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Tom Cat Development Corp. *and* Local 46, Metallic Lather Union and Reinforcing Ironworkers of New York City and Vicinity *and* Alberto Bota. Cases 2–CA–34267 and 2–CA–34600

November 22, 2002

DECISION AND ORDER

BY MEMBERS LIEBMAN, COWEN, AND BARTLETT

The General Counsel seeks summary judgment in this case on the ground that the Respondent has failed to file an answer to the complaint. Upon a charge filed in Case 2–CA–34267 by Local 46, Metallic Lather Union and Reinforcing Ironworkers of New York City and Vicinity (the Union or Local 46) on January 7, 2002, and a charge filed in Case 2–CA–34600 by Alberto Bota on May 9, 2002, the General Counsel issued an order consolidating cases, consolidated complaint and notice of hearing on June 28, 2002, against Tom Cat Development Corp., the Respondent, alleging that it has violated Section 8(a)(1) and (3) of the Act. The Respondent failed to file an answer.

On August 8, 2002, the General Counsel filed a Motion for Summary Judgment with the Board. On August 14, 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 failed to file a timely response.[1] The allegations in the motion are therefore undisputed.

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. In addition, the complaint affirmatively notes that unless an answer is filed within 14 days of service, all the allegations in the complaint will be considered admitted. Further, the undisputed allegations in the Motion for Summary Judgment disclose that the Region, on July 16, 2002 by facsimile transmission, served the Respondent with a letter informing the Respondent that unless an answer was received by July 26, 2002, a Motion for Summary Judgment would be filed.

The Respondent replied by letter dated July 17, 2002, from Thomas Pampalone, who is identified in the complaint as the Respondent's president. The letter acknowledged receipt of the complaint and the Region's subsequent communication. The letter continued as follows:

> Please be advised that as a follow-up to my conversation with you; we must now state for the record that Tom Cat Development Corp. did not do any work at 148 Madison Street and did not have any contracts or sub contracts for any works [sic] at 148 Madison Street. Furthermore as stated to you under separate cover Tom Cat Development Corp. has ceased doing business since mid February, 2002. We have and will continue to cooperate fully with you and your office but we must state for the records once more that Tom Cat Development Corp. did not do any work at 148 Madison Street.
>
> In your early letters of March–April 2002 you mentioned Arcade Restoration. We feel that this should be the area of your pursuit. If we could be of any further assistance please do not hesitate to contact me.

We find that the Respondent's July 17, 2002 letter does not constitute a proper answer under Section 102.20 of the Board's Rules and Regulations. The Board typically has shown some leniency toward a pro se litigant's efforts to comply with procedural rules. See, e.g., *Mid-Wilshire Health Care Center*, 331 NLRB 1032, 1033 (2000). Nevertheless, even in pro se cases, the Board has found answers legally insufficient if they "fail to address any of the factual or legal allegations of the complaint." *Eckert Fire Protection Co.*, 329 NLRB 920 (1999); accord, *Kloepfers Floor Covering, Inc.*, 330 NLRB 811 (2000). In the present case, the Respondent's letter does not respond to any of the complaint's factual or legal allegations, which concern the discharge of two employees in November and December 2001 because of their union activities. Instead, the letter asserts that the Respondent "did not do any work at 148 Madison Street" and "ceased doing business since mid February, 2002." Therefore, even considering the Respondent's pro se status, the letter is legally insufficient to constitute a proper answer.[2]

[1] The Respondent's response to the Notice to Show Cause was due to be filed with the Board on or before August 28, 2002. No response was filed by this due date. Instead, on October 31, 2002, the Respondent filed a document titled "Affidavits and Memorandum in Support of Application to Vacate a Default Declared by Counsel for the General Counsel and In Opposition to a Motion for Summary Judgment." The General Counsel filed a memorandum in opposition to the Respondent's submission on November 13, 2002. We reject the Respondent's response to the Notice to Show Cause as untimely. We find that the Respondent has failed to show good cause for failing to make a timely response to the General Counsel's Motion for Summary Judgment.

[2] Our dissenting colleague argues that it was sufficient for the Respondent to deny the charge allegation that one of the discharged employees was employed at a particular construction site. We disagree. As the case quoted in the dissent makes clear, the Respondent's obliga-

In the absence of good cause being shown for the failure to file a timely answer, we grant the General Counsel's Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a New York corporation with an office and place of business located at 35 Fifth Avenue, Bay Shore, New York, has been engaged in the business of concrete and masonry construction work.

Annually, the Respondent, in conducting its business operations purchases and receives at various jobsites goods and materials valued in excess of $50,000 directly from other enterprises located within the State of New York, each of which other enterprises had received these goods directly from points outside the State of New York.

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, Local 46, is a labor organization within the meaning of Section 2(5) of the Act. We also find that, at all material times, Local 45, United Brotherhood of Carpenters and Joiners of America (Local 45) has been 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, acting on its behalf:

Thomas Pampalone	President
Peter Pampalone	Labor Foreman
Frank Bartolotti	Superintendent
Richard Slueck	Supervisor

On about November 30, 2001, the Respondent discharged its employee Philip Peyton. Since that date, the Respondent has failed and refused to reinstate, or offer to reinstate, Peyton to his former position of employment.

The Respondent discharged Peyton because he was a member of and supported Local 46 and engaged in concerted activities, and to discourage employees from engaging in these activities.

On about December 1, 2001, the Respondent discharged its employee Alberto Bota. Since that date, the Respondent has failed and refused to reinstate, or offer to reinstate, Bota to his former position of employment.

The Respondent discharged Bota because he was a member of and supported Local 45 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 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. The unfair labor practices of the Respondent 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)(1) and (3) by discharging employees Peyton and Bota, we shall order the Respondent to offer the discriminatees full reinstatement to their former jobs, or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed. We also shall order the Respondent to make Peyton and Bota 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). In addition, the Respondent shall also be required to remove from its files any references to the unlawful discharges, and to notify the discriminatees in writing that this has been done and that the discharges will not be used against them in any way.[3]

ORDER

The National Labor Relations Board orders that the Respondent, Tom Cat Development Corp., Bay Shore, New York, its officers, agents, successors, and assigns, shall

tion is to address the allegations of the *complaint*, not the charge. See Sec. 102.20 of the Board's Rules and Regulations: "The respondent shall specifically admit, deny, or explain each of the facts alleged in the *complaint* . . . ." (Emphasis added.) See generally *Redd-I*, 290 NLRB 1115, 1116–1117 (1988) (discussing the distinction between the charge and the complaint). Here, as stated above, the Respondent's letter does not address any of the allegations of the *complaint* and is therefore legally insufficient under the Board's Rules.

[3] We recognize that, in its July 17, 2002 letter, the Respondent alleged that it ceased operations in February 2002. The effect of the alleged closing on our standard reinstatement and make-whole remedies is an issue that may be resolved at the compliance stage of this proceeding.

1. Cease and desist from

(a) Discharging or otherwise discriminating against employees because they are members of and support labor organizations and engage in concerted 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) Within 14 days from the date of this Order, offer Philip Peyton and Alberto Bota full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make whole Philip Peyton and Alberto Bota for any loss of earnings and other benefits suffered as a result of their unlawful discharges, 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 discharges of Philip Peyton and Alberto Bota, and within 3 days thereafter notify the discriminatees in writing that this has been done and that the discharges will not be used against them 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 facility in Bay Shore, New York, copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 2, 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 November 30, 2001.

(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.

Dated, Washington, D.C. November 22, 2002

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Wilma B. Liebman, Member

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Michael J. Bartlett, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER COWEN, dissenting.

Contrary to my colleagues, I would deny the General Counsel's motion for summary judgment because I consider the Respondent's July 17, 2002 letter to the Region a legally sufficient answer.

The complaint alleges that the Respondent unlawfully discharged employees Peyton and Bota. The underlying charge with respect to the former avers that Peyton was employed at a construction site at Madison and Pike Streets. Neither the other charge nor the complaint indicates a specific employment location. On July 17, 2002, Thomas Pampalone, identified in the complaint as the Respondent's president, timely submitted a letter to the Region in response to its letter advising that an answer to the complaint should be filed. In that letter, Mr. Pampalone referred to a prior conversation with the Region and pertinently averred that he "must now state for the record" that the Respondent did not do any work at 148 Madison Street and did not have any contracts or subcontracts for any work at that location.

As the Board has held:

> When a pro se respondent's answer clearly denies the unfair labor practice allegations of the complaint, the Board will not grant summary judgment for the General Counsel even if the answer does not address all the factual allegations of the complaint.

American Gem Sprinkler Co., 316 NLRB 102, 103 fn. 5 (1995). Contrary to my colleagues and consistent with this view, I find that this pro se Respondent has filed a legally sufficient answer. In this regard, the Respondent, in response to the Region's request for an answer to the complaint, has denied that he employed any workers at the only site referenced in the underlying documents. Consistent

[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."

with *American Gem Sprinkler* and similar precedent reflecting the Board's established policy of leniency towards pro se respondents, I find this denial sufficient despite the fact that it does not address all the factual allegations in the complaint. Although the General Counsel did not bother to specifically allege in the complaint the location at which Peyton and Bota supposedly worked for the Respondent, the charge against the Respondent does allege the location, and the Respondent's letter explicitly denies that it had any contracts or subcontracts covering work at that location. Thus, when one reads the complaint in conjunction with the charge on which it is based, the Respondent's letter can reasonably be understood as denying the complaint allegation that the Respondent violated the Act with respect to Peyton and Bota. In finding the Respondent's letter to be inadequate, my colleagues allow the General Counsel's inartful pleading to prevail over the Respondent's specific response that appears to address the key issue in dispute. Thus I would deny the General Counsel's motion and remand the case for hearing

Dated, Washington, D.C. November 22, 2001

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William B. Cowen, Member

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 had 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 our employees because they are members of and support labor organizations and engage in concerted 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 Philip Peyton and Alberto Bota full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make whole Philip Peyton and Alberto Bota for any loss of earnings and other benefits suffered as a result of their unlawful discharges, with interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to our unlawful discharges of Philip Peyton and Alberto Bota and, WE WILL within 3 days thereafter notify them in writing that this has been done and that the discharges will not be used against them in any way.

TOM CAT DEVELOPMENT CORP.