

UNITED STATE OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 5

POINTING PLUS INC.

and

JUAN GUZMAN, AN INDIVIDUAL Case 5-CA-72371

JOSE SAMUEL IGLESIAS, AN INDIVIDUAL Case 5-CA-72372

WILFREDO VENTURA RAMOS, AN INDIVIDUAL Case 5-CA-72390

ELISEO RAMOS HERNANDEZ, AN INDIVIDUAL Case 5-CA-72394

ACTING GENERAL COUNSEL'S MOTION TO STRIKE
AND REPLY TO RESPONDENT'S ANSWER
AND RESPONSE TO NOTICE TO SHOW CAUSE

On June 11, 2012, the Board issued an Order Transferring Proceedings to the Board and a Notice to Show Cause in the above-captioned cases. On June 25, 2012 Respondent submitted its Answer and Response to the Notice to Show Cause to the Regional Office, which forwarded Respondent's submission to the Board. This Motion and Reply will urge that the Board should strike Respondent's Response and Answer because Respondent did not properly serve it on all parties and that, even if the Response is considered, it did not adequately explain Respondent's failure to file a timely answer and so the Board should grant default judgment in any event.

Procedurally, Respondent's Response and Answer is defective for lack of proper service. The Board's Order and Notice provided that "cause be shown, in writing, filed with the Board in Washington, D.C., on or before June 25, 2012 (with affidavit of service on the parties to this proceeding)." Rule 102.114 of the Board's Rules and Regulations addresses the requirements for serving other parties. While Respondent's submission

was notarized, there was no Affidavit of Service, or any other indication, that Respondent served its Response and Answer upon any of the four Charging Parties. The Acting General Counsel therefore moves that Respondent's Response and Answer be stricken in their entirety for failure of proper service to all parties in this proceeding as required by the Board's Order and Notice to Show Cause as well as its Rules and Regulations.

Notwithstanding Respondent's failure to accomplish proper service, the Acting General Counsel will also address Respondent's submission. In that submission, Respondent raises arguments that bear upon a merit-determination in the case, among them: 1) that the employees who filed the above-captioned charges resigned, and were not terminated by Respondent; and 2) that one of the Charging Party employees, Juan Guzman, is a supervisor under the Act. Respondent's assertion that it would prevail at hearing on the merits of its defense are irrelevant to the Board's determination on the Acting General Counsel's Motion for Default Judgment. The Board has stated that "it will not address a respondent's assertion that it has a meritorious defense if good cause has not otherwise been demonstrated." *Dong-A Daily North America, Inc.*, 332 NLRB 15, 16 (2000). This requirement directly pertains to Section 102.20 of the Board's Rules and Regulations, which requires a respondent to show good cause if no answer is filed for why the Board should not deem all allegations in the complaint to be admitted. Therefore, the question before the Board now is not one of whether Respondent could prevail on the merits at trial, but rather whether it had good cause for failing to file a timely answer to the Acting General Counsel's Complaint.

The Acting General Counsel acknowledges that Respondent is pro se.¹ Yet the fact that Respondent is not formally represented by Counsel should not alter the Board's analysis of its failure to file a timely answer. The Board has been clear that "Merely being unrepresented by counsel does not establish a good cause explanation for failing to file a timely answer." *Lockhart Concrete*, 336 NLRB 956, 957 (2001). The Board has also held that a pro se respondent's ignorance of the Board's procedures does not constitute good cause for its failure to file a timely answer. See *Newark Symphony Hall*, 323 NLRB 1297 (1997) (good cause not established by the fact that the pro se respondent had not retained labor counsel when the complaint issued and did not know how to answer the complaint). While the Board has, on occasion, shown some leniency towards unrepresented respondents, those cases generally involved, "respondents that have timely filed some written response that can reasonab[ly] be construed as denying the substance of the allegations contained in the complaint, or that have offered as good cause an explanation other than simply their pro se status." *Calyer Architectural Woodworking Corp.*, 338 NLRB 315 (2002). To avoid a default judgment being entered against it on procedural grounds a pro se respondent must provide good cause explanation for its failure to respond. *Patrician Assisted Living Facility*, 339 NLRB 1153, 1154 (2003). A pro se respondent who fails to respond at all to the complaint allegations until after the Notice to Show Cause has issued, in spite of being notified and reminded in writing that it must, and provides insufficient explanation for its failure, will have its answer denied as untimely. *Id.* See also *Kenco Electric & Signs*, 325 NLRB 1118 (1998).

¹ The Acting General Counsel noted in its Motion for Default Judgment that repeated efforts had been made to procure a Notice of Appearance from Respondent's apparent Counsel de facto, H. Peyton Inge IV. Mr. Inge, however, repeatedly failed, or refused, to do so.

Respondent does not deny that, as of nearly a month after the original deadline to file an Answer, Respondent had still not filed one. Respondent instead alleges that Regional Attorney Albert Palewicz twice orally informed Respondent's owner and agent, Danny Palousek, that he would give him an extension for filing its answer. As presented in the Acting General Counsel's Motion for Default Judgment, the record shows the Complaint and Notice of Hearing issued on April 27, 2012 and Respondent's Answer was due on May 11, 2012. (Exhibit 20) Notwithstanding Respondent's failure to file an answer by May 11, 2012, and its failure to request an extension, the Regional Attorney, sua sponte, by letter dated May 18, 2012, gave Respondent an extension in which to file its answer. (Exhibit 22) That extension ran through June 1, 2012 and Respondent was reminded by e-mail on May 31, 2012 of its obligation to file an Answer by the deadline and likewise reminded that it should respond to each paragraph and subparagraph of the Complaint. (Exhibit 24)

Yet as of June 4, 2012 Respondent had neither filed an answer nor requested an additional extension. Instead, on June 4, 2012, after its extension had elapsed, Respondent expressed difficulty in meeting the already elapsed extended deadline because he had to consult with his attorney. (Exhibit 25) In that e-mail Respondent, by Danny Palousek, states, "I will be able to send my response back to respond? [sic]", which the Regional Attorney did not interpret as a request for a second extension. It was only on June 6, 2012 that Respondent clearly requested a second extension by e-mail from Danny Palousek, where it states, "I did not get my response in by June 1st. I did not have enough time to review with my lawyer. Can I respond or is it too late?" (Exhibit 26) In light of Respondent's repeated failures to file an Answer in spite of several

deadlines, the Regional Attorney informed Respondent that it was too late to forestall the Acting General Counsel from filing its Motion for Default Judgment. (Exhibit 27)

Respondent had been aware of the Charge filed against it since original charges were filed in January of 2012. It had knowledge of the Complaint since it was issued on April 27, 2012. Respondent has provided no good cause to explain why, over a month since the issuance of the Complaint, and after a written extension and reminder, it had not consulted with its attorney and submitted its Answer. Respondent has likewise not shown good cause as to why it did not request an extension prior to the original May 11, 2012, or even prior to the June 1, 2012 extended deadline. At all times, Respondent has failed to submit a timely answer or request an extension prior to its deadline. It had adequate time to consult with counsel and has submitted no other explanation as to why it could not submit a timely answer. Indeed, it was not until the Board issued its Notice to Show Cause that Respondent finally submitted its Answer. The Board should find that no good cause has been provided for Respondent's failure to submit a timely answer.

Additionally, Respondent's additional assertions in its Response are that the Acting General Counsel lacks jurisdiction because: 1) there was no notice of collective action or bargaining; and 2) Respondent's business does not affect commerce. The first involves determinations of merit of whether the employees involved in this case were involved in protected concerted activity, and whether the Respondent had knowledge of that activity. For the reasons already stated above, such determinations are irrelevant to the question of whether Respondent has good cause for not filing a timely Answer.

With regard to jurisdiction on commerce grounds, the Complaint alleges that Respondent is a District of Columbia Corporation with its principal office and place of

business in Washington, District of Columbia.² (Exhibit 20) It is well-established that the Board has plenary jurisdiction over a business enterprise with a residence and place of business in the District of Columbia. *M.S. Ginn & Company*, 114 NLRB 112 (1955); *Westchester Corp.*, 124 NLRN 194 (1959). Respondent's location, therefore, establishes the Board's plenary jurisdiction and negates the need for a fact-finding hearing on the grounds of commerce jurisdiction.

WHEREFORE, Counsel for the Acting General Counsel respectfully requests that Respondent's Response and Answer be stricken in its entirety for failure to accomplish proper service, or, in the alternative, that it be judged as insufficient to show good cause for failure to file a timely answer. The Counsel for the Acting General Counsel also reiterates its request stated in its Motion for Default judgment that, in accordance with Sections 102.24 and 102.50 of the Rules, the Board deem all matters alleged in the Complaint to be admitted as true, and that they be so found, and that a Decision and Order issue containing findings of fact, conclusions of law, and an appropriate remedy for the violations alleged in the Complaint.

Dated at Baltimore, Maryland, this 3rd day of July, 2012.

Respectfully submitted,

[José A. Masini]

José A. Masini
Counsel for the Acting General Counsel
Bank of America Center – Tower II
100 South Charles Street, Suite 600
Baltimore, MD 21201
(410) 962-2191
(410) 962-2181 – Fax
jose.masini@nlrb.gov

² Although it is the Acting General Counsel's position that the Answer should be struck entirely for the reasons already given, the Board should note that Respondent admitted in its Answer that it is, in fact, a resident of the District of Columbia.

CERTIFICATE OF SERVICE

This is to certify that on July 3, 2012, copies of the Acting General Counsel's Motion to Strike and Reply to Respondent's Response and Answer to Notice to Show Cause were served:

Electronically to:

Danny Palousek
Pointing Plus, Inc.
1214 Neal Street NE
Washington, DC 20002-3810
dpalousek@pointingplus.com

By overnight delivery to:

Juan Guzman
Apartment 10
8733 Carroll Avenue
Silver Spring, MD 20903-3151

Jose Samuel Iglesias
2619 Viking Drive
Herndon, VA 20171-2418

Wilfredo Ventura Ramos
Apartment 10
5700 Washington Boulevard
Arlington, VA 22205-2914

Eliseo Ramos Hernandez
Apartment 3
1124 N. Kenilworth Street
Arlington, VA 22205-3544

/José A. Masini/

José A. Masini
Counsel for the Acting General Counsel
Bank of America Center – Tower II
100 South Charles Street, Suite 600
Baltimore, MD 21201
(410) 962-2191
(410) 962-2198 – Fax
jose.masini@nlrb.gov