

IN THE UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

ARBAH HOTEL CORP d/b/a MEADOWLANDS VIEW HOTEL,  Petitioner,  v.  NATIONAL LABOR RELATIONS BOARD,  Respondent.	Case No. 20-1025  20-1102
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PETITIONER ARBAH HOTEL CORP.'S BRIEF  
IN OPPOSITION TO NLRB'S MOTION TO STRIKE  
PORTIONS OF ARBAH'S REPLY BRIEF AND  
OPPOSITION TO CROSS-APPLICATION

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**PRELIMINARY STATEMENT**

The Board's motion to strike portions of the reply brief filed by Arbah is based on misconceptions that the reply brief argues an entirely new and different position than the original opening brief, and that Arbah is not entitled to address the arguments contained in the opposition. On the contrary, each of the arguments presented in the reply brief is directly related to the fundamental arguments presented by the Hotel its original brief seeking review of the Board Decision and Order. The present motion seeks to prevent the Hotel from addressing the assertions made in the opposition brief, which would defeat the very purpose of a reply as provided for in the Rules of Appellate Procedure.

The Board also fails to acknowledge that Arbah's reply was also opposition to the cross-application seeking enforcement of the Decision and Order. The reply constitutes the Hotel's only opportunity to respond to the arguments set forth by the Board in support of enforcing the Order. Indeed, Arbah's opposition to the form of the Order and the specific relief to be enforced

is clearly within the scope of a reply brief. Therefore, the contention that Arbah waived the arguments in its reply and opposition brief is unavailing.

For the same reasons, Arbah's reply cannot be characterized as "sandbagging." The authority cited by the Board applies where a party intentionally held back an argument until the time of reply. This is not the case here, where Arbah's reply arguments directly address the points made by the Board in its opposition.

**LEGAL ARGUMENT**

**I. ARBAH'S REPLY BRIEF ARGUMENTS ARE CLOSELY RELATED TO THE ASSERTIONS IN ITS OPENING BRIEF.**

Pursuant to Federal Rule of Appellate Procedure 28, an appellant is afforded the opportunity to file a brief in response to the opposition submitted by the respondent. See Fed. R. App. P. 28. Arbah's reply not only directly addresses the Board's arguments but it also reasonably expands upon the arguments set forth in the opening brief. Specifically, Arbah previously argued

that it was not the cause of any termination of health care coverage and that termination of UHH was its right under the February 2012 Agreement.

Although this is not a case in which an entirely new argument was raised on reply, the Third Circuit has recognized circumstances under which a reply brief is appropriate even for addressing new arguments and developments raised in opposition. See *Morganroth & Morganroth v. Norris, McLaughlin & Marcus, P.C.*, 331 F.3d 406 (3d Cir. 2003) (reply brief was appropriate time for appellants to initially address statute of limitations defense raised in appellees' brief since appellants could not have been expected to anticipate appellees to raise defense not ruled upon in district court). In *Morganroth*, the appellant's reply brief was the first opportunity for appellant to argue the issue in response to appellees' argument. See *id.* at 416-417 n. 5. The Circuit Court of Appeals has the power to consider issues "antecedent to" and/or "ultimately dispositive of" a case regardless of whether briefed by the parties. *Tenafly*

*Eruv Ass'n, Inc. v. Borough of Tenafly*, 309 F.3d 144, 158-159 n. 15 (3d Cir. 2002) (quoting *United States Nat'l Bank v. Indep. Ins. Agents*, 508 U.S. 439, 447 (1993) and *Arcadia v. Ohio Power Co.*, 498 U.S. 73, 77 (1990)).

The reply at issue does not raise wholly new arguments but rather expands upon the fundamental position that the Board improperly found a violation by the Hotel. Arbah's reply brief directly responds to the allegation of the Board -- that Arbah's original argument was immaterial to the issue of whether there was a violation of the Act. The reply argument further addresses the issue of the Hotel's right to procure alternative health coverage without having to bargain with the Union.

Specifically, Arbah contended that it did not cause any lapse in coverage because it procured the alternate health plan with Qual Care. The cited references to the testimony on the record highlight the fact that Arbah took all steps to secure alternate coverage. The opposition asserted that the Board did not dispute

Arbah's right to secure different insurance but that the issue was that Arbah caused the termination of the UHH plan. These issues are linked in that no violation occurred if Arbah acted within its rights pursuant to the Agreement. The reply merely cited to the important facts on the record which were germane to a reasoned response to the opposition, specifically, the undisputed testimony that Arbah did all it could to procure alternative health coverage through QualCare. The motion is an effort to prevent consideration of these facts on the record, which became relevant due to Board's argument in its opposition. As strictly a matter of fairness, the Court should consider the Hotel's response, which is not an argument withheld from the opening brief, but rather is a true response to the opposition.

This matter is factually and procedurally distinguishable from the cases cited by the NLRB, where parties failed to raise arguments in their initial briefs at all. See, e.g., *Kost v. Kozakiewicz*, 1 F.3d 176, 182 (3d Cir. 1993). Indeed, the issue of whether the Hotel

had the right to unilaterally procure new coverage and cease payments to UHH was one of the primary points in the original brief.

In the cases cited by the Board, the issues precluded on jurisdictional grounds were not inextricably linked to the issues argued on appeal. *See, Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 666 (1982) (appeal considered subcontracting clauses in contest of collective bargaining agreement while finding no jurisdiction to consider newly-raised picketing issue); *United Dairy Farmers Co-op. Ass'n v. NLRB*, 633 F.2d 1054, 1064 (3d Cir. 1980) (NLRB-ordered remedies unchallenged before the Board could not be challenged on appeal). These cases involve situations where only remedial or separate factual issues were raised for the first time in the reply.

To grant the NLRB's motion is to allow its opposing contentions to go unchecked despite the existence of contrary facts on the record. Each argument in the reply

correlates directly with the assertions in the opposition and the initial arguments.

**II. ARBAH'S REPLY BRIEF RESPONDS TO THE ARGUMENTS SET FORTH BY THE BOARD IN SUPPORT OF THE CROSS-APPLICATION FOR ENFORCEMENT OF THE ORDER.**

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The NLRB's brief was submitted both in opposition to Arbah's appeal *and* in support of the cross-application for enforcement of the Order. The reply, therefore, was Arbah's first opportunity to address the affirmative arguments of the Board supporting the Decision, as compared to the Board's arguments refuting the opening brief. Because the Board is seeking affirmative relief, the Rules and equity dictate that Arbah has the opportunity to address those points.

An integral part of Arbah's reply deals with the reasons why the Order as drafted should not be enforced. Nothing was waived by Arbah because it was unknown what position the Board would take in its application for enforcement. In fact, the original brief argued that the Order requiring repayment to UHH of premium amounts was

improper. The reply argues that the Order should not be enforced even if the Court were to affirm the Decision for the reasons cited by the NLRB.

Arbah initially argued that the findings that the Board erred in finding that it unilaterally terminated health coverage and, therefore, must pay UNITE HERE HEALTH for amounts expended as health coverage since November, 2017. Arbah explicitly filed an exception to that aspect of the ruling.

In the original brief, Arbah contended that it would be inequitable to require it to pay UHH premiums. That position was echoed in the reply where the Hotel reiterated its position that the relief was inconsistent with its rights and the facts on the record (i.e., that no premiums were paid). In the reply, Arbah logically expanded the argument in light of the assertion by the Board that UHH provided no coverage beyond October, 2017. Per the reply brief, even if the Court were to adopt the Board's position, the Order still must be modified to

reflect the fact that UHH paid nothing for which reimbursement could be required.

The Board's opposition was its initial brief in support of the cross-application seeking enforcement of the Board's Decision and Order. This motion is an attempt to deprive the Hotel of the right to respond to the arguments first made by the Board in the opposition brief. Granting the motion would functionally allow the Board's enforcement arguments to go unrefuted. At the heart of the cross-application is whether the Decision and Order were appropriate and tailored to the findings of the Board. If no premiums were paid, no reimbursement of UHH is warranted.

A party does not waive or forfeit an argument where that argument is inextricably linked to issues or defenses raised in prior proceedings or appellate brief filings. See, e.g., *Avaya Inc., RP v. Telecom Labs, Inc.*, 838 F.3d 354, 396-397 n. 43-44 (3d Cir. 2016) (Plaintiff did not forfeit arguments regarding erroneous judgment on contract and fraud-related issues that

tainted antitrust verdict where issues were inextricably linked with manufacturer's antitrust arguments).

Even if the reply had not been Arabah's first opportunity to address the appropriateness of the Order, the initial brief argued that the Order was improper and the Hotel directly objected to the requirement that it make payment to UNITE HERE HEALTH for member health care contributions after November, 2017. One of the basic premises of Arabah's appeal was that it had the right to unilaterally implement new coverage and cease making payments to UHH. Related to that assertion was the argument that no premiums were due to UHH. The Order as issued by the Board is flawed in that it provides UHH with the entitlement to receive payments from November 2017, which would amount to unjust enrichment.

For the reasons set forth in Arabah's original argument and reply brief, the Order is overbroad and should be modified.

CONCLUSION

For these reasons, the Board's motion to strike portions of Arbah's reply brief should be denied in its entirety.

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