



UNITED STATES GOVERNMENT

NATIONAL LABOR RELATIONS BOARD

OFFICE OF THE GENERAL COUNSEL

Washington, D.C. 20570

October 19, 2016

Patricia S. Connor, Esquire
Clerk, United States Court of
Appeals for the Fourth Circuit
Lewis F. Powell, Jr. U.S. Courthouse
1100 East Main Street, Suite 501
Richmond, VA 23219-3517

Re: *NLRB v. McClay Energy, Inc.*, Board No.
09-CA-168156

Dear Ms. Connor:

I am enclosing a copy of the Board's application for summary entry of a judgment enforcing the Board's order in this case, and a proposed judgment.

Please serve a copy of the application on Respondent, whose addresses appear on the service list. I have served a copy of the Board's application and proposed judgment on each party admitted to participate in the Board proceedings, and their names and addresses also appear on the service list.

I am counsel of record for the Board, and all correspondence should be addressed to me. I would appreciate your furnishing the Board's Regional Director, whose name and address also appear on the service list, with a copy of all correspondence the Court sends to counsel in this case, and a copy of the judgment issued.

Very truly yours,

/s/ Linda Dreeben

Linda Dreeben
Deputy Associate General Counsel
NATIONAL LABOR RELATIONS BOARD
1099 14th Street, N.W.
Washington, D.C. 20570
(202) 273-2960

cc& documents to: Service List

SERVICE LIST

RESPONDENT:

Nathan Bentley, President
McClay Energy, Inc.
911 Fords Gap Rd
Auxier, KY 41602-9214

Tel: (606) 369-3751

Email: mcclayenergy@yahoo.com

Respondent's Incorporator and the
Registered Agent's address listed with the
Kentucky Secretary of State

THE BOARD IS NOT AWARE OF ANY
COUNSEL FOR RESPONDENT

NOTICE TO:

McClay Energy, Inc
Rt. 7 Westchester Hollow Road
Hensley, WV 24816

Phone: (606) 369-3751

CHARGING PARTY COUNSEL:

Charles F. Donnelly, Attorney
United Mine Workers of America, District
31 and Local 1501, AFL-CIO, CLC
1300 Kanawha Blvd. E.
Charleston, WV 25301-3001

Tel: (304) 346-0341

Fax: (304) 346-1186

Email: cdonnelly@umwa.org

REGIONAL DIRECTOR:

Garey Lindsay, Regional Director
National Labor Relations Board
John Weld Peck Federal Building
550 Main Street – Room 3003
Cincinnati, OH 45202-3271

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD	:	
	:	
Petitioner	:	No.
v.	:	
	:	Board Case No.:
MCCLAY ENERGY, INC.	:	09-CA-168156
	:	
Respondent	:	

APPLICATION FOR SUMMARY ENTRY OF A JUDGMENT
ENFORCING AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD

To the Honorable, the Judges of the United States
Court of Appeals for the Fourth Circuit:

The National Labor Relations Board (the Board), pursuant to Section 10(e) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 160(e)), applies to this Court for summary entry of a judgment enforcing its order against McClay Energy, Inc. (Respondent). The Board is entitled to summary enforcement of its order because Respondent failed to file an answer to the Board's unfair labor practice complaint and the Board entered an order by default. In support, the Board shows:

A. Jurisdiction of this Court

This Court has jurisdiction over this application under Section 10(e) of the Act (29 U.S.C. § 160(e)). Venue is proper in this Circuit because the unfair labor practices occurred in West Virginia. The Board's final order issued on August 19,

2016, and is reported at 364 NLRB No. 83.

B. Proceedings Before the Board

1. On April 15, 2016, a complaint and notice of hearing was issued in Case No. 09-CA-168156, charging Respondent with certain violations of the Act. The complaint, in part, advised the Respondent that under the Board's Rules (29 C.F.R. 102.20 and 102.21), the Respondent was required to file an answer to the complaint by April 29, 2016, and that if the Respondent failed to file an answer, the allegations of the complaint may be deemed to be true.

2. Respondent did not file an answer within the required time and did not request an extension of time in which to do so.

3. Having not received an answer, counsel for the General Counsel, on May 5, 2016, sent the Respondent a letter advising that if no answer was received by May 10, 2016, they would file a Motion for Default Judgment requesting that all allegations be deemed admitted as true.

4. The Respondent did not file an answer or request an extension of time.

5. On May 12, 2016, counsel for the General Counsel filed with the Board a Motion for Default Judgment based upon the Respondent's failure to file an answer to the complaint.¹

6. By order dated May 13, 2016, the Board transferred the case to itself and

¹ On June 24, 2016, the General Counsel submitted a supplement to his motion for default judgment with information related to the service of documents in this case.

issued a Notice to Show Cause, giving Respondent until May 27, 2016, to file with the Board in Washington, D.C., a response to the Motion for Default Judgment.

6. Respondent did not file a response. The allegations of the motion were therefore undisputed.

7. The Board, on August 19, 2016, issued its Decision and Order, granting the Motion for Default Judgment in the absence of good cause being shown for Respondent's failure to file a timely answer, and entering an appropriate order against the Respondent.

C. The Board Is Entitled to Summary Enforcement of Its Order

On these facts, the Board is entitled to summary enforcement of its order against Respondent. Where a respondent in a Board proceeding fails to file an appropriate answer to the unfair labor practice complaint in a timely manner, the Board may, pursuant to Board Rule 102.20, absent a showing of "good cause," deem the complaint's allegations admitted, and then may enter an order, essentially by default, against the respondent. No cause for Respondent's failure to file an answer was alleged or shown here.

It is settled that the Board is entitled to have that default judgment summarily enforced. Under Section 10(e) of the Act (29 U.S.C. § 160(e)), no objection that has not been urged before the Board shall be considered by a court of appeals "unless the failure or neglect to urge such objection shall be excused

because of extraordinary circumstances.” This limitation is jurisdictional and its application is mandatory. *Woelke & Romero Framing v. NLRB*, 456 U.S. 645, 666-67 (1982). Interpreting that requirement, courts have consistently held that a respondent’s failure to assert any defense before the Board entitles the Board, absent extraordinary circumstances, to summary enforcement of its order. *See, e.g., Father and Sons Lumber v. NLRB*, 931 F.2d 1093, 1095-96, 1097 (6th Cir. 1991); *NLRB v. Continental Hagen Corp.*, 932 F.2d 828, 830 (9th Cir. 1991); *NLRB v. Dane County Dairy*, 795 F.2d 1313, 1319-21 (7th Cir. 1986); *Oldwick Materials, Inc. v. NLRB*, 732 F.2d 339, 341 (3d Cir. 1984); *NLRB v. Aaron Convalescent Home*, 479 F.2d 736, 738-39 (6th Cir. 1973). No such circumstances have been alleged or shown here.

WHEREFORE, the Board respectfully requests that the Court, after serving notice of the filing of this application on Respondent, enter judgment summarily enforcing the Board’s order in full. A proposed judgment is attached.

/s/ Linda Dreeben
Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C. 20570

Dated in Washington, D.C.
this 19th day of October, 2016

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD	:	
	:	
Petitioner	:	No.
v.	:	
	:	Board Case No.:
MCCLAY ENERGY, INC.	:	09-CA-168156
	:	
Respondent	:	

JUDGMENT ENFORCING AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

This cause was submitted upon the application of the National Labor Relations Board for summary entry of a judgment against Respondent, McClay Energy, Inc., its officers, agents, successors, and assigns, enforcing its order dated August 19, 2016, in Case No. 09-CA-168156, reported at 364 NLRB No. 83 (2016) and the Court having considered the same, it is hereby

ORDERED AND ADJUDGED by the Court that the Respondent, McClay Energy, Inc., its officers, agents, successors, and assigns, shall abide by said order (See Attached Order and Appendix).

Mandate shall issue forthwith.

NATIONAL LABOR RELATIONS BOARD

v.

MCCLAY ENERGY, INC.

ORDER

McClay Energy, Inc., Hensley, West Virginia, its officers, agents, successors, and assigns, shall

1. Cease and desist from:

- (a) Failing and refusing to bargain collectively and in good faith with the United Mine Workers of America, District 17, as the exclusive collective-bargaining representative of employees in the following appropriate unit with respect to the effects of its decision to cease operations at its Hensley, West Virginia facility:

All full-time and regular part-time production and maintenance employees employed by the Respondent at its Route 7, Hensley, West Virginia, Westchester Mine facility, but excluding all contract employees, all office clerical employees, and all professional employees, guards and supervisors as defined in the Act.

- (b) Failing and refusing to provide the Union with requested information that is relevant and necessary to the Union's performance of its functions as the exclusive collective-bargaining representative of the unit.
- (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 affirmative action necessary to effectuate the policies of the Act.

- (a) On request, bargain collectively and in good faith with the Union concerning the effects of its decision to cease operations at its Hensley, West Virginia facility, and reduce to writing and sign any agreement reached as a result of such bargaining.

- (b) Pay the unit employees their normal wages for the period set forth in the remedy section of this decision, with interest.
- (c) Compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 9, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each 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) Furnish to the Union in a timely manner the information requested by the Union on October 13 and November 6, 2015.
- (f) Within 14 days after service by the Region, duplicate and mail, at its own expense and after being signed by the Respondent's authorized representative, copies of the attached notice marked "Appendix" to the Union and to all unit employees who were employed by the Respondent at the time that it ceased operations at its Hensley, West Virginia facility on September 24, 2015. In addition to the physical mailing 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 its employees by such means.
- (g) Within 21 days after service by the Region, file with the Regional Director for Region 9 a sworn certification of a responsible official on a form provided by the Region attesting to the steps the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES

MAILED PURSUANT TO A JUDGMENT OF THE UNITED STATES
COURT OF APPEALS ENFORCING AN 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 mail 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 bargain collectively and in good faith with the United Mine Workers of America, District 17, as the exclusive collective-bargaining representative of our unit employees set forth below, with respect to the effects of our decision to cease operations at our Hensley, West Virginia facility:

All full-time and regular part-time production and maintenance employees employed by us at our Route 7, Hensley, West Virginia, Westchester Mine facility, but excluding all contract employees, all office clerical employees, and all professional employees, guards and supervisors as defined in the Act.

WE WILL NOT fail and refuse to provide the Union with requested information that is relevant and necessary to the Union's performance of its functions as the exclusive collective-bargaining representative of the unit.

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, on request, bargain collectively and in good faith with the Union concerning the effects of our decision to cease operations at our Henley, West Virginia facility, and WE WILL reduce to writing and sign any agreement reached as a result of such bargaining.

WE WILL pay our unit employees their normal wages for the period set forth in the remedy section of the Board's decision, with interest.

WE WILL compensate our affected employees for any adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file with the Regional Director for Region 9, within 21 days of the date the amount of backpay is fixed,

either by agreement or Board order, a report allocating the backpay to the appropriate calendar years for each employee.

WE WILL furnish the Union in a timely manner the information it requested on October 13 and November 6, 2015.

MCCLAY ENERGY, INC.

The Board's decision can be found at <http://www.nlr.gov/case/09-CA-168156> 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, DC 20570, or by calling (202) 273-1940.



UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD	:	
	:	
Petitioner	:	No.
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	:	
Respondent	:	

CERTIFICATE OF SERVICE

The undersigned certifies that one copy each of the Board's application for summary entry of judgment and proposed judgment, in the above-captioned case, has this day been served by first class mail upon the following party at the address listed below:

Nathan Bentley, President
McClay Energy, Inc.
911 Fords Gap Rd.
Auxier, KY 41602-9214

McClay Energy, Inc
Rt. 7 Westchester Hollow Rd.
Hensley, WV 24816

/s/ Linda Dreeben

Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C. 20570

Dated in Washington, D.C.
this 19th day of October, 2016