

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

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| C.F. TAFFE PLUMBING CO., INC., Respondent, and MICHAEL SCHMIDT, an Individual, Charging Party. | CASE 13-CA-45890 Arthur J. Amcham Administrative Law Judge |
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**RESPONDENT'S RESPONSE IN OPPOSITION TO MICHAEL SCHMIDT'S MOTION TO
REOPEN THE RECORD AND RECEIVE FURTHER EVIDENCE**

Respondent C.F. Taffe Plumbing Co., Inc. ("Taffe") submits the following Response in Opposition to Michael Schmidt's Motion to Reopen the Record and Receive Further Evidence.

Michael Schmidt filed a motion, pursuant to Section 102.48 of the Rules and Regulations, seeking to reopen the record to receive additional evidence regarding certain the transmittal of certain text messages. Not only does Mr. Schmidt bring this motion at an incredibly late juncture, the requisite extraordinary circumstances which would justify reopening the record are simply not present.

Section 102.48(d)(1) provides, "A party to a proceeding before the Board may, because of **extraordinary circumstances**, move fore reconsideration, rehearing, or reopening of the record after the Board decision or order." (Emphasis added). It further provides:

A motion to reopen the record shall state briefly the additional evidence sought to be adduced, why it was not presented previously, and that, if adduced and credited, it would require a different result. Only newly discovered evidence, evidence which has become available only since the close of the hearing, or evidence which the Board believes should have been taken at the hearing will be taken at any further hearing. *Id.*

Mr. Schmidt seeks to open the record to admit certain phone records which he alleges establishes that Joe O'Brien never received a text message from Mr. Schmidt on May 6, 2010. Mr. Schmidt's motion is problematic in a number of respects. First, he has not provided sufficient explanation for why it was not presented previously. Second, he has not established that it would require a different result. Finally, Mr. Schmidt brings this motion at the latest possible juncture in the proceedings.

Mr. Schmidt asserts that the reason this evidence was not presented at the hearing level is "because Michael Schmidt did not know about the alleged text message on May 6, 2010 and could not defend himself . . ." As the record demonstrates, however, after Joe O'Brien testified with respect to this text message, and after Charles Taffe testified with respect to receiving this text message, Mr. Schmidt was given the opportunity to and did in fact provide rebuttal testimony. At the time he offered his rebuttal testimony, he was fully aware of the "alleged text message," having been present for the entire hearing and listened to all the testimony. As such, he had an opportunity to present evidence to the contrary, and he did not avail himself of that opportunity. Mr. Schmidt's explanation fails to sufficiently demonstrate a legitimate reason that any such evidence was not presented at the hearing level. On this basis alone his motion to reopen the record should be denied.

Additionally, nothing about the new evidence that Mr. Schmidt would seek to introduce would, if adduced and credited, require a different result. The ALJ made a finding the Taffes became aware of the text message on May 6, 2010, thus cutting off any backpay remedy on that date. Mr. Schmidt does not seek to disprove that this text message was ever sent. Rather, he seeks to prove that it was not sent on a given date. The date that matters, however, is the date that the employer first knew of the text message, and the ALJ determined that the employer

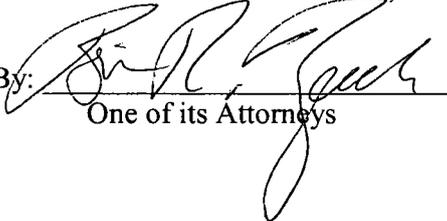
became aware of the text message on May 6, 2010, thus cutting off the backpay remedy. Nothing about the evidence that Mr. Schmidt proposes to admit would “require” a different result, and, as such, his motion to reopen the record should be denied.

Finally, Mr. Schmidt brings this motion at an incredibly late juncture. Not only did he have an opportunity to present rebuttal testimony at the hearing, but he also had opportunity to file exceptions to the ALJ’s decision and a response to Respondent’s Exceptions. Mr. Schmidt did not make any effort then to seek to reopen the record. Only now after all Exceptions and responses thereto have been filed, and after the Board has ruled on post-hearing motions, does Mr. Schmidt bring this motion to reopen the record. Considering the untimeliness of the motion and the lack of “extraordinary circumstances,” Mr. Schmidt’s motion to reopen the record should be denied.

WHEREFORE, Respondent prays that the National Labor Relations Board deny Michael Schmidt’s Motion to Reopen the Record and Receive Further Evidence.

Respectfully submitted,

C.F. TAFFE PLUMBING CO., INC.

By: 
One of its Attorneys

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STATEMENT OF SERVICE

The undersigned states that on this 1st day of February, 2011, he caused copies of the foregoing Response in Opposition to Michael Schmidt's Motion to Reopen the Record and Receive Additional Evidence to be served by UPS Overnight upon the following:

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A handwritten signature in black ink, appearing to read "R. R. Jones", is written over a horizontal line.

February 1, 2011

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ORDER SECTION