

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
THIRD REGION

NOVELIS CORPORATION,)		
)		
AND	)	CASES:	03-CA-121293
	)		03-CA-121579
UNITED STEEL, PAPER AND	)		03-CA-122766
FORESTRY, RUBBER	)		03-CA-123346
MANUFACTURING, ENERGY, ALLIED	)		03-CA-123526
INDUSTRIAL AND SERVICE WORKERS,	)		03-CA-127024
INTERNATIONAL UNION, AFL-CIO.	)		03-CA-126738
)		

NOVELIS CORPORATION,)		
)		
AND	)	CASE:	03-RC-120447
)		
UNITED STEEL, PAPER AND)		
FORESTRY, RUBBER)		
MANUFACTURING, ENERGY, ALLIED)		
INDUSTRIAL AND SERVICE WORKERS,)		
INTERNATIONAL UNION, AFL-CIO.)		
)		

**RESPONDENT’S REPLY TO COUNSEL FOR GENERAL COUNSEL’S OPPOSITION
TO RESPONDENT’S CONDITIONAL MOTION TO REOPEN THE RECORD FOR
LIMITED PURPOSE OF PRESENTING EVIDENCE REBUTTING UNCHARGED
CONDUCT OCCURRING AFTER THE ELECTION**

On June 18, 2015, Counsel for General Counsel (“the GC”) filed its opposition to Respondent Novelis Corporation’s (“Novelis”) motion, submitted pursuant to Section 102.48(b) of the Board’s Rules and Regulations, conditionally seeking to reopen the record in the above-captioned proceeding for the limited purpose of presenting evidence regarding the lawful motivations for Novelis’ alleged post-election announcements concerning future employee compensation and other working conditions at its Oswego facility. The GC maintains that a

“special showing” is required to reopen the record under Section 102.48(d) of the Rules and Regulations, and that Novelis’ Motion should be denied since “extraordinary circumstances” do not exist to justify reopening the record. The GC’s opposition to the Motion is flawed for several reasons, and the Board should grant the Motion.

I. Initially, Novelis Reiterates That The Post-Election Conduct Should Not Have Been Considered In The First Place And Thus This Motion Should Never Have Been Necessary

To be clear, the instant Motion should have been unnecessary because (and as made clear in Novelis’ brief in support of its exceptions), the ALJ never should have admitted or considered the evidence of the purportedly unlawful post-election announcements begin with. This conduct was not charged as an unfair labor practice, and the time for asserting that such conduct violated the Act expired several months ago under the six-month statute of limitations established under Section 10(b) of the Act.

Nevertheless, the ALJ considered and relied upon such evidence. The proper course for the Board on review is to eliminate such evidence from the record and refuse to adopt the ALJ’s *Gissel* analysis. But if for some reason the Board refuses to eliminate such evidence and is remotely inclined to consider it in its review of the ALJ’s decision, Novelis at a minimum should be given a fair opportunity to rebut this evidence due to the unabashed “bait and switch” tactics engaged in by the GC and permitted by the ALJ. While this would not cure the serious due process issues with the ALJ having considered uncharged conduct in recommending a remedy, a reopening of the record would at least give Novelis an opportunity to address the facts presented.

The following arguments as to why the record should be reopened for the purpose of allowing Novelis to present evidence as to its lawful reasons for the post-election announcements only need to be considered and are asserted for the Board’s consideration to the extent the Board finds that the evidence presented by the GC and the Union at the hearing regarding Novelis’

alleged unlawful post-election conduct is relevant to the instant proceeding or otherwise leaves undisturbed the ALJ's erroneous reliance on this evidence.

II. Section 102.48(b) Provides the Operative Legal Standards for Reopening the Instant Record

The GC is simply wrong in arguing that the requirements of Section 102.48(d)(1) apply at this stage of the proceedings. Section 102.48(d)(1) expressly applies only to reopening the record “after the Board decision or order.” NLRB R. & Reg. § 102.48(d)(1) (emphasis added). Section 102.48(b), on the other hand, applies to the reopening of the record after an ALJ's decision but before the Board renders its decision, and it requires no special showing. *See* NLRB R. & Reg. § 102.48(b); *see also NLRB v. U.S.A. Polymer Corp.*, 272 F.3d 289, 295 (5th Cir. 2001) (recognizing that respondent employer may file motion to reopen record under Section 102.48(b) prior to Board's decision); *NLRB v. Amalgamated Clothing and Textile Workers Union*, 662 F.2d 1044, 1045 n.1 (4th Cir. 1981) (recognizing that Section 102.48(d)(1) applies after the Board decision or order has issued, while Section 102.48(b) applies before an order or decision by the Board has issued). Section 102.48(b) provides that upon the filing of exceptions, the Board has authority to “reopen the record and receive further evidence” without any requirement of a special showing. *Id.* Thus, the GC's contention that Novelis attempted to “mislead” the Board by citing to an incorrect legal standard and that Novelis' Motion must satisfy some heightened standard (GC Opp., p. 2) is false.

III. Novelis' Motion Should be Granted Even Under the Standard Imposed by Section 102.48(d)(1)

Even assuming *arguendo* that Section 102.48(d)(1) supplies the operative standard, Novelis' motion clearly establishes circumstances warranting a reopening of the record.

A. Contrary To The GC's Argument, The Fact That The Evidence Novelis Conditionally Seeks To Introduce Is Not "New" Should Not Preclude The Board From Reopening The Record To Receive The Evidence

Novelis does not dispute the GC's statement in its opposition that the evidence it seeks to present through the instant motion is not "new evidence." But, that is not the issue here. As stated in its initial Motion, Novelis did not present evidence of its lawful motives for its post-election announcements at the unfair labor practice hearing as a direct result of the ALJ's rulings and statements during the proceedings, most notably his formal ruling, in response to Novelis' motion *in limine*, that he would not consider evidence of the post-election announcements as "evidence of additional unfair labor practices."

Inexplicably, and in direct contravention of his prior rulings, the ALJ unreservedly relied on the evidence of Novelis' post-election announcements in his *Gissel* analysis and as justification for the imposition of a bargaining order. ALJ Dec. 45, 69. According to the ALJ:

Contrary to the Company's assertion that it undertook meaningful measures in post-election employee communications to remediate or mitigate the impact of its unlawful conduct, contextual evidence negated it. The evidence related to the Company's postelection communications denying the allegations in the complaint, while also heaping 5 years of pay raises on the employees. This was an unusual occurrence since pay and benefits changes have always been implemented between October and December of each year. The unusual timing of this change was coupled with announcements in May that the Company denied the charges, but felt that employees' rights would be respected and hopefully expressed in a rerun election. The Company, clearly emboldened by how it peeled away union support with its unlawful tactics during the election campaign, would be pleased with such a result. That is not to be. The only fair, justified and appropriate remedy here is a bargaining order. See *Tipton Electric Co.*, 242 NLRB 202, 202-203 (1979) (postelection grant of benefits represents a calculated application of the carrot and the stick to condition employee response to any union organizing effort, affording the employer an unlawfully acquired advantage in a rerun election which cannot be cured by simply ordering the employer to mend its ways and post a notice).

ALJ Dec. 69 (emphasis added).

Novelis could not reasonably have been expected to anticipate the “bait and switch” treatment it received. For this reason alone, the GC’s assertion that Novelis “had ample opportunity to present its own rebuttal directly addressing the [post-election announcements]” (see GC’s Opp., p. 3) is nothing more than hollow misdirection aimed at diverting attention from the extraordinary offense to Novelis’ due process rights. See *Lamar Adver. of Hartford*, 343 NLRB 261, 265 (2004) (finding that to satisfy the requirements of due process, the Board “must give the party charged a clear statement of the theory on which the agency will proceed with the case ... [and] may not change theories in midstream without giving respondents reasonable notice of the change”).

B. Novelis Should Be Permitted To Introduce Evidence Of Its Lawful Motives If The Post-Election Announcements Are Made Part Of The Remedy Analysis To Avoid The Very Serious Due Process Violations That Otherwise Would Occur

The evidence Novelis seeks to introduce is precisely the type that warrants a reopening of the record under the present circumstances. In simplest terms, evidence concerning Novelis’ motivations should have been taken at the hearing to avoid an extraordinary offense to Novelis’ due process rights.

Novelis’ position throughout these proceedings is that evidence regarding the post-election announcements should not have been considered, because only evidence of unlawful post-election conduct is relevant as aggravating circumstances which tend to erode the possibility of ensuring a rerun election and therefore justify a bargaining order. See *Chromalloy Mining & Minerals v. NLRB*, 620 F.2d 1120, 1131 n. 8 (5th Cir. 1980); *J. P. Stevens & Co. v. NLRB*, 441 F.2d 514, 521 (5th Cir. 1971); *Bakers of Paris*, 288 NLRB 991, 992 (1988); *Larid Printing, Inc.*, 264 NLRB 369, 371 (1982). Here, the lawfulness of Novelis’ post-election conduct was never placed at issue until after the close of the record, when both the GC and the Union, despite prior

contrary assurances to the ALJ, argued that evidence of Novelis' "unlawful" post-election conduct should be considered in determining the appropriate remedies under *Gissel*, and when the ALJ, despite his prior ruling and admonition, accepted the argument unreservedly and imposed a bargaining order, at least in part, on that evidence.

Accordingly, either the evidence of Novelis' post-election announcements should not have been considered, or Novelis should have been provided notice that the lawfulness of its conduct was at issue. Not only was no such notice provided, the ALJ formally ruled that he would not consider the evidence for the purpose of establishing additional theories of liability or for the purpose of determining "whether there is a possibility of a fair rerun election," and subsequently considered Novelis' post-election announcements as evidence of both. The ALJ's handling of this issue poses the very due process concerns that he claimed to be seeking to avoid in his ruling on Novelis' motion *in limine*. If evidence of the post-election announcements is to be considered as part of the Board's *Gissel* analysis, or in any way deemed justification for the imposition of a bargaining order, the evidence concerning Novelis' motives for the announcements must be considered. Any other outcome unquestionably prejudices Novelis' due process rights. The GC's claim that Novelis' evidence should be precluded merely because it is not "new evidence" does not change this result.

C. The Evidence Novelis Conditionally Seeks To Introduce, If Credited, Establishes The Lawful Motivations For Novelis' Post-Election Announcements

The GC's assertion that the evidence of Novelis' post-election announcements is "immaterial" (GC Opp., p. 4) and therefore would not lead to a different result because the ALJ made no findings of a violation, is equally unavailing. Even if the import of the evidence of Novelis' post-election announcements on the ALJ's ultimate imposition of the bargaining order is not clear from the plain language of the ALJ's decision (which it is), the ALJ's reliance on

Tipton Electric Co., 242 NLRB 202, 202-03 (1979), in support of his issuance of a bargaining order brings to sharp focus the significance he assigned to the evidence. See ALJ Dec. 69.

In *Tipton*, the Board upheld the ALJ's imposition of a remedial bargaining order, relying in large part on the fact that the employer did not "attempt to limit their unlawful conduct to that aimed solely at dissipating the Union's pre-election majority." 242 NLRB at 202-03. Instead, the Board found that, after the election and while the union's objections were pending, the employer conveyed an unlawful benefit aimed at rewarding employees for their prior rejection of the union. *Id.* According to the Board, the employer's post-election grant of benefits "was a calculated application of the carrot and the stick to condition employee response to any union organizing effort" that afforded the employer "an unlawfully acquired advantage in regard to a rerun election which cannot be cured by simply ordering them to mend their ways in the future and post a notice." *Id.* (emphasis added).¹

That the portion of the *Tipton* decision highlighted above was directly quoted by the ALJ in support of his imposition of a bargaining order against Novelis speaks volumes to his treatment of Novelis' post-election announcements. It is clear that he likened the announcements to "the carrot and the stick" behavior deemed unlawful under *Exchange Parts* and cited by the Board in *Tipton* as justification for imposing a bargaining order. As in *Tipton*, the ALJ determined that Novelis' post-election announcements supported the imposition of a bargaining order due to the purported unlawful motives underlying those announcements.

¹ *Tipton* is easily distinguishable from the instant case for the simple reason that the post-election conduct at issue in that case was a charged, proved and fully litigated unfair labor practice violation in full accord with the employer's due process rights. In contrast, the post-election announcements at issue here were never alleged in the instant matter, prior to or during the hearing, to be unlawful. Indeed, at the hearing, and in their respective responses to Novelis' motion *in limine* to exclude such evidence, the GC and the Union expressly assured the ALJ that evidence of the announcements was not being presented to prove additional, uncharged violations, or otherwise as proof of unlawful conduct. See Tr. 2827-2832; ALJ Exh. 6 (B-C).

Evidence of Novelis' lawful motives for the post-election announcements, if credited, would lead to a different remedy in this case (assuming that Novelis engaged in unlawful conduct and that Novelis' post-election announcements could possibly be relevant to the determination of a remedy), as it would render the post-election announcements meaningless as a vital justification for the bargaining order imposed.

Respectfully submitted this 2nd day of July, 2015.

HUNTON & WILLIAMS LLP

/s/ Robert T. Dumbacher

Kurt A. Powell
Robert T. Dumbacher
Bank of America Plaza, #4100
600 Peachtree Street, NE
Atlanta, GA 30308
Telephone: 404-888-4000
Facsimile: 404-888-4190
Email: kpowell@hunton.com
Email: rdumbacher@hunton.com

Kurt G. Larkin
Riverfront Plaza, East Tower
951 E. Byrd Street
Richmond, Virginia 23219
Telephone: 804-788-8200
Facsimile: 804-788-8218
Email: klarkin@hunton.com

Kenneth L. Dobkin
Senior Counsel
Novelis Corporation
2560 Lenox Road, Suite 2000
Atlanta, Georgia
Email: ken.dobkin@novelis.com

Attorneys for Respondent
NOVELIS CORPORATION

CERTIFICATE OF SERVICE

I certify that on this 2nd day of July, 2015, I caused the foregoing to be electronically filed with the National Labor Relations Board at <http://nrlb.gov> and a copy of same to be served by e-mail on the following parties of record:

Brian J. LaClair, Esq.
Blitman & King
443 North Franklin Street, Suite 300
Syracuse, NY 13204
bjlaclair@bklawyers.com

Brad Manzolillo, Esq.
USW Organizing Counsel
Five Gateway Center Room 913
Pittsburgh, PA 15222
bmanzolillo@usw.org

Nicole Roberts, Esq.
Lillian Richter, Esq.
Linda M. Leslie, Esq.
National Labor Relations Board
Buffalo Office, Region 3
Niagara Center Bldg., Suite 360
130 South Elmwood Avenue
Buffalo, NY 14202
nicole.roberts@nrlb.gov
linda.leslie@nrlb.gov

Thomas G. Eron, Esq.
Peter A. Jones, Esq.
Bond, Schoeneck & King PLLC
One Lincoln Center
Syracuse, NY 13202
teron@bsk.com
pjones@bsk.com

/s/ Robert T. Dumbacher
Robert T. Dumbacher