

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 9

CONAGRA FOODS, INC.

and

UNITED FOOD AND COMMERCIAL  
WORKERS UNION, LOCAL 75

Cases 09-CA-062889  
09-CA-062899  
09-CA-068198  
09-CA-089532  
09-CA-090873

COUNSEL FOR THE GENERAL COUNSEL'S STATEMENT OF  
POSITION TO THE BOARD ON REMAND

**I. INTRODUCTION:**

On July 17, 2016, following its acceptance of the United States Circuit Court of Appeals for the Eighth Circuit's (Eighth Circuit or Court) Order to vacate and remand in part its Decision and Order in *ConAgra Foods, Inc.*, 361 NLRB No. 113 (2014) (*ConAgra* decision), the National Labor Relations Board (Board) requested statements of position from the respective parties following its acceptance of the Order to vacate and remand its Decision and Order in the above-cited case. See *ConAgra Foods, Inc. v. NLRB*, 813 F.3d 1079 (8th Circuit, 2016). The Board's request for statements of position is limited to the issues raised in the Court's remand.

In its decision, the Eighth Circuit affirmed the Board's conclusion that ConAgra Foods, Inc. (Respondent) violated Section 8(a)(1) of the Act when it posted an unlawfully overbroad no-solicitation rule. *ConAgra Foods, Inc.*, 813 F.3d at 1091. However, the Court reversed the Board's ruling that Respondent violated Section 8(a)(1) and (3) of the Act by issuing a verbal warning to an employee for soliciting employees to sign union authorization cards while in a working area during working time. *Id.* at 1090. In light of its decision to reverse, in part, the Board's *ConAgra* decision, the Eighth Circuit declined to enforce the default judgment granted by the Board in that same decision, and remanded to the Board "to determine whether the posted-letter violation constitutes grounds for granting the General Counsel's [motion for default judgment]." *ConAgra Foods, Inc.*, 813 F.3d at 1091.

Consequently, Counsel for the General Counsel respectfully submits that irrespective of the Court's Order vacating, in part, the Board's *ConAgra* decision (including the Board's decision to grant the General Counsel's motion for default judgment), the Board should nevertheless affirm its conclusion that Respondent violated the terms of a prior settlement agreement and find Respondent in default of same.

## II. PROCEDURAL HISTORY:

On November 30, 2011, upon charges filed by the United Food and Commercial Workers Union, Local 75 (Union) against Respondent, the Regional Director of Region 9 of the Board approved an informal Settlement Agreement and Notice to Employer (Settlement Agreement) executed by both parties. The Settlement Agreement, in relevant part, provides that: (1) Respondent will not advise its employees that they may not discuss and voice their opinion on union related issues in working areas and/or during work time; (2) Respondent will not, in any like or related manner, interfere with, restrain or coerce employees in the exercise of their rights guaranteed to employees by Section 7 of the Act; (3) Respondent will notify its employees that they have the right under the Act to discuss and voice their opinions on union related issues in working areas and/or during work time. Furthermore, the above-referenced settlement agreement contains a "Performance" provision in which Respondent agreed that:

[Respondent] agrees that in case of non-compliance with any of the terms of this Settlement Agreement by [Respondent], and after 14 days notice from the Regional Director of the National Labor Relations Board of such non-compliance without remedy by [Respondent], the Regional Director will issue the complaint that will include the allegations spelled out above in the Scope of Agreement section. Thereafter, the General Counsel may file a motion for default judgment with the Board on the allegations of the complaint. [Respondent] understands and agrees that all of the allegations of the aforementioned complaint will be deemed admitted and it will have waived its right to file an Answer to such complaint. The only issue that may be raised before the Board is whether [Respondent] defaulted on the terms of this Settlement Agreement. The Board may then, without necessity of trial or any other proceeding, find all allegations of the complaint to be true and make findings of fact and conclusions of law consistent with those allegations adverse to [Respondent], on all issues raised by the pleadings. The Board may then issue an order providing a full remedy for the violations found as is appropriate to remedy such violations. The parties further agree that a U.S. Court of Appeals Judgment may be entered enforcing the Board order ex parte after service or attempted service upon Charged Party/Respondent at the last address provided to the General Counsel.

Furthermore, upon charges being filed by the Union against Respondent in Cases 09-CA-089532 and 09-CA-090873, the then Acting General Counsel of the Board, by the Regional Director of Region 9 of the Board, issued an Order Consolidating Cases, Consolidated Complaint and Notice of Hearing on January 15, 2013, against Respondent. An Amendment to the Consolidated Complaint issued on February 28, 2013. Prior to issuing the above referenced Consolidated Complaint, the Regional Director of Region 9, by email, notified Respondent's counsel that Respondent, by engaging in the conduct alleged in Cases 09-CA-089532 and 09-CA-090873, was in non-compliance with the Settlement Agreement described above. As a result of Respondent's failure to cure its act of non-compliance, the Consolidated Complaint, and subsequent Amendment to the Consolidated Complaint issued.

The administrative hearing was held before Administrative Law Judge Arthur Amchan on March 25 and 26, 2013. At the hearing, Respondent introduced a letter to employees concerning Respondent's solicitation policy. As a result of Respondent's introduction of that letter into evidence, the General Counsel moved to amend the Consolidated Complaint to allege that the letter violated Section 8(a)(1) of the Act. The Board affirmed Judge Amchan's finding that the letter ran afoul of Section 8(a)(1). *ConAgra Foods, Inc.*, 361 NLRB No. 113 slip op. at 4.

### III. LEGAL ANALYSIS:

1. The Board should affirm its initial Decision that Respondent defaulted under the terms of the prior Settlement Agreement, and accordingly grant General Counsel's Motion for Default Judgment.

In the Settlement Agreement, Respondent agreed to refrain from advising its employees that they may not discuss and voice their opinion on union related issues in working areas and/or during work time. It further agreed that it would not engage in any "like or related" conduct. Subsequent to its execution of the Settlement Agreement, Respondent posted a notice to employees which stated, *inter alia*, "that solicitation for or against unions or other organizations by employees must be limited to *non-working times*." *ConAgra Foods, Inc.*, 361 NLRB No. 113 slip op. at 18. (emphasis added) By posting the letter, Respondent clearly engaged in conduct it explicitly agreed to cease, and by doing so, is in default of the terms of the Settlement Agreement.

Respondent's arguments to the Board urging it to deny General Counsel's motion for default judgment do not warrant a different conclusion. As articulated in then Acting General Counsel's Reply Brief to Respondent's Opposition to the Acting General Counsel's Motion for Default Judgment, Respondent's argument that it did not violate the Settlement Agreement because it was never given a 14-day written notice to cure its 8(a)(1) posting violation is entirely disingenuous. First, Respondent admittedly received an email by the Regional Director for Region 9 which notified Respondent that it was in non-compliance with the prior Settlement Agreement. Respondent made no effort to cure its default.

Respondent cannot credibly argue that a 14-day window to cure the non-compliance was necessary, or even appropriate, in these circumstances, when the Acting General Counsel first learned of the letter by virtue of Respondent having offered the letter into evidence at the administrative hearing. As noted above, Respondent was placed on notice that the Acting General Counsel, prior to having knowledge of the unlawful posting, already considered Respondent's actions to have violated the terms of the Settlement Agreement. Upon becoming aware of the unlawful letter, the Acting General Counsel immediately amended the Consolidated Complaint at the hearing to allege the letter as unlawful. Following Respondent's argument to its logical conclusion, an immediate postponement of the administrative hearing, of not less than 14 days, would have been necessary to allow Respondent to cure its unlawful actions. Stated differently, Respondent would require the postponement of a two-day hearing for at least 14 days to cure its unlawful actions, an opportunity it had prior to the Consolidated Complaint being issued; an opportunity which it previously ignored.

Equally insincere is any argument Respondent articulates which presumes it would have acted to cure the default if given the opportunity to do so. Not only has sufficient time elapsed since the administrative hearing for Respondent to have cured the default, which it has not, Respondent has unwaveringly maintained that its letter does not violate the Act. Clearly the 14 day window was not needed; Respondent does not believe its actions are violative of the Act. As such, Respondent has made no efforts to cure actions the then Acting General Counsel repeatedly found to have violated the Act, and the futility in providing Respondent with another 14 days to feign interest in complying with the Act cannot be understated.

**IV. CONCLUSION:**

For the reasons stated above, Respondent is not prejudiced, or harmed in any way, if the Board considers the posted letter in deciding whether Respondent is in default of the terms of the Settlement Agreement. In considering the letter in conjunction with the Settlement Agreement, Counsel for the General Counsel respectfully submits that Respondent has unquestionably violated the terms of the Settlement Agreement. Accordingly, Counsel for the General Counsel moves that the Board grant the previously filed motion for default judgment and issue an appropriate remedy.

Dated: July 1, 2016

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'D. Goode', written in a cursive style.

Daniel A. Goode  
Counsel for the General Counsel  
Region 9, National Labor Relations Board  
John Weld Peck Federal Building, Room 3003  
550 Main Street  
Cincinnati, Ohio 45202-3271

CERTIFICATE OF SERVICE

July 1, 2016

I hereby certify that I served the attached Counsel for the General Counsel's Statement of Position to the Board on Remand on all parties by sending copies thereof by electronic mail today to the following at the addresses listed below:

Ruth A. Horvatich, Attorney  
Roger J. Miller, Attorney  
McGrath North  
1601 Dodge St Ste 3700  
Omaha, NE 68102-1627  
Email: [Rhorvatich@mcgrathnorth.com](mailto:Rhorvatich@mcgrathnorth.com)  
Email: [Rmiller@mcgrathnorth.com](mailto:Rmiller@mcgrathnorth.com)

Pamela M. Newport, General Counsel  
United Food and Commercial Workers  
International Union, Local 75  
7250 Poe Ave  
Dayton, OH 45414-2698  
Email: [Pamela.newport@ufcw75.org](mailto:Pamela.newport@ufcw75.org)

Chad P. Richter, Attorney  
Ross M. Gardner, Attorney  
Jackson Lewis, PC  
10050 Regency Circle, Suite 400  
Omaha, NE 68114  
Email: [Richterc@jacksonlewis.com](mailto:Richterc@jacksonlewis.com)  
Email: [Gardnerr@jacksonlewis.com](mailto:Gardnerr@jacksonlewis.com)

/s/Daniel A. Goode

Daniel A. Goode  
Counsel for the General Counsel  
Region 9, National Labor Relations Board  
3003 John Weld Peck Federal Building  
550 Main Street  
Cincinnati, Ohio 45202-3271