IN RE PATRICK J. NEMAN, D/B/A THE MAIN EXCHANGE

TSCA Appeal No. 93-3

REMAND ORDER

Decided August 26, 1994

Syllabus

Respondent Patrick J. Neman appeals a default order entered against him in this TSCA enforcement action. The default order was issued because Neman did not respond to an amended complaint filed by Region V, alleging that Neman had committed numerous violations of the PCB Manufacturing, Processing, Distribution in Commerce and Use regulations at 40 C.F.R. Part 761. The default order assessed a penalty of $142,000, which is the amount proposed in the complaint. Neman argues that the default order should be vacated and the TSCA proceeding dismissed because during the pendency of the enforcement action, Neman filed a petition under Chapter 11 of the U.S. Bankruptcy Code and the "subject matter" of these TSCA proceedings was "concluded" by the United States Bankruptcy Court. Neman also argues that the default order should be vacated because he never received notice of the amended complaint or the motion for a default order.

Held: These TSCA proceedings were not stayed when Neman filed for bankruptcy, and the Bankruptcy Court did not resolve the subject matter of these proceedings. Neman's claim that he was never served with the amended complaint, however, is borne out by the record. Because the amended complaint charges Neman with violations that had not occurred at the time of the original complaint and because the penalty proposed in the amended complaint is dramatically higher than that proposed in the original complaint, the amended complaint should have been served in the same manner as the original complaint (*i.e.*, either in person or by certified mail, return receipt requested). There is nothing in the record, however, to suggest that Neman ever signed the return receipt accompanying the amended complaint (which completes service of the complaint), and the documentary record indicates that the amended complaint was sent to an address that was no longer current. In light of the dramatic differences between the amended complaint and the original complaint, the fact that Neman changed addresses without telling the Agency did not relieve the Agency of its obligation to serve the amended complaint on Neman in the same manner as the original complaint was served. The Region's attempt to serve the amended complaint on Neman's former bankruptcy attorney also did not satisfy the rules for serving complaints, because there is no evidence in the record that the attorney ever signed the return receipt accompanying the amended complaint, and in any event there is nothing in the record to suggest that Neman ever expressly or impliedly authorized the attorney to act as Neman's representative for receiving process in this case. The default order, which is based on the amended complaint, is vacated, and the proceedings are remanded to the Administrative Law Judge.

Before Environmental Appeals Judges Nancy B. Firestone, Ronald L. McCallum, and Edward E. Reich.

Opinion of the Board by Judge McCallum:

Before us is an appeal of the Order on Default issued by Administrative Law Judge Spencer T. Nissen ("Presiding Officer") in this administrative enforcement action arising under the Toxic Substances Control Act ("TSCA"), 15 U.S.C. §§ 2601-2671. The appeal was filed on August 24, 1993, by Respondent Patrick J. Neman d/b/a the Main Exchange ("Neman"). The default order, which was issued July 9, 1993, is based on an amended complaint filed on April 26, 1991, by U.S. EPA Region V, which alleges that Neman committed numerous violations of the PCB Manufacturing, Processing, Distribution in Commerce and Use regulations at 40 C.F.R. Part 761. The amended complaint proposes a penalty of $142,000, which is the amount assessed in the default order. The Presiding Officer issued the Order on Default, upon the Region's motion, because Neman had not filed an answer to the amended complaint.

Neman now appeals the Order on Default, arguing that the Order should be vacated and the TSCA proceeding dismissed because during the pendency of the enforcement action, Neman filed a petition under Chapter 11 of the U.S. Bankruptcy Code and the "subject matter" of these TSCA proceedings was "concluded" by the United States Bankruptcy Court. Neman also argues that the Order on Default should be vacated because he never received notice of the amended complaint or motion for a default order. In its response to the appeal, the Region argues that the bankruptcy proceedings have had no effect on this TSCA enforcement action and that it sent both the amended complaint and the motion for order on default by certified mail, return receipt requested to Neman and John Guy, the attorney who represented Neman in the bankruptcy proceedings. For the reasons set forth below, we conclude that these TSCA proceedings were not stayed when Neman filed for bankruptcy and that the Bankruptcy Court did not resolve the subject matter of these proceedings. We conclude, however, that the amended complaint was never received by Neman and that John Guy was not Neman's "representative" for purposes of receiving service of the amended complaint. We hold, therefore, that service of the amended complaint on Neman, as required by the Consolidated Rules of Practice (40 C.F.R. § 22.05(b)(1)), was never accomplished. The default order, which is based on the amended complaint, therefore, must be vacated and these proceedings remanded for further action consistent with this decision.

I. *BACKGROUND*

On December 24, 1987, the Region filed its original complaint against Neman, alleging recordkeeping and disposal violations of the PCB regulations at 40 C.F.R. Part 761 arising out of Neman's storage for reuse of seven PCB transformers in the basement of his facility. The complaint proposed a penalty of $24,000. The complaint was sent to 444 South Market Street, in Akron, Ohio, which is the site of the alleged violations. On February 5, 1988, Neman filed an answer, which was signed only by Neman as attorney.

On August 18, 1988, Neman filed a bankruptcy petition under Chapter 11 of the Bankruptcy Code. In these Chapter 11 proceedings, Neman was represented by an attorney named John Guy. On September 13, 1990, the Chapter 11 bankruptcy petition was converted to a personal bankruptcy under Chapter 7 of the Bankruptcy Code. A letter dated August 11, 1993, from Guy to Neman indicates that Guy's representation of Neman was confined to the Chapter 11 bankruptcy proceedings. Exhibit C, Notice of Appeal.

In May of 1989, the Region filed a status report with the Presiding Officer. The status report was sent to Neman at 209 S. Main Street, Suite 401. This is the last document filed in this enforcement action that Neman acknowledges receiving, until his former bankruptcy attorney, John Guy, forwarded the Presiding Officer's Order on Default to him.

On August 16, 1990, an EPA Technical Assistance Team inspected Neman's facility and determined that: PCB transformers, drums of PCB-contaminated oil, and PCB-contaminated soil remained at the facility; that the facility was not secured; and that conditions at the facility posed an imminent and substantial endangerment to the public health or welfare or the environment. Based on these findings, the facility was declared a Superfund removal site. This inspection and an earlier inspection by Ohio officials revealed what the Region believed were continuing violations of the PCB regulations, including failure to clean up PCBs, improper storage of PCBs, improper marking of PCBs, and improper recordkeeping.

On April 26, 1991, the Region filed an amended complaint against Neman, alleging violations discovered by the EPA Technical Assistance Team, in addition to those listed in the original complaint. The amended complaint also proposed a significantly increased penalty of $142,000. According to its certificate of service (which by oversight was sent out *after* the Amended Complaint), the Amended Complaint was mailed to 665 West Market Street. A cover letter that apparently accompanied the amended complaint indicates that the letter and amended complaint

were sent certified mail, return receipt requested. The cover letter and the certificate of service also indicate that the amended complaint was sent in the same manner to John Guy, the attorney who represented Neman during his Chapter 11 bankruptcy proceedings. The record does not contain return receipts signed by either Neman or Guy, and Neman never filed an answer to the amended complaint.

The Region filed a motion for default order on November 20, 1992, for Neman's failure to file an answer within the 20-day deadline prescribed in the Consolidated Rules of Practice (40 C.F.R. § 22.30(a)). The motion was sent to both Neman and Guy by certified mail, return receipt requested. While Guy signed the return receipt attached to his service, the receipt attached to Neman's service was returned unsigned with the words, "moved not forwardable" on it. The motion for default order was sent to Neman at 209 S. Main Street, Suite 401. Other documents in the record relating to the bankruptcy proceeding, however, indicate that at that time Neman's correct address was 1540 West Market Street, which is the address that Neman has used during the pendency of this appeal. *See* Exhibit A, Notice of Appeal (a pleading, an Order, and a letter from the bankruptcy proceedings all showing Neman's address as 1540 West Market Street and all having October 1992 dates).

On July 9, 1993, the Presiding Officer issued the Order on Default that is the subject of this appeal. In the Order, the Presiding Officer notes that: "Respondent's failure to respond to the Amended Complaint, dated April 26, 1991, within 20 days of its service constitutes grounds for a Default Order in favor of Complainant." Order on Default at 6. The Presiding Officer also determined that the proceeding to assess a civil penalty for failure to comply with the environmental laws is exempt from the stay provision of the U.S. Bankruptcy Code by 11 U.S.C. § 362(b)(4). The Order on Default assessed the penalty of $142,000 proposed by the Region in the Amended Complaint.

The Order on Default was sent to Neman at 665 West Market Street by certified mail. As noted above, documents in the record from the bankruptcy proceedings indicate that at the time the Order on Default was sent, Neman's address was 1540 West Market Street. Neman claims that he only received the Order on Default because it was forwarded to him by his former bankruptcy attorney, John Guy. Neman represents that he did not receive the Order on Default until August 18, 1993. On August 24, 1993, Neman filed this appeal.

II. *DISCUSSION*

At the outset, we address Neman's contention that the Bankruptcy Court somehow "concluded" the "subject matter" of this action in an

order issued October 9, 1992. *See* Exhibit A, Notice of Appeal (Order on Stipulation to Withdraw Objection of United States to Trustee's Notice of Proposed Abandonment of Property). We do not read the Court's Order as having that effect.[1] In the order, the Bankruptcy Court merely abandoned the bankruptcy estate's interest in the property where the alleged TSCA violations at issue occurred, presumably because the property has no value in its presently contaminated state. The order does not purport to, and does not have the effect of, "concluding" the "subject matter" of these TSCA penalty proceedings, and in fact the order expressly provides that the abandonment "shall not prejudice any claims, rights or interests that the United States may have." *Id.* Thus, we conclude that the October 9, 1992 order had no effect on this TSCA enforcement proceeding.

Having addressed Neman's bankruptcy argument, we turn to Neman's more serious claim that the amended complaint and motion for default order were never served upon him or his representative. For the reasons set forth below, we conclude that his assertion is borne out by the record and that accordingly, the Order on Default, which was based on the amended complaint, must be vacated.

The Amended Complaint charges Neman with numerous violations that apparently occurred after the original complaint was filed. It also raises the proposed penalty from $24,000 to $142,000, an increase of more than 500%. Under the circumstances, we believe that the amended complaint is in an important sense a new and different en-

[1] The mere fact that Neman filed a petition for bankruptcy during the pendency of this enforcement action had no effect on the status of the action. Under the U.S. bankruptcy code, the filing of a bankruptcy petition operates as a stay of "the commencement or continuation * * * [of an] administrative * * * proceeding against the debtor that was or could have been commenced before the commencement of the case under this title * * *." 11 U.S.C. § 362(a)(1). The code provides an exemption, however, for "the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power." 11 U.S.C. § 362(b)(4). This exemption covers actions like this one, where the Agency is seeking to assess a penalty for past violations of environmental regulations. *See, e.g., United State v. Nicolet, Inc.*, 857 F.2d 202, 209 (3rd Cir. 1988) (exemptions to automatic stay provision allow EPA to assess civil penalties for violations of environmental statutes); *In re Standard Tank Cleaning Corp.*, RCRA (3008) Appeal No. 91-2, 6-7 (CJO, July 19, 1991) ("[T]he mere entry of a money judgment in proceedings to enforce environmental statutes and regulations is not affected by the automatic stay provision."); *In re Fisher-Calo Chemicals and Solvents Corp.*, RCRA Appeal No. 85-5, at 2-8 (CJO, June 7, 1987) (same); *see also* H.R. Rep. No. 598, 95th Cong., 1st Sess. 348 ("where a governmental unit is suing a debtor to prevent or stop violation of * * * environmental protection * * * or similar police or regulatory laws, or attempting to fix damages for violation of such a law, the action or proceeding is not stayed under the automatic stay."). We note, however, that if an administrative enforcement proceeding results in a money judgment for the Agency, the automatic stay would preclude an action to collect the money judgment. 11 U.S.C. §§ 362(a)(1), 362(b)(5). *See United States v. Jones & Laughlin Steel Corp.*, 804 F.2d 348, 350-351 (6th Cir. 1986) (If EPA proceeding is for enforcement (as opposed to assessment) of money judgment, filing of Chapter 11 petition operates to stay the proceeding.).

forcement action, and should be treated as such. Thus, although the rules do not clearly specify the manner in which *amended* complaints should be served, we believe that strict adherence to the rules of service applying to original complaints is required in the present circumstances.[2]

The rules governing service of pleadings provide that a complaint must be served on a respondent or the respondent's representative either personally or by certified mail, return receipt requested. 40 C.F.R § 22.05(b)(1). When service is accomplished by certified mail, service is not complete until the return receipt is signed. 40 C.F.R. § 22.07(c). The properly executed return receipt constitutes proof of service and must be filed with the complaint immediately upon completion of service. 40 C.F.R. § 22.05(b)(1)(v).

The Region does not claim that it served the amended complaint on Neman in person. Instead, it claims that it sent the amended complaint to Neman by certified mail, return receipt requested. The record contains some support for this assertion: A cover letter that apparently accompanied the amended complaint indicates that the amended complaint was sent certified mail, return receipt requested. The certificate of service, which by oversight was apparently sent out *after* the amended complaint, does not specify the manner in which the amended

[2] When a procedural issue arises that is not addressed in Part 22, the Board has the discretion to resolve the issue as it deems appropriate. 40 C.F.R. § 22.01(c). In the exercise of this discretion, the Board finds it instructive to examine analogous federal procedural rules and federal court decisions applying those rules. *See In re Wego Chemical & Mineral Corporation*, TSCA Appeal No. 92-4, at 13 n. 10 (EAB, Feb. 24, 1993)(although the Federal Rules of Civil Procedure do not apply to Agency proceedings under Part 22, the Board may look to them for guidance); *In re Detroit Plastic Molding*, TSCA Appeal No. 87-7, at 7 (CJO, Mar. 1, 1990) (same). In this instance, our conclusion that the Region should have served the amended complaint in the same manner as the original complaint is consistent with the practice in the federal courts. Under F.R.Civ.P. rule 5(a), an amended complaint that contains new or additional claims against a party in default for failure to appear must be served in the same manner as the original complaint. *See Varnes v. Local 91, Glass Bottle Blowers Association*, 674 F.2d 1365, 1368 (11th Cir. 1982) (Claim for attorney's fees in amended complaint was "new or additional claim" within the meaning of F.R.Civ.P. 5(a), so amended complaint should have been served in same manner as original complaint.); *Cf. Hutchins v. Priddy*, 103 F. Supp. 601, 606 (W.D.Mo 1952) (Under a Missouri procedural rule patterned after F.R.Civ.P. 5(a), an amended complaint against a party in default for failure to appear should have been served in the same manner as the original complaint because it imposed a higher penalty than the original complaint and therefore contained a "new or additional claim."). Even when a party has appeared in the action, if the amended complaint includes a "radically" new claim or higher penalty, the amended complaint should be served in the same manner as the original complaint. *See Caribbean Transportation Systems, Inc. v. Autoridad De Las Navieras De Puerto Rico, et al.*, 901 F.2d 196, 196 (1st Cir. 1990) (The district court acted well within its legal power when it ordered personal service of the amended complaint, for the amended complaint differed radically from the original one: dropping one plaintiff and adding two new ones; dropping several defendants and adding several new ones; dropping the trade restraint claims and adding new civil rights claims, and dropping its general references to damages and adding a claim for $27 million).

complaint was mailed. Nevertheless, assuming that the amended complaint was sent to Neman by certified mail, as the cover letter indicates, the Region has not pointed to, and we cannot find, a signed receipt (which would constitute proof of service) or anything else in the record to suggest that Neman ever signed the return receipt. As explained below, the absence of a signed receipt, coupled with the circumstances described below lend credence to Neman's assertion that he never received the amended complaint.

The most plausible explanation for the absence of a signed receipt is that the amended complaint was sent to the wrong address. If the wrong address was used, it would not have been forwarded because it was sent certified mail, return receipt requested. The Region appears to concede that point in its reply brief, where it states that, in addition to sending the amended complaint to Neman, it also sent the amended complaint to John Guy, Neman's former bankruptcy attorney, "because Respondent's current address was not available." Complainant's Reply to Respondent's Reply to Response of Complainant at 3. That the amended complaint was sent to the wrong address is also suggested by the multiplicity of addresses on the various pleadings filed in this case. The last document Neman admits receiving was a status report sent to 209 S. Main Street in May of 1989. On March 21, 1991, a little over a month before the amended complaint was filed, the Region used this same address (*i.e.*, 209 S. Main Street, Suite 401) when it filed a response to an Order to Show Cause. For reasons that are not clear from the record, the Region must have decided that this was the wrong address, for when it mailed the amended complaint to Neman on April 26, 1991, it sent it to a new address. According to the certificate of service attached to it, the Amended Complaint was mailed to 665 West Market Street. Using this new address, however, must have been unsuccessful, because when the Region mailed the motion for a default order to Neman on November 20, 1992, it went back to using the same 209 S. Main Street address that it had used before mailing the amended complaint. The return receipt for the motion for a default order came back unsigned and, according to the Region, bore the notation: "moved, not forwardable." Documents filed in the bankruptcy matter in October of 1992 may explain why the return receipt came back unsigned. Those bankruptcy documents were sent to Neman at a third address: 1540 West Market Street, which is the address Neman has used during the pendency of this appeal. *See* Exhibit A, Notice of Appeal (a pleading, an Order, and a letter all showing Neman's address as 1540 West Market Street and all having October 1992 dates). This documentary record indicates that sometime between May of 1989, when the last document Neman admits receiving was sent to the 209 S. Main Street address, and October of 1992, when Neman's current address was used on a document filed in the bankruptcy matter, Neman moved to the 1540 West Market Street address without

telling the Agency. Whether Neman ever lived at the 665 West Market Street address used for the amended complaint is not clear from the record. In view of the foregoing, we conclude that the amended complaint was probably sent to the wrong address. This conclusion coupled with the absence of a return receipt signed by Neman lead in turn to the conclusion that service of the Amended Complaint on Neman was never accomplished.

The Region argues that if it was unable to complete service on Neman, then the blame lies with Neman. The Region contends that, inasmuch as Neman had been personally served with the original complaint and had made an appearance in the enforcement proceeding, it was incumbent upon him to notify the Presiding Officer and Region of any change of address. While that argument might carry the day in a different context, it must be rejected in this case. As noted above, the amended complaint charges new violations that apparently occurred after the filing of the original complaint and proposes a dramatically higher penalty than the original complaint. The stakes have been raised considerably. The amended complaint initiates what is in an important sense a new and separate enforcement action. Under the circumstances, even though Neman quit participating in the proceedings and did not notify the Agency of his address change, it would not be fair to use his default to dramatically increase the penalty amount or charge the respondent with numerous violations that had not even occurred when the original complaint was filed.[3] Before entering judgment and assessing such a penalty against him, Neman should have been given notice and an opportunity to defend himself against this new enforcement action. Such notice should have been delivered to the Respondent in the same fashion as the original complaint, so as to impress upon Neman the fact that the full force of the administrative enforcement machinery had once again been set in motion against him.[4] Given the dramatic difference between the original complaint and the amended complaint, we conclude that Neman's failure to tell the Agency of his address change is of no consequence.[5]

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[3] For similar reasons, section 22.27(b), governing the assessment of a penalty in an initial decision, prohibits a Presiding Officer from assessing a penalty greater than that proposed in the complaint if the respondent has defaulted. 40 C.F.R. § 22.27(b). The prohibition applies regardless of how or why the respondent defaulted or at what stage in the process the respondent defaulted. To allow the Region to increase the penalty proposed in the complaint after a respondent has quit participating in an action (but before a formal default order has been issued) would thwart the policy behind section 22.27(b).

[4] *See supra*, n.2.

[5] Nothing in the record suggests that Neman's changes of address were for the purpose of evading service.

Under section 22.05(b), service of the complaint may also be made on a "representative" of the respondent. The Region asserts that the amended complaint was also sent to John Guy, Neman's attorney in the Chapter 11 bankruptcy proceedings, and that this was sufficient to accomplish service on Neman for purposes of section 22.05(b). The letter accompanying the amended complaint and the belatedly filed certificate of service confirm that the amended complaint was sent to John Guy by certified mail, return receipt requested. We conclude, however, that mailing the amended complaint to John Guy did not satisfy the service requirement in section 22.05(b)(1) for two reasons. First, the Region has not pointed to, and we cannot find, anything in the record to suggest that Guy ever signed the return receipt. We therefore have no basis for concluding that service on Guy was ever completed. *See* 40 C.F.R. § 22.07(c) ("Service of the complaint is complete when the return receipt is signed. Service of all other pleadings is complete upon mailing."); 40 C.F.R. § 22.05(b)(1)(v) ("Proof of service of the complaint shall be made by * * * properly executed return receipt."). In this regard, we note that, in its brief, the Region never actually asserts that the amended complaint was *served on* Guy. The Region states only that the amended complaint was "mailed" to Guy. *See* Response to Respondent's Notice of Appeal at 12, 14, 20, 21-22. An interesting contrast to the Region's discussion of the amended complaint is provided by the Region's discussion of the Motion for Default. The Region makes a point of asserting that the Motion for Default was "served on" Guy, citing the signed receipt, which is attached to the brief as an exhibit. *Id.* at 12, 22. We believe this difference in treatment is intentional and reflects a recognition on the Region's part either that Guy never signed the return receipt or that any proof of his signing the return receipt has been lost.

Second, we are not convinced that Guy was Neman's "representative" within the meaning of section 22.05(b)(1) for the purpose of receiving service in this TSCA enforcement action. An attorney can only act as a client's representative for the purpose of receiving service if the client actually authorizes him or her to do so, either expressly or impliedly.[6] If authorization is to be inferred from the circumstances

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[6] *Cf. EIC Inc., et al. v. MCANY, Inc., et al.*, 79 Civ. 5446 (RWS), slip op. (S.D.N.Y. 1980)(Under Federal Rules of Civil Procedure, "[w]hat is necessary is that it appear that the attorney was authorized, either expressly or impliedly, to receive service of process for his client."); *Ransom v. Brennan*, 437 F.2d 513, 518 (5th Cir. 1971), *cert. denied*, 403 U.S. 904 (1971) (Under the Federal Rules of Civil Procedure, service of process on an attorney is not effectual solely by reason of his capacity as the defendant's attorney. The attorney must be appointed for the purpose of receiving service.); *Durbin Paper Company v. Hossain*, 97 F.R.D. 639 (S.D.Fla 1982)(same).

surrounding the attorney's appointment, those circumstances must clearly manifest the client's intent to confer such authorization.[7]

As far as we can tell from the record, Neman did not authorize Guy, either expressly or impliedly, to act as Neman's representative in these TSCA proceedings. We note, for example, that Guy did not co-sign Neman's answer to the original complaint, and there is no indication that Guy assisted Neman in the preparation of the answer. In fact, during the entire TSCA administrative proceedings, Guy never made an appearance on behalf of Neman. Guy's representation of Neman was apparently limited to the Chapter 11 proceedings in the bankruptcy matter, and in fact such representation appears to have ended *before* the filing of the amended complaint. These conclusions regarding the extent of Guy's representation of Neman are based on a cover letter that Guy sent to Neman when Guy forwarded the Presiding Officer's Order on Default to Neman. In that letter, Guy explains: "I have advised [the Region] that I was your bankruptcy counsel only during the Chapter 11 proceeding." The letter also advises Neman to "take whatever action is necessary to protect your interests." Guy's letter suggests, therefore, that Guy's representation of Neman was limited to the Chapter 11 bankruptcy proceedings. The conversion from Chapter 11 to Chapter 7 took place on September 13, 1990, *before* the Amended Complaint was filed.

Apparently, because of Guy's involvement in the Chapter 11 proceedings, both the Region and the Presiding Officer assumed that Guy was also Neman's representative for purposes of the TSCA proceedings at the time the Region attempted to serve the amended complaint. But Guy's representation of Neman in a discrete and separate legal matter (*i.e.*, the bankruptcy proceedings) did not transform Guy into Neman's representative for receiving process in this case.[8] Nor did the fact that Guy accepted service of documents filed in the TSCA proceedings[9] and for-

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[7] *Cf. EIC Inc., supra* ("And if such agency is to be implied, it must be implied [sic] from all the circumstances accompanying the attorney's appointment which indicate the extent of authority the client intended to confer.")

[8] *Cf. Olympus Corporation v. Dealer Sales & Service, Inc.*, 107 F.R.D. 300, 306 (E.D.N.Y. 1985) (under Federal Rules of Civil Procedure, appointment of attorney to receive process could not be inferred from fact that attorney represented defendant in related action in another jurisdiction); *Bennett v. Circus U.S.A., et al.*, 108 F.R.D. 142, 147 (N.D.Ind. 1985) (under Federal Rules of Civil Procedure, "[c]ourts will not consider the fact that the attorney represented the defendant in an unrelated matter as evidence of an appointment for service of process.").

[9] *Cf. Schwartz v. Thomas*, 222 F.2d 305, 308 (D.C.Cir. 1955) ("The rule is clear that it must appear that any agent who accepts service must be shown to have been authorized to bind his principal by the acceptance of process and, further, that the authority to accept such service cannot be shown by the extrajudicial statements of the attorney."); *Whisman v. Robbins*, 712 F. Supp. 632,

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warded them to Neman.[10] Moreover, even if Guy represented to the Region either directly or indirectly that he was authorized to receive process in these TSCA proceedings (a conclusion for which there is no support in the record), such representations are meaningless absent some evidence that Neman intended to confer such authority on Guy.[11]

III. *CONCLUSION*

Based on the foregoing considerations, we find no support in the record for the Region's assertion that Neman, either expressly or impliedly, authorized John Guy to act as Neman's representative for purposes of receiving service in these TSCA proceedings at the time the Amended Complaint was filed. Consequently, we conclude that service of the amended complaint on Neman in accordance with section 22.05(b)(1) was never accomplished and that the Agency, therefore, never had jurisdiction over Neman with respect to the amended complaint. Accordingly, the default order based on the amended complaint must be and hereby is vacated. This action is remanded for further proceedings consistent with this decision.[12]

So ordered.

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636 (S.D.Ohio 1988) (Under Federal Rules of Civil Procedure, service on member of legal department of pension fund was not sufficient even where member of legal department accepted service because member of legal department had not been appointed to receive service for the pension fund.).

[10] *Cf. Bennett v. Circus, supra*, at 147 (Under the Federal Rules of Civil Procedure, "[t]he fact that documents are passed on to a client is often viewed as a professional courtesy or an attempt to secure future business (sometimes referred to as 'primary professional functions') * * * which does not amount to actual representation for purposes of determining agency for service of process.")(citations omitted).

[11] *Cf. Olympus Corporation v. Dealer Sales and Service, Inc.*, 107 F.R.D. 300, 305 (E.D.N.Y. 1985) (Under the Federal Rules of Procedure, "an attorney's claim that he is authorized to receive process is not by itself sufficient; there must be some evidence that the client intended to grant such authority.").

[12] Our conclusion that the Region's amended complaint was never served on Neman raises the issue of whether the Region's original complaint remains in effect or whether the amended complaint supersedes it. This issue will have to be resolved by the Presiding Officer on remand. We note in passing that under the Federal Rules of Civil Procedure, an amended complaint supersedes the original complaint and strips it of legal effect. *See International Controls Corp. v. Vesco*, 556 F.2d 665, 668-669 (2nd Cir. 1977), *cert. denied*, 434 U.S. 1014 ("It is well established that an amended complaint ordinarily supersedes the original and renders it of not legal effect."). At least one court has held, however, that until the amended complaint is properly served, the original complaint is not superseded and remains in effect. *Id.* at 69 (where amended complaint was not properly served, original complaint was not superseded and remained in effect).