

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Thurgood Marshall U.S. Courthouse 40 Foley Square, New York, NY 10007 Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

Docket Number(s): 19-3716 Caption [use short title]

Motion for: Emergency stay, panel rehearing, and alternatively extension of time to respond. NLRB v. RM Bakery, LLC

Set forth below precise, complete statement of relief sought:

Petitioner (respondent in this NLRB enforcement proceeding) seeks an emergency stay pending review of its request for relief from a default judgment entered in this Court on December 27, 2019.

MOVING PARTY: RM Bakery, LLC OPPOSING PARTY: National Labor Relations Bd.
Plaintiff Defendant
Appellant/Petitioner Appellee/Respondent

MOVING ATTORNEY: Orin Kurtz OPPOSING ATTORNEY: David Habenstreit
[name of attorney, with firm, address, phone number and e-mail]

Gardy & Notis, LLP Acting Deputy Assoc. Gen. Counsel, NLRB
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212-905-0509, okurtz@gardylaw.com

Court-Judge/Agency appealed from:

Please check appropriate boxes:

Has movant notified opposing counsel (required by Local Rule 27.1):
[X] Yes [] No (explain):

Opposing counsel's position on motion:
[] Unopposed [] Opposed [X] Don't Know

Does opposing counsel intend to file a response:
[] Yes [] No [X] Don't Know

Is oral argument on motion requested? [] Yes [X] No (requests for oral argument will not necessarily be granted)

Has argument date of appeal been set? [] Yes [] No If yes, enter date:

Signature of Moving Attorney: S/Orin Kurtz Date: 2/10/2020 Service by: [] CM/ECF [] Other [Attach proof of service]

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUNCTIONS PENDING APPEAL:

Has request for relief been made below? [X] Yes [] No
Has this relief been previously sought in this Court? [] Yes [X] No

Requested return date and explanation of emergency:

RMB requests that this be returnable at the Court's earliest convenience. NLRB has stated it will seek contempt against RMB despite the filing of this timely petition; this creates undue pressure upon RMB and inhibits appellate rights.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS
BOARD,

Petitioner,

v.

RM BAKERY, LLC D/B/A LEAVEN &
CO., A WHOLLY-OWNED
SUBSIDIARY OF BKD GROUP, LLC,

Respondent.

No. 19-3716

Board Case No.:
02-CA-235116

**EMERGENCY MOTION FOR STAY AND MOTION FOR
PANEL REHEARING OR, ALTERNATIVELY, EXTENSION OF
TIME TO RESPOND**

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CORPORATE DISCLOSURE STATEMENT

RM Bakery, LLC d/b/a Leaven & Co., is a wholly-owned subsidiary of BKD Group, LLC. BKD Group, LLC is not a publicly traded Corporation or entity.

Respondent RM Bakery, LLC d/b/a Leaven & Co., a wholly-owned subsidiary of BKD Group, LLC (“RMB”) submits this Petition for (1) an emergency stay of proceedings in the National Labor Relations Board pending review of this Petition, pursuant to Federal Rule of Appellate Procedure 18, (2) a rehearing in connection with the December 27, 2019 Order (the “Order”, Exhibit A) enforcing a default judgment (Exhibit B hereto) obtained by the National Labor Relations Board (the “NLRB”) pursuant to Federal Rule of Appellate Procedure 40, or, alternatively, (3) to extend RMB’s time to respond to the NLRB’s application for enforcement.¹

In or about mid-January, 2020, RMB received a letter from the NLRB enclosing the Order. It was at that time that RMB learned of its default in the NLRB and the subsequent enforcement proceeding in this Court that resulted in a default and issuance of the Order.

RMB’s default is a result of misrepresentations and omissions made by RMB’s CFO (the “CFO”) who had assured the Company that he was handling this matter. After the CFO abruptly left the Company due to [REDACTED] and [REDACTED] RMB learned that

¹ Pursuant to Local Rule 27.1 (4), RMB requests that the Court act as soon as is practicable. In compliance with FRAP 18, RMB sought a stay of proceedings in the NLRB before petitioning this Court for a stay. The NLRB refused to stay the matter and, as explained below, is seeking contempt against RMB during the pendency of this Petition.

the CFO had concealed the status of the case from RMB and had allowed defaults to be entered. RMB was completely blindsided by this set of events and it should not be bound by the Order in these circumstances.

RMB satisfies all of the prerequisites for an emergency stay. Among other things, RMB can show that it likely would have prevailed on the merits if it been able to defend itself because the Complainants were independent contractors and not employees under NLRB precedent. The Complainants owned their own trucks, set their own schedules and decided when, if at all, to deliver RMB's products, were free to work for other companies including competitors of RMB, worked for RMB for just over one month, and were requested to provide IRS Forms W-9 and obtain their own vehicle insurance and product liability insurance to continue doing business with RMB.

RMB requests that this action be stayed on an emergency basis. RMB has complied with FRAP 18 and, before seeking a stay, requested same of the NLRB. The NLRB refused to stay enforcement pending this petition and informed RMB that it is seeking contempt for RMB's failure to comply with the Order—despite RMB informing the NLRB that it intends to comply with all non-monetary aspects of the Order.² The NLRB is thus requiring RMB to choose between exercising its

² RMB has informed the NLRB that it intends to comply with the non-monetary portions of the Order—including posting the required notices and offering reinstatement to the Complainants—and wishes to dispute the amount of

appellate rights and complying with a judgment of over \$181,000 that should never have been entered.

For all these reasons, and those further stated below, RMB's Petition should be granted.

I. FACTUAL BACKGROUND

In or about August or September, 2018, RMB acquired a bakery called Good Bread. Declaration of Dan Wilczynski (the "Wilczynski Dec.") ¶2. After the acquisition, it was learned that Good Bread had been contracting with several drivers—the Complainants—who were delivering products on an independent contractor basis. RMB continued to work with Complainants. *Id.*

Complainants owned their own trucks and paid their own expenses in connection with the trucks. RMB never directed the Complainants in their daily work and did not require them to pick up RMB products at any particular time, or at all. Rather, Complainants determined if, and when, they would pick up RMB products to deliver them to customers. Wilczynski Dec. ¶3. Complainants were not on RMB's payroll, but rather were paid as independent contractors without deduction of taxes or other customary deductions. Complainants were not paid hourly. *Id.* ¶4. Complainants did not only work for RMB; rather, they were free to,

the judgment. The NLRB nonetheless has indicated that it considers RMB to be non-compliant unless it agrees to comply with all aspects of the Order.

and did, deliver products for various separate companies on a daily basis including florists and others whose businesses are not known to RMB. *Id.* ¶5.

Shortly after Complainants began to do business with RMB, the CFO informed Complainants that RMB needed paperwork in order to properly pay their businesses, including IRS Forms W-9. *Id.* ¶6. The CFO also told the Complainants that they must provide RMB proof of insurance, with RMB as an additional insured, in order to continue to deliver RMB products. *Id.*

After the Complainants repeatedly refused to purchase insurance or provide Forms W-9, RMB ended its relationship with Complainants. *Id.* ¶7. Complainants then filed a charge with the NLRB for unfair labor practices, in particular, for RMB's alleged interference with their right to engage in concerted action in violation of the National Labor Relations Act.

Although the Company was generally aware that some proceeding was taking place in connection with complaints made by an independent contractor, the only person at the Company who was involved in the matter was the CFO. The CFO assured RMB on multiple occasions that he was handling the matter. Wilczynski Dec. ¶8.

In or about October or November, 2019, Mr. Wilczynski participated in a call with the CFO and a person named Patricia; Mr. Wilczynski was not aware at the time that Patricia was from the NLRB. Patricia said she had just received the

matter and would call RMB back, and that is the last Mr. Wilczynski heard of this matter from the CFO. After the call, CFO informed Mr. Wilczynski that the call was about a “state” matter that had already been resolved with the Complainants being declared independent contractors. *Id.* ¶9 This was consistent with the CFO’s previous assurances that the NLRB matter was a “state” matter that was under control.

In or about late November, 2019, the CFO left the Company abruptly, due to what RMB has been informed was [REDACTED] Wilczynski Dec. ¶10. RMB has generally been unable to contact the CFO with the exception of one conversation in early January, 2020. In that conversation, the CFO stated that [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] *Id.* ¶10.

In mid to late December, 2019, Mr. Wilczynski found numerous communications—including at least one communication addressed to Mr. Wilczynski from the NLRB and dozens of other parcels addressed to Mr. Wilczynski from other senders—buried, unopened, in the CFO’s office. The CFO had hundreds, or thousands, of unopened mail packages. Wilczynski Dec. ¶11. Among other things, the CFO had allowed bills to go unpaid and as a result, two of

RMB's vehicles were impounded by New York State. Many of the communications from the NLRB, while stating that they were sent by regular mail and email, only had the CFO's email address on them and did not indicate that they were sent to Mr. Wilczynski's email address. *Id.* ¶12. Thus, it appears that only the CFO, and not any other person at RMB, was receiving information about this matter. Whether intentional or not, the CFO had falsely led RMB to believe he was handling the matter. This had been made possible, in part, due to the fact that all mail was brought to the CFO of RMB, and Mr. Wilczynski, who works primarily on the production floor, was not apprised of any mail to him. *Id.*

In mid-January, 2020, RMB received a letter from the NLRB attaching the Order. *Id.* ¶13. RMB learned in that letter that (1) a default had been obtained against RMB in the NLRB and (2) a default had been obtained in this Court against RMB. *Id.*

Since receiving that Order, RMB has acted expeditiously, communicating regularly, through its lawyers, with the NLRB and filing this timely Petition. RMB has informed the NLRB that it intends to comply with the non-monetary portions of the Order and wishes to contest the monetary portion of the Order, but the NLRB has stated that it will not go forward with a hearing while this Petition is pending and that it intends to seek contempt notwithstanding this timely filing.

II. ARGUMENT

A. AN EMERGENCY STAY IS WARRANTED

RMB requests that the Court stay this matter on an emergency basis pending review of this Petition. Pursuant to FRAP 18(a), Petitioner has requested a stay from the NLRB and the NLRB refused. Indeed, the NLRB has stated that it is seeking contempt even while this timely Petition is pending.

RMB submits that its informal request for a stay is sufficient; FRAP 18 is stated “in flexible terms and is not intended to apply in a case where the application would be an exercise of futility, as it would have been here.” *Commonwealth-Lord Joint Venture v. Donovan*, 724 F.2d 67, 68 (7th Cir. 1983). Given the NLRB’s response to RMB’s request for a stay pending this Petition, and the undue pressure the NLRB has put on RMB, a motion to stay in the NLRB would be “an exercise in futility” (*id.*) and would, at a minimum, be impracticable. FRAP 18(a)(2)(A)(i).

1. The Relevant Factors Favor a Stay Pending Review

In determining whether to issue a stay pending appellate review, “the governing precedents direct that [the Court] consider the following factors: (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested

in the proceeding; and (4) where the public interest lies.” *U.S. S.E.C. v. Citigroup Glob. Markets Inc.*, 673 F.3d 158, 162 (2d Cir. 2012)(citation and quotation marks omitted).

“A party does not necessarily have to make a strong showing with respect to the first factor (likelihood of success on the merits) if a strong showing is made as to the second factor (likelihood of irreparable harm).” *People for the Am. Way Found. v. U.S. Dep’t of Educ.*, 518 F. Supp. 2d 174, 177 (D.D.C. 2007). Similarly, “[p]robability of success is inversely proportional to the degree of irreparable injury evidenced. A stay may be granted with either a high probability of success and some injury, or *vice versa*.” *Cuomo v. U.S. Nuclear Regulatory Comm’n*, 772 F.2d 972, 974 (D.C. Cir. 1985); *Mohammed v. Reno*, 309 F.3d 95, 101 (2d Cir. 2002).

1. RMB is Likely to Succeed on the Merits

The underlying action is a complaint against RMB for violation of the N.L.R.A, which expressly applies only to employees and not independent contractors. 29 U.S.C. § 152(3)(“employee” specifically excludes “any [] independent contractor”).

The NLRB’s “common law” test shows that the Complainants were independent contractors. *SuperShuttle DFW, Inc. and Amalgamated Transit Union*

Local 1338, 367 N.L.R.B. 75 (2019) (citing *NLRB v. United Insurance Co. of America*, 390 U.S. 254, 256 (1968)). The common law factors include:

(a) The extent of control which, by the agreement, the master may exercise over the details of the work. (b) Whether or not the one employed is engaged in a distinct occupation or business. (c) The kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision. (d) The skill required in the particular occupation. (e) Whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work. (f) The length of time for which the person is employed. (g) The method of payment, whether by the time or by the job. (h) Whether or not the work is part of the regular business of the employer. (i) Whether or not the parties believe they are creating the relation of master and servant. (j) Whether the principal is or is not in business.

Id.

“In applying these factors, [] there is no ‘shorthand formula’ and [] “all the incidents of the relationship must be assessed and weighed with no one factor being decisive. What is important is that the total factual context is assessed in light of the pertinent common-law agency principles.” *Id.* (citation omitted).

Here, the majority of factors and the “total factual context” support independent contractor status.

Factor (a) favors independent contractor status because RMB did not exercise any control over the details of Complainants’ work. Wilczynski Dec. ¶3. With regard to factor (b), Complainants were engaged in their own delivery

businesses, working for many companies, while RMB was engaged in the distinct bakery business.

Factor (c) is neutral as the record does not have sufficient information about local practices to provide an analysis. Factor (d) favors independent contractor status because the Complainants, as owners of vehicles and as contractors who work with many businesses, must have the skill to manage their own business. Alternatively, this factor could favor employee status because, generally, delivering bakery products does not require specialized training. *See Supershuttle*, 367 N.L.R.B. 75 (franchisees' work did not require any specialized training which weighed toward employee status). Thus, at worst, this factor is neutral.

Factor (e) favors RMB because the Complainants supplied the instrumentalities and tools (their delivery trucks) and worked off-premises thus RMB did not supply a "place of work," and RMB required Complainants to purchase their own insurance. Complainants worked with RMB at their discretion, for just over one month, and thus the length of employment was short (factor "f"), and were not by the amount of time they worked (factor "g") thus favoring independent contractor status.

There is no indication in the record that the parties intended to create a "master and servant" relationship and in fact, to the contrary, RMB repeatedly

conditioned Complainants' continued work on their provision of Forms W-9 and the purchase of insurance which employees do not provide (factor "i").

Last, it appears that Complainants were "in business" because they owned their own trucks and paid the expenses for those trucks, and used the trucks to work for multiple clients in addition to RMB (factor "j").

Indeed, this case is strikingly similar to *Super Shuttle*, a case in which the NLRB held that shuttle drivers were independent contractors rather than employees. In that case, like here, the drivers "ma[de] a significant initial investment in their business by purchasing or leasing a van," and had "total control over their schedule," thus working "as much as they choose, when they choose." The drivers were "free from control . . . in the day-to-day performance of their work," just as the Complainants were in this case. Wilczynski Dec. ¶3. The drivers were also free to choose "where they work" which is similar to the independence the Complainants had here to work for any other companies they desired. *Id.* ¶5. The *SuperShuttle* drivers were required to indemnify and hold harmless SuperShuttle for claims arising against them; similarly here, RMB required the Complainants to take out insurance naming RMB as an additional insured. This "indemnification greatly lessens [RMB's] motivation to control [the Complainants because RMB] is not liable for" their acts. *Supershuttle*, 367 N.L.R.B. 75. The NLRB also noted that the drivers "are not generally supervised," like the

Complainants here, and the drivers’ “near-absolute autonomy in performing their daily work without supervision supports a finding that they are independent contractors.” *Id.*

Last, with regard to investments in the instrumentalities, tools, and place of work, the NLRB noted that:

The primary instrumentalities of franchisees’ work are their vans and the Nextel dispatching system. As noted, franchisees purchase their vans . . . or they lease their vans, also a significant investment....In addition, franchisees pay for gas, tolls, repairs, and any other costs associated with operating their vans. Franchisees’ full-time possession of their vans facilitates their ability to work whenever and wherever they choose. These factors weigh in favor of independent-contractor status.

The Complainants here similarly owned or leased their own vehicles, RMB did not pay any expenses relating to the vehicles, and presumably the Complainants were in possession of the vehicles and thus were able to use them to “work whenever and wherever they choose.”

Moreover, RMB has a strong case to reopen the record in the NLRB, if such a motion must be made after the present review, because “extraordinary circumstances” exist to justify RMB’s failure to respond in the NLRB. Those reasons are the same as stated below in RMB’s arguments concerning “good cause” for its default: that the CFO falsely assured RMB was handling the matter, and concealed the truth, and thus RMB could not properly exercise diligence. *See* 29 U.S.C. § 160(e) (“No objection that has not been urged before the Board, its

member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances.”).

2. RMB Will be Irreparably Injured Absent a Stay

Here, if a stay is not granted, RMB will be inhibited in the exercise of its federal appellate rights. Although FRAP 40 permits RMB 45 days to seek review of the Order—a time that has not yet passed—the NLRB has stated that it will seek contempt against RMB while this Petition is pending in the absence of a ruling by this Court. This position is coercive and, as a practical matter, infringes on RMB’s ability to exercise its rights.

Moreover, if the NLRB is permitted to apply the hydraulic pressure it has placed upon RMB—the choice between a contempt proceeding on the one hand, and giving up its appellate rights on the other, even when RMB has informed the NLRB that it intends to comply all non-monetary portions of the Order—RMB could be forced to pay a judgment that may not be recoverable given the procedural posture of this case. Although monetary losses generally do not constitute “irreparable harm,” this case may be the exception.

Moreover, courts have recognized that “[p]robability of success is inversely proportional to the degree of irreparable injury evidenced. A stay may be granted with either a high probability of success and some injury, or *vice versa*.” *Cuomo*,

772 F.2d at 974. Thus, even if this factor is not strong for RMB, its significant likelihood of success on the merits tips the balance in favor of a stay.

3. There is no Evidence Indicating That any Party Will be Injured by a Stay

As an initial matter, there are no facts about the Complainants in the record other than the fact that they did business with RMB for just over one month in the year 2018 and that the business relationship ended. If the Complainants are indeed entitled to the judgment, a delay in receiving that judgment should not harm them because the NLRB has assessed “compound interest” on the back pay that they are allegedly owed.

4. The Public Interest Favors a Stay

This action involves a small group of independent contractors and a single company and may not immediately affect the public at large. However, the public interest favors a stay due to the precedent that may be set here. The NLRB’s decision to seek contempt while RMB is exercising its lawful—and meritorious—right to seek review of the Order should not be permitted due to its coercive nature. A stay of this action pending review will put the brakes on similar practices in the future by the NLRB.

B. THE COURT SHOULD PERMIT A REHEARING

As shown above, RMB was unable to present any arguments to this Court due to the acts of the CFO. Thus, through no error of its own, the Court

“overlooked” the facts concerning RMB’s reason for defaulting in the NLRB proceeding and also “overlooked” RMB’s arguments on the merits.

Pursuant to FRAP 40(a)(4), if “a petition for panel rehearing is granted, the court may do any of the following: (A) make a final disposition of the case without reargument; (B) restore the case to the calendar for reargument or resubmission; or (C) issue any other appropriate order.”

RMB submits that the most efficient course in this action would be for the Court to remand this matter to the NLRB with the instruction that the NLRB reopen the record, or permit RMB to move for same in the NLRB, in order to permit RMB to defend against the charges on the merits.

C. RMB’S DEFAULT IN THE NLRB AND THIS COURT WAS DUE TO GOOD CAUSE AND THUS ITS TIME TO RESPOND SHOULD BE EXTENDED

Under the Federal Rules, “[f]or good cause, the court may extend the time prescribed by these rules or by its order to perform any act, or may permit an act to be done after that time expires.” FRAP 26(b). “[A] finding of ‘good cause’ depends on the diligence of the moving party.” *Parker v. Columbia Pictures Indus.*, 204 F.3d 326, 340 (2d Cir. 2000).

Here, the CFO’s misrepresentations that this matter was being handled remove any fault of RMB and provide “good cause” to extend RMB’s time to respond.

The CFO told RMB that the matter was being handled, told Mr. Wilczynski that a phone call about this matter was about a “state” matter in which RMB had already prevailed and the Complainants were held to be independent contractors, and did not at any time inform RMB that defaults were being entered in both the NLRB and this Court. Wilczynski Dec. ¶¶11-13. Moreover, the CFO appears to have held the mailed notices concerning this proceeding, and although the notices purport to be sent to Mr. Wilczynski by email, none of the service documents bears his email address. *Id.*¶13.

Accordingly, RMB was unaware that defaults were being entered until, in mid-January 2020, RMB received a letter from the NLRB enclosing the Order. RMB thereafter acted in good faith, retained employment counsel, communicated with the NLRB, and is making efforts to comply with all non-monetary portions of the Order.

In the related context of excusable neglect, courts have excused an employer’s default due to the *negligent* acts of a responsible employee. *See Wood v. James W. Fowler Co.*, 168 Or. App. 308, 318, 7 P.3d 577, 582 (2000)(comptroller negligently failed to take steps to respond)(compiling similar cases).

Here, it would be a grave injustice for RMB to be bound by the intentional or negligent concealing of details by a trusted employee. *Lowry v. McDonnell*

Douglas Corp., 211 F.3d 457, 463 (8th Cir. 2000) (“the excuse given for the late filing must have the greatest import” in the “excusable neglect” analysis).

CONCLUSION

For the foregoing reasons, this matter should be stayed pending a decision on this Petition and, RMB’s petition for a rehearing should be granted.

DATED: February 10, 2020

GARDY & NOTIS, LLP

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s/Orin Kurtz

Attorney for Respondent RM Bakery, LLC

Dated: February 10, 2020

MANDATE

United States Court of Appeals
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 27th day of December, two thousand nineteen.

Present:

Peter W. Hall,
Debra Ann Livingston,
Richard J. Sullivan,
Circuit Judges.

NATIONAL LABOR RELATIONS BOARD

Petitioner

v.

RM BAKERY, LLC D/B/A LEAVEN & CO., A
WHOLLY-OWNED SUBSIDIARY OF BKD GROUP, LLC

Respondent

:
:
: No. 19-3716
:
: Board Case No.:
: 02-CA-235116
:
:
:

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, RM Bakery, LLC d/b/a Leaven & Co., a wholly-owned subsidiary of BKD Group, LLC, its officers, agents, successors, and assigns, enforcing its order dated October 8, 2019, in Case No. 02-CA-235116, reported at 368 NLRB No. 90, and the Court having considered the same, it is hereby

ORDERED AND ADJUDGED by the Court that the Respondent, RM Bakery, LLC d/b/a Leaven & Co., a wholly-owned subsidiary of BKD Group, LLC, its officers, agents, successors, and assigns, shall abide by said order (See Attached Order and Appendix).

Mandate shall issue forthwith.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk




A True Copy

Catherine O'Hagan Wolfe, Clerk

United States Court of Appeals, Second Circuit




NATIONAL LABOR RELATIONS BOARD

v.

RM BAKERY, LLC D/B/A LEAVEN & CO.,
A WHOLLY-OWNED SUBSIDIARY OF BKD GROUP, LLC

ORDER

RM Bakery, LLC d/b/a Leaven & Co., a wholly-owned subsidiary of BKD Group, LLC, Bronx, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from
 - (a) Terminating or otherwise discriminating against its employees because they engaged in protected concerted activities.
 - (b) 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 Juan Carlos Abarca, Nestor Marquez, Rene Moran, Gilberto Paniura, and Clayton Brown 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 Juan Carlos Abarca, Nestor Marquez, Rene Moran, Gilberto Paniura, and Clayton Brown whole for any loss of earnings and other benefits they may have suffered as a result of their unlawful terminations, in the manner set forth in the remedy section of this decision.
 - (c) Compensate Juan Carlos Abarca, Nestor Marquez, Rene Moran, Gilberto Paniura, and Clayton Brown for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 2, 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 year for each employee.

- (d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful terminations of Juan Carlos Abarca, Nestor Marquez, Rene Moran, Gilberto Paniura, and Clayton Brown, and within 3 days thereafter, notify the employees in writing that this has been done and that the unlawful terminations will not be used against them 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) Within 14 days of service by the Region, post at its Bronx, New York facility copies of the attached notice marked “Appendix” in both English and Spanish. Copies of the notice, in English and Spanish, on forms provided by the Regional Director for Region 2, 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 October 10, 2018.
- (g) Within 21 days after service by the Region, file with the Regional Director for Region 2 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 terminate you because you 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, within 14 days from the date of the Board's Order, offer Juan Carlos Abarca, Nestor Marquez, Rene Moran, Gilberto Paniura, and Clayton Brown 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 Juan Carlos Abarca, Nestor Marquez, Rene Moran, Gilberto Paniura, and Clayton Brown whole for any loss of earnings and other benefits they may have suffered as a result of their unlawful terminations, 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 compensate Juan Carlos Abarca, Nestor Marquez, Rene Moran, Gilberto Paniura, and Clayton Brown for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file with the Regional Director for Region 2, 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 year 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 terminations of Juan Carlos Abarca, Nestor

Marquez, Rene Moran, Gilberto Paniura, and Clayton Brown, and WE WILL within 3 days thereafter, notify them in writing that this has been done and that the unlawful terminations will not be used against them in any way.

**RM BAKERY, LLC D/B/A LEAVEN & CO., A WHOLLY-OWNED
SUBSIDIARY OF BKD GROUP, LLC**

The Board's decision can be found at <http://www.nlr.gov/case/02-CA-235116> 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.



NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

RM Bakery, LLC d/b/a Leaven & Co., a wholly-owned subsidiary of BKD Group, LLC and Make the Road New York. Case 02–CA–235116

October 8, 2019

DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS MCFERRAN
AND EMANUEL

The General Counsel seeks a default judgment in this case on the ground that the Respondent, RM Bakery, LLC d/b/a Leaven & Co., a wholly-owned subsidiary of BKD Group, LLC, has failed to file an answer to the complaint. Upon a charge and amended charge filed by Make the Road New York on January 30 and April 1, 2019,¹ respectively, the General Counsel issued a complaint on June 10 against the Respondent, alleging that it has violated Section 8(a)(1) of the National Labor Relations Act. The Respondent failed to file an answer.

On July 8, the General Counsel filed with the National Labor Relations Board a Motion for Default Judgment. On July 10, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed no response. The allegations in the motion are therefore undisputed.²

The 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 from service of the complaint, unless good cause is shown. In addition, the complaint affirmatively stated that, unless an answer was received by June 24, 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 and electronic mail dated June 24, notified the Respondent that unless an answer was filed by July 1, a motion for default judgment would be filed. Nevertheless, the Respondent failed to file an answer or request an extension of time to file an answer.

¹ All dates are in 2019 unless otherwise indicated.

² On August 5, the General Counsel filed a Motion to Expedite Default Judgment and Board Order asserting the urgency of a final Board Order to remedy the Respondent's unlawful conduct and to mitigate the

In the absence of good cause being shown for the failure to file an answer, we deem the allegations in the 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

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent has been a limited liability corporation of Delaware with an office and place of business located at 220 Coster Street, Bronx, New York 10474 (the facility), and has been engaged in the production and the non-retail sale of baked goods.

During the 12-month period ending April 25, the Respondent sold and shipped, from the facility, goods valued in excess of \$50,000 directly to points outside the State of New York.

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

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

Dan Wilczynski	-	Executive Vice President
Norman Rich	-	Chief Financial Officer
Daniel Kain	-	Route Manager
Victor Colado	-	Route Manager

2. On or about September 28, 2018, the Respondent failed to pay its employees Juan Carlos Abarca, Nestor Marquez, Rene Moran, Gilberto Paniura, and Clayton Brown for hours worked.

3. On or about October 5, 2018, the Respondent failed to pay its employees Juan Carlos Abarca, Nestor Marquez, Rene Moran, Gilberto Paniura, and Clayton Brown for hours worked.

4. On or about October 9, 2018, the Respondent employees Juan Carlos Abarca, Nestor Marquez, Rene Moran, Gilberto Paniura, and Clayton Brown ceased work concertedly and engaged in a one-day strike in protest of the Respondent's failure to pay employees.

resulting chilling effect on the remaining employees' exercise of their Sec. 7 rights. The Respondent also filed no response to this motion. We deny this motion as moot in light of our disposition of the case.

5. On or about October 10, 2018, the Respondent terminated employees Juan Carlos Abarca, Nestor Marquez, Rene Moran, Gilberto Paniura, and Clayton Brown.

6. The Respondent engaged in the conduct described above in paragraph 5 because Juan Carlos Abarca, Nestor Marquez, Rene Moran, Gilberto Paniura, and Clayton Brown engaged in the conduct described above in paragraph 4 and to discourage employees from engaging in these or other concerted activities.

CONCLUSION OF LAW

By the conduct described above, the Respondent has been interfering with, restraining, or 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. The unfair labor practices of the Respondent 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)(1) by terminating employees Juan Carlos Abarca, Nestor Marquez, Rene Moran, Gilberto Paniura, and Clayton Brown for engaging in protected concerted activity, we shall order the Respondent to offer these employees 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 and privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them. 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 decision in *King Soopers, Inc.*, 364 NLRB No. 93 (2016), *enfd.* in relevant part 859 F.3d 23 (D.C. Cir. 2017), we shall also order the Respondent to compensate the employees for their 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*.

In addition, we shall order the Respondent to compensate the named employees for any adverse tax

consequences of receiving a lump-sum backpay award and to file a report with the Regional Director for Region 2 allocating the backpay award to the appropriate calendar year for each employee. *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016).

The Respondent shall also be required to remove from its files any reference to the unlawful terminations of Juan Carlos Abarca, Nestor Marquez, Rene Moran, Gilberto Paniura, and Clayton Brown and to notify them in writing that this has been done and that the unlawful terminations will not be used against them in any way.³

ORDER

The National Labor Relations Board orders that the Respondent, RM Bakery, LLC d/b/a Leaven & Co., a wholly-owned subsidiary of BKD Group, LLC, Bronx, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Terminating or otherwise discriminating against its employees because they engaged in protected concerted activities.

(b) 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 Juan Carlos Abarca, Nestor Marquez, Rene Moran, Gilberto Paniura, and Clayton Brown 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 Juan Carlos Abarca, Nestor Marquez, Rene Moran, Gilberto Paniura, and Clayton Brown whole for any loss of earnings and other benefits they may have suffered as a result of their unlawful terminations, in the manner set forth in the remedy section of this decision.

(c) Compensate Juan Carlos Abarca, Nestor Marquez, Rene Moran, Gilberto Paniura, and Clayton Brown for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 2, 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 year for each employee.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful terminations of Juan Carlos Abarca, Nestor Marquez, Rene Moran, Gilberto Paniura, and Clayton Brown, and within 3 days

³ In the complaint, the General Counsel requests that the notice be posted in English and Spanish. We grant this request.

thereafter, notify the employees in writing that this has been done and that the unlawful terminations will not be used against them 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) Within 14 days of service by the Region, post at its Bronx, New York facility copies of the attached notice marked "Appendix" in both English and Spanish.⁴ Copies of the notice, in English and Spanish, on forms provided by the Regional Director for Region 2, 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 October 10, 2018.

(g) Within 21 days after service by the Region, file with the Regional Director for Region 2 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 8, 2019

John F. Ring, Chairman

Lauren McFerran, Member

William J. Emanuel

Member

(SEAL) 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

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- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
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WE WILL compensate Juan Carlos Abarca, Nestor Marquez, Rene Moran, Gilberto Paniura, and Clayton Brown for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file with the Regional Director for Region 2, within 21 days of the date the amount of backpay is fixed, either by agreement or

⁴ 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."

DECISIONS OF THE NATIONAL LABOR RELATIONS BOARD

Board order, a report allocating the backpay awards to the appropriate calendar year 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 terminations of Juan Carlos Abarca, Nestor Marquez, Rene Moran, Gilberto Paniura, and Clayton Brown, and WE WILL within 3 days thereafter, notify them in writing that this has been done and that the unlawful terminations will not be used against them in any way.

RM BAKERY, LLC D/B/A LEAVEN & Co., A
WHOLLY-OWNED SUBSIDIARY OF BKD GROUP,
LLC

The Board's decision can be found at <http://www.nlr.gov/case/02-CA-235116> 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 SECOND CIRCUIT

NATIONAL LABOR RELATIONS
BOARD

Petitioner,

v.

RM BAKERY, LLC D/B/A LEAVEN &
CO., A WHOLLY-OWNED
SUBSIDIARY OF BKD GROUP, LLC,

Respondent.

No. 19-3716

Board Case No.:
02-CA-235116

**DECLARATION OF DAN WILCZYNSKI IN SUPPORT OF EMERGENCY
MOTION FOR STAY AND MOTION FOR PANEL REHEARING OR,
ALTERNATIVELY, EXTENSION OF TIME TO RESPOND**

Pursuant to 28 U.S.C. §1746, under penalty of perjury, Dan Wilczynski states:

1. I am the Executive Vice President RMB Bakery. I am fully familiar with the circumstances set forth in this Declaration and would testify to any of these facts if called at trial.
2. In or about August or September, 2018, RMB acquired a bakery called Good Bread. After the acquisition, I learned that Good Bread had been contracting with several drivers—the Complainants—who were delivering products on an independent contractor basis. RMB continued to work with Complainants.
3. Complainants owned their own trucks and paid their own expenses in connection with the trucks. RMB never directed the Complainants in their daily work and did not require them to pick up RMB products at any particular time, or at

all. Rather, Complainants determined if, and when, they would pick up RMB products to deliver them to customers.

4. Complainants were not on RMB's payroll, but rather were paid as independent contractors without deduction of taxes or other customary deductions. Complainants were not paid on an hourly basis.

5. Complainants did not only work for RMB; rather, they were free to, and did, deliver products for various separate companies on a daily basis including florists and others whose businesses are not known to RMB.

6. Shortly after Complainants began to do business with RMB, the CFO informed Complainants that RMB needed paperwork in order to properly pay their businesses, including IRS Forms W-9. The CFO also told the Complainants that they must provide RMB proof of product liability insurance and automotive liability insurance, with RMB as an additional insured, in order to continue to deliver RMB products.

7. After the Complainants repeatedly refused to purchase or provide proof of insurance or provide Forms W-9, RMB ended its relationship with Complainants.

8. Although the Company was generally aware that some proceeding was taking place in connection with complaints made by an independent contractor, the only person at the Company who was involved in the matter was the CFO. The CFO assured RMB on multiple occasions that he was handling the matter.

9. In or about October or November, 2019, I participated in a call with the CFO and a person named Patricia; I was not aware at the time that Patricia was from the NLRB. Patricia said she had just received the matter and would call RMB back, and that is the last I heard of this matter from the CFO. After the call, CFO informed me that the call was about a “state” matter that had already been resolved with the Complainants being declared independent contractors. This was consistent with the CFO’s previous assurances that the NLRB matter was a “state” matter that was under control.

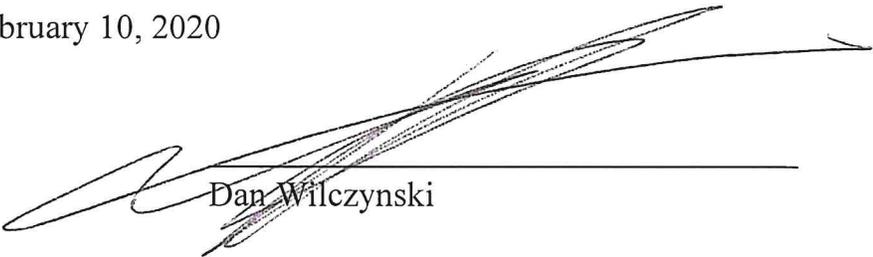
10. In or about late November, 2019, the CFO left the Company abruptly, due to what I have been informed was [REDACTED] I have generally been unable to contact the CFO, with the exception of one conversation in early January, 2020. In that conversation, the CFO stated that [REDACTED] [REDACTED] and was also believed to [REDACTED]

11. In mid to late December, 2019, I found numerous communications—including at least one communication addressed to me from the NLRB and dozens of other parcels addressed to me from other senders—buried, unopened, in the CFO’s office. The CFO had dozens of unopened mail packages. Among other things, the CFO had allowed bills to go unpaid and as a result, two of RMB’s vehicles were impounded by New York State.

12. Many of the communications from the NLRB, while stating that they were sent by regular mail and email, only had the CFO's email address on them and did not indicate that they were sent to my email address. Thus, it appears that only the CFO, and not any other person at RMB, was receiving information about this matter. Whether intentional or not, the CFO had falsely led RMB to believe he was handling the matter. This had been made possible, in part, due to the fact that all mail was retained by the CFO; I work primarily on the production floor, and was not apprised of any mail received on my behalf.

13. In mid-January, 2020, after RMB enacted a policy whereby all mail was delivered to me upon receipt, I received a letter from the NLRB attaching this Court's December 27, 2019 order. RMB learned in that letter that (1) a default had been obtained against RMB in the NLRB and (2) a default had been obtained in this Court against RMB.

Executed on February 10, 2020



Dan Wilczynski