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

NORTH AMERICAN SIGNS, INC.

and Case 25-CA-74185

INTERNATIONAL BROTHERHOOD
OF ELECTRICAL WORKERS, LOCAL
UNION NO. 153, AFL-CIO

Raifael Williams, Esq.,
for the General Counsel.
John Ladue and Erin Linder, Esqs.,
for the Respondent.
Paul Berkowitz, Esq.,
for the Charging Party.

DECISION

STATEMENT OF THE CASE

MARK CARISSIMI, Administrative Law Judge. This case was tried in South Bend, Indiana on August 30, 2012. The International Brotherhood of Electrical Workers, Local Union No. 153, AFL-CIO (the Union or the Charging Party) filed the charge on February 9, 2012 and the Acting General Counsel issued the complaint on May 29, 2012.

The complaint alleges that the Respondent violated Section 8(a)(5) and (1) of the Act, since about November 29, 2011,[1] by refusing to execute an agreed-upon collective-bargaining agreement.

On the entire record, including my observation of the demeanor of the witnesses[2], and after considering the briefs filed by the Acting General Counsel, the Charging Party and the Respondent, I make the following

[1] All dates are in 2011 unless otherwise indicated.

[2] In making my findings regarding the credibility of witnesses, I have considered their demeanor, the content of the testimony and the inherent probabilities based on the record as a whole. In some instances, I credited some, but not all, of what the witness said. I note, in this regard, that "nothing is more common in all kinds of judicial decisions than to believe some and not all" of the witness' testimony. *Jerry Ryce Builders*, 352 NLRB 1262 fn.2 (2008), citing *NLRB v. Universal Camera Corp.* 179 F.2d 749, 754 (2d Cir. 1950), revd. on other grounds 340 U.S. 474 (1951).

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation with an office and place of business in South Bend, Indiana has been engaged in the business of providing services for the electrical sign and luminous tube industry. During the past 12 months, the Respondent, in conducting its business operations purchased and received at its South Bend, Indiana facility goods valued in excess of $50,000 directly from points outside the State of Indiana.

The 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

Background

The Respondent manufacture signs at its South Bend, Indiana, facility for customers, including Nike and Ralph Lauren, that are installed at locations throughout the United States and internationally. Some of the signs manufactured by the Respondent are lighted with LEDs. The Respondent's director of operations is Douglas McCoige.

The record does not establish precisely the length of the collective bargaining history between the parties, but they have been signatory to at least five or six collective-bargaining agreements. The last agreement executed by the parties was effective by its terms from December 1, 2010 through November 30, 2011. There are approximately 29 employees in the unit represented by the Union. There are approximately 24 production employees and 5 installation employees. Most of the work done by the installation employees is performed within a 150 mile radius of the Respondent's South Bend facility. Much of the installation work beyond that distance is contracted out.

The 2011 Negotiations

The first meeting between the parties took place on October 10, 2011, at the Respondent's facility. McCoige and John Ladue, the Respondent's attorney, represented the Respondent. Present for the Union were Michael Compton, the Union's business manager; Stan Miles, the Union's president; and employees Ty Picton, Mark Shepherd, and Keith Van Lue. At this meeting, the Union presented a list of topics had it wished to discuss including wages, the length of the agreement, vacation schedules, subcontracting, the rehiring process and health insurance benefits. Ladue noted that the Respondent wished to propose changes to the contract to address the vacation/rehire issue. McCoige discussed the Respondent's economic situation and said that since the Respondent’s work force was made up of employees with relatively high wages, it made it difficult for the Respondent to make competitive bids. McCoige asked for suggestions

from the Union on how the Respondent might reduce overhead costs, which would permit it to bring more work in-house. The parties agreed to meet again on October 17.[3]

At the October 17 meeting held at the Respondent's facility, the same individuals that attended the first meeting were present for both parties. The Union presented written proposals regarding holidays, vacations and health insurance premiums. McCoige discussed the Respondent's desire to restructure the contract to reduce its overhead costs so that the Respondent could be more competitive in bidding jobs.

At the October 31 meeting that was held at the Hilton Garden in South Bend, the same individuals were present except for Miles.[4] At this meeting, the parties discussed the proposals made by the Union on October 17. The Union offered additional written proposals on: a clothing allowance; hours and overtime; personal days; seniority, layoffs, and recall; and attendance (article 25). Ladue indicated that the Respondent would have responses to the Union's proposals and would present its proposals at the next meeting, which was scheduled to be held on November 16.

At the November 16 meeting the Respondent presented its responses to the Union's proposals and furnished the Union with a number of written proposals. The Respondent indicated it did not agree to the Union's proposal regarding article 25 (attendance). Included in the Respondent's proposals was a proposal to substantially revise the existing attendance policy. This proposal provided:

> ARTICLE 25
> Attendance
>
> North American Signs depends on a regular schedule workforce to meet the requirements of our customer's deliveries. Regular attendance is expected as scheduled. Employees are expected to be at their designated work areas on time and ready to work.
>
> The purpose of this attendance policy is to set clear guidelines so everyone knows what is expected and so these guidelines can be fairly and consistently applied. This policy applies to all scheduled work times including overtime weekend days which are treated the same as regular weekdays if the employee agrees to work that overtime.
>
> A. No-Show/No-Call: Employees who are absent for two consecutive workdays without calling in to explain the reason for the absence, shall be automatically terminated for cause.

[3] The parties had a practice of Ladue preparing minutes of the bargaining sessions that were then initialed by both parties. I have relied on these minutes in making my findings regarding the negotiation sessions

[4] Through November 29, 2011, the location of the meetings and the participants remained the same.

> B. No-Show/Tardy: Employees who fail to show for work or are late for work without calling in at least one hour before the employee's scheduled start time, shall accumulate one attendance violation. Accumulation of two attendance violations in any one calendar month shall result in disciplinary action, including possible termination for cause. Accumulation of five attendance violations in any one calendar year shall result in disciplinary action, including possible termination for cause.
>
> C. Unpaid Excused Absences/Tardy: Employees who are absent from work due to a doctor's appointment, accident on the way to work, a medical issue requiring treatment, jury duty, school appointment, or other justifiable reason, may avoid an attendance violation and have the absence or tardy counted as unpaid, excused time off, if the employee provides written verification, signed by a third party (i.e., the doctors office, a court official, or the school) within 48 hours of the absence/tardy.(GC Exh. 9.)

McCoige testified without contradiction that the attendance provision in the then existing contract was ambiguous and administratively difficult to apply. McCoige further testified that in proposing the revisions to article 25, the Respondent's intention was to have a clear policy that was easier to apply. According to McCoige, the Respondent's understanding of the language of article 25 is that section b requires an employee who is not going to come to work or is going to be late to at least call in and inform the Respondent. The valid reasons for an excused absence are set forth in section c. If an employee does not have a valid reason for not coming to work or being tardy, the employee will accumulate an attendance violation under section c.

At the meetings held on November 21 the parties reviewed each of the Respondent's proposals that were furnished to the Union at the last meeting. At the meeting held on November 23 the parties continued to discuss the proposals to revise the existing contract that each had made.

The parties' next meeting was held on November 29. At this meeting, the parties focused on trying to reach a final agreement and ultimately reached an agreement in principle. While some of the terms of the agreement were in writing, other terms were a combination of written proposals with verbal modifications. The parties shook hands, congratulated each other and talked about distributing a draft copy of the agreement for review. The parties refer to the draft copy of an agreement as a "redline" draft. The reference to "redline" is apparently derived from the parties' practice of using red print to reflect both new language and language that had been stricken from the previous agreement. The preparation of a redline draft for circulation was consistent with the parties' past practice in bargaining. Pursuant to this practice, once the parties reached an agreement in principle on the terms of a new collective-bargaining agreement, either the Respondent or the Union would prepare an initial redline draft of the contract for both parties to review. To get from the first redline draft to a signature ready contract, the parties typically would exchange modifications and corrections to make sure that the draft agreement actually captures the parties' intent.

On November 30, at 9:52 a.m., McCoige sent an email along with a redline draft collective-bargaining agreement (GC Exh. 13). The text of McCoige's email indicates:

> Here is the redline copy of the CBA with the agreed upon changes.
>
> Let's try and sign this today-then we have a new agreement in place prior to the actual expiration of the current agreement. I realize you still must send it to the International for the final stamp.
>
> That being said if you need to schedule with Ty to come over and review/sign it just let me know and I'll print it without the redlines.

The attached draft includes the following relevant portion of article 25 (attendance):

> A. No-Show/No-Call: Employees who are absent for two consecutive workdays without calling in to explain the reason for the absence, shall be automatically terminated for cause
>
> B. No-Show/Tardy: Employees who fail to show for work or are late for work without calling in within one hour before the employee's scheduled start time, shall accumulate one attendance violation. Accumulation of two attendance violations in any one calendar month shall result in disciplinary action, including possible termination for cause. Accumulation of five attendance violations in any one calendar year shall result in disciplinary action, including possible termination for cause.
>
> C. Unpaid Excused Absences/Tardy: Employees who are absent from work due to a doctor's appointment, accident on the way to work, a medical issue requiring treatment, jury duty, school appointment, or other justifiable reason, shall avoid an attendance violation and have the absence or tardy counted as unpaid, excused time off, if the employee provides written verification, signed by a third party (i.e., the doctors office, a court official, or the school) within 48 hours of the absence/tardy or the employee has a signed NAS excused absence slip ("white slip").

As a result of the negotiations between the parties, there are some changes in the version of article 25 contained in the November 30 redline draft submitted to the Union from the Respondent's original proposal regarding article 25 made on November 16. There is no change to section a. In the second line of section b the words "at least" were deleted and the word “within” was substituted. In the third line of section c the word “may” was changed to “shall”. At the end of section c the following was added "or has a signed NAS excused absence slip (“white slip”).”

At the hearing, Compton testified that the Union's understanding of the language in article 25, section b is that as long as an employee calls in within an hour of the employees scheduled start time and notifies the Respondent that he or she would be absent or tardy, the employee will not receive an attendance violation, even if the employee does not give a reason for being absent or tardy. Compton admitted that section b does not explicitly state that if an employee calls in the employee would not get an attendance violation, but he believes that was the implication of the language. (Tr. 53-54, 80-82).

On November 30, Compton replied to McCoige's email submitting the redline draft to the Union by an email indicating:

> Please provide a copy to Ty, Mark, and Kent. As far as being able to sign it today, my day has filled up. I feel we have an agreement in place but I want to give the guys and I sufficient time to look it over and make sure nothing was missed. Thank you for the quick turnaround.

Later on November 30, McCoige heard from the Respondent's estimator that some of the employees were interpreting the language of article 25 to mean that as long as they called in, they could miss work whenever they wanted to. McCoige testified that was the first time he had heard that view expressed, as the Union had never expressed that position during the negotiations. According to McCoige, he then spoke to Ty Picton, the union steward and a member of the negotiating committee, about this issue. McCoige testified that when he relayed to Picton what he had heard about the manner in which some employees interpreted article 25, Picton replied "This isn't a gotcha, you guys just screwed up." (Tr. 97.) McCoige then contacted Ladue and relayed to him what he had heard and directed him to contact the Union and clarify this issue. [5]

On December 1 Ladue sent the following email (GC Exh. 14) to Compton:

> We need to clarify the language in Article 25 on attendance for two reasons. First, we agreed to that a call-in "within one hour of scheduled start time" would be included in section "B" and when I edited that section I failed to take out the word "before"-which makes it read like you need to call-in one hour before the scheduled start time. Second, Doug has heard some rumors on the floor that people are reading the language in section B to mean that if you call-in within an hour of your scheduled start time then you get an excused absence/tardy and avoid an attendance violation no matter why you are absent or late. This is not what was intended and not the way this Article will be administered, so we need to clarify that too. I have included two sentences at the end of section B to clarify that issue. I will call you shortly to discuss this.

Attached to the email was another draft of article 25, attendance. Consistent with Ladue's email, the word "before" was removed from section b. In addition, the following language was added at the end of paragraph B:

> If an employee calls in within one hour of the scheduled start time and the reason for the absence/tardy qualifies as an excused absence under Section C below, then

[5] Picton denied making such a statement to McCoige. Picton claimed that he had a "slightly hostile" relationship with McCoige and rarely spoke to him. I credit McCoige's testimony on this issue. McCoige's demeanor reflected certainty while testifying regarding this issue and it is plausible that he would check with Picton, the union steward and a bargaining committee member, before pursuing the issue of the Union's understanding of the language of article 25 any further. On this point, Picton appeared to testify in a manner that he believed would support the Union's position.

the absence/tardy will not result in an attendance violation. Otherwise, calling in within one hour of the scheduled start time does not avoid an attendance violation.

On December 1, the Respondent implemented the provisions of the tentative agreement it had reached with the Union, except for the attendance policy.

After receiving Ladue's December 1 email and proposed revision to article 25, Compton spoke to McCoige by phone and they agreed to meet on December 5 at the Union's office. McCoige credibly testified that at this meeting he and Compton tried to resolve the attendance issue and some other minor matters so that they could get the contract ready to be signed. According to McCoige, Compton proposed that employees call in within two hours the start time rather than one. In an effort to resolve the issue, McCoige offered to increase the number of days that an employee could be late or miss work if the Union accepted the Respondent's revised language contained in Ladue's December 1 email. As set forth above, both the draft of article 25 submitted to the Union on November 30 and the revisions contained in Ladue's December 1 email indicated that two attendance violations in a calendar month could result in disciplinary action, including possible termination. Both drafts also indicated that five attendance violations in a year could result in disciplinary action, including possible termination. McCoige proposed increasing the number of attendance violations in the month to five and in a year to twelve in an effort to secure the Union's agreement to article 25, as clarified by Ladue's email submitted to the Union on December 1. Compton said he needed to discuss the Respondent's proposal with the bargaining committee. McCoige and Compton also discussed changing the number of days for the probationary period under the recall procedure. The draft contract provided the probationary period for employees who are recalled was 45 days. Compton pointed out that the probationary period for new employees in the proposed agreement was 30 days and that the periods should be the same. McCoige indicated he would agree to that if the Union would accept the Respondent's attendance policy as revised on December 1. McCoige testified that he expected the Union to contact him after Compton had discussed the issues with the bargaining committee.[6]

[6] Compton's version of this meeting differed from that of McCoige. According to Compton, he and McCoige met for about 15 minutes. Compton admitted discussing the proposed clarification of article 25 that Ladue had submitted on December 1 but testified that he and McCoige discussed only minor language issues in it. Compton did not recall McCoige offering to increase the number of the attendance violations that would be permitted each month in order to secure the Unions agreement with the Respondent's December 1 proposed clarification. Compton testified that if McCoige did offer an increase in the number of attendance violations that would be permitted "it was an off the record discussion and it wasn't negotiations at that point." Compton testified that he and McCoige went through the redline draft that the Respondent had submitted to the Union on November 30 and that McCoige initialed the pages he was comfortable with but did not initial article 25, but rather stated he would have to speak to Ladue about it. I credit McCoige's testimony over Compton's regarding the substance of the December 5 meeting. McCoige's testimony was more detailed and was also inherently more plausible. After the Respondent had sent the revised language on December 1, it seems logical that McCoige and Compton would meet and discuss the substance of it and that this issue would be a critical part of their meeting. It is not plausible, in my view, that the only discussion regarding article 25 at this meeting involved minor language changes.

On December 7, Compton sent an email to McCoige stating:

> After our discussion Monday and my discussion with our Negotiating Committee I feel if you are still interested in discussing changing the agreement we need to find time to set (sic) down together. Please let me know if you are still interested in doing so.

The parties agreed to meet on December 8 at the Respondent's facility. Present for the Union at this meeting were Compton, Picton and Mark Shepherd. Ladue and McCoige were present for the Respondent. According to the uncontroverted testimony of Compton and Picton, the Union representatives indicated at the beginning of the meeting that the Union was not there to negotiate and, if the parties could not reach agreement on that preliminary issue, the Union would leave the meeting. The Respondent's representatives did not voice an objection to the Union's statement. At this meeting, the Respondent presented to the Union committee a proposal with the additional language at the end of article 25, section b that Ladue had submitted to Compton on December 1. (R. Exh. D, p. 1)

There is a substantial variance in the testimony of the witnesses as to whether the Union presented a written proposal to the Respondent at this meeting. Both McCoige and Ladue testified that the Union presented a written proposal to the Respondent regarding article 25 sections b and c that provided as follows:

> B. Tardy: Employees who fail to show for work or are tardy for work without calling in within one hour of the employee's scheduled start time, shall accumulate one attendance violation. Accumulation of two attendance violations in any one calendar month shall result in disciplinary action, including possible termination for cause. Accumulation of five attendance violations in any one calendar year shall result in disciplinary action, including possible termination for cause. <u>It shall not be considered an attendance violation if an employee calls in within 2 hours of the employees scheduled start time. If an employee is more than 2 hours tardy, whether the employee called in or not, this may be considered an unexcused absence and in such case would be covered by Section C of this Article</u>
>
> C. Unpaid Excused Absences: Employees who are absent from work due to a doctor's appointment, accident on the way to work, a medical issue requiring treatment, jury duty, school appointment, or other justifiable reason, shall avoid an attendance violation and have the absence or tardy counted as unpaid, excused time off, if the employee provides written verification, signed by a third party (i.e. the doctor's office, a court official, or the school) within 48 hours of the absence or the employee has a signed NAS excused absence slip ("white slip"). <u>Employees may use a personal day or wellness day to avoid an attendance violation. [</u>Underlining in the original.] [R. Exh. D, p.2.]

Compton initially admitted that the Union presented the proposed language noted above to the Respondent (Tr. 74). He also admitted at this meeting that the Union sought to have the Respondent consider reinstating vacation benefits for 3 employees. On rebuttal, Compton

testified that he did not recall presenting the proposal noted above as R. Exh. D, p. 2 to the Respondent on December 8. He also stated that he retained materials in his computer of all the proposals that he had made. The hearing was adjourned so that Compton could search his computer records. After returning to the hearing after reviewing the records, Compton testified that he did not present a revised proposal (R. Exh. D, p. 2) to the Respondent at the December 8 meeting. (Tr. 153.)[7] Both Picton and Shepherd also testified that the Union did not present this proposal to the Respondent at the December 8 meeting.

I credit the testimony of McCoige and Ladue regarding the fact that the Union presented a written proposal (R. Exh. D, p. 2.) to the Respondent on December 8. Their testimony regarding this issue is mutually corroborative and consistent and their demeanor was convincing. On the other hand, Compton first testified that he gave the written proposal set forth above to the Respondent at this meeting and then later testified that he did not. His demeanor while testifying about this issue was unimpressive and reflected substantial uncertainty. I find that the evidence from his computer records supports the fact that the Union prepared revised language regarding article 25 and presented it to the Respondent on December 8. While Ladue was the original author of article 25, Compton revised it on December 5 and presented the Union's proposed revision to the Respondent on December 8. In reaching this conclusion, I note Compton's testimony that he attempted to be very careful after November 30 to make sure the Union did not give the appearance of negotiating. I believe his testimony regarding the December 8 meeting was shaped by his desire to buttress the Union's legal position in this case. I also find that Picton and Shepherd testified on this point in a manner they believed would support the Union's position.

The parties were unable to resolve their differences regarding the language of article 25 at the meeting on December 8. On December 14 Ladue sent an email to Compton along with a copy of Respondent's redline draft (GC Exh. 16.)[8] On December 15, Compton replied to Ladue by email indicating that the contract should be ready for signatures in a couple of days.

On December 20, Compton submitted a "final" draft of the collective bargaining agreement attached to an email to McCoige. Compton indicated that he had made "changes or clarifications" as needed. The email requested that McCoige prepare the document for final review and signatures. As set forth in this draft (GC Exh. 17, R. Exh. E.) article 25, attendance provides:

[7] The computer records that Compton reviewed were introduced into evidence by the Charging Party as CP Exhs. 1A, 1B, and 1C. The document introduced as Cp Exh. 1C has the same language as R. Exh d, p. 2 and is entitled "Union Clarification to ARTICLE 25 Attendance" in Cp Exh. 1A. Compton's computer records indicate that CP Exh. 1C was modified on December 5, 2011, and the author was John Ladue. (Charging Party Exh. 1A and 1C, Tr. 152-153.) Compton admitted, however, that Ladue was not present in his office on December 5, 2011.

[8] The redline draft referred to in the email was not attached to GC Exh. 16 so that it is unclear as to which version of article 25 was submitted to the Union on this date. I infer, however, based on the record as a whole that it be contained the Respondent's revision to article 25 that Ladue submitted to Compton on December 1 and that was presented to the Union's negotiating committee on December 8.

> A. No-Show/No-Call: Employees who are absent for two consecutive workdays without calling in to explain the reason for the absence, shall be automatically terminated for cause.
>
> B. No-Show/Tardy: Employees who fail to show for work or are late for work without calling in within one hour of the employee's scheduled start time, shall accumulate one attendance violation. Accumulation of two attendance violations in any one calendar month shall result in disciplinary action, including possible termination for cause. Accumulation of five attendance violations in any one calendar year shall result in disciplinary action, including possible termination for cause.
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> C. Unpaid Excused Absences/Tardy: Employees who are absent from work due to a doctor's appointment, accident on the way to work, a medical issue requiring treatment, jury duty, school appointment, or other justifiable reason, shall avoid an attendance violation and have the absence or tardy counted as unpaid, excused time off, if the employee provides written verification, signed by a third party (i.e., the doctor's office, a court official, or the school) within 48 hours of the absence/party or the employee has a signed NAS excused absence slip ("white slip").

McCoige credibly testified that the December 20 redline draft also contained some changes that the Respondent had not agreed to on or before November 29. For example, in article 20 (R. Exh. E., p. 29) the number of days for the probationary period for recalled employees was changed from 45 to 30. McCoige testified that at the December 5 meeting with Compton he had indicated that if the Union would agree to the revision that the Respondent had proposed regarding article 25 on December 1 he would agree with the reduction of days in article 20. Since the Union had never agreed to the Respondent's proposed revision to article 25, McCoige had not assented to the change in the probationary period for recalled employees.

McCoige also indicated that the Respondent had not agreed to the change that the Union had made to article 12, personal days, section 12.03 (R. Exh. E., p. 19). Section 12.03 deals with the notification requirement for taking a personal day for illness or medical reasons. In the proposed draft of December 20, the Union struck the language indicating such notice had to be given at least 30 minutes prior to an employee's scheduled start time and inserted that such notice had to be given within an hour of the start time. McCoige indicated that the change was significant since, according to the Union's proposed language, if an employee started work at 6:00a.m., he or she could call in at 6:59 a.m. and take a personal day. McCoige indicated that such a policy would make scheduling extremely difficult.[9]

On January 10, 2012, Compton submitted another redline draft of the contract to Ladue. (GC Exh. 18, R. Exh. F.) This draft does not contain the language the Union inserted in its

[9] I do not credit Compton's testimony that the changes he made on the December 20 redline draft were consistent with the parties agreement on November 29. I find that McCoige was the more credible witness on this point. His demeanor exhibited certainty and his testimony was more detailed and more plausible than that of Compton.

December 20 draft regarding section 12.03. The language contained in the January 10 draft indicated that the employee must give notice 30 minutes prior to an employee's scheduled start time for illness or the medically related use of a personal day. The January 10 draft contained the version of article 25 that was set forth in the Union's December 20 redline draft.

On January 27, 2012, McCoige and Compton met with Michael Daugherty, an IBEW international representative, in order to discuss a grievance. At this meeting, McCoige raised with Daugherty the dispute between the parties involving article 25. The parties agreed to meet with Daugherty on Friday, February 3, 2012, to resolve the dispute. When McCoige became aware that Daugherty would be unable to attend a meeting on that date, McCoige contacted Compton by phone on February 2 to attempt to reschedule the meeting. During this call Compton informed McCoige that the Union was done negotiating and that the Respondent should sign the contract. On February 3, Compton sent an email to McCoige requesting that the Respondent sign the agreement that they had negotiated (GC Exh. 20.) On the same date, Ladue responded to Compton by email stating that the parties "never had a meeting of the minds on the meaning and intent of the draft language for Article 25." (GC Exh. 20.) Thereafter, the Union filed the charge in this case on February 9, 2012.

In June 2012, the Respondent stated it would begin to enforce the attendance policy on July 1, 2012 as set forth in its last offer. However, on August 7, 2012, McCoige and Compton met and McCoige informed the Union that the Respondent would not enforce the attendance policy. McCoige testified that since December 1, 2011, the Respondent has not applied either the attendance policy in the expired contract or its last proposal regarding article 25. Since December 1, 2011, no employees have been disciplined for attendance.

Analysis

The Acting General Counsel contends that the parties reached a contract incorporating all of the terms and conditions of employment, including the Respondent's proposal regarding the attendance policy, article 25, on November 29, 2011. The Acting General Counsel argues that the Respondent's subjective misunderstanding about article 25, section b is not relevant since the language of that section is unambiguous judged by a reasonable standard. Accordingly, the Acting General Counsel contends that under Section 8(d) of the Act the Respondent was obligated to execute the written contract submitted to the Respondent by the Union on December 20, 2011 incorporating the agreement reached on November 29, 2011, and the Respondent's refusal to do so violates Section 8(a)(5) and (1) of the Act. (Acting General Counsel's brief, p. 19.)

The Charging Party also contends that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to execute an agreement incorporating terms agreed to on November 29, 2011. While in general agreement with the position of the Acting General Counsel, the Charging Party contends that the Respondent, "understood exactly what the agreed-upon terms of Section B of Article 25 meant at the time the parties reached an agreement. Respondent's objection to the agreed-upon language occurred only after the parties reached their agreement. The after-the-fact rationalization of the Respondent does not provide a defense for its refusing to sign the contract to which the parties agreed. " (Emphasis in the original.)

The Respondent contends that the Acting General Counsel has not met his burden of establishing that the parties had reached a meeting of the minds on all the substantive issues of a collective bargaining agreement on November 29, 2011. The Respondent first argues that the parties had different interpretations of the ambiguous language contained in article 25, which establishes that there was no agreement on the terms of a contract. The Respondent also contends that the parties continued to negotiate after November 29, 2011, and these negotiations establish that there was no agreement reached between the parties on the terms of the complete collective-bargaining agreement on that date. Accordingly, the Respondent contends that it did not violate Section (a)(5) and (1) of the Act by refusing to execute an agreed-upon collective-bargaining agreement and that the complaint should be dismissed.

In *Hempstead Park Nursing Home*, 341 NLRB 321, 322 (2004) the Board summarized the legal principles to be applied in a case such as this as follows:

> Pursuant to Section 8 (d) of the Act, either party to a collective-bargaining agreement is obligated to execute, or assist in executing, a memorialized version of the agreement if requested to do so by the other party. *H. J. Heinz Co. v. NLRB*, 311 U. S. 514 (1941). However this obligation arises only after a "meeting of the minds" on *all* substantive issues and material terms has occurred. See *Intermountain Rural Electric Assn*., 309 NLRB 1189, 1192 (1992). The General Counsel bears the burden of showing that the parties have reached the requisite "meeting of the minds." Id. at 1192.
>
> A "meeting of the minds" in contract law is based on the objective terms of the contract rather than on the party's subjective understanding of the terms. Thus, subjective understandings (or misunderstandings) of the meaning of terms that have been agreed to are irrelevant, provided that the terms themselves are unambiguous "judged by a reasonable standard." *Vallejo Retail Trade Bureau*, 243 NLRB 762, 767 (1979), enfd. 626 F.2d 119 (9th Cir. 1980). However, when the terms of a contract are ambiguous, and the parties attach differing meanings to the ambiguous terms, a "meeting of the minds" is not established. "When . . . misunderstandings may be traced ambiguity for which *neither party* is to blame or for which *both parties* are equally to blame, and the parties differ in their understanding, their seeming agreement will create no contract." *Meat Cutters Local 120 (United Employers, Inc.),* 154 NLRB 16, 26-27 (1965) [emphasis in original]. [Footnote omitted.]

In addition to establishing that there was a "meeting of the minds" with respect to the terms of an agreement, the General Counsel must show shall that the document which the Respondent refused to execute accurately reflected that agreement. *Paper Mill Workers Local 61 (Groveton Papers Co*.), 144 NLRB 939, 941-942 (1963).

Applying the above noted principles to the instant case, I find, for the reasons set forth below, that the language of article 25 (attendance) set forth in the redline draft tendered by the Union on December 20 is ambiguous. I further find that the parties had incompatible understandings regarding the meaning of that language. I find therefore that the Acting General Counsel has failed to show that the parties reached a "meeting of the minds" regarding article 25.

Accordingly, I conclude that the Respondent is not obligated to execute the redline draft tendered by the Union on December 20, 2011, and I shall dismiss the complaint in this matter.

I find that there is ambiguity in sections b and c of article 25 as they are set forth in the December 20 redline draft which the Acting General Counsel contends the Respondent is obligated to execute.[10] In this connection, section b indicates that "Employees who fail to show for work or are late for work without calling in within one hour of the employee's scheduled start time, shall accumulate one attendance violation." The remainder of section b indicates that two attendance violations in a calendar month could result in discipline, including termination and five attendance violations in a calendar year could result in termination.

Section c provides that employees who are absent from work due to certain listed reasons "or other justifiable reasons" shall avoid an attendance violation and have the absence or tardy counted as unpaid, excused time off, if the employee provides written verification from a third party as to the reason for the absence or has an excused absence slip signed by a representative of the Respondent.

I find the language of article 25, sections b and c to be ambiguous because one could focus only on paragraph b and read it to mean that as long as an employee calls in within 1 hour of the employee's starting time and notified the Respondent that he or she will be absent, the employee will not receive an attendance violation. However, one could also read sections b and c as a whole and conclude that the only way to avoid an attendance violation, even after calling in, is to meet the requirements of an excused absence as set forth in section c. Since I find that, judged by reasonable standard, the objective terms of the proposed agreement are ambiguous, it is appropriate to consider the meaning each party attached to these ambiguous terms.

As noted above, McCoige explained the Respondent's understanding of the language of article 25, sections b and c is that they are to be considered as a whole. The Respondent's understanding of sections b and c is that an employee who is not going to come to work or is going to be late must call in and inform the Respondent under section b. If the employee has a valid reason as set forth in section c, the employee's absence will be excused and the employee will receive unpaid time off. If an employee does not have a valid reason as defined in section c, the employee will accumulate an attendance violation.

The Respondent's understanding of article 25 was expressed to the Union in Ladue's December 1 email immediately after the Respondent learned that the Union had a different understanding regarding the language of article 25. Ladue indicated that the Respondent did not intend this language to mean that if an employee called in within 1 hour of the employee's scheduled start time, the employee will be entitled to an excused absence and avoid an attendance violation regardless of the reason the employee was absent or late. Ladue's December 1 email included language to clarify the ambiguity in article 25, sections b and c. The Respondent proposed adding the following at the end of section b:

[10] There is no ambiguity in article 25, section a, as it clearly states that: "Employees who are absent for two consecutive workdays without calling in to explain the reason for the absence, shall be automatically terminated for cause."

> If an employee calls in within one hour of the scheduled start time and the reason for the absence/tardy qualifies an excused absence under Section C below, then the absence/tardy will not result in an attendance violation. Otherwise, calling in within one hour of the scheduled start time does not avoid an attendance violation.

According to Compton's testimony at the hearing, the Union's understanding of the language in article 25, section b is that as long as an employee calls in within an hour of the employees scheduled start time and notifies the Respondent that he or she will be absent or tardy, the employee will not receive an attendance violation, even if the employee did not give a reason for being absent or tardy.

I find that the language contained in the December 20, 2001 draft submitted by the Union regarding article 25, sections b and c, is ambiguous because it gives rise to reasonable but incompatible interpretations. I do not ascribe fault to either party for this ambiguity. As set forth above, the parties have widely divergent understandings of the language contained in article 25, sections b and c. Accordingly, I find that the Acting General Counsel has not established a meeting of the minds with respect to article 25, sections b and c. As the Board indicated in *Hempstead Park Nursing Home,* supra, at 324, "It is the general counsel's burden to prove not just a plausible interpretation, but also the *correct* interpretation, i.e., one that will be so clear as to preclude all others." (Emphasis in the original.) In my view, the Acting General Counsel has not met that standard.

In agreement with the Respondent, I find that the Board's decision in *Hempstead Park Nursing Home* is instructive in resolving the issues present in the instant case. In that case, the parties executed a memorandum of agreement (MOA) that contained the substantive terms of a collective-bargaining agreement but was not a fully integrated contract. Part of the MOA set forth a schedule of the employer's contributions to the pension plan as follows: “yr 1-0; yr 2-4968; yr 3-5613.” The MOA also set forth contributions to the benefit fund as follows: “yr 1-7979; yr 2-8810; yr 3-9647.”

Approximately 2 weeks after the MOA was signed, the pension plan and benefit fund office sent the employer a letter pointing out that there was no clear definition of the effective dates and duration of the contract in the MOA. The fund indicated that its interpretation of the MOA provided for payment on a calendar year basis. The union agreed with the fund and sent the employer a draft of a fully integrated collective-bargaining agreement that provided for the payment of pension and benefits contributions on a calendar year basis. For example, the union's draft contract provided for pension payments “effective 1/01/03-12/31/03: $4968.” Under the employer's interpretation, the term “yr” as used in the MOA referred to a full 12 month period and not a calendar year. As an example, the employer requested that the date of contributions read as follows: “03/01/03-02/29/04 =$4968.” The employer refused to sign the proposed contract submitted by the union.

Thereafter, the union filed a charge and the General Counsel issued a complaint on that charge. Relying on the legal principles I have quoted earlier in this decision, the Board found that the MOA was ambiguous and that the parties had attached incompatible meetings to the term

"yr." Under the circumstances, the Board concluded that the General Counsel did not establish that the parties had reached a meeting of the minds on the pension and benefit provisions. Accordingly, the Board found that the employer's refusal to sign the contract tendered by the union did not violate Section 8(a)(5) and (1) of the Act.

As further support for my conclusion, I rely in the Board's decision in *Liberty Pavilion Nursing Home*, 259 NLRB 1249 (1982). In that case, the Board found that an employer did not violate Section 8(a)(5) and (1) by refusing to sign an agreement when there was a mutual misunderstanding between the parties with respect to ambiguous language in a draft contract regarding the wages to be paid employees. Similarly, in *Oil, Chemical and Atomic Workers International Union, Local 7-507 (Capital Packaging Co.)* 212 NLRB 98 (1974) the Board dismissed a complaint alleging that a union violated Section 8(b)(3) where there was no "meeting of the minds" regarding essential terms of a proposed agreement when the language contained in the proposed agreement was ambiguous.

I find *Ebon Services, Inc*., 298 NLRB 219 (1990), enfd. mem 944 F.2d 897 (3d Cir. 1991), relied on by the Acting General Counsel in support of his position, to be distinguishable. In *Ebon Services*, the Board concluded that the parties reached a complete meaning of the minds on all substantive terms of a contract when the employer's representative, Felton read over the union's proposed contract page by page and agreed to sign it. Id. at 219 fn. 2; 223. There was no ambiguous language over which the parties had a mutual misunderstanding. Unlike the instant case, in *Ebon Services* the employer never informed the union of any problems it may have had with the contract as the union had submitted it.

In the instant case, as soon as the Respondent learned that some employees and a member of a Union's bargaining committee had a different understanding of the language of article 25, sections b and c, than it did, Ladue sent his December 1 email setting forth clearly what the Respondent's understanding of the language was. Thus, while the Respondent prepared the November 30 draft and asked the Union to sign it, as soon as the Respondent learned of the discrepancy in the understanding between it and the Union regarding the language in article 25, sections b and c, and before the Union had indicated its approval of the draft, the Respondent sought to clarify the meaning of the language used in those sections. This occurred in the historical context of the parties preparing a series of redline drafts before reaching the terms of a complete collective-bargaining agreement. Thus, the circumstances present in the instant case are quite different from those that existed in *Ebon Services.*

As I have noted above, the Acting General Counsel must establish in a case of this type that the agreement that the Respondent refused to sign accurately reflected the entire agreement between the parties. The Acting General Counsel contends that the December 20, 2011, draft the Union submitted to the Respondent is the document that I should order the Respondent to execute. According to the credited testimony of McCoige, however, that draft contains other provisions beyond article 25, sections b and c that the Respondent had not agreed to. In this connection, McCoige testified that at the December 5 meeting that he had with Compton, McCoige agreed to reduce the number of days in the probationary period for recalled employees from 45 to 30 only if the Union agreed to the clarifying language that the Respondent had proposed on December 1 regarding article 25, sections b and c. Since the Union never agreed to the clarifying language that the Respondent had proposed regarding article 25, sections b and c,

the condition precedent to be Respondent's agreement to reduce the probationary period for recall employees, the parties did not reach agreement on that issue. In addition, the Union included language in section 12.03 regarding the notification requirements for taking a personal day off for illness or medical reasons that the Respondent had not agreed to. Accordingly, I find that these inclusions are an additional reason that the Respondent did not violate Section 8(a)(5) and (1) by refusing to execute the December 20, 2011 draft contract submitted by the Union.

The Respondent further contends that, aside from the question of whether the proposed contract contained ambiguous language on which there was no "meeting of the minds," another reason that I should find that it did not violate Section 8(a)(5) and (1) is that the parties continued negotiations for more than 2 months after November 29 and never reached a complete agreement on the terms of the new contract.

In response to this argument, the Acting General Counsel contends that the parties reached an agreement on November 29, 2011, and that any further discussions over that agreement was a voluntary attempt on behalf of the Union to modify an existing agreement and not indicative of continued bargaining to arrive at the terms of a new collective-bargaining agreement.

Contrary to the Acting General Counsel's position, however I find that the parties did not reach agreement on the complete terms of a collective-bargaining agreement on November 29, 2011, and therefore I do not agree that the meetings that occurred after November 29 were a voluntary attempt on the part of the Union to perhaps modify the terms of an existing agreement.

While I have considered the evidence regarding the meetings between the parties that occurred after November 29, 2011, I do not find those meetings serve as an independent basis to support the dismissal of the complaint in this matter. In the first instance, there is uncontroverted evidence that at the December 8 meeting between the parties, the Union’s representatives indicated at the outset that they were not there to negotiate and that, if the parties did not reach agreement on that preliminary issue, the Union would leave the meeting. Since the Respondent's representatives did not voice an objection to the Union's position, I find that the parties’ exchange of proposals at that meeting was more in the nature of an attempt to settle the dispute regarding the terms of a new agreement prior to engaging in the litigation process. As a matter of policy, particularly where the parties have an existing collective bargaining relationship, I believe that an attempt to resolve disputes without resort to the legal process is a salutary goal. Under the circumstances present in this case, I do not rely on the continued meetings and the different proposals advanced by the Union after November 29, 2011 as indicative of the fact that it knew the parties had not reached a complete agreement on November 29, 2011. Rather, as I have explained above, under all the facts in this case, the parties simply did not reach agreement on the terms of a complete collective-bargaining agreement which the Respondent is obligated to execute. Accordingly, I shall dismiss the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[11]

ORDER

The complaint is dismissed.

Dated, Washington, D.C., November 1, 2012.

_____
Mark Carissimi
Administrative Law Judge

[11] 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.