

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

CHAPIN HILL AT RED BANK

and

Case No. 22-CA-67608

LOCAL 707, HEALTH EMPLOYEES ALLIANCE
RIGHTS AND TRADES (H.E.A.R.T.)

Margo Greenfield and Joshua Mendelsohn, Esqs.
for the Acting General Counsel
Morris Tuchman, Esq.
for the Respondent
Thomas Rubertone, Esq.
for the Charging Party

DECISION

Statement of the Case

Mindy E. Landow, Administrative Law Judge. Based upon charges filed in Case No. 22-CA-67608 by Local 707, Health Employees Alliance Rights and Trades (H.E.A.R.T.) (the Union or Local 707) a complaint and notice of hearing was issued on January 24, 2012, alleging that Chapin Hill at Red Bank (the Employer or Respondent) violated Section 8(a)(1) and (5) of the Act by failing and refusing to bargain with the Union about a new pension plan to replace the contractual plan which was no longer available to bargaining unit employees. Respondent filed an answer denying the material allegations of the complaint, and raising certain affirmative defenses, as discussed below. This case was tried in Newark, New Jersey on March 13, 2012.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by counsel for the Acting General Counsel (hereafter referred to as the General Counsel) and Respondent,¹ I make the following

Findings of Fact

I. Jurisdiction

The Respondent is a corporation with an office and place of business in Red Bank, New Jersey, where it is engaged in the operation of nursing home and rehabilitation center providing in-patient medical and residential care. During the 12-month period preceding the issuance of

¹ Subsequent to the filing of post-hearing briefs, counsel for the General Counsel and Respondent each filed motions to strike portions of each other's brief. These motions are hereby denied.

the complaint, Respondent derived gross revenues in excess of \$100,000 and purchased and received goods valued in excess of \$5,000 directly from suppliers located outside the State of New Jersey. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

Respondent is owned by Zev Farkas and is operated by Joseph Schlanger, its executive director. Odette Machado-Ranadeen (Machado) has been the president of the Union since 2006. The Union was certified on February 21, 2008, after a Board-conducted election, and currently represents certain employees at Respondent's facility. The bargaining unit consists of:

All full time and regular part-time CNAs, COTAs, PTAs, laundry employees, housekeeping employees, cooks, dietary aides, central supply, staffing coordinator, restorative aides, transporters, drivers, activity aides, LPNs, accounts payable clerks, rehabilitation technician, rehabilitation aides, unit secretary and telephone operators employed by the Employer at its 110 Chapin Avenue, Red Bank New Jersey facility, but excluding all confidential employees, RNs, professional employees, managers, guards and supervisors as defined in the Act.

The unit employees had previously been represented by SEIU 1199 NJ (1199). Terms and conditions of employment were embodied in an existing collective-bargaining agreement (the 1199 Agreement) which, among other things, provided for health and pension benefits for unit employees. After Local 707 was certified, the parties held several bargaining sessions and used the 1199 Agreement as an exemplar in crafting their contract. During bargaining, the Union was represented by Machado and several bargaining unit employees. Employer representatives during bargaining included Employer counsel Morris Tuchman and either or both of Farkas and Schlanger. Only Schlanger and Machado testified at the instant hearing.

At the time Respondent and Local 707 were bargaining for an initial contract, the Union was considering an affiliation with Local 74, U.S.W.U., I.U.J.A.T. (Local 74) Accordingly, Local 74 President Sal Aladeen attended negotiations. For reasons not contained in this record, the affiliation did not occur. On July 8, 2008, a memorandum of agreement (the July MOA) was signed by Chapin Hill, Local 707 and Local 74. It provided that the 1199 Agreement would remain in effect in all respects except that employees of Respondent would participate in the Local 74 health insurance plan. Thereafter, in October 2008, another MOA (the October MOA) was signed by Chapin Hill and Local 707 representatives which memorialized other aspects of the parties' agreement.² The October MOA incorporated the 1199 Agreement only as specifically adopted. Among other provisions, the October MOA required that Chapin Hill make payments into a pension fund for employees as follows:

Pension Fund – 30.1 but replace the fund description with the correct one for this CBA. Delete "...in the amounts specified in Section 3 below" and replace with "at a rate of 2% of eligible payroll effective 9/2010."

² The 1199 Agreement provided that it would be effective until June 15, 2009 and thereafter automatically renew for an additional period of 4 years unless a party provided written notice to the other of its desire to terminate the agreement or modify its terms. The 1199 Agreement further provides that in the event the agreement is automatically renewed, at the Union's option, the parties shall negotiate yearly such wages, hours and general terms and conditions of employment as the Union requests.

As Machado testified, during negotiations, Aladeen asked attorney Tuchman to inquire as to whether the 1199 pension fund which was vested as to bargaining unit employees could be “rolled over.” On a subsequent date, Tuchman responded that he had inquired and a roll
 5 over was not possible. Machado further testified that at the time October MOA was signed, the parties had not reached agreement on any specific fund to which pension contributions would be made on the specified date, but that she anticipated that any such fund would be affiliated with Local 74. When Counsel for the General Counsel asked Schlanger to confirm that “there
 10 was no final agreement reached on the identity of the actual pension fund,” Schlanger replied, “I don’t know if that’s correct.”

Schlanger’s further testimony on this issue is as follows:

15 Q: [by counsel for the General Counsel]: And there was discussion related to the pension fund?
 A: I assume so
 Q: Okay, Who spoke about the pension fund?
 A: Both sides
 20 Q: Okay, can – what did he employer say about the pension fund? What did you – did you say anything about the pension fund?
 A: I assume so. We agreed to something in here.
 Q: Do you recall saying anything about the pension fund during negotiations?
 A: Sure
 Q: What did you say?
 25 A: I don’t recall specifics. I recall talking about it and I assume this [shows] that I did agree.
 Q: And what discussion did you make related to the fund that you were going to contribute into?
 A: I can’t recall, but I assume they said they have a fund and we said okay.

30 Schlanger later testified that he did not remember how many bargaining sessions he attended or what he might have said about the pension fund. He further stated that there currently is no 401(k) or IRA for employees, but that he did not know (and later, that he could not recall) whether the Employer has made pension contributions for employees. He also
 35 testified that when the October MOA was executed, he contemplated that the Employer would be making contributions to the Local 74 pension plan and at a later date became aware of the fact that Local 707 would not be affiliating with Local 74, and that this occurred before the Employer’s obligation to make contributions took effect in September 2010.

40 The 1199 Agreement contained a grievance and arbitration procedure consisting of several steps, culminating in an agreement to arbitrate grievances if not resolved which covered “a dispute with regard to the application, interpretation or performance of an express term or
 45 condition of the Agreement.” The October MOA refers to this grievance and arbitration provision as follows:

See grievance and arbitration procedure attached in lieu of article 11, however add the language contained in the end of the first sentence of 11.6 starting with the words
 “...and he will give conclusive effect...”

50 There is, however, no such attachment as referred to above in the exemplar of the October MOA included in the formal record (at least, the one before me) and there is also no evidence regarding how the original provision, as set forth in the 1199 Agreement, may have

been modified other than what is set forth above. Thus, the precise terms of this particular provision are not clearly defined by the evidence here.

5 In about August 2010, Machado spoke with Schlanger by telephone and informed him that she would be filing a grievance relating to salary, retroactive pay, uniform allowance and other issues. She also stated that she would be visiting the facility to discuss this grievance on or about August 26th and would like, at that time, to speak with him regarding the specifics of the pension fund so that the parties could set up a 401(k) or IRA plan for employees and discuss where the contributions, which were due to commence the following month, were to go. As 10 Machado testified, without rebuttal, Schlanger stated that he would “take care of it” and that “he was on top of it.” When Machado went to the facility on August 26th, she sought to meet with Schlanger but was told he was busy and could not meet with her on that occasion.

15 In March 2011, the Union filed a grievance against Chapin Hill for non-payment of training, pension and legal fund contributions for its employees.³ When asked to explain the delay in doing so, Machado explained that when she first spoke to Schlesinger, and he stated that he was “on top of it,” she expected that the Employer would make the requisite contributions. After a few months passed, she felt that Respondent was being late with its 20 contributions as was usual, as the facility was typically late for several months, sometimes as much as 5 months late in making its contributions to contract funds. Eventually, Machado reached the realization that the Employer would not be making pension contributions and she filed a grievance over the issue. There was no response and the Union filed for arbitration over the Employer’s failure to make the requisite contributions. There were at least four arbitration 25 sessions, involving two grievances. The issue of the Employer’s failure to remit pension contributions came up on one occasion, on August 15, 2011.

At the arbitration, the Union’s attorney, Thomas Rubertone, had a conversation with J. Ari Weiss, counsel for the Employer. Rubertone told Weiss that the parties still had to reach agreement on the pension fund. According to Machado, Weiss stated that if the parties could 30 not reach agreement then they would arbitrate the pension fund. She did not offer further details of this discussion. The arbitrator encouraged the parties to reach agreement and stated that if they did not, they could bring it forward to arbitration. From the testimonial record here it is not clear whether the arbitrator was referring to the identity of the fund, or the failure of the employer to remit contributions from September 2010. There is no evidence as to whether Schlanger was 35 present at this arbitration, and he offered no detail about it in his testimony.

³ In this regard, Machado sent the following letter to Schlanger:

40 Dear Joseph,
Please be advised that the union is grieving Chapin Hill continuous violations of the CBA including but not limited to:
Failure to make contributions for Pension and Legal Benefits on behalf of all BU employees
Failure to properly make contributions for training on behalf of all BU employees.

45 The letter further states the remedy being sought as follows:

Remit all contributions to the Union for Training, Pension and Legal benefits, retroactive to the initial date of the violation.
Send reports regarding the contributions to the union as follows:
50 Properly document the dates for which contributions are being made
List the names of employees that contributions are being made for
State the contribution amount per employees.

Thereafter, on October 11, Machado sent the following letter to Farkas:

Dear Zev:

5

This letter is written to reiterate the unions demand to bargain, negotiate replacement fund(s) for the Local 74 pension fund. As you are aware, we were no longer affiliated with said fund when the employer's obligation to make contributions commenced in March 2011 (non-payment already subject of arbitration).

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Our proposal to reopen contract on various issues in advance of health insurance termination was declined by you and outstanding issues went to arbitration. We then proposed in the course of arbitration on other issues that either 401K or IRAs be established to resolve pension problem. There has been no response from you to date.

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I look forward to your response. Thank you.

It is undisputed that the Employer did not respond to this letter.

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Machado testified that the Union wished to do the same thing with the pension fund as had been done with regard to health insurance: have a specific MOA with clear language delineating the identity of the "correct" fund. When asked why she sought bargaining while a grievance was pending, Machado replied that there were two separate issues. One related to the contribution itself and retroactive monies that were due and the other had to do with the identity of the fund which would house such monies.

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III. Analysis and Conclusions

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The complaint alleges that, since October 11, 2011, Respondent violated Section 8(a)(1) and (5) of the Act by failing and refusing to bargain collectively over a new pension plan that was to replace a contractual plan that was no longer available to employees in the bargaining unit. Respondent denies that it had an obligation to respond to the Union's October 2011 letter, as there was no legal requirement that it consent to a mid-term modification of its collective-bargaining agreement with the Union. In addition, Respondent has argued that the allegations of the complaint are time-barred under Section 10(b) of the Act, and that the matter should be deferred to arbitration.

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A. Respondent's Affirmative Defenses

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1. The allegations of the complaint are not barred by Section 10(b) of the Act

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Section 10(b) of the Act provides, in pertinent part, "[t]hat no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board." It is well established that the Section 10(b) limitations period does not begin to run "until the charging party is on 'clear and unequivocal notice,' either actual or constructive, of a violation of the Act." *Ohio and Vicinity Regional Council of Carpenters (The Schaefer Group, Inc.)*, 344 NLRB 366, 367 (2005) (citation omitted). Under this standard, adequate notice will be found where the conduct was sufficiently "open and obvious to provide clear notice" to the charging party. *Broadway Volkswagen*, 342 NLRB 1244, 1246 (2004), enfd. sub nom. *East Bay Automotive Council v. NLRB*, 483 F.3d 628 (9th Cir. 2007)), or where the charging party was "on notice of facts that reasonably engendered suspicion that an unfair labor practice had occurred," and could have discovered the violation by exercising reasonable diligence. *Phoenix*

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Transit System, 335 NLRB 1263 fn. 2 (2001). Accord: *United Kaiser Services*, 355 NLRB No. 55, slip op. at 2 (2010). Conversely, Section 10(b) will not bar a charge where the employer has sent conflicting signals or engaged in ambiguous conduct. *Concourse Nursing Home*, 328 NLRB 692, 694 (1999), (citing *A & L Underground*, 302 NLRB 467, 469 (1991)). The Respondent here shoulders the burden of proof in establishing this affirmative defense. *Broadway Volkswagen*, supra; *United Kaiser Services*, supra, slip op. at 1. Thus, it is the Respondent's burden to adduce sufficient credible evidence that the Union was or should have been on "clear and unequivocal notice" more than 6 months before the charge was filed that the Respondent would not respond or would otherwise fail and refuse to negotiate the identity of the "correct" pension fund for bargaining unit employees. *Id.*, see also *St. George Warehouse*, 341 NLRB 905, 905 (2004) ("In determining whether a party was on constructive notice, the inquiry is whether that party should have become aware of a violation in the exercise of reasonable diligence.")

In support of its contention that the allegations of the complaint are time-barred, Respondent argues that the issues in this case were raised by the Union in August 2010 and, moreover, that the Union did not file charges when Schlanger purportedly refused to meet with Machado on August 26 of that year.

Contrary to Respondent, I find that the evidence fails to establish that the Union was on either actual or constructive notice that Respondent would fail and refuse to bargain with it over negotiating a pension fund for employees. As noted above, Respondent's obligation to make pension payments did not arise under the contract until September 2010. One month prior to that, in August, 2010, Machado advised Schlanger that she wanted to discuss the specifics of a pension fund to which contributions would be made. Schlanger assured Machado that he "would take care of it" and that he "was on top of it." See *Sterling Nursing Home*, 316 NLRB 413, 415-416 (1995) (when respondent agent told union that he would "take care of" and "straighten out" issues related to refusal to bargain, union did not receive "clear and unequivocal notice" of a refusal to do so). Machado was not told, when she visited the facility on August 26, 2010, that Schlanger would not meet with her about the fund or that he was refusing to discuss the issue but, rather, that Schlanger was busy and unable to meet with her at that time. Thus, there was no express refusal to bargain over the issue. A refusal to bargain is not ripe when an employer has merely failed to respond to a union's request that it do so. See e.g. *Waste Management of Utah*, 310 NLRB 883, 886 (1993) (union not charged with knowledge employer's position regarding demand for bargaining until a time within the 10(b) period when employer revealed where it stood not by an unequivocal statement but rather by its conduct generally); see also *Stanford Realty Associates*, 306 NLRB 1061, 1065 (1992). Respondent thereafter failed to make the contractually required contributions, and after several months, the Union filed a grievance over the issue of the Employer's failure to make various fund contributions, including those that were due to a pension fund for employees. Subsequently, on August 15, 2011, at an arbitration meeting concerning the Respondent's failure to pay into the existing contract funds, Respondent's counsel advised the Union's counsel that he would discuss the issue of the pension fund with the Union and the arbitrator encouraged the parties to do so. Again, there was no express refusal to meet and discuss the matter. Shortly thereafter, Machado sent her October 11 demand for bargaining, to which there was no response. The instant charge was filed on October 25, two weeks later.

With regard to the issue of constructive knowledge, I credit Machado's un rebutted testimony that in August 2010, Schlanger reassured her that he would attend to the matter. Respondent cannot rely upon Schlanger's dissembling to establish the requisite element of

notice. I further note that Machado credibly painted a background in which Respondent was frequently delinquent in fulfilling its contractual obligations.⁴ In this regard, in *A&L Underground*, supra at 302, the Board held that an unfair labor practice will not be time-barred if the “delay in filing is a consequence of conflicting signals or otherwise ambiguous conduct by the other party.” A party is not required to file a charge based upon mere suspicion. *R.G. Burns Electric Inc.*, 326 NLRB 440 (1998). Here, the Union had not only received assurances from Schlanger in August 2010, but subsequently, in August 2011, Respondent’s attorney J. Ari Weiss reaffirmed Respondent’s obligation to reach agreement with the Union about the identity of the pension fund. Based upon the totality of the evidence I find that Respondent has not shown that the Union had or should have had notice more than 6 months prior to the filing of the charge in October 2011 that Respondent was failing and refusing to bargain over the issue of what pension fund Respondent would contribute its contractually-mandated payments to. Rather, I find that while events outside the 10(b) period may shed light on Respondent’s unfair labor practices here, they do not independently trigger the limitations period. Moreover, any finding of a violation here would not solely rely upon events occurring outside the limitations period, but is triggered by Respondent’s failure to respond to Machado’s written request for bargaining. See *Machinists Local 1424 v. NLRB*, 362 U.S. 411, 416-417 (1960)(where occurrences within the 6-month limitations period in and of themselves may constitute, as a substantive matter, unfair labor practices, earlier events may be utilized to shed light on the true character of matters occurring within the limitations period.)

Accordingly, and bearing in mind that the Respondent bears the burden of proof in this matter, I find that Respondent has failed to demonstrate by sufficient probative and credible evidence that the instant charge is time-barred.

2. This matter is not appropriate for deferral to arbitration

Respondent raises the affirmative defense that the matter in dispute here should be deferred to the parties’ grievance-arbitration procedure under its contract with Local 707. *Collyer Insulated Wire*, 192 NLRB 837 (1971); *Dubo Mfg. Corp.*, 142 NLRB 431(1963). In this regard, Respondent argues that the Union has invoked the grievance procedure, appeared before the arbitrator and has indicated that it intends to proceed to arbitration over certain matters directly related to those in dispute here. In further support of its contention that this matter should be deferred to arbitration, Respondent relies in part on a notice of arbitration issued on March 11, 2012, showing that (1) a hearing on a grievance relating to “pension” was scheduled for March 15; (2) that on February 13, 2012, the Union proposed during negotiations for a successor agreement that there be a “401K to replace pension at contribution of 2% of gross payroll, with subsequent increases;” and (3) that the Employer responded on February 17 that “we are open to the 401K plan but reject the 2% annual contribution.”

As an initial matter, I note that deferral is an affirmative defense in which the burden of proof is assigned to the moving party. See *Rickel Home Centers*, 262 NLRB 731 (1982). In *United Technologies Corp.*, 268 NLRB 557 (1984), the Board observed that deferral is not appropriate unless there exists a “reasonable belief that arbitration procedures would resolve the dispute in a manner consistent with the criteria of *Spielberg Mfg. Company*, 112 NLRB 1080 (1955).” These principles also apply to deferral sought under *Dubo*, supra: i.e., even where the dispute has been scheduled for arbitration or is otherwise in the grievance procedure. See e.g.

⁴ I construe Schlanger’s equivocations on the issue of whether the Employer has remitted any contributions to a pension plan for its employees (as discussed above) to constitute an admission that it has not done so.

Local 814 IBT (Beth Israel Medical Center), 281 NLRB 1130, 1144-1146 (1986); *United States Postal Service*, 215 NLRB 488, 489 (1974).

5 The Board will defer to an arbitration award under *Spielberg* when the proceedings appear to have been fair and regular, all parties have agreed to be bound, and the decision of the arbitrator is not clearly repugnant to the purposes and policies of the Act. Additionally, the arbitrator must have considered the unfair labor practice issue which is before the Board. In *Olin Corp.*, 268 NLRB 573 (1984), the Board clarified that an arbitrator has adequately considered the unfair labor practice issue if (1) the contractual issue is factually parallel to the unfair labor practice issue, (2) the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice, and (3) the decision is susceptible to an interpretation consistent with the Act. *Id.* at 574.

15 In *Collyer*, *supra* at 841, the Board explained:

[E]ach case compels an accommodation between, on the one hand, the statutory policy favoring the full use of collective bargaining and the arbitral process and, on the other, the statutory policy reflected by Congress' grant to the Board of exclusive jurisdiction to prevent unfair labor practices.

20 Notwithstanding the pendency of a grievance relating to the Employer's failure to remit pension contributions, I cannot concur with Respondent's apparent contention that this dispute is factually parallel to any contractual issue before the arbitrator; that a statutory remedy lies within the arbitrator's power or that this matter involves merely an interpretation of an express term of an extant contract presently before him. Rather, I find that the relevant contractual clauses and grievance arbitration provisions fail to provide a mechanism to resolve the underlying statutory issue and further fail to provide an appropriate remedy for the alleged violations of the Act.

30 In *San Juan Bautista Medical Center*, 356 NLRB No. 102, slip op. at 2 (2011), the Board outlined the relevant *Collyer* criteria as follows:

35 The Board considers six factors in deciding whether to defer a dispute to arbitration: (1) whether the dispute arose within the confines of a long and productive collective-bargaining relationship; (2) whether there is a claim of employer animosity to the employees' exercise of protected rights; (3) whether the agreement provides for arbitration in a very broad range of disputes; (4) whether the arbitration clause clearly encompasses the dispute at issue; (5) whether the employer asserts its willingness to resort to arbitration for the dispute; and (6) whether the dispute is eminently well-suited to resolution by arbitration. [Citations and internal punctuation omitted.]

40 See also *United Technologies Corp.*, *supra* at 558; *Collyer Insulated Wire*, *supra* at 843.

45 Applying the foregoing criteria, I conclude, on whole, that deferral is not appropriate here. As an initial matter, while there is no evidence to suggest that the parties' relationship is generally contentious, the contractual clause which is at the center of the instant dispute was not agreed to at a time when the parties had experienced a long and productive relationship. To the contrary, this provision was the product of bargaining for an initial contract after the Union received its certification as representative of the bargaining unit. Although not attributable to any party, the parties' relationship was further complicated by the fact that, at the time bargaining for the initial contract was proceeding, it was contemplated by both the Employer and the Union that Local 707 would be affiliating with another labor organization. Moreover, the record is

ambiguous as to the precise scope of the contractual grievance arbitration clause. Even assuming, however, that the clause is generally a broad one, I would find that deferral is not appropriate in this instance.

5 In this regard, it is important to accurately characterize the nature of the dispute between the parties which is at issue here. Generally, in cases involving alleged violations of Section 8(a)(5) of the Act, the issue is often whether the employer had a contractual right to take (or not take) the action in question which is contested, and any purported violation of the Act in such cases turns on contract interpretation. Accordingly, such matters are, as the Board has found, 10 suitable for deferral to arbitration. Here, Respondent has pointed to no express contract term which is ripe for or requires interpretation. There is also no doubt that Respondent had a contractual obligation under the October MOA to make pension contributions and it follows that the identification of the “correct” plan is a necessary precondition to doing so.

15 As the General Counsel argues, the Board has held that it will not defer when contract terms do not arguably authorize the action taken by the Respondent, and where the matter does not fall within the context of contract interpretation.⁵ Here, I find that Respondent has failed to demonstrate that the dispute here is well suited to resolution by arbitration.

20 To this point, in *The Anaconda Company*, 224 NLRB 1041, 1044 (1976) enfd. mem. 578 F.2d 1385 (9th Cir. 1978), Administrative Law Judge William J. Pannier III, with Board approval, made the following observations:

25 The doctrine of regularized prearbitration deferral, however, is not without limitation. Thus, disputes over the terms and meaning of existing contracts have been distinguished from disputes concerning whether parties have legally bargained on the ground that the latter “are legal questions concerning the National Labor Relations Act which are within the special competence of the Board rather than of an arbitrator.” *The Columbus Printing Pressmen & Assistants’ Union No 252 (The R W Page Corporation)*, 30 219 NLRB 268 (1975) (plurality opinion of Members Kennedy and Penello). Illustrative of this is the Board’s endorsement of the view that *Collyer* is inapplicable to disputes concerning whether a party has refused to comply with the requirement of Section 8(d) of the Act that parties execute a contract embodying agreements reached on request. *Teamsters Union Local No 85, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Tyler Bros Drayage Co)*, 35 206 NLRB 500, 507-509 (1973) Similarly, though the precise point at which distinction from ability to achieve resolution through arbitration is not yet completely clear, the Board has agreed that no deferral should be accorded to matters which, while susceptible to arbitration under agreements, are factually undisputed and which are primarily statutory in nature 40 *Harley Davidson Motor Co, Inc AMF 214 NLRB 361 (1974)*, *Diversified Industries, a Division of Independent Stave Company*, 208 NLRB 233, 243 (1974).

45 Accord: *Service Employees (Alta Bates Medical Center)*, 321 NLRB 382, 384 (1996); See also *Pacific Coast Metal Trades Council (Lockheed Shipbuilding)*, 282 NLRB 239, 244 (1986)(doctrine in *Anaconda* applied in Board cases issued subsequent to *United Technologies and Olin*).

50 ⁵ In support of such contentions, the General Counsel relies upon *St. Joseph’s Hospital*, 233 NLRB 1116, 1118 (1977).

Consistent with the above analysis, the situation presented by the instant case is not factually disputed. As will be discussed in further detail below, there is no credible evidence that the parties have been in any disagreement over the identity of the “correct” fund; Respondent has pointed to no issue of contract interpretation which would resolve the instant dispute and there is no apparent disagreement, at least in the record before me, about Respondent’s contractual obligation to contribute to a pension fund for its employees. Moreover, Respondent’s failure to respond to the Union’s request for bargaining raises questions which are primarily statutory in nature.⁶

In support of its contention that this matter should be deferred to arbitration, Respondent relies upon *Wright v. Universal Maritime Service Corporation*, 525 U.S. 70, 78 (1998) a case which involved a lawsuit brought under the Americans with Disabilities Act (ADA). In particular, Respondent relies upon the Court’s observation as follows:

[a]n order to arbitrate a particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. (Citations omitted).

What Respondent fails to acknowledge, however, is that in that case, the Court held that a collective-bargaining agreement’s general arbitration clause did not waive an employee’s right to a judicial forum for a claim under the ADA. In so doing, the Court held:

That presumption, however, does not extend beyond the reach of the principal rationale that justifies it, which is that arbitrators are in a better position than courts to *interpret the terms of a CBA*. *Id.* (Citations omitted) (Emphasis in original).

While I find that Respondent’s reliance upon *Wright* is generally misplaced, I note that, even under the rubric of that case Respondent has failed to demonstrate how its alleged failure to bargain gives rise to any issue of contract interpretation. Rather, if proven, this is an unfair labor practice which is properly before the Board, and for which a Board remedy is appropriate. In particular, Respondent has failed to show how, under extant Board law, such a remedy would be within the scope of an arbitrator or how any interpretation of the collective-bargaining agreement by the arbitrator could or would solve the instant dispute.⁷

⁶ In a variety of other contexts, the Board has held that deferral is not appropriate where the issue involved is not arguably covered under the contract. See *Pepsi Cola Co.*, 330 NLRB 474 (2000) (deferral not appropriate where arbitrator decided case on procedural grounds without consideration of the merits); see also *Stephens Graphics, Inc.*, 339 NLRB 457, 461 (2003) (deferral of Section 8(a)(1) charge not appropriate where there was no specific contractual provision covering the dispute and there was no assurance that the alleged Section 7 rights were covered by the contract); *Western Massachusetts Electric Co.*, 228 NLRB 607, 610 (1977), enf. denied on other grounds 573 F.2d 101 (1st Cir. 1978) (no deferral where arbitrator determined unilateral suspension of employee benefit not arbitrable).

⁷ Respondent attempts to skirt this issue by citing *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960) (“When an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair solution of a problem. This is especially true when it comes to formulating remedies. There the need is for flexibility in meeting a wide variety of situations. The draftsmen may never have thought of what specific remedy should be awarded to meet a particular contingency.”) Such language does not confer the broad scope of discretion suggested by Respondent. As is well-settled, and discussed above, the Board will defer to an arbitration award only when certain basic criteria have been met. See *Spielberg Mfg. Co.*, supra; *Olin Corp.*, supra.

The evidence relied upon by Respondent in support of its contention that deferral is appropriate here is unavailing. The 2011 notice of arbitration concerning a proceeding over the Employer’s alleged “failure to pay training, pension and legal contributions,” fails to address the Union’s request to negotiate the identity or nature of the contractually-described “correct” pension fund. Moreover, Machado’s un rebutted testimony demonstrates that the arbitrator himself deemed this issue to be one best resolved through direct negotiations between the parties. Although her testimony indicates that the arbitrator agreed to become involved the matter in the event the parties were not able to reach agreement, that does not resolve the issue of whether the statutory imperatives of the Act are met by requiring the parties to submit this matter to arbitration. While it is theoretically possible that the Union could voluntarily agree to utilize the services of an arbitrator (or another mediator) to resolve this issue, see e.g. *Dubo supra*, that does not suggest or require the result in this instance that the Union be compelled to do so under penalty of dismissal of the complaint.

Finally, I note that the Employer has not demonstrated any affirmative indication of a genuine intent to proceed to arbitration over this matter: it did not advise the Union, in response to its demand for bargaining, that the matter could or would be appropriately dealt with in arbitration; it never filed a grievance seeking to have the matter resolved through arbitration; it never requested that the arbitrator consider the matter during the meetings held in connection with other pending grievances and has never stated that it would waive any applicable time limits for bringing the matter forward in an arbitral forum. Respondent has simply failed and refused to respond to the Union’s request for bargaining.

Respondent additionally relies on evidence regarding negotiations for a successor agreement. This does not however, compel the conclusion that this matter should be submitted to arbitration. In this regard I note that there is no evidence that Respondent has never made a specific proposal relating to the establishment or identification of the “correct” fund, notwithstanding the fact that its obligations to make pension contributions have been extant for almost two years under the predecessor collective-bargaining agreement. Moreover, any negotiation for a successor agreement does not address or remedy the issue of Respondent’s alleged failure to bargain with regard to the terms and conditions of employment set forth in the October MOA.

For the foregoing reasons I find that Respondent has failed to meet its burden of proof to show that deferral to arbitration of the issue of whether the Employer has met its statutory duty to bargain over the identity of a pension fund, described in the parties’ collective bargaining agreement merely as the “correct” fund, is appropriate in this instance. Moreover, as set forth above, I find that Respondent’s alleged failure to bargain over this matter is a statutory issue appropriately considered by the Board. For these same reasons, I reject Respondent’s additional affirmative defense, raised in its answer to the complaint but otherwise unarticulated, that the complaint should be dismissed because the Union has failed to “exhaust contractual and administrative remedies.”

B. The Respondent Unlawfully Refused to Bargain with the Union

In response to the substantive allegations of the complaint, Respondent asserts that “[t]here is no showing that it was even necessary to respond to the 11/10 (sic) bargaining request. Section 8(d) of the Act does not require bargaining mid contract. The evidence amply reflects that the parties did not “expressly” leave open any issue for subsequent

negotiations. . .”⁸ Respondent argues that the evidence shows that the parties arrived at a full agreement to have pension contributions go into the Local 74 pension fund. In support of this contention, Respondent notes that the letter written by Machado specifically references a demand to bargain to negotiate replacement fund(s) for the Local 74 pension fund. To the contrary, the General Counsel asserts that the fact that the Union’s request to bargain had been met with silence is all that is needed for the Board to find a violation of Section 8(a)(5) of the Act. In support of these contentions, the General Counsel relies upon *Diversified Bank Installations, Inc.*, 324 NLRB 457, 467 (1997) (respondent’s failure to respond to the union’s requests for meetings were tantamount to a refusal to continue bargaining with the union during the term of the parties’ contract) and *Richard Melow Electrical Contractors Corp.*, 327 NLRB 1112, 1116 (1999)(respondent failed to respond to the union’s request for meetings which had been agreed to as part of a settlement of prior unfair labor practice charges).

Prior to addressing these competing contentions, a few preliminary points are in order. Section 8(d) imposes the mutual obligation on employers and unions to bargain in good faith with respect to “wages, hours and other terms and conditions of employment.” The Board has long held that retirement benefits are a mandatory subject of bargaining. See e.g. *Triangle PWC, Inc.*, 231 NLRB 492,493 (1977); *Inland Steel Co.*, 77 NLRB 1, enfd. 170 F.2d 246 (7th Cir. 1948). Section 8(d) further provides that the duty to bargain collectively, “shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract.”

The issue of mid-term contract modifications under Section 8(d) of the Act most frequently arises when a claim is made that an employer unlawfully has changed a term and condition of employment during the term of a collective-bargaining agreement. Although that is not the situation presented by the instant case, some of the analytical principles applied by the Board are relevant in addressing Respondent’s arguments here.

When the Board analyzes an alleged Section 8(d) contract modification, it will not find a violation if an employer has a “sound arguable basis” for its interpretation and is not motivated by other unlawful considerations. *Bath Iron Works*, 345 NLRB 499, 502 (2005), affd. 475 F.3d. 14 (1st Cir. 2007). Moreover, the Board assesses whether a party’s contract interpretation has a sound arguable basis by applying traditional principles of contract interpretation. *Conoco, Inc.*, 318 NLRB 60, 62 (1995), enf. denied 91 F.3d 1523 (D.C. Cir. 1996). The parties’ actual intent as reflected by the underlying the contractual language is paramount. *Mining Specialists*, 314 NLRB 268, 269 (1994) and is determined by reviewing the plain language of the agreement. *Id.* The Board will also consider extrinsic evidence, such as past practice and bargaining history relating to the provision itself. *Ibid.* The Board does not interpret collective-bargaining

⁸ Respondent appears here to be responding to certain assertions in the Counsel for the General Counsel’s opening statement at hearing, in particular his statement that there was a “failure to bargain about a pension issue expressly left open in the parties’ collective bargaining agreement.” In the General Counsel’s post-hearing brief it is further claimed that Respondent refused to bargain with the Union “over the identity of the pension fund which was left undefined in the parties’ collective bargaining agreement.” In this regard, I note that the complaint alleges that there was a failure to bargain with the Union to “replace the contractual plan which was no longer available to bargaining unit employees.” I consider the General Counsel’s statements set forth above to be tantamount to a summary of the evidence adduced to support the allegations of the complaint. While an argument could be made that the complaint could have been more artfully drafted, I find that the complaint is sufficient to put Respondent on notice regarding the underlying issues involving its alleged refusal to bargain and, moreover, that these matters have been fully litigated herein.

agreements in a vacuum or rely on “abstract definitions unrelated to the context in which the parties bargained and the basic regulatory scheme underlying th[at] context,” *NLRB v. C&C Plywood Corp.*, 385 U.S. 421, 430 (1967). Rather, the Board interprets contracts in light of the “realities of labor relations and considerations of federal labor policy. . . .” *Electrical Workers IBEW Local 1395 v. NLRB*, 797 F.2d 1027, 1033 (D.C. Cir 1986).

The central issue presented by Respondent’s asserted 8(d) defense here is whether the parties had agreed on the identity of the “correct” fund at the time the October MOA was entered into. If that were to be the case, as Respondent argues, the Union may not compel bargaining over that issue during the term of that contract.

Contrary to Respondent’s contention that both Schlanger and Machado contemplated making payments to a specific Local 74 pension plan when the October MOA was signed, the documentary and testimonial evidence suggests otherwise: that there is a sound arguable basis for the Union’s contention that the parties had not reached a specific agreement on the identity of the fund to which the Employer would be required to submit contributions commencing in September 2010.

Respondent’s stated position here is premised upon scant and unpersuasive evidence. As an initial matter, the October MOA fails to identify the “correct” pension plan in any manner whatsoever. There is no record evidence to suggest, as Respondent argues in its brief, that the parties arrived at full agreement to have pension contributions go into a specific Local 74 pension fund. Schlanger’s testimony on this matter (set forth above) was unpersuasive, vague, dissembling and generally not worthy of credit. Rather, I give credence to Machado who testified that the identity of the plan had not been agreed to but that it was expected at the time that it would be affiliated with Local 74.

Moreover, had the parties reached agreement at the time the contract was executed as to the identity of the “correct” fund, there would have been no reason not to have specifically named it. In fact, based upon other evidence, including the separate MOA relating to health benefits, it is far more inherently probable that the Union would have insisted on delineating the Employer’s obligation more explicitly, had such an agreement been reached, especially in light of the fact that this was an initial contract between the parties. Respondent has offered no evidence or even a plausible explanation as to why any such agreement would not have been reduced to writing, had it in fact been reached. While the situation confronting the parties was complicated by the fact that, at the time the October MOA was negotiated and entered into, an affiliation with Local 74 was contemplated, any pension fund which would receive the contributions was never specifically identified. In this regard, I note that Aladeen, who attended negotiations, could have provided the parties with any information about a Local 74 pension fund which would have been required to memorialize their purported agreement. Additionally, there is no evidence that Respondent has made contributions to any pension fund whatsoever on behalf of its employees. This further belies Respondent’s contention that the identity of the fund was known and had been agreed to at the time the October MOA was entered into.

Moreover, as discussed above, when Machado initially broached the subject with Schlanger, he did not assert that there was an agreed-to contractual plan: rather he assured Machado that he would take care of such matters. As noted above, this is an admission which is un rebutted. Similarly so is Weiss’s admission in August 2011 that the parties would negotiate what plan the Employer would contribute to.

Thus, based upon the evidence in sum, including the express terms of the contracts in evidence, Machado’s credible testimony, Respondent’s admissions and the record as a whole I

find that the Union had a sound arguable basis for its contention that the identity of the “correct” plan under the October MOA had not been agreed to. Moreover, I conclude that by necessity the matter had been left open for further discussion. Clearly, the parties had to reach some accord about the plan in order for contributions to be made. Accordingly, I find that Machado’s request for bargaining to define the pension fund, a fund to which the Employer was contractually obliged to contribute, was not a demand for a mid-term contract modification which Respondent was privileged to refuse but rather, was something that Respondent had an affirmative obligation to bargain about.

Moreover, the evidence is clear that Respondent did not respond to the Union’s October 2011 request for bargaining over this issue. Accordingly, I find that by failing and refusing to bargain with the Union over the identity of the contractually described “correct” pension fund to which contributions were due Respondent has violated Section 8(a)(1) and (5) of the Act.

Conclusions of Law

1. Respondent Chapin Hill at Red Bank (Employer) is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. Local 707, H.E.A.R.T (Union) is a labor organization within the meaning of Section 2(5) of the Act.

3. At all relevant times, the Union has been the exclusive collective-bargaining representatives of employees of the Employer in the following appropriate unit:

All full time and regular part-time CNAs, COTAs, PTAs, laundry employees, housekeeping employees, cooks, dietary aides, central supply, staffing coordinator, restorative aides, transporters, drivers, activity aides, LPNs, accounts payable clerks, rehabilitation technician, rehabilitation aides, unit secretary and telephone operators employed by the Employer at its 110 Chapin Avenue, Red Bank New Jersey facility, but excluding all confidential employees, RNs, professional employees, managers, guards and supervisors as defined in the Act.

4. By failing and refusing to meet and bargain with the Union to replace the contractual pension plan which was no longer available to bargaining unit employees, Respondent has violated Section 8(a)(1) and (5) of the Act.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Having unlawfully failed and refused to bargain with the Union, Respondent must be ordered to do so. Respondent will also be ordered to post an appropriate notice at its facility located in Red Bank, New Jersey.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁹

⁹ If no exceptions are filed as provided by Sec. 102.46 of the Board’s Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

5 1. The Respondent, Chapin Hill at Red Bank, Red Bank, New Jersey, its officers, agents, successors, and assigns, shall

10 (a) Cease and desist from failing and refusing to bargain with the Union over a replacement for the contractual pension fund which is no longer available to employees in the following appropriate unit:

15 All full time and regular part-time CNAs, COTAs, PTAs, laundry employees, housekeeping employees, cooks, dietary aides, central supply, staffing coordinator, restorative aides, transporters, drivers, activity aides, LPNs, accounts payable clerks, rehabilitation technician, rehabilitation aides, unit secretary and telephone operators employed by the Employer at its 110 Chapin Avenue, Red Bank New Jersey facility, but excluding all confidential employees, RNs, professional employees, managers, guards and supervisors as defined in the Act.

20 (b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

25 (a) On request, bargain with the Union as the exclusive representative of the employees in the above-described appropriate unit concerning a replacement for the contractual pension fund which is no longer available to bargaining unit employees, and if an agreement is reached embody the understanding in a signed agreement.

30 (b) Within 14 days after service by the Region, post at its facility in Red Bank, New Jersey copies of the attached notice marked "Appendix."¹⁰ Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or by other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 25, 2011.

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50 ¹⁰ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

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Dated, Washington, D.C., September 7, 2012.

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Mindy E. Landow
Administrative Law Judge

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APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities

WE WILL NOT fail and refuse to bargain with Local 707 H.E.A.R.T over a replacement for the contractual pension fund which is no longer available to employees in the following appropriate unit:

All full time and regular part-time CNAs, COTAs, PTAs, laundry employees, housekeeping employees, cooks, dietary aides, central supply, staffing coordinator, restorative aides, transporters, drivers, activity aides, LPNs, accounts payable clerks, rehabilitation technician, rehabilitation aides, unit secretary and telephone operators employed by the Employer at its 110 Chapin Avenue, Red Bank New Jersey facility, but excluding all confidential employees, RNs, professional employees, managers, guards and supervisors as defined in the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed to you by Section 7 of the Act.

WE WILL upon request, bargain with the Union as the exclusive representative of the employees in the above-described appropriate unit concerning a replacement for the contractual pension fund which is no longer available to bargaining unit employees, and if an agreement is reached embody the understanding in a signed agreement.

CHAPIN HILL AT RED BANK

(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

20 Washington Place, 5th Floor
Newark, New Jersey 07102-3110
Hours: 8:30 a.m. to 5 p.m.
973-645-2100.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 973-645-3784.