

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

**MGM GRAND HOTEL, LLC
d/b/a MGM GRAND**

And

Case 28-CA-186022

CYNTHIA THOMAS, an Individual

**GENERAL COUNSEL'S OPPOSITION TO
RESPONDENT'S MOTION FOR SUMMARY JUDGMENT**

Pursuant to Section 102.24(b) of the Rules and Regulations of the National Labor Board (the Board), Counsel for the General Counsel (CGC) respectfully submits this opposition to the Motion for Summary Judgment (the Motion) filed by MGM Grand Hotel, LLC d/b/a MGM Grand (Respondent). Contrary to Respondent's contentions, deferral to the arbitrator's decision is inappropriate, as is summary judgment given that there are genuine issues of material fact in dispute. Moreover, Respondent's service was defective and cannot be timely cured.

I. PROCEDURAL BACKGROUND

On October 11, 2016, Cynthia Thomas, an Individual (Charging Party or Thomas) filed a charge against Respondent. On November 4, 2016, Thomas filed a first amended charge against Respondent alleging, among other things, that she was unlawfully suspended and discharged. Respondent has a collective-bargaining agreement (CBA) with the Local Joint Executive Board of Las Vegas, which is comprised of the Culinary Workers Union, Local 226 and the Bartenders Union, Local 165, both of which are affiliated with UNITE HERE International Union (collectively referred to herein as "the Union"). Thomas was not only covered by the CBA, but was also a Union Shop Steward. On December 30, 2016, the Regional Director for Region 28 of the Board (the Regional Director) deferred the unfair labor practice allegations to the parties'

grievance and arbitration procedure in accordance with *Collyer Insulated Wire*, 192 NLRB 837 (1971), and *United Technologies Corp.*, 268 NLRB 557 (1984), and pursuant to a *Babcock & Wilcox Construction Co.*, 361 NLRB No. 132 (2014) standard of review.

The arbitration was held on November 14 and 30, 2017 before Arbitrator Gary L. Axon (the Arbitrator). On March 2, 2018, the arbitration record was closed after briefs were submitted. On April 2, 2018, the Arbitrator issued his Opinion and Award (the Award). On August 31, 2018, the Regional Director revoked deferral and resumed processing of the charge. The Region requested that Respondent provide it with a copy of the arbitration transcript, but Respondent declined. On September 27, 2018, the Regional Director issued a Complaint and Notice of Hearing (the Complaint), alleging that Respondent violated Section 8(a)(1) and (3) the National Labor Relations Act (the Act) by suspending and discharging Thomas. On October 11, 2018, Respondent filed an Answer and Statement of Defenses (Answer) to the Complaint.

On November 16, 2018, Respondent's counsel filed a Motion to Reschedule the Hearing due to it conflicting with another Board hearing scheduled to commence on the same date with Respondent's counsel. On November 28, 2018, the Regional Director issued an Order Rescheduling Hearing from January 15, 2019 to February 12, 2019, after all the parties indicated that they and their witnesses would be available that week.

On January 15, 2019, Respondent filed its Motion with the Board, seeking dismissal of the Complaint based on the Arbitrator's Award.

II. ARGUMENT

A. *Respondent's Service is Defective and if Cured, Will Be Untimely*

i. The Board's Legal Standard Regarding Filing and Service

Sections 102.24(a) and (b) of the Board's Rules and Regulations (the Board's Rules) require that motions for summary judgment be filed in writing with the Board no later than 28 days prior to the scheduled hearing. Furthermore, Section 102.5(f) of the Board's Rules, titled, "Filing and service of papers by parties: form of papers; manner and proof of filing or service" states in pertinent part:

(f) Service. Unless otherwise specified, documents filed with the Agency must be **simultaneously served** on the other parties to the case including, as appropriate, the Regional Office in charge of the case. Service of documents by a party on other parties may be made personally, or by registered mail, certified mail, regular mail, email (unless otherwise provided for by these Rules), private delivery service, or by fax for documents of or under 25 pages in length. [...] [**Emphasis added.**]

ii. Respondent's Motion Should Be Denied For Defective Service

Respondent filed its Motion on January 15, 2019 – exactly 28 days prior to the February 12, 2019 hearing. However, according to Respondent's Certificate of Service, it failed to serve the Charging Party.¹ If Respondent were to attempt to cure service by serving the Charging Party now, it would render its Motion untimely. Since Respondent failed to properly serve all the parties in violation of the Board's Rules, its Motion should not be considered and should be denied outright. If the Board grants Respondent's Motion, it will severely prejudice the Charging Party.

B. Respondent's Motion Establishes That Material Facts Are In Dispute

i. The Board's Legal Standard Regarding Summary Judgment

It is well settled that summary judgment is appropriate *only* if it is affirmatively established that: "(1) that there is no genuine issue as to any material fact and (2) that the moving

¹ The Certificate of Service also indicates that the Regional Director of Region 28 was served via the NLRB's electronic filing system and First Class Mail. Although the Region has no record of receiving an e-filed copy, (presumably because it was only e-filed with the Board and not the Region), CGC avers that Respondent's counsel emailed her a copy directly.

party is entitled to a judgment as a matter of law.” *Stephens College*, 260 NLRB 1049, 1050 (1982), *Conoco Chemicals Company*, 275 NLRB 39, 40 (1985). Section 102.24(b) of the Board’s Rules further specifies that the Board may deny a motion for dismissal and/or summary judgment “where the motion itself fails to establish the absence of a genuine issue, or where the opposing party’s pleadings, opposition and/or response indicate on their face that a genuine issue may exist.” In a summary judgment proceeding, the pleadings and evidence must be viewed in the light most favorable to the nonmoving party. *Eldeco, Inc.*, 336 NLRB 899, 900 (2001); *Petrochem Insulation, Inc.*, 330 NLRB 47, 52 n.20 (1999), *enfd.* 240 F.3d 26 (D.C. Cir. 2001). Additionally, the party seeking summary judgment has the burden of supporting its motion with admissible evidence. *Lake Charles Memorial Hospital*, 240 NLRB 1330, 1331 n.4 (1979).

In order to overcome summary judgment, CGC need only argue that a “genuine issue” exists with the allegations in the Complaint. Section 102.24(b) of the Board’s Rules specifies that “[i]t is not required that either the opposition or the response be supported by affidavits or other documentary evidence showing that there is a genuine issue for hearing.” Thus, CGC only needs to provide claims which, “on their face,” create a genuine issue of fact. Moreover, the Board has held that “a simple denial of unlawful conduct is sufficient to raise a material question without requiring [CGC] to come forward with affidavits or other evidence.” *Id.* (citing *Florida Steel Corporation*, 222 NLRB 586 (1976)).

ii. Respondent’s Motion Should Be Denied For Failing to Meet the Summary Judgment Standard

In its Answer and in its Motion, Respondent denies that the Charging Party was engaged in protected activity when she advised another Unit employee regarding a potential disciplinary issue in her capacity as a Union Shop Steward. Moreover, Respondent asserts that the Charging Party instructed the other employee to lie. However, CGC does not concede this. CGC maintains

that even if Respondent held an honest belief that the Charging Party engaged in misconduct (which has not been established), the Charging Party did not, in fact, engage in the asserted misconduct. See *NLRB v. Burnup & Sims*, 379 U.S. 21 (1964). Moreover, Respondent has no basis for claiming that the misconduct it suspected was willful, malicious, or otherwise so egregious as to lose the protection of the Act. See *Linn v. United Plant Guard Workers*, 383 U.S. 53 (1966); *NLRB v. Thor Power Tool*, 351 F.2d 584, 587 (7th Cir. 1965), enfg. 148 NLRB 1379, 1380 (1964); *Trilogy Communications, Inc.*, JD(ATL)-46-01 (2001). Thus, the suspension and discharge would still be unlawful.

Clearly there are genuine disputes over material facts regarding the allegations in the Complaint. The questions of whether the Charging Party was engaged in protected activity and whether she was discharged while acting in her capacity as a Union Shop Steward require a hearing to resolve these issues. A hearing would allow contrary evidence, including witness testimony, to be presented to an administrative law judge to evaluate the strength of the evidence and the credibility of witnesses.

Respondent's Motion itself, with its 100-plus pages of attachments, establishes the need for a hearing. Respondent's exhibits are the very kind of evidence that would be expected at a hearing. Many of these documents were previously unseen by General Counsel (including the excerpts from the arbitration transcript, which was requested but not produced), and they should not be considered evidence by the Board unless and until offered and received by an administrative law judge as part of a record through an unfair labor practice hearing. Respondent's Motion, which contains facts, authority, and argument, supports CGC's position that there are genuine issues as to material facts that warrant a hearing.

C. The Region Cannot Defer to the Arbitrator's Award

i. The Board's Deferral Standards in *Babcock & Wilcox*

Under *Babcock & Wilcox Construction Co.*, 361 NLRB No. 132 (2014), deferral to an arbitral decision is appropriate in Section 8(a)(1) and (3) cases where the arbitration procedures appear to have been fair and regular, the parties agreed to be bound, and the party urging deferral demonstrates that: (1) the arbitrator was explicitly authorized to decide the unfair labor practice issue; (2) the arbitrator was presented with and considered the statutory issue, or was prevented from doing so by the party opposing deferral; and (3) Board law "reasonably permits" the arbitral award.

ii. Respondent's Motion Should Be Denied Because the Arbitrator's Award Discriminates Against the Charging Party As A Shop Steward

Although the Arbitrator summarily disagreed with the Union's assertion that the Charging Party was punished for performing her duties as shop steward, Board law does not reasonably permit deferral to the Award. Deferral to the award is not appropriate because Respondent suspended and discharged the Charging Party specifically because of the manner in which she counseled an employee in her capacity as a steward during a disciplinary investigation, and, also, because the Arbitrator's decision is specifically grounded in the discriminatory premise that, as a steward, the Charging Party should be held to a higher standard of honesty than other employees. Specifically, the Arbitrator stated:

The Company's very serious allegation that Grievant was dishonest during an investigation is **compounded by the fact she was a Shop Steward**, charged with representing members of the bargaining unit with honesty and integrity. (p. 15)

[...]

Grievant's misconduct was particularly egregious because she was an experienced Shop Steward charged with representing fellow members of the bargaining unit during the disciplinary process. In this advocacy role she had a

higher duty to be honest, forthcoming, and to refrain from any activity, which could interfere with the integrity of an investigation. (p. 24)

[Emphasis added.]

Under Board law, employers must accord employees *greater* leeway when then are engaged in protected activities than they afford employees in other settings. See *Atlantic Steel Co.*, 245 NLRB 814 (1979). The Arbitrator's award, which does the opposite, and explicitly discriminates against the Charging Party based on her status as a steward, therefore, is not reasonable in light of Board law. Thus, deferral is not appropriate.

III. CONCLUSION

Based on the foregoing, the Board should deny Respondent's Motion because:

(1) Respondent's service was defective and cannot be timely cured; (2) there are genuine issues of material fact warranting a hearing on the allegations of the Complaint and which preclude summary judgment; and (3) deferral is inappropriate based on the Arbitrator's bias toward the Charging Party as a Union Shop Steward. There is no basis for granting summary judgment, and as such, CGC respectfully requests that Respondent's Motion be denied.

Dated at Phoenix, Arizona, this 22nd day of January, 2019.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the General Counsel's Opposition to Respondent's Motion for Summary Judgment in MGM Grand Hotel, LLC d/b/a MGM Grand, Case 28-CA-186022, were served via E-Gov, E-Filing; Email on this 22nd day of January 2019, on the following:

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