

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 5**

DAYCON PRODUCTS COMPANY, INC.

and

Cases 5-CA-35687
5-CA-35738
5-CA-35965
5-CA-35994

DRIVERS, CHAUFFEURS AND HELPERS
LOCAL UNION NO. 639 AFFILIATED WITH
INTERNATIONAL BROTHERHOOD OF
TEAMSTERS

**COUNSEL FOR THE ACTING GENERAL COUNSEL'S
RESPONSE TO RESPONDENT'S MOTION TO REOPEN RECORD AND
INCLUDE 10(j) TRANSCRIPT, AND MOTION TO STRIKE**

Respondent Daycon Products Company, Inc. (“Daycon” or “Respondent”) seeks to have the National Labor Relations Board (“the Board”) order that the Record in the above-captioned matter be reopened to include the transcript from an evidentiary hearing held before the United States District Court for the District of Maryland, Southern Division, pertaining to the Acting General Counsel’s petition for injunctive relief pursuant to Section 10(j) of the National Labor Relations Act (“the Act”).¹ For the reasons identified below, there is no basis for granting Respondent’s motion, and it should be stricken from the record.

Respondent does not even come close to satisfying the elements necessary for the Board to order the reopening of the record. Under Rule 102.48(d)(1) of the Board’s Rules and Regulations, “[a] motion to reopen the record shall state briefly the additional evidence sought to

¹ The administrative trial in the above-captioned matter was held before ALJ Joel P. Biblowitz on November 17-22, 2010. After the administrative trial concluded, the Board authorized the AGC, on December 2, 2010, to seek injunctive relief under Section 10(j) of the Act. On December 17, 2010, the AGC filed a petition for injunctive relief in the United States District Court for the District of Maryland, Southern Division. On January 20, 2011, the AGC and Respondent appeared before Judge Deborah K. Chasonow and presented their arguments in a motions hearing. The parties again appeared before Judge Chasonow on February 10, 2011, each presenting evidence and argument in support of their respective positions. As of this date, Judge Chasonow had not yet ruled on the AGC’s petition.

be adduced, why it was not presented previously, and that, if adduced and credited, it would require a different result.” National Labor Relations Board Rules and Regulations, Sec. 102.48(d)(1). Such a reopening is only warranted in “extraordinary circumstances.” Id. In evaluating a motion under Sec. 102.48(d)(1) for a reopening of the record, the Board considers whether the evidence was newly discovered and previously unavailable. See Transit Management of Southeast Louisiana, Inc., 331 NLRB 248, n. 2 (2000); Novel Knit, Inc., 299 NLRB 58, n. 2 (1990). As the movant, Respondent bears the burden of establishing that the record should be reopened. Respondent has not met this burden.

Respondent’s motion is deficient due to its sheer scope. Respondent seeks to add the entire transcript from the February 10, 2011 evidentiary hearing and argument held before Judge Chasonow.² The purpose of this hearing was for the introduction of evidence not germane to the administrative proceeding—namely, the irreparable harm that would ensue if injunctive relief were not granted, and the balance of equities between the parties to the petition for injunctive relief. Predictably, some of the evidence developed at this hearing is not the least bit relevant regarding the question of whether Respondent has violated the Act.³ As such, Respondent’s motion to dump the entire transcript into the administrative record is questionable on its face.

Even presuming Respondent only wishes to introduce the hand-selected portions it references in its motion, Respondent still fails to meet its burden. At root, Respondent seeks to introduce, and rely upon, portions of the testimony of Mr. Douglas Webber, the Charging Party Union’s lead negotiator and business agent. Counsel for the Acting General Counsel readily concedes that Mr. Webber is the most significant witness in the present administrative

² Notably, Respondent does not seek to introduce the exhibits admitted into evidence at the February 10, 2011 evidentiary hearing held before Judge Chasonow. Respondent proffers no explanation as to why it wishes to introduce only the transcript.

³ For example, two employees testified about medical conditions that are going untreated because they have been prevented from returning to work and re-obtaining their health insurance through Respondent.

litigation—which is precisely why Respondent’s motion is so flawed. Mr. Webber testified extensively during the trial held before Administrative Law Judge Biblowitz. He was Counsel for the Acting General Counsel’s first, and chief, witness, and he was cross-examined extensively by Respondent’s counsel. In fact, Mr. Webber was later re-called as a witness—by Respondent—on the last day of the administrative trial. Yet, in its motion, Respondent does not even attempt to explain why it did not previously ask Mr. Webber the same questions it now seeks to shoehorn into the administrative record. In light of the fact that Respondent has not credibly explained why it failed to elicit this evidence from Mr. Webber, the Board should dismiss Respondent’s motion.

Moreover, Respondent’s only explanation for why this evidence was not introduced previously—that the Charging Party Union’s perception, in February 2011, of Respondent’s offer from February 2010 was not available to Respondent when the administrative trial took place—should be summarily rejected. For one, Respondent does not even address the obvious—that the evidence it seeks to introduce on the Charging Party Union’s perception in February 2011 is hopelessly irrelevant to the question of whether the Respondent committed unfair labor practices in April 2010. Second, Respondent proffers no explanation as to why it did not ask Mr. Webber what the Charging Party Union’s perception was when it had him under oath and on the witness stand in the administrative trial. Furthermore, Respondent’s explanation, if even *considered*, opens the possibility of the Board’s administrative proceedings always being re-opened: a witness’s perception of an issue after the administrative trial is *always* something that is not available to a party to the administrative litigation at the time of the trial. Under Respondent’s approach, hearings would always be re-opened so that a respondent could obtain

additional evidence from a witness, even if it had called that same witness during the administrative trial.

Respondent also fails to explain adequately how the evidence it seeks to introduce, if credited, demands a different result than that reached by Judge Biblowitz. Counsel for the Acting General Counsel echoes the point made by the Charging Party Union's counsel, that there is no material inconsistency between Mr. Webber's testimony in the administrative trial and his testimony in the evidentiary hearing. Furthermore, even if admitted into the administrative record, Webber's conception of the parties' respective bargaining postures on February 10, 2011 is not relevant to the keystone question for the Board: did Respondent meet its burden in the administrative trial of proving that it and the Charging Party Union were at impasse on April 23, 2010, when Respondent undisputedly and unilaterally changed employees' terms and conditions of employment. Respondent's strained efforts merely ignore the facts of what actually took place in the parties' bargaining—that Respondent aborted the bargaining process by sneaking out of a bargaining session without a word to the Charging Party Union or the federal mediator involved in the negotiations, and then declaring impasse by letter. If Mr. Webber's testimony from the evidentiary hearing before the United States District Court were introduced into the administrative record, it would not demand a conclusion that Respondent met its burden of proving the parties were at impasse on April 23, 2010.

Furthermore, the Board should reach the same conclusion regarding Respondent's laughable argument that the Charging Party Union did not make an unconditional offer for the employees to return to work. In the words of Judge Biblowitz, such an argument is "easily disposed of." ALJD, p. 17, ln. 4. Respondent presumably argues that the fact that Mr. Webber made the unconditional offer after learning that Counsel for the Acting General Counsel would

be issuing a complaint against Respondent's unlawful unilateral change demands that the Board reverse Judge Biblowitz's determination that Mr. Webber's offer was unconditional. Yet the evidence from the evidentiary hearing demands no such result. Rather, the evidence developed at the evidentiary hearing *supports* Judge Biblowitz's determination. Respondent concedes that it has treated Mr. Webber's offer as unconditional, and some employees have been recalled to work for Respondent. Clearly, the Charging Party Union has imposed no condition on these employees returning to work. Thus, the Board should reject Respondent's argument.

In sum, Respondent's motion fails in all respects. Respondent seeks to dump into the administrative record an entire transcript without articulating why it is necessary for the Board to have the entire transcript—virtually all of which is irrelevant to the questions posed to the Board. Even for the portion of this transcript that is *tangentially* relevant (Mr. Webber's testimony), Respondent proffers no credible reason why such evidence was not introduced in the administrative trial, especially considering the fact that Respondent not only cross-examined Mr. Webber at length about the parties' bargaining, but then re-called him as a witness and questioned him again. Furthermore, Respondent fails to explain adequately how the evidence it seeks to introduce would, if credited, demand a reversal of Judge Biblowitz's determinations. Thus, the Board should deny Respondent's motion. Additionally, the Board should also strike Respondent's motion and the accompanying exhibits from the record. See Innovative Communications Corp., 333 NLRB 665, n. 2 (2001)(granting motion to strike transcript from 10(j) proceeding, which was attached to respondent's brief). According to Sec. 102.45(b), the record of this case includes Respondent's motion. National Labor Relations Board Rules and Regulations, Sec. 102.45(b). If the Board denies Respondent's motion without striking it from the record, Respondent will still have accomplished its objective of having the entire transcript of

CERTIFICATE OF SERVICE

I hereby certify that copies of the Counsel for the Acting General Counsel's Response to Respondent's Motion to Preclude and/or for Protection of Due Process Rights were electronically filed and served by e-mail, on the 24th day of March 2011, on the following parties:

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