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W.R. Transport, LLC and Kiany Deshone Foucha.
Case 15–CA–185397

April 13, 2018

DECISION AND ORDER

BY CHAIRMAN KAPLAN AND MEMBERS MCFERRAN
AND EMANUEL

The General Counsel seeks a default judgment in this case on the ground that the Respondent failed to file a timely answer to the complaint. Upon a charge filed by employee Kiany Deshone Foucha (Foucha) on October 3, 2016, and amended on October 24 and November 18, 2016, and April 26, 2017, the General Counsel issued the complaint on July 18, 2017, against W.R. Transport, LLC, the Respondent, alleging that it has violated Section 8(a)(1) of the National Labor Relations Act. Although properly served copies of the charge, amended charges, and complaint, the Respondent failed to file a timely answer.

On August 23, 2017, the General Counsel filed a Motion for Default Judgment with the Board. Thereafter, on August 24, 2017, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. A written response to the notice was to be filed on or before September 7, 2017. On September 6, 2017, the Respondent filed with the Region an untimely answer to the complaint. No response to the General Counsel’s Motion for Default Judgment, or to the Board’s Notice to Show Cause was filed with the Board.

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 of service of the complaint, unless good cause is shown. In addition, the complaint affirmatively states that unless an answer was received by August 1, 2017, the Board may find, pursuant to a motion for default judgment, that the allegations in the complaint are true. Further, the undisputed allegations in the General Counsel’s motion disclose that the Region, by letter dated August 10, 2017, by certified mail to the Respondent and regular mail to the Respondent’s legal representative, advised the Respondent that unless an answer was received by August 17, 2017, a motion for default judgment would be filed. Notwithstanding the August 10 reminder letter, the Re-

spondent failed to file an answer until September 6, 2017, after the General Counsel had filed the Motion for Default Judgment.

We note that the Respondent did not file a request for an extension of time to file an answer by the August 1 or August 17 deadlines, and has offered no explanation for its failure to do so. Such failure to promptly request an extension of time for filing is a factor demonstrating a lack of good cause. See, e.g., *V. Garofalo Carting*, 362 NLRB No. 170, slip. op. at 1 (2015); *Day & Zimmerman Services*, 325 NLRB 1046, 1047 (1998).

Moreover, the Respondent does not contend that it has established good cause to file the answer late. Section 102.2(d)(2) of the Board’s Rules and Regulations provides express instructions for late-filed documents. A Respondent must file “along with the document, a motion that states the grounds relied on for requesting permission to file untimely,” accompanied by a sworn affidavit of the facts relied on to support the motion. In *Elevator Constructors Local 2 (Unitec Elevator Services Co.)*, 337 NLRB 426, 428 (2002), the Board stated that in all matters arising under the excusable-neglect provision of Section 102.111(c), a precursor to Section 102.2(d)(2),¹ “we will 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.” Here, the Respondent did not file such a motion, nor did it submit a supporting affidavit. Thus, the Respondent did not comply with the requirements of Section 102.2(d)(2), and has failed to show good cause for filing an untimely answer.

In the absence of good cause being shown for the failure to file a timely answer, we reject the answer filed on September 6, 2017, as untimely and we deem the factual allegations in the complaint to be admitted as true. Nevertheless, we deny the General Counsel’s motion for default judgment. For the reasons explained below, we shall dismiss the complaint, although without prejudice to the General Counsel’s right to re-issue the complaint pursuant to his authority under Section 3(d) of the Act.

¹ On February 24, 2017, the Board published amended Procedural Rules and Regulations to be effective March 6, 2017. As part of the revisions, the service and filing provisions that were previously in Sec. 102.111 were moved to Sec. 102.2 in order to be given a “higher profile position,” and underwent reorganization and other minor revisions. Procedural Rules and Regulations, 82 Fed.Reg. 11748, at 11748 (Feb. 24, 2017). Sec. 102.2(d), “Late-filed documents,” reflects the same procedures as the prior Sec. 102.111(c) version. 82 Fed.Reg. 11748, at 11752.

Analysis

The General Counsel's complaint alleges the following:

6(a) Since about May 4, 2017, Respondent, at Respondent's facility, has classified its bus drivers as independent contractors.

6(b) Respondent misclassified its employee-drivers to discourage them from engaging in Section 7 activity and to deprive them of the protections of the Act.

7. By the conduct described above in paragraph 6, Respondent has been interfering with, restraining, and coercing employees in the exercise of the rights guaranteed by Section 7 of the Act in violation of Section 8(a)(1) of the Act. Complaint at 2, paragraphs 6–7.

The complaint thus alleges that the Respondent misclassified its workers as independent contractors, thereby depriving them of their rights guaranteed under Section 7 of the Act, in violation of Section 8(a)(1) of the Act. This unfair labor practice theory is currently under consideration in *Velox Express, Inc.*, 15–CA–184006, in which the Board has invited all interested parties to file briefs addressing the following question: “Under what circumstances, if any, should the Board deem an employer’s act of misclassifying statutory employees as independent contractors a violation of Section 8(a)(1) of

the Act?” *Notice and Invitation to File Briefs*, February 15, 2018. In those circumstances, we find it appropriate to deny the General Counsel’s Motion for Default Judgment and, given the early phase of this case, dismiss the complaint without prejudice pending the Board’s disposition of *Velox Express, Inc.* Following the disposition of that case, the General Counsel may reissue the present complaint as he deems appropriate.

ORDER

It IS ORDERED that the General Counsel’s Motion for Default Judgment is denied and the complaint is dismissed without prejudice.

Dated, Washington, D.C. April 13, 2018

Marvin E. Kaplan, Chairman

Lauren McFerran, Member

William J. Emanuel, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD