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

MERCK, SHARP & DOHME CORP.

and

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| UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, LOCAL 10-580, AFL-CIO, CLC | Case 06-CA-163815 |
| LOCAL 94C, INTERNATIONAL CHEMICAL WORKERS COUNCIL OF THE UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO | Case 05-CA-168541 |
| UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, LOCAL 4-575, AFL-CIO, CLC | Case 22-CA-168483 |

**COUNSEL FOR THE GENERAL COUNSEL'S OPPOSITION TO RESPONDENT'S MOTION TO REOPEN THE RECORD TO ADDUCE ADDITIONAL EVIDENCE RELEVANT TO RESPONDENT'S DUE PROCESS CLAIM**

Counsel for the General Counsel hereby files this Opposition to Respondent Merck, Sharp & Dohme Corporation's Motion to Reopen the Record to Adduce Additional Evidence Relevant to Respondent's Due Process Claim ("Respondent's Motion"), which was filed on February 17, 2017 by Merck, Sharp & Dohme Corporation ("Respondent"). Counsel for the General Counsel strenuously opposes Respondent's Motion because it does not meet the requirements of Sections 102.48(d)(1) and (2) of the National Labor Relations Board's Rules and Regulations ("Rules and Regulations"), which governs Respondent's request, and because it lacks substantive merit.

Section 102.48(d)(1) of the Rules and Regulations provides, in pertinent part, that "A party to a proceeding before the Board may, because of extraordinary circumstances, move for reconsideration, rehearing, or reopening of the record *after the Board decision or order*." (Emphasis added) Given that the Board has not yet issued a decision in this matter, Respondent's Motion is clearly premature and must be denied.

By way of procedural background, the Regional Director of NLRB Region Six issued a Consolidated Complaint and Notice of Hearing in these cases on June 30, 2016, based on charges filed against Respondent in Region 5, Region 6 and Region 22 of the NLRB.[1] The Consolidated Complaint, at paragraphs 8 and 9, specifically alleges that Respondent violated Section 8(a)(3) of the Act by failing to give to its employees at Respondent's Riverside, Elkton, and Rahway facilities, an "appreciation" paid day off, while granting this benefit to Respondent's unrepresented employees, because the bargaining unit employees who are represented at those facilities by USW Local 10-580, UFCW Local 94C, and USW Local 4-575, respectively, engaged in concerted activities, and to discourage employees from engaging in these activities. Based on these pleadings, Respondent was provided with proper and complete notice of the alleged Section 8(a)(3) violation. A hearing was held before Administrative Law Judge David Goldman ("the ALJ") in Bloomsburg, Pennsylvania on October 4 and 5, 2016.

On December 20, 2016, the ALJ issued a Decision and Recommended Order in these cases in which he specifically concluded that Respondent had violated Section 8(a)(3) of the Act by "discriminatorily denying union-represented employees a paid day off in retaliation for union activity protected by the Act." (ALJ Decision, p. 20) The matter was promptly transferred to the

[1] Specifically, Case 06-CA-163815 was based on charges filed against Respondent by Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Local 10-580, AFL-CIO, CLC, ("USW Local 10-580"); Case 05-CA-168541 was based on charges filed by Local 94C, International Chemical Workers Council of the United Food and Commercial Workers International Union, AFL-CIO ("UFCW Local 94C); and Case 22-CA-168483 was based on charges filed by United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Local 4-575, AFL-CIO, CLC ("USW Local 4-575").

Board in accordance with Section 102.45 of the Rules and Regulations. The Board has not yet issued its Decision, thereby making Section 102.48(d)(1) inapplicable to this case.

Turning to the substantive question about whether Respondent's Motion has merit, Respondent filed the instant Motion with the Board contemporaneously with its Exceptions to the ALJ's Decision, wherein Respondent argued that it had been denied due process because the ALJ reached his conclusion based on a theory that differed from that proffered by Counsel for the General Counsel. Based on this contention, Respondent now seeks to reopen the record to adduce evidence related to the ALJ's theory of the Section 8(a)(3) violation. Notably, Respondent cites no authority for its proposition that the ALJ is prevented from applying alternative theories to the facts of the case.

In support of its Motion, Respondent seeks to make part of the record pre-trial email communications between Respondent's counsel and Counsel for the General Counsel, in which the latter represented the General Counsel's theory of the violation. Respondent asserts in its Motion that these emails constitute "evidence" that would warrant a reopening of the record under Section 102.47 and 102.48(d)(1) and (2) of the Rules and Regulations, which provide that a record can be reopened if additional evidence, if adduced and credited," would require a "different result" than that reached by the administrative law judge. Respondent's argument in this regard is wholly misguided, as the subject emails do not constitute "evidence" associated with the underlying facts of the case. Rather, they are nothing more than a reflection of professional courtesy extended from Counsel for the General Counsel to Respondent's counsel in advance of the trial, for purposes of expediency.

The subject emails in no manner prevented or restricted the General Counsel from thereafter pursuing alternative theories or different trial strategies. Nor was the ALJ constrained in reaching his conclusion of law based on an alternative theory.[2] Given that the emails do not

[2] Section 101.11(a) and Section 102.45(a) of the Board's Rules and Regulations set forth the ALJ's obligations with respect to hearing and deciding cases. Nowhere do the Rules provide that the ALJ will be constrained by either

constitute evidence of any sort, Counsel for the General Counsel adamantly opposes their inclusion in the record.

Respondent's due process claim is particularly disingenuous because the ALJ reached his conclusion based on testimony elicited by Respondent's counsel from Respondent's own witnesses. In this regard, Brian Killen ("Killen"), the Plant Manager at Merck's Riverside facility, testified that he was informed by Respondent's Director of Labor Relations that the reason Respondent did not give the paid day off to employees in the United States covered by a collective bargaining agreement was that in the past unions had refused to entertain changes to certain terms in existing collective bargaining agreements proposed by Merck.

The relevant testimony of Killen, in which he recounted a conference call among various plant managers and Respondent's Executive Director of U. S. Labor Relations, is as follows:

> I and other plant managers asked about the reason [why Respondent had decided to exclude unionized employees from the paid day off benefit] and the feedback that we got was that in the previous—in the recent history – I'll call it that – in the previous couple of years that the company had made changes to the non-CBA employees. You know relatively simple changes that company linked to areas like how they administer payroll and 401K and how they complete year in [sic] end holidays. So the company made these changes for non-unionized employees, and they tried to discuss them with the union outside of contract negotiations, and the feet [sic] back from union was not to pursuit [sic] and talk to us at the next negotiations. So that was the feedback that we [the plant managers] got when we pushed on – give us some more reasoning. (Transcript p. 244, lines 4-15)

Killen further testified that when asked by Edward Vallo, the president of USW Local 10-580, about why Respondent was excluding the unionized employees from receiving the paid day off, Killen responded in the following manner:

> I articulated the reasons that I was given, which were linked to payroll administration changes, 401K administration changes and year-end holidays. That's what I had taken from the discussion [the aforesaid conference call among plant managers and Zingales]; again, changes that had happened with the

party's theory of the case.

> nonunionized employees but the union wouldn't discuss it in the previous period of time outside of negotiations. (Transcript p. 245, lines 17-23)

Respondent's U.S. Labor Representative, Tony Zingales, also testified at the hearing on behalf of Respondent. The ALJ correctly concluded in his Decision that Zingales had "indirectly corroborated" Killen's account. (ALJ Decision p. 5, line 41) The import of the above-cited testimony is that Respondent had ample opportunity to present its witnesses, elicit testimony, and cross-examine witnesses at the hearing. To the extent that it failed to anticipate a need to address *all* potential legal implications of testimony *by its own witnesses*, the fault lies squarely with Respondent's counsel and not with the ALJ or the Board's processes. In this regard, Respondent's counsel was fully aware, or should have been fully aware, prior to the hearing that Killen and Zingales would testify with specificity as to the motive for Respondent's denial to unionized employees of the paid day off, as this was part of Respondent's defense during the investigation of the unfair labor practice charges and Respondent was represented by the same counsel during that investigation.

Respondent's due process argument is further weakened by the fact that in his post-hearing brief to the ALJ, Counsel for the General Counsel noted that Killen's testimony about why Respondent denied the paid day off to unionized employees, while granting it to unrepresented employees, evinces anti-union animus (i.e., the reason that the benefit was not offered was because of the Locals' lawful refusal to agree to other changes.[3] Likewise, counsel for the Charging Parties argued in his brief that the reason for Respondent's conduct, as testified to by Killen, proves an unlawful motive.[4]

The fact that both Counsel for the General Counsel and the Charging Parties' counsel argued for the finding of a violation based on anti-union animus, as testified to by Killen and

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[3] Brief on Behalf of Counsel for the General Counsel to Administrative Law Judge David Goldman at p. 23, footnote 12.

[4] Charging Parties' Post-Hearing Brief to the Administrative Law Judge at pages 8-9.

Zingales, unequivocally placed the motivation issue at the fore. Thus, any motion for reopening the record should have been made to the ALJ *before* he issued his Decision. Because Respondent had an opportunity to address its concern prior to the issuance of the ALJ's Decision, but failed to do so, Respondent's due process argument must be rejected.

In sum, Counsel for the General Counsel urges the Board to deny Respondent's Motion on two grounds: 1) Procedurally, the Motion it is untimely under Section 102.48(d)(1) of the Board's Rules and Regulations because the Board has not yet issued its Decision, and 2) Substantively, Respondent's due process argument is utterly meritless and unsupported by fact or law.

Dated at Pittsburgh, Pennsylvania, this 1st day of March 2017.

Respectfully submitted,

/s/ David L. Shepley

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