

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Thurgood Marshall U.S. Courthouse 40 Foley Square, New York, NY 10007 Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

Docket Number(s): 20-1522 & 20-1973 Caption [use short title]

Motion for: Striking Portions of Opening and Reply Briefs

Set forth below precise, complete statement of relief sought:

An order striking portions of Petitioners' opening and reply briefs that depend on non-record material and of Petitioners' reply brief that raise arguments not raised in the opening brief.

305 West End Holding, LLC v. NLRB

MOVING PARTY: National Labor Relations Board OPPOSING PARTY: 305 West End Holding, LLC, et al.

- Plaintiff Defendant Appellant/Petitioner Appellee/Respondent

MOVING ATTORNEY: David Habenstreit OPPOSING ATTORNEY: Paul E. Wagner [name of attorney, with firm, address, phone number and e-mail]

National Labor Relations Board Stokes Wagner, ALC 1015 Half Street SE, Washington, DC 20570 903 Hanshaw Road, Ithaca, NY 14850 202-273-2960; appellatecourt@nlrb.gov 607-257-5165; pwagner@stokeswagner.com

Court- Judge/ Agency appealed from: National Labor Relations Board

Please check appropriate boxes:

Has movant notified opposing counsel (required by Local Rule 27.1): Yes No (explain):

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUNCTIONS PENDING APPEAL:

Has this request for relief been made below? Has this relief been previously sought in this court? Requested return date and explanation of emergency:

Opposing counsel's position on motion: Unopposed Opposed Don't Know

Does opposing counsel intend to file a response: Yes No Don't Know

Is oral argument on motion requested? Yes No (requests for oral argument will not necessarily be granted)

Has argument date of appeal been set? Yes No If yes, enter date:

Signature of Moving Attorney:

/s/ David Habenstreit Date: 02/10/2021 Service by: CM/ECF Other [Attach proof of service]

**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

305 WEST END HOLDING, LLC, d/b/a)	
305 WEST END AVENUE OPERATING,)	
LLC and ULTIMATE CARE)	
MANAGEMENT ASSISTED LIVING)	
MANAGEMENT, LLC, a division of the)	
ENGEL BURMAN GROUP, d/b/a)	
ULTIMATE CARE MANAGEMENT, LLC))	
)	Nos. 20-1522 & 20-1973
Petitioners/Cross-Respondents)	
)	
v.)	Board Case Nos.
)	02-CA-188405, et al.
NATIONAL LABOR RELATIONS)	
BOARD)	
)	
Respondent/Cross-Petitioner)	

**OPPOSED MOTION OF THE NATIONAL LABOR RELATIONS
BOARD TO STRIKE PORTIONS OF OPENING AND REPLY BRIEFS**

To the Honorable, the Judges of the United States
Court of Appeals for the Second Circuit:

The National Labor Relations Board (“the Board”), by its Assistant General Counsel, respectfully moves the Court to strike portions of the opening and reply briefs of 305 West End Holding, LLC, d/b/a 305 West End Avenue Operating, LLC and Ultimate Care Management Assisted Living Management, LLC, a division of the Engel Burman Group, d/b/a Ultimate Care Management, LLC (collectively “the Company”). The Board has contacted Company counsel about this motion; the Company intends to file an opposition.

The Company's opening and reply briefs rely on documents that were undisputedly not part of the record in the underlying Board proceeding and so not considered by the Board in reaching the decision under review. The Company nevertheless tried to have the Court consider them, by filing a motion asking the Court to supplement the appendix with these non-record documents or, alternatively, take judicial notice of them. The Court denied that motion, concretizing the documents' status as being outside of the record on appeal and irrelevant to the Court's consideration of any issue. Accordingly, the Court should strike those portions of the Company's opening and reply briefs that rely on these non-record materials.

The Company's reply brief also makes arguments regarding why the Court should consider those non-record documents that it did not raise in its opening brief and are therefore waived. The Court should strike these belatedly-raised arguments.

In support of its motion, the Board states as follows:

I. PROCEDURAL HISTORY

The Company has petitioned the Court to review, among other things, the Board's determination that the Company was a successor employer obligated to recognize and bargain with the United Food & Commercial Workers Union, Local 2013 ("the Union"), which represented the employees of the Company's predecessor. Prior to briefing, the Company filed a "Motion to Supplement

Appendix,” in which it requested that the Court (1) add to the record on appeal four documents that admittedly were not part of the agency record or considered by the agency in making the decision under review, or (2) alternatively, take judicial notice of the documents. These documents, attached to the Company’s motion as “Exhibit 1,” concern a nearly decade-old criminal proceeding in the Southern District of New York against several officials of a predecessor union and include a sealed indictment, a verdict form, a sentencing memorandum, and a Court of Appeals decision regarding the criminal convictions.¹

Before the Board filed its response to the Company’s motion, the Court referred it to the panel that would decide the merits of the case. The Board then filed its response, urging the Court to reject the Company’s motion as to “Exhibit 1.” The Board explained that, pursuant to Federal Rule of Appellate Procedure 16(a), “[t]here is no distinction between the record compiled in the agency proceeding and the record on review.” Adv. Comm. Notes to Fed. R. App. P. 16(a) (1967). Accordingly, since the documents were never part of the record before the Board, they could not be made part of the appellate record. The Board also emphasized that the National Labor Relations Act requires a reviewing court

¹ The motion also asked the Court to include in a supplemental appendix the brief the Board’s General Counsel filed with the Board in support of the General Counsel’s exceptions to the Administrative Law Judge’s decision. The Company attached the brief to its motion as “Exhibit 2.” The Board did not oppose this request, provided the brief was clearly delineated as non-record material.

to determine whether the Board's decision was supported by substantial evidence on the record *before the Board*. 29 U.S.C. §§ 151, 160(e) and (f). Therefore, since the documents were not part of the record before the Board, they could not bear on the Court's review. The Board also pressed the Court to reject the Company's judicial notice request because the proffered documents were entirely irrelevant to any issue pending on appeal.

The Company, proceeding as if the Court had granted its motion, relied on this non-record material in its opening brief. Specifically, it used these documents to make a tortured and illogical claim that the criminal actions of several predecessor-union officials supported finding that the Union currently operated on a members-only basis, meaning that it applied the contract and its terms to union members only rather than all unit employees. According to the Company, such a finding would indicate the Union lacked majority support and excuse the Company's refusal to recognize and bargain with the Union.

After the Company filed its opening brief, but before the Board filed its responsive brief, the Court notified the parties that it had placed the Company's motion on the substantive motions calendar for December 29, 2020. The Board's answering brief, filed before the Court ruled on the motion, again urged the Court not to consider the irrelevant, non-record documents or any arguments in the Company's opening brief that relied on them.

On December 29, 2020, the Court denied the Company’s motion, thus declining to add the Exhibit 1 documents to the record on appeal or take judicial notice of them.² *See* attachment. The Company then filed its reply brief, in which, undeterred by the Court’s denial of its motion, it continued to rely on the now-rejected documents to support its arguments. It also repeated the arguments made in its motion—but *not* included in its opening brief—that the Court should add the documents to the appellate record or take judicial notice of them. The Company’s refusal to submit to the Court’s decision not to accept this non-record material—either by including it in the record on appeal or taking judicial notice of it—and its repeated reliance on this material to defend its unlawful conduct has prompted the Board to file this motion.

II. ARGUMENT

A. This Court has already denied the Company’s request to consider the non-record documents

This Court will not only “decline to consider extra-record assertions and documents,” *Rana v. Islam*, 887 F.3d 118, 122 (2d Cir. 2018), it will strike portions of briefs that depend on documents that are outside the record on appeal, *see, e.g., Natofsky v. City of New York*, 921 F.3d 337, 344 (2d Cir. 2019) (granting cross-motion to strike party’s non-record materials “and the portions of his brief that

² The Court granted the Company’s unopposed request to include Exhibit 2 in a supplemental appendix.

refer to those materials”). As discussed below, the Court has already decided that the Exhibit 1 documents are not part of the record. It should therefore strike all portions of the Company’s opening and reply briefs that rely on those documents (the Board has identified the specific portions in question below, at the end of the present motion).

On December 29, this Court, in no uncertain terms, “ORDERED that the motions to supplement the appendix are . . . DENIED as to Exhibit 1.” *See* attachment. This denial constituted a rejection of the Company’s arguments that the Court should consider the Exhibit 1 documents and the information contained therein, including its argument for judicial notice. Despite this clear rejection, the Company’s reply brief repeats its argument that these documents should be part of the record, again requests judicial notice, and reiterates its groundless claim that the documents support finding that the Union operated on a members-only basis. Consistent with the Court’s order and the law of the case, the Court should reject the reply brief’s now-defunct arguments for considering the documents and strike the portions of the Company’s opening and reply briefs that rely on them.

“[T]he law of the case doctrine provides that an appellate court’s decision should generally be adhered to by that court in subsequent stages in the same case.” *Shomo v. City of New York*, 579 F.3d 176, 186 (2d Cir. 2009) (internal quotations omitted). Consistent with this doctrine, “a merits panel will not ordinarily revisit a ruling by a motions panel absent cogent or compelling reasons.”

N.Y. Pet Welfare Ass'n, Inc. v. City of New York, 850 F.3d 79, 83 n.3 (2d Cir. 2017). “The major grounds justifying reconsideration are ‘an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice.’” *Doe v. N.Y.C. Dept. of Social Services*, 709 F.2d 782, 789 (2d Cir. 1983) (quoting 18 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4478, at 790 (1981)). The Court is particularly loath to revisit a prior ruling where the Court in making that ruling had “the complete record before it and full briefing on the issue.” *N.Y. Pet*, 850 F.3d at 83 n.3.

Here, a motions panel of this Court rejected the Company’s request that the Court consider the Exhibit 1 documents by either adding them to the record on appeal or taking judicial notice of them. It did so after a full consideration of both the Company’s motion, which contained detailed arguments in support of its request, and the Board’s thorough and vigorous opposition to the motion. In denying the motion, the panel established the law of the case as to this issue—the Court would not consider these irrelevant documents and the Company could not rely on them to support its arguments. *See Shomo*, 579 F.3d at 186. Notably, the Company in its reply brief presents no “cogent or compelling reasons” for revisiting the motions panel’s decision. *N.Y. Pet*, 850 F.3d at 83 n.3. In fact, it presents no reasons at all for doing so, choosing instead simply to copy and paste the arguments from its defeated motion and pretend the Court has not already

rejected them. Thus, this Court's ruling that it will not consider the Exhibit 1 documents remains the law of the case, and there are no cogent or compelling reasons for it to be revisited.

B. The Company waived its reply brief arguments urging the Court to consider the Exhibit 1 documents by failing to make those arguments in its opening brief

The Court's December 29 order rejected the Company's request that the Court consider the Exhibit 1 documents, denying the Company's motion outright and leaving no alternative arguments for the merits panel to consider. *See* attachment. Thus, the Court's order settled the question of whether it would consider the documents. But even assuming, for argument's sake, any issue remained as to the propriety of considering the documents, the reply brief was an impermissible forum in which to address it. This is because the Company failed to make any argument in support of considering the documents in its opening brief, and a party may not raise arguments in its reply brief that it failed to raise in its opening brief. The Court will not only refuse to consider portions of a reply brief raising arguments not raised in the opening brief, it will strike them. *See, e.g., Mohamed v. Nolan Law Grp.*, 574 F. App'x 45, 46 n.1 (2d Cir. 2014) (granting appellee's motion to strike portions of reply brief presenting arguments not raised in opening brief). Accordingly, the Court should strike the portions of the Company's reply brief arguing for the Court to make the Exhibit 1 documents part of the record or take judicial notice of them.

Federal Rule of Appellate Procedure 28(a)(8)(A) provides that an “appellant’s brief must contain . . . appellant’s contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies.” Accordingly, this Court deems arguments not raised in a party’s opening brief waived and will not consider those arguments if the party attempts to raise them in its reply brief. *See NLRB v. Star Color Plate Serv., Div. of Einhorn Enterprises, Inc.*, 843 F.2d 1507, 1510 n.3 (2d Cir. 1988) (party’s failure to present claim in opening brief was grounds for court’s “refusal to hear . . . claim” subsequently raised in reply brief); *Gaetano & Assocs. Inc. v. NLRB*, 183 F. App’x 17, 22 (2d Cir. 2006) (“Because the Company failed to raise this [reply brief] argument in its opening brief, we deem it waived.”).

Here, the Company’s reply brief arguments in support of the Court considering the Exhibit 1 documents are nowhere to be found in its opening brief. Thus, the opening brief did not argue that the Court should consider the Exhibit 1 documents because the Company tried unsuccessfully to have the agency consider them, nor did it argue that the Court should take judicial notice of the documents. Instead, as described above, the Company in its opening brief proceeded as if the Court had granted its motion to consider the documents in reviewing the Board’s decision, opting not to address the undecided matter of whether the Court could do so. By failing to make any arguments in its opening brief in support of the Court considering the documents, the Company waived the right to do so in its reply

brief. *See, e.g., Gaetano*, 183 F. App'x at 22. The Court should not consider the Company's belatedly-raised arguments. *See, e.g., Star Color*, 843 F.2d at 1510 n.3; *Gaetano*, 183 F. App'x at 22.

Moreover, the Federal Rules of Appellate Procedure and this Court's Local Rules permit a party to file a motion to reconsider, vacate, or modify the Court's disposition of a motion within 14 days. Fed. R. App. P. 27(g); Local Rule 27.1. The Company chose not to avail itself of these provisions following the Court's December 29 order. Instead, it attempted to renew its rejected motion arguments in its reply brief, a clearly impermissible forum in which to do so, particularly given that the Board had no opportunity to respond. The Court should reject the Company's improper attempt to make an end run around the appropriate procedural path.

The Board requests that the Court strike the portions of the Company's reply brief arguing for the Court to consider, including through judicial notice, the non-record documents, as the Company made no such arguments in its opening brief. The Board has identified the specific portions of the reply brief in question below.³

³ The Employer's reply brief contentions that the Exhibit 1 documents should be part of the record on appeal or are appropriate for judicial notice, in addition to having been both waived and already rejected by this Court, are utterly lacking in merit for the reasons detailed in the Board's opposition to the Company's motion and reiterated in its brief.

In sum, portions of the Company's opening and reply briefs depend on documents that are outside the record on appeal. This Court declines to consider, and will strike, extra-record assertions and documents, and the Board asks that it do so here. Furthermore, the Company's reply brief arguments asking the Court to consider the documents have already been rejected by the Court, are waived, and are meritless.

WHEREFORE, the Board respectfully requests that the Court strike the following portions of the Company's opening brief, which depend on documents that are outside the record on appeal:

- The paragraph on pages 9-10 that begins with "Some of the employees..."
- The first two sentences of the paragraph that begins on page 10 with "The Union in this case..."
- The first two paragraphs of the "Summary of the Argument" section in their entirety, beginning on page 17 with "The bargaining unit at issue..." and ending on page 18 with "...themselves members of the Union."

The Board further asks that the Court strike the entire portion of the Company's reply brief under the heading "Evidence Regarding the Union's Predecessor," which runs from pages 11 to 14. This includes:

- The entirety of the three consecutive paragraphs beginning on page 11 with “*Evidence Regarding the Union’s Predecessor...*” and ending on page 13 with “...their authenticity can exist.”),” which raise arguments not raised in the opening brief and consequently waived.
- The entirety of the two consecutive paragraphs beginning on page 13 with “The corrupt practices...” and ending on page 14 with “...therefore cannot be enforced,” which rely on documents that are outside the record on appeal.

Respectfully submitted,

/s/ David Habenstreit

David Habenstreit
Assistant General Counsel
NATIONAL LABOR RELATIONS BOARD
1015 Half Street, SE
Washington, DC 20570

Dated at Washington, DC
this 10th day of February 2021

ATTACHMENT

NLRB
02-CA-188405
02-CA-189863
02-CA-195031

United States Court of Appeals

FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 29th day of December, two thousand twenty.

Present:

Debra Ann Livingston,
Chief Judge,
Peter W. Hall,
Denny Chin,
Circuit Judges.

305 West End Holding, LLC, d/b/a 305 West End Avenue
Operating, LLC, et al.,

Petitioners-Cross-Respondents,

v.

20-1522 (L),
20-1973 (Con)

National Labor Relations Board,

Respondent-Cross-Petitioner.

Petitioners move to supplement the appendix and United Food and Commercial Workers Union, Local 2013, moves to intervene. Upon due consideration, it is hereby ORDERED that the motions to supplement the appendix are GRANTED as to the document attached to the motions as Exhibit 2 and DENIED as to Exhibit 1. *See* Fed. R. App. P. 16(b). The motions to intervene are DENIED. *See* Fed. R. App. P. 15(d).

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court


Catherine O'Hagan Wolfe



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v.)	Board Case Nos.
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NATIONAL LABOR RELATIONS)	
BOARD)	
)	
Respondent/Cross-Petitioner)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 27(d)(2), the Board certifies that the foregoing contains 2,793 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2016.

/s/ David Habenstreit
David Habenstreit
Assistant General Counsel
National Labor Relations Board
1015 Half Street, SE
Washington, DC 20570

Dated at Washington, DC
this 10th day of February 2021