JD(NY)-28-12
Guttenberg, NJ

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

GALAXY TOWERS CONDOMINIUM ASSOCIATION

and **Case No. 22-CA-030064**

LOCAL 124, RECYCLING, AIRPORT, INDUSTRIAL & SERVICE EMPLOYEES UNION

***Benjamin Green, Esq.,* for the General Counsel.**
Michael E. Lignowski and Joseph C. Ragaglia, Esqs.,
***(Morgan, Lewis & Bockius, LLP),* Philadelphia, PA,**
***and Christopher P. Murphy, Esq.,* Media, PA, for the Respondent.**
Steven H. Kern and Lauren M. Kugielska, Esqs.,
***(Barnes, Iaccarino & Shepherd*, LLC), Elmsford, NY,**
for the Union.

DECISION

Statement of the Case

STEVEN DAVIS, Administrative Law Judge: Based on a charge filed on July 6, 2011 by Local 124, Recycling, Airport, Industrial & Service Employees Union (Union), a complaint was issued against Galaxy Towers Condominium Association (Respondent or Galaxy or the Employer) on October 31, 2011.

The complaint alleges that the Respondent violated Section 8(a)(1) and (5) of the Act in three respects. First, since about May 11, 2011, the Respondent refused to furnish the Union with certain information it had requested. Second, that since about July 27, 2011, the Respondent failed and refused to bargain with the Union for a new contract, and finally, that on about August 1, 2011, the Respondent subcontracted the work of unit employees and laid off all the unit employees except the maintenance employees, without affording the Union an opportunity to bargain with Respondent with respect to this conduct and the effects of this conduct. The complaint's proposed remedy is that an order be issued requiring the Respondent to restore its business operations as they existed before bargaining unit work was subcontracted on about August 1, 2011.

The Respondent's answer denied the material allegations of the complaint, and on 12 days from January 12 to April 27, 2012, a hearing was held before me in Newark, NJ, and in New York, NY.[1] Upon the evidence presented in this proceeding, and my observation of the demeanor of the witnesses and after consideration of the briefs filed by the General Counsel and the Respondent, I make the following:

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[1] After the hearing closed, I denied the Respondent's motion to reopen the hearing to introduce a purported federal criminal indictment against witness James Bernadone. I also denied the Respondent's request to file a reply brief.

Findings of Fact

I. Jurisdiction and Labor Organization Status

The Respondent, a New Jersey corporation having an office and place of business in Guttenberg, New Jersey, has been engaged in the management of a residential condominium complex. During the preceding 12 month period, the Respondent, in conducting its business operations, derived gross revenues in excess of $500,000, and purchased and received at its Guttenberg, NJ facility, goods and supplies valued in excess of $5,000 directly from suppliers located outside New Jersey. The Respondent admits and I find that it has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

The Respondent also admits, and I find, that the Union has been a labor organization within the meaning of Section 2(5) of the Act.

II. Background

Galaxy Towers is a condominium residential apartment building consisting of 1076 residential units and 32 commercial units.

On June 5, 2006, the Union was certified by the Board as the exclusive collective-bargaining representative of the employees in the following admittedly appropriate collective-bargaining unit:

> All full-time and regular part-time service employees, maintenance employees, garage attendants, master mechanics, concierges, doormen, porters, handymen, security guards and hall persons, employed by Respondent at its 7000 Boulevard East, Guttenberg, New Jersey facility, but excluding all office clerical employees, temporary employees, managerial employees, professional employees, guards and supervisors as defined in the Act.

III. The Interim Agreement

Bargaining began on about July 6, 2006. Representing the Union were Louis DeAngelis, its labor relations and benefits consultant, James Bernadone, its secretary-treasurer, and Christopher Sabatella, its attorney. The Respondent was represented by attorney Stephen Ploscowe. The Union's first proposal consisted of the prior agreement between Local 734, the union which had represented the unit prior to the certification of Local 124. DeAngelis made some changes to that contract before he presented it to Ploscowe. The Union's proposed contract contained essentially the same provision, Article 12 – Production Efficiency and Management Rights – as that contained in the Local 734 agreement. That proposal did not specifically mention that the Employer had the right to subcontract work, and indeed, did not mention "subcontracting" at all.

On August 8, the parties executed an "Interim Agreement" which stated that the parties "have reached the following interim agreement subject to the remaining negotiations and final agreement." The Interim Agreement provided for checkoff, no strike/no lockout, grievance/arbitration provisions, new hire language, and for a monthly supplemental bonus. The Interim Agreement was silent as to management rights and subcontracting.

Apparently on the same date, August 8, the Respondent submitted a counterproposal to the Union's first proposal, which included a provision for management rights, as follows:

> Article 12 – Production Efficiency and Management Rights
> Section 2a.
> Management of the Employer's operations and the direction of its working force, including the right to establish new jobs, change existing jobs, increase or decrease the number of jobs, change materials or equipment, subcontract any work, change any method of operations, shall be vested solely and exclusively in the Employer. Subject to the provisions of this Agreement, the Employer shall have the exclusive right to schedule and assign work to be preformed and the right to hire or rehire employees, promote, recall employees who are laid off, demote, suspend, discipline or discharge for proper cause, transfer or lay off employees because of lack of work or other legitimate reasons, it being understood, however, that the Employer shall not discipline or discharge an employee except for proper cause or otherwise improperly discriminate against an employee.

On August 15, Union attorney Sabatella responded, accepting, rejecting and suggesting changes to the Respondent's counterproposal. His response specifically accepted the management rights clause "as drafted," and also said that "the Union reserves the right to add to, delete from or otherwise amend and modify these proposals."

On August 16, Ploscowe sent Sabatella a red-lined copy of the Union's first proposal with changes based on the Employer's counterproposals. It, too, contained the above management rights clause as drafted by Ploscowe and accepted by Sabatella.

On September 19, Ploscowe sent Sabatella another copy of the "proposed collective-bargaining agreement," noting some changes that had been made since the last exchange of documents, and further noting which items remained open. Included in the contract was the above Article 12, in which it was stated that the right to subcontract any work is vested solely and exclusively in the Employer. That section was not among the items deemed to be "open."

The Respondent notes that each draft contract exchanged by the parties thereafter in 2006 contained the above management rights clause giving the Respondent the exclusive right to subcontract any work.

On November 13, Ploscowe sent DeAngelis an e-mail with an attachment, stating that it was a copy of the proposed agreement last drafted by Sabatella on October 5, with notations indicating which items were agreed upon (okay) or not agreed upon (open). The Management Rights clause, as set forth above, was included in the agreement, with no notation that it was either "okay" or "open."

In late 2006, Sabatella was dismissed as the Union's counsel and DeAngelis began bargaining with Ploscowe.

IV. The Memorandum of Agreement

On December 6, the employees ratified a "final offer" on economic terms which included wages, medical benefits, paid time off, vacations, retirement program, and a new hire rate. It

was provided as follows: "Contract Language: As agreed upon to date and/or as to be resolved by the parties during final drafting as to any open items."

The Union insisted that the only items ratified were the MOA's economic terms, and that no management rights clause was ratified.

Following the ratification by the employees, a Memorandum of Agreement (MOA), prepared by Ploscowe, was signed in early January, 2007. It states that the Employer and the Union "hereby agree to the following terms of a new agreement which was ratified by the Local 124 members." It covers the term of the agreement, from June 1, 2006 to May 31, 2009, and listed the wage increase amounts, medical coverage amounts, paid time off days, vacations, retirement program and a new hire rate.

The MOA also contains the following:

> Contract Language: As agreed upon to date and/or as to be resolved by the parties during final drafting as to any open items. It is specifically agreed as follows as to these open items:
>
> 1. Article 4 (Vacations), Section 3 shall read as follows: Unearned vacation time may not be used. The Employer may use part-time or temporary employees to fill in for vacation time off. Vacation time off is paid at the employee's base rate of pay at the time of vacation. It does not include overtime or any special forms of compensation such as incentives, commissions, bonuses, or shift differentials.
>
> 2. Article 17 (Miscellaneous), Section 6b shall read: Unearned PTO [paid time off] days may not be used as sick days without the express approval of the Employer's General Manager for a verifiable illness. Upon termination of employment, Employer shall deduct payment given for unearned sick days from employee final check.

As to those two items, DeAngelis stated that the parties "specifically agreed to them," but that "everything else in the article or in the contract was open." He added "there may have been some tentative agreements which I came to know, but they were all tentative subject to a final agreement and ratification…. It didn't bother me about any of that language, because I knew at some point we were going to sit down and bargain a contract. We just wanted to expedite the economics."

Ploscowe testified that it was his understanding that all tentative agreements reached prior to that time had been incorporated into the MOA. His pre-trial affidavit states that the parties reached an "MOA on most items. The MOA is dated December 12, 2006. The MOA states that there were still some open items that the parties had to continue negotiating."

Thereafter, on March 13, 2007, Ploscowe sent Bernadone a copy of the "proposed agreement." It contained Article 13, Section 2a, providing that the Employer has the sole and exclusive right to subcontract any work.

It also contained changes, additions and deletions from the proposed agreement sent to the Union on November 13, 2006. For example, Article 12, Section 4(e) was marked as "ok –

9/28/06" in the agreement sent in November, 2006. The clause added in 2007 stated that when a temporary employee becomes a regular unit employee, his/her probation period and date of employment shall be the date the temporary employee is converted to a regular employee.

In another change, the agreement "ok 9/28/06" in Article 3 Section 5 was supplemented in the March, 2007 proposed agreement to add that "if any employee does not work on a scheduled work day, the time not worked will also be counted toward determining the hours worked in any one week."

Contract clause, Article 7 Section 4(E) marked "ok 9/28/06" where it was agreed that seniority ceases after an absence from work for 3 days without notice to the employer unless the employee is unable to give notice to the employer was changed in March, 2007 in Article 8 Section 4(E) to eliminate the last phrase "unless the employee is unavailable to give notice to the Employer."

A contract clause, marked "ok 10/6/06" in Article 10 Section 1, provided for a standard union visitation clause with notice to the Employer upon the agent's arrival in the facility. It was changed in Article 11 Section 1 in the March, 2007 proposed contract to provide that the failure to give such notice "will result in forfeiture of the visitation privileges."

Ploscowe wrote that if the agreement was acceptable, Bernadone could sign it, but if Bernadone had any changes, he should so advise Ploscowe. The Union did not sign the agreement and Bernadone did not respond to Ploscowe's request for comments.

Thereafter, Stephen Goldblatt was retained by the Union, and on May 7, he wrote to Ploscowe, stating that the Union "has advised me that they would like to address the following issues for negotiation with regard to the collective bargaining agreement."

1. A grievance procedure that permits more time for the Union to file a grievance.
2. A provision desired by the Union for sick days instead of paid time off days.
3. Implementation of the vacation schedule offered by the Employer and ratified by the employees.
4. A discussion of the issue of temporary employees regarding overtime and transition to full-time status and union membership.

Ploscowe responded the following day with his "preliminary thoughts" after reviewing the four items with the Respondent. He followed up on May 24 with the Employer's responses to the four items.

On June 1, Wendell Shepherd and her law firm were retained by the Union. She asked Ploscowe for the status of the collective bargaining agreement and Ploscowe sent her his May 24 note to Goldblatt. On July 3, Ploscowe sent her a "chronology of negotiations" with the relevant documents from the beginning of negotiations, including the draft contracts, Sabatella's e-mails, the MOA, and the Interim Agreement. In the letter, Ploscowe told Shepherd that "the only four items that the Union has raised to date with regard to the collective bargaining agreement are the four items contained in the last few e-mails. Other than that, as far as I know, the agreement has been totally and fully accepted by the Union."

Ploscowe wrote to Shepherd on July 29, advising that as to their upcoming meeting, he was only aware of the four items mentioned by attorney Goldblatt as items being open. A meeting was set for August 3. In advance of that meeting, Ploscowe asked Shepherd to send him a list of which items the Union believes are "open."

DeAngelis stated that he reviewed with Shepherd the proposed agreement sent in March, 2007, the interim agreement and the MOA, and it was his position that he had never agreed to the language items that were open, including subcontracting, because no contract had been finalized. "The MOA was an economic agreement and the other items were not finalized - so we hadn't reached a final contract and we hadn't ratified a final contract."

DeAngelis stated that by May or June, 2007, he became aware that the proposed contract provided that the Employer had a right to subcontract work and he "hit the ceiling." He told Ploscowe that "subcontracting negates the whole contract. We may as well not have a contract if you have a right to just throw everyone out." Ploscowe replied that the Respondent's board of directors wanted a subcontracting clause. DeAngelis answered that the Employer would not get that clause but if it was concerned with a specific department, that could be discussed. DeAngelis testified that Ploscowe did not tell him at that time that the management rights and subcontracting clauses had already been implemented.

DeAngelis testified that he was not aware of the negotiations between Sabatella and Ploscowe, specifically denying any knowledge of the management rights clause or Sabatella's acceptance of it at that time. DeAngelis stated that there were about 8 to 10 negotiation sessions in 2006. According to him, the parties did not discuss the Employer's proposal for a management rights clause or subcontracting because neither party raised those issues.

DeAngelis stated that during the course of the parties' discussions in 2006, they may have made certain tentative agreements, but they were all tentative subject to a final agreement and ratification of the contract. His goal was to "expedite the economics, stating that the Union was under pressure from the employees for a wage increase which they had not received for 1½ years. DeAngelis believed that "tentative" agreements meant that they were pending "some future agreement … subject to ratification by the members and a full final document."

On August 1, Shepherd sent a two page list of items she wished to discuss at the upcoming meeting. As relevant here, the list included "Article 13 – Section 2a – The Union did not agree to the inclusion of subcontracting language. Section 2b – The Union wants the old Section 2 language."

Ploscowe wrote on August 6 that he and the Respondent were upset at the Union's "attempt to renegotiate what was agreed upon during the negotiation process" calling the Union's actions "regressive." He wrote that Union attorney Goldblatt identified only four areas of concern. Regarding the subcontracting provision, Ploscowe wrote that "we proposed the 'subcontracting' language on August 8. See the attached August 8 proposals provided to the Union. The same language appeared in every draft of the agreement that followed including those drafted by [the Employer] and Local 124. It was never challenged by Local 124. Thus, it is clear that it was agreed upon. [The Employer] will not give up its agreement."

On August 9, Ploscowe wrote in a message to the Respondent, that the Union wanted the word "subcontracting" deleted from the management rights clause, but that the Respondent's position is that the clause was agreed to, and not objected to until Shepherd entered the negotiations. He added that, although the Respondent rejected the Union's position, it "will agree to the following additional language as to subcontracting." Such language included that if the Respondent decided to subcontract, it would give the union two weeks' notice and meet with the Union upon request to negotiate the effects of any subcontracting on any employee who is not hired by the subcontractor and is permanently laid off as a result of the subcontracting.

On September 26, Shepherd wrote to Ploscowe, detailing the Union's positions on each clause it had questions about. Regarding the subcontracting clause, Shepherd noted that the Union "never agreed to the language in Article 13, Sections 2a and 2b.

On November 9, 2007, Ploscowe wrote to Shepherd stating that the Union specifically agreed to the management rights contractual language when Sabatella agreed to that language on August 15, 2006, adding that Sabatella did not object to that language which remained in all further drafts of the agreement.

At least continuing into March, 2008, the Union insisted that it would not agree to a contract that contained the Employer's right to subcontract. In July, 2008 in an effort to reach agreement on a collective-bargaining agreement, according to Shepherd, Ploscowe offered that if the Union agreed to the subcontracting clause, the Respondent would provide overtime pay for work done after eight hours. The Union rejected that proposal and the Respondent continued to insist on the subcontracting clause.

V. The Settlement Agreement

On October 1, 2008, the parties executed a Board Settlement Agreement which settled a charge filed by the Employer. The Agreement stated that the Union "will not, in bargaining with the GTC [Employer], unlawfully withdraw from tentative agreements reached during negotiations for a collective bargaining agreement, including tentative agreements reached with Galaxy concerning subcontracting. We rescind our withdrawal from tentative agreements reached, including subcontracting, as described in the Production Efficiency and Management Rights clause, Article 13, Sections 2a and 2b."

DeAngelis stated that his understanding of the Agreement was that "tentative agreements" meant that they "were not agreements we had entered…. and that they would be subject to the final agreement and ratification."

VI. Further Bargaining

At the last bargaining session in this series of negotiations in December, 2008, no final agreement on a contract was reached. The Union refused to ratify the Respondent's proposal for subcontracting contained in the management rights proposal. The Respondent renewed its offer of overtime after eight hours if the provision was ratified, but the Union rejected the offer. Thereafter, Ploscowe sent a proposed contract to Shepherd with changes from the agreement sent the Union in November, 2006.

Ploscowe was replaced by attorney Michael Kingman. With the MOA having expired on May 31, 2009, the parties began negotiations, in June, 2009, for a new collective-bargaining agreement. The Union rejected the Respondent's request for a one year extension of the current contract with a freeze on all terms and conditions. Instead, the Union proposed a three year contract. In return, the Employer proposed a three year wage freeze on all wages and health insurance payments. The Respondent's proposal also stated that "the terms and conditions of the collective bargaining agreement as modified by the [MOA] and ratified by the stipulation of settlement entered into by the parties with the NLRB shall continue in full force and effect. The terms of the agreement as to … subcontracting … to remain unchanged."

On June 4, 2009, the Respondent sent its "proposal" for a new contract to the Union. It consisted of a statement of economic difficulty for the Employer's homeowners – their payment

of a special assessment of over $1.5 million due to the cost of energy, and the fact that many were in default of their mortgages and assessment payments. It called the Union's demands "unrealistic, excessive, and impossible." The Respondent proposed a one-year extension of the current agreement with a freeze on all terms and conditions including salary and benefits. In turn, the Union proposed a three year contract.

The parties met at several bargaining sessions in June, July, and August. Bargaining was not fruitful, and the MOA was extended three months under separate agreements, to August 31, 2009.

Kingman stated that no agreement was reached on economic items, subcontracting or other terms. He added that in the summer of 2009, the Union had a "political problem" with the subcontracting language and threatened to strike over the issue. Kingman offered to change the wording of the subcontracting clause but the Union refused. According to Kingman, he believed that subcontracting was provided for in the contract and had been agreed to by the Union, but agreed to have an arbitrator decide those issues and hold negotiations in abeyance.

VII. The Request for Arbitration

An "Interim Agreement" was executed on August 31, 2009 in which the MOA was further extended to temporarily suspend negotiations to permit binding arbitration "in connection with the issue of subcontracting" of the following issues: "Does the current agreement between the parties permit subcontracting by the Employer, and, if so, what is the nature and extent of such permitted subcontracting." The arbitration never took place based on the Respondent's request for an indefinite postponement which the Union objected to. No decision was issued by the arbitrator.

While the matter was pending before the arbitrator, no negotiations took place between September, 2009 and Spring, 2010.

In January, 2010, the Union instituted several arbitrations relating to discharges of workers, the proper wage rate, misclassification of employees and entitlement to vacations. In February, Kingman wrote to one of the arbitrators that since the Union was of the opinion that the contract was not legal and binding, he did not agree that the matters may properly be submitted for arbitration at that time.

VIII. Another MOA and Subcontracting

In early August, 2010, Kingman met with DeAngelis and Bernadone. They discussed a two-year collective-bargaining agreement which included, according to Kingman, "some new language concerning subcontracting." Kingman hand-wrote proposed subcontracting language and gave it to the two Union agents, telling them that subcontracting was "inevitable" and that it could take place within one year. They discussed that a company named PM Solutions had done a study of the Respondent with a view of saving money from its operations, and that PM suggested subcontracting. Kingman gave them the phone number of Michael Frances, a principal in Planned Building Services (PBS), a cleaning contractor, who he said "may in fact wind up being a subcontractor here." The Union agents did not meet with Frances.

According to Kingman, the Union agents asked about bumping rights of employees if their work was subcontracted. Kingman wrote a two paragraph addition to a subcontracting clause with bumping rights described therein. It stated, in part, that "in the event the employer shall subcontract a department or division, the employees … shall have the right to exercise

bumping rights over less senior employees…."

According to Kingman, he and the Union agents reached an agreement on the terms of a complete collective-bargaining agreement. On August 23, Kingman sent a copy of the agreement to the Union with instructions that it be signed and returned to him for a vote by the Respondent's Board of Directors two days later.

The document, entitled Memorandum of Agreement, states that the 2006-2009 contract, as amended by the MOA signed in early January, 2007 "shall continue in full force and effect except as modified and amended by this CBA."

The contract provides for a two year term, from June 1, 2009 to May 31, 2011. It also provides that there shall be no increases in wages or medical benefits for the first year, but a 2% increase in both categories the second year. It further provides that the Management Rights provision, Article 13, Section 2 of the Agreement is amended as follows:

> In the event the Employer shall subcontract a Department or Division, the employees of such Department or Division shall have "bumping rights" over less senior employees in job categories in other Departments or Divisions where such employees shall possess the requisite skill set and qualifications for such job category. The Employer shall have the right to discontinue and terminate its status as the Employer at the GTCA, and shall have the right to "outsource", that is, retain a third party who shall thereafter become for all legal and lawful purposes the employer of all employees at the GTCA facilities."

The Union did not sign this MOA.

On November 19, 2010, the Respondent issued a Request for Proposal (RFP) in which it sought proposals for the outsourcing of garage services, security services, custodial services, front desk/concierge services, maintenance and Unit Service. The deadline for the submission of bids was December 22, 2010. Five prospective subcontractors submitted bids. Later, the Respondent limited its intention to subcontract to front services, housekeeping and the garage staff.

The parties resumed negotiations in December, 2010, and seven bargaining sessions were held thereafter from March through June, 2011.

On March 16, 2011, the Respondent presented its last, best and final contract offer. It stated that the contract between the parties which ran from June 1, 2006 through May 31, 2009, as amended by the MOA "shall be deemed to have been and continue in full force and effect except as modified by the terms contained herein." The proposed contract provided, inter alia, for a two year term, from June 1, 2009 to May 31, 2011, and a management rights clause which included the "bumping rights" provision set forth above. It also included a statement that the "Welfare Plan shall dismiss the lawsuit filed in the Federal District Court against the GTCA for additional benefit payments through 2009 with prejudice in return for payment of the sum of $2,000." The Union did not respond to that offer.

On April 12, 2011, Kingman sent an e-mail to the Union's law firm which stated that the Respondent was prepared to continue negotiations. The note also said that the Employer is "contemplating alternative employment scenarios whereby [the Employer] would no longer be

the direct employer" of the housekeeping, concierge and security departments. Kingman sought to discuss this with the Union at their next meeting, with a view toward the Respondent's Board making a final decision in June, and implementing a change in operations, if necessary, effective July 1, 2011.

IX. The Request for Information

At a bargaining session on May 9, the Respondent presented a PowerPoint presentation with slides, the essence of which was that the Employer could save over $1 million per year by subcontracting some of the services it performs. The Union requested that certain information be provided. The request, as relevant here, was made in written form two days later on May 11:

> 1. Please provide the Request for Proposals (or Requests, if more than one) said to have been sent out by Galaxy concerning outsourcing of bargaining unit work and supervisory/management work related to such bargaining unit work that may be outsourced along with it.
> 2. Please provide the bids or offers or proposals said to have been received from five entities for performance of such work on an outsourced basis.

In an e-mail dated May 19, Kingman informed the Union that it did not believe that some of the information requested was "relevant to the union's role as bargaining representative…." Kingman stated that the savings in costs by subcontracting would be more than $1 million per year. The e-mail included certain "relevant information, consisting of information presented at the last bargaining session, and additional information consisting of services and overall cost savings to be provided by vendors who bid on the RFP." Specifically, the e-mail included a four page document consisting of (a) a list of services to be provided by vendors who bid on the Employer's RFP which included Security and Guard Related Services; Garage Exit & Entrance position monitoring; Janitorial Service; and Concierge and Doorman Services (b) a list of numbers of staff needed for positions in security and garage, front service, and custodial and (c) a chart of "cost to provide service," listing the 2011 budget, vendor range dollars, vendor which could be selected, and projected savings.

Kingman asked the Union for an alternative proposal which would generate similar savings.

Kingman testified that he did not believe that the Union's request for bids and the request for proposals were relevant to effects bargaining or to the cost issue of the Respondent saving money by subcontracting. Nevertheless, the Respondent ;provided some information. However, Kingman conceded that the information it provided was "in a different format than they requested it…." The Union's witnesses denied receiving the requested information set forth in its May 11 request, above.

Specifically, the Respondent's brief states that, as to the Request for Proposals (item one in the Union's May 11 letter), the Respondent's May 19 e-mail and attachment contains all the information requested – in other words, the information contained in the Request for Proposal, but not the specific Request itself. In addition, Kingman testified that he told the Union that its request was not relevant since "the RFP contains information that is descriptive of the Galaxy and therefore is meaningless to providing the specific services that the Union provides. Secondly, because the Union already provides the services and therefore doesn't need the RFP to say that security workers or maintenance workers do a particular job. The nature of the RFP

itself is such that it has no bearing whatsoever on the ability of the union to calculate how much they're getting or what the services they're getting are."

As to the request for bids received from the five bidders (item two in the Union's May 11 letter), those bids were not provided. Kingman testified that he told the Union that the request was not relevant because two of the bids were from non-union contractors and were not considered. It also did not provide the bid from the only vendor being considered, PBS, because its bid was subject to negotiation resulting in changed prices from the original bid.

X. Continued Bargaining and the Decision to Subcontract

The parties bargained on May 23. By that time the Respondent's board of directors had not made a decision regarding subcontracting and the Union had not made a specific proposal on that issue. Kingman noted that the Union's position at all times was that the Respondent should not subcontract any work. Kingman testified that the Union did not, at any time, make a proposal which would save the Respondent money. However, Kingman did concede that DeAngelis attempted to "put together a package that included the subcontracting" which would not have increased the Employer's costs.

Kingman testified that on June 6, DeAngelis told him that he believed that 1/3 of the unit employees would accept a severance package, 1/3 would accept an offer of employment from PBS, and 1/3 would "walk away."

A bargaining session was held the next day. DeAngelis testified that at the meeting the Union again requested the information it had asked for. However, according to Kingman, DeAngelis asked attorney Steven Kern if they could limit the information the Union sought, and just ask for the information they "really need." Kern said that he needed the number of hours the employees would be working at the subcontractor. According to Kingman, the parties then discussed effects bargaining and how the subcontracting would be implemented. They spoke about meeting with PBS. After a break, Kern said that he still wanted the Request for Proposal and the bids.

According to Kingman, the Union did not make a proposal in response to the Employer's position on subcontracting that would have reduced direct labor costs for the Employer. In fact, Kern said that the Union could not match the anticipated savings due to subcontracting unless all the employees took a 30% pay cut. Kingman advised Kern that the Respondent's board of directors was scheduled to meet on June 9.

On June 9, the Respondent's board of directors voted to authorize Kingman to enter into negotiations with PBS for a contract for subcontracting.

According to Kingman, at their June 16 meeting, he and DeAngelis discussed the "possibility of structuring the subcontracting" – the Union wanted PBS to hire as many of the Respondent's employees as possible. DeAngelis expected to make a "comprehensive offer" at the next meeting.

DeAngelis testified that on June 20, he proposed a plan in which every employee would be offered severance pay. Depending on the number of employees who accepted that offer, estimated at about 30%, the Union estimated that the Employer would save about $400,000 to $500,000. It was the Union's belief that these potential savings would cause the Employer to rescind its decision to subcontract the unit employees' work. At that time the Employer's board of directors had voted to hire PBS to perform the work in the job categories described above.

The Respondent argues that, by negotiating concerning the number of employees who would receive severance pay and those who would be employed by PBS, the Union "acquiesced" in the decision to subcontract and focused solely on bargaining over the effects of that decision. I do not agree with the Respondent. Clearly, at that point, the Union was insisting that it never agreed to subcontracting.

On June 23, Kingman advised the Union that the Respondent "has voted to retain an independent company to provide services to residents at the Galaxy, and the employer is presently engaged in effects bargaining with the union as to the cessation of employment activities by the Galaxy Towers." On June 28, Union attorney Kern wrote to Kingman stating that although the current bargaining has included "matters incidental to the potential subcontracting of most bargaining unit work" that should not be construed as the Union's agreement that such subcontracting may lawfully be done. In fact, Kingman conceded that the Union never said that it was waiving its right to bargain over the Employer's decision to subcontract. Rather, according to Kingman, the Union stated that it understood what the Employer was doing and why it is taking that course of action, and "we can't match the savings."

On the same day, June 23, Kingman advised the Union that, inasmuch as it is engaged in effects bargaining with the Union, the issue before the arbitrator should be held in abeyance pending the conclusion of [effects bargaining] negotiations.

At the June 30 bargaining session, Union attorney Kern asked "whether a contract is still on the table." DeAngelis testified that he told Kingman that he wants to negotiate a contract – he still wanted to have a collective-bargaining agreement, a full agreement, and we would discuss the [employees] who would accept a voluntary severance and how that impacted them." De Angelis repeated that he wanted a three-year contract and wage increase, referring to the March 16 proposal. Kingman replied that the Union must "sign off on all litigation," meaning that it had to withdraw the pending ERISA lawsuit, the Employer was "getting out of the employment business" and was "bringing [PBS] in in July, and that impasse had been reached on the terms of the contract – that it had made its last, best and final offer. They rejected it. We've moved way beyond that. Now we've gone onto subcontracting and we've engaged in effects bargaining."

Kingman told the Union bargainers that "we reached impasse when they rejected our last, best final offer and we were not going to negotiate that proposal piecemeal since it was interdependent and contingent on the economic savings that would be realized from outsourcing."

On about July 6, the Respondent signed a contract with PBS. On July 6, Union attorney Shepherd wrote to Kingman that the Union's position continues to be that the Employer is contractually unable to subcontract bargaining unit work.

On July 8, Kingman wrote to the Union, reminding it that the parties have been engaged in effects bargaining in their last several sessions over the past three months. He further noted that he expected that the employment of the Employer's employees would cease as of August 1, as the contract with PBS had been signed.

On July 12, the Employer advised its employees that it had decided to hire PBS to provide the services that they had previously performed in the Security, Garage, Front Service and Custodial Departments, and that their employment would be terminated, effective August 1, 2011.

DeAngelis testified that the Union did not receive all the information it had asked for and at the final bargaining session on July 27, he requested the information the Union had previously asked for. Union attorney Kern told the Employer that "in order to really know better what we were doing, we still wanted to have the request for proposals." The Union also wanted to receive the bids for the work in order to determine whether the bid was a "decent bid or contract." The Union insisted that its position continued to be that it wanted an "overall contract" and voluntary severance for the Respondent's employees.

At that meeting, according to Kingman, Union agent Bernadone claimed that the parties had not engaged in effects bargaining. Kingman replied that Bernadone had not been at half the meetings, and at those meetings he attended, he stormed out. Then, Bernadone "went berserk." Kingman stated that no one wanted to subcontract but it was "purely and totally economics." They discussed the fact that layoff notices had been sent, and that the Employer wanted the employees to receive severance pay. DeAngelis offered to put a package together regarding the number of employees who would be hired by PBS. Kingman asked for the names of those workers who wanted severance pay and the amounts desired. DeAngelis lowered the amount of money claimed for severance pay so that if all the workers accepted severance, the sum would be about $500,000. Kingman said that he could offer $120,000 and asked for the number of workers who would be working for PBS, but the Union did not supply that number.

On August 1, the Respondent laid off 67 unit employees and subcontracted their work to PBS. Of those laid off, four accepted positions with PBS.

Analysis and Discussion

The complaint alleges that the Respondent violated Section 8(a)(1) and (5) of the Act in three respects. First, since about May 11, 2011, the Respondent refused to furnish the Union with certain information it had requested. Second, that since about July 27, 2011, it failed and refused to bargain with the Union for a new contract, and finally, that on about August 1, 2011, the Respondent subcontracted the work of unit employees and laid off all the unit employees except the maintenance employees, without affording the Union an opportunity to bargain with Respondent with respect to this conduct and the effects of this conduct. The complaint's proposed remedy is that an order be issued requiring the Respondent to restore its business operations as they existed before bargaining unit work was subcontracted on about August 1, 2011.

I. The Alleged Refusal to Furnish Information

The complaint alleges that since about May 11, 2011, the Respondent refused to furnish the Union with the following information that it had requested:

> 1. Please provide the Request for Proposals (or Requests, if more than one) said to have been sent out by Galaxy concerning outsourcing of bargaining unit work and supervisory/management work related to such bargaining unit work that may be outsourced along with it.
>
> 2. Please provide the bids or offers or proposals said to have been received from five entities for performance of such work on an outsourced basis.

The law relating to an employer's response to a union's information request is well settled. An employer has the statutory obligation to provide, on request, relevant information that the union needs for the proper performance of its duties as collective-bargaining representative. *NLRB v. Truitt Mfg. Co.,* 351 U.S. 149, 152-53 (1956). Where the union's request is for information pertaining to employees in the bargaining unit, that information is presumptively relevant and the respondent must provide the information. However, where the information requested by the union is not presumptively relevant to the union's performance as bargaining representative, the burden is on the union to demonstrate the relevance. *Richmond Health Care,* 332 NLRB 1304, 1305 fn.1 (2000). A union has satisfied its burden when it demonstrates a reasonable belief, supported by objective evidence, that the requested information is relevant. *Knappton Maritime Corp.,* 292 NLRB 236, 238-239 (1988).

The Board uses a broad, discovery-type standard in determining the relevance of requested information. Potential or probable relevance is sufficient to give rise to an =employer's obligation to provide information. *Richmond Health Care,* above.

DeAngelis testified that he needed to know the pay rates and the benefits for the new employees, and he wanted to see the RFPs "because I never accepted at face value the contention that they … can save a million dollars by … subcontracting." On June 28, Union attorney Kern told Kingman that the Union needed the requested information to "properly assess Galaxy's proposals and formulate its own proposals."

In *National Grid USA Service Co.,* 348 NLRB 1235, 1244-1245 (2006), the union requested the request for proposal issued by the employer to prospective subcontractors. The employer refused, and instead submitted a written summary of the RFP. The Board held that the summary was insufficient and that the union was "entitled to review the original documents and not … be limited to summaries and Respondent's representations as to the documents'' contents."

In *E.I. du Pont de Nemours & Co.,* 346 NLRB 553, 557-558 (2006), a case in which the employer decided to subcontract part of its operations, the Board stated that "in order to assess the accuracy of the Respondent's claims, it was necessary for the union to examine the data that formed the bases for the Respondent's conclusions" that, as here, the employer would save $1 million per year by subcontracting. The Board held that "by refusing to provide the information upon which it relied in making the decision to subcontract, the Respondent prevented the Union from effectively creating a counterproposal."

The Respondent asserts, first, that it supplied all relevant information in its possession in response to any "legitimate" requests for information made by the Union…." Secondly, it argues that the requests were part of a "contrived, sham bargaining process…. presented solely in connection with a scheme to delay and frustrate the bargaining process."

As to its first assertion, the Respondent concedes that it provided the "substantive portions" of the RFP to the Union, as set forth above. However, it did not provide the RFP itself, which is what was requested. In addition, the Respondent concedes that it did not provide the bids from the five prospective contractors who submitted bids for the work. The law is clear that the original document is what is required, not the Respondent's view of what the document contains.

The Respondent argues that the bids were not relevant because two of them were rejected by the Respondent because they were submitted by non-union companies. Further, the Respondent submits that in May, 2011, it was only considering entering into an agreement with

one of the three remaining vendors, thereby rendering the other two bids irrelevant. It then refused to supply the bid of the winning vendor, PBS, because the original bid was subject to negotiation and would change and it, and the other bids were provided pursuant to confidentiality agreements.

In *A-1 Door & Building Solutions*, 356 NLRB No. 17, slip op. at 3 (2011), the union requested information concerning bidding on jobs. The Respondent refused to supply the information because the information was confidential. The Board stated that "in considering union requests for relevant but assertedly confidential information, the Board balances the union's need for the information against any 'legitimate and substantial' confidentiality interests established by the employer. *Detroit Edison Co. v. NLRB,* 440 U.S. 301 (1979). The party asserting confidentiality has the burden of proving that such interests exist and that they outweigh its bargaining partner's need for the information. *Jacksonville Area Assn. For Retarded Citizens*, 316 NLRB 338, 340 (1995). Further, a party refusing to supply information on confidentiality grounds has a duty to seek an accommodation. *Pennsylvania Power Co*., 301 NLRB 1104 1105 (1991).

There was no evidence of any confidentiality agreement that was entered into between the bidders and the Respondent, or that the Respondent attempted to seek an accommodation with the Union regarding the allegedly confidential bids. Similarly, there is no evidence that the Union sought to delay or frustrate negotiations by making the requests. Rather, the evidence establishes that on the day that the Respondent presented its PowerPoint presentation in which it asserted that it could save $1 million per year by subcontracting, the Union asked for the RFP and the bids made pursuant to the RFP. It is clear that the documents are relevant inasmuch as the Union sought to determine how $1 million could be saved. By examining what services were sought by the Respondent in the RFP, and how much the bidders were offering to provide those services for, the Union would be able to intelligently prepare a counteroffer. In addition, the Respondent repeatedly asked the Union to make a proposal which would save an equal amount of money. Clearly, in order to do so, the Union must have the RFP which set forth what services were required. The bids, too, would enable the Union to prepare an alternate proposal since it would become aware of what the competitive bidders were willing to receive as compensation.

Accordingly, I find that the information requested was relevant to the Union's ability to make a counterproposal and to learn precisely what the Respondent's proposal to the bidders was. I further find that the Respondent violated Section 8(a)(1) and (5) of the Act by failing an refusing to furnish the RFP(s) and the bids submitted by prospective subcontractors, as requested by the Union in its May 11 letter.

II. The Alleged Refusal to Bargain for a New Contract

The complaint alleges that since about July 27, 2011, the Respondent failed and refused to bargain with the Union for a new contract. The Respondent alleges that the parties were at an impasse on July 27 and that it had lawfully implemented its last best and final offer.

"The essential question is whether there has been movement sufficient 'to open a ray of hope with a real potentiality for agreement if explored in good faith in bargaining sessions."' *Hayward Dodge,* 292 NLRB 434, 468 (1989). I find that such ray of hope presented itself at the last bargaining session.

I credit DeAngelis' testimony that, at the bargaining session of June 30, he told Kingman that he wants to negotiate a contract – he still wanted to have a collective-bargaining agreement, a full agreement, and he would discuss which employees would accept a voluntary

severance and how that impacted them. De Angelis repeated that he wanted a three-year contact and a wage increase, referring to the March 16 proposal.

Accordingly, the Union was still willing to negotiate. It was, at that time, exploring ways in which different types of severance packages for the current employees would cause the Respondent to abandon its interest in subcontracting. Therefore, there was a willingness and movement by the Union toward reaching agreement. In addition, the Respondent added a provision related to bumping rights in its proposal for subcontracting.

The Board, in *Taft Broadcasting Co*., 163 NLRB 475, 478 (1967), set forth a number of factors for determining whether impasse has been reached:

> Whether a bargaining impasse exists is a matter of judgment. The bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues as to which there is disagreement, the contemporaneous understanding of the parties as to the state of negotiations are all relevant factors to be considered in deciding whether an impasse in bargaining existed.

I accordingly find and conclude that no impasse existed at the time the parties ceased bargaining.

Even assuming that a valid impasse in bargaining existed, the Board has held that an employer's failure and refusal to provide requested information to the union precludes a finding that a valid impasse has taken place. *Caldwell Mfg. Co.,* 346 NLRB 1159, 1160, 1170 (2006).

Inasmuch as I have found, above, that the Respondent did not furnish the relevant information requested by the Union, and to which it was entitled, the Respondent prematurely declared impasse, and unilaterally implemented its last best offer. Accordingly, no valid impasse existed because of the Respondent's failure to provide the requested information to the Union.

In addition, a lawful impasse cannot be declared where permissive subjects of bargaining are demanded. Here, during the course of the bargaining, and at the last bargaining session on June 30, the Respondent insisted that the Union withdraw its ERISA lawsuit pending in federal court. "The Board has repeatedly held that an employer may not condition bargaining on the withdrawal of unfair labor practice charges or other litigation." *WWOR-TV,* 330 NLRB 1265, 1265 (2000).

Accordingly it must be found that the Respondent failed and refused to bargain with the Union over the terms of a new contract from July 27, 2011, unlawfully declared that impasse had taken place, and unlawfully implemented the terms of its last best and final offer.

III. The Alleged Unlawful Subcontracting

The complaint alleges that on about August 1, 2011, the Respondent subcontracted the work of unit employees and laid off all the unit employees except the maintenance employees, without affording the Union an opportunity to bargain with Respondent with respect to this conduct and the effects of this conduct.

A brief review of the relevant facts will be helpful. The Respondent's August 8, 2006 proposal provided for a management rights clause with a broad subcontracting clause giving the

Employer the sole and exclusive right to subcontract any work. One week later, Union attorney Sabatella expressly accepted the management rights clause "as drafted." Several draft proposals sent by Ploscowe to Sabatella contained the same clause. The proposed contract, with that clause, was sent to DeAngelis also.

On December 6, the employees ratified a "final offer" on economic terms which also included the statement that "contract language" agreed upon would include the items "as agreed upon to date…." Following the ratification, an MOA was signed by both parties in early January, 2007. It states that the parties agree to the terms of a new agreement which was ratified by the employees. It covers certain economic items and the phrase used earlier, "contract language: as agreed upon to date…."

Thereafter, Union attorney Goldblatt advised Ploscowe that there were only four open items - none of them involved the issue of subcontracting. It was only when Shepherd became the Union's representative that, in August, 2007, she asserted that the Union did not agree to the subcontracting clause.

At that point, the MOA had been signed. It represented the parties' agreement up to that time. I agree with the General Counsel that it was a partial agreement, covering mostly economic items, but it was a binding agreement nevertheless. Two Union attorneys, Sabatella and Goldblatt, agreed that the Respondent had the right to the broad subcontracting clause in the parties' agreement. The fact that the MOA covered only economic matters is of no moment.

In addition to accepting the subcontracting clause without change, Sabatella also accepted, without change, other terms in the Employer's proposal including vacations, force reduction, seniority, part of the grievance procedure and part of the miscellaneous working conditions proposal.

Further, Goldblatt could only identify four items that "the Union has advised me that they would like to address" for negotiation, none of which concerned subcontracting.

Indeed, the Settlement Agreement entered into by the Union gives support to a finding that the Union unlawfully withdrew from this tentative agreement on subcontracting. In the Agreement, the Union agrees to rescind its withdrawal from tentative agreements reached, including subcontracting, specifically referring to the clause at issue: Article 13, Sections 2a and 2b.

Given these facts, I cannot credit the Union's insistence at trial that it never agreed to the subcontracting clause. It is inconceivable that it was not aware of the existence of the clause – Sabatella gave a detailed two-page response to the Employer's proposal. Goldblatt's response stated that his client advised him that it had only four areas of concern. No issue was raised that these two attorneys lacked authority to engage in negotiations with the Respondent in behalf of the Union, or to bind the Union with respect to agreements they reached with the Employer.

I accordingly cannot credit the testimony of the Union's witnesses that, prior to Shepherd's involvement in the negotiations, they voiced any objection to the subcontracting clause or refused to agree to it. The undisputed documentary evidence does not support such testimony.

The important point is that the MOA represents a written, binding agreement between the parties. It is true, as argued by the General Counsel, that, as set forth above, certain items marked "ok" in the November, 2006 proposed contract were changed thereafter in the March,

2007 proposed contract, thereby indicating that those terms could not be and were not indisputably incorporated by reference in the MOA since the MOA was signed in January, 2007, *before* the March, 2007 proposed contract was sent to the Union.

However, that does not change the fact that the MOA was signed with the agreement of the parties that whatever items were agreed to therein were binding on them. Indeed, Ploscowe testified that those changes were made because he continued to bargain with the Union about those items Shepherd wanted changed – "she pointed out a number of things she thought was confusing. That doesn't mean there wasn't an agreement. She asked to have clarification on those… We went back to the bargaining table to deal with the items that she listed, because we were trying desperately to have the Union sign off on an agreement. That doesn't mean that we didn't necessarily agree that the language as given wasn't agreed to."

Ploscowe also noted that occasionally, depending on the circumstances, a party might seek to renegotiate an agreed upon item. For example, thereafter, in 2007 through 2011, further bargaining took place. This does not detract from the fact that the Union agreed to subcontracting. Bargaining here continued to explore what ways the subcontracting might be undertaken.

The Respondent asserts that its subcontracting of unit work was lawful inasmuch as the Union agreed to it, referring to attorney Sabatella's "accepted as drafted" response to the Respondent's August 8 proposal for a management rights clause which included the right to "subcontract any work."

From that agreement by Sabatella, and later draft agreements which contained that subcontracting language, the Respondent argues that its final offer containing the language "Contract Language: As agreed upon to date and/or as to be resolved by the parties during final drafting as to any open items" means that, inasmuch as the subcontracting language had been "agreed upon to date" the Union must be held to such language as its agreement to subcontracting.

The Union argues that the employees' ratification of the final offer was simply an offer on economic terms. When the MOA was drafted upon the ratification, it again contained the disputed language that "contract language: As agreed upon to date, and/or as to be resolved by the parties during final drafting as to any open items."

In this regard, the Union insists that the only items ratified were the MOA's economic terms, and that no management rights clause was ratified. The Union is technically correct. The MOA does not contain a specific reference to the Employer's right to subcontract. In fact, the MOA itself does not contain any reference to subcontracting.

In contrast, the Employer contends that the MOA "incorporated by reference the Union's tentative agreement to 'accept as drafted' the [Respondent's] management rights proposal" which permits it to "subcontract any work."

Following the ratification by the employees a Memorandum of Agreement (MOA), prepared by Ploscowe, was signed in early January, 2007. It states that the Employer and the Union "hereby agree to the following terms of a new agreement which was ratified by the Local 124 members." It covers the term of the agreement, from June 1, 2006 to May 31, 2009, and listed the wage increase amounts, medical coverage amounts, paid time off days, vacations, retirement program and a new hire rate.

In this connection, the General Counsel argues that these were only specific economic items that the Union was most interested in agreeing to – a partial agreement on economic terms which most affected the employees. According to the General Counsel, this was not the full agreement which would govern the parties' future relationship, but rather an expedient method to give the employees those terms in which they were most interested.

As to those items, the wage increase, medical coverage, paid time off, vacations, retirement program and a new hire rate, DeAngelis stated that the parties "specifically agreed to them," but that "everything else in the article or in the contract was open." He added that "there may have been some tentative agreements which I came to know, but they were all tentative subject to a final agreement and ratification…. It didn't bother me about any of that language, because I knew at some point we were going to sit down and bargain a contract. We just wanted to expedite the economics."

Ploscowe's understanding differs from that of DeAngelis. Ploscowe testified that he believed that all tentative agreements reached prior to that time had been incorporated into the MOA, but that there were still some open items that the parties would continue to negotiate.

The General Counsel asserts that the MOA did not contain a waiver of the Union's right to bargain over subcontracting. That is correct, but the Respondent's argument is not that the Union waived its right to subcontract. The Respondent's position is that the Union specifically agreed that the Employer had that right in Sabatella's specific agreement to the subcontracting clause. I agree with the Respondent's position.

It must be noted that certain clauses in the proposed contract of November, 2006, marked by Ploscowe "ok" with the date of agreement were thereafter changed in the March, 2007 proposed agreement, as set forth above. Accordingly, the General Counsel argues that if those accepted proposals could be changed they are, in fact, tentative and not binding. From that, he contends that the subcontracting clause must also be considered non binding because it was subject to change in the March, 2007 agreement. He therefore argues that by picking and choosing which proposals it sought to amend, the Respondent decided for itself which were binding on the Union.

The General Counsel supports his position by pointing to Ploscowe's testimony. When asked by the General Counsel whether items which had been specifically agreed upon are "still open in the sense that they're still subject to negotiations" he remarked that they are "absolutely not" still subject to negotiations. He added that items which he marked as "okay" meant that that item "equaled language agreed upon on the dates noted."

Of course this raises the question that if these proposals were changed how can the Respondent insist that the subcontracting clause remained. The answer to the General Counsel's argument is that the Union indisputably agreed to the subcontracting clause and ratified that agreement in the MOA.

It is true that during the course of bargaining, which consumed five years, there were discussions after the MOA was entered into, in which the Respondent offered certain concessions to the Union if it would waive its right to bargain over subcontracting decisions. The General Counsel argues from this that no agreement had been reached that subcontracting had been agreed to. I do not agree. In an attempt to reach a contract, the Respondent could properly bargain with the Union offering an incentive to the Union. That does not change the fact that the subcontracting clause was agreed to, as set forth above.

A waiver of statutory bargaining rights must be "clear and unmistakable." *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983). The Board, in applying this test, has held that, before a waiver can be found: a contract clause must specifically include the subject at issue; bargaining history must show that the matter was fully discussed during negotiations; and the Union consciously yielded its interest in the subject. *Johnson-Bateman Co.,* 295 NLRB 180, 184-188 (1989).

I find that all these conditions have been met. First, the subcontracting clause specifically included the subject of subcontracting and provided for the broad reservation of the Employer's right to subcontract any work. As to matter being fully discussed during negotiations, I find that Sabatella's agreement to the subcontracting clause, DeAngelis' being sent a copy of the proposed contract in November, 2006 and making no objection to the disputed clause, Goldblatt's citing of only four objections to the contract, none of which were the subcontracting clause, establishes that, at that time, the matter was fully discussed during negotiations. Finally, by the Union's actions set forth above, I also find that it consciously yielded its interest in the subject.

The Board found in *Allison Corp*., 330 NLRB 1363, 1365 (2000), that a management rights clause, similar to the instant clause, "specifically, precisely, and plainly grants the Respondent the right 'to subcontract' without restriction. We therefore find a 'clear and unmistakable waiver' by the Union of its statutory right to bargain regarding the Respondent's decision to subcontract."

I therefore find and conclude, as the Board did in *Allison Corp*., that the Respondent did not violate Section 8(a)(1) and (5) of the Act by unilaterally subcontracting unit work.

IV. Effects Bargaining

The complaint alleges that the Respondent subcontracted the work of unit employees and laid off all the unit employees except the maintenance employees, without affording the Union an opportunity to bargain with Respondent with respect to the effects of this conduct.

"While a contract clause may constitute a waiver of a bargaining right, it does not automatically follow that the same contract clause waives a party's right to bargain over the effects of the matter in issue. An employer has an obligation to give a union notice and an opportunity to bargain about the effects on unit employees of a managerial decision even if it has no obligation to bargain about the decision itself." "*Allison Corp*., above at 1365.

The Respondent has a "duty to give pre-implementation notice to the union" to allow for meaningful effects bargaining." *Willamette Tug & Barge Co.*, 300 NLRB 282, 283 (1990). *Los Angeles Soap Co*., 289 NLRB 289 fn. 1 (1990).

The evidence establishes that the parties engaged in effects bargaining. Prior to the implementation of subcontracting, there was substantial bargaining over the possibility that unit employees be hired by PBS at certain wage and benefit levels that it would find acceptable. The parties also bargained about voluntary severance for the existing unit employees with the Union offering varying levels of severance payments.

I accordingly find and conclude that the Respondent has satisfied its obligation to bargain with the Union over the effects of its decision to subcontract the work of certain of the unit employees.

Conclusions of Law

1. The Respondent, Galaxy Towers Condominium Association, is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. The Union, Local 124, Recycling, Airport, Industrial & Service Employees Union, is a labor organization within the meaning of Section 2(5) of the Act.

3. The unit described above is a unit appropriate for the purposes of collective bargaining.

4. By failing and refusing to furnish the Union with the information it requested in its letter of May 11, 2011, which information is necessary and relevant to the union's performance of its duties as the exclusive collective-bargaining representative of the unit employees, the Respondent has violated Section 8(a)(1) and (5) of the Act.

5. By failing and refusing to bargain with the Union for a new contract, by insisting to impasse upon a matter that does not constitute a mandatory subject of bargaining under Section 8(d) of the National Labor Relations Act, the Respondent has violated Section 8(a)(1) and (5) of the Act.

6. By implementing terms and conditions of employment upon its employees when a valid impasse has not been reached, the Respondent has violated Section 8(a)(1) and (5) of the Act.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Inasmuch as the Respondent has failed and refused to provide the Union with requested information to which it was entitled, the Respondent shall be ordered to provide the Union with such information.

Inasmuch as the Respondent unlawfully failed and refused to bargain with the Union for a new contract by unlawfully declaring that impasse had taken place and unlawfully implementing the terms of its last best and final offer, the Respondent shall be ordered to bargain with the Union, and, if an understanding is reached, to embody the understanding in a signed agreement.

The Respondent shall also be ordered to rescind any changes to the terms and conditions of employment of its employees not affected by its lawful decision to subcontract certain unit work. I shall also order the Respondent to make whole those employees not affected by its lawful decision to subcontract unit work, for any loss of earnings and other benefits they may have suffered as a result of the Respondent's unlawful actions, in the manner set forth in *Ogle Protection Service,* 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6TH Cir. 1971), with interest as prescribed *in New Horizons for the Retarded*, 283 NLRB 1173 (1987), plus daily compound interest as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010), enf. denied on other grounds sub.nom., *Jackson Hospital Corp. v. NLRB*, 647 F.3d 1137 (D.C. Cir. 2011).

In addition, I shall order the Respondent to make all contractually-required contributions to the benefit funds that it failed to make, if any, including any additional amounts due the funds on behalf of those employees not affected by its lawful decision to subcontract unit work in accordance with *Merryweather Optical Co.,* 240 NLRB 1213, 1216 fn. 7 (1979). Further, the Respondent shall reimburse such employees for any expenses ensuing from its failure to make any required contributions, as set forth in *Kraft Plumbing & Heating,* 252 NLRB 891 fn. 2 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981), such amounts to be computed in the manner set forth in *Ogle Protection Service*, supra, with interest as prescribed in *New Horizons for the Retarded*, supra, and *Kentucky River Medical Center*, above.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[2]

ORDER

The Respondent, Galaxy Towers Condominium, Guttenberg, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to furnish the Union with information it requests which is necessary and relevant to the Union in the performance of its duties as the exclusive collective-bargaining representative of the employees in the appropriate unit.

(b) Failing and refusing to bargain with the Union for a new contract.

(c) Insisting to impasse upon a matter that does not constitute a mandatory subject of bargaining under Section 8(d) of the National Labor Relations Act.

(d) Implementing terms and conditions of employment when a valid impasse has not been reached.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Furnish the Union with the information it requested in its letter of May 11, 2011.

(b) On request, bargain with the Union for a new contract, and, if an understanding is reached, embody the understanding in a signed agreement.

(c) Upon request from the Union, rescind the unilateral changes to the terms and conditions of employment of the employees not affected by its lawful decision to subcontract certain unit work until such time as the parties have bargained in good faith to an agreement or impasse on the terms and conditions of employment of such employees.

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[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(d) Make the employees who are not affected by its lawful decision to subcontract certain unit work, whole for any loss of earnings and other benefits they may have suffered as a result of the Respondent's unlawful actions, with interest, as set forth in the remedy section of this decision.

(e) Make all contractually-required benefit fund contributions, if any, that have not been made to the fringe benefit funds on behalf of the employees who are not affected by its lawful decision to subcontract certain unit work, and reimburse those employees for any expenses ensuing from its failure to make the required payments, with interest, as set forth in the remedy section of this decision.

(f) Within 14 days after service by the Region, post at its facility in Guttenberg, New Jersey, copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 11, 2011.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. September 25, 2012

_____
Steven Davis
Administrative Law Judge

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT refuse to give the Union the information it requests which is necessary and relevant to the Union in the performance of its duties as the exclusive collective-bargaining representative of the employees in the appropriate unit.

WE WILL NOT refuse to bargain with the Union for a new contract.

WE WILL NOT insist to impasse upon a matter that does not constitute a mandatory subject of bargaining under Section 8(d) of the National Labor Relations Act.

WE WILL NOT implement terms and conditions of employment for you when we have not reached a valid impasse in bargaining with the Union.

WE WILL NOT in any like or related manner interfere with your rights under the National Labor Relations Act.

WE WILL give the Union the information it requested in its letter of May 11, 2011.

WE WILL on request, bargain with the Union for a new contract, and, if an understanding is reached, embody the understanding in a signed agreement.

WE WILL upon request from the Union, rescind the unilateral changes to the terms and conditions of employment of the employees of those of you have not been affected by our lawful decision to subcontract certain unit work until such time as we have bargained with the Union in good faith to an agreement or impasse on the terms and conditions of employment of such employees.

WE WILL make the employees who are not affected by our lawful decision to subcontract certain unit work, whole for any loss of earnings and other benefits they may have suffered as a result of our unlawful actions, with interest.

WE WILL make all contractually-required benefit fund contributions, if any, that have not been made to the fringe benefit funds on behalf of the employees who are not affected by our lawful decision to subcontract certain unit work, and reimburse those employees for any expenses ensuing from our failure to make the required payments, with interest.

GALAXY TOWERS CONDOMINIUM ASSOCIATION

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

20 Washington Place, 5th Floor

Newark, New Jersey 07102-3110

Hours: 8:30 a.m. to 5 p.m.

973-645-2100.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 973-645-3784.