

**UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES**

In the Matter between)	
)	
KERRY INC.,)	
)	
Respondent,)	
)	
And)	Case Nos. GR-7-CA-52965 &
)	GR-7-CA-53192
LOCAL 70, BAKERY, CONFECTIONERY,)	
TOBACCO WORKERS AND GRAIN)	
MILLERS INTERNATIONAL UNION,)	
AFL-CIO,)	
)	
Charging Union.)	

**RESPONDENT'S OBJECTION TO CHARGING UNION'S
MOTION TO REOPEN PART OF THE RECORD**

NOW COMES Respondent Kerry Inc., through undersigned counsel, pursuant to Section 102.48(d)(1) of the Rules and Regulations governing the National Labor Relations Board and files Respondent's Objection to Charging Union's Motion to Reopen Part of the Record. In support of the Objection, Respondent provides as follows:

I. Factors Required to Reopen Record

Section 102.48(d)(1) sets forth the factors that must be met in order for the Board to consider reopening the record. These factors are:

- A motion may be made on a showing of extraordinary circumstances;
- A motion is to be made after the Board decision or order;
- A motion must be for evidence only available since the close of the hearing or that should have been taken at the hearing; and
- Through the motion, the party must show why the evidence would require a different result. (NLRB Rules and Regulations Sec. 102.48(d)(1))

II. The Charging Union Failed to Meet the Factors Necessary to Reopen the Record

The Charging Union asks the Board to reopen the record to admit into evidence a memo that allegedly was issued to the union and bargaining unit employees in 2002. The memo concerns the payment of overtime. The Charging Union's Motion to Reopen should be denied for the following reasons:

A. The Charging Union Has Not Established Any Extraordinary Circumstances

The Charging Union's argument is that it simply put the memo in the wrong file, even though it admits to knowing about the existence of the memo in August 2003. In other words, the Charging Union was the recipient of the memo and knew of its existence prior to the hearing. The memo was available to the Charging Union as it was in its possession. Being a poor keeper of records or innocently misplacing a document is not an extraordinary circumstance. Instead, it is rather ordinary.

The Charging Union placed the document in a "Kerry" file as admitted in the Motion. All the Charging Union had to do was review its "Kerry" files. Such is not an extraordinary measure when preparing for litigation. The Board has even so held. In International Transport Service, 344 NLRB 279 (2005), the employer discharged an employee and was ordered to reinstate the employee. Post-decision, the employer reviewed documents it had in its possession and discovered additional evidence of fraud that the discharged employee had committed. The employer attempted to reopen the record and introduce the evidence. The employer claimed that the evidence was newly discovered because it was contained in a set of sixty boxes of documents. The counsel for the General Counsel argued successfully against introduction because the evidence was not newly discovered. The ALJ found and the Board agreed, that the documents were in the employer's possession and it was the employer's own fault that it did not conduct a more thorough review. Id. at 291. The employer failed to act with reasonable

diligence to uncover the documents and the motion to reopen was denied accordingly. Id. (citing Fitel/Lucent Technologies, Inc., 326 NLRB 46, fn. 1 (1998) (citing Owen Lee Floor Service, 250 NLRB 651, fn. 2 1980)).

The Charging Union would have the Board allow for a record to be opened whenever a party “forgot” about a piece of evidence or misplaced a piece of evidence. Such an argument has been squarely rejected. The Charging Union admitted to having possession of the memo and essentially of not acting with reasonable diligence. The Charging Union cannot claim that its files are too voluminous as such an argument is not valid. Id. at 291.

Mere forgetfulness is not extraordinary and should not be used as an excuse to have the Board correct a mistake of one of the parties. Thus, the Motion should be denied for this reason alone.

B. The Motion is Premature

Section 102.48(d)(1) specifically provides that the motion be made after the Board’s decision or order. The Board has not yet ruled on the case.

C. The Evidence Was Available Before The Hearing

Again, the Charging Union had the document since at least August 2003. The concept of unavailability means that the document could not be obtained. The document could have been obtained and was solely within the power of the Charging Union to find it and produce it. When an item is in the possession of a party, it is available. See, e.g., United Parcel Service, 327 NLRB 317, 320 (1998) (motion to reopen record to allow testimony of witness who was an employee, but not presented is denied as witness was available). Thus, the Charging Union fails to meet this factor as well. The memo was available to the Charging Union before the hearing; the Union representative just did not look in the right folder.

D. The Evidence Was Not Improperly Excluded From the Hearing

The Charging Union cannot claim that the evidence was improperly excluded from the hearing because it was not submitted to the ALJ. See, e.g., United Parcel Service, 327 NLRB at 320 (evidence not submitted could not be improperly rejected). Thus, the ALJ did not make any improper ruling. Again, it is solely the fault of the Charging Union that the document was not presented at the hearing; a fault which should not be excused. Thus, the Charging Union failed to meet this factor as well.

E. Introduction of the Memo Would Not Necessitate a Different Result

On page 4 of its Motion, the Charging Union claims that the memo proves that the Company actually once paid overtime after eight hours and not only after forty hours worked in a week. The Charging Union is missing an evidentiary step. Even if the memo was credited and admissible, at best, the memo only shows what the Respondent informed the Charging Union back in 2002. It does not show that the Respondent actually did then or any time thereafter pay overtime after eight hours in a day. Indeed, the memo concerns a matter under a contract that the Respondent adopted upon its purchase of the facility from the predecessor and which expired in 2004. The memo does not reflect anything that happened during subsequent negotiations, of which there were two. Even if the Company paid overtime after eight hours a day in 2003, the memo does not reflect whether anything subsequently changed by agreement or otherwise regarding the payment of overtime. The memo does not address whether any changed occurred within the six month period preceding the filing of the Charge. Thus, it is not even relevant.

The Charging Union asks that Orin Holder be allowed to present testimony regarding the memo. Such testimony would have no relevance because Holder admitted at the hearing that he had no knowledge as to whether the Respondent ever paid overtime after eight hours in a day or only after forty hours in a work week. (Tr. pg. 45, lns. 9-15) Holder also admitted that the

Respondent has always insisted that overtime did not accrue until after forty hours worked in a week. (Tr. pg 46, lns. 3-9) Holder then testified that overtime accrues after an employee works forty hours in a week. (Tr. pg. 46, lns. 22-24) The testimony of Holder concurred Company practice as of 2006, which is after the date of the memo. (GC Ex. 4) Holder also confirmed that he did not file a grievance over the overtime issue until 2010. (Tr. pg. 49, ln. 20 - Tr. pg. 50, ln. 10) Consequently, Holder cannot provide any testimony that would establish whether or not the Company ever paid overtime after eight hours in a day; he has admitted that he has no actual knowledge as to such and that his understanding was that the Company paid overtime after forty hours worked in a week. The Motion should be denied for this reason as well.

The memo is also noticeably devoid of the language providing that overtime is paid after eight hours or after forty, but not both. (Emphasis added) The current CBA (GC Ex. 2) provides that: "All employees will be paid for time and one-half for all hours actually worked in excess of eight (8) hours per day or forty (40) hours per week but not for both. However, to qualify for daily overtime rates, the employee must work all of his scheduled hours in the week unless prevented by proven sickness or other similar reason satisfactory to his supervisor." (Article 6, Section 6.5)

A memo missing critical language does not constitute evidence as to what was the agreement and practice under that missing language.

The Charging Union did not produce one witness at the hearing who had first-hand knowledge of anyone receiving overtime after working eight hours in a day, instead of only after forty hours in a week. The Charging Union had ample notice of the hearing; indeed it filed the Charge. Thus, had anyone actually received overtime after just eight hours worked in a day, the Charging Union could have produced someone with first-hand knowledge. Instead, only the

Respondent produced evidence which definitively answered the question of whether overtime had ever been paid after just eight hours worked in a day. That answer was “no.” The Respondent submitted the best evidence, the payroll records. The payroll records established that since at least 2008, the Company has paid overtime after 40 hours per week, not after eight hours per day. (R. Ex. 13, 14 15) This practice preceded the current CBA.

Significantly, the ALJ found that the Union had proposed to have overtime paid after eight hours worked in a day during the 2008 CBA negotiations. In other words, the Charging Union knew that overtime was not being paid after eight hours, but after forty, which is contrary to the document they want to produce.

Again, the only conclusive evidence on whether the Respondent paid overtime after eight hours worked in a day would be payroll records. Those were introduced and refuted the Charging Union’s claim. An outdated memo cannot overcome the first hand conclusive evidence of payroll records.

Consequently, the new evidence does not require that the ALJ or Board reach a different result.

III. Conclusion

The Charging Union cannot meet any of the criteria set forth in Section 102.48(d)(1) of the Rules and Regulations that would even warrant consideration of a motion to reopen the record. The Charging Union presents no extraordinary circumstances, the "evidence" at issue does not relate to whether the Respondent changed the terms of the current CBA and the evidence, even if admitted, would not result in a different outcome to the hearing. Thus, the record should not be reopened and the Motion should be denied.

Respectfully submitted,

KERRY INC.

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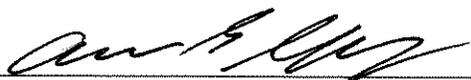
STATEMENT OF SERVICE

On **November 22, 2011**, the undersigned, an attorney, filed with the National Labor Relations Board, Office of the Executive Secretary, via the Board's electronic filing system, an electronic copy of the foregoing **Respondent's Objection to Charging Union's Motion to Reopen Part of the Record**, and served copies of same upon the parties below:

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