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 REPLY BRIEF TO THE GENERAL COUNSEL'S ANSWERING BRIEF

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Pursuant to Section 102.46(h) of the National Labor Relation Board ("Board" or "NLRB")'s Rules and Regulations, Galaxy Towers Condominium Association submits this Reply brief in response to the Acting General Counsel ("GC")'s answering brief. To the extent not discussed below, Galaxy Towers Condominium Association ("GTCA" or "Respondent") relies on arguments asserted in its brief in support of cross-exceptions.[1] *See* Respondent Galaxy Towers Condominium Association's Brief in Support of its Cross-Exceptions to the Administrative Law Judge's Decision ("GTCA's Brief in Support of Cross-Exceptions").[2]

I. SUMMARY OF REPLY ARGUMENT

The GC attempts to bolster several inaccurate conclusions drawn by the ALJ by asserting that the Union not only did not acquiesce in GTCA's decision to subcontract, but also purportedly bargained in good faith. The record, however, supports neither contention, and the GC's attempts to minimize or dismiss the contrary, persuasive record evidence should be disregarded. Additionally, the GC's answering brief conflates several matters of law, citing inapplicable cases, as discussed below.

The GC also attempts to deflect attention from the ALJ's clear factual error in finding the parties had not reached impasse, rather than properly viewing such evidence through the context of the entire course of bargaining and the Union's intransigent opposition to subcontracting. The GC does not refute the numerous facts cited by GTCA which establish the Union cancelled meetings (Tr. 1335), engaged in regressive positions (Tr. Tr. 1266-67), and failed to make a

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[1] Similarly, GTCA does not repeat its disagreement with the GC's summary of facts, as further outlined in its answering brief to the GC's exceptions. *See* 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 ("GTCA's Answering Brief").

[2] References to the ALJ's decision will appear as "ALJD" and references to the hearing transcript will appear as "Tr. __". References to exhibits introduced at the hearing will appear as "GC Ex. __" for the Acting General Counsel Exhibits or "R. Ex. __" for Respondent Exhibits. References to the Acting General Counsel's Answering Brief will appear as "GC Brief." References to GTCA's Brief in Support of Cross-Exceptions will be cited as "GTCA Br."

single, concrete proposal on this critical issue (Tr. 818, 1214, 1330, 1339-40). The GC attempts to side-step these undisputed facts in his answering brief by asserting a fictitious characterization of events in which GTCA attempted to railroad the Union into a decision. The record, however, clearly conflicts with such a description, and the ALJ's conclusion that impasse was declared prematurely cannot stand. Accordingly, for the reasons set forth herein and in GTCA's Brief in Support of its Cross-Exceptions, the ALJ's conclusion that GTCA violated Sections 8(a)(1) or 8(a)(5) should be overturned.

II. ARGUMENT[3]

A. The GC Fails To Rebut The Contention That The ALJ Erred By Finding The Union Did Not Acquiesce In The Decision To Subcontract Bargaining Unit Work in 2011.

The GC argues the Union merely went along with (rather than acquiesced in) GTCA's request to discuss effects bargaining issues and that Respondent "manufactured" an agreement on the decision to subcontract. Initially, the GC contends, mistakenly, that the Union would have to demonstrate a clear and unmistakable intention to agree to this decision. (GC Br, at 27 n. 20, 28 (citing *Rose Fence Inc.*, 359 NLRB 1, 7 (2012)). This argument, however, misconstrues the relevant legal standard by applying the standard for a contractual waiver to a single instance of acquiescence. Just as an instance of acquiescing in a single unilateral change cannot establish a contractual waiver moving forward, *see Owens-Corning Fiberglas*, 282 NLRB 609 (1987) ("A union's acquiescence in previous unilateral changes does not operate as a waiver of its right to bargain over such changes for all time"); the legal tests to ascertain waiver and acquiescence are distinct and separate. It is well-settled, for example, that a union may acquiesce in a unilateral

[3] Several of GTCA's arguments remain unopposed. Because the GC did not, and cannot, challenge those contentions, the Board should grant GTCA's cross-exceptions on the basis of arguments made in its brief in support thereof. (*See, e.g.*, GTCA's Brief in Support of Cross-Exceptions, at § III.A.3; III.C; and III.A.1 n. 21).

change by failing to request bargaining or even simply by protesting the change without further effort to negotiate a resolution. *See generally AT&T Corp.*, 337 NLRB 689, 692 (2002) (noting union may abandon its right to bargain by failing to bargain continuously); *Am. Buslines, Inc.*, 164 NLRB 1055 (1967) (holding employer's unilateral change was lawful where Union's reaction to proposal "was merely to protest the proposal in a letter by characterizing it as an invasion of its statutory rights").

The GC's argument is further flawed on a factual basis. The GC ignores the Union's repeated assertions that they could not approach the labor cost savings that GTCA would realize through subcontracting, (Tr. 742, 744), and attempts to minimize the Union's related focus solely on effects bargaining. (*See, e.g.*, Tr. 105-06, 402, 802, 1307-08, 1311; R Ex. 48). The GC's contention that GTCA somehow cajoled the Union into bargaining over effects is simply not supported by the record. Moreover, when GTCA insisted that the Union make a proposal on the decision to subcontract, it was the Union who initiated discussions about how the subcontracting and subsequent hiring process would occur. (Tr. 1175).[4] There no evidence to support the GC's contention that the Union "may or may not have been able to match Respondent's savings[.]" (GC Br. at 20). The Union repeatedly admitted it could not. Through these actions, in addition to its consent to the Board of Directors vote on June 9, 2011, the Union demonstrated that it acquiesced to the subcontracting decision.[5]

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[4] The GC's further attempt to characterize effects bargaining as an altruistic effort to go above and beyond its bargaining obligation, (GC Br., at 15, n. 13, 27), strains a common sense view of these facts. It is, instead, commonplace for parties to negotiate issues such as severance without assurances that employees will be retained. Indeed, termination of employment is within the very definition of a separation payment. *See* Black's Law Dictionary (9th ed. 2009) (defining "severance pay" as "[m]oney (apart from back wages or salary) paid by an employer to a dismissed employee") (emphasis added).

[5] Moreover, such undisputed evidence contradicts the GC's claim GTCA enforced an "arbitrary self-imposed time table." (GC Br., at 12).

B. The GC Cannot Show The Union Engaged In Good Faith Bargaining Over The Issue Of Subcontracting.

GTCA argued in the alternative that the parties had reached impasse on the decision to subcontract,[6] an argument supported by the Union's public façade and opposition it maintained for political reasons, in contrast to the admissions it made in private meetings with GTCA's representatives.[7]

The GC further conflates an impasse over the decision to subcontract with an effort to bargain to impasse over a contractual waiver. Nowhere in its Brief in Support of Cross-Exceptions did GTCA argue that the parties had bargained to impasse over a contractual waiver. Instead, it is Respondent's position – ratified by the ALJ – that the parties expressly agreed to such a waiver through the MOA and Interim Agreement,[8] but that the parties nonetheless reached impasse over the subcontracting decision in 2011. Accordingly, the authority cited by the GC, such as *McClatchy Newspapers, Inc.*, 321 NLRB 1386 (1996), is wholly inapposite, as GTCA is not asserting the parties reached impasse over a new management rights clause. Instead, authority, such as *Air-Ways Cab* should apply, in which the Board affirmed an ALJ's

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[6] The GC mistakenly attempts to disqualify arguments on the basis that they somehow conflict (*see, e.g.*, GC Br., at 1 n.2, 25), despite the fact that it is axiomatic that a party may assert arguments in the alternative. *See, e.g.*, Fed. R. Civ. P. 8(d)(2-3).

[7] Equally feeble is the GC's effort to claim counsel has somehow "misrepresented" evidence of record. (GC Brief, at 1 n.1; 9; 24). Not only do the documents and transcripts speak for themselves, but the evidence fully and comprehensively supports GTCA's position. In R. Ex. 31, for example, Union representative James Bernardone wrote, "Please let those currently making decisions know that you oppose outsourcing and its risks! Lets [sic] avoid the lawsuits that will surely follow at any attempt to remove workers on a wholesale basis." (*Id.* at 2.). The GC's contention that this text does not express a complete opposition to subcontracting strains the plain meaning of the letter. *See generally Am. Buslines*, 164 NLRB 1055, 1056 (1967) (noting the "[u]nion failed to prosecute its right to engage in [bargaining] but contented itself by protesting the contemplated promotions in its letter dated February 10 and by subsequently filing a refusal-to-bargain charge"). Accordingly, GTCA maintains that the Union publicly expressed its opposition to subcontracting.

[8] As discussed below and contrary to the GC's contention, Respondent has never argued that the Interim Agreement was void. (GC Br., at 6 n. 10, 31).

determination that the parties reached impasse over the issue of switching to independent contractors, explaining:

> Throughout negotiations, the Companies maintained their position that the cabs were to be driven by independent contractors under lease agreements; whereas the Union persistently maintained that the cabs should continue to be driven by statutory employees. At the fourth bargaining session, the Union was still adhering to the proposals it had advanced before negotiations began, which proposals assumed that drivers would be statutory employees; and even after the Companies had announced their intention of actually changing to lease operations, the Union modified its prior position by proposing a change in the size of the drivers' commission rather than ever tendering a proposal which called for even a partial or eventual lease operation. I conclude that the parties had reached an impasse about the Companies' proposal to change to a lease operation. *Thomas Sheet Metal Co.*, 268 NLRB 1189 (1984).

Teamsters Local 688 (Air-Ways Cab), 277 NLRB 1518, 1526-27 (1986) (holding absent bad faith bargaining, a "party is entitled to claim an impasse at the point where he is warranted in assuming that further bargaining would be futile").

As in *Air-Ways Cab*, the Union's publically-stated opposition and wholesale failure to engage in bargaining over the decision to subcontract rendered negotiation of an agreement impossible and left the parties at an intractable impasse over GTCA's decision to subcontract. *See Michigan Transp. Co, Inc.*, 273 NLRB 1418, 1420 (1985) (dismissing Section 8(a)(5) allegations where employer outsourced unit work after impossibility of reaching concessionary deal because union had no counterproposal). Contrary to the GC's characterization of the process (GC. Br., at 2), GTCA repeatedly sought, over a period of more than 3 months, to induce the Union to bargain meaningfully on the subcontracting issue. (*See, e.g.*, Tr. 1284-85, 1304-05, 1318-19; R Ex. 45). The GC's contention that such a time frame "artificially rush[ed] the entire process," (GC Br., at 22), or somehow bypassed negotiations is specious, particularly in light of GTCA's offer to give the Union additional time in June of 2011. (Tr. 1319). In response, the

Union not only failed to make a *substantive* proposal, but it also thwarted discussion of this issue by canceling meetings (Tr. 657-58, 1335); being generally unavailable to meet (Tr. 1286, 1335); making only vague and hypothetical proposals (Tr. 818, 1214, 1330, 1339-40) (including proposals that would *increase* costs to GTCA) (Tr. 1305), and engaging in explosive, unprofessional behavior during bargaining sessions (Tr. 1183-84, 1215, 1336). As of May, 2011, the Union advised negotiations were simply "not going anywhere," (GC Ex. 59, 5/9/11, at 1). In sum, the facts show that the Union made every effort to avoid bargaining over GTCA's contemplated subcontracting.[9]

As explained in GTCA's Brief in Support of its Cross-Exceptions, the Union's request for information, set against this backdrop, was nothing more than another sham bargaining tactic.[10] The Union had all the information it needed to create a counterproposal, but, instead, never proffered any concrete suggestion whatsoever. Moreover, the GC mischaracterizes the ALJ's decision regarding the subcontracting bids. (GC Br. at 10, 20). The ALJ did not make a credibility finding with respect to confidentiality but, instead, mistakenly found that there was no evidence whatsoever that the bids were confidential. (ALJD at 15, l. 18). Because there is competent testimony of record (Tr. 750, 832-34), the ALJ should have made a credibility finding in order to disregard that evidence.

Moreover, contrary to the GC's argument, Respondent has accurately and consistently represented the facts of record. As explained in its Brief in Support of Cross-Exceptions, GTCA did not continue to insist on withdrawal of the health fund litigation as a condition of bargaining.

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[9] Accordingly, there is no record support for the GC's contention that the Union was "extremely flexible in attempting to reach a viable agreement" or made a "herculean effort to reach some sort of agreement[.]" (GC. Br., at 23, 25).

[10] Nor does the GC address GTCA's contention that no obligation to produce the information existed in light of the ALJ's finding that the Union had waived its right to bargain over such a decision.

In a patent attempt to bolster an otherwise weak argument with unsupported accusations, the GC accuses counsel of "a flagrant misrepresentation of undisputed fact" in this regard. (GC Br., at 8). To the contrary, however, competent evidence of record established that GTCA raised this issue once and then never again raised it thereafter. As Kingman testified on April 19, 2012,

> Q: Okay. And did the settlement of that lawsuit relate in any way to the parties' bargaining in the spring and summer of 2011?
>
> A: No. At the March 16 meeting Mr. Bernardone made it clear that he wasn't going to address the welfare fund suit, as part of the bargaining. He wasn't going to address it. So that we dropped it and never raised it -- never discussed it again in negotiations.

(Tr. 1279). The GC, instead, cites to a portion of the transcript in which Kingman admits the parties never formally struck the language from the contract proposal. There had, however, clearly been a meeting of the minds that withdrawal of this litigation would not be a condition of the contract. Moreover, there is nothing unlawful about GTCA's attempt to confirm that any new contract agreement and management rights language would settle the parties' dispute underlying the threat to litigate the related subcontracting decision. (Tr. 1282-83). Accordingly, the case cited by the GC, in which the employer refused to set any future bargaining dates unless the Union withdrew all pending ULPs and discontinued related threats, is inapposite to discussions regarding the ultimate settlement of the parties' disagreements over contractual language and any related litigation. *See Caribe Staple Co., Inc. & Suarez*, 313 NLRB 877, 890 (1994).

C. The GC Fails to Rebut the Permissive Nature of Midterm Bargaining

As the GC acknowledges, "the parties contemplated a suspension of negotiations for a successor contract in 2009[.]" (GC Br., at 32). Such suspension excused GTCA from bargaining obligations traditionally imposed following an extension. Contrary to the GC's contention, however, (GC Br., at 6 n. 10, 31), GTCA has never argued that the Interim

Agreement was void. Although Respondent took the position that the Union violated the terms of the Agreement, such breach does not render the agreement ineffective. To the contrary, the continuing validity of the Interim Agreement has been wholly uncontested throughout the litigation, (*see, e.g.*, GC Brief In Support of Exceptions, at 12), and surely would have been raised previously if the GC truly believed it to be a valid defense to any waiver of subcontracting obligations. The GC should not be permitted to challenge this uncontested and established fact at this late date.[11]

III. CONCLUSION

For the foregoing reasons, the Company respectfully urges the Board to find merit to its Cross-Exceptions to the Administrative Law Judge's decision, and to dismiss the Complaint in its entirety.

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Respectfully submitted,

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[11] Further, while claiming GTCA refused to bargain for a new contract involving the IUS employees, the GC offers no evidence to support GTCA's purported refusal to bargain following the 2011 subcontracting decision. As shown by the record and ignored by the ALJ, GTCA proposed to bargain over the IUS employees, and there have been no unilateral changes affecting those employees. (Tr. 1198).