

A.C.E. Construction, Inc. and New Jersey Regional Council of Carpenters. Case 22–CA–25655

September 30, 2003

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS
LIEBMAN
AND WALSH

The General Counsel seeks a default judgment¹ in this case on the ground that the Respondent has failed to timely answer the complaint. Upon a charge filed by the New Jersey Regional Council of Carpenters, the Union, on March 10, 2003,² the General Counsel issued the complaint on May 30 against A.C.E. Construction, Inc., the Respondent, alleging that it has violated Section 8(a)(1) and (5) of the Act by failing and refusing to provide the Union with requested information necessary for and relevant to the Union's performance of its duties as the exclusive collective-bargaining representative of the unit. The Respondent failed to file an answer.

By letter dated June 17, the Region notified the Respondent that unless an answer was received by June 24, a Motion for Default Judgment would be filed. No answer was filed.

On July 16, the General Counsel filed a Motion for Summary Judgment with the Board. On July 22, 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's counsel, Sean F. Byrnes, filed a response to the Notice to Show Cause, admitting that the Respondent failed to file a timely answer, but asserting good cause for its failure to do so. The issue before the Board, therefore, is whether the reasons proffered by the Respondent for its failure to file a timely answer constitute good cause. We find, for the reasons set forth below, that good cause has not been established, and we grant the General Counsel's Motion for Default Judgment.

Ruling on Motion for Default Judgment

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 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 General Counsel's motion disclose that the Region, by letter dated June 17, notified the Respondent that unless an answer was received by June 24, a Motion for Default Judgment would be filed.

In the response to the Board's Notice to Show Cause, Byrnes, who states that he represents the Respondent in the instant proceeding as well as in a proceeding in New Jersey involving the American Arbitration Association (AAA), claims that he was unaware of the present matter prior to receipt of a copy of the General Counsel's motion.³ He also contends that the Respondent may not have "appreciate[d] the fact that this matter involving the National Labor Relations Board was a separate proceeding from the one pending . . . in New Jersey." Byrnes requests that the Board postpone its decision on the General Counsel's motion and allow the Respondent to participate in a hearing.

For the reasons set forth below, 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 Respondent was served with the complaint on May 30.⁴ It is well established that once a respondent has been properly served with the complaint, knowledge of the complaint may be imputed to a respondent's counsel. *Day & Zimmerman Services*, 325 NLRB 1046 (1998); *Jones Pallet Recycle & Mfg.*, 288 NLRB 279 (1988), *enfd.* 888 F.2d 129 (7th Cir. 1989). Therefore, Byrnes' implicit contention that the Respondent could not file a timely answer because Byrnes was unaware of the complaint is without merit. We impute knowledge of the complaint to Byrnes on the basis of the Respondent having been served with the complaint.

Second, Byrnes argues that the Respondent's failure to file a timely answer may have been due to inadvertent error. In this regard, Byrnes asserts that the Respondent may not have been able to distinguish between the proceeding involving the Board and the proceeding involving the AAA. This claim does not establish good cause. The Respondent was properly served the complaint detailing the specific allegations pending against the Respondent and explaining the Respondent's obligation to file a timely answer. Furthermore, the Respondent was also sent a letter by the General Counsel reminding it of its failure to file an answer to the complaint and extending the deadline for filing an answer to June 24. We find that these documents preclude any valid basis for confus-

¹ The General Counsel's motion requests summary judgment on the ground that the Respondent has failed to file an answer to the complaint. Accordingly, we construe the General Counsel's motion as a motion for default judgment.

² All dates refer to 2003 unless otherwise indicated.

³ Byrnes states that the New Jersey proceeding involves the same collective-bargaining agreement at issue here.

⁴ The General Counsel attached to his motion a copy of a post office return receipt showing that the Respondent received the complaint on June 2.

ing the Board proceeding with the AAA proceeding. See *Lee & Sons Tree Service*, 282 NLRB 905 (1987) (Board found no merit in respondent's contention that its failure to file an answer was due to excusable neglect because of its mistaken belief that the matters addressed in the complaint had been resolved through the D.C. Office of Wage and Hour).

The Respondent never advised the Region that it did not understand what it was required to do. *Associated Supermarket*, 338 NLRB 780, 781 (2003). Nor did it request an extension of time to file an answer. *Lockhart Concrete*, 336 NLRB 956, 957 fn. 3 (2001). The Board has long held that such a pattern of repeatedly ignoring the Board's procedures and warnings is incompatible with a showing of good cause. *Odaly's Management Corp.*, 292 NLRB 1283, 1284 (1989).

In the absence of good cause being shown for the failure to file a timely answer, we grant the General Counsel's Motion for Default Judgment.⁵

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 Hazlet, New Jersey, has been engaged as a general contractor in the building and construction industry performing commercial construction.

During the 12-month period preceding the issuance of the complaint, the Respondent purchased and received at its Hazlet, New Jersey facility goods valued in excess of \$50,000 directly from points outside the State of New Jersey.

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 PRACTICE

The following employees of the Respondent (the unit) constitute a unit appropriate for the purposes of collec-

⁵ Citing Sec. 102.111(c) of the Board's Rules, the dissent states that it would give the Respondent an opportunity to supply affidavits to support its explanation for its failure to file a timely answer. Sec. 102.111(c) provides, inter alia, 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." (Emphasis added.) This is the same standard that we have applied above. Inasmuch as the Respondent has filed a response to the Notice to Show Cause but has not shown good cause for its failure to file a timely answer, even though we have accepted its representations as true, we see no reason to grant it yet another opportunity to explain its failure to comply with the Board's Rules.

tive bargaining within the meaning of Section 9(b) of the Act:

All Carpenters and Joiners; Lathers; Millwrights; Pile Drivers, Bridge, Dock and Wharf Carpenters; Divers, Underpinners, Timbermen and Core Drillers; Shipwrights, Boat Builders, Ship Carpenters, Joiners and Caulkers; Cabinet Makers, Bench Hands, Stair Builders and Millmen; Wood and Resilient Floor Layers and Finishers; Carpet Layers; Display Workers; Shinglers, Siders and Insulators; Acoustic and Drywall Applicators; Shorers and House Movers; Loggers, Lumber and [Sawmill] Workers; Furniture Workers, Reed and Ratan Workers; Shingle Weavers; Casket and Coffin Makers; Box Makers, Railroad Carpenters and Car Builders and all those engaged in the operating of wood working or other machinery required in the fashioning, milling or manufacturing of products used in the trade, or engaged as helpers to any of the above divisions or sub-divisions, but excluding any other employees.

At all material times, Building Contractors Association of New Jersey (the Association) has been an organization composed of various employers engaged in the construction industry, one purpose of which is to represent its employer-members in negotiating and administering collective-bargaining agreements with various labor organizations, including the Union.

About October 15, 2001, the Respondent entered into a "short form agreement," which at all material times bound the Respondent to the terms and conditions of employment of the Association Agreement effective as of October 15, 2001, and to the terms and conditions of future Association Agreements unless timely notice was given.

The Respondent, an employer engaged in the building and construction industry, granted recognition to the Union as the exclusive collective-bargaining representative of the unit without regard to whether the majority status of the Union had ever been established under the provisions of Section 9(a) of the Act. Such recognition has been embodied in successive collective-bargaining agreements, the most recent of which is effective for the period May 1, 2002, to April 30, 2007.

For the period of October 15, 2001, to April 30, 2007, based on Section 9(a) of the Act, the Union has been the limited exclusive collective-bargaining representative of the unit.

Since on or about February 14, the Union, by letter, has requested that the Respondent furnish the Union with the following information: certified payroll documents for the Ocean County Sports Complex project; and certified payroll documents for any of the Respondent's subcontractors for the same project. The information re-

requested is necessary for and relevant to the Union's performance of its duties as the exclusive collective-bargaining representative of the unit employees. Since on or about February 14, the Respondent has failed and refused to furnish the Union with the information requested.

CONCLUSION OF LAW

By its failure to furnish the Union with information necessary for and relevant to its performance of its duties as the exclusive collective-bargaining representative of unit employees, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5) 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. Specifically, we shall order the Respondent to provide the Union with the information requested by letter dated on or about February 14.

ORDER

The National Labor Relations Board orders that the Respondent, A.C.E. Construction, Inc., Hazlet, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to provide New Jersey Regional Council of Carpenters with information necessary for and relevant to its performance of its duties as the exclusive collective-bargaining representative of employees in the following appropriate unit:

All Carpenters and Joiners; Lathers; Millwrights; Pile Drivers, Bridge, Dock and Wharf Carpenters; Divers, Underpinners, Timbermen and Core Drillers; Shipwrights, Boat Builders, Ship Carpenters, Joiners and Caulkers; Cabinet Makers, Bench Hands, Stair Builders and Millmen; Wood and Resilient Floor Layers and Finishers; Carpet Layers; Display Workers; Shinglers, Siders and Insulators; Acoustic and Drywall Applicators; Shorers and House Movers; Loggers, Lumber and [Sawmill] Workers; Furniture Workers, Reed and Ratan Workers; Shingle Weavers; Casket and Coffin Makers; Box Makers, Railroad Carpenters and Car Builders and all those engaged in the operating of wood working or other machinery required in the fashioning, milling or manufacturing of products used in the trade, or engaged as helpers to any of the above divisions or sub-divisions, but excluding any other employees.

(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) Provide the Union with information it requested by letter on or about February 14, 2003.

(b) Within 14 days after service by the Region, post at its facility in Hazlet, New Jersey, copies of the attached notice marked "Appendix."⁶ Copies of the notice, on forms provided by the Regional Director for Region 22, 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 on or about February 14, 2003.

(c) 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.

CHAIRMAN BATTISTA, dissenting.

I would not grant the Motion for Default Judgment.

This case involves a failure to answer a complaint by a pro se Respondent. That is, although the Respondent had counsel in a case involving the American Arbitration Association (AAA), the Respondent did not have counsel in the instant case. However, both matters involved the same collective-bargaining agreement. The Respondent asserts, without contradiction, that it did not appreciate the fact that the two proceedings were separate. It therefore assumed that its counsel in the AAA matter was handling the NLRB matter as well. In fact, counsel was not handling the NLRB matter, and was not aware of the complaint and the necessity to respond thereto.

After the issuance of the Notice to Show Cause, counsel was made aware of these NLRB matters. He has responded, with the explanation set forth above.

⁶ 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."

It may well be that a reasonable person would have responded to the complaint, or at least told his lawyer (in the AAA proceeding) about the complaint. However, even if the failure to take these steps was neglectful, the issue is whether such neglect was “excusable.”¹ In my view, it is not surprising that a lay person confronted with multiple litigation becomes confused about such matters. I also note that the General Counsel and the Charging Party claim no prejudice arising from the Respondent’s nonresponse. In these circumstances, the penalty of forfeiture may be unwarranted. I would therefore give the Respondent an opportunity to supply affidavits to support its explanation of the failure to respond to the complaint.²

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 any union
Choose representatives to bargain with us on
your behalf

¹ See Sec.102.111(c) of the Rules.

² Id. My colleagues argue that, even if every assertion of fact by the Respondent is true, these facts do not amount to “excusable neglect.” I do not agree. I would pass on this case only after all of the relevant facts are secured.

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to provide New Jersey Regional Council of Carpenters with information which is necessary for and relevant to its performance of its duties as the exclusive collective-bargaining representative of our employees in the following appropriate unit:

All Carpenters and Joiners; Lathers; Millwrights; Pile Drivers, Bridge, Dock and Wharf Carpenters; Divers, Underpinners, Timbermen and Core Drillers; Shipwrights, Boat Builders, Ship Carpenters, Joiners and Caulkers; Cabinet Makers, Bench Hands, Stair Builders and Millmen; Wood and Resilient Floor Layers and Finishers; Carpet Layers; Display Workers; Shinglers, Siders and Insulators; Acoustic and Drywall Applicators; Shorers and House Movers; Loggers, Lumber and [Sawmill] Workers; Furniture Workers, Reed and Ratan Workers; Shingle Weavers; Casket and Coffin Makers; Box Makers, Railroad Carpenters and Car Builders and all those engaged in the operating of wood working or other machinery required in the fashioning, milling or manufacturing of products used in the trade, or engaged as helpers to any of the above divisions or sub-divisions, but excluding any other employees.

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 furnish the Union with the information it requested on or about February 14, 2003.

A.C.E. CONSTRUCTION, INC.