



UNITED STATES GOVERNMENT

NATIONAL LABOR RELATIONS BOARD

OFFICE OF THE GENERAL COUNSEL

Washington, D.C. 20570

March 18, 2019

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. Cobalt Coal Corp. Mining, Inc.*,
Board Nos. 09-CA-092229, 09-CA-095354
and 09-CA-096073

Dear Ms. Connor:

I am transmitting 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/ David Habenstreit

David Habenstreit
Assistant General Counsel
NATIONAL LABOR RELATIONS BOARD
1015 Half St., S.E.
Washington, D.C. 20570
(202) 273-2960

cc& documents to: Service List

SERVICE LIST

RESPONDENT:

Mr. Michael Crowder
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Mr. Al Kroontje
900, 903 — 8th Ave., SW
Calgary, Alberta T2P 0P7

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RESPONDENT IS NOT
REPRESENTED BY COUNSEL

CHARGING PARTY:

Charles F. Donnelly, Esq.
United Mine Workers of America
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REGIONAL DIRECTOR:

Matthew Denholm, Acting Rgn'l Dir.
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 Nos.:
COBALT COAL CORP. MINING, INC.	:	09-CA-092229
	:	09-CA-095354
Respondent	:	09-CA-096073

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 Cobalt Coal Corp. Mining, Inc. (Respondent). The Board is entitled to summary enforcement of its order because Respondent failed to file an answer to the Board's consolidated complaint and compliance specification 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 December 18, 2018 and is reported at 367 NLRB No. 45.

B. Proceedings Before the Board

1. On February 25, 2013, the Board's General Counsel issued a consolidated complaint, compliance specification and notice of hearing in Case Nos. 09-CA-092229, 09-CA-095354 and 9-CA-96073, 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 and that if the Respondent failed to file an answer, the allegations would be deemed to be true.

2. Having not received an answer, on March 19, 2013, the General Counsel, sent the Respondent a letter advising that if no answer was received by March 25, 2013, a Motion for Default Judgment would be filed requesting that all allegations of the Consolidated Complaint and Compliance Specification be deemed to be admitted as true. On March 26, 2013, Respondent, by its Owner and President Michael Crowder, sent an email to the Region stating that the company was insolvent and could not afford counsel.

3. On March 28, 2013, counsel for the General Counsel sent Respondent a letter informing Respondent that having counsel was not required to file an answer and that an answer was still due. The Respondent did not file an answer, respond

to the letter of March 28, 2013, or request an extension of time. Consequently, on April 3, 2013, 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.

4. By order dated April 4, 2013, the Board transferred the case to itself and issued a Notice to Show Cause, giving Respondent until April 18, 2013, to file with the Board in Washington, D.C., a response to the Motion for Default Judgment. Respondent did not file a response. Consequently, on May 24, 2013, the Board issued its Decision and Order, reported at 359 NLRB No. 123, 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.

5. At the time of the Board's May 2013 Decision and Order the composition of the Board included two persons whose appointments to the Board had been challenged. On June 26, 2014, the United States Supreme Court issued its decision in *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014), holding that the challenged appointments to the Board were not valid.

6. On June 22, 2018, the General Counsel filed a motion seeking to vacate the Board's May 24, 2013 Decision and Order, and upon de novo review of the General Counsel's motion for default judgment, to reissue the Decision and Order. Respondent did not respond.

7. The Board granted the General Counsel's motion to vacate the Board's May 24, 2013 Decision and Order and proceeded to consider de novo the General Counsel's Motion for Default Judgment. The Board found that no good cause explanation for its failure to file an answer had been offered. Consequently, in the absence of good cause being shown for the failure to file an answer, on December 18, 2018, the Board granted the General Counsel's Motion for Default Judgment and ordered Respondent to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

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.

Dated in Washington, D.C.
this 18th day of March 2019

/s/ David Habenstreit
David Habenstreit
Assistant General Counsel
National Labor Relations Board
1015 Half St., S.E.
Washington, D.C. 20570

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD	:	
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Petitioner	:	No.
v.	:	
	:	Board Case Nos.:
COBALT COAL CORP. MINING, INC.	:	09-CA-092229
	:	09-CA-095354
Respondent	:	09-CA-096073

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, Cobalt Coal Corp. Mining, Inc., its officers, agents, successors, and assigns, enforcing its order dated December 18, 2018, in Case Nos. 09-CA-092229, 09-CA-095354 and 9-CA-96073, reported at 367 NLRB No. 45 (Dec. 18, 2018), and the Court having considered the same, it is hereby

ORDERED AND ADJUDGED by the Court that the Respondent, Cobalt Coal Corp. Mining, 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.

COBALT COAL CORP. MINING, INC.

ORDER

Cobalt Coal Corp. Mining, Inc., Premier and Hensley, West Virginia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

- (a) Creating the impression that it is engaged in surveillance of its employees' union or other protected concerted activities.
- (b) Coercively interrogating employees about their or their coworkers' union activities, sympathies, or support.
- (c) Threatening employees with closure of the mine if they select the Union as their collective-bargaining representative.
- (d) Telling employees that they are being sent home prior to the completion of their work shift because the employees selected the Union as their collective-bargaining representative.
- (e) Refusing to recall and/or assign work to employees because the employees formed, joined, or assisted the Union, or engaged in protected concerted activities, and to discourage employees from engaging in these activities.
- (f) Sending home employees prior to the completion of their work shift because the employees formed, joined, or assisted the Union, or engaged in protected concerted activities, and to discourage employees from engaging in these activities.
- (g) 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) Make whole the following employees for any loss of earnings and other benefits suffered as a result of the discrimination against them, by paying them the amounts opposite their names, plus interest accrued to

the date of payment and minus tax withholdings required by Federal and State laws, as set forth in the remedy section of this Decision:

Johnny Simms	\$ 1600
Bruce Blankenship	\$ 120
Eddie Branch	\$ 130
Fred Coleman	\$ 104
William Mullins	\$ 100
Danny Smith	\$ 130
TOTAL BACKPAY:	\$ 2184

- (b) Compensate Simms, Blankenship, Branch, Coleman, Mullins, and Smith 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 from the date of this Order, a report allocating the backpay awards to the appropriate calendar years for each employee.
- (c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful refusal to recall and/or assign work to Simms and the unlawful sending home of Blankenship, Branch, Coleman, Mullins, and Smith prior to the completion of their work shift, and within 3 days thereafter, notify them in writing that this has been done and that the refusal to recall and/or assign work and sending home prior to the completion of their work shift will not be used against them in any way.
- (d) 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 employees who were employed by the Respondent at any time since September 24, 2012. In addition to physical mailing of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means.
- (e) Within 21 days after service by the Region, file with the Regional Director 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.

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 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 create the impression among our employees that your union activities are under surveillance.

WE WILL NOT interrogate you about your or your coworkers' union activities, sympathies, or support.

WE WILL NOT threaten you with closure of the mine if you select the Union as your collective-bargaining representative.

WE WILL NOT tell you that you are being sent home prior to the completion of your work shift because you selected the Union as your collective-bargaining representative.

WE WILL NOT refuse to recall and/or assign work to you because you formed, joined, or assisted the Union, or engaged in protected concerted activities.

WE WILL NOT send you home prior to the completion of your work shift because you formed, joined, or assisted the Union, or engaged in protected concerted activities.

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 make whole employees Johnny Simms, Bruce Blankenship, Eddie Branch, Fred Coleman, William Mullins, and Danny Smith for any loss of earnings

and other benefits suffered as a result of our unlawful discrimination against them, paying them the amounts set forth in the Board's Order, plus interest.

WE WILL compensate employees Johnny Simms, Bruce Blankenship, Eddie Branch, Fred Coleman, William Mullins, and Danny Smith for the 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 of the Board's Order, a report allocating the backpay awards to the appropriate calendar years for each employee.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful refusal to recall and/or assign work to Johnny Simms and the unlawful sending home of Bruce Blankenship, Eddie Branch, Fred Coleman, William Mullins, and Danny Smith prior to the completion of their work shift, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the refusal to recall and/or assign work and sending them home prior to the completion of their work shift will not be used against them in any way.

COBALT COAL CORP. MINING, INC.

The Board's decision can be found at <http://www.nlr.gov/case/09-CA-092229> 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.



UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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Petitioner	:	Nos.
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COBALT COAL CORP. MINING, INC.	:	09-CA-092229
	:	09-CA-095354
Respondent	:	09-CA-096073

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 parties at the addresses listed below:

Mr. Michael Crowder
1042 Muddy Creek Road
Piney Flats, TN 37686

Mr. Al Kroontje
900, 903 — 8th Ave., SW
Calgary, Alberta T2P 0P7

Mike Crowder
Cobalt Coal Corp. Mining, Inc.
PO Box 565
Blountville, TN 37617-0565

/s/ David Habenstreit
David Habenstreit
Assistant General Counsel
National Labor Relations Board
1015 Half St., S.E.
Washington, D.C. 20570

Dated in Washington, D.C.
this 18th day of March 2019