

All American Fire Protection, Inc. and Kenneth T. McClellan. Case 7–CA–43221

October 1, 2001

DECISION AND ORDER GRANTING MOTION FOR
DEFAULT SUMMARY JUDGMENT

BY CHAIRMAN HURTGEN AND MEMBERS
TRUESDALE
AND WALSH

Upon a charge filed by Kenneth T. McClellan on July 20, 2000, the General Counsel of the National Labor Relations Board issued a complaint on August 28, 2000, against All American Fire Protection, 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 October 23, 2000, the General Counsel filed with the Board Motions to Transfer Case to and Continue Proceedings before the Board and for Default Judgment on the Pleadings. On October 26, 2000, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion for default judgment should not be granted. On November 2, 2000, the Respondent filed a response to the Notice to Show Cause.

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

Ruling on Motion for Default 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 states that, unless an answer is filed within 14 days of service, all the allegations in the complaint shall be considered to be admitted to be true.

The undisputed allegations in the Motion for Default Summary Judgment disclose that, on July 27, 2000,¹ the Respondent's president, Michael J. DeBolle,² informed the Board agent investigating this case during a phone conversation that he would not cooperate in the investigation. On August 3, the Board's Regional Office sent a letter to the Respondent confirming this phone conversation and informed DeBolle that he had until August 10 to contact the

Region regarding the investigation. The Region decided to issue a complaint in this proceeding on August 15. Thereafter, on August 23, DeBolle telephoned the Board agent to inquire about the status of the investigation. After the Board agent informed DeBolle of the Region's decision to issue complaint, DeBolle asked whether the Respondent still had the opportunity to present its position in this matter. The Board agent told DeBolle that he was free to submit whatever information he wanted. Although the Region subsequently issued the complaint on August 28, its efforts to serve the complaint on the Respondent by certified mail were unsuccessful because the Respondent did not claim delivery. The post office returned that copy of the complaint to the Regional Office as unclaimed.

The undisputed allegations of the General Counsel's motion further show that, on September 13, the Region received a letter from the Respondent, dated August 31, detailing the Charging Party's work history and stating its reasons for his discharge. The next day, September 14, the Regional Attorney for Region 7 sent the Respondent a letter, by both certified and regular mail, advising the Respondent that it had not filed an answer to the complaint and that, unless it filed an appropriate answer by September 28, the Region would file a Motion for Default Judgment. The certified letter mailed September 14 was returned to the Region unclaimed, but the letter sent by regular mail was not returned.

Thereafter, when he telephoned the Board agent on September 18, DeBolle inquired about the Regional Attorney's letter and stated that he thought his August 31 letter had closed the case. The Board agent informed DeBolle that the case was not closed and that the Respondent's letter was insufficient to constitute an answer to the complaint of August 28. The Board agent then reviewed the complaint, paragraph by paragraph, with DeBolle and informed him that the Respondent should either admit or deny each individual allegation set forth in the complaint. DeBolle told the Board agent that he had the complaint in front of him and claimed that he was reviewing it as the Board agent explained each paragraph. DeBolle also agreed to submit his answer and mail it to the Region before September 28. On September 25, the Region sent to the Respondent, by regular mail, a second copy of the complaint, which was not returned to the Region as undeliverable.

The Respondent, however, did not file an answer to the complaint by the September 28 deadline set by the Region. It was not until November 2, in response to the Notice to Show Cause, that the Respondent filed an answer to the complaint. DeBolle stated, in filing this belated answer, "I am sorry for not having paid attention to NLRB procedures."

¹ All dates are in 2000, unless otherwise noted.

² Although General Counsel, in the Motion for Default Judgment, consistently refers to the Respondent's president as "Michael Boellio" throughout the document, the complaint, the Respondent's letter to the Region dated August 31 (discussed *infra*), and the Respondent's response to the Notice to Show Cause state that "Michael J. DeBolle" is the name of this official. Accordingly, we shall refer to the Respondent's president as "DeBolle" here.

Although the dissent finds that the Respondent's letter to the Region, dated August 31, was sufficient to constitute a valid answer here, the evidence clearly shows, as the General Counsel points out, that the Respondent had not seen the complaint by the time the Region received this letter on September 13. It is undisputed that the Respondent did not receive the complaint and notice of hearing that the Region originally sent on August 28, which was returned to the Region as unclaimed.³ Because the Region did not send a second copy of the complaint by regular mail until September 25, the Respondent's earlier submission could not have constituted a valid answer to the complaint.⁴ We therefore conclude that the Respondent's letter that the Region received on September 13 was nothing more than a position statement.⁵ The Board consistently has held that statements of position, including information submitted during the precomplaint investigative phase, are alone insufficient to constitute answers to complaints.⁶ These submissions do not meet the specificity requirements of Section 102.20 where, as here, they neither admit nor deny the complaint allegations.⁷ In these circum-

³ The Respondent's refusal to accept receipt of the complaint does not constitute good cause for failing to file an answer. See, e.g., *Powell & Hunt Coal Co.*, 293 NLRB 842 fn. 2 (1989).

⁴ Contrary to our colleague, we would not create the fiction of permitting the Respondent to file a valid answer before it had received the complaint.

⁵ The dissent erroneously finds that the investigatory stage of an unfair labor practice proceeding concludes with the Regional Office's decision to issue a complaint. Neither the Region's decision to issue complaint nor the actual issuance of the complaint is necessarily its final action on the merits of the case. The Regional Director has the authority to withdraw the complaint at any time before the hearing and may withdraw it, with the judge's approval, during the hearing on a discovery that the underlying unfair labor practice charge lacks merit. See Secs. 10275.1 and 10275.3 of the Board's Casehandling Manual for Unfair Labor Practice Proceedings. Thus, we do not find it material, as our colleague does, that the Respondent sent this letter after the Region had notified it of its intention to issue complaint.

⁶ See, e.g., *Bricklayers Local 31*, 309 NLRB 970 (1992), enfd. mem. 992 F.2d 1217 (6th Cir. 1993); *Wheeler Mfg. Corp.*, 296 NLRB 6 (1989); and *Printing Methods*, 289 NLRB 1231 (1989). Cf., *Mid-Wilshire Health Care Center*, 331 NLRB 1032, 1033 (2000), citing *Central States Xpress*, 324 NLRB 442, 443-444 (1997) (Board held that the employer's statement of position was sufficient to constitute an answer where the employer expressly resubmitted it subsequent to the issuance of the complaint and where the employer expressly intended it to serve as an answer to the complaint). In contrast to *Mid-Wilshire* and *Central States Xpress*, the Respondent here never sought to resubmit this position statement as an answer to the complaint (see above).

⁷ The Board was clearly concerned with the substantive rights of the parties in promulgating this requirement. As the Board explained in *Pipeline Construction Workers Local 692 (Fulghum Construction Corp.)*, 248 NLRB 1315, 1316 (1980), "[t]he reasons [for the rule] are as manifest here as in other judicial and administrative proceedings: viz, to facilitate the joining of issues and reduce the area of litigation, and in order that the rights of parties may be more quickly established and wrongs sooner rectified." Our dissenting colleague fails to recognize the purpose of this requirement in accepting position statements,

stances, we find, contrary to our colleague, that the Respondent did not file a timely answer to the complaint within 14 days of any service of the complaint here as required by Section 102.20 and 102.21 of the Board's rules.

In any event, after the Region received the letter that the dissent finds is a valid answer, the Board agent specifically informed DeBolle that the letter was insufficient to constitute an answer and that he had until September 28 to file an answer. The Board agent even went so far as to explain the complaint paragraph-by-paragraph to DeBolle and to inform him of the Board's requirement that he either admit or deny each paragraph of the complaint. Nevertheless, the Respondent did not file an answer until after the General Counsel moved for Default Summary Judgment. The General Counsel in this case gave the Respondent an extension of time for filing an answer and the Respondent failed to meet that deadline. The Board "typically has shown some leniency toward a pro se litigant's efforts to comply with our procedural rules,"⁸ but this Respondent made no effort to comply with the Board's Rules and Regulations despite the Region's repeated attempts to apprise DeBolle of our procedures.⁹

We further conclude that the Respondent's November 2 response to the Notice to Show Cause does not set forth good cause for its failure to file a complete, timely answer to the complaint. Thus, because the Respondent has not shown good cause for its failure to file a timely answer, we decline to accept the answer that the Respondent subsequently filed in response to the Notice to Show Cause. Accordingly, we grant the General Counsel's Motion for Default Summary Judgment on the complaint allegations.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a corporation with an office and place of business in Detroit, Michigan, has been engaged in the installation of fire suppression devices. During the calendar year ending December 31, 1999, the Respondent, in conducting its business opera-

like the one DeBolle submitted here, as answers to complaints. His position is both contrary to Sec. 102.20 of the Board's Rules and inconsistent with established principles set forth above.

⁸ *A.P.S. Production*, 326 NLRB 1296, 1297 (1998). See also, e.g., *Dismantlement Consultants*, 312 NLRB 650, 651 fn. 6 (1993); *Tri-Way Security*, 310 NLRB 1222, 1223 fn. 5 (1993); and *Acme Building Maintenance*, 307 NLRB 358 fn. 6 (1992).

⁹ As stated above, the Respondent did not attempt to use its earlier position statement as a valid answer by resubmitting it or referring to it in any timely submission after it received a copy of the complaint. We therefore conclude, contrary to the dissent, that this failure is dispositive of our finding that the Respondent has failed to file a timely answer to the complaint.

tions described above, purchased goods and materials valued in excess of \$50,000 from points located outside the State of Michigan and caused these goods and materials to be shipped directly to its jobsites within the State of Michigan, and provided services in excess of \$50,000 within the State of Michigan for various enterprises, including CVS Pharmacy and Powerhouse Gym, which enterprises themselves are directly engaged in interstate commerce. 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 Sprinkler Fitters Local 704 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO (the Union), is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

About June 19, 2000, the Respondent, through its agent and president, Michael J. DeBolle, threatened to close the Respondent's business if the employees selected the Union as their collective-bargaining representative. Also about June 19, 2000, the Respondent, by telephone through DeBolle, discharged Charging Party Kenneth T. McClellan. The Respondent engaged in this conduct because McClellan engaged in activities on the Union's behalf, and to discourage employees from engaging in these and other concerted 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, thereby violating Section 8(a)(1) of the Act. Additionally, by discharging an employee because he engaged in union activities, the Respondent has been discriminating in regard to hire or tenure or terms and conditions of employment of its employees, thereby discouraging membership in a labor organization and other concerted activities in violation of Section 8(a)(3) and (1) of the Act.

By the conduct described above, the Respondent has engaged in unfair labor practices affecting 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) of the Act by discharging employee Kenneth T. McClellan, we shall order the Respondent to offer him full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without

prejudice to his seniority or any other rights or privileges previously enjoyed. We also shall order the Respondent to make McClellan whole for any loss of earnings and other benefits suffered as a result of the discrimination against him. 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 also shall be required to remove from its files any reference to McClellan's discharge, and to notify him in writing that this has been done.

ORDER

The National Labor Relations Board orders that the Respondent, All American Fire Protection, Inc., Detroit, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening to close the business if employees select the Union as their collective-bargaining representative.

(b) Discharging or otherwise discriminating against employees because they assist the Union and engage in concerted activities in order to discourage employees from engaging in these and other concerted activities.

(c) 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 Kenneth T. McClellan full reinstatement to his former job or, if this job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Kenneth T. McClellan whole for any loss of earnings and other benefits suffered as a result of his unlawful discharge, 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 discharge of Kenneth T. McClellan, and within 3 days thereafter, notify him in writing that this has been done and that his discharge will not be used against him 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 to be 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 Region 7, post at its various facilities copies of the attached notice marked "Appendix."¹⁰ Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt 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 insure 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 June 19, 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.

MEMBER HURTGEN, dissenting in part.

Contrary to the majority, I would not grant the General Counsel's Motion for Default Judgment on the 8(a)(3) and (1) allegation pertaining to Charging Party Kenneth McClellan's discharge. At all times material, Respondent was unrepresented by counsel. The complaint issued on August 28, 2000. It alleged, *inter alia*, that McClellan was discharged for his union activities. On August 31, Respondent's president, Michael J. DeBolle, submitted a letter to the Region. The letter denied the allegation and asserted that the Respondent had discharged McClellan for cause. In my view, the letter clearly placed in issue the matter of whether the Respondent unlawfully had discharged McClellan.

My colleagues conclude that DeBolle's letter does not constitute a valid answer to the complaint because he did not receive the complaint before sending the letter. However, the Regional Office told the Respondent on August 23 that a complaint would issue. Respondent's letter was in response to that. In these circumstances, I would not ignore the letter simply because it had been sent before the complaint was received.

My colleagues next contend that the letter was a mere position statement that was submitted during the investigatory stage, *i.e.*, the period during which the Regional Office decides whether to issue complaint. However, in the

instant case, the Regional Office told the Respondent on August 23 that a decision had already been made (on August 15) to issue complaint. Thus, the letter was sent after the investigatory stage.

My colleagues suggest that the case was still in the investigatory stage. They note that a Regional Director can decide to reverse a decision to issue a complaint. The statement is true but irrelevant to the instant case. The decision to issue complaint was made on August 15. On August 23, the Board agent told DeBolle that he could submit his position statement. The complaint issued on August 28, *i.e.*, before the Respondent's letter was received on September 13. Obviously, the Region did not intend to treat the letter as a part of its investigation, *i.e.*, as a reconsideration of the decision to issue a complaint.

My colleagues also say that, after being apprised of the complaint on September 18, the Respondent should have resubmitted, or referred to, its August 31 letter. I would not take away a pro-se respondent's defense simply because of a failure to adhere to this formality.

My colleagues also note that the Board agent handling this case informed DeBolle that the letter did not constitute an answer, and the agent gave him a deadline for filing an answer. However, that is simply the position of the Regional Office as to the validity of the letter as an answer. It is for the Board to determine whether that position is correct.

I recognize that the Respondent promised on September 18 to file another answer by September 28. The Respondent did not do so until November 2. However, I fail to see how this conduct is relevant to the issue of whether the letter of August 31 was an adequate answer. Similarly, the Respondent's alleged failure to cooperate in the investigation is irrelevant to the issue of whether the letter of August 31 was a valid answer.

For these reasons, I would deny the General Counsel's motion as it relates to McClellan's discharge. It is essential to realize that the majority is denying the Respondent its fundamental right to defend itself and to litigate its position. Particularly where, as here, Respondent is pro se, we should not take away that right unless it has been clearly waived.

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.

¹⁰ 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."

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 threaten to close our business if employees select the Union as their collective-bargaining representative.

WE WILL NOT discharge or otherwise discriminate against our employees because they assist the Union and engage in concerted activities in order to discourage employees from engaging in these and other concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, offer Kenneth T. McClellan full reinstatement to his former job or, if this job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Kenneth T. McClellan whole for any loss of earnings and other benefits suffered as a result of his unlawful discharge, with interest.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharge of Kenneth T. McClellan and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that his discharge will not be used against him in any way.

ALL AMERICAN FIRE PROTECTION,
INC.