

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 22**

**GALAXY TOWERS CONDOMINIUM
ASSOCIATION**

Respondent

and

Case 22-CA-030064

**LOCAL 124, RECYCLING, AIRPORT,
INDUSTRIAL & SERVICE EMPLOYEES**

Charging Party

**THE GENERAL COUNSEL'S
BRIEF IN SUPPORT OF EXCEPTIONS**

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I. INTRODUCTION

On September 25, 2012, Administrative Law Judge Steven Davis (“ALJ”) issued his decision in the instant case. Therein, the ALJ failed to find that Respondent Galaxy Towers Condominium Association (“Respondent”) violated Section 8(a)(1) and (5) of the Act by, on August 1, 2011, unilaterally subcontracting most unit work and laying off 67 unit employees (of a 77-employee unit).¹ The ALJ determined that Local 124, Recycling, Airport, Industrial & Service Employees Union (“Union”) waived its right to bargain over such decisions on January 2, 2007, when it signed a *partial contract* in the form of a Memorandum of Agreement (“MOA”).² [GCX 11] The MOA did not include Respondent’s proposal on management’s right to subcontract. Nevertheless, the ALJ found that the partial MOA incorporated and implemented such a provision by reference. The ALJ erred in this conclusion. As discussed below, the plain language of the parties’ agreements, among other evidence, reflects that no such management rights provision was ever implemented.

The MOA was a partial contract that did not implement any prior agreement on management rights. The partial MOA described and implemented specific economic provisions (wages, paid-time-off days (“PTO”), vacation, and medical benefits) that were

¹ The ALJ did find that, in 2011, Respondent violated Section 8(a)(1) and (5) of the Act by failing to provide the Union with certain information and implementing the terms of its last, best and final offer in advance of good-faith impasse. These allegations are not addressed herein. The General Counsel supports the ALJ’s decision as it relates to these issues and urges the Board to affirm his findings and conclusions.

² As discussed below, the General Counsel respectfully submits that the ALJ failed to properly apply the applicable standard in reaching this conclusion. The party asserting a bargaining waiver bears the burden of establishing that the existence of the waiver is clear and unmistakable. *Rose Fence, Inc.*, 359 NLRB 1, 7 (2012).

expressly distinguished from other unidentified *tentative agreements* and *future agreements* which would not be implemented until the parties executed a full and final contract. We know this to be true because the MOA cannot logically be read in any other way and because the parties explicitly said so in a subsequent agreement. On October 1, 2008, the parties entered into an informal Board settlement agreement (“Settlement Agreement”) that described any prior agreement on management’s right to subcontract as a conditional “*tentative agreement.*”³ [GCX 19] Since any agreement on management rights was still *admittedly tentative* on October 1, 2008, it could not have been implemented two years earlier by the MOA.

II. UNDISPUTED FACTS

A. Negotiations in 2006

On June 5, 2006, the Union was certified as the exclusive collective bargaining representative of a unit of Respondent’s service employees. [ALJD 2:21-32]⁴ [Tr. 33] The parties began negotiations on July 6, 2006. [ALJD 2:36-39] [Tr. 33] The Union submitted the first written proposal, which did not contain any reference to subcontracting. [ALJD 2:39-54] [GCX 3] As negotiations progressed, Respondent submitted a number of full-length counter-offers that adopted portions of the Union’s proposal and contested others. [ALJD 3:26-44] [GCX 7-9] [RX 73].

³ The Settlement Agreement resolved a prior charge of regressive bargaining (22-CB-10488) that Respondent filed against the Union on August 17, 2007. [RX 14, 15] [Tr. 1478]

⁴ References to the ALJ’s decision are cited herein as [ALJD page(s):line(s)]. References to the record are cited herein as follows: Transcript [Tr.], General Counsel exhibits [GCX], and Respondent exhibits [RX].

On August 8, 2006, the parties entered into an interim agreement (the “2006 Interim Agreement”) which implemented a new hire wage rate and certain provisions from the Union’s proposal on grievance/arbitration, checkoff, no strike/no lockout, and a monthly supplemental bonus. [ALJD 2:47-51] [GCX 4] [Tr. 36-37]

Through November 13, 2006, the parties negotiated several tentative agreements on individual contractual provisions. [ALJD 4:42-43] [Tr. 1033] By definition, in the context of collective bargaining, such *tentative agreements* are not immediately implemented or placed into effect. [Tr. 1102-4] Rather, as explained by the Board in many decisions and as testified to by several experienced labor professionals at trial, tentative agreements are *conditional* and not implemented until the parties execute a full and final contract (or reach impasse thereon).⁵ [Tr. 48, 60-61, 248, 879, 891, 1033, 1102-4, 1610-11, 1653-56] Tentative agreements are also subject to modification until they are implemented and finalized. [Tr. 1610-11, 1653-56] Parties may agree to implement specific contractual provisions as they are agreed upon, and the parties did so by entering into the 2006 Interim Agreement. However, Respondent attorney and lead negotiator

⁵ See e.g., *Dresser-Rand Co.*, 358 NLRB No. 97, 7 (Aug. 6, 2012) (upon impasse, and not before, employer implemented last proposals and *tentative agreements* that were previously reached); *Whitesell Corp.*, 357 NLRB No. 97, 4-5 (Sept. 30, 2011) (employer did not implement contract proposal even though parties previously “reached tentative agreements on approximately 30 contract articles”); *Times Union, Capital Newspapers Division of the Hearst Corp.*, 356 NLRB No. 169, 3 (May 31, 2011) (employer did not implement tentative agreements that were reached during bargaining because parties were not able to reach agreement on all contractual provisions); *Holmes Typography, Inc.*, 218 NLRB 518, 524 (1975) (“all language was tentative until complete agreement was reached on all aspects of the contract” and “whatever may be said for the desirability of securing firm agreement on specific issues at each stage of negotiations, such fragmentation of the bargaining process is not necessarily conducive to consummating a complete agreement”).

Stephen A. Ploscowe testified that the parties did not otherwise implement provisions as they were agreed upon. [Tr. 1102-4] Here, Respondent admits that all agreements which were reached by the parties in 2006 (such as management rights) were *tentative* until January 2, 2007 (when the MOA was signed). [Tr. 1033]

Among the tentative agreements that the parties reached prior to the signing of the MOA, by e-mail in August, 2006, Ploscowe proposed, and then Union attorney Chris Sabatella accepted, a management rights provision with the right to subcontract. [ALJD 3:21-24] [RX 36-38] [GCX 5, 6] In accepting this provision, Sabatella indicated that “[t]he Union reserves the right to add to, delete from or otherwise amend and modify these proposals.” [ALJD 3:23-25] [GCX 6] [RX 38] The parties never discussed management rights or subcontracting at the bargaining table. [Tr. 41, 1082-83] In October, 2006, Sabatella was released as Union counsel and replaced as lead negotiator by Union labor consultant Louis DeAngelis. [ALJD 3:45-46] [Tr. 34, 223, 254].

On November 13, 2006, Ploscowe e-mailed the Union a full-length contract proposal that consisted of the Union’s initial proposal as Respondent sought to modify it. [ALJD 3:40-44] [GCX 9] Ploscowe indicated his acceptance of portions of the Union’s proposal by adopting provisions without change. [Tr. 1082] [GCX 3, 9] Ploscowe also identified provisions in the Union’s proposal that the parties had agreed to modify by placing a handwritten “ok” next to the altered provisions.⁶ [ALJD 3:40-44] [Tr. 1023]

⁶ Interestingly, although Respondent proposed and Sabatella accepted a modification of the management rights provision, Ploscowe did not seek to identify and highlight that tentative agreement by placing a handwritten “ok” next to that provision in the proposal he sent to the Union after Sabatella was replaced. [ALJD 3:43-44] [GCX 9 Art. 12]

[GCX 3, 9] Thus, Ploscowe's November 13, 2006 proposal reflected the parties' *tentative agreements*. [GCX 9] Additional provisions were still in dispute. [Tr. 42]

B. The MOA

In 2006, the parties did not reach agreement on all contractual provisions. [ALJD 4:35-45] [Tr. 42, 1099] Nevertheless, they executed a partial contract. [ALJD 17:18-20] [Tr. 47-48, 1099] On December 6, 2006, Ploscowe faxed the Union a draft MOA that contained Respondent's "final offer" on wages, PTO, vacation, and medical benefits. [ALJD 3:51-52] [GCX 10] These economic items were specifically identified and described in separate paragraphs. In addition, the draft MOA contained the following final paragraph [ALJD 4:1-2] [GCX 10]:

Contract Language: As agreed upon to date and/or as to be resolved by the parties during final drafting as to any open items.⁷

In negotiations leading up to the MOA, the parties did not discuss whether the MOA was intended to implement provisions (e.g., management rights) other than the economic items which were specifically described therein (i.e., wages, PTO, vacation,

⁷ Contrary to Respondent's contention, the Union did not clearly and unmistakably waive its right to bargain over subcontracting decision by agreeing to this language in the MOA. This is the central issue upon exception and must be resolved against Respondent. As noted above, by entering into the MOA, the parties agreed to implement specific provisions on wages, PTO, vacation, and medical benefits. "Contract Language" *distinguishes* those agreements from other unspecified (e.g. management rights) and/or as yet undetermined agreements that were not being implemented by the *partial MOA*. "Contract Language" could not refer to provisions to be implemented by the MOA because the MOA could not implement future agreements that were "to be resolved" and did *not yet exist*. Rather, the entire paragraph on final "Contract Language" - including both conditional *tentative agreements* (those "agreed upon to date") and *future agreements* (those "to be resolved by the parties during final drafting") - refers to provisions that would only go into effect on some *future date* if and when the parties reached a full and final contract. [Tr. 47-48, 244, 248, 1096] Indeed, nearly two years later, Respondent signed the Settlement Agreement which still clearly and expressly described management's right to subcontract as a conditional "*tentative agreement*." [GCX 19]

and medical benefits).⁸ Ploscowe testified that no such discussions occurred.⁹ [Tr. 1000, 1029, 1031] Indeed, the parties did not seek to identify a list of provisions that had been “agreed upon to date,” and no such list was presented to unit employees for ratification. [Tr. 42-45, 243, 1090, 1638, 1647]

The MOA was modified by Ploscowe after it was submitted to the employees for ratification and signed by the Union on January 2, 2007. [Tr. 44-45] [GCX 11] The MOA implemented specific economic terms for the period from June 1, 2006 to May 31, 2009. [ALJD 17:18-20] [GCX 11] [Tr. 1034] In addition, as noted above, the MOA included the paragraph on “Contract Language.” This paragraph contained the same first sentence (on which Respondent relies) as the draft MOA, with additional language as follows [GCX 11]:

Contract Language: As agreed upon to date and/or as to be resolved by the parties during final drafting as to any open items. It is specifically agreed as follows as to these open items:

1. Article 4 (Vacations), Section 3 shall read as follows:
Unearned vacation time may not be used. The Employer may use part-time or temporary employees to fill in for vacation time off. Vacation time off is paid at the employees base rate of pay at the time of vacation. It does not include overtime or any special forms of compensation such as incentives, commissions, bonuses, or shift differentials.

⁸ Ploscowe testified and his notes reflect that, on November 15, 2006, the parties discussed the implementation of new wage rates that would go into effect after the MOA was ratified. [Tr. 1549-1550, 1722] [GCX 62] However, Ploscowe testified that this conversation only concerned the implementation of wages and no other provisions. [Tr. 1550] The parties agree that the MOA implemented new wages rates.

⁹ Although Ploscowe testified that the Union did not seek to limit the 2006 negotiations to economics, he *did not testify* that the parties affirmatively discussed whether the MOA was intended to implement unspecified non-economic “Contract Language” that was “agreed upon to date.”

2. Article 17 (miscellaneous), Section 6b shall read:
Unearned PTO days may not be used as sick days without the express approval of the Employer's General Manager for a verifiable illness. Upon termination of employment, Employer shall deduct payment given for unearned sick days from employee final check

As of January 2, 2007, the parties had executed the 2006 Interim Agreement and the MOA, which implemented specific provisions and reflected the parties' contractual relationship.¹⁰ [GCX 4, 11]

Additional provisions were either tentatively agreed upon (though not implemented) or "open items" (that might be resolved as negotiations continued for a full and final contract). [Tr. 47-48, 1035, 1096] These unspecified provisions were described in the MOA under "Contract Language: As agreed upon to date and/or s to be resolved by the parties during final drafting as to any open items." [GCX 11] [Tr. 47-48, 1096] As Ploscowe testified, such *final* "Contract Language" would ultimately include everything that was agreed upon "prior to the signing of the MOA and anything that might have been agreed to thereafter." [Tr. 1096]

C. Respondent's Post-MOA Proposal

On March 13, 2007, Ploscowe sent the Union a full-length contract proposal which sought to modify many of the *tentative agreements* that were reached by the parties prior to the signing of the MOA (i.e., tentative agreements that had been "agreed

¹⁰ The Union replaced Local 734, L.I.U. of N.A., AFL-CIO ("Local 734") as the bargaining representative of the unit. [GCX 2] [Tr. 32-33] Other than the specific terms which were implemented by the 2006 Interim Agreement and the MOA, the parties understood that (by law) the terms of Respondent's contract with Local 734 would remain in effect until a complete agreement was reached to replace it. [Tr. 82, 215, 272-73, 1073].

upon to date”). [ALJD 4:51-52] [ALJD 5:1-19] [GCX 12] [Tr. 300, 443-48, 1110-34]
 Specifically, Respondent’s March 13, 2007 proposal modified the following *tentative agreements* [ALJD 16:51-52] [ALJD17:1-3]:

GCX 9 – Art. Agreed¹¹	GCX 12 – New Art.	Description of Respondent’s 2007 Change to 2006 Tentative Agreement
Art. 1 § 4(e) Ok – 9/28/06	Art. 1 § 4(e)	Added last sentence - temporary employee hired as regular employee must work full probationary period. [Tr. 1112-13]
Art. 3 § 5 Ok – 9/28/06	Art. 3 § 5	Added last sentence – new language regarding work on an unscheduled working day. [Tr. 1116-17]
Art. 6 § 2 Not contested	Art. 7 § 2	Changed layoff notice to be received by the Union from 24 hours to 12 hours. [Tr. 1120-21]
Art. 7 § 4(E) Ok – 9/28/06	Art. 8 § 4(E)	Removed phrase - seniority lost after 3-day absence unless “unable to give notice.” [Tr. 1121-22]
Art. 9 § 4 Not contested	Art. 10 § 4	Added last sentence – employee responsibility for employer equipment. [Tr. 1122-23]
Art. 9 Not contested	Art. 10 § 6	Added entire § 6 – employee responsibility for radios. [Tr. 1130-33]
Art. 10 § 1 Ok – 10/6/06	Art. 11 § 1	Added last sentence – forfeit of Union visitation rights. [Tr. 1133-34]

In his decision, the ALJ found that the *tentative agreements* which Respondent sought to modify in March, 2007 *were not implemented* by the MOA. The decision states as follows [ALJD 17:50-52] [ALJD 18:1-2]:

¹¹ The far left column reflects provisions that Ploscowe designated as “Ok” in his November 13, 2006 proposal (indicating his belief that those provisions were agreed upon) or “not contested” (indicating that Respondent adopted the Union’s language). [Tr. 1082] [GCX 3, 9, 12]

It is true, as argued by the General Counsel, that, as set forth above, certain items marked “ok” in the November, 2006 proposed contract were changed thereafter in the March, 2007 proposed contract, thereby indicating that those terms could not be and were not indisputably incorporated by reference in the MOA...

D. Union Correspondence

In about March, 2007, the Union retained attorney Stephen Goldblatt. [Tr. 255-56] On May 7, 2007, Goldblatt sent Ploscowe an e-mail indicating that the Union “would like to address the following issues for negotiation with regard to the collective bargaining agreement[.]” [RX 10] Goldblatt then identified four items: (1) the grievance procedure which had been implemented by the 2006 Interim Agreement, (2) a return to sick days (which had been changed to PTO by the MOA), (3) implementation of the vacation schedule in the MOA, and (4) matters related to the use of temporary employees. By June 1, 2007, Goldblatt had been replaced as Union counsel by Wendell “Wendy” Shepherd. [RX 42]

On August 1, 2007, Shepherd sent Ploscowe an e-mail that withdrew from any prior tentative agreement on management rights. [ALJD 6: 30-33] [GCX 15] This withdrawal was no different than Respondent’s March 13, 2007 withdrawal from other pre-MOA *tentative agreements*. [GCX 12] [Tr. 300, 443-48, 1110-34]

E. The Settlement Agreement

On August 17, 2007, Respondent filed a charge (22-CB-10448) alleging that the Union was taking an unlawful regressive position with respect to management rights and other *tentative agreements*. [ALJD 6:35-38] [RX 14] [Tr. 1478] Charge 22-CB-10448

was submitted to the Board's Division of Advice and an Advice memorandum issued on June 11, 2008. [RX 15] That Advice memorandum begins as follows [RX 15]:

This case was submitted for advice as to whether the IUJAT, Local 124 (the "Union") violated Section 8(b)(3) of the Act when its newly hired attorney withdrew from *tentative agreements* on bargaining proposals without providing any reason, conduct that the Region has determined constituted regressive bargaining unless it was privileged by the Union's change of counsel. [Emphasis added]

In the meantime, the parties continued bargaining for a full and final contract that would incorporate and supplement the terms of the MOA (a partial contract). These negotiations took place from August 3, 2007 to December 4, 2008. [GCX 75, 76, 80, 84] [RX 50-73] In his notes, Ploscowe described management rights as "open" and, in negotiations, Respondent offered to revise its management rights proposal. [ALJD 6:48-52] [ALJD 7:12-16] [ALJD 7:34-39] [GCX 75, 76] [RX 53, 62] [Tr. 1555, 1648-50]

On October 1, 2008, nearly two years after the MOA was signed, the Settlement Agreement in case 22-CB-10448 was approved. [ALJD 7:18-30] [GCX 19] The Settlement Agreement contained the following notice posting with regard to the parties' *tentative agreements* [ALJD 7: 18-30] [GCX 19] [Tr. 60-61]:

WE WILL NOT, in any bargaining with Galaxy Towers Condominium Association (herein "Galaxy"), unlawfully withdraw from *tentative agreements* reached during negotiations for a collective bargaining agreement, including *tentative agreements* reached with Galaxy concerning subcontracting.

WE WILL NOT in any like or related manner engage in conduct in derogation of our statutory right to bargain with Galaxy.

WE WILL rescind our withdrawal from *tentative agreements* reached, including sub-contracting as described in the Production Efficiency and Management Rights clause, Article 13, Section 2a and 2b. [Emphasis Added]

At trial, Ploscowe described the Settlement Agreement as it referred to management rights [Tr. 1540]:

So the agreement was made, *tentative* or otherwise, it was made. And they can't back out of it. They can't withdraw it. That's what the NLRB was saying. [Emphasis added]

F. Failure To Reach A Full And Final Contract

After the Settlement Agreement was approved, the parties returned to the table, but did not complete a full and final contract. [ALJD 7:34-36] [Tr. 61, 1528-30, 1548, 1657-60, 1718-25] On December 12, 2008, Ploscowe e-mailed Shephard a proposed contract. [ALJD 7:38-39] [RX 73] In this proposal, as in his proposal of March 13, 2007, Respondent sought to modify several *tentative agreements* that were reached before the MOA was signed.¹² [RX 73] The Union did not accept Respondent's December 12, 2008 proposal and the parties never executed a complete agreement for the period June 1, 2006 to May 31, 2009.¹³ [ALJD 7:34-36] [Tr. 61, 1548]

Since the partial MOA was scheduled to expire on May 31, 2009, the parties stopped bargaining for a complete agreement. Ploscowe was replaced by attorney Michael Kingman and, when negotiations resumed, the parties started bargaining for a successor agreement. [ALJD 7:41-43] [Tr. 61-65, 453, 701-2, 772, 795, 1053] [GCX 22-24] The parties remained far apart on economics and disagreed over non-economic items such as management's right to subcontract unit work. [ALJD 8:7-9] [Tr. 1251-53]

¹² Specifically, Respondent was still insisting upon modifications to the following *tentative agreements* (as reflected in Respondent's November 13, 2006) [GCX 9]: Art. 1 § 4(e); Art. 6 § 2; Art. 7 § 4(E); Art. 9 § 4; and Art. 10 § 1. [RX 73] [Tr. 1556-76, 1650-52, 1655-61]

¹³ In the words of the MOA, the parties never reached agreement on all final "Contract Language" and such "Contract Language" was never implemented.

[GCX 22-24] Further, Respondent claimed that it already had the right to subcontract work under the current “collective bargaining agreement.”¹⁴ [ALJD 7:46-49] [GCX 24] The Union denied that Respondent had any such right. [Tr. 64-65]

On August 13, 2009, Respondent proposed that the parties suspend negotiations for a new contract and submit to arbitration the issue whether Respondent had a current right to unilaterally subcontract work. Kingman prepared an interim agreement to that effect. [Tr. 1253, 1383-82]

On August 31, 2009, the parties signed an interim agreement which suspended negotiations for a successor agreement and extended the parties “collective bargaining agreement” to a date 30 days after an award issued in the subcontracting arbitration. [GCX 25] However, the arbitration was never completed and an award never issued. [Tr. 70-71, 353, 1269, 1666] [GCX 32] Accordingly, the parties’ partial collective bargaining agreement (consisting of the 2006 Interim Agreement and the MOA) never expired. [Tr. 71, 353, 1666, 1269, 1728]

¹⁴ In June 2009, Kingman mistakenly believed that Ploscowe’s unsigned March 13, 2009 proposal was the parties’ collective bargaining agreement. [Tr. 709] [GCX 12, 24] As Kingman testified, when he was retained, he did not recall examining agreements for signatures. [Tr. 702] In fact, the 2006 Interim Agreement and the MOA were the only contracts that the parties had executed. [GCX 4, 11] These documents reflected the partial “collective bargaining agreement” that the parties had been negotiating to complete since the MOA was signed. The parties extended this partial “collective bargaining agreement” three times between June 1, 2009 and August 31, 2009. [GCX 20]

III. CENTRAL QUESTION PRESENTED UPON EXCEPTION
[GC General Exception Point I]

Did the ALJ err in finding that the Union waived its right to bargain over subcontracting decisions by entering into the MOA?

IV. SUMMARY OF THE ERRORS IN THE ALJ'S DECISION

In reaching his decision, the ALJ did not properly apply the applicable standard to the facts of the instant case. It is undisputed, and the ALJ found, that Respondent's management rights proposal included a clear waiver of the Union's right to subcontract. [ALJD 20:1-25] However, the ALJ did not address whether the MOA "clearly and unmistakably" implemented that proposal. Accordingly, the ALJ did not determine whether Respondent satisfied its burden of proving that a Union bargaining waiver was "clearly and unmistakably" in effect when it subcontracted most unit work and laid off 67 employees. See *Rose Fence Inc.*, 359 NLRB 1, 7 (2012).

In reaching his decision, the ALJ incorrectly accepted Respondent's interpretation of the MOA without addressing language therein which contradicts that interpretation and confirms the General Counsel's position. Respondent claimed that the MOA implemented a provision on management rights which was "agreed upon to date." However, Respondent ignores the context of the phrase "agreed upon to date" in a paragraph on "Contract Language," which also refers to items "to be resolved by the parties during final drafting...." When read in its entirety, the paragraph on "Contract Language" cannot refer to agreements to be implemented by the MOA since the MOA could not implement agreements that were still "to be resolved" and *did not yet exist*.

Rather, “Contract Language” refers to conditional *tentative agreements* (those “agreed upon to date”) and *future agreements* (those “to be resolved by the parties during final drafting”) which, unlike specifically defined economic provisions, would only be implemented if and when the parties concluded their “final drafting” of a complete agreement on some *future date*. No such full and final contract was executed.

In his decision, the ALJ erred in distinguishing between tentative agreements that Respondent sought to modify in March, 2007 (which he found not to be implemented by the MOA) and a tentative agreement on management rights (which he found to be implemented by the MOA). The ALJ found that various unspecified tentative agreements which were reached prior to the signing of the MOA and modified by Respondent in March, 2007, “could not be and were not indisputably incorporated by reference in the MOA.....” [ALJD 17:50-52] [ALJD 18:1-2] If the MOA did not implement *some unspecified tentative agreements* that were “agreed upon to date” (since Respondent felt free to modify them), then the MOA did not implement *any unspecified tentative agreements* (e.g., management rights) that were “agreed upon to date.” Rather, *all* such unspecified agreements were still understood to be *tentative* and subject to renegotiation.

In reaching his decision, the ALJ incorrectly relied upon uncontested findings that Sabatella agreed to Respondent’s management rights proposal in August, 2006 and that Goldblatt did not identify management rights as “open” in a May 7, 2007 e-mail. [ALJD 17:1-30] [ALJD 17:38-43] [ALJD 18:5-23] [ALJD 19:19-24] [ALJD 19:50-51] Neither finding is relevant. The question is not whether management rights was *tentatively agreed upon* (i.e., an unimplemented provision that did not require additional negotiation)

or “open” (i.e., an unimplemented provision that did require additional negotiation).¹⁵ Rather, even assuming the former, the question is whether any tentative agreement on management rights was clearly and unmistakably implemented by the MOA. It was not.

Finally and most striking, in reaching his decision, the ALJ failed to address the Settlement Agreement’s unequivocal reference to any provision on management’s rights to subcontract as a conditional “*tentative agreement*.” By entering into the Settlement Agreement, the parties confirmed and Respondent admitted that any such *tentative agreement* was not implemented by the MOA.

V. **ISSUES TO BE RESOLVED IN ANSWERING THE CENTRAL QUESTION UPON EXCEPTION**

Given the above-referenced errors in the ALJ’s decision, the following issues are submitted to the Board for consideration:

A. **The ALJ’s Application Of The Legal Standard:**

[GC General Exception Point I.A] [GC Specific Exceptions 8]

- Did the ALJ incorrectly apply the legal standard in concluding that Respondent’s management rights proposal was in effect and a waiver of the Union’s right to bargain over subcontracting decisions, where the *tentative agreement* on management rights was not “clearly and unmistakable” implemented by the MOA?

¹⁵ On August 1, 2007, Shepherd withdrew from Sabatella’s *tentative agreement* on management rights and “opened” that subject for renegotiation. Thereafter, in his notes, Ploscowe’s described management rights as “open.” [GCX 75, 76]

**B. The Plain Language Of The MOA:
[GC General Exceptions Point I.B] [GC Specific Exceptions 5, 6]**

- If “Contract Language,” as described in the MOA, includes provisions that were “to be resolved by the parties during final drafting” and *did not yet exist* as of the signing of the MOA, must “Contract Language,” in its entirety, refer to provisions that *were not* meant to be implemented by the MOA?

**C. Respondent’s Post-MOA Proposal:
[GC General Exception Point I.C] [GC Specific Exception 7]**

- If the parties understood the MOA to finalize and implement all tentative agreements that had been “agreed upon to date,” why did Respondent seek to modify such “final and binding” agreements in its subsequent proposals?
- If the ALJ found that the partial MOA did not implement *some unspecified tentative agreements* which were reached in 2006 (as evidenced by Respondent’s attempt to modify those agreements after the MOA was signed), how could the MOA have implemented *any unspecified tentative agreements* (e.g. management rights)?

**D. Goldblatt’s May 7, 2007 E-mail
[GC General Exception Point I.D] [GC Specific Exceptions 1-3]**

- Did Goldblatt’s May 7, 2007 e-mail fail to confirm a “clear and unmistakable” waiver of the Union’s right to bargain over subcontracting decisions?

- Is the relevant question whether Goldblatt identified management rights as an “open item” that was not *tentatively agreed* upon by Sabatella, or is the relevant question whether the MOA clearly and unmistakably implemented such a *tentative agreement*?

**E. The Plain Language of the Settlement Agreement
[GC General Exception Point I.E] [GC Specific Exception 4]**

- Did the plain language of the Settlement Agreement establish that management rights was merely the subject of a “*tentative agreement*” which, as such, could not have been implemented nearly two years earlier by the MOA?

VI. ARGUMENT

POINT I

The ALJ Erred In Finding That The Union Waived Its Right To Bargain Over Respondent’s Decision To Subcontract Unit Work By Entering Into the MOA

A. The ALJ Did Not Properly Apply The Legal Standard And Respondent’s Burden of Proof

The ALJ made reference to the elevated burden that is required to find a waiver of the Union’s statutory right to bargain over subcontracting decisions, but failed to properly apply that standard to the facts of this case. National labor policy encourages collective bargaining and disfavors the waiver of statutory bargaining rights. See *United Technologies Corp.*, 274 NLRB 504, 507 (1985); *Success Village Apartments, Inc.*, 348 NLRB 579, 628 (2006); *Chesapeake and Potomac Telephone Co. v. NLRB*, 687 F.2d 633, 6346 (2d Cir. 1982). 29 U.S.C. § 151. Accordingly, the *existence* of a bargaining

waiver must be clear and unmistakable. *American Diamond Tool*, 306 NLRB 570 (1992); *Johnson-Bateman*, 295 NLRB 80, 184-187 (1989). Further, “the party asserting waiver has the burden of establishing *its existence*.” *Rose Fence, Inc.*, 359 NLRB 1, 7 (2012) (emphasis added) citing *Pertec Computer*, 284 NLRB 810 (1987).

Respondent did not come close to proving that, *by entering into the MOA*, the Union clearly and unmistakably waived its right to bargain over subcontracting decisions. The ALJ correctly concluded that Respondent’s proposal on management rights contains a waiver of the Union’s right to bargain over subcontracting decisions. [ALJD 20] [GCX 5] However, this was never contested by the General Counsel and does not alter Respondent’s burden to prove the existence of a bargaining waiver that was clearly and unmistakably in effect when most unit work was subcontracted and most unit employees were laid off. That is, Respondent was required to prove that the MOA clearly and unmistakably implemented Respondent’s proposal on management rights. *Id.* As explained below, Respondent did not satisfy its burden in this regard.

B. The Plain Language Of The MOA Cannot Be Read To Clearly And Mistakably Implement An Unspecified Provision On Management Rights Which Remained A Tentative Agreement After The MOA Was Signed

The MOA specifically lists and defines economic items which were implemented at that time. The MOA does not make reference to management rights or subcontracting. In fact, Respondent’s management rights provision was never discussed by the parties at the bargaining table or presented to unit employees for ratification.

Absent a management rights provision in the MOA, Respondent attempts to pluck out and rely upon a single phrase in the paragraph that describes “Contract Language.” This attempt is unavailing. *See Engelhard Corp. v. NLRB*, 437 F.3d 374, 381 (3rd Cir. 2006) (it is an established principle of contract construction to read all portions of an article or clause together “as a harmonious whole”) citing *Ludwig Honold Mfg Co. v. Fletcher*, 405 F.2d 1123, 1130 n.31 (3rd Cir. 1969) (district court erred “in isolating one phrase of the ... clause to reach its conclusion that the contract language was clear and unambiguous”).

In the paragraph on “Contract Language,” Ploscowe groups together those provisions that were “agreed upon to date...” and/or “to be resolved by the parties during final drafting...” Therefore, the paragraph on “Contract Language,” when read in its entirety, cannot refer to provisions that were to be implemented by the MOA because the MOA could not implement provisions that were “to be resolved by the parties in final drafting” and *did not yet exist*. Rather, “Contract Language” necessarily refers to *conditional tentative agreements* (those “agreed upon to date”) and *future agreements* (those “to be resolved by the parties during final drafting”) that would only be implemented after the parties reached a full and final agreement on all “Contract Language.”¹⁶ In this regard, “Contract Language” distinguishes specifically defined economic provisions to be implemented by the MOA from other agreements (such as management rights) which would be implemented in the *future*.

¹⁶ This is consistent with Ploscowe’s testimony that final “Contract Language” would include agreements reached “prior to the signing of the MOA and anything that might have been agreed to thereafter.” [Tr. 1096]

Ploscowe's use of the conjunction "and/or" does not change this inescapable conclusion. After the MOA was signed, it was conceivable that the parties would agree upon a final contract that only included the economic terms which were implemented by the MOA and tentative agreements that were to be implemented once the parties reached agreement on all final "Contract Language" (without any other terms because none were "resolved during final drafting"). Thus, "Contract Language" does not necessarily refer to tentative agreements "and" future agreements (making the use of the conjunction "and/or" arguably more appropriate). But regardless of the conjunction, under "Contract Language," *tentative agreements* (those "agreed upon to date") were grouped together with *future agreements* (those "to be resolved") in a paragraph that necessarily refers to provisions which were not to be implemented by the MOA (but on some *future date*).

The General Counsel's reading of the MOA does not render meaningless those tentative agreements which were reached in 2006. It is common for bargaining parties to postpone the implementation of tentative agreements until a full agreement has been reached. Nevertheless, those tentative agreements remain a necessary part of any successful bargaining process since the parties could not reach agreement on a contract as a whole until they first reach agreement on its individual provisions.

The fact that Ploscowe drafted the MOA also weighs strongly in favor of a finding that it was not meant to implement a new provision on management rights. *California Offset Printers, Inc.*, 349 NLRB 732, 735 (2007) citing *Lafayette Park Hotel*, 326 NLRB 824, 828 (1998) (conflicts in contract interpretation resolved against the drafter). Ploscowe is an experienced labor lawyer who admittedly understood the elevated burden

of proving the existence of a bargaining waiver and the principle that conflicts in contract interpretation are generally resolved against the drafter. [Tr. 1104-5] Nevertheless, he did not include a management rights provision in the MOA and drafted a paragraph on final “Contract Language” that could not refer to terms to be implemented by the MOA (as some of those terms *did not yet exist*). Respondent may not be heard to contest discrepancies in an MOA that was drafted by its own experienced labor counsel. *Id.*

C. Respondent’s Post-MOA Proposal Reflects That The MOA Did Not Finalize And Implement Provisions Which Were Not Specifically Described Therein

The ALJ found that, on March 13, 2007, Respondent sought to modify several *tentative agreements* which, as a result, “could not be and were not indisputably incorporated by reference in the MOA....” [ALJD 17:51-52] [ALJD 18:1-2] Having determined that the MOA did not implement *some unspecified tentative agreements* that were “agreed upon to date,” it must be concluded that the MOA did not implement *any unspecified tentative agreements* (e.g., management rights) that were “agreed upon to date.” The MOA cannot be read to implement prior agreements that Respondent desired to be final and binding, while other agreements remained tentative and unimplemented because Respondent desired to modify them. Nevertheless, the ALJ reached this erroneous and contradictory conclusion. [ALJD 19:25-43]

In his decision, the ALJ attempted to describe the General Counsel's position, but failed to articulate a logical conclusion in response to it. The opinion of the ALJ states in relevant part [ALJD 19:25-43]:¹⁷

It must be noted that certain clauses in the proposed contract of November, 2006, marked by Ploscowe "ok" with the date of agreement were thereafter changed in the March, 2007 proposed agreement, as set forth above. Accordingly, the General Counsel argues that if those accepted proposals could be changed they are, in fact, *tentative* and not binding. From that, he contends that the subcontracting clause must also be [tentative and] considered non binding because it was subject to change.... [Emphasis added]

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.

This illogical conclusion is incorrect. The "subcontracting clause" was no more "indisputably agreed to" and "ratified in the MOA" than any other *tentative agreement* that was "agreed upon to date" (i.e., prior to the signing of the MOA). If a Union bargaining waiver on subcontracting was finalized and implemented by the MOA because it was "agreed upon to date," then all such tentative agreements were finalized and implemented by the MOA (including the tentative agreements that Ploscowe sought to modify on March 13, 2007). But that begs the question and the alternative – were those agreements actually implemented by the MOA or *did they remain tentative?*

Clearly, the answer is the latter. Since both parties were modifying unspecified *tentative agreements* that were reached before the MOA was executed, then all of those agreements were perceived as tentative, subject to renegotiation, and unimplemented

¹⁷ The ALJ came close to correctly stating the General Counsel's position, but failed in one respect. The ALJ did not to include the words [tentative and], which have been added to the relevant quotation from his decision.

after the MOA was signed. None of those pre-MOA *tentative agreements* were finalized and implemented by the MOA. Further, if unspecified non-economic agreements (such as management rights) remained *tentative* after the MOA was signed, it would explain why, on October 1, 2008, the parties expressly described them as such in the Settlement Agreement.

D. Goldblatt Did Not Agree Or Confirm In His May 7, 2007 E-Mail That The MOA Implemented Respondent's Proposal On Management Rights

By his e-mail of May 7, 2007, Goldblatt did not give any indication that the parties had agreed to implement a tentative agreement on management rights. [RX 10] With regard to the e-mail, the ALJ makes the following erroneous observations:

Union attorney Goldblatt advised Ploscowe that there were only four open items - none of them involved the issue of subcontracting. [ALJD 17:13-16]

Two Union attorneys, Sabatella and Goldblatt, agreed that the Respondent had the right to the broad subcontracting clause in the parties' agreement. [ALJD 17:20-22]

Goldblatt could only identify four items that "the Union has advised me that they would like to address [with regard to the collective bargaining agreement]" for negotiation, none of which concerned subcontracting. [ALJD 17:29-30]

First, Goldblatt's e-mail does not mention management rights or subcontracting, and does not mention the implementation of any provision related thereto. Although Goldblatt inquired about implementation of the vacation schedule, the parties do not dispute that such specifically defined economic provisions were implemented by the MOA. The e-mail does not give any indication that the MOA was intended to implement other *unspecified tentative agreements* on provisions such as management rights.

Clearly, the May 7, 2007 e-mail does not contain or confirm a “clear and unmistakable” waiver of the Union’s right to bargain over Respondent’s subcontracting decisions.

Second, Goldblatt’s e-mail does not purport to be an exhaustive list of “open items.” In fact, the first three items were not “open.” Rather, those items concerned provisions that were agreed to and implemented by the 2006 Interim Agreement (grievance procedure) and the MOA (PTO and vacation). Further, Goldblatt does not indicate that the enumerated items were the only subjects that the Union wanted to discuss or that Respondent was free to implement any other provisions.

Third, and most importantly, it is entirely irrelevant whether management rights was considered an “open item” on May 7, 2007. Sabatella *tentatively agreed* to management rights on August 25, 2006 and that *tentative agreement* was withdrawn (or “opened”) by Shepherd on August 1, 2007. But whether management rights was the subject of a *tentative agreement* (i.e., an unimplemented provision that did not require additional negotiation) or “open” (i.e., an unimplemented provision that did require additional negotiation) is of no moment. Even assuming the former, Respondent cannot rely on a *tentative agreement* that was not implemented by the MOA or thereafter.

E. The Plain Language Of The Settlement Agreement Contains a Clear Admission That Any Prior Agreement On Management Rights Was An Unimplemented “Tentative Agreement”

The Settlement Agreement contains the most powerful evidence that any provision on management’s right to subcontract was, at most, the subject of a conditional “*tentative agreement*” which was never implemented or placed in effect. It says so.

Tentative agreements have a specific meaning in the context of collective bargaining. [*Supra* p. 2-3] As Ploscowe testified, bargaining parties do not normally implement contractual provisions as they are agreed upon. Rather, provisions are *tentatively agreed* to on a conditional basis. Those *tentative agreements* are conditioned upon the execution of a full and final contract. Thus, by definition, a *tentative agreement* is one that has not been implemented or placed into effect. It is undisputed that, prior to the MOA, management rights was the subject of such a *tentative agreement*.

Tentative agreements are often at issue in charges of regressive bargaining.¹⁸ The parties tentatively agree to various provisions as negotiations progress. This progress may be disturbing to a party that does not actually want to complete a contract and thereby see those *tentative agreements* be implemented. Accordingly, that party may attempt to avoid implementation by taking a regressive position and revoking some of its *tentative agreements* without offering an adequate explanation. In such situations, it is understood that the charged party is withdrawing from tentative agreements because they are still conditional and have not yet been implemented by a final and binding contract.

In case 22-CB-10448, as explained by Ploscowe and in the Advice memorandum, Respondent alleged that the Union unlawfully withdrew from “*tentative agreements*.” [Tr. 1478] [RX 15] Although a withdrawal from such *tentative agreements* may have

¹⁸ See *Holmes Typography, Inc.*, 218 NLRB 518, 524 (1975); *Universal Fuel, Inc.*, 358 NLRB 1 (Sept. 27, 2012); *Suffolk Academy*, 336 NLRB 659, 669 (2001) *enfd.* 322 F.3d 196 (2d Cir. 2003); *Driftwood Convalescent Hospital*, 312 NLRB 247, 247 (1993); *Homestead Nursing Center*, 310 NLRB 678, 678 (1993); *Arrow Sash & Door Co.*, 281 NLRB 1108, *fn.* 2 (1986); *HTH Corp.*, 356 NLRB No. 182, 2011 WL 2414720 (June 14, 2011); *Whitesell Corp.*, 357 NLRB NO. 97, 4, 2011 WL 4619133, *5 (Sept. 30, 2011); *Area Trade Bindery Co.*, 352 NLRB 172, *fn.* 3 (2008).

been unlawful, the implementation of such *tentative agreements* was still conditioned upon events that never occurred (i.e., the execution of a full and final contract).

Accordingly, on October 1, 2008, the Settlement Agreement confirmed that any provision on management rights was still understood by the parties to be the subject of a “*tentative agreement*.” In this regard, the Settlement Agreement confirms the General Counsel’s reading of the MOA: i.e., “Contract Language” refers to unspecified *tentative agreements* (those “agreed upon to date”) and future agreements (those “to be resolved by the parties during final drafting”) to be implemented on some future date if and when the parties reached agreement on all “Contract Language.” Since the parties never reached agreement on all final “Contract Language,” those unspecified *tentative agreements* were never implemented.

Thus, the ALJ erred in stating as follows with regard to the Settlement Agreement [ALJD 17:32-36]:

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. In the Agreement, the Union agrees to rescind its withdrawal from *tentative agreements* reached, including subcontracting, specifically referred to the clause at issue; Article 13, Section 2a and 2b. [Emphasis added]

Once again, the question is not whether the Union withdrew from a tentative agreement on management rights, but whether such a tentative agreement was ever implemented. The ALJ offers no explanation how an agreement on management rights can simultaneously be both *tentative* (i.e., conditional) and in effect (i.e., final and implemented). Likewise, the ALJ offers no explanation how a Union bargaining waiver

could have been clearly and unmistakably implemented by the MOA when the parties were still expressly describing any such agreement as *tentative* nearly two years later.

The world has truly turned upside down when Respondent may *indisputably describe* any agreement on management rights as a “*tentative agreement*,” with the obvious legal implication that such a *tentative agreement* had not been implemented, and then argue that the bargaining waivers in that management rights clause are “clearly and unmistakably” in effect. Respondent has never attempted to explain and resolve this gaping factual discrepancy. Rather, Respondent has simply ignored the Settlement Agreement’s reference to “*tentative agreements*” in the hope that the word “tentative” would magically disappear. However, the plain language of the Settlement Agreement directly contradicts Respondent’s position, and the word “tentative” cannot be vanished like a rabbit from a hat.

F. This Case Does Not Turn On Credibility

This case does not turn on credibility. First, pursuant to the rule of parol evidence, the plain language of the parties’ agreements is controlling. *Dr. Pepper Snapple Group*, 357 NLRB No. 167, 2011 WL 7052271, *13 (Dec. 29, 2011) citing *Church Square Supermarket*, 356 NLRB No. 170, slip op. at 3-4 (May 31, 2011) and *Price Crusher Food Warehouse*, 249 NLR B 433, 437-38 (1980). Extrinsic evidence need not be considered. *Id.* Here, “Contract Language” cannot possibly refer to agreements (e.g., management rights) which were intended to be implemented by the MOA, and the Settlement Agreement confirms that *such tentative agreements* were not implemented by the MOA.

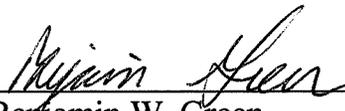
Even if extrinsic evidence were considered, it would merely be icing on the General Counsel's cake. After the MOA was signed, both parties modified agreements that were reached before the MOA was signed. Thus, the parties clearly perceived those agreements (including management rights) to be *tentative* and subject to renegotiation.

Finally, the record does not contain any conflicting testimony with regard to negotiations that, if credited in Respondent's favor, might suggest a meeting of the minds that contradicts the plain language of the parties' agreements. Union witnesses testified to *their understanding* that all agreements which were reached in 2006, other than economic provisions specifically described in the MOA, would remain tentative until the parties reached a full and final contract. [ALJD 19:7-14] Ploscowe testified to *his understanding* to the contrary. [ALJD 19:15-18] The ALJ did not identify or credit any discussions between the parties that might establish a meeting of the minds one way or the other. Thus, we are left with the plain language of the MOA and the Settlement Agreement, which (in addition to the parties' post-MOA proposals) conclusively establish that the MOA did not clearly and unmistakably implement Respondent's proposal on management rights.

VII. CONCLUSION

Based upon the foregoing, the decision of the ALJ must be overturned and his finding, that Respondent lawfully subcontracted most unit work and laid off 67 employees, must be reversed.

Respectfully submitted this 19th day of November, 2012.



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