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LBE, Inc. and Local 486, International Brotherhood of Teamsters. Case 7–CA–52090

December 16, 2009

DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBER SCHAUMBER

The General Counsel seeks a default judgment in this case on the ground that the Respondent failed to file an appropriate answer to the complaint. Upon a charge filed by Local 486, International Brotherhood of Teamsters (the Union) on May 13, 2009,¹ the General Counsel issued a complaint on July 14, against LBE, Inc. (the Respondent) alleging that it violated Section 8(a)(5) and (1) of the National Labor Relations Act (the Act) by failing to furnish the Union with requested information concerning agreements regarding the shutdown of its operation. Copies of the charge and the complaint were properly served on the Respondent. Following receipt of a letter from the Region, dated July 29, giving the Respondent an extension of time until August 5 to file an answer, on August 4 the Region received a handwritten note from the Respondent. On August 5, the Region notified the Respondent that the handwritten note did not constitute a proper answer and, unless the Respondent filed an appropriate answer by August 12, a Motion for Default Judgment would be filed.

On August 13, the General Counsel filed a Motion for Default Judgment with the Board. Thereafter, on August 17, the Board issued an order transferring the proceeding from the Region to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed no response to the Motion for Default Judgment or to the Notice to Show Cause. The allegations in the motion are therefore undisputed.

Ruling on Motion for Default Judgment²

¹ All dates hereafter refer to 2009 unless otherwise indicated.

² Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Liebman and Member Schaumber constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act. See *Narricot Industries, L.P. v. NLRB*, ___ F.3d ___, 2009 WL 4016113 (4th Cir. Nov. 20, 2009); *Snell Island SNF LLC v. NLRB*, 568 F.3d 410 (2d Cir. 2009), petition for cert. filed 78 U.S.L.W. 3130 (U.S. Sept. 11, 2009) (No. 09-328); *New Process Steel v. NLRB*, 564 F.3d 840 (7th Cir. 2009), cert. granted

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 stated that unless an answer was received on or before July 28, the Board may find, pursuant to a motion for default judgment, that the allegations in the complaint are true. Further, the undisputed allegations in the General Counsel's motion disclose that on July 22, the complaint, which had been sent by certified mail, was returned as "refused," and that by letter dated July 29, the Region informed the Respondent that unless an appropriate answer (including a statement indicating the reason for the late submission) was received by August 5, a motion for default judgment would be filed. Copies of the letter were sent both by certified and regular mail, and the certified copy was returned as "refused."

On August 4, the Region received an unsigned and undated note, handwritten on the copy of the Region's July 29 letter to the Respondent. The note, presumably from the Respondent acting pro se, stated that "correspondence was mailed back to NLRB this week," that "[t]he Teamster statement is not true and false [sic]," that "there was an agreement . . . to maintain service, drivers, and standard to the end date," that the Respondent complied with its obligations under the agreement, and that "all agreements between the parties were to be confidential—they are."

The Region thereafter sent a letter to the Respondent explaining that its response did not constitute a proper answer and stating that unless the Respondent filed an appropriate answer on or before August 12 the Region would file a motion for default judgment.³ The Region received no further response from the Respondent.

At the outset, we recognize that the Respondent does not appear to have legal representation in this proceeding. In determining whether to grant a motion for default judgment on the basis of a respondent's failure to file a sufficient or timely answer, the Board typically shows some leniency toward respondents who proceed without the benefit of counsel. E.g., *Clearwater Sprinkler System*, 340 NLRB 435 (2003). Indeed, the Board generally will not preclude a determination on the

___ S.Ct. ___, 2009 WL 1468482 (U.S. Nov. 2, 2009); *Northeastern Land Services v. NLRB*, 560 F.3d 36 (1st Cir. 2009), petition for cert. filed 78 U.S.L.W. 3098 (U.S. Aug. 18, 2009) (No. 09-213). But see *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469 (D.C. Cir. 2009), petition for cert. filed 78 U.S.L.W. 3185 (U.S. Sept. 29, 2009) (No. 09-377).

³ The Region's letter also directed the Respondent to contact the Region if it had any questions or requests concerning the letter or the requirements for filing a proper answer.

merits of a complaint if it finds that a pro se respondent has filed a timely answer that can reasonably be construed as denying the substance of the complaint allegations. *Clearwater Sprinkler System*, supra, citing *Harborview Electric Construction Co.*, 315 NLRB 301, 302 (1994). However, the Respondent's lack of representation does not excuse it from its obligation to file an appropriate answer to the complaint. See generally *Newark Symphony Hall*, 323 NLRB 1297 (1997). As set forth above, the Respondent refused service of the complaint,⁴ failed to file a timely answer to the complaint, and did not provide an explanation for failing to file a timely answer.

The Respondent's handwritten note to the Region does not constitute an appropriate answer to the complaint, even considering the leniency afforded to pro se respondents. The note is undated and unsigned, gives no explanation for the Respondent's failure to file an answer by the due date, and does not reference the complaint allegations including, most significantly, the allegations that the Respondent refused to furnish the Union with requested information. Although the note mentioned that all agreements between the parties were confidential, it did not state that the Respondent refused to furnish the requested information because of concerns about confidentiality.

Rather than answering the complaint allegations, the handwritten note stated that "[t]he Teamster statement is . . . false." This suggests an intention to present the Respondent's position on the charge filed by the Union rather than an answer to the General Counsel's complaint (of which the Respondent refused service). It is well settled that a statement of position is generally insufficient to constitute an answer to the complaint. E.g., *Mail Handlers Local 329 (Postal Service)*, 319 NLRB 847 (1995).⁵

As set forth above, the Respondent's note refers to an earlier correspondence to the Region, and neither the General Counsel's motion nor the supporting documents show the Region's acknowledgment of such correspondence. However, as the Respondent's note

appeared to present a position on the charge rather than an answer to the complaint, and as the Respondent refused service of the complaint, there is no basis to assume that the earlier correspondence (assuming it actually exists) could have constituted the Respondent's answer. Further, having failed to respond to the Motion for Default Judgment or the Notice to Show Cause, the Respondent has not explained whether the earlier correspondence has any significance at all to the Respondent's obligation to file a timely answer to the complaint.⁶

In sum, the Respondent failed to file any document, timely or untimely, that could reasonably be construed as an answer to the complaint. Accordingly, and 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.

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 in Saginaw, Michigan, has been engaged in providing freight pickup and delivery service for DHL Express (USA), Inc.

During the 2008 calendar year, a representative period, the Respondent, in conducting its operations described above, derived gross revenues in excess of \$100,000, and provided service in excess of \$50,000 to DHL Express (USA), Inc., which itself, during the same period of time, derived gross revenues in excess of \$50,000 for the transportation of freight from the state of Michigan directly to points outside the state of Michigan.

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, Tony Lander has held the position of Respondent's president and has been a supervisor of the Respondent within the meaning of

⁴ The Respondent also refused service of the copy of the Region's July 29 letter sent by certified mail. "It is well settled that a respondent's failure or refusal to accept certified mail cannot serve to defeat the purposes of the Act." *I.C.E. Electric, Inc.*, 339 NLRB 247 fn. 2 (2003), citing *Michigan Expediting Service*, 282 NLRB 210 fn. 6 (1986), enf. sub nom. *NLRB v. Shabazz*, 869 F.2d 1492 (6th Cir. 1989) (Table).

⁵ Compare *Central States Xpress*, 324 NLRB 442, 444 (1997) (finding an exception to the general rule where the pro se respondent resubmitted a position statement denying the complaint allegations along with a cover letter specifically stating that the resubmitted statement was intended as a response to the complaint allegations).

⁶ We further note the existence of two minor inadvertent errors: (a) the Motion for Default Judgment referred to the Respondent's undated note (handwritten on a copy of the Region's July 29 letter and received by the Region on August 4) as the "Respondent's July 29 response," and (b) the Notice to Show Cause stated that the Respondent failed "to file an insufficient answer to the Complaint and Notice of Hearing," (emphasis added) rather than stating that it failed to file a sufficient answer. In view of the Respondent's failure to file a response either to the motion or the notice, we find there is no indication that the Respondent may have been prejudiced by these inadvertent errors.

Section 2(11) of the Act and an agent of the Respondent within the meaning of Section 2(13) of the Act.

The following employees of the Respondent (the unit) constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time drivers and dock employees employed by Respondent located in the DHL Express (USA), Inc., distribution facility located at 8015 Garfield Road, Freeland, Michigan, but excluding all office clerical employees and guards and supervisors as defined in the Act.

Since about 2005, and at all material times, the Union has been the exclusive collective-bargaining representative of the unit and has been so recognized by the Respondent. This recognition has been embodied in a collective-bargaining agreement which is effective from January 1, 2007, through January 1, 2010. At all material times, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the unit.

On about February 10 and 19, the Union, by email, and by e-mail and a letter, respectively, requested that the Respondent provide a copy of the document between DHL and the Respondent regarding the shutdown of Respondent's operation, less any financial amounts.

On about March 23, the Union, by letter, requested that the Respondent furnish it with information pertaining to the DHL Contract Employee Retention Program (CERP), less any financial amounts.

The information requested by the Union, described above, is necessary for, and relevant to, the Union's performance of its duties as the exclusive collective-bargaining representative of the unit.

Since about February 10, the Respondent has failed and refused to furnish the Union with the information requested about February 10 and 19, described above.

Since about March 23, the Respondent has failed and refused to furnish the Union with the information requested about March 23, described above.

CONCLUSION OF LAW

By the conduct described above, the Respondent has been failing and refusing to bargain collectively and in good faith with the Union as the exclusive collective-bargaining representative of its unit employees within the meaning of Section 8(d) and in violation of Section 8(a)(5) and (1) of the Act, and has thereby 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 violated Section 8(a)(5) and (1) of the Act by failing and refusing to furnish the Union with necessary and relevant information, we shall order the Respondent to provide the Union with the information requested on about February 10, 19, and March 23, 2009.

ORDER

The National Labor Relations Board orders that the Respondent, LBE, Inc., Saginaw, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to furnish the Union, Local 486, International Brotherhood of Teamsters, with information that is necessary for and relevant to the performance of its duties as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All full-time and regular part-time drivers and dock employees employed by Respondent located in the DHL Express (USA), Inc., distribution facility located at 8015 Garfield Road, Freeland, Michigan, but excluding all office clerical employees and guards and supervisors as defined in the Act.

(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) Furnish the Union with the information it requested on about February 10, 19, and March 23, 2009.

(b) Within 14 days after service by the Region, post at its facility in Saginaw, Michigan, copies of the attached notice marked "Appendix."⁷ 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 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

⁷ 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."

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 February 10, 2009.

(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.

Dated, Washington, D.C. December 16, 2009

Wilma B. Liebman, Chairman

Peter C. Schaumber, Member

(SEAL) 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 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 fail and refuse to furnish the Union, Local 486, International Brotherhood of Teamsters, with information that is necessary for and relevant to the performance of its duties as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All full-time and regular part-time drivers and dock employees employed by us located in the DHL Express (USA), Inc., distribution facility located at 8015 Garfield Road, Freeland, Michigan, but excluding all office clerical employees and guards and supervisors as defined in the Act.

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 about February 10, February 19, and March 23, 2009.

LBE INC.