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

CHAUFFERS, TEAMSTERS and HELPERS, LOCAL UNION NO. 771, affiliated with INTERNATIONAL BROTHERHOOD OF TEAMSTERS and its JOINT COUNCIL NO. 53	:	
Respondent,	:	CASE NO. 4-CB-10482
and	:	
PENNSY SUPPLY, INC., d/b/a READY-MIXED CONCRETE,	:	
Charging Party.	:	

RESPONDENT'S BRIEF IN SUPPORT OF ITS EXCEPTIONS TO THE FINDINGS AND DECISION OF THE ADMINISTRATIVE LAW JUDGE

The Respondent, Teamsters Local Union No. 771, by and through its counsel, Ira H. Weinstock, P.C., respectfully submits the following Brief in Support of its Exceptions to the Administrative Law Judge's Decision.

STATEMENT OF FACTS

The Complaint in the instant matter alleged that on or about April 6, 2010, a complete agreement on terms and conditions of employment was reached. (Complaint, Para. 6). This was not the case at all. It further alleges that on or about April 14, 2010, the Union's agents repudiated the Agreement and, in doing so, violated Section 8(b)(3) of the Act. In that the parties' bargaining was conditioned on, consistent with the Union's Constitution and By-Laws,

and the history of negotiations between the parties, and the written notice of such, the approval of Mr. Rhinier and a ratification vote of the members was necessary. Pennsy Supply became a successor to the existing collective bargaining agreement covering its predecessor, Ready-Mixed Concrete Company, and Teamsters Local Union No. 771 (the "Union"). (Tr. 155).

Numerous exhibits illustrate the lack of a final agreement. General Counsel's Exhibit 1 illustrates the lack of a complete agreement by the parties. Mr. Wardrop was recorded as stating that there is a "tentative agreement" on everything "except the side letter and management rights Article XXI." The exhibit also provides that the company negotiator stated that Howard (Rhinier) should be there, and that agreements needed to be signed by Howard (Rhinier). The Company Offer from April 6 has "tentative agreement" written all over it in the margins, and each page states that the company reserves the right to change, alter, or modify the terms of the proposals. This further established the lack of an agreement at the time alleged.

Respondent's Exhibit 1 is the July 29, 2010 letter from the Regional Director noting that there is insufficient evidence to establish that the Union has violated Section 8(b)(1)(A) or 8(b)(2) of the Act in any manner, and that there is insufficient evidence of a violation of 8(b)(3) by demanding that the Employer agree to an illegal bargaining subject, by bargaining regressively, or by filing grievances to change the agreed-upon management rights clause.

Respondent's Exhibit 3 is a February 17, 1999 letter from Howard Rhinier advising the Ready-Mixed Concrete Company that as long as Mr. Rhinier remains in office "there will be no side agreements, either verbal or written" unless the agreement is approved in writing by Mr. Rhinier.

Respondent's Exhibit 2 contradicted the allegation that a full and complete agreement had been reached on April 6, in that had the parties so believed, there would have been no need for an extension of day-to-day operations. The Company witness admitted that the extension was necessary because Mr. Rhinier's signature and a ratification had not been obtained.

Howard Rhinier testified that he is the Secretary-Treasurer of the Local Union and has held that office for twelve (12) years. (Tr. 118). He identified Respondent's Exhibit 3 as a letter he wrote to the Charging Party's predecessor in order to make sure that no agreements, whether contractual, verbal, or written, can be agreed to without his approval. He subsequently wrote analogous letters to all of the various companies, including the one to Ready-Mix. (Tr. 120). This continued to be his policy and the practice between the parties through the present time. (Tr. 121). In accordance with this policy, Mr. Wardrop did not have authority to bind the Local on his own. (Tr. 121). He must bring any proposed agreements to Mr. Rhinier, to seek approval, and also obtain the approval of the membership by ratification. (Tr. 122). Mr. Rhinier did not agree to any proposals in 2010. (Tr. 122-123).

He described a conversation with Toni Robertson that took place in April. (Tr. 123-124). He described that Local By-Laws and the International's Constitution required ratification votes in order to approve contracts. Every prior contract with Pennsy Supply or Ready-Mixed went to a vote. (Tr. 124). The Local has approximately thirty (30) contracts, and they are all handled in the same manner. (Tr. 125).

Toni Robertson admitted that in her Affidavit, she made no mention of Mr. Wardrop's authority to agree to a new contract. (Tr. 160). She admitted that on April 6th, Mr. Wardrop talked about the need for ratification. He stated that the contract would have to be approved by

Mr. Rhinier and ratified. (Tr. 161; See also Affidavit of Toni Robertson at p. 3). It was abundantly clear that the agreement was tentative in nature. (Tr. 162).

James Wardrop testified that he was previously assigned to work on contract negotiations with Ready-Mix in 2006 and negotiated at that time. That contract was signed by the owner of the Company and Howard Rhinier. (Tr. 257). He described the subsequent 2010 negotiations. He noted that tentative agreements mean that there are more steps required, specifically agreement of the principal officer and a ratification vote. (Tr. 258-259). The Company was aware of this in that its representatives asked about Mr. Rhinier's attendance or lack thereof and noted that he should be there. (Tr. 258-259; GC-1 ("He should be here")).

On April 6, 2010, the parties were still going back and forth on some of the issues. The Management Rights Clause issue was still outstanding. They had reached a tentative agreement based on the side letter being signed, which was necessary to any complete tentative agreement. (Tr. 260). At the time the parties came to a tentative agreement on April 6, he shook hands with the company representatives and stated that they have a tentative agreement if it is signed by Mr. Rhinier and ratified by the membership. (Tr. 260). Mr. Waldrop subsequently was informed that Mr. Rhinier did not agree with the side agreement, which was necessary to the tentative contract agreement and the contract was, therefore, not voted upon. (Tr. 261). He called the Company around April 8, informed Melissa Devitz of the situation and requested a meeting on the disagreement to the side letter and Management Rights Clause. A meeting was scheduled for April 14.

At the April 14 meeting, the Company stated that what they had was their only offer. (Tr. 262). He received a letter from the Company withdrawing the side letter. (Tr. 262). Absent a

modification to the Management Rights Clause, the Company would have nullified a recent arbitration decision regarding territories. (T. 263). He identified GC-6, which withdrew the side agreement proposal, and GC-7, which was his response on April 16, as well as the subsequent correspondence between the Company and himself. (Tr. 263; GC-8 through GC-10). He was asked if there was ever an agreement reached with the Company with regard to a contract in 2010 and responded there had not been, because it was dependent on the side letter being acceptable and approved. (Tr. 264). The necessary issue of the financial and operational impacts of the arbitration decision that was required in order to coexist with the Management Rights Clause proposal was never fully resolved, and would, as the parties knew, require Mr. Rhinier's approval as a settlement with regard to an arbitration. (Tr. 265-266).

Matthew Dunn, the transportation manager for the Company and was present at the negotiations. He noted that Mr. Wardrop was asked if he was "able" to negotiate and not that Mr. Wardrop had the authority to ratify a final agreement. (Tr. 198). He admitted that he knew what the map issue was and that it had to do with the Management Rights Clause and he did not want the arbitration map to apply. (Tr. 204). He further admitted that he wasn't sitting there paying attention to everything. (Tr. 203). He admitted that "You wouldn't have an agreement unless you agreed to everything." (Tr. 218).

Brian Groff testified and admitted that every contract proposal had ground rules at the bottom of every page stating that the Company "reserves the right to change, alter or modify these proposals or to introduce new proposals as a result of collective-bargaining negotiations." (Tr. 230; GC-12). He also admitted that the Union had the same rights. (Tr. 231). He admitted that the status of terms was listed as "tentative" and that he had read those pages, even though

prior to that, he claimed that the word "tentative" was never used. (Tr. 232-233). **He admitted that the side agreement was necessary to the contract. (Tr. 237).**

Mr. Wardrop testified that he told the Company that, consistent with the letter from Mr. Rhinier and the longstanding practice between the parties, any side agreement would have to be approved by Mr. Rhinier, and that a contract would also require ratification by the membership. The Affidavit of the chief negotiator for the company stated that the agreement **had to be signed off on by M. Rhinier and also ratified.** This is consistent with the Constitution and By-Laws of both the International and the Local Unions. **GC-12 notes, in Melissa Devitz's handwriting, that the agreement reached is only tentative. (Tr. 291).**

Furthermore, both Mr. Wardrop and one of the negotiators for the Company agreed that the contract and the side agreement were a complete package. There was testimony that the arbitration settlement, as the subject of the side agreement, had to be approved by Mr. Rhinier. The Company withdrew the side agreement after the date it alleges there existed a complete and full agreement. This would have been impossible, except that the Company knew, as did all of the parties, that such a complete agreement had not yet occurred, and is again consistent with the fact that the parties continued to meet and negotiate after April 6, and that all proposals and agreements were marked "tentative" and contained a "right to alter or modify" provision.

Throughout the proceedings, some participants incorrectly assert that the collective bargaining agreement expired on March 31, 2010. The contract contained a provision stating:

> This agreement shall become effective as of April 1, 2007 until and including March 31, 2010, and shall continue in full force and effect from year to year, for one (1) year periods, unless either party shall notify the other by certified letter, not later than sixty (60) days prior to the expiration date in 2010 or in subsequent years, of an intention to have same changed.

(Exhibit GC-2). The previous contract therefore continued to be in effect.

The Decision of the Administrative Law Judge, dated July 27, 2011, discounted the testimony of Mr. Waldrop, and asserted that he had the authority to reach a final agreement, that there was in fact a complete agreement, and that a final and binding agreement was repudiated. For the following reasons, the Respondent respectfully submits that those conclusions are in error, and even discounting the testimony of Mr. Waldrop, the admissions of the Company witnesses themselves establish that they knew that tentative agreements had to be approved and ratified before taking effect, and that approval of the side letter, later withdrawn by the Company, was a condition precedent to approval of the remainder of the tentative agreement.

STATEMENT OF ISSUE INVOLVED

1. Whether the Administrative Law Judge erred in equating genuine authority to "carry on meaningful bargaining regarding fundamental issues" with unilateral authority to reach a complete and binding agreement without union membership ratification?

Suggested Answer: YES

2. Whether the Administrative Law Judge erred in determining that Mr. Wardrop "had complete and full authority, at all times, to enter into a final and binding collective bargaining agreement as well as any side agreements with the Employer"?

Suggested Answer: YES

3. Whether the Administrative Law Judge erred in determining that the Employer was not informed of the need for additional approvals in order to enter into a final and binding agreement, and that the agreement was final and binding?

Suggested Answer: YES

4. Whether the Administrative Law Judge erred in determining that the side letter was not a condition precedent to a complete agreement?

Suggested Answer: YES

ARGUMENT

I. THE ADMINISTRATIVE LAW JUDGE ERRED IN EQUATING GENUINE AUTHORITY TO "CARRY ON MEANINGFUL BARGAINING REGARDING FUNDAMENTAL ISSUES" WITH UNILATERAL AUTHORITY TO REACH A COMPLETE AND BINDING AGREEMENT WITHOUT UNION MEMBERSHIP RATIFICATION.

The Administrative Law Judge emphasized that the "duty to bargain includes the obligation to appoint a negotiator with genuine authority to carry on meaningful bargaining regarding fundamental issues." Decision at p. 4 (citing *Schmitz Food*, 313 NLRB 554, 5650 (1993)). However, in this instance, the parties knew that Mr. Rhinier was the ultimate authority regarding approval and that all Teamsters contracts are constitutionally required to be ratified by the membership before becoming effective or final. As such, the law in this instance was misapplied:

> If, however, negotiators on the other side are apprised in advance of a requirement that any final and binding agreement is dependent on approval by the employer and that the agreement fashioned by the parties is only a tentative one, then either party has the right to reject it after presentation to its principal, *Seller Tank Truck Service, Inc.*, 307 NLRB 1090 (1992). The burden of proof on the issue of whether an agreement exists is on the General Counsel. See *Demolition Workers Union Local 95 (Mack Royce Dismantling, Ltd.)*, 330 NLRB No. 49 (1999). *Teamsters Local 287 (Reed & Graham)*, 272 NLRB 348 (1984).

Mid-Wilshire Health Care Center., 337 NLRB 72 (2001). Here, this is the legal principle that should have been applied in light of the admissions of even the Company's own witnesses.

II. THE ADMINISTRATIVE LAW JUDGE ERRED IN DETERMINING THAT MR. WARDROP "HAD COMPLETE AND FULL AUTHORITY, AT ALL TIMES, TO ENTER INTO A FINAL AND BINDING COLLECTIVE BARGAINING AGREEMENT AS WELL AS ANY SIDE AGREEMENTS WITH THE EMPLOYER."

The testimony and exhibits made it abundantly clear that Mr. Wardrop did not have "complete and full authority, at all times, to enter into a final and binding collective bargaining agreement as well as any side agreements with the Employer," either actual or apparent. Even unfairly discounting Mr. Waldrop's testimony, as did the Administrative Law Judge, the admissions of the Employer itself, as well as the testimony of others, indicates that everyone closely involved and paying attention knew of the additional need for Mr. Rhinier's approval and signature and ratification of the membership.

Toni Robertson admitted that on April 6th, Mr. Wardrop talked about the need for ratification. She also stated that contract would have to be approved by Mr. Rhinier and ratified. (Tr. 161; See also Affidavit of Toni Robertson at p. 3). It was abundantly clear that the agreement was tentative in nature. (Tr. 162). The Affidavit of the chief negotiator for the Company stated that the agreement had to be signed off on by Mr. Rhinier and also ratified. This is consistent with the Constitution and By-Laws of both the International and the Local Unions. GC-12 notes, in Melissa Devitz's handwriting, that the agreement reached is only tentative. (Tr. 291). Brian Groff testified and admitted that every contract proposal had ground rules at the bottom of every page stating that the Company "reserves the right to change, alter or modify these proposals or to introduce new proposals as a result of collective-bargaining negotiations." (Tr. 230; GC-12). He also admitted that the Union had the same rights. (Tr. 231). This testimony of every significant witness indicates that the parties, contemporaneous with the

events alleged, understood the nature of any agreement to that point as tentative. In light of these admissions, there was not even clear apparent authority to enter into final and binding agreements, as opposed to meaningful agreements that require ratification of membership to become final and binding.

In attempting to get around the fact that the Company itself, in the exhibits, consistently utilized the term "tentative" to modify the term "agreement," the witnesses, some of whom were experienced and well versed in human resources matters, astoundingly and incredibly claimed that they attributed no meaning or value whatsoever to the words "tentative" or "ratification." Aside from depriving those witnesses of any indicia of credibility, even assuming this to be true, the Union cannot justifiably be held to the subjective standard of a human resources professional who does not understand the meaning of the word "tentative." Words have meaning, and in the course of the history of labor relations, the word tentative has always meant that something more is necessary to render an agreement "final."

III. THE ADMINISTRATIVE LAW JUDGE ERRED IN DETERMINING THAT THE EMPLOYER WAS NOT INFORMED OF THE NEED FOR ADDITIONAL APPROVALS IN ORDER TO ENTER INTO A FINAL AND BINDING AGREEMENT, AND THAT THE AGREEMENT WAS FINAL AND BINDING.

The tentative agreement was clearly not final, in light of (1) the understanding of the parties over years of a bargaining relationship that agreements required the approval of the principal officer and ratification of the membership; (2) the Company's own assertions of the right to change, alter, or modify the tentative agreement, and (3) the Company's actions both before and after the tentative approval that acknowledge the nature of the agreements as tentative.

The Affidavit of the chief negotiator for the Company stated that the agreement had to be signed off on by Mr. Rhinier and also ratified. This is consistent with the Constitution and By-Laws of both the International and the Local Unions. GC-12 notes, in Melissa Devitz's handwriting, that the agreement reached is only tentative. (Tr. 291).

The Company's specific words and conduct in the days following the alleged agreements also indicate an understanding on its part that preconditions had not been met. In the April 15, 2010 letter to Mr. Wardrop, Toni Robertson acknowledged this, stating that "all that was needed was the signature of Howard Rhinier to complete the process." The letter also acknowledges that the agreements were still tentative: "to discuss 'a few issues' Mr. Rhinier had with the tentative agreements reached." Finally, the Company acknowledged in the letter that there was not, in fact, a full and complete agreement: "What remains of the parties agreement is the successor Labor agreement in which the parties had but one disagreement"; and "the Company acknowledges that the parties have reached complete agreement on all lawful issues encompassed within the Labor Agreement except for the Union's illegal demand regarding Landisville." The Company, therefore, acknowledged picking and choosing terms at its own discretion and requiring ratification of only those terms, where the testimony was clear that the contract and the side agreement had to be a complete package. Not only do those established facts indicate that the Employer knew and itself characterized all agreements to that point as tentative, but they also reinforce that the Employer knew of the need for Mr. Rhinier's approval before the agreements became final.

IV. THE ADMINISTRATIVE LAW JUDGE ERRED IN DETERMINING THAT THE SIDE LETTER WAS NOT A CONDITION PRECEDENT TO A COMPLETE AGREEMENT.

Even absent the discounted testimony of Mr. Wardrop, the admissions of the Company negotiators establish that the side agreement was necessary to a final and complete agreement. Matthew Dunn, the transportation manager for the Company, admitted that he knew what the map issue was and that it had to do with the Management Rights Clause, and he did not want the arbitration map to apply. (Tr. 204). He further admitted that he wasn't sitting there paying attention to everything. (Tr. 203). He admitted that "You wouldn't have an agreement unless you agreed **to everything**." (Tr. 218).

Brian Groff testified and admitted that every contract proposal had ground rules at the bottom of every page stating that the Company "reserves the right to change, alter or modify these proposals or to introduce new proposals as a result of collective-bargaining negotiations." (Tr. 230; GC-12). He also admitted that the Union had the same rights. (Tr. 231). He admitted that the status of terms was listed as "tentative" and that he had read those pages, even though prior to that, he claimed that the word "tentative" was never used. (Tr. 232-233). **He admitted that the side agreement was necessary to the contract. (Tr. 237).**

Moreover, the General Counsel's exhibits confirm Mr. Wardrop's testimony. He received a letter from the Company withdrawing the side letter (Tr. 262), further confirming its status as an offer and, therefore, establishing that lack of a complete and final agreement. Absent a modification to the Management Rights Clause, the Company would have nullified a recent arbitration decision regarding territories. (T. 263). He identified GC-6, which withdrew the side agreement proposal, and GC-7, which was his response on April 16, as well as the subsequent

correspondence between the Company and himself. (Tr. 263; GC-8 through GC-10). He was asked if there was ever an agreement reached with the Company with regard to a contract in 2010 and responded there had not been, because it was dependent on the side letter being acceptable and approved, as admitted by Mr. Goff. (Tr. 264). The necessary issue of the financial and operational impacts of the arbitration decision that was required in order to coexist with the Management Rights Clause proposal was never fully resolved, and would, as the parties knew, require Mr. Rhinier's approval as it was a settlement with regard to an arbitration case. (Tr. 265-266).

Inasmuch as the side letter was a necessary precondition to a complete agreement on contract issues between the party, no agreement was final or complete. In that a final, complete, and binding agreement is necessary in order for any repudiation to take place, the Administrative Law Judge erred in finding that the Respondent engaged in unfair labor practices within the meaning of Section 8(b)(3) of the Act.

CONCLUSION

In light of the foregoing, the Respondent respectfully requests that the Board vacate the findings, conclusions, and recommended Order, and determine that no unfair labor practices were committed by the Respondent. The evidence established that the Company was on notice in writing and verbally of the need for contracts to be approved and ratified, and of the need for Mr. Rhinier's approval of any side agreements. The Company's own actions illustrated the understanding that all positions were tentative, even to the point of continuing to negotiate after the alleged date of agreement and withdrawing the tentative side letter, which would have been required in order to obtain the agreement alleged. These facts and actions on the part of the

Company exposed the Company's and the General Counsel's claims of a full and complete agreement as incorrect and simply opportunistic.

Respectfully Submitted

IRA H. WEINSTOCK, P.C.
800 North Second Street
Harrisburg, PA 17102
Phone: 717-238-1657

Ira H. Weinstock
Digitally signed by Ira H. Weinstock
DN: CN = Ira H. Weinstock, C = US, O = IRA H. WEINSTOCK, P.C.
Date: 2011.09.22 11:06:47 -04'00'

By:_____
IRA H. WEINSTOCK

CERTIFICATE OF SERVICE

AND NOW, this 22nd day of September, 2011, I, Ira H. Weinstock, Esquire, attorney for the Respondent, hereby certify that I served the within **RESPONDENT'S BRIEF IN SUPPORT OF ITS EXCEPTIONS TO THE FINDINGS AND DECISION OF THE ADMINISTRATIVE LAW JUDGE** this day by emailing same to:

Margaret M. McGovern, Esquire (for the Acting General Counsel)
(Margaret.McGovern@nlrb.gov)

Vincent Candiello, Esquire (for the Charging Party)
(vcandiello@postschell.com)

Ira H. Weinstock
Digitally signed by Ira H. Weinstock
DN: CN = Ira H. Weinstock, C = US, O = IRA H. WEINSTOCK, P.C.
Date: 2011.09.22 11:07:16 -04'00'

By:_____
IRA H. WEINSTOCK