



UNITED STATES GOVERNMENT

NATIONAL LABOR RELATIONS BOARD

OFFICE OF THE GENERAL COUNSEL

Washington, D.C. 20570

August 30, 2019

Molly Dwyer, Clerk of Court
Office of the Clerk
U.S. Court of Appeals for the Ninth Circuit
P.O. Box 193939
San Francisco, CA 94119-3939

Re: *NLRB v. El Rio Bakery, Inc.*,
Board Case Nos. 22-CA-216755
and 22-CA-221086

Dear Ms. Dwyer:

I am enclosing 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 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
Acting Deputy Associate General Counsel
National Labor Relations Board
1015 Half Street, S.E.
Washington, D.C. 20570
(202) 273-2960

cc: service list

SERVICE LIST

RESPONDENT

Respondent's Statutory Agent:

Jose Luis Jimenez
741 W. Iowa St.
Tucson, AZ 85706

Respondent's Directors:

Griselda and Carlos Vargas
3546 S. Mission Rd., Unit-B,
Tucson, AZ 85713

Respondent's Business Address

El Rio Bakery
901 N Grande Ave
Tucson, AZ 85745

Additional Address:

El Rio Bakery, Inc.
247 N. Desert Stream Dr.
Tucson, AZ 85745

Tel: (520) 624-4996

Email: carlosguillermo48@outlook.com

CHARGING PARTY

Charging Party:

Ms. Maria Teresa Tolano
1335 West Saint Marys Rd., Apt. 214
Tucson, AZ 85745-3152

Tel: (520) 278-3714

Charging Party Counsel:

Leah Z. Jaffe, Esquire
Workers' Rights Clinic
James E. Rogers College of Law
University of Arizona
1145 North Mountain Ave.
Tucson, AZ 85719-4534

Tel: (520) 624-4996

Email: ljaffe@email.arizona.edu

Regional Director:

Cornele A. Overstreet, Rgnl. Dir.
2600 N. Central Ave., Ste. 1400
Phoenix, AZ 85004-3099

Phone: (602) 640-2160

Interested Party:

Eric Ollason
182 N. Court Ave.
Tucson, AZ 85701

Tel: (520) 791-2707

Email: eollason@182court.com

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD	:	
	:	
Petitioner	:	No.
v.	:	
	:	Board Case Nos.
EL RIO BAKERY, INC.	:	22-CA-216755
	:	22-CA-221086
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 Ninth 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 El Rio Bakery, Inc. (“Respondent”). The Board is entitled to summary enforcement of its order because Respondent failed to file an answer to the Board’s 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 Arizona. The Board’s final order issued on February 28, 2019, and is reported at 367 NLRB No. 99.

B. Proceedings Before the Board

1. On July 25, 2018, the Regional Director issued an Order Consolidating Cases, Consolidated Complaint and Notice of Hearing in Case Nos. 22-CA-216755 and 22-CA-221086 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 by August 8, 2018, and that if the Respondent failed to file an answer, the Board may find, pursuant to a Motion for Default Judgment, that the allegations in the consolidated complaint are true.

2. Having received no answer, on August 9, 2018, the General Counsel sent a letter a letter to Respondent advising that if no answer was received by August 16, 2018, the Board's Regional Office would file a Motion for Default Judgment with the Board. The letter was served upon Respondent via U.S. Mail at Respondent's business address and by email.

3. The Respondent did not file an answer.

4. On August 24, 2018, counsel for the General Counsel filed a Motion to Transfer and Continue Matter before the Board and Default Judgment based upon the Respondent's failure to file an answer to the complaint.¹

¹ On October 17, 2018, the General Counsel filed a correction to the motion.

5. By order dated August 29, 2018, the Board transferred the case to itself and issued a Notice to Show Cause, giving Respondent until September 12, 2018, to file a response to the Motion for Default Judgment with the Board in Washington, D.C.

6. Respondent did not file a response.

7. On February 28, 2019, the Board issued its Decision and Order. In the absence of good cause being shown for Respondent's failure to file a timely answer, the Board granted the Motion for Default Judgment and entered 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.” 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., NLRB v. Continental Hagen Corp.*, 932 F.2d 828, 830 (9th Cir. 1991); *Father and Sons Lumber v. NLRB*, 931 F.2d 1093, 1095-96, 1097 (6th 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/ David Habenstreit
David Habenstreit
Acting Deputy Associate General Counsel
National Labor Relations Board
1015 Half Street, S.E.
Washington, D.C. 20570

Dated in Washington, D.C.
this 30th day of August 2019

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD	:	
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Petitioner	:	No.
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EL RIO BAKERY, INC.	:	22-CA-216755
	:	22-CA-221086
Respondent	:	

JUDGMENT ENFORCING AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

Before:

This cause was submitted upon the application of the National Labor Relations Board for summary entry of a judgment against Respondent, El Rio Bakery, Inc., its officers, agents, successors, and assigns, enforcing its order dated June 26, 2019, in Case Nos. 22-CA-216755 and 22-CA-221086, reported at 367 NLRB No. 99, and the Court having considered the same, it is hereby

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

Endorsed, Judgment Filed and Entered

/s/ Molly Dwyer
Molly Dwyer
Clerk

NATIONAL LABOR RELATIONS BOARD

v.

EL RIO BAKERY, INC.

ORDER

El Rio Bakery, Inc., Tucson, Arizona, 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' protected concerted activities.
 - (b) Reducing its employees' work hours, discharging, or constructively discharging its employees because they engage in protected concerted activities.
 - (c) Reducing its employees' work hours, discharging and/or constructively discharging, or otherwise discriminating against its employees because they cooperate in a Board investigation.
 - (d) Requiring that employees complete new job applications because they engage in protected concerted activity.
 - (f) 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) Within 14 days from the date of this Order, offer Maria Teresa Tolano, Rebecca Herrera Lopez, Javier Ponce, and Jose Daniel Mendoza full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.
 - (b) Make Maria Teresa Tolano, Rebecca Herrera Lopez, Javier Ponce, and Jose Daniel Mendoza whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of this Decision and Order.

- (c) Make Javier Ponce and Jose Daniel Mendoza whole for any loss of earnings and other benefits suffered as a result of the unlawful reduction of their work hours in the manner set forth in the remedy section of this Decision and Order.
- (d) Compensate Maria Teresa Tolano, Rebecca Herrera Lopez, Javier Ponce, and Jose Daniel Mendoza for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 28, 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.
- (e) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges and/or constructive discharges, and within 3 days thereafter notify Maria Teresa Tolano, Rebecca Herrera Lopez, Javier Ponce, and Jose Daniel Mendoza in writing that this has been done and that their discharges and/or constructive discharges will not be used against them in any way.
- (f) 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.
- (g) Within 14 days after service by the Region, post at its facility in Tucson, Arizona, copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 28, 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 an internet site, and/or other electronic means, if the Respondent customarily communicates with its 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 September 22, 2017.

- (h) Within 21 days after service by the Region, file with the Regional Director for Region 28 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

**POSTED 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 that we are engaged in surveillance of your protected concerted activities.

WE WILL NOT reduce the work hours, discharge, or constructively discharge any employee for engaging in protected concerted activities.

WE WILL NOT reduce the work hours, discharge, or constructively discharge, or otherwise discriminate against any of you for cooperating in a National Labor Relations Board investigation or for filing a charge with the National Labor Relations Board.

WE WILL NOT require you to complete a new job application because you engage in protected concerted activity.

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 Maria Teresa Tolano, Rebecca Herrera Lopez, Javier Ponce, and Jose Daniel Mendoza full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Maria Teresa Tolano, Rebecca Herrera Lopez, Javier Ponce, and Jose Daniel Mendoza whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, less any net interim earnings, plus interest, and WE WILL also make those employees whole for reasonable search-for-work and interim employment expenses, plus interest.

WE WILL make Javier Ponce and Jose Daniel Mendoza whole for any loss of earnings and other benefits suffered as a result of our unlawful reduction in their hours of work, plus interest.

WE WILL compensate Maria Teresa Tolano, Rebecca Herrera Lopez, Javier Ponce, and Jose Daniel Mendoza for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file with the Regional Director for Region 28, 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.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges and/or constructive discharges of Maria Teresa Tolano, Rebecca Herrera Lopez, Javier Ponce, and Jose Daniel Mendoza, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges and/or constructive discharges will not be used against them in any way.

EL RIO BAKERY, INC.

The Board's decision can be found at www.nlr.gov/case/28-CA-216755 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
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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, proposed judgment and mediation questionnaire in the above-captioned case, has this day been served by first class mail upon the following parties at the addresses listed below:

Jose Luis Jimenez
741 W. Iowa St.
Tucson, AZ 85706

Griselda and Carlos Vargas
3546 S. Mission Rd., Unit-B,
Tucson, AZ 85713

El Rio Bakery
901 N Grande Ave
Tucson, AZ 85745

El Rio Bakery, Inc.
247 N. Desert Stream Dr.
Tucson, AZ 85745

/s/ David Habenstreit
David Habenstreit
Acting Deputy Associate General Counsel
National Labor Relations Board
1015 Half Street, S.E.
Washington, D.C. 20570

Dated at Washington, D.C.
this 30th day of August 2019