

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
WASHINGTON, D.C.**

MILUM TEXTILE SERVICES CO.,  
and  
UNITE HERE!

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

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

NOW COMES Respondent, Milum Textile Services Co. (hereinafter “Respondent”) and replies to the Opposition to Respondent’s Motion to Reopen the Record and opposes the Motion to Strike the “Affidavit” of Craig Milum.

**A. Respondent’s Motion to Reopen the Record is Timely Filed.**

The Respondent’s Motion to Reopen the Record to include evidence regarding turnover and changed circumstances was timely filed immediately after the issue arose regarding the appropriateness of the imposition of a *Gissel* bargaining order. The filing of such a motion prior to the actual imposition of a *Gissel* bargaining order in this case would have been irrelevant to the proceedings and without merit.

This case was heard in March and April of 2007 before Administrative Law Judge Joseph Gontram and the Respondent offered testimony regarding the turnover rate at the Respondent’s operation and the passage of time. Both the Respondent and the General Counsel filed post-hearing briefs, and Respondent addressed the issue of the impact of turnover and passage of time

on the appropriateness of the imposition of a *Gissel* bargaining order. The Administrative Law Judge Lana H. Parke issued her ruling in this case on October 5, 2007. In the decision Administrative Law Judge Parke specifically found that the imposition of a *Gissel* bargaining order was not appropriate under the facts and circumstances of the case. Exceptions and Cross-Exceptions to the Administrative Law Judge's decision were filed by the Respondent and the General Counsel, and the Respondent again addressed the issue of the appropriateness of the imposition of a *Gissel* bargaining order in light of turnover and the passage of time. It was not until December 30, 2011 that the Board issued its Decision and Order in this case in which the Board reversed Administrative Law Judge Parke and imposed a *Gissel* bargaining order.

Based upon the facts, the General Counsel's contention that the Respondent's Motion to Reopen the Record is not timely is without merit. The General Counsel totally ignores the fact that the Respondent had absolutely no reason to move to reopen the record to include evidence of turnover and changed circumstances until there was there was an issue outstanding that would require such evidence. It would literally have been absurd for the Respondent to have moved to reopen the record prior to the imposition of a *Gissel* bargaining order by the Board. Furthermore, the General Counsel ignores the fact that the Respondent is seeking to introduce evidence regarding the passage of time **since the hearing in 2007** and to supplement and update evidence of employee turnover **since the hearing in 2007**. The Respondent clearly could not have introduced evidence of circumstances that occurred after the hearing during the course of the hearing as it was unavailable by definition.

The General Counsel's reliance on the case of *Electro-Voice, Inc.*, 321 NLRB 444 (1996), and *Metal Blast, Inc. v. NLRB*, 324 F.2d 602 (6<sup>th</sup> Cir. 1963), in support of its contention is misplaced as the cases are distinguishable. In the *Electro-Voice* case the Respondent, unlike

the Respondent in the instant case,<sup>1</sup> not only failed to introduce evidence of employee turnover (among other things) at the hearing, but failed to move to reopen the record to introduce such evidence even after the Administrative Law Judge filed his decision imposing a *Gissel* bargaining order. See *Electro-Voice, Inc.*, 320 NLRB 1094, 1095 (1996). In fact, the Respondent in the *Electro-Voice* case did not move to reopen the record until after the Board ultimately affirmed the imposition of the *Gissel* bargaining order. *Electro-Voice, Inc.*, 321 NLRB 444, 444 (1996). Similarly, the case of *Metal Blast, Inc. v. NLRB*, 324 F.2d 602 (6<sup>th</sup> Cir. 1963), dealt with a situation where the Respondent had failed to introduce the proffered evidence at the time of the hearing, i.e., the evidence was available to the Respondent at the time of the hearing. This is starkly different from the instant case where it was factually impossible for the Respondent to have evidence of future events that post-dated the hearing.

Based upon the foregoing, the Respondent's Motion to Reopen was filed timely.

**B. The Proffered Evidence of Turnover and Changed Circumstances Would Result in a Different Result.**

The General Counsel's contention that the proffered evidence of turnover and changed circumstances would not result in a different result is similarly without merit. The General Counsel totally ignores the fact that there is controlling precedent from the United States Court of Appeals for the District of Columbia Circuit that not only requires that the Board consider the passage of time and turnover when evaluating the appropriateness of the extraordinary remedy of a *Gissel* bargaining order, but states that "an employer must be allowed the opportunity to introduce evidence of changed circumstances that would mitigate the need for a bargaining order." See *Cogburn Health Center, Inc. v. NLRB*, 437 F.3d 1266 (D.C. Cir. 2006); *Charlotte*

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<sup>1</sup> General Counsel admits in his opposition to the motion that Respondent in fact introduced evidence of turnover during the hearing.

*Amphitheater Corp. v. NLRB*, 82 F.3d 1074, 1080 (D.C. Cir. 1996). Therefore, the Board is mandated to consider this evidence in order to determine whether the imposition of a *Gissel* bargaining order is appropriate.

**C. The Motion to Strike the Milum “Affidavit” Should Be Denied.**

The General Counsel’s Motion to Strike the “Declaration of Craig Milum” (incorrectly referred to by the General Counsel as an “Affidavit”<sup>2</sup>) that was submitted with the Respondent’s Motion to Reopen, as the General misses the point of Respondent’s inclusion of the Milum Declaration. The Milum Declaration sets forth the information required by Section 102.48(d)(1) of the Board’s Rules and Regulations, i.e., a brief statement of “the additional evidence sought to be adduced.” The Respondent attached the Declaration for the sole purpose of complying with the Board’s rule and to illustrate the type of evidence that Respondent would introduce if the Motion to Reopen was granted. Respondent did not submit the Milum Declaration as the actual proposed evidence to be added to the record, as a supplement to the record, or an exhibit to the record. Through the use of the Milum Declaration, the Respondent shows the nature of the evidence that it seeks to introduce into the record all of which is directly relevant to the *Gissel* bargaining order that was imposed by the Board on December 30, 2011. If Respondent’s Motion to Reopen is granted, Respondent will introduce admissible evidence in accordance with the applicable rules of evidence regarding changed circumstances, including employee turnover. The Milum Declaration was never intended as a substitute for, live testimony, business records, and other credible, reliable evidence that will demonstrate why a different result is required here, that is, why a remedial bargaining order is not appropriate under the facts and changed

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<sup>2</sup> The Declaration of Craig Milum is not labeled as an affidavit, is not notarized, and is not made under oath. All references by the General Counsel to the “Affidavit” and “Milum’s sworn testimony” should be disregarded.

circumstances present in this case. Accordingly, there is neither any reason nor any need to strike the Milum Declaration.

**D. Conclusion.**

For the foregoing reasons, Respondent respectfully moves the Board to reopen the record in this matter to permit Respondent to introduce evidence concerning the passage of time between the alleged unfair labor practices and the date of the Board's issuance of its Decision and Order, to supplement and update evidence of employee turnover since March 4, 2006, and to provide evidence relating to the lack of any alleged unfair labor practices since at least October 2007. Respondent further requests that the General Counsel's Motion to Strike the so-called "Milum Affidavit" be denied.

Dated this 24<sup>th</sup> day of February 2012.

Respectfully submitted,

MILUM TEXTILE SERVICES CO.

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**CERTIFICATE OF SERVICE**

I hereby certify that copies of the foregoing Respondent's Reply to General Counsel's Opposition to Respondent's Motion to Reopen the Record and Opposition to Motion to Strike in Milum Textile Services Co., Cases 28-CA-20898 et al, was served by E-Gov, E-filing, and E-mail on this 24<sup>th</sup> day of February 2012, upon the following:

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