

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

**McDONALD’S USA, LLC, A JOINT EMPLOYER,
et al.**

Cases 02-CA-093893, et al.

04-CA-125567, et al.

and

13-CA-106490, et al.

**FAST FOOD WORKERS COMMITTEE AND
SERVICE EMPLOYEES INTERNATIONAL
UNION, CTW, CLC, et al.**

20-CA-132103, et al.

25-CA-114819, et al.

31-CA-127447, et al.

**GENERAL COUNSEL’S OPPOSITION TO CHARGING PARTIES’ MOTION
TO REOPEN THE RECORD AND FOR RECONSIDERATION AND MOTION TO
STRIKE REFERENCES TO ATTACHMENT A FROM THE RECORD**

Counsel for the General Counsel (CGC) hereby files his opposition to Charging Parties’ Motion to Reopen the Record and for Reconsideration. Additionally, CGC moves to strike references to Attachment A from the record. According to the National Labor Relations Board’s Rules and Regulations, the Board may reopen the record if a party can demonstrate “extraordinary circumstances,” specifically, that it has obtained newly discovered evidence that became available after the close of the hearing and that, if admitted and credited, would require a different result. 29 C.F.R. § 102.48(c)(1). Here, Charging Parties do not meet that standard because their proffered evidence—an unauthenticated document¹—is inadmissible. Even if it were admitted, this purported Board record would not require a different result. Therefore, Charging Parties’ motion and request for a stay of the Board’s Order should be denied, and Attachment A, and all references to it, should be removed from the record. See *Postal Service*, 306 NLRB 474 (1992) (granting General Counsel’s motion to strike all references to an arbitration award appended to the charging party’s post-hearing brief when the award was not introduced into the record).

¹ Charging Parties describe the document as “apparently leaked.” Charging Parties’ Motion, at p. 2.

ARGUMENT

1. The Board should not reopen the record to admit Attachment A because it cannot be authenticated under the Federal Rules of Evidence.

Section 10(b) of the National Labor Relations Act states that any “proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States.” 29 U.S.C. § 160(b); *see also* 29 C.F.R. § 102.39 (same). Courts have only permitted the Board to deviate from the Federal Rules of Evidence when the Board can articulate a legitimate policy reason to do so. *Teamsters Local Union 769 v. NLRB*, 532 F.2d 1385, 1391-92 (D.C. Cir. 1976) (acknowledging the Board’s discretion to admit evidence that would be inadmissible in a court of law but admonishing the Board for its failure to articulate a reason for doing so); *see Carpenter Sprinkler Corp. v. NLRB*, 605 F.2d 60, 66 (2d Cir. 1979) (finding no abuse of discretion when the Board deemed inadmissible a secret recording of contract negotiations that may have been otherwise admissible under the Federal Rules of Evidence because the Board explained that encouraging such recordings would impair the collective-bargaining process). Pursuant to Federal Rule of Evidence 901, to authenticate or identify an item of evidence so that it may be admitted, “the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.” Fed. R. Evid. 901. Alternatively, Federal Rule of Evidence 902 enumerates 14 categories of self-authenticating evidence, which require no extrinsic evidence of authenticity in order to be admitted. Fed. R. Evid. 902.

In the instant case, the proffered evidence is not admissible because Charging Parties have not authenticated the document and it is not one of the enumerated categories of self-authenticating documents. As the Charging Parties admit, Attachment A was published by a commercial journal

that did not disclose how it obtained the document. Nor can CGC verify its authenticity; CGC is not privy to this document and any recusal lists applicable to the Board side of the Agency are outside the General Counsel's purview. Further, Charging Parties do not articulate any legitimate policy rationale to justify admitting a document of unknown origin that would be inadmissible in a court of law.

2. The Board should not reopen the record to admit Attachment A because, even if it were an authentic Board-side document, the issue it addresses has already been considered and would not require a different result.

A motion to reopen the record must explain how, if the additional evidence is admitted, it would require a different result. 29 C.F.R. § 102.48(c)(1); *Electrical Workers, Local 3*, 363 NLRB No. 30, slip op. at 1, fn. 1 (2015); *APL Logistics, Inc.*, 341 NLRB 994, 994 (2004). The purported substance of Attachment A—Member Emanuel's recusal obligations—has already been considered by the Board. This is evidenced by footnote 2 to the Board Order, which states that Member Emanuel considered Charging Parties' motion to recuse and determined, in consultation with the Board's Designated Agency Ethics Official—based on Executive Order 13370 (the Trump Ethics Pledge) and the Standards of Ethical Conduct for Executive Branch employees, 5 C.F.R. § 2635.502—that recusal was not necessary. *McDonald's USA, LLC*, 368 NLRB No. 134, n. 2 (2019). Because the issue of whether Member Emanuel should be recused was already addressed in the Board Order, reopening the record to admit an unauthenticated document regarding recusal would not change the result.

3. Because Charging Parties do not satisfy the standard for reopening the record, the Board should not stay its Order.

Pursuant to the Board's Rules and Regulations, a motion for reconsideration or to reopen the record "will not stay the effectiveness of the action of the Board unless so ordered." 29 C.F.R. § 102.48(c)(3). Because Charging Parties present no legitimate reason to reopen the record or for reconsideration, the Board should not stay its Decision or the administration of the settlement. Moreover, on December 30, 2019, the ALJ issued an order approving the settlement agreements, pursuant to the Board's December 12, 2019 Order remanding the case and directing that the settlement agreements be approved. Therefore, the administration of the settlement agreements has begun, and Charging Parties' request for a stay should be denied as moot.

CONCLUSION

For the foregoing reasons, the Board should deny Charging Parties' Motion to Reopen the Record and for Reconsideration and its request for a stay of the Board's Order, and strike from the record Attachment A and any reference to it.

Dated: January 21, 2020

/s/ Geoffrey Dunham
Geoffrey Dunham
Counsel for the General Counsel

CERTIFICATE OF SERVICE

The undersigned, an attorney for the General Counsel, hereby certifies that he caused a true and correct copy of General Counsel's Opposition to Charging Parties' Motion to Reopen the Record and for Reconsideration and Motion to Strike References to Attachment A from the Record to be electronically filed with the National Labor Relations Board on January 21, 2020 and served on the same date via electronic mail at the following addresses:

Justin D. Martin, Esq.
Ilana R. Yoffe, Esq.
Jones Day
250 Vesey Street
New York, NY 10281-1047
jmartin@jonesday.com
iyoffe@jonesday.com

Barry M. Bennett, Esq.
George A. Luscombe, III, Esq.
Dowd, Bloch, Bennett & Cervone
8 S. Michigan Avenue, 19th Floor
Chicago, IL 60603-3315
bbennett@dbb-law.com
gluscombe@dbb-law.com

Robert Brody, Esq.
Kate Bogard, Esq.
Brody and Associates, LLC
179 Post Road West
Westport, CT 06880-4602
rbrody@brodyandassociates.com
kbogard@brodyandassociates.com

Gwynne Wilcox, Esq.
Micah Wissinger, Esq.
David Slutsky, Esq.
Levy Ratner, P.C.
80 Eighth Avenue, Eighth Floor
New York, NY 10011-7175
gwilcox@levyratner.com
mwissinger@levyratner.com
dslutsky@levyratner.com

Jonathan M. Linas, Esq.
E. Michael Rossman, Esq.

Jones Day
77 W. Wacker Drive, Suite 3500
Chicago, IL 60601-1692
jlinas@jonesday.com
emrossman@jonesday.com

Claude Schoenberg, Esq.
Schoenberg Law Office
Two Bala Plaza, Suite 300
Bala Cynwyd, PA 19004
claude.schoenberg@me.com

Steve A. Miller, Esq.
James M. Hux, Jr., Esq.
Fisher & Phillips LLP
10 S. Wacker Drive, Suite 3450
Chicago, IL 60606-7592
smiller@laborlawyers.com
jhux@laborlawyers.com

Mary Joyce Carlson, Esq.
1100 New York Avenue, NW
Suite 500 West
Washington, DC 20005
carlsonmjj@yahoo.com

Jonathan Cohen, Esq.
Eli Naduris-Weissman, Esq.
Rothner, Segall & Greenstone
510 S. Marengo Avenue
Pasadena, CA 91101-3115
jcohen@rsglabor.com
enaduris-weissman@rsglabor.com

Jeffrey A. Macey, Esq.
Robert A. Hicks, Esq.

Macey, Swanson and Allman
445 N. Pennsylvania Street, Suite 401
Indianapolis, IN 46204-1893
jmacey@maceylaw.com
rhicks@maceylaw.com

Sean D. Graham, Esq.
Weinberg Roger & Rosenfeld
800 Wilshire Boulevard, Suite 1320
Los Angeles, CA 90017-2623
sgraham@unioncounsel.net

Roger K. Crawford, Esq.
Best, Best & Krieger LLP
2855 E. Guasti Road, Suite 400
Ontario, CA 91761
roger.crawford@bbklaw.com

Thomas O'Connell, Esq.
Ashley Ratliff, Esq.
Jacqueline Yaeger, Esq.
Best, Best & Krieger
3390 University Avenue, 5th Floor
Riverside, CA 92501
thomas.oconnell@bbklaw.com
jacqueline.yaeger@bbklaw.com
ashley.ratliff@bbklaw.com

Louis P. DiLorenzo, Esq.
Patrick V. Melfi, Esq.
Bond, Schoeneck & King, PLLC
600 Third Avenue
New York, New York 10016
ldilorenzo@bsk.com
pmelfi@bsk.com

Nicole Berner, Esq.
1130 Connecticut Avenue, NW, Suite 950
Washington, DC 20036-3975
nicole.berner@seiu.org

Michael J. Healey, Esq.
Healey & Hornack, P.C.
247 Fort Pitt Boulevard, 4th Floor
Pittsburgh, PA 15222
mike@unionlawyers.net

Joseph A. Hirsch, Esq.
Hirsch & Hirsch
One Belmont Avenue
8th Floor, Suite 8001
Bala Cynwyd, PA 19004
jahirsch@hirschfirm.com

David P. Dean, Esq.
Kathy L. Krieger, Esq.
James & Hoffman, PC
1130 Connecticut Avenue, NW, Suite 950
Washington, DC 20036
dpdean@jamhoff.com
klkrieger@jamhoff.com

Deena Kobell, Esq.
National Labor Relations Board, Region 04
615 Chestnut Street, 7th Floor
Philadelphia, PA 19106-4404
deena.kobell@nlrb.gov

Edward Castillo, Esq.
Christina Hill, Esq.
Elizabeth Cortez, Esq.
Sylvia Taylor, Esq.
National Labor Relations Board, Region 13
209 South La Salle Street, Suite 900
Chicago, IL 60604-1443
edward.castillo@nlrb.gov
christina.hill@nlrb.gov
elizabeth.cortez@nlrb.gov
sylvia.taylor@nlrb.gov

Richard McPalmer, Esq.
National Labor Relations Board, Region 20
901 Market Street, Suite 400
San Francisco, CA 94103
richard.mcpalmer@nlrb.gov

Brian Gee, Esq.
Rudy Fong-Sandoval, Esq.
National Labor Relations Board, Region 31
11500 W. Olympic Boulevard, Suite 600
Los Angeles, CA 90064
brian.gee@nlrb.gov

rudy.fong-sandoval@nlrb.gov

Jamie Rucker
Jacob Frisch
National Labor Relations Board, Region 2
26 Federal Plaza, Room 3614

New York, NY 10278
jamie.rucker@nlrb.gov
jacob.frisch@nlrb.gov

Dated: January 21, 2020

 /s/ Geoffrey Dunham
Geoffrey Dunham
Counsel for the General Counsel