

NOT INCLUDED IN
BOUND VOLUMES

LBP
Indianapolis, IN

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

SHEEHY ENTERPRIZES, INC.

and

Case 25-CA-30583

LABORERS' INTERNATIONAL UNION
OF NORTH AMERICA, STATE OF INDIANA
DISTRICT COUNCIL, a/w LABORERS'
INTERNATIONAL UNION OF NORTH AMERICA

ORDER DENYING MOTION

On August 12, 2010, the National Labor Relations Board, by a three-member panel, issued a Decision and Order in this proceeding,¹ affirming the judge's rulings, findings, and conclusions to the extent and for the reasons stated in the Board's earlier decision reported at 353 NLRB No. 84 (2009).² In its earlier decision, the Board found

¹ 355 NLRB No. 83 (2010).

² On January 30, 2009, the two sitting members of the Board issued a Decision and Order in this proceeding. Thereafter, the Respondent filed a petition for review in the United States Court of Appeals for the Seventh Circuit, and the General Counsel filed a cross-application for enforcement. On April 20, 2010, the court of appeals denied the Respondent's petition for review and granted the General Counsel's cross-application for enforcement. 602 F.3d 839. On June 17, 2010, the United States Supreme Court issued its decision in *New Process Steel, L.P. v. NLRB*, 130 S.Ct. 2635, holding that under Section 3(b) of the Act, in order to exercise the delegated authority of the Board, a delegee group of at least three members must

that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to adhere to, and repudiating, the collective-bargaining agreement with the Union to which it agreed to be bound on May 21, 2004.

On August 20, 2010, the Respondent filed a motion for reconsideration and reopening of the record.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Section 102.48(d)(1) of the Board's Rules and Regulations provides that a "party to a proceeding before the Board may, because of extraordinary circumstances, move for reconsideration, rehearing, or reopening of the record after the Board decision or order." As explained below, there has been no showing of extraordinary circumstances here.

In its motion, the Respondent asserts that (1) the Board "failed to consider the import" of *A & L Underground*, 302 NLRB 467, 468 (1991), and *NLRB v. Jerry Durham Drywall*, 974 F.2d 1000 (8th Cir. 1992); (2) the panel that decided

be maintained. Thereafter, on July 21, 2010, the court of appeals remanded this case to the Board "so that a properly constituted panel can resolve this dispute." After reviewing this case de novo, the Board affirmed the administrative law judge's rulings, findings, and conclusions and adopted the judge's recommended Order "to the extent and for the reasons stated in the decision

the case "did not have the opportunity to review the record" before the case was decided; and (3) Member Becker should be recused from this matter "because of his long history of representing the Laborers, who filed the original charge in this case."

We reject the Respondent's contentions. First, the Respondent's reliance on *A & L Underground* and *NLRB v. Jerry Durham Drywall* does not warrant reconsideration. In citing those cases, it appears that the Respondent is attempting to relitigate the Section 10(b) argument that the Board and the Seventh Circuit previously rejected as untimely. The Respondent asserts no new facts in support of its Section 10(b) argument, and the cases it now relies on were decided in 1991 and 1992. The Respondent does not rely on any newly discovered evidence, nor has it raised any arguments that were not previously available. Accordingly, there are no extraordinary circumstances warranting reconsideration of the Section 10(b) issue.

Second, we reject the Respondent's argument that the Board did not have sufficient opportunity to review the record before deciding the case. The Seventh Circuit remanded the case to the Board on July 21, 2010 and the

reported at 353 NLRB No. 84 (2009)," which the Board incorporated by reference.

three-member panel issued its decision on August 12, 2010. The panel had sufficient time to, and did fully, consider the issues involved in this case.³

Third, Member Becker declines to recuse himself from participating in this case. He notes that he has never represented Laborers' International Union of North America, State of Indiana District Council – the Charging Party in this case. See *Service Employees Local 121RN (Pomona Valley Hospital Medical Center)*, 355 NLRB No. 40, slip op. at 5-13 (2010).

Having duly considered the matter, the Board finds that the Respondent has not raised any extraordinary

³ The Respondent states in its motion that the Board "retried Sheehy before the same two persons who made the earlier decision plus one (1) more member" and that "it was very unlikely that those two (2) members would admit further error and reverse their earlier decision." To the extent that the Respondent is asserting that the three-member panel deciding the case should not have included the two members who participated in the initial decision, we reject that suggestion and find that the composition of the panel does not warrant reconsideration. The Board specifically addressed this contention in footnote 2 of its August 12, 2010 decision, where it explained that it was following its "general practice in cases remanded from the courts of appeals" and was acting "for reasons of administrative economy" in assigning the case to the members who participated in the original decision. The footnote further explained that "the Board members not assigned to the panel had the opportunity to participate in the adjudication of this case at any time up to the issuance of this decision." *Sheehy Enterprises*, supra, 355 NLRB No. 83, slip op. at 1.

circumstances warranting reconsideration of the Board's decision. See Section 102.48(d)(1) of the Board's Rules and Regulations. Accordingly,

IT IS ORDERED that the Respondent's Motion for Reconsideration and Reopening of the Record is denied.

Dated, Washington, D.C., September 29, 2010.

Wilma B. Liebman, Chairman

Craig Becker, Member

Mark Gaston Pearce, Member

(SEAL)

NATIONAL LABOR RELATIONS BOARD