

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

SPACE NEEDLE, LLC, and UNITE HERE! LOCAL 8, and JULIA DUBE,	Respondent,  Union,  An Individual.	Consolidated Case Nos.  19-CA-098908 19-CA-098988 19-CA-098836 19-CA-108459   19-CA-107024
---	---	--

**RESPONDENT'S REPLY BRIEF TO GENERAL COUNSEL'S  
ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS**

Dated: April 29, 2014

William T. Grimm  
Brian P. Lundgren  
Davis Grimm Payne & Marra  
701 Fifth Avenue, Suite 4040  
Seattle, WA 98104  
(206) 447-0182  
wtgrimm@davisgrimmpayne.com  
blundgren@davisgrimmpayne.com

**PAYROLL DUES DEDUCTION (RESP. EXCEP. 1-17).** The General Counsel argues that it has no burden to specifically prove an agreement because “the world of labor law would look very different” if it were required to affirmatively establish that the Space Needle contractually agreed to restart the dues deduction program. (GC Ans. Brf., p.7). This claim is contrary to law. *Reed & Graham*, 272 NLRB 348, 351 (1984) (“the General Counsel has [not] met its burden of proof in showing that by any traditional legal test the parties herein reached a binding agreement on a contract”); *Crittenton Hospital*, 343 NLRB 717, 718-19 (2004)(accord). The General Counsel engages in subjective speculative inclinations, rather than following Board precedent which provides that whether a meeting of the minds was reached is determined not by subjective and speculative inclinations, but by the parties’ intent as “objectively manifested” in what they said to each other. *MK-Ferguson, Co.*, 296 NLRB 776 n.2 (1989).

1. **The General Counsel erroneously suggests that in December 2012 it was completely clear that WKYC-TV applied prospectively only.** (GC Ans. Brf., p.3). If so, why did the Union assert that the Space Needle was required to restart the dues program because of *WKYC-TV*? Why did Region 19 not immediately withdraw the Complaint it issued in 2012?

2. **The General Counsel ignores the objective manifestations of the parties by erroneously claiming the Union made an “offer” that was “accepted” by the Space Needle.** (GC Ans. Brf., pp.5-9). There was no offer to enter into a bargained-for-exchange; instead, the Union demanded compliance representing to the Space Needle that *WKYC-TV* placed the Space Needle in violation of the law unless it restored “the checkoff practice by the next pay date.” (GC Exh. 58). The General Counsel erroneously argues the Space Needle stated “it should begin withholding dues”; on the contrary, the Administrative Law Judge’s Decision (“ALJD”) correctly found this was an equivocal statement of the parties’ respective positions. (ALJD p. 4). The General Counsel did not file an Exception to that ALJD finding. The General Counsel also

exclaims without support that the word “can” is a “statement of intent.” Even if that were true, the statement would be a gratuitous undertaking, not an ingredient of a *quid pro quo*, and such promises are unenforceable legally. *Houchens Market*, 155 NLRB 729, 734 (1965).<sup>1</sup>

3. **Calling such conduct “stalling,” the General Counsel feigns shock that the Space Needle would wait for its vacationing labor counsel to weigh in.** (GC Ans. Brf., pp.5-9). The argument that the Space Needle “stalled” is immaterial. The December 19 letter, ghostwritten by the Union’s attorney, was sent to Space Needle management when the Union knew the Space Needle’s labor counsel was on vacation, when the dues deduction issue has always been discussed with that labor counsel who conducts bargaining on behalf of the Space Needle, and when there existed a pending Complaint and Hearing on the topic in which the labor counsel was the attorney of record. (Tr. 545:6-9; 545:21-546:14; 674:1-676:20; R.Exh. 2). The undisputed record evidence was the Space Needle was waiting for its vacationing labor counsel to weigh in on the issue prior to committing to a position on the Union’s claim that the Space Needle was out of compliance after *WKYC-TV*. (Tr. 676:1-681:3).

4. **The General Counsel improperly goes beyond the objective manifestations of the parties and subjectively speculates about intent.** (GC Ans. Brf., pp.5-9). It is improper for the General Counsel to impose its own subjective inclinations upon the parties’ objective manifestations to one another. *MK-Ferguson, Co., supra*. The January 2 letter manifests that the Space Needle was not taking a position on the Union’s representation that the Space Needle would be in violation of the law unless it restarted the dues program by the next pay date. The letter describes both parties’ positions (*i.e.*, comfortable in our position, feel *WKYC-TV* supports

---

<sup>1</sup>The General Counsel’s citation of *North Hills Office Services, Inc.*, 344 NLRB 523, 526 (2005) is misplaced. (GC Ans. Brf. p.7). In that case, the parties were engaged in collective bargaining and the employer made an offer to the union and in its offer selected “silence” as the form of acceptance by the Union. *Id.*; REST 2d CONTR §§ 24; 30. Here, there was no collective bargaining, no offer by the Space Needle or the Union, no acceptance of an offer, and no bargained-for-exchange.

your position), and uses only the permissive language “can” [be able to], and intentionally avoids any mandatory language such as “will,” “must,” or “shall.” (GC Exh. 59). Likewise, in the face of a false assertion of legal violation if it did not restart the dues program, the Space Needle did not restart the dues program which objectively manifests no agreement to the Union’s false representation that a failure to resume by the next pay date would be a violation of the law. The language cited by the General Counsel as to when dues that are collected could be “expected” to be delivered to the Union is moot and immaterial as the *status quo* never changed and there were never any dues collected.<sup>2</sup>

**5. The General Counsel erroneously claims the Union provided an accurate current list of team members and amounts owing after the January 7, 2013 deadline.**

(GC Ans. Brf., p.4). The General Counsel’s sole witness on the dues topic, Erik Van Rossum of the Union, testified that he did not have foundation to know about the provision and accuracy of the dues information the Union emailed the Space Needle; instead, that information was known by the administrative staff at the Union. (Tr. 510:5-13; 546:24-547:10).<sup>3</sup> No other witness was presented by the General Counsel on this point. With respect to exhibits, the General Counsel cites emails (and calls it business records) when it is undisputed the Space Needle’s emails state it will take additional time to review, enter, and reconcile the information. (Tr. 660:8-17; 664:17-665:17; GC Exhs. 69 and 70). The record evidence established that the Union never provided accurate information. (Tr. 660:8-17; 717:19-25; 718:5-719:25; 720:5-722:6;

---

<sup>2</sup>The General Counsel presented no evidence, extrinsic or otherwise, of a bargained for agreement. (GC Ans. Brf. pp. 5-9). “In interpreting a contract, the parties’ intent underlying the contract language is paramount and is given controlling weight. To determine the parties’ intent, the Board looks to both the contract language and to relevant extrinsic evidence....” *Resco Products*, 331 NLRB 1546, 1548 (2000).

<sup>3</sup>Despite having the burden, the General Counsel never called the administrative staff at the Union to testify and never submitted proof of an accurate and timely provision of information. It should be inferred that if called, the Union staff would have testified consistent with the undisputed record evidence that the Union never provided accurate information. *Desert Pines Golf Club*, 334 NLRB 265, 267-68 (2001).

724:1-728:24; 729:3-730:23; 739:24-741:10; R. Exhs. 15, 17, 18; G.C. Exh. 62). Accordingly, as the Space Needle being able to [“can”] deduct dues was premised upon provision of the information by January 7, there was never an obligation to deduct dues no matter how unreasonably one construes the parties’ communications.

6. **The General Counsel fails to grasp that the parties’ objective manifestations after the January 2 letter show no agreement.** (GC Ans. Brf., pp.5-9). It is undisputed that no bargaining between the parties occurred. (Tr. 548:11-549:2; 652:8-653:19; 680:8-14). After the Space Needle’s labor counsel returned from vacation in late January, the Union began negotiating the restarting of the dues program by offering to withdraw an unfair labor practice charge, and demanding that the Space Needle use the Union’s “triplicate form” if the program were restarted. (GC Exhs. 61, 62).<sup>4</sup> Where the parties continue to discuss additional terms their objective manifestations show no agreement. *Intermountain Rural Electric Ass’n.*, 309 NLRB 1189, 1193 (1992); *Magic Chef, Inc.*, 288 NLRB 2 (1988); *Interprint Co.*, 273 NLRB 1863, 1864-65 (1985). The Union’s proposed terms were never agreed upon. (Tr. 547:15-11; G.C. Exh. 63). Accordingly, the parties’ objective manifestations show no agreement.

7. **The General Counsel completely ignores the Union’s objective manifestations that “there was no deal.”** (GC Ans. Brf., pp.5-9). After being informed of the Space Needle’s labor counsel’s determination, the Union stated: “If there is no deal, there is no deal. We aren’t going to withdraw the charges.” (Tr. 558:1-559:10).<sup>5</sup> Next, the Union objectively manifested that the Space Needle’s commitment was to “**stop violating the National Labor Relations Act**”

---

<sup>4</sup>Where any proposed or agreed upon deadline has passed prior to the parties having reached agreement, there is no agreement as the commencement date has not been agreed upon. *Raytown United Super*, 287 NLRB 1155 (1988); *Springfield Electric*, 285 NLRB 1305, 1306 (1987). The parties’ objective manifestations show continued negotiation, no agreed commencement date, and no accurate information having been supplied by the Union.

<sup>5</sup>The Union rescinded and repudiated any purported agreement by expressing an intention to cease performing. REST 2d CONTR § 283, *Comment a*.

and it had adopted the “**position that it will abide by the law....**” (Tr. 554:4-24; R.Exh. 4). The Union’s new charge alleged the Space Needle violated the law by continuing “**to refuse to provide payroll dues deduction.**” (R.Exh. 7; Tr. 560:15-561:6). The Union made no allegation of an agreement having been bargained. *Interprint Co.*, 273 NLRB 1863, 1864 (1985) (inappropriate under Board’s remedial powers to write an agreement for the parties).

8. **The General Counsel’s attempt to invent consideration fails.** (GC Ans. Brf., p. 8). The General Counsel now asserts that “avoiding liability for unfair labor practice charges (which the Union offered to withdraw upon Respondent’s performance) constitutes ample consideration.” (GC Ans. Brf., p. 8). Yet, the Space Needle rejected the Union’s offer to withdraw the unfair labor practice charge in exchange for restarting the dues program. Complying with the law is not consideration. Rest. 2d Contracts § 73 (performance of a legal duty is not consideration). Any such consideration would be illusory as the parties had no binding obligation in such a hypothetical bargained-for-exchange. Rest. 2d Contracts § 77, Comment a, Illustration 2. The Space Needle had no binding obligation since it merely stated what would be required for it to be able to [“can”] restart dues pursuant to the Union’s false claim that a failure to do so would violate the law. By asserting legal compliance as the parties’ bargained-for-exchange, the General Counsel effectively admits no breach (or “reneging”) as the Space Needle complied with *WKYC-TV* and any commitment to “abide by the law.”

9. **The General Counsel presented no evidence to contradict the clear evidence of record relating to mistake and misrepresentation.** (GC Ans. Brf., p. 9). The General Counsel represents to the Board a “rather obvious reality” that the Space Needle believed, based upon *WKYC-TV*, that it was out of compliance when that was not in fact the case, and the General Counsel admits the Union was likewise wrong about *WKYC-TV* when it represented that the case required the Space Needle to restart the dues program. (GC Ans. Brf., pp. 8-9). Under

this representation, the mistake would be mutual. The cases cited by the General Counsel in its answering brief are inapposite, and the cases cited by the Space Needle in its briefing apply. The General Counsel cites *Apache Power Co.*, 223 NLRB 191 (1976), where the Board ruled that rescission for unilateral mistake was warranted because the mistake was obvious. And, it cites, *North Hills Office Services, Inc.*, 344 NLRB 523 (2005) and *Health Care Workers*, 341 NLRB 1034 (2004), where the Board articulated that to avoid rescission based upon unilateral mistake it would have to be shown that the Union had no notice of such mistake and acted in “perfect good faith.” The General Counsel did not show the Union acted in “perfect good faith” and the record is to the contrary. The Union’s own attorney drafted the December 19 compliance demand. The mistake was obvious to the Union’s attorney in the language of *WKYC-TV*. It was the Union who was misrepresenting *WKYC-TV*. Yet, the Union then bypassed the Space Needle’s labor counsel when it misstated the holding of *WKYC-TV* to the Space Needle. When he returned from vacation, the Space Needle’s labor counsel informed the Union it was wrong about the holding in *WKYC-TV*. There is a mutual mistake, a misrepresentation and/or a unilateral mistake. Under any of these principles, there never was a binding agreement.

**POLLING AND SOLICITATION (RESP. EXCEP. 56-65).** The General Counsel wrongly asserts that the Space Needle is not allowed to know the status of an employee’s choice as to dues deduction. It is lawful for an employer to be informed of union withdrawal so that dues are not collected. *Perkins Machine*, 141 NLRB 697 (1963); *Cyclops Corp.*, 216 NLRB 857 (1975); *Peoples Gas System*, 275 NLRB 505 (1985)<sup>6</sup> The General Counsel erroneously claims that the Space Needle tracked which employees had returned signed resignation forms; rather,

---

<sup>6</sup>The cases the General Counsel cites, *Globe Construction Co.*, *Houston Coca Cola*, *Hatteras Yachts*, *North Hills Office Services*, *Air Flow Equipment*, *Register Guard*, and *RL White Co.*, involved union organizing campaigns and/or elections—not the lawful administrative purpose of employee dues deduction choice.

servers. It was undisputed that this was the correct number of shifts given the business levels and projected business levels. It was undisputed that Ms. Dube did not make it onto the schedule because after the more senior servers chose to pick up shifts there did not remain enough shifts for Ms. Dube. There was no adverse action. Like the ALJD, the General Counsel erroneously relies on the testimony of Mr. Heckendorn to conclude that servers were “forced” to take the shifts that were added in March 2013. All record evidence, including Mr. Heckendorn’s testimony, contradicts this conclusion. (Resp. Brf. in Support of Exceptions, pp.28-29). Mr. Heckendorn testified that he did not recall even being asked if he wanted to pick up a shift. Neither he nor any other servers testified they were forced to take shifts added to the March 25 schedule. The General Counsel also erroneously asserts that the conversion of on call shifts, which actually increased Ms. Dube’s chances of recall, was an “unprecedented maneuver” when the evidence and testimony shows it was not. (*Id.* at pp. 29-32).

2. **The General Counsel failed to establish any animus towards Ms. Dube or her protected activity, which she engaged in for years.** (GC Ans. Brf. pp. 19-34). Like other employees Ms. Dube’s protected Union activity was continuous for years prior to her seniority-based layoff and inability to be recalled from layoff. The General Counsel failed to establish that she was in any manner relative to other employees more or less outspoken with respect to Union activities. As for the anonymous email, contrary to the General Counsel’s representation to the Board, Ms. Dube did not write the anonymous email. The General Counsel did not establish that the Space Needle management had any idea of what Ms. Dube’s opinions were with respect to the anonymous email, whether any of her given opinions were pro-union or pro-management, or that the Space Needle would have been in any way upset with Ms. Dube having any opinion on the topic. Ron Severt, in his speech, merely briefly stated his lawful opinion on perceived inaccuracies in the anonymous email. (GC Exh. 18, p. 9). There exists nothing unlawful in any

of the purported allegations of animus asserted by the General Counsel, nor do the purported allegations have any causal nexus to Ms. Dube or her protected Union activity.<sup>9</sup> The conduct referenced is a First Amendment right of free speech under Sections 8(a)(1) and 8(c) of the Act. *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1989). All the alleged animus and management discussions have no relation to the addition of shifts on March 25, 2013, or to the unsupported theory that the schedule was manipulated by forcing servers to take shifts. The staffing levels were correct and consistent with business needs and historical business levels.

3. **The General Counsel did not establish that animus was a substantial or motivating factor in the alleged failure to recall Ms. Dube or that it had any causal nexus whatsoever to the purported adverse staffing decision.** (GC Ans. Brf., pp. 19-34). The General Counsel provides a long narrative litany of purported manipulation, based upon strained spinning of routine discussions between management as to proper procedure. It was undisputed that none of the alleged “manipulation” in any way involved or affected the decision to add shifts to the schedule in March 2013, or the procedure for filling those shifts. With respect to all discussions amongst management as to the proper procedures, management in fact discerned, disseminated, and followed the procedures correctly and without any deviation, unilateral or otherwise, from past practice. In early April 2013, shortly after Ms. Dube failed to make it onto the schedule due to seniority, Mike Douglas, through a personal meeting, memorandum and email, cleared up any misunderstandings Ms. Dube may have had, and thoroughly and accurately informed her of the staffing level status and procedure by which she could either be recalled or rehired. The Space Needle followed past practice, seniority, and was appropriately staffed given

---

<sup>9</sup>The General Counsel never established any “confrontation” of Jeff Wright by Ms. Dube and instead continues to advance that completely baseless allegation. Employees were invited to ask Mr. Wright questions after the February 12, 2013 meeting. (Tr. 251:4-11). Among other employees, Ms. Dube accepted that invitation and asked Mr. Wright a question. (Tr. 253:4-23). He simply answered her question with the same answer he had given in his speech. (G.C. Exh. 65). There is no evidence anybody was upset with the question, or that the question was met with hostility or perceived as a “challenge.”

both the projected and actual business levels. The timing of all staffing decisions, all staffing changes, all hiring, all job fairs, was completely consistent with years past.

4. **The evidence of record shows that Ms. Dube would not have been recalled in any event.** (GC Ans. Brf., pp. 19-34). The record clearly shows that during the timeframe in question the only persons who made it onto the schedule were Amico, Lindsay, Elston, and Lum, all of whom are above Ms. McCauley and Ms. Dube in seniority. It was undisputed that seniority and past practice were followed. The more senior servers chose to pick up shifts that were added in March 2013 and there existed no business justification thereafter to add more shifts. There was no deviation from past practice or seniority in the addition of those shifts. For the nearly identical business levels in each year, on April 3 there were 39 servers on the schedule in 2013 and 38 servers on the schedule in 2011. On May 13 (first day after Ms. Dube's recall window expired), there were 40 servers on the schedule in 2013 and 40 servers on the schedule in 2011. Likewise, with respect to rehire, past practice was followed and there was no adverse decision. Instead, Ms. Dube was offered a rehire position. Ms. Dube refused to accept that rehire position. Regardless of any alleged protected activity, the result would have been the same. (Resp. Brf. in Supp. Exceptions, pp. 27-38).

**DATED** at Seattle, Washington this 29<sup>th</sup> day of April, 2014.

**DAVIS GRIMM PAYNE & MARRA**



WILLIAM T. GRIMM, WSBA #06158  
BRIAN P. LUNDGREN, WSBA #37232  
701 Fifth Avenue, Ste. 4040, Seattle, WA 98104  
Telephone: 206-447-0182

ATTORNEYS FOR RESPONDENT/EMPLOYER  
SPACE NEEDLE, LLC

**CERTIFICATE OF SERVICE**

I hereby certify that on the 29<sup>th</sup> day of April, 2014 I caused to be filed with the Executive Secretary of the National Labor Relations Board, via the NLRB E-Filing system, the foregoing ***“RESPONDENT’S REPLY BRIEF TO GENERAL COUNSEL’S ANSWERING BRIEF TO RESPONDENT’S EXCEPTIONS.”***

I further certify that true and correct copies of the same were served via electronic mail upon the following individuals at the email address specified for them as shown below:

**GENERAL COUNSEL**

Mara-Louise Anzalone  
NLRB Region 19  
915 2<sup>nd</sup> Avenue, Suite 2948  
Seattle, WA 98174-1006  
[Mara-Louise.Anzalone@nlrb.gov](mailto:Mara-Louise.Anzalone@nlrb.gov)

**COUNSEL FOR GENERAL COUNSEL**

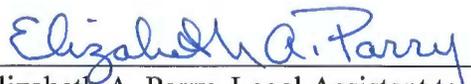
Mary Ana Hermosillo  
NLRB Region 19  
915 2<sup>nd</sup> Avenue, Suite 2948  
Seattle, WA 98174-1006  
[Mary.Herosillo@nlrb.gov](mailto:Mary.Herosillo@nlrb.gov)

**COUNSEL FOR UNITE! HERE LOCAL 8**

Carson Glickman-Flora, Attorney  
Schwerin Campbell Barnard Iglitzin and Lavitt LLP  
18 W Mercer St. Ste. 400  
Seattle, WA 98119-3971  
[flora@workerlaw.com](mailto:flora@workerlaw.com)

**CHARGING PARTY – NLRB 19-CA-107024**

*VIA CERTIFIED MAIL, RETURN RECEIPT REQUESTED*  
Julia Dube  
PO Box 3592  
Bellevue, WA 98009  
[dube.julia@gmail.com](mailto:dube.julia@gmail.com)

  
\_\_\_\_\_  
Elizabeth A. Parry, Legal Assistant to  
Attorneys for Employer/Respondent