

**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 AND MOTION TO STRIKE THE
INACCURATE AND PROCEDURALLY IMPROPER MOTION THAT
RESPONDENT FILED, WITHOUT "SPECIAL PERMISSION,"
ON DECEMBER 31, 2012**

Submitted by:

**Benjamin W. Green
Counsel for the General Counsel
National Labor Relations Board
Region 22
20 Washington Place – 5th Floor
Newark, NJ 07102
Benjamin.Green@nlrb.gov
(973) 645-6453**

The General Counsel hereby replies and moves to strike the inaccurate and procedurally improper Motion (the “Motion”) that Respondent filed with the National Labor Relations Board (the “Board”) on December 31, 2012. Respondent did not seek and does not have “special permission” to file the Motion and supporting brief as is required under Section 102.46(h) of the Board’s Rules and Regulations. The Motion misrepresents that the Union took inconsistent positions in the instant case and a separate case before United States District Judge William J. Martini in the matter of *Galaxy Towers Condominium Association v. Local 124 I.U.J.A.T.*, 2:11-cv-04726 (WJM). The Motion requests that the Board take judicial notice of Judge Martini’s November 28, 2012 opinion in that matter. Respondent’s Motion is in flagrant disregard of the Board’s Rules and Regulations, Section 102.46, as it pertains to the briefing of a case upon exception and cross-exceptions. Accordingly, the Motion must be denied and struck in its entirety.

During the instant unfair labor practice (“ULP”) trial, the parties litigated the position that the Union took in the matter before Judge Martini in *Galaxy Towers Condominium Association v. Local 124 I.U.J.A.T.*, 2:11-cv-04726 (WJM). The affidavit of Union Executive Secretary-Treasurer James Bernadone (“Bernadone’s Affidavit”), upon which the Union relied in the District Court case, was entered into evidence. [RX 29]¹ At the ULP hearing, Respondent called Bernadone as a witness and questioned him regarding that affidavit. Respondent was free to enter upon the administrative record any additional

¹ References to the ULP record are cited herein as follows: Transcript [Tr.], General Counsel exhibits [GCX], and Respondent exhibits [RX].

evidence (such as briefs, transcripts, and exhibits) regarding the position that the Union took in connection with the District Court case.² Respondent did not do so.

Upon the conclusion of the ULP trial, the General Counsel prepared a post-hearing brief to the Administrative Law Judge (“ALJ”) which discussed Bernadone’s Affidavit and the position that the Union took in connection with the District Court case. The General Counsel’s Post-Hearing Brief to the ALJ is attached hereto as Exhibit B.³ [GC PHB pp. 20-21, 49] Conversely, in its post-hearing brief, Respondent did not rely upon Bernadone’s Affidavit for the proposition that, with regard to the parties’ contractual relationship, the Union had taken conflicting positions in the instant matter and the District Court case. Respondent’s Post-Hearing Brief to the ALJ is attached hereto as Exhibit C.

In fact, the Union has been entirely consistent in this regard. The Union has taken the position that the parties agreed to immediately implement specific terms in an Interim Agreement that they signed at the start of negotiations on August 8, 2006 (“2006 Interim Agreement”). [Tr. 36-37] [GCX 4] These terms included a grievance/arbitration provision from the Union’s initial proposal. [GCX 3, 4] The Union has taken the position that the parties agreed to immediately implement other economic terms (wages, medical benefits, paid-time off) that were specifically identified and described in a Memorandum of Agreement (the “MOA”) that the Union signed on January 2, 2007. [GCX 11] Additional

² The parties had submitted all briefs and evidence to Judge Martini before the ULP trial opened on January 12, 2012. See paragraph 7 of the declaration of Union attorney Steven H. Kern, which is attached hereto as Exhibit A.

³ References to the General Counsel’s Post-Hearing Brief to the ALJ are cited herein as [GC PHB p.].

terms, such as management rights, were the subject of unimplemented tentative agreements that were still conditioned upon the conclusion of a full and final contract.

The grievance/arbitration provision that the parties implemented by the 2006 Interim Agreement did not specify the names of the arbitrators to be used (which were left blank). [GCX 3 p. 13-14 Art. 14 § 4] [GCX 4] The arbitrators, including Eugene Coughlin, were subsequently agreed upon and used as a matter of practice. [Tr. 547-48, 1150-52, 1615-17] *The grievance/arbitration provision was not, as Respondent claims, implemented by the MOA.* Indeed, Judge Martini made no finding to the contrary in his decision.

The individual agreement on this single provision (grievance/arbitration) was reflected in Article 15 of a draft contract proposal that Respondent presented to the Union on March 13, 2007 (the only writing which accurately reflected the parties' interim agreement, with the names of the arbitrators, on the grievance/arbitration provision). [GCX 12 p. 18 Art. 15 § 4] Accordingly, Article 15 of the March 13, 2007 proposal (without the remainder of that proposal) was relied upon by the Union and attached to Bernadone's Affidavit in the District Court case as evidence that the parties had agreed to use Coughlin as an arbitrator. [Tr. 1615-17] Bernadone's Affidavit contains no indication that the parties intended to implement other contractual provisions, such as management rights, which were not referenced in the 2006 Interim Agreement or the MOA. [GC PHB pp. 20-21, 49]

Respondent did not make any argument to the contrary in its post-hearing brief to the ALJ and the ALJ did not make any reference to Bernadone's Affidavit or the District Court case in his decision. Respondent did not take exception to the ALJ's failure to make any such reference or rely on the same. Respondent made no reference to Bernadone's Affidavit or the District Court case in its Answer to the General Counsel's exceptions with regard to

the proper interpretation of the MOA. Respondent does not purport to file the Motion as a “reply” to any argument or assertion of fact that the General Counsel has made in connection with its exceptions or Respondent’s cross-exceptions. Respondent has not sought “special permission,” as required by Section 102.46(h) the Board’s Rules and Regulations, to file a brief in support of an eleventh-hour defense that it did not previously assert.⁴ In this regard, Respondent’s Motion is absurdly improper, and that Motion must be rejected and struck in its entirety.

Respectfully submitted this 3rd day of January, 2012.



Benjamin W. Green
Counsel for the General Counsel
National Labor Relations Board
Region 22
20 Washington Place
Newark, New Jersey 07102
Benjamin.Green@nlrb.gov
(973) 645-6453

⁴ In the process, Respondent attempts to rely upon an opinion by Judge Martini instead of documents that would actually reflect the Union’s position in the District Court case (e.g., briefs, affidavits, transcripts, exhibits, etc). Of course, neither the Judge’s opinion nor any other evidence suggests that the Union has taken an inconsistent position or that Respondent’s management rights proposal was implemented by the MOA. Typical of Respondent’s conduct in this case and throughout negotiations with the Union, Respondent would prefer to misrepresent the Union’s position and the content of documents instead of addressing the Union’s actual position and the actual evidence.