

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

TEAMSTERS AUTOMOTIVE CHAUFFEURS,
PARTS, GARAGE, OFFICE, CLERICAL, AIRLINE,
HEALTH CARE, PETROLEUM INDUSTRY,
PRODUCE, BAKERY AND INDUSTRIAL WORKERS
WITHIN WESTERN PENNSYLVANIA AND JOINT
COUNCIL #40, LOCAL UNION NO 926 a/w
INTERNATIONAL BROTHERHOOD OF TEAMSTERS, AFL-CIO,

and

Case 6-CB-11383

PENSKE TRUCK LEASING CO., L.P.

Clifford E. Spungen, Esq.,
of Pittsburgh, PA, for the General Counsel

Robert A. Eberle (Jubelirer, Pass & Intrieri),
of Pittsburgh, PA, for the Respondent

William Allport, Esq. (Penske Truck Leasing Co., L.P.),
of Beachwood, Ohio, for the Charging Party

DECISION

Statement of the Case

DAVID I. GOLDMAN, Administrative Law Judge. This case involves the Penske Truck Leasing Co., L.P. (Penske) facility located in Neville township, an island in the Ohio River northwest of Pittsburgh, Pennsylvania (Neville Island facility). The union representing the Penske Neville Island facility employees affected by this case is formally known as the Teamsters Automotive Chauffeurs, Parts, Garage, Office, Clerical, Airline, Health Care, Petroleum Industry, Produce, Bakery and Industrial Workers within Western Pennsylvania and Joint Council #40, Local Union No 926 affiliated with the International Brotherhood of Teamsters, AFL-CIO (Union or Teamsters). In December 2006,¹ the Teamsters' membership ratified what the parties then viewed as a successor collective-bargaining agreement to replace the expiring 2002 agreement. Subsequently, and before execution of the new agreement, a dispute broke out over what the parties had agreed to with regard to the placement of a new job classification into the existing bargaining unit. The Teamsters refused to sign the collective-bargaining agreement, asserting that there had been no "meeting of the minds" and, therefore, no contract. On February 16, 2007, Penske filed an unfair labor practice charge with the Pittsburgh Regional office of the National Labor Relations Board (Board). The Regional Director, acting on behalf of the Board's General Counsel, issued a complaint on April 25, 2007, alleging that the Teamsters' refusal to sign the collective-bargaining agreement constituted a refusal to bargain collectively with an employer as set forth in Section 8(b)(3) of the National

¹ All dates are 2006 unless otherwise indicated.

Labor Relations Act (Act), 29 U.S.C. § 158(b)(3). The Teamsters filed a timely answer denying any violation of the Act. The case was tried in Pittsburgh, Pennsylvania on June 25, 2007.

5 On the entire record, including my observation of the demeanor of the witnesses and other indicia of credibility, and after considering the briefs filed by the General Counsel and the Union, I make the following findings of fact, conclusions, and recommended order.²

FINDINGS OF FACT

10 I. JURISDICTION

The complaint alleges, Respondent admits, and I find that Respondent is a labor organization within the meaning of Section 2(5) of the Act. Penske is a limited partnership engaged in the retail renting and nonretail leasing of maintenance trucks throughout the country. 15 The complaint alleges, Respondent admits, and I find that the Charging Party Penske is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

20 A. *Factual Background*

Penske's truck leasing division has two chief lines of business. The "rental" business refers to the short term rental of trucks for moving and other purposes. A second line of business is devoted to longer term fleet maintenance and truck sales. The Neville Island facility 25 is the headquarters for Penske's Pittsburgh district.

In the Fall of 2006, the Teamsters represented 2 rental representatives and 10 Customer Service Representatives (CSRs) at the Neville Island facility. The rental representatives worked from the second floor rental department along with many sales and district management 30 personnel who had offices at the Neville Island facility. The CSRs (who are the focus of this case) worked in the service department located in the 5 service bays composing the first floor of the facility. They performed light maintenance and minor repairs on vehicles including changing tires, preventive maintenance, running a diagnostic computer to assess maintenance problems, and working in a parts room. Their duties also included fueling and washing vehicles on a fuel 35 island adjacent to the building. As of 2006, the CSRs also performed the "hiking" of long term lease fleet vehicles. "Hiking" involves moving vehicles to different Penske facilities. While the CSRs "hiked" lease fleet vehicles, nonunion "hikers" working from the Neville Island facility hiked customer rental vehicles.³

40 The parties' 2002 collective-bargaining agreement was set to expire November 3. Two extension agreements entered into during bargaining for a new agreement extended the 2002 agreement to December 19. Penske entered negotiations determined to make changes that would right an increasingly unprofitable operation. Financially, Penske viewed it as a "very serious situation." One change management sought was to have the hikers assume the hiking 45

²I correct the transcript at page 32 line 5 to state "CSR" in place of "Fueller/Washer"; and correct page 82 line 21 to state "administer" in place of "menstruate."

50 ³Another union represents 14 or 15 skilled maintenance employees working in the service area at the Neville Island facility. These employees are in a separate bargaining unit and are responsible for more skilled maintenance on the vehicles. They have no role in this case.

work performed by CSRs. As referenced, nonunion hikers hiked consumer and commercial rental vehicles, earning approximately \$10 an hour. Full service leased vehicles and contract maintenance vehicles were hiked by the CSRs, who earned approximately \$20 an hour at straight time rates. A lot of their hiking was done at overtime rates after they had completed their other duties. Penske intended to transfer this CSR hiking work to the lower paid hikers. Another Penske goal was to introduce new, lower paid positions at Neville Island. One such position, called a fueler washer, existed at other facilities and would allow wage and pension contribution savings compared to having the more highly compensated CSRs perform the fueling and washing duties. This work was usually performed in conjunction with customers arriving or leaving with a vehicle, primarily on the first and second shift. Another position Penske planned to introduce during bargaining was the “combination man.”⁴ This was the “CSR position go[ing] forward.” New employees hired to do CSR work would work under the “combination man” title and would be paid a lower wage and receive less pension contributions on their behalf. As Penske’s then Director of Labor Relations, Dean Burrell explained:

By creating that new classification, we didn’t negatively impact the existing CSRs. And this is a more senior unit. These guys are going to retire over time; and the idea was that as a CSR retired or left, we would replace them with the fueler washer if it was—if that was appropriate or we would replace them with a combination man at a lower wage rate and a lower pension rate.

Penske and the Teamsters began negotiations October 17 for a new collective bargaining agreement to cover the Neville Island facility. The negotiations were completed in four bargaining sessions: October 17, October 18, November 10, and November 28. Burrell served as Penske’s chief negotiator. The Teamster’s chief negotiator was Marc Dreves, the Union’s business agent and Recording Secretary.

The October 17 negotiating session began with Penske area vice president Jack Gallagher stressing the importance of these negotiations for Penske and mentioning that Penske was looking for some changes in hiking and other job classifications. After Gallagher’s presentation, the parties exchanged initial proposals and discussed them. The parties’ proposals referenced the changes that each wanted to make to the terminating 2002 agreement. The Union’s proposal chiefly concerned economics but also sought to insert language in Article V Section 5 (Classification and Wage Rate) stating that “All Customer Service employees will receive training on all job duties within six (6) months of the New Agreement.” The previous Article V Section 5 contained a more open-ended obligation to train CSRs.⁵ At the hearing in this case, Dreves explained that “[o]ver the years, we’ve had a number of individuals that typically worked the fuel island [where they] . . . washed and fueled. And they made claims to us over the years that they didn’t receive the training that they needed to go and do” the other CSR work, such as preventative maintenance. This proposal was

⁴Although the proposed labor agreement refers to this position as the “combination person,” throughout the hearing and in the briefs, the parties refer to the position as a “combination man” or “combination men.” In this decision I use the designations interchangeably.

⁵In the 2002 predecessor agreement, Article V Section 5 stated:
SECTION 5. It is understood that employees classified as Customer Servicemen will perform all types of garage work heretofore included in other garage job classifications. The Company will provide training to all Customer Service employees so that they can perform the duties assigned.

intended to keep these CSRs from being limited to fuel and washing duties, and, in Dreve's view, would positively address productivity concerns raised by Penske in the past. Penske's initial proposal was limited to noneconomic issues and did not include a proposal for new job classifications, or any change to Article V Section 5. It did call for the hikers to take over the hiking performed by CSRs. At some point in the first 2 days of negotiations the parties agreed to this, with the anticipation that the hikers would sign authorization cards and be included in the bargaining unit for the first time.

The next day, October 18, Penske discussed with the Union that it intended to seek significant changes to the job classifications including proposing a new fueler washer position. The parties did not talk about the nature of these new classifications in detail but Burrell testified that Penske explained to the Union that the new classifications would allow Penske wage relief. Dreves told Penske that "we would be open to that if it didn't adversely affect our members that currently work there." According to Dreves, "[m]y big concern was are we still going to be able to do that work, and that's the question I asked. And the answer we got is you currently do that work, yes, we'll be able to continue to do that work." As corroborated by Dreve's bargaining notes from the October 18 meeting, Dreves asked,

U [—] Will current employees still be able to do all the work that [the new] classifications will cover. We currently do all that work

Co — Yes—They do the work currently and will continue to do it."

From Dreve's perspective, this satisfied him that the incumbent employees would not be adversely affected by the introduction of the new classifications. Dreve's reasoned that if CSRs, who presently performed the fueler washer work, continued to perform that work, they would be able to use their seniority to bid for any vacancies created by a retiring or resigning CSR employee, even if the work included fueling and washing. Dreves indicated that the Union wanted to "see the economics and will address this issue." There was no discussion regarding bidding rights of existing CSRs or the new fueler washers at any time in the negotiations. The parties had no discussion during negotiations on how the new fueler washer position would be integrated into the existing bargaining unit.⁶

During the November 10 meeting, Penske specifically identified the new positions it was proposing. This included the combination man position and the fueler washer (and two others,

⁶The General Counsel contends that I should discredit Dreve's testimony that he asked for and received assurances that the CSRs would continue to perform their range of bargaining unit work. The General Counsel asserts (GC Br. at 13 fn. 18) that Dreve's notes "are not probative evidence of what took place during this conversation" because "Dreves did not specifically testify as to the accuracy of these notes." I disagree. I find that his notes of the meeting, taken contemporaneously (according to his testimony) corroborate his testimony. The General Counsel faults Respondent for failing to put on additional witnesses to corroborate Dreve's testimony, but the more salient point is that neither Dreve's testimony, nor his notes, were contradicted by the General Counsel's witnesses. No General Counsel witness rebutted or denied this conversation that Dreve's indicated took place October 18. No notes from Penske's side of the table were offered into evidence. While either side could have obtained and proffered Penske's bargaining notes, I believe that the General Counsel would have offered them into evidence if they contradicted (affirmatively or even by omission) Dreve's point. I credit Dreve's testimony, which, in addition to being offered with a credible demeanor, was corroborated by his notes and unrebutted by any other witness.

a rental clerk and management trainee, of no significance to this case). Burrell testified that during bargaining (probably on November 10, although the record is unclear), a union committee member, Marvin Darnell, asked “how do we know that you’re not going to swap out these cheaper combination men for CSRs?” Burrell testified that he replied “look you know us. We’re not going to swap out equivalent positions just to bring in cheaper guys.” Ted Wilson, Penske’s District Manager, offered similar assurances, stating “we would not bring combination men in on an earlier shift than CSRs.” According to Burrell, and Wilson, Penske orally provided a different answer with regard to the fueler washers. Asked whether the CSRs “are [] still going to get to do fueling and washing,” Burrell and Wilson testified that Wilson responded, “yes. If I didn’t have a fueler/washer there to do the work, whether he was out sick or on vacation they could do that work.”⁷

At the November 10 meeting wage and pension rates for the current employees were discussed. The discussion of wage rates for the new classifications was deferred until wages for current classifications were bargained.

At the fourth bargaining session on November 28, both the Union and Penske offered two counterproposals during the day’s bargaining in an effort to reach agreement. Again, there was no discussion of the bidding rights or placement of the new fuel washer jobs. As Burrell explained, “the way it ended was we had gone back and forth a fair number of times. It was not acrimonious, but we were pretty much at the point where we had taken it as far as we were going to take it.” According to Burrell, the “massive changes” proposed in the new agreement were all “go[ing] forward. In terms of these guys, the existing unit, it really wasn’t.” Burrell contended that doing nothing “to harm the existing employees with these changes” was a “mutual interest” of Penske and the Union in these negotiations. Burrell testified that the results of the negotiations were that “during bargaining we proposed new classifications that essentially protected the existing guys. It grandfathered them, but created new classifications.”

Penske asked the Union to take the Company’s proposal (which included the items tentatively agreed to by the parties) to the employees for a vote. The Union agreed to do so, although Dreves refused to endorse the proposal, saying that he would remain neutral with regard to its ratification. Burrell told Dreves that he would prepare a written Memorandum of Understanding setting forth the parties’ tentative agreements. Burrell also agreed to prepare a one-page handout setting forth the highlights of the new agreement. By letter dated December 5, Burrell provided these items to Dreves and Burrell signed the Memorandum of Agreement for Penske. Two days later Burrell resent the package, resigning the Memorandum of Agreement and this time including a “Pittsburgh Financial Summary” setting forth financial data and highlighting Penske’s concerns with the profitability of the Neville Island facility. The Memorandum of Agreement identified the creation of the fueler washer and combination person positions, and established wage rates for those positions, but made no reference to how fueler washers or combination persons would be placed into the bargaining unit. The Memorandum included hikers in the “recognition” section of the agreement and provided that “[n]o hiker can hike leased vehicles if any customer service representative on the payroll as of November 4, 2006 is on lay-off.” The “Highlights” sheet prepared for distribution to the bargaining unit did

⁷Burrell attributed this question to Darnell or Dreves. Wilson attributed it to Darnell. I credit Wilson and Burrell’s un rebutted testimony that Wilson responded to the question by stating that CSRs would continue to perform fueler washer work when fueler washers were not available. I note, however, that this exchange is not found in Dreves’ notes (nor were any other notes proffered to corroborate it), suggesting that the question was not from Dreves and the response not addressed to him, and may have been “cross talk” at the bargaining table.

not mention the creation of the fueler washers or the combination person. It did state: "Hikers added to unit, but with job protection for current CSRs."

5 The ratification vote was scheduled for December 17. At the December 17 meeting, Dreves explained Penske's offer to the membership. Specifically with regard to the implementation of the fueler washer and combination positions he "explained that they [the incumbent CSRs] would be able to bid because of the seniority language that's in the contract."

10 The proposal was ratified by employees and, after a telephone call to clear up some issues in the Employer's proposed memorandum (unrelated to the issues in dispute in this case), Dreves told Burrell that the contract has been ratified. The next day Dreves faxed Burrell a copy of the Memorandum, executed by Dreves and two other union bargaining committee members, with the discussed changes handwritten on the Memorandum. At that point, Burrell (who was out of town) contacted Penske's offices and told them that the signed Memorandum was on its way. The proposal included a signing bonus for incumbent employees and Burrell told his office that "we want to make sure that those [signing bonus] checks get cut before Christmas." He also instructed his office "to make sure that the rest of the contract was implemented."

20 *B. Subsequent Disputes Over What was Agreed to by the Parties*

1. The placement of fueler washers into the unit

25 On January 10, 2007, Dreves was at Penske to discuss with Wilson the overtime policy that had been negotiated. In the course of this meeting Dreves asked Wilson if Penske was going to fill the first shift CSR position vacated when a CSR, Walter Dombrowski, resigned in the fall of 2006 before negotiations began. Wilson told Dreves that Penske planned to put a fueler washer on the first shift and not replace the vacant CSR position.⁸ Dreves asked if the current CSRs could bid on that position. Wilson said "no. It's a fueler/washer position, and they wouldn't be able to bid on it." Dreves replied that based on their seniority rights, CSRs should be able to bid on and fill the position. Wilson disagreed. This was, in fact, the first time there had been any specific discussion with the Union about bidding for new fuel washer duties that had always been part of the CSRs work. Dreves "[w]ent back, reviewed my notes, reviewed all the notes, asked my guys to review their notes. At that point, I said we didn't have a meeting of the minds because we didn't. It's not how we understood it, and that's never how it was presented."

40 Dreves contended that the fueler washer work had always been part of the CSR position and that the incumbent CSRs should be permitted to bid on it. According to Dreves, after incumbents were allowed to move where their bids and seniority took them, Penske could fill the remaining opening with the new fueler washer position. However, this could result in the fueler washer vacancy being on the third shift, a suggestion that Wilson rejected because "we do a minimal amount of fueling" then and so the third shift personnel need "to be able to do more than just fuel and wash. However, on the first shift, I have a position that does nothing but operate the fuel islands 40 hours a week." After the meeting Wilson called Burrell, who then

50 ⁸Dombrowski had long worked the CSR position with significant restrictions. He limited his work to washing trucks and working on the fuel island.

called Dreves from his car late in the evening. They talked briefly and Burrell told Dreves “we’ll work our way through this,” but there was no resolution.

5 Notwithstanding the emergence of this dispute, the next day, by letter dated January 11, 2007, Burrell sent Dreves a redlined copy of the labor agreement for Dreves to execute. This was the first “mock up” of the full agreement that the Union had seen, as previous written exchanges had simply stated proposed changes to the prior contract.

10 By letter dated January 16, 2007, Dreves wrote to Burrell stating that,

15 As you will recall from our phone conversation of last week and after the meeting with the Company over issues of [] bidding jobs, Hikers coming into the bargaining unit and the Company holding some Hikers out of the unit, this Local reviewed all notes from the negotiations and conversations and our position is that the parties did not have a meeting of the minds. Therefore, I am requesting that you contact my office to schedule dates to begin bargaining over the open issues.⁹

20 Burrell wrote back, in correspondence dated January 24, 2007, framing the dispute as follows:

25 [T]he Union contests the Company’s right to post a bid for a first shift fueler-washer, a new position under the contract. Instead, the Union maintains that an existing customer support representative on a later shift has the right to take that bid at his higher wage rate, and the fueler-washer opening must be on the later shift.

30 During bargaining, I stated that Penske would not substitute equivalent newly-created jobs from existing classifications, e.g., substituting a new combination employee for an existing customer support representative. However, fueler-washers are not equivalent to customer support representatives so their use is unrestricted, and Penske can bid those jobs as desired.

35 The parties met to discuss their dispute on February 6, 2007. Burrell suggested that Dreves execute the agreement. Dreves declined, taking the position that “there wasn’t a meeting of the minds” and the parties needed to set bargaining dates. The parties discussed their positions. Penske wanted to fill the fueler washer position on the first shift. The Union’s position was that CSR employees should be allowed to bid on vacancies for work they were performing (e.g., fueler washer work) before a new employee was hired into a new fueler washer position. As a practical matter, this would permit an incumbent CSR employee working on the 2nd or 3rd shift to fill a vacancy created by a departing first shift CSR employee. After the CSRs had been given the opportunity to fill vacant positions, the Union understood that the remaining opening could be filled by a new combination man or fueler washer. There was also discussion about some other issues, including the Union’s concern that hikers from another location whose work brought them to the Neville Island facility should be included in the

50 ⁹The dispute over the hikers involved whether hikers from other Penske facilities would be among the hikers newly included in the bargaining unit. Burrell testified, credibly and without contradiction, that Dreves told him that if the fueler/washer dispute was resolved the issue of the hiker’s would “go away.” I find that the real dispute between the parties was (and is) regarding the method of adding fueler washers to the bargaining unit.

parties.¹⁰ It was raised as an issue for the first time in a meeting in March at the Board's Regional office where the parties met in an attempt to resolve the unfair labor practice charge filed by Penske. At that time the Union's attorney took the position that the language on Section 5 proposed by the Union had not been intended to replace the first sentence of Section 5. At that point, in the Union's view, this was another reason not to sign the agreement prepared by Penske. In the Union's view, inclusion of the first sentence would buttress its position in the fueller washer dispute, as explicit recognition that the CSRs will continue to perform all the garage work suggests they would be able to bid on any such work, including fueller washer duties.¹¹

Analysis

The Board summarized the case law relevant to this matter in *Hempstead Park Nursing Home*, 341 NLRB 321, 322 (2004):

Pursuant to Section 8(d) of the Act, either party to a collective-bargaining agreement is obligated to execute, or assist in executing, a memorialized version of the agreement if requested to do so by the other party. *H.J. Heinz Co. v. NLRB*, 311 U.S. 514 (1941). However, this obligation arises only after a "meeting of the minds" on all substantive issues and material terms has occurred [Board's emphasis]. See *Intermountain Rural Electric Ass'n*, 309 NLRB 1189, 1192 (1992). The General Counsel bears the burden of showing that the parties have reached the requisite "meeting of the minds." *Id.* at 1192.

A "meeting of the minds" in contract law is based on the objective terms of the contract rather than on the parties' subjective understanding of the terms. Thus, subjective understandings (or misunderstandings) of the meaning of terms that

¹⁰Burrell testified affirmatively that this language was not discussed in the January and February meetings. Dreves testified that he could not recall. I credit Burrell's testimony on this point over Dreves's uncertainty. The Union admits as much, pointing out that Dreves was hospitalized for a week in late January 2007 and suggesting (R. Br. at 12) that this was the reason for the Union's delay in raising the discrepancy with regard to Article V Section 5.

¹¹Burrell's dismissive attitude toward the significance of the Union's proposal, and Article V Section 5 generally, gives me pause. As to the inconsequence of the first sentence of Article V Section 5, Burrell's position does not account for the overlap in duties between traditional CSR functions and the fueller washers, much less the combination man position, which was intended to perform exactly the same work as the CSRs. The first sentence may have been irrelevant when CSRs were the only classification in the garage area, but given Penske's goals in these negotiations it is hard to accept Burrell's insouciant assurance of the insignificance of language promising that CSRs "will perform all types of garage work." This is also true with regard to Burrell's characterization of the undisputed portion of the Union's proposal seeking to guarantee training for CSRs within 6 months. Burrell indicated that this proposal was "not that big of a deal" in explaining Penske's willingness to agree to it immediately. But given Penske's interest in having CSR employees voluntarily move away from fueller washer duties one would think that a proposal to train them to do so would be of great interest, as it would avoid the problem, described by Dreves, of CSRs being limited to fueller washer duties by their lack of skills. Burrell's discussion of Article V Section 5 is the one instance where I believe that his testimony was colored by the perception that Penske and the General Counsel's litigation position would be served by diminishing the importance of this provision.

5 have been agreed to are irrelevant, provided that the terms themselves are unambiguous "judged by a reasonable standard." *Vallejo Retail Trade Bureau*, 243 NLRB 762, 767 (1979) *enfd.* 626 F.2d 119 (9th Cir. 1989). However, when the terms of a contract are ambiguous, and the parties attach differing meanings to the ambiguous terms, a "meeting of the minds" is not established. "When . . . misunderstandings may be traced to ambiguity for which *neither party* is to blame, or for which *both parties* are equally to blame, and the parties differ in their understanding, their seeming agreement will create no contract." *Meat Cutters Local 120 (United Employers Inc.)*, 154 NLRB 16, 26-27 (1965) (emphasis in original).

10 See also, *Transit Service Corp.*, 312 NLRB 477, 481 (1993); *Ebon Services, Inc.*, 298 NLRB 219, 224 (1990), *enfd.* 944 F.2d 897 (3d Cir. 1991); *Luther Manor Nursing Home*, 270 NLRB 949 *fn.* 1 (1984), *enfd.* 772 F.2d 421 (8th Cir. 1985).

15 In this case, the Government contends that the proposal ratified by the employees on December 17 reflected the parties' mutual agreement on all substantive issues and material terms to be incorporated in the bargaining agreement. Therefore, the Union's refusal to execute the written agreement based on the ratified proposal is violative of the Act. However, the Union denies that its refusal to execute the agreement violated the Act, contending, first, that the parties' negotiations did not result in a binding agreement between the parties, as agreement on a substantive issue was not achieved. Second, in a related, but independent defense, the Union contends that the written document submitted by Penske for the Union's execution did not accurately reflect the parties' agreement on Article V, Section 5. The Union contends that each defense obviates any duty to execute the written agreement prepared by Penske.

20 *Was There a "meeting of the minds" on all Substantive Issues and Material Terms?*

25 Certainly, at the time of the ratification and during the 3 weeks thereafter, both parties believed and acted as if, they had successfully entered into a new labor agreement binding on the parties until at least November 3, 2008. This is a "hallmark indication that a binding agreement has been reached"¹² but it is not dispositive in every circumstance. Even in the face of a ratification of the purported agreement, if a substantive and material condition was not agreed to by the parties, no contract is formed. See, e.g. *Sheridan Manor Nursing Home*, 329 NLRB 476, 478 (1999), *enfd.* 225 F.3d 248 (2d Cir. 2000); *Teamsters Local 287 (Reed & Graham, Inc.)*, 272 NLRB 348 (1984).

30 The Union's position is that the parties' failure to mutually agree on a substantive issue revealed itself on January 10, 2007 when Penske announced its intention to replace a recently vacated CSR position on the first shift with one of the newly negotiated and lower paid job classifications—the fueler washer position. The Union's view is that if Penske thinks that was agreed to in negotiations, Penske is wrong, and there was no "meeting of the minds" on an important (i.e., "substantive and material") subject.

35 Some preliminary conclusions can be drawn. First, the issue of the new classifications was an overwhelmingly important issue for both parties in these negotiations. Indeed, Penske witnesses testified compellingly that the creation of new job classifications with lower wages and lower pension contributions, along with transfer of unit work to the hikers, was the central issue in what promised to be, as Burrell explained, "some difficult bargaining." Under these

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50 ¹²*Winward Teachers Association*, 346 NLRB No. 99, slip op. at 3 (2006).

circumstances it would be hard to contend—and no party does—that the placement of the new fuel washers within the bargaining unit was anything other than a substantive and material issue for the parties.

5 Second, as mentioned, no *written* language (either in the parties' proposal or in the final proposed collective-bargaining agreement) touches on the issue of the relative rights of incumbents and employees hired into the new classifications, placement of the new classifications within the existing bargaining unit, or other language reflecting the parties' agreement on this important issue. The only exception to this is the explicit recognition in Article V Section 7 of the proposed agreement that hikers cannot be assigned fleet car hiking if CSRs are on layoff. But no written language at all deals with the combination man or fueler washer's placement in the bargaining unit. Arguably—but just barely so—the generalized and preexisting management rights and seniority provisions of the purported agreement could offer some guidance on the disputed issue of the fueler washer's interaction with CSR work. Indeed, 10 Dreve's initial explanation to employees was that the general seniority provisions governed this issue, but a review of that language highlights the ambiguity, indeed the forced nature, of such construction. The fact is nothing written in the proposed agreement directly deals with the subject. Certainly, no new language relevant to the current dispute accompanied the bare creation of the new classifications and their wage scales that appear in Article V Section 1 of the presumptive agreement. Had the Union taken Penske's suggestion after this dispute arose and executed the proposed agreement and taken its dispute over the fuel washer position to arbitration an arbitrator would have to strain to find guidance in the terms of the proposed agreement.¹³

25 This brings us to a third point, which corroborates the fact of and serves as a corollary to the lack of relevant written language just discussed. Putting aside the Union's contentions regarding Article V Section 5, in advancing their respective arguments the parties do not look to the terms of the proposed collective-bargaining agreement, or even to the terms of the proposals exchanged in bargaining. Instead, both parties contend that the question of what they agreed to, and whether they mutually agreed to anything on the issue of fueler washer's interactions with CSRs, is answered, or at least suggested, by oral statements made by the parties during negotiations. Neither party's account of oral statements in negotiations dispositively answers the question of the bidding rights of the CSRs, or Penske's right to place fueler washers in first shift positions previously held by CSR employees, but it is the closest the parties can come in their attempts to justify their positions. Thus, as Burrell explained in his 30 January 24, 2007 letter to Dreves, in an effort to justify Penske's position and rebut Dreve's:

40 During bargaining, I stated that Penske would not substitute equivalent newly-created jobs for [an] existing classifications, e.g., substituting a new combination employee for an existing customer support representative. However, fueler-washers are not equivalent to customer support representatives so their use is unrestricted, and Penske can bid those jobs as desired.

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50 ¹³As noted, the Union does contend that the first sentence of Article V Section 5 would support its interpretation. Penske, for its part, takes the position this language was deleted and was "just a throw away. . . . language . . . that to us really didn't mean anything." For purposes of my analysis I assume, *arguendo*, that Penske's version of Article V Section 5 accurately reflects the parties' agreement, and that the first sentence was deleted for insignificant reasons.

At the hearing, Burrell and Wilson added to this explanation, testifying that assurances were provided to the Union in bargaining that “we would not bring combination men in on an earlier shift than CSRs.” However, with regard to the fueler-washer position, Burrell and Wilson testified that the Union was told that CSRs would henceforth perform fueling and washing “[i]f I didn’t have a fueler/washer there to do the work, whether he was out sick or on vacation they could do that work.” This obviously envisions a reduced fueling and washing role for CSRs, if not necessarily that “Penske can bid those jobs as desired.” It does not precisely address the question of bidding. Somewhat ambiguously, Burrell also testified that “the idea was that as a CSR retired or left, we would replace them with the fueler/washer if it was—if that was appropriate or we would replace them with a combination man at a lower wage rate and a lower pension rate.” These oral accounts of Penske’s view of the agreement did not find their way into the written terms of the proposed agreement. By contrast, the parties’ agreement on hikers performing work previously performed by CSRs was expressly referenced, or, at least, alluded to, by the written provision stating: “No hiker can hike leased vehicles if any customer service representative on the payroll as of November 4, 2006, is on lay-off.” Article V, Section 7. This first appeared in the “Status of Bargaining” report issued by Penske after the November 10 meetings.

Similarly, the Union’s understanding of the “agreement” was based on an oral exchange in negotiations, in which the Union asked, with regard to the new classifications, “are we still going to be able to do that work, and that’s the question I asked. And the answer we got is you currently do that work, yes, we’ll be able to continue to do that work.” If this is a less than pellucid statement that CSRs will be able to bid to more desirable shifts ahead of new employees designated for the new classifications, it is suggestive. Dreves understood from it that the current employees would continue to perform their work and thus, would not be adversely affected by the introduction of the new classifications. As he testified, he agreed to move forward with discussions to actually create the new classifications on that basis. Indeed, with regard to the combination person position, that was precisely the point that Penske’s negotiators stressed to the Union: Wilson told the Union “we would not bring combination men in on an earlier shift than CSRs,” which was a major concern of the Union in agreeing to the new classifications. It cannot be forgotten that a theme of Penske’s during negotiations, and at trial, was that the “massive changes” proposed in the new agreement were all “go[ing] forward. In terms of these guys, the existing unit, it really wasn’t” and that doing nothing “to harm the existing employees with these changes” was a “mutual interest” of Penske and the Union in these negotiations.

In this regard, I find the explanations provided by Burrell, Wilson, and Dreves for their positions credible and there is no evidence that this dispute was manufactured for advantage. In other words, I take both Penske and the Union at their word: based on their agreements reached during bargaining they were in accord with how the hikers and the combination men would bid and interact with the CSRs. But based on their discussions during bargaining they had divergent views of how the process would go with regard to the placement of fueler washers into the bargaining unit. Notably, they do not rebut one another’s account. Each side relies on a very limited and different conversation that occurred briefly during negotiations. Burrell and Wilson cite a November 10 conversation, which even in their recounting, contains no indication of assent on the part of the Union. Dreve’s cites to an October 18 conversation which, at least, indicates Penske’s agreement. But the truth is neither conversation specifically dealt with the subject of fueler washer bidding rights or their placement in the unit. The parties each drew their own conflicting inferences from these limited conversations.

In sum, what the record shows is that issue of assignment of fueler washers in place of CSRs was hardly discussed, and no agreement was reached. Based on incomplete discussion,

the parties took their divergent views of the anticipated process, and submitted the issues agreed upon—which included nothing about this issue—to the membership for ratification. There was no subjective meeting of the minds on this issue.

5 The absence of a subjective meeting of the minds is not, as the General Counsel points out, necessarily a problem for the General Counsel’s case. As referenced, *supra*, it is well-settled that the term “meeting of the minds” is something of a misnomer in that the formation of a contract does not require identical subjective understandings of the effect of terms of the contract. The General Counsel stresses the Board’s admonition that “subjective understandings or misunderstandings as to the meaning of terms which have been agreed to are irrelevant, provided that the terms themselves are unambiguous judged by a reasonable standard.” *Diplomat Envelope*, 263 NLRB 525, 536 (1982), *enfd.* 760 F.2d 253 (2d Cir. 1985); *Vallejo Retail Trade Bureau*, 243 NLRB 762, 767 (1979). However, it is the proviso to this legal maxim that is operative here. The subjective understandings of an agreement are irrelevant only where
10 unambiguous terms of the proposed contract demonstrate that the issue in dispute was the subject of some agreement (even if it requires an arbitrator to determine which parties’ subjective understanding prevails). The irrelevance of divergent subjective understandings of an agreement does not extend to issues on which the parties agreed to ambiguous terms, or to
15 no terms at all. In the situation “[w]here the alleged agreement reached is ambiguous, extrinsic or parol evidence has relevance in determining whether agreement or a meeting of the minds
20 has been reached.” *Diplomat Envelope*, *supra*.

 That is the case here. Indeed, this case is similar in pertinent ways to *Teamsters Local 287 (Reed & Graham, Inc.)*, 272 NLRB 348 (1984), where a union refused to sign an agreement
25 prepared by an employer that omitted a side agreement on a subject that the parties had failed to discuss in bargaining, but which historically had been included in previous labor agreements. There, as here, the administrative law judge found that there was “no explicit agreement to include or exclude the [disputed] agreement” and, turning to the language agreed to between the parties found that the issue of the inclusion or exclusion of the disputed subject was not
30 covered or resolved by the unambiguous written terms agreed to by the parties. Accordingly, the administrative law judge, in reasoning adopted by the Board, found that the parties had not reached an agreement on the issue in dispute and therefore that no agreement occurred, requiring dismissal of the complaint. In this case, the missing terms are not of longstanding historical agreement—the missing terms concern an entirely new subject—but the result is the
35 same, for the same reason: the evidence is that there was no subjective meeting of the minds and there are no unambiguous written terms that can form the basis for a contractual agreement.¹⁴

 Thus, we are presented with a situation in which no objective agreement, no common
40 language, binds the parties on the issue. This fundamentally distinguishes the circumstances at hand from those in *Winward Teachers Ass’n*, 346 NLRB No. 99 (2006). In that case, the parties negotiated, reviewed, and *agreed* to express language stating that “[t]he School has the right to pay bonuses without Union approval.” Subsequently, the Union refused to execute the contract, contending that this language did not adequately describe its understanding of the admitted
45 agreement that the school had the “right to pay bonuses without Union approval.” The Board

¹⁴I note that Dreve’s assurances to the members that the agreement’s seniority language would protect them from incursions by the fueller washers was not the product of an agreement
50 between the parties, and it is not compelling. The seniority provision does not unambiguously, if at all, relate to the parties’ dispute.

held that “[w]here the parties have agreed on the contract’s actual terms, disagreements over the interpretation of those terms do not provide a defense to a refusal to sign the contract.” Slip op. at 3. But here, where *no* language summarizes the parties’ “agreement” on the issue of placement of the fueler washers into the bargaining unit, there is something other than a matter of interpretation of terms at stake, there is an absence of agreement on the entire subject. Obviously, the distinction between a disagreement over interpretation of agreed to terms that “are unambiguous judged by a reasonable standard,” and the failure to agree to such terms at all will be a fine one in certain circumstances. Here it is not. The record demonstrates that the fueler washer position was created, but no agreement on its use and interaction with the CSRs was reached. If there was unambiguous language on the subject, the parties’ divergent subjective impressions of that language would be irrelevant. But there is not; to the contrary, there is a gaping hole in the language of the purported contract and legitimately so, as it reflects the failure of the parties to agree on this substantive issue. As the Board has explained,

the duty to bargain includes the obligation to assist in reducing an oral agreement to writing. That obligation, however, arises only after a meeting of the minds on all substantive issues has occurred. Here, the parties’ disagreement transcended a dispute as to contract language, and involved a disagreement over the substance of certain contract terms. Thus, the requisite meeting of the minds as to all substantive matters did not occur.

Luther Manor Nursing Home, 270 NLRB 949 fn.1 (1984), *enfd.* 772 F.2d 421 (8th Cir. 1985).¹⁵

Essentially, this case is no different from those where the parties have negotiated a purported agreement on most all important terms but failed to agree to a commencement or termination date for the agreement. In such cases, the Board holds that no contract has formed because of the failure to reach a meeting of the minds. Of course, the Board will imply an agreement on a material term if the record suggests it, but this is a case where the record affirmatively rebuts any inference that there was agreement on the issue of the fueler washer’s integration into the unit. See *Transit Service Corp.*, 312 NLRB 477, 481 (1993) (while duration of contract can be inferred from 3-year wage increases in parties’ proposals, there is no basis to infer effective date where review of negotiations suggest no agreement on this topic, hence no meeting of minds and no contract formed); *Interprint Co.*, 273 NLRB 1863 (1985) (no contract because, among other things, no agreement on significant issues such as effective and termination date). In my view, the General Counsel implicitly acknowledges the problem when he contends on brief (GC Br. at 14) that Respondent’s “failure to be curious during bargaining” is to blame for this situation. The suggestion is that the lack of clarification sought by the Union leaves it with no one but itself to blame for its misconception of Charging Party’s intentions. This is somewhat beside the point—the point being that no agreement was reached on a fundamental issue raised by the creation of the new classifications and no language in the parties’ tentative agreements unambiguously addressed it. But I do not agree that the Union has more or less responsibility to seek clarification than the Employer has duty to clarify. As Burrell explained, Penske anticipated “tough negotiations” in its effort to address profitability

¹⁵The lack of agreement with regard to the fueler washer’s stands in contrast to the oral agreement regarding the combination man. As to that classification, there is no express language regarding its relationship to the CSRs, but the parties agree that oral understandings reached in bargaining govern the Employer’s ability to “swap” combination persons for CSRs or to bring “combination men in on an earlier shift than CSRs.” That is their agreements on the subject and, in the context of a complete agreement, it would be binding on the parties.

5 issues at the Neville Island facility. However, these negotiations, completed in four sessions, did not turn out to be tough negotiations. They were not precisely because one of the hardest issues was not addressed and discussed only glancingly. The record is clear that although this fundamental issue was anticipated and briefly mentioned, no agreement was reached on it, and no terms of the contract unambiguously cover it, or even mention it. In the absence of a written or oral agreement on this substantive issue in negotiations, there is no overall agreement and no duty to execute the written contract.¹⁶

10 CONCLUSIONS OF LAW

1. Respondent Teamsters is a labor organization within the meaning of Section 2(5) of the Act.
- 15 2. Respondent did not violate the Act as alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹⁷

20 ORDER

The complaint is dismissed.

25 Dated, Washington, D.C. September 4, 2007

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35 _____
David I. Goldman
Administrative Law Judge

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¹⁶Given my resolution of this case I do not reach the Union's alternative (albeit related) defense that Penske's draft of Article V Section 5 is not in accord with the parties' agreement.

50 _____
¹⁷If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.