JD(ATL)–12–11
Huntsville, AL

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
ATLANTA BRANCH OFFICE

SPRAY-ON FIREPROOFING, INC.

and **Case 10-CA-38602**

ADAM BENNEFIELD, An Individual

Katherine Chahrouri, Esq.,
for the General Counsel
Paul T. Joseph, Esq.,
for the Respondent

DECISION

Statement of the Case

KELTNER W. LOCKE, Administrative Law Judge**:** This case involves a default judgment after Respondent withdrew the answer it had filed to the Acting General Counsel's complaint.

Procedural History

This case began on September 27, 2010, when the Charging Party, Adam Bennefield, an individual, filed an unfair labor practice charge against Spray-On Fireproofing, Inc., the Respondent. The National Labor Relations Board docketed this charge as Case 10–CA–38602. The Charging Party amended the charge on November 8, 2010.

On November 10, 2010, the Regional Director for Region 10 of the Board, acting for and with authority delegated by the Board's General Counsel, issued a Complaint and Notice of Hearing (the complaint). It alleged, among other things, that Respondent unlawfully had interrogated its employees about their protected, concerted activities and had discharged the Charging Party because of his protected, concerted activities and to discourage other employees from engaging in such activities. It further alleged that these actions violated Section 8(a)(1) of the National Labor Relations Act (the Act).

On December 30, 2010, Respondent filed an answer to the complaint.

On February 16, 2011, I conducted a prehearing telephone conference call with counsel. At that time, Respondent's counsel stated that Respondent's owner had died intestate.

On February 28, 2010, a hearing in this matter opened before me in Decatur, Alabama. On the record, Respondent's counsel withdrew Respondent's answer. Counsel for the Acting General Counsel moved for default judgment and I granted the motion. Counsel waived the filing of briefs.

Default Judgment

Section 102.20 of the Board's Rules and Regulations provides that the allegations in a complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint, unless good cause is shown. The withdrawal of an answer has the same effect as a failure to file an answer, i.e., the allegations in the complaint must be considered to be true. See *Maislin Transport*, 274 NLRB 529 (1985). Having granted the Acting General Counsel's motion, I make the following.

Findings of Fact

1. Jurisdiction

The charge in this proceeding was filed by the Charging Party on September 27, 2010, and a copy was served by regular mail on Respondent on the same date. The amended charge in this proceeding was filed by the Charging Party on November 8, 2010, and a copy was served by regular mail on Respondent on the same date.

At all material times, Respondent, a Michigan corporation with an office and place of business in Huntsville, Alabama, herein called Respondent's facility, has been engaged in providing spray-on fireproofing in the building and construction industry.

During the 12-month period preceding issuance of the complaint on November 10, 2010, Respondent, in conducting the operations described above, purchased and received at its Huntsville, Alabama, facility goods valued in excess of $50,000 directly from points outside the State of Alabama. At all material times Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Supervisory Status

At all material times the following individuals held the designated positions and were supervisors of Respondent within the meaning of Section 2(11) of the Act and agents of Respondent within the meaning of Section 2(13) of the Act: Phillip G. Rashid, president and owner; and Douglas Grimsley, supervisor.

3. Alleged Unfair Labor Practices

On or about a date in early April 2010, Respondent, by its Supervisor Douglas Grimsley,

at Respondent's facility, interrogated its employees about their protected concerted activities. On or about April 14, 2010, Respondent discharged its employee, Adam Bennefield.

Respondent engaged in the conduct described in the paragraph above because Respondent believed employees had engaged in protected concerted activities, and to discourage employees from engaging in these activities.

By the conduct described above, Respondent has been interfering with, restraining, and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act in violation of Section 8(a)(1) of the Act. These unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

Remedy

Based on the present record, and in view of the death of Respondent's owner, it is not possible to predict with reasonable certainty the continued viability of the company. However, it would appear there is a substantial likelihood that Respondent will become defunct, and the remedy here should take into account that possibility.

The remedy should include both the posting of the notice to employees attached hereto as Appendix A, and a further requirement that Respondent mail copies of the notice, at its own expense, after being signed by the Respondent's authorized representative, to the last known address of employees who had been employed by the Respondent on the project at which the unfair labor practices occurred. More specifically, Respondent should be required to mail a copy of the signed notice to every employee who had worked at the Von Braun Complex Phase III construction jobsite at Redstone Arsenal, Huntsville, Alabama, at any time from April 1, 2010, the approximate date of the first unfair labor practice alleged in the complaint, until the completion of the Respondent's work at this project. See *Excel Container, Inc*., 325 NLRB 17, (1997). Also, if Respondent customarily has communicated with its employees by electronic means such as posting on an intranet or internet site or by email, Respondent shall distribute the notice to employees by such means as well. See *J. Picini Flooring*, 356 NLRB No. 9 (2010).

Some uncertainty exists regarding whether backpay continues to accrue. This uncertainty arises not only because it is unclear whether Respondent continues in business, but also because Respondent has been, at all material times, a contractor in the construction industry. Therefore, an issue may exist regarding whether Respondent, but for its unlawful discharge of Adam Bennefield, would have continued to employ Bennefield after the completion of the Von Braun Complex Phase III construction job, by transferring him to other work, or whether it would have terminated his employment at that time. Such matters must be reserved for the compliance phase of this case, to be resolved in accordance with *Dean General Contractors*, 285 NLRB 573 (1987).

Conclusions of Law

1. The Respondent, Spray-On Fireproofing, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Respondent violated Section 8(a)(1) of the Act by interrogating employees about their protected, concerted activities and by discharging the Charging Party, Adam Bennefield, because he engaged in protected, concerted activities and to discourage other employees from engaging in such activities.

On these findings of fact and conclusions of law and on the entire record in this case, I issue the following recommended[1]

ORDER

The Respondent, Spray-On Fireproofing, Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from:

(a) Interrogating its employees about their protected concerted activities.

(b) Discharging employees because they engaged in protected, concerted activities and/or to discourage other employees from engaging in such activities.

(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights to self-organization, to form, join, or assist any labor organization, to bargain collectively through representatives of their own choosing, or to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) If Respondent is not defunct, offer immediate and full reinstatement to Adam Bennefield to his former position or, if his former position is no longer available, to a substantially equivalent position.

(b) Make Adam Bennefield 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), plus interest compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010).

(c) Preserve, and, within 14 days of a request, provide at the office designated by the Board or its agents, a copy of all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of

[1] If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, these findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board, and all objections to them shall be deemed waived for all purposes.

such records if stored in electronic form, necessary to analyze the amount of back pay due under the terms of this Order. If requested, the originals of such records shall be provided to the Board or its agents in the same manner.

(d) Within 14 days after service by the Region, post at its facilities in Huntsville, Alabama, copies of the attached notice marked "Appendix A."[2] Copies of the notice, on forms provided by the Regional Director for Region 10, 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. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. Additionally, 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 April 1, 2010.

(e) 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 Regional Director attesting to the steps that the Respondent has taken to comply.

Dated Washington, D.C., April 12, 2011.

Keltner W. Locke
Administrative Law Judge

2 If this Order is enforced by a judgment of the 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."

APPENDIX A

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 abide by 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 interfere with, restrain or coerce our employees in the exercise of these rights, guaranteed to them by Section 7 of the National Labor Relations Act.

WE WILL NOT interrogate employees about their protected concerted activities.

WE WILL NOT discharge an employee for engaging in protected concerted activities or to discourage other employees from engaging in such activities.

WE WILL offer Adam Bennefield immediate and full reinstatement to his former position or, if his former position no longer exists, to a substantial equivalent position.

WE WILL make Adam Bennefield whole, with interest compounded daily, for all losses he suffered because we unlawfully discharged him.

SPRAY–ON FIREPROOFING, INC.
(Employer)

Date: _____ **By:** _____
(Representative) **(Title)**

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.
233 Peachtree Street, N.E., Harris Tower, Suite 1000, Atlanta, GA 30303-1531
(404) 331–2896, Hours: 3:00 a.m. to 4:30 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (205) 933–3013