

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 8**

**MIDWEST TERMINALS OF
TOLEDO INTERNATIONAL**

and

**OTIS BROWN, An Individual,
MIGUEL RIZO JR., An Individual,
MARK LOCKETT, An Individual,
and**

**CASES 8-CA-038092
8-CA-038581
8-CA-038627
8-CA-063901
8-CA-073735
8-CA-092476
8-CA-097760**

**LOCAL 1982, INTERNATIONAL
LONGSHOREMEN'S ASSOCIATION, AFL-CIO**

**EXCEPTIONS OF COUNSEL FOR THE
GENERAL COUNSEL AND BRIEF IN SUPPORT**



Cheryl Sizemore
Counsel for the General Counsel
National Labor Relations Board
1695 AJC Federal Building
1240 East Ninth Street
Cleveland, Ohio 44199
(216) 522-8187 (telephone)
(216) 522-2418 (fax)
Cheryl.Sizemore@nlrb.gov

INDEX

TABLE OF AUTHORITIES..... ii

EXCEPTIONS..... 1

OVERVIEW OF BRIEF..... 5

8(A)(3) AND 4) REFUSAL TO HIRE..... 7

8(A)(5) FAILURE TO IMPLEMENT CONTRACT..... 12

CONCLUSION..... 19

PROOF OF SERVICE..... 21

TABLE OF AUTHORITIES

Cases

Ben Franklin National Bank, 278 NLRB fn. 3 (1986)15
Big John Food King, 171 NLRB 1491 (1968).....15
H.J. Heinz Co. v. NLRB, 311 U.S. 514 (1941)12
Hunter Douglas, Inc., 277 NLRB 1179 (1985)..... 7
Jack August Enterprises, 212 NLRB 881 (1977) 7
Pacific Iron & Metal Co., 175 NLRB 604 (1969).....18
Raboun v. NLRB, 159 F.2d 906 (2d Cir. 1952).....18
Sunrise Nursing Home Inc., 325 NLRB 380, 389 (1998).....18
Windward Teacher's Association, 546 NLRB 1148 (2006)..... 19
Young Women's Christian Association, 349 NLRB 762 (2007).....17

**UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION 8**

**MIDWEST TERMINALS OF
TOLEDO INTERNATIONAL**

and

**OTIS BROWN, An Individual,
MIGUEL RIZO JR., An Individual,
MARK LOCKETT, An Individual,
and**

**CASES 8-CA-038092
8-CA-038581
8-CA-038627
8-CA-063901
8-CA-073735
8-CA-092476
8-CA-097760**

**LOCAL 1982, INTERNATIONAL
LONGSHOREMEN'S ASSOCIATION, AFL-CIO**

**EXCEPTIONS OF COUNSEL FOR THE
GENERAL COUNSEL AND BRIEF IN SUPPORT**

Administrative Law Judge Mark Carissimi issued his decision in the above-captioned cases, JD-80-13, on November 12, 2013.

I. EXCEPTIONS

Counsel for the General Counsel excepts to the following findings of fact and conclusions of law made by Judge Carissimi in this matter: ¹

¹ All further page and line references in the Exceptions are to Judge Carissimi's decision, JD-80-13. Where "JD" is used herein, it will refer to the written decision issued by Judge Carissimi; Where "Tr." is used herein, it will refer to the transcript. Where "G.C. Exh", is used herein, it will refer to General Counsel's Exhibit. Where "R. Exh", is used herein, it will refer to Respondent's Exhibit. Where "Jt. Exh.", is used herein, it will refer to Joint Exhibit.

1. JD, page 20, lines 19-20

Judge Carissimi's findings and conclusions that the records introduced by the General Counsel and the Respondent establish that employees named in paragraph 9(C) the Complaint did, in fact, work during the months of April and May 2009.

2. JD, page 20, lines 37-38

Judge Carissimi's findings and conclusions that the evidence establishes the Respondent presented a valid defense under *Wright Line* to this Complaint allegation.

3. JD, page 21, line 5

Judge Carissimi's findings' that the Respondent made work assignments during this period consistent with the parties' contract and past practice.

4. JD, page 21, lines 7-10

Judge Carissimi's findings and conclusions that the General Counsel took the position that the employees named in paragraph 9(C) of the Complaint were discriminated against based solely on the fact that their number of hours worked, relative to the skilled employees and Tucker and Moody, should have been higher.

5. JD, page 21, line 10-12

Judge Carissimi's findings that the Respondent assigned work, during this period, consistent with the parties' contract and past practice and, therefore, it is

not appropriate for him to review how the hours of work had been apportioned during the time period in question.

6. JD, page 21, lines 14-17

Judge Carissimi's findings and conclusions that the General Counsel has not established, by a preponderance of the evidence, that the Respondent refused to hire the employees named in the Complaint paragraphs 9(C), from April 1, 2009 to May 15, 2009, for reasons violative of Section 8(a) (4), (3), and (1) of the Act.

7. JD, page 30, lines 9-11

Judge Carissimi's findings and conclusions, regarding paragraphs 13(B) and (C) of the Complaint, that Counsel for the General Counsel contends that the Respondent is obligated to execute the agreement reached by the parties.

8. JD, page 30, lines 45-47 and page 31, line 1

Judge Carissimi's findings and conclusions that the General Counsel has not established that the parties reached agreement on all the substantive terms of a complete collective-bargaining agreement which the Respondent then refused to sign.

9. JD, page 32, lines 18-20

Judge Carissimi's findings and conclusions that through filing a grievance, the Union was, in effect, reverting to its position expressed in its proposal on December 2, in which it sought to have the Respondent pay its unfunded liability pursuant to a payment plan.

10. JD, page 32, lines 20-23

Judge Carissimi's findings and conclusion that the Union's actual position was to accept the Respondent's acquiescence to its economic proposal while seeking to have its apparent agreement to the unfunded liability language overturned by an arbitrator and that this constituted a significant departure from the agreed to contract language on the matter.

11. JD, page 32, line 23

Judge Carissimi's findings and conclusions that the Respondent was confronted with a major change in the Union's bargaining position during bargaining in December 2011.

12. JD, page 32, lines 28-30

Judge Carissimi's findings and conclusions that the collective-bargaining agreement reached by the parties differed with respect to the unfunded liability.

13. JD, page 32, lines 33-36

Judge Carissimi's findings and conclusions that there was no "meeting of the minds" on all the substantive and material terms of the collective-bargaining, but rather, the evidence establishes that the parties maintained their differing positions as to whether the unfunded liability language of the prior contract should be included in a new contract.

14. JD, page 32, lines 44-45

Judge Carissimi's findings and conclusions that the facts in the instant case are distinguishable from *Windward Teachers Assn.*, 346 NLRB 1148 (2006).

15. JD page 33, lines 11-14

Judge Carissimi's findings and conclusions that there was no indication at the December 9, 2011 bargaining session that the parties had successfully negotiated an agreement and that the meeting ended without any acknowledgement that the parties had reached an agreement.

16. JD page 33, line 15

Judge Carissimi's findings and conclusions that the Union never tendered a complete collective-bargaining agreement to the Respondent.

17. JD page 33, lines 17-18

Judge Carissimi's findings and conclusions that the Respondent has not refused to execute an agreed-upon collective-bargaining agreement in violation of Section 8(a) (5) and (1) of the Act

II BRIEF OF THE COUNSEL FOR THE ACTING GENERAL COUNSEL IN SUPPORT OF EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

Counsel for the General Counsel files these exceptions because the decision issued by ALJ Carissimi is erroneous with respect to the Complaint allegations contained in (1) Paragraph 9 (C) and 9 (D) concerning Respondent's refusal to hire and/or employ Otis Brown, Lavern Jones, Ricardo Canales, Fred Victorian Jr., Don Russell, and Clifford Anderson because Charging Parties Rizo Jr. and Brown, as well as "regular list employees Mario Rizo Jr., Prentis Hubbard, and Tony Boyd, filed contractual grievances and engaged in other protected concerted activities; and (2) Paragraph 13 (B) and (C) concerning Respondent's failure and refusal to implement the terms of the collective bargaining agreement reached by the Charging Party Union and Respondent.

With regards to the allegations of Complaint paragraph 9, Counsel for the General Counsel notes that the Judge's decision regarding the refusal to hire reflects that he found the existence of a prima facie case. See JD page 19, lines 23-30; page 20, lines 1-7. So, the Judge clearly understood that the Counsel for the General Counsel had presented strong evidence that Respondent was refusing to put a number of employees on the regular referral list to work during April and May 2009 because a few employees had engaged in Section 7 and charge filing activities by April and May 2009. Where the Judge erred was in finding that Respondent had met its burden under *Wright Lines*.

With regards to the allegations of Complaint paragraph 13, Judge Carissimi ignored existing and well established precedent regarding Board law concerning a "meeting of the minds" in connection with contract law and the subsequent obligation to implement terms of an agreement once the parties have reached agreement. In so doing, he wrongfully concluded that the Respondent had not violated Section 8(a) (5) of the Act when it failed to implement the terms of the agreed-upon collective bargaining agreement. Clearly, Judge Carissimi misunderstood and/or misapplied the facts that caused him to reach conclusions not supported by the record. Moreover, the Judge's legal analysis is not supported by Board law, the facts in the record, and the Complaint. That is the only way that he could have concluded that the Union and Respondent had not reached a complete agreement on all substantial terms.

Counsel for the General Counsel submits that the evidence presented herein supports a reversal of Judge Carissimi's decision with respect to these two issues on the basis of his misconstruing the Complaint allegations and misapplication of Board law.

A. Respondent violated Section 8(a) (3) and (4) of the Act when it refused to hire and/or employ Charging Party Brown, Lester Corggens, Lavern Jones, Ricardo Canales, Fred Victorian Jr., Don Russell, and Clifford Anderson because Charging Party Brown and Miguel Rizo Jr., as well as Prentis Hubbard, Mario Rizo Jr., and Tony Boyd engaged in union/ protected activities, and filed unfair labor practice charges.

As a matter of clarity, the Complaint asserts, in amended paragraph 9 (C), that the individuals named in that paragraph were not hired because employees named in paragraph 9 (D) had filed grievances, engaged in union and/or protected concerted activities and filed unfair labor practice charges under the Act. In short, Respondent discriminated against a larger group of employees on the regular referral list because of the Section 7 activities of a much smaller group. Because of the fact that employees had to be called off the list in a certain order, Respondent had to punish many employees to avoid providing work opportunities to those few who had actively engaged in Section 7 and charge-filing activities. As noted above, Judge Carissimi understood this argument and found the existence of a prima facie case. This finding is well supported by Board law. While it is true that these individuals underneath Brown and named in Complaint Paragraph 9 (C) did not engage in union activity, Section 8(a) (3) and 8(a) (4) of the Act prohibits the discriminatory treatment of an employee not engaged in union activity if they were the innocent victims of employer conduct motivated by anti-union animus harbored against others. See *Jack August Enterprises*, 232 NLRB 881, 900 (1977); *Hunter Douglas, Inc.*, 277 NLRB 1179 (1985) Here, it was the Employer's disdain for Brown and a few others that led the Respondent to infrequently employ any of the employees listed in paragraph 9(C).

A brief review of some of the record testimony, and Judge Carissimi's findings, will clearly demonstrate both the strength of the case presented by Counsel for the General Counsel as well as the lack of any valid *Wright Line* defense presented by Respondent. On April 24, 2009, the Respondent, by Tim Jones approached Miguel Rizo Sr., while he was in the process of warranting aluminum that had been shipped by truck. (Tr. 184, 185) Jones told Rizo that a nut coke ship was scheduled to enter the port soon. Jones further stated that he was in a dilemma because he needed to remove at least eight skilled men from the current aluminum job to work on the ship. (Tr.185). Rizo responded that there was no problem because he could pull the skilled men off the aluminum job to work on the vessel and he (Jones) could then hire regular list men to work the aluminum job. (Tr. 185) Jones responded that he could not hire regular list men to work the aluminum job because the people at the top of the list either had charges or lawsuits filed against the Company. (Tr. 185, 186)

Judge Carissimi correctly credited Rizo's testimony on this issue and determined that Rizo neither misunderstood nor misconstrued Jones' statement. (JD page 18, lines 18-20.) Judge Carissimi stated, "I find that Jones told Rizo that Respondent would not hire employees from the regular list because the employees at the top of that list had filed lawsuits or charges against the Respondent. In context, I find that Jones' reference to "charges" encompassed both the filing of grievances and unfair labor practice charges."

Significantly, at the time Jones made the statement, Charging Party Brown was the number 3 man on the seniority list for regular list employees and the next available hire. Tony Board was the number 8 man on the list, and similar to Brown, had filed grievances and unfair labor practices.

Moreover, at no time during Rizo Sr.'s conversation with Superintendent Jones did Jones assert that there was an economic justification or some other basis for not providing work to the next available employee. Instead, he stated he had a dilemma because he could not call in employees that had filed lawsuits against the company. Because Brown was the next man to be called, the Respondent did not want to provide him with significant work hours. Thus several employees underneath him on the seniority list were not hired also. That is, if Brown was not hired, Respondent could, and would, not hire anyone else on the list.

In sum, the above clearly demonstrates that (1) Respondent was withholding work from the employees on the regular referral list and (2) there was no economic justification for it. Here, where an Employer makes an 8(a) (1) statement that evidences its true motives, it should not be able to hide behind an "after the fact" fabricated reason to avoid liability. Respondent's actions here should be deemed pretextual and not the determinative reason for refusing to hire Brown and the other individuals named in Paragraph 9 (C).

The documentary evidence further undermines Respondent's *Wright Line* defense. What it reveals is that Respondent continued the extraordinary practice of hiring skilled list men to work six or seven consecutive days for several weeks, and providing them overtime pay for working 12-16 hours each day.

A review of General Counsel Exhibits 47(a) – 47 (ii) and 49 (a) – 49 (z) during the relevant time period shows the excessive number of hours that skilled men and the number 1 and 2 regular list employees, Robert Moody and Claude Tucker, were working. Indeed, these individuals worked Monday through Friday, every Saturday and at least

two Sundays during April 2009. (G.C. Exhs. 49(a) thru 49(z). During the latter part of April 2009, the same individuals were working ten to sixteen hours each day. This required some of the skilled men to work an eight hour shift in the morning and return to work at 8:00 p.m. for another full shift. (G.C. Exh. 47 – 47(ii), 49(a)/ Respondent was working a few favored employees unprecedented numbers of hours to avoid assigning work to Brown and others below him on the regular referral list.

Further, the record shows that at the same time, Respondent was allowing work to go unfinished, rather than hire Brown and those below him on the regular referral list. Rizo Sr. credibly testified that there was voluminous work involving aluminum sows that had been transported to the facility through the winter and spring of 2009. (Tr. 18, 904) The aluminum sows had to be checked, weighed, and stored in the warehouse. (Tr. 184, 904) This process, both tedious and time consuming, required a great deal of manpower. Superintendent Leach confirmed this when questioned by Judge Carissimi. Rizo Sr. credibly testified that 2009 was the first year that truckloads of aluminum sows were shipped to the ILA side of the dock. This is consistent with Respondent's business records.

Because the truck loads of aluminum sow required so much work, other work assignments, including vessel work began to back up. Ironically, this is the very reason that Tim Jones approached Union Steward Rizo Sr. Even so, Jones refused Rizo's request to hire regular list employees because it would require grievance and charge filers to be called in. (Tr. 185-186)

Counsel for the General Counsel notes that once Union Steward Rizo filed a grievance over Jones statements and refusal to hire tactics, the Employer began to

provide Brown and those individuals listed below him significant hours. These facts are not in dispute. (JD page 20, lines 22-33. See also G.C. Exhs. 47(e), 49(d), 49(i), 49(f), 49(k) – (n), 49(p), 49(r), 49 (t), 49(w) and 49(x). Charging Party Brown testified that once the Employer finally called him to work, the other employees listed in paragraph 9(C) of the Complaint were immediately assigned the aluminum sows work. Brown testified that it was the largest amount of aluminum work that he had ever seen. (Tr. 924) This had been as true in April and May as it was in June 2009. Yet, Respondent elected to allow this work to go unperformed until the grievance forced its hand.

The Employer produced some evidence that vessel work in the port had decreased overall in 2009 as compared to the previous year. However, the documentary evidence and Counsel for the General Counsel witnesses credibly testified that the aluminum sow work was voluminous at the time prior to, during, and immediately after Jones made his statements. (Tr. 191)

Significantly Leach testified that the aluminum sow work was not available after the end of April 2009. (Tr. 931) Yet, Respondent's business records demonstrate that this was not the case. Contrary to Leach's testimony, the records show that there were daily truckloads of aluminum sows unloaded and assigned to the ILA side of the dock that needed to be warranted between February 2009 and June 2009. (G.C. Exh.) Counsel for the General Counsel asserts that Leach's false testimony about available work, and Jones' direct statement that he would not hire employees that filed grievances and charges, demonstrate Respondent's reasons were pretextual, and were not the determinative reasons for refusing to hire Charging Party Brown and the other named individuals.

Based on the above, Counsel for the General Counsel would submit that Respondent has not established any *Wright Line*'s defense to this allegation. Despite Judge Carissimi's findings to the contrary, the evidence shows that any economic justification offered for withholding work from Brown and others on the regular referral list were pretextual, in light of Jones' statement. Further, the above evidence shows that letting work pile up and working a select few employees an unprecedented number of hours was neither justified by the contract or past practice. In light of these facts, it is requested that the Board reverse Judge Carissimi's ruling on this issue and find that the Respondent violated Section 8 (a)(4), (3) and (1) of the Act by refusing to hire and/or employ Charging Party Otis Brown, Lester Corggens, LaVern Jones, Ricardo Canales, Fred Victorian Jr., Don Russell, and Clifford Anderson.²

B. Respondent Failed and Refused to Implement the Terms of an Agreed Upon Collective Bargaining Agreement in Violation of Section 8(a) (5) of the Act.

Judge Carissimi erred in finding that the parties never reached an agreement on all the substantive terms of a complete collective-bargaining agreement which the Respondent then refused to sign. (JD page 30, lines 45-47) In so doing, the ALJ incorrectly concluded that Respondent did not violate Section 8(a) (5) of the Act. Judge Carissimi asserts that "the obligation to bargain collectively under Section 8(d) of the Act requires either party, upon the request of the other, to execute a written contract incorporating an agreement reached during negotiations. *H.J. Heinz Co. v. NLRB*, 311 U.S. 514 (1941) This obligations arises, only after a "meeting of the minds" on all

² Tony Brown, the number 8 regular list employee was not included in the Complaint for remedy purposes because he resolved his claims pursuant to a private settlement agreement that precluded him from

substantive issues and material terms has occurred. (JD page 30, lines 32-36) Counsel for the General Counsel contends that Judge Carissimi's reading of the law is correct, but his application of Board law to the facts of this case is not.

Certain background facts and circumstances of the case as they relate to this allegation bear repeating in some detail here. General Counsel directs the Board's attention to the following facts:

The parties' most recent local agreement expired on December 31, 2010. Negotiations for a successor agreement began in September 2011 and ended on December 8, 2011. (Tr. 430)³ The parties agreed that they would utilize an electronic working version of the contract on negotiations. This document was color coded to show employer proposals/deletions, union proposals/deletions, tentative agreements (in green) and unchanged language from the previous contract (in black). Tr. 431, 432, 480; G.C. Exhs. 53, 54)

It is undisputed that Union Vice-President of the Atlantic Coast District Andre Joseph, one of three individuals representing the Union during negotiations was solely responsible for inputting agreed upon changes on the working version of the contract after each negotiation session. (Tr. 480, 538) Joseph dispatched changes to the parties by e-mail and/or personal delivery prior to the next meeting. (Tr. 538)

By late November 2011, there was only one substantive issue remaining. Respondent's Human Resource Manager Blakely and General Counsel's witnesses

obtaining any further compensation from Respondent.

³ The Union was placed in trusteeship in 2010 and the trusteeship ended in July 2012. (Tr. 477) Accordingly, the Union was primarily represented by co-trustees John Baker President of the Great Lakes District Council of the ILA/Vice-President Atlantic Coast District and Andre Joseph Vice-President of the Atlantic Coast District. Although Local Union Steward Miguel Rizo Sr. was present, Baker and Joseph were the decision makers at the bargaining table. (Tr. 480, 538)

readily admitted this at the hearing. (Tr. 435, 445, 482) This issue as outlined by Judge Carissimi concerned the Pension Health and Welfare Fund. (JD page 25, lines 11-15) The previous contract had provided that a portion of the Respondent's contributions toward an employee's health and welfare account were to be maintained as an unfunded obligation. The Respondent maintained a written record of the monies owed for each employee, but there was no actual money contributed from the accrued balance. (Tr. 481, 482; R. Exh. 11, page 13)

During most of the bargaining sessions, the parties maintained their respective position on this issue. The Respondent wanted the old language to remain and the Union did not. On about December 1, 2011, the Union offered to resolve the matter by proposing to provide the Employer with additional time to contribute monies to pay down the accrued unfunded liability while paying the current payments into a trust. (Tr. 485, 491; G.C. Exh. 51; JD page 26, lines 13-37)

On December 8, 2011, the Respondent refused the Union's offer. Then Respondent made a proposal that did not directly address the unfunded liability issue. Instead it provided a pension contribution for employees for the first 350 hours of their employment once they became eligible to participate in the Union's Pension Plan. The Respondent also offered to retroactively provide the same benefit to some of its current employees. Based on the Respondent's offer, the Union stated that it would discuss the Respondent's offer with its legal counsel and provide a response. (G.C. Exh. 57; JD page 27, foot note 16)

Baker testified that Respondent's latest offer was discussed with legal counsel and the Union made the decision to accept Respondent's proposal; thereby leaving the

original unfunded liability language in the contract unchanged. (Tr. 498; G.C. Exhs. 54, 57)

Respondent's witness Human Resource Manager Blakely and General Counsel's witness Baker testified that the Union's acceptance of the Respondent's offer and the Union's acceptance to leave the unfunded liability language in the contract was e-mailed to Blakely on the evening of December 8, 2-11. (Tr. 435, 436, 498; G.C. Exh. 54) This fact is not in dispute. Blakely testified that he opened the e-mail and determined that the Union had e-mailed a new contract that included the Union's agreement to retain the current unfunded liability language. This clearly resolved, in his mind, the only issue that had kept the parties from reaching an agreement. (Tr. 436, 445) Because of this, Blakely believed that the meeting scheduled for the following day would yield the execution of a new agreement.

Counsel for the General Counsel asserts that at the moment that Respondent's representative Blakely received the Union's acceptance of its last offer, a contract was formed. While the Board has traditionally taken the position that the "technical rules of contract law do not necessarily control the making of collective-bargaining agreements," it will, on occasion, utilize these principles if necessary to the resolution of a particular case. *Ben Franklin National Bank*, 278 NLRB fn. 3(1986) *Big John Food King*, 171 NLRB 1491 (1968). Counsel for the General Counsel urges the Board to apply the traditional rules of offer and acceptance to the instant matter.

A review of the agreement e-mailed to the Respondent reveals that there was no material or substantial terms that needed to be resolved by the parties. The Respondent had made an offer on the one remaining issue and the Union had accepted it

unequivocally. This is confirmed by the events of the following day. Respondent's witness Blakely testified that the parties reviewed the document the following day (December 9, 2011). Once the parties reached page 17, Blakely testified that he confirmed with the Union that they had tentatively agreed with the Respondent's position on the unfunded pension liability, and the Union responded "Yes". (Tr. 453, 507) Blakely testified without hesitation, for the second time that this meant there were no other major issues remaining. Tr. 453.

Counsel for the General Counsel contends that once the Union dispatched the agreement to the Respondent and it was received, the Respondent was bound by the terms of the agreement that was dispatched to Respondent. (G.C. Exh. 54) This is basic contract law. Contrary to Judge Carissimi's determination, all material terms in the tentative agreement had been resolved. (JD page 30, lines 45-47)

Judge Carissimi seemingly relies on two "after the fact" issues to support his decision to dismiss this allegation. First, Judge Carissimi asserts that there could be no "meeting of the minds" where the Union files a grievance claiming that the parties' oral agreement on the unfunded liability issue constitutes a potential violation of the master agreement between the parties. (JD page 32, lines 14-23. It is true that a grievance was filed by the Union, but this occurred subsequent to the Union sending an e-mail accepting the terms of the contract, and reiterating its acceptance of the contract terms at a meeting held between the parties the following day. These facts are not in dispute. (JD page 27, lines 17-33, page 28, lines 106; TR 508). Baker explained that the grievance was filed solely to clear up the difference between the language contained in the master agreement and the language contained in the agreed upon local contract. (Tr. 508)

As noted by Judge Carissimi, Union Representative Baker, in a letter dated December 16, 2012, stated that the grievance that was filed subsequent to the parties reaching an agreement and that the grievance itself had nothing to do with the agreement. At that time Baker asked the Respondent if it would honor the agreement reached. (JD page 28, lines 42-47, page 29, lines 1-19.; G.C. Exh. 58) Respondent refused.

Respondent, by Human Resource Blakely was angered by the filing of the grievance and informed the Union that the grievance was a problem and that they did not have an agreement. While the Respondent may be angered by a grievance filed after the parties reached an agreement, it certainly has no right to withdraw its position that an agreement has been reached. *Young Women's Christian Association (YWCA)* 349 NLRB 762 (2007) Simply put, once final agreement on the substantive terms of a collective bargaining agreement has been reached, as it has here, "it would be" profanely destabilizing to the negotiation process" to allow Respondent to unilaterally renege on an agreement based on events that took place after the agreement was made. *Id.* at 763.

Counsel for the General Counsel would argue that the grievance filing did not evidence a disagreement about the terms of the bargain. It merely evidenced the Union's belated recognition of an issue that had existed for a number of years; the potential conflict between the master and local agreement on the subject of unfunded liability. Keep in mind, the Union had agreed to the Employer's language on the disputed issue; no one argues otherwise. It is this agreement to identical language, that proposed by Respondent, is what requires both parties to adhere to their bargain. Timing should not preclude the Union from asserting, by means of a grievance, that there had been (the language in question was found in previous local agreements as well), and continued to

be, a potential conflict. The fact that the Union filed a grievance at the bargaining session where the agreement was to be reviewed and executed should not change the outcome. Counsel for the General Counsel asserts that no one could argue that this same grievance, filed mid-term of this local agreement, would allow Respondent to refuse to continue to apply its terms. What if the Union had filed a different grievance on December 9, 2011, arguing a different conflict between the two contracts? Would that have permitted the Respondent to refuse to implement the new local agreement? Of course not. So, the mere fact that the Union elected this moment to raise a long-standing issue of conflict should not permit the Respondent to escape its obligations under the Act.

Judge Carissimi's contention that there must be a tender to execute an agreement in order to be a violation is also misplaced. The Complaint does not allege a refusal to execute violation and Counsel for the General Counsel is not making that argument now. What is alleged is a refusal to **implement** violation. It is well-established that once a verbal agreement is reached by the parties, they are obligated to abide by the terms of the agreement even though the terms have not been reduced to writing. See *YWCA*, supra at 764, See also *Sunrise Nursing Home Inc.*, 325 NLRB 380, 389 (1998) The Act does not require that a collective bargaining agreement be reduced to writing unless either party demands it. *Pacific Iron & Metal Co.*, 175 NLRB 604 (1969)⁴ To hold that the Union was obligated to formally demand signature by Respondent, in light of Blakely's adamant denial that a contract had been reached, before asserting that the terms be implemented would be to exalt form over substance.

⁴ *Citing Raboun v. NLRB*, 159 F. 2d 906 (2d Cir. 1952) (There is nothing in the Act which compels the conclusion that collective-bargaining contracts must be formally attested by the parties; rather Sec. 8(d) – specifically provides for a written agreement “if requested by either party”—a clear evidence that writing is not required as a matter of law”).

Judge Carissimi is also incorrect in distinguishing the instant matter from the Board's decision in *Windward Teacher's Association*, 346 NLRB 1148 (2006). In that case, the Board makes clear that if parties clearly agree to the same language on all the material terms of an agreement, a contract is reached. The fact that one party later discovers this language may not arguably support their beliefs, stated verbally to the Union near the time of agreement, about what the language meant was deemed of no significance by the Board majority. Here, the facts are even more supportive of the finding of a meeting of the minds. Both parties agreed to the same language on unfunded liability and both agree what it means. The only dispute is whether this long-standing language, basically carried over from the last local agreement, conflicts with the master agreement. This long dormant issue should not excuse Respondent's conduct in not implementing the terms of the December 2011 local agreement.

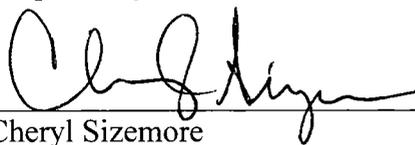
Applying the Board law to these uncontroverted facts, it is requested that the Board reverse Judge Carissimi's ruling on this issue and find that the Respondent violated Section 8(a) (5) of the Act by refusing to implement the terms of the agreed upon contract.

III CONCLUSION

Counsel for the General Counsel respectfully submits that Judge Carissimi's decision in these matters should be set aside to the extent that he failed to find the aforementioned alleged violations of Section 8(a)(1) (3) and (5) of the Act as set forth in the Complaint.

Dated at Cleveland, Ohio this 10th day of January 2014.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Cheryl Sizemore", is written over a horizontal line.

Cheryl Sizemore
Counsel for the General Counsel
National Labor Relations Board
1695 AJC Federal Building
1240 E. 9th Street
Cleveland, Ohio 44199
216-522-8187
Fax 216-522-2418

PROOF OF SERVICE

I attest that a copy of the foregoing Exceptions and Brief in Support were e-mailed the 10th day of January 2014 to the following:

Aaron Tulencik, Esq.
Mason Law Firm Co., LPA
425 Metro Place North, STE 620
Dublin, OH 43017-5357
atulencik@masonlawfirm.com

Ronald Mason, Esq.
Mason Law Firm Co., LPA
425 Metro Place North, STE 620
Dublin, OH 43017-5357
rmason@maslawfirm.com

Sam Eidy, Esq.
3627 Cavalear Drive
Toledo, OH 43606-1146
Hotrodlawman@att.net

Joseph Hoffman, Esq.
Faulkner, Hoffman & Phillips
20445 Emerald Parkway, STE 210
Cleveland, OH 44135-6029
Hoffman@fmplaw.com



Cheryl Sizemore
Counsel for the General Counsel
National Labor Relations Board
1695 AJC Federal Building
1240 E.9th Street
Cleveland, Ohio 44199
216-522-8187
Fax 216-522-2418