

Lee's Industries, Inc. and Lee's Home Health Services, Inc. and Lee's Companies, Inc. and Bernice Brown. Case 04–CA–036904

February 28, 2013

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS GRIFFIN
AND BLOCK

The Acting General Counsel seeks default judgment in this case on the ground that the Respondent has failed to file an answer to the corrected compliance specification.

On September 30, 2010, the Board issued a Decision and Order¹ that, among other things, ordered the Respondent, Lee's Industries, Inc., Lee's Home Health Services, Inc., and Lee's Companies, Inc., a single employer, to make whole discriminatee Bernice Brown for any loss of earnings and other benefits resulting from the Respondent's unfair labor practices in violation of Section 8(a)(3) and (1) of the Act. On July 20, 2011, the United States Court of Appeals for the Third Circuit entered its judgment enforcing the Board's Order.²

A controversy having arisen over the amount of back-pay due Bernice Brown, on October 11, 2012, the Regional Director issued a corrected compliance specification and notice of hearing alleging the amount due under the Board's Order, and notifying the Respondent that it should file an answer complying with the Board's Rules and Regulations. Although properly served with a copy of the corrected compliance specification, the Respondent failed to file an answer.

By letter dated November 5, 2012, the Region advised the Respondent that no answer to the corrected compliance specification had been received and that unless an answer was filed by November 12, 2012, a motion for default judgment would be filed.

By letter dated November 12, 2012, the Respondent's president, Eric Lamback, requested an extension of time to file an answer to the corrected compliance specification.³ On November 14, 2012, the Regional Director granted the request and extended the time for filing an answer to November 21, 2012. Nevertheless, the Respondent failed to file an answer.

¹ 355 NLRB 1267.

² No. 10-4690.

³ In its request, the Respondent stated that "Lee's Industries, Inc. is in the initial stages of Bankruptcy and need[s] more time due to Restructuring." It is well established that the institution of bankruptcy proceedings does not constitute good cause for the failure to file an answer and does not deprive the Board of jurisdiction or authority to entertain and process an unfair labor practice case to its final disposition. *Dubin Paper Co.*, 359 NLRB 518 (2012) (not reported in Bound volume); *OK Toilet & Towel Supply, Inc.*, 339 NLRB 1100, 1100 (2003).

On November 29, 2012, the Acting General Counsel filed with the Board a Motion for Default Judgment, with exhibits attached. On December 3, 2012, 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 filed no response. The allegations in the motion and in the corrected compliance specification are therefore undisputed.

Ruling on Motion for Default Judgment

Section 102.56(a) of the Board's Rules and Regulations provides that a respondent shall file an answer within 21 days from service of a compliance specification. Section 102.56(c) provides that if the respondent fails to file an answer to the specification within the time prescribed by this section, the Board may, either with or without taking evidence in support of the allegations of the specification and without further notice to the respondent, find the specification to be true and enter such order as may be appropriate.

According to the uncontroverted allegations of the motion for default judgment, the Respondent, despite having been advised of the filing requirements and being granted an extension of time to file an answer, has failed to file an answer to the corrected compliance specification. In the absence of good cause for the Respondent's failure to file an answer, we deem the allegations in the corrected compliance specification to be admitted as true, and we grant the Acting General Counsel's Motion for Default Judgment. Accordingly, we conclude that the net back-pay due discriminatee Bernice Brown is as stated in the corrected compliance specification and we will order the Respondent to pay that amount, plus interest accrued to the date of payment.⁴

ORDER

The National Labor Relations Board orders that the Respondent, Lee's Industries, Inc., Lee's Home Health Services, Inc. and Lee's Companies, Inc., a single employer, Philadelphia, Pennsylvania, its officers, agents, successors, and assigns, shall make whole Bernice Brown by paying her the amount of \$19,647.49 as set

⁴ As set forth in the corrected compliance specification, on February 29, 2012, the discriminatee, Bernice Brown, tendered her resignation to the Respondent and waived any future rights to employment.

forth in the corrected compliance specification, plus interest accrued to the date of payment, as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010), and minus tax withholdings required by Federal and State laws.⁵

⁵ In *Latino Express, Inc.*, 359 NLRB No. 44 (2012), the Board adopted two new remedies: the first requiring respondents to submit appropriate documentation to the Social Security Administration (SSA) allocating backpay, when it is paid, to the appropriate calendar quarters; and the second requiring respondents to reimburse employees for any

additional income taxes they owe as a consequence of receiving a lump-sum backpay award covering more than 1 calendar year. The Board decided to apply both remedial policies retroactively, but not to apply the second to cases, such as this one, that already were in the compliance stage on the date *Latino Express* issued. Id. at slip op. 4 fn. 36. We note that nothing in *Latino Express* prevents the Acting General Counsel from requesting that the Board modify a previously issued order in a pending case to include an applicable remedy, at least where the Board still has jurisdiction to do so. That is not the case here, however. See *Scepter, Inc. v. NLRB*, 448 F.3d 388, 390–391 (D.C. Cir. 2006) (Board has no authority to modify the remedy in a court-enforced order).