

V. Garofalo Carting, Inc. and Local 339, United Service Workers Union, International Union of Journeyman and Allied Trades. Case 29–CA–141798

August 17, 2015

DECISION AND ORDER

BY MEMBERS MISCIMARRA, HIROZAWA,
AND MCFERRAN

The General Counsel seeks a default judgment in this case on the ground that the Respondent, V. Garofalo Carting, Inc. has failed to file a timely answer to the complaint. Upon a charge filed on November 25, 2014, by Local 339, United Service Workers Union, International Union of Journeyman and Allied Trades, the General Counsel issued a complaint and notice of hearing on January 30, 2015,¹ against the Respondent, alleging that it violated Section 8(a)(5) and (1) of the National Labor Relations Act. Although properly served copies of the charge and the complaint, the Respondent failed to file an answer.

By letter and email dated February 17, the Board's Region 29 informed the Respondent that it had not received the Respondent's answer to the complaint, which was due on February 13. That letter warned that, unless the Respondent filed its answer with the Regional Director by February 20, the Region would seek Summary Judgment, and all complaint allegations would be deemed admitted. The Respondent did not file an answer by the February 20 deadline. On March 2, the General Counsel filed with the Board a Motion for Default Judgment. On March 3, the Respondent filed an answer to the complaint and a request that the Motion for Default Judgment be withdrawn. On March 4, the Board issued an Order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. On April 10, the Respondent filed a Memorandum in Opposition to the Motion, and the General Counsel filed a reply, with exhibits attached.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for 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 the service of the complaint, unless good cause is shown. The complaint in this case affirmatively states that an answer "must be received by [Region 29] on or before February 13," and that if no answer is filed, or an answer is filed untimely, "the Board may find, pursuant

to a Motion for Default Judgment, that the allegations in the complaint are true." In addition, the General Counsel's motion asserts (and the Respondent's opposition does not dispute) that, by letter and email dated February 17, Region 29 advised the Respondent that unless it received an answer by February 20, it would file a motion for default judgment.

Despite receiving the complaint and the Region's warning letter, the Respondent neither filed an answer nor requested an extension of time to do so before the February 20 deadline expired. Instead, it filed an answer on March 3, a day after the General Counsel filed the Motion for Default Judgment. The Respondent also filed an opposition to the Motion for Default Judgment, in which it contends that it has established good cause to file the answer late. Specifically, the Respondent argues that its attorney had other commitments, that the Region should have given the Respondent even more time to answer before filing the motion, that the Respondent attempted to settle the case, and that the Union was not prejudiced by the Respondent's delay in filing an answer.

We find the Respondent's arguments unavailing. The Respondent did not file an answer to the complaint by either the February 13 or the February 20 deadline. Nor did it request an extension of time to file an answer. Such failure to promptly request an extension of time is a factor demonstrating lack of good cause. See, e.g., *A.C.E. Construction, Inc.*, 340 NLRB 609, 610 (2003); *CAC Services*, 338 NLRB 993, 993 (2003); *Associated Supermarket*, 338 NLRB 780, 781 (2003). On March 3, when the Respondent filed an untimely answer, it did not comply with the express instructions for doing so in Section 102.111(c)(2) of the Board's Rules and Regulations. That is, it did not file "a motion that states the grounds relied on for requesting permission to file untimely," accompanied by an affidavit containing the facts relied on to support the motion. In *Elevator Constructors Local 2 (Unitec Elevator Services Co.)*, 337 NLRB 426, 428 (2002), the Board announced that in cases under the excusable-neglect provision of Section 102.111(c) of the Board's Rules and Regulations, the Board would "strictly adhere to our rule that the specific facts relied on to support the motion to accept a late filing shall be set forth in affidavit form and sworn to by individuals with personal knowledge of the facts." Because the Respondent did not comply with the requirements of Section 102.111(c)(2) of the Board's Rules and Regulations, its untimely answer was improperly filed.

Moreover, the unsworn assertions the Respondent has provided in its opposition do not demonstrate good cause for its failure to file a timely answer. First, counsel for the Respondent avers that he has been "inordinately sub-

¹ All dates are in 2015 unless otherwise stated.

dued [sic] in other matters,” and that the delay in the filing of the answer is not attributable to the Respondent. An attorney’s heavy workload does not constitute good cause for the failure to file a timely answer. See, e.g., *U.S. Telefactors Corp.*, 293 NLRB 567, 567 (1989) (no good cause shown where respondent’s attorneys had unusually heavy workload and one attorney was ill); *Father & Sons Lumber*, 297 NLRB 437, 437 (1989) (no good cause where answer was late because respondents’ attorney was involved in litigation and had a breakdown of staff communication and responsibility), *enfd.* 931 F.2d 1093 (6th Cir. 1991).²

Second, the Respondent argues that the Region should have further delayed its filing of a motion for default judgment. The Region, however, had already refrained from filing its motion from February 13 to 20, in connection with its warning letter to counsel for the Respondent, and had no obligation to delay its filing even further. In fact, the Board has held that the failure of a Regional Office to issue the recommended warning prior to filing a default judgment motion does not excuse a respondent’s antecedent failure to file a timely answer. See *Bricklayers Local 31*, 309 NLRB 970, 970 (1992), *enfd.* mem. 992 F.2d 1217 (6th Cir. 1993).³

Counsel for the Respondent avers that he attempted to settle the complaint allegations with the Union, and for this reason, he submitted two requests for extensions of time to respond to the instant motion, each of which the Region granted. The Respondent argues that the granting of these requests shows that the Union was not prejudiced by the delay in filing an answer. But the possible settlement of a case does not exempt a respondent from the requirement to file an answer. See *Sorenson Indus-*

tries, 290 NLRB 1132, 1133 (1988); see also *U.S. Telefactors Corp.*, above at 567 (combination of possible settlement, illness of one of respondent’s attorneys, and unusually heavy workload of respondent’s attorneys did not constitute good cause for failure to file timely answer). Thus, the Respondent’s settlement efforts are not a good cause to deny a Motion for Default Judgment.

Lastly, the Respondent contends that its delay in filing an answer has not prejudiced the Union because it filed its answer “well before the hearing date.” In support of its argument, the Respondent cites *Stage Employees IATSE (Crossing Guard Productions, Inc.)*, 316 NLRB 808 (1995). That case is readily distinguishable: the Board found that the respondent’s delay in filing its answer was excusable where the Regional Office was implicated in the delay because of a miscommunication between the respondent and counsel for the General Counsel. *Id.* at 808. Moreover, the Board only discussed the lack of prejudice as an additional, not the primary, reason for denying the motion. *Id.* at 809.

For the foregoing reasons, we find that the Respondent has failed to show good cause why the Board should not find all of the allegations in the complaint to be true. Accordingly, we reject the late answer that the Respondent filed in response to the Motion for Default Judgment. In the absence of good cause being shown for the failure to file a timely answer, we deem the allegations of the consolidated complaint to be admitted as true, and 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 domestic corporation with an office and place of business located at 926 Crooked Hill Road, Brentwood, New York, has been engaged in providing sanitation services to residential and commercial customers.

During the past year, which period is representative of its annual operations in general, the Respondent, in the course and conduct of its business operations described above, derived revenues in excess of \$50,000 from providing sanitation services for various entities including the towns of Huntington, Smithtown, and Brookhaven, New York, each of which is directly engaged in interstate commerce.

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.

² Counsel for the Respondent claims that the Region was aware of his other commitments because he had asked for a postponement of the hearing date in the case. Any scheduling conflicts in March and April with respect to the hearing would have had no bearing on the Respondent’s ability to file an answer in February. A respondent’s communication with the Region about the litigation does not constitute good cause for the failure to file a timely answer. See, e.g., *Electra-Cal Contractors*, 339 NLRB 370, 370–371 (2003) (rejecting argument that respondent could reasonably infer from charging party’s request for postponement of hearing that it would not have to file timely answer); *Associated Interior Contractors, Inc.*, 339 NLRB 18, 18 (2003) (finding no good cause for failing to file timely answer where respondents’ counsel requested postponement of hearing date).

³ The Region’s actions were fully consistent with Sec. 10280.3 of the Board’s Casehandling Manual, which advises that, if a respondent fails to timely file an answer, counsel for the General Counsel should write to the respondent advising that no answer has been filed and warning that a motion for default judgment will be filed within a certain period of time, “normally not to exceed 1 week from [the] date of written communication.” Sec. 10280.3 further states that if an answer is not filed within the specified period, “counsel for the General Counsel should file a Motion for Default Judgment with the Board.”

II. ALLEGED UNFAIR LABOR PRACTICES

At all material times, Mario Garofalo has held the position of the Respondent's president and has been a supervisor of the Respondent within the meaning of 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 constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

Included: All full-time and regular part-time residential garbage/refuse removal truck drivers and helpers, roll off drivers, retriever drivers, front and rear end drivers employed by the Employer at its 926 Crooked Hill Road, Brentwood, New York facility.

Excluded: Mechanics, mechanics helpers, yard personnel, office clerical employees, guards and supervisors as defined in the Act.

At all times since October 14, 2010, the Respondent has recognized the Union as the exclusive collective-bargaining representative of the employees in the unit. The Respondent and the Union have embodied that recognition in a collective-bargaining agreement, effective from March 1, 2011, through February 28, 2014.

At all times since October 14, 2010, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the employees in the unit.

About September 17, 2014, the Union and the Respondent reached complete agreement on the terms and conditions of employment to be incorporated in a collective-bargaining agreement.

Since about September 25, 2014, the Union has requested that the Respondent execute a written contract containing the parties' agreement.

Since about September 25, 2014, the Respondent, by Mario Garofalo, has failed and refused to execute the parties' agreement.

Since about September 17, 2014, the Respondent has failed and refused to apply the terms of the parties' agreement to the unit employees.

CONCLUSIONS OF LAW

1. By the conduct described above, the Respondent has been failing and refusing to bargain collectively with the Union as the exclusive collective-bargaining representative of unit employees, in violation of Section 8(a)(5) and (1).

2. The Respondent's unfair labor practices affect 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 execute and implement the agreement it reached with the Union on September 17, 2014, we shall order the Respondent to execute and implement the agreement and give retroactive effect to its terms. We shall also order the Respondent to make whole the unit employees for any loss of earnings and other benefits attributable to its failure to execute the agreement, as set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), *enfd.* 444 F.2d 502 (6th Cir. 1971), and *Kraft Plumbing & Heating*, 252 NLRB 891 (1980), *enfd.* mem. 661 F.2d 940 (9th Cir. 1981), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

Additionally, in accordance with *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB 101 (2014), we shall order the Respondent to compensate the unit employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards and to file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each unit employee.

We shall also order the posting of an appropriate notice, attached hereto as "Appendix."

ORDER

The National Labor Relations Board orders that the Respondent, V. Garofalo Carting Inc., Brentwood, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to execute and implement, as requested by Local 339, United Service Workers Union, International Union of Journeymen and Allied Trades since about September 25, 2014, a collective-bargaining agreement containing the terms and conditions of employment agreed to on September 17, 2014, for employees in the following bargaining unit:

Included: All full-time and regular part-time residential garbage/refuse removal truck drivers and helpers, roll off drivers, retriever drivers, front and rear end drivers employed by the Employer at its 926 Crooked Hill Road, Brentwood, New York facility.

Excluded: Mechanics, mechanics helpers, yard personnel, office clerical employees, guards and supervisors as defined in the Act.

(b) Failing and refusing to bargain collectively with the Union as the exclusive collective-bargaining representative of bargaining unit employees, in violation of Section 8(a)(5) and (1) of the Act.

(c) 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 action necessary to effectuate the policies of the Act.

(a) Execute and implement the agreement with the Union, described above in paragraph 1(a), and give retroactive effect to its terms to the effective date of the agreement.

(b) Make unit employees whole for any loss of earnings and other benefits suffered as a result of the Respondent's failure to sign and effectuate the agreement, plus daily compound interest, as set forth in the remedy section of this decision.

(c) Compensate unit employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each unit employee.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Brentwood, New York, copies of the attached notice marked "Appendix."⁴ Copies of the notice, on forms provided by the Regional Director for Region 29, 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. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or internet site, and/or other electronic means, if the Respondent customarily communicates with employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or cov-

ered by any other material. If 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 September 17, 2014.

(f) Within 21 days after service by the Region, file with the Regional Director for Region 29 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.

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 execute and implement, as requested by Local 339, United Service Workers Union, International Union of Journeymen and Allied Trades since about September 25, 2014, a collective-bargaining agreement containing the terms and conditions of employment agreed to on September 17, 2014, for employees in the following bargaining unit:

Included: All full-time and regular part-time residential garbage/refuse removal truck drivers and helpers, roll off drivers, retriever drivers, front and rear end drivers employed by the Employer at its 926 Crooked Hill Road, Brentwood, New York facility.

Excluded: Mechanics, mechanics helpers, yard personnel, office clerical employees, guards and supervisors as defined in the Act.

WE WILL NOT fail and refuse to bargain collectively with the Union as the exclusive collective-bargaining representative of our bargaining unit employees.

⁴ 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."

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL execute and implement the collective-bargaining agreement with the Union containing the terms and conditions of employment agreed to on September 17, 2014, and give retroactive effect to its terms to the effective date of the agreement.

WE WILL make unit employees whole for any loss of earnings and other benefits suffered as a result of our failure to sign and effectuate the agreement, plus interest.

WE WILL compensate our unit employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each unit employee.

V. GAROFALO CARTING, INC.

The Board's decision can be found at www.nlr.gov/case/29-CA-141798 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, SE., Washington, D.C. 20570, or by calling (202) 273-1940.

