

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
WASHINGTON, D.C.**

SECURITY WALLS, LLC

and

Case No. 13-CA-076699

**INTERNATIONAL UNION, SECURITY POLICE
AND FIRE PROFESSIONALS OF AMERICA**

**REPLY TO NATIONAL LABOR RELATIONS BOARD
OPPOSITION TO RESPONDENT'S
MOTION FOR SUMMARY JUDGMENT**

Pursuant to Rule 102.24 of the National Labor Relations Board Rules and Regulations, undersigned counsel for respondent, Security Walls, LLC, hereby submits this Reply to Counsel for Acting General Counsel's Opposition to Respondent's Motion for Summary Judgment. Acting Counsel for General Counsel's Opposition is disingenuous, deceitful and wholly unsupported by the record. General Counsel's opposition is in total disregard of the Board's rules and regulations as well as the provisions, clearly set out, in the Board's Case Handling Manual, specifically Section 10264.2.

Counsel for the Acting General Counsel (hereinafter "General Counsel") asserts that Respondent's Motion for Summary Judgment suffers from "two fatal flaws." More specifically, General Counsel claims that there are 'genuine issues of material fact,' and secondly that Respondent's contention that the information sought by the Union is not relevant. On September 28 the Parties to this litigation were involved in a conference call with the Administrative Law Judge assigned to this matter. At this time, and for the first time, General

Counsel, with the collusive support of the Union Representative, asserted that they were prepared to introduce evidence at the Hearing, of 'facts' purporting to support General Counsel's claim that during the course of the events leading to the Unfair Labor Practice Charges, Respondent and its agents allegedly committed certain acts and uttered certain statements that demonstrate and support General Counsel's claim that there are 'genuine issues of material fact' involved in this matter. If such is the case, General Counsel was required by the Board's own Rules to have set out these matters in the Complaint in order ". . .to enable the parties to understand the offenses charged and the issues to be met."alleged these matters in the Complaint." (Section 10246.2, NLRB Case Handling Manual)

BACKGROUND

1. The original charge in this matter was filed on March 15, 2012 and specifically alleges:

"On or about February 28, 2012, the above named Employer Failed and refused to provide relevant information to the Union per its February 21 2012, request."

2. On May 15, 2012 the first amended charge was filed, containing the following allegation:

"On or about February 21, 2012 the above named Employer failed and refused to provide information requested by the Union in its request on February 21, 2012."

3. On July 19, 2012, the ORDER Consolidating Cases, Consolidated Complaint and Notice of Hearing was issued by Richard Kelliher-Paz, Acting Regional Director, alleging in pertinent part with respect to Case No. 13-CA-076699, as follows:

"VII (a) About February 21, 2012 the Union via email requested

Respondent provide the Union with the following information:

A copy of Respondent's current contract with the Department of Energy/Fermi to provide security services at Fermi.

(b) The information requested by the Union, as described above in paragraph VII (a) is necessary for, and relevant to, the Union's performance of its duties as the exclusive collective-bargaining representative of the Unit.

(c) Since on or about February 21, 2012, Respondent has failed and refused to provide the information requested and described above in Paragraph VII (a)."

4. On August 20, 2012, the Order Severing Allied Barton Security Services, From Outstanding Complaint and all Further Proceedings in this Matter was issued by Gail Morgan, Acting Regional Director.

5. On August 20, 2012 the First Amended Consolidated Complaint and Notice of Hearing was issued by Gail Morgan, Acting Regional Director and with respect to Case No. 13-CA-076699 alleged as follows:

"VII (a) About February 21, 2012 the Union via email requested

Respondent provide the Union with the following information:

A copy of Respondent's current contract with the Department of Energy/Fermi to provide security services at Fermi.

(b) The information requested by the Union, as described above in paragraph VII (a) is necessary for, and relevant to, the Union's performance of its duties as the exclusive collective-bargaining representative of the Unit.

(c) Since on or about February 21, 2012, Respondent has failed and refused to provide the information requested and described above in Paragraph VII (a).”

6. In Paragraph VIII of both, the Consolidated Complaint and the First Amended Consolidated Complaint, it was alleged that Respondent’s conduct, “ failing and refusing to bargain in good faith with the exclusive collective-bargaining representative of its employees within the meaning of Section 8(d) of the Act” was in violation of Section 8(a)(1) and (5) of the Act..

7. On September 28, 2012 Respondent was served via email, with a copy of General Counsel’s Opposition to Respondent’s Motion for Summary Judgment. Therein, General Counsel proceeded to assert allegations that nowhere have been introduced or set out in the either the Original Charge, the Amended Charge or in any Complaint heretofore issued by the Region. Respondent has based its Motion for Summary Judgment on the allegations set out in the Complaints as filed in this matter. Those allegations circumscribe the scope and range of the Complaint and require Respondent to answer allegations, only to the extent set out in the Complaint. General Counsel’s actions in attempting to expand the scope of the Complaint and the allegations set out therein in order to argue that there purportedly are ‘disputed issues of material fact,’ and accordingly Respondent’s Motion for Summary Judgment is ‘fatally flawed’ should be rejected.

We respectfully suggest that it is General Counsel who has exceeded the boundaries of reputable pleadings and actions. General Counsel has acted in a manner which can be described only as disingenuous and deceitful, and closely bordering upon unethical conduct.

ARGUMENT

The Board Rules and Regulations, Complaint, Section 102.15 specifically provide as follows:

“The complaint shall contain (a) a clear and concise statement of the facts upon which assertion of jurisdiction by the Board is predicated, and (b) **a clear and concise description of the acts which are claimed to constitute unfair labor practices, including, where known, the approximate dates and places of such acts and the names of respondent’s agents or other representatives by whom committed.**” (Emphasis added)

Additionally, the Board’s Case Handling Manual also provides in Section 10264.2 The Content of Complaint, Particularity of Complaint: “The allegations of the complaint should be sufficiently detailed to enable the parties to understand the offenses charged and the issues to met. The Complaint should be sufficiently specific to defend against a Motion for a Bill of Particulars.” The Case Handling Manual goes on to remind counsel, “ The failure to properly draft or amend complaints can result in the loss of substantive rights.”

In *McKenzie Engineering Co.*, 326 NLRB 473 (1998) the Board acknowledged that although it agreed with the ALJ’s underlying finding that the unlawful conduct in the case stemmed from the respondent’s desire to rid itself of the Union, the Decision, specifically pointed out:

“[W]e do not adopt his finding of an additional violation based on the **unalleged withdrawal of recognition.**” (Emphasis added)

The Board also cited *NLRB v. Townsend Mfg. Co.*, 101 F.3d 292 (2d Cir. 1996) in which the

Court stated:

“The complaint must contain notice of the charges, and of a hearing to determine them.

Notice must inform the respondent of the acts forming the basis of the complaint.”

(Emphasis added; Citations omitted.)

In *Pergament United Sales, Inc. v. NLRB*, 920 F.2d 130, 135 (2d Cir. 1990) The Court pointed out:

“ Notice does not mean a complaint necessarily must state the legal theory upon which the General Counsel intends to proceed. **Instead notice must inform the respondent of the acts forming the basis of the complaint.** For example, the **Board’s rules require a Complaint to contain a clear and concise description of the acts which are claimed to constitute unfair labor practices , where known, the approximate dates and places of such acts and the names of respondent’s agents or other representative by whom committed.**” 29 C.F.R Sec 102.15 (b) (1990) (Emphasis added)

In the instant matter, General Counsel was obviously aware of the details of the allegations to be relied upon to support the complaint since the original unfair labor practice charge was filed in this matter, March 15, 2012, and yet not until September 28, in its Opposition to the Motion for Summary Judgment and during the telephone conference call with the Administrative Law Judge at 11:00 A.M. P.D.T. has General Counsel ever mentioned these “facts.” Moreover, these purported ‘facts’ have never been set them out in any Complaint issued by the Region. Respondent asserts that this constitutes a violation of Respondent’s *due process rights*, and General Counsel is bound by, and limited to, the specific allegations set out in the Complaints heretofore issued. The Complaint cannot now raise new issues, barely three weeks

prior to trial. It is also apparent from the context of the comments made by General Counsel and the Union Representative during the conference call with the ALJ, that it is the intention of the Board to introduce into evidence at the hearing, the allegations asserted in General Counsel's response to Respondent's Motion for Summary Judgment filed with the Division of Judges as well as his assertion of 'facts' made during the conference call. General Counsel has failed to include any of these allegations in any Charge or Complaint filed against Respondent, and yet he has now advanced these claims unilaterally with the ALJ, clearly a violation of Respondent's *due process rights*, and the basis for dismissal of all charges. The Board has recognized its obligation to provide *due process*. "In determining whether a respondent's due process rights were violated, the Board has considered the scope of the complaint, and any representations by the General Counsel concerning the theory of violation, as well as the difference between the theory litigated and the judge's theory." *NYP Holdings, d/b/a The New York Post*, 353 NLRB 343, 344 (2008) (see also, *Sierra Bullets, LLC* 340 NLRB 242, 242-243 (2003) As mentioned before, regardless of who the ALJ happens to be who will preside over the Hearing, General Counsel's Opposition to the Motion For Summary Judgment and his remarks made during the 'conference call' unilaterally introduce an unlawful bias into the 'presumed impartiality' of the Hearing process.

A "Fair and Impartial Hearing" requires that neither Party thereto is entitled to expose the 'trier of fact' to any matter, prior to, or outside of the Hearing, at which both parties participate equally, evidence in support of its position under circumstances which do not provide the opposing Party the opportunity to object or otherwise preclude such evidence under trial conditions.

CONCLUSION

Based upon the foregoing and based upon both Rule 8 (b) of the Federal Rules of Civil Procedure, the NLRB Rules and Regulations Section 102.15 and the rules set out in the Board's own Case Handling Manual, Section 10264.2, General Counsel is bound and limited to the specific allegations set out in the Complaints heretofore issued and upon which Respondent has based its defenses and Motion for Summary Judgment. As can be seen from the text of the Complaints, the extent of the allegations as to the violation of Section 8(a)(5) is limited to the claim that by failing and refusing to provide the Union with a copy of the current contract with DOE/Fermi Respondent has violated the Act. There are no allegations set forth in any Complaint or Charge asserting specific acts by Respondent or its agents which made the contents of the 'Contract' relevant.

Moreover, the Union is bound by the terms of the Collective Bargaining Agreement. It is not a party to any contract between Respondent and DOE/Fermi, and that contract does not govern the collective bargaining relationship between the parties. Section 8(d) clearly imposes the obligation of the parties to honor their Agreement. Regardless of any claim the Union or the General Counsel may assert as to the relevance of the DOE/Fermi contract, there can be no wage matters re-negotiated or implemented except by virtue of the provisions of Article 23 f of the Agreement. The wage provision of the Agreement was never re-opened. Regardless of anything contained in the contract between Respondent and its customer, there is no obligation upon an Employer to share the contents thereof with the Union, unless the Employer has made those contents relevant. (*Truitt Mfg. Co*, 351 U.S. 149 (1956) Casual remarks made by anyone outside of the scope of actual negotiations are not binding upon either Party, particularly if they have

never been alleged in the Complaint.

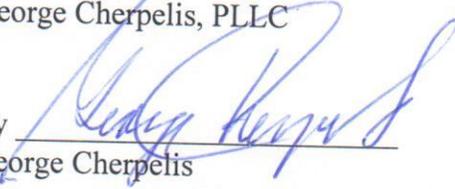
PRAYER FOR RELIEF

General Counsel should be held to the allegations set forth in the First Amended Consolidated Complaint. The Office of the Executive Secretary should proceed to address Respondent's Motion for Summary Judgment on the basis of that Motion as so filed.

In the alternative, should General Counsel seek to proceed beyond the scope of the specific allegations as set out in Paragraph VII of the Complaints, Respondent moves that General Counsel's Opposition to Respondent's Motion for Summary Judgment be stricken and that General Counsel's actions in filing its opposition with the Division of Judges, and his arguments made during the conference call with the ALJ constitute a clear violation of Respondent's Right to The Due Process of Law and this matter be dismissed in its entirety without further proceedings.

Dated: October 2, 2012

Respectfully submitted,
Law Office of
George Cherpelis, PLLC

By 
George Cherpelis

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CERTIFICATION OF SERVICE

Copies of the foregoing Response to General Counsels Opposition to Respondent's Motion for Summary Judgment were served on October 2, 2012 upon the parties below

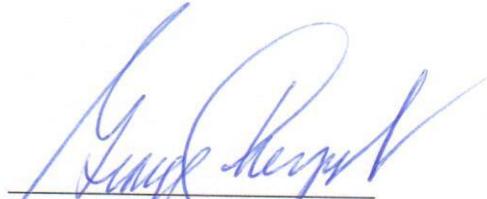
VIA E-FILING

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