NOT INCLUDED
IN BOUND VOLUMES

PMH
Honolulu, HI

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

HARRY ASATO PAINTING, INC.

and

Cases 20-CA-124382
20-CA-125157

INTERNATIONAL UNION OF PAINTERS
AND ALLIED TRADES, PAINTERS
LOCAL UNION 1791

ORDER DENYING MOTION
FOR RECONSIDERATION AND REOPENING THE RECORD

On May 29, 2015, a three-member panel of the National Labor Relations Board issued a Decision and Order in the above-entitled proceeding.[1] The Board adopted the decision of the administrative law judge and found that the Respondent, Harry Asato Painting, Inc., violated Section 8(a)(1) by interrogating employees about whether they wanted to remain members of the International Union of Painters and Allied Trades, Painters Local Union 1791 (with which the Respondent had a Section 8(f) agreement), and coercing employees into resigning their union membership and resigning from the Union's apprenticeship program. The Board also adopted the judge's finding that the Respondent violated Section 8(a)(5) and (1) by unlawfully repudiating the 2013-2016 collective-bargaining agreement and its relationship with the Union and making unilateral changes to employees' pay and benefits. Among other standard remedies, the Board ordered the Respondent to make all contractually required contributions to

[1] 362 NLRB No. 104.

the Union's benefit funds that it failed to make under the terms of the parties' 2013-2016 collective-bargaining agreement.

On June 23, 2015, the Respondent filed a motion for reconsideration and reopening of the record. The General Counsel filed an opposition to the motion, the Respondent filed a reply, and the General Counsel filed a surreply.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Having considered the matter, we deny the Respondent's motion as lacking in merit.

The Respondent asserts that the Board made a material error by relying on the parties' 2013-2016 collective-bargaining agreement in assessing the appropriate remedies. In support, the Respondent proffers an email communication from the Union dated January 27, 2015--after the close of the hearing--that purportedly memorializes a new collective-bargaining agreement and agrees to allow the Respondent to limit its liability under the judge's decision with respect to payments owed to the Union benefit funds.[2]

[2] The email, sent by Union Business Representative Mitchell Shimabukuro to Respondent's President Glenn Asato, reads, in pertinent part:

> "Ok per our discussion today at your office the Painters Union Local 1791 will waive the following fees that was (sic) awarded by the NLRB ALJ. Harry Asato Painting will not be required to repay into these following funds from January 1, 2014 to January 31, 2015.
> LMCF, Training Fund and TP&C
> It is understood that all fund payments by Harry Asato Painting will start from February 1, 2015, also coverage for Health & Welfare will be paid by Harry Asato Painting until the members are covered under the Painters Union Health & Welfare fund.
> It is further understood the back pay will be determined by the board agents from the NLRB. . . .

We find that the Respondent has failed to present the kind of "extraordinary circumstances" required for reconsideration or reopening of the record under Section 102.48(d)(1) of the Board's Rules and Regulations.[3] The Respondent asserts that the email qualifies under Section 102.48(d)(1) as evidence that has been discovered only since the close of the hearing. For such evidence to be sufficient, however, it (1) must have been capable of being presented at the original hearing and (2) could not have been discovered by reasonable diligence. *Rush University Medical Center*, 362 NLRB No. 23, slip op. at 1 fn. 2 (2015) (denying request to reopen record for election petitions that did not exist at the time of the hearing); see also *Allis-Chalmers Corp*., 286 NLRB 219, 219 fn.1 (1987) (denying "the motion [to reopen] as it proffers evidence concerning an alleged event that occurred after the close of the hearing"). Because the evidence at issue here did not exist at the time of the hearing, it does not provide a basis for reconsideration or reopening the record. *APL Logistics*, 341 NLRB 994, 994 fn. 2 (2004), enfd. 142 Fed.Appx. 869 (6th Cir. 2005).

Even assuming that the evidence here met the other requirements of Section 102.48(d)(1), the Respondent's motion suffers from two additional fatal flaws. First, it is well established that the Board need not reopen the record unless the moving party has

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> The Painter Union will also waive all back dues and admin fees for all existing members working for Harry Asato Painting.
> All of these concession is (sic) agreed on providing Harry Asato abide by the decision of ALJ and respondent will not appeal the decision."

[3] Section 102.48(d)(1) of the Board's Rules and Regulations provides, in pertinent part:

> A party to a proceeding before the Board may, because of extraordinary circumstances, move for . . . reopening of the record after the Board decision or order. . . . 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.

demonstrated that the new evidence would require a different result. See Sec. 102.48(d)(1); *Fitel/Lucent Technologies, Inc.,* 326 NLRB 46, 46 at fn.1 (1998); *Opportunity Homes*, 315 NLRB 1210, 1210 at fn. 5 (1994), enfd. 101 F.3d 1515 (6th Cir. 1996); *NLRB v. Johnson's Industrial Caterers*, 478 F.2d 1208, 1209 (6th Cir. 1973). The Respondent has not shown that the evidence of post-hearing bargaining would change the unfair labor practice findings. Second, the Respondent failed to bring the evidence to the Board's attention promptly upon discovery, as required by Section 102.48(d)(2). The Respondent waited almost 5 months after it received the Union's email to file its motion before the Board. See *Labor Ready, Inc*., 330 NLRB 1024, 1024 (2000) (finding untimely a motion that was filed 3 months after discovery of new evidence).

For the above reasons, we deny the Respondents' motion. We leave to compliance the issue of whether evidence concerning bargaining that occurred subsequent to the judge's decision is relevant to the issue of mitigation of the Respondent's remedial obligations.

IT IS ORDERED that the Motion for Reconsideration and Reopening of the Record is denied.

Dated, Washington, D.C. September 30, 2015.

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Mark Gaston Pearce, Chairman

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Philip A. Miscimarra, Member

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Kent Y. Hirozawa, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD