

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

MILUM TEXTILE SERVICES CO.

and

**Cases 28-CA-20898
28-CA-20906
28-CA-20973
28-CA-21050
28-CA-21203**

UNITE HERE!

**ACTING GENERAL COUNSEL'S OPPOSITION
TO RESPONDENT'S MOTION TO REOPEN THE RECORD
AND MOTION TO STRIKE AFFIDAVIT OF CRAIG MILUM**

I. BACKGROUND

On December 30, 2011, the Board issued its decision in this matter based upon charges filed by UNITE HERE! (Union) alleging that Milum Textile Services, Inc. (Respondent) engaged in a variety of unfair labor practices during the Union's organizing drive.¹ See *Milum Textile Services, Inc.*, 357 NLRB No. 169 (2011). In its decision, the Board found that Respondent violated the Act by: promising and/or granting benefits to discourage employees from engaging in union activity; seeking a temporary restraining order (TRO) against the Union in federal court that lacked a reasonable basis and was filed with a retaliatory motive; prohibiting employees from wearing union buttons while working; threatening to reduce employees' wages or benefits; interrogating employees; suspending employees; and discharging two leading union activists. *Id.* slip op. at 10. As part of its remedy, the Board ordered Respondent to: rescind its illegal rules; reimburse the Union for all legal and other expenses incurred in the defense of the TRO; and reinstate the discharged workers. The Board further

¹ While dated December 30, 2011, the decision was served upon the parties on January 5, 2012.

issued a bargaining order pursuant to *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), requiring Respondent to meet and bargain with the Union as the exclusive bargaining representative of its production employees.²

During the underlying unfair labor practice hearing, and before the Board, Respondent argued that a *Gissel* bargaining order was inappropriate due to employee turnover and the passage of time since the commission of the unfair labor practices in 2006. At the hearing, Respondent was given the opportunity to present admissible documentary evidence to support this claim, but did not do so.³ Instead, Respondent relied upon the testimony of its President and CEO Craig Milum (Milum), who testified that Respondent's employee turnover rate in 2006 was 400%. (Tr. 1999) Furthermore, Milum testified that, at the time of the hearing, about one year after the unfair labor practices occurred, 30% of the original Union petitioners were still employed with Respondent. (Tr. 2190-91) Respondent relied upon Milum's testimony to argue in its brief to the Board that a *Gissel* bargaining order was unwarranted. See Resp't Br. in Opp'n to GC's Exceptions, dated 1/16/08, at 47-49 (Attached as Exhibit A).

II. BOARD DECISION

In its decision, the Board found that a *Gissel* bargaining order was warranted because of the "seriousness of the violations, the extent of the dissemination among employees, and the position of the individuals committing the unfair labor practices." *Milum Textile Services, Inc.*, supra, slip op. at 9. The Board specifically rejected Respondent's argument that the passage of time since the violations precluded a bargaining order, noting that "the Board's established practice is to evaluate the appropriateness of a *Gissel* bargaining order as of the time that the

² The Board also remanded a portion of the case back to the Administrative Law Judge (ALJ) to determine whether Respondent violated Section 8(a)(1) of the Act by filing the federal court lawsuit, upon which the TRO was based, and maintaining the suit after the court denied the TRO. In its current motion, Respondent does not seek to introduce new evidence regarding any of the remanded issues.

³ One of Respondent's exhibits, showing the ethic breakdown of its workforce, was admitted into evidence. (R. 40)

unfair labor practices occurred; changed circumstances are generally not considered.” *Id.* slip op. at 10, citing *Evergreen America Corp.*, 348 NLRB 178 181-82 (2006). On January 30, 2012, Respondent filed a Petition for Review in the United States Court of Appeals for the District of Columbia (DC Circuit) in Case 12-1062, seeking review of the Board’s Decision and Order. However, the record has not been filed with the DC Circuit. *George Banta Co., Inc., v. NLRB*, 686 F.2d 10, 16 (DC. Cir. 1982) (upon the filing of the record, jurisdiction is exclusively vested in the Circuit Court).

III. RESPONDENT’S MOTION TO REOPEN THE RECORD

On February 2, 2012, Respondent filed with the Board a Motion to Reopen the Record (Motion) and attached an Affidavit signed by Milum to support its Motion (Milum Affidavit). Citing Section 102.48(d)(1) of the Board’s Rules and Regulations, Respondent asks that the Board reopen the record to allow Respondent to introduce “previously unavailable evidence concerning the passage of time . . . [and] to supplement and update evidence previously offered by it at the hearing in this matter relating to employee turnover since March 4, 2006.” Resp’t Mot. at p.1.

Regarding the passage of time, it is unclear from Respondent’s Motion what evidence it seeks to introduce; the dates of the unfair labor practices and the Board’s decision are otherwise obvious. Regarding employee turnover, Respondent claims that the record should be reopened to introduce “supplement[al] and update[ed]” evidence of employee turnover “because the nature of that evidence was continually evolving.” *Id.* at 3. Finally, Respondent asks to introduce evidence regarding whether additional unfair labor practice charges have been filed against it during the intervening time period. *Id.* at 4.

IV. ARGUMENTS RELATED TO RESPONDENT'S MOTION

A. Respondent's Motion is Untimely

Section 102.48 of the Board's Rules and Regulations read, in part, as follows:

(d)(1) 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. . . . 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.

(2) Any motion pursuant to this section shall be filed within 28 days, . . . except that a motion for leave to adduce additional evidence shall be filed promptly on discovery of such evidence.

Here, Respondent waited over four years after the ALJ's decision to seek to reopen the record.

As such, Respondent's Motion is untimely and should be denied; "Respondent has failed to state why it neglected to offer the evidence until after the Board issued its decision." *Electro-Voice, Inc.*, 321 NLRB 444, 444 (1996) Respondent's claim that this evidence was "evolving" is belied by Milum's testimony at trial that employee turnover during 2006 was 400%, and one year after the unfair labor practices occurred, only 30% of the original Union supporters remained working for Respondent. Similarly, at hearing, Respondent's counsel referred to the high rate of turnover in the linen industry in general, and at Respondent's workplace in particular, on repeated occasions. (Tr. 735, 2017, 2023) Clearly, by its own admissions at trial, any alleged turnover at Respondent was not "evolving." "Respondent was in possession of this evidence while this matter was pending with the Board on exceptions," and has offered no explanation whatsoever for its failure to raise any mitigating circumstances why this motion was not made until more than four years after the hearing closed. *Electro-Voice*, 321 NLRB at 444. Therefore, Respondent's Motion is untimely, and should be denied. *Id.*

Respondent's reliance on the Circuit Court's decision in *Coburn Health Center, Inc., v. NLRB*, 437 F.3d 1266 (DC Cir. 2006), is unavailing, and does not privilege its untimely filing.⁴ In *Coburn Health Center*, unlike here, the employer never presented evidence of changed circumstances to the Board on exceptions. 335 NLRB at 1397, 1400 (2001). The Circuit Court ordered the Board to reopen the record, finding that the employer's "changed circumstances . . . were gradual, incremental, and cumulative," and that the employer did not present evidence of changed circumstances when it filed its exceptions with the Board because "those changes took place over the ensuing three years" after the exceptions were filed. 437 F.3d at 1272. Here, unlike the facts in *Coburn*, if Milum's sworn testimony is true, Respondent was in possession of evidence of employee turnover at the time of the hearing, and presented whatever admissible evidence it chose to introduce at trial, and to the Board on exceptions. As Respondent asserted at trial that employee turnover in 2006 was 400%, any alleged turnover that Respondent seeks to introduce was not "gradual" or "incremental." Instead, Respondent is attempting to introduce evidence on issues that was available at hearing, and that Respondent attempted to, but could not, successfully introduce into the record. (Tr. 2085-2090; Resp't Rejected Ex. 67) The Board should not countenance such efforts, and Respondent's Motion should be dismissed. *Metal Blast, Inc. v. NLRB*, 324 F.2d 602, 604 (6th Cir. 1963) (Board did not abuse its discretion by denying motion to reopen the record where the evidence could have been introduced at hearing).

⁴ The fact that Respondent has filed a Petition for Review in the DC Circuit is of no significance. Jurisdiction only vests exclusively with the Circuit Court after the record has been filed with the court, *George Banta Co., supra*, 686 F.2d at 16, which has not occurred here. See Docket, Case 12-1062. Accordingly, the Board, and not the DC Circuit, retains jurisdiction; when ruling on this Motion the Board should follow its consistent policy of adhering to its established precedent "until the Supreme Court of the United States has ruled otherwise." *Pathmark Stores, Inc.*, 342 NLRB 378, 378 n. 1 (2004).

B. The Evidence Respondent Seeks to Introduce Would not Result in the Board Reaching a Different Result.

Because the evidence Respondent seeks to introduce on the passage of time, employee turnover, and lack of intervening unfair labor practices, would not result in the Board reaching a different result, the Board should refrain from reopening the record. See *Action Auto Stores, Inc.*, 298 NLRB 875, 875 (1990), citing Board's Rules & Regulations Section 102.48(d)(1). In determining whether to issue a bargaining order, "the Board has specifically held that 'the validity of a bargaining order depends on an evaluation of the situation as of the time the unfair labor practices were committed.'" Id. quoting *Highland Plastics*, 256 NLRB 146, 147 (1981). Regarding employee turnover, the Board traditionally does not consider turnover in determining whether a bargaining order is appropriate. Id.; *Garvey Marine, Inc.*, 328 NLRB 991, 995-96 (1999). "To delete a *Gissel* bargaining order on this basis would reward, rather than deter, an employer who engaged in unlawful conduct during an organizing campaign." *Electro-Voice*, 321 NLRB at 445. As such, additional evidence concerning employee turnover is irrelevant.

Regarding passage of time, the Board already considered, and dismissed, this claim in the underlying decision. *Milum Textile Services Inc.*, 357 NLRB No. 169 slip op. at 10. Respondent has provided no reason as to why the Board should change its original, and correct, ruling. Finally, in assessing the appropriateness of a bargaining order, the Board does not consider whether the employer has engaged in subsequent unfair labor practices. *Electro-Voice*, 321 NLRB at 445. Therefore, allowing Respondent to "reopen the already extensive record at this late date would only permit additional employee turnover, and would put a premium upon continued litigation by the employer." *Action Auto Stores, Inc.*, 298 NLRB at 876 (internal quotations omitted).

V. MOTION TO STRIKE MILUM AFFIDAVIT

Counsel for the Acting General Counsel moves to strike the Milum Affidavit, as the introduction of affidavits are not provided for in the Board's rules with respect to motions to reopen the record. Moreover, the affidavit should be stricken as it seeks to introduce hearsay evidence, and violates the best evidence rule. See Fed. R. Evid. 801; 1002.

A. The Board's Rules Do Not Provide for the Submission of Affidavits and Counter Affidavits on Motions to Reopen the Record

Section 102.48 (d)(1) of the Board's Rules and Regulations read, in part, as follows "[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." Wisely, the rules do not contemplate, or provide for, the introduction of affidavits or counter affidavits by the parties. Allowing such a practice would turn a motion to reopen the record into a discovery proceeding; the Board's rules do not provide for discovery. Compare *Kiro, Inc.*, 311 NLRB 745, 746, 746 n. 4 (1993) (in summary judgment proceeding before the Board the government is not required to set forth facts through affidavits, as the Board has never allowed prehearing discovery). Accordingly, since the Board's rules do not provide for the submission of affidavits on a motion to reopen the record, the Milum affidavit must be stricken in its entirety.

B. Portions of the Milum Affidavit Must Be Stricken as It Contains Inadmissible Hearsay.

Hearsay "is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Fed. R. Evid. 801(c). Hearsay statements in affidavits are inadmissible, unless such statements fall within an

established hearsay exception. *Chao v. Westside Drywall, Inc.*, 709 F.Supp.2d 1037, 1048 (D Or. 2010).

Here, the Acting General Counsel moves to strike paragraphs 3 and 4 of the Milum affidavit as hearsay. In both paragraphs, Milum sets forth various statements regarding the make-up of Respondent's workforce, in relation to the employees who signed the Union's authorization petition in March 2006. Because Respondent offers these statements for the truth of the matters asserted therein, and no hearsay exception applies, both paragraphs must be stricken.

Respondent may attempt to argue that Milum's statements are admissible because they fall under the business records exception. However, such an argument is baseless. Federal Rule of Evidence 803(6) exempts from the definition of hearsay statements contained in business documents made at or near the time of an event, recorded by someone with personal knowledge of the event, kept in the regular course of business, and made by someone under a business duty to record the matter. To admit evidence under the business records exception, a "witness must establish the regular practices and procedures surrounding the creation of records, the very elements that are necessary for a finding of trustworthiness." *Enron Corp. Litigation*, 2003 WL 23316646, 2 (SD Tex. 2003) (court strikes affidavit and attached documents that do not show personal knowledge or meet the business records exception). An affidavit which specifically states that the matters contained therein are based upon the affiants review of business records which are kept in the ordinary course of business, under a business duty to record information accurately, at or near the time of the events recorded, is admissible under the business records exception. *ABN Amro Mortg. Group, Inc., v. Maximum Mortg., Inc.*, 2006 WL 2598034, 5 (ND Ind. 2006) (court admits affidavit based upon business records exception). *St. Paul Fire &*

Marine Ins. Co. v. Schilli Transp. Svcs., 2011 WL 1743480, 5 (ND Ind. 2011) (same) summary judgment ruling reversed by 2012 WL 470261 (7th Cir. 2012).

Here, Milum's affidavit does not state that he reviewed records made at or near the time of any individual event, recorded by some with knowledge of the event, or that the records he reviewed were kept in the regular course of business. Instead, he simply states that he reviewed nebulous "payroll records." As such, the Milum Affidavit fails to meet the business records exception, and paragraphs 3 and 4 must be stricken.

C. The Best Evidence Rule Precludes Admission of the Milum Affidavit.

Along with the hearsay issues outlined above, paragraphs 3 and 4 of the Milum Affidavit must be stricken because the statements contained therein purport to state the contents of written documents, which is precluded by the best evidence rule. The best evidence rule provides, in part, that "[t]o prove the content of a writing, recording, or photograph, the original writing, recording or photograph is required." Fed. R. Evid. 1002. A court will strike statements in an affidavit that attempt to prove the content of a document "without attaching a verified copy of the writing or explaining why such a copy cannot be provided." *Marshall v. IBEW Local 701*, 2008 WL 4389868, 5 (ND Ill. 2008) (court strikes portions of a declaration because it attempts to prove the content of a document); *Kesey, LLC v. Francis*, 2009 WL 909530, 34-36 (D Or. 2009) (court strikes part of affidavit summarizing contents of an article, as the article itself is the best evidence); Cf. *Net 2 Press, Inc., v. 58 Dix Avenue Corp.*, 266 F.Supp.2d 146, 156 (D Me. 2003) (court admits statements in declaration because the declarant is not attempting to "prove the content" of any documents).

Here, in paragraphs 3 and 4 of the Milum Affidavit, Milum summarizes the contents of "payroll" documents, and attempts to prove the content of those documents through his affidavit,

without attaching a verified copy of the documents or explaining why such a copy cannot be provided. Accordingly, both paragraphs 3 and 4 of the Milum Affidavit violate Fed. R. Evid. 1002 and should be stricken.⁵

VI. CONCLUSION

Based upon the foregoing, the Board should deny Respondent's Motion to Reopen the Record. Respondent's Motion is untimely, and the evidence Respondent seeks to admit, if admitted, would not require the Board to change its results. Also, the Board should strike the Affidavit of Craig Milum, attached to Respondent's Motion. The submission of affidavits are not allowed under the Board's Rules. Moreover, portions of the Milum Affidavit contain inadmissible hearsay, violate the best evidence rule, and set forth matters that are summaries of voluminous documents. Accordingly, Counsel for the Acting General Counsel asks that the Board deny Respondent's Motion, and strike the Milum Affidavit.

Dated at Phoenix, Arizona, this 16th day of February 2012.

Respectfully submitted,

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⁵ Paragraphs 3 and 4 of the Milum Affidavit also summarize the information contained in the documents Milum claims to have reviewed. As such, both paragraphs constitute summaries of voluminous documents, and are inadmissible as Respondent never made these documents available to the General Counsel or the Union for examination. See Fed. R. Evid. 1006.

CERTIFICATE OF SERVICE

I hereby certify that a copy of ACTING GENERAL COUNSEL'S OPPOSITION TO RESPONDENT'S MOTION TO REOPEN THE RECORD AND MOTION TO STRIKE AFFIDAVIT OF CRAIG MILUM in MILUM TEXTILE SERVICES, INC., Cases **28-CA-20898** et al., was served by E-Gov, E-Filing, E-Mail, on this 16th day of February 2012, on the following:

Via E-Gov, E-Filing:

Lester A. Heltzer, Executive Secretary
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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

In the Matter of:

MILUM TEXTILE SERVICES COMPANY,

Respondent,

And

UNITE HERE!

Charging Party.

Case Numbers:

28-CA-20898

28-CA-20896

28-CA-20973

28-CA-21050

28-CA-21203

**BRIEF IN SUPPORT OF
RESPONDENT'S RESPONSE TO THE EXCEPTIONS TO THE
ADMINISTRATIVE LAW JUDGE'S DECISION
FILED BY THE GENERAL COUNSEL**

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	No. <u> A </u>

notices to remain posted. The bargaining order issued by the ALJ was upheld by the Board, but the Ninth Circuit overturned the bargaining order stating that the “Board's traditional cease-and-desist and other affirmative remedies including posting of a notice will sufficiently address [Tower's] misconduct to ensure that a fair rerun election can be held, and that these remedies and the holding of a rerun election will satisfactorily protect and restore employees' Section 7 rights.”

Further, in *National Labor Relations Board v. Chatfield-Anderson Co.*, 606 F.2d 266 (9th Cir. 1979), the union obtained authorization cards and petitioned for an election. During the course of the election campaign the company interrogated employees about their union activities, threatened economic reprisals including closing the plant, imposed stricter work rules, withheld contemplated raises and bonuses, promised economic benefits, threatened to prolong negotiations with the union while withholding raises and bonuses, and announced an open-door policy to improve communications between employees and management. The union lost the election. The Board confirmed the Administrative Law Judge's imposition of a *Gissel* bargaining order, but the Ninth Circuit overturned the bargaining order stating that the company's behavior was “hardly irreparable in the sense required to justify a bargaining order.”

Thus, even if the allegations set forth in the complaint were deemed true, a *Gissel* bargaining order is not an appropriate remedy because traditional remedies could create an atmosphere in which a free and fair election could be held.

2. **A *Gissel* Bargaining Order Is Not Appropriate Due To The High Rate Of Employee Turnover and Demographic Changes In The Workforce.**

The next issue that must be addressed in determining the appropriateness of a *Gissel* is whether a bargaining order would best serve the interests of the “affected employees” and protect their freedom of choice. *Western Drug, supra*. In determining the best interests of the affected employees, employee **turnover** must be considered as well as whether there was **unusual delay**.

[Id] The Board is not free to disregard employee turnover when issuing a bargaining order." *Douglas Foods Corp. v. NLRB*, 251 F.3d 1056 (D.C. Cir. 2001). In the instant case as in *Western Drug, supra*, before this case was tried,⁶⁵ the employee turnover was dramatic and created a change in circumstances.⁶⁶ It is undisputed that in 2006 the Respondent had a turnover rate of 400%. [Tr 1999] By July 2006, only 20 of the original 43 individuals whose names appear on the Union's "petition" are still employed at Milum. [Tr 2191] At the time of the hearing, only thirteen (13) of the original forty-three (43) individuals whose names appear on the Union's "petition" were still employed at Milum. [Tr 2190] Thus, the workforce had substantially changed. In addition to the rapid turnover in the workforce at Milum, the ethnic demographics of the workforce have changed substantially between 9 March 2005 and 9 March 2007.⁶⁷ In March 2006, the employees spoke English, Spanish, Burmese, Somali and Arab. [Tr 2023–2024; R 40] As a result in the change in demographics, the number of languages spoken by the employees in March 2007 included English, Spanish, Burmese, Javanese (phonetic), Arab, Somali, and Russian. [Tr 2024] With the tremendous turnover rate and the ever changing demographics of the work force at Milum's operation, there is no evidence that Milum's alleged acts, if proven, would "continue to repress employee sentiment long after most, or even all, original participants have departed." *Western Drug, supra*. A bargaining order is not appropriate in this case.

3. **A Gissel Bargaining Order Is Not Appropriate Due To The Time Period Between the Alleged Unfair Labor Practices And An Election, If Ordered.**

Time is a factor that should be considered by the Board -- in addition to employee turnover -- in determining the appropriateness of a *Gissel* bargaining order. As the Court stated

⁶⁵ There is not an allegation that Milum did anything that created the turnover.

⁶⁶ Even the Union organizers recognized that there was a high turnover rate. [Tr 985]

⁶⁷ On 9 March 2005, the workforce was 8% Native American, 85% Hispanic, and 8% Middle Eastern. By 9 March 2006, the complexion of the workforce had changed to 4% Anglo, 6% Native American, 59% Hispanic, 11% Asian, and 20% Middle Eastern. The demographics continued to change at Milum, and on 9 March 2007, the workforce was comprised of 1% Anglo, 3% Native American, 34% Hispanic, 31% Asian, 29% Middle Eastern, and 1% Russian. [R 40]

in *Peoples Gas System, Inc. v. NLRB*, 629 F.2d 35 (D.C. Cir. 1980), “With the passage of time, any coercive effects of an unfair labor practice may dissipate, employee turnover may result in a work force with no interest in the Union, and a fair election might be held which accurately reflects uncoerced employee wishes as of the present time.” In this case any delay is the direct result of the Union’s inaction: the Union obtained signatures on a petition and then did absolutely nothing. If the Union obtained the signatures of a majority of the employees on 4 March 2006 as it claims, then it was free to go to the NLRB and petition for an election. The fact that the Union did not do that led to a situation where over a year has passed since that date. The record in this case is clear that the only unfair labor practice that is alleged to have occurred even near 4 March 2006 was the one that involved the alleged statements made by Craig Milum at the work stoppage, and any impact that these alleged statements might have had on an election is *de minimus* at best. This is another reason militating against a bargaining order, and since the Union is responsible for any delay, it cannot be said that Milum is benefiting from its behavior if any of the allegations are proven.

4. **There Is No Evidence That The Employees Have Been Impacted By The Alleged Conduct Of Milum.**

As set forth above, this case involves a handful of employees out of a workforce of eighty (80) employees, and the General Counsel did not introduce evidence to support a finding that the employees generally were impacted by the alleged unfair labor practices other than the opinions of the union organizers. The case of *Cintas Corporation*, 4-CA-34160; JD-65-06; Ira Sandron; 9/20/06, involved a situation where (aside from the incident involving the union fliers) only five production employees out of approximately ninety were “subjected to” unfair labor practices. The ALJ held that the unfair labor practices did not, therefore, “pervade” the unit. As a result the unfair labor practices are not so “numerous, pervasive, and outrageous” as to require the imposition of extraordinary remedies, and none were granted. Thus, the General Counsel has not

presented sufficient evidence to support a finding that even if the alleged unfair practices were upheld, that a fair election could not be conducted. Based upon the foregoing, even if all of the alleged unfair labor practices were upheld, a *Gissel* bargaining is unwarranted and inappropriate. The General Counsel has failed to show that in that event a fair election could not be conducted in conjunction with traditional remedies.

III. Conclusion

This was a hard-fought case at the hearing and the initial brief level. The ALJ Parke reviewed the transcript of the hearing, applied the law, and rendered her decision. As set forth herein, the ALJ's findings were consistent with the facts and the law, and should be upheld by the Board.

Respectfully submitted this 16th day of January 2008.

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