50. . . . All motions made at the hearing shall be made in writing to the administrative law judge or stated orally on the record.

(b) All motions for summary judgment or dismissal shall be *filed with the Board* no later than 28 days prior to the scheduled hearing. Where no hearing is scheduled, or where the hearing is scheduled less than 28 days after the date for filing an answer to the complaint or compliance specification, whichever is applicable, the motion shall be filed promptly. Upon receipt of the motion, the Board may deny the motion or issue a notice to show cause why the motion should not be granted. If a notice to show cause is issued, the hearing, if scheduled, will normally be postponed indefinitely. If a party desires to file an opposition to the motion prior to issuance of the notice to show cause in order to prevent postponement of the hearing, it may do so. [Emphasis added.]

mary judgment against the Respondent, and the hearing transcript has no oral statement on the record by the General Counsel seeking such relief. Thus, it appears that the judge acted, *sua sponte*, and improperly granted summary judgment.<sup>2</sup>

Therefore, I would reverse the judge's decision and order a remand for further proceedings. Once remanded, if the Respondent, now represented by counsel, fails to timely answer the complaint, I would permit the General Counsel to file a default summary judgment with the Board in accordance with Section 102.24(a) and (b) of the Board's Rules.

#### 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 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 discharge or otherwise discriminate against any of you because you engage in union activity or other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

WE WILL NOT coercively question you about your union support or 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 Walter E. Clayton Jr. 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.

<sup>2</sup> I agree with my colleagues that Sec. 102.35(a)(8) of the Board's Rule and Regulations provides that the administrative law judge has the authority, *subject to the Rule and Regulations of the Board*, "To dispose of . . . motions for summary judgment." Nevertheless, as noted above, there is no evidence in the record that such a Motion for Summary Judgment was filed or otherwise made under the Board's Rules and Regulations. Unlike my colleagues, I am not willing to substitute speculation for evidence of a properly filed motion.

WE WILL make Walter E. Clayton Jr. whole for any loss of earnings and other benefits resulting from his discharge, 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 discharge of Walter E. Clayton Jr., and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

CALYER ARCHITECTURAL WOODWORKING  
CORP.

*Scott R. Cardell, Esq.*, for the General Counsel.  
*Rino Buschemi, pro se*, for the Respondent.

#### DECISION ON MOTION FOR SUMMARY JUDGMENT

RAYMOND P. GREEN, Administrative Law Judge. This case was heard by me in Brooklyn, New York, on May 13, 2002. The charge and first amended charge were filed on February 13 and March 14, 2002. A complaint and notice of hearing was issued by the Regional Director of Region 29 on March 15, 2002.

The complaint and notice of hearing stated that the Respondent is required to file an answer with the Regional Director within 14 days from the service of the complaint. (By March 29, 2002.) The notice further provided that if the Respondent failed to file an answer all of the allegations in the complaint shall be deemed to be admitted by it to be true and may so be found by the Board.

The Respondent failed to file an answer to the complaint. Additionally, the Regional Office sent a followup letter to the Respondent reminding it that no answer had been filed and that to avoid judgment against it the Respondent was required to file an answer by 5:30 p.m. on April 23, 2002. An examination of the formal papers (GC Exh. 1) shows that the complaint was served by certified mail, return receipt requested, on March 15, 2002, and that the followup letter was served in the same manner on April 9, 2002.

At the opening of the hearing, the Respondent's owner, Rino Buschemi, appeared in person, but without counsel. He acknowledged receipt of the complaint and his initial response was that he was not aware that he was required to file an answer. When told that the complaint explicitly required him to file an answer, he then asserted that he sent some kind of letter to the Regional Office. However, when asked to produce a copy of this letter, Buschemi said that he did not have one, as his secretary had quit and taken the paperwork with her. I don't believe him.

Therefore in accordance with Sections 102.20, 102.21, and 102.35 (h) of the Board's Rules and Regulations, I grant the General Counsel's Motion for Summary Judgment and make the following

#### FINDINGS AND CONCLUSIONS

1. The Respondent, a corporation with its principal office and place of business at 325 Calyer Street, Brooklyn, New

York, has been engaged in the manufacture of architectural woodworking.

2. During the past year, which is representative of its annual operations generally, the Respondent, in the course and conduct of its operations, provided services valued in excess of \$50,000 to customers located within the State of New York, who in turn are directly engaged in interstate commerce.

3. The Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

4. The Union has been a labor organization with the meaning of Section 2(5) of the Act.

5. Rino Buschemi has been the Respondent's owner and an agent of the Respondent acting on its behalf.

6. On or about February 11, 2002, the Respondent, by Buschemi, at its Brooklyn facility, interrogated employees about their union activities.

7. On or about February 11, 2002, the Respondent discharged Walter E. Clayton Jr. and since that date had failed to reinstate or offer to reinstate him to his former position of employment.

8. The Respondent discharged and failed to reinstate Walter E. Clayton Jr. because he engaged in union activity and to discourage employees from engaging in such union activities or other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

9. By the conduct described above, the Respondent has interfered with, restrained, and coerced employees in the exercise of the rights guaranteed to them by Section 7 of the Act and has violated Section 8(a)(1) of the Act.

10. By the conduct described above, the Respondent has discriminated in regard to the hire or tenure or terms or conditions of employment of its employees, thereby discouraging membership in a labor organization in violation of Section 8(a)(1) and (3) of the Act.

11. The aforesaid violations of the Act affect commerce within the meaning of Section 2(6) and (7) of the Act.

#### REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily discharged Walter E. Clayton Jr., it must offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from the date of his discharge to the date of his reinstatement or a valid reinstatement offer, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). See also *Florida Steel Corp.*, 231 NLRB 651 (1977).

[Recommended Order omitted from publication.]