

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 9

In the Matter of

DIVERSIFIED ENTERPRISES, INC.

Case 9-CA-43110

and

MID-ATLANTIC REGIONAL COUNCIL OF  
CARPENTERS WEST VIRGINIA DISTRICT,  
UNITED BROTHERHOOD OF CARPENTERS  
AND JOINERS OF AMERICA

MEMORANDUM IN SUPPORT OF MOTION  
FOR SUMMARY JUDGMENT

NOW COMES COUNSEL FOR THE ACTING GENERAL COUNSEL and respectfully submits this Memorandum in Support of its Motion for Summary Judgment.

On August 13, 2010, the National Labor Relations Board, herein called the Board, issued a Decision and Order, herein called the Order, in the above-styled case adopting the Decision and Recommendation of Administrative Law Judge Eric M. Fine, which, among other things, required that Diversified Enterprises, Inc., herein called Respondent, make whole employee Robert Hornsby, herein called Hornsby, for the elimination of certain privileges, including the use of a company truck and gas charge cards, in violation of Section 8(a)(1) and (3) of the National Labor Relations Act, herein called the Act. *Diversified Enterprises, Inc.*, 355 NLRB No. 88 (2010, *aff'g* 353 NLRB 1174 (2009)).

On December 20, 2011, pursuant to Section 102.69 of the Board's Rules and Regulations, Series 8, as amended, the Regional Director for Region 9 issued a Compliance Specification and Notice Hearing based on the Order. (A copy is attached to the Motion for Summary Judgment as Exhibit A.) The Compliance Specification advised Respondent of its obligation to file an Answer to the allegations contained therein on or before January 3, 2012, or postmarked on or before January 2, 2012.

The Compliance Specification summarized the facts and calculations of backpay owed to Hornsby, set forth the amounts of Respondent's obligations due to Hornsby, advised Respondent of the obligation to file an answer pursuant to Section 102.56 of the Board's Rules and Regulations, and notified Respondent that a failure to submit an adequate answer in the manner required by Section 102.56(b) of the Board's Rules and Regulations would result in the Board finding the allegations in the compliance specification to be true.

On January 9, 2012, Respondent filed an Answer with the Board and on the same date mailed a copy of the Answer to the Regional Director and Union. (A copy is attached hereto as Exhibit A.) Respondent's answer does not dispute the accuracy of the backpay figures or their method of calculation as required by Section 102.56(b) of the Board's Rules and Regulations but instead inappropriately pleads affirmative defenses of the supervisory status of Hornsby and its inability to pay.

Respondent first asserts that Hornsby was not an eligible "employee" entitled to a company-provided vehicle or gas credit card at the relevant times herein. In support of this assertion Respondent states in its Answer that "two and a half years after being hired by Diversified, Mr. Hornsby became a supervisor, and it was at this time and for this purpose he was provided a company vehicle." Respondent's affirmative defense is not a proper answer to a compliance specification because it is barred by the doctrine of *res judicata*. It is well settled that issues litigated and decided in an unfair labor practice proceeding may not be relitigated in the ensuing compliance proceeding. *In re Paolicelli*, 335 NLRB 881, 883 (2001). Here, the administrative law judge, in the underlying decision, specifically addressed Hornsby's supervisory status in the section aptly titled "Hornsby's alleged supervisory status" and determined "that Respondent failed to meet its burden of establishing that Hornsby was a supervisor within the meaning of Section 2(11) of the Act." *Diversified Enterprises*, supra at 1180-1182. By responding to the Compliance Specification with denials of Hornsby's employee

status, the Respondent is seeking to relitigate that issue. Accordingly, those portions of Respondent's answer which deny Hornsby's status as an employee under the Act constitute an inappropriate pleading and should be stricken. *Unico Replacement Parts*, 286 NLRB 738, 739 (1987).

Respondent's second affirmative defense, that "Diversified no longer engages in active business operations and does not own or maintain any assets, either tangible or intangible, with which it could pay Mr. Hornsby" is also insufficient. It is well established that the purpose of a compliance proceeding is determining the amount due, not a respondent's ability to pay. *Star Grocery Co.*, 245 NLRB 196, 197 (1970); *Coal Rush Mining, Inc.*, 341 NLRB 32, 33 fn. 2 (2004). In the compliance stage, a respondent already bears a burden because it has been found guilty of violating the law in a way that caused harm, and the role of the compliance judge is not to look into a respondent's pocket, but to quantify that harm. Accordingly, Respondent's monetary ability to comply with the make-whole order is immaterial at this stage of the proceeding and should be rejected. *Id.*

Without the Respondent's inappropriate and insufficient affirmative defenses, all that is left in Respondent's Answer are general denials - "Diversified denies the allegations set forth in numbered paragraph 1 of the Compliance Specification," and "Diversified denies the allegations set forth in numbered paragraph 2 of the Compliance Specification." It is well established Board law that general denials shall not suffice as answers to Compliance Specifications. *United States Service Industries*, 325 NLRB 485 (1998). Here, Respondent fails to admit, deny, or explain its position on dates, amounts, formulas or calculations alleged in the Compliance Specification. In fact, Respondent completely ignores all relevant allegations of the Compliance Specification. Its answer is thus inadequate under Section 102.56(b) of the Board's Rules and Regulations.

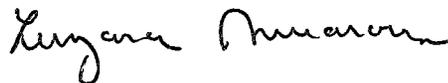
In response to Respondent's wholly inadequate Answer, the Regional Office notified Respondent, by letter dated January 11, 2012, that the Answer was inadequate because "The

issues were litigated in the underlying unfair labor practice case and were fully addressed before the Board,” and informed Respondent of its obligation to clarify or submit a more adequate Answer in this matter by January 18, 2012. (A copy of the letter is attached hereto as Exhibit B). To date, Respondent has failed to submit any clarification or an amended answer.

Inasmuch as Respondent has failed to file an answer in conformity with Section 102.56 of the Board’s Rules and Regulations, Counsel for the Acting General Counsel’s Motion for Summary Judgment should be granted. Because Respondent does not address the allegations of the Compliance Specification in the manner proscribed by Section 102.56(b) of the Board’s Rules and Regulations, the allegations should be admitted to be true and should be so found by the Board without taking evidence in support of the allegation as specified by Section 102.56(c). WHEREFORE, Counsel for the Acting General Counsel submits that Respondent has not denied any factual issues raised by the compliance specification that have not been previously considered in the unfair labor practice case. Thus, there are no unresolved questions requiring an evidentiary hearing before an administrative law judge. Counsel for the Acting General Counsel, therefore, moves that the Board grant the relief sought in the accompanying Motion for Summary Judgment.

Dated at Cincinnati, Ohio this 2<sup>nd</sup> day of February 2012.

Respectfully submitted,



Zuzana Murarova  
Counsel for the Acting General Counsel  
Region 9, National Labor Relations Board  
3003 John Weld Peck Federal Building  
550 Main Street  
Cincinnati, Ohio 45202-3271

Attachments: Exhibits A and B

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**MID-ATLANTIC REGIONAL COUNCIL OF  
CARPENTERS WEST VIRGINIA DISTRICT,  
UNITED BROTHERHOOD OF CARPENTERS  
AND JOINERS OF AMERICA**

**ANSWER OF DIVERSIFIED ENTERPRISE, INC.  
TO COMPLIANCE SPECIFICATION**

COMES NOW the Respondent, Diversified Enterprise, Inc. (hereinafter "Diversified"), pursuant to Section 102.56 of the National Labor Relations Board's Rules and Regulations, and hereby answers the Compliance Specification filed by the National Labor Relations Board (hereinafter "NLRB") as follows:

1. Diversified denies the allegations set forth in numbered paragraph 1 of the Compliance Specification. Specifically, Diversified denies that Robert Hornsby was an eligible "employee" entitled to a company-provided vehicle or gas credit card at the relevant times herein. Approximately two and a half years after being hired by Diversified, Mr. Hornsby became a supervisor, and it was at this time and for this purpose that he was provided a company vehicle.

Diversified further states that even if the allegations in numbered paragraph 1 were true and accurate, Diversified no longer engages in active business operations and does not own or maintain any assets, either tangible or intangible, with which it could pay Mr. Hornsby. Diversified has no employees, no address, and no principal office location. The sole reason that Diversified remains a

registered corporation with the West Virginia Secretary of State is to conclude pending litigation matters, and it is anticipated that Diversified will be formally dissolved.

2. Diversified denies the allegations set forth in numbered paragraph 2 of the Compliance Specification. Specifically, Diversified denies that Robert Hornsby was an eligible "employee" entitled to a company-provided vehicle or gas credit card at the relevant times herein. Approximately two and a half years after being hired by Diversified, Mr. Hornsby became a supervisor, and it was at this time and for this purpose that he was provided a company vehicle.

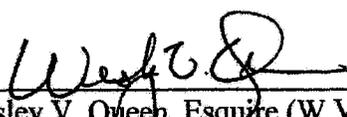
Diversified further states that even if the allegations in numbered paragraph 2 were true and accurate, Diversified no longer engages in active business operations and does not own or maintain any assets, either tangible or intangible, with which it could pay Mr. Hornsby. Diversified has no employees, no address, and no principal office location. The sole reason that Diversified remains a registered corporation with the West Virginia Secretary of State is to conclude pending litigation matters, and it is anticipated that Diversified will be formally dissolved.

**WHEREFORE**, for the reasons stated hereinabove, the Respondent, Diversified Enterprise, Inc., respectfully requests that the Compliance Specification be dismissed and repealed.

Respectfully submitted,

**DIVERSIFIED ENTERPRISE, INC**

By Counsel:

  
\_\_\_\_\_  
Wesley V. Queen, Esquire (W. Va. Bar No. 9707)  
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Mount Hope, West Virginia 25880  
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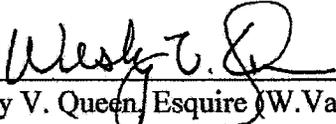
**CERTIFICATE OF SERVICE**

I, hereby certify that on January 9, 2012, the foregoing “ANSWER OF DIVERSIFIED ENTERPRISE, INC. TO COMPLIANCE SPECIFICATION” was electronically filed with the Board and was, on the same day, mailed to the following recipients via United States Mail:

Gary E. Lindsay, Acting Regional Director  
Region 9, national Labor Relations Board  
3003 John Weld Peck Federal building  
550 Main Street  
Cincinnati, OH 45202-3271

Randall May, Organizer  
Carpenters Local 302  
418 Seventh Avenue  
Huntington, WV 25701-1930

David L. Nees, Esquire  
Region 9, national Labor Relations Board  
3003 John Weld Peck Federal building  
550 Main Street  
Cincinnati, OH 45202-3271

  
\_\_\_\_\_  
Wesley V. Queen, Esquire (W.Va. Bar No. 9707)

January 11, 2012

Mr. Wesley V. Queen, Esquire  
163 Williams Industrial Park Drive  
Mount Hope, West Virginia 25880

Re: DIVERSIFIED ENTERPRISES, INC.  
Case 9-CA-43110

Dear Mr. Queen:

I am sending you this letter in response to your Answer submitted in the above-related case. It appears that your answer is not responsive to the Compliance Specification issued by this office in the above-related case. The issues that you state in the Answer were litigated in the underlying unfair labor practice case and were fully addressed before the Board. Therefore, since your Answer is inadequate in response to this matter, I am recommending that a Motion for Summary Judgment be submitted to the Board. Accordingly, you have until January 18, 2012 to clarify or submit a more adequate Answer in this case

Very truly yours,

Eric J. Gill  
Attorney

EXHIBIT B