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**St. Regis Enterprises, LLC and Caroline Lett.** Case  
07–CA–170591

October 27, 2016

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA  
AND MCFERRAN

The General Counsel seeks a default judgment in this case on the ground that the Respondent, St. Regis Enterprises, LLC, has failed to file a timely answer to the complaint. Upon a charge filed by Caroline Lett on February 23, 2016,<sup>1</sup> and an amended charge filed on April 20, the General Counsel issued a complaint and notice of hearing on May 31, alleging that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging Lett, and violated Section 8(a)(1) of the Act by coercively interrogating her and by maintaining several employee work rules and policies. Although it was properly served with copies of the charges and the complaint, the Respondent failed to file an answer.

On July 14, the General Counsel filed with the Board a Motion for Default Judgment. On July 20, the Board issued an Order transferring the proceeding to the Board and a Notice to Show Cause why the General Counsel's motion should not be granted. Also on July 20, the Respondent filed a response to the General Counsel's Motion for Default Judgment and a Motion for an Enlargement of Time to file an answer to the complaint, with an answer attached. On August 3, the Respondent filed a response to the Notice to Show Cause. On August 10, the General Counsel filed a reply.

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 stated that an answer "must be received by [Region 7] on or before June 14," and that if no answer was filed, or an answer was 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 admits, that Region 7 twice extended the deadline for filing an answer. First, by a warning letter dated June 17, Region 7 advised the Respondent that unless it received an an-

swer by June 24, it would file a motion for default judgment. The Respondent did not file an answer or request an extension of time to file one. Instead, Jason Wilson, the Respondent's attorney of record since May 3, filed a letter by facsimile transmission on June 29 stating that he no longer represented the Respondent. In another warning letter dated July 6, Region 7 acknowledged the extant lack of counsel and advised the Respondent that unless it received an answer by July 13, "accompanied by a statement indicating the reason for its late submission," it would file a motion for default judgment.

Despite receiving the complaint and the Region's two warning letters, the Respondent neither filed an answer nor requested an extension of time to do so before any of the deadlines passed. In fact, it did not attempt to file an answer until July 20, 6 days after the General Counsel had filed the Motion for Default Judgment with the Board. In the documents filed on that date—Respondent's opposition to default judgment and its motion for enlargement of time to file an answer—and in its response to the Notice to Show Cause filed on August 3, the Respondent makes several arguments in support of the contention that it has established good cause to file the answer. For the reasons set forth below, and contrary to our dissenting colleague, we find no merit in these arguments.

Section 102.111(c) of the Board's Rules provides that answers to a complaint "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." It also requires that a party seeking to file a document beyond the prescribed time "shall file, along with the document, a motion that states the grounds relied on for requesting permission to file untimely. The specific facts relied on to support the motion shall be set forth in affidavit form and sworn to by individuals with personal knowledge of the facts."

First, we note that the Respondent did not file an answer to the complaint or request an extension of time to file an answer by the June 14, 24, or July 13 deadlines. It did not request an "enlargement" of time to file an answer until after the Motion for Default Judgment was filed. The Board has stated that a party's "failure to promptly request an extension of time to file an answer is a factor demonstrating lack of good cause." *Day & Zimmerman Services*, 325 NLRB 1046, 1047 (1998); see also *V. Garofalo Carting*, 362 NLRB No. 170, slip op. at 1 (2015), and *Dong-A Daily North America*, 332 NLRB 15, 16 (2000). Furthermore, on July 20, when the Respondent filed an answer, it did not comply with the express instructions for doing so in Section 102.111(c). That is, its motion stating the grounds for requesting

<sup>1</sup> All dates are in 2016 unless otherwise stated.

permission to file an untimely answer was not accompanied by the required sworn affidavit from an individual with personal knowledge of the facts relied on to support the motion. A supporting affidavit was not provided until 2 weeks later, on August 3, as an attachment to the Respondent's response to the Board's Notice to Show Cause. In *Elevator Constructors Local 2 (Unitec Elevator Services Co.)*, 337 NLRB 426, 428 (2002), the Board announced that in all matters raising excusable neglect issues, 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 submit the facts in the required affidavit form, its untimely answer was improperly filed. See *V. Garofalo Carting*, supra, 362 NLRB No. 170, slip op. at 1.

Moreover, neither the unsworn factual assertions the Respondent provided in support of its July 20 motions nor the sworn assertions in its response to the Notice to Show Cause demonstrate good cause for its failure to file a timely answer. The Respondent argues that it is "unsophisticated in emerging and changing NLRA principles impacting it as an employer" and "lack[s] experience and expertise in NLRB proceedings." Yet, the Respondent did not lack experienced legal support at all times in this matter. The Respondent was originally represented in this proceeding by Stephen Kursman of the Demorest Law Firm. During the precomplaint investigatory period, Kursman provided responses to the unfair labor practice allegations, with supporting exhibits, in letters sent to Region 7 on March 15, 16, and 23. On May 3, attorney Wilson replaced Kursman and continued as the Respondent's counsel until at least June 29, when he notified the Respondent and the Region that he was withdrawing from representation. Thereafter, according to the Respondent, Wilson contacted the Lewis & Munday law firm on July 15 and formally engaged that firm, and its counsel Samuel McCargo, to represent the Respondent in this proceeding.

The Respondent contends in its response to the Notice to Show Cause that Wilson took this action because "he concluded that his lack of knowledge and experience in this area of the law made it ethically imperative that he immediately withdraw." The Respondent provides no explanation why it took Wilson almost a month after issuance of the complaint, and 15 days after the original deadline for filing an answer, to conclude that he could not adequately represent it, or why it took until July 15 to

contact and secure representation by current counsel.<sup>2</sup> The Respondent also contends in its response to the Notice to Show Cause that it replaced Kursman and his firm because of a perceived conflict of interests between the Respondent's owners and the company managing the hotel's operations. Notwithstanding the claimed concern that Kursman was not representing the Respondent's interests, the July 20 motions and the response to the Notice to Show Cause filed by the Respondent's current counsel repeatedly rely on the evidence provided by Kursman during the investigatory stage as a "complete, clear, and comprehensive answer" to the unfair labor practice allegations. It is well-established that informal statements of position in response to a charge, such as the ones the Respondent submitted prior to the complaint's issuance here, are insufficient to constitute answers to the complaint. See, e.g., *Unlimited Security, Inc.*, 338 NLRB 500, 500 (2002); *Bricklayers Local 31*, 309 NLRB 970, 970 (1992), enfd. mem. 992 F.2d 1217 (6th Cir. 1993); *Wheeler Mfg. Corp.*, 296 NLRB 6, 6 (1989). However, the Respondent fails to provide any explanation why this previously submitted "complete, clear, and comprehensive" information was insufficient to enable Wilson, an experienced attorney, to prepare and timely file the required answer to the complaint. In any event, the replacement of Kursman with Wilson was analogous to "upheaval in [a] law practice," which the Supreme Court has instructed is entitled to little weight in determining whether the failure to meet a filing deadline was the result of excusable neglect.<sup>3</sup> Under these circumstances, while the Respondent was without representation from June 29 until July 19, the Board's practice of "show[ing] some leniency toward a pro se litigant's efforts to comply with our procedural rules" does not apply to our evaluation of the Respondent's failure to file a timely answer to the complaint.<sup>4</sup> *Moo & Oink, Inc.*, 356 NLRB 1249, 1250 (2011) (internal citation omitted).

<sup>2</sup> The General Counsel correctly notes, as a matter of Board public record, that both Wilson and McCargo represented the St. Regis Hotel in proceedings before the Board in Cases 07-CA-051072 (McCargo), 07-CA-050715 (McCargo), 07-CA-051142 (Wilson), 07-CA-051513 (Wilson), and 07-CA-051369 (Wilson).

<sup>3</sup> *Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership*, 507 U.S. 380, 398 (1993). See also *Elevator Constructors Local 2 (Unitec Elevator Services Co.)*, 337 NLRB at 426 (stating *Pioneer Investment Services Co.* has guided Board decisions as to what circumstances constitute excusable neglect under Sec. 102.111(c)).

<sup>4</sup> Our dissenting colleague would find that the Respondent's neglect in filing its answer was excusable because the Respondent experienced difficulties in securing counsel. We disagree. Where, as here, a party repeatedly disregards deadlines and fails to promptly request an extension of time, the Board has consistently held that "merely being unrepresented by counsel does not establish a good cause explanation for failing to file a timely answer." *Patrician Assisted Living Facility*, 339 NLRB 1153, 1153 (2003).

Second, the Respondent argues that because Region 7 was aware of the Respondent's changes in legal representation, it should have further expanded the time for filing an answer for a few more days. We disagree. The Region had already sua sponte extended the time for filing an answer for 1 month, from June 14 to July 13, in connection with its two warning letters. It had no obligation or good reason to delay further the filing of a motion for default judgment.<sup>5</sup> Despite repeated extensions and warnings, the Respondent's untimely answer "was extracted only as a consequence of the General Counsel's filing of a [default judgment] motion." *Patrician Assisted Living Facility*, 339 NLRB at 1154.

Third, the Respondent contends that the Federal Rules of Civil Procedure support a resolution of this case based on a determination of the merits or arguments presented rather than by default judgment. But, as the Board has explained, there are important differences between federal civil litigation and Board administrative process. *Id.*; see also *Morgan's Holiday Markets*, 333 NLRB 837, 839 (2001). Here, the administrative process had been underway for almost 4 months before the deadline for filing an answer to the complaint. This is not analogous to a defendant in federal civil litigation where often the service of the complaint is the defendant's first notice of a legal claim against it.<sup>6</sup>

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Citing *Roy Spa, LLC*, 363 NLRB No. 183 (2016), our colleague also contends that the Board has excused similarly untimely responses by other parties and the General Counsel. In *Roy Spa*, the Board excused the General Counsel's delayed filing because it found the 2013 shutdown of the Federal Government to be an extraordinary intervening event. Contrary to the suggestion of our colleague, the Board has uniformly rejected untimely filings in the absence of a showing of excusable neglect or extraordinary circumstances. Here, the Respondent has made no such showing.

<sup>5</sup> The Region's actions were fully consistent with the nonbinding provisions of 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." In fact, the Board has held that the failure of a Regional Office to issue the recommended warning letter 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 at 970.

<sup>6</sup> We also reject the Respondent's argument that Region 7 and Charging Party Lett were not prejudiced by the Respondent's failure to file a timely answer, as it is not necessary to show prejudice before requiring the Respondent to comply with the Board's rules. *Starrs Group Home, Inc.*, 357 NLRB 1219, 1220 (2011).

Fourth, the Respondent argues that the complaint itself is procedurally deficient in several ways, and therefore cannot be the basis for legal relief. Primarily, the Respondent asserts that the complaint fails to comply with Section 102.15(b) of the Board's Rules and Regulations which provides that a complaint shall contain "a clear and concise description of the acts which are claimed to constitute unfair labor practices, including, where known, the approximate dates and places of such acts and the names of respondent's agents or other representatives by whom committed." We disagree. The complaint in this case meets the Rules' specificity requirements with respect to each of the unfair labor practice allegations. It sets forth the dates and locations of the alleged unfair labor practices, the name of the alleged discriminatee and of the Respondent's agent involved, and the text of each of the allegedly unlawful employee work rules. "[A]n unfair labor practice complaint is not judged by the strict standards applicable to certain pleadings in other, different legal contexts." *Artesia Ready Mix Concrete, Inc.*, 339 NLRB 1224, 1226 & fn. 3 (2003) (citing cases). Thus, the complaint sufficiently puts the Respondent on notice of the acts alleged to be unfair labor practices.<sup>7</sup>

Lastly, the Respondent claims that it has meritorious defenses to the allegations in the complaint. The Board has repeatedly stated that a respondent's asserted meritorious defenses are not properly before it when, as here, the respondent has failed to show good cause for its late response. See, e.g., *Perry Brothers Trucking, Inc.*, 364 NLRB No. 10, slip op. at 2 (2016), and cases cited there.

For the foregoing reasons, we find that the Respondent has failed to file a sufficient answer to the complaint or show good cause why the Board should not find all of the allegations in the complaint to be true. Accordingly, we deny the Respondent's Motion for an Extension of Time and 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

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<sup>7</sup> The Respondent also contends that pre-complaint investigation was inadequate and the complaint failed to allege that Region 7 complied with Sec. 101.8 of the Board's Rules and Regulations prior to the issuance of the complaint. Apart from the fact that the Respondent's assertion of an inadequate investigation is purely speculative and its interpretation of Sec. 101.8 is mistaken in several respects, Sec. 101.8 pertains only to the General Counsel's exercise of exclusive prosecutorial authority under Sec. 3(d) of the Act and is not subject to our review.

## FINDINGS OF FACT

## I. JURISDICTION

At all material times, Respondent, a limited liability corporation with an office and place of business in Detroit, Michigan (Detroit facility), has been engaged in the operation of a hotel providing lodging and restaurant services to guests.

During the calendar year ending December 31, 2015, a representative period, the Respondent, in the course and conduct of its business operations described above, derived gross revenues in excess of \$500,000 and purchased services valued in excess of \$5000 from public utilities and telecommunications entities engaged directly 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.

## II. ALLEGED UNFAIR LABOR PRACTICES

At all material times, the following individuals held the position set forth opposite their respective names and have been supervisors of the Respondent within the meaning of Section 2(11) of the Act and agents of the Respondent within the meaning of Section 2(13) of the Act.

Shirley Johnson	Partner
Bill Williams	General Manager
Robert Duncan	Front Desk Manager
Chantel Pearson	Front Desk Supervisor
Keisha Hester	Housekeeping Supervisor

The following events occurred, giving rise to this proceeding:

1. Since about October 21, 2015, Respondent has maintained the following employee work rules and policies at its Detroit facility:

(a) "I agree not to return to the hotel before or after my working hours without authorization from my manager." [Expectations of Employment, page 1, 4th bullet]

(b) Risk of immediate discharge for "[f]ailure to conduct and portray a genuine attitude of hospitality toward fellow associates and customers." [Expectations of Employment, page 2, #1]

(c) "I understand that unless approved by the General Manager or appropriate Executive Committee Member, no badges, buttons, pins, patches or ribbons may be attached to my Name Tag or any other part of my uniform or business attire . . . ." [Expectations of Employment, page 2, 3rd bullet]

(d) "Associates are NEVER allowed to sit and socialize in common areas or in customers' view." [House Rules, page 1, 9th bullet]

(e) "At no time are you to discuss gratuity with a guest." [House Rules, page 2, 2nd bullet]

(f) "NEVER discuss personal topics, problems, hotel business, or social issues in the common areas, and certainly not where guests are present, and never discuss personal issues or work issues with guests." [House Rules, page 2, 4th bullet]

(g) "All electronic and telephone communications systems and all communications and information transmitted by, received from, or stored in these systems are the property of The Hotel St. Regis Detroit and, as such, are to be used solely for job-related purposes. The use of any software and business equipment, including but not limited to, facsimiles, telecopiers, computers, the Hotel's e-mail system, the Internet, and copy machines for private purposes is strictly prohibited . . . ." [Expectations of Employment, page 3, following the heading "E-Mail, The Internet And Other Telephonic Communications"]

2. About February 12, 2016, Respondent, by its agent Shirley Johnson, at its Detroit facility, coercively interrogated its employee, Caroline Lett.

3. (a) About February 16, 2016, Respondent discharged Lett.

(b) Respondent engaged in the conduct described in paragraph 3(a) because Respondent perceived that Lett may favor union representation, and to discourage employees from harboring such sympathies or engaging in union activities.

## CONCLUSIONS OF LAW

By the conduct described in paragraphs 1 and 2, Respondent has been interfering with, restraining, and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act in violation of Section 8(a)(1) of the Act. By the conduct described in paragraph 3, Respondent has been discriminating in regard to the hire or tenure or terms or conditions of employment of its employees, thereby discouraging membership in a labor organization in violation of Section 8(a)(3) and (1) of the Act. 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)(3) and (1) of the Act by discharging Caroline Lett, we shall order the Respondent to offer Lett full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her senior-

ity or any other rights or privileges previously enjoyed. In addition, we shall order the Respondent to make Lett whole for any loss of earnings and other benefits suffered as a result of the discrimination against her. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), 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). In accordance with our recent decision in *King Soopers, Inc.*, 364 NLRB No. 93 (2016), we shall also order the Respondent to compensate Lett employees for her search-for-work and interim employment expenses regardless of whether those expenses exceed interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra. We shall further order the Respondent to compensate Lett for any adverse tax consequences of receiving a lump-sum backpay award and to file with the Regional Director for Region 7 a report allocating the backpay award to the appropriate calendar year. *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016).

The Respondent additionally shall be ordered to remove from its files any references to Lett's unlawful discharge and within 3 days thereafter to notify her in writing that this has been done and that the discipline will not be used against her in any way.

Finally, having found that the Respondent violated Section 8(a)(1) by maintaining overbroad employee work rules in its Expectations of Employment and House Rules, we shall order the Respondent to rescind or revise the unlawful rules, and advise its employees in writing of such rescission or revision in accord with *Guardsmark, LLC*, 344 NLRB 809, 812 (2005), enfd. in relevant part 475 F.3d 369 (D.C. Cir. 2007).

The Respondent shall also post the attached notice in accord with *J. Picini Flooring*, 356 NLRB 11 (2010).

#### ORDER

The National Labor Relations Board orders that the Respondent, St. Regis Enterprises, LLC, Detroit, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from
  - (a) Discharging or otherwise discriminating against employees for supporting a labor organization.
  - (b) Coercively interrogating employees about their union sympathies or support.
  - (c) Maintaining rules which employees would reasonably construe to discourage engaging in union or other protected concerted activities, and specifically the following overly broad employee work rules:

(i) "I agree not to return to the hotel before or after my working hours without authorization from my manager." [Expectations of Employment, page 1, 4th bullet]

(ii) Risk of immediate discharge for "[f]ailure to conduct and portray a genuine attitude of hospitality toward fellow associates and customers." [Expectations of Employment, page 2, #1]

(iii) "I understand that unless approved by the General Manager or appropriate Executive Committee Member, no badges, buttons, pins, patches or ribbons may be attached to my Name Tag or any other part of my uniform or business attire . . . ." [Expectations of Employment, page 2, 3rd bullet]

(iv) "Associates are NEVER allowed to sit and socialize in common areas or in customers' view." [House Rules, page 1, 9th bullet]

(v) "At no time are you to discuss gratuity with a guest." [House Rules, page 2, 2nd bullet]

(vi) "NEVER discuss personal topics, problems, hotel business, or social issues in the common areas, and certainly not where guests are present, and never discuss personal issues or work issues with guests." [House Rules, page 2, 4th bullet]

(vii) "All electronic and telephone communications systems and all communications and information transmitted by, received from, or stored in these systems are the property of The Hotel St. Regis Detroit and, as such, are to be used solely for job-related purposes. The use of any software and business equipment, including but not limited to, facsimiles, telecopiers, computers, the Hotel's e-mail system, the Internet, and copy machines for private purposes is strictly prohibited . . . ." [Expectations of Employment, page 3, following the heading "E-Mail, The Internet And Other Telephonic Communications"]

(d) 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) Within 14 days from the date of this Order, offer Caroline Lett full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(b) Make Caroline Lett whole for any loss of earnings and other benefits suffered as a result of the discrimination against her, in the manner set forth in the remedy section of the decision.

(c) Compensate Caroline Lett for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 7, within 21 days of the date the amount of backpay is

fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge, and within 3 days thereafter, notify the employee in writing that this has been done and that the discharge will not be used against her in any way.

(e) 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.

(f) Rescind or revise the rules listed in 1(c), above.

(g) Furnish employees with inserts for the current Expectations of Employment and House Rules that (1) advise that the unlawful provisions have been rescinded, or (2) provide lawfully worded provisions on adhesive backing that will cover the unlawful provisions; or publish and distribute revised copies of Expectations of Employment and House Rules that (1) do not contain the unlawful provisions, or (2) provide lawfully worded provisions.

(h) Within 14 days after service by the Region, post at its facility in Detroit, Michigan, copies of the attached notice marked "Appendix."<sup>8</sup> Copies of the notice, on forms provided by the Regional Director for Region 7, 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 covered 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 November 31, 2015.

(i) Within 21 days after service by the Region, file with the Regional Director for Region 7 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.

Dated, Washington, D.C. October 27, 2016

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Mark Gaston Pearce, Chairman

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Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MISCIMARRA, dissenting.

Respondent's Answer in this case—initially due on June 14, 2016—was not filed until July 20, 2016. Unlike my colleagues, however, I would deny the General Counsel's motion for default judgment on the basis that the late filing of Respondent's Answer involved "excusable neglect." Without question, the Respondent and its attorneys engaged in "neglect" regarding their treatment of the initial and amended complaints. I also agree that parties must be "held accountable for the acts and omissions of their chosen counsel." *Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership*, 507 U.S. 380, 397 (1993). However, the Board's excusable neglect standard permits the late filing of an answer even when there is a "showing of fault" (*id.* at 388) which, as the Supreme Court has acknowledged, may include "inadvertence, mistake, or carelessness, as well as . . . intervening circumstances beyond the party's control." *Id.*

In the instant case, Respondent's answer was filed 36 days late. However, as my colleagues acknowledge, the Respondent was represented by three sets of counsel in succession. The first attorney, Stephen Kursman, was perceived to have a conflict of interest between Respondent and the company managing Respondent's hotel that gives rise to the instant case. The second attorney, Jason Wilson, reportedly concluded that his "lack of knowledge and experience in this area of the law made it ethically imperative that he immediately withdraw." The third attorney, Samuel McCargo, was affiliated with a law firm that was first contacted by Respondent's second attorney, Wilson, on July 15, 2016, resulting in attorney McCargo's filing of Respondent's answer 5 days later July 20, 2016. These events are materially different from

<sup>8</sup> 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."

what my colleagues analogize to “upheaval in [a] law practice” that would normally be afforded “little weight.” *Id.* at 398. Again, the Supreme Court has held that “excusable neglect” may warrant leniency even when a party and its attorneys *have engaged* in “neglect,” and the evaluation of whether such neglect is “excusable” should entail the evaluation of “all relevant circumstances” including “the danger of prejudice . . . , the length of the delay and its potential impact . . . , the reason for the delay, including whether it was within the [party’s] reasonable control” and whether the party “acted in good faith.” *Id.* at 395.

I believe the events described by my colleagues establish that the Respondent correctly concluded its interests were not being well served before the Board, and Respondent’s second attorney, Wilson, contacted attorney McCargo’s law firm on July 15, 2016, resulting in the filing of an answer within 1 week thereafter. I agree with my colleagues that the situation presented here is far from ideal. However, the Board itself has been far from consistent in the treatment of late filings by parties and the Board’s own General Counsel. For example, as I pointed out in *Roy Spa, LLC*, 363 NLRB No. 183, slip op. at 5–8 (2016) (Member Miscimarra, dissenting), the General Counsel filed a response 46 days late—even longer than the delay at issue in the instant case—and the Board majority excused the untimely response even though there had been no timely request for an extension of time, and the only reason advanced by the General Counsel’s attorney was his “current work load.” *Id.*, slip op. at 5.

The Board should endeavor to treat requests for leniency in a consistent and even-handed manner regardless of whether the attorneys seeking leniency represent the General Counsel or a party-respondent.<sup>1</sup> Accordingly, in the instant case, I would deny the General Counsel’s motion for default judgment and permit the allegations in the instant case to be litigated on the merits.<sup>2</sup>

<sup>1</sup> As the D.C. Circuit observed in denying enforcement of a Board order based on finding that rejection of untimely filed exceptions was an abuse of discretion: “If the Board articulates its reasons for a strict rule that requires filings to be in hand on the due date and announces that it will apply this rule uniformly or with specific stated exceptions then this court would be obliged to defer to the Board’s discretion and authority. Under such circumstances there would be no reason not to enforce the Board’s order on request. The present sometimes-yes, sometimes-no, sometimes-maybe policy of due dates cannot, however, be squared with our obligation to preclude arbitrary and capricious management of the Board’s mandate.” *NLRB v. Washington Star Co.*, 732 F.2d 974, 976 (1984).

<sup>2</sup> My colleagues enter default judgment against Respondent without otherwise considering whether allegations in the original and amended complaints have merit. Accordingly, I similarly do not reach or pass on the merits in the instant case.

Dated, Washington, D.C. October 27, 2016

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Philip A. Miscimarra, Member

NATIONAL LABOR RELATIONS BOARD

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 discharge or otherwise discriminate against any of you for supporting a labor organization.

WE WILL NOT coercively question you about your union sympathies or support.

WE WILL NOT promulgate or maintain the following rules which employees would reasonably construe to discourage engaging in union or other protected concerted activities, and specifically the following overly broad employee work rules:

- (i) “I agree not to return to the hotel before or after my working hours without authorization from my manager.” [Expectations of Employment, page 1, 4th bullet]
- (ii) Risk of immediate discharge for “[f]ailure to conduct and portray a genuine attitude of hospitality toward fellow associates and customers.” [Expectations of Employment, page 2, #1]
- (iii) “I understand that unless approved by the General Manager or appropriate Executive Committee Member, no badges, buttons, pins, patches or ribbons may be attached to my Name Tag or any other part of my uni-

form or business attire . . . .” [Expectations of Employment, page 2, 3rd bullet]

(iv) “Associates are NEVER allowed to sit and socialize in common areas or in customers’ view.” [House Rules, page 1, 9th bullet]

(v) “At no time are you to discuss gratuity with a guest.” [House Rules, page 2, 2nd bullet]

(vi) “NEVER discuss personal topics, problems, hotel business, or social issues in the common areas, and certainly not where guests are present, and never discuss personal issues or work issues with guests.” [House Rules, page 2, 4th bullet]

(vii) “All electronic and telephone communications systems and all communications and information transmitted by, received from, or stored in these systems are the property of The Hotel St. Regis Detroit and, as such, are to be used solely for job-related purposes. The use of any software and business equipment, including but not limited to, facsimiles, telecopiers, computers, the Hotel’s e-mail system, the Internet, and copy machines for private purposes is strictly prohibited . . . .” [Expectations of Employment, page 3, following the heading “E-Mail, The Internet And Other Telephonic Communications”]

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, within 14 days from the date of the Board’s Order, offer Caroline Lett full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Caroline Lett whole for any loss of earnings and other benefits resulting from her discharge, less any net interim earnings, plus interest, plus reasonable search-for-work and interim employment expenses.

WE WILL compensate Caroline Lett for the adverse tax consequences, if any, of receiving a lump-sum backpay

award, and WE WILL file with the Regional Director for Region 7, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year.

WE WILL, within 14 days from the date of the Board’s Order, remove from our files any reference to the unlawful discharge of Caroline Lett, and WE WILL, within 3 days thereafter, notify her in writing that this has been done and that the discharge will not be used against her in any way.

WE WILL rescind or revise the employee work rules listed above.

WE WILL furnish you with inserts for the current Expectations of Employment and House Rules that (1) advise that the unlawful provisions have been rescinded, or (2) provide lawfully worded provisions on adhesive backing that will cover the unlawful provisions; or WE WILL publish and distribute a revised Expectations of Employment and House Rules that (1) do not contain the unlawful rules, or (2) provides the language of lawful rules.

ST. REGIS ENTERPRISES, LLC

The Board’s decision can be found at [www.nlrb.gov/case/07-CA-170591](http://www.nlrb.gov/case/07-CA-170591) 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, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

