

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
WASHINGTON, D.C.**

<b>In the Matter of</b>	:	
	:	
<b>MIKE-SELL'S POTATO CHIP CO.,</b>	:	
	:	
<b>Respondent,</b>	:	<b>CASE NO. 9-CA-072637</b>
	:	
<b>and</b>	:	
	:	
<b>BAKERY, CONFECTIONARY,</b>	:	
<b>TOBACCO WORKERS AND GRAIN</b>	:	
<b>MILLERS INTERNATIONAL UNION,</b>	:	
<b>LOCAL 57, AFL-CIO-CLC,</b>	:	
	:	
<b>Charging Party.</b>	:	
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**BRIEF OF RESPONDENT MIKE-SELL'S POTATO CHIP COMPANY TO THE  
NATIONAL LABOR RELATIONS BOARD IN SUPPORT OF ITS EXCEPTIONS TO  
THE DECISION OF ADMINISTRATIVE LAW JUDGE PAUL BOGAS**

**Jennifer R. Asbrock (0078157)  
Robert J. Brown (0010402)  
THOMPSON HINE LLP  
Austin Landing I  
10050 Innovation Drive, Suite 400  
Dayton, Ohio 45342-4934  
Tel. (937) 443-6849  
Fax. (937) 443-6635  
Bob.Brown@ThompsonHine.com  
Jennifer.Asbrock@ThompsonHine.com**

**Attorneys for Mike-sell's  
Potato Chip Company**

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**I. INTRODUCTION**

Respondent Mike-sell’s Potato Chip Company (“Mike-sell’s” or “Company”) has filed Exceptions to the Decision and Order of Administrative Law Judge Paul Bogas (“ALJ”), which issued in the above-captioned case on July 3, 2012 (JD-36-12) (“Decision”).<sup>1</sup> This Brief is being filed in support of the Company’s Exceptions.

Stated briefly, Mike-sell’s excepts to the factual findings of the ALJ, as well as his conclusions of law, that the Company “violated Section 8(a)(5) and (1) when, on January 1, 2012, it implemented changes to the contractual health and welfare benefits for employees

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<sup>1</sup> Citations to the Decision are parenthetically referenced as “ALJD, p. \_\_\_\_.” Citations to Joint Exhibits, Respondent Exhibits, and General Counsel Exhibits are parenthetically referenced as “JX-\_\_\_\_”, “RX-\_\_\_\_”, and “GX-\_\_\_\_”, respectively. Citations to Official Transcript pages are parenthetically referenced as “Tr. \_\_\_\_.”

represented by the B&C Union without following the procedures set forth in the contractual reopening clause and without the Union's consent." Additionally, Mike-sell's excepts to the credibility findings and assessments of the ALJ, as well as his proposed remedy and order. The Company's specific exceptions are detailed in the contemporaneously-filed Exceptions to the Decision of Administrative Law Judge Paul Bogas, for which this Brief is submitted in support.

## **II. STATEMENT OF THE CASE**

### **A. Background Facts**

Mike-sell's is a privately-held manufacturer and distributor of snack foods and is headquartered in Dayton, Ohio. (ALJD, p. 2; Tr. 143.) Mike-sell's Dayton production and maintenance employees are represented by the Bakery, Confectionary, Tobacco Workers and Grain Millers International Union, Local 57, AFL-CIO-CLC ("Union"), and their employment is governed by a Labor Agreement, executed on November 15, 2010, but effective August 5, 2010, through August 5, 2014. (ALJD, p. 2; Tr. 144; GX-2, Cover Page and p. 17.) The Labor Agreement required the Company to maintain existing health and welfare benefits for one year from the Agreement's execution date, after which either party may serve a written request to reopen negotiations for all health and welfare benefits. (ALJD, p. 2; Tr. 16; GX-2, p. 16.) More specifically, the Labor Agreement states as follows:

Section 11.7 (Reopening Clause) – The company and union hereby agree that all health and welfare benefits defined in this agreement in article 11 shall remain in full force for one (1) year from the execution of this agreement. After one year, either the company or the union shall have the right to reopen this agreement and to redefine all health and welfare benefits by simply serving the other party with a written notice of its intention to reopen negotiations concerning all health and welfare benefits. Within ten (10) days after sending of said notice, the company and union shall begin negotiations for health and welfare benefits. If the company and the union are unable to agree within ten (10) days after beginning negotiations for health and welfare benefits as to the health and welfare benefits, then, the matter shall be referred to Federal Mediation for resolution. If a resolution is not reached through Federal Mediation within ten (10) days after

referral, then company and union agree the matter shall be submitted to binding arbitration. The binding arbitration shall be held and completed within thirty (30) days after the request of either party for binding arbitration.

(ALJD, pp. 2-3; Tr. 147-48; GX-2, p. 16 (emphasis added).)

The parties have a history of contentious negotiations and “loud and boisterous disagreements.” (Tr. 149-50, 178.) In the past, it has always been blatantly obvious when the parties disagreed on a particular issue, as they bickered back and forth until the matter was resolved. (Tr. 149-50, 178.) This contentious relationship has held true both in regular bargaining and mid-term bargaining situations for at least the past six years.<sup>2</sup> (Tr. 150.)

When the parties have engaged in regular bargaining for a successor agreement, they follow a traditional practice of placing tentative agreements in writing and having Union members vote to ratify them. (*See, e.g.*, Tr. 43-48, 196-98; GX-22; GX-23; GX-24; GX-25.) However, the Labor Agreement does not have an integration clause, and when the parties have engaged in mid-term bargaining over a discrete subject, they do not have a practice of reducing their agreements to writing or putting their agreements to a vote by the Union membership. (Tr. 178, 182; *see generally* GX-2.) In fact, there are several agreements in place between the Union and the Company that were bargained mid-term, that are not in writing, and that directly contradict substantive provisions of the Labor Agreement.<sup>3</sup> (Tr. 182, 188-95.) Most recently, after the current Labor Agreement was negotiated and signed, the parties engaged in mid-term

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<sup>2</sup> The ALJ, in his Decision, paid no attention to the history of the parties’ relationship, which provides important context and background for understanding the importance of the parties’ communications before, during, and after the December 14, 2011, bargaining session.

<sup>3</sup> For example, the Labor Agreement requires the peelers / packers to remain in the peeler room because they are least senior, but the Company entered an unwritten agreement with the Union (in response to the Union’s specific request during mid-term bargaining) that allows the peelers / packers to move to the front line. (Tr. 189-91; GX-2, p. 10.) The Labor Agreement also requires employees to take their vacation in week-long increments, but the Union negotiated an unwritten, mid-term agreement with the Company to allow employees to take vacation one day at a time. (Tr. 192-94; GX-2, pp. 8-9.) The Labor Agreement also requires three days’ notice of a foreseeable absence, but the Company has agreed (in response to a specific proposal from the Union) not to enforce this contractual notice requirement. (Tr. 194-95; GX-2, p. 14.)

bargaining and later agreed that Maintenance Mechanics would be paid fifty cents more per hour than the signed Labor Agreement actually provides. (Tr. 112-15, 182-87; RX-2.) The parties never put this mid-term agreement into writing, but the additional fifty cents per hour was verbally agreed to and has been continuously paid since January 2011.<sup>4</sup> (Tr. 115-16, 183, 188.)

The Labor Agreement's reopener provision has been in place for some time, and the current dispute is not the only time that the parties have reopened negotiations for health and welfare benefits. (ALJD, p. 3; Tr. 148.) The parties previously reopened negotiations for health and welfare benefits under the predecessor contract in 2008, so the Union is intimately familiar with the reopener process and the contractual timelines. (ALJD, pp. 3, 7; Tr. 71-73, 107-08, 148.) It was clear that the parties could not come to an agreement on the health and welfare changes Mike-sell's proposed in 2008, so the parties followed the contractual process all the way through arbitration. (ALJD, pp. 3, 7; Tr. 71, 148, 149-50.) The Company prevailed at arbitration, and the changes were implemented.<sup>5</sup> (ALJD, pp. 3, 7; Tr. 71, 148-49.) No new written agreement was executed to reflect the 2008 changes. (Tr. 71, 148-49.)

### **B. Circumstances Leading to the 2011 Reopener**

Mike-sell's provides a self-insured, high-deductible health and welfare plan for its employees, which includes a Health Savings Account ("HSA") partially funded by the Company. (ALJD, p. 3; Tr. 145.) All of these health and welfare benefits are administered by Anthem Blue Cross / Blue Shield. (ALJD, p. 3.) Although Mike-sell's gets quotes from outside companies every year, the Company has consistently found that outside quotes cannot compete

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<sup>4</sup> In his Decision, the ALJ discounts the importance of the parties' longstanding mid-term bargaining practices, which have occurred repeatedly over the course of many years. (ALJD, p. 8 at fn.5.)

<sup>5</sup> In 2008, however, the Union delayed negotiations, mediation, and arbitration in order to stretch the entire reopener over more than a year, long after the contractual process should have ended. (ALJD, pp. 3, 7; Tr. 148.) Mike-sell's was determined not to allow this sort of delay to occur again.

economically with its own self-insurance. (Tr. 146.) Prior to January 1, 2012, Mike-sell's health and welfare plan had remained unchanged for four years. (Tr. 147.) Despite sky-rocketing healthcare costs, the Company worked hard not to pass these increased costs to employees.

By 2011, Mike-sell's could no longer afford to continue the existing health and welfare benefits. (Tr. 150-51.) The cost of providing these benefits in 2011 had increased about 43% (i.e., \$500,000) over the cost of providing the same benefits in 2010. (Tr. 150; GX-6; RX-1, p. 4.) As for the Union standing alone, the total cost of claims for bargaining unit members in 2011 had increased almost \$150,000 from the total cost of claims in 2010. (Tr. 151.) At the same time that healthcare costs were skyrocketing, Mike-sell's business was losing significant amounts of money due to the competitive environment in which it operates. (Tr. 150-51). Under these circumstances, Mike-sell's was forced to take immediate action to mitigate these increased healthcare costs.<sup>6</sup> (Tr. 150-51.)

The Company's goal was to find an affordable solution to its healthcare dilemma that would adversely affect as few employees as possible. (Tr. 151-52, 154.) Mike-sell's considered a dozen different plans. (Tr. 153-54.) After carefully weighing its options, Mike-sell's ultimately decided (1) to reduce contributions to HSAs from \$500 (single) / \$1,000 (family) to \$250 (single) / \$500 (family); and (2) to require employees to pay 20% co-insurance after meeting their deductible (which remained the same), up to an out-of-pocket maximum of \$4,000 (single) / \$8,000 (family).<sup>7</sup> (ALJD, p. 3; Tr. 145, 152-53.) Even with these changes, the

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<sup>6</sup> During the 2008 reopener, the Union had already independently attempted to find a more affordable healthcare plan, but the Union had been unable to find an insurance company that was even willing to provide a quote due to the small number of employees in the bargaining unit and the large number of claims and pre-existing and/or chronic conditions. (Tr. 170.)

<sup>7</sup> Under the pre-2012 plan, everything was paid at 100% after the deductible. (ALJD, p. 3; Tr. 145.)

Company's savings were only about \$220,000, which was \$30,000 less than the Company had anticipated. (Tr. 151, 153-54.)

### **C. The Parties' Pre-Bargaining Communications**

On November 8, 2011, Mike-sell's served a written request to reopen negotiations for health and welfare benefits in accordance with Section 11.7 of the Labor Agreement and suggested four potential bargaining dates. (ALJD, pp. 3-4; Tr. 16-17, 155-58; GX-2, p. 16; GX-3; RX-1, p. 1.) The Union replied in writing on November 10, 2011, stating that the Union would "prepare to honor [the Company's] request to redefine the health and welfare [benefits]" upon receiving "a reason for reopening [the Labor Agreement] to redefine all health and welfare benefits." (ALJD, p. 4; Tr. 17-18, 158; GX-4; RX-1, p. 2.) The Union did not respond to the Company's request for potential bargaining dates.<sup>8</sup> (GX-4; RX-1, p. 2.)

Mike-sell's twice responded to the Union's inquiry about the reason for reopening health and welfare benefits, although it had no obligation to do so in order to start the reopener timeclock.<sup>9</sup> (Tr. 18-20, 158-59; GX-5; GX-6; RX-1, pp. 3-4.) On November 11, 2011, Mike-sell's explained that the Company simply wanted to exercise its contractual right to reopen negotiations on the subject of health and welfare benefits, which required only a written notice of an intent to reopen. (Tr. 158; GX-5; RX-1, p. 3.) The Union did not respond to the Company's November 11th letter. (Tr. 19, 158-59.) On November 15, 2011, Mike-sell's further explained that the reopener was being requested "due to rising costs" and cited specific cost increases from

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<sup>8</sup> Beyond referencing the first communication from each side, the ALJ pays little heed to the "flurry of correspondence" between the parties. (ALJD, p. 4.) However, the substance and tenor of these communications are critical in determining each party's intentions before, during, and after the reopener.

<sup>9</sup> The Labor Agreement provides that "either the company or the union shall have the right to reopen this agreement and to redefine all health and welfare benefits by simply serving the other party with a written notice of its intention to reopen negotiations concerning all health and welfare benefits." (GX-2, p. 16 (emphasis added)).

2010 to 2011. (Tr. 159; GX-6; RX-1, p. 4.) The Company reiterated its request for potential bargaining dates in both of these letters. (Tr. 159; GX-5; GX-6; RX-1, pp. 3-4.)

On November 16, 2011, the Union offered to begin negotiations for the health and welfare benefits reopener on November 29th at the Union's office in Columbus, Ohio. (Tr. 20-21, 159-60; GX-7; RX-1, p. 5.) Mike-sell's responded to the Union that same day, explaining that November 29th was unacceptable to begin bargaining because it would delay the start of negotiations more than ten days after Mike-sell's served the reopener request on November 8th, which would not comport with the Labor Agreement's requirement to begin negotiations "[w]ithin ten days after sending of [the Company's] notice." (Tr. 21-22, 73, 160; GX-8; RX-1, p. 6.) Mike-sell's further explained that if the Union failed to commence bargaining within the Labor Agreement's ten-day window, then the Company would proceed to the next step in the Labor Agreement by requesting a mediator.<sup>10</sup> (GX-8; RX-1, p. 6.) Mike-sell's heard nothing back from the Union.

On November 18, 2011, Mike-sell's requested a mediator, scheduled mediation for November 29th (i.e., the specific date offered by the Union as being available), and notified the Union of the scheduled mediation. (Tr. 22, 161-62, 165; GX-9; RX-1, p. 7.) The Union replied on November 20, 2011, indicating that its Business Agent had "scheduled meetings in other locations on [November 29th]" and demanding that any meetings take place at the Union's office in Columbus, Ohio. (Tr. 22-23, 163; GX-10; RX-1, p. 8.) The Union also claimed that Mike-sell's had not yet responded to its information request. (GX-10; RX-1, p. 8.)

Mike-sell's replied via email on November 23, 2011, explaining that it was unreasonable for the mediation to take place at the Union's office in Columbus, Ohio, because everyone who

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<sup>10</sup> During the 2011 reopener process, Mike-sell's remained mindful of the Union's delay tactics during the 2008 reopener process; the Company was determined not to let that happen again. As later events demonstrate, the Union did everything it could to again stall the process.

would be involved in the mediation (i.e., the mediator, the Company representatives, the Union membership, and the Union Steward) is located in Dayton, Ohio, except for the Union's Business Agent.<sup>11</sup> (Tr. 23-24, 162-64; GX-11; RX-1, p. 9.) The email further explained that, if the Union refused to participate in the mediation on the very date that it had suggested as being available, the Company would proceed to binding arbitration in accordance with the Labor Agreement's reopener timeline. (Tr. 164; GX-11; RX-1, p. 9.) Finally, Mike-sell's reminded the Union that it had already responded to its information request in prior correspondence dated November 11th and November 15th. (GX-11; RX-1, p. 9; *see also* GX-5; GX-6; RX-1, pp. 3-4.)

On November 27, 2011, the Union stated via email that it would be unavailable on November 29th for the scheduled mediation. (Tr. 24-25, 164-65; GX-12; RX-1, p. 10.) The Union insinuated that the reason for its unavailability stemmed from the fact that Mike-sell's had rejected November 29th as the date to begin negotiations. (GX-12; RX-1, p. 10.) The Union also submitted a new, more detailed request for information, demanding a response by December 1, 2011. (Tr. 25, 165; GX-12; RX-1, p. 10.) On November 28, 2011, Mike-sell's sent two emails responding to the Union's new information request and explaining that the mediation would proceed as scheduled. (Tr. 25-26, 165-66; GX-13; GX-14; RX-1, pp. 11-12.)

The Union failed to attend the mediation on November 29th. (Tr. 77, 166.) Mike-sell's therefore informed the Union that the Company would invoke the Labor Agreement's binding arbitration clause. (Tr. 28, 166; GX-37; RX-1, p. 13.) The Company asked the Union whether it had a preference between the only two arbitrators known to be available to hear the case within the thirty-day timeframe established by the Labor Agreement. (Tr. 28, 166; GX-37; RX-1, p. 13; *see also* GX-2, p. 16.)

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<sup>11</sup> This request was also contrary to the bargaining practices of the parties, as negotiations had always taken place in Dayton, Ohio. (Tr. 77, 163.) Negotiations had never taken place in Columbus, Ohio. (Tr. 77, 162.)

On November 30, 2011, the Union emailed Mike-sell's and claimed that, because "no negotiations [had] taken place" and the parties "[had] not met with a Federal Mediator," there was "nothing to submit to arbitration." (Tr. 29, 167; GX-16; RX-1, p. 14.) The Union then requested that Mike-sell's explain "how the Company propose[d] to redefine health and welfare benefits, so that the process of negotiations [could] be commenced." (GX-16; RX-1, p. 14.) Finally, the Union rejected the two arbitrators suggested by the Company and stated that, if arbitration became necessary, the parties should request a panel from the Federal Mediation and Conciliation Service ("FMCS"). (Tr. 167; GX-16; RX-1, p. 14.)

On December 2, 2011, Mike-sell's responded to the Union, explaining the specific changes that the Company had been requesting to bargain over. (GX-17, pp. 5-6; RX-1, pp. 17-18.) Mike-sell's further referenced its many attempts to bargain, mediate, and arbitrate the health and welfare benefits within the time limits set by the Labor Agreement. (GX-17, p. 6; RX-1, pp. 17-18.) Last, the Company explained that, per the Union's request, an expedited panel had been referred by FMCS so that the parties could engage in the normal arbitrator selection process. (Tr. 167; GX-17, p. 6; RX-1, p. 18.) The Company confirmed that it remained open to bargaining with the Union in the interim, pending arbitration. (GX-17, p. 6; RX-1, p. 18.)

The Union replied on December 2, 2011, refusing to engage in the arbitrator selection process and claiming for the first time that the Company's notice to reopen negotiations was "void" because it was served seven days prior to the one-year anniversary of the Labor Agreement's execution date. (ALJD, p. 4; Tr. 31; GX-17, pp. 4-5; RX-1, pp. 16-17.) On December 6, 2011, Mike-sell's sent an email acknowledging this technical flaw but explaining that its requests to reopen the health and welfare benefits provision had continued throughout November 2011, including a request to negotiate that was sent on November 15, 2011, exactly

one year after the Labor Agreement was executed. (Tr. 168; GX-17, pp. 3-4; RX-1, pp. 15-16; *see also* GX-6; RX-1, p. 4.) Nonetheless, the Company once again invited the Union to negotiate over the next ten days. (ALJD, p. 4; Tr. 168; GX-17, pp. 3-4; RX-1, pp. 15-16.) The Union agreed to meet and bargain with Mike-sell's at the Company's facility on December 14, 2011. (ALJD, p. 4; Tr. 32, 168-69; GX-17, pp. 2-3; GX-18; RX-1, p. 15.)

#### **D. The December 12th Informational Meeting**

In early December, before the parties' bargaining session, Mike-sell's held informational sessions for all employees to explain the proposed health and welfare changes. (Tr. 94-97, 122-23, 155, 203.) These changes were already "set in stone" for nonunion personnel, as well as for the employees in other bargaining units with whom Mike-sell's had no obligation to negotiate. (ALJD, p. 4 at fn.2.) On December 12, 2011, Mike-sell's held a separate informational meeting for the Union and explained that the Company had an obligation to meet and bargain with the Union over the proposed changes.<sup>12</sup> (ALJD, p. 5; Tr. 97, 109, 155, 205, 207.) Although Mike-sell's understood that the adoption of the proposed changes would be dependent on the outcome of bargaining (Tr. 154-55, 216), the Company nonetheless felt that it would be beneficial for Union members to attend the same informational meeting as other employees so that they received the same information and notice of the changes that the Company was hoping to put into effect on January 1, 2012. (Tr. 155-56, 210.) It gave Union members—including the Union Steward—the opportunity to ask any questions about the proposed changes directly to the insurance representative. (Tr. 92, 94-95, 97, 210.) It is undisputed that none of the Union

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<sup>12</sup> The ALJ discounts the importance of this meeting, finding it "unnecessary to resolve [the] credibility question" raised by the parties' differing testimony. (ALJD, p. 5.) By ignoring this meeting, the ALJ effectively excludes inconsistencies in the testimony between Union witnesses, as well as important facts that shed light on the Union's motives during the reopener process.

members asked any questions or raised any concerns or objections to the proposed changes at the informational meeting.<sup>13</sup> (ALJD, p. 5; Tr. 97, 109, 125.)

#### **E. The December 14th Bargaining Session**

The December 14th bargaining session was attended by Sharon Wille (“Wille”), the Company’s human resources director, Steve Campbell (“Campbell”), the Union Steward, and Vester Newsome (“Newsome”), the Union’s Business Agent. (ALJD, p. 5; Tr. 33, 98.) Ms. Wille had blocked off the entire day for negotiations because she figured it would take at least that long to come to some agreement. (Tr. 169.) But, to the Company’s surprise, the bargaining session was short, sweet, and non-confrontational, lasting only about 15 or 20 minutes. (Tr. 33, 170, 171, 177; RX-3.)

The Union presented no written proposals. (Tr. 79.) Mr. Newsome simply asked what changes Mike-sell’s wanted to make and why, and Ms. Wille explained the rising costs that led to the specific health and welfare benefit proposals. (ALJD, p. 6; Tr. 33-34, 170.) Mr. Newsome stated that the changes would affect bargaining unit members, and Ms. Wille emphasized that all employees would be equally affected. (Tr. 171.) Mr. Newsome inquired whether Mike-sell’s had considered outside insurance carriers rather than remaining self-funded, but he admitted that the Union’s past attempts to find outside insurance had failed—and would fail again—due to the small number of employees in the group and the large number of claims and pre-existing and/or chronic conditions. (Tr. 170.) Mr. Newsome asked whether it was possible for Mike-sell’s to hold off on the changes for a few months, but Ms. Wille assured him that the costs were only

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<sup>13</sup> The ALJ, in his Decision, states that “the insurance broker provided employees with informational packets that had not been shared with the Union,” seemingly insinuating that the Company was trying to hide substantive information from the Union. (ALJD, p. 5.) While the Union had not previously received a copy of the informational packet, that was simply because the Union had delayed the start of negotiations beyond the date of the informational meeting. In any case, it is undisputed that the Union Steward, Steve Campbell, attended the December 12th informational meeting and thus received an informational packet before the December 14th bargaining session. (ALJD, p. 5; Tr. 92, 94-95.)

expected to rise in the coming year, as employees' conditions and claims persisted. (Tr. 34-35, 170-72.) Mr. Newsome asked whether the reduced HSA contributions and the increased co-insurance were the only proposed changes to health and welfare benefits, and Ms. Wille confirmed that there were no further changes proposed for 2012 but that additional changes may be proposed in future years. (Tr. 171.) Mr. Newsome then stated that Mike-sell's had "the right to make the changes," so Ms. Wille informed Mr. Newsome that the Company planned to implement the changes on January 1, 2012.<sup>14</sup> (Tr. 171-72, 177-78.) The parties then left the bargaining table and shook hands, and Ms. Wille handed Mr. Newsome a box of holiday chocolates on his way out the door. (Tr. 171.) Although Ms. Wille took notes during the bargaining session, the parties did not put anything in writing to memorialize their agreement, as that was not their customary mid-term bargaining practice. (RX-3; Tr. 112-16, 178.)

#### **F. Post-Bargaining Events**

Mike-sell's received no further communication from the Union. (Tr. 79, 103, 111, 178-80.) Based on the parties' communications during the December 14th bargaining session, as well as the Union's failure to reject the proposed changes or request additional bargaining sessions within the contractual ten-day period ending December 24th,<sup>15</sup> Mike-sell's understood the parties to have reached an agreement that the proposed changes to health and welfare benefits were acceptable. (Tr. 111, 178-79, 181-82, 215.) The Company thus implemented the proposed health and welfare benefit changes on January 1, 2012, just as Ms. Wille had announced would be done at the conclusion of the December 14th bargaining session. (Tr. 110, 112, 171-72.)

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<sup>14</sup> Ms. Wille ultimately suspected that, had the matter proceeded to arbitration, an arbitrator would have found the Company's proposed changes to be reasonable under the circumstances, just as in 2008. Thus, she interpreted Mr. Newsome's comment to relate to the likelihood that—if push had come to shove—an arbitrator would find that Mike-sell's had the right to implement the changes and that the Union would prefer to consent to the changes in bargaining rather than wasting money to ultimately lose again at arbitration. (Tr. 211-12.)

<sup>15</sup> Not only did the Union fail to request another bargaining session, but it also failed to seek a referral to mediation or arbitration. (Tr. 82-83, 111.)

On January 13, 2012, the Union claimed that no agreement had been reached regarding the proposed health and welfare benefit changes and suddenly demanded that the matter proceed to mediation because the parties “were unable to agree . . . within the ten day time limit.” (Tr. 51-52, 180; GX-26; RX-1, p. 19.) The Union further demanded that the Company reinstate the former health and welfare benefits. (GX-26; RX-1, p. 19.) Ms. Wille was “absolutely stunned.” (ALJD, p. 6; Tr. 180.) Mike-sell’s declined to reinstate the former benefits because both parties had ultimately agreed that the proposed changes were acceptable and would be implemented on January 1, 2012. (ALJD, p. 6; Tr. 52, 181-82; GX-27; RX-1, p. 20.) The Union thereafter filed the instant unfair labor practice charge and prompted two more rounds of correspondence regarding the dispute, wherein both parties maintained their respective positions. (ALJD, p. 1; GX-1(a); Tr. 54-55, 181-82; GX-28; GX-29; GX-41; GX-44; RX-1, pp. 21-22.)

### **III. QUESTIONS PRESENTED**

Mike-sell’s respectfully submits that the following questions are presented for review by the National Labor Relations Board (“Board”), based on the contemporaneously-filed Exceptions to the Decision of Administrative Law Judge Paul Bogas:

Whether the record as a whole contains a preponderance of evidence that the parties reached an agreement at the December 14th bargaining session;

Whether the record as a whole contains a preponderance of evidence to support the ALJ’s witness credibility assessments, factual findings, conclusions of law, remedy, and order; and

Whether the record as a whole contains a preponderance of evidence that the Company violated Section 8(a)(1) and 8(a)(5) of the National Labor Relations Act (“Act”).<sup>16</sup>

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<sup>16</sup> These concepts are inextricably intertwined, and the answer to one question will inevitably be the answer to all. Therefore, the Board should consider all of the Company’s exceptions and all of the Company’s arguments to apply with equal force to all of the questions presented for review.

#### IV. ARGUMENT

This case turns on whether the parties reached an agreement at the December 14th bargaining session. In answering this question, the ALJ was required to consider all of the facts in the record and all of the witnesses' testimony. The ALJ repeatedly concluded that Ms. Wille's testimony was "implausible" based on his own subjective evaluation of the relative likelihood of her account. (ALJD, pp. 7-8.) However, an ALJ is in no better position than the Board to assess inherent probabilities of testimony, and the Board is not bound by credibility determinations based on such assessments. *In re Betances Health Unit, Inc.*, 283 NLRB 369, 370 (1987) (citing *Kelco Roofing*, 268 NLRB 456 (1983)) (reversing credibility determinations made by ALJ).

Regarding the disputed aspects of the December 14th bargaining session, the ALJ decided to credit the Union's witnesses over the Company's witness, purportedly "[b]ased on [his] consideration of the demeanor and testimony of the witnesses and the record as a whole." (ALJD, p. 7.) However, it is well established that "[a]n Administrative Law Judge cannot simply ignore relevant evidence bearing on credibility and expect the Board to rubber stamp his resolutions by uttering the magic word 'demeanor.'" *See, e.g., In re Permaneer Corporation*, 214 NLRB 367, 369 (1974). In several instances in this case, the ALJ took testimony out of context and/or failed to consider other evidence that conflicted with his conclusions. This kind of "selective analysis" is improper, especially where the inferences drawn from ignoring certain evidence are contrary to direct, un rebutted testimony. *See, e.g., NLRB v. Cutting, Inc.*, 701 F.2d 659, 665-69 (7th Cir. 1983). Here, the evidence that was ignored by the ALJ is the same critical evidence that reveals the truth in this case: Mike-sell's had nothing to gain by fabricating an agreement between the parties and suddenly ignoring the reopener process that the Company had previously pursued so diligently in accordance with contractual timelines.

Based on the following considerations, which are explained below in further detail, the Company's exceptions should be granted, the ALJ's ruling should be reversed, and the General Counsel's Complaint should be dismissed because:

The record as a whole does not contain a preponderance of evidence that the parties reached an agreement at the December 14th bargaining session;

The record as a whole does not contain a preponderance of evidence to support the ALJ's witness credibility assessments, factual findings, conclusions of law, remedy, and order; and

The record as a whole does not contain a preponderance of evidence that the Company violated Section 8(a)(1) and 8(a)(5) of the Act.

**A. The Parties' Contentious Relationship and Bargaining History**

Ms. Wille presented undisputed evidence that the parties had a strained relationship and a contentious bargaining history, full of "loud and boisterous disagreements." (Tr. 149-50, 178.) Ms. Wille expected the 2011 reopener to follow this same pattern, with the parties arguing all day long at the bargaining table and leaving frustrated with one another; she did not expect to reach an agreement. (Tr. 169.) Ms. Wille was prepared to advance the reopener process, as evidenced by the fact that she had already lined up a mediator and an expedited arbitration panel. (Tr. 22, 161-62, 165, 167; GX-9; GX-17, p. 6; RX-1, pp. 7, 18.) Yet Ms. Wille left the December 14th bargaining session understanding that the parties had reached a resolution and that Mike-sell's was free to implement on January 1st. She therefore did not pursue the reopener process any further, despite being ready and willing to move ahead and having previously informed the Union of her intent to do so. (Tr. 215; ALJD, p. 4.) The history of the parties' relationship provides critical background for understanding the importance of the parties' communications before, during, and after the December 14th bargaining session.

## **B. The Lack of Written Agreements on Mid-Term Bargaining Issues**

The ALJ places great emphasis on the fact that the parties did not sign a written agreement related to the proposed health and welfare changes. (ALJD, pp. 6, 8.) The mere fact that the parties' December 14th agreement was never placed in writing is not dispositive. While the technical rules of contract law are not always controlling in labor relations negotiations, the normal rules of offer and acceptance are applicable to determine whether an agreement was reached. An offer can be accepted, and the parties bound, without the agreement being reduced to writing and signed. *Kasser Distiller Products*, 307 NLRB 899, 903 (1992). Section 8(d) of the Act only requires that parties bargain in good faith and execute "a written contract incorporating any agreement reached if requested by either party." 29 U.S.C. § 158(d) (emphasis added). Thus, the Board has found verbal agreements to be enforceable even where there is no demonstrated practice of not putting agreements in writing. *See, e.g., Safeway Steel Products*, 333 NLRB 394, 400 (2001) (recognizing that the surrounding circumstances of a negotiations sessions, which ended with a handshake on the deal, established an "explicit, forthright demonstration of acceptance and approval," despite the lack of a signed writing); *International Brotherhood of Electrical Workers, Local Union No. 22*, 268 NLRB 760, 762 (1984) (finding that verbal assent was sufficient to bind local union even where union's constitution and bylaws required approval from the international division, as the local union placed no caveat or reservation on its verbal assent that approval from its international division would be necessary).

In this case, when the parties have engaged in regular bargaining for a successor agreement, they have followed a traditional practice of placing tentative agreements in writing and having Union members vote on them. (*See, e.g.,* Tr. 43-48, 196-98; GX-22; GX-23; GX-24; GX-25.) But the Labor Agreement does not have an integration clause, and when the parties

have engaged in mid-term bargaining, they do not have a practice of reducing their agreements to writing or putting their agreements to a vote by the Union membership. (Tr. 178, 182; *see generally* GX-2.) As explained in Section II(A) of this Brief, there are several agreements between the Union and the Company that were bargained mid-term, that are not in writing, and that directly contradict substantive provisions of the Labor Agreement. (Tr. 182, 188-95.)

If the parties had wanted to preclude verbal modifications of the Labor Agreement, they could have negotiated an integration clause. Such clauses typically state that the written contract integrates the parties' "entire agreement" and may not be amended except through a writing signed by both parties. *See, e.g.,* Elkouri & Elkouri, *How Arbitration Works* § 12.7 pp. 620-21 (6th Ed. 2003) (citing cases); *see also Baldwin-Whitehall School District*, 129 LA 899, 908-09 (Kobell, March 21, 2011) (discussing effect of integration clauses); *Township of Robinson*, 109 LA 995, 999 (Dean, Jr., October 6, 1997) (same). But the Labor Agreement in this case contains no integration clause, and the parties have a long history of coming to unwritten agreements on mid-term bargaining issues in which the agreed-upon changes are directly contrary to express provisions of the Labor Agreement. It is undisputed that unwritten, mid-term agreements have been reached on both economic issues and noneconomic issues. (Tr. 112-15, 182-95; RX-2.) Hence, the lack of a written agreement does not support the ALJ's Decision. Rather, it simply demonstrates consistency with the parties' course of dealing for mid-term issues.

### **C. The Importance of the 2008 Reopener and the Union's Delay Tactics**

Although the ALJ generally recognized the year-long delay in the 2008 reopener (ALJD, pp. 3, 7; Tr. 148), he did not properly consider its overall import as the cause for the Company's diligence—and the Union's delay—during the 2011 reopener. Mike-sell's knew well that the contractual reopener process would have to be exhausted—or resolved by mutual agreement—

before the proposed health and welfare changes could be implemented. (Tr. 154-55, 215-17.) Mike-sell's also knew from experience with the 2008 reopener that, if the Company did not insist on strict adherence to the contractual reopener timelines, the Union may draw the process out over the course of a year. (Tr. 148, 214.) Mike-sell's was therefore determined to strictly follow the contractual timelines for the 2011 reopener because it wanted to implement the proposed changes within a short period of time (i.e., as close to January 1, 2012, as possible). Ms. Wille did everything in her power to move the reopener process along in accordance with contractual timelines, and she would have continued with the reopener process had the parties not reached an agreement at the December 14th bargaining session. (Tr. 215.)

The Union knew what was likely to happen if Mike-sell's succeeded in pursuing its proposals through the entire reopener process, as the Union remembered all too well losing at arbitration during the 2008 reopener. The Union knew that it did not have the luxury of a year-long delay this time, as Mike-sell's was diligently pursuing the contractual timelines, which set a 60-day window for the entire reopener process. (ALJD, pp. 2-4; GX-2, p. 16.)

The ALJ hastily recognized that the parties engaged in "extensive, rapid-fire correspondence." (ALJD, p. 8.) But the ALJ failed to recognize that all of this correspondence was initiated and continued by Mike-sell's in an effort to comply with each step of the reopener process, which would have continued had the Union not conceded to the Company's proposal during the December 14th bargaining session. (RX-1; Tr. 215.) Indeed, the ALJ recognized that Ms. Wille had previously informed the Union of her intention to proceed to binding arbitration if no agreement was reached. (ALJD, p. 4.)

In contrast, the Union's actions before, during, and after the December 14th bargaining session reflect an attempt to avoid and delay the contractual reopener process at every juncture.

For example, Mr. Newsome failed to provide a bargaining date within ten days from the date that negotiations were reopened;<sup>17</sup> demanded that negotiations take place 90 minutes away from the parties' normal meeting location; refused to participate in the mediation process, despite his previously-announced availability on the scheduled mediation date; refused to select an arbitrator even after specifically suggesting (by and through counsel) that Mike-sell's request an FMCS arbitration panel; and waited until early December 2011 to claim for the first time that Mike-sell's had reopened negotiations prematurely. (Tr. 73-77, 162-63, 167-68; GX-16; GX-17, pp. 3-6.) In addition, while Mr. Newsome testified that he told Ms. Wille at the December 14th bargaining session that the parties would "let an arbitrator make the decision," the Union never followed up to pursue mediation or to participate in the arbitrator selection process within the contractual timelines. (Tr. 49-50, 82.)

The Union's continual delay tactics in November and December reflect an obvious attempt to avoid the contractual reopener process altogether, as the ultimate outcome had not been favorable in 2008. (Tr. 156-81; RX-1, pp. 2, 5, 8, 10, 14-18.) The Union realized that the only way to delay the proposed health and welfare changes in 2011 was to delay the contractual progression to arbitration. Of course, the Union could not flat out refuse to participate in the contractual process, or it would face an unfair labor practice charge itself. But the Union could give "lip service" to the contractual process by bargaining with the Company and reaching a verbal agreement on the proposals, which the Union knew would not be put in writing based on the party's mid-term bargaining practices. The Union also knew that, if it made verbal concessions at the bargaining table, then Mike-sell's would believe that the parties had reached

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<sup>17</sup> This is true whether the reopener notice date is considered as of November 8th (i.e., the one-week premature date on which the reopener notice was first sent) or November 15th (i.e., the third request from the Company to reopen which was timely sent on the one-year anniversary of the Labor Agreement's execution date), as Mr. Newsome offered no bargaining dates until November 29th. (GX-3; GX-5; GX-6; GX-7; RX-1, pp. 1, 3-5.)

agreement and would have no reason to push the reopener process forward. If Mike-sell's went to implement on January 1, 2012, the Union could simply deny the existence of an agreement based on the lack of a signed writing and either argue (1) that the Company was now outside the contractual timelines, so the timelines had been waived; or (2) that the Company must continue to follow the contractual process to arbitration. And if Mike-sell's actually implemented the changes based on the verbal agreement on December 14th, the Union knew that it could simply file an unfair labor practice charge, denying the concessions made at the table and forcing the Company to restart the reopener process. In any scenario, the Union would have a chance to successfully delay the proposed changes beyond the 60-day window set by the Labor Agreement.

**D. The Significance of the December 12th Informational Meeting**

The ALJ discounts the importance of the December 12th informational meeting with the Union, where the Company's proposed healthcare changes were explained by an insurance representative. (ALJD, p. 5.) However, the Union's testimony about this meeting calls its credibility into question. Mr. Campbell and Mr. Christopher Clark, a Union member and witness, both testified that Ms. Wille presented the health and welfare proposals during the December 12th meeting as a foregone conclusion, as though the Company had already made the decision to implement the changes for the Union on January 1, 2012.<sup>18</sup> (Tr. 97, 124.) Logic dictates that, if Mike-sell's had actually presented the proposals to the Union as a foregone conclusion and had mentioned nothing about bargaining, then Union members would be expected to have raised questions or concerns at the informational meeting, yet none were raised. (Tr. 97, 109, 125.) The Union's testimony does not fit with the surrounding circumstances.

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<sup>18</sup> The ALJ, in his Decision, also makes the broad finding that, "[i]n 2011, [Mike-sell's] decided to make reductions to employees' benefits." (ALJD, p. 3.) To the extent that this finding conveys that Mike-sell's never intended to bargain with the Union over the proposed changes to bargaining unit members' health and welfare benefits, it is directly contrary to the undisputed evidence in the record.

Evidence regarding the December 12th informational meeting is also important because it reveals inconsistencies in the Union's testimony. Mr. Clark denied that Ms. Wille referenced her upcoming bargaining session with the Union at the December 12th informational meeting, suggesting that he had no idea that Mike-sell's would be talking with the Union at all. (Tr. 124-25.) This testimony was flatly contradicted by both Ms. Wille and Mr. Campbell, each of whom explained that Ms. Wille did indeed disclose that she would be meeting with the Union about the proposed changes. (*Compare* Tr. 124-25 with Tr. 97, 155, 207.) Mr. Campbell further confirmed that, even before the informational meeting, he had informed Union members "what was going on" and that the Union and the Company "were going to have a meeting about the insurance" so that "everybody was on the same page." (Tr. 99.)

#### **E. The Union's Demand to Bargain Outside the Contractual Timelines**

Mr. Newsome testified—and the ALJ held—that Mike-sell's had the exclusive obligation to push the contractual reopener process forward from step to step. (ALJD, p. 9 at fn.7; Tr. 50, 89.) However, the Labor Agreement does not identify any particular party as being exclusively responsible for moving the process forward. (GX-2, p. 16.) In fact, the Labor Agreement specifically refers to "the request of either party for binding arbitration," which does not reflect an intent to place the onus of requesting arbitration on the party who requested the reopener. (GX-2, p. 16 (emphasis added).) Furthermore, if Mike-sell's had sole responsibility for moving the reopener process forward, then the Union would not have sent a letter on January 13, 2012, attempting to submit the matter to the mediation. (GX-26.) Rather, based on the strict constructionist attitude that the Union had adopted thus far,<sup>19</sup> it seems much more likely that the Union would have claimed that Mike-sell's had waived the right to move to the next step in the reopener process because the

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<sup>19</sup> On December 2, 2011, the Union claimed that the Company's notice to reopen negotiations was "void" because it was served seven days prior to the one-year anniversary of the Labor Agreement's execution date. (Tr. 31; GX-17, pp. 4-5; RX-1, pp. 16-17.)

Company did not request mediation within ten days of the parties' bargaining session, thereby forcing the Company to begin the reopener timeline all over again and buying even more time for Union members. It makes no sense that the Union would suddenly take initiative to attempt to move the reopener process along, if it truly had no obligation to do so.

#### **F. The Union's Inconsistent Testimony**

The ALJ either ignored or hastily discounted several inconsistencies between the testimony of Union witnesses. In addition to the inconsistencies between Mr. Clark's testimony and Mr. Campbell's testimony as explained in Section IV(D) of this Brief, the Union's testimony about its overall bargaining stance on the proposed health and welfare changes is also inconsistent, as are the ALJ's findings in that regard.

Mr. Campbell adamantly testified—and the ALJ found—that the Union had already decided, “[b]efore entering the December 14 session,” that it would not agree to any change whatsoever “unless it was going to be for the better.” (ALJD, pp. 4, 6; Tr. 94, 100.) Mr. Campbell thus did not testify that the Union raised any alternative proposals during the December 14th bargaining session. (Tr. 98-100.) In contrast, Mr. Newsome testified—and the ALJ found—that the Union proposed “a number of alternatives” during the December 14th bargaining session, such as implementing a smaller reduction in HSA contributions or postponing the changes until June 2012, the latter of which Mr. Campbell specifically denied being discussed. (ALJD, pp. 6-7; *compare* Tr. 34-35 *with* Tr. 100.) Either of Mr. Newsome's proposed alternatives would obviously result in some reduction to health and welfare benefits, which would not be consistent with Mr. Campbell's emphatic stance of only accepting a “change for the better.” The ALJ gave no explanation for how he reconciled these inconsistencies.

The ALJ also ignored or discounted other differences in the testimony of Mr. Newsome and Mr. Campbell. For example, Mr. Newsome testified that the December 14th bargaining session occurred in a downstairs conference room, while Mr. Campbell testified that it took place upstairs in Ms. Wille’s personal office—an inconsistency that the ALJ hastily dismissed as not being “meaningful.” (ALJD, p. 9 at fn.6; *compare* Tr. 33 *with* Tr. 98, 108-09.) Next, Mr. Newsome denied that Ms. Wille ended the bargaining session by stating that the changes would be implemented for the Union on January 1st, whereas Mr. Campbell admitted that Ms. Wille had announced as much—an important contradiction in testimony that the ALJ either did not catch or blatantly ignored. (ALJD, pp. 6-7; *compare* Tr. 80 *with* Tr. 110, 112.) Also, Mr. Newsome claimed that the agreement to pay Maintenance Mechanics at a rate higher than in the Labor Agreement is reflected in a “letter” signed by both the Company and the Union, yet he failed to bring a copy of this purported “letter” to the hearing,<sup>20</sup> and Mr. Campbell later confirmed that this pay raise was indeed based on a purely verbal agreement. (ALJD, p. 8 at fn.5; *compare* Tr. 83-87 *with* Tr. 114-16.) These compounding inconsistencies belie the ALJ’s conclusion that the Union’s witnesses were credible and corroborative.

#### **G. Ms. Wille’s Demeanor and Testimony**

The ALJ improperly found that Ms. Wille’s account was “implausible in the extreme” and that Ms. Wille “was a less than fully credible witness based on her demeanor and testimony as [a] whole.” (ALJD, pp. 7-8.) The ALJ criticizes Ms. Wille’s testimony because it was not corroborated (ALJD, p. 5 at fn.3, 9-10), whereas the General Counsel called three Union witnesses and introduced notes to corroborate Mr. Newsome’s testimony (ALJD, pp. 9-10).

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<sup>20</sup> Mr. Newsome provided examples of several written agreements for successor contracts to the General Counsel for use at the hearing, yet he failed to provide the purported “letter” dealing with the extra-contractual Maintenance Mechanic’s pay increase. (Tr. 42-43, 47, 83-87; GX-22; GX-24.) Notably, the General Counsel produced no examples of written agreements reached on mid-term bargaining issues.

However, there is no principle of law applicable to Board proceedings that requires the testimony of interested witnesses to be ignored or rejected simply because of the absence of corroboration. *See, e.g., In re Skippy Enterprises, Inc.*, 211 NLRB 222, 225 (1974).

In any case, Ms. Wille did, in fact, introduce corroborating evidence of the December 14th bargaining session in the form of her personal notes taken during the regular course of business to document the meeting. (Tr. 174-75; RX-3.) The ALJ decided that Ms. Wille's notes were "less reliable" than Mr. Newsome's notes based on the fact that Ms. Wille could not recall whether she had taken all of the notes at the meeting itself or whether she made some notes after the meeting. (ALJD, pp. 9-10; Tr. 176-77.) It appears that, in making this credibility determination, the ALJ has confused and/or merged the "present sense impression" hearsay exception (which requires that the out-of-court statement be made "while the declarant was perceiving the event or condition, or immediately thereafter") with the "business records" hearsay exception (which requires only that the record be made "at or near the time [of the event]"). (*Compare* Federal Rule of Evidence 803(1) *with* Federal Rule of Evidence 803(6).) Ms. Wille testified that, while all her notes were made the same day as the bargaining session, some notes may have been made at the bargaining session itself while others may have been made shortly thereafter. (Tr. 176-77.) This comports perfectly with the "business records" exception, which means that Ms. Wille's notes are just as reliable as Mr. Newsome's notes.

The ALJ evaluated Ms. Wille's "demeanor" based on the fact that (1) she "had no direct knowledge regarding the circumstances of [certain unwritten, midterm agreements between the parties];" and (2) she "gave the impression of being extremely impatient to see the health care changes implemented" based on her "premature filing of the reopening notice and her insistence on going ahead with a date for federal mediation even after Newsome stated that the Union could

not be present on that day.” (ALJD, pp. 8-9.) The ALJ’s findings regarding Ms. Wille’s demeanor are based on evidence that was misconstrued and taken out of context.

As to the unwritten agreements, Ms. Wille has worked for Mike-sell’s for over six years, and she has personal knowledge of existing unwritten agreements, despite the fact that some were entered prior to her tenure. (Tr. 182, 188-95.) Her knowledge is based on the fact that, during the course of her employment, she noticed that certain things were not being done according to the terms of the Labor Agreement. (Tr. 200.) Like any responsible human resources manager, Ms. Wille inquired as to why the Labor Agreement was not being followed the way it was written. (Tr. 199-200.) Through her inquiries, Ms. Wille gained “institutional knowledge” from Company officials, who informed her of various unwritten, mid-term agreements that had been negotiated between the parties. (Tr. 199-201.) Ms. Wille needed to know whether the deviations were simply a past practice (which can easily be discontinued when the practice is in direct conflict with the Labor Agreement) or whether the deviations were bargained-for changes that were simply never put in writing (which cannot be changed without further bargaining). Given that Ms. Wille needed to know the status of these existing contract deviations to determine whether they were legally required to continue, it is entirely reasonable that she would seek out accurate historical information. The fact that Mike-sell’s has admitted to the existence of these unwritten agreements—all of which were proposed by the Union, not the Company—further demonstrates Ms. Wille’s credibility. After all, Mike-sell’s has nothing to gain by providing sworn testimony regarding the existence of unwritten agreements—favorable to the Union—that serve to bind and restrict the Company from following the terms of the Labor Agreement as written.

As to the premature reopener filing, there is no evidence that Ms. Wille intended to “jump the gun” by deliberately filing the notice to reopen a week early. It is easy to see how such a mistake was made. The effective date of the Labor Agreement is printed conspicuously on the cover of the Labor Agreement itself, which is the date that Ms. Wille consulted before issuing the notice. (GX-2.) The execution date of the Labor Agreement happened to occur several months after the effective date, and the execution date is not printed in bold on the cover of the Labor Agreement. Ms. Wille simply made a mistake in serving the notice a week early, based on the effective date (rather than the execution date) of the Labor Agreement. This mistake does not demonstrate “extreme impatience” or an incredible demeanor.<sup>21</sup>

As for the mediation, Ms. Wille chose November 29, 2011, as a mediation date because that was the date that Mr. Newsome had specifically stated he could be available. (Tr. 20-21, 159-60, 162; GX-7; RX-1, p. 5.) It was not unreasonable for Ms. Wille to rely on Mr. Newsome’s representations of availability at the time the mediation was scheduled. It was also not unreasonable for Ms. Wille to keep the mediation on the calendar even after Mr. Newsome claimed that he had suddenly become unavailable, as Ms. Wille reasonably expected Mr. Newsome to reschedule whatever he had scheduled in the meantime in order to honor his commitment to be available for the reopener. Ms. Wille’s actions do not demonstrate “extreme impatience” or an incredible demeanor, as found by the ALJ. Rather, they reflect those of a party who is diligently endeavoring in good faith to comply with contractual timelines, despite the Union’s attempts to delay the reopener process.

Furthermore, Ms. Wille was forthright and steadfast in her testimony, and she gave a consistent and detailed explanation of events. (Tr. 141-217.) The General Counsel elicited

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<sup>21</sup> To the extent that Mike-sell’s was faulted for the premature reopener notice, the Union should have also been faulted for waiting over three weeks to object to this procedural flaw. (GX-17, pp. 14-15; RX-1, pp. 16-17.)

nothing during Ms. Wille's cross examination that would suggest she was not telling the truth about what occurred before, during, or after the December 14th bargaining session. Moreover, Ms. Wille's actions before, during, and after the bargaining session are consistent with those of a party who is determined to comply with the contractual reopener process and who would have aggressively continued pursuit of that process if no agreement had been reached.<sup>22</sup> Even the ALJ found that Ms. Wille expressly informed the Union of her intention to proceed to binding arbitration, if an agreement was not reached in negotiations or mediation. (ALJD, p. 4.)

In contrast, Mr. Newsome and Mr. Campbell were not credible witnesses. Mr. Newsome's testimony was directly inconsistent with Mr. Campbell's testimony on several points, as explained in Section IV(F) above. Their testimony was self-serving and vague,<sup>23</sup> and their demeanor on cross examination was evasive and defensive. It is clear that neither Mr. Newsome's testimony nor Mr. Campbell's testimony is nearly as complete or as detailed as Mr. Wille's testimony regarding the December 14th bargaining session. (*Compare* Tr. 33-37, 40-41, 99-100, 110-12 *with* Tr. 169-73, 177-80.) It is also plain that, while the Company's actions are consistent with its stance before, during, and after the bargaining session, the Union's avoidance tactics and strategic inaction would not be expected to follow from its purported emphatic

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<sup>22</sup> The ALJ focused on the fact that, at one point, Ms. Wille may have confused the Union's Labor Agreement terms with those of other bargaining units whose contracts allow unilateral modifications of healthcare benefits. (ALJD, pp. 7-8.) While Ms. Wille may have suffered from a moment of confusion at the hearing, it was of no consequence. Ms. Wille was clearly aware of the contractual reopener process, as she had made great efforts to follow it. She knew that process required the Company either to bargain with the Union until agreement or to obtain a favorable arbitration decision before implementing any changes. (Tr. 154-55, 215-17.) She also knew the difference between the Union's Labor Agreement and other bargaining unit contracts, which is why she did not serve the Union with the same letter as the other unions in November 2011. (ALJD, p. 4, at fn.2; Tr. 154-55, 216; GX-42.)

<sup>23</sup> When asked whether he was sure what was said at the December 14th bargaining session, Mr. Newsome admitted he could not recall exactly what was said, but he remembered "words to that effect." (Tr. 81.) Mr. Campbell also testified in a vague and evasive manner that "we both pretty much told [Ms. Wille] the same thing that people can't afford that. They just can't, they can't afford to take that kind of cut. . . . That was it. Like I said we spoke in a meeting and we said that we couldn't make any changes, couldn't agree to that and that, that was it. . . . [W]e just kind of just stopped and kind of said, I think both parties kind of said we'll see what happens." (Tr. 99-100.)

disagreement with the Company's stated objectives. Overall, the preponderance of the evidence does not support the ALJ's finding that the Union's witnesses are more credible than Ms. Wille.

**V. CONCLUSION**

For the reasons stated above, the Company's exceptions should be granted, the ALJ's ruling should be reversed, and the General Counsel's Complaint should be dismissed because:

The record as a whole does not contain a preponderance of evidence that the parties reached an agreement at the December 14th bargaining session;

The record as a whole does not contain a preponderance of evidence to support the ALJ's witness credibility assessments, factual findings, conclusions of law, remedy, and order; and

The record as a whole does not contain a preponderance of evidence that the Company violated Section 8(a)(1) and 8(a)(5) of the Act.

Respectfully submitted,

*/s/ Jennifer R. Asbrock*

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Jennifer R. Asbrock (0078157)

Robert J. Brown (0010402)

THOMPSON HINE LLP

Austin Landing I

10050 Innovation Drive, Suite 400

Dayton, Ohio 45342-4934

Tel. (937) 443-6849

Fax. (937) 443-6635

Bob.Brown@ThompsonHine.com

Jennifer.Asbrock@ThompsonHine.com

Attorneys for Mike-sell's  
Potato Chip Company

**CERTIFICATE OF SERVICE**

I hereby certify that on July 30, 2012, Respondent Mike-sell's Potato Chip Company's Brief in Support of Exceptions to the Decision of Administrative Law Judge Paul Bogas was electronically filed through the National Labor Relations Board website (www.nlr.gov), with copies sent to the following in the manner described below:

By Federal Express, overnight delivery, eight (8) copies to:

Lester A. Heltzer  
Executive Secretary  
National Labor Relations Board  
1099 14th Street, NW, Room 5400 East  
Washington, DC 20570

By Federal Express, overnight delivery, one (1) copy each to:

Gary W. Muffley, Regional Director  
National Labor Relations Board Region 9  
3003 John Weld Peck Federal Building  
550 Main Street  
Cincinnati, Ohio 45202-3271

Eric Oliver, Esq. and Zuzana Murarova, Esq.  
c/o Office of the General Counsel  
National Labor Relations Board Region 9  
3003 John Weld Peck Federal Building  
550 Main Street  
Cincinnati, Ohio 45202-3271

Vester Newsome, Financial Secretary-Treasurer  
Bakery, Confectionery, Tobacco Workers and  
Grain Millers Int'l Union (BCTGM) Local 57  
555 East Rich Street  
Columbus, Ohio 43215-5356

*/s/ Jennifer R. Asbrock*  
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Jennifer R. Asbrock