Windward Roofing and Construction Co., Inc. *and* Illinois District Council No. 1 of the International Union of Bricklayers and Allied Craftworkers, AFL–CIO. Case 13–CA–38606

March 19, 2001

DECISION AND ORDER

BY MEMBERS LIEBMAN, HURTGEN, AND WALSH

Upon a charge filed by the Union on June 5, 2000, the General Counsel of the National Labor Relations Board issued a complaint on September 21, 2000, against Windward Roofing and Construction Co., Inc., the Respondent, alleging that it has violated Section 8(a)(1) and (3) of the National Labor Relations Act. Although properly served copies of the charge and complaint, the Respondent failed to file a timely answer.

On January 16, 2001, the General Counsel filed a Motion for Summary Judgment, with exhibits attached, with the Board. On January 18, 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 filed a Response together with an answer to the complaint and a supporting affidavit. The General Counsel submitted a memorandum in support of the motion, and the Respondent filed a memorandum in response to the General Counsel's memorandum.

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

Ruling on Motion for Summary Judgment

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 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 the allegations in the complaint shall be deemed to be admitted true and may be so found by the Board." Further, exhibits attached to the Motion for Summary Judgment indicate that the counsel for the General Counsel for Region 13, by certified letter dated December 19, 2000, notified the Respondent's counsel that, unless an answer was received by December 29, 2000, a Motion for Summary Judgment would be filed. An answer was not filed until February 2, 2001.

The Respondent's attorney contends that he has shown good cause for the failure to file a timely answer to the complaint. Specifically, the Respondent's attorney claims in his affidavit that the complaint was "served on September 25, 2000 in the midst of the last six weeks of the busy construction season and was somehow mislaid." The Respondent's attorney also maintains that from November 1, 2000, through March 1, 2001, the "Respondent's business closes down due to weather conditions." With respect to the General Counsel's December 19, 2000 "reminder letter," the Respondent's attorney states that he did not receive it until January 11, 2001, "well after the deadline of December 29, 2000." Upon receiving the letter, the Respondent's attorney alleges that he telephoned counsel for the General Counsel, but he "was unresponsive to my good faith reasons for the delay."

For the following reasons, we find that the Respondent has failed to establish good cause for the failure to file a timely answer.

First, it is undisputed that the complaint was served by certified mail on the Respondent itself and that the Respondent received the complaint. Under Board precedent, knowledge of the complaint may be imputed to the Respondent's counsel. *Day & Zimmerman Services*, 325 NLRB 1046 (1998) (knowledge of complaints imputed to the respondent's consultant where there was effective service of the complaints on the respondent itself).

Second, the General Counsel has attached to his Motion for Summary Judgment copies of a U.S. Postal Service certified mail receipt and a certified mail log maintained by the Regional Office indicating that the complaint was also served by certified mail on the Respondent's attorney. In his affidavit, the Respondent's attorney does not claim that he did not receive a copy of the complaint.

Third, even assuming the Respondent's counsel did not timely receive the General Counsel's December 19, 2000 letter, "such a letter is not required by the Board's Rules." *Bricklayers Local 31*, 309 NLRB 970 (1982), enfd. 992 F.2d 1217 (6th Cir. 1993). Therefore, "the failure of a Regional Office to warn a respondent prior to issuance of a default summary judgment motion does not excuse the antecedent failure to file a timely answer." Id.

Fourth, with respect to the contention that the complaint was "somehow mislaid," such a claim of "unexplained inadvertence does not constitute good cause for the Respondent's late filing." Id. and cases cited at footnote 5.

Fifth, even assuming the complaint was received during the Respondent's "busy season," it is well settled that "preoccupation with other aspects of the business does not constitute good cause for a party's failure to file a timely answer." *Dong-A Daily North America*, 332 NLRB No. 8, slip op. at 1 (2000).

Finally, the temporary closing of the Respondent's business on November 1, 2000, does not explain the failure to file a timely answer inasmuch as the answer was due the previous month.

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 Summary Judgment.[1]

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, an Illinois corporation, with an office and place of business in Chicago, Illinois, has been engaged in the roofing, masonry, and sheet metal business. During calendar year 1995, the Respondent, in conducting its business operations, derived gross revenues in excess of $500,000, and purchased and received goods valued in excess of $50,000 from other enterprises located within the State of Illinois, each of which other enterprises had received those goods directly from points located outside the State of Illinois. 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 of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

At all material times the following individuals held the positions set forth opposite their respective names and have been supervisors of the Respondent within the meaning of Section 2(11) of the Act and agents of the Respondent within the meaning of Section 2(13) of the Act:

John Schultz	General Superintendent and Head of Roofing Dept.
John Szymanski	Superintendent and Head of Roofing Dept.

About March 14, 2000, the Respondent, by John Szymanski by telephone, interfered with, restrained, and coerced employees in the exercise of their Section 7 rights, by informing them that the Respondent was nonunion.

About May 12, 2000, the Respondent, by one of its agents, who is unknown to the Union but who is well known to the Respondent, by telephone, interrogated employees about their union or protected concerted activities.

Since about March 2000, the Respondent has failed and refused to hire and to consider for hire the following applicants: Jeff Bloom, Andrew Gasca, and Donald Newton.

Since about March 2000, and continuing to date, the Respondent had at least 14 positions available for which applicants Jeff Bloom, Andrew Gasca, and Donald Newton were qualified.

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

CONCLUSION OF LAW

By the acts and conduct described above, the Respondent has been interfering with, restraining, and coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act, in violation of Section 8(a)(1) of the Act. By refusing to hire and consider for hire the individuals named above, the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act. The foregoing 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. Specifically, having found that the Respondent has violated Section 8(a)(3) and (1) by failing and refusing to hire Jeff Bloom, Andrew Gasca, and Donald Newton, we shall order the Respondent to offer them immediate instatement to the positions to which they applied or, if those positions no longer exist, to substantially equivalent positions. *FES*, 331 NLRB No. 20, slip op. at 4 (2000).[2] Further, the Respondent shall make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them. 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). The Respondent shall also be required to remove from its files any and all references to the unlawful failure and refusal to hire and to consider for hire these individuals, and to notify them in writing that this has been done.

[1] Having granted the Motion for Summary Judgment, we deny the Respondent's request for leave to file its answer instanter.

[2] The Respondent also unlawfully refused to consider Bloom, Gasca, and Newton for hire, but it is unnecessary to provide the standard *FES* remedy for those violations (requiring the Respondent to place Bloom, Gasca, and Newton in the positions they would have been in, absent discrimination, for consideration for future openings in accord with nondiscriminatory criteria). See *FES*, supra, slip op. at 7. This is so because we are providing Bloom, Gasca, and Newton with the more comprehensive relief of an instatement order. In other words, the limited remedy for the refusal-to-consider violation is subsumed within the broader remedy for the refusal-to-hire violation. See *Budget Heating & Cooling,* 332 NLRB No. 132, slip op. at fn. 3 (2000).

ORDER

The National Labor Relations Board orders that the Respondent, Windward Roofing and Construction Co., Inc., Chicago, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating its employees about their union membership, activities, and sympathies.

(b) Interfering with its employees' Section 7 rights by informing them that it was nonunion.

(c) Failing and refusing to hire or to consider for hire employees because they joined and assisted the Union and engaged in concerted activities, and to discourage its employees from engaging in these activities.

(d) 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 Jeff Bloom, Andrew Gasca, and Donald Newton instatement to the positions to which they applied or, if those positions no longer exist, to substantially equivalent positions.

(b) Make Jeff Bloom, Andrew Gasca, and Donald Newton whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, 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 and all references to the unlawful failure and refusal to hire and to consider for hire these employees 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.

(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 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 Chicago, Illinois, copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 13, 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 March 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.

[3] 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 the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT interrogate our employees about their union membership, activities, and sympathies.

WE WILL NOT interfere with our employees' Section 7 rights by informing them that we are nonunion.

WE WILL NOT fail and refuse to hire or to consider for hire employees because they joined and assisted the Union and engaged in concerted activities, and to discourage our 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, within 14 days of the Board's Order, offer Jeff Bloom, Andrew Gasca, and Donald Newton instatement to the positions to which they applied, or, if those positions no longer exist, to substantially equivalent positions.

WE WILL, make Jeff Bloom, Andrew Gasca, and Donald Newton whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, with interest.

WE WILL, within 14 days of the Board's Order, remove from our files any and all references to the unlawful failure and refusal to hire and to consider for hire these employees, 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.

WINDWARD ROOFING AND CONSTRUCTION CO., INC.