

**UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD**

**SHEET METAL WORKERS INTERNATIONAL
ASSOCIATION LOCAL No. 18 – WISCONSIN, AFL-CIO**

Respondent,

and

Case No: 30-CB-075815

EVERBRITE, LLC

Charging Party.

**RESPONDENT’S EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE
LAW JUDGE**

Respondent, Sheet Metal Workers International Association Local No. 18, by its attorneys, excepts to the following portions of the decision of Administrative Law Judge Arthur Amchan:

1. Page 3, lines 25-26. The ALJ erred when he found as an undisputed fact that the Union received a copy of the Company’s filed FMCS form F-7, cited by the ALJ as G.C. Exh. 19, on December 27th, 2011. The parties stipulated that on December 27, 2011 the Union’s office received only a letter from the FMCS, not Everbrite, stating that it had been notified, “...of your upcoming collective bargaining negotiations.” (Tr. 8-9). The Union did not receive a copy of the F-7 form filed by Everbrite in December of 2011, marked as G.C. Exh. 15, until it was turned over by subpoena in preparation for the hearing in June of 2012. (Tr. 59-60). As neither the General Counsel nor Employer have even alleged that the Union received the December F-7 form before the hearing, the Union believes this to be a mistake a fact by the ALJ.

2. Page 3, lines 33-35. The ALJ erred when he found as an undisputed fact that the Union Financial Secretary Randy Krocka raised the possibility of grandfathering employees who were close to retirement so that they would not be affected by any changes to the collective bargaining agreement at the December 21st meeting. At the December 21st meeting Krocka only criticized the Company's proposal by stating that its competitor had at least proposed to grandfather in employees who were close to retirement. Krocka did not propose that grandfathering would be acceptable to the Union or make any proposals of any kind. (Tr. 150-151).

3. Page 4, lines 14-28. The ALJ erroneously concluded that the Company proposals of October 25, 2011 and December 21, 2011 were effective notice of the Company's desire to reopen the agreement. The plain language of the proposals was for midterm modification and extension of the current contract effective December 1, 2011, three months before the contract could reopen and a successor contract could begin. (Tr. 98-99). Both proposals were only notice that the Company desired midterm modifications to the existing contract, they were not notice that if the Union rejected the proposals the Company would then desire to reopen the agreement and negotiate a successor contract months later.

4. Page 4, lines 30-32. The ALJ erroneously concluded that the Union subjectively understood that Everbrite intended to bargain for a new contract and that this was reflected by agreeing to bargaining sessions in January with its bargaining committee. The Union's conduct demonstrated only that it understood the Company to be making proposals for immediate midterm modifications and extension of the existing contract. Further, the parties' collective bargaining agreement required actual written notice to reopen the agreement. The Company orally requested meeting dates with the bargaining committee after both proposals had been

presented and the Union had stated it would not bargain over them. (Tr. 65). As a result, the Union's understanding based on an oral statement by the Company, after the parties had discussed the proposals, is not relevant to the question of whether adequate written notice had already been provided in the proposals themselves.

5. Page 4, lines 38-46. The ALJ erroneously concludes that the matter should not be deferred to arbitration. Local 18 excepts to this conclusion on the general grounds that it is counter to the plain language of the parties' agreement and standing legal precedent. It further objects to the specific reasoning of the ALJ as follows:

- a. Page 4, Lines 38-40. The ALJ erroneously concludes that deferral is inappropriate when the merits of the case have been fully litigated in the hearing and deciding in favor of it would delay resolution. This is inconsistent with Board precedent. The Company had a contractual obligation to arbitrate the dispute. It refused to do so when requested.
- b. Page 4, Lines 40-43. The ALJ erroneously concludes that because the Union sent a letter indicating its willingness to arbitrate five days before the hearing that it intended to delay resolution of the case. This is inconsistent with Board precedent. There is no support for this conclusion on the record. The Company did not even contact the Union to request scheduling, but took the position that deferral was inappropriate. (Er. Exh. 1).
- c. Page 4, Lines 43-45. The ALJ erroneously concluded that Union's conduct constitutes a rejection of the principles of collective bargaining and that deferral is not proper under *Rappazo Electric Co.*, 281 NLRB 471, fn. 1 (1986). As a matter of law the Union's position that the Company did not provide written notice to reopen the

contract does not constitute a rejection of principles of collective bargaining. *Rappazo Electric* is not controlling authority as it was a case involving an employer's repudiation of a collective bargaining agreement and is inapplicable to the parties' dispute over a roll over clause. Further, so far as it is applicable to a dispute over a roll over clause, it has been overruled.

6. Page 5, Conclusion of Law, lines 3-5. The ALJ erroneously concludes that the Union violated Section 8(b)(3) of the Act in refusing to bargain over a successor collective bargaining agreement to its March 1, 2009 – February 29, 2012 contract with Everbrite. The Company failed to provide written notice of desire to reopen the contract as required and the Union therefore had no obligation to negotiate a successor agreement as the contract has rolled over until 2013.

7. Page 5-6, Remedy and Order, lines 9-39, 1-13. The ALJ erroneously ordered remedies instructing the Union to cease and desist from refusing to bargain for a successor agreement and to take specified affirmative actions. As the Union has not violated Section 8(b)(3) of the Act such remedies are unwarranted.

Dated this 24th day of August, 2012

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Charging Party.

**MEMORANDUM OF LAW IN SUPPORT OF THE SHEET METAL
WORKERS INTERNATIONAL ASSOCIATION LOCAL No. 18's
EXCEPTIONS TO THE ALJ'S DECISION**

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STATEMENT OF THE CASE

The charging party Everbrite LLC filed an unfair labor practice against the respondent Sheet Metal Workers Local No. 18 alleging that the Union, by asserting that the Company had not properly reopened the contract and the contract had renewed for another year, had refused to bargain in good faith in violation of 8(b)(3) of the Act. The General Counsel subsequently issued a complaint against the Union.

The Administrative Law Judge held that Everbrite's two proposals for midterm modifications and extensions of the current agreement constituted written notice to terminate the agreement under the duration clause. Accordingly, the ALJ held the Union had violated 8(b)(3) of the Act.

The Union did not violate the Act. Demands for midterm concessions did not reopen the labor agreement under its terms. Moreover as this case turns on the interpretation of the labor agreement, it should be deferred to the grievance and arbitration provision in the parties' agreement.

STATEMENT OF FACTS

Everbrite manufactures large signs and at six manufacturing facilities: South Milwaukee, Wisconsin; Elkhorn, Wisconsin; Pardeeville, Wisconsin; Chanute, Kansas; Mt. Vernon, Illinois; and Buena Vista, Virginia. (Tr. 25-35). Barb Schaal is the Vice President of Administration and is responsible for labor negotiations. (Tr. 28).

Local 18 represents approximately 30 employees at the South Milwaukee plant. (Tr. 10). The employees perform a variety of production and maintenance work. (GC Exh. 2). Randy Krocka is the financial secretary for Local 18. (Tr. 138). Earl Phillips is a business representative. (Tr. 11).

The current labor agreement (“Agreement”) (GC Exh. 2) provides in Article XXXII, Section 2 that:

This Agreement, and any amendments hereto as provided above, shall remain in full force and effect through February 29, 2012. Thereafter, this Agreement shall continue in effect on a year to year basis, unless either party notifies the other of its intent to modify, or terminate this Agreement, and does so in writing at least (60) days prior to the expiration date.

(GC Exh. 2).

Each party knew by long established practice how to reopen the Agreement. By letter dated November 20, 1984, Everbrite sent a timely notice to reopen the Agreement. (U. Exh. 3). The letter stated in part, “In accordance with Article XXI, Section 2, of the present agreement this letter is the sixty (60) day notice to you that Everbrite Electric Sign, Inc. desires to reopen the agreement...”

Likewise, by letters dated in 1990, 1993, 1999, 2002, 2005, and 2008 Local 18 sent timely notices to reopen the Agreement. (Er. Exh. 6-9, 15). In 2008, the notice to reopen the Agreement in pertinent part read: “Pursuant to Article XIX of the current agreement this is the SIXTY (60) day notice to you that Local #18 desires to re-open this Agreement.” (Er. Exh. 10).

On June 13, 2012, the Union sent a letter to Everbrite expressing its willingness to submit the dispute to the Joint Board under the parties’ grievance and arbitration provision. (GC Exh. 28). The parties have not had an arbitration or Joint Board meeting because they have been able to resolve disputes at prior steps. (Tr. 76). The grievance and arbitration provision states that either party may submit a dispute to the Joint Board and eventually arbitration. Article X, Section 3 states in part,

Further, it is agreed that in the event that any grievance or interpretation of this Agreement arises which effects more than one (1) employee in the bargaining unit, either party may request a meeting of the "Joint Board."

(GC Exh. 2).

Article XI Section 1 states further,

If the grievance has not been satisfactorily settled by the Joint Board or otherwise resolved by the parties; either party may submit the dispute to arbitration with thirty (30) days after the meeting of the Joint Board after giving prior notification of five (5) days to the other party of intention to arbitrate.

(GC Exh. 2).

The wages of Local 18 members at Everbrite are at the very bottom of the range of wages both for union members generally and the sign industry itself. (Tr. 150). However, Everbrite has been consistently profitable. In a BizTimes article, an Everbrite representative confirmed the Company's success. The article read, "Everbrite would not disclose its revenues for 2010. However, Horneck said the company fared well during the recession because of its diversified customer base and because of whom some of its largest customers are." (Tr. 78). On October 26, 2011, the Company owners sent a Memo stating that the Company had had "...exceptional sales and financial results the past several weeks." (U. Exh. 1).

Despite its success, Everbrite decided to seek concessions from its workers. In early 2010, the Company hired Rick Sherman as a member of its advisory board to cut labor costs. (Tr. 11). The Company demanded concessions from all of its union represented employees. (Tr. 36). Everbrite did not wait for each union's contract to expire or reopen. It sought midterm concessions. (Tr. 82-83).

On October 28, 2010, the Company demanded concessions from the Union at its La Crosse, Wisconsin facility. (Er. Ex. 5). The Company told the membership at La Crosse that accepting the concessions was the only way to keep the plant open. The proposed concessions

called for a wage cut and five year extension. The Union agreed to the concessions (Tr. 81). The Company closed the plant in early 2011. (Tr. 29, 81-82).

In 2010 Everbrite sought midterm concessions from Local 18 and other unions. (Tr. 140). The Union, in accordance with its practice, agreed to listen to the Company's request. During the last several years it has been very common for employers to approach the Union to request midterm modifications. (Tr. 140). It is common practice for the Union to meet and listen to an employer's request. (Tr. 140).

On December 3, 2010, Randy Krocka, Union business agent Earl Phillips and Rick Sherman met. (Tr. 142-143). At that meeting Sherman discussed a written Company proposal for midterm concessions. (U. Exh. 2). That proposal, dated 11/18/10 sought a 12 percent wage reductions "effective immediately" and a five year wage freeze. Krocka told Sherman that they were not interested in reopening the contract. (Tr. 142).

On July 21, 2011, the Company asked to meet. (GC Exh. 3). The parties agreed to meet on August 29th primarily to discuss the Mark Rumpel grievance. (GC Exh. 4-5). The Company did not mention the purpose of the meeting or use the phrase "negotiations", "bargain", or "re-open" in any of its email correspondence leading to the meeting. Instead, the Company stated only, "[t]he plan will be to have the meeting with Rick Sherman and discuss the Mark Rumpel grievance." (GC. Exh. 5).

On August 29, 2011, only Earl Phillips from the Union attended. (Tr. 42). The parties discussed and resolved the Rumpel grievance. Afterwards Sherman came into the meeting and expressed to Phillips the Company's desire for midterm concessions. Phillips refused to bargain. (Tr. 44-45, 89). The meeting ended.

In early September, Schaal again sought a meeting with the Union. (GC Exh. 6). By email dated September 26, Schaal asked if the bargaining committee would be attending the next meeting. (GC Exh. 7). In response, the Union stated that it would meet "...to further discuss your concerns, but at this time we will not need a bargaining committee until we feel that your concern warrant opening the contract." (GC Exh. 7). Schaal understood that the Union was not agreeing to open the contract. (Tr. 92-93).

On October 25, 2011, the parties met. Only Krocka and Phillips came on behalf of the Union. As it was not a bargaining session for a new contract, the Union did not bring a bargaining committee. At the meeting, the Company provided the Union with a proposal for concessions "Effective December 1, 2011." (GC Exh. 8). Schaal threatened that if the Union did not accept the concessions its jobs would be outsourced and the South Milwaukee plant closed. (Tr. 48).

The Union again stated it had no intention of opening the agreement. (Tr. 147). The Union made no counterproposals. (Tr. 147-148). The parties then exchanged information requests on withdrawal liability and the office health plan. (Tr. 148).

After the meeting, the Company sent an email requesting a second meeting. (GC Exh. 13). The emails set up only a time to meet, December 21st, and did not state that the Company had reopened the agreement or that the meeting was for negotiations for a new contract. (GC Exh. 13-14).

On December 14, 2011, unknown to the Union, Robert Shorewood filled out an F-7 form and submitted it directly to the FMCS. (Tr. 59; GC Exh. 15). Sherwood has been the Director of Employment, Labor, and Compensation with Everbrite for over twelve years. (Tr. 125). The F-7 form provided three options for notice type: "Renegotiation," "Reopener," "Initial contract." (GC

Exh. 15). Sherwood did not check “Reopener.” Instead, Sherwood checked “Renegotiation” indicating that the parties were about to engage in negotiations to modify the existing agreement. (GC Exh. 15). The Union was never sent or given a copy of this F-7 form from the Company or FMCS.

On December 21st, Krocka and Phillips met with Schaal and Sherman. (Tr. 149). Again the Union did not bring a bargaining committee. (Tr. 1-201). The Company provided the Union with a written proposal. (GC. Exh. 16). The proposal stated at the very top that its terms were to be “Effective December 1, 2011.” Krocka stated that at least other employers had had the respect to grandfather in existing employees. (Tr. 150). The Union made no counterproposals. (Tr. 149-150). The Union stated that it was not interested in bargaining. (Id).

Everbrite then asked the Union to meet in January. (Tr. 151). The Company did not indicate whether the January meeting would be to negotiate a successor agreement pursuant to reopening the contract or if it would be continued discussions for a midterm modifications. (Tr. 1-201). The Union initially agreed, but ultimately cancelled the meeting. Everbrite sent no confirmation of the meeting in writing before the deadline to reopen the contract. (Tr. 1-201).

As the Union itself had an option to reopen the contract or allow it to renew for another year, it held a meeting with its membership on December 27, 2012. (Tr. 181). As is customary when the Union has an option to reopen the contract or the Company still might send notice, the Union distributed surveys to the membership to see what they would potentially want if the contract reopened. (Tr. 158).

The Union’s office received a letter from the FMCS on December 27th. (Tr. 8-9). The letter offered mediation services and stated in only vague terms that, “The Federal Mediation and Conciliation Service (FMCS) has recently been notified of your upcoming collective bargaining

negotiations.” (GC Exh. 19). Sherwood’s F-7 form for renegotiation was not attached. While the Union’s office received the letter, Krocka did not. As it was the holidays, Krocka was working exclusively from home until after the New Year. (Tr. 173). Krocka did not see the letter until January of 2012. (Id).

On January 6, 2012, Krocka met with the bargaining unit. (Tr. 160). Krocka informed the membership that the contract had rolled over for another year and the Union did not intend to open the contract. (Tr. 184). On January 7, 2012, Krocka sent an email to Schaal stating that both parties had missed the 60 day deadline to reopen the agreement as found in Article XXXII, Section 2 of the Agreement. Krocka stated further that the Union understood the contract had rolled over for an additional year. (GC Exh. 18).

On January 9, 2012, Krocka received a letter from the Company’s attorney Robert Mulcahy. (U. Exh. 5). The letter was copied to be filed with the FMCS and Wisconsin Employment Relations Commission. Mulcahy stated in the letter that the Union had received notice from the FMCS in December of “reopening” the contract. Mulcahy then stated that this was notice again that the Company was seeking to reopen the contract. Attached to the letter was a new and completely different FMCS form F-7. The form was signed and dated by Mulcahy on January 9, 2012, not December 14, 2011. Further, where Sherwood had checked “Renegotiation” in December, Mulcahy had now checked “Reopener.” Mulcahy was filing a different and new F-7 form with the FMCS nine days after the 60 days notice was due.

Schaal provided an affidavit to Region 30. In it she stated that, “[p]rior to January 9, 2012, the Employer had not provided written notice to the Union requesting termination or modification of the contract.” (Tr. 95).

ISSUES PRESENTED

1. Did the ALJ err when he concluded that the matter should not be deferred to arbitration? (Exception 5)
2. Did the ALJ err when he concluded that the Company proposals of October 25, 2011 and December 21, 2011 were effective written notice of the Company's desire to reopen the agreement? (Exceptions 3,6,7)
3. Did the ALJ err when he concluded that the fact that the Union agreed to bargaining sessions in January demonstrated that the Union understood by the two midterm proposals that Everbrite intended to reopen the contract? (Exception 4)
4. Did the ALJ err when he found as an undisputed fact that the Union received a copy of the Company's filed FMCS form F-7, cited by the ALJ as G.C. Exh. 19, on December 27th, 2011? (Exception 1)
5. Did the ALJ err when he found as an undisputed fact that the Union Financial Secretary Randy Krocka raised the possibility of grandfathering employees who were close to retirement so that they would not be affected by any changes to the collective bargaining agreement at the December 21st meeting? (Exception 2)

ARGUMENT

I. THE CHARGE SHOULD BE DEFERRED.

A. Disputes Over the Interpretation of a Duration Clause Are Arbitrable and Subject to Deferral.

The present charge should be deferred to the grievance and arbitration procedure in the collective bargaining agreement. Disputes over whether a contract has rolled over under a provision of a collective bargaining agreement are subject to arbitration and the Board's policy of deferral. In *Tri-Pak Machinery, Inc.*, 325 NLRB 671 (1998) the Board held,

We find no merit in the General Counsel's broad assertion that deferral to arbitration is inappropriate for questions regarding extensions or renewals of collective bargaining agreements as to which the parties are in dispute. If there is no dispute about the existence of the contract containing the arbitration clause, and the clause, as here, broadly covers all disputes about contractual terms, then disputes concerning the renewal or termination of that contract are appropriate for arbitration.

Id. at 673.

In *Laborer's Union Local 67*, 2002 NLRB LEXIS 82, the administrative law judge followed *Tri-Pak* and stated:

The issue decided under the 1999 agreements' grievance and arbitration procedures was not whether or not the contracts were valid, but rather whether or not they automatically renewed. Thus counsel for the Respondents argues the General Counsel's arguments are misplaced and the cases dealing with a refusal to defer when the issue is the existence of a contract are inapplicable. This is a case involving a contract renewal issue.

Id. at 18.

The judge here relied on a footnote in a case that preceded *Tri-Pak* by twelve years, *Rappazo Electric Co.*, 281 NLRB 471, fn. 1 (1986), for the proposition that deferral is not proper in a dispute over a renewal clause in the parties' collective bargaining agreement. In *Rappazo* an employer repudiated the agreement and unilaterally changed its terms. Here, the Union did not repudiate the collective bargaining agreement. It abided by it. This case is governed by the Board's subsequent decision in *Tri-Pak*.

The dispute here arose within the confines of a long collective bargaining relationship between Everbrite and Local 18. There is no claim of employer or union animosity. The parties' agreement provides for arbitration of a very broad range of disputes and the arbitration clause clearly encompasses the dispute at issue. The Union has indicated its willingness to allow Everbrite, as the aggrieved party, to submit the dispute to arbitration; foregoing any procedural or timeliness arguments. As there have been no arbitrations or grievances taken to the Joint Board, there is no past practice to modify the plain language of the agreement. The plain language of Article X, Section 3 provides that either party may submit a very broad range of disputes directly to the Joint Board. "Further, it is agreed that in the event that any grievance or

interpretation of this Agreement arises which effects more than one (1) employee in the bargaining unit, either party may request a meeting of the ‘Joint Board.’” Article XI, Section 1 allows either party to submit the dispute to arbitration. “If the grievance has not been satisfactorily settled by the Joint Board or otherwise resolved by the parties; either party may submit the dispute to arbitration within (3) days after the meeting of the Joint Board.” As the current dispute turns on the interpretation of Article XXXII of the agreement, the grievance and arbitration provision encompasses it.

B. Deferral Was Timely Asserted by the Union.

The Union’s deferral argument was timely asserted. Yet, the ALJ dismissed the Union’s deferral argument by claiming that the mere fact that it first raised the possibility and defense shortly before the hearing showed an intent to delay resolution of the parties’ dispute.

There was no intent to delay resolution by the Union. It was Everbrite’s duty as the party claiming that the agreement had reopened to file a grievance and seek arbitration. *Chemical Workers Local 6-0682*, 339 NLRB 291 (2003). It failed to do so. The Union proposed compliance with the parties’ grievance and arbitration procedure before the hearing. Everbrite declined; failing to agree even to expedited arbitration.

The Union amended its answer prior to the hearing. (GC Ex. 1). Section 102.23 of the Board’s Rules and Regulations allows a respondent to amend their answer any time prior to the hearing. *See also, Laurel Baye Healthcare of Lake Lanier, LLC*, 346 NLRB 159, fn.1 (2005) (“Sec. 102.23 of the Board's Rules permits a respondent to ‘amend his answer at any time prior to the hearing.’”).

The Board has held that deferral arguments raised for the first time at the hearing, in addition to answers, are timely raised.

It is inappropriate, however, to defer when no arbitral awards have issued and the Respondent has not sought deferral in view of the Board's long-held view that it will not defer to prospective arbitration unless the argument for deferral is asserted before or during an unfair labor practice hearing.

15th Avenue Iron Works, 301 NLRB 878, 879 fn. 12 (1991) enf'd. 964 F.2d 1336 (2d Cir. 1992); *United Technologies (II)*, 274 NLRB 504 (1985); *See Also Harbor View Health Care Ctr.*, 2010 NLRB LEXIS 72, 151, fn.52 (ALJ held "Deferral is an affirmative defense that can be waived if not raised in a timely fashion. To be timely raised, such a defense must be raised either in the answer or at the hearing.")

The Board recently reaffirmed the holding in *Gene's Bus Co.*, 357 NLRB No. 85 (2011), addressing the merits of a Respondent's deferral argument because it was raised in its answer.

The Respondent asserted this defense in its answer to the complaint and in its exceptions. Although the Respondent's exceptions and brief are not clear, and it advances no specific argument for deferral, we infer that it is excepting to the judge's failure to defer to the arbitral award, and is thus requesting that we defer.

Id. at 25, fn. 23.

In short, the Board has held that deferral arguments raised either in a party's answer or at trial are timely.

The claim of undue delay by a party is also not sufficient grounds to circumvent the grievance and arbitration procedure. Deferral is based upon the national labor policy favoring arbitration and promoting collective bargaining. The Board in *United Technologies*, 268 NLRB 557 (1984), stated:

Arbitration as a means of resolving labor disputes has gained widespread acceptance over the years and now occupies a respected and firmly established place in Federal labor policy. The reason for its success is the underlying conviction that the parties to a collective-bargaining agreement are in the best position to resolve, with the help of a neutral third party if necessary, disputes concerning the correct interpretation of their contract. Congressional intent regarding the use of arbitration is abundantly clear.

Id. at 558.

In *Columbia Typographical Union No. 101*, 220 NLRB 1173 (1975) Member Penello, concurring, stated that promoting collective bargaining through deferral outweighed any concerns of delay. “Thus, the potential for delay in deferring to the parties' grievance-arbitration procedures is more than offset by the potential for having the parties settle their disputes through collective bargaining.” *Id.* at 1174.

In *Community Convalescent Hospital*, 199 NLRB 840 (1972) the Board held that an 8(a)(5) charge was subject to deferral even where the respondent had deliberately delayed arbitration because the grievance and arbitration procedure was still available to the parties. In *Community Convalescent* the employer had unilaterally changed wage rates and the Union was forced to sue to compel arbitration. Despite the prospect that deferral might delay resolution the Board held,

...we find that the question whether Respondent paid its employees at the contractually required rates should be deferred to arbitration. Although Respondent may have engaged in unwarranted foot-dragging in complying with the contractual grievance-arbitration procedures, that procedure has not broken down and is still available to the parties. [section omitted] With matters in this posture, it is evident that little would be gained by inserting the Board into a dispute that the parties can resolve through arbitration...

Id. at 841.

The General Counsel, in a recent memorandum on deferral quoted *Community Convalescent Hospital* with approval stating, “...‘unwarranted foot-dragging’ by the employer in complying with the grievance-arbitration mechanism will not foreclose deferral if the arbitration ‘procedure has not broken down and is still available to the parties’”. *Guideline Memorandum Concerning Collyer Deferral where Grievance-Resolution Process is Subject to Serious Delay*, GC-01, 3-4 (2012). The General Counsel continued, “Thus under existing Board law a delay in the process will not in itself render deferral inappropriate so long as the arbitration procedure

remains available and is functioning regularly, and there is no evidence of serious employer misconduct.” *Id.* at 4. Here, the parties’ grievance and arbitration procedure remains available and the dispute should accordingly be deferred.

C. The Union Did Not Waive Its Deferral Argument By Participating in the Hearing.

The ALJ also asserted that as the merits of the case were tried before him, deferral was inappropriate. He cited no authority for the proposition. The Board has rejected the argument that a party which asserts deferral in its answer subsequently waives it by participating in a trial on the merits of the charge. In *United Technologies (II)*, 274 NLRB 504 (1985) the Board reversed a ruling by an ALJ which held that the respondent had waived its pled deferral defense by failing to restate it at a trial on the charge’s merits. The Board held,

Contrary to the judge, we find that the Respondent properly raised its deferral defense at an appropriate stage in the case and preserved its position for deferral throughout the proceedings. Unlike the employers in *Cutten Supermarket, Conval-Ohio, Inc.*, and *Asbestos Workers Local 22 (Rosendahl, Inc.)*, who unsuccessfully requested deferral for the first time in a posthearing brief to the judge or with the exceptions to the Board, the Respondent affirmatively pled deferral in its answer and renewed its arguments for deferral in its supplemental brief to the judge.

Id. at 504.

In the present case, the issue was raised in the answer and litigated by both parties at the hearing. The Union asserted deferral as the lead argument in its opening statement. (Tr. 20-21). General Counsel solicited testimony from Schaal that in her opinion, despite the language of the contract, the Company had no ability to file a grievance. (Tr. 31-33). The Union then cross-examined Schaal to establish the fact that there had in fact not been any arbitrations which could have established a past practice altering the procedure’s plain language. (Tr. 75-76). All parties argued the issue in their post-hearing briefs. The fact that the parties had a hearing on both the

merits of the deferral argument and underlying dispute does not waive the Union's right to assert it. The present charge should therefore be deferred to arbitration.

II. THE COMPANY PROPOSALS OF OCTOBER 25 AND DECEMBER 21, 2011 WERE NOT EFFECTIVE NOTICE UNDER THE LABOR AGREEMENT OF THE COMPANY'S DESIRE TO REOPEN THE CONTRACT.

A. The Company's Written Proposals for Midterm Modifications Did Not Give Notice to Reopen the Contract.

The plain language of the proposals was for a midterm modification of the contract, not to reopen the contract.

The parties' contract requires that notice be provided in writing. Article XXXII, Section 2 of the parties' collective bargaining agreement requires that notice be provided in writing stating:

This Agreement, and any amendments hereto as provided above, shall remain in full force and effect through February 29, 2012. Thereafter, this Agreement shall continue in effect on a year to year basis, unless either party notifies the other of its intent to modify, or terminate this Agreement, and does so in writing at least (60) days prior to the expiration date.

(GC. Exh. 2).

The Board strictly construes the requirements of contract termination clauses. *Motion Machine Operators*, 238 NLRB 507 (1978); *Jetline Products, Inc.*, 229 NLRB 322 (1977). Notice to reopen the contract must be expressed in writing. Oral notice is insufficient. In *Jetline Products, Inc.*, the Board held that the discussion over proposals provided oral notice that was sufficient only because the reopener provision did not specifically require written notice. The Board held,

...where the parties intended notification to be in written form they explicitly so stated. In contrast, the provision in question here refers only to "notice" and does not specify that it be given in writing. Accordingly, we conclude that an oral communication of an intention to modify the terms of the contract is sufficient to satisfy the notice requirement of article I, section 1.

Id. at 323. *See also, Int'l Ass'n of Machinists & Aero. Workers of Am., Local Lodge S-76, 2009 NLRB LEXIS 279, 18-19* (“All that is necessary is that one party--in writing, if the contract requires that--convey to the other its desire...”)

The plain language of the October and December proposals was for a midterm modification of the collective bargaining agreement. A proposal for midterm modification is one that, “changes the terms and conditions of employment during the existence of a collective bargaining agreement.” *Mid-Term Modification of Terms and Conditions of Employment, Duke L.J.* Vol. 813, 813 (1972). The parties’ collective bargaining agreement expired on February 29, 2012 if properly reopened. The October and December proposals both provided that they were intended to be effective December 1, 2011 nearly three months before the end of the regular contract. Both proposals stated on the top of their first page the following:

ARTICLE I, Execution and Date of Agreement
New Agreement effective date
Effective December 1, 2011...

Before the date appears three times the phrases “effective,” “effective date,” or “execution and date of agreement”. In addition, the first two lines are even bolded for emphasis leaving little doubt as to the date’s purpose.

The proposals contained no correspondence to the Union or any other language explaining the intent of the proposals. The proposals contained only effective dates, expiration dates, and the new terms and conditions sought. Had the parties reopened the contract, the original term of the agreement would have expired three months later on February 29, 2012 and the soonest a new agreement could begin would have been March 1, 2012. Notice to reopen the contract itself was not due until January 1, 2012, nearly a month after the effective date of the proposals. As a result, the proposals were for midterm modifications.

It is noteworthy that not even the Company's head of labor relations considered the proposals to be written notice conveying their intent to reopen the contract. When Barb Schaal gave her affidavit to the Region she admitted that "[p]rior to January 9, 2012, the Employer had not provided written notice to the Union requesting termination or modification of the contract." (Tr. 95). This admission is significant. Schaal is an experienced labor relations executive. If Schaal who drafted the proposals did not believe that they gave notice to reopen the agreement, the Union cannot be charged with notice.

When the Board determines whether written notice is effective to reopen a contract, it is based on the language of the writing itself. The judge here relied upon *Oakland Press*, 229 NLRB 476 (1977) as precedent supporting his decision. Yet, the Board in *Oakland Press* found that written notice to re-open a contract was effectively provided because the language of the party seeking to reopen the contract requested changes effective, not midterm, but the first day after the regular contract expired.

In *Oakland Press* the parties' contract had a nearly identical clause to Article XXXII, Section 2 which read,

This Agreement shall be in full force and effect from June 1, 1973, to and including May 31, 1976, and shall continue in full force and effect from year to the year thereafter, unless written notice of desire to cancel or to terminate the Agreement is served by either party upon the other at least sixty (60) days prior to the date of expiration.

Id. at 478.

The parties' regular agreement expired May 31, 1976. The union then made proposed changes by letter which stated that the effective date of the changes would be the first day after the term of the regular agreement on June 1st. The letter read,

You are hereby notified that Newspaper Drivers and Handlers Local 372, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, desires to continue its current collective bargaining agreement with your firm, but also to negotiate certain changes or revisions in its provisions, including those set forth in memorandum agreements and other supplements thereto to take affect during the contract period commencing June 1, 1976.

Id.

The Board put great weight upon the proposed effective date, finding that it was a crucial fact communicating the essential message that the union desired to reopen the contract.

I find that the essential message was in fact conveyed, even if not in the precise, technical terms of the contract. It is clear from the letter that the Union considered the contract would expire on May 31 and it wished to negotiate changes to take effect during the contract period commencing June 1, 1976.

Id. at 479.

Everbrite made two proposals with effective dates on December 1, 2011 three months before the expiration of the regular collective bargaining agreement. The Company representative who presented the proposals to the Union did not consider them to be written notice. The plain language of the proposals simply does not convey an intent to reopen the agreement when it terminated.

B. In Collective Bargaining it is Far From Axiomatic That an Employer Who Seeks Midterm Concessions Will Reopen an Agreement and Negotiate a Successor Contract if the Concessions are Rejected.

An employer who proposes midterm concessions to a union cannot be assumed to always desire to reopen the contract at the next available opportunity. Yet, it is this assumption that the ALJ seems to rest his decision upon.

In the current economy many employers want unions to modify the existing labor agreement and extend concessions as long as possible. This does not mean that those employers always want to reopen a contract and lose the protection of a no strike clause. A company

which reopens a contract to bargain a new one makes itself susceptible to a strike. There is no cost for a company to make a proposal for midterm concessions to a union. The union will either accept or reject the proposal. Companies which are entirely satisfied with their contracts will often make proposals for midterm concessions to simply see if they can increase their profits.

The parties' collective bargaining agreement contains a no strike clause in Article XIV, Section 1 preventing the Union from engaging in any strike or interference with production. If the contract had been reopened, Local 18 could have called a strike in opposition to the proposed concessions.

Additionally, Local 18 could inflict more economic damage to the Company in a strike than the concessions for 30 individuals could be worth. The employees perform highly skilled work on the Company's largest customer's signs. A strike would stop this work.

Under the agreement Everbrite could shut down their plant and outsource the work without the Union disrupting production. Companies which are planning to close a facility often want an extension of a contract with a no strike clause in order to deprive the Union of bargaining power during the closure. The widespread existence of no strike clauses in contracts and their usefulness to employers during outsourcing has been long noted. "Most American collective bargaining agreements contain no-strike provisions which severely limit the unions' leverage when faced with a mid-term capital redeployment." *The Impact of The European Community on Labor Law: Some American Comparisons* 68 Chi.-Kent L. Rev. 1427, 1454-1455 (1993). The lack of bargaining power a union holds under a no-strike provision was also noted by Administrative Law Judge Ladwig in *Komatsu America Corp.*, 2003 NLRB 325.

I note that the General Counsel does not indicate what bargaining leverage the Union had, or could have invoked, after the January 25 notice of the outsourcing, in view of the no-strike provision in the collective-bargaining agreement.

[sections omitted]

Because of the no-strike provision in the collective-bargaining agreement, the Union had no bargaining power, not even a measure of bargaining power, to persuade the Company to agree to any of the Union's proposed severance, early-retirement, or retirement benefits.

Id. at 26, 29.

Here, Everbrite had less than a year earlier employed this exact tactic at another plant. In October 2010, Everbrite approached the Union at its La Crosse plant mid contract and told the membership that the plant would close unless they agreed to midterm concessions. The written proposal given to the Union at La Crosse by Everbrite plainly stated, “Union Concessions Needed to keep the plant Open.” (Er. Ex. 5). The La Crosse employees voted to accept the concessions. Everbrite closed La Crosse months later in early 2011 under the protection of a no-strike provision.

Ultimately, from the Union’s prospective it was simply unclear whether the Company would value the no strike provision more than the proposed concessions and chose not to reopen the contract if it turned down the proposals for midterm concessions. It certainly seemed more than probable given the Company’s conduct at the La Crosse facility. The ALJ errs by presuming that this Union or any union always knows an employer’s next move upon rejection of a similar proposal. Such an assumption simply does not reflect reality.

C. In Context, the Proposals Conveyed No More Than Their Plain Language.

Looking outside the plain language, the context in which the proposals were made conveys no more than the fact that they were for a midterm modification and extension of the collective bargaining agreement.

In *Chemical Workers Local 6-0682 (Checker Motors Corp.)*, 339 NLRB 291 (2003), relied upon by the ALJ, there was never any question that the Company would reopen the agreement. Before ever making a single proposal the COO called a meeting with the entire union bargaining committee and explained in detail that the company desired to reopen the agreement and that it desired to have early negotiations to reach that new agreement.

On December 20, 2001, Company Chief Operating Officer Temple called a meeting of the entire Union bargaining committee. Temple told the Union's committee the Company wanted to have early negotiations and added the Company had a short list of concerns to negotiate....Temple explained the Company wanted early negotiations to try and work out an agreement before June because it wanted to avoid the need for banking parts.

Id. at 292.

In addition, the February 18th proposal for an early contract was, unlike the present case, not found to be the sole notice. In fact the proposal was one of many, and by date the third consecutive notice after the employer had given two sufficient verbal notices to the Union. Unlike here, the parties' contract did not require written notice. The ALJ also found various notices and waiver subsequent to the February 18th proposal when the Union made written counter offers, reached tentative agreements, and otherwise engaged in protracted and substantial negotiation. *Id.* at 298.

In short, *Checker Motors* did not stand for the proposition that every proposal for midterm modification, no matter the context, conveyed an employer's desire to later reopen the agreement upon its rejection. Rather, the finding was based on the context in which the proposal was made.

This case differs from *Checker Motors*. No statement that Everbrite was seeking early negotiations was made. Everbrite never preceded the presentation of its proposals to the Union

with a statement that they were for a successor agreement. Schaal testified that the October proposal was "...a proposal to make a change to the contract" and characterized it further stating, "I suppose you could say mid-term." (Tr. 98). Schaal went on to also agree that the December proposal was by its own terms to be effective December 1st. (Tr. 99). The Company also conceded that it was seeking concessions from all its employees' unions immediately whether or not the contracts were in effect, and its proposals to Local 18 were no exception. The Company made proposals for midterm concessions to the Unions at La Crosse, Mt. Vernon and Pardeeville.

Everbrite's conduct only indicated that it was seeking midterm modifications. During the past three decades the parties have had the same reopener provision in their agreement. Letters were sent in the years 1984, 1990, 1993, 1999, 2002, 2005, and 2008 that explicitly opened the agreement. In 2008, the Union sent a letter to reopen the agreement to Sherwood, an experienced Everbrite labor relations manager still employed with the Company, who filed the F-7 form in December. In addition, Schaal and Sherman brought decades of combined experience to the Company. The Company knew how to reopen the agreement and yet did not do so.

Further, the failure of Schaal to respond to three separate statements to her by the Union that it was not going to open the agreement or bargain is consistent with the seeking of midterm concessions from the Union. In an email on September 26th and in person on October 25th and December 21st the Union stated that it either would not open the agreement, was not interested in bargaining or both. Schaal, when asked if she had said anything in response, said "No." (Tr. 64). If the Company felt it had reopened the agreement, she would have said something in response.

The FMCS F-7 form filed on December 14, 2011, also indicates Everbrite was engaging in talks aimed at midterm concessions. Line 1 of the form asks that the filer select one of three types of notice. The three types listed are “Renegotiation,” “Reopener,” and “Initial Contract.” The F-7 form is accompanied with instructions from the FMCS. The instructions for line 1 briefly define each choice stating, “[i]ndicate if the notice concerns 1) a renegotiation of an existing contract, 2) a voluntary or previously agreed upon contract reopening, or 3) an initial contract.” On the F-7 form Sherwood did not check the box for “Reopener,” but checked the box for “Renegotiation” of the existing contract. The Company’s own director of labor relations believed it was renegotiating the current contract, not reopening it.

Everbrite’s conduct before presenting the two proposals indicated that it sought midterm concessions. Everbrite knew how to provide a timely written notice and failed to do so. Everbrite’s labor relations director filed a form with the FMCS that indicated the Company believed the parties were engaged in talks for renegotiation. By its conduct, Everbrite demonstrated to the Union only that it was seeking midterm concessions.

III. THE FACT THAT THE UNION AGREED TO MEET IN JANUARY IS IRRELEVANT.

The ALJ stated, “Moreover, the Union subjectively understood that Everbrite intended to bargain for a new contract. This is reflected by the Union agreeing to bargaining sessions in January 2012 with unit members of its bargaining committee in attendance.” To the extent the ALJ concludes that the Union simply understood that the Company was seeking to reopen the contract and negotiate a successor agreement, it is irrelevant. The question before the ALJ was one of contractual interpretation and compliance. The question was whether the Company provided written notice of its desire to reopen the collective bargaining agreement under Article

XXXII Section 2 in order to bargain a successor agreement. The specific language of Article XXXII Section 2 requires that the notice be given in writing. As discussed above, the Board strictly construes such a requirement. *See Jetline Products, Inc.*, 229 NLRB 322, 323 (1977). The only question that is relevant is whether the Company, in accordance with the contract, conveyed its desire to reopen the agreement in writing, not whether the Union had a subjective understanding the Company was seeking a new agreement.

To the extent the ALJ concluded that the Union initially agreed to meet in January with its committee because the Union understood from the two written proposals that the Company was seeking to reopen the agreement; he erred. At the time the proposals were made, both proposals were intended to be proposals for a midterm modification of the contract. The Union stated that it would not bargain in response to both proposals. It was only after the Union had been presented with the second proposal on December 21st and it had stated that it would not bargain that the Company asked to schedule the meeting.

Finally, even if, upon realizing that the Union would not accept midterm concessions, the employer realized and made an oral request clearly conveying its desire to reopen the contract, the request would still be insufficient to meet the writing requirement and open the contract. No writing was sent to the Union from Everbrite between the presentation of the December 21st proposal and deadline to reopen the contract.

Nor did the initial agreement to meet in January constitute a waiver by the Union. There have been multiple cases where parties have not only met, but discussed the proposals and waiver was not found. *See e.g. Champaign County Contractors Association*, 210 NLRB 467 (1974) (parties briefly discussed and sparred over initial proposals); *Sawyer Stores, Inc.*, 190 NLRB 651 (1971) (party listened and objected to proposals but made no counter offer).

The parties agreed upon a written requirement so that there would be a clear unequivocal expression of intent. Regardless of what the Company intended to do, it pursued midterm concessions. When it became clear that the Union was not interested, it failed to communicate in writing its intent to reopen the agreement. The Company simply failed to meet the contractual requirements under Article XXXII to reopen the agreement.

IV. THE ALJ ERRED IN TWO FINDINGS OF FACT.

A. The Union Did Not Receive a Copy of the Company's FMCS Form F-7 on December 27, 2011.

The ALJ erred in two findings of fact. First, the ALJ erred in finding that the Union received a copy of the FMCS form F-7 filed by the Company in December of 2011, cited by the ALJ as G.C. Exh. 19, on December 27, 2011. General Counsel Exhibit 19 is in fact a form letter sent by the FMCS a non-signatory to the collective bargaining agreement, not Everbrite, to the Union. The form F-7 was not attached or sent from Everbrite. (Tr. 8-9, 59-60). General Counsel Exhibit 15 was the form F-7 filed by Everbrite in December of 2011 and not provided to the Union until the hearing.

B. Union Financial Secretary Randy Krocka Did Not Raise the Possibility of Grandfathering Employees Who Were Close to Retirement.

Second, the ALJ erred when he found as an undisputed fact that Union Financial Secretary Randy Krocka raised the possibility of grandfathering employees who were close to retirement so that they would not be affected by any changes to the collective bargaining agreement at the December 21st meeting. Krocka testified only that he criticized the Company proposal for not respecting members by proposing that they be grandfathered. He did not testify that he would have accepted such a concession. His testified that, "I had mentioned that with one of our other sign companies, when they were going to -- you know, they needed some

concessions -- they at least took care of the people that were there.” (Tr. 150). Then Krocka went on to testify that, “I didn’t make any proposal.” (Tr. 151). Accordingly, the finding by the ALJ that the criticism was a proposal is incorrect.

CONCLUSION

For the reasons stated above, the Board should dismiss the complaint.

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CERTIFICATE OF SERVICE

On this 24th day of August, 2012, the undersigned certifies that the attached Respondents Exceptions to the Decision of the Administrative Law Judge and Memorandum of Law in Support of the Sheet Metal Workers International Association Local No. 18's Exceptions to the ALJ'S Decision were filed with the National Labor Relations Board via the NLRB Electronic Filing System. The foregoing documents were also served upon the following via email:

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