

**United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL**

Advice Memorandum

DATE: May 21, 1996

TO : Robert H. Miller, Regional Director
Region 20

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: San Francisco Web Pressmen and Platemakers
Union No. 4
Cases 20-CB-9862, 9915 530-6033-8400
530-8042
San Francisco Newspaper Agency 554-1433-8300
Case 20-CA-26764

These Section 8(a)(5) and 8(b)(3) cases were submitted for advice as to whether the Employer and/or the Union unlawfully refused to execute agreed-upon collective bargaining agreements.¹

FACTS

The San Francisco Newspaper Agency ("Employer" or "Agency") produces and distributes two daily newspapers in the San Francisco area, the Examiner and the Chronicle. San Francisco Web Pressmen and Platemakers Union No. 4 ("Union" or "Web 4") represents employees performing work in the Employer's pressroom and photoengraving pre-press areas.

The parties have had a long collective bargaining relationship. Their last contract expired by its own terms on November 1, 1993. Negotiations for a subsequent agreement were conducted using a two track method. Web 4 bargained with the Employer over "local" matters specific to its membership. After all nine unions which represent

¹ The merits of the Section 10(j) request will be considered in a separate memorandum. The Employer and a separate union, Teamsters Local 921, also filed refusal to execute charges against each other in Cases 20-CB-9819 and 20-CA-26431, respectively. Those cases are being addressed in a separate Advice memorandum.

the Employer's workforce concluded local bargaining, the unions, including Web 4, joined together as the Conference of Newspaper Unions ("CNU") and commenced negotiations with the Employer over "joint" issues.

The Employer and Web 4 ostensibly reached agreement on local issues during the night of October 29-30, 1994.² However, since joint issues had not been resolved, on November 1, 2600 employees represented by the nine CNU unions went out on strike. The strike, marred by violence, lasted until November 12. By the strike's conclusion, each union had finished local contract negotiations with the Employer and the CNU and the Employer had resolved joint negotiations. Subsequently, each union, including Web 4, ratified their respective agreements.³

On December 1, the Employer sent the Union copies of its version of the new collective bargaining agreement for signature. During the first week of December, Employer vice president Richard Jordan and labor relations manager Mike Mullins met with Web 4 president Mark Arata to discuss the agreement. According to both Jordan and Mullins, Arata stated that Web 4 would not sign the contract because of the on-going dispute between the Employer and Teamsters Local 921, a separate CNU union which also refused to sign a proffered agreement with the Employer.⁴ Arata added that the CNU was taking the position that none of its member unions should sign their contracts until matters were resolved between Local 921 and the Employer.⁵

² All dates hereafter are in 1994 unless specified otherwise.

³ The entire Web 4 agreement is comprised of unchanged sections of the 1990-1993 contract, the agreement on local issues reached on October 29-30, the joint CNU-Employer settlement, and the strike settlement agreement. Details of the ratification meeting are not known.

⁴ Local 921 and the Employer also filed refusal to execute charges against each other in Cases 20-CA-26431 and 20-CB-9819, respectively. Those cases are being addressed in a separate Advice memorandum.

⁵ [FOIA Exemptions 6, 7(C), and 7(D)]

On December 29, 1994, the Employer notified Web 4 by letter that it had found and corrected five typographical errors in its submitted contract. On January 5, 1995,⁶ the Employer again urged Web 4 to sign and return the proffered contract.

On February 2, the Employer received a letter consisting of a two-page, single-spaced list of 70 corrections the Union wanted made in the Employer's draft before it was willing to sign the agreement. The next day, the Employer met with representatives of some of the CNU unions, including Web 4, ostensibly for the purposes of signing their agreements. Instead, CNU executive Douglas Cuthbertson spoke of union solidarity. Jordan asked which of the assembled union officials intended to sign their contract. Arata responded, "If we sign, will you give us the dispatcher?"⁷ Arata then accused the Employer of trying to destroy the union. Jordan responded that he did not feel that Web 4 had such a bad deal and he pointed out two other newspaper contracts with Web 4 which were more favorable to those employers. Arata responded that those situations were different from the instant parties' situation. He then stated, "We're allied with our brothers the Teamsters." Arata refused to sign the agreement.

.] However, a Teamsters Local 921 newsletter dated November 25 from Local 921 secretary-treasurer Andy Cirkelis to its membership provides that, "[b]y agreement, no [CNU] union will sign until all unions are ready to sign." Nonetheless, all Unions except Web 4 and IBT Local 921 have signed contracts with the Employer.

⁶ All dates hereafter are in 1995 unless specified otherwise.

⁷ Arata was referring to a dispute involving the Employer's appointment of a supervisory employee to perform dispatching functions which a unit employee had previously performed. At that time, the dispute was the subject of an on-going arbitration as well as an unfair labor practice charge in Case 20-CA-26495. The controversy did not play a role in contract negotiations.

Representatives of the Employer and Web 4 have met sporadically since February 3. The parties have resolved most of the issues which Web 4 itemized on February 2. Web 4 refuses, however, to execute an agreement without resolving these issues.⁸ On May 24, Web 4 gave the Employer a copy of a collective bargaining agreement containing changes to which the Union alleges the parties had agreed during bargaining. The Employer has refused to execute the Union's version of the contract.

In early March 1996, the Union asked the Employer for another copy of the Employer's December 1994 version of the contract. On March 12, the Employer gave the Union a copy of a document it had compiled in April 1995 which the Employer maintains is a true and accurate version of the parties' agreement.⁹ This latest version contains a number of changes to the Employer's previously submitted December 1994 draft. According to the Employer, however, the changes either reflect ministerial corrections to the earlier draft or accurately represent the parties' agreement.¹⁰

ACTION

We conclude that Web 4 violated Section 8(b)(3) of the Act by failing to sign the Employer's proffered collective

⁸ A complete discussion of these eight issues will be addressed, infra.

⁹ The Employer compiled this draft to satisfy the Region's request for a complete version of the contract which it could eventually present to the District Court for enforcement under a section 10(j) proceeding, if such were ever to occur.

¹⁰ Although the Employer gave the Region a copy of this document in April 1995, the Union contends that the Employer had never previously presented it with the draft. The Employer's attorney admits that the Employer inadvertently failed to serve the contract on the Union in 1995. Richard Jordan, however, maintains that he personally served the contract on Mark Arata in April 1995. Jordan was unable to provide the Region with supporting documentary or testimonial evidence.

bargaining agreement. We further conclude that the unfair labor practice charges against the Employer should be dismissed, absent withdrawal.

It is axiomatic that, "when an oral agreement is reached as to the terms of a collective-bargaining contract, each party is obligated, at the request of the other, to execute that contract when reduced to writing, and failure or refusal to do so constitutes an unfair labor practice."¹¹ An obligation to sign an agreement arises when the parties reach a "meeting of minds" over the terms of an agreement.¹² A meeting of minds,

does not literally require that both parties have identical subjective understandings on the meaning of material terms in the contract. Rather, subjective understanding (or misunderstandings) as to the meaning of terms which have been assented to are irrelevant, provided that the terms themselves are unambiguous "judged by a reasonable standard."¹³

It similarly is clear that a party may not condition the execution of a bargained-for agreement on a nonmandatory subject of bargaining.¹⁴ Thus, in South

¹¹ Oil, Chemical and Atomic Workers International Union and its Local 7-507 (Capital Packaging Company), 212 NLRB 98, 108 (1974). Accord: H.J. Heinz Co. v. NLRB, 311 U.S. 514 (1941). This obligation to execute is binding on unions as well as employers. Teamsters Local 70 (Emery Worldwide), 295 NLRB 1123 (1989).

¹² Lincoln Hills Nursing Home, Inc., 257 NLRB 1145, 1153 (1981).

¹³ Vallejo Retail Trade Bureau, 243 NLRB 762, 767 (1979) (quoting Pittsburgh-Des Moines Steel Company, 202 NLRB 880, 888 (1973)).

¹⁴ See, e.g., Plattdeutsche Park Restaurant, 296 NLRB 133, 137 (1989) (unlawful refusal to execute agreement unless union withdraws lawsuits); Zayre Department Stores, 289 NLRB 1183, 1185-86 (1988) (employer unlawfully conditioned execution of contract on nonmandatory ratification clause).

Atlantic and Gulf Coast District (Lykes Bros. Steamship Co.),¹⁵ the Board held that the respondent longshoremen union violated Section 8(b)(3) by refusing to execute an agreed-upon collective bargaining agreement unless and until the employer comes to a final agreement with other unions representing the Employer's non-unit checkers and clerks. Thus, the judge held that,

A union enjoying statutory status as exclusive representative of all employees within a bargaining unit may not unilaterally extend the scope of its agency authority and insist to impasse upon the employer's capitulation to the demands of other employees and other unions.¹⁶

The evidence herein establishes that Web 4 conditioned execution of its agreement with the Employer on a satisfactory resolution of Teamster Local 921's contract negotiations. Thus, (1) according to Jordan and Mullins, in the first week of December 1994 Arata told them that Web 4 would not sign the contract because of the on-going dispute between the Employer and Local 921; (2) Arata added that the CNU indicated that none of its member unions should sign their contracts until matters were resolved between Local 921 and the Employer; and (3) on February 2, 1995, Arata explained to Jordan that Web 4 refused to sign its agreement because, "We're allied with our brothers the Teamsters." By conditioning execution of its agreement on a satisfactory resolution of Local 921's negotiations, we conclude that a prima facie case exists that the Union

¹⁵ 181 NLRB 590 (1970).

¹⁶ Id. at 592. The ALJ in Paperworkers Local 620 (International Paper Co.), 309 NLRB 44, 53 (1992), cited South Atlantic approvingly in his decision -- adopted by the Board -- that 24 separate unions unlawfully conditioned execution of their separate agreements on a nonmandatory subject of bargaining, a pooled ratification process under which execution of each agreement depended on the ratification of all agreements. See similarly Jefferson Smurfit Corp., 311 NLRB 41 (1993) (following International Paper).

refused to execute the contract in violation of Section 8(b)(3).

In defense Web 4 points to a series of contractual issues which allegedly separate the parties. However, Web 4 first raised these allegedly substantive differences separating the parties after it ratified the agreement on November 13 and after Arata tied the refusal to execute to Local 921's dispute. Because of the Union's clear statements tying execution of its agreement to the Teamsters negotiations as well as the timing of the Union's communication of the issues which allegedly separate the parties, we conclude that Web 4 bears the burden of establishing that the issues are material and substantial. This is so because the integration of ministerial changes and/or inadvertent omissions into a final document does not relieve a party of its lawful obligation to sign the agreement.¹⁷ We further conclude that Web 4 failed to satisfy this burden.

1. Union Name Change

Web 4 objected to the form of its name which the Employer used as signatory to the contract. In the recent past, the Union merged with a separate union representing the Employer's pre-press employees. Accordingly, the Union sent the Employer a January 18 letter announcing the Union's new name, described therein as the Web Pressman-Prepress Worker's Union 4n. The letterhead, however, identified the Union by its old title, San Francisco Web Pressmen and Platemakers' Union No. 4. A letter from the Union to the Employer also dated January 18 identified the Union as Web Pressman/Prepress Workers' Union 4n; again, the Union's old name appeared on the letterhead.

Accordingly, by letter dated January 24, the Employer asked for the Union's exact legal name, and requested further information to confirm the name change, including the resolution and/or motion by which the Union adopted its present name, the date the change became effective, and a formal statement of assumption of the Union's liabilities under its former name. The Employer repeated its requests by letters dated February 3, February 23, and March 13. By

¹⁷ See, e.g., Alexandria Manor, 317 NLRB 2, 6 (1995).

letter dated April 17, Union attorney David Rosenfeld refused to provide the requested information, maintaining that the Union has a right to change its name without providing the Employer with the guarantees it has requested. Although Rosenfeld did not specifically identify the correct version of Web 4's new name, he referred to Web 4 as San Francisco Web Pressmen and Prepress Union No. 4. Finally, on Web 4's May 24 draft collective bargaining agreement which the Employer has refused to sign, the Union referred to itself by yet another name, San Francisco Web Pressmen and Prepress Workers' Union No. 4.

The Employer filed a charge in Case 20-CB-9915 alleging that Web 4 failed to respond to the Employer's request for clarification and confirmation of the Union's new name. The Region concluded that, "under the peculiar circumstances presented herein," complaint should issue alleging that Web 4 violated Section 8(b)(3) by refusing to provide the Employer with the requested information. Thus, the Region concluded that Web 4 was delaying and obstructing execution of the contract by refusing to clarify what its real name is and by not giving the Employer the information it had requested so that the contract could be corrected in this regard.

We conclude that this self-generated controversy is insufficient to keep Web 4 from signing the agreement. As set forth above, the Union used a variety of titles in communications with the Employer both before and after the January 18 announcement of its new name. This apparently led to some confusion in the eyes of the Employer. Thus, the Region intends to issue complaint against Web 4 for its failure to respond to the Employer's request for information about and verification of the Union's real name. Accordingly, based on the Union's lack of cooperation in sorting out the confusion, as well as the fact that the Union first raised this issue after Arata tied non-execution of the Web 4 agreement to the Local 921 Teamsters' contract, we conclude that this issue is insufficient to privilege Web 4's refusal to sign the agreement

2. Section 1(1): Definition of Pressroom Emergency

Web 4 has refused to sign the proffered agreement without receipt of a letter from Jordan explaining how the Employer construes section 1(1) of the contract under which the Employer may assign work in the pre-press department to non-journeymen unit employees for less than a full shift.

One of the Employer's primary goals during bargaining was to reduce the number of full-time unit positions in the pre-press department, primarily by cross-training and cross-classifying pressroom employees to perform pre-press duties. However, the Employer also sought the authority under section 11 to assign unit pre-press work to statutory supervisors in an emergency. Furthermore, under section 1(1) the Employer proposed language allowing for the assignment of journeyman work to non-journeymen unit employees on a regular, as well as emergency, basis.

The parties addressed these related issues at the final bargaining session held on October 29-30, 1994.¹⁸ Section 1(1) of the expired contract provided that:

Assignments to do flexo-platemaking work will be for a full shift except that the foreman may assign employees for less than a full shift if necessary due to:

- (1) Apprentices and flypersons performing maintenance.¹⁹
- (2) Pressroom emergencies. An "emergency" as used herein means a breakdown of the machinery or any condition arising over which the Employer has no control.
- (3) Assignments of floormen.²⁰

¹⁸ Jordan and Mullins represented the Employer at this final session, along with Gary Dunham who took notes. Union attorney David Rosenfeld was Web 4's chief negotiator, although Arata, Mosgofian and Calonico, among others, were also present.

¹⁹ Apprentices and flypersons are junior employees who have not yet reached journeyman status.

²⁰ Floormen are experienced journeymen who earn a higher rate of pay.

Section 11(b) of the expired agreement provided that, "[i]n an emergency, the foreman shall have the right to take the place of any employee on any press in order to operate the press."²¹ Under a new provision, section 11(g), the parties attempted to define the parameters by which foremen may perform unit work in an emergency:

An emergency for the purposes of this section shall mean an extraordinary condition or situation which results from circumstances beyond the immediate control of the Employer and which is impairing the Employer from meeting its production deadline.

The parties spent the majority of the session on October 29 bargaining over section 11(g), although section 1(1) also remained an open issue. According to the Employer's bargaining notes,²² the Union suspected that the Employer might attempt to manufacture emergencies in order to assign unit work to supervisors. Consequently, it attempted to elicit from the Employer an exact definition of "emergency" under section 11(g). Jordan, however, stated that he was unable precisely to articulate each and every emergency. The Union read the Employer a proposal defining an emergency under section 11(g). Jordan asked if this proposal would also define "emergency" under section 1(1). Rosenfeld stated that it would not.

Turning to the other remaining issues, the Union proposed deleting subparagraphs (1) and (3) from section 1(1), thus prohibiting non-journeymen from performing journeymen work for less than a full shift except in an emergency. Jordan rejected this proposal as insufficiently flexible.

The parties dropped their discussion of section 1(1) and returned to section 11(g). Rosenfeld attempted to

²¹ Foremen are statutory supervisors.

²² The Employer provided bargaining notes for this session; the Union refused the Region's request to do the same.

narrow opportunities to use supervisors in an emergency by excluding from the definition of "emergency," situations where the Employer fails to hire enough employees to adequately staff the machines. Jordan proposed limiting this exclusion solely to situations where the Employer fails to hire sufficient employees from the Union hiring hall. According to the Employer's handwritten notes, Rosenfeld responded, "Make you a deal -- send us a letter confirming our discussion 1(1) ..." The notes do not reflect the conclusion of Rosenfeld's offer and do not contain Jordan's response.

Directly after this exchange, the parties agreed to Jordan's modification. Rosenfeld then stated, "On 1(1) -- your position is one of insistence. Although we'd like to clarify, we'll agree to current language." Thus, the Union dropped its demand to delete subparagraphs (1) and (3) dealing with apprentices, flypersons, and floormen. The parties then reviewed all tentative agreements and finding all in order, agreed that they had settled negotiations on local issues.

Web 4's membership ratified the agreement on November 13 without receipt of the letter concerning section 1(1). Web 4 also failed to mention the letter in its January 29 list of corrections sent to the Employer. However, by letter dated February 22, Web 4 chapel chairman Calonico notified Jordan that the Union had not received the letter "clarifying the Employer's understanding of Section 1(1)."

On March 2, Jordan sent Rosenfeld a letter stating that, "[t]he description of 'pressroom emergency' in section 1(1) was not intended to be used to interpret what an 'emergency' is for purposes of Section 11(g) of the current labor agreement." By letter dated April 25, Rosenfeld rejected Jordan's purported clarification of section 1(1). Rosenfeld stated that,

Because your letter of March 2, 1995 does not set forth any description of "Pressroom emergencies" other than to simply quote the language of the contract, it is our position that you have failed to fulfill our agreement reached at the bargaining table. In our view you are bound to the past practiced [sic] which was discussed

extensively by the parties at length as of October 29, 1994.

Thus, Rosenfeld contended that the Employer is bound to the past practice of assigning journeymen work to apprentices, flypersons and floormen only under exceptional circumstances, if at all.

We conclude that the evidence is insufficient to establish that the Union's concern over the definition of "pressroom emergency" for the purposes of section 1(l) is a meaningful issue separating the parties. On the whole, the Employer's bargaining notes reflect the Employer's version of the parties' agreement on October 29-30. Thus, earlier in the session the parties agreed that the definition of "emergency" in section 11(g) would not effect "emergency" for the purposes of section 1(l). Much of the rest of the discussions that night centered around 11(g), not 1(l). However, the parties again discussed the definition of "emergency" right before Jordan agreed to send the Union a clarifying letter of some sort. Accordingly, the Employer's bargaining notes arguably support its contention that Jordan merely agreed to supply the Union with a description of "emergency", not with a full discussion of the past practice of the entirety of section 1(l), an issue which the parties had not discussed directly before the conversation leading to the promised letter. Despite repeated requests, the Union declined to present its bargaining notes or an affidavit from its lead negotiator that night, David Rosenfeld, in support of its contrary contention. Thus, the totality of the evidence supports the Employer's claim that it has satisfied its promise to supply the Union with a letter clarifying a contentious issue on October 29-30.

The Employer appended its March 2 letter onto its March 1996 draft as a "side letter."²³ The Union claims that not only is the letter unresponsive to its bargaining demands, as above, but that the parties never agreed to

²³ For the sake of simplicity, the Employer's version of the contract which it gave to the Union on March 12, 1996, will be referred to as the "March 1996" draft, despite Jordan's assertion that he served it on a Union official in April 1995.

append it to the contract. Neither the Union's nor the Employer's versions of the contract describes how the parties intend to treat side letters.

Nonetheless, it is clear that the parties never agreed to append the letter to the contract. The Employer's December 1994 draft does not include this side letter and the Union has never demanded its inclusion. Moreover, it appears that the side letter would be mere surplusage in any event; under the contractual grievance and arbitration clause, "any dispute" between the parties is grievable, not just those which arise under the contract. Accordingly, we conclude that there is no obligation to include the side letter in the December 1994 contract.

3. Overscale Formula

The Union refused to sign the Employer's proffered agreement until the Employer adds a correct "overscale formula" used to calculate the rate of pay for certain pre-press jobs which earn pay in excess of the journeyman rate.

During negotiations leading to the previous 1990-93 contract, the parties agreed to language that, "[b]y January 30, 1991 the Agency will provide accurate formulas for the following overscale jobs," including those at issue herein. By letter dated August 27, 1991, Jordan sent the Union an assertedly corrected version under which journeymen and assistant foremen would receive "at least" \$20 per shift and shift foremen "at least" \$35 per shift above the journeyman rate. Nonetheless, the Union printed copies of the agreement with what both parties agree are erroneous overscale formulae by which journeymen and foremen would receive wages of \$24.62 and \$46.49 above their base rates, respectively. By letter to the Union dated December 16, 1991, Jordan noted the erroneous formulae. Jordan further contended that during a face-to-face meeting in late 1991 Web 4's former secretary-treasurer, Chuck Reynolds, acknowledged that the Employer's August 27 formula, supra, was correct.

Union secretary Denis Mosgofian, on the other hand, contended that in 1991 the Union rejected the Employer's proffered overscale formulae, since the Employer has historically paid laser operators and foremen \$25 and \$45

over and above the night journeyman rate, respectively.²⁴ Thus, according to Mosgofian, the Employer's formulae of "at least" \$20 and \$35, respectively, would afford it the opportunity of lowering these employees' wages from current levels.²⁵

The Union does not contend that the parties bargained for accurate overscale formulae during the current round of negotiations. Rather, Mosgofian states that in March 1994 the Employer proposed to retain the above-cited language that "[b]y January 30, 1991 the Agency will provide accurate formulas" This language appears in the Employer's draft agreement which the Union refuses to sign. The Union contends that it is still waiting for the accurate formulae. The Employer, on the other hand, contends that the Union already agreed to them in 1991, and thus that nothing more is due.

The evidence establishes that in 1991 the parties resolved this issue along the lines posited by the Employer.²⁶ According to Jordan, in 1991 Web 4, through former secretary-treasurer Chuck Reynolds, agreed to the overscale formula found in the Employer's 1991 letter to the Union. The Employer supports [FOIA Exemptions 6, 7(C), and 7(D)] with a copy of the 1991 letter which apprised the Union of the new formula. Mosgofian, however, merely denies that the Union ever agreed to the formula. The Union did not support its assertion through documentary evidence or affidavit testimony which would flesh out details of the purported rejection, such as, by whom or in what manner the offer was rejected. Furthermore, the Union failed to present Reynolds during the investigation. Most importantly, however, the Union apparently failed to demand bargaining over this issue during the recent round of

²⁴ Mosgofian does not explain by what means the Union rejected the Employer's formula. The Union did not present Chuck Reynolds during the investigation.

²⁵ There is no evidence that the Employer has done so.

²⁶ [FOIA Exemption 5

negotiations. Rather, Mosgofian stated merely that in March 1994, the Employer proposed the language of the expired agreement, that, "[b]y January 30, 1991 the Agency will provide accurate formulas" Thus, the Union waited until January 1995 -- over two months after the parties concluded negotiations and the membership ratified the contract -- to demand to bargain over this material term of the agreement. Accordingly, we conclude that this issue does not block the Union from signing the Employer's proffered agreement.

Despite the Employer's previous position, stated above, in its March 1996 draft the Employer reverted back to the previous contract's formulae of \$24.62 and \$46.49 above journeymen and foremen rates, respectively. The Employer explained that it abandoned its earlier position because it no longer wanted to continue this argument which has lasted since the Union's refusal to sign the December 1994 draft.

We conclude that the Union is obligated to sign the December 1994 draft, including the overscale formula as proffered therein, rather than the Employer's subsequent concession. As set forth above, the evidence establishes that in 1991 the parties agreed that journeymen and foremen would receive "at least" \$20 and \$35 above journeyman scale, respectively. The Union has refused to sign the contract with this provision since at least December 1994. It would be incongruous to reward the Union's intransigence on this issue by allowing them to reap the benefits of the Employer's concession. Accordingly, we conclude that the Union is obligated to sign the December 1994 draft with the overscale formula specified therein.

4. Change "Foreman" to "Supervisor"

The Union further disputes the replacement of the word "foreman" with "supervisor" throughout the Employer's draft collective bargaining agreement.

Foremen are statutory supervisors within the meaning of section 2(11) of the Act. Mosgofian contends that on October 29, the parties agreed to change the wording of the title of Section 11 from "Foreman - Duty and Authority" to "Supervisor/Foreman - Duty and Authority." According to Mosgofian, Union bargaining committee chairman Tenorio

rejected Mullin's additional proposal to replace "foreman" with "supervisor" throughout the body of the agreement.

Jordan and Mullins, however, contend that during the discussion of Section 11 on October 29 David Rosenfeld agreed to change "foreman" to "supervisor" in Section 11, as well as everywhere else in the contract.²⁷ According to Mullins, Rosenfeld later acknowledged this agreement during a February 14 telephone conversation and promised to clear it up with the Union.²⁸ The Employer's October 29-30 bargaining notes establish that during a discussion of section 11(g) Rosenfeld stated that, "section 11 and other sections of the contract have to be conformed to reflect the fact that certain people will no longer be in the unit."²⁹

Through a hearing in case 20-UC-344, Web 4 and the Employer have spent considerable time and effort to clarify the extent of employees' supervisory authority. The Union's objection to the above-referenced change stems from its apprehension that "supervisor," as the Employer used it throughout the draft contract, is an undefined term which may lead to the extension of supervisory authority to a whole group of as-yet unnamed employees.³⁰

²⁷ According to Jordan, after one of the Union's representatives complained about the change, Rosenfeld stated, "We don't care what they call them. We have our own terms for them." Rosenfeld was the Union's lead negotiator during the final session.

²⁸ Rosenfeld similarly told a Board agent by telephone on February 15 that the Union had agreed to this change throughout the contract. Rosenfeld has refused to provide a Board affidavit for the purposes of the instant investigation.

²⁹ As set forth above, the Union refused to give the Board agent a copy of its bargaining notes for October 29-30.

³⁰ There is no evidence that this has occurred, nor does the Union explain how by calling agreed-upon statutory supervisors by another name potentially removes jobs from the unit.

We conclude that the Employer's evidence outweighs the Union's contrary assertion in this regard. The Employer supports its contention that Rosenfeld agreed on October 29-30 to change "foreman" to "supervisor" throughout the contract by (1) [FOIA Exemptions 6, 7(C), and 7(D)] concerning the events of that evening; (2) its October 29-30 bargaining notes which establish that Rosenfeld stated that section 11 as well as other sections of the contract have to be "conformed to reflect the fact that certain people will no longer be in the unit; and (3) [FOIA Exemptions 6, 7(C), and 7(D)] concerning a February 14 telephone conversation in which Rosenfeld acknowledged that he will convince the Union to live up to its commitment to make the language change.³¹ Despite the Employer's evidence, the Union failed to provide bargaining notes which would support its contrary assertion and Rosenfeld declined to give a statement during the investigation.

5. Drop "Room" from "Pre-Pressroom"

Web 4 also demands that the phrase "pre-pressroom" be changed to "pre-press" in various parts of the agreement. Web 4 believes that the Employer's use of "pre-pressroom" erroneously suggests that the employees working in this area are something less than a department in the company and a separately defined "chapel" of the Union. According to the Union, the Employer's behavior is part of a plan to eliminate the pre-press department as a separate entity by using cross-classified pressroom employees to perform pre-press work.

Web 4 Chapel chairman John Calonico contends that during an unidentified early bargaining session the parties agreed to change "pre-pressroom" to "pre-press." However, Web 4 bargaining committee member Paul Trimble does not corroborate Calonico; he states that this was a relatively minor issue that can be resolved quickly.

Mullins maintains that in November 1993 the parties reached agreement on the contract provisions containing the phrase "pre-pressroom." Mullins further states that on

³¹ Rosenfeld similarly admitted to the Region that the Union had agreed to this change throughout the contract.

August 10, 1994, the parties reviewed all sections of the contract; the Employer's copy of the tentative agreements as of that date contains the phrase "pre-pressroom" in the relevant contract sections. Mullins contends that the Union did not object to the Employer's version of the tentative agreements on August 10. The Union also failed to include the disputed contract provisions in its October 17 list of open contract provisions.

We conclude that the Union's vague assertion that the Employer agreed to drop "room" from "pre-pressroom" during an unidentified early session is otherwise unsupported by the evidence. Thus, we conclude that the evidence, including the August 10 tentative agreements and the Union's failure to include this allegedly open issue in its October 17 list, establishes that the parties agreed to retain the disputed language.

6. Delete Side Letter

Web 4 further contends that the Employer's proffered contract mistakenly includes a side letter to the previous agreement which the parties agreed to delete.

The side letter provides the following:

During the negotiations for the current contract, the Agency agreed that it would not, during the term of this Agreement, file a unit clarification to have positions removed from the bargaining unit.

We jointly agreed that employees named on the attrition list will not lose eligibility for the attrition list benefits by accepting management positions outside the bargaining unit.

With regard to the second paragraph, in 1990 the parties entered into a "Supplemental Agreement on Job Security/Job Dignity and Work Arrangements." The supplemental agreement guarantees, inter alia, full-time employment until age 70 for specified unit employees whose names were placed on an "Attrition List." By operation of the above-referenced side letter, unit employees who are promoted to supervisory positions outside the unit remain on the attrition list.

Mosgofian and Calonico contend that on October 29-30 the parties agreed to delete the above side letter in its entirety.³² According to the Employer's October 29 bargaining notes, Jordan initially took the position that the side letter had expired, freeing the Employer to file a UC petition at any time. Rosenfeld, however, proposed retaining the side letter as a quid pro quo for a second side letter to be appended onto the agreement in which Web 4 promises not to withdraw the pending UC petition. Jordan accepted Rosenfeld's offer. Mullins further contends that during a February 14 telephone conversation Rosenfeld acknowledged that he will write the above-described side letter.³³ The parties did not specifically discuss the second sentence of the side letter pertaining to the attrition list.

Despite the Union's claims to the contrary, the evidence indicates that the Union is utilizing this issue in an attempt to negate its agreement with the Employer not to withdraw the pending UC petition. The Union has no identifiable interest in demanding the deletion of the instant side letter which prohibits the Employer from filing a UC petition. Although the side letter also provides that certain named supervisors will remain on the attrition list guaranteeing them lifetime employment, the Union similarly has no interest in statutory supervisors' terms and conditions of employment, a non-mandatory subject of bargaining.³⁴ This is because the inclusion of

³² [*FOIA Exemptions 6, 7(C), and 7(D)*] purportedly quotes from the Union's bargaining notes of October 29 in which Jordan allegedly agreed to delete the entire side letter. As set forth above, Web 4 refused to provide the Board agent with a copy of these notes.

³³ The Board agent similarly stated that during a February 15 telephone conversation, Rosenfeld told her that he is supposed to write a letter concerning the outstanding UC case. Nonetheless, in April 1995 Rosenfeld attempted to withdraw case 20-UC-344 after many days of hearings.

³⁴ See generally Allied Chemical and Alkali Workers Local 1 v. Pittsburgh Plate Glass Co., 404 U.S. 157, 159-160 (1971)

supervisors on the attrition list does not affect unit employees inasmuch as the named supervisors were grandfathered onto the list and their deletion therefrom would not serve to open slots for unit employees. Thus, since the side letter serves only to waive the Employer's statutory rights, the Employer's contention that it agreed to retain the side letter as a quid pro quo for the Union's agreement not to withdraw the pending UC petition -- which is supported by affidavit testimony as well as bargaining notes -- is reasonable.

7. Delete Names of Supervisors from Attrition List

Web 4 further refuses to sign the Employer's proffered agreement unless the names of two foremen, Ronald Reed and John Olsen, are deleted from the attrition list.

Web 4 does not contend that it raised this issue during bargaining. Rather, it contends that since the above-referenced side letter is no longer part of the agreement, the two supervisors (who had been promoted out of the unit) necessarily do not belong on the attrition list. The Employer maintains that the side letter is part of the current agreement and thus that the two supervisors cannot be struck from the list solely because they currently are supervisors.

Moreover, the Employer maintains that the supplemental agreement as well as the attrition list were never up for renegotiation so they have no obligation to bargain over this issue. By its terms, the supplemental agreement "shall remain in full force and effect as long as there are employees still on the Attrition List in the employment of the Employer and until there is mutual agreement to change it." By letter dated August 13, 1993, the Employer gave the Union notice that it would not agree to reopen the supplemental agreement.

We cannot conclude that the deletion of the two supervisors from the list necessarily flows from the parties' purported agreement to delete the attrition list side letter. As set forth above, we conclude that the parties never agreed to delete the disputed side letter.

(employer's unilateral change in benefits of non-unit, retired employees is not an unfair labor practice).

Furthermore, as set forth above, supervisors' terms and conditions of employment (such as lifetime employment guaranteed by the attrition list) are not mandatory subjects about which the Union may insist. Accordingly, the Union is not privileged to refuse to sign the contract because of its position on this non-mandatory issue.

8. New Union Officer to Sign Supplemental Agreements

Web 4 objects to the Employer's refusal to allow two newly-appointed Union officers to sign the above supplemental agreement, as well as a similar document pertaining to pressroom employees, to replace the signatures of two former Web 4 officers.

Mosgofian contends that in 1990 the Employer allowed two then-new Union officers to sign the agreements, even though the parties originally entered into the agreements in 1977. Calonico considers the Employer's contrary position during this round of negotiations to be an insult to the Union. The Employer, however, objects to new signatures since the supplemental agreements were not up for renegotiation in 1994.

Like the dispute concerning the supervisors' inclusion on the attrition list, the Union never raised this issue during bargaining. Nor does the Union contend that the supplemental agreements were up for bargaining during the recent round of negotiations. Rather, the evidence establishes that the Employer invoked its contractual right not to renegotiate the terms of these agreements. Accordingly, we conclude that the Union has no right to demand to reopen these agreements solely so that its new officers can sign them.

9. Corrected Seniority Date

In its March 1996 draft, the Employer changed employee Denis Mosgofian's erroneous seniority date to the correct date. The Union acknowledges that the new date is accurate; however, it complains that the Employer had no right to correct it unilaterally. However, in January 1995 the Union demanded that the Employer make this change.

Insofar as both parties acknowledge that the seniority date in the Employer's March 1996 draft is accurate, we

conclude that this ministerial correction does not relieve the Union of its obligation to sign the contract.³⁵

10. Renumbered Appendix

In its March 1996 draft, the Employer renumbered Appendix XIV to Appendix XV and changed the numbering of subsequent appendices so that they are consecutive. The Union acknowledges that this change is correct; in fact, in January 1995, it demanded that the Employer agree to the correction. Nonetheless, the Union again contends that the Employer had no right to do this without the Union's explicit, prior approval.

Like the corrected seniority date, this ministerial change similarly is insufficient to separate the parties. Once again, both parties agree that the Employer's resolution is an accurate version of the parties' agreement. In fact, the Union specifically demanded that the Employer make this change. Again, this ministerial change does not relieve the Union of its obligation to sign the contract.

11. Picket Line Clause

The Employer included a new clause in its March 1996 draft, section 26, which accords employees the right to refrain from crossing picket lines established by other unions. The clause did not appear in the Employer's December 1994 draft, apparently because of an inadvertency on the part of the Employer.³⁶ However, in January 1995 the Union demanded that substantially similar language be in the contract. A substantially identical version of the picket line clause also appears in the Union's May 24, 1995, draft which it forwarded to the Employer for signature.

³⁵ See Alexandria Manor, supra at p. 7 n.17.

³⁶ The clause was the product of negotiations between the Employer and the CNU, rather than the Union. Thus, the apparently inadvertent omission of this clause from the December 1994 draft could likely be the result of piecemeal bargaining.

Like many of the previous issues, the Employer merely responded to the Union's demands that this clause be inserted into the contract, as negotiated. And as set forth above, the Union is not relieved of its obligation to sign the December 1994 draft merely because the Employer subsequently integrated an agreed-upon clause into the contract.

12. Addition of the Strike Settlement Agreement and Pressroom Policy Statement

The Employer stapled copies of the Strike Settlement Agreement as well as a "Pressroom Policy Statement" onto its March 1996 draft. The Strike Settlement Agreement sets the terms by which employees returned to work after the strike. The Pressroom Policy Statement, which Union and Agency representatives signed before the strike, concerns the treatment and discipline of employees who consume alcohol during working hours. There is no debate that the parties are bound by both of these separate agreements. The Union, however, complained merely that the agreements did not appear in the Employer's December 1994 draft and, thus, do not belong in the contract. The Employer's March 1996 draft contract does not refer to these documents in any way; rather, they merely are stapled to the contract itself.

It is uncontroverted that the parties never agreed during bargaining to include these documents as part of the contract. Rather, the Strike Settlement Agreement and Pressroom Policy Statement constitute stand-alone agreements between the parties which do not rely on the contract for their effect. Disputes concerning their interpretation are grievable under the collective bargaining agreement regardless of whether they are part of the contract or not. Thus, their inclusion in the contract, if such was the Employer's intention by stapling them thereto, is mere surplusage. Accordingly, we conclude, like the Section 1(l) side letter discussed above, that the Union has no obligation to enter into an agreement containing these documents. However, upon their exclusion from the contract, the Union remains obligated to sign the December 1994 contract, with the changes discussed herein.

CONCLUSION

As set forth above, we conclude that Web 4 violated Section 8(b)(3) of the Act by failing to sign the Employer's proffered collective bargaining agreement. Furthermore, the unfair labor practice charge against the Employer should be dismissed, absent withdrawal.

B.J.K.