UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 19

TEAMSTERS LOCAL UNION NO. 206
affiliated with the INTERNATIONAL
BROTHERHOOD OF TEAMSTERS
(First Student, Inc.)

and **Case 36-CB-2823**

RICHARD O. HARMON, An Individual

REPLY TO RESPONDENT'S RESPONSE TO NOTICE TO SHOW CAUSE WHY DEFAULT JUDGMENT SHOULD NOT BE GRANTED

On April 3, 2012, Counsel for the Acting General Counsel, pursuant to Section 102.24(b) of the National Labor Relations Board Rules and Regulations, Series 8, as amended, filed a Motion for Default Judgment because Respondent has failed to comply with the provisions of an informal settlement agreement approved by the Regional Director for the National Labor Relations Board, Region 19, in this matter. Thereafter, the Board, on April 5, 2012, issued a Notice to Show Cause Why Default Judgment should not be granted. Respondent filed its Response on May 17, 2012 ("Response"), arguing that it has fully complied with the Settlement Agreement and that the Acting General Counsel's Motion for Default Judgment should not be granted. As Respondent's arguments are fatally flawed, Counsel for the Acting General Counsel herein replies to that Response.

At issue in this case is a three-page document breaking down the independent audit of Respondent's chargeable and non-chargeable expenditures for calendar year 2010 ("2010 Breakdown"), prepared on May 9, 2011, by Middleton & Company C.P.A., P.C. ("Middleton & Co."). Page one is a cover letter signed by Middleton & Company representative, Steve Middleton, CPA, explaining that he made the calculations based

on his review of specific expenditures. The second page, again signed by Mr. Middleton, is on Middleton & Co. letterhead and sets forth Mr. Middleton's calculated list of expenditures, non-chargeable expenditures, and a non-chargeable percentage. It also contains a reference at the bottom of the page to his third page notes; those notes on page three set forth the basis of accounting and define chargeable versus non-chargeable expenditures.

1. Respondent asserts in its Response that the whole and complete three page 2010 Breakdown it received from Middleton & Co. on May 9, 2011, was remitted to the Region on June 1, 2011, and that this satisfies its legal obligation. Assuming, *arguendo,* that the three page document is satisfactory, the flaw in Respondent's reasoning is that providing a complete copy of the 2010 Breakdown to the Region does not absolve Respondent of its legal requirement to provide the same *complete* document to Mr. Harmon.

Respondent did send a *highly redacted and incomplete* copy of the 2010 Breakdown to Mr. Harmon on November 28, 2011. Unfortunately, the copy sent did not include the cover letter from Middleton & Co. identifying it as the accounting firm that performed the audit. Further, the copy also did not include: Middleton & Co.'s letterhead on page two showing the list of chargeable and non-chargeable expenses; the reference to the notes made on a third page; the signature of Mr. Middleton; or, most importantly, the entirety of page three, which included the notes and explanations of the page two figures. Thus, there was absolutely no way for Mr. Harmon to know the source of any figures provided or the veracity of such representations.

Specifically, the November 28, 2011, cover letter to Mr. Harmon states only that the information contained on the expenses page is from "Middleton and Company, C.P.A., P.C." There is no explanation as to whether Middleton & Co. is an independent accounting firm; nor is there any explanation from a representative of the alleged independent accountant or auditor as to who reviewed the figures or how the figures on the expenses page were derived. *California Saw and Knife Works,* 320 NLRB 224 (1995), requires that: the Respondent's expenses must be independently verified; members must be informed of such verifications; and the auditor independently verifies that the expense claimed was actually made. While it is possible that Respondent conducted an independently verified audit of its expenses, it would have been impossible for the Charging Party or any other party provided what Mr. Harmon was on November 28, to determine that from the documents provided.

On March 26, 2012, Respondent sent another letter to Charging Party, adding little to its explanation of an independent audit by stating, "The breakdown between chargeable and non-chargeable expenses previously provided to you was performed by Middleton & Company, CPA, PC. This is the independent accounting firm which has performed an audit of Teamsters Local No. 206 books. The breakdown is based upon the results of this audit."

Respondent's merely stating that the audit was independent doesn't make it so and does not make it possible for the Charging Party to reasonably verify that the audit was performed by an independent auditor or even that an audit was conducted at all. Again, Respondent failed to meet the criteria of an independent audit as described in *CWA v. Beck*, 487 U.S. 735 (1988), *Petroleum & Allied Indus., Local 618 (Chevron*

Chemical Co.), 326 NLRB 301 (1998), and *American Federation of Television and Recording Artists (KGW Radio),* 327 NLRB 474 (1999).

On May 10, 2012, one year and one day after receiving the 2010 Breakdown from Middleton & Co., Respondent, in response to the filing of the pendant Motion for Default Judgment, provided the 2010 Breakdown in its entirety to Mr. Harmon. This does not obviate the need for Default Judgment, as the Board's remedies in this case do not run solely to providing the requested audit information and the public interest must be served.

In short, although Respondent had the entire 2010 Breakdown in its possession as of May 9, 2011, and even provided it to the Region during the investigation, it continually chose to withhold that information from Mr. Harmon until the within Motion was filed, and instead provide him with a fractional and incomplete redacted document from which he could not possibly discern the information to which he is legally entitled.

2. Respondent also argues that the Region combined allegations in the instant case (36-CB-2823) with a related case (19-CB-71288), filed by the same Charging Party. Respondent mistakes the investigation of a *continuing* violation of the Settlement Agreement that is now before the Board with the institution of a new proceeding. It is not.

As Respondent accurately points out in its Response, in the Settlement Agreement approved by the Regional Director on August 29, 2011, which is subject to the instant Motion for Default Judgment, Respondent agreed to the following undertakings:

a. Upon the Charging Party's filing an objection to paying union dues for non- representational activities, promptly recognize him as an objector, promptly reduce his dues and fees so that he will be charged only for the Union's representational activities, and provide him with information setting forth the percentage of the reduction in dues and fees charged to him, the basis for that calculation, and the right to challenge, and a procedure for challenging, the amounts charged; and

b. Recognize the Charging Party as an objecting non-member retroactive to February 2, 2011, and provide him with information setting forth the percentage of the reduction in dues and fees charged to objecting non-members, the basis for that calculation, and the right to challenge, and a procedure for challenging, the amounts charged.

Respondent also agreed in the Settlement Agreement that, in the event of non-compliance with any of the terms of the Settlement Agreement, the Regional Director would re-issue the Complaint and proceed with a Motion for Default Judgment to be filed by the General Counsel with the Board, which, in turn, may find all allegations of the Complaint to be true and make findings of fact and conclusions of law consistent with those allegations, adverse to Respondent on all issues raised by the pleadings. The Board may then, without the necessity of trial or any other proceeding, issue an Order, *ex parte,* providing a full remedy for the violations so found as is customary to remedy such violations including, but not limited to, the provisions of the Settlement Agreement.

Charge 19-CA-71288, filed by the Charging Party on December 22, 2011, and amended on February 29, 2012, is currently in abeyance, as resolution of the Motion for Default Judgment will resolve that matter. It was used to bring to the Region's attention the reasons for Respondent's asserted non-compliance with the Settlement Agreement in regard to the 2010 Breakdown:

a. The [B]reakdown was not verified by an independent audit with proof that any verification occurred.

b. The [B]reakdown failed to provide a separate breakdown for each affiliate or other bodies to whom per capita payments were made, and furthermore, there was no verification by an independent audit of those breakdowns.

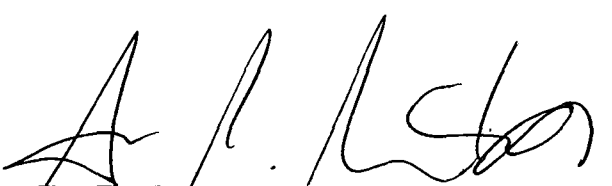
c. The [B]reakdown provides insufficient information for the Charging Party to determine whether to challenge the [Respondent] Union's claim that its designated expenditures are for representational activities.

Given the different opinions of the parties in compliance as to the instant matter, Charge 19-CA-71288 served merely as the vehicle for the Region to examine in detail what Respondent actually did vis-à-vis its obligation under the extant Settlement Agreement: providing Mr. Harmon with information setting forth the percentage of the reduction in dues and fees charged to objecting non-members, the basis for that calculation, and the right to challenge, and a procedure for challenging, the amounts charged. Respondent's apparent attempt to represent that the two cases are distinct and unrelated and, therefore, argue that the Acting General Counsel is seeking Default

Judgment on a new violation, is nothing more than a red herring. It is simply not the case.

3. Respondent is well aware of its legal obligations under *Beck* and its progeny to comply with the terms of the Settlement Agreement. It has repeatedly failed to do so, causing an undue delay to the information due to Mr. Harmon and a needless expenditure of Agency resources. As such, Counsel for the Acting General Counsel moves the Board to grant its April 3, 2012, Motion for Default Judgment, finding all of the allegations of the March 30, 2012, Complaint to be deemed admitted and true, and to issue an appropriate Remedial Order, including, a notice posting, recognizing the Charging Party as an objecting non-member retroactive to February 2, 2011, and providing him with current information setting forth the percentage of the reduction in dues and fees charged to objecting non-members, the basis for that calculation, and the right to challenge, and a procedure for challenging, the amounts charged.

Dated in Seattle, Washington, this 1st day of June, 2012.



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AFFIDAVIT OF SERVICE OF: REPLY TO RESPONDENT'S RESPONSE TO NOTICE TO SHOW CAUSE WHY DEFAULT JUDGMENT SHOULD NOT BE GRANTED, dated June 1, 2012.

I, the undersigned employee of the National Labor Relations Board, being duly sworn, say that on **June 1, 2012**, I served the above-entitled document(s) by **E-File, E-Mail and regular mail,** as noted below, upon the following persons, addressed to them at the following addresses:

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/s/ DENNIS SNOOK

Dennis Snook, Designated Agent of NLRB

June 1, 2012
Date

Name
Kathlyn L. Mills, Secretary
Signature