

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

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IN THE MATTER OF: Case No.: 22-CA-29242

CENTURY BUFFET AND RESTAURANT,
Respondent,

And

318 RESTAURANT WORKER'S UNION,
Charging Party.

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RESPONDENT'S MOTION TO REOPEN RECORD

The Respondent respectfully requests the National Labor Relations Board (the "Board") to reopen the record to receive additional evidence on the grounds that Respondent seeks to adduce evidence that is new, could not have been introduced at hearing, is material and highly probative evidence that seriously impairs the credibility of a key witness, and would require a different result if addressed and credited, and on the basis of the following:

Background

1. A hearing on the alleged unfair labor practice in the above-captioned matter was held before Administrative Law Judge ("ALJ") Steven Davis on August 3 and 4, November 18 and December 9, 2010.

2. The ALJ closed the record on December 9, 2010. Hearing Transcript ("Tr.") page 478 lines 5-8.

3. On May 2, 2011, the ALJ filed its Decision and transferred this matter to and continued before the Board.

Respondent's Motion To Reopen Record To Receive Additional Evidence

4. The Board Rules and Regulations (“Board Rules”) allow a party to a proceeding before the Board to “move for reconsideration, rehearing, or reopening of the record after the board decision or order.” Section 102.48(d). The same section of the Board Rules provides that “[a] motion to reopen the record shall state briefly the additional evidence to be adduced, why it was not presented previously, and that, if addressed and credited, it would require a different result.”

5. The Board has generally granted motions to reopen where new evidence surfaces after the hearing that significantly affects the credibility assessment of witnesses. *See Sunshine Piping, Inc. v. United Assoc. of Journeymen & Apprentices*, 351 N.L.R.B. 1371, 1409 (N.L.R.B. 2007) (case reopened because new evidence suggests that respondent knowingly altered its records in anticipation of litigation and in response to charges filed under the National Labor Relations Act); *Anderson v. VA*, 2010 MSPB LEXIS 5007 (M.S.P.B. Aug. 25, 2010) (appellant's motion to reopen and supplement the record granted because new evidence surfaces that called into question the credibility assessment of a witness.)

6. Here, Respondent is moving to adduce: 1) Certificate of Incorporation for 88 Auto Security & Sound Inc. (“88 Auto”), which shows Ji Xian Liang (“Jessica”) as the designated agent of the corporation and the person who initially filed the Certificate of Incorporation. Certificate of Incorporation annexed hereto as **Exhibit A**; 2) 88 Auto’s Certificate of Change, which shows that Jessica has been the President of the corporation.

Certificate of Change annexed hereto as **Exhibit B**; 3) Jessica's W-2 forms from 2007 to 2009, which shows that, in addition to working at Respondent restaurant, Jessica was employed by Baby Budda NYC Inc. and New Baby Budda Inc. during the same period. W-2 forms annexed hereto as **Exhibit C**; 4) document showing that Jessica received New York State unemployment benefits during 2009 despite being a business owner. Unemployment insurance record annexed hereto as **Exhibit D**; and 5) a handwritten document by the Union representative Tony Tsai ("Tony"), in which Tony requested that employees work less hours. Document annexed hereto as **Exhibit E**.

7. All of the evidence herein sought adduced are new evidence that only came to light after the close of the hearing.

8. The ALJ closed the record on December 9, 2010. Tr. 478 L 5-8.

9. On or about December 9, 2010, Respondent received, among others, Jessica's tax returns and W-2 forms for the years 2007 to 2009, along with documents indicating her New York State Unemployment Insurance benefit payments.

10. On May 4, 2011, Respondent received corporate documents of 88 Auto from the New York Department of State.

11. In or about May, 2011, Respondent discovered a document in Union representative Tony's handwriting that was written during a meeting June 2009, in which Tony requested that employees work less hours.

12. On June 20, 2011, Respondent received, among others, Jessica's 2006 tax return and 88 Auto's 2009 tax return.

13. On July 15, 2011, Respondent received, among others, 88 Auto's 2007 and 2008 tax returns, and Jessica's 2008 W-2 forms.

14. Jessica's tax documents were provided to the Respondents pursuant to an Order dated October 27, 2010 of the Honorable Michael A. Shipp of the United States District Court, District of New Jersey. Order of Judge Ship attached hereto as **Exhibit F**. Even though the Judge ordered the production of tax documents in October of 2010, the employees purposely delayed the production thereof until July of 2011.

15. Like the evidence sought adduced in Sunshine Piping, Inc., these evidence here seriously impairs the credibility of a key witness. 351 N.L.R.B. at 1409. As evidence already in the record shows, Jessica, in her testimony in the federal action, denied knowledge that her husband operated a business. GC10 P205 L13 to P206 L20. Jessica even denied outright that her husband owned an auto shop. GC10 P209 L11 to L21.

16. The Department of State records, specifically 88 Auto's Certificate of Incorporation and Certificate of Change, which came to light only after the close of the hearing, directly contradicts Jessica's testimony cited above. Contrary to her sworn statements, Jessica was in fact the President of 88 Auto and was the person who incorporated the entity on November 30, 2007. *See Exhibit A and B*.

17. The newly discovered corporate records of 88 Auto unambiguously prove that Jessica knowingly gave false testimony on the record and to the Court. Such bold-faced lies on its own should be sufficient to justify the Board reopening the record. Such perjurious conduct as demonstrated by evidence here would require a different result in Jessica's credibility assessment, as it completely destroys Jessica's credibility as a key witness for the Charging Party.

18. Jessica's W-2 forms during the relevant period also raise serious doubts on the credibility of her testimony. Jessica testified that she was employed by Respondent twelve to thirteen hours per day for six days a week. Tr. P224 L23-25; P225 L1-2. However, her newly discovered W-2 forms indicate that Jessica in fact held other jobs with significant income during that same time period. *See Exhibit C.* Her 2008 W-2 forms show that Jessica earned more than \$20,000 from her employment with the restaurants Baby Budda NYC Inc. and New Baby Budda Inc. during 2007. **Id.**

19. First, Jessica has failed to disclose her employment with these two restaurants during the hearings and other proceedings. Her failure to disclose her additional employments led the General Counsel to believe that she was not employed after leaving Respondent restaurant. Tr. P474 L18-20.

20. Second, and most significantly, if Jessica indeed worked twelve to thirteen hours a day for six days a week at the Respondent restaurant as she had testified, she could not possibly have had the time to also work for Baby Budda Inc. and New Baby Budda Inc. and earn \$20,000 during the same period. Therefore, the W-2 forms create significant inconsistencies in Jessica's testimony and seriously undermines ALJ's credibility assessment of her. This evidence is newly discovered and is a critical piece of the puzzle, without which the Board's credibility assessment regarding Jessica's testimony would be incomplete. As such, the Board should reopen the record to allow the addition of this evidence.

21. The New York State Department of Labor document, which was discovered after the close of the record, shows that Jessica had applied for and received unemployment insurance benefits during 2009. *See Exhibit D.* As 88 Auto's corporate

documents show, Jessica was the owner and president of the business during the same time period. **Id.** As the owner of a small business, Jessica is not entitled to receive unemployment insurance benefits under New York Law. Therefore, this evidence further undermines Jessica's credibility, as it proves that she lied about her involvement with 88 Auto not only in her sworn testimony before the Court, but also in her application for state unemployment benefits. As such, the Board should allow the evidence to be adduced in order to properly make its requisite credibility assessment of Jessica.

22. The document bearing Tony's handwriting should be adduced because it corroborates the testimony of Ko Fung "Peter" Yeung ("Peter"), and directly contradicts the ALJ's finding on the same point. Peter testified that the decision to change employee's hours was prompted upon request by Tony during a meeting in June of 2009. Tr. P340. However, the ALJ, in its May 2, 2011 decision, found that "it is very doubtful that Tony would ask that the employees work fewer hours, thereby making less money." ALJ Decision P20 L50-51.

23. The document annexed as Exhibit E, if addressed and credited, requires an entirely different result than that of the ALJ's finding. The handwritten document herein sought adduced actually corroborates Peter's testimony that Tony did in fact request the change in employee work hours. The document is written in Tony's handwriting and shows the hours the Union was requesting on behalf of the employees. *See Exhibit E.* The document is clear on its face that Tony requested the worker's hours be change to about 8 hours per day, from 11 AM to 8:30 PM, with 1 ½ hours of break time in between. **Id.** As such, the document corroborates Peter's testimony and shows that the ALJ's finding was not based on evidence but purely upon personal conjecture

and speculation. Had this evidence been before the ALJ, the ALJ surely could not have found it “very doubtful that Tony would ask that the employees work fewer hours, ...”. ALJ Decision P20 L50-51. Accordingly, the Board should allow this evidence to be adduced because it requires a different result if addressed and credited.

24. Given that the evidence sought to be adduced are new, could not have been introduced at hearing, are material and highly probative as to the credibility of key witnesses, and would require a different result, Respondent respectfully requests that the Board enter an Order to reopen the record to receive additional evidence.

WHEREFORE, Respondent respectfully requests that the Board grant Respondent’s motion and enter an Order to reopen the record to receive additional evidence attached hereto.

Dated: September 23, 2011
New York, New York

Respectfully submitted,

Law Office of Benjamin B. Xue, P.C.
Counsel for the Respondent

/s/ Benjamin B. Xue
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