

**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. 13-CA-106490, et al. 20-CA-132103, et al. 25-CA-114819, et al. 31-CA-127447, et al.
and	
FAST FOOD WORKERS COMMITTEE AND SERVICE EMPLOYEES INTERNATIONAL UNION, CTW, CLC, et al.	

**CHARGING PARTIES’ REPLY IN FURTHER SUPPORT OF THEIR MOTION TO
REOPEN THE RECORD AND FOR RECONSIDERATION, AND IN OPPOSITION TO
THE GENERAL COUNSEL’S MOTION TO STRIKE REFERENCES TO THE
EMANUEL SUPPLEMENTAL RECUSAL LIST FROM THE RECORD**

On January 21, 2020, counsel for the General Counsel responded to the Charging Parties’ January 7, 2020 Motion to Reopen the Record and for Reconsideration by arguing (1) that the “Board Member William Emanuel Supplemental Recusal List” dated February 9, 2018 (attached as Exhibit A to Charging Parties’ Motion) is inadmissible; and (2) even if admitted, the Supplemental Recusal List would not require a different result in *McDonald’s USA, LLC*, 368 NLRB No. 134 (Dec. 12, 2019). As we demonstrate below, both arguments are unavailing.

First, the Board should take administrative notice of the Supplemental Recusal List, especially given the stage of these proceedings and the fact that the Recusal List relates to a Board member’s ethical responsibilities, not to the Charging Parties’ burden of proof on any underlying claims in this case. In addition, the Charging Parties have made a sufficient *prima facie* showing that the Recusal List is authentic.

As to the second point, the Board has not acknowledged that the Supplemental Recusal List (or any version thereof) was in fact considered in deciding the Charging Parties’ original recusal motion. If the Recusal List was considered, the Board must say so, and if not, the Board

must reopen the record to address the omitted document. In either case, since the Board’s original Decision failed to explain how it dealt with an Agency document categorically demanding Member Emanuel’s recusal, the Supplemental Recusal List compels reconsideration and issuance of a decision different from the Board’s December 12, 2019 Decision and Order.

ARGUMENT

A. The Board should take administrative notice of the Recusal List, and in any case Charging Parties have made a sufficient showing that the recusal list is authentic.

The General Counsel errs in arguing that the Board should deny Charging Parties’ Motion and reject the Supplemental Recusal List—indeed, strike all “references” to Exhibit A in this proceeding—because that document has not been “authenticated” in accordance with the Federal Rules of Evidence. The pending proceeding is no longer at the trial phase, where evidentiary authentication of documents is typically resolved. Thus, Charging Parties do not have at their disposal the array of litigation tools (e.g., depositions, requests for admission, document and witness subpoenas) typically used to satisfy Fed. R. Evid. 901. Indeed, the fact that the Supplemental Recusal List was not accessible or discoverable earlier in these proceedings by any ordinary means is what precipitated Charging Parties’ Motion to reopen the record.

Moreover, there is no process available to compel the Board itself to hold an evidentiary hearing to authenticate that document.¹ Instead, Charging Parties’ only recourse under the Board’s rules was moving to reopen the record. That avenue is clearly appropriate here. The existence and nature of the recently disclosed Supplemental Recusal List—on its face, an internal

¹ Even if there were such a process, the General Counsel suggests that only the Board Members and/or the Board’s own personnel could provide authentication, because only they have access to recusal lists that apply to “the Board side of the Agency.” Gen. Counsel Opp. at 3. In other words, because the General Counsel “is not privy to” such “Board side” documents, counsel for the General Counsel would be unable to enter into any of the stipulations parties routinely use in NLRB hearings to resolve authentication and admissibility issues as to, e.g., business records.

Agency document—is exactly what Charging Parties ask the Board itself to confirm in reopening the record and reconsidering the December 12 Decision and Order. In particular, the Board would do this by (1) reopening the record to admit the Recusal List and apply it to the determination whether Member Emanuel should have been recused in the proceedings (special appeal and recusal motion) that came before the Board in August 2018; or (2) explaining on reconsideration how the Recusal List was, in fact, already considered and applied in the first instance.

Further, Charging Parties are not introducing the Recusal List to satisfy their evidentiary burden and make a trial record in an adversarial ULP proceeding. Rather, they submit this document to ensure that the Board is meeting its ethical obligations. The purpose of Rule 901 is to foreclose unreliable evidence in support of a party’s evidentiary burden, not to prevent a decisionmaker from considering facts establishing a conflict of interest or other ethical constraint. The General Counsel cites no case where Rule 901 was used to prevent a party from introducing facts that a decisionmaker was ethically compromised, particularly where the decisionmaker itself was the only person who could “authenticate” the evidence.

Here, the Board is in the best position to authenticate the Supplemental Recusal List in the context of deciding Charging Parties’ Motion for Reconsideration. And the Board is fully capable of stating, within that motion context, whether this apparent Agency document is authentic. Indeed, as noted above, the General Counsel suggests that *only* the Board can do so. *Supra* at 2 n.1. The General Counsel identifies no basis to summarily “strike” Exhibit A (and all “references” to it) without further comment from the Board, under these circumstances.

In short, given the procedural posture of these proceedings and the nature of the evidence that the Charging Parties seek to admit, the Board should not apply the strictures of Fed. R. Evid.

901 to the Recusal List. Rather, the Board itself should verify the Supplemental Recusal List's authenticity as an internal Agency document, and should take administrative notice of that document in deciding the Charging Parties' motion for reconsideration. The Board has long recognized the propriety of taking administrative notice of its own records and documents. *See, e.g., Reno Hilton*, 319 NLRB 1154, 1157 fn. 16 (1995) (finding that the Board need not await a motion by a party to take administrative notice of its own documents); *Lord Jim's*, 264 NLRB 1098, 1098 fn. 1 (1982) ("the Board takes administrative notice of its own files"); *J. S. Abercrombie Co.*, 83 NLRB 524 and n.4 (1949); *Brentwood Prods., Inc.*, 81 NLRB 635, 638 (1949). The Board should follow that sound precedent and take such administrative notice here.

In any case, even if Fed. R. Evid. 901 is applied, Charging Parties have made a sufficient showing that the Supplemental Recusal List is authentic at this stage of the proceedings. Under Rule 901, a party seeking admission of evidence need only make a *prima facie* showing of authenticity. *E.W. French & Sons, Inc. v. Gen'l Portland Inc.*, 885 F.2d 1392, 1398 (9th Cir. 1989); *see also Rodriguez v. Gold & Silver Buyers, Inc.*, No. 4:12-CV-1831, 2013 U.S. Dist. LEXIS 136332, at *24 n.8 (S.D. Tex. Sep. 24, 2013) ("Courts do not require conclusive proof of authenticity before allowing the admission of disputed evidence . . ."). This is not a burdensome requirement; it necessitates only that the proponent provide "some evidence which is sufficient to support a finding that the evidence in question is what its proponent claims it to be." *United States v. Jimenez Lopez*, 873 F.2d 769, 772 (5th Cir. 1989); *United States v. Barnes*, 803 F.3d 209, 217 (5th Cir. 2015).

Here, Bloomberg Law—a well-respected news agency that routinely reports on the Board's proceedings—published a July 9, 2019 story concerning Member Emanuel's recusal obligations, attaching the Recusal List and describing the document as one leaked by an internal

source working at the Board. Notably, the Board never requested that Bloomberg Law issue a correction or retraction and never denied that the leaked Emanuel Recusal List was anything but accurate and authentic. The General Counsel has similarly declined to take a position as to whether the document is authentic, and has failed to offer any evidence demonstrating that the document is fraudulent. *See Nester v. Textron, Inc.*, 888 F.3d 151, 161 (5th Cir. 2018) (noting that a party’s “failure to offer any rebuttal to authenticity bolsters admission”); *McConathy v. Dr. Pepper/Seven Up Corp.*, 131 F.3d 558 , 562 (5th Cir. 1998) (identifying opponent's failure to "claim that the document is not authentic" as one of several bases for authentication).

Finally, the Supplemental Recusal List itself contains indicia of its reliability. Specifically, as pointed out in the Charging Parties’ Motion, when a case arose involving Novelis Corporation, another company listed on the Recusal List, Member Emanuel did in fact recuse himself. *See* Motion at 5-6. This suggests that the Supplemental Recusal List accurately articulated Member Emanuel's recusal obligations.

In sum, Charging Parties have provided more than enough evidence to support a prima facie finding that the Recusal List “is what the [Charging Parties] claim[] it is.” Fed. R. Evid. 901(a).

B. The Supplemental Recusal List requires the Board to explain its actions and to grant a stay.

The General Counsel simultaneously argues that the Supplemental Recusal List is inadmissible, but also that the “substance” of Charging Parties’ Exhibit A has already been considered. Gen. Counsel Opp. at 3. If the Recusal List (or its content) was in fact considered, then the Board must explain how that document and other relevant internal documents were addressed and evaluated in deciding Charging Parties’ recusal motion. Only the Board can explain what was considered and relied upon, or what was discounted and why, underlying

Member Emanuel's decision to participate in the Board's disposition of this case in direct contravention of the Recusal List.

As previously shown, the Board's December 12 Decision fails to acknowledge the existence of the Supplemental Recusal List and fails to abide by that document's comprehensive, unqualified recusal mandate in all cases involving "McDonald's (including franchisees)." *See* Motion at 6-7 and n.7. If the "substance" of that Recusal List was in fact considered, then the Board's Decision is fatally deficient because it completely omits anything approaching the legally required showing of "reasoned decision making." *Id.* Accordingly, the December 12 Decision, including denial of Charging Parties' recusal motion, must be vacated, and Member Emanuel must be recused from this case.

Finally, the General Counsel mistakenly argues that because the Supplemental Recusal List is not admissible evidence, there is no legitimate reason for the Board to reopen the record and stay its December 12 Decision pending reconsideration. But he takes that position without addressing the Charging Parties' meritorious grounds for reconsideration. Instead, the General Counsel relies on the fact that he has already begun administration of the settlement agreements.

That argument only further justifies the grant of a stay pending adjudication of the Charging Parties' Motion. As demonstrated above, the Recusal List is evidence that must be considered by the Board. The Board should, therefore, reopen the record, admit the Supplemental Recusal List, and reconsider both the December 12 Decision and Member Emanuel's participation therein while issuing an interim stay to prevent further steps predicated on fatally flawed Board rulings. To do anything else would be wasteful and inefficient.

CONCLUSION

For all the foregoing reasons, and for the reasons stated in the Charging Parties' Motion, the Board should grant the Charging Parties' Motion and the relief requested therein.

January 28, 2020

Respectfully submitted,

Mary Joyce Carlson
1100 New York Ave., NW, Suite 500 West
Washington, DC 20005
Tel: 202-230-4096
carlsonmjj@yahoo.com

Kathy L. Krieger
JAMES & HOFFMAN, P.C.
1130 Connecticut Avenue, N.W., Suite 950
Washington, DC 20036
Tel: 202-496-0500
Fax: 202-496-0555
klkrieger@jamhoff.com

Micah Wissinger
LEVY RATNER, P.C.
80 Eighth Avenue, 8th Floor
New York, NY 10011
Tel: 212-627-8100
Fax: 212-627-8182
mwissinger@levyratner.com

Counsel for Charging Parties

CERTIFICATE OF SERVICE

I, Kathy L. Krieger, affirm under penalty of perjury that on January 28, 2020 I caused a true and correct copy of the foregoing document to be filed electronically with the Executive Secretary of the National Labor Relations Board and served on the same date via electronic mail at the following addresses:

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

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

Robert Brody, Esq.
Kate Bogard, Esq.
Alex Friedman, Esq.
Lindsay Rinehart, Esq.
Brody & Associates, LLC
102 Post Road West, Suite 101
Westport, CT 06880
rbrody@brodyandassociates.com
kbogard@brodyandassociates.com
afriedman@brodyandassociates.com
lrinehart@brodyandassociates.com

Micah Wissinger
LEVY RATNER, P.C.
80 Eighth Avenue, 8th Floor
New York, NY 10011
Tel: 212-627-8100
Fax: 212-627-8182
mwissinger@levyratner.com

Mary Joyce Carlson
1100 New York Ave., NW, Suite 500 West
Washington, DC 20005
Tel: 202-230-4096
carlsonmjj@yahoo.com

Kathy L. Krieger
James & Hoffman, P.C.
1130 Connecticut Ave, NW, Suite 950
Washington, DC 20036
Tel: 202-496-0500
Fax: 202-496-0555
klkrieger@jamhoff.com

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

Michael S. Ferrell, Esq.
Jonathan M. Linas, Esq.
E. Michael Rossman, Esq.
Jones Day
77 W. Wacker Drive, Suite 3500
Chicago, IL 60601-1692
mferrell@jonesday.com
jlinas@jonesday.com
emrossman@jonesday.com

Claude Schoenberg, Esq.
Schoenberg Law Office
2 Bala Plaza, Suite 300
Bala Cynwyd, PA 19004
claudio.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

Jeffrey A. Macey, Esq.
Robert A. Hicks, Esq.
Macey Swanson and Allman
445 North Pennsylvania Street Suite 401
Indianapolis, IN 46204-1893
jmacey@maceylaw.com
rhicks@maceylaw.com

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

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

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

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

Nicole G. Berner, Esq.
1800 Massachusetts Avenue, NW
Washington, DC 20036
Nicole.Berner@seiu.org

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

Joseph A. Hirsch, Esq.
Hirsch & Hirsch
2 Bala Plaza, Flr 3, Suite 300
Bala Cynwyd, PA 19004
jahirsch@hirschfirm.com

Deena Kobell, Esq.
National Labor Relations Board - Region 4
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

Christopher Cullen, Esq.
National Labor Relation Board
Division of Legal Counsel
1015 Half Street, SE
Washington, DC 20570
Christopher.cullen@nlrb.gov

Jamie Rucker, Esq.
Jacob Frisch, Esq.
Alejandro Ortiz, Esq.
Nicholas A. Rowe, Esq.
Nicole Lancia, Esq.
Zachary E. Herlands, Esq.
National Labor Relations Board - Region 2
26 Federal Plaza Room 3614
New York, NY 10278-0104
jamie.rucker@nlrb.gov
jacob.frisch@nlrb.gov
alejandro.ortiz@nlrb.gov
nicholas.rowe@nlrb.gov
nicole.lancia@nlrb.gov
Zachary.Herlands@nlrb.gov

Brian Gee, Esq.
John Rubin, 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
john.rubin@nlrb.gov
rudy.fong-sandoval@nlrb.gov