UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

DURHAM SCHOOL SERVICES, L.P.,

Employer,

and

Case 15-RC-096096

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 991,

Petitioner.

PETITIONER'S RESPONSE IN OPPOSITION TO EMPLOYER'S MOTION TO REOPEN THE RECORD

Petitioner, International Brotherhood of Teamsters, Local Union No. 991 (ñLocal 991ò) respectfully submits this response opposing Employerôs Motion to Reopen the Record to Receive Supplemental Affidavit of April Perez. In support of this opposition, Petitioner relies on the following grounds:

1. **There is no Authority or Procedure to Re-Open The Record in a Postelection Proceeding When no Hearing is Held.**

This is a proceeding conducted pursuant to Section 9(c) of the Act, 29 U.S.C. §159(c). The Regional Director of Region 15 approved a Stipulated Election Agreement on January 24, 2013 as permitted by the Boardôs Rules and Regulations Section 102.62(b). This section provides in pertinent part that ñé [t]he method of conducting such election and postelection procedure shall be consistent with that followed by the Regional Director in conducting elections pursuant to sections 102.69 and 102.70. Board Rule Section 102.69(a) permits parties to file objections to the election or to conduct affecting the results of the election. If objections are filed, the Rules provide that ñé the Regional Director shall, consistent with the provision of section 102.69(d), initiate an investigation, as required, of such objections.....ò In compliance

with this provision, the Regional Director conducted an administrative investigation of the Employerôs, Durham School Services, L.P. (ñDurhamò), Objections.

Section 102.69 permits the Regional Director to act on the basis of an administrative investigation. Consistent with this provision, the Regional Director issued her Report and Recommendation to dismiss all of the Employerôs Objections on March 25, 2013. On April 8, 2013, Durham filed Exceptions to this Report as permitted by 102.69(c)(4).[1] As part of the post-election procedures, there is not authority for a party to seek to re-open the record when a hearing is not conducted. To the contrary, Section 102.69(g)(1)(ii) specifically provides the documents that constitute the record in a proceeding in which no hearing is held. A statement of a witness, like the one proposed to be added to the record, is not included as an initial part of the record. Although a party has the right to append a witness statement or affidavit that was timely submitted to the Regional Director as documentary evidence to support the partyôs exceptions and become part of the record on review, this option would not apply to the proposed supplemental affidavit. This affidavit is untimely, because it was submitted *after* Durham filed its Objections, *after* the Regional Director conducted her investigation, and *after* the Regional Director issued her Report and Recommendation.

Further, there is no provision for a party in this type of post-election proceeding to move to re-open the record. Board Rule 102.65(e) provides a procedure to re-open the record in pre-election matters. While Board Rule 102.69(e), which addresses post-election proceedings, incorporates Board Rule 102.65 by reference, Board Rule 102.69(e) applies only when a hearing has been conducted. Durhamôs Objections in this matter were resolved as a result of an administrative investigation. Consequently, Board Rule 102.69(e) is inapplicable.

[1] Petitioner will respond to the Employerôs Exceptions in a separate Answer Brief.

2. Alternatively, Durham Could Not Meet The Burden to Reopen The Record in Any Proceeding Before The Board.

Even assuming the Boardôs Rules allow the record to be reopened, Durham may only do so under *extraordinary* circumstances, but not to get a second bite at the apple. The only procedural authority for re-opening the record in a representation proceeding is found in the provisions of the Boardôs Rules applicable to proceedings before an election has been held. Specifically, Section 102.65(e) provides in pertinent part:

> A party to a proceeding may, because of extraordinary circumstances, move after the close of the hearing for reopening the record, é Only newly discovered evidence ï evidence which has become available only since the close of the hearing ï or evidence the ... Board believes should have been taken at the hearing will be taken at any further hearing.

Assuming arguendo that this provision is applicable to this matter, the Employer has not and cannot satisfy the heavy burden to re-open the record. *See Manhattan Center Studios, Inc. and Theatrical Stage Employees Local 1,* No. 2-CA-35394, 357 NLRB No. 139, 2011 NLRB LEXIS 722, at *10 (Dec. 14, 2011). First, Durham must demonstrate an *extraordinary* circumstance. While one can only imagine that an extraordinary circumstance could arise due to a witnessôs unavailability or destruction of certain documentary evidence, that is not the case here. The reason given for the need to include a second affidavit from April Perez is so Durham can add testimony from Perez to refute evidence produced by the Petitioner. Durham already took an affidavit from Perez and timely submitted it to the Regional Director. In the initial affidavit previously submitted by Durham, Perez admits she allowed the Union to take her picture and she signed at least one document that she did not read. Durham was aware at that time that Perez had signed a document that very well could have been a release. The Employer can hardly claim extraordinary circumstances exist when the Union produces a release signed by

Perez giving the Union consent. This weakness in Durhamôs evidence or their desire to refute evidence produced by the Union does not constitute extraordinary circumstances. Surely, this is not the type of *extraordinary* circumstance envisioned when the Rules were promulgated. Moreover, an adverse recommendation is as common place as a favorable recommendation ï one party receives an adverse ruling in every case.

Second, even if the Employer could demonstrate that extraordinary circumstances exist, it then must show that the affidavit is newly acquired evidence. In *Manhattan*, the Board addressed the standard of proof for reopening the record pursuant to Board Rule 102.65(e). The Board held:

> A party seeking to introduce new evidence after the record of a representation proceeding has been closed must therefore establish (1) that the evidence existed but was unavailable to the party before the close of the proceeding; (2) that the evidence would have changed the result of the proceeding; and (3) that it moved promptly upon discovery of the evidence.

Manhattan Center Studios, Inc. (IATSE Local 1), 2011 NLRB LEXIS 722, at *11. In applying this standard to the Employerôs current Motion to Reopen, Durham cannot even satisfy the first requirement.

In order to establish that the evidence was unavailable before the close of the proceeding, the party must show that it was ñexcusably ignorantò of the evidence at the time of the proceeding. *Id.* at 12. The Board has compared this standard to that imposed by Fed. R. Civ. P. 60(b)(2) to reopen a case or for a new trial. *Id*. at 13. Consequently, in making the determination of unavailability, the Board considers whether the evidence sought to be introduced to the record ñcould not be discovered by reasonable diligence.ò *Id.*

The very nature of a supplemental affidavit indicates that it is unlikely that Durham could not have discovered the testimony through reasonable diligence.

The witness who provides the evidence in the supplemental affidavit sought to be admitted to the record has already submitted an affidavit that was used by Durham in support of its Objections. In such instances, a party tends to elicit any and all evidence to be included in the affidavit to support its position. This would most certainly be the case in these types of proceedings where the decision maker, in this case the Regional Director, has the clear authority to make a decision and recommendation solely on the administrative record. Any evidence now sought to be included in the record could have been discovered with reasonable diligence at the same time the initial timely affidavit was submitted to the Regional Director.

Moreover, to permit an affidavit prepared solely in response to an adverse ruling by the Regional Director to be added to the record as newly acquired evidence would circumvent the Boardôs Rules. The witness was clearly available to, and did, provide as much evidence required by Durham prior to the issuance of the Regional Directorôs Report and Recommendation. The content of the affidavit is not newly acquired evidence, but rather it is existing evidence that was not timely provided to the Regional Director. To permit this type of interpretation of the Boardôs Rule would clearly not be in the best interest of Petitioner, the authority of the Regional Director or the Boardôs processes and procedures.

If Durham could establish that the testimony of April Perez in her second affidavit was unavailable at the time the record closed, it still must demonstrate that the new testimony would have compelled a different result from the Regional Director. Like the unavailability element, Durham cannot meet its burden here either. Durham takes the position that the Report and Recommendation is inconsistent with the first affidavit of April Perez. When the fact is that the

Petitioner could have and did, submit clear and undisputable evidence to the Regional Director that April Perez gave knowing consent to all of the Petitionerôs pre-election conduct. Such conduct under those circumstances is not objectionable under established Board precedent in representation proceedings. In the face of the evidence provided by the Petitioner, supplemental testimony from April Perez would not change the outcome of the Report and Recommendation. It is simply more evidence from Durham that may, at most, indicate a change of heart in Perezôs Union sentiments, but not the level of fraud or forgery necessary to become objectionable conduct.

Finally, Durham would have to establish that it acted promptly after discovery of the ñnewò evidence. Again, Durham did not discover new evidence, but rather is attempting to introduce untimely evidence in support of its Objections into the record. Consequently, even if procedurally available, Durham cannot meet its heavy burden to reopen the record to submit the supplemental affidavit of April Perez into the record.

Based on the above grounds, the Petitioner respectfully requests that the Employerôs Motion to Reopen the Record be denied.

Respectfully submitted this 16th day of April, 2013,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing pleading has been served by electronic mail on this 16th day of April, 2013 on the following persons:

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