

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

CONDITIONED AIR SYSTEMS, INC.

and

Case 05-CA-079299

PLUMBERS AND GAS FITTERS LOCAL
UNION NO. 5, UNITED ASSOCIATION
OF JOURNEYMEN AND APPRENTICES OF
THE PLUMBING AND PIPE FITTING
INDUSTRY OF THE UNITED STATES AND
CANADA, AFL-CIO

**CHARGING PARTY'S MEMORANDUM IN OPPOSITION TO
RESPONDENT'S MOTION TO REOPEN OR SUPPLEMENT
THE RECORD AND RECEIVE FURTHER EVIDENCE**

Plumbers and Gas Fitters Local Union No. 5, United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO (referred to hereinafter as the "Charging Party" or the "Union"), hereby submits this memorandum in opposition to the Motion to Reopen or Supplement the Record and Receive Further Evidence of the Respondent, Conditioned Air Systems, Inc. ("CAS").

I. STATEMENT OF FACTS

Beginning in December 2011, Union officials suspected Respondent of operating an alter ego business. The Union subsequently submitted a written request for information to the Respondent, which went unanswered. Due to Respondent's failure to respond, the Union filed a charge with the National Labor Relations Board ("Board"), alleging the Respondent had violated Sections 8(a)(5) and (1) of the Act.

A hearing was held before Administrative Law Judge Arthur J. Amchan on September 6, 2012. At the hearing, Respondent alleged that it was not in a collective bargaining relationship with the Union. In a decision dated October 26, 2012, Judge Amchan found Respondent had a contractual relationship with the Union as the result of a collective bargaining agreement signed in September 2008 (the “2008 Letter of Assent”), executed by the Business Manager of the Union and Virginia Merrigan, Secretary-Treasurer of Respondent on behalf of Respondent. The 2008 Letter of Assent also bound the Respondent to the terms and conditions of the collective bargaining agreement between the Union and the Mechanical Contractors Association of Metropolitan Washington, Inc. (“Association”). (Decision at 2). The 2008 Letter of Assent provided that it would remain in effect until terminated by the Respondent by giving 150 days written notice prior to the expiration of the labor agreement between the Union and Association. *Id.* The Union never received written termination from Respondent. (ALJ Hearing Transcript (“Tr.”) at 10:3-5). Respondent continued to comply with the terms of the collective bargaining agreement by paying employees the wage rates set forth in the agreement, contributing to the benefit funds, and reporting to the Union whenever it hired or terminated employees. (Decision at 3).

At the hearing, Respondent’s President, Richard Putnam, asserted that Merrigan did not have the “legal binding right” to sign the 2008 Letter of Assent. (Tr. 55:8-11). However, Putnam also testified that he knew Merrigan signed legally binding documents such as checks and corporate filings on behalf of the Respondent. Putnam also conceded that he never informed the Union that Merrigan did not have the right to sign the 2008 Letter of Assent. (Tr. 12:2-4; 59-60; 64-66). Judge Amchan concluded as a matter of fact that Merrigan was “clearly an agent of Respondent and thus bound Respondent to the Union’s contract with the Association.” (Decision

at 6). Drawing on common law principles of agency, Judge Amchan determined that Merrigan had apparent authority to bind Respondent, because Respondent created a “reasonable belief” in the Union that Respondent had authorized Merrigan to sign the 2008 Letter of Assent. *Id.* Judge Amchan also found that Respondent ratified Merrigan’s conduct by complying with the labor agreement between the Association and the Union, as well as by failing to repudiate the contract. *Id.* Respondent now requests the Board reopen the record in order to allow testimony by Merrigan regarding her agency, or alleged lack thereof, to bind Respondent to the 2008 letter of assent. (Brief at 2). However, Respondent’s claims do not meet the standard required to reopen the record, and Respondent’s motion should be denied.

II. ARGUMENT

Under the Board’s Rules “[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.” 29 C.F.R. § 102.48(d)(1). A motion to reopen the record must state 1) the additional evidence sought to be adduced; 2) the reason it was not presented previously, and 3) must also show that, if adduced and credited, a different result would be required. *Id.* However, even if the moving party establishes these three requirements, the record will only be reopened to admit certain evidence. Specifically, “[o]nly 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.” *Id.* Respondent has not met the standard for a motion to reopen the record because they have not provided an adequate reason why the evidence was not produced previously, or that Merrigan’s testimony, as Respondent believes it would unfold, requires a different result. In addition, the

testimony sought to be presented by Respondent is not newly discovered and was available at the time of the hearing. Respondent's motion should therefore be denied.

A. Merrigan's Testimony Was Available to Respondent at the Time of the Hearing

A motion to reopen must state, in part, the reason the evidence to be adduced was not previously available. 29 C.F.R. § 102.48(d)(1). The Board's regulations also require that only newly discovered evidence that has become available since the close of the hearing, or that which the Board believes should have been taken at the hearing may be taken at any further hearing. *Id.* When it is apparent that the evidence in question was available previously, and that the issue was already raised in a previous hearing and the evidence could have been obtained had due diligence been exercised, the motion should be denied. *See, e.g. Lincoln Hills Nursing Home*, 257 NLRB 1145, 1155 (1981) (evidence was available at all times and even in Employer's possession); *Alcoa Marine Corp.*, 240 NLRB 1265, 1266 (1979) (evidence was not previously unavailable or unable to be discovered by the exercise of due diligence). *Skaggs Pay Less Drug Stores*, 190 NLRB 538 (1971) (issue was already raised in previous hearing and Respondent had ample opportunity to respond). "A motion seeking to introduce evidence as newly discovered must also show facts from which it can be determined that the movant acted with reasonable diligence to uncover and introduce the evidence." *Owen Lee Floor Service*, 250 NLRB 651, fn. 2 (1980).

Respondent asserts that it did not have knowledge that Merrigan signed the 2008 Letter of Assent, nor that it would be the subject of the September 6, 2012 hearing "until moments before the hearing began." (Brief at 3). Of course this is not true. Paragraph 4(b) of the Amended Complaint expressly alleged that Virginia Merrigan was a supervisor of Respondent and that she was "an agent of Respondent within the meaning of Section 2(13) of the Act." In its

Answer Respondent denied this allegation. Thus Respondent knew or should have known that this was an issue to be decided in this case. Having squarely put this issue in contention, it was Respondent's responsibility to come to the hearing prepared.¹ Moreover, Respondent has presented no evidence to suggest that, if proper due diligence was exercised, Merrigan's testimony would have been unavailable at the time of the hearing. As was the case in *Lincoln Hills Nursing Home*, Merrigan's testimony was available to Respondent. The motion should be denied because the evidence Respondent seeks to introduce is not newly discovered or previously unavailable. Moreover, Respondent's failure to show that it acted with reasonable diligence to obtain Merrigan's testimony in time to be used at the hearing precludes Respondent from relying on this testimony at the present time. *Fitel/Lucent Technologies, Inc.*, 326 NLRB 46, n1 (1998).

B. Merrigan's Testimony is Irrelevant and Would Not Require a Different Result

Respondent seeks to adduce testimony from Merrigan on "her putative agency to sign and bind Respondent to the 2008 Letter of Assent." (Brief at 2). However, Putnam did testify about Merrigan's authority, or lack thereof, to act for Respondent and Respondent fails to explain how Merrigan's testimony would differ or cause a different conclusion. Moreover, this

¹ Respondent provides no support for its claim that it did not have a copy of the 2008 Letter of Assent signed by Merrigan and that its request, of some unknown source, for a copy of the agreement went unanswered. Indeed given that Mr. Putnam at the ALJ Hearing testified that "[w]ith the business falling apart, the documents have been either thrown away, destroyed, stolen, you know, a lot of this stuff from this business has walked out the door, so I can't find any of this stuff any longer" (Tr. 62:16-23), there is every reason to believe he has no one but himself to blame for not having a copy of the 2008 Letter of Assent. Moreover, putting aside the dubious nature of its claim that it was not signed to a collective bargaining agreement, considering the fact Respondent paid wages and fringe benefit contributions as required under the 2008 Letter of Assent for at least the past four years and was itself operating under the assumption it was bound to the 2008 Letter of Assent (Tr. 77:12-24), Respondent failed to raise the issue of the need for Merrigan's testimony with the Administrative Law Judge nor did it ask the ALJ for a continuance.

alleged testimony is irrelevant to Judge Amchan's finding that Merrigan had **apparent** authority to sign the 2008 Letter of Assent and that Respondent ratified Merrigan's action in doing so. As Merrigan's testimony is irrelevant, Respondent cannot successfully claim that it "should have been introduced," nor that introduction of this evidence would require a different result.

Judge Amchan made a factual finding that Merrigan had apparent authority to sign the 2008 Letter of Assent and to bind Respondent to the agreement. (Decision at 6). Drawing on common law principles, Judge Amchan explained as follows:

Apparent authority results from a manifestation by the principal to a third party that creates a reasonable belief that the principal has authorized the alleged agent to perform the acts in question. Either the principal must intend to cause a third person to believe the agent is authorized to act for him, or the principal should realize that its conduct is likely to create such a belief."²

Id. Applying these principles, the Judge found that Respondent allowed Merrigan to represent it in dealings with the Union. Moreover, Respondent never informed the Union that Merrigan did not have authority to take these actions on behalf of Respondent. *Id.* Therefore, Respondent manifested Merrigan's authority to the Union, and should have realized that its conduct would cause the Union to believe that Merrigan had the authority to sign the 2008 Letter of Assent.³

² Respondent cites the same two prong analysis in its brief, albeit worded slightly differently. As stated by Respondent, "Two conditions... must be satisfied before apparent authority is deemed created: (1) there must be some manifestation by the principal to a third party, and (2) the third party must believe that the extent of the authority granted to the agent encompasses the contemplated activity." Brief at 4, *citing N.L.R.B. v. Local Union 1058, United Mine Workers of Am.*, 957 F.2d 149, 152-53 (4th Cir. 1992).

³ Respondent contends that Judge Amchan did not properly apply this test because the requirements of the "two prong" test for apparent authority were not satisfied. However, Respondent concedes that evidence was presented in the hearing regarding both the manifestation of authority by Respondent as well as the Union's reasonable belief in Merrigan's authority. Respondent's argument instead alleges that this evidence is not sufficient to support the judge's conclusion. Respondent's argument must fail, as the Board does not allow the record to be reopened merely to attack the Judge's determinations regarding the credibility of the evidence presented. *Precoat Metals*, 341 NLRB 1137, n. 1 (2004).

Moreover, Judge Amchan explained that even if Merrigan did not have authority to bind the Respondent, Respondent was bound to the agreement because it ratified Merrigan's conduct in signing the letter of assent. *Id.* (citing *Service Employees Local 87 (West Bay Maintenance)* 291 NLRB 82, 83 (1988) (finding ratification where the party had knowledge of the conduct occurring and failed to take steps necessary to repudiate the conduct); *One Stop Kosher Supermarket, Inc.*, 355 NLRB No. 201 (2010), slip opinion at 5-6 (stating a party may be bound by the actions of its agent absent actual or apparent authority where the party subsequently ratified those actions by silence and/or affirmative conduct).

Merrigan's testimony is irrelevant to Judge Amchan's findings. The fact that Merrigan purportedly did not believe she had the authority to bind Respondent to the 2008 Letter of Assent is irrelevant to the finding that Respondent represented to the Union that she had authority to sign the agreement, and that even absent this apparent authority, Respondent ratified her actions.

Moreover, Judge Amchan already considered testimony from Putnam on whether Merrigan actually had authority to bind Respondent to the 2008 Letter of Assent. Putnam testified at the hearing as follows:

It was just brought to our attention recently from my other legal team that's working on other teams that Ms. Merrigan was not an authorized signer to be entering into an agreement with Plumbers Local 5. I have a copy on my desk of the one that I have signed for Steamfitters Local 602, and I am the only one as president of the Company that is authorized to sign or enter into any agreement with the Company. So as far as I'm concerned, all these other documents are nonbinding because it is not a legal document signed by an official of the Company.

(Tr. at 55:16-25). Putnam also testified that as recently as 2012 he believed Ms. Merrigan was part owner of his Company (Tr. 67-69.), thus lending further support for the Union's understanding and belief in Merrigan's authority to bind the company.

Respondent does not explain how Merrigan's testimony regarding her actual authority would demand a different result, especially considering the same testimony was given by Putnam at the hearing and was considered by the Judge in making his decision. Therefore, Respondent's motion should be denied.

C. Respondent's Motion Should be Denied for Lack of Promptness

The Board's rules require "a motion for leave to adduce additional evidence shall be filed promptly on discovery of such evidence." 29 C.F.R. § 102.48(d)(2). As provided above, Merrigan's testimony has been available to Respondent at all times. Even if Respondent was caught by surprise at the hearing regarding the signature on the 2008 Letter of Assent (Brief at 3), Respondent has known that Merrigan's authority to bind Respondent has been an issue since at least the hearing was held in September of 2012 (although as discussed *supra* Putnam actually knew this prior to the hearing when he denied the allegation in the Amended Complaint that Merrigan was an agent of Respondent). Respondent has no explanation as to why it waited nine months to bring the current motion to open the record to include testimony from Merrigan. Respondent's motion must therefore be denied.

III. CONCLUSION

Respondent's motion fails to meet the requirements of a motion to reopen the record in that it has not shown that the evidence was previously unavailable or that, if admitted and credited, a different result would be required. Moreover, the evidence Respondent seeks to adduce is not proper evidence for which to reopen the record because it is not newly discovered and irrelevant to the Judge's findings. Finally, Respondent has failed to timely open the record, having waited approximately nine months since the hearing to raise the issue. For all these

reasons, the Union respectfully requests that Respondent's Motion to Reopen or Supplement the Record be denied.

Respectfully submitted,

Dated: July 2, 2013

_____/s/_____
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CERTIFICATE OF SERVICE

I hereby certify that on this 2nd of July, 2013, a copy of the foregoing Charging Party's Memorandum in Opposition to Respondent's Motion to Reopen or Supplement the Record and Receive Additional Evidence has been served upon the following via email:

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