

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

ALLEN BINSTOCK,
Regional Director of Region 8, NLRB
for and on behalf of
NATIONAL LABOR RELATIONS BOARD

Applicant

v.

Civil No. 3:17-MC-00041

MIDWEST TERMINALS OF
TOLEDO INTERNATIONAL, INC.

Judge J. Helmick

Respondent

APPLICANT'S REPLY TO RESPONDENT'S OPPOSITION TO
APPLICANT'S REQUEST FOR LEAVE TO FILE REPLY TO RESPONDENT'S
OPPOSITION TO APPLICATION FOR SUBPOENA ENFORCEMENT;
OR IN THE ALTERNATIVE, APPLICANT'S MOTION TO DISREGARD
RESPONDENT'S INITIAL OPPOSITION AS UNTIMELY

1. On July 12, 2017, the Regional Director for Region 8 of the National Labor Relations Board, (the Board or Applicant), filed an Application for Order Enforcing Subpoenas Duces Tecum and Ad Testificandum. The Board requested that an Order to Show Cause issue

requiring Respondent to appear before the Court on a date specified in the order and to show cause why an order should not issue directing Respondent to produce the subpoenaed records and witness testimony as described in its Application. The Board issued the subpoenas because Respondent had failed, and continues to fail, to cooperate with the investigation of matters that are currently pending in the Regional Office.

2. The Board filed its Application and request for an Order to Show Cause under Section 11(2) of the National Labor Relations Act, 29 U.S.C. § 161(2), which provides “[i]n case on contumacy or refusal to obey a subpoena issued to any person, any United States district court . . . upon application by the Board shall have jurisdiction to issue to such person an order requiring such person to appear before the Board . . . to produce evidence . . . or . . . to give testimony touching the matter under investigation”

3. On August 17, 2017, Respondent filed an untimely “Response in Opposition to Application for Order Enforcing Subpoena Duces Tecum.” Respondent did not request leave to file its untimely Opposition. On September 18, 2017, Applicant filed a request for leave to file a reply to Respondent’s Opposition. On September 25, 2017, Respondent filed a Response in Opposition to Applicant’s Request for Leave. Accordingly, Applicant files this Reply to Respondent’s Opposition to Applicant’s Request for Leave; or In the Alternative, Applicant’s Motion to Disregard Respondent’s Initial Opposition as Untimely.

Respondent’s Initial Opposition was Untimely Filed

4. To the extent the Court treats the Board’s Application as a motion under Fed.R.Civ.P. 7(b) and N.D. of Ohio Civ. R. 7.1, Applicant notes that Respondent failed to file its Opposition within the prescribed days allocated for filing a response. On July 12, 2017,

Applicant manually filed its Application with this Court as required when initiating such a miscellaneous-type case. The Application included a Memorandum in Support, proposed Show Cause Order, exhibit list and exhibits. On this same date, July 12, Applicant served its complete Application by certified mail on Respondent's counsel. On this same date, Applicant also electronically served Respondent's counsel an electronic copy of the Application, Memorandum in Support, proposed Show Cause Order and the exhibit list. On July 13, 2017, the Court gave notice to Respondent's counsel of the filing of the Application along with electronic access to the Application and the accompanying documents.

5. Since the Board requested that an Order to Show Cause issue requiring Respondent to appear before the Court on a date specified and to show cause why another order should not issue directing Respondent to produce the subpoenaed records and present witness testimony, the Application should be considered a non-dispositive motion. Accordingly, pursuant to N.D. of Ohio Civ.R. 7.1(d), Respondent had 14 days to file an opposition to the non-dispositive motion. Giving 3 additional days for mail service and having a weekend due date, Respondent should have filed its opposition to the non-dispositive motion by Monday, July 31. Respondent presumably treated the Application as a dispositive motion, filing its initial Opposition on August 17, 2017, which under N.D. of Ohio Civ.R. 7.1(d) and Fed.R.Civ.P. 6(d), providing an additional 3 days for service by mail, should have been filed no later than Monday, August 14.

6. In either event, Respondent did not file its Opposition to the Application until August 17. In this initial Opposition to the Application, Respondent's counsel failed to address its untimeliness and Respondent's counsel did not request any leave from this Court to proceed with the filing of its Opposition.

7. In its more recent Opposition to the Applicant's Request for Leave to File a Reply, Respondent states that Applicant has not established good cause as to why leave should be granted. Counsel for the Applicant maintains that good cause need not be shown when requesting to file a reply to an untimely opposition. Notwithstanding, on the date Respondent did file its untimely Opposition, August 17, counsel for the Applicant was preparing for deposition-type oral testimony under oath which was then given over the course of the following two weeks in Marysville and Bellefontaine, Ohio.

Applicant's Reply and Motion to Disregard

8. Counsel for the Applicant sought leave to file a reply to Respondent's Opposition to the Application to assist the Court with determining what documents need to be produced by Respondent pursuant to the two underlying NLRB subpoenas duces tecum and what testimony the Applicant seeks from Respondent's witness pursuant to the two NLRB subpoenas ad testificandum.

9. If it so please the Court, counsel for the Applicant continues to request leave until at least October 4, 2017, or thereafter within three days of the Court's ruling, to file a reply brief if such a reply would assist the Court in deciding the merits of the Application. In the alternative, counsel for the Applicant requests that the Motion to Disregard Respondent's Initial Opposition as Untimely be granted. In either event, the Applicant requests that the Court rule on

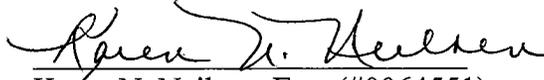
the Board's Application by issuing an Order to Show Cause requiring Respondent to appear before the Court to explain its failure to comply with the Board's subpoenas.

Respectfully submitted,

National Labor Relations Board

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Iva Choe, Regional Attorney for Region 8

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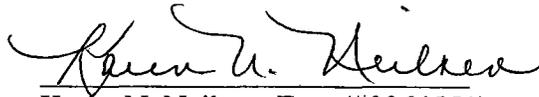
Fax: (216) 522- 2418

September 29, 2017
Cleveland, OH

CERTIFICATE OF SERVICE

I hereby certify that on September 29, 2017, I filed electronically, via the CM/ECF System, the foregoing Applicant's Reply to Respondent's Opposition to Applicant's Request for Leave to File Reply to Respondent's Opposition to Application for Subpoena Enforcement; or In the Alternative, Applicant's Motion to Disregard Respondent's Initial Opposition as Untimely with the Clerk of Court. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. Additionally, I served this document by e-mail and regular mail on the following counsel:

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