

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

ST. PAUL PARK REFINING CO. LLC,
d/b/a ANDEAVOR,

Respondent

and

RICHARD TOPOR, An Individual

Charging Party

Cases 18-CA-205871 and
18-CA-206697

**COUNSEL FOR THE GENERAL COUNSEL'S OPPOSITION TO
RESPONDENT'S MOTION FOR RECONSIDERATION**

St. Paul Park Refining Co. LLC, d/b/a Andeavor (Respondent's) Motion for Reconsideration of the Board's August 30, 2019 Decision and Order (Motion) should be denied, for three reasons. First, contrary to Respondent's arguments, the Eighth Circuit's decision in *Southern Bakeries, LLC v. NLRB*, Nos. 18-2370 & 18-2568, 2019 WL 4280367 (8th Cir. Sept. 11, 2019) does not affect the Board's decision in this case. Second, the issuance of a circuit court decision in an unrelated case does not satisfy the Board's "extraordinary circumstances" standard that applies to motions for reconsideration. Third, Respondent's Motion should be denied because its remaining arguments raises no new facts or arguments not already considered by both the Administrative Law Judge and the Board in reaching their well-reasoned decisions.

The National Labor Relation Board's Rules and Regulations do not allow motions for reconsideration to be granted as a matter of course. Rather, the Board's Regulations limit the circumstances in which such a motion is granted to those in which the requesting party can

demonstrate “extraordinary circumstances.” 29 C.F.R. § 102.48(c)(1).¹ Respondent’s Motion falls far short of meeting this high burden. The Motion rests primarily on a misapprehension of the Eighth Circuit’s recent decision in *Southern Bakeries*, in which the court denied enforcement of a Board decision because of its *sole* and *exclusive* reliance on the unlawfulness of an underlying disciplinary action that was subject to litigation. The issuance of this decision and its narrow holding does not constitute “extraordinary circumstances” for at least two reasons: first, and most importantly, *Southern Bakeries* does not affect the result here because the Board *did not* rely solely (or even primarily) on the unlawfulness of underlying discipline in reaching its result in this case; and second, because the issuance of a circuit court decision in an unrelated case does not meet the Board’s high bar for reconsidering its initial decision.

Respondent’s remaining arguments simply amount to a re-hashing of arguments that were already considered and rejected by the Board in Respondent’s exceptions. The proper forum for these arguments now is the circuit courts of appeals, should Respondent choose to exercise its appellate options. They do not warrant a reconsideration of the initial decision by the Board.

STANDARD OF REVIEW

As a matter of administrative efficiency and finality, the Board’s Regulations naturally limit the circumstances in which the Board will grant a motion for reconsideration. Specifically, under Section 102.48(c)(1) of these Regulations, a party making such a request must demonstrate that “extraordinary circumstances” are present that warrant the Board revisiting its initial determination. The Board has recently found that this “extraordinary circumstances” standard is

¹ Respondent cites to 29. C.F.R. § 102.48(d)(1) as the basis for this proposition. This is in error, as the most recent Rules and Regulations discuss Motions for Reconsideration in § 102.48(c)(1).

met in circumstances where “manifest injustice” would result, where a party can identify a “material error” that would affect the results of a decision, or where a party can point to “newly discovered evidence” that was in existence at the time of the hearing. *Wal-Mart*, 351 NLRB 130 (2007); *UPMC Shadyside Hospital*, Case Nos. 06-CA-102465 et al., 2018 WL 6524011, unreported order dated Dec. 11, 2018 (admitted factual misstatement that did not affect result does not satisfy “extraordinary circumstances” standard); *Ingredion, Inc.*, Case Nos 18-CA-160654 and 18-CA-170682, 2018 WL 3955531, unreported order dated Aug. 16, 2018 (collective-bargaining agreement reached after close of hearing did not qualify as “newly discovered” evidence). Where such “extraordinary circumstances” are not present, the Board will deny such a request. *See, e.g., Santa Barbara News-Press*, 359 NLRB 1110 (2015); *Enloe Medical Center*, 348 NLRB 991 (2006); *Management Training Corp.*, 320 NLRB 131 (1995) (denying motions for reconsideration based on changed law and/or factual circumstances).

ANALYSIS

The Eighth Circuit’s Decision in Southern Bakeries Is Inapplicable to the Instant Case, As the Board Applied a Traditional Wright Line Analysis and the Cases Are Factually Distinguishable

The only changed circumstance that Respondent points to in support of its Motion is the recent Eighth Circuit decision in *Southern Bakeries, LLC v. NLRB*, Case Nos. 18-2370 and 18-2568, 2019 WL 4280367, (Sept. 11, 2019). Respondent’s Motion characterizes *Southern Bakeries* as giving Respondent free rein to “rely on an existing disciplinary warning to support more serious subsequent discipline, even if that prior discipline is later held to be unlawful.”²

² Respondent’s Motion begins by incorrectly stating that the Eighth Circuit “overruled” Board precedent relied on in this decision. Motion at 5. This statement demonstrates a misunderstanding of Board law, as only the Supreme Court and the Board itself have the power

(Motion at pp. 1–2.) This characterization of *Southern Bakeries* severely misstates the court’s holding, which took the Board to task for *solely* and *exclusively* relying on the unlawfulness of prior discipline, still under litigation, to establish the General Counsel’s *prima facie* case. In truth, the Eighth Circuit’s holding is largely inapplicable to *St. Paul Park II*, as the Board applied a traditional *Wright Line* analysis in assessing the General Counsel’s *prima facie* case and thereafter provided an independent basis for rebutting Respondent’s affirmative defense—specifically Respondent’s disparate treatment of Topor—that did not rely in any way on the status of prior discipline that was still under litigation. As such, *Southern Bakeries* does not support a reconsideration of the Board’s initial decision in this matter.

Specifically, in the underlying Board decision in *Southern Bakeries*, the Board determined that the discharge of a union supporter was unlawful because it relied on a written warning that the Board had found unlawful in a prior case. *Southern Bakeries, LLC*, 366 NLRB No. 78, slip op. at 2 (May 1, 2018). Due to this prior discipline, the Board declined to engage in a traditional *Wright Line* analysis, including an assessment of whether the elements of the General Counsel’s *prima facie* case were met. Rather, the Board held that because the employer could not demonstrate that it would not have discharged the employee absent the prior “unlawful” discipline, the discharge was unlawful. *Id.* Indeed, the Board explicitly stated that it was *not* relying on a traditional *Wright Line* analysis, noting the while the ALJ had suggested that the termination was unlawful even absent its reliance on prior unlawful discipline, that “it [was] unnecessary to rely on this undeveloped basis for finding the violation.” *Id.* at slip op. 2, n.4.

to overrule Board precedent. *See infra* p. 8. Instead, the Eighth Circuit here denied in part enforcement of a Board order in a particular case.

The court declined enforcement in *Southern Bakeries*, as it rejected the Board’s exclusive reliance on this prior discipline for two reasons. First, the court held that the underlying discipline was not “unlawful” at the time that the employer discharged the employee because it was still being litigated by the employer. Because the lawfulness of this discipline was still in dispute at the time of the discharge, the court concluded that “[i]t was legal error for the ALJ and the Board to base their decision in this case *entirely* on this factor.” *Southern Bakeries, LLC*, 2019 WL 4280367, at *3 (emphasis in original). Second, the court found that the Board erred by applying a “per se” rule, placing the burden on the employer to justify its discipline, without first ensuring that the General Counsel had satisfied a *prima facie* case of discrimination, including a nexus between employer animus and the discipline. On this front, the court found that “the Board erred in concluding that the prior final written warning, *standing alone*, satisfied the General Counsel’s burden.” *Southern Bakeries, LLC*, 2019 WL 4280367, at *4 (emphasis in original). In sum, the court’s disagreement with the Board lies with the Board’s *exclusive* reliance on the unlawfulness of the prior discipline as a bootstrap for finding the subsequent discharge unlawful.

The Board’s analysis in the instant case stands in stark contrast to the analysis found faulty by the court in *Southern Bakeries*. The Board in this case did not rely “entirely,” or even primarily, on the unlawfulness of the prior discipline leading up to the discharge. Rather, the Board conducted a traditional *Wright Line* analysis, in which it determined that discriminatee Richard Topor engaged in protected concerted activity, that the Respondent had knowledge of this activity, and that Respondent only began disciplining him after this protected activity. In noting that the General Counsel met its traditional *Wright Line* burden, the Board *did not* focus on or even mention the unlawfulness of the prior discipline; rather, the Board found the requisite

animus element was met by Respondent “subjecting [Topor] to closer scrutiny beginning in January 2017 and continuing through July 2017.” *St. Paul Park Refining d/b/a Andeavor*, (*St. Paul Park II*), 368 NLRB No. 62, slip op. at 1, n.2 (Aug. 30, 2019). This conclusion is further bolstered by the Board’s citation to its precedent in *Sears, Roebuck, & Co.*, 337 NLRB 443, 443–44 (2002), *enforcement denied*, 349 F.3d 493 (7th Cir. 2003), a case which involved a standard *Wright Line* analysis and did not rely on the “prior unlawful discipline” doctrine.

The Board’s analysis, combined with the facts of this case, also satisfy the nexus element required by the court in *Southern Bakeries*. *Southern Bakeries, LLC*, 2019 WL 4280367, at *4. The Board correctly focuses on the clear thread of discipline and heightened scrutiny that began at the time of Topor’s protected activity in late 2016, and that culminated in his termination less than one year later. *St. Paul Park Refining*, 368 NLRB No. 62, slip op. at 1, n.2 This is in stark contrast to the facts at issue in *Southern Bakeries*, which involved a years-long gap between the protected activity and the termination under review by the court. *Southern Bakeries LLC*, 2019 WL 4280367, at *1–2 (indicating that protected activity occurred in 2013, while discharge occurred in 2016). The nexus between Topor’s protected activities, Respondent’s animus towards Topor, and its unlawful course of conduct is established by a clear temporal thread, one that was lacking in *Southern Bakeries*.³

³ Respondent’s Motion further attempts to connect the Board’s decision in *St. Paul Park II* with *Southern Bakeries* by claiming that, in both matters, “the actual *decision-maker*” did not possess knowledge of the protected activity. Motion at 13 (emphasis in original). This argument is similarly without merit. In *Southern Bakeries*, the human resources representative and supervisor involved in the investigation and termination decision were not employed at the time of the alleged discriminatees’ protected activity and prior discipline. 2019 WL 4280367 at *2. Here, by contrast, the human resources manager, Tim Kerntz, who directed the investigation and made the ultimate recommendation to terminate Topor was intimately involved in Respondent’s *entire* course of conduct across the two cases and had clear knowledge of Topor’s protected activities. See *St. Paul Park II*, 368 NLRB No. 62, slip op. at 10 (noting Kerntz’s role in recommending termination); *St. Paul Park I*, 366 NLRB No. 83, slip op. at 4, 8, 10 (discussing

Additionally, although the Eighth Circuit’s decision in *Southern Bakeries* found fault only with the Board’s analysis of the General Counsel’s *prima facie* case, the Board’s treatment of Respondent’s affirmative defense in this case also meets any reasonable interpretation of the standard set forth by the Eighth Circuit. The Board provided two alternative, *independent*, bases upon which Respondent’s affirmative defense failed: first, that it relied on prior discipline that the Board had found unlawful in *St. Paul Park Refining Co., LLC, d/b/a Western Refining, (St. Paul Park I)*, 366 NLRB No. 83, (May 8, 2018), *enforced*, 929 F.3d 610 (8th Cir. 2019), and second, that “Respondent did not establish that it treated similar incidents involving other operators’ errors comparably.” *St Paul Park II*, slip op. at 1, n.2. Respondent’s Motion mischaracterizes the Board’s reliance on Topor’s prior discipline and largely ignores that the Board provided this alternative rationale.⁴

The Board’s reliance on the prior discipline here is distinguishable on at least two grounds from *Southern Bakeries*. First, the Board only relied on Topor’s prior discipline in assessing the validity of Respondent’s affirmative defense under *Wright Line*, not in establishing

Kerntz’s knowledge of Topor’s involvement in collective-bargaining negotiations and his role in investigating Topor’s alleged misconduct). In further contrast to *Southern Bakeries*, Hastings (the individual who Respondent contends was the sole decisionmaker) *was* employed at the time of *St. Paul Park I* and was aware of at least some of disciplinary actions in that case. *St. Paul Park I*, 366 NLRB No. 83, slip op. at 8.

⁴ Rather than actually address the Board’s decision in this matter, Respondent’s Motion primarily rests on mischaracterizations of its content. To the extent that its Motion does address any arguments actually contained in the Board’s decision, these arguments are directed almost exclusively at the *administrative law judge’s* recommendation. *See, e.g.*, Motion at pp. 5, 9, 12. This focus on the administrative law judge ignores that the Board conducted an independent analysis of Topor’s discharge, one that relied very little on the unlawfulness of any underlying discipline. *St. Paul Park II*, 268 NLRB No. 62, slip op. at 1, n.2. Further, Respondent’s myopic focus on the recommendation of the administrative law judge is misplaced, as it is the Board’s decision that is ultimately subject to any review by the circuit courts of appeals.

the necessary elements of the General Counsel’s *prima facie* case. As discussed above, *Southern Bakeries* focused on issues in the Board’s analysis of the *prima facie* case, not on reliance of prior discipline in rebutting the employer’s affirmative defense—thus distinguishing this case from the court’s holding. Second, and more importantly, the Board established that, regardless of the lawfulness of any underlying discipline, the evidence that Respondent treated Topor disparately as compared to other employees *independently defeated its Wright Line defense*.⁵ In support of its conclusion rejecting Respondent’s defense, the Board again cited to *Sears, Roebuck, & Co.*, 337 NLRB at 444–45, a decision that rested heavily on evidence of disparate treatment and did not rely at all on the lawfulness of any predicate discipline. This discussion conclusively demonstrates that the Board did not rely solely, or even primarily, on the lawfulness of Topor’s underlying discipline in reaching its conclusion in this case.

In sum, *Southern Bakeries* represents a rather narrow holding, one that applies only to those instances where the Board relies “*entirely*” and “*standing alone*” on the unlawfulness of prior discipline, still subject to litigation, in assessing whether the General Counsel has met its *prima facie* case. *Southern Bakeries, LLC*, 2019 WL 4280367, at *3, *4. Here, the Board independently assessed the General Counsel’s *prima facie* case without relying on the unlawfulness of the underlying discipline *and* provided an alternative basis for rebutting Respondent’s purported *Wright Line* defense. As such, *Southern Bakeries* is inapposite, and certainly does not warrant the Board reconsidering its well-reasoned decision.

⁵ Indeed, Respondent’s Motion even recognizes that the Board presented an alternative rationale for its finding, based on this disparate treatment between Topor and other similarly situated employees. *See Motion* at p. 7 (bullet points 5 & 6).

Circuit Court Decisions in Unrelated Cases Do Not Constitute Extraordinary Circumstances Under the Board's Rules and Regulations

As discussed at the outset of this Opposition, the Board does not grant motions for reconsideration lightly. Rather, they are limited to those situations that present “extraordinary circumstances.” Notably, Respondent does not even attempt to tackle the issue of whether, even assuming that *Southern Bakeries* does apply to this case, it satisfies the “extraordinary circumstances” standard laid out in the Board’s Rules and Regulations. Based on established Board precedent, the answer to this question is no.

The Board’s decision in *Bell Aerospace Co.*, 196 NLRB 827 (1972), *denying motion*, 190 NLRB 431 (1971), is instructive of this principle. In the underlying case, the Board rejected the employer’s contentions regarding managerial status and, based on that decision, determined that a unit of buyers constituted an appropriate unit for collective bargaining. Subsequent to the Board’s initial decision in *Bell Aerospace*, the Eighth Circuit Court of Appeals issued a decision in an unrelated case, rejecting the Board’s treatment of managerial employees. The employer thereafter filed a motion for reconsideration, arguing that the Eighth Circuit’s decision mandated a different result. The Board denied this motion, noting further that it was unpersuaded by the Eighth Circuit’s reasoning and that it stood by its position regarding managerial status. *Id.* at 828–29; *see also H & M Int’l Transportation, Inc.*, 363 NLRB No. 189 (May 11, 2016) (*denying motion for reconsideration despite contrary circuit court decisions regarding appointment of agency’s general counsel*).

The same result should naturally follow in this case. The Eighth Circuit’s decisions are not binding on the Board. *See, e.g., MV Transportation*, 368 NLRB No. 66, slip op. at 13 (Sept. 10, 2019) (“We agree with the dissent that the Board is not required to acquiesce in adverse decisions of the circuit courts.”) As in *Bell Aerospace*, the Eighth Circuit’s decision in *Southern*

Bakeries is distinguishable and does not change existing Board law. Finally, a circuit court decision in an unrelated case simply does not constitute “extraordinary circumstances,” as understood by the Board’s Rules and Regulations, and Respondent does not cite to any case suggesting that it does. To hold otherwise would create an administrative nightmare, one where an adverse decision in an unrelated circuit court case could require the Board to revisit its prior decisions in scores of cases. The proper venue for Respondent’s arguments lie in the courts of appeals, not in a second bite at the apple before the Board.

Respondent’s Remaining Arguments Do Not Satisfy the Standards for a Motion for Reconsideration

Beyond the Eighth Circuit decision in *Southern Bakeries*, Respondent cites to a bevy of alleged errors in the Board’s decision, primarily through a series of bullet points on pages six and seven of its Motion. Respondent contends that each of these bullet points are “material errors that constitute extraordinary circumstances.” Motion at 6. These arguments, however, are not raised with any “particularity,” nor does Respondent cite to any “specific record evidence” in support of these arguments, as required by Section 102.48(c)(1) of the Regulations. Further, these arguments constitute merely a re-hashing of various exceptions that were considered and rejected by the Board as part of its *Wright Line* analysis in this case. Finally, Respondent provides little to no explanation as to why any of these alleged errors would affect the overall result in this case.⁶ Accordingly, they should be rejected by the Board.

⁶ Respondent’s only remaining argument that does not rest on *Southern Bakeries* is that the ALJ erred by relying on the credibility determinations of another factfinder. Motion at 17–18. This argument is clearly without merit. This argument was already considered and rejected by the Board. *St. Paul Park II*, 368 NLRB No. 62, slip op. at 1, n.1 (“We specifically reject the Respondent’s contention that the judge erroneously relied on credibility findings from the earlier Board decision”). The ALJ conducted a careful review of the evidence in the record, and made findings against arguments raised by both parties. *See, e.g., Id.*, slip op. at 7, n. 14 (discrediting argument from Respondent’s brief based on record evidence); *Id.*, slip op. at 8, n.18

CONCLUSION

For the reasons discussed above, Respondent's Motion should be denied.

/s/ Tyler J Wiese

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(discrediting argument from Counsel for General Counsel's brief based on lack of record evidence). Finally, Respondent's purported legal authority—*Local No. 3, IBEW (Nixondorf Computer Corp.)*, 252 NLRB 539 (1980)—does not actually support its position here. While the Board did note that it was inappropriate for an ALJ to base credibility findings on those made in another case, the Board further found that the ALJ had not acted improperly in *Local 3* because he made his own independent resolutions—*exactly what occurred in St. Paul Park II*.

The ALJ's Order Granting the General Counsel's Motion in Limine (attached for convenience as Exhibit A to this Opposition) confirms that the issue of credibility resolutions was appropriately handled by the ALJ. In this order, the ALJ confirmed that he would follow the Board's decision in *St. Paul Park I* (which had issued in the time between when the motion in limine was filed and the order issued) and that he would not allow the transcript or exhibits *St. Paul Park I* to be introduced wholesale into the record in *St. Paul Park II*, but that he would allow evidence from to be used "insofar as it is relevant to the current case, e.g. for the *impeachment of witness testimony*." (emphasis added). Thus, the ALJ's ruling confirms that while he was (of course) bound by the decision in *St. Paul Park I*, he did not otherwise improperly adopt credibility resolutions from *St. Paul Park I*, nor did he limit either parties' use of evidence from this case to determine credibility resolutions in *St. Paul Park II*.

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Cases 18-CA-205871
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and

RICHARD TOPOR,
An Individual

ORDER GRANTING THE GENERAL COUNSEL'S MOTION IN LIMINE

On May 3, 2018, the General Counsel filed a motion in limine essentially to foreclose the relitigation of any issues that were decided or could have decided in *St. Paul Park Refining d/b/a Western Refining*, 366 NLRB No. 83 (May 8, 2018).¹ Respondent filed a response on May 18, 2018. As I am bound by the Board's decision, the motion in limine is **GRANTED**. Thus, the correspondence Respondent received from the Minnesota State OSHA plan will not be received in evidence, nor will the decision of Arbitrator Douglas Knudson regarding the same suspension and final written warning that was addressed in 366 NLRB No. 83 be received into evidence or considered.

I deny the General Counsel's motion to admit the transcripts and exhibits from 366 NLRB No. 83 into this record. As I am bound by the Board's findings, conclusions and rulings this is unnecessary. However, the parties will be allowed to use evidence that was admitted into evidence in the prior proceeding insofar as it is relevant to the current case, e.g. for the impeachment of witness testimony.

Dated: May 22, 2018

Washington, D.C.


Arthur J. Amchan
Deputy Chief Administrative Law Judge

¹ The Board issued its decision affirming the December 20, 2017 decision of Administrative Law Judge Charles Muhl 5 days after the General Counsel filed its motion in limine.

CERTIFICATE OF SERVICE

I hereby certify that I served the attached Opposition on the parties listed below, by electronic mail, on this date.

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