



United States Government

**NATIONAL LABOR RELATIONS BOARD**  
**1099 14<sup>th</sup> STREET NW**  
**WASHINGTON DC 20570**

May 7, 2015

Re: Benjamin H. Realty Corp.  
Case 22-RC-087792

### **ORDER**

The Employer's Motion for Reconsideration and Motion to Reopen the Record are denied.<sup>1</sup> The Employer asserts that the record should be reopened to receive a complaint filed in New Jersey state court on June 30, 2014 on behalf of employee Justo Pastor Perea alleging, *inter alia*, that the Employer discriminatorily demoted him in January 2013 and July 2013. Based on Perea's credited testimony, the Board found in this representation proceeding that Perea was demoted in March 2012, prior to the November 8, 2012 election in this case, when the Employer hired Moshe Weiss as its manager.

A party seeking to introduce new evidence after the record of a representation proceeding has been closed must 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.*, 357 NLRB No. 139, slip op. at 3 (2011). We assume *arguendo* that the Employer has shown that the complaint was unavailable at the time the hearing closed and that it moved promptly upon its discovery. However, the Employer has not shown that the contents of the complaint would have changed the outcome of the proceeding. The complaint was signed by Perea's counsel, and there is no indication on the face of the document that Perea

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<sup>1</sup> The Board's policy with respect to responses to motions is to permit the party that filed the original motion to file a reply to any opposition to the motion, just as a party filing exceptions under Sec. 102.46 is permitted to file such a brief. See Sec. 102.46(h). In consideration of the need for administrative finality, however, sur-replies are generally not permitted, except by special leave of the Board. See *D. L. Baker Electric, Inc.*, 330 NLRB 521, fn. 4 (2002). Compare *Faurecia Automotive Seating*, 353 NLRB No. 5 (September 10, 2008). Here, no circumstances were presented warranting the General Counsel's April 3, 2015 "sur-reply" to the Employer's reply to the General Counsel's opposition to the Motion to Reopen and Motion for Reconsideration. Accordingly, that document was not considered by the Board.

verified or subscribed to its allegations. Perea's counsel asserts that the allegations are erroneous, and that he wishes to amend the complaint. Most importantly, the Employer does not dispute that Weiss was hired in March 2012. Based on the credited testimony in this case, the Board determined that there was a substantial change in Perea's duties and responsibilities after Weiss was hired. The fact that a complaint signed by Perea's counsel, alone, alleged that Perea was demoted on subsequent dates does not "compel[] a different result." *Manhattan Center Studios, Inc.*, above, slip op. at 5.

By direction of the Board:

Farah Z. Qureshi  
Associate Executive Secretary