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Agencia de Publicaciones de Puerto Rico, Inc. *and* United Industrial Workers Service, Transportation, Professional and Government Workers of North America, AFL–CIO. Case 24–CA–10801

December 24, 2008

DECISION AND ORDER

BY CHAIRMAN SCHAUMBER AND MEMBER LIEBMAN

The General Counsel seeks a default judgment in this case on the ground that the Respondent has failed to file a timely answer to the complaint. On a charge filed and later amended by the Union on November 14, 2007, and March 4, 2008, respectively, the General Counsel issued the complaint on June 26, 2008, against Agencia de Publicaciones de Puerto Rico, Inc. (the Respondent), alleging that it had violated Section 8(a)(1) and (5) of the National Labor Relations Act. On July 29, 2008, the Respondent filed an answer.

On August 13, 2008, the General Counsel filed a Motion for Default Judgment with the Board.[1] On August 15, 2008, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted, allowing until August 29, 2008, for a response to be filed. The Respondent filed a timely opposition to the motion.

Ruling on Motion for Default Judgment[2]

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 affirmatively states that the answer must be received by the Regional Office **"on or before July 10, 2008, or postmarked on or before July 10, 2008** [emphasis in original]." The complaint also states that if no answer is filed, the allegations in the complaint may be found to be true by the Board, pursuant to a motion for default judgment. The undisputed allegations in the Motion for Default Judgment further disclose that the Region, having received no answer by the July 10, 2008 due date, notified the Respondent by letter dated July 11, 2008, that unless an answer was received by the close of business July 25, 2008, all facts alleged in the complaint would be deemed to be true and would be so found by the Board.[3]

The Respondent did not file an answer by July 25, 2008. Instead, on July 29, 2008, the Regional Office received the Respondent's answer, which was dated July 24, 2008, and transmitted by certified mail in an envelope bearing a July 28, 2008 postmark. The answer contained no explanation as to why it was untimely filed. Nor was the answer accompanied by a request for leave to file an untimely answer or an explanation as to why the Respondent had not sought a further extension of time to file its answer.

In its response to the Board's Notice to Show Cause, the Respondent acknowledges that it filed its "response" to the complaint on July 29, 2008. The Respondent further states that "any delay in the filing" of the answer was attributable to the fact that July 25 is a holiday and hence, the answer was mailed on the next business day following the holiday.[4] The Respondent therefore asks that the Board find its answer to be timely, and it argues that a contrary result would be "unjust, inequitable and would represent an enormous burden" on it. As explained below, we find no merit in the Respondent's argument.

Section 102.111(a) of the Board's Rules and Regulations provides, in relevant part, that

> [I]n computing any period of time prescribed or allowed by these rules . . . [t]he last day of the period so computed is to be included unless it is a Saturday, Sunday, or a legal holiday, in which event the period runs until the official closing time of the receiving office on the next Agency business day[.]

Thus, because the July 25 extended deadline fell on a holiday, and the following 2 days were Saturday and Sunday, the due date for filing the Respondent's answer was Monday, July 28. As stated above, the Regional Office did not receive the answer until Tuesday, July 29, and the document was postmarked July 28.

[1] In pars. 2(a) and (c) on p. 2 of his motion, the General Counsel mistakenly refers to "the Respondent" instead of "the Union" as a labor organization and the exclusive collective-bargaining representative. As these misstatements appear only in the General Counsel's motion and not in the complaint itself, we view them as minor typographical errors.

[2] Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Schaumber and Member Liebman constituted a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act.

[3] A copy of the Regional Director's July 11, 2008 letter to the Respondent is attached to the General Counsel's motion.

[4] We take administrative notice that July 25 is Commonwealth Constitution Day in Puerto Rico, an official holiday in Puerto Rico, where this case arises.

Had the Respondent's answer been postmarked before July 28, it would have been considered timely. Section 102.111(b) of the Board's Rules states, in relevant part, that

> [T]he Board will accept as timely filed any document which is . . . postmarked on the day before (or earlier than) the due date; documents which are postmarked on or after the due date are untimely. "Postmarking" shall include timely depositing the document with a delivery service that will provide a record showing that the document was tendered to the delivery service in sufficient time for delivery by the due date, but in no event later than the day before the due date.

The Respondent clearly did not comply with the terms of this rule. The Respondent acknowledges that it did not place its answer in the mail until the due date, July 28.

Had the Respondent shown good cause for its failure to file on time, its answer might yet have been accepted. Section 102.111(c) of the Board's Rules provides that answers to a complaint "may be filed within a reasonable time after the time prescribed by these rules only upon good cause shown based on excusable neglect and when no undue prejudice would result." It also requires that a party seeking to file a document beyond the prescribed time "shall file along with the document, a motion that states the grounds relied on for requesting permission to file untimely. The specific facts relied on to support the motion shall be set forth in affidavit form and sworn to by individuals with personal knowledge of the facts."

The Respondent, however, failed to file a motion with its late answer to the complaint. The Respondent addressed the issue of its late filing only in its response to the Motion for Default Judgment. In its response, the Respondent concedes that it filed its answer late, but asserts only that it should be excused because the July 25 filing deadline fell on a holiday.

We find that the Respondent has failed to show good cause for its untimely filing. The fact that the deadline established by the Regional Director's discretionary extension of time fell on a holiday should have been immediately apparent to the Respondent. In such circumstances, the Respondent should have either (1) taken steps to ensure that its answer was received by the extended due date, July 28;[5] (2) made sure that it mailed the answer in time for it to be postmarked prior to July 28; (3) contacted the Regional Office and requested a further extension of time in which to file its answer;[6] or (4) included with its answer a motion to file belatedly, with a supporting affidavit, setting forth the reasons it was unable to file timely.

The Respondent did none of these. It did not even place its answer in the mail until the July 28 due date. Therefore, it was clearly not possible for the answer to be received on that day. The Respondent neither asserts that it was unable to have mailed the answer earlier nor otherwise provides a reason for its failure to comply with the July 28 deadline.[7] Accordingly, we reject the Respondent's answer as untimely, and we grant in part the General Counsel's Motion for Default Judgment.[8]

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a Delaware corporation with an office and place of business in Cataño, Puerto Rico, has been engaged in the distribution of magazines, periodicals, and other printed material to retail stores in Puerto Rico.

During the 12-month period preceding the issuance of the complaint, the Respondent, in conducting its business operations in Cataño, Puerto Rico, purchased and received at its place of business goods valued in excess of $50,000 directly from points outside the Commonwealth of Puerto Rico.

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 Industrial Workers Service, Transportation, Professional and Government Workers of North America, AFL–CIO (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, Gerardo A. Angulo has held the position of the Respondent's president and has been a supervisor of the Respondent within the meaning of Section 2(11) of the Act, and an agent of the Respondent within the meaning of Section 2(13) of the Act.

The following employees of the Respondent constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

[5] E.g., by hand delivery; see Sec. 102.111(b) of the Board's Rules.

[6] The Board has found that a party's failure to promptly request an extension of time to file an answer is a factor demonstrating lack of good cause. See *Lockhart Concrete*, 336 NLRB 956, 957 (2001).

[7] Indeed, the answer is dated July 24. The Respondent does not explain why it did not mail it that day or the following Saturday, July 26.

[8] See fn. 9, below.

> All full-time and regular part-time warehouse employees, sales representatives, and truck drivers employed by the Respondent at its facilities located in Cataño, Puerto Rico; excluding all executive, administrative, professional, technical, confidential employees, foremen, guards, and supervisors as defined in the Act.

On October 30, 1967, the Union was certified as the exclusive collective-bargaining representative of the above-described unit and, at all material times since that date, the Union has been the certified exclusive collective-bargaining representative of the unit employees under Section 9(a) of the Act.

Since its certification as representative, the Union has been party to successive collective-bargaining agreements with the Respondent, the most recent of which was effective, by its terms, from February 1, 2007, to January 31, 2010.

On or about October 16, 2007, the Respondent sold its rights to distribute magazines, periodicals, and other printed material to retail stores in Puerto Rico to another unrelated business entity.

On October 30, 2007, the Respondent notified the Union that effective October 31, 2007, it was closing operations and terminating the entire bargaining unit.

The Respondent sold its distribution rights without affording the Union an opportunity to bargain with respect to the effects of this conduct.[9]

CONCLUSION OF LAW

By the acts and conduct described above, the Respondent has failed and refused to bargain collectively with the exclusive collective-bargaining representative of its employees, and has thereby engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) 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.

As a result of the Respondent's unlawful failure to bargain in good faith with the Union about the effects of its decision to sell its distribution rights, the terminated employees have been denied an opportunity to bargain through their collective-bargaining representative. Meaningful bargaining cannot be assured until some measure of economic strength is restored to the Union. A bargaining order alone, therefore, cannot serve as an adequate remedy for the unfair labor practice committed.

Accordingly, we deem it necessary, in order to effectuate the purposes of the Act, to require the Respondent to bargain with the Union, on request, concerning the effects of selling its distribution rights on its employees, and shall accompany our order with a limited backpay requirement designed both to make whole the employees for losses suffered as a result of the violation and to recreate in some practicable manner a situation in which the parties' bargaining position is not entirely devoid of economic consequences for the Respondent. We shall do so by ordering the Respondent to pay backpay to the terminated employees in a manner similar to that required in *Transmarine Navigation Corp*., 170 NLRB 389 (1968), as clarified by *Melody Toyota*, 325 NLRB 846 (1998).

Thus, the Respondent shall pay the terminated employees backpay at the rate of their normal wages when last in the Respondent's employ from 5 days after the date of this Decision and Order until the occurrence of the earliest of the following conditions: (1) the date the Respondent bargains to agreement with the Union on those subjects pertaining to the effects of the sale of its distribution rights on its employees; (2) a bona fide impasse in bargaining; (3) the Union's failure to request bargaining within 5 business days after receipt of this Decision and Order, or to commence negotiations within 5 business days after receipt of the Respondent's notice of its desire to bargain with the Union; or (4) the Union's subsequent failure to bargain in good faith. In no event shall the sum paid to these employees exceed the amount they would have earned as wages from October 31, 2007, the date on which the Respondent closed its operations, to the time they secured equivalent employment elsewhere, or the date on which the Respondent shall have offered to bargain in good faith, whichever occurs sooner; provided, however, that in no event shall the sum be less than the employees would have earned for a 2-week period at the rate of their normal wages when last in the Respondent's employ. Backpay shall be based on earnings which the terminated employees would normally have received during the applicable period, less any net interim earnings, and shall be computed in accordance with *F. W. Woolworth Co*., 90 NLRB 289

[9] The complaint also alleges that the Respondent violated the Act by failing to bargain over the decision to sell its distribution rights. Although the complaint alleges that its decision to sell its distribution rights is a mandatory subject of bargaining, we find that the allegations of the complaint do not support a cause of action given the Supreme Court's decision in *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981). Accordingly, we shall deny the Motion for Default Judgment with respect to these allegations and remand them for further appropriate action. See *Nick & Bob Partners*, 340 NLRB 1196 fn. 2 (2003).

(1950), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[10]

In view of the fact that the Respondent's facility is currently closed, we shall order the Respondent to mail copies of the attached notice, in both English and Spanish, to the Union and to the last known addresses of its former employees in order to inform them of the outcome of this proceeding.

ORDER

The National Labor Relations Board orders that the Respondent, Agencia de Publicaciones de Puerto Rico, Inc., Cataño, Puerto Rico, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing to bargain collectively with United Industrial Workers Service, Transportation, Professional and Government Workers of North America, AFL–CIO, as the exclusive collective-bargaining representative of the employees in the following unit, by failing to give the Union prior notice of its decision to sell its distribution rights and an opportunity to bargain over the effects of that decision on the employees in the unit. The unit is:

> All full-time and regular part-time warehouse employees, sales representatives, and truck drivers employed by the Respondent at its facilities located in Cataño, Puerto Rico; excluding all executive, administrative, professional, technical, confidential employees, foremen, guards, and supervisors as defined in the Act.

(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) On request, bargain collectively and in good faith with the Union with respect to the effects on the unit employees of its decision to sell its distribution rights, and reduce to writing and sign any agreement reached as a result of such bargaining.

(b) Pay to the terminated unit employees their normal wages for the period set forth in the remedy section of this decision, with interest.

(c) 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.

(d) 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, signed and dated copies of the attached notice marked "Appendix,"[11] in both English and Spanish, to the Union and to all unit employees who were terminated as a result of the sale of its distribution rights.

(e) 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.

IT IS FURTHER ORDERED that the complaint allegations concerning the Respondent's failure to bargain with the Union over the decision to sell its distribution rights are severed and remanded to the Regional Director for further appropriate action.

Dated, Washington, D.C. December 24, 2008

Peter C. Schaumber,	Chairman
Wilma B. Liebman,	Member

(SEAL) 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 this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

[10] In the complaint, the General Counsel seeks "an order requiring Respondent to pay compound interest instead of simple interest." Having duly considered the matter, we are not prepared at this time to deviate from our current practice of assessing simple interest. See, e.g., *Glen Rock Ham*, 352 NLRB No. 69, slip op. at 1 fn. 1 (2008), citing *Rogers Corp.*, 344 NLRB 504 (2005).

[11] 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."

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 to bargain collectively with United Industrial Workers Service, Transportation, Professional and Government Workers of North America, AFL–CIO, as the exclusive collective-bargaining representative of the employees in the following unit, by failing to give the Union prior notice of our decision to sell our distribution rights and an opportunity to bargain over the effects of that decision on the employees in the unit. The unit is:

All full-time and regular part-time warehouse employees, sales representatives, and truck drivers employed by us at our facilities located in Cataño, Puerto Rico; excluding all executive, administrative, professional, technical, confidential employees, foremen, guards, and supervisors as defined in the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, on request, bargain collectively and in good faith with the Union with respect to the effects on the unit employees of our decision to sell our distribution rights on October 16, 2007, and reduce to writing and sign any agreement reached as a result of such bargaining.

WE WILL pay to the terminated unit employees their normal wages for the period set forth in the remedy section of the Board's Decision and Order, with interest.

AGENCIA DE PUBLICACIONES DE PUERTO RICO, INC.