

CERTIFICATE OF SERVICE

I certify that on the 24th day of August, 2011, I electronically served copies of the Counsel for the Acting General Counsel's Response Opposing Respondents' Motion for Reconsideration on the following parties of record:

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**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**

**Respondent ANRC - Region
Respondent ANRC - Chapter**

and

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

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

Charging Union OPEIU

and

**LOCAL 580, INTERNATIONAL
BROTHERHOOD OF TEAMSTERS**

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

Charging Union Teamsters

**COUNSEL FOR THE ACTING GENERAL COUNSEL'S RESPONSE
OPPOSING RESPONDENTS' MOTION FOR RECONSIDERATION**

Reply briefs in this matter were due on August 18, 2011. Respondents filed a Reply Brief on August 19 without explanation. On August 22, 2011, the Board rejected, sua sponte, the brief as untimely. Respondents filed a Motion for Reconsideration in response to the Board's rejection of its Reply Brief. For the

reasons set forth below, Counsel for the Acting General Counsel opposes Respondents' Motion.

Section 102.111(c) of the Board's Rules and Regulations, as amended, 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.* (emphasis added).

As an initial matter, Respondents failed to comply with Section 102.111(c). Specifically, Respondents did not file, along with their Reply Brief, a motion that states the grounds relied upon for requesting permission to file untimely.

Additionally, the terms of the Board's policy for electronic filings, which are posted on the Agency's website, are clear and unambiguous, and provide, *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 in understanding or following the E-Filing instructions... 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.

Based on the clear language of the Board's E-Filing policy, the Board's rejection of Respondents' late-filed Reply Brief was appropriate. This is particularly true with respect to Respondents, who have already filed several motions and briefs electronically in the past and should be well aware of the rules governing such submissions.

Moreover, the cases cited by Respondents are inapplicable to the instant facts. Respondents first cite *International Union of Elevator Constructors*, 337 NLRB 426, 427 (2002), in which the Board accepted a late-filed brief under the "excusable neglect" doctrine. That untimely brief was filed before the new standard enunciated in *Elevator Constructors*, in which the Board, while allowing the late-filed document due to the confusion in the law at the time, explicitly announced that, "Henceforth, a late document will not be excused when the reason for the tardiness is solely a miscalculation of the filing date." *Id.* at 428. Such is the situation here. Indeed, based on the affidavit of Ms. Sammon, Respondents admitted to "miscalculating" the filing date, i.e. when it could timely E-file its brief in Washington D.C.

Respondents also cite *Pioneer Investment Services Co., v. Brunswick Associates Ltd. Partnership*, 507 U.S. 380, 395 (1993), noting that the determination of “excusable neglect” is an equitable one. Respondents assert that the balance of equities weighs in favor of accepting and considering their brief. Remarkably, Respondents completely undercut their strongest argument by stating on page 5 of their brief in support of the motion for reconsideration that, “Respondents’ reply brief does not raise new arguments not previously raised and argued. . .” Thus, based on Respondents’ own admission, one must conclude Respondents would suffer no inequity. For the Board to accept Respondents’ untimely brief despite the fact Respondents would not be prejudiced on the basis that one of their attorneys was not aware that Washington D.C. is located in the Eastern Time Zone would render meaningless Section 102.111(c) of its Rules and Regulations as well as its clearly-defined E-Filing policy.

Respondents further cite several cases with no Board precedent with respect to late-filed documents: See e.g. *Barstow Community Hospital*, 352 NLRB 1052 (2008); *Altercare of Wadsworth Center*, 355 NLRB No. 96 (2010); *Landmark Family Foods, Inc.*, 356 NLRB No. 170 (2011); and *Loparex LLC*, 353 NLRB 1224, 1225, fn. 1 (2009). These were all cases in which the untimely filing consisted of a post-hearing brief to an Administrative Law Judge (ALJ), and the decision to accept the untimely filing was made by the ALJ. Furthermore, the ALJ’s decision to accept the late-filed briefs was not excepted to by any party, and thus the issue was never put before the Board.

The only Board decision cited by Respondents that arguably relates to the issue at hand is *WGE Federal Credit Union*, 346 NLRB 183 (2005). In *WGE*, the Board allowed the untimely filing because an attorney was unfamiliar with Board's filing rules, which at the time conflicted with the E-Filing rules in the federal courts, and, by the Board's own admission, was confusing. In the instant case, Respondents do not contend that they were unfamiliar with the filing rules. Instead, Respondents' counsel failed to take into account the time difference between Central Standard Time and Eastern Standard Time. As stated above, given such failure, and in light of Respondents' admission that they would not be prejudiced, Respondents clearly do not meet the standard of excusable neglect.

CONCLUSION

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

Dated at Detroit, Michigan this 24th Day of August, 2011

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