**UNITED STATES OF AMERICA**
**BEFORE THE NATIONAL LABOR RELATIONS BOARD**
**SAN FRANCISCO BRANCH OFFICE**
**DIVISION OF JUDGES**

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| AMPERSAND PUBLISHING, LLC<br>d/b/a SANTA BARBARA NEWS-PRESS | Cases | 31-CA-028589 |
| | | 31-CA-028661 |
| and | | 31-CA-028667 |
| | | 31-CA-028700 |
| GRAPHIC COMMUNICATIONS CONFERENCE, | | 31-CA-028733 |
| INTERNATIONAL BROTHERHOOD OF TEAMSTERS | | 31-CA-028734 |
| | | 31-CA-028738 |
| | | 31-CA-028799 |
| | | 31-CA-028889 |
| | | 31-CA-028890 |
| | | 31-CA-028944 |
| | | 31-CA-029032 |
| | | 31-CA-029076 |
| | | 31-CA-029099 |
| | | 31-CA-029124 |

**ORDER DENYING RESPONDENT'S MOTION FOR CONTINUANCE OF 12/10/19 COMPLIANCE HEARING**

On July 13, 2018, a Compliance Specification was issued setting a hearing for September 25, 2018, in West Los Angeles, California, in this case adjudicated a decade ago and involving millions of dollars in owed backpay. The Notice of Hearing specifically provides that the hearing will commence at 9:00 a.m. on September 25, 2018, in a hearing room at the Region 31 office, 11500 West Olympic Boulevard, Suite 600, Los Angeles, California**,** *and on consecutive days thereafter until concluded*.

On August 31, 2018, hearing in this matter was postponed to November 5, 2018. On October 3, 2018, another postponement was granted for hearing to move to January 7, 2019, on Respondent's request.

On December 19, 2018, hearing in this case was postponed to March 12, 2019. On February 25, 2019, the hearing in this matter was postponed indefinitely so that the Board could adjudicate a motion for partial summary judgment filed by the General Counsel.

On September 3, 2019, the Board issued its Decision and Order granting the motion for partial summary judgment.

On September 5, 2019, an order scheduling hearing was issued to the parties setting the current hearing date, December 10, 2019, as the hearing date to commence what everyone has

estimated to be a 4-day hearing in West Los Angeles at Region 31. The Order specifically provides again that the hearing will continue on consecutive days until concluded.

Yesterday afternoon, on November 25, 2019, fifteen days before the current hearing date of December 10, Respondent filed its request for a short continuance of the compliance hearing here (Motion to Postpone Hearing) for "a few weeks, until early to mid-January, or whenever thereafter is convenient for all parties." The Motion argues that Respondent's counsel was somehow surprised to learn during last week's status conference call with the trail judge and other parties that hearing in this case is estimated to last "several days" and that Respondent's counsel's "schedule involves numerous irremediable conflicts." Specifically, Respondent's counsel lists various calendar conflicts involving other litigation or arbitration matters from December 2-6, and December 10, 12 and 13, 2019. In addition, the General Counsel has demanded a response to the amended compliance specification by December 6, and separately the NLRB is expecting a further production of documents by the first week of December. Finally, Respondent's counsel mentions that "[g]iven the fact that one of the General Counsel's witnesses is not available for in-person testimony during the currently-scheduled timeframe, there is no reason to force the hearing to go forward now rather than at a time when all parties and witnesses can be available." (Motion to Postpone at 1-2.)

Later on November 25, 2019, I issued an Order to Show Cause ("OSC") giving the parties until noon on Monday, December 2, 2019, to file any opposition to the Motion to Postpone since this is Thanksgiving week 2019 and some lawyers take time off for the holiday.

Earlier today, November 26, 2019, Counsel for the General Counsel's opposition response to the Order to Show Cause ("GC Opposition") was filed. Counsel opposes the Motion to Postpone and argues that the September 5, 2019 order scheduling the current December 10, 2019 hearing specifically informs everyone including Respondent's counsel that the hearing will continue on consecutive days until concluded. The GC Opposition further argues:

> 2. Respondent has not proffered any information to demonstrate, or even suggest, that Mr. Frost's conflicting responsibilities between December 3 through 13, as described in its request for a continuance, arose before September 5, such that they could not have been scheduled in the first instance to accommodate Mr. Frost's participation in the December 10 compliance hearing.
> 3. Respondent has not proffered any information to demonstrate, or even suggest, that Mr. Frost's scheduled responsibilities between December 10 through 13, as described in its request for a continuance, are in fact immovable at this time. Respondent provided no evidence or argument to justify postponing the December 10 compliance hearing in this matter in lieu of Mr. Frost simply rescheduling his other responsibilities.
> 4. Mr. Frost is a partner with the law firm Eisner, LLP. Another partner from that same firm, Michael Eisner, also entered an appearance in the above-captioned cases with Region 27 as early as April 6, 2017, around the onset of the compliance stage of the matter. Mr. Eisner has never indicated his removal from these cases and he continues to be served with all formal documents in the matter.

5. Respondent's request for a continuance only describes Mr. Frost's scheduling conflicts from December 3 through 13. Respondent's request does not state or suggest that Michael Eisner also has scheduling conflicts with the December 10 compliance hearing. Respondent has not proffered any reason why Michael Eisner, or another partner from the firm Eisner, LLP, cannot represent Respondent at the December 10 compliance hearing if Mr. Frost's scheduling conflicts are truly "irremediable," as Respondent asserts.
6. To the extent Respondent suggests that Mr. Frost's current scheduling conflicts arose because he has only recently learned that the compliance hearing may take several days past December 10, Respondent's surprise at this fact is a product of its own lack of planning and inquiry. Respondent never affirmatively inquired with the Regional Director or the General Counsel as to the anticipated length of the hearing, so as to avoid scheduling conflicts for the expected duration of the hearing on consecutive days after December 10. Moreover, the Regional Director and the General Counsel never otherwise stated or suggested to Respondent that the hearing would only last one day on December 10, or fewer than several days thereafter. Therefore, Respondent reasonably could have, and should have, planned for the compliance hearing to potentially last several days and made appropriate scheduling arrangements in advance.
7. Respondent also asserts as a basis for its request that the General Counsel has "demanded" a response from Respondent by December 6 on the Amendment to Compliance Specification. Respondent is incorrect to assert that the General Counsel has "demanded" a response. On November 15, the Regional Director issued an Amendment to the Compliance Specification (Amendment). The Amendment largely reduces Respondent's total liability for the bargaining expenses owed to the Union from a total of $183,290 to $111,774. The Amendment also states that Respondent "may file an answer" to the Amendment, and such answer must be received by December 6. Thus, the answer is optional. To date, Respondent has not requested any extension of the December 6 deadline to file an answer or proffered any explanation as to why it could not meet that deadline if it chooses to file an answer. Respondent has not substantiated its suggestion that the Amendment, and/or Respondent's option to submit an answer to the Amendment by December 6, justifies a delay in the compliance hearing scheduled for December 10.
8. Respondent also states in its request for a continuance that "the NLRB is expecting a further production of documents by the first week of December." It is unclear what Respondent intends to suggest by this statement. The General Counsel has not subpoenaed Respondent to produce documents at the December 10 compliance hearing, nor has the General Counsel made any other demands or requests that Respondent produce documents in the first week of December 2019. Rather, in following up on the parties' pre-hearing conference call with Administrative Law Judge (ALJ) Dickie Montemayor, the General Counsel simply wrote to the parties and suggested that the parties schedule a conference call before the hearing to discuss potential joint stipulations and joint exhibits. Respondent has not and cannot substantiate how such a request would preclude it from preparing for or participating in the compliance hearing scheduled for December 10.
9. Respondent requests a continuance of several weeks, until early or mid-January 2020. However, Respondent has not provided any evidence or argument to demonstrate why it needs a continuance of several weeks if Mr. Frost's scheduling conflicts apparently end on December 13. Respondent has not stated or substantiated why it could not participate

in a compliance hearing at an earlier date before January 2020, such as during the week beginning December 15.

The GC Opposition concludes:

> Respondent was put on notice of the December 10 compliance hearing date months ago, but it has waited until just two weeks before the hearing to request a continuance. Respondent has not demonstrated that all of its attorneys have genuine scheduling conflicts from December 10 through 13 that could not have been avoided and cannot now be rescheduled or resolved. The purpose of the compliance hearing scheduled to begin on December 10 is to determine the liquidated amount of bargaining expenses and backpay that Respondent owes to the Union and to employees for various unfair labor practices that it committed approximately a decade ago. Respondent's request for a continuance does not raise any compelling basis to further delay a critical step in the Board's progress towards achieving a remedy in these cases.

Also earlier today, November 26, 2019, Counsel for the Charging Party Union's opposition response to the Order to Show Cause ("CP Opposition") was filed. CP Counsel opposes the Motion to Postpone and argues that:

> 1. This proceeding is intended to provide for the calculation of damages for substantial finally established Respondent liability ordered by the District of Columbia Circuit in March 2017, some 32 months ago. The multiple ULP charges that originated this matter were first filed in 2008, adjudicated by an ALJ in 2009 with a ruling in 2010, and became final at the Board level in 2015. The dozens of employees who are victims of this Respondent's multiple violations of the NLRA (and the union as well) should not be required to wait any longer than absolutely necessary to finally receive the remedies for which they have waited for over a decade, which in accordance with the Board's summary judgment ruling already amount to well in excess of $1 million, with likely another $1,000,000 due and owing (and with more unfair labor practices still to be litigated).
> 2. The original specification that commenced this compliance proceeding has been in Respondent's possession for over a year.
> 3. There have been several postponements of this hearing. The December 10 hearing date has been known to Respondent since September 5, 2019, yet Respondent waited until November 25 – two weeks before the hearing – to accumulate alleged conflicts and request a postponement. Respondent's counsel asserts that he was not aware of the duration of the hearing until the November 21 conference call with ALJ Montemayor, but he does not assert that he made any effort to learn that information prior to that occasion. More significantly, Respondent's counsel does not state when he allegedly committed to any of the alleged conflicting dates noted in its postponement request. Furthermore, it is not clear that the alleged "obligations" Respondent's counsel states that he "has" are actually his personal obligations. In that regard, counsel is billed on his firm's website as the Chair of its Litigation Department[1] that boasts 13 lawyers under his wing in that department. The website lists a total of 42 lawyers at the firm.

[1] https://www.eisnerlaw.com/practice-focus/litigation/

4. Most of the alleged conflicting "obligations" occur well before the December 10 hearing, and thus do not pose genuine "conflicts" with the instant hearing. Notably, Respondent's counsel does not explain why or when he arranged to fly *from New York* to (presumably) Los Angeles *on the very first day of the hearing in this matter.* He does not state the time of the hearing in the December 9 *Borden v. TPG* matter, or why he decided not to depart New York that same day instead of the next to arrive in time for the hearing in this matter. Nor does he offer any case numbers or accounts of the courts or other fora in which the listed matters are being adjudicated. Nor does counsel explain how, why or when the depositions noted to be taken December 12 and 13 were scheduled to conflict with the December 10 hearing week, and why they cannot be postponed or handled by another lawyer. Indeed, counsel's concession that he was unaware of the duration of this compliance proceeding suggests that the "Únion Patriot" depositions were scheduled *after* September 5. Yet he made no inquiry about the length of the instant proceeding until November 21.

5. All of the GC's and Union's witnesses are available to testify in accordance with Board procedures the week of December 10th. The Respondent should not be rewarded for failing to either prepare, or to find a lawyer with a calendar cleared for the hearing dates. See, e.g., *Int'l Union of Operating Engineers, Local No. 501 v. NLRB*, 1989 U.S. App. LEXIS 23243 (9th Cir. June 26, 1989)("The ALJ had no duty to grant further continuances to unprepared parties, and he had to be fair to [Respondent] Holiday Gifts, who was prepared to proceed.")

6. "Postponements of proceedings are not a matter of right; rather, they are to be either granted or denied upon consideration of the inconvenience and possible unfairness to other affected parties as against a claimed hardship of the party making the request (*N.L.R.B.) v. Hijos de Ricardo Vela, Inc*., 475 F.2d 58, 61 (C.A. 1, 1973), enf'g 194 NLRB 377 (1971); *N.L.R.B. v. Air Control products, Inc*., 335 F.2d 245, 248 (C.A. 5, 1964)), while keeping in mind that these proceedings must proceed with "the utmost dispatch." *N.L.R.B. v. American Potash & Chemical Corp.*, 98 F.2d 488, 492 (C.A. 9, 1938)[2], cert. denied, 306 U.S. 643; *N.L.R.B. v. Glacier Packing Co., Inc., 507 F.2d 415, 416 (C.A. 9, 1974)3. Unless a postponement or continuance is improperly refused, it is not a denial of due process for the Board to conduct its hearing without the presence of a respondent or his representative. N.L.R.B. v. Jones & Laughlin Steel Corp., 301 U.S. 1, 25, 47 (1937); N.L.R.B. v. American Potash & Chemical Corp., supra; N.L.R.B. v. Glacier Packing Co., Inc., supra; Spiegel Trucking Company 225 NLRB 178, 179 (1976), aff'd 559 F.2d 188 (C.A. D.C., 1977)." Jacques SYL Knitwear, Inc. , 247 N.L.R.B. 1525, 1529-1530 (1980).*

The injured parties in this case have waited long enough, and Respondent has not adequately explained why this proceeding should not go forward as scheduled. The ALJ should deny Respondent's request for a postponement, and should order the hearing go forward on December 10 and consecutive days thereafter until completed.

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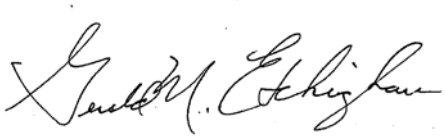
[2] As the Court elaborated in that case, "The Act makes it clear that the proceedings must proceed with the utmost dispatch. When the Company received the complaint and notice of trial and chose the particular firm of lawyers to represent it, it should have secured one of their staff of attorneys or some other counsel who was free from other engagements to undertake the case with the instant attention contemplated by the Congress." 98 F.2d at 492. Respondent has not suffered a shortage of attorneys throughout its lengthy history of unfair labor practice litigation, deploying literally dozens of lawyers from numerous law firms over that span.

Having fully considered the pleading, I find that good cause has not been shown to grant Respondent's late-filed and incomplete Motion for a Continuance of the December 10, 2019 compliance hearing in light of the several hearing postponements that precede the current Motion. In addition I further find that any postponement beyond December 10, 2019 would cause great prejudice to the parties who have arranged for witnesses to attend the December 10 hearing, the Union and discriminatees who have waited for more than a decade for this long overdue compliance hearing alleging they are owed well in excess of $1 million, with likely another $1,000,000 due and owing - damages which would be caused by further delay of hearing in this matter. In addition, I also find the Motion was not filed in a timely manner as Respondent's counsel had more than 2.5 months to file its motion after receiving notice of the 12/10/19 hearing date and chose to wait until the 11th hour to file its Motion. Moreover, I further find that Respondent's counsel has not provided adequate evidence that his schedule conflicts arose before September 5, 2019 or that he cannot resolve any of his listed conflicts or that another lawyer from his law firm cannot step in his place.

In addition, the hearing notices here have consistently mentioned that the hearing would continue on consecutive days until finished and this matter has been at least a 4-day matter on the San Francisco Division of Judges' docket since July 2018, when the compliance specs issued. Respondent counsel surprise to hear that this is a 4 plus day hearing is disingenuous. In addition, Respondent's counsel must make this case a priority in their schedule as Mr. Frost, Mr. Eisner or someone else from their law firm of 13 -42 lawyers should surely be able to present a defense after all of the time this case has been outstanding. Such dilatory conduct should not be encouraged. To grant the Motion and allow further delay to the compliance hearing which follows a ULP hearing a decade ago would likely mean that a compliance case long overdue for a hearing on its merits would continue to remain without one. Therefore, the Respondent's Motion for a Continuance of the December 10, 2019 compliance hearing is **DENIED** in its entirety and the December 10, 2019 hearing shall go forward at Region 31 in West Los Angeles, California, and consecutive days thereafter, until finished, as previously noticed.

Dated: November 26, 2019, San Francisco, California.



Gerald M. Etchingham, Associate Chief
Administrative Law Judge

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