

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

**INGREDION, INC. d/b/a PENFORD PRODUCTS
CO.**

and

**BCTGM Local 100G, affiliated with BAKERY,
CONFECTIONARY, TOBACCO WORKERS, AND
GRAIN MILLERS INTERNATIONAL
UNION, AFL-CIO**

**Cases 18-CA-160654
18-CA-170682**

**GENERAL COUNSEL'S OPPOSITION
TO RESPONDENT'S MOTION TO REOPEN THE RECORD**

The Board issued its decision in the above-captioned cases on May 1, 2018. *Ingredion, Inc. d/b/a Penford Products Co.*, 366 NLRB No. 74 (2018). On May 17, 2018, pursuant to National Labor Relations Board Rules and Regulations Section 102.48(c), Respondent filed a Motion to Reopen the Record (Respondent's Motion) for receipt of two documents: a collective-bargaining agreement (CBA); and an affidavit from Respondent's Director of Employee Relations, Labor Relations and Compliance, Andrew Sullivan (Sullivan).¹ Sullivan's affidavit discusses the employment status of (former) employee Ken Meadows (Meadows) and provides information about the CBA. Respondent also appends to its Motion the evidence which it seeks to have received.

General Counsel opposes Respondent's Motion to Reopen the Record for two reasons:

1) Respondent has not demonstrated extraordinary circumstances required for reopening the

¹ Respondent filed this Motion to Reopen the Record only after it had already filed its Petition for Review of the Board's decision in the United States Court of Appeals for the District of Columbia on May 7, 2018.

record; and 2) consideration of the collective-bargaining agreement and affidavit would not require a different result.

This opposition will first set forth the applicable standard, then it will discuss how the standard is not met for each of the documents and why Respondent's Motion should be denied, and finally, it will address the appropriate stage of the proceedings for Respondent to raise these issues.

1. Extraordinary circumstances are required for reopening a record

The Rules and Regulations expressly provide a framework for assessing a Motion to Reopen made after the issuance of a Board decision in Section 102.48(c) and Section 102.48(c)(1), which set forth the extraordinary and limited nature of the circumstances under which a Motion to Reopen is appropriate:

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 A motion to reopen the record must state briefly the additional evidence sought to be adduced, why it was not presented previously, *and that, if adduced and credited, it would require a different result*. [emphases added]

Thus, Respondent must show that due to extraordinary circumstances, each of these documents, if adduced and credited, would require a different result than that reached by the Board. Respondent clearly fails to meet its burden. Counsel for General Counsel respectfully requests that Respondent's Motion be denied in full.

a. Reaching a CBA is not an "extraordinary circumstance" within the meaning of Rules and Regulations Section 102.48(c)

The CBA that Respondent seeks to admit into the record was reached after the close of the unfair labor practice hearing in this matter and after the decision was issued by Administrative Law Judge (ALJ) Mark Carissimi on August 26, 2016. Respondent does not

argue why, nor does it provide any legal support for its assertion that the CBA constitutes an “extraordinary circumstance” under Section 102.48(c) and in fact there appears to be no such precedent. It can be reasonably assumed that it is common for parties to reach collective-bargaining agreements *after* bargaining resumes where conduct during *prior bargaining* violated the Act. Such was the case here. The Board has recently denied a motion to reopen filed by a respondent seeking to introduce an arbitration award which issued after the close of the ALJ hearing. *St. Paul Park Refining Co. LLC d/b/a Western Refining*, 366 NLRB No. 83 (2018) (denying respondents motion to reopen the record to enter an arbitration award finding just cause for the termination because it sought “to adduce evidence about an alleged event that occurred after” the hearing closed). The same result should obtain here, as the CBA was reached after the hearing in the above-matter closed.

b. The CBA would not “require a different result” within the meaning of Rules and Regulations Section 102.48(c)(1) if the record were reopened and it were adduced and credited

In addition to the fact that the CBA was reached after the hearing closed, whether the parties reached a collective-bargaining agreement in 2017 has *no bearing* on the Board’s finding that Respondent violated the Act in 2016 when it failed to bargain in good faith with the Union by unilaterally implementing a last, best and final offer without being at lawful impasse; insisting to impasse on non-mandatory subjects of bargaining; dealing directly with employees; unreasonably delaying in providing information to the Union; threatening employees; denigrating the Union; and making further unilateral changes to its unlawfully implemented last, best and final offer. Thus, the subsequent reaching of a CBA does not serve to cure the violations found by the Board and can have no impact on the violations here. In fact, the CBA that Respondent proffers would not compel a different result because that evidence is

demonstrably irrelevant to the determination made by the Board regarding Respondent's unlawful conduct in 2016. *Security Walls, Inc.* 365 NLRB No. 99, slip op. at 8-9 (2017) (The Board based its denial of a motion to reopen both on the fact that the proffered evidence would not "require a different result" and that the proffered evidence had not existed at the time of the hearing, as required). Further, to the extent Respondent's Motion seeks to enter the CBA into evidence because the CBA may impact Respondent's liabilities under the Board's remedial Order, those issues are appropriately addressed in compliance as discussed in section two below.

c. Meadows's retirement is neither an "extraordinary circumstance" nor does it require a different result within the meaning of Rules and Regulations Section 102.48(c) and 102.48(c)(1)

Respondent appears to seek to reopen the record to add Sullivan's affidavit for the purpose of establishing that former employee Ken Meadows has retired. However, Respondent fails to explain how Meadows retirement constitutes an "extraordinary circumstance" under Section 102.48(c), or how the admission of Sullivan's affidavit, if adduced and credited, discussing Meadows' retirement would require a different result. Instead, Respondent argues that the Board's decision infringes on Meadows' rights under the First and Fifth Amendments of the Constitution, presumably because Meadows is no longer employed by Respondent.² As addressed below, this is a simple matter appropriately addressed at the compliance stage of the proceedings.

² To the extent that Respondent's arguments go beyond this, the notice reading remedy has long been held by various courts to fall within the scope of the Board's remedial authority. See, e.g., *Textile Workers of America v. NLRB*, 388 F.2d 896 (2d Cir. 1967), cert. denied, 393 U.S. 836 (1968); and *HRH Corp. v NLRB*, 823 F.3d 668 (D.C. Cir. 2016).

2. The issues raised in Respondent's Motion are compliance issues

To the extent that Respondent's Motion seeks to introduce the CBA and Sullivan's affidavit as evidence related to the remedies ordered by the Board, such a request is inappropriate at this stage of the proceedings, and instead may be appropriately addressed in compliance.

The Board has long held that "remedial questions are appropriately resolved in the compliance stage of unfair labor practice proceedings." *Local 1064, United Catering, Restaurant, Bar and Hotel Workers Union (Service America Corp.)*, 298 NLRB 872 (1990) (finding amount of backpay due to the Charging Party raised no "factual issues regarding Respondent's violations" of the Act); *Nick Robilotto, Inc.*, 292 NLRB 1279 (1989) (finding "[t]he Board does not determine at the adjudicatory stage of a proceeding the question of how much the Respondent owes. We leave this matter to the compliance stage.").

Respondent's argument with regard to Meadows is apparently directed at the Board's Order regarding the reading of the Notice to Employees which states:

(k) During the time that the notice is posted, convene the unit employees during working time at the Respondent's Cedar Rapids, Iowa facility, by shifts, departments, or otherwise, and have Ken Meadows read the attached notice to the assembled employees, or permit a Board agent, in the presence of Meadows and other corporate officials responsible for labor relations, to read the notice to employees.

This issue can be taken care of in short order. Assuming Respondent contends in compliance that it no longer has control over Meadows, Counsel for General Counsel would have no opposition to Respondent designating a currently employed responsible management official to either read the Notice or be present when the Notice is read by a Board Agent. Thus, consistent with precedent, to the extent Respondent's Motion is aimed at addressing questions of liability, backpay, and who reads the Notice to Employees, these are remedial questions which are addressed in the compliance stage and not in the adjudicatory stage before the Board.

Conclusion

In sum, Respondent's proffered evidence fails to meet the criteria set forth in the Board's Rules and Regulations. The CBA and Sullivan's affidavit do not present or create any extraordinary circumstances, and, because the proffered documents are irrelevant, their admissions would not compel a different conclusion than the one reached by the Board. In addition, the issues raised by Respondent are appropriately addressed in the compliance stage of these proceedings. For all of the above reasons, Counsel for the General Counsel respectfully requests that the Board deny Respondent's Motion to Reopen the Record in its entirety.

Dated: May 23, 2018

s/ Chinyere C. Ohaeri

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CERTIFICATE OF SERVICE

The undersigned certifies that copies of General Counsel's Opposition to Respondent's Motion to Reopen the Record were served by electronic mail on the 23rd day of May, 2018, on the following parties:

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