

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
WASHINGTON, D.C.

THE AMERICAN NATIONAL RED CROSS,
GREAT LAKES BLOOD SERVICES REGION
and MID-MICHIGAN CHAPTER,

Respondents,

and

CASES 7-CA-52033
 7-CA-52288
 7-CA-52544
 7-CA-52811
 7-CA-53018

LOCAL 459, OFFICE AND PROFESSIONAL
EMPLOYEES INTERNATIONAL UNION, AFL-CIO

Charging Party OPEIU,

and

CASES 7-CA-52282
 7-CA-52308
 7-CA-52487

LOCAL 580, INTERNATIONAL BROTHERHOOD
OF TEAMSTERS

Charging Party IBT.

LOCAL 459, OFFICE AND PROFESSIONAL EMPLOYEES' RESPONSE
OPPOSING RESPONDENTS' MOTION FOR RECONSIDERATION

On August 19, 2011, Charging Party OPEIU Local 459 filed a Motion to Strike Respondents' Reply Brief to the Board in these matters due to the untimeliness of its electronic filing. On August 22, 2011, the Board, through its Associate Executive Secretary, determined Respondents' Reply Brief to be untimely filed, and ruled that it would, therefore, not be considered by the Board. Thereafter, at approximately 5:30 p.m. on August 22, Respondents filed a Motion for Reconsideration of the Board's determination. For the reasons set forth below, Charging Party OPEIU Local 459 opposes Respondents Motion.

In urging reconsideration, Respondents rely solely upon Section 102.111(c) of the Board's Rules and Regulations, as amended, which provides in relevant part:

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. A party seeking to file such motions, exceptions, answers, or briefs beyond the time prescribed by these rules *shall file, along with the document, a motion that states the grounds relied upon for requesting permission to file untimely.*

As an initial matter, Respondents have failed to meet the above requirements to seek permission to file an otherwise untimely document since they failed to simultaneously file a motion seeking permission for same at the time they filed their untimely Reply Brief.

Next, the primary thrust of Respondents argument urging reconsideration is that Respondents' counsel "mistakenly failed to account for the fact that the receiving office in Washington, D.C. is on Eastern Standard Time rather than Central Time", and that the Board should find that counsel's "mistake" constitutes "excusable neglect" under the above-cited provision. Respondents further argue that their counsel's "mistake" should be overlooked because the untimely filing of its Reply brief resulted in no "undue prejudice" to the other parties to these proceedings. As will be shown below, Respondents' argument fails to meet the standard for acceptance of untimely filed documents. Moreover, the cases cited by Respondents are inapposite and unpersuasive.

First and foremost, the Board's policy for Electronic Filings is clear and unambiguous. What is also clear and unambiguous from Respondents' Motion, supporting Brief, and Affidavit, is that Respondents' counsel never bothered to read the Board's Electronic Filing policy. If she had, it could not have reasonably escaped her attention that the policy provides, *inter alia*, as follows:

E-FILINGS MUST BE TIMELY

The Agency will accept electronic filings *up to 11:59 pm in the local time zone of the receiving office on the due date.*

A document will be considered timely filed if the E-Filing receipt reflects that the entire document was received by the Agency's E-Filing system ***before midnight local time on the due date.***

Although the Agency's E-Filing system is designed to receive filings 24 hours per day, parties ***are strongly encouraged to file documents in advance of the filing deadline and during normal hours of the receiving office.*** . . .

User Problems. Problems with a user's telephone lines, internet service provider, hardware, or software; ***user problems in understanding or following the E-Filing instructions;*** or rejection of a document because it contains a virus do not constitute technical failure and ***will not excuse an untimely filing.*** . . . ***A user who waits until after close of business on the due date to attempt to E-File does so at his/her peril.*** . . .

Prior to the filing of their untimely Reply Brief, Respondents in these proceedings had electronically filed several motions, a post-hearing brief to the ALJ, Exceptions to the ALJ's Decision, and an Answering Brief to OPEIU Local 459 and General Counsel's Exceptions. The fact that Respondents' counsel had apparently failed to ever review and understand the Board's E-Filing policy despite multiple prior filings in these same matters far exceeds a simple case of "excusable neglect", and is in direct conflict with the Board's E-Filing policy which makes clear that user problems in either understanding or following the e-filing instructions "will not excuse an untimely filing". Moreover, Respondents' counsel waited until 30 minutes before midnight Central Time to file her Reply brief, ignoring the Board's explicit caution to parties about filing documents after normal business hours. The Board's Rules and Regulations do not, as Respondents suggest, state that a lack of "undue prejudice" privileges an otherwise untimely filing. Rather, the Board's Rules require the existence of both "excusable neglect" and a lack of undue prejudice.

The cases cited by Respondent are distinguishable in every respect from the instant case. In *International Union of Elevator Constructors, Local No. 2 (Unitec Elevator Services Co.)*, 337 NLRB 426 (2002), the Board, contrary to Respondents' representation, only allowed the untimely filed answering brief because of prior existing case law which had never been expressly

overruled, specifically *Postal Service*, 309 NLRB 305 (1992). In deciding *IUEC*, and expressly overruling *Postal Service*, however, the Board made clear its intent moving forward “to enforce strict compliance with” Section 102.111(c), and further held that “the mistaken calculation of a filing date, absent a showing of extenuating circumstances, does not constitute excusable neglect under Section 102.111(c). *Id.* at 426. In citing to the U.S. Supreme Court’s decision in *Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership*, 507 U.S. 380 (1993), Respondents here conspicuously fail to mention that not only did the Supreme Court note that in considering whether neglect is “excusable” it would consider whether the delay in filing “was within the reasonable control of the movant”, but, that the Supreme Court specifically held that **“inadvertence, ignorance of the rules, or mistakes in construing the rules do not usually constitute ‘excusable neglect’”**. *Id.* at 392. The Board in *IUEC* adopted that holding and ruled that “a late document will not be excused when the reason for the tardiness is solely a miscalculation of the filing date.” *Id.* at 428.

The cases of *Barstow Community Hospital*, 352 NLRB 1052 (2008); *Altercare of Wadsworth Center*, 355 NLRB No. 96 (8/19/10), and; *Landmark Family Foods, Inc.*, 356 NLRB No. 170 (5/31/11), are improperly cited by Respondents as Board precedent. These were all decisions in which the untimely filing consisted of a post-hearing brief to the ALJ, and the decision to accept the untimely filing was made by the ALJ, which decision was not excepted to, and was, therefore, never before the Board. The Board made no ruling in those cases on whether, had the issue been presented to it for determination, it would have likewise found the existence of “excusable neglect” under the same circumstances, given its prior enunciation of “strict enforcement” in *IUEC*. Moreover, in *Landmark Family Foods*, the untimely filing was due to the Board’s e-filing system refusing to accept the document in Word format, despite that the e-filing policy states that Word documents are acceptable. *Loparex LLC.*, 353 NLRB 1224

(2009) was another ALJ decision in which the issue of untimely filing was not presented to the Board. Furthermore, the issue in *Loparex* was not an untimely filing, but rather, merely the untimely service of the filing on Counsel for the General Counsel.

The only true Board decision cited by Respondents is *WGE Federal Credit Union*, 346 NLRB 183 (2005), in which the Board allowed the untimely filing, but only due to circumstances which do not exist in the instant cases. Specifically, at the time of the events in *WGE*, the Board's e-filing system was fairly new, and the rules had not been changed so that e-filed documents would be accepted up to 11:59 p.m., but only up to 5:00 p.m., which conflicted with the rules for e-filing in the federal courts, and which the Board conceded was confusing. At the time, Member Liebman (now Chairman Liebman) vigorously dissented, citing to the e-filing policy's admonition against last minute filings, and stating, among other things, "[i]f the Board were to excuse a failure to ascertain the requirements of applicable rules, then the rules would become a nullity." *Id.* at 184. (Citing, *Bartlett Nuclear*, 314 NLRB 1, fn. 1 (1994), and cases cited therein).

Here, the e-filing system is no longer new, having been in place for several years, and, in fact, used by Respondents and other parties routinely for the filing of documents in Board cases. The deadline for e-filing mirrors that in the federal courts so any confusion caused by that distinction has been eliminated. The e-filing rules are clear, unambiguous, and easily understood if one merely takes the time and effort to read them.

Contrary to Respondents' assertions, the instant matter of untimely filing is governed not by the cases cited in Respondents' Motion, but rather, by *Metropolitan Regional Counsel of Philadelphia (R.M. Shoemaker Co.)*, 332 NLRB 1340, 1341 (2000), a case also cited by Chairman Liebman in *WGE Federal Credit Union*. In *Carpenters*, the Board denied the employer's request for acceptance of its untimely filed answering brief, which was filed only one

day after the due date. The Board found that the employer's failure to ensure both that it understood the Board's rules and that the "same day delivery" service with whom it had contracted would indeed deliver the document on the "same day", rather than the following day, did not constitute "excusable neglect". The Board rejected the untimely filed document even though it acknowledged that "the 'neglect' was not the [employer's] fault [but rather the delivery service's fault], and thus was 'excusable' in that sense". *Id.* at 1341.

Here, unlike in *Carpenters*, the neglect was solely counsel for Respondents' fault, caused by her failure to read and understand the Board's e-filing policies, and her 11th hour attempt to e-file Respondents' Reply Brief. There were no technical difficulties and no culpability whatsoever by a third party. If the Board allows such patent negligence and inattention to qualify as "excusable neglect", then the Board's e-filing admonitions and stringently written policies will be rendered meaningless. Moreover, there will be no deterrent effect whatsoever for parties who wait until the 11th hour to e-file documents and, in doing so, ignore the Board's explicit admonition, and fail to fulfill their professional responsibility for knowing all of the Board's rules.

Accordingly, for all of the above-stated reasons, OPEIU Local 459 requests that the Board deny Respondents' Motion for Reconsideration and adhere to its prior decision to reject Respondents untimely filed Reply Brief.

Respectfully submitted this 23rd day of August, 2011.

s/ Tinamarie Pappas .
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CERTIFICATE OF SERVICE

TINAMARIE PAPPAS states that on August 23, 2011, she e-filed Local 459 Office and Professional Employees' Response Opposing Respondents Motion for Reconsideration, through the Board's e-filing system, and served all counsel of record via electronic transmission, at the email addresses set forth below:

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The above statements are true and correct to the best of my information, knowledge and belief.

s/ Tinamarie Pappas _____.