

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

Advice Memorandum

DATE: September 22, 2006

TO : James J. McDermott, Regional Director
Region 31

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

SUBJECT: Mark Burnett Productions, Inc.
Case 31-CA-27707

530-6033-8401
530-8042

This Section 8(a)(5) case was submitted for advice on whether the parties reached a "meeting of the minds" resulting in a valid collective-bargaining agreement, barring the Employer from subsequently withdrawing recognition from the Union. We conclude, in agreement with the Region, that the parties reached a "meeting of the minds" because they reached agreement on unambiguous contractual language. We also agree that the Employer unlawfully refused to execute the written agreement sent to the Employer on or about January 20, 2006.

This case was also submitted for advice on whether, once the parties had reached an oral agreement, the Employer unlawfully delayed in reducing that agreement to writing, and if so whether the parties should be treated as having a signed contract. We conclude, in agreement with the Region, that the Employer's over six-week delay in reducing the parties' agreement to writing was unreasonable and violated Section 8(a)(5) as a failure to assist in reducing the contract to a writing. [FOIA Exemptions 2 and 5

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Unlawful withdrawal of recognition; "meeting of the minds"

Once a union and an employer have reached an agreement on a contract, the employer may not unilaterally withdraw recognition from the union.¹ That a contract is unsigned or has not been reduced to a writing does not privilege an employer to withdraw recognition.² Thus, if the parties had reached a "meeting of the

¹ Auciello Iron Works, Inc., 317 NLRB 364, 368 (1995), enf'd, 60 F.3d 24 (1st Cir. 1995), aff'd, 527 U.S. 781 (1996); North Bros. Ford, 220 NLRB 1021, 1022 (1975) (employer unlawfully withdrew recognition after contract acceptance; evidence of union loss of majority support postdated acceptance).

² North Bros. Ford, 220 NLRB at 1022, quoted in, Auciello Iron Works, Inc., 317 NLRB at 373 n.5.

minds" and a binding oral agreement on November 29, 2005, the Employer subsequently unlawfully withdrew recognition in January 2006.

A valid oral argument based on a meeting of the minds does not depend on both parties having identical subjective understandings on the meaning of material terms in the contract. If those contract terms are unambiguous "judged by a reasonable standard," the parties had a meeting of the minds and subjective understandings are irrelevant.³

The Employer and the Union reached an oral agreement on November 29, the date when the Union accepted the Employer's written "last, best and final offer." That oral agreement included the following provision requiring contributions on the Employer's behalf to the contractual benefits plan from employees who were paid overscale:

To the extent that any employee is compensated at a rate in excess of scale, such overscale compensation may be applied to cover up to 60% of the Pension & Health contributions . . . to be made by the company on behalf of such employee.

We conclude, in agreement with the Region, that the terms of this provision are unambiguous judged under a reasonable standard.

When the Employer submitted a contract marked "draft" to the Union on January 12, 2006, it added language explicitly making this provision retroactive to September 8, 2005. The Employer had not previously expressed any retroactivity requirement for this provision to the Union, and it failed to explicitly include that requirement in its final offer.⁴ The

³ Compare Cutter Laboratories, Inc., 265 NLRB 577 (1982) (where language granting employees an employer benefits plan not ambiguous, parties' differing interpretation of how plan would operate did not prevent meeting of the minds over plan) and Windward Teachers Ass'n, 346 NLRB No. 99 (2006) (clause language was clear and union reviewed, approved, and ratified contract without objecting to clause; question over clause interpretation did not prevent meeting of minds) to Hempstead Park Nursing Home, 341 NLRB 321, 322-324 (2004) (no meeting of minds where contractual terms were ambiguous, parties attached "reasonable but incompatible meanings" to the ambiguous terms, and the differing interpretations were not the fault of one party) and Vallejo Retail Trade Bureau, 243 NLRB 762, 767 (1979), *enf'd*, 626 F.2d 119 (9th Cir. 1980) (no meeting of the minds over across-the-board wage increases because of ambiguity in union's letter of understanding) and Mary Bridge Children's Hospital, 305 NLRB 570, 572-573 (1991) (no valid contract where parties mistakenly included defective formula for computing bonuses).

⁴ See NLRB v. Midvalley Steel Fabricators, Inc.,

Employer's subjective belief that it had intended to negotiate a retroactive payment requirement does not negate the parties' agreement to the unambiguous contract language negotiated.⁵ Although the Employer may have become displeased with the agreement that it reached with the Union, it is still bound by that agreement. Any disputes over the subjective interpretation of the benefit fund contribution provisions may be addressed in the contractual grievance procedure.⁶

Failure to execute the collective-bargaining agreement;
failure to assist in reducing agreement to writing

We conclude, in agreement with the Region, that the Employer unlawfully refused to execute the collective-bargaining agreement sent to it by the Union on January 20, 2006 that represented the complete agreement reached on November 29, 2005. The remedy for this violation is to sign the collective-bargaining agreement forthwith apply it retroactively to the effective date of the agreement⁷ and rescind any unilateral changes.⁸

We further agree that part of the Section 8(d) duty to execute a contract includes the obligation to assist in reducing to a writing the agreement that was reached.⁹ In Kennebec Beverage Co., the Board not only found that the employer had unlawfully refused to execute a written contract after it was

621 F.2d 49 (2d Cir. 1980) (meeting of minds where parties reached oral agreement, union reduced agreement to a writing, company said the draft looked all right and never contacted union to indicate, as promised, whether there were any mistakes in written contract), enf'g Midvalley Steel Fabricators, Inc., 243 NLRB 516 (1979).

⁵ Cutter Laboratories, supra and Windward Teachers Ass'n, supra. See also Health Care Workers (Trinity House), 341 NLRB 1034 (2004).

⁶ See Windward Teachers Ass'n, 346 NLRB No. 99, slip op. at 6 (2006); Teamsters Local 471 (Superior Coffee), 308 NLRB 1, 3 (1992).

⁷ See Valley Honda, 347 NLRB No. 59, slip op. at 3 n.6 (2006) (employer that refused to execute a contract must make its agreement retroactive to the effective date set forth in the agreement); Ethan Enterprises, 342 NLRB 129, 130, 135 (2004), enf'd mem. 2005 WL 3037451 (9th Cir. 2005) (same).

⁸ Ebon Services, Inc., 298 NLRB 219, 225 (1990), enf'd mem. 944 F.2d 897 (3d Cir. 1991).

⁹ Kennebec Beverage Co., 248 NLRB 1298 (1980); Grocery Warehouse, 312 NLRB 394, 397 (1993).

eventually rewritten to conform to the parties' actual agreement. But it also found that the employer earlier had unlawfully failed to inform the union that its written draft of the parties' oral agreement had omitted a necessary provision. The Board found that the employer thereby failed "to comply with its duty to assist in reducing such agreement to writing."¹⁰

In Grocery Warehouse,¹¹ the employer agreed to transform the parties' bargaining agreements into written documents by a specified date, but never did so. The union prepared its own written versions of the agreements, but the employer failed to these review for eight months. The Board found that the employer violated 8(a)(5): "By failing and refusing to assist in the reduction to writing of the collective-bargaining agreements . . . and by refusing to execute and sign the collective-bargaining agreements."¹² The affirmative remedy for these two violations was to "forthwith" sign the agreements and give them appropriate retroactive effect.¹³

Here, as in Kennebec and Grocery Warehouse, the Employer not only unlawfully failed to execute the contract, it delayed in reducing the contract to writing. After the Union on November 29 agreed to the Employer's written statement of its "last, best and final offer," the Employer offered to prepare a written version of that contract. The Employer's obligation was not burdensome and should not have consumed over six weeks.¹⁴ The parties' agreement consisted only of a two-page supplement to the pre-existing, industry-wide basic agreement and did not require additional efforts by the Employer, other than to pick a name for the signatory employer.

The Employer asserts that the December 13 employee petition seeking a ratification vote provided a reasonable basis for the delay in reducing the agreement to writing. We reject this contention, in agreement with the Region, because the Union timely advised the Employer that ratification had not been a prerequisite to the parties' agreement.¹⁵ Accordingly, the Employer unlawfully refused to assist in reducing the contract to a writing as well as unlawfully refused to execute the written contract.

¹⁰ 248 NLRB at 1298.

¹¹ 312 NLRB at 394, 397.

¹² Id. at 394 (emphasis added).

¹³ Id. at 398-99.

¹⁴ Compare Waxie Sanitary Supply, 337 NLRB 303 (2001) (33-day delay in executing contract violated Section 8(a)(5)).

¹⁵ See London Chop House, 264 NLRB 638, 639 (1982); Martin J. Barry, 241 NLRB 1011, 1013 (1979).

In accordance with this analysis, the Region should proceed with its amended complaint alleging that the Employer: unlawfully delayed in reducing the contract to writing after the parties agreed on November 29; unlawfully refused to execute the agreement proffered by the Union on January 20; and unlawfully withdrew recognition. [FOIA Exemptions 2 and 5

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¹⁶ [FOIA Exemptions 2 and 5

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