

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD

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GALAXY TOWERS CONDOMINIUM ASSOCIATION, INC., :  
 :  
Employer, :  
 : 22-RC-13150  
and :  
 :  
INTERNATIONAL BROTHERHOOD OF TEAMSTERS, :  
LOCAL UNION 966, :  
 :  
Petitioner, :  
 :  
and :  
 :  
INTERNATIONAL UNION OF JOURNEYMEN AND ALLIED :  
TRADES, LOCAL 124, :  
 :  
Intervenor. :  
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**EXCEPTIONS OF INTERVENOR LOCAL 124**

Intervenor Local 124, by its attorneys, Barnes, Iaccarino & Shepherd, LLP, hereby takes the following exceptions to the decision of Administrative Law Judge Steven Fish (hereinafter, “the ALJ”) dated February 3, 2011 :

1. Decision at 7, lines 1-3 – The ALJ incorrectly concluded that the actions of the Local 124 Welfare Fund (“the Fund”) were in fact directed by union officials and undertaken in their capacities as union officials. That the union-side trustee (James Bernardone) is also Local 124 Secretary-Treasurer, and that the testifying witness Michael Pagan is the administrator of the Fund as well as an officer of Local 124, are not sufficient justification to attribute the actions of the Fund in reinstating previously existing dental benefits to Local 124. *Commercial Prop Svces.*, 304 NLRB 134 (1991); *UFCW Local 1439*, 268 NLRB 780 (1984).

2. Decision at 7, lines 17-22 – The ALJ wrongly concluded that Bernardone was acting as a union official rather than fund trustee, and that the Fund was acting as agent of Local 124, regarding the reinstatement of dental benefits. The dental benefits had been suspended for six months while the Fund tried to find a cheaper alternative and the Union tried to negotiate increased contributions to the Fund by Galaxy. As the ALJ noted, neither of the two hoped-for alternatives had been realized when the decision was made to reinstate the benefits. But it does not follow that union goals and purposes must therefore have been paramount rather than the Fund’s stated plan. The ALJ’s reasoning omitted the very first factor in the Fund’s plan regarding suspension of dental: the passage of six months.

3. Decision at 7, lines 36-37; at 9, lines 6-7 — The ALJ incorrectly observed that Fund trustee and union official James Bernardone was present in the hearing room during the hearing herein, and relied on this observation in drawing adverse inferences based on Bernardone’s failure to testify. Bernardone was in fact not present the day of the hearing at any time, although a couple of persons from the Local 124 and the Fund office were present.

4. Decision at 7, lines 41-43 – The ALJ wrongly concluded that the Fund was acting as an agent of Local 124 when it reinstated dental benefits and Local 124 was therefore responsible.

5. Decision at 8, lines 13-17 – The ALJ wrongly accepted that loss of the dental benefit was a major campaign issue. This was based solely on the uncorroborated testimony of petitioner Local 966’s President, James Anderson; see Decision at 4, lines 36-37. Local 124 witness Pagan testified that the dental benefits were not a campaign issue, because the workers understood the necessity for the suspension of dental, but rather wages and the lack of a new contract were the campaign issues. [Tr. at 83-84]

6. Decision at 8, lines 29-30 – The ALJ wrongly concluded that Local 124 did not meet its burden of establishing that the reinstatement of dental benefits and announcement thereof were governed by factors other than the pendency of the election. Local 124 contends that the evidence summarized in the Decision at page 8, lines 30-41 does indeed meet Local 124’s burden, and demonstrates that it was already established policy that the dental benefit was going to be reinstated, and that policy was properly not deviated from on account of the campaign. Dart Container, 277 NLRB 1369 (1984)(extension of an existing benefit does not interfere with an election). Local 124 further notes that the over-all burden is on the objecting party to supply evidence that would warrant setting an election aside. Id. at 1369 fn. 7.

7. Decision at 8, lines 51-52 – The ALJ unfairly drew an adverse inference that Ruiz’s testimony would not have corroborated Pagan’s testimony concerning initiation of the 6-month suspension of dental benefits, and regarding communication to and approval of such suspension of dental by Galaxy employees (Decision at 8, lines 44-51). Such testimony by Ruiz would have been merely cumulative, would have pertained to details that are collateral rather than germane to any relevant issue, and would have pertained to details that were not disputed by any conflicting evidence. Petitioner Local 966 could have brought one or more employee witnesses to dispute Pagan’s testimony, but it did not. The decision herein should be based on the evidence presented.

8. Decision at 9, lines 21-29 – The ALJ incorrectly found that Pagan was not qualified to testify “about the reasons for the timing of the announcement and reinstatement of the benefits”, because he himself was not the decision-maker. Pagan participated as Fund administrator in the decision to suspend dental and in the decision now at issue to reinstate dental, although he was not himself a decision-maker, *per se*, since he is not a trustee. In Mercy

Hospital, 338 NLRB 545 (2002), cited by the Decision, the Board found that a witness was unqualified, id. at 546, because she did not even participate in the decision, id. at 545.

9. Decision at 9, lines 31-33, 43-45 – The ALJ incorrectly concluded that the announcement and reinstatement of dental benefits constituted objectionable conduct that impaired employees’ free choice and that Objection 6 herein should therefore be sustained.

10. Decision at 18, lines 19-22 – The ALJ incorrectly recommended an Order setting aside the election and remanding the case to the Regional Director for a new election

WHEREFORE, the Board should overrule all objections to the election including Petitioner’s Objection # 6, and certify the results thereof.

Dated: Elmsford, New York  
March 3, 2011

Respectfully submitted,  
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by: 

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STATEMENT OF SERVICE

The undersigned hereby certifies that true copies of the within EXCEPTIONS OF INTERVENOR LOCAL 124 are being served by email on March 3, 2011 addressed to each of the following :

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and filed with the Region 22 office of the NLRB via the NLRB's online electronic filing system.

  
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Steven H. Kern