

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 32**

NPM, INC.

and

GRAHAM CARLSON, an Individual

Case 32-CA-238817

and

AUDREY ESCHRIGHT, an Individual

**Cases 32-CA-238824
32-CA-240297**

and

FRÉDÉRIC HARPER, an Individual

Case 32-CA-239938

**COUNSEL FOR THE GENERAL COUNSEL'S MOTION FOR LEAVE
TO FILE CORRECTED OPPOSITION TO RESPONDENT'S MOTION TO
RESCHEDULE THE HEARING**
AND
**CORRECTED OPPOSITION TO RESPONDENT'S MOTION TO RESCHEDULE
THE HEARING**

MOTION FOR LEAVE

Counsel for the General Counsel files this motion for leave to file a Corrected Opposition to Respondent's Motion to Reschedule the Hearing. The Opposition filed on June 28, 2019, requires correction because it was recently discovered that the description about the status of settlement negotiations was inadvertently described inaccurately. In order to correct the record, Counsel for the General Counsel respectfully requests that the earlier filed Opposition is replaced by the corrected version, herein attached.

DATED AT Oakland, California this 28th day of June 2019.

/s/ Christy J. Kwon

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[CORRECTED VERSION]

I. Introduction

On June 17, 2019¹, npm, Inc. (Respondent) filed a Motion to Reschedule the Hearing (Motion), currently scheduled to commence on July 8. Respondent failed to properly serve Counsel for the General Counsel (CGC) with a copy of the Motion. On this basis alone, the Motion should be denied. However, even if the Motion were not procedurally deficient, Respondent has failed to establish proper cause as necessary under Section 102.16 of the Rules and Regulations of the National Labor Relations Board (Rules and Regulations). Here, Respondent asserts that a postponement is warranted in order to pursue settlement discussions and because two of its witnesses are traveling during the months of July and August. These reasons are insufficient. First, there is no impediment to further settlement discussions as the parties are engaged in ongoing settlement negotiations and will continue to do so. Secondly, as set forth more fully below, proper cause is not established by its witnesses purported prescheduled trips. Accordingly, CGC respectfully requests that the Motion be denied.

II. Background

On March 22, Respondent npm, Inc. (Respondent) terminated Graham Carlson, Audrey Eschright, and Frédéric Harper (Charging Parties). After investigation of the unfair labor practice charges, the Regional Director for Region 32 of the National Labor Relations Board (Regional Director) determined that Respondent had violated Section 8(1) and (3) of the Act by terminating the Charging Parties and committing other Section 8(a)(1) violations. The Consolidated Complaint issued on June 10. Prior to issuing the Consolidated Complaint, the parties engaged in settlement discussions. On May 20 and 21, CGC e-mailed proposed informal Board settlement

¹ Unless otherwise noted, all dates referenced herein occurred in 2019.

offers to Respondent's counsel. Thereafter, Respondent hired new counsel. On May 23, CGC spoke with one of Respondent's new attorneys, Stacey Chiu. During the telephone conversation, CGC informed Chiu that if a complaint were issued the matter would be set for hearing in early to mid-July. Chiu did not state that Respondent, its counsel, or any of its witnesses would be unavailable in early to mid-July.

CGC began settlement discussions with Respondent's new counsel on May 28 and are still ongoing.

On June 14, Respondent's counsel contacted CGC to request his position on a hearing postponement to the week of August 12 or September 11, 12, and 13. On June 17, CGC informed Respondent's counsel that CGC would oppose a request for a continuance given that the terminations were nip-in-the-bud terminations and that the Board was still evaluating whether to seek Section 10(j) injunctive relief. CGC also informed Respondent's counsel that he was unavailable on the proposed dates due to prescheduled vacation.²

On June 17, Respondent filed the Motion, without serving it on CGC. On June 20, CGC received an Order to Show Cause (OSC) issued by Associate Chief Administrative Law Judge Gerald M. Etchingham ordering that a response be filed to the Motion by June 27 at noon.³ The OSC was the first instance that CGC learned that any motion had been filed. After receiving the OSC on June 20, CGC immediately contacted Respondent's counsel to state his opposition and request a copy of the Motion, which was provided by Respondent's counsel on June 20.

² CGC will be on an NLRB-sponsored work-related trip to a conference put on by the Equal Employment Opportunity Commission in Atlanta, Georgia from July 27 to August 1. On August 2, CGC will be traveling to El Salvador, Guatemala, and Honduras for a period of two weeks, returning on August 19. Between about August 30 and September 16, CGC will be on a previously scheduled trip to Richmond, Virginia and Pittsburgh, Pennsylvania. Between September 17 and September 28, CGC will be in Washington, D.C. attending previously scheduled meetings at the NLRB's Headquarters Office.

³ Although the June 20 OSC indicated that the Motion was filed on June 19, the copy in CGC's possession states that it was filed and served on June 17, 2019.

Between June 20 and 24, CGC and Respondent's Counsel communicated regarding CGC's contention that the Motion should be denied on procedural grounds due to the lack of service of the Motion on CGC. Attached hereto as Exhibit 1 are true and correct copies of the e-mail correspondence. In brief, Respondent contends that service was not defective because the attachment to the Consolidated Complaint indicated that service must be made on *all other parties* noted in the Notice of Hearing, which did not include Counsel for the General Counsel.⁴

III. Argument

A. Respondent's Motion Must Be Denied Because it was not Properly Served

Under Section 102.24(a) of the Rules and Regulations, any party filing a motion must also file an affidavit of service indicating that service has been made on *all other parties*. It is undisputed that Respondent failed to serve CGC with the Motion, as is indicated by the service sheet attached to the Motion. Notwithstanding that a copy of the motion was provided to CGC, the Motion must be denied as it was not served in accordance with Section 102.24(a).

Any argument that Section 102.24(a) does not require service of the Motion because of language contained in the Consolidated Complaint is without support in the Rules and Regulations or the law. Indeed, this flawed suggestion means that motions can be filed without CGC's knowledge and thus without the ability to know or argue against any matters raised by the motion. Accordingly, such an argument should be rejected and the Motion denied.

B. Respondent's Motion Should be Denied Because Respondent Has Failed to Establish Proper Cause

⁴ Should Respondent attempt to file a "reply" or "rebuttal" brief, such a brief would be improper under Section 102.24(a) of the Rules and Regulations, which only provide for the filing and consideration of motions and responses, but not reply or rebuttal briefs.

Under Section 102.16 of the Rules and Regulations, a party may seek to extend the hearing date only for proper cause shown. Under certain circumstances, proper cause can be shown by, inter alia, showing an immediate need to care for a family member⁵ or due to counsel's unavailability because of his representation of clients in multiple NLRB proceedings occurring on the same date.⁶ However, there are instances when an alleged prescheduled trip is not proper cause depending on factors such as the seriousness of the allegations.⁷ Nor is a bare assertion that company witnesses are unavailable deemed proper cause.⁸

In the instant case, Respondent has failed to demonstrate proper cause exists to postpone the hearing past July 8. First, Respondent asserts that it must postpone the hearing because its Chief Executive Officer Bryan Bogensberger and Chief Operating Officer Dawn Umlah "are traveling extensively for critical fundraising, including to New York, and will be on pre-arranged trips in July and August." However, the statement omits critical information such as the specific dates of travel, the times of the meetings, the nature of the meetings, the reason(s) why in-person attendance is necessary for both Bogensberger and Umlah, any efforts made to reschedule those meetings, and the reason(s) why efforts made to reschedule the meetings were unsuccessful.

Second, Respondent asserts as a basis for postponement that it would facilitate further settlement negotiations. However, there is reason why the parties cannot continue to negotiate a

⁵ *Vendrite Vending Corp.*, Case No. 29-CA-122982 (ALJ Order Dated July 29, 2014).

⁶ *TDY Industries, LLC*, Case Nos. 19-CA-227649 and 19-CA-227650 (ALJ Order Dated May 16, 2019); see also *Kaiser Foundation Hospitals et al.*, Case No. 32-CA-220268 (ALJ Order Dated February 28, 2019).

⁷ *United States Postal Service*, Case Nos. 28-CA-222265 et al. (ALJ Order Dated January 30, 2019) (finding no proper cause in denying Respondent counsel's request to postpone due to a previously scheduled out-of-town trip to take continuing legal education courses); see also e.g. *Alpha-Omega Change Engineering*, Case Nos. 31-CA-175397 et al. (ALJ Order Dated March 7, 2017) (finding no proper cause in denying Respondent counsel's request to postpone due to the vacation of a witness).

⁸ *Vendrite Vending Corp.*, Case No. 29-CA-122982 (ALJ Order Dated July 18, 2014).

settlement with the current trial date. In fact, Counsel for the GC contends that keeping the hearing date will facilitate settlement negotiations because all parties will have the pressure to resolve the matter.

In sum, based on the seriousness of these cases, which involve three nip-in-the-bud terminations at the onset of an organizing drive, the lack of any detail regarding the unavailability of Respondent's witness, and no indication that the hearing date is impeding settlement negotiations, Respondent has failed to demonstrate that proper cause exists to warrant a postponement of the hearing.

IV. Conclusion

For the reasons stated above, Counsel for the General Counsel respectfully requests that the Motion, which seeks to reschedule the July 8 hearing, be denied.

DATED AT Oakland, California this 28th day of June 2019.

/s/ Christy J. Kwon

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Date: June 28, 2019

**AFFIDAVIT OF SERVICE OF COUNSEL FOR THE GENERAL COUNSEL'S
MOTION FOR LEAVE TO FILE CORRECTED OPPOSITION TO RESPONDENT'S
MOTION TO RESCHEDULE THE HEARING AND
CORRECTED OPPOSITION TO RESPONDENT'S MOTION TO RESCHEDULE
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I, the undersigned employee of the National Labor Relations Board, being duly sworn, depose and say that on the date indicated above I served the above-entitled document(s) upon the persons at the addresses and in the manner indicated below. Persons listed below under "E-Service" have voluntarily consented to receive service electronically, and such service has been effected on the same date indicated above.

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June 28, 2019

Date

Ida Lam, Designated Agent of NLRB

Name

/s/ Ida Lam

Signature