

**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 REPLY BRIEF TO RESPONDENT'S
ANSWERING BRIEF TO THE GENERAL COUNSEL'S
EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

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I. INTRODUCTION

Pursuant to Section 102.46(h) of the Board's Rules and Regulations, this Reply brief is submitted in response to Respondent's answering brief to the General Counsel's exceptions to the decision of the Administrative Law Judge.¹ The Reply brief does not purport to address each and every assertion in Respondent's answering brief. Herein, the General Counsel will only reply to Respondent's arguments to the extent they require clarification beyond the General Counsel's treatment of the case in its brief in support of exceptions.

II. RESPONDENT FAILS TO FURTHER ITS DEFENSE BY EMPHASIZING THE IRRELEVANT AND UNDISPUTED FACT THAT THE UNION TENTATIVELY AGREED TO A MANAGEMENT RIGHTS PROPOSAL IN AUGUST, 2006

Respondent spends an inordinately large portion of its answering brief regurgitating the uncontested fact that, in August, 2006, then Union attorney Christopher Sabatella tentatively agreed to a provision on management rights with subcontracting. [R. Answering Bf. P. 2, 4-17] This fact is neither disputed nor relevant. As the General Counsel made clear throughout the trial, the issue is not whether Sabatella agreed to a management rights clause, but whether any tentative agreement on management rights, and the bargaining waivers therein, were clearly and unmistakably implemented by a Memorandum of Agreement (the

¹ References to the ALJ's Decision are cited herein as [ALJD page(s);line(s)]. References to the General Counsel's brief in support of exceptions are cited herein as [GC. Exceptions Brf.]. References to Respondent's answering brief to the General Counsel's brief in support of exceptions are cited herein as [R. Answering Brf.]. References to the record are cited herein as follows: Transcript [Tr.], General Counsel exhibits [GCX], and Respondent exhibits [RX].

“MOA”) the Union signed on January 2, 2007.² [GCX 11] [Tr. 11-12, 22-23, 230, 314-15, 317, 859, 1539] For reasons explained at length in the General Counsel’s brief in support of exceptions, the MOA did not implement such tentative agreements.

In the course of “proving” a fact which is not in dispute, Respondent notes that the ALJ purported to “discredit” the alleged testimony of Union Consultant Louis DeAngelis to the effect that the Union never agreed to subcontracting.³ However, DeAngelis offered no such testimony. Rather, DeAngelis testified at great length to his understanding that any agreement on management’s right to subcontract was merely tentative pending a final contract and was not implemented by the MOA. [Tr. 48, 60-61, 219-20, 235, 237, 244-45, 247-48, 250, 307, 435-37, 471] Consistent with the ALJ’s factual findings (below), those “tentative agreements” were referred to as such in the informal Settlement Agreement of case 22-CB-10448 (the “Settlement Agreement”) and were never implemented by a full and final contract (which was not reached) [ALJD 6:20-38]:

On October 1, 2008, the parties executed a Board Settlement Agreement which settled a charge filed by the Employer. The Agreement stated that the Union “will not, in bargaining with the GTC [Employer], unlawfully withdraw from tentative agreements reached during negotiations for a collective bargaining agreement, including tentative agreements reached with Galaxy concerning subcontracting. We rescind our withdrawal from tentative

² In a puzzling footnote, Respondent misrepresents that the General Counsel failed to cite in its exceptions brief any case law or evidence for the proposition that it is common for bargaining parties to defer the implementation of tentative agreements until a complete collective bargaining agreement is reached. [R. Answering Brf. p. 23 fn. 21] In fact, the General cited extensively to case law and evidence, including the testimony of Stephen A. Ploscowe. [GC. Exceptions Brf p. 3] Ploscowe is an attorney that represented Respondent from about 2006 to 2008, and currently represents the subcontractors that Respondent unilaterally retained to replace unit employees. [Tr. 1069-1070] Respondent called Ploscowe as a witness at trial.

³ Presumably, Respondent would like to frame the dispute in this case as one that is based on credibility determinations. It is not. There is no dispute or conflict in testimony with regard to a tentative agreement on management rights that was reached by the parties in August 2006.

agreements reached, including subcontracting, as described in the Production Efficiency and Management Rights clause, Article 13, Sections 2a and 2b.”

DeAngelis stated that his understanding of the Agreement was that “tentative agreements” meant that they “were not agreements we had entered, [that we were bound to]⁴ and that they would be subject to the final agreement and ratification.” ...

At the last bargaining session in this series of negotiations in December, 2008, no final agreement on a contract was reached.

Respondent makes an equally futile attempt to elevate the significance of the Union’s initial denial, for some time, that management rights was the subject of a tentative agreement. [R. Answering Brf. p. 21] After DeAngelis replaced attorney Christopher Sabatella as lead negotiator, the Union did not immediately believe or admit that management rights had been tentatively agreed upon. [Tr. 307, 435-37] Indeed, as DeAngelis testified, the Union was not concerned about identifying unspecified tentative agreements that were referenced in the MOA because those tentative agreements would still be subject to negotiation prior to the conclusion of a final contract. [Tr. 47-48, 223, 244] Later, the Union conceded that Sabatella had entered into a tentative agreement on management rights and signed the Settlement Agreement (whereby the parties confirmed that such “tentative agreements” would be reinstated and not unlawfully withdrawn in future negotiations). [GCX 19] [Tr. 60-61, 307] But it is entirely irrelevant whether the Union initially believed that management rights was not tentatively agreed upon and later conceded the point. Regardless, in October 2008, the parties understood management rights to be an unimplemented “tentative agreement,” and the Union never suggested the contrary.

⁴ In quoting the testimony of DeAngelis, the ALJ excluded the bracketed phrase, “that we were bound to....” The excluded phrase reflects a correction by DeAngelis that “tentative agreements” had been “entered [in]to” but were not binding. Rather, as DeAngelis testified, those “tentative agreements” were still conditioned upon “the final agreement and ratification.”

Respondent's related contention – i.e., that the Union never asserted its understanding that unspecified non-economic agreements remained tentative and were not implemented by the MOA - is simply wrong. [R. Answering Brf. p. 21] As noted above, the parties entered into a Settlement Agreement to that effect. [GCX 19] [Tr. 60-61] Moreover, after the Settlement Agreement was signed, the Union expressly advised Respondent at the bargaining table that any final contract which included a managerial right to subcontract would be subject to ratification (and was unlikely to be ratified by a unit that was “up in arms”). [Tr. 1718-19, 1735-36] [GCX 84] [ALJD 7:34-39] If the Union were conceding that management rights had already been ratified and implemented by the MOA, there would have been no need to ratify and implement it again.

III. RESPONDENT MISCHARACTERIZES THE GENERAL COUNSEL'S INTERPRETATION OF “CONTRACT LANGUAGE” AS IT IS USED IN THE MOA, AND OFFERS A FRIVOLOUS “COMPETING” INTERPETATION

Respondent is particularly misguided in its assertion that the General Counsel's interpretation of the MOA would render the paragraph on “Contract Language” a nullity. [R. Answering Brf. p. 22] The paragraph on “Contract Language” differentiates specifically defined economic items that were implemented by the partial MOA from final “Contract Language” that was not implemented by the MOA. As subsequent events and this litigation confirm, the distinction is highly significant.

Contrary to Respondent's interpretation of “Contract Language”, the paragraph does not distinguish items that were “agreed upon to date” (as items implemented by the MOA) from open items that were to be implemented in the future. [R. Answering Brf. p. 21-22] Rather, Ploscowe grouped together under a single heading these two classifications of

agreements which were not being implemented by the MOA, separate and apart from other provisions that were to be implemented. Since we know that the MOA could not implement items that were still “to be resolved” and did not yet exist, we know that “Contract Language,” as a category of agreements, does not purport to describe items that were to be implemented.⁵ Indeed, Ploscowe’s failure to confirm and identify the specific provisions that were “agreed upon to date” is a powerful indication that the parties did not intend to implement them. [Tr. 1090] Even more compelling, in the subsequent Settlement Agreement, the parties expressly referred to provisions (like management rights) that were “agreed upon to date” (i.e., the date of the MOA) as “tentative agreements.” [GCX 19] By definition, tentative agreements are conditioned upon the completion of all final “Contract Language.” [Tr. 48, 60-61, 248, 879, 891, 1033, 1102-4, 1610-11, 1653-56] [GC. Exceptions Brf p. 3]

Absent a viable interpretation of the MOA, Respondent ultimately resorts to a flagrant misrepresentation of the ALJ’s decision. In this regard, Respondent claims that the “the ALJ specifically discredited DeAngelis’ specious claim that the MOA did not incorporate existing tentative agreements. (ALJD at 17, 11. 38-48)” [R. Answering Brf. p. 22-23] The ALJ did no such thing. As clearly reflected in the portion of the decision that Respondent cites, the ALJ found that Sabatella tentatively agreed to Respondent’s management rights proposal and that subsequent Union attorney, Stephen Goldblatt, failed to identify management rights as open. These factual findings are not disputed. The ALJ did not “discredit” the Union’s *undisputed understanding* that the MOA only implemented specific economic items and did not implement other unspecified “tentative agreements.” [ALJD 4:4-5] [ALJD 4:36-40]

⁵ Rather, “Contract Language” refers to unidentified and unimplemented “tentative agreements” (as they are referred to in the Settlement Agreement) that were “agreed upon to date” and/or other “open items” that were still “to be resolved by the parties during final drafting.”

Likewise, the ALJ did not “credit” Ploscowe’s understanding to the contrary. Indeed, the ALJ did not identify or “credit” any discussion between the parties which would suggest a meeting of the minds one way or the other.

IV. RESPONDENT FAILS TO FURTHER ITS DEFENSE BY EMPHASIZING THE IRRELEVANT AND UNDISPUTED FACT THAT GOLDBLATT DID NOT DESCRIBE MANAGEMENT RIGHTS AS AN “OPEN ITEM” IN MAY, 2007

Respondent spends significant ink regurgitating the uncontested fact that, in May, 2007, Goldblatt did not identify management rights as an “open item.” [R. Answering Brf. p. 23] In light of Respondent’s attempt to elevate this irrelevant fact to a finding that is dispositive of the case, the term “open item” should be clarified. DeAngelis testified that, in addition to provisions that were still in dispute, a tentative agreement can be considered “open” because it has not been implemented and can still be renegotiated. [Tr. 471] From this perspective, management rights was still “open” even though Sabatella tentatively agreed to it.⁶ Throughout his testimony, Ploscowe used the term “open item” as a reference to provisions that had not been agreed upon. [Tr. 1023, 1082] From this perspective, management rights was “closed” when Sabatella tentatively agreed to it. But in either case, whether management rights was considered “open” or “closed, it is still undisputed and irrelevant that Sabatella tentatively agreed to it in August, 2006. [R. Answering Brf. p. 5 fn. 6] The dispositive question is whether a tentative agreement on management rights was clearly and unmistakably implemented by the MOA. Clearly, it was not.

⁶ DeAngelis noted that Sabatella’s counter-proposal included an underlined qualification that “the the Union reserves the right to add to, delete from or otherwise amend and modify these proposals.” [GCX 6] [Tr. 250]. See *Holmes Typography, Inc.*, 218 NLRB at 524-525 (party that reserved right to modify or delete proposals were not bound and could lawfully modify tentative agreements).

V. **RESPONDENT'S DISCUSSION OF ITS POST-MOA MODIFICATION OF PRE-MOA TENTATIVE AGREEMENTS IS ENTIRELY CONSISTENT WITH THE GENERAL COUNSEL'S THEORY OF THE CASE**

Respondent's discussion of its post-MOA modification of pre-MOA tentative agreements, under a so-called "reservation of right," is a remarkably desperate attempt to explain away uncontested evidence with logic that is actually incriminating. [R. Answering Brf. p. 24-25] Respondent concedes that, in his March 13, 2007, Ploscowe sought to modify several tentative agreements which were reached by the parties prior to the signing of the MOA. [R. Answering Brf. p. 24] [Tr. 1023, 1082] Respondent states that Ploscowe did so "under a reservation of right." [R. Answering Brf. p. 24] Although the parties never discussed any "reservation of right" in advance of Ploscowe's March 13, 2007 proposal, the general proposition is correct.⁷ Both parties understood that unspecified tentative agreements (including management rights) were not finalized or implemented by the MOA, and that they had a "right" to withdraw, modify and renegotiate such tentative agreements in subsequent negotiations. We know this because both parties did so. [GC. Exceptions Brf. p. 7-9, 21-23] We also know this because both parties signed a Settlement Agreement to that effect.

VI. **RESPONDENT'S DISCUSSION OF THE SETTLEMENT AGREEMENT IS FRIVOLOUS**

Respondent saves its most frivolous assertions for a discussion of the Settlement Agreement. First, Respondent notes that a settlement agreement does not constitute a "finding or admission that respondent has committed an unfair labor practice," particularly as

⁷ Likewise, the parties never discussed the meaning of "Contract Language" (as it is used in the MOA) or when such "Contract Language" was intended to be implemented. However, the plain language of the paragraph, along with the Settlement Agreement and the parties' post-MOA proposals, reflect that "Contract Language" was not to be finalized or implemented until the parties reached agreement on all final "Contract Language."

here where the Settlement Agreement includes a non-admissions clause. [R. Answering Brf. p. 25-26] The Union would agree since the Union was the respondent in case 22-CB-10448.

However, the Settlement Agreement clearly reflects a factual admission as to the status of certain provisions (including management rights) and an agreement as to the parties' obligation with regard to those provisions in future negotiations. The parties resolved in the Settlement Agreement that management rights is and "will" continue to be a conditional "tentative agreement." This is no less an admission as to the status of the management rights provision than one made in any other context. By Respondent's reasoning, if labor counsel had written a letter to the Union which admitted and agreed that management rights is and will continue to be a "tentative agreement," that admission would be admissible and dispositive. However, if Respondent's counsel admits the same in a Board settlement agreement, the statement has no evidentiary value and must be ignored. The contention is without merit.⁸

Likewise, Respondent's tortured attempt to disappear this admission and the word "tentative" from the plain language of the Settlement Agreement is profoundly contrived. In the Settlement Agreement, long after the MOA was signed, the parties clearly and repeatedly stated that a pre-MOA agreement on management rights is and will continued to be a "tentative agreement." The Union "will" reinstate "tentative agreements," including management's right to subcontract, and "will not" unlawfully withdraw from such "tentative agreements." Nevertheless, Respondent asserts that such "tentative agreements" are not

⁸ See *In re Landmark Land Co. of Carolina, Inc.*, 76 F.3d 553, 565 (4th Cir. 1996); *Vulcan Hart Corp. v. N.L.R.B.*, 718 F.2d 269, 277 (8th Cir. 1983); *In re Fosamax Products Liability Litigation*, 2011 WL 40000907 (Aug. 30, 2011); *In re A&W Publishers, Inc.*, 39 B.R. 666, 668 (1984).

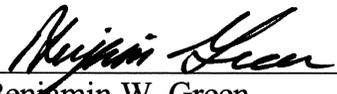
actually “tentative” and would not continue to be “tentative,” even though the Settlement Agreement says so thrice. Rather, according to Respondent, these “tentative agreements” actually ceased to be “tentative” two years earlier and were not “tentative” when Respondent categorically admitted as much two years later. Clearly, Respondent’s contention is a blatant misinterpretation of the plain language of the Settlement Agreement and painfully frivolous.

If Respondent actually believed that management rights was implemented by the MOA and not a conditional unimplemented “tentative agreement,” Respondent’s counsel should not have signed a Settlement Agreement which repeatedly said so. Of course, Respondent was not under any such misconception. Like the Union, Respondent understood management rights to be an unimplemented “tentative agreement” which was still conditioned upon the completion of all final “Contract Language.” [Tr. 60-61, 1654]

VII. CONCLUSION

Based upon the foregoing and the General Counsel’s brief in support of exceptions, 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 17th day of December, 2012.



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