

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

**KENNY/OBAYASHI V, A JOINT VENTURE
BETWEEN KENNY CONSTRUCTION
COMPANY AND OBAYASHI USA, LLC**

CASE 08-CA-226350

and

**LABORERS' LOCAL UNION NO. 894
a/w LABORERS INTERNATIONAL UNION
OF NORTH AMERICA**

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

On November 5, 2019, Respondent Kenny/Obayashi V (Respondent) filed a Motion to Re-Open the Record in the above-captioned case (Respondent's Motion). Respondent's Motion requests Administrative Law Judge Thomas Randazzo (ALJ) to re-open the record to include evidence of phone records dated August 24 through September 15, 2018 from Respondent's Superintendent Michael Quinn, which Respondent's counsel attached to its motion as Exhibit A. There is no basis for granting Respondent's Motion and the proffered evidence should be stricken from the record. As explained below, the information Respondent seeks to add is not newly discovered. Rather, at the time of the hearing Respondent knew this information and failed to use reasonable diligence to secure it at that time. Moreover, the information Respondent seeks to include into the record would not lead to a different result by the ALJ.

A. PROCEDURAL BACKGROUND

At issue in this matter is the termination of Respondent's employee and Laborers' Local Union 894 (Union) member Ivan Thompson. On August 17, 2018, Thompson provided Respondent's Labor Relations Manager Catherine Moncada a statement substantiating the Union's

claims that Respondent's supervisors and managers discriminated against jobsite employees on the basis of race and union activity. On August 24, 2018, Respondent permanently laid off and/or terminated Thompson in response to his voiced criticism of Respondent's supervisors and managers in their discriminatory conduct towards employees.

The hearing in this matter was conducted before the ALJ on August 6 through August 9, 2019, and October 7, 9, and 10, 2019, with post-hearing briefs to be submitted by the parties by December 13, 2019. On November 5, 2019, Respondent filed the instant motion.

Section 102.35(a)(8) of the National Labor Relations Board's (Board) Rules and Regulations governs the filing of a motion to reopen the record after the close of the hearing, authorizing an ALJ to decide such motion.

B. LAW & ARGUMENT

Respondent fails to satisfy the elements necessary for the ALJ to order the reopening of the record. Pursuant to Section 102.48(c)(1) of the Board's Rules and Regulations, "[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." Such an order is only warranted in "extraordinary circumstances." *Id.* In evaluating a motion to reopen the record pursuant to Section 102.48(c)(1), the Board considers whether the evidence was newly discovered and previously unavailable. *Transit Management of Southeast Louisiana, Inc.*, 331 NLRB 248, n. 2 (2000), *Novel Knit, Inc.*, 299 NLRB 58, n. 2 (1990). Newly discovered evidence is evidence which was in existence at the time of the hearing, and of which the moving party was excusably ignorant. *Fite/Lucent Technologies, Inc.*, 326 NLRB 46, fn 1 (1998), *Owen Lee Floor Services*, 250 NLRB 651, fn 2 (1980). Respondent has failed to meet this burden.

Respondent's Motion seeks admission of cell phone records of its Superintendent Michael Quinn that show telephone numbers called or received by Quinn's cellular phone and the length of each call. These records cover the time period from August 20 through September 15, 2018. In its motion, Respondent contends such cell phone records purportedly establish that Quinn, a decision-maker of Thompson's permanent layoff and/or termination, lacked knowledge of Thompson's protected concerted activities at any time prior to Thompson's separation from its employment on August 24, 2019.

Respondent's Motion is deficient because the information it seeks to add to the record is not newly discovered, was known to Respondent at the time of the hearing and was, indeed, procurable prior to the ALJ's adjournment of the hearing.

In mixed-motive cases, *Wright Line*, 251 NLRB 1083 (1980) instructs that in determining whether an employee's termination violates Section 8(a)(1) and (3), the General Counsel must demonstrate that the employee's protected conduct was a motivating factor in the employer's adverse actions. The General Counsel satisfies this initial burden by showing that the employee engaged in protected activity; the employer had knowledge of that activity; and that the employer harbors animus towards such activity. The burden then shifts to the employer to demonstrate it would have taken the same action even absent the employee's protected activity. *Strongsteel of Alabama*, 367 NLRB No. 90, *slip op.* at 2 (Feb. 13, 2019). The employer cannot meet this burden merely by showing that it had a legitimate reason for the action, rather, it must demonstrate that it would have taken the same action even in the absence of the protected conduct. *Id.*

Respondent seeks to introduce the proffered phone records to purportedly establish that Quinn lacked knowledge of Thompson's protected activity prior to the adverse action. It claims

in its Motion that it was unaware until the last day and a half of the hearing that it was necessary to establish this evidence as part of its defense. Respondent's argument must fail.

Counsel for the General Counsel presented evidence during the first portion of the hearing in August 2019 that Quinn and Respondent's Project Manager David Chastka discussed Thompson's termination on or about August 18-20, 2018. (Hearing Transcript pp. 143-144). Accordingly, as of August 9, 2019 upon the recess of the hearing, Respondent had two months before the October 7 resumption to secure Quinn's telephone records. Respondent's failure to discern the need for those records and its failure to exercise reasonable efforts to get the records prior to the October 9 closing of the record are not extraordinary circumstances warranting the re-opening of the record.

Moreover, despite its admission in its instant Motion that it became aware prior to the close of the hearing that it would need the telephone records to substantiate its defense, Respondent made no request or motion to the ALJ prior to the close of hearing to keep the record open for purposes of producing proffered phone logs despite claims in its motion that it attempted to gather such evidence. Respondent's counsel then waited nearly a month after the record was closed to file the instant Motion despite the representation in its Motion that it "received the detailed call log just after the close of the hearing, after the parties and the Administrative Law Judge left the room." Respondent's Motion p. 4. Respondent's counsel fails to demonstrate that it was excusably ignorant of the existence of proffered phone records involving Quinn or that it acted with diligence in uncovering the proffered evidence. See *Security Walls, Inc.* 365 NLRB No. 99 slip op. (June 15, 2017) (Board's denial of a motion to reopen the record on the basis that Respondent failed to show that the evidence existed at the time of the hearing and that it acted with diligence in uncovering the evidence.); see also *Owens Floor, supra*, at fn.2.

Even assuming the proffered phone logs show that there was a phone call between Quinn and Respondent's Labor Relations Manager Catherine Moncada on the date that Thompson was terminated, it does not establish, as it claims, that no other communications occurred between Respondent's Project Manager Chastka and Quinn, Respondent's Project Engineer John Criss and Quinn, and/or Moncada and Quinn between August 17, 2018 and August 24, 2018 concerning Thompson's termination and the underlying protected conduct. Contrary to Respondent's contentions, the record evidence demonstrates that from August 18 through August 24, 2018, Moncada had several in-person, email and telephone communications with Project Manager David Chastka and Project Engineer John Criss immediately after she met with Thompson and other employees. (Hearing Transcript pp. 62-63, 217; General Counsel's Exhibit 12) Contrary to Respondent's assertion, it has not demonstrated that the phone log it seeks to introduce, if credited, will lead to a different conclusion by the ALJ concerning Respondent's knowledge of Thompson's protected conduct.

Accordingly, Counsel for the General Counsel respectfully requests that Respondent's Motion to Reopen the Record be denied and requests the ALJ strike from the record Respondent's Motion and its accompanying Exhibit A. Pursuant to Section 102.45(b) of the Board's Rules and Regulations, motions and accompanying exhibits are part of the record in the instant case. If the ALJ denies Respondent's Motion without striking Exhibit A, Respondent will still have accomplished its objective of having its supplemental evidence admitted into the record. Counsel for the General Counsel respectfully requests that the ALJ deny Respondent's attempt to accomplish this objective through this baseless motion.

Dated at Cleveland, Ohio this 13th day of November 2019.

/s/ Cheryl Sizemore

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of Counsel for the General Counsel's Opposition to Respondent's Motion to Reopen the Record was filed via e-filing and served on the following parties by e-mail on November 13, 2019.

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