UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

NOEL CANNING, a Division of the Noel Corporation,	)	Case 19-CA 32872
and	)	MEMORANDUM IN SUPPORT OF EXCEPTIONS TO DECISION OF ADMINISTRATIVE LAW JUDGE
TEAMSTERS LOCAL 760	)	

I. STATEMENT OF THE CASE

A. SUMMARY OF THE CASE

The question presented is narrow: Did the employer and Union reach an agreement on the terms of a contract during the negotiations held on December 8, 2010 subject only to ratification by the Union membership? The term of the contract and language at issue is whether the employer agreed to allow employees (as a group) to determine how much of a forty cents (40¢) per hour increase could be diverted to the Union retirement plan. Agreement had been reached on all other terms of the contract. General Counsel claims that an agreement was reached and that it was voted by the

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Union membership who approved diverting all of the wage increase to retirement contributions and that the employer refused to sign a contract that contained the agreement terms.

The employer acknowledged that such a proposal was discussed, but denies an agreement was reached. Instead, at the end of the December 8th meeting, the employer agreed to provide its proposal the following day, which it did. The employer notified the Union that the offer the Union intended to present to the membership for ratification was not the employer's offer. The Union submitted and voted the offer anyway.

B. PROCEDURAL HISTORY

On December 15, 2010, Teamsters Local 760 filed a charge with the Regional Director of Region 19 in which it was alleged the employer, Noel Canning Company, a division of Noel Corporation, violated Sections 8(A)(1) and (5) of the Act "by (1) engaging in regressive bargaining after the parties reached a tentative agreement…"; and (2) stating the employees were better off without the Union". (GC1(A)) That charge was amended on February 7, 2011 to allege: (1) the employer refused to execute a written contract following agreement of the parties; and (2) engaging in regressive bargaining after the parties reached tentative agreement; and (3) stating employees would be better off without the Union (GC 1(C)).

On March 31, 2011, the Regional Director issued a Complaint that alleged violations of Sections 8(A)(1) and (5). The Complaint alleged that (1) the employer informed employees that it would give employees anything they wanted if they would get rid of the Union; (2) a complete agreement was reached during the December 9,

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2010 negotiations; and (3) the employer has refused to execute a written agreement that contained the agreed upon terms (GC 1(E)). The employer, Noel Canning, denied the allegations (GC 1(G)).

A hearing was held on June 21 and 22, 2011 before an Administrative Law Judge. On September 26, 2011 the Administrative Law Judge issued a decision. The decision found that (1) an agreement was reached between the employer and Union during the December 8, 2010 negotiations and that the agreement was that employees would determine how much of the forty cents (40¢) per hour increase would be diverted to retirement, subject only to ratification of the Union membership. The Administrative Law Judge also found that the employer had refused to execute a written agreement despite the finding that the written agreement was incorrect and did not reflect the agreement reached. The Administrative Law Judge found no merit to the claim that the employer's statements violated Section 8(A)(1), because they were timely and specifically retracted. The 8(A)(1) charges were dismissed.

Exceptions were filed in a timely manner on October 19, 2011 and served electronically on counsel on October 20, 2011. A request for extension of time in which to file a brief in support of the exceptions was granted on October 21, 2011 and the time for filing the brief was extended to November 21, 2011.

C. FACTUAL BACKGROUND

Noel Canning Company is a division of Noel Corporation that bottles Pepsi-Cola products. The employees of Noel Canning are represented by Teamsters 760. The parties have had a long and stable history. The preceding Collective Bargaining

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Agreement was effective from May 1, 2007 until April 30, 2010 (GC 2). The terms of that agreement were extended by mutual agreement to June 15, 2010 to facilitate negotiations. (Resp. 1)

The issues brought to the bargaining table by the Union were few in number. They included: (1) increased contributions to the Union pension trust; (2) payment of accrued sick leave upon termination; and (3) wage increases (GC 4). An issue regarding the need for better ventilation was raised and quickly dropped (TR 85:12-22).

The employer, Noel Canning Company, raised issues of which retirement plan would be used, the company sponsored plan or Teamsters plan. Noel Canning also raised questions regarding the financial stability of the Teamsters plan (unfunded liability) and whether the Teamsters "PEER" plan (an early retirement option) provided any benefit to Noel employees. The "PEER plan" requires additional contributions by the employer to allow employees to choose early retirement. Noel employees did not use the PEER plan to retire early, and all contributions were lost and did not benefit Noel employees (TR 195:2-3). The amount of wage increases and contributions were, as always, of interest to the employer.

The final negotiations took place on December 8, 2010 in a meeting room at the Teamster's Hall (TR 156:22). Union Business Agent, Robert Koerner acted as the Union negotiator (TR 21:20). Matt Urlacher, a Noel production worker and Union member attended (TR 156:9-11) as did Mark Webber as a substitute (TR 129:25). The employer representatives at the December 8th meeting included Rodger Noel, President; Larry Estes, CFO; Cindy Zimmerman, Treasurer; and Sam Brackney, Noel Canning Plant Manager. All participants sat at a conference table except for Mark

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Webber who sat some two rows distant, some twenty (20) feet away from the table (TR 107:22; ER 5).

The General Counsel claims that an agreement was reached to vote a two part, "either-or", proposal and that the Union would remain neutral. The first option was (1) two year contract retroactive to June 2010; (2) Forty cents (40¢) per hour wage increase each year; and (3) employees could choose how much of the wage increase would be diverted to retirement contributions. The second option presented to employees was (1) seventy-eight cents (78¢) the first year in wage, (2) twelve cents (12¢) in pension; and (3) the second year thirty-three cents (33¢) (Koerner TR 58:11-59:8).

The Union business representative Koerner testified that he asked the employer to read the proposal to him, and when they did so, he "wrote it down" (Koerner TR 59:9-21). Koerner made a notation "TA 12-8-2010" indicating a tentative agreement, but he chose not to ask the employer to initial or sign the notation, although he acknowledged that doing so was the best practice and he had done so in the past (TR 104:13 – 105:7).

The employer representatives acknowledge discussion of those options, but deny that an agreement was reached (TR 142:3-23; 144:8-1; 148:26; 170:19-23; 171:18-23; 189:22-190:1; 198:19-21). Union committee member Matt Urlacher who sat next to Union representative Koerner and directly across from Ms. Zimmerman, did not hear Koerner ask, or Zimmerman read, the proposal (TR 161:10-162:1). He did not see Koerner take notes (TR 166:8-11). The other employee present did not support Koerner's testimony.

The General Counsel claimed the meeting ended with the agreement. The

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employer asserted that no agreement was reached and that it agreed to provide its final proposal in writing the next day (TR 144:2-4; 171:14-16; 199:9-11).

The employer's proposal was submitted the following day, Thursday, December 9, 2010, by email. The proposal, designated "Last and Final Offer", provided (1) a two year contract; (2) forty cents (40¢) per hour increase effective 1/1/11 and 10/1/11; (3) up to ten cents (10¢) of each wage increase could be diverted to retirement contributions; and (4) a signing bonus of $300.00. The alternate proposal included (1) a two year contract; (2) $300.00 signing bonus; (3) ninety cents (90¢) per hour increase effective 1/1/11; (3) pension diversion of up to twelve cents (12¢) per hour; (4) employee contribution to health care premiums; and (5) thirty-three cents (33¢) per hour increase effective 10/1/11 (GC 13).

The Union responded on December 10th claiming there had been a "tentative agreement" reached on December 9th (GC 14). A heated telephone discussion followed (TR 149:17-25). Each side maintained its position. Koerner voted the proposal he claimed had been made and tentatively agreed upon. Koerner prepared a written agreement containing what it claimed had been agreed upon and ratified (GC 18). The employer declined to sign the agreement (GC 17).

II. THE BURDEN OF PROOF

The General Counsel bears the burden of proof. He must show that the parties had the requisite meeting of the minds on the agreement reached and that the written document the employer declined to sign accurately reflected the agreement. *Winward Teachers Assn.*, 345 NLRB 1148, 1150 (2006); *New Orleans Stevedoring Co.*, 308 NLRB 1076,1081 (1992)

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III. THE SCOPE OF REVIEW

The Board's decision is based upon the entire record at the hearing, the Administrative Law Judge's decision, the exceptions and supporting memorandum. Rules and Regulations Section 102.48(b). The Board has a policy that it will not overturn an Administrative Law Judge's credibility resolutions unless the clear preponderance of the evidence demonstrates the rulings are not correct. *Standard Drywall*, 91 NLRB 544 (1950) An Administrative Law Judge must set out the basis for his credibility resolutions and provide specific evidence relied upon in resolving the relevant factual issues in dispute, as well as the factual basis for each violation. Without such specification, the Board cannot conduct an adequate or appropriate review. *Lee Builders*, 341 NLRB 726 (2004).

The Board itself, and not the Administrative Law Judge, has the power and responsibility of determining facts as demonstrated by a preponderance of the evidence. *Standard Drywall*, 91 NLRB at 544-45. The Board must reverse the Administrative Law Judge's Decision. The Administrative Law Judge sought to reach a result favorable to General Counsel and Union. To do so he ignored clear direct testimony, created evidence to reach the desired result, and ignored obvious flaws in the General Counsel's case. The Decision of the Administrative Law Judge is clearly wrong.

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IV. THE ADMINISTRATIVE LAW JUDGE REACHED SO FAR FOR A RESULT THAT FAVORED THE GENERAL COUNSEL THAT HE REQUIRED THE EMPLOYER TO SIGN A CONTRACT THAT HE ACKNOWLEDGED DID NOT CONTAIN THE CORRECT TERM.

It is not in dispute that an employer violates Section 8(A)(1) and (5) by refusing to execute a Collective Bargaining Agreement incorporating all of the terms agreed upon by the parties during negotiations. *H. J. Heintz Co.*, 311 U.S. 514 (1941) Here, the union presented a contract and the employer declined to sign it. As demonstrated below, there was no meeting of the minds as to the terms of the contract and the employer was not required to sign the contract.

However, if it were to be assumed for purposes of argument that there was a meeting of the minds, as urged by the General Counsel, the written agreement did not accurately reflect the dates of the contract. The contract presented by the Union to the employer was for a three (3) year term, extending from October 1, 2010 to September 30, 2003 (GC 18). The record clearly reflects that neither the employer nor the Union ever discussed or proposed a three (3) year agreement. There is no claim that the parties ever agreed to a three (3) year contract.

Although the Administrative Law Judge recognized the contract was incorrect, and did not accurately reflect the appropriate two (2) year length contemplated by the parties, he found the employer violated the Act because it did not sign the contract (ALJ Decision p. 9 and 10; ¶ 11:6-7) and imposed a remedy that required the employer to sign the Collective Bargaining Agreement. (ALJ Decision 11:40-41; 12:36-3; Appendix)

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The Administrative Law Judge was wrong. The employer did not violate the Act by refusing to sign an agreement that did not contain the agreement of the parties and the correct dates. A decision that requires an employer to sign a contract lasting one year longer than either party proposed or contemplated makes no sense at all. That decision does show how this Administrative Law Judge ignored common sense and evidence to find in favor of the General Counsel and Union.

V. THE ADMINISTRATIVE LAW JUDGE IGNORED CLEAR AND UNDISPUTED TESTIMONY AND CREATED AN EXPLANATION TO BOLSTER THE CREDIBILITY OF THE UNION REPRESENTATIVE KOERNER.

The Administrative Law Judge disregarded the clear and equivocal impeachment of Union Representative Koerner and improperly justified doing so by creating evidence and explanation not supported by the record.

Union Business Agent Koerner testified on direct examination that a tentative agreement had been reached during the December 8th negotiations and that the two part, "either/or" proposal would be voted as a "Proposal A" and "Proposal B" (TR 69:10-11; 70:14-16).

On cross examination Koerner was shown the affidavit dated January 11, 2011 that he provided to the Region during the investigation of the charge (TR 102:1). In that affidavit, Koerner discussed the heated telephone call of December 9th. Koerner stated in the affidavit:

> …I told Roger that I was voting the contract on Wednesday and that I would vote what we TA'd during the December 8th meeting **noting different than T.A.'d.**

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Koerner TR 103:14-25
(emphasis added)

Koerner never was able to explain the statement in the affidavit that what he was going to vote was different than what had been agreed upon.

On redirect, Koerner was asked by General Counsel if he believed the statement in the affidavit contained "an error" (TR 112:9-10) or if anything was "incorrect" regarding the statement. (TR 112:14-16) Despite the obvious and blatant attempt by General Counsel to lead the witness to the answer wanted by General Counsel (which was to claim an error in the affidavit), Koerner did not follow the lead. Koerner testified and confirmed that **there was no error or mistake to the affidavit** (TR 112:17). Koerner was asked:

> Q: Having read that provision or provisions do you think there is anything incorrect regarding that portion of your statement?
> A: No, I do not.
>
> (TR 112:15-17)

As a result, Koerner reaffirmed that the proposal voted was different.

Koerner feebly sought to explain the difference as being the way in which the signing bonus was determined and expressed. Koerner stumbled, claiming that what was voted for a signing bonus "…is the same thing…it's not exactly the same" (TR 113:6-7).

The Administrative Law Judge dismissed Koerner's feeble explanation and created a new one:

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> I believe it is more likely that the quoted language confused Koerner and that the affidavit simply contained a spelling error.
>
> ALJ Dec p. 6 n. 8

There is no basis in the record to support this determination. General Counsel tried mightily to lead the witness to testify that there was "an error" or that the statement "was incorrect" (TR 112:9-10; 112:14-16). The witness denied any error and reaffirmed the statement was correct (TR 112:15-17). The Administrative Law Judge could not disregard the witness' clear testimony that there was no error. However, the Administrative Law Judge did so because it allowed him to reach the result he desired. To reach the result required him to ignore other testimony demonstrating Koerner's testimony was unreliable. The Administrative Law Judge was wrong to do so, he cannot be allowed to create evidence to support a desired result.

VI. THERE ARE TOO MAY CONTRADICTIONS AND CONFUSIONS TO MAKE KOERNER'S TESTIMONY CREDIBLE.

Not only did the Administrative Law Judge ignore Koerner's statement that what was voted was different from that proposed by the employer, but he also chose to ignore the fact that Koerner's memory was selective, his memory poor, and he was impeached numerous times. It is easier for the Administrative Law Judge to reach a desired result if he ignored the testimony he did not like.

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- Koerner testified that the employer made the last proposal, but he was unable to identify which person actually made the proposal (TR 58:9).

- Koerner testified on direct examination that he asked Ms. Zimmerman to read back the proposal. (TR 59:10; 60:1-14; 62:4-8) Ms. Zimmerman, and Mr. Brackney denied that a proposal had been made, and denied that Koerner had asked Ms. Zimmerman to read a proposal back or that she did so (TR 144:17-19; 170:24-17:6) Union Committee Member Urlacher sat beside Koerner and directly across from Ms. Zimmerman (CR 5). Urlacher testified that he never heard Koerner ask Zimmerman to read back a proposal and that he did not see Koerner take notes (TR 166:8-11). Had the request been made or a proposal read back, Urlacher would have heard it, being only a couple o feet away from and facing Zimmerman. He did not. Had Koerner taken notes, Urlacher would have seen him do so because he sat next to him. The other Union member present did not support Koerner's testimony.

- Koerner's email of December 10th identifies negotiations as having occurred on December 9th (GC 14). He was clearly wrong.

- Koerner initially testified that he asked Ms. Zimmerman to read the proposal and took notes as she did so (TR 59:10-21). The affidavit provided to the region differed. In the affidavit Koerner swore that he merely checked his notes, the affidavit said nothing about writing the notes at that time (TR 101:10-19). Koerner was unable to consistently testify about the sequence of events and his

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actions.

- Koerner testified under direct that upon receiving the employer's written proposal by email on December 9th (GC 13) he called Mr. Noel (TR 68:5). Other witnesses testified that it was Mr. Noel who placed the call to Koerner (TR 149:1-3; 187:21). Koerner's affidavit of January 11th contradicts his testimony and acknowledges that Noel placed the call (TR 102:5). Again, Koerner was wrong.

- Koerner denied that he was at the dump when a telephone call was received (TR 102:24). Others testified that Koerner stated that he was at the dump (TR 149:14-15; 187:22).

- Koerner testified that at the conclusion of negotiations on December 8th he asked to use the company facilities to vote the proposal (TR 65:15-20). Others stated he did not make the request during negotiations, but rather at a later time (TR 180:14-24; 191:17-21).

- Koerner had a faulty memory about who attended negotiations. He testified that Ms. Zimmerman and Mr. Estes were present for all negotiation sessions (TR 27:21; 28:4). They were not (TR 137:17-19; 194:10-13). He was unable to accurately recall the participants despite his claim that he had taken notes of every meeting.

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- Koerner was untruthful during negotiations. He was asked if the Teamsters Pension Plan had an unfunded liability or a withdrawal liability. His response was initially that he checked with the Trust and that it did not (TR 88:16-17). His answer was not truthful or correct. Koerner did not personally contact the Trust. Instead, he simply asked his boss. The answer was clearly not true. The Teamsters Pension Plan had a substantial and significant unfunded liability, having obligations that exceeded assets by some five (5) billion dollars (Resp. 2). The financial management of the Teamsters Pension Plan was poor, with obligations increasing over assets in each of the past three years (Resp. 3). In addition, there was a significant withdrawal liability to Noel Corporation (Resp. 3). It is troubling that Koerner and the Teamsters deliberately concealed the financial condition of the pension plan from both Noel and the Noel employees.

- Koerner's untruthfulness is further underscored by undisputed testimony. Following the alleged 8(A)(1) statements attributed to Rodger Noel, those statements were immediately retracted and Noel asked Koerner if he was going to file charges against him (TR 163:4-5; 144:20; 145:1; 198:3-8). Koerner's response was "no", he would not file charges against him (TR 145:1-5; 168:7-8; 198:8-11). Despite the promise, Koerner did file allegations of 8(A)(1) violations based upon the statements .[1] This conduct demonstrates clearly that Koerner will break a promise or revise a position if he believes he can benefit by doing so.

[1] The allegations were found to be without merit and dismissed by the ALJ (Decision 11:10-19). (The alleged violation is not part of the appeal.)

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- Koerner's testimony about what was actually submitted to Union employees is confusing. Koerner testified on direct examination that he submitted what had been agreed upon at the table (TR 69:10-11) and that proposal was voted (TR 70:14-16). General Counsel introduced only a copy of the notice of the vote (GC 15) and the tally of ballots (GC 16). The letters used (Proposal A and Proposal B) to identify the proposals differed between Koerner's "notes" (GC 11 p. 2) and the tally of ballots (GC 16). As a result, there is confusion about what was voted and ratified. General Counsel, and the Union, had sole and exclusive access to the ballot used, but chose not to introduce it as an exhibit. Doing so would have resolved the confusion and conflict. An adverse inference arises because the General Counsel did not introduce a copy of the ballot to show the proposal that was actually accepted. *Martin Luther King, Sr. Nursing Center*, 231 NLRB 15, 15 n.1 (1977)[2].

Koerner's testimony has been shown to have been confused, incorrect, and untruthful. He reversed a position when he thought it would benefit him. The Administrative Law Judge ignored these significant and important matters affecting Koerner's credibility and found Koerner's testimony to be credible because of his notes regarding the December 8th meeting. (Decision 9:25) It is easy to find a person credible by ignoring the errors, contradictions, confusion, and untruthfulness of his testimony, which is what the Administrative Law Judge did. The Administrative Law Judge made no effort to explain these matters. As discussed next, a basis of the credibility

[2] The discrepancy in testimony and evidence is especially important because of Koerner's undisputed and unexplained affidavit statement that the proposal voted was different than that proposed. (See SV, page 8-9)

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determination, the negotiation notes, is suspect. Again, the Administrative Law Judge chose to ignore clear evidence to reach a desired result.

VII. THE NEGOTIATION NOTES ARE UNRELIABLE

Koerner testified that he took notes during each negotiation session. Although he purported to list the names of each participant, his notes were incorrect. The notes identified Ms. Zimmerman and and Mr. Estes as having attended every negotiation. The undisputed testimony is that they did not attend all meetings. (Compare GC 3, 5, 6, 7, 8 and 137:17-19) The notes were inaccurate.

It is interesting that although Koerner claimed that he made contemporaneous notes during the December 8th meeting, the employee Matt Urlacher, who sat next to him for the entire negotiation session, did not see Koerner take notes. Mr. Matt Urlacher attended every negotiation session as a part of the Union negotiating team (TR 156:9-11). During the December 8th negotiations, Mr. Urlacher sat next to Koerner, only a couple of feet away. (Resp. 5) Mr. Urlacher testified that he did not see Koerner take notes during that meeting. (TR 160:8-11) Mr. Urlacher would certainly have been in a position to observe Koerner's note taking, if it occurred. However, he did not see Koerner take notes.[3] Mr. Urlacher's testimony confirms that of the employer witnesses that Koerner did not take notes.

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[3] Mr. Urlacher also disputed Koerner's claim that Koerner had asked Zimmerman to read the proposal. Urlacher said that did not occur. (TR 166:8-11) Urlacher's testimony supports the employer's witnesses on that matter and he also testified there had been no agreement reached. (TR 161:10-162:1)

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Mr. Urlacher's testimony is noteworthy because although he had been subpoenaed by General Counsel and was present and available for the case in chief, General Counsel chose not to call him. Obviously, General Counsel sought to hide important and direct testimony contrary to the position asserted. Mr. Urlacher was called by the employer. It is unusual and suspicious that General Counsel did not call Mr. Urlacher.

In addition, Koerner's notes are clearly abbreviated and do not contain the complete discussions. The notes are merely self-serving summaries of what Koerner wanted to preserve. For example, Koerner's notes of December 8th are less than two pages in length. The negotiations lasted three (3) hours (TR 98:4-6). The notes do not clearly and accurately reflect what occurred in those meetings. There is a question as to when the notes were made.

It is interesting that Koerner's notes of the December 8th meeting and his testimony differ and raise questions about the accuracy and truthfulness of his testimony and the notes. In testimony, Koerner asserted the employer's "Proposal A" to be "…78 cents and 12 cents in pension and 33 cents in wages if they participated in health and welfare" (TR 59:15-16). His notes reflect a different alternative proposal by the employer: "First year 90¢ wage/pension 88¢ to wage, 12¢ to pension. Second year 35¢ wage/pension." (GC 11 p. 1) [It is noted that 88¢ + 12¢ = $1.00] The notes on the second page differ again: ".78 year 1 wage .12 pension start Nov 1 .33 year 2 wage Oct 1 2011 0 pension 2, 2 year deal H & W same no change." (GC 11 p. 2) The Administrative Law Judge did not explain the discrepancies, but merely ignored them.

Koerner claimed he made a contemporaneous notation that a tentative agreement ("TA") had been reached. When faced with the difference in the handwriting, slant,

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pressure, and ink between the notation and the remainder of the document, he reluctantly conceded that the notation was probably something that was added later (TR 99:18). Adding a subsequent note that there had been an agreement is self serving and highly suspicious.[4]

Thus, the notes were clearly not accurate and differed from his testimony. The notes did not reflect the entire discussions at the table. The lettering of the proposals was reversed. Changes were made after the meeting. The notes did not accurately reflect what occurred in the meeting. They differed from testimony. The Judge never addressed the inaccuracies and inconsistencies. The Judge erred by by any reliance on the notes.

VIII. THE ADMINISTRATIVE LAW JUDGE IMPROPERLY CRITICIZED THE EMPLOYER'S TESTIMONY AND PLACED THE BURDEN OF PROOF WITH THE COMPANY

The Administrative Law Judge criticized the employer witnesses' testimony as "abbreviated, conclusionary, non-specific" (Decision 9:34-35). He also determined that it was "significant" that none of the employer witnesses "stated what proposals had been made by either the respondent of the Union during the December 8th session" (Decision 9:35-37). Again, the Administrative Law Judge is wrong.

The issue in this case was simple: Did the employer and Union reach a tentative

[4] Koerner admitted that the best practice is to have both parties initial and date agreed upon proposals. Koerner had done so in the past. He had no explanation why he chose not to do so in this case (TR 104:13-105:7). Having the employer initial the agreement, if there was an agreement, would have clearly resolved any questions. The fact that he did not support the position that no agreement had been reached.

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agreement on a proposal to which the employer offered 40¢ an hour in each of the two years of a contract, and the employees would choose (as a group) how much of the increase would be diverted to pension? General Counsel identified the issue during the opening statement (TR 10:3-7); the employer also identified the issue, albeit more clearly and with greater precision (TR 11:17-23). That was exactly what General Counsel had to prove. The employer is not obligated to prove anything, much less prove the negative, that no agreement was reached. The employer witnesses' testimony was direct, precise, simple, and uncluttered. The question simple, did the employer agree to the language urged by the General Counsel? The answer was clearly a simple "no". (See Zimmerman 144:8-16; Brackney 170:19-23; Noel 189:22-190-1; Estes 198:18-21) Even Noel employee and Union member Matt Urlacher testified that he never heard Rodger Noel agree to allow employees to decide how much of the wages could divert to pension (Urlacher 160:12-15).

The employer witnesses all denied an agreement was reached.[5] The employer was not obligated to explain why the General Counsel was wrong, or what could have caused the Union's confusion. The Judge's criticism was wrong and simply part of justifying a result rather than conducting an appropriate detailed analysis.

IX. THE ADMINISTRATIVE LAW JUDGE DELIBERATELY IGNORED UNDISPUTED AND UNCHALLENGED TESTIMONY THAT THE NEGOTIATIONS WERE CONFUSED AND DISJOINTED.

[5] It is noted that General Counsel tried to avoid Urlacher's unfavorable testimony by failing to call him a witness despite his presence during the case in chief.

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The Administrative Law Judge was critical that although there was employer witness testimony that the negotiations of December 8th were confused, there was no further detail provided (Decision 7:15-18 n.9). Again, the Judge inappropriately criticized the employer. The testimony was clear and consistent. The meeting of December 8th was disjointed and confusing. ("…almost everyone was talking because we were calculating...Rodger was confused…Bob was calculating and talking. Everyone was talking. (TR 142:6-15) Things were loud and animated. (TR 158:21-25) The Union was discussing issues not supposed to be discussed. (Urlacher 159:4-7) "very chaotic, unorganized" (TR 109:6); "Bob was talking, everyone was talking…Bob was trying to push us to come up with something…but we really weren't really ready…He started pushing, pushing…" (TR 186:13-187:14) The negotiations were clearly chaotic, confused, and disorganized. The description was not challenged by the Union or General Counsel although they had every opportunity to do so. Once again, the Judge was incorrect and his criticism inappropriate and unsupported. The undisputed, chaotic, and confused nature of the December 8th negotiations supports the employer's position that no agreement was reached.

X. NO ADVERSE INFERENCE MAY BE DRAWN

The Administrative Law Judge inappropriately criticized the employer's witnesses for not providing notes of the negotiations and made an adverse finding against the employer (Decision 9:27-32). Again, he was wrong to do so. The Administrative Law Judge noted that Webber observed Ms. Zimmerman taking notes and that she did not deny the assertion, provide he notes, or explain why they were not available (Decision

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9:30). However, Zimmerman did explain that she made "calculations" when it was discovered the employer's offer contained an error. (TR 142:6-5) Again, the Administrative Law Judge improperly placed a burden of production on the employer to provide notes and made an adverse inference. There is no showing in the record that there had been a subpoena by General Counsel for employer notes. (See GC1 no record). Without such a record, the Administrative Law Judge improperly made an adverse inference. The Administrative Law Judge reached far to do so to support a desired result. In doing so he abused his discretion.

XI. THE ADMINISTRATIVE LAW JUDGE CREATES TESTIMONY

The Administrative Law Judge also seemed to create testimony that was not presented. The Administrative Law Judge stated that a vote was taken, apparently sometime between October 26 and November 15 bargaining session, and the employees voted to remain with the Union pension trust." (Decision 3: n. 2) However, there was no testimony to support that assertion. The judge created that fact. This is a relatively minor point, but it demonstrates the Judge's carelessness, inattention, and willingness to create testimony.

XII. WEBBER'S CONFUSED TESTIMONY

Mr. Mark Webber is a production employee at Noel and a Union member. Mr. Webber attended the December 8th negotiations as a substitute, the other participant

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had sustained an injury. Webber had not received any training or instructions from the Union as to his role in negotiations (TR 129:18-130:1). He had never observed or participated in previous negotiations (TR 115:22-29).

Webber's testimony is important for what it did not contain. Although Koerner testified that he asked Zimmerman to read the employer's proposals[6], no witnesses, including Webber, confirmed Koerner's claim. Webber did not testify that Koerner asked or Ms. Zimmerman reviewed proposals.

Webber claimed that toward the end of the August 8th meeting he reviewed proposals with Ms. Zimmerman. He testified that he did so, Ms. Zimmerman responded "That's correct, that's correct, that's correct—all the way down" (TR 118:20). Webber wanted to be certain he understood correctly (TR 119:18). When he did so, all participants were still at the bargaining table (TR 119:20).

Ms. Zimmerman testified that the discussions had reached some common ground:

> Then there were some issues to work out. Rodger was tired, we were all confused. Then Mark had to leave and asked me some questions and I responded and I said, "Yes, that's what we have been talking about" and he left.
>
> (TR 142:19-23)

Mr. Brackney confirmed Ms. Zimmerman's testimony, that Webber had asked about some of the discussions and he made notes. Then Brackney testified that Ms. Zimmerman had told Weber that "We have discussed it", but did not state that there had been an agreement (TR 171:8-23). Webber then left before the meeting ended

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(TR 171:10-11).

There was no other confirmation of Webber's testimony. Neither Koerner nor Urlacher supported or confirmed Webber's testimony. It is easy to see how a person who was asked at the last minute to attend one negotiation meeting without any instruction or directions could be confused. Simply, he erroneously believed the words "we have been discussing that" meant agreement. He was wrong.

The abbreviated handwritten notes (GC 21) provided by Webber do not add support to the testimony. Those notes are questionable because they provide "485.00 retro". It was explained by Webber that "480. retro" meant the gross amount employees were to receive (TR 130:19). However, the accuracy is questionable. No other witness, employer's or Union, ever mentioned a $480.00 figure.

Webber also testified that Rodger Noel said words to the effect of "Let's do it" which to Webber meant it was done (TR 123:9). However, Webber was the only person who so testified. The other participants testified that everyone was tired and that the employer agreed to send its proposal later (TR 144:2) "We said we would go back and write up our offer…"; (TR 171:12) Rodger said I am really tired, we need to end…Bob asked Rodger to present a proposal in writing"; (TR 199) Rodger said…I'm not feeling good, I'm getting really tired…Bob Koerner said, You guys go back and write something up and get back to me".)

Webber's testimony does not show that an agreement was reached. He confuses the language used and left before the negotiations ended.

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[6] As noted above, Koerner's testimony varies on the subject (See p. 12 above.)

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XIII. CONCLUSION: NO AGREEMENT WAS REACHED

The Administrative Law Judge erred in finding Koerner and Webber's testimony consistent.

XIV. CONCLUSION

The decision of the Administrative Law Judge must be reversed and the Complaint must be dismissed. It is clear that no agreement was reached during the August 8th meeting. The Administrative Law Judge's finding that the employer violated the Act by refusing to sign a contract that the Administrative Law Judge acknowledged did not contain the correct term is absurd.

Submitted this 21st day of November, 2011.

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CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of November, 2011, I sent a copy of Memorandum in Support of Exceptions to Decision of Administrative Law Judge, as well as this Certificate of Service *via email* to:

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