

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 13**

POLYCON INDUSTRIES, INC.

and

CASE: 13-CA-104249

**TEAMSTERS LOCAL UNION NO. 142,
AFFILIATED WITH THE INTERNATIONAL
BROTHERHOOD OF TEAMSTERS**

**COUNSEL FOR THE GENERAL COUNSEL’S ANSWERING
BRIEF TO RESPONDENT’S EXCEPTIONS TO THE
ADMINISTRATIVE LAW JUDGE’S DECISION**

The evidence in this case unequivocally establishes that Respondent Polycon Industries, Inc. violated Sections 8(a)(1) and (5) of the Act by refusing to sign a collective-bargaining agreement after it reached an agreement on all of the substantive terms of a first contract with Teamsters Local 142.¹

After years of bargaining, Respondent’s attorney clearly communicated to the Union’s attorney, via email dated May 3, 2013, that the parties had reached a first contract. However, Respondent thereafter blatantly refused to execute the agreement when it learned that a decertification petition was being circulated.

¹ In this brief, the Administrative Law Judge will be referred to as “the ALJ”; the National Labor Relations Act will be referred to as “the Act”; the National Labor Relations Board will be referred to as “the Board”; Polycon Industries, Inc. will be referred to as “Respondent”; and Teamsters Local Union No. 142, Affiliated with the International Brotherhood of Teamsters will be referred to as “the Union or Local 142”. Citations to the ALJ’s Decision will be referred to as “ALJD” followed by the specific page(s) and line(s) referenced. With respect to the record developed in this case, citations to pages in the transcript will be designated as “Tr.” followed by the page number. The General Counsel’s exhibits will be designated as “GC” followed by the exhibit number. Respondent’s exhibits will be designated as “R” followed by the exhibit number.

However, under established Board law, a party may not lawfully refuse to execute an agreed-upon contract due to an asserted good-faith doubt about an incumbent union's continued majority status based on events occurring after the agreement is reached. This is true regardless of the status of any written document memorializing the agreement. Thus, Respondent could not lawfully refuse to execute the agreed-upon contract based on it becoming aware of a decertification petition *after* the parties reached final agreement on May 3. Any argument raised by Respondent that no agreement exists is wholly inconsistent with the record evidence. Moreover, any argument that Respondent received actual knowledge of the Union's lack of majority support prior to forming an agreement with the Union is plainly specious and wholly contradictory with the record evidence.

On November 12, 2013, the ALJ issued a well-reasoned decision finding that Respondent's actions violated Section 8(a)(1) and (5) of the Act as alleged by the General Counsel. On December 10, 2013, Respondent filed eight separate Exceptions to the ALJ's decision and requested that the Charge be dismissed in its entirety. Unlike the ALJ's decision, Respondent's Exceptions do not accurately state the facts, misapply applicable case law and, in some respects, fail to include any argument in support of its claims. In sum, Respondent's Exceptions attack the ALJ's decision on two grounds. First, contrary to the record evidence, Respondent contends that the parties had not reached a meeting of the minds on a final contract on May 3, 2013. Second, Respondent argues that even if the parties had finalized a contract as of early May 2013, it could not execute the agreement because it had actual knowledge of the Union's lack of majority support. However, because the undisputed facts fully support the ALJ's conclusion that a meeting of the minds was reached on May 3, Respondent's Exceptions on this point must be rejected. Therefore, Respondent's Exceptions 1, 4 and 5 should be dismissed.

Similarly, Respondent's attempts to defend its conduct on the basis of a supposed lack of majority support is both factually unsupported and, more importantly, legally insufficient. Accordingly, Respondent's Exceptions 2 and 3 are meritless.²

Pursuant to 102.46 of the Board's Rules and Regulations, the General Counsel, through its attorney Cristina Ortega, files this Answering Brief to Respondent's Exceptions. For the reasons discussed below, the General Counsel submits that Respondent's Exceptions should be denied in their entirety.

I. THE ALJ CORRECTLY CONCLUDED THAT THE PARTIES REACHED A MEETING OF THE MINDS ON MAY 3, 2013 AND RESPONDENT WAS OBLIGATED TO EXECUTE THE AGREED UPON CONTRACT. (Exceptions 1, 4 and 5)

Respondent's exceptions 1, 4 and 5, take issue with the ALJ's finding and conclusion that the parties reached a meeting of the minds on contract terms on May 3, 2013 and that Respondent was therefore obligated to execute it.³ In making his findings on this point, the ALJ correctly relied on undisputed facts, including the parties' written correspondence. ALJD p. 11, lns 34-39. Those undisputed facts can be summarized as follows.

The parties began contract negotiations in October 2010. In January 2013, the contract was finalized except Respondent noticed a typographical error in the contract's vacation provision and brought it to the attention of the Union. Tr. 20. The parties resolved the issue on March 11, with a mutual understanding that the typographical error would be corrected. Tr. 21.

² To the extent that any of Respondent's remaining Exceptions were intended to make additional separate arguments beyond these two broad claims, they must be rejected because they utterly fail to comply with the Board's Rules and Regulations. Section 102.46. Specifically, Respondent's Exceptions 6, 7 and 8 make no specific objection to the ALJ's conclusion that Respondent's unfair labor practice affects commerce, the ALJ's proposed Remedy or the ALJ's proposed Order. Presumably, any position that Respondent takes with respect to the inappropriateness of the ALJ's proposed Remedy and Order is based solely on the argument and position it has taken on its exceptions to the findings and conclusions made by the ALJ. Respondent fails to state, either in the Exceptions or in its brief, its grounds for these Exceptions. *Id.* at 102.46(b)(1). Thus, Respondent's Exceptions 6, 7 and 8 should be overruled on procedural grounds alone. *Id.* at 102.46(b)(1) and (2).

³ All dates hereinafter are in 2013 unless otherwise indicated.

The following day, on March 12, Respondent raised one concern, the statutory validity of the union security clause. JT 5. After numerous attempts to appease Respondent with alternative union security language, Respondent accepted the Union's proposed language on May 3, as evidenced by the email from Respondent to the Union. JT 15. Given that the union security clause was the only outstanding issue on the table and given Respondent's affirmative acceptance of the contract, the ALJ correctly concluded that the parties reached a meeting of the minds on May 3.

Specifically, on May 3, Respondent's counsel, Steve Johnson, emailed the Union's Counsel, Paul Berkowitz, in response to Local 142's union security language proposal. Johnson's email to Berkowitz stated, "[y]our language is fine...[l]et's have the contract start date be May 1, 2013." JT 15. In the email, Johnson went on to ask Berkowitz to prepare the contract for review and signature. ALJD p. 11, lns 37-39. On May 7, Berkowitz emailed Johnson an updated copy of the agreement with the new agreed-upon union security language. ALJD p. 12, lns 1-2; JT 15 and 16. Despite having clearly reached a final agreement in early May, suddenly, on May 9, Johnson emailed Berkowitz notifying him that Respondent would not be signing the collective-bargaining agreement. ALJD p. 9, lns 26-29; JT 15.

The ALJ's conclusion that the parties reached a meeting of the minds is well grounded in Board law. Section 8(d) of the Act requires the parties to a collective-bargaining relationship, once they have reached agreement on the terms of a collective-bargaining contract, to execute that contract at the request of either party. A failure to do so is clearly unlawful. It is well-settled that an employer violates Section 8(a)(5) of the Act by refusing to sign a written contract incorporating agreed-upon terms or by otherwise repudiating an oral agreement. *H.J. Heinz Co. v. NLRB*, 311 U.S. 514, 525-526 (1941). Such conduct constitutes a clear breach of the

employer's bargaining obligations, because a "refusal to honor, with his signature, the agreement which he has made with a labor organization, discredits the organization, impairs the bargaining process and tends to frustrate the aim of the statute to secure industrial peace through collective bargaining." *Id.* at 526; See also *Auciello Iron Works v. NLRB*, 517 U.S. 781, 782 (1996).

The question of whether the parties reached an agreement depends on whether the parties reached a "meeting of the minds" on the terms of the draft document. *Diplomatic Envelope Corp.*, 263 NLRB 525, 535-536 (1982); *Ebon Services*, 298 NLRB 219, 223 (1990). The existence of a collective-bargaining agreement is essentially a factual question, and it is the Board's function to determine "whether negotiations have produced a bargain which the employer has refused to sign and honor..." *NLRB v. Strong*, 393 U.S. 357, 361 (1969); See also, *North Bros. Ford*, 220 NLRB 1021, 1022 fn. 9 (1975) (Respondent was aware that union desired a written contract and any doubt it might have had was removed when charges were filed and a complaint issued alleging that its refusal to execute a contract was an unfair labor practice). If it is determined that an agreement was reached, a party's refusal to execute the agreement is a violation of the Act. See *H.J. Heinz Co.*, 311 U.S. at 526.

In its brief in support of its exceptions, Respondent fails to provide any legal authority for its incorrect assertion that the parties did not reach a meeting of the minds on May 3. Despite the plain reading of Johnson's email to Berkowitz accepting the contract, proposing a start date of May 1 and requesting a final copy for signature, Respondent argues that as of May 3, the parties were in continued negotiations.

In an attempt to support its arguments on this issue, Respondent incorrectly relies on the written communications between the parties that took place after Johnson's May 3 acceptance of the final term of the contract. On May 7, the date Berkowitz sent Johnson the final written

agreement via email, Berkowitz proposed moving a sentence from Article 1, Section 2 to Article 1, Section 3. ALJD p. 11, fn. 8; JT 15. The ALJ considered this fact and, citing *Teamsters Local 771 (Ready-Mix Concrete)*, correctly concluded that Berkowitz' proposal did not reopen the parties' negotiations or render the May 3 agreement invalid. ALJD p. 11, fn. 8; 357 NLRB No. 173, slip op. at 6 (2011). The existence of a collective-bargaining agreement remains, as does the parties' obligation to execute it, even if one party discovers minor discrepancies or drafting errors in the bargained-for contract, particularly where the other party indicates a willingness to make these changes. *Fashion Furniture Mfg., Inc.*, 279 NLRB 705, 705-06 (1986).

In its brief, Respondent also argues that the parties did not reach a meeting of the minds because Respondent's CFO and VP of Operations, William Hansen, testified that he thought the purpose of the May 3 email from Johnson, was a "continuation of our negotiations." Tr. 63-64. However, whether the parties reached a "meeting of the minds" is determined "not by the parties' subjective inclinations, but by their intent as objectively manifested in what they said to each other." *MK-Ferguson Co.*, 296 NLRB 776 fn. 2 (1988); See also *Windward Teacher Assn.*, 346 NLRB 1148, 1150-51 (2006). During Respondent's direct examination of Hansen, he testified that he was involved in the collective bargaining process between Respondent and Local 142 from its inception. Tr. 57. Hansen also testified that he was copied on Johnson's May 3 email to Berkowitz. However, Hansen conveniently and self-servingly categorized Johnson's acceptance of the union security clause language as Respondent merely obtaining "a clearer understanding of what we were agreeing to [] a continuation of our negotiations." Tr. 63.

Hansen further testified that Respondent's attorney (Johnson) kept him apprised of each communication with Local 142 concerning the collective-bargaining process. Tr. 64. Specifically, during his direct examination, Johnson asked Hansen:

Q: Is it your understanding that there was further negotiations between Mr. Berkowitz and myself that occurred on May 7th regarding the wording of the right to work language?

A: By basis of the string e-mails, yes, I was aware that the negotiations were continuing.

Q: Was I reporting to you as these events were occurring?

A: Yes you were.

Tr. 64.

While Hansen can claim that the May 3 and May 7 emails between Johnson and Berkowitz were merely further negotiations, his blatantly self-serving characterization is irrelevant. The fact is that Johnson's May 3 email clearly stated that the union security language was fine and offered to have the contract start date be May 1. JT 15. Nothing in Berkowitz' May 7 email negates that agreement. JT 15. Hansen's attempt to bolster Respondent's argument by adding a convenient reading of a document that speaks for itself cannot, and should not, alter the plain meaning of the communications. Rather, the obvious and inescapable conclusion is that the parties reached a final agreement by no later than May 3.

The ALJ correctly concluded that prior to Johnson's May 3 acceptance email, no topic remained for the parties to bargain over. ALJD p. 11, lns 23-31. Thus, as the ALJ appropriately found, Respondent's communication to the Union on May 3 was its acceptance of the only arguably outstanding issue between the parties. Therefore, the contract sent to Respondent on May 7 was fully consistent with the final agreement the parties reached on May 3. JT 15 and 16. Based on this chronology of events, the ALJ properly concluded that Respondent was obligated to execute the contract it reached with the Union.

II. THE ALJ CORRECTLY REJECTED RESPONDENT'S DEFENSE THAT AN EMPLOYEE DECERTIFICATION PETITION RELIEVED RESPONDENT OF ITS OBLIGATION TO EXECUTE THE CONTRACT (Exceptions 2 and 3)

In Exception 2 Respondent challenges the ALJ's conclusion that an employee circulated decertification petition did not relieve Respondent of its obligation to execute the contract. In Exception 3, Respondent takes issue with the ALJ's conclusion that the Union has been the exclusive collective-bargaining representative of the employees in the bargaining unit since July 27, 2010. By these two claims, Respondent contends that the employee decertification petition somehow privileged its conduct. However, the evidence fails well short of demonstrating that Respondent was relieved of its obligation to sign the agreed-upon contract. Moreover, the Respondent bases its defense on the false premise that the parties did not reach a meeting of the minds on May 3. Contrary to Respondent's specious argument, there is more than ample evidence in the record to support the ALJ's flat rejection of Respondent's defense and therefore, these exceptions should be rejected.

A. The sequence of events fails to support Respondent's purported defense.

After finally agreeing to a contract the week before, on May 9, Johnson sent an email to Berkowitz repudiating the agreement and specifically refusing to sign it. Johnson's May 9 communication stated:

I am advised that most employees signed a petition, perhaps 60. I am not going to review the document, nor send the document to the client for review and signature until I have some idea what's going on. At least at this point, it appears that 142 does not enjoy the support of a majority of the Polycon workforce, and if that's the case, the Board can guide us through the appropriate steps.

JT 14.

In attempting to defend its conduct Respondent argues that it had a legal basis for refusing to execute the contract. In particular, Respondent contends that no contract existed as of May 3 and that, in addition, it learned of a decertification effort prior to May 3. Thus, Respondent claims it could not legally execute the contract. During its opening statement at the

trial, Respondent made a new argument by claiming that even if a contract existed on May 3, it nonetheless had actual knowledge, prior to May 3, that the Union no longer enjoyed majority support of the unit employees. Tr. 15. Thus, Respondent repeats its argument that it could not legally execute the contract. Tr. 15. In other words, Respondent shifts its baseless argument from it having a good-faith doubt of the Union's lack of majority support to a claim unsubstantiated by the record that prior to its acceptance of the contract, Respondent had actual knowledge of the Union's lack of majority support. Finally, in its Exceptions, Respondent makes yet another new argument. Specifically, Respondent now adds the claim that it was justified in rescinding its acceptance of the contract because it had actual knowledge of the Union's loss of majority support as of May 9.

While all of Respondent's contentions are wholly without merit, it attempts to support its shifting defenses through claims not supported by the evidence, and with the dubiously credible testimony of employee Michael Phipps and CFO/VP Bill Hansen. Phipps' testimony was both internally inconsistent and completely at odds with Hansen's on critical points. Phipps first testified that he contacted the Labor Board around March 30 to obtain information on how to obtain a decertification election. Tr. 52. However, Phipps then dramatically changed his story and claimed that it was not until May 3 and May 4 that he and a couple of other employees circulated a decertification petition among unit employees. Tr. 53-54. In addition, he admitted that it was only after obtaining signatures from employees that Phipps called the Labor Board to get instructions on how to file a decertification petition.⁴ Tr. 54.

During Respondent's direct examination of Hansen, he testified that he first became aware of employee dissatisfaction with the Union in mid to late April via shift meetings, through

⁴ A decertification petition, Case 13-RD-105718, was not filed with the Labor Board until May 22. JT 18. Following the filing of the Petition in 13-RD-105718, on June 21, the Employer filed a petition for an election in Case 13-RM-107720. JT 19.

the employee suggestion box, and seeing one or two pages of a decertification petition which was circulated among unit employees. Tr. 65, 66. Not surprisingly, Hansen failed to provide any specific evidence of employee dissatisfaction with Local 142 that he obtained during shift meetings or through the employee suggestion box in support of this bald assertion. This dearth of evidence strongly undercuts his credibility on this key claim regarding Respondent's defense.

Moreover, Hansen's testimony was critically inconsistent with Phipps' testimony concerning the circulated decertification petition. Contrary to Phipps' testimony that he circulated the petition on May 3 and 4, Hansen claimed that he had seen certain pages of the petition in late April. Tr. 54, 66. However, obviously Hansen could not have seen the decertification petition in late April because, according to Respondent's own witness, Phipps, no such document existed at that time.

Clearly cognizant of this important inconsistency, Johnson attempted in vain to rehabilitate Hansen. Specifically, Johnson blatantly coached Hansen with the following question: "In front of you is the signed petition *with dates*, and that is Exhibit 17 *with dates*, I'll represent to you, *beginning on May 2nd and following a few days after that*. Do you recall when it was that you first saw that document?" (emphasis added) Tr. 65. Despite this obvious attempt to lead him, Hansen nonetheless admitted that he had not seen the document in its entirety until he received notice from the Labor Board that a decertification petition was filed. Tr. 65. Hansen further candidly admitted that prior to May 7, he had only seen one or two pages of the employee circulated petition. Tr. 66. According to Hansen, this happened when employees questioned him about where to sign because it was unclear to the employees what their signature meant. Tr. 66. Clearly then, despite Respondent's great effort to the contrary, Respondent did not have actual knowledge that Local 142 lacked majority status prior its May 3 agreement or prior to its May 9

refusal to execute the contract.

Finally, in its Exceptions Respondent raises, for the first time, the claim that Hansen provided Johnson with a copy of the employee decertification petition between May 7 and May 9. Moreover, and perhaps most incredibly, Respondent also suddenly asserts that it forwarded this decertification petition to Berkowitz on May 9, when it also refused to execute the contract. Neither claim, however, is supported by the record in this case. Accordingly, these new “facts” should be completely disregarded.

It is also important to note that a critical aspect of Respondent’s “loss of majority support” defense is sorely lacking. Any assertion that a union no longer enjoys majority support among the employees must include evidence demonstrating the overall number of employees in the unit at the time of the alleged loss of majority support. However, here the Employer failed to present any reliable evidence on this point. Without this key number, there is simply no way to determine whether a majority of the unit employees actually no longer supported the Union. Respondent cannot reasonably rely on the RD Petition’s reference to the total number employees at Respondent, as this is clearly hearsay. Moreover, this Petition was filed nearly three weeks *after* Respondent refused to execute the contract. In addition, the minimal evidence in the record as to the number of employees came from employee Michael Phipps who testified that there “are fewer than 100 employees at Polycon.” Tr. 54. This incredibly vague testimony falls well short of carrying Respondent’s burden of establishing the necessary elements of its defense. Instead, on this record, the actual number of employees in the unit, a fact well within Respondent’s control, is a complete mystery. Without this decisive information no conclusion can be reached about whether the Union lost majority support at Respondent at any particular time. For this reason the Respondent’s defense fails.

B. The ALJ correctly held that the Union is entitled to an irrebuttable presumption during the collective-bargaining agreement that it enjoys the support of a majority of bargaining unit employees.

The ALJ also properly found that at the time the parties agreed on contract terms, any decertification petition in existence had just begun circulating and it had not been signed by a majority of employees in the bargaining unit. ALJD p. 13, lns 11-14. The ALJ found that Respondent agreed to contract terms and then subsequently questioned whether the Union lost the support of a majority of employees in the bargaining unit. ALJD p. 13, lns 15-17. The ALJ appropriately reasoned, pursuant to Board precedent, the Union enjoyed an irrebuttable presumption of majority support during the term of the collective bargaining agreement, thus Respondent was obligated to execute the contract it reached with the Union. ALJD p. 13, lns 17-27 and fn. 11.

Perhaps recognizing the futility of arguing that it learned of an employee decertification petition (but said nothing) prior to its acceptance of the May 3 contract, Respondent distinctly shifts its argument in its Exceptions. Suddenly, Respondent focuses on the new claim that it received actual knowledge of the Union's loss of majority support as of May 9, the date it repudiated the contract by refusing to sign it. Regardless of which defense Respondent asserts, the Respondent's obligation to sign the contract it reached with the Union remains and the ALJ appropriately ruled to this effect.

Respondent's reliance on *Levitz Furniture Co. of the Pacific, Inc.* to support any one of its numerous shifting defenses is misplaced. 333 NLRB 717 (2001). Respondent claims once it received the employee decertification petition on May 9 (a fact wholly unsupported by the record), it was privileged to stop bargaining with the Union and repudiate the contract. Under *Levitz*, the Board held that an employer could not unilaterally withdraw recognition based on a

good-faith doubt of the union's majority support, but could take that unilateral action "only where the union has actually lost the support of the majority of the bargaining unit employees." *Id.* at 717. However, rebutting the presumption of majority support can only occur during times when the presumption is rebuttable. When the presumption is not subject to challenge, "[a]n employer may not lawfully withdraw recognition while a collective bargaining agreement is in effect, because an incumbent union enjoys presumption of majority status during the life of the contract (up to 3 years)." *Id.* at 730, fn. 70.

Thus, *Levitz* flatly rejects Respondent's first defense that any good-faith doubt of the Union's majority support prior to May 3 privileged its refusal to execute the contract. Further, *Levitz* rejects Respondent's remaining claims that it was entitled to repudiate the contract based on actual knowledge of the union's loss of majority support. As discussed, above, Respondent did not meet its burden in demonstrating that the unit employees actually no longer supported the Union prior to unlawfully repudiating the contract.

Moreover, the ALJ correctly found that any decertification petition in existence had just begun circulating and had not been signed by a majority of employees in the bargaining unit at the time parties agreed to final contract terms. ALJD p. 13, lns 11-14. Respondent cannot rely on events occurring after the parties' reached a complete collective-bargaining contract to excuse it from honoring the contract. It is axiomatic that the Act requires an employer to execute its agreement with a union representing its employees once an agreement is reached. This is true regardless of what transpired after the agreement was reached. See, e.g., *Utility Tree Service*, 215 NLRB 806, 807 (1974), motion to reopen the record denied 218 NLRB 784 (1975), enfd. mem. 539 F.2d 718 (9th Cir. 1976) (emphasis added)(rejecting employer's defense that the union's actual loss of majority status two days *after* the parties reached agreement on a contract justified

its refusal to execute its contract); See also *Belcon, Inc.*, 257 NLRB 1341 (1981) (“Having found there was a valid agreement in existence between the parties on November 29, I do not deem it necessary to treat the Respondent’s claim that it had a [subsequent] good-faith doubt based on objective considerations regarding the Union’s majority status”); *North Bros. Ford, Inc.*, 220 NLRB at 1022 (“Final agreement was reached no later than October 14, 1974, well before the decertification petition was filed. Once final agreement on the substantive terms was reached, and regardless of the status of any written instrument incorporating that agreement, the Respondent was not free to refuse to bargain even if then it has lawful grounds for believing that Local 376 had subsequently lost its majority status”) (footnote omitted).

Indeed, as the Board explained in *Auciello Iron Works, Inc.*, even if an employer knows that a union lacks majority support but fails to act on it before an agreement is reached, the employer is bound by its agreement. Specifically, the Board stated:

[W]here objective evidence to support a good-faith doubt of a union’s majority status is known to the employer before a union’s acceptance of the employer’s contract offer but the employer does not act on that evidence prior to acceptance, the union’s acceptance creates a valid collective-bargaining agreement. Therefore, an employer that disclaims its bargaining obligation in reliance on a good-faith doubt at that point violates Section 8(a)(5) of the Act. Further, the employer is precluded during the contract term from withdrawing recognition or otherwise refusing to bargain based on an alleged good-faith doubt that the union lacked majority status at the time of acceptance.

317 NLRB 364, 368 (1995).

Here, it is undisputed that Respondent did not act on whatever claimed evidence it had as to the Union’s loss of support until May 9. Accordingly, under *Auciello Iron Works*, all of Respondent’s asserted defenses must be rejected since by May 9 the parties already had an agreed-upon contract. Moreover, the conclusive presumption of majority status remains, even if the employer “has lawful grounds for believing that [the union] has subsequently lost its majority

status.” *Auciello Iron Work*, 517 U.S. 781 (1996); *North Bros. Ford*, 220 NLRB at 1022; See e.g. *Valley Honda*, 347 NLRB 615, 615 fn. 6 (2006); *Flying Dutchman Park, Inc.*, 329 NLRB 414, 417 fn. 5 (1999). The parties here had completed their negotiations and had agreed upon the terms of their first contract before the union purportedly lost majority support. As such, Respondent’s refusal to execute the agreement violated Section 8(a)(5) of the Act.

Respondent ineffectively attempts to distinguish the instant case from *YWCA*, 349 NLRB 762 (2007). In that case, the Board held that the employer was bound by the contract it reached with the union and would have been required to execute the contract even if employees thereafter filed a decertification petition with the Board. *Id.* at 763. Respondent claims that the instant case is distinguishable from *YWCA* because unlike *YWCA*, a decertification petition was filed with the Board before a contract was signed. In other words, Respondent attempts to excuse its unlawful conduct because several weeks after it repudiated the contract it reached with the Union, a decertification petition was filed with the Board. However, as the Board held in *YWCA*, “Board law continues to permit employees to file a decertification petition up to the time the contract is actually signed. What it prohibits, in contrast, is the Respondent’s repudiation of the agreement and its withdrawal of recognition from the union.” *Id.* at 764. Any attempt by Respondent to distinguish this case from *YWCA* because no decertification petition was filed like in the instant case is misplaced. As of May 9, the date in which Respondent repudiated the contract, no decertification petition was filed with the Board.⁵

⁵ The instant case is similarly inapposite to *Chicago Tribune Co. v. NLRB* and Respondent’s continued reliance on it is misplaced. 965 F.2d 244 (1992). As the ALJ correctly reasoned, “[T]he Seventh Circuit addressed a unique set of facts in which the union lost the support of a majority of employees in the bargaining unit long before the employer renewed its contract offer and the union accepted the offer.” ALJD p. 13, fn. 12; 965 F.2d at 249-50. In *Chicago Tribune*, both parties were continuing negotiations (the employer renewed its contract offer and the union’s acceptance) despite the employer’s actual knowledge that the union lacked majority support of the unit employees. *Id.* The facts in this case simply do not support Respondent’s claim that it actually knew the Union did not enjoy the majority support of the unit employees. Notably, the Board held that the union’s acceptance of the company’s offer had been valid and that the company’s refusal to sign the collective bargaining agreement was therefore unlawful.

This case is analogous to *Flying Dutchman*, where the Board held that an employer unlawfully refused to sign an oral agreement reached with a union, despite the fact that the contract contained an unlawful provision in its union security clause. 329 NLRB at 416. In that case, five days after the parties had agreed orally to a contract, an employer representative contacted the union negotiator and complained about a mistake in the contract language. *Id.* at 414-15. The union then corrected the mistake and forwarded the contract to the employer for execution. *Id.* at 415. However, the same day that the union did so, both parties learned that a decertification petition had been filed with the Board. *Id.* In finding that the employer's subsequent refusal to execute the contract violated the Act, the Board emphasized that the employer's motivation for refusing to sign the agreement was its knowledge of the decertification petition filing. *Id.* at 417. The Board expressly rejected the employer's contention that it was not obligated to sign the contract because it contained an unlawful provision in it. *Id.* Instead, the Board noted that, in such circumstances, it requires the employer to execute the contract with the unlawful provision deleted. *Id.* at 416.

In *Flying Dutchman* the Board also reiterated, once again, that an employer cannot justify a refusal to execute an agreed-upon contract by asserting a good-faith doubt about the majority status of a union based upon events occurring *after* the parties' reached oral agreement. *Id.* at 417. In the instant case, the facts are even less in Respondent's favor than they were in *Flying Dutchman*. By the time Respondent unequivocally refused to sign the agreement, their agreement no longer included an unlawful union security clause. Thus, Respondent's reliance on the employee circulated decertification petition, which Hansen admitted having only seen one or two pages of it at the time Respondent repudiated its agreement, is without legal support.

303 NLRB 682 (1991).

Moreover, Respondent cannot rely on the decertification petition filed with the Board, which occurred nearly three weeks after Respondent refused to execute the contract.

Therefore, because by the time Respondent had even a hint of employee disaffection from the Union it already had an agreement with the Union, each of Respondent's defenses fail. By the time Respondent even tries to show it had any knowledge that some employees did not support the Union, the parties clearly had a full agreement, including a state law compliant union security clause. As the ALJ correctly observed, the evidence presented by Respondent to support its defense that the union lacked majority support failed to credibly establish that the Union lost majority support by any relevant date.

I. CONCLUSION

Based on the foregoing, Respondent's Exceptions to the Decision of the Administrative Law Judge are all without merit and should be rejected by the Board. Therefore, Counsel for the General Counsel respectfully requests that Respondent's Exceptions be overruled in their entirety.

Dated at Chicago, Illinois, this 7th day of January 2014.

Respectfully submitted,

/s/ Cristina M. Ortega electronically filed
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CERTIFICATE OF SERVICE
13-CA-104249

I certify that on this 7th day of January 2014, a true and correct copy of Counsel for the General Counsel's Answering Brief to Respondent's Exceptions to the Administrative Law Judge's Decision was served by electronic mail upon the following parties of record:

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