

**Apache Powder Company and International Chemical Workers Union, Local No. 184. Case 28-CA-3453**

March 22, 1976

**DECISION AND ORDER**

BY CHAIRMAN MURPHY AND MEMBERS FANNING  
AND JENKINS

On December 10, 1975, Administrative Law Judge Jerrold H. Shapiro issued the attached Decision in this proceeding. Thereafter, General Counsel filed exceptions and a supporting brief, and Respondent filed an answering brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge.

As explained more fully in the Administrative Law Judge's Decision, we agree that both parties in their 1974-75 negotiations had not agreed to a change in the so-called pension break date in the 1972-75 contract, which provided that in computing monthly pensions retiring employees were to receive \$5 for each year of service prior to January 5, 1973, and \$7.50 for each year after that date. The record shows that during these negotiations the Charging Party proposed, *inter alia*, that the \$5 and \$7.50 multipliers be increased and a new schedule adopted. The Respondent responded, on December 19, 1974, by proposing that the \$5 and \$7.50 multipliers be increased to \$6 and \$9, respectively. However, in its proposal the Respondent also referred to the break date—that is, the date when the higher rate became effective—as January 5, 1972, instead of January 5, 1973. Later, the Charging Party agreed to this proposal and their stipulated agreement, signed and ratified on January 5, 1975, incorporates, by reference to "multipliers," the Respondent's December 19, 1974, offer. Shortly thereafter, when the error in the break date was discovered, the Respondent notified the Charging Party. Since then the Respondent has refused to sign a finished, printed copy of January 5, 1975, stipulation which contains the pension break date of January 5, 1972, although it has honored all other provisions of the agreement.

We agree with the Administrative Law Judge that the parol-evidence rule does not operate to exclude testimony offered to establish that in fact no agreement was reached in the first place. Moreover, we

agree that rescission for unilateral mistake is, for obvious reasons, a carefully guarded remedy reserved for those instances where the mistake is so obvious as to put the other party on notice of an error. We find that the instant case presents such an unusual instance.

Thus, the Respondent's December 19, 1974, offer, later agreed to and incorporated by reference in the parties' stipulated agreement, proposed a "change" in the existing multipliers of \$5 (to \$6) and \$7.50 (to \$9), respectively, for the periods before and after January 5, 1972. The Charging Party argues that it assumed that the Respondent was thereby offering to change the break date as well as the multipliers. However, we agree with the Administrative Law Judge that this interpretation is so palpably at odds with the pension provisions of the existing contract as to put the Charging Party on notice of an obvious mistake by the Respondent. For in order to change the break date from January 5, 1973, to January 5, 1972, the Respondent would be increasing the multiplier for the January 5, 1972—January 5, 1973, period from \$5 to \$9, and such an assumption clearly cannot be reconciled with the Respondent's offer to change only the \$5 multiplier to \$6 and the \$7.50 multiplier to \$9. Therefore, in agreement with the Administrative Law Judge, we shall dismiss the complaint in its entirety.

**ORDER**

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the complaint herein be, and it hereby is, dismissed in its entirety.

**DECISION**

STATEMENT OF THE CASE

JERROLD H. SHAPIRO, Administrative Law Judge: The hearing in this case, held on November 4, 1975, is based on an unfair labor practice charge filed by International Chemical Workers Union, Local No. 184, herein called the Union, on March 12, 1975, and a complaint issued on August 29, 1975, on behalf of the General Counsel of the National Labor Relations Board, herein called the Board, by the Regional Director for Region 28, alleging that Apache Powder Company, herein called the Respondent, has engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the National Labor Relations Act, as amended, herein called the Act. Respondent filed an answer denying the commission of the alleged unfair labor practices.

Upon the entire record, from my observation of the demeanor of the witnesses, and having considered the post-hearing briefs submitted by the General Counsel and Re-

spondent, I make the following:

## FINDINGS OF FACT

### I. THE BUSINESS OF RESPONDENT

The Respondent, Apache Powder Company, is a New Jersey corporation engaged in the manufacture and sale of chemicals, explosive products, and related products at its facility in the State of Arizona where it annually manufactures and sells products valued in excess of \$50,000 which it ships directly to customers located outside the State of Arizona.

Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act. I further find that it will effectuate the purposes of the Act for the Board to assert jurisdiction over this matter.

### II. THE LABOR ORGANIZATION INVOLVED

International Chemical Workers Union, Local No. 184, the Union, is admittedly a labor organization within the meaning of Section 2(5) of the Act.

### III. THE QUESTIONS TO BE DECIDED

The ultimate question for decision is whether Respondent violated Section 8(a)(5) and (1) of the Act when it refused the Union's request to sign a collective-bargaining agreement incorporating an agreement on pension benefits. In order to answer this question, it is necessary first to determine whether the Respondent and Union reached an agreement about pension benefits and, if so, the terms of the agreement.

### IV. THE ALLEGED UNFAIR LABOR PRACTICES

#### A. *The Facts*

The Union for about 20 years has represented a unit of the Respondent's production and maintenance employees and has been signatory to a series of collective-bargaining agreements with Respondent covering these employees. Prior to the instant dispute over the terms of the newly negotiated pension benefit agreement, the most recent collective-bargaining agreement was effective from January 5, 1972, until January 5, 1975. This agreement, among other things, contained a pension plan which in pertinent part provided that the pension benefits received by eligible employees "shall be equal to the amount of: \$5.00 multiplied by the number of years of Continuous Service occurring before January 5, 1973, plus \$7.50 multiplied by the number of years of Continuous Service occurring after January 5, 1973." Regarding "Continuous Service," the plan set out certain situations, i.e., layoffs or absences for over a certain duration, wherein employment for purposes of pension benefits was not considered continuous but to have been broken. In summation, the amount of pension benefits received by an eligible employee was computed by combining two factors, (1) the number of years of "Continuous

Service" occurring before and after January 5, 1973, herein called the break date, multiplied by (2) different dollar amounts, herein called the pension multipliers or the multipliers.

The negotiations for a contract to succeed the one scheduled to terminate January 5, 1975, commenced early in December 1974 at which time the Union made a number of proposals, including one to change the existing pension plan. This proposal, in pertinent part, provided that the plan be amended "to provide immediate full credit for any broken service" and that the break date between the multipliers be eliminated and that employees eligible for pension benefits receive \$11 monthly for each year of service from year 1 through 15, \$12.50 monthly for each year of service from year 16 through year 30 of service, and \$14 monthly for all years of service in excess of 30.

On December 19, 1974, the Respondent, through its negotiators, came forward with a counterproposal, in writing, on economic matters which included a pension proposal that provided: "(1) Change the multiplier for all service after January 5, 1972, from \$5.00 to \$6.00. (2) Change the multiplier for all service after January 5, 1972, from \$7.50 to \$9.00."<sup>1</sup> Upon receipt of these proposals, the Union's negotiators asked to be allowed to consider them for the remainder of the day and respond the next day.

Thomas Drew, an International union representative who was the Union's chief spokesman during negotiations, considered the Respondent's economic proposal and then, during the evening of December 19, met with the Union's executive board. Drew told them that Respondent's proposal was inadequate and that since the parties were a long way from reaching an agreement, the Union had better prepare for a strike. Several questions were asked about Respondent's proposal, including one about the pension proposal. Drew, using the blackboard, illustrated the pension benefits that an employee with 20 years of service would receive under the existing pension plan, the Union's proposed plan, and the Respondent's proposed plan. In illustrating the Respondent's proposed plan, Drew relied on the break date set forth in that plan, January 5, 1972, and believed that Respondent's use of January 5, 1972, rather than January 5, 1973, as the break date constituted a concession by the Respondent.<sup>2</sup>

The next day, December 20, the Union's negotiation committee met with Respondent's committee and indicated that Respondent's December 19 proposal was not satisfactory and, with regard to the pension proposal, told Respondent's negotiators that "the multipliers were not big enough." There was no mention of or discussion about the break date and at no time material herein, either before or

<sup>1</sup> In addition to furnishing copies of its December 19 proposal at the bargaining table, Respondent between December 20 and January 3 posted copies of the proposal on its plant bulletin boards and distributed copies to several employees.

<sup>2</sup> Respondent did not intend to change the existing break date. Its use of the January 5, 1972, break date in the December 19 proposal was due to the mistake of its chief negotiator, John Boland. In drafting this proposal, Boland intended to change the multipliers and retain the existing break date of January 5, 1973, but inadvertently wrote the date January 5, 1972, based on an erroneous assumption that the pension plan's break date for pension benefits was the same as the effective date of the existing agreement, January 5, 1972.

after December 20, did the parties mention or discuss the break date during negotiations; all that was discussed was the multipliers.

At the conclusion of the December 20 meeting, negotiations were broken off with no further meetings scheduled. Thereafter, on January 3, 1975, the parties returned to the bargaining table at the request of a Federal mediator. On January 5, an agreement was reached when Respondent on that date made a new and improved economic proposal which the Union accepted. The agreement, the outcome of the negotiations, was assembled into one document, General Counsel's Exhibit 2, by the Respondent's chief negotiator, John Boland. Boland attached Respondent's December 19 and January 5 proposals and, where pertinent, in the January 5 proposal referred by reference to specific provisions contained in the December 19 proposal which the parties intended to incorporate into the final agreement. Other items which had previously been settled prior to December 19 and reduced to writing were also incorporated into the agreement. The agreements reached on still other items were written out by Boland; other portions were xeroxed provisions from the prior agreement with the necessary changes. All of these various documents, in patchwork fashion, comprised the agreement reached on January 5. To signify that they had reached a complete bargaining agreement, Boland and Drew, on January 5, affixed their initials to each page of the 21-page document. The part of this agreement which pertains to pension benefits consists of two documents. The Respondent's proposal of December 19, 1974, previously described, and Respondent's proposal of January 5, 1975, which in pertinent part reads:

Pensions. Provide that all service with [Respondent] be credited in determining pension entitlement for employees retiring on or after January 5, 1975.

Pension Multipliers As Proposed in 12-19-74 offer.

On January 5, 1975, following the initialing of the agreement, the Union's membership ratified the agreement and the president of the Union notified the Respondent's director of labor relations, Eugene Oliver, that the agreement had been ratified and that the parties had a new contract.

Thereafter, Oliver took the agreement and put it in proper form so that it could be typed for the parties' signatures. In so doing, he discovered that Boland in preparing the Respondent's December 19 proposal had mistakenly used the break date of January 5, 1972, rather than January 5, 1973, and had neglected to include a double indemnity provision in the Respondent's life insurance proposal.<sup>3</sup> On January 8, 1975, Oliver informed Boland of these mistakes who immediately phoned Drew and told him about the mistakes. Drew, in the midst of negotiations with another employer, answered that he understood what Boland was saying and would get back to Boland. Boland then in-

<sup>3</sup> The Union during negotiations had proposed an increase in the amount of life insurance benefits from \$6,000 to \$10,000. The \$6,000 coverage was subject to a double indemnity provision. The Union's proposal only requested an increase in the face amount of the life insurance; it neglected to include the double indemnity feature. The Respondent, however, decided to offer a double indemnity provision applicable to the entire \$10,000 policy amount which Boland, when he drafted the December 19 proposal, inadvertently omitted.

structed the Respondent's officials to prepare a final agreement for the signatures of the parties which would incorporate all of the terms of the January 5 agreement and specifically directed them to include a provision for double indemnity in the provision dealing with life insurance benefits and to use a break date of January 5, 1973, in the provision dealing with the pension benefits.

Thereafter, on January 9, this agreement was given to the Union's negotiation committee for signature with the explanation, by Oliver, that the break date in the pension plan had been changed from January 5, 1972, to January 5, 1973, inasmuch as the 1972 date had been incorporated in the Respondent's December 19 proposal by mistake. The Union's representatives refused to sign the agreement so long as it contained a break date of January 5, 1973, rather than January 5, 1972. On January 27, 1975, Drew on behalf of the Union, by letter, informed Boland that "[the Union] stands prepared to sign the new agreement . . . as soon as [Respondent] amends its signature draft to provide for pension amendments provided for within the signed tentative agreement." At all times material, Respondent has refused to sign a collective-bargaining agreement that contains a pension agreement which includes a break date of January 5, 1972. It is undisputed, however, that immediately after January 5, 1975, Respondent placed into effect retroactively all of the terms agreed upon by the parties in their January 1, 1975, agreement and that only the one covered by this dispute was not placed into effect; namely, the provision dealing with pension benefits. Then, on June 25, 1975, the parties signed a document which, in effect, is the same as the document given to the Union on January 9, with minor corrections, but without agreeing to the break date in the pension plan. A stipulation and agreement was also signed by the parties which in substance states that the parties agree that all provisions of the agreement are final and binding except for the break date between the pension multipliers and that the parties will accept "the final decision" rendered in the instant unfair labor practice case on the matter of the break date and if "the final decision" does not decide which date is the proper one, then the parties will arbitrate the matter.

#### B. Discussion and Conclusionary Findings

The record establishes that, when the parties on January 5, 1975, initialed the multipage document, they had reached agreement on all of the terms of a collective-bargaining agreement and intended the initialed document to be an integration of all that had been said and done in the course of negotiations. What was their agreement with respect to the break date between the pension multipliers? This is the disputed question involved in this proceeding. The part of the initialed agreement pertinent to a resolution of this dispute consists of the Respondent's proposals of December 19 and January 5.

The December 19 proposal, agreed to by the Union and a part of the final agreement, reads in pertinent part as follows:

The following is proposed in settlement of all unsettled matters now pending:

A. . . .

**B. Pension**

(1) Change the multiplier for all service prior to January 5, 1972, from \$5.00 to \$6.00

(2) Change the multiplier for all service after January 5, 1972, from \$7.50 to \$9.00

The January 5 proposal, agreed to by the Union and a part of the final agreement, reads in pertinent part as follows:

The following is proposed in settlement of all matters pending between the parties.

A. . . . .

**B. Pensions. . . . .**

Pension Multipliers As Proposed in 12-19-74 offer

It is the General Counsel's contention that the final agreement initialed by the parties, on its face, unambiguously establishes a break date between the pension multipliers of January 5, 1972; thus, by refusing to sign a collective-bargaining agreement containing this break date, the Respondent violated Section 8(a)(5) and (1) of the Act. Respondent, without conceding that the record establishes that it agreed to change the existing break date from January 5, 1973, to January 5, 1972, urges that, when viewed most favorably to the General Counsel, the record merely establishes that there was no agreement whatsoever regarding the break date, but that there was a mistake of fact and no meeting of the minds on this subject. Respondent, over the General Counsel's objection, urges that the parol evidence rule does not apply to the consideration of evidence adduced to support its contention that there was a mistake of fact and no meeting of the parties' minds. General Counsel argues that even assuming the parol evidence rule is not applicable, the record does not establish that a mistake occurred and even if there was a mistake, Respondent is in no position to use it as a defense in this case since it was a unilateral mistake.

Turning first to the question of whether it is proper to consider evidence before determining which interpretation of the agreement is correct, I conclude that such evidence is appropriate and, accordingly, deny the General Counsel's motion to strike such evidence. It is well settled that the parol evidence rule is a rule of substantive law which requires that when the parties have made a contract "and have expressed it in a writing to which they have [all] assented as the complete and accurate integration of that contract, evidence, whether parol or otherwise, of antecedent understandings and negotiations will not be admitted for the purpose of varying or contradicting the writing."<sup>4</sup> Concededly, the January 5, 1975, agreement reached by the parties constitutes a complete and accurate integration of the terms of the collective-bargaining agreement reached by the parties.<sup>5</sup> Thus, evidence outside the agreement cannot be introduced to vary its terms. However, it is also well established that evidence may be introduced for the pur-

pose of ascertaining the correct interpretation of an agreement,<sup>6</sup> as well as to establish the nonexistence of an agreement.<sup>7</sup> The evidence here was offered in order to ascertain the meaning of an agreement and to establish the nonexistence of an agreement, not to vary the terms of an agreement. I have considered the evidence for those purposes.

Next, I turn to the primary question. Did the parties agree to change the break date dividing the pension multipliers in the contractual pension plan and, if so, what were the terms of the agreement. In agreement with the General Counsel, I conclude that the language in the initialed agreement seems on the surface to establish a break date of January 5, 1972, between the pension multipliers. Having said that, I must examine the record to ascertain whether the evidence establishes that the parties ascribed some other meaning to the language in question. At the outset, I note that the initialed agreement, insofar as it concerns pension benefits, makes no sense by itself. It must be read in conjunction with the terms of the contractual pension plan which was in existence on January 5, 1975, and which the parties by their initialed agreement intended to change. The existing pension plan provides in substance that an employee eligible to receive a pension shall receive a monthly payment "equal to the amount of \$5.00 multiplied by the number of years of Continuous Service occurring before January 5, 1973, plus \$7.50 multiplied by the number of years of Continuous Service occurring after January 5, 1973." When the terms of the initialed agreement are considered in the context of the then existing pension plan, it is my opinion that they give support to the testimony of Boland that it never was Respondent's intent to change the existing break date and graphically demonstrate the ambiguity of the terms contained in the initialed agreement.

If one is to "Change the multiplier" for service after January 5, 1972, "from \$7.50 to \$9.00" as provided in the initialed agreement, then it is necessary that the existing pension plan pay eligible employees a \$7.50 multiplier for all service after January 5, 1972. It does not do so. The \$7.50 multiplier in the existing pension plan applies only to service after January 5, 1973. This circumstance is a strong indication that Respondent's intent in advancing its pension benefit proposal was to change only the pension multipliers and not the break date between the multipliers. Any doubt of the correctness of this inference is removed when Respondent's final pension proposal is considered. This proposal made on January 5, 1975, refers solely to "pension multipliers" and does not refer to the break date. Moreover, it is undisputed there was never one word uttered during the contract negotiations, during the material period of time, about the break date; rather, all discussion centered around the dollar figures to be used as the pension multipliers.

Based on the foregoing, I find that the record overwhelmingly establishes that it was Respondent's intent in advancing its January 5, 1975, proposal to change only the dollar figures used for pension multipliers and not to

<sup>4</sup> 3 Corbin Contracts § 573 (1960).

<sup>5</sup> An agreement is integrated where the parties thereto adopt a writing or writings as the final and complete expression of the agreement. An integration is the writing or writings so adopted. Restatement of the Law, Contracts Section 228.

<sup>6</sup> 3 Corbin Contracts § 543, 579 (1960); Restatement of the Law, Contracts § 242.

<sup>7</sup> 3 Corbin Contracts § 573, 580; see also 30 Am Jur 2d, Evidence § 1033, 1037.

change the existing break date of January 5, 1973; but through inadvertence, Respondent mistakenly used the break date of January 5, 1972, in its proposal to change the pension multipliers. I further find, for the reasons set out below, that under the circumstances of this case, a reasonably intelligent person would have surmised that the Respondent, in making its pension proposal, had no intent to change the existing break date.

On its face, the Respondent's proposals of December 19 and January 5 were worded in terms of changing the pension multipliers, not in terms of a change in the break date. I realize that, if the Respondent's proposal of December 19 is viewed in isolation, it indicates Respondent was proposing a break date of January 5, 1972. But it would be impossible for a person to view the proposal in a vacuum because it was proposed as a modification of an existing pension plan and makes absolutely no sense unless considered in the context of the existing plan. When read in conjunction with the existing plan it is readily apparent, as found above, that Respondent meant to change only the pension multipliers and not the break date and that anyone considering the proposal in light of the existing agreement would have realized this or been placed on guard. The Union's negotiators admittedly were familiar with the existing pension plan and knew that the existing break date was January 5, 1973, not January 5, 1972. Moreover, if the December 19 proposal, when considered along with the existing pension plan, did not introduce a sufficient degree of ambiguity and uncertainty so as to place a person of reasonable intelligence in doubt as to the nature of Respondent's intention about the break date, then certainly Respondent's final proposal of January 5, which was worded solely in terms of a change in the "pension multipliers," should have created a degree of uncertainty and ambiguity so as to have placed a reasonably intelligent person in serious doubt as to the nature of Respondent's intention with respect to the break date. This doubt should have been given even more substance by the fact that there had been absolutely no discussion during the material part of the negotiations about a change in the existing break date; rather, negotiations centered entirely around increasing the dollar amounts used as the pension multipliers.

Based on the foregoing, I am convinced that the record establishes that Respondent did not intend to change the existing break date of January 5, 1973, but mistakenly used the break date of January 5, 1972, in its December 19 proposal; that this mistake was so obvious so as to have placed a person of reasonable intelligence on guard; and that the terms of the initialed agreement, considered in context, are ambiguous with respect to the intent of the parties concerning the break date. For these reasons, I am of the opinion that there was no meeting of the parties' minds as to the break date or, phrased another way, there was no mutual assent by the parties on this subject. Respondent and the Union each attached a different meaning to the initialed agreement insofar as it pertained to the break date between the pension multipliers. Whether this situation is viewed, as contended by the General Counsel, as one of unilateral mistake, or as contended by Respondent, as one of mutual mistake, there was in my view no agreement.

If the situation herein is viewed as one of mutual mis-

take—which I am inclined to do because of the ambiguity of the initialed agreement—then the comments of Professor Corbin are applicable:

If the court is convinced that the two parties gave substantially different meanings to the words of a contract, and it is not convinced that either one of them knew or had reason to know what the other meant or understood by the words, then there is no reason for choosing one interpretation rather than the other and there is no contract. 3 Corbin Contracts, *supra* §538 at 64-65.

Likewise,

It is essential to every agreement that the parties to it should have consented to the same subject matter in the same sense; they must have contracted *ad idem*. Hence, where one person offers a thing and the other accepts it and the parties have in mind different things, there can be no agreement; so, where the language used is understood differently by the parties, there is no meeting of the minds and there can be no agreement. A mutual misunderstanding as to an essential element of a supposed agreement vitiates the agreement. 17 C.J.S., *Contracts*, §144(b) at 897.

If the situation herein is viewed as one of unilateral mistake, then:

There is considerable authority to the effect that a mistake of one party known to the other affects the validity of their agreement. This is held to be true where the mistake is obvious on the face of the contract. Accordingly, where there is a mistake that on its face is so palpable as to put a person of reasonable intelligence on his guard, there is not a meeting of the minds, and consequently there can be no contract. 17 Am Jur 2d, §146 at 493-494.

Likewise,

The remedy of rescission for unilateral mistake is particularly available where the offeree, from the very nature of the offer, should be aware that there has been a mistake; in short, where the mistake should have been "palpable to the offeree." 13 Williston on Contracts §1573 at 490 (1970).

In many cases under consideration, the party not in error did or should have suspected the existence of a mistake, in which case, of course, rescission . . . should and will be allowed. 13 Williston on Contracts §1578 at 514 (1970).

Based on the reasons set forth above, I conclude that the parties did not reach an agreement on the break date dividing the pension multipliers; thus, it was not an unfair labor practice for Respondent to refuse to sign a collective-bargaining agreement incorporating a break date of January 5, 1972. Cf. *McLean-Arkansas Lumber Company, Inc.*, 109 NLRB 1022, 1038-39 (1954); *Taylor Chevrolet Corporation*, 199 NLRB 1064, 1067-68 (1972); and *Oil Chemical and*

*Atomic Workers International Union and its Local 7-507 (Capitol Packaging Company)*, 212 NLRB 98 (1974). Accordingly, I shall recommend that the complaint be dismissed in its entirety.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

**ORDER**<sup>8</sup>

The complaint is dismissed in its entirety.

<sup>8</sup> In the event no exceptions are filed as provided by Sec. 102.46 of Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions and Order, and all objections thereto shall be deemed waived for all purposes.