

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 28**

In the Matter of:

STERN PRODUCE COMPANY, INC.

**Case Nos. 28-CA-163215
 28-CA-166351
 28-CA-168680**

and

**UNITED FOOD AND COMMERCIAL
WORKERS UNION, LOCAL 99**

REPLY IN SUPPORT OF MOTION TO REOPEN THE RECORD

Stern Produce Company, Inc. (“Stern”), through its attorneys, Sherman & Howard L.L.C., submits this Reply in Support of Motion to Reopen the Record and in support states as follows:

I. Section 102.48(b) applies at this stage of proceedings.

Counsel for the General Counsel (“CGC”) erroneously cites Section 102.48(d) as the legal standard to reopen the record. However, Section 102.48 was amended effective March 6, 2017, eliminating subpart (d). (The former and current versions of Section 102.48 are attached hereto as Exhibits A and B, respectively). Also, former subpart (d) expressly applied to reopening the record “after the Board decision or order.” *See* Ex. A (29 C.F.R. § 102.48(d)). CGC is simply wrong that subpart (d) applies.¹ Instead, the analysis begins and ends under subpart (b) of Section 102.48

¹ CGC purports to quote the pertinent regulation on page 1 of the Opposition to Motion to Reopen Record. Specifically, CGC incorrectly describes, “The Board applies Section 102.48(d) of the Board’s Rules and Regulations, which requires a showing of extraordinary circumstances, ‘in ruling on a motion to reopen a record filed after the issuance of an administrative law judge’s decision but before the issuance of a Board decision.’” *Opp.* at 1. This is a remarkable misquote because it is contrary to the regulation, and the quotation itself cannot be found in the regulation or any of the four cases to which CGC cites.

whereby a party may seek to reopen the record following timely exceptions but *before* the Board has ruled. That is precisely the procedural posture of this case: Stern filed exceptions to the administrative law judge's decision, CGC filed cross-exceptions, and the matter is pending before the Board.

More importantly, Section 102.48(b) does not require Stern to establish extraordinary circumstances to reopen the record or show that additional evidence would require a different result. *See Kurz-Kasch, Inc. v. NLRB*, 865 F.2d 757, 761 (6th Cir. 1989) (“[i]t is well within the Board’s discretion to reopen the record [under Section 102.48(b)] for introduction of more evidence that would settle the question”).² In other words, the regulation draws a distinction between a motion to reopen the record before or after the Board has ruled. While it creates a high bar for reopening the record *after* a Board decision, the regulation does not require such an extraordinary showing when a party moves to reopen the record *before* a Board decision.³ Thus, Stern is not required to establish extraordinary circumstances, nor is it required to establish that the additional evidence would require a different result, to reopen the record.

² Stern’s position is consistent with the Board’s in *Cogburn Health Ctr., Inc. v. NLRB*, 437 F.3d 1266 (D.C. Cir. 2006). In *Cogburn*, the company moved to reopen the record to consider changed circumstances after the Board (in agreement with the administrative law judge) issued a *Gissel* order. *Id.* at 1270-71. The Board denied the motion to reopen the record and argued that the company “could have alerted the Board to the ‘changed circumstances’ *during* the three-year interval between the ALJ’s decision and the Board’s order.” *Id.* at 1272, *citing NLRB v. U.S.A. Polymer Corp.*, 272 F.3d 289, 295 (5th Cir. 2001) (“both Polymer and the NLRB agreed that the Board’s procedural rules would have permitted Polymer to file a motion to reopen or update the record prior to the Board’s decision”).

³ The purpose of the limitations on “extraordinary postdecisional motions” is “not to allow a party to circumvent the Board’s Rules and Regulations and raise new issues that were not preserved for appeal through the filing of timely exceptions.” *H&M Int’l Transp., Inc.*, 2016 NLRB LEXIS 341, *4-5 (May 11, 2016).

II. It is obvious that evidence of “changed circumstances” is relevant.

Stern has proffered evidence of changed circumstances that should compel the Board to reopen the record in order for the Board to further consider the peril of issuing the extraordinary remedy of a bargaining order in the instant matter. The applicable analysis requires the balancing of three considerations: (1) the employees’ Section 7 rights, (2) whether other purposes of the Act override the rights of employees to choose their bargaining representatives, and (3) whether alternatives to a bargaining order adequately remedy violations of the Act. *Vincent Indus. Plastics, Inc. v. NLRB*, 209 F.3d 727, 738 (D.C. Cir. 2000). As described below, contrary to CGC’s contention, this three-pronged analysis *must* consider the appropriateness of the bargaining order *at the time the order is issued*. *Id.* The underlying rationale is that a bargaining order risks infringing upon the rights of employees to decide whether they wish to be represented by a union. *E.g., Hilton-Laughlin v. NLRB*, 148 F.3d 1166, 1170 (D.C. Cir. 1998).

For decades, the Board has expressed disagreement with the courts of appeals regarding whether changed circumstances are relevant to the Board’s consideration of a bargaining order. CGC provides a lengthy argument about why changed circumstances are not relevant, however, its argument is directly at odds with nearly all of the courts of appeals. *See NLRB v. Goya Foods*, 525 F.3d 1117, 1133 n.23 (11th Cir. 2008) (“relevance of changed circumstances, at least in a *Gissel*-type case, appears to be a settled issue among the courts of appeals”).⁴ Every appellate court but one that has addressed the issue has ruled that the validity of a bargaining order should be determined at the time the order is issued (in view of the contemporaneous circumstances).

⁴ “The Ninth Circuit is the lone holdout and has refused, as recently as its 2007 decision in *East Bay Auto. Council v. NLRB*, 483 F.3d 628, 635 (9th Cir. 2007), to consider changed circumstances, employee turnover, or delay to be relevant in any case.” *Goya Foods*, 525 F.3d at 1133 n.23. The Tenth Circuit has not squarely addressed this issue.

E.g., *NLRB v. LaVerdiere's Enters.*, 933 F.2d 1045, 1055 (1st Cir. 1991) (refusing to enforce bargaining order due to passage of time and employee turnover); *Novelis Corp. v. NLRB*, 885 F.3d 100, 109 (2d Cir. 2018) (consideration of changed circumstances is a mandatory part of the analysis as to whether a bargaining order is appropriate at the time the order is issued); *NLRB v. Armcor Indus., Inc.*, 1978 U.S. App. LEXIS 11414, *4 (3d Cir. May 1, 1978) (changed circumstances must be considered when assessing whether a bargaining order is proper); *Overnite Transp. Co. v. NLRB*, 280 F.3d 417, 437 (4th Cir. 2002) (passage of time and employee turnover are highly relevant); *NLRB v. U.S.A. Polymer Corp.*, 272 F.3d 289, 295 (5th Cir. 2001) (the Board must consider evidence of changed circumstances); *DTR Indus., Inc. v. NLRB*, 39 F.3d 106, 115 (6th Cir. 1994) (changed circumstances can be “determinative” in evaluating the propriety of a bargaining order); *Montgomery Ward & Co., Inc. v. NLRB*, 904 F.2d 1156, 1160 (7th Cir. 1990) (remanding for a detailed consideration changed circumstances); *NLRB v. Cell Agr. Mfg. Co.*, 41 F.3d 389, 398 (8th Cir. 1994) (the Board must consider changed circumstances when deciding whether to issue a bargaining order); *NLRB v. Goya Foods*, 525 F.3d 1117, 1133 n.23 (11th Cir. 2008) (“relevance of changed circumstances, at least in a *Gissel*-type case, appears to be a settled issue among the courts of appeals”); *Charlotte Amphitheater Corp. v. NLRB*, 82 F.3d 1074, 1080 (D.C. Cir. 1996) (the Board must consider changed circumstances when it evaluates whether a bargaining order is warranted).

In addition to the prevailing view of the circuit courts of appeal, the Board itself has, at times, recognized that it may consider changed circumstances and that changed circumstances sometimes require a more traditional, less drastic remedy. *See Sysco Grand Rapids, LLC*, 2017 NLRB LEXIS 57, *111 (March 2, 2017), *citing Highland Plastics*, 256 NLRB 146, 147 (1981). In *Audubon Regional Medical Center*, the Board determined that, in light of changed

circumstances such as management turnover and passage of time, the *Gissel* bargaining order recommended by the administrative law judge was inappropriate. 331 NLRB 374, 377-78 (2000) (“rather than engender further litigation and delay over the propriety of a bargaining order, we believe that employee rights would better be served by proceeding directly to a second election”). The Board specifically found that, given the change of circumstances, a bargaining order would likely be unenforceable in court. *Id.* at 378. Likewise, the Board found that a bargaining order was unwarranted in light of employee and management turnover and passage of time in *Research Federal Credit Union*, 327 NLRB 1051, 1052 (1999).

Stern submits that the Board should defer to the overwhelming weight of authority where such an extreme remedy is at issue. Fundamentally, should Stern be forced to seek relief in the Court of Appeals for the District of Columbia (as it is authorized to do under 29 U.S.C. § 160(f)), remand may be inevitable. The Court of Appeals has forcefully and repeatedly articulated its exasperation with the Board’s failure to properly justify the deprivation of employees’ Section 7 rights:

In remanding the NLRB's decision to impose a bargaining order, we cannot help but feel a sense of *dej vu* [sic]. The Board, inexplicably, has once again defied the law of this circuit and failed to offer an adequate justification for the bargaining order sanction imposed against [the employer]. We therefore find ourselves in the all-too-familiar position of having to remand this case to the Board for adequate justification of the proposed affirmative bargaining order, thus further delaying relief for the employees the Board purports to protect Time and again this Court has been required to overturn NLRB orders that violate the explicit requirements of our precedent. Case law in our circuit is as clear as it could be on this question. The Board, however, continues to ignore us. We continue to reverse. We persist not out of pique but from a sense that it is our duty to ensure that the Board adheres to its statutory mandate ... So long as the Board persists on its current course we have no choice but to remand each offending order. We reiterate [this] sentiment here, hopefully for the final time.

Douglas Foods Corp. v. NLRB, 251 F.3d 1056, 1067 (D.C. Cir. 2001) (internal quotes and citations omitted). In short, failure to consider Stern’s proffered changed circumstances would (and should)

doom a Board decision that would seek to affirm the administrative law judge's recommended order and present reversible error.

III. General Counsel's hyperbolic outrage is not supported by the record.

CGC attempts to obfuscate the prevailing authority on changed circumstances by revisiting its conclusory allegations against Stern that are not supported by the record or established precedent. For example, CGC contends that (i) Stern's conduct "is pervasive and has a long lasting coercive effect on unit employees," (ii) that a substantial number of employees would recall Stern's unlawful labor practices because the "significant number of employees exposed" to such practices, and (iii) "that changes in the unit composition are likely a direct result of" widespread unfair labor practices. Opp. at 6-7. These statements describe facts in other cases in which bargaining orders were considered. However, they do not apply here – because CGC has simply made them up. CGC introduced *no evidence* showing dissemination of any alleged threat of plant closure. In fact, the only sustained allegation of a threat of plant closure (supported by a shred of evidence) concerned just three employees. Further, it is undisputed there have been no acts of discrimination, and nearly every employee testified as to the minimal effect of the alleged violations and/or expressed a desire to vote on the question of representation.

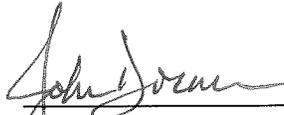
The evidence Stern seeks to introduce is further persuasive evidence that a bargaining order is not warranted. Over two-and-a-half years have passed since the scheduled election, and nearly half of the proposed bargaining unit are no longer employed at Stern. Multiple appellate courts have rejected a bargaining order under similar circumstances. *E.g., Novelis*, 885 F.3d at 109. Further, it is highly significant that Stern terminated its relationship with Mr. Pasalagua and Ms. Penn in January 2016, as they are the individuals responsible for all but 2 of the violations found by the administrative law judge. Billy Stern, Stern's owner and president, has significantly

diminished responsibilities since the scheduled election, and Stern has entirely new personnel managing its day-to-day operations. *See NLRB v. Windsor Indus., Inc.*, 730 F.2d 860 (2d Cir. 1984) (management turnover may obviate the need for a bargaining order).

CGC knows better than to argue that “post-scheduled-election” allegations support a bargaining order. *See* Opp. at 12. The Region did not prove, nor did the administrative law judge determine, that Stern’s post-election conduct, such as preparation of witnesses for the hearing, or the execution of informal Board settlement agreements, violated the Act or have any relevance to the *Gissel* analysis. These allegations are evidence of nothing and are introduced merely in an attempt to prejudice the consideration of the Motion to Reopen the Record. Moreover, CGC’s inapt reference to Stern’s interview with two hearing witnesses is a red herring meant to distract from CGC’s witness’s breach of the sequestration order and CGC’s apparent subornation of perjury. These unfounded allegations further reflect CGC’s seeming intent to effect a punitive rather than remedial order against Stern, which is inconsistent with the Act and tramples employees’ rights to select their own bargaining agent. In short, a bargaining order is not a snake oil cure for unfair labor practices and, as an extreme remedy, should be viewed more carefully, considering significant changed circumstances since the scheduled election. Stern respectfully requests that this Motion be granted in its entirety.

Dated: June 6, 2018

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CERTIFICATE OF SERVICE

I hereby certify that on June 6, 2018, a true and correct copy of the foregoing **REPLY IN SUPPORT OF MOTION TO REOPEN THE RECORD** was electronically filed and served on the following:

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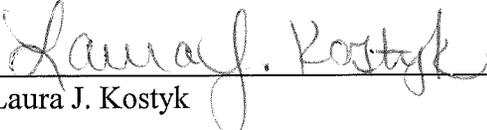
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Code of Federal Regulations
Title 29. Labor
Subtitle B. Regulations Relating to Labor
Chapter I. National Labor Relations Board
Part 102. Rules and Regulations, Series 8 (Refs & Annos)
Subpart B. Procedure Under Section 10 (a) to (i) of the Act for the Prevention of Unfair Labor Practices
Procedure Before the Board

This section has been updated. Click [here](#) for the updated version.

29 C.F.R. § 102.48

§ 102.48 Action of the Board upon expiration of time to file exceptions to the administrative law judge's decision; decisions by the Board; extraordinary postdecisional motions.

Effective: [See Text Amendments] to March 5, 2017

(a) In the event no timely or proper exceptions are filed as herein provided, the findings, conclusions, and recommendations of the administrative law judge as contained in his decision shall, pursuant to section 10(c) of the Act, automatically become the decision and order of the Board and become its findings, conclusions, and order, and all objections and exceptions thereto shall be deemed waived for all purposes.

(b) Upon the filing of timely and proper exceptions, and any cross-exceptions, or answering briefs, as provided in [§ 102.46](#), the Board may decide the matter forthwith upon the record, or after oral argument, or may reopen the record and receive further evidence before a member of the Board or other Board agent or agency, or may make other disposition of the case.

(c) Where exception is taken to a factual finding of the administrative law judge, the Board, in determining whether the finding is contrary to a preponderance of the evidence, may limit its consideration to such portions of the record as are specified in the exceptions, the supporting brief, and the answering brief.

(d)(1) 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 for reconsideration shall state with particularity the material error claimed and with respect to any finding of material fact shall specify the page of the record relied on. A motion for rehearing shall specify the error alleged to require a hearing de novo and the prejudice to the movant alleged to result from such error. A motion to reopen the record shall 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. 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.

(2) Any motion pursuant to this section shall be filed within 28 days, or such further period as the Board may allow, after the service of the Board's decision or order, except that a motion for leave to adduce additional evidence shall be filed promptly on discovery of such evidence. Copies of any request for an extension of time shall be served promptly on the other parties.

(3) The filing and pendency of a motion under this provision shall not operate to stay the effectiveness of the action of the Board unless so ordered. A motion for reconsideration or for rehearing need not be filed to exhaust administrative remedies.

Credits

[[28 FR 7974](#), Aug. 6, 1963, as amended at [34 FR 14432](#), Sept. 16, 1969; [51 FR 23746](#), July 1, 1986; [56 FR 49143](#), Sept. 27, 1991]

<Part heading effective until March 6, 2017. See, also, text of part effective March 6, 2017, incorporating revisions to a majority of the sections in this part by [82 FR 11751](#).>

SOURCE: [24 FR 9102](#), Nov. 7, 1959; [51 FR 3597](#), Jan. 29, 1986; [51 FR 15612](#), [15613](#), April 25, 1986; [51 FR 17732](#), May 15, 1986; [51 FR 23745](#), July 1, 1986; [52 FR 27990](#), July 27, 1987; [53 FR 10872](#), April 4, 1988; [58 FR 42235](#), Aug. 9, 1993; [72 FR 38778](#), July 16, 2007, unless otherwise noted.

AUTHORITY: Sections 1, 6, National Labor Relations Act ([29 U.S.C. 151](#), [156](#)). Section 102.117 also issued under section 552(a)(4)(A) of the Freedom of Information Act, as amended ([5 U.S.C. 552\(a\)\(4\)\(A\)](#)), and Section 102.117a also issued under section 552a(j) and (k) of the Privacy Act of 1974 ([5 U.S.C. 552a\(j\)](#) and [\(k\)](#)). Sections 102.143 through 102.155 also issued under section 504(c)(1) of the Equal Access to Justice Act, as amended ([5 U.S.C. 504\(c\)\(1\)](#)).

Notes of Decisions (92)

Footnotes

¹ Procedure under sec. 10 (j) to (l) of the Act is governed by subparts F and G of this part. Procedure for unfair labor practice cases and representation cases under sec. 8(b)(7) of the Act is governed by subpart D of this part.

Code of Federal Regulations
Title 29. Labor
Subtitle B. Regulations Relating to Labor
Chapter I. National Labor Relations Board
Part 102. Rules and Regulations, Series 8 (Refs & Annos)
Subpart C. Procedure Under Section 10(a) to (i) of the Act for the Prevention of Unfair Labor Practices (Refs & Annos)

29 C.F.R. § 102.48

§ 102.48 No exceptions filed; exceptions filed; motions for reconsideration, rehearing, or reopening the record.

Effective: March 6, 2017

Currentness

(a) No exceptions filed. If no timely or proper exceptions are filed, the findings, conclusions, and recommendations contained in the Administrative Law Judge's decision will, pursuant to Section 10(c) of the Act, automatically become the decision and order of the Board and become its findings, conclusions, and order, and all objections and exceptions must be deemed waived for all purposes.

(b) Exceptions filed.

(1) Upon the filing of timely and proper exceptions, and any cross-exceptions or answering briefs, as provided in § 102.46, the Board may decide the matter upon the record, or after oral argument, or may reopen the record and receive further evidence before a Board Member or other Board agent or agency, or otherwise dispose of the case.

(2) Where exception is taken to a factual finding of the Administrative Law Judge, the Board, in determining whether the finding is contrary to a preponderance of the evidence, may limit its consideration to such portions of the record as are specified in the exceptions, the supporting brief, and the answering brief.

(c) Motions for reconsideration, rehearing, or reopening the record. 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.

(1) A motion for reconsideration must state with particularity the material error claimed and with respect to any finding of material fact, must specify the page of the record relied on. A motion for rehearing must specify the error alleged to require a hearing de novo and the prejudice to the movant from the error. 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. Only 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.

(2) Any motion pursuant to this section must be filed within 28 days, or such further period as the Board may allow, after the service of the Board's decision or order, except that a motion to reopen the record must be filed promptly on discovery of the evidence to be adduced.

(3) The filing and pendency of a motion under this provision will not stay the effectiveness of the action of the Board unless so ordered. A motion for reconsideration or rehearing need not be filed to exhaust administrative remedies.

SOURCE: [24 FR 9102](#), Nov. 7, 1959; [51 FR 3597](#), Jan. 29, 1986; [51 FR 15612](#), [15613](#), April 25, 1986; [51 FR 17732](#), May 15, 1986; [51 FR 23745](#), July 1, 1986; [52 FR 27990](#), July 27, 1987; [53 FR 10872](#), April 4, 1988; [58 FR 42235](#), Aug. 9, 1993; [72 FR 38778](#), July 16, 2007; [82 FR 11754](#), Feb. 24, 2017, unless otherwise noted.

AUTHORITY: Sections 1, 6, National Labor Relations Act ([29 U.S.C. 151](#), [156](#)). Section 102.117 also issued under section 552(a)(4)(A) of the Freedom of Information Act, as amended ([5 U.S.C. 552\(a\)\(4\)\(A\)](#)), and Section 102.117a also issued under section 552a(j) and (k) of the Privacy Act of 1974 ([5 U.S.C. 552a\(j\)](#) and [\(k\)](#)). Sections 102.143 through 102.155 also issued under section 504(c)(1) of the Equal Access to Justice Act, as amended ([5 U.S.C. 504\(c\)\(1\)](#)).

Current through May 31, 2018; 83 FR 25325.

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Context and Analysis (6)

Federal Register Summaries (6)

Remove [82 FR 11748-01](#) Friday, February 24, 2017

DATES: This rule will be effective on March 6, 2017.

Amend [72 FR 38778-01](#) Monday, July 16, 2007

ACTION: Final rule.

SUMMARY: The National Labor Relations Board (NLRB) issues a final rule exempting three systems of records and portions of four other systems of records from certain provisions of the Privacy Act of 1974, 5 U.S.C. 552a, pursuant to Section (k)(2) of that Act, 5 U.S.C. 552a(k)(2), and amending existing Privacy Act regulations for clarity.

DATES: Effective July 16, 2007.

Amend [58 FR 42234-01](#) Monday, August 9, 1993

ACTION: Final rule.

SUMMARY: The National Labor Relations Board ("NLRB") is exempting a Privacy Act system of records from certain provisions of the Privacy Act of 1974, 5 U.S.C. 552a. This system of records is entitled "NLRB-18, Office of Inspector General Investigative Files."

EFFECTIVE DATE: August 9, 1993.

Amend [53 FR 10872-01](#) Monday, April 4, 1988

ACTION: Final rule.

SUMMARY: The National Labor Relations Board (NLRB) amends its Freedom of Information Act (FOIA) Regulations, 29 CFR 102.117, in accordance with provisions of the Freedom of Information Reform Act of 1986 (Pub. L. 99-570) regarding fees and fee waivers. As required by the Reform Act, the Office of Management and Budget has issued a fee schedule and guidelines, 52 FR 10012 (March 27, 1987) to which the NLRB's rules conform.

EFFECTIVE DATE: May 16, 1988.

Amend [52 FR 27990-01](#) Monday, July 27, 1987

ACTION: Final rule.

SUMMARY: The National Labor Relations Board is amending § 102.118 of its rules and regulations that provides for the procedures under which Board personnel may be allowed to produce Agency records or testify concerning Agency matters. The amendment clarifies the rule to specify that former Agency personnel are subject to the same procedures when asked to produce Agency records or testify concerning Agency matters.

EFFECTIVE DATE: July 27, 1987.

Amend [51 FR 15612-02](#) Friday, April 25, 1986

ACTION: Final rule.

SUMMARY: In response to requests that the Board facilitate the procedure for issuing an advisory opinion to a court or state agency on assertion of jurisdiction over an employing enterprise, the Board is amending §§ 102.98 and 102.99 to allow a court or state agency to request an advisory opinion from the Board as to whether it would assert jurisdiction over that enterprise.

EFFECTIVE DATE: June 1, 1986.