

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 PIPEFITTING INDUSTRY
OF THE UNITED STATES AND CANADA,
AFL-CIO

**ACTING GENERAL COUNSEL'S OPPOSITION TO
RESPONDENT'S MOTION TO REOPEN OR SUPPLEMENT
THE RECORD AND RECEIVE FURTHER EVIDENCE**

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The Acting General Counsel, by his undersigned counsel, submits this opposition to Respondent's Motion to Reopen or Supplement the Record and Receive Further Evidence. As discussed in greater detail below, the Acting General Counsel respectfully urges that the Board deny Respondent's motion because Respondent has failed to demonstrate sufficient cause or extraordinary circumstances to justify reopening the record.

I. STATEMENT OF FACTS AND THE CASE

The central issue in this case is whether Respondent unlawfully refused to furnish information to the Union in violation of Section 8(a)(1) and (5) of the Act. The Union filed the charge in this case on April 20, 2012, concerning a request for information sent to Respondent on or about March 22, 2012. The Acting General Counsel issued a Complaint and Notice of Hearing on July 24, 2012, and an Amended Complaint on August 21, 2012. The case was tried before ALJ Arthur Amchan on September 6, 2012, and on October 26, 2012, Judge Amchan issued his decision finding Respondent had violated the Act as alleged in the Amended Complaint. Respondent filed exceptions to Judge Amchan's decision; those exceptions, and the Answering Briefs of the Acting General Counsel and the Charging Party are currently pending before the Board.

As a factual predicate to any legal obligation to furnish information under the Act, the Acting General Counsel alleged in both the Complaint and Amended Complaint that on or about September 22, 2008, Respondent entered into a Letter of Assent with the Union, and thereby recognized the Union as the exclusive collective-bargaining representative of certain employees. (See GCx 1-C and 1-I ¶ 6) In both its Answer to the Complaint and Answer to the Amended Complaint, Respondent denied the allegations contained in Complaint paragraph 6(a) regarding the September 22, 2008 Letter of Assent. (See GCx 1-H and 1-L)

The Amended Complaint alleges that “At all material times, Virginia Merrigan has held the position of Secretary-Treasurer and has been an agent of Respondent within the meaning of Section 2(13) of the Act.” (GCx 1-I ¶ 4(b)) Respondent denied this allegation in its Answer to the Amended Complaint. (GCx 1-L ¶ 4(b)) In his decision, the judge found that Virginia Merrigan was Respondent’s Secretary-Treasurer, that she was “clearly an agent of Respondent,” that Respondent allowed Merrigan to represent it in many of its interactions with the Union, and that Respondent’s president Richard Putnam never advised the Union as to any restrictions of Merrigan’s authority. (ALJD 2:9-10; 6:1-14). The judge also found that “...Virginia Merrigan was clearly and agent of Respondent and thus bound Respondent to the Union’s contract with the Mechanical Contractor’s Association.” (ALJD 6:1-3) As argued in the Acting General Counsel’s Answering Brief, Respondent did not except to these findings by the judge.

II. ARGUMENT

Section 102.48(d)(1) and (2) of the Board’s Rules and Regulations provides, in relevant part:

A party to a proceeding before the Board may, because of extraordinary circumstances, move for...reopening of the record....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. ...a motion for leave to adduce additional evidence shall be filed promptly on discovery of such evidence.

Respondent’s attempt to reopen the record to adduce the testimony of Virginia Merrigan about her “putative agency to sign and bind Respondent to the 2008 Letter of Assent” should be denied by the Board for any number of reasons, including: (1) Respondent’s failure to justify why this evidence was not presented previously; (2) Respondent’s failure to show that Ms.

Merrigan's testimony would require a different result; (3) Respondent's failure to show that this evidence is newly discovered; (4) Respondent's failure to show that her testimony only became available since the close of the hearing; or (5) Respondent's failure to promptly file its motion.

A. Respondent Has Not Explained Why Ms. Merrigan's Testimony Was Not Presented at the Hearing.

Respondent asserts that Ms. Merrigan's testimony was not presented previously because "Respondent did not have knowledge that she signed the 2008 Letter of Assent nor that it would be the subject of the hearing until moments before the hearing began." (R. Brf. in Spprt. at 3) Respondent's assertion is unsupported by the record evidence. Even assuming that this case began with the issuance of the Complaint and Notice of Hearing on July 24, 2012, (and thus disregarding the preceding administrative investigation by the Regional Director in its entirety), the Complaint put Respondent on notice more than six weeks before the trial that the Letter of Assent would be a subject of the hearing. This message was reinforced more than two weeks before the hearing opened with the issuance of the Amended Complaint, which repeated the Complaint's allegation regarding the 2008 Letter of Assent, and explicitly alleged that Ms. Merrigan was an agent of Respondent. Therefore, Respondent's claim that it didn't learn these facts until "moments before the hearing began" is simply untrue (and is arguably disingenuous and frivolous), and the Board is entitled to deny Respondent's motion on this basis alone.¹

¹ Respondent also claims that Ms. Merrigan's testimony wasn't presented previously because it did not receive advance notice of the evidence that would be introduced at the hearing. Other than its bare and unspecific assertion, Respondent offers the Board no evidence that it ever made a request for such evidence, when it was made, or even that its request was rejected. More importantly, however, it is well-established that there is no right to pre-trial discovery in Board hearings.

B. Ms. Merrigan's Testimony Would Not Require a Different Result.

Respondent has also failed to demonstrate that Ms. Merrigan's testimony would require a different result. The judge found that Respondent was bound to the 2008 Letter of Assent in three independent ways: (1) Ms. Merrigan was an agent of Respondent; (2) she was an apparent agent of Respondent; and (3) Respondent ratified Ms. Merrigan's conduct of signing the Letter of Assent by abiding by the terms of the collective-bargaining agreement and failing to repudiate Ms. Merrigan's conduct. Thus, even if (as expected) Ms. Merrigan testifies that she was not authorized to sign the 2008 Letter of Assent, Respondent has failed to show that this case would have a different outcome. Her testimony could not disturb the judge's findings that Ms. Merrigan was an apparent agent or that Respondent behaved as if it was bound by her signature on the 2008 Letter of Assent.

At trial, Mr. Putnam testified that Ms. Merrigan signed documents on behalf of Respondent such as checks and corporate filings with the State of Maryland. He also failed to contradict Union Business Manager James Killeen III's testimony that Ms. Merrigan was held out as a part owner of Respondent, had acted on behalf of Respondent when dealing with the Union, and that Mr. Putnam never told the Union that Ms. Merrigan was not authorized to represent or act on behalf of Respondent. (Tr. 11:10-12; 11:16-24; 12:2-4; 37:7-16; 59-60; 64-66) No testimony from Ms. Merrigan about her subjective belief of her own authority can change Mr. Putnam's trial testimony.² Thus, even if Ms. Merrigan testifies she didn't have authority to sign the 2008 Letter of Assent, this wouldn't disturb Mr. Putnam's testimony that she was held

² Accordingly, even if Ms. Merrigan's proposed testimony would directly contradict Mr. Putnam's, the record demonstrates that he was the highest authority at Respondent. Therefore, because the judge relied on Mr. Putnam's admissions in concluding that Respondent had a collective-bargaining relationship with the Union, no testimony from Ms. Merrigan could override that of Mr. Putnam.

out as a part owner, or that he never told the Union she wasn't authorized to act on behalf of Respondent.

A fortiori, testimony from Ms. Merrigan would not disturb the record evidence and the judge's finding that Respondent operated as if it was bound by the 2008 Letter of Assent. The record shows that Respondent sent notices to the Union when employees were separated, and submitted payments to the Union for fringe benefits owed under the CBA. Mr. Putnam testified that through at least March 2012, Respondent was trying to pay its employees the wages and fringe benefits owed under the collective-bargaining agreement. (Tr. 78) Finally, Mr. Putnam admitted that: "Yes, we have been operating as being part of Local 5." (Tr. 55)

Respondent has failed to demonstrate that any testimony from Ms. Merrigan could refute all of the independent bases for the judge's conclusion that Respondent had a collective-bargaining relationship with the Union. Its remaining arguments about the judge's agency analysis are essentially an attempt to file additional (and untimely) exceptions to the judge's decision, and should be rejected by the Board.

C. Ms. Merrigan's Testimony is Not Newly Discovered or Previously Unavailable Evidence.

Respondent has failed to demonstrate how Ms. Merrigan's testimony is "newly discovered" or that her testimony "became available *only* since the close of the hearing." (emphasis added). "Newly discovered evidence is evidence which was in existence at the time of the hearing, and of which the movant was excusably ignorant." *Owen Lee Floor Service, Inc.*, 250 NLRB 651, fn.2 (1980). Obviously, neither Ms. Merrigan herself, nor any testimony that she was not authorized to sign the 2008 Letter of Assent is "newly discovered" evidence. Mr. Putnam testified at the hearing that "it was just brought to his attention...that Ms. Merrigan was

not an authorized signer to be entering into any agreement with [the Union.] (Tr. 55) Thus, the record shows that this alleged “new” evidence was known to Respondent at the time of the hearing and is not “newly discovered” entitling Respondent to reopen the record. Respondent was not ignorant, excusably or otherwise, of Ms. Merrigan or any purported limits on her authority at the time of the hearing, and its motion should therefore be denied.

Respondent has also not shown that Ms. Merrigan’s testimony was unavailable at the hearing. Respondent did not raise any concern at the hearing about Ms. Merrigan’s absence, ask for any continuance to seek her attendance, or seek a subpoena to compel her attendance. At no point in this case, including in its motion to reopen the record, has Respondent asserted that Ms. Merrigan was unavailable at the hearing last September. Because Respondent hasn’t shown that Ms. Merrigan’s testimony was unavailable at the time of the hearing, its motion should be denied.

D. Respondent’s Motion is Untimely.

Finally, Respondent’s motion should be denied because it was not filed promptly after Ms. Merrigan’s testimony was “discovered.” Preliminarily, as discussed above, the Acting General Counsel maintains that Ms. Merrigan’s proposed testimony is not newly discovered evidence. But even assuming that it is, Respondent has not identified *when* Ms. Merrigan’s testimony became available (with a concomitant showing that Respondent exercised reasonable diligence in obtaining her testimony), and consequently, the parties and the Board have no way to determine whether Respondent’s motion was filed “promptly.” Respondent has not explained why its motion was filed more than eight months after the hearing record was closed. “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, Inc.*, 250 NLRB 651, n.2 (1980). The Board should not be forced to speculate what efforts Respondent took during those intervening eight months to obtain Ms. Merrigan’s testimony, or whether those alleged efforts were reasonably diligent. Because Respondent has not shown that it acted promptly in seeking to reopen the record, its motion should be denied.

III. CONCLUSION

Respondent’s motion to reopen the record fails to satisfy the requirements of Section 102.48(d)(1) and (2) in several ways. Respondent has not explained why Ms. Merrigan’s testimony was not introduced at the hearing, that her testimony is newly discovered or was previously unavailable, that Respondent filed its motion promptly, or that her proposed testimony would change the judge’s determination that Respondent violated Section 8(a)(1) and (5) of the Act by failing to furnish information to the Union. Accordingly, it is respectfully urged that the Board deny Respondent’s Motion.

Respectfully submitted,

/s/ Patrick J. Cullen

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Dated this 11th day of July, 2013.

STATEMENT OF SERVICE

I hereby certify that on July 11, 2013, copies of the Acting General Counsel's Opposition to Respondent's Motion to Reopen or Supplement the Record and Receive Further Evidence were served by e-mail on the following parties:

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