

**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'S REPLY TO THE GENERAL COUNSEL'S OPPOSITION TO ITS
MOTION FOR JUDICIAL NOTICE AND TO APPLY JUDICIAL ESTOPPEL, OR IN
THE ALTERNATIVE, MOTION FOR SPECIAL LEAVE TO FILE ITS MOTION**

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I. ARGUMENT

Respondent Galaxy Towers Condominium Association (“GTCA”), through its undersigned counsel, submits this Reply To The General Counsel’s (“GC”) Opposition To Its Motion For Judicial Notice And To Apply Judicial Estoppel, Or In The Alternative, Motion For Special Leave To File Its Motion Brief In Support Of Its Motion. In his Opposition, the GC argued: (1) that GTCA’s Motion should be stricken for failure to obtain “special leave” from the National Labor Relations Board (“NLRB” or “Board”) before filing it, based on 29 CFR §102.46(h); and (2) the Charging Party, Local 124, Recycling, Airport, Industrial & Service Employees Union (“Union”), did not successfully assert a position in *Galaxy Towers Condominium Association v. Local 124 I.U.J.A.T.*, Civil Action No.: 2:11-cv-04726 (WJM) that is inconsistent with the position the GC and Union have taken in this case. GTCA will address these issues in reverse order.

A. The Union’s Position in the Federal Case Cannot Be Squared With the Position the GC and the Union Asserted in this Case.

The Union argued successfully in the federal case that the arbitration at issue was conducted “pursuant to Article 15 of the Collective Bargaining Agreement between Galaxy and the Union (“the CBA”).” (Bernardone Aff., 1).¹ The Union attached a “*true copy* of Article 15 of the CBA” to the Bernardone Aff. (*Id.*). (emphasis added) That CBA excerpt included the subcontracting language in dispute here. (*Compare* Bernardone Aff. at Ex. A *with* GC Ex. 12). In this case, both the Union and GC argued emphatically that GC Ex. 12 was not the parties’ CBA. (*See* GC’s Post-Hearing Brief, at 44; GC’s Brief in Support of Exceptions, at 19-20; Exceptions of Charging Party Union Local 124, at 2). In fact, the Union’s principal officer, James Bernardone

¹ The Bernardone Aff. from the District Court case is in the record of this case at R Ex. 2.

testified at the hearing that he told GTCA’s then labor counsel “to stick [GC Ex. 12] up his ass.” (Tr. at 917, ll.9-10).

By contending that the document was a CBA in federal court, while wholly dismissing it in this forum, the Union – with the GC’s assistance – is engaged in precisely the type of chicanery the doctrine of judicial estoppel is intended to stop. *Fellner v. Tri-Union Seafoods, L.L.C.*, No. 06-688, 2010 WL 1490927, at *1 n.2 (D.N.J. April 13, 2010) (quoting *In re Teleglobe Communs. Corp.*, 493 F.3d 345, 377 (3d Cir. 2007)) (“Judicial estoppel is a discretionary tool used by [c]ourts to prevent `a party from playing fast and loose with the courts by adopting conflicting positions in different legal proceedings (or different stages of the same proceeding).”).²

The GC’s desperate attempt to show that the Union has been consistent on this point does not hold up. In fact, the GC’s assertion that “[t]he arbitrators, including Eugene Coughlin, were subsequently agreed upon and *used as a matter of practice*” simply cannot be squared with Bernardone’s straightforward assertions that Article 15 was part of the parties’ CBA:

- As Secretary-Treasurer of Local 124, I handled the collective grievance of Union members, Mario Paredes, Francisco Castillo, and Javier Meras . . . concerning their discharge by [GTCA], pursuant to Article 15 of the Collective Bargaining Agreement between Galaxy and the Union (“the CBA”). . . .
* * *
- On April 10, 2007, Galaxy's attorney at the time, Mr. Stephen Ploscowe, provided me with a written correspondence, indicating that Galaxy sought to amend Article 15 of the CBA to delete Mr. Coughlin's name. . . .
* * *
- At no time did I, acting in the capacity as Secretary-Treasurer for the Union, agree to disqualify Eugene Coughlin from the contract arbitrators designated in Article 15, Section 4 of the CBA.

(Bernardone Aff., at ¶¶ 2, 8, 13). Bernardone did not view this language as derived “as a matter

² The GC appears to try to make a waiver argument. (GC’s Reply and Motion to Strike, at 1-2). This argument misses the mark. Until Judge Martini entered his Opinion in the federal case, there was no basis for the assertion of judicial estoppel.

of practice” – he viewed it part of the parties’ CBA and repeatedly said so.

The Union played fast and loose and got caught. The Board cannot permit the GC to facilitate the Union’s attempt to pervert justice. Judicial estoppel should be applied here, and the GC and the Union should be estopped from asserting a position inconsistent with that taken by the Union in the federal case.

B. GTCA’s Motion Is Not Procedurally Deficient.

The GC seeks to strike the Motion because GTCA filed it without first obtaining “special leave” from the Board, pursuant to Section 102.46(h) of the Board’s Rules and Regulations (“Rules”), 29 CFR 102.46(h). That provision of the Board’s Rules provides that, in the exceptions context, after the filing of a party’s brief in reply to an opposing party’s answering brief “[n]o further briefs shall be filed except by special leave of the Board. Requests for such leave shall be in writing and copies thereof shall be served promptly on the other parties.” *Id.*

GTCA was not required to seek “special leave” before filing its Motion because that provision of the Board’s Rules relates to the filing of “further briefs” in support of, or in opposition to, pending exceptions. An example of such a “further brief” would be a sur-reply to a reply to an answering brief. GTCA did not file a “further brief;” it filed a stand-alone Motion seeking specific legal relief. Therefore, Section 102.46(h) does not apply.

Rather, GTCA’s Motion is governed by Section 102.47 of the Rules, relating to the “[f]iling of motion after transfer of case to the Board.” That provision of the Rules does not require that the moving party seek Board permission before filing and it has never been so interpreted. *See Tyler Pipe & Foundry Co.*, 171 NLRB 308, n.1 (1968) (granting the GC’s motion, filed pursuant to Section 102.47, without referencing advance permission); *Fairfax Hospital*, 310 NLRB 299, n.1 (1993) (same). Similarly, the GC routinely files such motions

without first seeking leave; many examples of the GC's motion practice are available on the Board's electronic case filing system. Finally, the Board's December 10, 2010 tentative draft *Guide to Board Procedures* informs that Section 102.46(h) prohibits the filing of "[a]n answering brief to another party's brief in support of the judge's decision;" and "[a] responsive brief to a reply brief (except by special leave of the Board)." *Guide to Board Procedures* (tentative draft) at 50.³ With regard to motion filed pursuant to Section 102.47, the Guide does not specify that advance leave of the Board is required. *Id.* at 75.

Thus, because GTCA was not required to seek the Board's permission before filing its Motion pursuant to Section 102.47, the GC's motion to strike should be denied.⁴

³ GTCA acknowledges that the draft *Guide* is not final and is not binding authority. However, since the stated purpose of the draft *Guide* is "to assist parties in complying with the Board's Rules and Regulations and administrative practices," it is appropriate to cite to it here.

⁴ In the alternative, in the event that special leave is required, Respondent respectfully requests that such leave be granted and that the Motion be deemed granted as of December 31, 2012.

II. CONCLUSION

For the reasons stated herein and its earlier filings, GTCA respectfully urges the Board to apply the doctrine of judicial estoppel in this case to prevent the GC and the Union from advancing a position inconsistent with that taken by the Union in the related federal court litigation. GTCA also respectfully asks the Board to deny the GC's motion to strike.

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Respectfully submitted,

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