



**United States Government**

**NATIONAL LABOR RELATIONS BOARD**

Region 22

20 Washington Place, 5th Floor

Newark, NJ 07102-3115

November 20, 2012

Lester A. Heltzer, Executive Secretary  
Office of the Executive Secretary  
National Labor Relations Board  
1099 14<sup>th</sup> Street, N.W.  
Washington, D.C. 20570-0001

Re: Chapin Hill at Red Bank  
Case 22-CA-067608

Dear Mr. Heltzer:

Please consider this letter brief as Counsel for the Acting General Counsel's Answering Brief to Respondent Chapin Hill at Red Bank's Exceptions to the Administrative Law Judge's Decision in the above-referenced case.

Counsel for the General Counsel relies upon the Statement of the Case and the Findings of Fact as set forth in the Administrative Law Judge's Decision and the record of the hearing in this matter.

As an initial matter, Respondents' exceptions must be disregarded for violating the National Labor Relations Board Rules and Regulations. Under Rule 102.46(b)(1):

"Each exception (i) shall set forth specifically the questions of procedure, fact, law, or policy to which exception is taken; (ii) shall identify that part of the administrative law judge's decision to which objection is made; (iii) shall designate by precise citation of page the portions of the record relied on; and (iv) shall concisely state the grounds for the exception. If a supporting brief is filed the exceptions document shall not contain any argument or citation of

authority in support of the exceptions, but such matters shall be set forth only in the brief.”

Rule 102.46(b)(2) requires that any exception which fails to comply with the foregoing requirement be disregarded.

On November 6, 2012, Respondent filed an “exceptions memorandum,”(hereafter “memorandum”) and on November 8, 2012, Respondent filed an additional document titled simply, “exceptions” (hereafter “exceptions document”) wherein it cited pages and lines of the Administrative Law Judge’s Decision (“ALJD” or “JD”) to which it excepted, but failed to state the questions of procedure, fact, law or policy to which exception is taken or concisely stated the grounds for the exception.<sup>1</sup> Therefore, Respondent’s exceptions to the ALJD fail to comply with the requirements of Rule 102.46(b)(1) and must not be considered.

Respondent’s memorandum fails to mention many of the pages, paragraphs and exceptions referenced in its exceptions document.<sup>2</sup> Those exceptions, which the Respondent did not mention must be disregarded as a matter of course as violative of 102.46(b)(1).

Those issues which *were* raised by Respondent in its exceptions have been thoroughly dealt with in the ALJD, support for which is found in the record. Counsel for the General Counsel will therefore address a limited number of issues raised by Respondent and rely for the remainder upon the Judge’s Findings of Fact and Conclusions of Law.

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<sup>1</sup> General Counsel moves to strike those portions of Respondent’s memorandum which contain facts not in evidence. Specifically, on P.3 of Respondents’ memorandum, Respondent makes assertions related to the relationship between Local 707 and Local 74, which are not contained anywhere in the record.

<sup>2</sup> Those exceptions which were not mentioned in Respondents’ brief included: Page 4, line 3, 24-25, 33-35; P.7 lines 9-24, P.8 lines 44-53; P. 9, lines 1-19; P.11 lines 1-6, 8-14, 28-44; P. 12 footnote 8; P. 13, lines 14-18, 28-49; P. 14, lines 1-13, 34-36; P. 15 lines 1-43.

POINT 1: THE ALJ WAS CORRECT IN REFUSING TO DEFER THIS CASE TO ARBITRATION

Respondent asserts that the Judge erred in not deferring this case to arbitration. The Board has long held it will not defer when contract terms do not arguably authorize the action taken by the Respondent, and where the matter does not fall within the context of contractual interpretation. *St. Joseph's Hospital*, 233 NLRB 1116, 1118 (1977). An employer's refusal to bargain does not give rise to a contract interpretation issue, but rather an unfair labor practice. As set forth in the ALJD, the relevant clauses of the collective bargaining agreement fail to provide any arbitrator with the ability to fashion a remedy in this instance. ALJD P. 7-11. The Employer's refusal to bargain constituted an unfair labor practice. Respondent's exception contains no case law whatsoever to refute the detailed and well reasoned position of the Judge. The exception is without merit, and should be disregarded.

POINT 2: THE ALJ CORRECTLY FOUND THAT THE ALLEGATIONS OF THE COMPLAINT ARE NOT BARRED BY SECTION 10(b)

Section 10(b) of the Act provides that "no complaint shall issue based on any unfair labor practice occurring more than six months prior to the filing of the charge with the Board." Respondent asserts the claims at issue in this case are barred by Section 10(b) because in August 2010, Respondent's agent, Joseph Schlanger, told Union President Odette Machado that he "was on top of it" when Machado asked to discuss specifics of the pension fund.<sup>3</sup> Respondent asserts that Schlanger's statement somehow put the Union on notice that the Employer had refused to

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<sup>3</sup> Respondent's exceptions distort the record by failing to include that Schlanger told Machado both that "he would take care of it" and that "he was on top of it." In her decision, Judge Landow referenced both of Schlanger's statements. ALJD P.4.

bargain in 2010, a theory for which Respondent provides no supporting facts or case law. In her decision, Judge Landow wrote eloquently about this matter, stating that it is well established that the Section 10(b) period does not begin to run until the charging party is on “clear and unequivocal notice” that an unfair labor practice has occurred. ALJD, P.5. Further, Judge Landow cited to several cases in which the Board has not found the 10(b) period to run in situations where Respondent intimated it would remedy the problem. Specifically, the Judge relied on *Sterling Nursing Home*, 316 NLRB 413, where the 10(b) period did not begin to run where Respondent’s agent told the union he would “take care of” and “straighten out” the issue. ALJD, P.5. Respondent’s position defies logic and ignores legal precedent and must be disregarded.

### POINT 3: THE ALJ CORRECTLY FOUND A VIOLATION ON THE MERITS

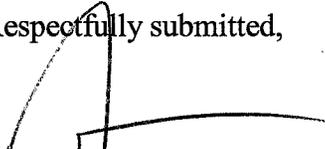
Respondent asserts that based on Section 8(d) it did not need to respond to the Union’s October letter, in which it requested to bargain with the Respondent over the identity of the pension fund.<sup>4</sup> Once again, Respondent presents no case law to rebut the detailed and well researched ALJD, which expressly refuted this argument when raised in Respondent’s post hearing brief. ALJD P. 11-14. Rather than engage in a point by point analysis of the evidence relating to this exception, General Counsel will rely on the factual and legal conclusions reached by the Judge who, after painstakingly analyzing all evidence presented by Respondent, found that Respondent had unlawfully failed to bargain. Therefore, this exception is without merit and should be denied.

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<sup>4</sup> Both Respondent’s post hearing brief and exceptions reference an “11/10” letter. There was no such letter at issue in the case, and despite the Judge’s reference to this mistake, Respondent did not choose to correct it in its exceptions. ALJD P.11. For the purposes of this brief, it is assumed Respondent was referring to the October letter.

Based upon all of the foregoing, it is respectfully submitted that Respondent's Exceptions to the Decision of the Administrative Law Judge are defective and without merit and must be denied in their entirety.<sup>5</sup> It is further submitted that the Administrative Law Judge's Decision should be affirmed and that her recommended Order be adopted by the Board.

Respectfully submitted,



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<sup>5</sup> Respondent's assertion that the President's appointments of Board members during the Senate recess were unconstitutional must also be disregarded. In similar circumstances, the Board has found that it is inappropriate for it to decide whether Presidential appointments are valid. Instead, the Board applies the well-settled "presumption of regularity support[ing] the official acts of public officers in the absence of clear evidence to the contrary." *Lutheran Home at Moorestown*, 334 NLRB 340, 341 (2001), citing *U.S. v. Chemical Foundation*, 272 U.S. 1, 14-15 (1926).

**CERTIFICATION OF SERVICE**

This is to certify that copies of the foregoing General Counsel's Answering Brief to Respondent's Exceptions have been served upon the parties as follows:

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Dated this 20<sup>th</sup> day of November, 2012

**s/ Joshua S. Mendelsohn**  
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