No. 01-1392

In the Supreme Court of the United States

USA POLYMER CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the National Labor Relations Board (Board) abused its discretion when it declined to accept for filing petitioner's untimely motion to reopen the Board's proceedings.

2. Whether the Board reasonably determined, after a merger between two international unions, that an affiliate of the post-merger union continued the employee representation its predecessor had provided before the merger.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-17a) is reported at 272 F.3d 289. The decision and order of the National Labor Relations Board (Board) (Pet. App. 18a-38a) and the decision and recommended order of the administrative law judge (ALJ) (Pet. App. 39a-160a) are reported at 328 N.L.R.B. 1242. The Board's order declining to accept for filing petitioner's untimely motion to reopen (App., *infra*, 1a-8a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on November 6, 2001. A petition for rehearing was denied on January 8, 2002 (Pet. App. 1a-2a). The petition for a writ of certiorari was filed on March 18, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner operates a plastics-recycling facility in Houston, Texas. Pet. App. 4a. In October 1994, a regional affiliate of the International Ladies' Garment Workers' Union (ILGWU) began a campaign to represent workers at petitioner's plant. *Id.* at 5a, 39a n.1, 42a-43a. By late January 1995, the ILGWU had obtained signed authorization cards to represent at least 58 of the 64 employees whom it sought to represent. *Id.* at 44a. On January 27, 1995, petitioner laid off 29 employees. All of the discharged workers had signed union authorization cards. *Id.* at 44a & n.4. Nine of the ten employees on a union organizing committee were laid off. *Id.* at 22a. The union filed charges with the Board, in which it alleged that petitioner had engaged in unfair labor practices including layoffs that were motivated by a desire to undermine the union's organizing campaign. *Id.* at 5a, 39a-40a.

On July 1, 1995, the ILGWU merged with the Amalgamated Clothing and Textile Workers Union to form the Union of Needle Trades, Industrial and Textile Employees (UNITE). The ILGWU affiliate that filed charges against petitioner became an affiliate of UNITE. See Pet. App. 39a & n.1.

Acting on the union's charges, the General Counsel of the Board issued administrative complaints against petitioner. Pet. App. 39a-40a. In March 1996, an ALJ found after a hearing that petitioner engaged in multiple unfair labor practices in violation of Section 8(a)(1), (3) and (4) of the National Labor Relations Act (Act), 29 U.S.C. 158(a)(1), (3) and 4. Those practices included threatening workers who engaged in union activities, firing workers in retaliation for their union organizing activities, and punishing workers for testifying about

the unfair labor practices. Pet. App. at 145a-148a; see *id.* at 39a-160a.

2. On August 24, 1999, the Board affirmed the ALJ's decision and held that petitioner committed "numerous, egregious" unfair labor practices in response to the union's organizing campaign, in violation of the Act. Pet. App. 19a. To remedy petitioner's violations, the Board directed petitioner—among other actions—to reinstate the 29 unlawfully laid-off employees and to bargain with the UNITE affiliate in accordance with *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, 610-616 (1969). See Pet. App. 19a & n.2, 26a n.10, 27a-38a, 131a-134a.

In *Gissel*, this Court held that the Board may require an employer to bargain with a union, without an election by employees, in exceptional cases involving outrageous and pervasive unfair labor practices (referred to as "category I" cases), as well as in "less extraordinary cases marked by less pervasive practices which nonetheless still have the tendency to undermine majority strength and impede the election processes" (referred to as "category II" cases). 395 U.S. at 613-614.

The Board found in this case that petitioner's "intimidating course of conduct places it among those exceptional cases warranting a bargaining order under category I of the *Gissel* standard, because traditional remedies cannot erase the coercive effects of the conduct, making the holding of a fair election impossible." Pet. App. 23a. The Board alternatively found that a bargaining order is warranted under *Gissel* category II, because petitioner's violations of the Act—particularly its layoff of employees in retaliation for union activities—nullified the possibility that "employees would * * * express their uncoerced desires through the mechanism of an election." *Id.* at 25a.

When issuing the bargaining order pursuant to *Gissel*, the Board expressly considered that four years had elapsed since petitioner committed its unfair labor practices, and that the ILGWU had merged into UNITE during this time. Pet. App. 25a-27a n.10. The Board determined, however, that "the passage of time does not diminish the need for and appropriateness of a bargaining order in this case," *id.* at 25a n.10, and that petitioner had not shown that the UNITE affiliate failed to provide a continuity of representation with its predecessor ILGWU affiliate, *id.* at 26a-27a n.10.

3. On September 29, 1999, the Board received petitioner's motion for reconsideration of the August 24, 1999 decision, for reopening of the record, and for rehearing. Pet. App. 6a, 161a-177a. Petitioner contended in the motion that new evidence had come into existence after the ALJ's proceeding and that this evidence showed that "a bargaining order is an entirely inappropriate remedy." *Id.* at 163a. The Office of the Executive Secretary of the Board notified petitioner that its motion was untimely. See *id.* at 190a-191a. Petitioner then filed a letter asking the Board to accept the late filing and stating that petitioner was represented by new counsel who made "an inadvertent interpretation of the time limits" for filing the motion. *Id.* at 193a.

On November 23, 1999, the Board declined (over one member's dissent) to accept petitioner's motion for reconsideration and reopening. App., *infra*, 1a-8a. The Board explained that, under its rules of procedure, petitioner's motion was due 28 days after the August 24, 1999 decision—*i.e.*, on September 21, 1999. Yet petitioner's motion was dated September 24, 1999, and was received by the Board on September 29, 1999. *Id.* at 1a. The Board cited Section 102.48(d)(2) of the Board's

rules, which provides that a motion for reconsideration, rehearing, or reopening of the record "shall 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 for leave to adduce additional evidence shall be filed promptly on discovery of such evidence." 29 C.F.R. 102.48(d)(2).

The Board further found that petitioner had not shown that its failure to meet the filing deadline was justified by "good cause * * * based on excusable neglect," as would be necessary to warrant acceptance of the late filing. App., *infra*, 3a-4a; see 29 C.F.R. 102.111(c) ("In unfair labor practice proceedings, motions * * * may be filed within a reasonable time after the time prescribed by these rules only upon good cause shown based on excusable neglect and when no undue prejudice would result."). The Board concluded that petitioner's "inadvertent misinterpretation of the time limit, even when considered in the context of counsel becoming familiar with the case and investigating whether any circumstances have changed since the commission of the unfair labor practices, does not rise to the level of excusable neglect." App., *infra*, 4a. The Board also noted that petitioner's counsel could have requested an extension of time to file a motion for reconsideration, but failed to do so. *Id.* at 4a n.5. Finally, the Board found that petitioner's motion was untimely for the additional reason that petitioner failed to explain adequately why its evidence (which involved employee turnover and other corporate changes since the ALJ's hearing) could not have been presented before the Board issued its decision. *Id.* at 4a-5a; see 29 C.F.R. 102.48(d)(1) ("A motion to reopen the record shall state briefly the additional evidence sought to be adduced, [and] why it was not presented previously.").

4. The United States Court of Appeals for the Fifth Circuit enforced the Board's order. Pet. App. 3a-17a. After reviewing an "admittedly confusing line of [Fifth Circuit] cases" on the subject, *id.* at 9a, the court of appeals held that when the Board evaluates the appropriateness of a *Gissel* bargaining order, it must consider record evidence of changed circumstances after the unfair labor practice occurred. *Id.* at 10a; see also *id.* at 16a (Board must "consider current circumstances when issuing a *Gissel* bargaining order").

The court made clear, however, that the Board is required only to consider evidence that is "properly presented or tendered," and that "[i]t is not the Board's responsibility to continually update the factual picture that the parties have provided." Pet. App. 14a. Thus, "[t]he party that seeks to benefit from demonstrating a change of circumstances bears the burden of timely providing the Board with evidence of those changes. The Board is entitled to assume, in the face of the parties' silence, that the facts as initially presented continue to adequately describe the employer's workforce." *Ibid.*

Applying those principles, the court of appeals concluded that the Board did not abuse its discretion when it refused to accept petitioner's untimely motion. Pet. App. 14a-15a. The court noted that the changed circumstances alleged by petitioner had "occurred gradually, over a period of years," and that petitioner "appears to have made a conscious decision to wait until after the Board's decision to inform the Board of the significant changes that had taken place in its workforce." *Id.* at 15a.

The court of appeals also rejected petitioner's contention that the factual record that was before the Board did not support the *Gissel* bargaining order. Pet.

App. 15a-16a. Although the court recognized that "[t]he imposition of a bargaining order is an extraordinary remedy," it held that the remedy is warranted in this case because there was substantial record evidence that petitioner "threatened and laid off a sizeable number of its workers due to union activity at its Houston plant." *Id.* at 16a.

ARGUMENT

1. Petitioner primarily argues that this Court should grant the petition in order to establish that "the passage of time and current conditions are factors that should be considered when determining whether to issue a *Gissel* bargaining order." Pet. 10; see *id.* at i (Question 1), 10-11, 14-16. The court of appeals, however, *agreed* with petitioner on this point. The court held that the Board must consider evidence of changed circumstances that may have occurred after the unfair labor practice (such as employee turnover and the passage of time) when it evaluates the appropriateness of entering a *Gissel* bargaining order. Pet. App. 8a, 10a, 16a.

As the Fifth Circuit noted in this case, the courts of appeals overwhelmingly require the Board to consider changed circumstances before it enters a *Gissel* bargaining order. Pet. App. 7a; see also *Charlotte Ampitheater Corp.* v. *NLRB*, 82 F.3d 1074, 1078 (D.C. Cir. 1996) (discussing cases); Pet. 14-16 (same). That judicial rule differs from the Board's own view that the propriety of a *Gissel* bargaining order should be based on the situation at the time the unfair labor practices were committed, rather than on circumstances that obtain when the Board issues its decision. See *Garvey Marine, Inc.*, 328 N.L.R.B. 991, 995 (1999), enforced, 245 F.3d 819 (D.C. Cir. 2001). "Otherwise," the Board

has explained, the employer "would be allowed to benefit from the effects of its wrongdoing," including "the delays inherent in the litigation process as well as employee turnover, some of which may occur as a direct result of the unlawful conduct." *Ibid.*

Although some courts thus disagree with the Board, this disagreement does not support the instant petition for a writ of certiorari. As noted, the Fifth Circuit adopted *petitioner's* position that changed circumstances must be considered. In this case, moreover, the Board did inquire whether the passage of time between petitioner's unfair labor practices and the Board's decision rendered a *Gissel* bargaining order inappropriate. The Board determined that, on the facts presented here, the passage of time "does not diminish the need for and appropriateness of a bargaining order." Pet. App. 25a n.10.[1]

In view of judicial applications of *Gissel*, it also is the Board's practice to consider record evidence of specific changed circumstances (in addition to the passage of time) when determining whether to issue a bargaining

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[1] There is no merit to petitioner's suggestion (Pet. 12-14) that the Board's decision in this case is inconsistent with decisions in which the Board has declined to issue a *Gissel* bargaining order due to the passage of time. None of the cases cited by petitioner (*id.* at 12-13) involved egregious, category I employer misconduct such as the Board found here. Moreover, those cases generally involved a greater lapse of time between the employer's violations and the Board's decision than occurred in this case. See *Audubon Reg'l Med. Ctr.*, 331 N.L.R.B. No. 42 (June 22, 2000), slip op. 4-5 (six years); *Regal Recycling, Inc.*, 329 N.L.R.B. 355, 355-357 (1999) (seven years); *Comcast Cablevision of Philadelphia, L.P.*, 328 N.L.R.B. 487, 487 & n.1 (1999) (eight years); *Cooper Hand Tools*, 328 N.L.R.B. 145, 162-166 (1999) (more than four years); *Wallace Int'l de Puerto Rico, Inc.*, 328 N.L.R.B. 29, 29 (1999) (nearly five years).

order. See, *e.g.*, *Garvey Marine, Inc.* v. *NLRB*, 245 F.3d 819, 828-829 (D.C. Cir. 2001) (upholding Board determination that bargaining order was appropriate despite changes in ownership of employing entity and workforce turnover); *Audubon Reg'l Med. Ctr.*, 331 N.L.R.B. No. 42 (June 22, 2000), slip op. 6 (declining to issue bargaining order where "none of the supervisory or managerial employees who perpetrated the unfair labor practices is still employed"). The Board's refusal to consider petitioner's new evidence in this case was based on petitioner's failure to make a timely submission of the evidence, *not* on a general rule against receiving such material. See App., *infra*, 1a-5a.

2. Petitioner next contends (Pet. 17-18) that this Court should grant certiorari to address the Board's supposed misapplication of its own rules governing the filing of motions for reconsideration, reopening, and rehearing. The courts, however, "must give substantial deference to an agency's interpretation of its own regulations." *Thomas Jefferson Univ.* v. *Shalala*, 512 U.S. 504, 512 (1994). In this case, petitioner fails to make any substantial showing that the Board's refusal to accept the late-proffered evidence was "plainly erroneous or inconsistent with the [relevant] regulation," *ibid.* (internal quotation marks omitted), much less that this procedural issue is sufficiently important to warrant this Court's review.

Petitioner argues (Pet. 16-19) that Board rules prevented petitioner from moving to submit additional evidence until after the Board rendered its decision on August 24, 1999. Petitioner is mistaken. The Board's rules plainly contemplate motions for leave to adduce additional evidence during the pendency of a Board proceeding, directing that such motions "shall be filed promptly on discovery of [the additional] evidence." 29

C.F.R. 102.48(d)(2). Section 102.48(d)(1) of the Board's rules, moreover, requires a party that files a motion to reopen based on additional evidence to "state * * * why [the additional evidence] was not presented previously." 29 C.F.R. 102.48(d)(1). Thus, as the court of appeals held in this case (see Pet. App. 14a-15a), the Board has reasonably concluded that a motion to reopen the record after a Board decision is untimely if the moving party, without adequate explanation, seeks to adduce evidence that was in the movant's possession during an earlier stage of the administrative proceedings. See *Labor Ready, Inc.*, 330 N.L.R.B. No. 151, 2000 WL 339961, at *1-*2 (Mar. 23, 2000); *Electro-Voice, Inc.*, 321 N.L.R.B. 444 (1996).[2]

Judicial decisions do not "cloud the issue" (Pet. 19) of when a motion to adduce new evidence may be filed with the Board. Insofar as they are relevant at all, the cases cited by petitioner (Pet. 19-20) illustrate that a standard of diligence—not satisfied here—applies to raising allegations of changed factual circumstances. See *Charlotte Amphitheater Corp.*, 82 F.3d at 1080 (before Board's decision, employer "moved to reopen the record with reasonable promptness following the

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[2] Petitioner incorrectly attributes to the court of appeals the view that 29 C.F.R. 102.48(d)(2) obligates parties to update the factual record continually during the pendency of their case. Pet. 17. The court of appeals made no such statement. It simply concluded that "[w]hile the Board must consider properly presented or tendered evidence of materially changed relevant circumstances in bargaining order cases, we can see no reason why the Board itself should be required to gather evidence." Pet. App. 14a; accord *Charlotte Amphitheater Corp.* v. *NLRB*, 82 F.3d 1074, 1080 (D.C. Cir. 1996) (Board has "no affirmative duty to inquire whether employee turnover or the passage of time has attenuated the effects of earlier unfair labor practices").

issuance of the ALJ's recommendation of a bargaining order"); *Texas Petrochems. Corp.* v. *NLRB*, 923 F.2d 398, 401 (5th Cir. 1991) (employer filed motion to reopen shortly after ALJ's decision). In *Camvac International, Inc.* v. *NLRB*, No. 88-5573, 1989 WL 65727 (June 20, 1989), the Sixth Circuit merely acknowledged that the Board has discretion to allow late filings. *Id.* at *2. The other cases cited by petitioner do not address the question of whether evidence is timely when offered in an unfair labor practice proceeding.

3. The Board, moreover, supported its denial of petitioner's motion to reopen on an alternative ground that is entirely independent of whether petitioner could have filed a motion to adduce new evidence before the Board issued its decision. The Board—affirmed by the court of appeals (Pet. App. 13a-14a)—explained that petitioner provided an inadequate excuse for failing to file its motion to reopen (or a motion for an extension of time) within 28 days *after* the Board's decision, as provided by the Board's rules. App., *infra*, 4a & n.5. Petitioner's argument (Pet. 21-22) that counsel did not receive the Board's August 24, 1999 decision until August 30, 1999, does little to explain petitioner's failure to make a timely filing of a motion to reopen and nothing to justify petitioner's failure to apply for an extension of time. Nor does petitioner's factbound argument raise any question that would warrant review by this Court.

4. There likewise is no merit to petitioner's final contention (Pet. 24-26) that the Board abused its discretion by issuing a bargaining order because the UNITE affiliate with which petitioner must bargain is "totally different" (Pet. 24) from the predecessor ILGWU affiliate that conducted the original organizing campaign. Petitioner does not make any specific chal-

lenge to the settled, four-part test that the Board used to determine whether there was a "continuity of representation" between the ILGWU affiliate and the successor UNITE affiliate. See Pet. App. 26a-27a n.10, 138a (applying *Western Commercial Transp., Inc.*, 288 N.L.R.B. 214 (1988)). Applying that test, the Board reasonably found, in agreement with the ALJ, that there was "considerable testimony and documentation" supporting the conclusion that "the post-merger entity, UNITE, provides for substantial continuity of representation" and that petitioner had not met its burden of proving discontinuity. Pet. App. 26a-27a n.10. The Board's determination was amply supported by the record, see *id.* at 138a-144a (ALJ's decision), and petitioner's attempt to exploit the happenstance of a union merger presents no issue that warrants this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 2002

APPENDIX

[SEAL OMITTED]

United States Government

NATIONAL LABOR RELATIONS BOARD
1099 14th Street NW
WASHINGTON DC 20570

November 23, 1999

Re: U.S.A. Polymer Corp.
Cases 16-CA-17189 and 16-CA-17455
328 NLRB No. 177 (1999)

ORDER

Respondent requests that the Board exercise its discretion under Section 102.48(d)(2) of the Board's Rules and Regulations and accept its Motion for Reconsideration, for Reopening the Record and for Rehearing in this case notwithstanding that its Motion was filed beyond the 28 days following service of the Board Order. Alternatively, Respondent contends the Board should accept the late filing because its misinterpretation of the time limits constitutes excusable neglect under Section 102.111(c) of the Board's Rules and Regulations.

Section 102.48(d)(2) of the Board's Rules and Regulations requires any motion for reconsideration, rehearing or reopening of the record "be filed within 28 days, or such further period as the Board may allow, after service of the Board's decision or order. . . ." In the instant matter the motion was due on September 21, 1999. Respondent's Motion is dated September 24 and was received on September 29. The Motion was re-

jected as untimely by the Associate Executive Secretary and Respondent now request reconsideration of that rejection.

Respondent cites *Camvac International, Inc. v. NLRB*, 877 F.2d 62 (6th Cir., 1989), to support its position that Section 102.48(d)(2) of the Board's Rules and Regulations provides the Board with discretion to accept such requests received beyond the 28-days deadline. Specifically, Respondent contends that the clause "or such other period as the Board may allow" provides the authority to excuse late filings.

We disagree that *Camvac* or the cited clause compels consideration of a motion to reopen the record filed outside of the 28-day period following service of the Board order. Admittedly, the procedural facts in *Camvac* are similar to those in the instant matter. However, the Board accepted the court's decision in *Camvac* as the law of that case only.[1] It did not agree that the "or such other period" clause found in Section 102.48(d)(2) excused late filings. We also disagree with our dissenting colleague's view that the clause is specifically aimed at the enlargement of time for those post-decision motions noted in Section 102.48(d)(1).

In our view, that clause merely provides the Board with the discretion to allow additional time for the filing of the motion if a timely request for an extension is submitted or an extension is otherwise proper under the Board's Rules. In this regard we note that the clause is not unique to post-decisional motions, but is also included in the rules establishing filing periods for

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[1] *Camvac International, Inc.*, 297 NLRB 853, 854 (1990).

pre-decisional briefs, which deadlines can be extended.[2] The omission of the same clause from Section 102.46(h) on the filing of reply briefs, extensions for which are specifically prohibited, further supports conclusion that the purpose of the clause is to allow the Board to grant extensions when properly and timely requested. Moreover, interpreting the clause as urged by Respondent and our dissenting colleague would render amorphous and vague, if not meaningless, the specific pre and post-decisional deadlines that are contained in the Rules.

Furthermore, in 1991 when the Board announced that it would begin accepting late documents only on good cause based on excusable neglect, it noted that at that time, "the rules of the National Labor Relations Board make no provision for late filing of documents."[3] Of course, as noted above, the clause that Respondent and our dissenting colleague contend allows the late filing was contained in the Rules in 1991. Had the Board's interpretation of the clause been the same as Respondent's and the dissent's, it would not have characterized the Rules as devoid of such a provision.

Finally, we note that *Camvac* was decided before the Board instituted its excusable neglect rule. Whatever ambiguity there may have been prior to this new rule, it is now clear that late filings may be accepted only "upon good cause shown based on excusable neglect and when no undue prejudice would result." Section 102.111(c) of the Rules and Regulations. As the Board stated in announcing the new rule, "it would be

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[2] See the time constraints for the filing of exceptions, cross exceptions and answering briefs in Section 102.46 of the Board's Rules and Regulations.

[3] 56 Fed. Reg. 49141 (1991)

appropriate to include in Section 102.111 a formal basis for accepting certain late-filed documents in unfair labor practice cases. This provision is newly added as paragraph (c) of Section 102.111. Documents not covered by the new provision may not be filed after the time when they otherwise would be due."[4]

Here, we find that the Respondent has failed to satisfy the requirements of Section 102.111(c). In *Pioneer Investment Co. v. Brunswick Associates*, 507 U.S. 380 (1993), a bankruptcy case, the Supreme Court recognized that excusable neglect is an elastic concept, not limited strictly to omissions caused by circumstances beyond the control of the movant. However, although the Court instructed that the decision is at bottom an equitable one, it also warned that inadvertence, ignorance of the rules, or mistakes construing the rules do not usually constitute excusable neglect. In the instant matter, the Respondent's inadvertent misinterpretation of the time limit, even when considered in the context of counsel becoming familiar with the case and investigating whether any circumstances have changed since the commission of the unfair labor practices, does not rise to the level of excusable neglect.[5]

Moreover, to the extent the Respondent's motion seeks to adduce additional evidence regarding employee turnover and other corporate changes since the unfair labor practice hearing, it is also untimely on the ground that the Respondent has failed to adequately

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[4] *Ibid.*

[5] While we can appreciate that a new counsel retained after issuance of the Board decision may need some time to become familiar with the case, we note that counsel was free anytime during the 28 days following service of the decision to request an extension to file its request for reconsideration, but chose not to do so.

state "why [the evidence] was not presented previously" as required by Section 102.48(d)(1) of the Board's rules. See *Electro-Voice, Inc.*, 321 NLRB 444 (1996), where the Board, for this reason, rejected as untimely a similar motion to reopen the record to adduce evidence of posthearing turnover, notwithstanding that the motion was filed within 28 days of the Board's decision. As in that case, the Respondent here was clearly in the possession of the evidence during the time that the case was pending before the Board on exceptions and has offered no explanation for its failure to raise the evidence until after the Board's decision issued.[6]

Accordingly, based on the foregoing, Respondent's request for reconsideration of the rejection of its late-filed Motion is denied. By direction of the Board:

Richard D. Hardick
Associate Executive Secretary

MEMBER HURTGEN, dissenting:

I would accept Respondent's motion for reconsideration. It was sent on September 24 and received on September 29. Under Section 102.48(d)(2), the motion was due on September 21 "or such further period as the Board may allow."[1]

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[6] See also Section 102.48(d)(2), which requires that motions for leave to adduce additonal evidence be filed "promptly on discovery of such evidence."

[1] My colleagues acknowledge that a new counsel, retained after the issuance of the Board decision, would need some time to become familiar with the case. However, they then say that *Respondent*, at an earlier time, could have sought to adduce additional

I would allow the additional minimal period, and thus I would accept the motion. In this regard, I note that, under the quoted language of Section 102.48(d)(2), a court has ordered the Board to received a motion for reconsideration in a similar case. See *Camvac International, Inc. v. NLRB*, , 877 F.2d 62 (6th Cir., 1989). As here, *Camvac* involved a *Gissel* order and a motion for reconsideration based on passage of time and turnover. In addition, I note that the motion here was filed by new counsel, retained after the issuance of the Board order. In these circumstances, I would accept the motion for reconsideration.

My colleagues argue that *Camvac* is not controlling because Section 102.111(c)—the "excusable neglect" rule—was added to the Rules after *Camvac*. The argument has no merit. Section 102.111 (c) and Section 102.48 (d)(2) are two separate provisions, and they are analytically distinct. Section 102.48(d)(2) is aimed specifically at motion for reconsideration. It provides that the Board can enlarge the time period for such motions. It can do so without reference to excusable neglect. When the Board so enlarges the time, the document is not late. By contrast, Section 102.111(c) is a general provision. If provides that the Board will accept a late document if there is excusable neglect.

The court in *Camvac* relied on 102.48(d)(2), and so do I. I recognize that Section 102.111(c) was promulgated after *Camvac*. However, the section simply adds another argument for the Respondent, i.e., the "excusable neglect" argument. Clearly, however, this "new" section does not detract from the force of Respondent's

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evidence. In these circumstances, the acknowledgement of the difficulties facing new counsel rings a bit hollow.

primary argument based on 102.48(d)(2). As noted, my conclusion, like that of the court in *Camvac*, rests on that rule.[2]

My colleagues point out that the language on which I rely ("or such other period as the Board may allow") is present in regard to the timeliness of some documents and is absent in regard to the timeliness of others. I do not see how this point aids the position of my colleagues. The language is present with respect to the document involved herein, viz. a motion for reconsideration.[3]

The language on which I rely does not render the relevant rules amorphous, vague, or meaningless. Those rules remain clear, including the clear provision that the Board may, within its discretion, enlarge the time period for the filing of certain documents. In the absence of the exercise of such discretion, the numerical time limits remain precisely as they are stated.

My colleagues refer several times to "late" documents (see, e.g., the discussion of the 1991 announcement). However, as noted supra, when the Board enlarges the time period for a motion, the motion, if filed within the enlarged period, is, by definition, not a late-filed document.

My colleagues also argue that it is too late for Respondent to adduce additional evidence regarding matters occurring "since the unfair labor practice hearing." The argument has no merit. Section 102.48(d)(1)

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[2] Thus, I do not pass on whether there was "excusable neglect' under Section 102.111(c).

[3] Where the language is absent, there is a provision specifically prohibiting an extension of time (see 102.46[h]). That prohibition is not in Section 102.48(d)(2).

specifically provides that evidence that has become available "since the close of the hearing" can be accepted. My colleagues then go on to assert that Respondent has not explained "why (the evidence[)] was not presented previously." This assertion is also without foundation. As discussed supra, Respondent has explained that it has new counsel, retained after the issuance of the Board decision.[4] Indeed, my colleagues acknowledge that new counsel needed time to become familiar with the case. Having acknowledged this fact, my colleagues then turn around and slam the door on the submissions of new counsel.

cc: Parties

[4] By contrast, in *Electro-Voice*, 321 NLRB 444 (1996), there was no explanation at all.