

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 13**

**RITZ-CARLTON WATER TOWER
PARTNERSHIP**

and

CASE 13-CB-19622

UNITE HERE LOCAL 1

**GENERAL COUNSEL'S OPPOSITION TO
RESPONDENT'S MOTION FOR SUMMARY JUDGMENT**

Now comes Kevin McCormick, Counsel for the General Counsel, who files this Opposition to Respondent's Motion for Summary Judgment. Counsel for the General Counsel hereby opposes Respondent's Motion for the reasons set forth below and respectfully requests that the Motion be denied.

In essence, Respondent is attempting to sidestep its bargaining responsibilities by insisting that this case be deferred to arbitration. First, Respondent asserts that there are no disputed questions of fact that warrant a hearing and so summary judgment is appropriate. Respondent asserts that the sole issue in this case involves the interpretation of the September 2009 Memorandum of Agreement ("the MOA") between UNITE HERE Local 1 ("Respondent") and the Ritz-Carlton Chicago ("the Charging Party"). As a result, Respondent contends that the unfair labor practice charge should be deferred to arbitration, and that Board law contains no prohibition against deferral of a charge that contains a refusal to bargain allegation.

With regard to Respondent's first claim, this case contains issues of fact that must be determined before an administrative law judge. Summary judgment is only appropriate only

when there is genuine issue of material fact. *APS Events, LLC*, 355 NLRB No. 152 (2010). In the MOA which the parties executed on September 17, 2009, Paragraph III states that the MOA “shall apply to all existing side letters between the Employer and Union that were **not** raised during the parties’ September 1, 2009 meeting. Specifically, the parties agree to continue their negotiations in good faith regarding the specific side letter and operations issues unique or pertaining to the Employer **that were raised during the parties’ September 1, 2009 meeting** notwithstanding the execution of this Memorandum of Agreement.” (emphasis in bold added)

The evidence will show during the trial as presented by the Counsel for the General Counsel, on September 1, 2009, the parties met face to face for bargaining. During the meeting, the Charging Party brought up nine specific issues it had with the current agreement and how they were actually practiced at the Charging Party’s hotel. Several of these topics are listed in the Complaint in paragraph VI(a). The Charging Party distributed to the other representatives a chart that laid out the nine issues it wanted to discuss. The Charging Party made it clear at this meeting to the Respondent that it wished to continue to discuss these issues at future meetings. As will be shown by the evidence, the Respondent’s representative Henry Tamarin asked questions about what the current practice was at the hotel and how it differed from the collective bargaining agreement, and, most importantly, that he was more than willing to continue the discussions on **each and every one** of the issues the Charging Party mentioned on an ongoing basis.

The evidence will also show that the parties continued to discuss these issues at another bargaining session later in September, 2009. In fact, one of the Respondent’s representatives had questions on the proposals and made both verbal and written information requests regarding these nine items.

In a complete about-face, the Respondent stated to the Charging Party that it did not have to bargain over the nine subjects they had been previously discussing. As the Respondent's own letter demonstrates in its Motion for Summary Judgment, Exhibit C, the Respondent denied that it had agreed to bargain about **all** of the matters mentioned at the September 1, 2009 meeting and instead, would now only bargain on certain matters that were raised. As the letter states, "The Union does not agree with the Ritz-Carlton's position that all nine of the issues it wants to negotiate now are ones the Union agreed to bargain about with the Ritz-Carlton apart from the Sheraton Chicago negotiations." Respondent's Exhibit C. The Respondent changed its bargaining stature from first agreeing unconditionally to discuss the nine items from the September 1, 2009th meeting to instead only bargaining over certain items that met its "unique or pertaining to" test.

Clearly, the evidence listed above demonstrates that there are genuine issues of material fact. Even though the Respondent denies in its Answer that since October 21, 2010, it has refused to bargain over the nine subjects listed in the Complaint, Respondent's November 23, 2010, letter states otherwise. A hearing before an administrative law judge is obviously needed to decide upon these genuine issues of material fact. Accordingly, summary judgment is not appropriate. *APS Events*, supra.

Next, the Respondent insists that the unfair labor practice should be deferred to arbitration. This, as noted above, is nothing more than an attempt by the Respondent to circumvent its bargaining responsibilities under the Act. Respondent cites *United Technologies Corp.*, 268 NLRB 557 (1984), for the principle that the parties to a collective-bargaining agreement are in the best position to resolve disputes concerning the interpretation of their contract. However, this principle assumes that a **complete** collective-bargaining agreement, with

all of its terms, is actually in place. As explained above, a complete agreement has not been reached in this case, and the central issue is whether a meeting of the minds occurred such that the existence of a complete contract is indisputable. “Deferral is inappropriate when the existence of a contract is the nature of the dispute. The question presented is not one of contract interpretation, but of statutory obligation.” *General Longshore Workers, International Longshoremen’s Association, AFL-CIO, Local Union No. 3033*, 286 NLRB 798, 807 (1987).

The Respondent goes on to base its argument on criteria announced in *Textron*, 310 NLRB 1209 (1993).¹ Besides ignoring the fact that a complete contract does not exist here, Respondent completely glosses over the fourth factor announced in *Textron*, supra. *Textron* requires that the employer assert its willingness to utilize arbitration to resolve the dispute. *Id.* at 1210. In the instant case, not only has the employer Charging Party not asserted its willingness to utilize the arbitration clause to resolve the dispute, the collective-bargaining agreement doesn’t allow it to invoke the grievance procedure. This fact is another fatal flaw in Respondent’s argument. In *Local No. 6-0682, Paper, Allied-Industrial Chemical and Energy Workers International Union, AFL-CIO-CLC*, 339 NLRB 291, the Board agreed with the administrative law judge that the respondent union violated 8(b)(3) when it failed and refused to bargain in good faith. The Board agreed with the judge that deferral was inappropriate because the charging party Checker Motors had no ability to invoke the grievance procedure to resolve the dispute. *Id.* (rejecting the union’s reliance on *Tri-Pak Machinery, Inc.*, 325 NLRB 671 (1998)). The plain language of Section 46 (a) of the disputed collective-bargaining agreement here states, “Any employee or one of a group of employees, any Shop Steward, or any Local

¹ Those criteria are: (1) the dispute arose within the confines of a long and productive collective bargaining relationship; (2) there is no claim of employer animosity to the employees’ exercise of protected right; (3) the parties’ contract provided for arbitration in a very broad range of disputes; the arbitration clause clearly

Union having a grievance shall, within not more than seven (7) calendar days after the occurrence of the event resulting in the grievance, discuss the matter with the immediate supervisor or department head of the Employer, who will attempt to adjust it within seven (7) calendar days from the date received.” Respondent’s Exhibit A, page 32. Nowhere in the language does it give the Charging Party employer here the right to invoke the grievance procedure. Hence, Respondent’s argument for deferral also fails for these reasons.

Additionally, Respondent’s argument for deferral fails because this dispute is not “eminently well suited to such resolution.” *Textron*, supra at 1210. Even assuming that a complete contract with all of its terms exists, an arbitrator lacks the ability to interpret and enforce Board law. Only an administrative law judge can apply the necessary case law precedent and make an order and recommendation to the Board concerning whether Respondent violated Section 8(b)(3) of the Act.

For the forgoing reasons, Counsel for the General Counsel respectfully request that Respondent’s Motion be DENIED.

DATED at Chicago, Illinois this 16th day of June, 2011.


Kevin McCormick
Counsel for the General Counsel
National Labor Relations Board
Region 13
209 S. LaSalle Street – Suite 900
Chicago, Illinois 60604
ph: 312.353.7594
fax: 312.886.1341

encompasses the dispute at issue; (4) the employer has asserted its willingness to utilize arbitration to resolve the dispute; and (5) the dispute is eminently well suited to such resolution. *Textron*, supra at 1210.

13-CB-19622 CERTIFICATE OF SERVICE

The undersigned Counsel for the General Counsel Opposition To Respondent's Motion For Summary Judgment hereby certifies that the foregoing General Counsels' has been served this 16th day of June 2011, on the following parties in the manner indicated below.

**CERTIFIED MAIL
RETURN RECEIPT**

**Ms. Karen Kent
Executive Vice President
UNITE HERE Local 1
55 W VanBuren St
Chicago, IL 60605**

**Mr. Wesley G Kennedy, Esq.
Allison, Slutsky & Kennedy, P.C.
230 West Monroe Street
Suite 2600
Chicago, IL 60606**

**Ms. Cecelia Moore
Director of Human Resources
Ritz Carlton Hotel
160 East Pearson Street
Chicago, IL 60611**

**Mr. Thomas J. Posey, Esq.
Franczek Radelet P.C.
300 S. Wacker Drive
Suite 3400
Chicago, IL 60606-6708**

Davis, Cowell & Bowe LLP
595 Market Street, Suite 1400
San Francisco, CA 94105
Attn: Kristen Martin

McCracken, Stemerma & Holsberry
1630 S. Commerce St., Suite A-1
Las Vegas, NV 89102
Attn: Richard G. McCracken, Esq.

REGULAR FIRST CLASS MAIL

Lester A. Helzter, Executive Secretary
National Labor Relations Board
Office of Executive Secretary
1099 14th Street, N.W. Room 11602
Washington, D.C. 20005-3419



Kevin McCormick
Counsel for the General Counsel
National Labor Relations Board
Region 13
209 S. LaSalle Street – Suite 900
Chicago, Illinois 60604

RECEIVED

2011 JUN 21 AM 10: 54

HLRB
ORDER SECTION