



**United States Government**  
**NATIONAL LABOR RELATIONS BOARD**

Region 2  
26 Federal Plaza – Room 3614  
New York, New York 10278-0104  
Telephone: (212) 264-0300  
Facsimile: (212) 264-2450

Julie Y. Rivchin, Field Attorney  
Direct Tel: (212) 264-8271  
Email: Julie.Rivchin@nlrb.gov

July 13, 2011

Lester A. Heltzer  
Office of the Executive Secretary  
National Labor Relations Board  
1099 14th Street, N.W.  
Washington, DC 20570

Re: *Rogan Brothers Sanitation,*  
Case No. 2-CA-40028

Dear Mr. Heltzer:

Counsel for the Acting General Counsel (“General Counsel”) respectfully submits this request for leave to submit a reply to Respondent’s Opposition to the Acting General Counsel’s Motion to Strike Portions of Respondent’s Answer and Motion for Summary Judgment in the above-referenced case.

While General Counsel presented its arguments to the Board in its May 13, 2011 submission, Respondent’s Opposition raised certain additional issues and arguments to which General Counsel wishes to briefly respond.

In the event that General Counsel is granted leave to submit a reply, General Counsel’s Reply Memorandum of Law is attached hereto.

Very truly yours,

A handwritten signature in cursive script that reads "Julie Y. Rivchin".

Julie Y. Rivchin  
Counsel for the Acting General Counsel

cc: Michael J. Mauro, Esq. (Counsel for Respondent)  
Jane Lauer Barker, Esq. (Counsel for Charging Party)

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 2**

**ROGAN BROTHERS SANITATION, INC.  
Respondent**

**and**

**Case No. 2-CA-40028**

**INTERNATIONAL BROTHERHOOD OF  
TEAMSTERS LOCAL 813  
Charging Party**

**REPLY MEMORANDUM OF LAW IN SUPPORT OF THE ACTING GENERAL  
COUNSEL’S MOTION TO TRANSFER CASE TO THE BOARD,  
MOTION TO STRIKE PORTIONS OF RESPONDENT’S ANSWER,  
AND MOTION FOR SUMMARY JUDGMENT**

Counsel for the Acting General Counsel (the “General Counsel”) respectfully submits this reply memorandum of law in further support of its Motions to the National Labor Relations Board (the “Board”), and in response to Respondent’s Opposition to General Counsel’s Motion.<sup>1</sup>

**A. Respondent Does Not Dispute the Breach or Notice Thereof**

While Respondent sets forth a host of arguments in its Opposition, General Counsel notes first and foremost that in none of these arguments does Respondent dispute that it has breached the Settlement Agreement. The Default Provisions of the Settlement Agreement, which the Board should enforce as it has consistently done in prior cases<sup>2</sup>, provide that “[t]he only issues that may be raised in response to the Board’s Order to Show Cause are whether the Charged Party/Respondent defaulted upon the terms of this Settlement Agreement and/or if it received

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<sup>1</sup> References to General Counsel’s May 13 Motions are set forth as (GC Motion, p. \_\_), references to the exhibits thereto are set forth as (GC Motion, Ex. \_\_), and references to General Counsel’s Memorandum of Law in support of its Motions (attached as exhibit 16 to the Motion) are set forth as (GC Mem., p. \_\_). References to Respondent’s Opposition are set forth as (Resp. Opp., p. \_\_).

<sup>2</sup> See, e.g., Testa Constructions Company, Inc., 356 NLRB No. 31 (2010); Benchmark Mechanical, Inc., 348 NLRB 576 (2006); U-Bee, Ltd., 315 NLRB No. 92 (1994)

notice to cure said default.” (See GC Motion, Ex. 5). Respondent does not dispute that it defaulted on the terms of the Agreement and does not dispute that it received notice to cure the default. Because these are the sole issues that Respondent may raise in response to the Order to Show Cause, there are no disputed issues of fact requiring a hearing and, therefore, summary judgment is appropriate.

**B. Respondent’s Arguments are Without Merit**

Moreover, each of the arguments Respondent raises in its Opposition are without merit and fail to provide a defense to General Counsel’s Motion.

1. The Board’s Deferral Policies are Not Relevant to the Instant Motion

First, Respondent asserts that the Board should deny summary judgment and instead “defer to the arbitration process.” (Resp. Opp., p. 3). Regardless of whether Respondent is correct in its assertion that the “underlying [ ] unfair labor practice charges in this case are appropriate to defer to arbitration,”<sup>3</sup> this argument has no place in this summary judgment proceeding. Respondent’s invocation of the Board’s deferral policies is a defense concerning the merits of the underlying unfair labor practice charges. The Settlement Agreement, as discussed in Section A, supra, provides that in response to the Order to Show Cause, Respondent may only raise defenses concerning the alleged breach and notice to cure. In signing the Settlement Agreement, Respondent expressly waived its right to raise such defenses. Thus, because the issue of deferral concerns the underlying allegations, this argument is not properly raised here.<sup>4</sup>

Even if the underlying unfair labor practice charges could be arbitrated, as Respondent asserts, the instant dispute does not involve only those claims. Instead, the instant motion most

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<sup>3</sup> General Counsel does not concede that these claims are, in fact, appropriate to defer to arbitration. However, this factual question need not be decided in order to resolve, and dispose of, Respondent’s defense to the instant motion.

<sup>4</sup> For this same reason, certain of Respondent’s asserted defenses may be dismissed out of hand as they relate to the merits of the underlying unfair labor practice charges, not to the breach. (See, e.g., Resp. Opp., p. 12 (asserting that “the alleged terminations were in fact layoffs and not motivated by anti-union animus)).

directly concerns Respondent's breach of a settlement agreement executed between Respondent and the National Labor Relations Board, Region 2. In other words, the instant dispute is not one between Respondent and the charging party Union (with whom it has an arbitration agreement), but between Respondent and the General Counsel (with whom no such agreement exists).

For these reasons, Respondent's invocation of the Board's deferral policy fails to present a defense to General Counsel's motion and therefore, summary judgment should be granted for General Counsel.

2. There are No Disputed Facts Requiring Resolution

Respondent makes a number of unsupported assertions in its attempt to argue that the Settlement Agreement should not be enforced. Even construing the facts in the light most favorable to Respondent, these assertions fail to set forth any genuine dispute of material fact.

First, Respondent asserts that General Counsel made a "threat" and unlawfully "coerce[ed]" Respondent by informing General Manager Michael Vetrano that "if he did not sign the Settlement Agreement . . . , the NLRB would issue a complaint against Rogan and find that Rogan violated the law." (Resp. Opp., p. 8). Assuming this assertion is accurate, such a statement is simply a description of the Region's lawful process, and by no means can be construed as a coercive threat. (See Unfair Labor Practice Casehandling Manual, § 10126.2 ("[f]ollowing a Regional Office determination as to the merits of a case, the Board agent should pursue settlement before issuance of complaint")).

Next, there is no issue of fact as to whether Vetrano possessed apparent authority to sign the Settlement Agreement on behalf of Respondent. The arguments set forth in General Counsel's initial memorandum of law make this clear, and Respondent's opposition fails to assert any defenses setting forth a factual dispute. First, the facts set forth in the affidavits of

James Rogan and Michael Vetrano go only to the question of whether Vetrano had actual authority. Respondent fails to put forth any facts that would, if true, permit the Board to find that Vetrano did not possess apparent authority. Respondent does not dispute that Vetrano is, in fact, the General Manager of Respondent, and so informed the Region when he executed the Settlement Agreement. Respondent also does not assert that Vetrano or anyone else from the company made any representations to the Region which would cause a reasonable person to doubt that this high-level employee, acting within the scope of his employment, did not possess such authority. Respondent does not attempt to distinguish Board law requiring the conclusion, based on these facts, that Vetrano possessed apparent authority and that, accordingly, the Settlement Agreement is binding on Respondent. See, e.g., One Stop Kosher Supermarket, Inc., 355 NLRB No. 201, p. 5 (2010) (finding apparent authority where “Respondent held Ganz out . . . as its primary representative and conduit . . . with respect to . . . the unfair labor practice charges . . . and Ganz’[s] execution of the [ ] agreement plainly related to that function”).

Furthermore, Respondent asserts that it did not ratify the Agreement based on the “plain fact that Rogan repudiated the agreement nearly immediately after Vetrano signed it.” (Resp. Opp., p. 11). However, as demonstrated by General Counsel’s exhibits 8 and 9, Respondent “repudiated” the Agreement on entirely separate grounds from the question of Vetrano’s authority. Respondent does not dispute that the first time it asserted that Vetrano (purportedly) lacked authority to enter into the Agreement was in response to General Counsel’s motions in the instant proceeding. Therefore, there is no factual dispute that Respondent did not repudiate the Agreement on these grounds, and instead, that Respondent effectively ratified the Agreement through its later conduct, as set forth in General Counsel’s initial brief. (GC Mem., p. 15-16). Again, Respondent makes no attempt to distinguish Board law requiring this conclusion. See,

e.g., One Stop Kosher, 355 NLRB No. 210, p. 6 (finding that respondent’s “failure to immediately disavow” execution of contract by individual supposedly lacking actual authority and “subsequent affirmative conduct” constituted ratification).

Next, Respondent’s asserted “contract defenses” fail to present any issues of fact requiring resolution. (Resp. Opp., p. 13-14). Respondent’s argument on this point fails to set forth a single fact which, even if true, would provide a defense to finding that Respondent breached the Agreement. Accordingly, these bare assertions do not present any obstacle to granting summary judgment for the General Counsel.

Next, Respondent asserts that the affidavit of Joseph Smith provides a valid defense to enforcing the Settlement Agreement. This argument is without merit. The factual questions raised by Respondent are all irrelevant because, as a legal matter, the Settlement Agreement Respondent entered into with the General Counsel trumps any later-attempted waiver of rights Smith may have made. Even if Smith attempted to waive his right to backpay, which General Counsel disputes, Respondent had already entered into a binding agreement with the National Labor Relations Board – not with Smith – to vindicate those public rights. In other words, even if the Smith Affidavit constituted a valid waiver (which, again, General Counsel disputes), it provides no defense to Respondent’s breach of an agreement made with General Counsel.

Further, General Counsel notes that certain factual assertions made by Respondent on this subject are simply untrue or irrelevant. First, Respondent asserts that “the settlement agreement Smith signed notified him of his right to backpay.” As an initial matter, Smith is not a signatory to the Settlement Agreement at issue here. As to the Smith Affidavit, this document does not provide affirmative notice that Smith has a “right to backpay.”<sup>5</sup> (See GC Ex. 8). Respondent

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<sup>5</sup> Instead, the document refers to backpay “allegedly owed or due according to the National Labor Relations Board in its arbitrary decision.” (GC Motion, Ex. 8 (emphasis added)).

also asserts that “Smith has revoked the Union’s right to represent or maintain the charge as it relates to him.” (Resp. Opp. p. 15). This point is irrelevant, even if true. Even if the charging party attempted to withdraw the charge as it related to Smith, it is now within the discretion of the Region whether to accept that withdrawal. Furthermore, Respondent misconstrues the nature of Smith’s relationship to the Union with respect to the pending action. The Union’s filing of an unfair labor practice charge alleging Smith as a discriminatee does not constitute a personal representation of Smith but instead affirms statutory rights available to all employees. Thus, the idea that Smith has renounced the Union’s “representation” is inapposite, and fails to set forth an issue of fact rendering summary judgment inappropriate.

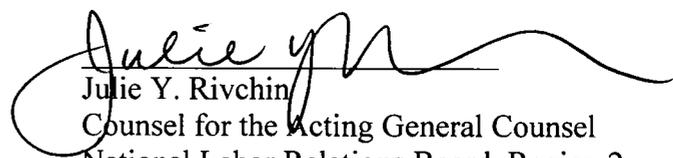
Finally, Respondent’s assertion concerning the appropriate remedy is not a valid defense to the instant motion and irrelevant to this proceeding. As noted in General Counsel’s initial motion, questions of remedy are properly determined in a compliance proceeding and not at this stage. See Tuv Taam Corp., 340 NLRB 756 (2003).

### CONCLUSION

For the foregoing reasons, and for the reasons set forth in General Counsel’s initial Memorandum of Law in support of its pending motions, General Counsel respectfully requests that the Board grant General Counsel’s Motion to Transfer Case to the Board, Motion to Strike, and Motion for Summary Judgment.

Dated at New York, New York, this 13<sup>th</sup> day of July, 2011.

Respectfully submitted,

  
Julie Y. Rivchin  
Counsel for the Acting General Counsel  
National Labor Relations Board, Region 2  
26 Federal Plaza, Room 3614  
New York, NY 10278

**CERTIFICATE OF SERVICE**

This is to certify that on July 13, 2011, I served a copy of the General Counsel's Request for Leave to File Reply, together with General Counsel's Reply Memorandum of Law, on the following individuals by electronic mail, in accordance with the service requirements of Seciton 102.114(i) of the Board's Rules and Regulations:

Michael J. Mauro, Esq.  
Milman Labuda Law Group PLLC  
mikemauro@mllaborlaw.com  
*Counsel for Respondent*

Jane Lauer Barker  
Pitta & Gibilin LLP  
jbarker@pittagiblin.com  
*Counsel for Charging Party*

  
Julie Y. Rivchin  
Counsel for the Acting General Counsel  
National Labor Relations Board, Region 2  
26 Federal Plaza, Room 3614  
New York, NY 10278