

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

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

and

**Cases 02-CA-093893, et al.
04-CA-125567, et al.**

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

**MCDONALD’S USA, LLC’S OPPOSITION TO THE CHARGING PARTIES’
MOTION TO REOPEN THE RECORD AND FOR RECONSIDERATION**

Under the pretense of identifying “newly discovered material evidence” (Mot. at 1) – namely, a half-page unauthenticated “recusal list” purportedly leaked to the media over six months ago and publically available ever since – the Service Employees International Union and Fast Food Workers Committee (“Union”) ask the National Labor Relations Board to reopen the record and reconsider its well-reasoned December 12, 2019 decision approving the settlement of this case (“Decision”). Under the Board’s Rules, the Union’s Motion is deficient in at least three respects. First, the Motion is untimely. The Union failed to file it “*promptly* on discovery of the evidence to be adduced,” NLRB Rules & Regs. § 102.48(c)(2) (emphasis added), and instead waited nearly six months to first see how the Board would rule on its Motion to Recuse. Second, the Motion fails to identify any “extraordinary circumstances” that warrant reopening or reconsidering the Decision, as the Board’s Rules require, and instead simply rehashes the same Union arguments that have already been rejected. Third, the Motion nowhere cites, much less tries to establish, any of the standards required to secure a stay of the Board’s Decision and halt implementation of the settlement that is well underway after the Administrative Law Judge approved it on December 30, 2019. For these reasons, the Board should summarily reject the Union’s attempts to inject additional and unnecessary delay into this already protracted proceeding and to postpone further

the important remedies that the settlement provides to alleged discriminatees.

ARGUMENT

A. The Board Should Not Reopen The Record Or Admit The Union's Document.

The Union first moves the Board to reopen the record and admit its proffered document. The Board should summarily reject that request under its established Rules because the Union's motion is untimely and does not demonstrate "extraordinary circumstances" or provide any evidence that would "require a different result" from the Board's Decision. NLRB Rules & Regs. § 102.48(c).

1. The Union's Motion To Reopen The Record Is Untimely.

The Union's bid to reopen the record is, on its face, untimely under the Board's Rules. The Union itself concedes that the document at issue "came to light . . . when a commercial journal disclosed the (apparently leaked) Agency record in a July 2019 news article." (Mot. at 2.) It is indisputable that the Union sat on the document for the five intervening months before the Board issued the December 12, 2019 Decision, then waited almost another month before filing its motion to reopen on the basis of this document – *after* the Board rejected the Union's settlement positions and Member Emanuel rejected the recusal motion, *after* the Administrative Law Judge approved the settlement on December 30, 2019, and *after* implementation of the settlement had begun. Under the Board's Rules, that is too late.

The Board's Rules are clear: a party seeking to reopen the record in a matter must move "promptly on discovery of the evidence to be adduced." NLRB Rules & Regs. § 102.48(c)(2); *cf. Reliant Energy*, 339 NLRB 66 (2003). In full, the relevant language provides:

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.**

NLRB Rules & Regs. § 102.48(c)(2) (emphasis added). Thus, while some motions are subject to a 28-day filing requirement, motions to reopen are specifically “except[ed]” from that limit and subject to the more strict “prompt[.]” filing requirement. NLRB Rules & Regs. § 102.48(c)(2).

The Board has applied this Rule consistently to reject a party’s motion to reopen the record where the party waits months, even weeks, to alert the Board to purportedly new evidence. *See, e.g., Mich. State Employees Assoc.*, 364 NLRB No. 65, at *1 n.2 (Aug. 4, 2016) (denying motion where party “discovered the new evidence on January 20, 2014” and “obtained related documents on January 29 and on March 14, 2014,” but “waited until April 3 to file the motion”); *Harry Asato Painting, Inc.*, 2015 WL 5734974, at *2 (NLRB Sept. 30, 2015) (rejecting motion where party “waited almost 5 months after it received the Union’s email”); *Labor Ready, Inc.*, 330 NLRB 1024, 1025 (2000) (finding motion untimely where party “subpoenaed the logs at a hearing on January 14, 1999, but did not file its motion until April 26, 1999”).

Where the moving party waits to file a motion to reopen until *after* the Board decides the underlying matter against it, dismissal is particularly warranted to avoid the kind of gamesmanship the Union is engaging in here. *See, e.g., Precoat Metals*, 341 NLRB 1137, 1137 n.1 (2004) (rejecting motion where party received documents “about 11 months before the judge's decision was issued in this case” but “did not bring this evidence to the judge's attention prior to the issuance of his decision”); *St. Anthony’s Ctr.*, 227 NLRB 1777, 1777 n.1 (1977) (rejecting motion where party delayed filing it “until a date 149 days after the close of the hearing and 49 days after the issuance of the . . . Decision”); *cf. Schurz Commc’ns, Inc. v. FCC*, 982 F.2d 1057, 1060 (7th Cir. 1992) (“Litigants cannot take the heads-I-win-tails-you-lose position of waiting to see whether they win and if they lose moving to disqualify a judge who voted against them.”).

The reason for the Rule’s timing requirement is plain. The Board expects parties to submit

all purportedly relevant evidence so that the Agency may give it due consideration (if any is due) at the time it decides the underlying matter. *See, e.g., Electro-Voice, Inc.*, 321 NLRB 444, 444 (1996) (rejecting motion where party “was in possession of this evidence at least during the period when the case was pending before the Board”). The Board does not allow parties strategically to withhold materials, only to seek a second bite at the apple if the Agency rejects their position. Because the Board disfavors motions to reopen (and for reconsideration) and grants them only upon a showing of “extraordinary circumstances” and if they are “promptly” filed, NLRB Rules & Regs. § 102.48(c), the Board should dismiss the Union’s tardily-filed motion on timeliness grounds alone.

The Union seeks to excuse its inaction with two equally unavailing arguments. First, it contends (Mot. at 4) that its motion to reopen was timely because it was “filed within 28 days of service of the Board’s December 12, 2019 decision as prescribed in 29 C.F.R. § 102.48(c)(2).” The Union misreads the rule. As explained above, the Rule specifically “except[s]” motions to reopen from that 28-day limit and, instead, subjects them to the more strict “prompt[]” filing requirement. NLRB Rules & Regs. § 102.48(c)(2). Further, this prompt filing requirement is triggered not by the Board’s decision, but by the “discovery of the evidence to be adduced.” *Id.* Waiting nearly six months after “discovery of the evidence to be adduced” – as the Union admittedly did here – is not “promptly” within the meaning of the Rule. *See, e.g., Mich. State Employees Assoc.*, 364 NLRB No. 65, at *1 n.2 (four-month delay untimely); *Harry Asato Painting, Inc.*, 2015 WL 5734974, at *2 (five-month delay untimely); *Labor Ready, Inc.*, 330 NLRB at 1025 (four-and-a-half-month delay untimely).

Second, the Union contends (Mot. at 4) that its delay was justified because “there was no reason to suspect, before the issuance of the Board’s decision, that the [document] would not be

taken into consideration here as an official document of record, and would not be honored in the disposition of this case.” But that is no excuse at all. As an initial matter, there was every reason for the Union to suspect that its document was not an “official document of record,” as it now claims. Notably, Member Emanuel had *already* participated in this case, without objection from the Union, prior to the Union’s motion to recuse and the Board’s December 12, 2019 decision. *See McDonald’s USA, LLC*, 2018 WL 447422, at *1 (NLRB Jan. 16, 2018) (Member Emanuel participating in decision granting McDonald’s USA’s special appeal from ALJ order requiring McDonald’s USA to create and provide an expert report). And while the Union now points (Mot. at 2-3 n.2) to a news article that describes the document as a leaked Board record, the Board itself has never confirmed the authenticity of the document and has made clear such leaked documents are not to be trusted. *See* NLRB’s Ethics Recusal Report, at 27 (Nov. 19, 2019) (noting that “‘leaks’ have disclosed interim, incorrect or incomplete information about Board members’ recusal obligations”).¹

In any event, and most fundamentally, a party is not entitled to reopen the record simply because it received an unfavorable result after making a strategic choice to withhold a purportedly relevant document while a matter was pending decision. *See, e.g., Precoat Metals*, 341 NLRB at 1137 n.1 (rejecting contention that delay in motion to reopen was justified where party was “not certain whether such a motion would be necessary”).

2. The Union’s Document Does Not Amount to “Extraordinary Circumstances” or Dictate a Different Result.

Separately, even if the motion was timely (which it is not), the Union’s bid to reopen the record fails because its document does not demonstrate “extraordinary circumstances” or “require

¹ Available at: <https://www.nlr.gov/sites/default/files/attachments/basic-page/node-7831/nlr-ethics-recusal-report-november-19-2019.pdf>.

a different result” on any aspect of Member Emanuel’s recusal decision. NLRB Rules & Regs. § 102.48(c) (requiring a party moving to reopen to demonstrate “extraordinary circumstances” and that the new evidence “require[s] a different result”); *see also Harry Asato Painting, Inc.*, 2015 WL 5734974, at *2 (“[I]t is well established that the Board need not reopen the record unless the moving party has demonstrated that the new evidence would require a different result”); *Fitel/Lucent Technologies, Inc.*, 326 NLRB 46, 46 n.1 (1998) (motion to reopen record denied where it “fail[ed] to demonstrate that the [new evidence] would require a different result”); *Opportunity Homes, Inc.*, 315 NLRB 1210, 1210 n.5 (1994) (“It is well established that the Board need not reopen the record unless the moving party has demonstrated that the new evidence would require a different result.”). The Union has demonstrated neither.

The Union contends (Mot. at 7) that “Member Emanuel’s recusal from this case” is “compelled” by its belatedly filed document. But the Union’s late-filed document does not undercut any of the reasons that Member Emanuel is not subject to recusal under the applicable rules. *See* Exec. Order 13770; 5 C.F.R. § 2635.502. That is, the document does not address or change the fact that “[n]o party in this case is a former client of Member Emanuel.” *McDonald’s USA*, 368 NLRB No. 134, slip op. at *1 n.2 (Dec. 12, 2019). Likewise, it does not address or change the fact that “Member Emanuel no longer has a covered relationship with . . . Littler Mendelson, and in any event Littler Mendelson does not represent a party to this case.” *Id.* As such, the Union’s document in no way compels a different result on its motion to recuse Member Emanuel, and it raises no extraordinary circumstances justifying reconsideration of the recusal decision. *See id.* (rejecting Union’s contentions based on the “factual, legal, and temporal circumstances here”).

In short, the Union has failed to demonstrate how its singular reliance on a one-page,

unauthenticated, and unreliable document, which includes no substantive analysis of the recusal rules, changes the outcome of Member Emanuel’s recusal decision. It does not. Tellingly, the Union tries to have it both ways with its baseless ethics challenge: on the one hand, the Union argues that the supposedly material new document prevents Member Emanuel from participating in the Decision, but simultaneously asserts that it does not prevent “Member Emanuel’s participation in ordering a stay.” (Mot. at 15 n.16.) The Union cannot have it both ways: the truth is, Member Emanuel is not recused from deciding any matter related to this case – and, indeed, he has previously decided motions in the case with no Union objection – and the Union’s contrary contentions here are gamesmanship that should be rejected out of hand.

B. Reconsideration Of The Decision Is Not Appropriate.

Next, the Union raises various claims (Mot. at 6-14) that the Board should “reconsider and vacate its December 12, 2019 Decision.” However, the Union has identified no “extraordinary circumstances” that would require or permit the Board to do so under its Rules. NLRB Rules & Regs. § 102.48(c). Indeed, the Union is simply rehashing the same substantive arguments that had been previously raised and rejected. That is not a valid basis, and certainly not an extraordinary circumstance, for obtaining reconsideration of the Decision. *See, e.g., Electro-Voice, Inc.*, 321 NLRB at 444 (rejecting motion to reconsider that “rais[es] only issues previously considered and rejected by the Board”); *Int’l Hod. Carriers Bldg.*, 135 NLRB 1153, 1168 (1962) (denying motion where “nothing new in fact or law was introduced into the case which warranted reconsideration”).

As an initial matter, arguments concerning reconsideration of the Union’s motion to recuse Member Emanuel are properly directed to Member Emanuel individually, not the Board. Under Board practice, Board members decide for themselves whether to recuse in consultation with the Board’s Designated Agency Ethics Official. *See, e.g., Serv. Employees Local 121RN (Pomona Valley Hosp. Med. Ctr.)*, 355 NLRB 234, 238 (2010) (Member Becker declining to recuse

himself). That is the precise approach followed here with respect to the Union's Motion – a fact all three Board members acknowledged. *See McDonald's USA*, 368 NLRB No. 134, slip op. at *1 n.2 (“Member Emanuel has considered the motion and has determined, in consultation with the Board's Designated Agency Ethics Official, not to recuse himself.”); *id.* at *13 n.1 (Member McFerran, dissenting) (“I interpret the Charging Parties' motion as directed to Member Emanuel individually, not to the Board itself.”). *A fortiori*, reconsideration of his recusal decision also lies with Member Emanuel.

Regardless of the decisionmaker, however, each of the Union's contentions should be dismissed:

First, with respect to its underlying motion to recuse Member Emanuel, the Union argues (Mot. at 6-7) that “the Board erred materially by failing to consider and comply” with its belatedly filed document. As demonstrated above (*supra* at 2-7), the Union failed to submit the document in a timely manner, so the Board has no obligations to consider it at all. But, in any event, the Union's document does not require Member Emanuel's recusal for all the reasons discussed above.

Second, the Union argues (Mot. at 7-10) that Member Emanuel's recusal is required by “*the grounds previously presented by Charging Parties in their August 2018 recusal motion filings.*” (Mot. at 7-10 (emphasis added).) The Board has long held, however, that it will not allow a party to rehash prior arguments in a motion for reconsideration. *See Electro-Voice, Inc.*, 321 NLRB at 444; *Int'l Hod. Carriers Bldg.*, 135 NLRB at 1168. Moreover, the Union cannot use its supposedly new document to bootstrap and recycle those same recusal arguments, especially where, as here, the Union did not submit the document in a timely manner and the document does not require Member Emanuel's recusal. That said, *McDonald's USA* refuted the Union's

contentions in its prior filings,² incorporated here, and Member Emanuel properly rejected the Union's positions in the Decision. *See McDonald's USA*, 368 NLRB No. 134, slip op. at *1 n.2.

Third, the Union incorrectly argues (Mot. at 10-11) that the Decision "erred in denying recusal on the specific ground that 'Member Emanuel no longer has a covered relationship' with Littler Mendelson." The question is academic. Even if Member Emanuel had a covered relationship with Littler Mendelson presently, he still would not be subject to recusal because "Littler Mendelson does not represent a party to this case." *McDonald's*, 368 NLRB No. 134, slip op. at *1 n.2; *see also* Charging Parties' Reply in Support of Motion for Recusal of Chairman Ring and Member Emanuel, at 2 (Aug. 28, 2018) (acknowledging that Littler Mendelson represented a party "only at the pre-litigation stage" of this case). Moreover, Member Emanuel last worked with Littler Mendelson in 2017, and under the plain language of the regulation at issue, he no longer has a covered relationship with that law firm. *See* 5 C.F.R. § 2635.502(b)(1)(iv) (stating that a person has a "covered relationship" with any entity for whom he or she "has, within the last year, served as . . . general partner . . . or employee"); *cf.* Exec. Order 13770 at Sec. 1 ¶ 6 & Sec. 2(j).

Fourth, the Union next contends (Mot. at 11-12) that the Board should have addressed its "well-founded recusal motion with respect to Chairman Ring" and granted it "for all the reasons presented in their prior submissions." Apart from repeating the same arguments again, the Union's arguments with respect to Chairman Ring were not "well founded" in the first place – they were baseless, as *McDonald's USA* demonstrated in its prior papers. More pertinent for present purposes, however, "Chairman Ring took no part in the consideration of this case." *McDonald's*, 368 NLRB No. 134, slip op. at *1 n.2. The Union cites no authority that suggests the Board should

² *See* *McDonald's USA, LLC's Opposition to Charging Parties' Motion to Recuse Chairman Ring and Member Emanuel* (Aug. 21, 2018) (hereinafter, "Opp. to Recusal Motion").

(or even can) decide a recusal motion mooted by a member's lack of participation. The Union's Motion also does not establish "extraordinary circumstances" that would require the Board to reconsider how it handled a moot motion.

Fifth, the Union offers a strawman argument, contending (Mot. at 13) that "material errors here would also include any use of the Board's November 19, 2019 Ethics Recusal Report." The Decision *does not cite or reference* that internal report. Rather, the Decision properly addresses and applies the governing executive and regulatory standards, namely, Executive Order 13770 and the Standards of Ethical Conduct for Employees of the Executive Branch,³ and the Union has articulated no extraordinary circumstances for reconsidering the straightforward application of those governing standards. The Union cannot concoct grounds for reconsideration based on speculation over whether the Board may have considered an internal Board report that it nowhere cited in its Decision.

Sixth, the Union's contention (Mot. at 13-14) that the Board should have applied an "abuse of discretion" standard in reviewing the ALJ's decision to deny approval to the settlement is not a new argument, and it presents no "extraordinary circumstance" for the Board's reconsideration. As the Union concedes (Mot. at 14 n.15), it argued for precisely this standard of review in its prior papers. The Board majority addressed this issue (and former Member McFerran's dissent) in the Decision, properly concluding that "approval of an informal settlement agreement is always within the discretion of the Board," *McDonald's USA*, 368 NLRB No. 134, slip op. at *5 n.15 (collecting cases), especially where (as here) "a part of the judge's rationale in rejecting the settlement is no longer applicable because of a proposed rulemaking." *Id.* A desire to rehash the Union's (and

³ 5 C.F.R. § 2635.502

former Member McFerran's) prior positions in this case is not a valid basis for reconsideration. *See Electro-Voice, Inc.*, 321 NLRB at 444; *Int'l Hod. Carriers Bldg.*, 135 NLRB at 1168.⁴

C. The Board Should Deny the Union's Request for a Stay.

Finally, the Board should reject the Union's request (Mot. at 15) for a stay. The Union cites no legal authority to support its request, and there is none. On the contrary, the Board disfavors stays of its orders pending motions for reconsideration, *see* National Labor Relations Board Office of the Executive Secretary, GUIDE TO BOARD PROCEDURES, at 40 (April 2017), and the Union has failed to establish any circumstances warranting a stay here. *See, e.g., Cuomo v. U.S. Nuclear Regulatory Comm'n*, 772 F.2d 972, 974 (D.C. Cir. 1985) (considering "(1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay").

For the reasons stated above, the Union has no likelihood of success on its Motion, and it has not even attempted to argue that it would be irreparably harmed in the absence of a stay or that the public interest favors a stay. Indeed, a stay would only serve to harm the alleged discriminatees who, under the settlement, are entitled to full relief without further delay – a consideration that requires rejection of the Union's stay request. *Cf. McDonald's USA, LLC*, 364 NLRB No. 144,

⁴ Notably, however, ALJ Esposito did abuse her discretion by (among other things) citing the controlling test for evaluating settlements, *see Independent Stave*, 87 NLRB 740 (1987), but applying the defunct, full-remedy *Postal Service* test. *See McDonald's USA, LLC's Request for Special Permission to Appeal the Administrative Law Judge's July 17, 2018 Order Denying Motions to Approve Settlement Agreements*, at 4-5 (Aug. 13, 2018) (describing how ALJ Esposito "applied the wrong legal standard" and that her decision was "completely contrary to prevailing law."); *McDonald's USA, LLC's Special Appeal From the Administrative Law Judge's July 17, 2018 Order Denying Motions to Approve Settlement Agreements*, at 3, 3n.5 (Aug. 13, 2018) ("[A]s the Courts of Appeals have repeatedly recognized, it is clear reversible error for an agency decisionmaker to purport to claim adherence to controlling precedent while actually applying different standards to achieve a desired result. That is exactly what happened below.") (collecting cases); *see also McDonald's USA*, 368 NLRB No. 134, slip op. at *6 ("If we were to reject the informal settlements solely because McDonald's refused to guarantee compliance with the remedial provisions as a joint employer, we would essentially be reinstating the 'full remedy' rule we abandoned in *UPMC*.").

slip op. at *3 (Nov. 10, 2016) (Member Miscimarra, dissenting) (expressing prescient concern that delays associated with this case would put one of the “worst burdens” on the “alleged discriminatees” because they will be denied full relief until the completion of “many more years of litigation.”)

At most, the Union argues (Mot. at 15) that it would be “inefficient and wasteful” if the Board’s regional offices and the charged franchisees began implementation of the settlement agreements, but then had to “undo settlement implementation measures down the road.” Tellingly, however, that is a concern that neither the General Counsel nor any of the charged franchisees have raised. *See* 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, at 4 (January 21, 2020) (opposing Union’s request for a stay and noting, “the administration of the settlement agreements has begun . . .”) Further, the Union did not even file its stay request until *after* the Administrative Law Judge approved the settlement and triggered its implementation on December 30, 2019, undercutting its disingenuous plea for efficiency and avoidance of waste.

CONCLUSION

For the foregoing reasons, the Charging Parties’ Motion to Reopen the Record and for Reconsideration should be denied.

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Respectfully submitted,

s/ Patricia A. Dunn

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CERTIFICATE OF SERVICE

The undersigned, an attorney, affirms under penalty of perjury that on January 22, 2020, he caused a true and correct copy of McDonald's USA, LLC's Opposition to the Charging Parties' Motion to Reopen the Record and for Reconsideration to be electronically filed using the National Labor Relations Board's website and to be served upon counsel for the Parties by e-mail at the following addresses designated for this purpose:

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