UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

GALAXY TOWERS CONDOMINIUM
ASSOCIATION

Respondent

and Case No. 22-CA-030064

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

Charging Party

RESPONDENT GALAXY TOWERS CONDOMINIUM ASSOCIATION'S ANSWERING BRIEF TO GENERAL COUNSEL'S AND CHARGING PARTY'S EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

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On September 25, 2012, Administrative Law Judge Steven Davis ("ALJ") issued his decision ("ALJD") in this matter. Therein, the ALJ found that Respondent Galaxy Towers Condominium Association ("GTCA") had lawfully subcontracted bargaining unit work based on specific contract language that Charging Party Local 124, Recycling, Airport, Industrial & Service Employees Union ("Union") had tentatively agreed to in August 2006 and then agreed to incorporate into the bargaining parties' ratified Memorandum of Agreement ("MOA"), signed January 2, 2007. Displeased with the ALJ's unimpeachable legal and factual findings on this issue, the General Counsel ("GC") invites the National Labor Relations Board ("NLRB" or "Board) to adopt his patently erroneous and illogical view of the facts and the law applicable in this case.

As explained below, the GC's contrived arguments are no more availing now than when they initially were rejected by the ALJ. The facts found by the ALJ establish beyond doubt that representatives of the Union agreed to include in the bargaining parties' MOA[1] a management rights clause ("MRC") expressly granting to GTCA the right to "***subcontract any work***." (ALJD at 19, ll. 41-43). The ALJ then properly concluded as a matter of law that based on that express language, the outcome in this case was controlled by the Board's decision in *Allison Corp*., 330 NLRB 1363 (2000). (ALJD at 20, ll. 18-25).

The Board should resist the GC's invitation to follow him down the analytical "rabbit hole" that he has constructed in order to avoid the sound factual and legal conclusions reached by the ALJ on the subcontracting issue. Instead, the Board should overrule the GC's exceptions and adopt the ALJ's conclusion that GTCA's decision to subcontract bargaining unit work on August

[1] The GC concedes that the MOA never expired and continues to be in force today. (General Counsel's Brief in Support of Exceptions ("GC Br.") at 12; *see also* Tr. 230-31).

1, 2011 did not violate Section 8(a)(1) and (5) of the Nation Labor Relations Act (NLRA" or "Act"). 29 U.S.C. § 158(a)(1), (5)

I. FACTS.[2]

A. Introduction.

The resolution of the subcontracting issue turns principally upon a small number of documents exchanged by the bargaining parties between August 2006 and May 2007. Tacitly admitting their fatal impact on his Exceptions, the GC largely omits any detailed discussion of these critical documents. Principally created by the Union's various counsel in 2006 and 2007, these documents establish beyond any legitimate dispute that the Union agreed to the broad waiver language relied on by the ALJ in finding that GTCA lawfully subcontracted bargaining unit work.[3] In an almost literal sense, these documents are a "road map" leading to the ALJ's ultimate factual findings.

Given the documentary record, the ALJ properly did not credit the contrary testimony of the GC's factual witnesses on this issue, Union "consultant" Louis DeAngelis ("DeAngelis") and Union officer James Bernardone (Bernardone"), that they had "voiced any objection to the subcontracting clause or refused to agree to it." (ALJD at 17, ll. 46-47, 38-39).[4]

B. The Bargaining Relevant to the Subcontracting Clause.

On or about June 5, 2006, a majority of GTCA's service, maintenance and garage attendant employees ("unit employees") chose the Union as their collective bargaining

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[2] Incredibly, GC characterizes the fact section of his Brief as setting forth "Undisputed Facts". GC's Brief in Support of Exceptions ("GC Br.") at 2. Suffice it to say that GC's factual assertions are neither undisputed nor complete.

[3] Critically, the Union never claimed that its counsel's authority was limited in any way. (Tr. 225, 227, 881).

[4] Given the ALJ's express credibility findings on this point, the GC's claim that "[t]his case does not turn on credibility" is not correct. *See* GC Br. at 27-28. Similarly, the GC does not explain why the ALJ's decision to discredit DeAngelis' testimony should be overturned or ignored. (*Compare* GC Br. at 28 *with* (ALJD at 17, ll. 38-48)).

representative in an NLRB-supervised election, rejecting the incumbent union, Local 734 L.I.U. of N.A., AFL-CIO ("Local 734"). (GC Ex. 3; Tr. 33).[5]

The Union and the GTCA met for the first time on July 6, 2006 to negotiate a collective bargaining agreement ("CBA") to replace the CBA between GTCA and Local 734 ("Local 734 CBA"). (GC Ex. 2; Tr. 33). The Union made its first proposal on July 21, 2006, when Bernardone sent a substantially complete draft CBA to GTCA. (GC Ex. 3; R Ex. 35). That draft CBA included a management rights clause, Article 12 - Production Efficiency And Management Rights, that provided:

> The management of, and the direction of, the working force of the Employer, including, but not limited to, the right to hire, suspend or discharge for just cause; to enlarge, combine, decrease, divide, transfer or rearrange departments and to make and enforce reasonable shop rules; establish rules and regulations for its operations, except and reserved to, the Employer, provided that the exercise of such rights will not be used for the purpose of discrimination against any member of the Union or to be contrary to any other specific provision of the Agreement, and provided that nothing herein would be construed to abrogate the provisions of the grievance-arbitration procedure contained in Article 14.

(GC Ex. 3).

The parties held their first substantive bargaining session on August 8, 2006. (Tr. 36). Attorney Stephen Ploscowe ("Ploscowe") represented GTCA and attorney Christopher Sabatella ("Sabatella") represented the Union. (GC Ex. 62). At that meeting, the parties entered into a handwritten, partial CBA, the "Interim Agreement," describing a limited number of terms of employment to be implemented immediately. (GC Ex. 4). Specifically, the Interim Agreement implemented: (1) the Union's proposed checkoff, no strike/no lockout, visitation and grievance/arbitration language; (2) GTCA's new hire language, as modified by the parties; and

[5] References to the record refer to the hearing of Board Case 22-CA-030064, unless otherwise designated, and are herein abbreviated as follows: Record citations to the transcript (Tr.), General Counsel exhibits (GC Ex.), and Respondent exhibits (R Ex.).

(3) the Union's proposal to continue the payment of a small bonus based on days worked in the preceding month. (*Id*.).

Either at that meeting or before the parties' next meeting, Ploscowe presented GTCA's response to the Union's initial proposal. (GC Ex. 5). GTCA rejected the Union's MRC proposal and made the following counter-proposal:

> **MANAGEMENT RIGHTS**
>
> Section l. ***Management of the Employer's operations and the direction of its working force, including the right to*** establish new jobs, change existing jobs, increase or decrease the number of jobs, change materials or equipment, ***subcontract any work***, change any method of operations, ***shall be vested solely and exclusively in the Employer***. Subject to the provisions of this Agreement, the Employer shall have the exclusive right to schedule and assign work to be performed and the right to hire or rehire employees, promote, recall employees who are laid off, demote, suspend, discipline or discharge for proper cause, transfer or lay off employees because of lack of work or other legitimate reasons, it being understood, however, that the Employer shall not discipline or discharge an employee except for proper cause or otherwise improperly discriminate against an employee.

(*Id*. (emphasis added)). GTCA's counter-proposal differed from the Union's initial proposal in a ***critical*** way – it specifically reserved to GTCA the sole and exclusive right to "***subcontract any work***." (Tr. 686, 788).

Attorney Sabatella responded in writing to GTCA's August 8, 2006 counter-proposal. In a document captioned "Response to Galaxy Towers' Counter Proposal," Sabatella described the Union's position on each element of GTCA's counter-proposal. (GC Ex. 6). Regarding GTCA's management rights proposal, Sabatella wrote that the proposal was "***[a]ccepted as***

drafted." (*Id*. (emphasis added)). At this point, the Union had tentatively agreed to GTCA's subcontracting language.[6]

On August 16, 2006, Ploscowe sent Sabatella a "redlined" draft of the Union's original proposal showing the language changes tentatively agreed to by the Union as of that date. (GC Ex.7). Ploscowe incorporated Sabatella's agreement to the subcontracting language into the draft's MRC language:

> **ARTICLE 12 - PRODUCTION EFFICIENCY AND MANAGEMENT RIGHTS**
>
> . . .
>
> ~~Section 2. The management of, and the direction of, the working force of the Employer, including but not limited to, the right to hire, suspend or discharge for just cause; to enlarge, combine, decrease, divide, transfer or arrange departments and to make and enforce reasonable shop rules; establish rules and regulations for its operations, except and reserved to, the Employer, provided that the exercise of such rights will not be used for the purpose of discrimination against any member of the Union or to be contrary to any other specific provision of the Agreement, and provided that nothing herein would be construed to abrogate the provisions of the grievance arbitration procedure contained in Article 14.~~
>
> Section 2a. Management of the Employer's operations and the direction of its working force, including the right to establish new jobs, change existing jobs, increase or decrease the number of jobs, change materials or equipment, ***subcontract any work***, change any method of operations, shall be vested solely and exclusively in the Employer. Subject to the provisions of this Agreement, the Employer shall have the exclusive right to schedule and assign work to be performed and the right to hire or rehire employees, promote, recall employees who are laid off, demote, suspend, discipline or discharge for proper cause, transfer or lay off employees because of lack of work or other legitimate reasons, it being understood, however, that the Employer shall not

[6] The GC contends the fact that this tentative agreement is subject to modification until implementation is determinative in the instant case. (*See, e.g.*, GC Br. at 3). To be clear, however, GTCA does not contend that this tentative agreement reduced the MRC to a contractual obligation at that time. Instead, this tentative agreement became final when incorporated into the parties' MOA. (GC Ex. 6).

> discipline or discharge an employee except for proper cause or otherwise improperly discriminate against an employee.

(*Id*. (emphasis added)). From this point forward, this MRC language – incorporating GTCA's right to "subcontract any work" – ***appeared in every draft CBA exchanged by the parties in 2006, even those prepared by Sabatella***. (*See, e.g.,* GC Ex. 8, GC Ex. 9).

Sabatella's October 4, 2006 draft CBA removed the redlining notations contained in Ploscowe's original mark-up of the draft CBA, indicating that he agreed with the change and further eliminating any doubt that the management rights language had been accepted tentatively by the Union. (R Ex. 8).[7] Sabatella transmitted that draft CBA to Ploscowe under cover of an October 4, 2006 e-mail, which replied to Ploscowe's e-mail of September 19, 2006. (*Id*.).

The Union's agreement to the subcontracting language was no mistake – Sabatella reviewed and revised the draft CBA he had received from Ploscowe a little more than two weeks earlier. For example, the attachment to Sabatella's e-mail is titled "Redlined Galaxy CBA after 10_3_06 Negotiations.doc"; whereas, the title of the attachment to Ploscowe's earlier e-mail was "Draft Agreement dated 9/19/06-Galaxy Towers/Local 124". (*Compare* R Ex. 8 *with* GC Ex. 8). Sabatella also deleted the "9/19/2006" date stamp Ploscowe had added on the upper right-hand corner of his draft CBA; Sabatella's deletion is shown as a strikethrough in the same location. (*Id*.) Finally, Sabatella replaced the document control number appearing in the lower left-hand corner of Ploscowe's draft (559293_1.DOC~~557504_1.DOC~~) with an identifying mark of his own, "Redlined Galaxy CBA after 10_3_06 Negotiations.DOC". (*Id*.).

In or around mid-October, 2006, Sabatella "disappeared" without explanation from the Union's negotiating team. (Tr. 1136). His role as the Union's lead negotiator was assumed by DeAngelis, purportedly a "consultant" for the Union. (Tr. 1136, R Ex. 4, R Ex. 5). Although he

[7] Ploscowe and Sabatella also corresponded regarding the parties' bargaining proposals. (R Ex. 36A-B, R Ex. 38). This correspondence clearly shows that the Union "accepted as drafted" GTCA's MRC language. (*Id*.)

had attended three meetings[8] prior to Sabatella's disappearance, DeAngelis neither challenged that subcontracting language agreed to by Sabatella, nor asked Ploscowe how it came to be in the draft CBA. (GC Ex. 9; Tr. 41).

On December 5, 2006, GTCA made a final offer to the Union, which was to be submitted to the unit employees for ratification. (GC Ex. 10) That final offer, drafted by Ploscowe, included several proposed terms, including the term of the contract, elements of the Interim Agreement, various economic terms and a provision titled "Contract Language." That provision stated:

> ***As agreed upon to date*** and/or as to be resolved by the parties during final drafting as to any open items.

(*Id*. (emphasis added)). DeAngelis presented this final offer to the unit employees and they ratified it on December 6, 2006. (Tr. 243, 1106-07; GC Ex. 65).

Following the ratification of the final offer, Ploscowe drafted the MOA for execution by the parties. (GC Ex. 11). The MOA was identical to the final offer, except that it included two additional items that had been "open" as of the ratification but which subsequently had been settled. (*Id*., Tr. 46). The MOA's preamble stated that the parties "***agree to the following terms of a new agreement which was ratified by Local 124 members[.]***" (*Id.* (emphasis added)). One of those agreed-upon terms was the "Contract Language" provision contained in the final offer. The MOA was signed by GTCA and the Union on December 21, 2006 and January 2, 2007, respectively. As indicated by the document's preamble, the MOA is a CBA, albeit one that left certain items open "to be resolved by the parties during final drafting. . . ." The MOA, however, through its "***as agreed upon to date***" provision incorporated all then-existing tentative agreements, including the tentative agreement on subcontracting. (Tr. 1033). Notably, the

[8] DeAngelis attended the August 15th, August 29th and September 29th bargaining sessions.

Union never attempted to withdraw from its mid-August 2006 tentative agreement on subcontracting prior to the execution of the MOA.

C. <u>The Union's Attempted Repudiation of the Agreement on Subcontracting.</u>

On March 13, 2007, Ploscowe mailed Bernardone a complete, execution-ready CBA. (GC Ex. 12). Ploscowe advised Bernardone that "[i]f you believe that any changes are necessary, please let me know." (*Id*.). Bernardone did not respond to Ploscowe's letter; in fact, nothing was heard from the Union for nearly two months. Then, on May 7, 2007, a new Union lawyer, Stephen Goldblatt, e-mailed Ploscowe and stated: "My client [*i.e*., the Union] has advised me that they would like to address the following issues for negotiation with regard to the collective bargaining agreement. . . ." (R Ex. 10). Goldblatt then identified ***four items*** that the Union had advised him needed to be addressed – ***the subcontracting language was not among those issues***.

The following day, Ploscowe provided Goldblatt his preliminary perspective on the four items that the Union had identified. (R Ex. 11). After discussing these four issues with GTCA, Ploscowe e-mailed Goldblatt on May 24, 2007, and provided a substantive response on each issue. (GC Ex. 12). Goldblatt, however, did not respond to Ploscowe's e-mail. Instead, he "disappeared" as suddenly and inexplicably as Sabatella had.

On June 1, 2007, Ploscowe learned that the Union had retained yet another lawyer, Wendell Shepherd. (R Ex. 42). Ploscowe e-mailed Shepherd a copy of his May 24 e-mail to Goldblatt, relating to the four items which the Union had indicated "that [the Union] would like to address." (R Ex. 41). Shepherd did not respond. On July 3, 2007, Ploscowe sent Shepherd a comprehensive set of documents relating to the 2006 negotiations leading to the MOA and the subsequent correspondence between himself and Goldblatt. (R Ex. 13). Ploscowe advised

Shepherd that Goldblatt had identified only four open, unresolved issues. Shepherd again did not respond timely to Ploscowe's correspondence. In advance of a scheduled August 3, 2007 meeting with Shepherd, Ploscowe made two further attempts to determine what issues, if any, Shepherd believed were unresolved. (GC Ex. 13, GC Ex. 14).

Shepherd finally responded to Ploscowe by e-mail dated August 1, 2007. (GC Ex. 14). Therein, Shepherd identified ***over twenty items*** the Union claimed were unresolved in the parties' bargaining. Regarding the subcontracting language – "accepted as drafted" by the Union in August 2006 – Shepherd simply claimed "***[t]he Union did not agree to the inclusion of subcontracting language***." (*Id.*)

Ploscowe was surprised and angered by the Union's assertion that a large number of issues remained unresolved and by its frivolous denial of the agreement on subcontracting. In an August 6, 2007 letter, Ploscowe wrote:

> I cannot tell you how upset both my client and I are with Local 124's attempt to renegotiate what was agreed upon during the negotiation process. While I can understand that there may have been some confusion on some issues on the Union side as a result of the Union's frequent change of negotiators, that is not an acceptable excuse for the Union's now regressive stand on a number of significant issues.
>
> I am reserving my client's right to file appropriate unfair labor practice charges with the hope that you will be able to get this situation back on track.
>
> When Stephen Goldblatt, Esq. became Local 124's counsel, he reviewed the agreement with the Union officials (or so he told me) and forwarded four (4) areas of concern. You were informed of those in my earlier emails to you which included my responses to Stephen.. [sic]
>
> Apparently, Local 124 has now told you that there are 28 items that are open or need to be addressed. Frankly, I believe we have good reason to challenge the "good faith" of Local 124 and some of those on its bargaining committee.

(GC Ex. 16).

With regard to the subcontracting issue, Ploscowe stated:

> We proposed the "subcontracting" language on August 8. See the attached August 8 proposals provided to the Union. The same language appeared in every draft of the agreement that followed including those drafted by [GTCA] and Local 124. It was never challenged by Local 124. Thus, it is clear that it was agreed upon. [GTCA] will not give up its agreement.

(*Id*.).

Shepherd responded to Ploscowe in a letter dated September 26, 2007. (GC Ex. 18). On subcontracting, Shepherd simply reiterated that "The Union never agreed to this language." (*Id*.). That deadlock – Ploscowe explaining that the subcontracting language was agreed to in August 2006 and Shepherd simply asserting that the Union did not – continued. To break the deadlock, Ploscowe filed an unfair labor practice ("ULP") charge against the Union on August 17, 2007, alleging that the Union had bargained in bad faith by "reneging on previously agreed upon items and language." (R Ex. 14). The NLRB took an extraordinary amount of time to investigate the ULP charge. Ultimately, the charge was referred to the NLRB's Office of Advice for analysis. (R Ex. 15).

On June 11, 2008, the Office of Advice issued an Advice Memorandum addressing the merits of GTCA's ULP charge. (*Id*.) The Office of Advice relied on the following facts:

> The parties' held their first face-to-face negotiations on July 6, 2006, and there have been one or two meetings per month, as well as email negotiations, since then. The parties are continuing to negotiate. Throughout negotiations the Employer has been represented by attorney Stephen Ploscowe. During that same period, the Union has changed representatives four times. The Union's current attorney, Wendell "Wendy" Shepherd, began representing the Union for contract negotiations in July 2007.
>
> Upon becoming the Union's legal representative, Shepherd asserted, in response to the Employer's emailing of a draft agreement, that the Union had never agreed to various items the Employer was asserting had been agreed upon. The Employer responded that the documentary evidence, which included Union

> counter proposals and a Memorandum of Agreement in which the Union explicitly agreed to various contract provisions and language, established that there had been agreement on those items.
>
> The Employer has now agreed to reopen all but two of the previously agreed-to contract items for further negotiation. The first item that the Employer will not agree to reopen is Article 13, Sec. 2a - which allows management the right to subcontract unit work. The Employer provided documentary evidence establishing that Chris Sabatella, the Union's original bargaining representative, unequivocally agreed to the subcontracting language in August 2006. The Employer's evidence further establishes that despite many opportunities, the Union never disputed the inclusion of the subcontracting language in the contract until Shepherd disputed it in August 2007. ***When questioned during the investigation as to why she would contend there was no agreement when prior Union counsel had unequivocally agreed to the management rights article containing the subcontracting language, Shepherd stated that no self respecting union would agree to this. The Union has provided no other reason for its current disavowal of Sabatella's agreement to the subcontracting language and has provided no evidence to rebut the Employer's claim that the Union agreed to the subcontracting language.***

(*Id*. (emphasis added)).

Based on those facts, the Division of Advice reached the following conclusion:

> It is a violation of the Act for a party negotiating a collective bargaining agreement to withdraw without good cause from tentatively agreed-to contract proposals. ***The Union has presented no rationale for withdrawing from the tentative agreements at issue here other than that "no self-respecting union would agree" to them. Indeed, the Union has not even acknowledged that it withdrew from the subcontracting agreement, but rather has maintained that it never agreed to that provision notwithstanding compelling evidence to the contrary.*** Applying well-established Board law to these facts, the Region has determined that the Union engaged in bad faith bargaining unless the Union's change of counsel privileged its withdrawal from these tentative agreements.
>
> We have found no cases suggesting that a change in bargaining representative can privilege otherwise unlawful regressive bargaining. Moreover, permitting such a defense would enable parties to avoid prior agreements merely by retaining new counsel, a result the law should not encourage. ***Indeed, although it is***

> ***apparent that Shepherd reviewed her new client's prior agreements and made judgments about those agreements which resulted in the Union's withdrawals, the Union has not even articulated its "change of counsel" as a defense to the charge but has continued to maintain that it did not enter into the agreements at issue***.
>
> Accordingly, the Region should issue a Section 8(b)(3) complaint, absent settlement.

(*Id*. (emphasis added)).

A few months later, the Union settled the ULP charge. (GC Ex. 19). The informal settlement agreement contained a notice posting obligation; the notice directed the Union to "rescind [its] withdrawal from tentative agreements reached, including sub-contracting, as described in the Production Efficiency and Management Rights clause, Article 13, Sections 2a and 2b." (*Id*.). Notwithstanding the conclusions reached by the Division of Advice, the Union's settlement of the ULP charge and the unambiguous language of the notice posting, the Union has continued to deny that it had agreed to the subcontracting language at issue or that that language was incorporated by reference into the MOA. The ALJ, however, expressly found such denial was not credible. (ALJD, at 17, ll. 38-48).

During the pendency of the ULP, the parties had continued to meet in an effort to reach an overall CBA. (*See, e.g.*, GC Ex. 74, 80, 84; R Ex. 50-74). During that process, GTCA conceded on many of the issues the Union belatedly had identified as open in an effort to reach an overall CBA. However, GTCA refused to concede on this issue of subcontracting. (R Ex. 72). Notwithstanding its refusal to concede on this issue, GTCA, acting under a reservation of rights,[9] made a number of proposals either linking a Union agreement on subcontracting to some specific economic enhancement desired by the Union or proposing limitations or restrictions on

[9] The GC's Brief improperly ignores this reservation of rights in arguing Ploscowe deemed the subcontracting language to be "open." (*Compare* GC Br. at 15, n.15 *with* GC Ex. 16, R Ex. 15). As held by the ALJ, and ***not excepted to by the GC***, the fact that the parties continued to bargain through 2011 "does not detract from the fact that the Union agreed to subcontracting." (*See* ALJD, at 18, ll. 14-18).

the broad right to subcontract agreed to by the Union in August 2006.[10] The Union, however, refused to accept any of these conditional proposals and it refused to make ***any*** substantive counter-proposal on this issue. Instead, the Union repeatedly insisted that it would not under any circumstance agree to any form of subcontracting. (R Ex. 58A ("The right to subcontract. He [DeAngelis] said that the Union would never agree to a contract that contained the right to subcontract"). Despite these after-the-fact protestations, the ALJ's Decision correctly determined the parties' MOA is a written, binding agreement that grants GTCA discretion to unilaterally implement a subcontracting decision. (ALJD, at 17, ll. 50-51; 20, ll. 24-25).

II. THE ALJ'S DECISION.

A. The ALJ's Factual Conclusions.

The ALJ largely found the facts set forth above. (*See* ALJD at 2-7).[11] Therein, the ALJ also discussed at some length the testimony of Union consultant DeAngelis offered by the GC to establish either that, contrary to the clear documentary evidence, the Union had no idea that the subcontracting language had been tentatively agreed to or that its implementation (and that of all non-economic terms) would be deferred until the bargaining parties reached an overall agreement on all potential issues. (ALJD at 4, ll. 35-40; 6, ll. 1-28). Later in his decision, the ALJ specifically discredited DeAngelis and his contentions on this issue:

> Given these facts, I cannot credit the Union's insistence at trial that it never agreed to the subcontracting clause. It is inconceivable that it was not aware of the existence of the clause – Sabatella gave a detailed two-page response to the Employer's proposal. Goldblatt's response stated that his client advised him that it had

[10] *See* R Ex. 62 ("As to OT after 8 and subcontracting, I proposed a trade, one for the other, that is, Galaxy will agree to the OT after 8 on a go forward basis if the Union agrees on subcontracting and we add "cross-training" to section 13.2a. The Union asked for more information on subcontracting, that is, is it limited to Security (as the Union has heard) and does that include the Garage employees? Also, will the Galaxy pay severance/buyouts to employees not hired by a subcontractor? Galaxy is concerned about older (long term?) employees losing their jobs and benefits. If the Union has a specific counter proposal, let me know.").

[11] Certain parts of this section of the ALJD are not factual findings, but rather reflect the ALJ's recitation of the parties' positions. *See, e.g.*, (ALJD at 3, ll. 36-38; 4, ll. 4-5, 35-45).

> only four areas of concern. No issue was raised that these two attorneys lacked authority to engage in negotiations with the Respondent in behalf of the Union, or to bind the Union with respect to agreements they reached with the Employer.
>
> I accordingly cannot credit the testimony of the Union's witnesses that, prior to Shepherd's involvement in the negotiations, they voiced any objection to the subcontracting clause or refused to agree to it. The undisputed documentary evidence does not support such testimony.

(*Id*. at 17, ll. 38-48).[12]

The ALJ reiterated and explained his factual conclusions in the "Analysis and Discussion" section of his Decision. (*See* ALJD at 16-20). Specifically, the ALJ found the following operative facts:

- GTCA's August 8, 2006 proposal provided for a MRC with a broad subcontracting clause giving it the sole and exclusive right to subcontract any work. (ALJD at 16, l. 51 – 17, l. 1).

- One week later, Sabatella expressly accepted the MRC "as drafted." (ALJD at 17, ll. 1-2).

- At that time, Sabatella gave a detailed two-page response to the Employer's proposal. (ALJD at 17, ll. 1-2).

- Several draft proposals sent by Ploscowe to Sabatella contained the same clause. (ALJD at 17, ll. 2-3).

- The proposed contract, with that clause, was sent to DeAngelis. (ALJD at 17, ll. 3-4).

- On December 6, the employees ratified a "final offer" on economic terms which also included the statement that "Contract Language" agreed upon would include the items "as agreed upon to date." (ALJD at 17, ll. 6-8).

- Following the ratification, the bargaining parties signed an MOA in early January, 2007. (ALJD at 17, ll. 8-9).

- The MOA stated that the parties agree to the terms of a new agreement which was ratified by the employees. (ALJD at 17, ll. 9-10).

[12] The GC's attempt to argue there was no "meeting of the minds one way or the other," accordingly, should be disregarded. (GC Br. at 14).

- The MOA covered certain economic items and the phrase used earlier, "Contract Language: as agreed upon to date…." (ALJD at 17, ll. 10-11).

- Thereafter, Union attorney Goldblatt advised Ploscowe that there were only four open items - none of them involved the issue of subcontracting. (ALJD at 17, ll. 13-14).

- It was only when Shepherd became the Union's representative that, in August, 2007, she asserted that the Union did not agree to the subcontracting clause. (ALJD at 17, ll. 14-16).

- At that point, the MOA had been signed. (ALJD at 17, l. 18).

- The MOA represented the parties' agreement up to that time. (ALJD at 17, ll. 18-19).

- The MOA was a partial agreement, covering mostly economic items, but it was a binding agreement nevertheless. (ALJD at 17, ll. 19-20).

- Two Union attorneys, Sabatella and Goldblatt, agreed that the Respondent had the right to the broad subcontracting clause in the parties' agreement. (ALJD at 17, ll. 20-22).

- In addition to accepting the subcontracting clause without change, Sabatella also accepted, without change, other terms in the Employer's proposal including vacations, force reduction, seniority, part of the grievance procedure and part of the miscellaneous working conditions proposal. (ALJD at 17, ll. 24-27).

- No issue was raised that either Sabatella or Goldblatt lacked authority to engage in negotiations with the Respondent in behalf of the Union, or to bind the Union with respect to agreements they reached with the Employer. (ALJD at 17, ll. 41-43).

- The MOA represents a written, binding agreement between the parties. (ALJD at 17, ll. 50-51).

- The MOA was signed with the agreement of the parties that whatever items were agreed to therein were binding on them. (ALJD at 18, ll. 5-6).

- The Union agreed to subcontracting. (ALJD at 18, ll. 16-17).

- The MOA does not contain a specific reference to the Employer's right to subcontract. In fact, the MOA itself does not contain any reference to subcontracting. (ALJD at 18, ll. 38-40).

- The MOA states that the Employer and the Union "hereby agree to the following terms of a new agreement which was ratified by the Local 24 members." (ALJD at 18, ll. 48-49).

- The MOA covers the term of the agreement, from June 1, 2006 to May 31, 2009, and listed the wage increase amounts, medical coverage amounts, paid time off days, vacations, retirement program and a new hire rate. (ALJD at 18, ll. 49-51).

- The MOA did not contain, on its face, a waiver of the Union's right to bargain over subcontracting. (ALJD at 19, ll. 19-21).

- The Union specifically agreed that the Employer had the right to subcontract in Sabatella's specific agreement to the subcontracting clause. (ALJD at 19, ll. 21-23).

- The Union indisputably agreed to the subcontracting clause and ratified that agreement in the MOA. (ALJD at 19, ll. 42-43).[13]

Each of these facts is amply supported by the record. Therefore, the Board should adopt the ALJ's factual and credibility determinations *in toto*, as they relate to the subcontracting waiver issue.

B. <u>The ALJ's Legal Conclusions.</u>

Based on the forgoing facts, the ALJ concluded that the Union had "clearly and unmistakably" waived its right to bargain over subcontracting. (ALJD at 20, ll. 1-16). In reaching this conclusion, the ALJ properly relied on *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983) and *Johnson-Bateman Co.*, 295 NLRB 180, 184-188 (1989). (ALJD at 20, ll. 1-16). The ALJ next concluded that the result in this case was controlled by the Board's analogous decision in *Allison Corp*., 330 NLRB 1363 (2000). (ALJD at 20. ll. 18-25). Specifically, the ALJ concluded that:

> ***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.***

[13] In reaching these factual conclusions, the ALJ again considered and rejected the contrary view of the facts based on DeAngelis' testimony and urged by the GC. (See ALJD at 18, ll. 32-40; 19, ll. 1-13).

Id. (emphasis added). The ALJ's legal conclusions on this issue are amply supported by existing Board law and the facts set out above. Therefore, the Board should adopt the ALJ's legal conclusions *in toto*, as they relate to the subcontracting waiver issue.

III. ARGUMENT.[14]

A. The ALJ Properly Found that GTCA Did Not Violate the Act by Subcontracting Bargaining Unit Work on August 1, 2011.

As noted above, the ALJ properly found as a matter of fact that "the Union specifically agreed that the Employer had that right [to subcontract any work] in Sabatella's specific agreement to the subcontracting clause" and that "the Union indisputably agreed to the subcontracting clause and ratified that agreement in the MOA." (ALJD at 19, ll. 21-23, 42-43). As further noted above, the ALJ properly concluded as a matter of law in reliance on *Allison Corp*., *supra*, that GTCA "did not violate Section 8(a)(1) and (5) of the Act by unilaterally subcontracting unit work." The ALJ's conclusion is amply supported by directly analogous Board law.

To be given effect, a union's purported waiver of bargaining rights must be "clear and unmistakable." *Metropolitan Edison*, 460 U.S. at 708.[15] Under this standard, for a waiver of bargaining rights to exist, "[e]ither the contract language relied on must be specific or the

[14] The Union filed exceptions to the ALJD, but did not bother submitting a supporting brief. The Union also did not bother to include in its exceptions any citation to authorities, as required under Section 102.46(b)(1) of the Board's Rules and Regulations. The Board, therefore, should strike or disregard the Union's exceptions for failure to comply with the applicable Rules. To the extent the exceptions are considered, GTCA relies on its arguments made in opposition to the GC's exceptions, which arguments respond directly to the Union's exceptions. Specifically, Union exceptions #1 and #2 are addressed in Sections III. a. and b.1, 4. of GTCA's Answering Brief; exception # 3 is contrary to the ALJ's factual finding detailed in Section II. a. and the Union has offered no argument why those findings should not be adopted; exception #4 is addressed in Section II. b. 3. Of GTCA's Answering Brief; and exception #5 is addressed in Sections III. a. and b. 2. of its Answering Brief. In sum, the Union's exceptions are procedurally deficient and without merit. These exceptions should be overruled.

[15] In the alternative, GTCA contends that the result reached by the ALJ on this issue should be affirmed based on the so-called contract-coverage analysis. GTCA acknowledges that the Board has not adopted the contract-coverage analysis and has continued to apply the clear and unmistakable waiver standard in cases like this. For the reasons (which are incorporated herein by reference) stated by then Chairman Battista in his dissent in *Provena St. Joseph Medical Center*, 350 NLRB 808, 816-818 (2007), GTCA respectfully urges the Board to reconsider its application of the clear and unmistakable waiver standard and, instead, to adopt the contract-coverage standard.

employer must show that the issue was fully discussed and consciously explored and that the union consciously yielded or clearly and unmistakably waived its interest in the matter." *Amoco Chem. Co.*, 328 NLRB 1220 (1999), *enf. denied*, 217 F.3d 869 (D.C. 2000). Here, the ALJ found (and GTCA contends) that the waiver exists as a result of the very specific language of the MRC permitting GTCA in its sole discretion to "subcontract any work." Notably, the GC does not contest the finding that the MRC language grants this discretion. (GC Br. at 18).

The Board has found a waiver based on similar contract language. In *Allison Corp*, the management-rights clause in the parties' CBA provided:

> SECTION 13. MANAGEMENT RIGHTS
>
> A. The Company has, retains, and shall possess and exercise all management rights, functions, powers, privileges and authority inherent in the Company as owner and operator of the business, excepting only such rights that are specifically and expressly relinquished or restricted by a specific Article or Section of this Agreement.
>
> B. ***The Company shall have the exclusive right*** to manage the business and operation of its facilities; to schedule and require the performance of overtime work; to discipline or discharge employees for just cause; to adopt, modify or rescind reasonable work rules, quality and production standards and to discipline or discharge employees for violation of such rules and standards; to determine, implement, modify or eliminate techniques, methods, processes, means of production; ***to subcontract***; to transfer work or materials from one Company operation to another, as now may exist or as may hereafter be established; to utilize labor saving devices; to determine the location of the business, including the establishment of new facilities and the relocation, closing, selling, merging or liquidating of any facility, department, division or subdivision thereof either permanently or temporarily; and generally to control and direct the Company in all of its operations and affairs.

330 NLRB at 1364-65 (emphasis added).

Based on this language, the Board held:

> Here, on the other hand, the management-rights 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. We therefore

> conclude that the Respondent did not violate Section 8(a)(5) by unilaterally subcontracting unit work.

Id. at 1365 (internal footnotes omitted).

Numerous other Board cases hold that a bargaining waiver will be found where, as here, the contract language at issue "specifically, precisely and plainly" addresses the bargainable subject. *See Provena St. Joseph Med. Ctr.*, 350 NLRB at 815 (finding a waiver relating to the implementation of a disciplinary policy on attendance and tardiness based on "several provisions of the management-rights clause, [which] taken together, explicitly authorized the Respondent's unilateral action."); *Good Samaritan Hosp.*, 335 NLRB 901, 902 (2001) (waiver of right to bargain over summer staffing found based on union's agreement that the employer had "the exclusive right to manage the plant and its business and the exercise customary functions of management in all respects. . . ."); *Ingham Regional Med. Ctr.*, 342 NLRB 1259, 1262 (2004) (waiver of right to bargain over subcontracting found based language reserving to the employer the right to "use outside assistance or to engage independent contractors to perform any of the Employer's operations or phases thereof (subcontracting). . . ."); *Airco Die Casting, Inc.*, 354 NLRB No. 8 (2009) (in the absence of any employees on layoff, waiver of right to bargain over subcontracting found based language stating that the employer "shall have the right the right to subcontract normal bargaining unit work only when such subcontracting does not result in a layoff or there are no employees on layoff.").

B. <u>The GC's Exceptions to the ALJ's Decision Should Be Overruled.</u>

1. The ALJ Applied the Correct Legal Standard.

Contrary to the GC's claim, the ALJ applied the correct legal standard, citing *Metropolitan Edison* and *Johnson-Bateman*, in finding a waiver of the Union's right to bargain over GTCA's subcontracting decision. The ALJ also appropriately placed the burden of proving

a waiver on GTCA – a burden it met. Specifically, GTCA proved and the ALJ found that *(a)* on behalf of the Union, Sabatella "accepted as drafted" the MRC proposed by GTCA, which included an express subcontracting provision; and *(b)* that tentative agreement was incorporated into the MOA through the "as agreed upon to date" contract term. (ALJD at 17, ll. 1-2; 19, ll. 42-43).

In his Exceptions, the GC concedes that the MRC meets the Board's standard to establish a clear and unmistakable waiver. (GC Br. at 13 ("It is undisputed…that Respondent's management rights proposal included clear waiver of the Union's right to subcontract")). The GC, instead, argues that the MOA did not "clearly and unmistakably" incorporate the MRC under *Allison Corp*., supra. Specifically, the GC contends only that the ALJ "did not address whether the MOA 'clearly and unmistakably' implemented the proposal." (GC Br. 13).

The case law, however, does not require the incorporation by reference language used by bargaining parties to be "clear and unmistakable" as to bargaining waiver where the underlying contract language meets that burden.[16] In other words, having "clear and unmistakably" waived its rights by agreeing to the MRC, there is no requirement that the Union ***again*** clearly and unmistakably waive its rights in the MOA's incorporating language. Neither *Allison Corp*., which is directly on-point, nor any of the Board's other waiver cases require the "double waiver" standard advocated by the GC.[17] Accordingly, the ALJ committed no error here.

2. The MOA Can Logically Be Read in Only One Way – As Incorporating Tentative Agreements in Effect at Its Execution.

[16] The GC further attempts to challenge email exchanges between Goldblatt and Ploscowe as failing to show a "clear and unmistakable" intent, while simultaneously and paradoxically arguing that any pre-August 1, 2007 agreements are "of no moment." (GC Br. at 23-24).

[17] The GC's citation to *Rose Fence Inc.*, 359 NLRB 1 (2012) is misplaced. That case did not involve a purported waiver based on express contract language, as is the situation here.

The GC next suggests that the ALJ erred by failing to adopt his strained and illogical reading of the MOA.[18] According to the GC, because the MRC and its subcontracting provision were not specifically set out in the MOA, those terms were not made a part of that contract when it was signed by the Union on January 2, 2007. (GC Br. at 18-21). Further, the GC contends that only those economic terms expressly described in the MOA were "contractual" and that all non-expressed matters (*i.e*, all the non-economic terms) were deferred until a "complete" CBA could be agreed upon. (*Id*. at 19). The goal of the GC's analytical contortions is to try to create ambiguity in the MOA where none, in fact, exists.

The Board should note initially that the Union never made this argument in 2007, when it first claimed that it had not agreed to the disputed subcontracting language. Rather, the Union simply claimed that it had never agreed to this term and then, when defending the ULP charge filed by Ploscowe in 2007, it defended only on the ground that "no self-respecting union" would agree to such a provision. (R Ex. 15). The Union never made this argument in 2008, 2009, 2010 or 2011, as the dispute over the subcontracting language continued. The GC's argument, then, is nothing more than a *post hoc* attempt to save the Union from the consequences of its own bargaining.

Further, the GC's interpretation of the "Contract Language" provision of the MOA cannot be credited. As noted above, this provision is a term of the MOA, providing:

> ***As agreed upon to date*** and/or as to be resolved by the parties during final drafting as to any open items.

[18] When interpreting a CBA, "traditional rules of contract construction apply when not inconsistent with federal labor law." *Int'l Union, United Auto., Aero. & Agric. Implement Workers of Am. v. Skinner Engine Co.*, 188 F.3d 130, 138 (3d Cir. 1999). The MOA must be read "to give effect to all of its provisions and to render the provisions consistent with each other." *Local 205, Cmty. & Soc. Agency Emps.' Union, Dist. Council 1707 AFSCME v. Day Care Council of N.Y., Inc.*, 992 F. Supp. 388, 392 (S.D.N.Y. 1998) (citing *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 63 (1995)); *see also Engelhard Corp. v. NLRB*, 437 F.3d 374, 381 (3d Cir. 2006) (discussing the need to interpret "all provisions of a contract together as a harmonious whole").

This MOA provision does two things – the first clause ("[a]s agreed upon to date") incorporates by reference and makes contractual then-existing tentative agreements and the second clause ("as to be resolved by the parties. . . .") recognizes that remaining open issues would be addressed in future bargaining. There simply is no other possible interpretation of this provision.[19]

The reading of the "Contract Language" provision urged by the GC was properly rejected by the ALJ and the Board should do the same. (ALJD at 17, ll. 18-22). Clearly, if the bargaining parties had wanted to reach a contract on only economic issues (or other issues of importance to the Union), they knew how to do that. The August 8, 2006 Interim Agreement was such a limited CBA; it covered only a discrete set of topics. (GC Ex. 4). If, as the GC maintains, the MOA was intended only to "list[ ] and define[ ] economic terms that were implemented at that time" (GC Br. at 18) and that all other terms "would only be implemented after the parties reached a full and final agreement" (GC Br. at 19), then the "Contract Language" term is reduced to a meaningless surplus term.[20] The interpretation urged by the GC, thus, violates the black letter rule of contract interpretation that all provisions of a CBA should be given effect. *See Fortec Constructors v. U.S.*, 760 F.2d 1288, 1292 (Fed. Cir. 1985). An interpretation which renders portions of the contract meaningless, useless, ineffective, or superfluous should be eschewed. *See United Pacific Ins. Co. v. United States*, 497 F.2d 1402, 1405 (1974); Restatement (Second) Contracts § 203(a) (1981).

The GC also fails to note that the ALJ specifically discredited DeAngelis' specious claim that the MOA did not incorporate existing tentative agreements. (ALJD at 17, ll. 38-48). Thus, there is no credited record evidence to support the GC's contorted contract interpretation.

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[19] Because there is no ambiguity or internal conflict in the MOA, GC's citation to *California Offset Printers, Inc.*, 349 NLRB 732 (2007), is not relevant to the resolution of this case.

[20] For the same reason, the Board should reject the GC's attempt to fold tentative agreements into "open" items, as such an argument improperly strains the plain language of the MOA and ignores the "Contract Language" provision. *See, e.g.*, GC Br. at 13, 20 (arguing that tentative agreements were "grouped together with future agreements").

Moreover, the necessary converse of the ALJ's discrediting of DeAngelis is that he credited Ploscowe's testimony that the "Contract Language" provision did incorporate existing tentative agreements.[21]

3. GTCA's Post-MOA Conduct Does Not Undermine the ALJ's Conclusion that the MOA Incorporated the Existing Tentative Agreement on Subcontracting.

Without the slightest hint of irony, the GC argues that GTCA's actions after the MOA was signed are probative of how this matter should be decided. The GC virtually fails to mention in any way the ***critical*** post-MOA conduct of the Union that eliminates any possible doubt about the inclusion of the MRC in the MOA. Specifically, the conduct of and admissions by the Union's short-lived counsel, Steven Goldblatt, in May 2007 are outcome-dispositive on this issue. Goldblatt wrote to Ploscowe on May 7, 2007 and stated: "My client [i.e., the Union] has advised me that they would like to address the following issues for negotiation with regard to the [CBA]. . . ." (R Ex. 10). Goldblatt then identified four issues to be addressed, but he did not specify the subcontracting language as one of them. (*Id.*). Goldblatt's identification of the four open issues – and his failure to identify the subcontracting language as an open item – is an admission chargeable to the Union.[22] This admission is made even more powerful by Goldblatt's assertion that the open items he listed were made known to him by the Union. (*Id.*

[21] The GC asserts that it is not uncommon for bargaining parties to defer the contractual adoption of tentative agreements until a complete CBA is reached. (*See e.g.*, GC Br. at 20). The GC does not cite any case law or evidence for that proposition. Additionally, GTCA submits that while other bargaining parties may permissibly defer adoption of tentative agreements to a full agreement, that is not what happened here.

[22] The GC's attempt to mitigate the harm to his case of Goldblatt's admissions in Section VI. D. of his Brief is borderline frivolous. (GC Br. at 23-24). Again trying to create ambiguity where none exists, the GC suggests that Goldblatt's failure to mention subcontracting somehow brings that issue into question. By its terms, Goldblatt's e-mail dealt only with those issues the Union contended were "open." Goldblatt would have had no reason to address settled matters, like subcontracting. If the GC believed he could prove that Goldblatt meant something different than what he clearly said, Goldblatt should have been called as a witness at trial. In fact, as discussed further in GTCA's Brief in Support of its Cross-Exceptions, the ALJ should have drawn an adverse inference based on the GC's failure to do so. Similarly, if the GC disagreed with GTCA's evidence on the contract negotiations with Sabatella, the GC should have called him at trial. As such, the GC's attempt to create factual ambiguity based on pure speculation, should be disregarded.

("My client has advised me. . . .")) Not surprisingly, the ALJ specifically relied on Goldblatt's admissions in concluding that the MOA had incorporated by reference the agreed upon MRC. (ALJD at 17, ll. 13-30).

The GC argues that certain inconsistencies between some of the pre-MOA tentative agreements reached by the bargaining parties and the language of Ploscowe's March 17, 2007 draft CBA somehow brings into question the Union's agreement to the MRC. (GC Br. at 21-23). This argument fails for several compelling reasons. First, the Union never made this argument in the years leading up to the trial – even though Goldblatt reviewed the draft CBA with the Union in May 2007. Logic dictates that if the Union – which has been represented by counsel throughout this process – believed that it could assert this argument in good faith, it would have done so years ago, especially in connection with its defense of the ULP charge against it.

Second, the ALJ properly found that GTCA's modification of certain agreed upon language did not affect the validity of the agreement on the MRC. (ALJD at 18, ll. 5-6). In addition to the reasons stated by the ALJ, GTCA suggests that his conclusion on this point should be affirmed on the following additional basis. That is, GTCA contends that the MOA incorporated all then-existing tentative agreements. At that point, GTCA was not foreclosed from proposing modifications to the agreements contained in the MOA in order to reach an overall CBA. That is exactly what Ploscowe, under a reservation of rights, did on GTCA's behalf in his negotiations with Shepherd, even going so far as to propose limitations on its unfettered right to subcontract in order to reach a complete CBA. (ALJD at 18, ll. 6-18).[23] The important and operative fact here is that GTCA never modified or abandoned in any way its position on the MRC.

[23] Accordingly, the GC's contention that Ploscowe deemed the management rights provision as "open" is incomplete and misleading. (GC Br. at 10).

Third, the GC attempts to dispute the ALJ's ultimate factual conclusion that "the [U]nion indisputably agreed to the subcontracting clause and ratified that agreement in the MOA" on the ground that if GTCA sought to modify ***any*** of the pre-MOA tentative agreement, then ***all*** of those agreements must have remained tentative after the MOA was signed. As discussed above, such negotiations were clearly made pursuant to a reservation of rights, and GTCA did not waive any contractual agreements by attempting to reach a voluntary resolution on these issues.

4. The Language of the 2008 Settlement Agreement Does Not Support a Reversal of the ALJ.

Finally, the GC contends that the language of the Notice that accompanied the Informal Settlement Agreement in Case 22-CB-10448 (GC Ex. 19) somehow establishes that the Union's agreement on the MRC remained tentative, notwithstanding the subsequent execution of the MOA. (GC Br. 24-27). Initially, the GC contends that the ALJ failed to address this language. As his own exceptions indicate, however, the ALJ ***did*** address this language and found that the settlement agreement actually supports GTCA's approach. (*See* GC's Specific Exception, No. 4).[24]

As with his other exceptions, the GC contorts the factual and legal import of this Informal Settlement Agreement. While the GC seeks to wield the language of this Notice as a sword, it actually has no probative value since an Informal Settlement Agreement is not an adjudication of any fact or even an admission by the Union (the charged party in that case) that it violated the Act.[25] According to the Sixth Circuit:

> A settlement agreement does not amount to a finding or admission that respondent has committed an unfair labor practice. . . . Thus at this stage of the proceeding there has been no adjudicatory

[24] Failing to recognize the irreconcilable conflict in his positions, the GC relies upon the Settlement Agreement as a key piece of evidence in his case, while simultaneously arguing that extrinsic evidence should not be considered in interpreting the MOA. (GC Br. at 27-28).

[25] The Informal Settlement Agreement contains a standard non-admissions clause.

> finding of an unfair labor practice, nor can one be read into the settlement agreement. The Board concedes that such agreements are most often prompted by a desire to reach an amicable disposition of the matter without the need for expensive and time-consuming hearings and court review. Such agreements "are not an admission of past liability," but serve to regulate future responsibilities of the parties.

NLRB v. Bangor Plastics, Inc., 392 F.2d 772 (6th Cir. 1967) (citing *Poole Foundry & Mach. Co. v. NLRB*, 192 F.2d 740 (4th Cir. 1951), *cert. den.*, 342 U.S. 954 (1952)). *See also*, *BPH & Co., Inc. v. NLRB*, 333 F.3d 213, 222 (D.C. Cir. 2003) ("If, however, the Regional Director elects to approve a settlement in which the parties specifically agree that the charged party "does not admit having violated the National Labor Relations Act," as here, then, plainly, the employer has not agreed to remedy unfair labor practices. Rather, the employer has agreed to take certain actions to secure a dismissal of the pending unfair labor practice charges — nothing more and nothing less.").

Properly understood, then, the Informal Settlement Agreement and accompanying Notice do not constitute an administrative finding, or an admission by the Union (let alone by GTCA) that the Union's August 2006 agreement to the MRC, later incorporated into the MOA, somehow constituted a tentative agreement when the Notice was drafted. Rather, the Union simply agreed "to take certain action to secure the dismissal of the pending [ULP]."

The action the Union agreed to take in that case was to rescind its withdrawal from a tentative agreement relating to the MRC, including the subcontracting language. Contrary to the GC's claim, that action is entirely consistent with the proofs in this case. That is, when Shepherd took the position with Ploscowe that the Union disputed that it was bound by the MRC, she wrote that "[t]he Union did not agree to the inclusion of subcontracting language" and "[t]he Union never agreed to this language." (GC Ex. 14, 18) Shepherd did not then contend that

bargaining parties' agreement on the MRC was nothing more than a tentative agreement from which the Union could withdraw. Even more compellingly, Shepherd did not make that argument in responding to the merits of the ULP. In its June 11, 2008 Advice Memorandum addressing this ULP, the Division of Advice summarized the Union's position as follows:

> The Employer has now agreed to reopen all but two of the previously agreed-to contract items for further negotiation. The first item that the Employer will not agree to reopen is Article 13, Sec. 2a - which allows management the right to subcontract unit work. The Employer provided documentary evidence establishing that Chris Sabatella, the Union's original bargaining representative, unequivocally agreed to the subcontracting language in August 2006. The Employer's evidence further establishes that despite many opportunities, the Union never disputed the inclusion of the subcontracting language in the contract until Shepherd disputed it in August 2007. ***When questioned during the investigation as to why she would contend there was no agreement when prior Union counsel had unequivocally agreed to the management rights article containing the subcontracting language, Shepherd stated that no self respecting union would agree to this. The Union has provided no other reason for its current disavowal of Sabatella's agreement to the subcontracting language and has provided no evidence to rebut the Employer's claim that the Union agreed to the subcontracting language.***

(R Ex. 15 (emphasis added)).

The Division of Advice further stated that "the Union has not even acknowledged that it withdrew from the subcontracting agreement, ***but rather has maintained that it never agreed to that provision notwithstanding compelling evidence to the contrary.***" (*Id*. (emphasis added)). Thus, it is clear that the Union never contended that it was withdrawing from a tentative agreement. Rather, its position was that it had never made any agreement relating to subcontracting. Once forced to adhere to the MRC tentative agreement (the existence of which it had denied), the Union was then contractually bound by that agreement as a result of the incorporating language of the MOA.

IV. CONCLUSION

For all of the reasons set forth above, GTCA respectfully requests that the Board overrule the GC's Exceptions and affirm in all material respects the decision of the ALJ with respect to the lawfulness of GTCA's subcontracting decision at issue here.

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Respectfully submitted,

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