

THE GENERAL COUNSEL'S
EXCEPTIONS TO THE DECISION AND RECOMMENDED ORDER OF THE
ADMINISTRATIVE LAW JUDGE

The General Counsel, pursuant to Section 102.46 of the Board's Rules and Regulations, excepts to the Administrative Law Judge ("ALJ") with regard to the decision he issued on September 25, 2012 ("ALJD")¹ in the above-captioned case. These exceptions are submitted with a separate brief in support thereof.²

General Exceptions to the ALJD

The General Counsel generally excepts to the findings, rulings, and conclusion in the ALJD as follows:

Point I

The ALJ erred in finding that the Union waived its right to bargain over subcontracting decisions by entering into a Memorandum of Agreement ("MOA") that was signed by the Union on January 2, 2007. [ALJD § III]

A. The ALJ's Application Of The Legal Standard

The ALJ incorrectly applied the legal standard in concluding that Respondent's management rights proposal was in effect and served as a waiver of the Union's right to bargain over subcontracting decisions, where a *tentative agreement* on management rights was not "clearly and unmistakable" implemented by the MOA.

[ALJD 20:1-25] [GC Brf. § IV p. 13; V.A; VI.A]

¹ References to the ALJD are cited herein as [ALJD pages:lines].

² References to the General Counsel Brief in Support of Exceptions are cited herein as [GC Brf.].

B. The Plain Language of the MOA

The ALJ erred in finding that the MOA implemented “Contract Language,” since the paragraph on “Contract Language” includes provisions that “were to be resolved by the parties during final drafting” and could not be implemented by the MOA because they did yet exist. [ALJD 18:25-30] [ALJD 19:19-23] [GC Brf. §§ II.B; IV p. 13-14; V.B; VI.B]

C. Respondent’s Post-MOA Proposal

The ALJ erred in finding that the MOA could implement some *unspecified tentative agreements* that were “agreed upon to date” (i.e., management rights), where Respondent modified several *tentative agreements* after the MOA was signed and the Judge found that such *tentative agreements* (which were still subject to renegotiation) had not been finalized or implemented by the MOA. [ALJD 17:50-52] [ALJD 18:1-3] [ALJD 19:25-43] [GC Brf. §§ II.C; IV p. 14; V.C & VI.C]

D. The Union’s May 7, 2007 E-mail

The ALJ erred in relying upon a May 7, 2007 e-mail from then Union attorney Stephen Goldblatt which did not identify management rights as an “open item” that required further negotiation (as opposed to a *tentative agreement* which would not require further negotiation), where the relevant issue is whether the MOA clearly and unmistakably implemented any *tentative agreement* on management rights. [ALJD 17:13-30] [GC §§ Brf. II.D; IV p. 14-15; V.D; VI.D]

E. The Plain Language of the Settlement Agreement

The ALJ erred by failing to address the plain language of an informal Board settlement agreement, approved in case 22-CB-10448 on October 1, 2008, which stated that management rights was merely the subject of a “*tentative agreement*” that, as such, could not have been implemented nearly two years earlier by the MOA. [ALJD 17:32-36] [GC Brf. § II.E; IV p. 15; V.E; VI.E]

Specific Exceptions to the ALJD

The General Counsel specifically excepts to the findings, rulings, and conclusion in the ALJD as quoted below:

1. The ALJ’s finding at [ALJD 17:13-14]:

Union attorney Goldblatt advised Ploscowe that there were only four open items - none of them involved the issue of subcontracting. [RX 10]

2. The ALJ’s finding and conclusion at [ALJD 17:20-22]:

Two Union attorneys, Sabatella and Goldblatt, agreed that the Respondent had the right to the broad subcontracting clause in the parties’ agreement. The fact that the MOA covered only economic matters is of no moment. [GCX 5] [RX 10, 38]

3. The ALJ’s finding at [ALJD 29-30]:

Goldblatt could only identify four items that “the Union has advised me that they would like to address” for negotiation, none of which concerned subcontracting. [RX 10]

4. The ALJ’s conclusion at [ALJD 17:32-33]

Indeed, the Settlement Agreement entered into by the Union gives support to a finding that the Union unlawfully withdrew from this tentative agreement on subcontracting. [GCX 19] [Tr. 47-48, 60-61, 248, 879, 891, 1102-4, 1610-11, 1653-56, 1718]

5. The ALJ's adoption of Respondent's argument at [ALJD 18:25-30]:

From that agreement by Sabatella, and later draft agreements which contained that subcontracting language, the Respondent argues that its final offer containing the language "Contract Language: As agreed upon to date and/or as to be resolved by the parties during final drafting as to any open items" means that, inasmuch as the subcontracting language had been "agreed upon to date" the Union must be held to such language as its agreement to subcontracting. [GCX 10, 11] [Tr. 48, 244-45, 247-48, 436-37, 915-16, 1096-97]

6. The ALJ's conclusion at [ALJD 19:19-23]:

The General Counsel asserts that the MOA did not contain a waiver of the Union's right to bargain over subcontracting. That is correct, but the Respondent's argument is not that the Union waived its right to subcontract. The Respondent's position is that the Union specifically agreed that the Employer had that right in Sabatella's specific agreement to the subcontracting clause. I agree with the Respondent's position. [GCX 10, 11] [Tr. 48, 244-45, 247-48, 436-37, 915-16, 1096-97]

7. The ALJ's conclusion at [ALJD 19:40-43] :

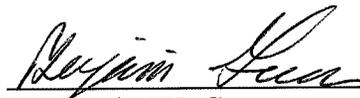
Of course this raises the question that if these proposals were changed how can the Respondent insist that the subcontracting clause remained. The answer to the General Counsel's argument is that the Union indisputably agreed to the subcontracting clause and ratified that agreement in the MOA. [GCX 12] [Tr. 300, 443-48, 1110-34]

8. The ALJ's conclusion at [ALD 20:1-25]:

I find that all these conditions have been met. First, the subcontracting clause specifically included the subject of subcontracting and provided for the broad reservation of the Employer's right to subcontract any work. As to matter being fully discussed during negotiations, I find that Sabatella's agreement to the subcontracting clause, DeAngelis' being sent a copy of the proposed contract in November, 2006 and making no objection to the disputed clause, Goldblatt's citing of only four objections to the contract, none of which were the subcontracting clause, establishes that, at that time, the matter was fully discussed during negotiations. Finally, by the Union's actions set forth above, I also find that it consciously yielded its interest in the subject.

The Board found in *Allison Corp.*, 330 NLRB 1363, 1365 (2000), that a management rights clause, similar to the instant clause, “specifically, precisely, and plainly grants the Respondent the right ‘to subcontract’ without restriction. We therefore find a ‘clear and unmistakable waiver’ by the Union of its statutory right to bargain regarding the Respondent’s decision to subcontract. I therefore find and conclude, as the Board did in *Allison Corp.*, that the Respondent did not violate Section 8(a)(1) and (5) of the Act by unilaterally subcontracting unit work. [GCX 10, 11] [Tr. 48, 244-45, 247-48, 436-37, 915-16, 1096-97]

Respectfully submitted this 19th day of November, 2012.



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