

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SUB-REGION 24**

_____)
IN RE SPARTAN PRODUCTS,)
)
)
Employer,)
-- against --)
)
INTERNATIONAL ASSOCIATION OF)
MACHINISTS AND AEROSPACE WORKERS,)
AFL-CIO,)
)
)
Petitioner,)
_____)

Case No. 12-CA-192417

**EMPLOYER’S MOTION UNDER 29 C.F.R. § 102.2(d)
FOR A VERY SHORT EXTENSION OF TIME TO FILE
ITS POST-HEARING MEMORANDUM, NUNC PRO TUNC**

To the Honorable Administrative Law Judge Elizabeth Tafe:

Employer Spartan Products, LLC (Spartan) hereby moves for an order pursuant to 29 C.F.R. § 102.2(d) extending the date by which Spartan’s post-hearing memorandum must be served and filed from 11:59 p.m. on August 3, 2018, to 12:00:45 a.m. on August 4, 2018, *nunc pro tunc*. The Declaration of Michael C. Quinn dated August 5, 2018, is submitted in support of Spartan’s motion.

The hearing of this matter was held in St. Croix, U.S. Virgin Islands, on June 12-13, 2018. Post-hearing briefs were originally due by July 19, 2018. As anticipated at the close of the hearing, the date was extended pursuant to Spartan’s unopposed motion to August 3, 2018. (Exhibit A (July 12, 2018, letter order of Deputy Chief Administrative Law Judge Arthur Amchan).)

As explained in counsel’s Declaration, Spartan commenced filing its post-hearing memorandum via the ECF system of the National Labor Relations Board (NLRB),

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<https://apps.nlr.gov/eservice/efileterm.aspx>, late on August 3, 2018. Immediately thereafter, counsel left his office and dropped copies of the brief addressed to NLRB Field Attorney Manijée Ashrafi Negroni, Esq., Grand Lodge Representative Javier Almazan, and your Honor in the Priority Mail mailbox at the U.S. Post Office located in Havensight, St. Thomas, Virgin Islands. He then went home.

Counsel returned to his office today, Sunday, August 5, 2018, and checked his email inbox. It contained a confirmatory email from the NLRB Division of Judges concerning Spartan's brief. (Exhibit B.) The email shows that Spartan's brief was not fully uploaded and marked submitted until "8/4/2018 12:00:45 AM (UTC-05:00) Eastern Time (US & Canada)." (*Id.*) The brief is therefore 46 seconds late. *See* 29 C.F.R. § 102.2(b) ("E-Filed documents must be received by 11:59 p.m. of the time zone of the receiving office.").

Spartan (and Spartan's counsel) respectfully request that your Honor accept Spartan's brief as timely filed, *nunc pro tunc*.

Counsel should not have waited until shortly before the deadline to file Spartan's brief. His schedule is hectic, but so is your Honor's, Attorney Ashrafi Negroni's and Mr. Almazan's. Counsel, however, did connect to and begin downloading the brief before midnight, presumably complying with the procedural rule. The mailing copies were printed and ready to go before midnight; counsel simply did not reach the mailing receptacle until shortly thereafter.

The NLRB's procedural rules provide that post-hearing memoranda "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." 29 C.F.R. § 102.2(d)(1). "A party seeking to file such documents beyond the time prescribed by these Rules must file, along with the document, a motion that states the grounds relied on for requesting permission to file untimely. The

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specific facts relied on to support the motion must be set forth in affidavit form and sworn to by individuals with personal knowledge of the facts.” *Id.* § 102.2(d)(2).

Good cause, excusable neglect and a distinct lack of prejudice are all present here. The present situation is quite similar to *In re Green Apple Supermarket of Jamaica, Inc.*, 366 N.L.R.B. No. 124 (July 11, 2018). There, over the NLRB General Counsel’s objection, Administrative Law Judge Kenneth W. Chu accepted the respondent’s brief—filed one minute and eleven seconds late—on grounds very like those present here:

The posthearing briefs were due at the end of the day on August 25, 2017. The Respondent electronically filed its brief at 12:01:11 a.m. on August 26, essentially, a minute and 11 seconds late in its submission. The attorney for the Respondent moved for acceptance of his brief and maintained that he had efiled his brief prior to midnight, but the date stamp on the document received was delayed because of “. . . travel through the cyber space to be accepted by the Board due to the complexity of the Board's efile system” (See Respondent's motion for acceptance of late filed posthearing brief to the Administrative Law Judge, dated August 26, 2017). The counsel for the General Counsel opposed, contending that NLRB's efile system specifically explains to the parties that the “. . . parties are strongly encouraged to file documents in advance of the filing deadline and during the normal business hours of the receiving office, in the event problems are encountered and alternate means of filing become necessary” and argued that the failure to timely submit documents will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off-line or unavailable for some reason (see General Counsel's opposition to Respondent's motion to accept untimely filed posthearing brief, dated August 28, 2017). I have decided to accept the Respondent's posthearing brief after due consideration of counsel's reply to the opposition of the General Counsel to the untimely filing of the Respondent's brief. The filing deadline was 11:59 p.m. on August 25. The Respondent's brief was electronically date stamped at 12:01:11 a.m. on August 26. It is clear that a user who waits until after close of business on the due date to attempt to E-File does so at his/her own peril. However, Sec. 102.111(c) of the Board's Rules and Regulations states that a party may file a brief within a reasonable time after the applicable deadline based on a showing of “good cause . . . based on excusable neglect and when no undue prejudice would result.” This is not the situation where a brief was hours or days late upon submission. In other contexts, the Board has exhibited some leniency regarding filing deadlines particularly when the delay has not resulted in prejudice to other parties. *See, e.g., Bon Appetit Management Co.*, 334 NLRB 1042 (2001) (Excelsior list

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1 day late); *Pole-Lite Industries*, 229 NLRB 196 (1977) (Excelsior list 3 calendar days and 1 working day late). I find good cause in the Respondent's explanation and that there was no prejudice to the General Counsel in accepting the posthearing brief from the Respondent. Here, the Respondent's untimely submission was due to a delay in the electronic transmission of his document. The counsel for the General Counsel does not contend that the delay of a minute and 11 seconds resulted in an undue prejudice. I would accept the explanation of counsel for the Respondent that the process in electronically filing his brief commenced prior to the deadline but was not electronically concluded until a minute after the deadline.

Green Apple, 366 N.L.R.B. at 6 n.6. See also *Scott v. Va. Port Auth.*, 2018 WL 3232825, * 4 n.4. (E.D. Va. Feb. 7, 2018) (decided under Fed. R. Civ. P. 6, corresponding to Section 102.2(d)) (“Scott’s memorandum was filed minutes after the deadline, prompting Scott to file a motion for leave to file. ECF No. 65. The Court granted that motion on January 25, 2018. ECF No. 66.”); *Young v. Holland Am. Line, N.V.*, 2016 WL 7451563, *1 n.1 (N.D. Cal. Dec. 28, 2016) (“Although Plaintiffs filed their opposition brief six minutes past the filing deadline, ECF No. 35- 1 at 6, the Court will exercise its discretion to consider it. Therefore, the Court grants Plaintiffs’ administrative motion in part, ECF No. 35, and accepts Plaintiffs’ corrected opposition and supporting declarations. ECF Nos. 30-32. The Court denies the administrative motion to the extent it asks the Court to consider the untimely Supplemental Declaration of John Scarpino. ECF No. 36.”); *Jackson v. Fulton Co., Ga.*, 2015 WL 12859407, * (N.D. Ga. Jan. 23, 2015) (“Regarding Plaintiff’s reply brief in support of her motion for partial summary judgment, [Doc. 148], the undersigned notes that her reply brief was filed at 12:14 AM on November 11, 2014, only fourteen minutes after the deadline for filing the brief expired. Therefore, the reply brief will be considered to the extent it is responsive to Defendants’ arguments.”).

Here, the delay was even shorter than in *Green* (although that is not a fact Spartan’s counsel is proud of). Counsel was logged on to the NLRB’s ECF system and began downloading Spartan’s brief before midnight on August 3. Uploading the document and its exhibits was not complete until forty-five seconds after midnight. As did ALJ Chu in *Green*, your Honor should accept Spartan’s memorandum as timely filed, *nunc pro tunc*.

There is no prejudice to the NLRB if your Honor does so. Reply briefs have not yet been ordered, and may never be (although Spartan did request reply briefing at the end of the hearing; your Honor reserved decision on the issue). Counsel received Attorney Ashrafi Negroni's brief at 5:00 p.m. on August 3, 2018, but has not yet read it; as the text makes clear, Spartan's memorandum does not respond to the NLRB's arguments and it is not in the nature of a reply. Spartan originally suggested requesting an extension of the briefing schedule to Friday, August 10, 2018. (Exhibit C at 3 [7/3/18 email from M. Quinn to M. Ashrafi Negroni].) The NLRB stated that it would not object to such a request. (*Id.* at 2 [7/5/18 email from M. Ashrafi Negroni to M. Quinn] ("The Region will not oppose your motion to extend the due date for the brief until August 3 or August 10.")) Spartan inquired today as to whether the NLRB will or will not object to the instant motion. (Exhibit D [8/5/18 email from M. Quinn to M. Ashrafi Negroni, *et al.*].) As of this writing, Spartan has not received a response (but it is Sunday, after all), but given the foregoing, an objection is not expected.

Based on the foregoing, Spartan requests that an order be entered pursuant to 29 C.F.R. § 102.2(d) extending the date by which Spartan's post-hearing memorandum must be served and filed from 11:59 p.m. on August 3, 2018, to 12:00:45 a.m. on August 4, 2018, *nunc pro tunc*.¹

Respectfully submitted,
DUDLEY, TOPPER and FEUERZEIG, LLP

Dated: August 5, 2018

By: s\Michael C. Quinn
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¹ This case represents the first time Spartan's counsel has taken an NLRB case to the hearing stage. He learned today that the rules also state that "[w]here any brief filed with the Board exceeds 20 pages, it must contain a subject index with page references and an alphabetical table of cases and other authorities cited." 29 C.F.R. § 102.5(a). Spartan's 23-page brief does not. If counsel intends to continue representing clients before the NLRB, he will learn its rules. In this one case, he asks that your Honor excuse this omission, with his apology.

Certificate of Service

It is hereby certified that on this 5th day of August, 2018, I served a copy of the foregoing motion upon the following by the NLRB's ECF system, First Class U.S. Mail and e-mail:

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/s/Michael C. Quinn

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