UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 13

UNITE HERE LOCAL 1
(STEFANI'S PIER FRONT, INC. d/b/a
CRYSTAL GARDEN)

and **Case 13-CB-96888**

EILEEN CHAPA, An Individual

COUNSEL FOR THE ACTING GENERAL COUNSEL'S RESPONSE TO RESPONDENT'S ANSWERING BRIEF

At the heart of this case is whether Respondent's actions in causing the termination of Eileen Chapa were lawful. Respondent's actions were not lawful because of its failure to abide with the terms of the payment plan that it entered with Chapa. Chapa was entitled to notice based on the terms of their agreement, and contrary to Respondent's Answering Brief, this theory is not outside the Complaint's allegations. The Complaint alleges that Respondent violated Section 8(b)(2) of the Act by causing the discharge of Eileen Chapa without previously advising her about the consequences of nonpayment of the dues in arrears, the total amount she owed, a monthly breakdown of that amount, and how the amount was calculated. This language is the standard language used in complaints alleging a respondent's failure to provide *Philadelphia Sheraton* notice. The underlying facts of the Complaint center on the November payment plan and whether *Philadelphia Sheraton* notice was given after the November plan was executed. In fact, the Judge relies upon the individual payment plan as a form of effectuating *Philadelphia Sheraton* notice, and Chapa's failure to make a payment under the November plan is what Respondent relies on as its legal right to seek her termination. Therefore, Respondent's argument that the administration of the November plan is not a theory in the Complaint is simply not true.

Assuming, however, that the administration of the plan is a new theory, it is well-settled that the Board may "find and remedy a violation even in the absence of a specified allegation in the complaint if the issue is closely connected to the subject matter of the complaint and has been fully litigated." *Pergament United Sales*, 296 NLRB 333, 334 (1989). The Complaint's subject matter squarely dealt with whether Respondent gave Chapa notice of her default after she executed the November payment plan. Respondent's arguments that the administration of the payment plan is outside the scope of the Complaint's allegations is incoherent. Respondent cannot have it both ways. It cannot on the one hand argue that the plan fully explained to Chapa the consequences of her nonfeasance while on the other hand argue that the administration of the plan is not at issue in the Complaint. Similarly, Respondent cannot argue that the plan clearly communicated Chapa's responsibilities while arguing to the contrary that the ambiguous nature of the plan warranted the admission of extrinsic evidence to explain the plan's 10-day notice language.

Additionally, Board precedent does support the conclusion that each payment plan stood on its footing, thus triggering Respondent's obligation to give Chapa notice of her default. The notice requirement is not for Respondent. It is for the delinquent employee whose livelihood and career are impacted when a union-security clause is enforced. Cases such as *Palmer House*, 353 NLRB No. 90, *2 (2009), *Colgate-Palmolive Company*, 138 NLRB 1037 (1962), and *Teamsters Local200 (State Sand & Gravel)*, 155 NLRB 273, 277-278 (1965), remind us of how the Board has limited a union's ability to seek an employee's termination after the union has agreed to enter into a payment plan and begun to receive payments under that plan. Chapa's November plan triggered new rights and obligations on all parties, and when she defaulted on that plan, Respondent did not have the right to cause her termination without notice of the default.

It is also worth noting that Respondent's attempts at effectuating notice after Chapa's default is insufficient. The mailbox rule does not apply in *Philadelphia Sheraton* cases. The burden is on Respondent to prove that it gave *actual notice* to Chapa before it caused her termination. See *Boilermakers, Local 732*, 239 NLRB 504, 505 n. 8 (1978) (the union may establish actual notice by providing credible evidence of personal knowledge or, although not required of the union, by offering documentary evidence such as a return receipt from registered or certified mail.) Notice of the delinquency is ineffective where an employee credibly testifies that he was not informed of the delinquency prior to termination. *United Metaltronics Local 955*, 254 NLRB 601, 606 (1981). Moreover, attempting to notify the employee by letter is not sufficient where the union sends the delinquency notice by regular mail without any regard as to whether it was received. *Machinists (Borg-Warner Corp.)*, 237 NLRB 1278, 1278 (1978). Accordingly, because Respondent caused Chapa's discharge without complying with the actual notice requirements of *Philadelphia Sheraton* it violated Section 8(b)(2) of the Act.

Chapa also is not a free-rider who willfully sought to avoid her ongoing obligations to pay dues. She executed a dues authorization form that went into effect October 12, 2013 – two months before her termination. It is important to note that Respondent does not argue that she was *not* paying her ongoing dues obligations at the time of her termination. More importantly, Chapa never disavowed the money she owed the Respondent in arrears. But each employee that the Respondent cites as a comparator in its brief argued that he/she owed no responsibility to the union, argued that she was not responsible to the union or simply refused to accept responsibility. See, *Ralph's Grocery Comp.*, 209 NLRB 117, 225 (member avoided paying union obligations under the *pre-text* that he was unaware of the existence of a union-security clause and his financial obligations there under); *Professional Services Unlimited*, 317 NLRB

352, 355 (1995) (for seven months the member *refused to pay any dues* noting that she was not obligated because other unit employees were not paying their dues); *I.B.I Security, Inc.*, 292 NLRB 648, 649 (1989) (member made a conscious effort to evade his obligations and failed to tender payment for his union dues until *after* the union sought his discharge);and *Big Rivers*, 260NLRB 329, 329 (1982) (member failed to make *any* effort to meet dues obligations for eight months after the union made repeated warnings that it would enforce its union-security clause). Chapa was making every conscious effort to pay her arrearages, and the Judge ignored these efforts by relying, in error, upon the notices given before November 12, 2013.

When the facts of this case are isolated to solely those events occurring after November 12, 2013, only two questions remain: did Respondent give Chapa notice of her default before summarily causing her termination and, if not, was its conduct excused under the free-rider exception? The answers to both of these questions is no. Respondent failed to notify Chapa that she defaulted on the November payment plan before causing her termination, and that failure is the basis for the Complaint's allegations and supports finding that Respondent violated the Act by causing her termination.

Dated at Chicago, IL September 26, 2013.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the **COUNSEL FOR THE ACTING GENERAL COUNSEL'S RESPONSE TO RESPONDENT'S ANSWERING BRIEF** was served via e-file and e-mail on September 26, 2013, on the following:

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