

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

WALDEN SECURITY, INC.

and

UNITED GOVERNMENT SECURITY OFFICERS
OF AMERICA, INTERNATIONAL UNION
JOINTLY WITH ITS MEMBER LOCALS 85, 86,
109, 110, 111, 152, 161, 167, 173, 175, 220

Cases 14-CA-170110,
18-CA-170129,
16-CA-170337,
and 15-CA-176496

**GENERAL COUNSEL'S OPPOSITION TO RESPONDENT'S MOTION
TO REOPEN AND SUPPLEMENT THE RECORD AND GENERAL COUNSEL'S
MOTION TO STRIKE RESPONDENT'S BRIEF IN SUPPORT OF EXECPTIONS**

Having presented its case to an Administrative Law Judge and lost, Respondent Walden Security, Inc. now seeks to try out a new litigation strategy by introducing evidence it possessed before the record closed but did not present.¹ General Counsel vigorously opposes Respondent's motion to introduce additional evidence into the record following an adverse decision.² The evidence Respondent seeks to introduce is not uncontroverted. Further, General Counsel seeks to strike Respondent's brief from the record because it is rife with references to materials that are not in the record.

Respondent's Motion to Reopen and Supplement the Record Should be Denied

Respondent seeks to have the National Labor Relations Board (Board) apply Section 102.48(b)(1) of the Board's Rules and Regulations (Board's Rules) in an unprecedented manner

¹ These cases were submitted to Administrative Law Judge Melissa M. Olivero pursuant to a Joint Motion and Stipulation of Fact (Joint Motion) on September 26, 2016. Judge Olivero issued a Decision on July 7, 2017, finding that Respondent was a perfectly clear successor that violated the Act unilaterally changing terms and conditions of employment without notifying the Union or providing an opportunity to bargain. Respondent filed exceptions on October 10, 2017 along with a brief in support of the exceptions and a motion to reopen and supplement the record.

² General Counsel does not except to Judge Olivero's finding that Respondent did not violate the National Labor Relations Act with respect to the termination standard.

to introduce evidence that was available to it long before the matter was submitted for decision on a Joint Motion and Stipulation of Fact. Respondent's motion must be denied because it is not justified under the Board's Rules and is completely unsupported by case law.

First, Respondent's motion must be denied because it is not justified under the Board's Rules. Respondent seeks to introduce evidence that it admits it had available to it long before the matter was submitted to the administrative law judge. Board Rule 102.48(c)(1) states that "[o]nly newly discovered evidence, evidence which has become available only since the close of the hearing, or evidence which the Board believes may have been taken at the hearing will be taken at any further hearing." The Board Rule further requires that the party attempting to introduce the new evidence must account for why the evidence was not presented earlier. Although Board Rule 102.48(c) applies after a Board decision, there would be no need for such a specific rule if Respondent could reopen the record to introduce non-newly discovered evidence at any point after the administrative law judge's decision issued. Such a permissive policy would result in never-ending attempts relitigate issues by a losing party. Accordingly, a decision to reopen the record necessarily requires a compelling justification, such as newly discovered evidence. Respondent does not assert any compelling reason to explain why it did not introduce this evidence at hearing other than asserting an error in litigation strategy by the previous representative.

Further, contrary to Respondent's contentions, reopening the record to admit its evidence would be prejudicial. The decision about which evidence to include in the stipulated record was made after extensive discussions and negotiations between Respondent, General Counsel, and the Charging Party (the parties). The parties crafted the stipulated record through weeks of discussion and significant give and take; it was not the product of mere happenstance. All of the

parties made concessions about what would appear in the stipulated record because the alternative was a logistically challenging hearing. At the time, the Consolidated Complaint and Notice of Hearing issued, the Cases involved 11 bargaining units spread across four different National Labor Relations Board Regions. Further complicating the matter, many of the bargaining units represented members in multiple cities encompassing a wide geographic range. It was possible that testimony would have been needed from witnesses in at least 27 different locations spread from El Paso, Texas to New Orleans, Louisiana and north to Des Moines, Iowa. The parties recognized there would be significant expense and disruption if witnesses were presented from so many different locations. To avoid this, the parties engaged in extensive discussions and negotiations to establish which facts were uncontroverted and what would be included in the stipulation of facts. Respondent had a full opportunity during these negotiations to press its case for the inclusion of all potentially relevant documents. It would be manifestly unfair if Respondent were allowed to now unilaterally supplement the record with evidence that the parties did not agree to include in the record.

Having presented its case and, lost before the Administrative Law Judge, Respondent, through a newly hired counsel, seeks to add into the record evidence that was fully available to it before the Joint Motion was submitted. In fact, Respondent itself created the documentary evidence it now seeks to add into the record long before the hearing occurred. In these circumstances, Respondent has not justified its request to reopen the record to admit this additional evidence. *See North Hills Office Services*, 342 NLRB 437, 437 fn. 1 (2004) (holding that documents that were not made a part of the record “must be excluded from consideration by the Board, because to consider such documents would deny the other parties to the proceeding an opportunity for voir dire and cross examination.”).

Second, Respondent's motion must be denied because it is wholly without precedent. Respondent does not cite, and General Counsel cannot find, any instances of the Board granting a motion in similar circumstances to reopen the record to introduce non-newly discovered evidence pursuant to Rule 102.48(b)(1) or its predecessor, Rule 102.48(b). In *Phelps Dodge Mining Company*, 308 NLRB 985, 985 fn. 4 (1992), set aside on other grounds 22 F.3d 1493 (10th Cir. 1994), the Board denied a similar request to reopen the record to add additional evidence to the record. The Board noted that "Rule 102.48(b) is not carte blanche for remedying omissions in a party's trial of the case." *Id.* The purpose of the Section 102.48(b)(1) appears to be to introduce evidence excluded from the record pursuant to erroneous administrative law judge rulings. See *The Connecticut Pen and Pencil Co.*, 242 NLRB 972, 972 fn. 1 (1979), enf. denied 636 F.2d 1203 (2nd Cir. 1980) ("It is within the Board's discretion to reopen the record when it believes certain evidence should have been taken by the administrative law judge at the hearing. See Sec. 102.48(b) of the Board's Rules and Regulations."). Moreover, if the record could be freely supplemented with evidence that was available at the time of the hearing, there would be no need for Rule 102.48(c)(1), which allows the reopening of the record based on newly discovered evidence. See *Washington Street Brass & Iron Foundry, Inc.*, 268 NLRB 338, 338 fn. 1 (1983) ("[T]o the extent that Respondent's exceptions assert the existence of fact that are not part of the formal record, we are unable to consider such evidence absent a showing that such facts were newly discovered or not previously available. See Sec. 102.48(b) and (d)(1) [now Sec. 102.48(c)(1)] of the Board's Rules and Regulations.").

In addition to newly discovered evidence, Section 102.48(b)(1) has been properly applied to introduce new formal documents in the record. See *Burndy, LLC*, 364 NLRB No. 77, slip op. at 1, fn. 1 (2016) (Board granting General Counsel's motion to use Section 102.48(b) to

make a Notice of Ratification part of the case record, following a challenge to the former acting General Counsel's authority to issue a complaint). There is simply no case law supporting Respondent's attempt to reopen the record to introduce documents it could have introduced at the hearing.

Finally, General Counsel does not agree that the proposed evidence is uncontroverted. Most egregious is the affidavit that Respondent seeks to introduce, which must be excluded as inadmissible hearsay. Pursuant to Federal Rule of Evidence 801(c), hearsay is a statement that the declarant does not make at the current trial or hearing that is offered to prove the truth of the matter in the statement. The affidavit here contains statements that were not made at hearing and it is offered to establish the truth about Respondent's actions prior to December 1, 2015. There is no opportunity to cross examine the affiant. As inadmissible hearsay, this statement should be struck and expunged from the record.

In sum, Respondent made a litigation decision to limit the scope of issues before the Administrative Law Judge. Respondent should not be given a second chance to litigate simply because it was dissatisfied with the results of its initial strategy. Respondent's motion to reopen the record should be denied and Respondent's proposed evidence and any references to such evidence should be expunged from the record.

Respondent's Brief Should Be Struck

Pursuant to Board Rule 102.47, General Counsel moves to strike Respondent's Brief in Support of Exceptions because it references materials not in the record. *See Southern Mail, Inc.*, 345 NLRB 644, 644 fn. 2 (2005). Board Rule 102.46(A)(2)(iii) provides that the brief in support of exceptions must "present[] clearly the points of fact and law relied on in support of the position taken on each question, with specific page citations to the record."

Respondent's entire brief must be struck, as it abounds with references to matters not established in the record. A cursory review of the brief establishes that Respondent refers to facts from outside the record on at least 17 pages of its 37 page brief. This is not a situation where just one or two pages could be struck and the remainder of the brief left intact. The entire brief must be struck. However, if the entire brief is not struck, General Counsel argues that, at a minimum, pages 1-29 must be struck, leaving only pages 31-37 of Respondent's brief, corresponding to sections III.B and III.C.

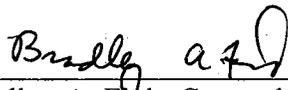
If the entire brief is struck, Respondent should not be provided an opportunity to file a new brief, as such a brief would be untimely. *See* Board Rule 102.46(a). Here, the Board granted multiple extensions of time to file exceptions, which were due by October 10, 2017. Respondent would not be unfairly prejudiced by having its brief struck. Respondent filed a separate motion to reopen and supplement the record. Respondent could have argued in this motion about the relevance of its newly-proposed evidence in order to avoid contaminating its brief with matters not in the record. Further, Respondent should have fully understood the scope of admissible evidence. In its motion to reopen, Respondent cited Board Rule 102.48. This very same rule provides, "Only newly discovered evidence, evidence which has become available only since the close of the hearing ... will be taken at any further proceeding." Board Rule 102.48(c)(1). Respondent should not be surprised that it could not introduce non-newly discovered evidence after the record closed. Respondent could not have been unaware that there was no basis for adding already-existing evidence into the record, yet Respondent repeatedly cited that evidence in its brief. Accordingly, there would be no undue prejudice to Respondent if its brief were to be struck and no opportunity was given to file a new brief. Just as there would be no undue

prejudice to striking an untimely brief for not following the Board Rules, there is no undue prejudice for striking a brief that flagrantly disregards the Board's Rules about content.

In conclusion, General Counsel respectfully requests that Respondent's October 10, 2017, brief in support of exceptions be struck for referencing factual matters not in the record and that Respondent not be allowed to submit a compliant brief.

Dated: October 24, 2017

Respectfully submitted,



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**AFFIDAVIT OF SERVICE OF GENERAL COUNSEL'S OPPOSITION TO
RESPONDENT'S MOTION TO REOPEN AND SUPPLEMENT THE RECORD**

I, the undersigned employee of the National Labor Relations Board, being duly sworn, say that on **October 24, 2017**, I served the above-entitled document(s) by **electronic mail** upon the following persons, addressed to them at the following addresses:

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