

I.C.E. Electric, Inc., Early Warning Security, Inc. and International Brotherhood of Electrical Workers, Local Union 317, AFL-CIO. Case 9-CA-38707

June 11, 2003

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN
AND WALSH

The General Counsel seeks a default judgment¹ in this case on the ground that the Respondent has failed to file an answer to the consolidated complaint and compliance specification. Upon a charge filed by the Union on August 21, 2001, the General Counsel issued the complaint and compliance specification on October 25, 2001, against alleged single employer I.C.E. Electric, Inc. and Early Warning Security, Inc. (the Respondent), alleging that the Respondent has violated Section 8(a)(1) and (3) of the Act and setting forth the amount of backpay due. The Respondent failed to file an answer.

On January 28, 2002, the General Counsel filed a Motion for Summary Judgment and memorandum in support with the Board. On February 1, 2002, 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 filed no response. The allegations in the motion are therefore undisputed.

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. Similarly, Section 102.56 of the Board's Rules and Regulations provides that the allegations in a compliance specification shall be deemed admitted if an answer is not filed within 21 days from service of a compliance specification. In addition, the consolidated complaint and compliance specification affirmatively noted that unless an answer to the complaint was filed within 14 days of service, and an answer to the compliance specification was filed within 21 days of service, all the allegations in the complaint and compliance specification would be considered admitted. Further, the undisputed allegations in the General Counsel's motion disclose that the Region, by letter dated November 30, 2001, notified

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

the Respondent that unless an answer was received by December 11, 2001, A Motion for Default Judgment would be filed.² Nevertheless, the Respondent did not file an answer.

In the absence of good cause being shown for the failure to file a timely answer, 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, I.C.E., located at 3901 Brown Street, Ashland, Kentucky, has been an electrical contractor engaged in construction work. At all material times, Early Warning, also located at 3901 Brown Street, Ashland, Kentucky, has been engaged in the business of residential/commercial alarm monitoring.

At all material times, I.C.E. and Early Warning have been affiliated business enterprises with common officers, ownership, directors, management, and supervision; have formulated and administered a common labor policy; have shared common premises and facilities; have provided services for and made sales to each other; have interchanged personnel with each other and have held themselves out to the public as single-integrated business enterprises. Based on the foregoing, I.C.E. and Early Warning constitute a single integrated business enterprise and a single employer within the meaning of the Act.

Based on a projection of its operations since about February 13, 2001, when it commenced the business operation described above, the Respondent would annually provide services valued in excess of \$50,000 to Patton Construction, Inc., an enterprise located within the Commonwealth of Kentucky. Patton Construction, Inc. is a general contractor engaged in the construction business and annually performs services valued in excess of \$50,000 in states other than the Commonwealth of Kentucky.

We find that, at all material times, the Respondent has been an employer engaged in commerce within the

² Copies of the consolidated complaint and compliance specification and the November 30, 2001 letter were sent to the Respondent by certified and regular mail. The copies sent by certified mail were returned to the Regional Office marked "refused" and/or "unclaimed." The consolidated complaint and compliance specification sent by regular mail was not returned, and the letter sent by regular mail was returned marked "return to sender," with the Respondent's address crossed out. It is well settled that a respondent's failure or refusal to accept certified mail cannot serve to defeat the purposes of the Act. See, e.g., *Michigan Expediting Service*, 282 NLRB 210 fn. 6 (1986). Further, the failure of the Postal Service to return the copy of the consolidated complaint and compliance specification that was served by regular mail indicates actual receipt of that document. See *Lite Flight, Inc.*, 285 NLRB 649, 650 (1987). Accord: *Express Gourmet*, 338 NLRB No. 114 (2003).

meaning of Section 2(2), (6), and (7) of the Act and that International Brotherhood of Electrical Workers, Local Union 317, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

At all material times, Christopher Hutchinson, president/CEO, and Bob Hunt, director of operations, have been supervisors of Respondent within the meaning of Section 2(11) of the Act and agents of Respondent within the meaning of Section 2(13) of the Act.

Since about March 21, 2001, the Respondent has failed and refused to hire or consider for employment the following applicants for employment:

Ronald D. Cole
Warren G. Spry
Charles N. Taylor

Since about March 22, 2001, the Respondent has also failed and refused to hire or consider for employment the following applicants for employment:

Scott E. Burnett
Kevin W. Mullins

The Respondent engaged in the conduct described above because the named applicants for employment formed, joined, or assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities.

CONCLUSION OF LAW

By the acts and conduct described above, the Respondent has discriminated in regard to hire or tenure or terms or conditions of employment of employees or applicants for employment, thereby discouraging membership in a labor organization in violation of Section 8(a)(3) and (1) of the Act. See *Just Electric, Inc.*, 338 NLRB No. 96 (2003) (not reported in Board volumes) (citing *FES*, 331 NLRB 9 (2000), supplemental decision 333 NLRB 66 (2001), enfd. 301 F.3d 83 (3d Cir. 2002)). The Respondent's unfair labor practices 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, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. The compliance specification, which is consolidated with the complaint, states that the General Counsel knows of only three employees who have been hired by the Respondent since March 21, 2001. It further alleges that the first three applicant-discriminatees who applied for employment on March 21, 2001 (Cole, Spry, and Taylor) are entitled to instate-

ment to those positions.³ Accordingly, as these allegations are uncontroverted, we shall order the Respondent, in the event it resumes the same or similar business operations,⁴ to offer them instatement to jobs for which they applied, or if those jobs no longer exist, to substantially equivalent jobs, without prejudice to their seniority or any other rights or privileges they would have enjoyed absent the discrimination against them. We shall further order the Respondent to make Cole, Spry, and Taylor whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, as set forth in the compliance specification, with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), minus any tax withholdings required by Federal and State laws.⁵

In addition, with respect to the other two discriminatees (Burnett and Mullins), we find that a refusal-to-consider remedy is appropriate. See *FES*, supra, 331 NLRB at 14–15. Therefore, we shall order the Respondent, in the event it resumes the same or similar business operations, to place Burnett and Mullins in the position they would have been, absent discrimination, for consideration for future openings, consider them for the openings in accord with nondiscriminatory criteria, and notify

³ In *FES*, supra, the Board held that “proof of the availability of openings cannot be deferred to the compliance stage of the proceeding.” 331 NLRB at 14. Here, the allegations that there were three openings are contained in the compliance specification rather than the complaint. However, the compliance specification is consolidated with the complaint, and has been presented to the Board simultaneously with the complaint on the General Counsel's Motion for Default Judgment. In these circumstances, we find that the *FES* requirement has effectively been satisfied, and that it would serve no purpose to require the General Counsel to issue an amended complaint alleging the same facts that are currently alleged in the consolidated compliance specification. Cf. *Jet Electric Co.*, 334 NLRB 1059 (2001) (holding in abeyance final determination of appropriate remedy for refusal to consider for hire or hire violations pending a remand for a hearing before an administrative law judge, or, alternatively, issuance of an amended complaint and filing of new motion for summary judgment, addressing the number of openings that were available to the eight applicant-discriminatees), supplemental decision 338 NLRB 1148 (2002).

⁴ The compliance specification states that the Respondent laid off all employees and curtailed all of its business operations as an electrical contractor engaged in construction work on May 4, 2001, and the specification therefore terminates the backpay period on that date.

⁵ The consolidated complaint and compliance specification requests an order requiring Respondent to “reimburse any discriminatee entitled to a monetary award for any extra Federal and/or state income taxes that may result from a lump sum payment of such award.” Such a remedy 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 *Tres Estrellas De Oro*, 338 NLRB 503 (2002).

them, the Union, and the Regional Director in writing of future openings in positions for which Burnett and Mullins applied or substantially equivalent positions, until such time as the Regional Director determines the case should be closed.

Further, we shall require the Respondent to remove from its files any and all references to the unlawful failure and refusal to hire or consider for hire the five discriminatees, and to notify them in writing that this has been done.

Finally, as the Respondent has ceased operations, we shall order it to mail a copy of the attached notice to the Union and to the last known addresses of its employees in order to notify them of the outcome of this proceeding.

ORDER

The National Labor Relations Board orders that the Respondent single employer, I.C.E. Electric, Inc. and Early Warning Security, Inc., Ashland, Kentucky, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to hire or to consider for hire employees because they formed, joined, or assisted the International Brotherhood of Electrical Workers, Local Union 317, AFL-CIO and engaged in concerted activities, or to discourage employees from engaging in these 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) In the event the Respondent resumes the same or similar business operations, within 14 days thereafter, offer Ronald D. Cole, Warren G. Spry, and Charles N. Taylor reinstatement to the positions to which they applied or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights or privileges they would have enjoyed absent the discrimination against them.

(b) Make Ronald D. Cole, Warren G. Spry, and Charles N. Taylor whole for any loss of earnings and other benefits suffered as a result of the discrimination against them by paying them the amounts set forth below, plus interest and minus tax withholdings required by Federal and State laws, as set forth in the remedy section of this decision.

<i>Backpay</i>	<i>Benefit Contribution</i>	<i>TOTAL</i>
Ronald D. Cole	\$ 689.92 \$ 126.20	\$ 816.12
Warren G. Spry	2,439.30 126.20	2,565.50
Charles N. Taylor	0 0	<u>0</u>
		\$ 3,381.62

(c) In the event the Respondent resumes the same or similar business operations, within 14 days thereafter, place Scott E. Burnett and Kevin W. Mullins in the position they would have been, absent discrimination, for consideration for future openings, consider them for the openings in accord with nondiscriminatory criteria, and notify them, International Brotherhood of Electrical Workers, Local Union 317, AFL-CIO, and the Regional Director for Region 9, in writing, of future openings in positions for which Burnett and Mullins applied or substantially equivalent positions.

(d) Within 14 days from the date of this Order, remove from its files any and all references to the unlawful failure and refusal to hire or to consider for hire Ronald C. Cole, Warren G. Spry, Charles N. Taylor, Scott E. Burnett, and Kevin W. Mullins, 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.

(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, duplicate and mail, at its own expense and after being signed by the Respondent's authorized representative, a copy of the attached notice marked "Appendix"⁶ to the Union and all employees who have been employed by the Respondent at any time since March 21, 2001.

(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
MAILED 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 mail and obey this notice.

⁶ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Mailed by Order of the National Labor Relations Board" shall read "Mailed Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

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 fail and refuse to hire or to consider for hire employees because they form, join or assist the International Brotherhood of Electrical Workers, Local Union 317, AFL-CIO and engage in concerted activities, or to discourage employees from engaging in these 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, in the event we resume the same or similar business operations, within 14 days thereafter, offer Ronald D. Cole, Warren G. Spry, and Charles N. Taylor instatement to the positions to which they applied or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights or privileges they would have enjoyed absent the discrimination against them.

WE WILL make Ronald D. Cole, Warren G. Spry, and Charles N. Taylor whole for any loss of earnings and

other benefits suffered as a result of the discrimination against them by paying them the amounts set forth in the Board's Order, plus interest and minus tax withholdings required by Federal and State laws.

WE WILL, in the event we resume the same or similar business operations, within 14 days thereafter, place Scott E. Burnett and Kevin W. Mullins in the position they would have been, absent discrimination, for consideration for future openings, consider them for the openings in accord with nondiscriminatory criteria, and notify them, International Brotherhood of Electrical Workers, Local Union 317, AFL-CIO, and the Regional Director for Region 9, in writing, of future openings in positions for which Burnett and Mullins applied or substantially equivalent positions.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any and all references to the unlawful failure and refusal to hire or to consider for hire Ronald C. Cole, Warren G. Spry, Charles N. Taylor, Scott E. Burnett, and Kevin W. Mullins, and WE WILL, 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.

I.C.E. ELECTRIC, INC., AND EARLY WARNING SECURITY, INC.