

York Printing Company and its Successor, York Printing Services Company, Ltd. and Des Moines Graphic Communications Union, Local No. 86-C, Graphic Communications International Union. Case 18-CA-11289

September 24, 1992

ORDER GRANTING MOTION

BY CHAIRMAN STEPHENS AND MEMBERS OVIATT
AND RAUDABAUGH

On April 30, 1992, Administrative Law Judge Richard J. Boyce of the National Labor Relations Board issued a Supplemental Decision and, on the same date, the proceeding was transferred to and continued before the Board in Washington, D.C. On May 29, 1992, the Board granted the Respondent's request for an extension of time to file exceptions to June 18, 1992. On June 23, 1992, the Board received the Respondent's exceptions, postmarked and mailed on June 18. On June 24, 1992, the Board rejected the exceptions as untimely.

On July 13, 1992, the Respondent filed a motion to file exceptions out-of-time under Rule 102.111(c) of the Board's Rules and Regulations. In support of its motion, the Respondent provided an affidavit from its president, Elizabeth Terrill Hintz. She is not an attorney and she appears pro se.

The exceptions were due, in Washington, D.C., on June 18, 1992. Hintz avers that the necessary documents were ready by June 17 and were in her home in Des Moines on that date. Apparently, her intention was to deliver the documents "by hand" in Minneapolis on June 17. She planned to fly to that city on that date. Minneapolis is the site of the Regional Office in which this case was processed. Hintz appears to have been under the impression that the documents could be filed by hand with the Board at its office in Minneapolis. Of course, she was incorrect in this respect. However, given her lack of legal training and her emotional state,¹ we are unwilling to say that this error constituted inexcusable neglect.

Hintz' plans were thwarted because of a burglary in her home between 4:30 and 5:15 a.m. on June 17. Hintz alleges that luggage was taken and that the exceptions were in the luggage. She immediately filed a police report. She reconstructed the documents on June 17 and mailed them on June 18, 1 day late under the "postmark" rule.

There is a factual issue with respect to whether the documents were in the luggage that was stolen. Our dissenting colleague points to various factors which

¹ In her affidavit Hintz alludes to an emotional illness and to the medication therefor. Although she identifies both, we believe that, in the interests of privacy, it is inappropriate to set forth these matters in detail.

lead him to believe that the documents were not in the luggage and therefore were not taken. Concededly, these factors raise an issue as to whether Hintz is telling the truth in this respect.² In these circumstances, the Board could hold a hearing to decide the issue of whether the documents were in the stolen luggage. Given our limited resources, we do not consider it prudent to expend further resources to decide this factual issue. This is particularly so where, as here, the resolution of the issue is not germane to the question of whether an unfair labor practice has been committed but rather only to the question of whether exceptions should be accepted. Consequently, we shall give Hintz the benefit of the doubt and take her at her word.

Based on the above, we have decided to accept the exceptions.³

MEMBER OVIATT, dissenting.

Contrary to my colleagues, I would deny the Respondent's motion under Section 102.111(c) of the Board's Rules and Regulations to file exceptions out-of-time. Because of the significant inaccuracies in the evidence submitted by the Respondent to support its claim that its exceptions were untimely filed because they were stolen, I reject its claim of "excusable neglect."

Section 102.111(c) provides, in pertinent part, that:

In unfair labor practice proceedings, motions, exceptions, answers to a complaint or a backpay specification, and briefs 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.

Section 102.111(c) further provides that a party requesting leave to file out-of-time pleadings must support its request with sworn affidavits from individuals having personal knowledge of the facts supporting the request.

Exceptions to the administrative law judge's supplemental decision were originally due on May 28, 1992. The Respondent requested and received an extension until June 18, 1992, to file exceptions. The Respondent alleges that it did not file its exceptions until June 23 because they were stolen and advances this alleged theft as "excusable neglect" under Section 102.111(c).

In support of its "excusable neglect" defense, the Respondent provided the sworn affidavit of its president, Elizabeth Terrill Hintz, stating that she prepared

² As a related matter, there is also an issue as to why Hintz ultimately mailed the documents to the correct place, i.e., the Board's office in Washington, D.C.

³ The Board notified the parties in a July 28, 1992 letter that the Respondent's motion was granted and that cross-exceptions were due on August 11, 1992. The letter further informed the parties that this Order Granting Motion would follow.

10 copies of the exceptions without assistance of legal counsel. Hintz further averred that she was booked on a 6:05 a.m. flight from Des Moines to Minneapolis on June 17, and that between 4:30 a.m. and 5:15 a.m. on June 17, 1992, her home was burgled and luggage containing the exceptions was stolen.¹ Hintz stated that she immediately filed a police report but that, because she was required to attend a convention in Great Falls, Montana, the next day, she was unable to make more copies of the exceptions and mail them until June 18, the due date.

As part of its motion, the Respondent included Hintz' lists of the stolen items—dated June 17 and 30, and a copy of the June 17 theft report that Hintz filed with the Des Moines police. This police report listed the stolen items as:

1 LARGE SUITCASE WITH VERIOUS [sic] CLOTHES, *PApers, MAil*

1 SML CARRYON CASE WITH MAKEUP & MEDICATION, *Misc. PApers* [Emphasis added.]

An examination of this report discloses that the italicized words, "PApers, MAil" and "Misc. PApers," are written in a different script and apparently with a different pen from the remainder of the police report. The text of the police report is clearly inconsistent and of suspicious origin, particularly because the accompanying, typed, police verification of loss report catalogued the stolen items as "large suitcase with various clothes value \$900; [and] 'small carry on case with makeup and medication value \$400.'" The police verification report made no mention of allegedly stolen Board exceptions, or other documents.

In its opposition to the Respondent's claim of "excusable neglect," the Union challenged the veracity of the Respondent's assertions questioning, among other things, why Hintz purportedly placed multiple copies of the exceptions in her suitcase when she intended to mail them. Additionally, the Union supplied the Board

¹ Hintz stated that nothing besides the luggage was taken.

with a copy of the June 17 theft report it obtained from the Des Moines Police Department. This copy unequivocally establishes that the Respondent submitted altered evidence in support of its motion to file exceptions out-of-time. Thus, this report lists the allegedly stolen items as only:

1 LARGE SUITCASE WITH VERIOUS [sic] CLOTHES

SML CARRYON CASE WITH MAKEUP & MEDICATION

Further, this report is accompanied by an affidavit from Des Moines Police Detective Bill Boggs who states that these were the only items reported stolen in the June 17 police report, and that Hintz did not provide the police with her lists of stolen items until July 1, 1992.

Considering the evidence in its entirety, it is clear that Hintz never claimed to the police on June 17 that exceptions or other documents had been stolen. Neither did the Respondent promptly inform the Board that these documents had been taken. It seems clear that only after the Board wrote the Respondent on June 24, rejecting its exceptions as untimely filed, did Hintz inform the police (through her lists of stolen items) that the exceptions had been taken,² and proffer obviously falsified documents to the Board in order to establish the Respondent's claim of "excusable neglect."

In other circumstances I might have sympathized with the pro se Respondent. Given the instant facts and fabrications, however, I do not. On the contrary, I find that the Respondent's conduct in apparently attempting to construct a claim of "excusable neglect" demonstrates a contempt for Board processes that I, for one, am unwilling to countenance. See, generally, *Kanakis Co.*, 293 NLRB 435, 436 (1989).

Accordingly, I dissent.

² As the Respondent had no compunction about tampering with police documents, I think it equally likely that Hintz' "June 17" list of stolen items was not prepared until after the Board notified the Respondent that its exceptions were rejected.