UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 9

DAYTON HEIDELBERG DISTRIBUTING CO. a/k/a HEIDELBERG DISTRIBUTING COMPANY,	:	**CASE NO. 09-CA-156105**
Respondent,	:	
and	:	
TEAMSTERS LOCAL UNION No. 284, affiliated with the International Brotherhood of Teamsters,	:	
Charging Party.	:	

TEAMSTERS LOCAL UNION NO. 284's BRIEF TO THE ADMINISTRATIVE LAW JUDGE

I. INTRODUCTION

This case came before Administrative Law Judge Thomas Randazzo on December 7 through 9, 2015 upon the General Counsel's Complaint alleging that Dayton Heidelberg Distributing Company (hereinafter sometimes referred to as "Respondent" or "Employer") failed and refused to execute a collective bargaining agreement with Teamsters Local Union No. 284 (hereinafter sometimes referred to as "Union" or "Local 284") after reaching a complete agreement with Local 284 on all of the terms and conditions of employment for the bargaining unit employees in violation of Sections 8(a)(1) and 8(a)(5) of the Act. Local 284 respectfully

submits that the record evidence and applicable case law supports the allegations in the Complaint that Respondent violated Sections 8(a)(1) and 8(a)(5) of the Act as alleged.

II. FACTS

Respondent is engaged in the distribution of beer, wine and other beverages with multiple locations in the State of Ohio for this purpose. (Transcript page 27, 510, hereinafter T. ____) Four (4) of Respondent's locations have been represented by four (4) separate Teamsters Local Unions for long periods of time including Teamsters Local Union No. 20 (hereinafter "Local 20") in Toledo, Ohio for approximately twenty (20) years, Teamsters Local Union No. 293 (hereafter "Local 293") in Cleveland, Ohio for approximately twenty (20) years, Teamsters Local Union No. 957 (hereinafter "Local 957") in Dayton, Ohio for over forty (40) years and Teamsters Local Union No. 1199 (hereinafter "Local 1199) in Cincinnati, Ohio for approximately twenty (20) years. In 2013Teamsters Local Union No. 377 (hereinafter "Local 377") organized a bargaining unit of employees in the Youngstown, Ohio area for a location Respondent had recently purchased and was doing business as Ohio Wine Imports Company, Inc. After negotiating in excess of one (1) year without reaching an agreement, a decertification petition was filed in which Local 377 was ultimately unsuccessful.

Local 284 was certified as the collective bargaining representative for the driver and warehouse employees of Respondent's Columbus, Ohio facility on February 15, 2013 (Joint Exhibit 1, paragraph 2, hereinafter JX ____, ¶ ___) Local 284 and Respondent began bargaining for an initial collective bargaining agreement shortly thereafter through the beginning of April, 2014 without success. (JX 1, ¶ 3; T. 517) A petition to decertify Local 284 as the collective bargaining representative of the bargaining unit employees was filed in August of 2014 and the Employer withdrew recognition of Local 284 as the collective bargaining representative of the

bargaining unit employees after receiving a copy of the decertification petition from the Petitioner. (T. 529-530)

Local 284 filed an unfair labor practice charge against the Employer for unlawfully withdrawing recognition of Local 284 as the collective bargaining representative for the bargaining unit employees. Region 9 issued a consolidated complaint on the charge filed by Local 284, including other previously filed unfair labor practice charges over disciplinary actions taken by the Employer. On December 3, 2014, during the second day of the scheduled trial, Respondent and Local 284 entered into a settlement agreement regarding the allegations contained in the consolidated complaint which was approved by Administrative Law Judge Amchan. (JX 1, ¶ 4; Stipulation Exhibit 2, hereinafter SX. ___) As part of the settlement entered into between Local 284 and Respondent, Respondent was obligated to, among other things, "recognize and bargain in good faith with the International Brotherhood of Teamsters Local Union No. 284" and if an agreement was reached during said good faith bargaining the Respondent was obligated to "sign a document containing that Agreement, ..." (SX. 2, p. 2)

Pursuant to the December 3, 2014 settlement agreement, negotiations between Local 284 and Respondent began on January 20, 2015. (T. 32 and 538) Respondent and Local 284 had additional negotiations sessions on February 11, 2015, February 19, 2015, March 17, 2015, April 8, 2015 and April 9, 2015. (T. 35) While proposals were exchanged between the parties during these negotiation sessions and one or two of the outstanding issues were resolved through tentative agreements, very little, if any progress was made on the major outstanding issues between the parties. (T. 38)

As previously mentioned, Local 377 had been certified as the collective bargaining representative for approximately eight (8) bargaining unit employees in the Youngstown, Ohio

area. In November of 2014 a decertification petition was filed by a sufficient number of the bargaining unit employees at that location to obtain an election scheduled for early December, 2014. Local 377 filed an unfair labor practice charge against the Respondent alleging bad faith bargaining which, because of the timing of the filing of the charge in relationship to the election date, did not block the election. However, Region 8 decided to impound the ballots following the election without conducting a tally of ballots. The ballots for the Local 377 decertification election were not counted until early June, 2015 resulting in the decertification of Local 377. Local 377 filed objections to the conduct of the election alleging that the Excelsior list provided by Respondent contained two incorrect addresses, involving twenty-five percent (25%) of the bargaining unit. (T. 597)

At the first bargaining session between Respondent and Local 284 following the December settlement agreement, Attorney John Doll became the principal spokesperson for Local 284 for the negotiations. (T. 32) Mr. Doll had also previously served as the principal spokesperson for Local 957 in its negotiations with the Employer and the newly elected officers of Local 957 requested Mr. Doll to act as its chief spokesperson in the upcoming negotiations with the Employer since its contract was scheduled to expire at the end of February, 2015. (T. 33-34)

At the April 17, 2015 Local 284 negotiation session, Local 284 made a substantial change to its negotiation proposals and submitted to Respondent a package proposal accepting a number of Respondent's proposals that had previously been rejected by Local 284. After presenting its new package proposal to Respondent and explaining the proposal to Respondent's representatives, the parties agreed to take a lunch break. (T. 38-39) After the lunch break, Craig Brown, Chief Negotiator for Respondent and Greg Maurer, Respondent's Operation's Manager

for the Columbus facility, met with Mr. Doll, Randy Verst, Co-Chair of the Ohio Conference of Teamsters Beverage Division and President of Local 1199, and Martin Jay, Trustee and Business Representative for Local 20, along with the FMCS Mediator Mike Salmon. (T. 41) During this meeting, Mr. Brown stated that the Union had made a very serious offer that deserved very serious consideration by the Employer. Mr. Brown further stated that since Brooke Hice, the Employer's Vice President and General Counsel, who normally attended the negotiation sessions but was absent on this date, was not present he would have to take Local 284's proposal back to Ms. Hice and other management officials for consideration. (T. 41) There were no further meetings between Respondent and Local 284 on April 17, 2015. (T. 42)

Respondent and Local 284 next met for negotiations on April 29, 2015. (T. 43) At the beginning of this negotiation session, Respondent rejected the Union's package proposal of April 17, 2015 and presented a proposal on all open issues as individual proposals and not as a package. (T. 45 and 566) However, Respondent maintained its position on union security and stated that it would not agree to Local 284's union security proposal because of its concerns that its long term employees may quit. (General Counsel Exhibit 5, hereinafter GCX ____) After a short recess in negotiations the Employer representatives returned to the bargaining table at which time the parties had a discussion concerning some of the outstanding issues including union security, wages and health insurance. There was also a discussion concerning the pending decertification petition that had been blocked because of the pending unfair labor practice charges. Dan Kirk, Vice President of Local 284 stated that the bargaining unit employees elected Local 284 as their bargaining representative in 2013, fair and square. (GCX 5; T. 49-50)

After a lunch break, Mr. Doll, Mr. Verst and Mr. Jay met away from the bargaining table with Mr. Brown and Ms. Hice to see if there was something the parties could do to reach an

agreement. (T. 50) During this discussion the "global agreement" concept was brought up by Mr. Brown to try to resolve issues with the other Teamster Local Unions in negotiations with Respondent including Local 377, Local 20, Local 293 and Local 957. (T. 50-53) No agreements were reached during this away from the table meeting, but the parties agreed to get back together to see if an agreement could be reached as discussed. (T. 54)

The next negotiation session between Respondent and Local 284 occurred on May 26, 2015. (T. 57; GCX 6) While this negotiation session was previously scheduled to include all representatives of Respondent and Local 284, Respondent and Local 284 continued their meeting away from the bargaining table with Mr. Doll, Mr. Verst and Mr. Jay representing Local 284 and Mr. Brown and Ms. Hice representing Respondent. (T. 57-58, 193-194, 304) Mr. Brown started the meeting by reviewing the open issues for the Local 284 collective bargaining agreement including duration, wages, management rights, no strike/no lockout and grievance procedure. Mr. Brown then reviewed the items the Employer wanted to include in the "global agreement" including the discontinuance of the corporate campaign against Respondent, contract extensions for Local 293, Local 20 and Local 957, the approval for the Local 293 members to vote on the tentative agreement, an agreement that Local 377 would withdraw its unfair labor practice charges so the decertification ballots could be counted and an agreement that Local 284 would stipulate to a decertification election, withdrawing its pending unfair labor practice charges. Mr. Brown stated that Respondent would agree to union security in the Local 284 collective bargaining agreement if Local 284 agreed to stipulate to a decertification election.

Mr. Brown then went through the open issues in the collective bargaining agreement negotiations for Local 284. For the duration Mr. Brown reviewed that Respondent had a contract with Local 1199 until 2016, the tentative agreement with Local 293 had a 2019 expiration date,

Local 20 was going to have a 2019 expiration date, the Respondent had proposed a 2018 expiration for Local 957 and Respondent was proposing a two year agreement for Local 284. In regard to the no strike/no lockout clause, Mr. Brown explained that Respondent wanted its language to be accepted by Local 284. In regard to wages Respondent proposed $.45 effective 11/1/2015 and $.20 effective 11/1/2016. For the "global agreement" Mr. Brown proposed that the corporate campaign be stopped, that extensions be granted for Local 293, Local 957 and Local 20. Mr. Brown also proposed that Respondent wanted an agreement from all Teamster Unions in Ohio not to organize the Respondent's three (3) non-union locations. Mr. Verst and Mr. Jay immediately responded that the non-organizing proposal was a complete non-starter. (T. 59, 63, 66, 206-209, 218-219, 290, 308, 415-417, 423, 591 and 794; GCX 6)

The Union responded to Respondent's proposal by offering the expiration date of the collective bargaining agreement with Local 284 to be November 1, 2018, a wage proposal beginning May 1, 2015 through November 1, 2017, the Union's previously proposed starting wage schedule, that the parties would work out their differences on the no strike/no lockout article, that the Respondent and Local 284 would work out their differences on the management rights clause related to the effects bargaining issue. Respondent was advised that there could be no agreement on the no organizing of Respondent's non-union locations, the extension proposal by Respondent was acceptable, and Respondent was advised that Local 377 would not withdraw the unfair labor practice charges blocking the counting of the decertification ballots. Local 284 made no proposal regarding the corporate campaign or agreeing to the withdraw of the unfair labor practice charge blocking the decertification petition in return for Union security because those items were not objectionable. (T. 60, 68, 70, 306-308, 415-418, 596-597; JX 6)

Respondent and Local 284 exchanged additional proposals during the day on May 26, 2015 with the last two open issues being the Respondent's proposal to have Local 377 withdraw its unfair labor practice charge so the decertification ballots could be counted and Respondent maintaining its last wage proposal. After a caucus the Respondent agreed to withdraw its proposal that Local 377 be part of the "global agreement" but would not change its wage proposal. The Union accepted the last Respondent proposal that excluded Local 377 from being included as part of the "global agreement" and the Respondent's last wage proposal. The parties shook hands and agreed that Mr. Brown would draft the necessary documents for review and signature. (T. 62, 72-73, 308-312, 418-419, and 605; GCX 6, Respondent Exhibits 4 and 5, hereinafter RX ____) No additional bargaining sessions were scheduled as the negotiations between Respondent and Local 284 had been completed. (T. 262, 310)

On May 27 or May 28 Mr. Doll drafted a negotiation update for Local 284 and dated it May 26, 2015, the date Respondent and Local 284 reached a tentative agreement for a collective bargaining agreement. (T. 73, 226, 266; GCX 7) The negotiation update dated May 26, 2015 was emailed to Local 284 either late in the day on May 27 or early on May 28, 2015. (T. 226) Respondent distributed a letter on May 28, 2015 to the Local 284 bargaining unit employees reporting on the successful negotiations with Local 284. (JX 1, ¶ 7; SX 5; T. 611, 833-834)

On May 29, 2015 Mr. Brown, on behalf of Respondent, sent an email to Mr. Doll transmitting a draft of the collective bargaining agreement between Respondent and Local 284 and a draft of the "global agreement." (T. 74; SX 7) According to Mr. Doll, the draft collective bargaining agreement between Respondent and Local 284 was consistent with the agreement reached on May 26, 2015. (T. 76) On June 3, 2015 Mr. Doll sent an email to Mr. Brown setting forth numerous areas of the proposed "global agreement" the parties had not discussed and on

which the parties had not reached agreement on May 26, 2015. (SX 9) Areas on which there had been no discussions and/or on which no agreement was reached on May 26, 2015 included having the International Brotherhood of Teamsters, hereinafter IBT, a party to the "global agreement," having Local 1199 a party to the "global agreement," setting forth a specific date for the decertification election to be held for the Columbus bargaining unit employees represented by Local 284, including a release that had not been discussed and having specific expiration dates for Local 20, Local 293, Local 957 and Local 1199. (T. 75-76; SX 9; GCX 6; RX 4 and 5)

On June 3, 2015 Mr. Brown, on behalf of Respondent, sent Mr. Doll an email setting forth Respondent counter to the June 3, 2015 email sent by Mr. Doll to Mr. Brown. (SX 10) Mr. Doll responded to the June 3, 2015 email from Mr. Brown with a June 4, 2015 email again explaining the areas in which no discussion was held and/or no agreement was reached on May 26, 2015 for the "global settlement." (SX 11)

Respondent and Local 957 had a negotiation session scheduled for June 8, 2015. (T. 77) Prior to any negotiations occurring between Respondent and Local 957, Mr. Brown and Ms. Hice for Respondent and Mr. Doll, Mr. Verst and Mr. Jay for Local 284 met to discuss the discrepancies contained in the proposed "global agreement" drafted by Mr. Brown and the agreement the parties reached on May 26, 2015. During this meeting Mr. Doll explained to Mr. Brown that Local 1199 and the IBT would not be a part of the "global agreement." (T. 78-79, 238, 247 and 314) Following this meeting, Mr. Doll emailed Mr. Brown Local 284's draft of the proposed Settlement Agreement. (T. 80; SX 13)[1]

Later in the afternoon on June 8, 2015 Mr. Brown requested another meeting concerning the "global agreement" (T. 80-81 and 318) During this afternoon meeting, Mr. Brown explained

[1] The Settlement Agreement and Release (SAR) prepared by Mr. Brown, the Settlement Agreement prepared by Mr. Doll and the terms "global agreement" and "global settlement" were used interchangeably during the hearing.

that he had just learned that Mr. Doll had filed objections on behalf of Local 377 in regard to the decertification election alleging that Respondent had provided bad addresses on the Excelsior list. (T. 81-82, 427-428 and 444). At the end of that meeting, Respondent provided Local 284 a revised proposal on the Settlement Agreement which now included Local 377 as a party. (T. 81-82, 644; SX 14)

The last scheduled negotiation session between Respondent and Local 957 occurred on June 19, 2015. (T. 82) Respondent and Local 957 negotiating teams met across the table beginning at approximately 9:54 a.m. to continue their negotiations for a new collective bargaining agreement. This first session ended at 10:12 a.m. and for the rest of the day, negotiations between Respondent and Local 957 occurred away from the bargaining table. (GCX 8) At 11:20 a.m. on June 19, 2015 Mr. Brown sent an email to Mr. Doll requesting a counterproposal from Local 284 on the "global agreement." (T. 85; GCX 9) Mr. Doll emailed Mr. Brown a counterproposal from Local 284 in the early afternoon of June 19, 2015. (T. 87; JX 1, ¶ 15; SX 15) Later in the afternoon Mr. Doll, Mr. Jay and Mr. Brown met to review and compare the June 19, 2015 counterproposal from Local 284 with Respondent's June 8, 2015 proposal for the "global agreement." Ms. Hice was not present. (T. 84-85, 88) During this meeting the parties compared the two proposals paragraph by paragraph with Mr. Brown commenting that each paragraph contained in Local 284's June 19, 2015 counterproposal was "okay" or there was "no problem" with each of the paragraphs. (T. 88, 272)

Later that same afternoon Mr. Brown, Mr. Doll and Mr. Jay had a conversation concerning the expiration date of the Local 957 collective bargaining agreement. Respondent had been proposing a three (3) year collective bargaining agreement while Local 957 had consistently proposed a four (4) year collective bargaining agreement. (T. 89) During the

discussion in the afternoon, Respondent, through Mr. Brown, offered higher wage rates for the Local 957 bargaining unit employees if they would accept a three (3) year collective bargaining agreement. After lengthy discussions, the bargaining unit employees decided to maintain their position that only a four (4) year collective bargaining agreement would be acceptable. (T. 89-90, 322, 682) Mr. Brown told Mr. Doll and Mr. Jay that he would get back with them after a decision had been made. A short time later Mr. Brown informed Mr. Doll and Mr. Jay that "I got you your four year deal." (T. 90, 322)

After obtaining a tentative agreement on the length of the Local 957 collective bargaining agreement, Mr. Brown, Mr. Doll and Mr. Jay met on some of the other open issues away from the bargaining table and after discussions going back and forth on those issues there was a frame work for an agreement on the "core economic piece," but operational issues still had to be worked out. (T. 688-690) Mr. Brown then indicated that he would prepare a last, best and final proposal for the consideration of the Local 957 bargaining unit members. (T. 690-691, 694)

By early evening Mr. Brown completed the Employer's last, best and final offer to present to the Local 957 full negotiating committee. After Mr. Brown passed out the Employer's last, best and final offer he stated that the Employer understood by making this last, best and final proposal to Local 957 all of the collective bargaining agreements expiration dates were going to be lined up together and that the Employer was taking a big risk in doing so but that the Employer believed that the Teamster Unions would operate in good faith and that Respondent would not again experience the problems that it experienced during the 2015 negotiations. (T. 92, 324, 448)

After leaving the meeting room where Mr. Brown had presented the Employer's last, best and final offer, Mr. Brown returned a few minutes later and asked to speak with Mr. Doll and

Mr. Jay. (T. 94) Mr. Doll, Mr. Jay and Matt Crawford, an associate in Mr. Doll's law firm, followed Mr. Brown back to the small conference room where prior meetings that day had occurred. (T. 94-95, 325-326, 449-450) After all four individuals were in the conference room, Mr. Brown distributed a proposal to change the expiration date of the Local 284 collective bargaining agreement, which had been tentatively agreed to on May 26, 2015, from February 9, 2019 to February 9, 2018, a three year collective bargaining agreement. (T. 95, 278-279, 326; SX 16) Mr. Doll and Mr. Jay both advised Mr. Brown that the Employer could not now change the expiration date of the Local 284 collective bargaining agreement, that there was already an agreement for the duration clause for the Local 284 collective bargaining agreement and that the Employer's proposal to change the expiration date for the Local 284 collective bargaining agreement was unacceptable. (T. 95, 326, 450) Mr. Brown immediately became upset, yelling that Respondent could change the expiration date for the Local 284 collective bargaining agreement and slammed his fist on the table cursing at Mr. Doll, Mr. Jay and Mr. Crawford. (T. 95-96, 325-327, 450-451)

On the following Monday, June 22, 2015, Mr. Doll sent an email to Mr. Brown advising him that the Local 957 membership ratified the last, best and final proposal submitted by the Employer on June 19, 2015. Mr. Doll also advised Mr. Brown that the settlement agreement ("global agreement") agreed to on June 19, 2015 had to be completed. (SX 17) Mr. Brown sent an email dated June 24, 2015 in response to the June 22, 2015 email from Mr. Doll. (SX 18) In his June 24, 2015 email Mr. Brown stated that Respondent was "puzzled" by Local 284's request to finalize the "Global Settlement Agreement," since Respondent only presented a change in the expiration date of the Local 284 collective bargaining agreement. (SX 18) Mr. Brown further stated in his June 24, 2015 email: "Thus, when Local 957 and the Dayton negotiating committee

insisted on a 2019 expiration it only stood to reason that the Company would adjust the expiration date of the Columbus contract, the only contract subject to negotiation on this time." Mr. Brown further stated in his June 24, 2015 email: "However, given the Union's (Local 284's) strident and final rejection of the Company's proposal to change the expiration date of the Columbus contract to February, 2018, we see no reason to engage in a meaningless exercise of addressing other remaining issues of contention with respect to the Global Settlement Agreement." (SX 18) Mr. Doll responded to Mr. Brown's June 24, 2015 email (SX 18) with an email dated June 25, 2015. (SX 19) In addition to countering the statements made by Mr. Brown in his June 24, 2015 email, Mr. Doll stated: ". . . during our discussion on the Settlement Agreement on June 18 you never identified any modifications that needed to be made to the June 19 version of the Settlement Agreement. Please advise as to the modifications you now state are needed to the Settlement Agreement." (SX 19)

Mr. Brown responded to Mr. Doll's June 25, 2015 email with a letter dated July 2, 2015 sent electronically. (SX 20) In his July 2, 2015 letter Mr. Brown reviewed the discussions that led to the tentative collective bargaining agreement between Respondent and Local 284 and the discussions that occurred on June 8, 2015 and June 19, 2015 related to both Local 957 and Local 284. (SX 20) In regard to the Local 284 June 19, 2015 proposal for the "global agreement" Mr. Brown wrote: "A number of the disputed issues were resolved either by compromise or developments through the course of time (i.e., concerns related to Local 377). The Company is also prepared to withdraw certain settlement conditions on the basis of good faith assurances by the Union (i.e., that the IBT would cease its support in activities regarding the corporate campaign). I indicated that the proposal was constructive and that I saw no areas of contention that likely could not be resolved, but that it would have to be reviewed by Company General

Counsel Brooke Hice. . ." (SX 20, p. 8) Mr. Brown further stated in his July 2, 2015 letter that "If the Union still objects to an expiration date of February, 2018 in Columbus, then the Company has no interest in entering into any Global Settlement Agreement." (SX 20, p. 9)

On July 11, 2015 the Local 284 bargaining unit members employed at Respondent's Columbus facility ratified the collective bargaining agreement between Local 284 and Respondent tentatively agreed to on May 26, 2015. (T. 99-100; SX 7 and SX 21) On July 13, 2015 Mr. Doll sent an email to Mr. Brown advising him of the results of the ratification vote and that Local 284 was "prepared to enter into a stipulated election agreement on the pending decertification petition as soon as Heidelberg signs the agreement accepted by the bargaining unit employees." (SX 24) Respondent refused to sign the ratified collective bargaining agreement between Respondent and Local 284 and responded to Mr. Doll's July 13, 2015 email with a letter dated July 16, 2015 (SX 25) taking the position that its proposal submitted on April 29, 2015 was the Employer's current collective bargaining proposal for the Local 284 negotiations. (T. 100; SX 25)

III. LEGAL ANALYSIS AND ARGUMENT

Respondent Is Obligated To Sign The Agreed Upon Collective Bargaining Agreement And "Global Agreement."

Long ago in H.J. Heinz Co. v. National Labor Relations Board, 311 U.S. 514, 7 LRR Man. 291 (1941) the Supreme Court held that an employer had to sign a collective bargaining agreement it had reached with a union. In doing so the Court held: "A businessman who entered into negotiations with another for an agreement having numerous provisions, with the reservation that he would not reduce it to writing or sign it, could hardly be thought to have bargained in good faith. This is even more so in the case of an employer who, by his 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." 7 LRR Man. at 297 Since the Heinz decision, the Board has issued a number of decisions that held part of the obligation of Section 8(d) of the Act requires either party, upon the request of the other party to execute a written collective bargaining agreement incorporating an agreement reached during negotiations. See, Windward Teachers Association, 346 NLRB 1148, 1150 (2006); Hempstead Nursing Home, 341 NLRB 321, 174 LRRM 1460 (2004); Graphic Communications Union, District Council No. 2 (Riverwood International USA), 318 NLRB 983, 990 (1995). The obligation to execute a written collective bargaining agreement incorporating an agreement reached during negotiations, however, only arises if the parties had a "meeting of the minds" on all substantive issues and material terms of the agreement. Windward Teachers Association at 1150; Hempstead Park Nursing Home, 341 NLRB 321 (2004)

The Board has also held that a "meeting of the minds" is dependent upon the objective terms of the collective bargaining agreement rather than the subjective understandings of the terms by the parties. Additionally, the Board has consistently applied the reasonable objective standard in determining whether a "meeting of the minds" has occurred. Vallejo Retail Trade Bureau, 243 NLRB 762, 767 (1979)

The Board has also consistently held that an employer violates Section 8(a)(5) and 8(a)(1) of the Act when an employer refuses to execute a written collective bargaining agreement that incorporates the agreement reached during contract negotiations. New Orleans Stevedoring Co., 308 NLRB 1076, 1081 (1992).

Based upon the evidence introduced at the hearing and the case authority set forth above, Local 284 submits that on May 26, 2015 Respondent and Local 284 reached a "meeting of the minds" on a full and complete collective bargaining agreement and a full and complete "global agreement" resolving all issues between Respondent and Local 284. At the conclusions of the May 26, 2015 meeting, the representative of the parties shook hands and agreed that Mr. Brown would draft both the collective bargaining agreement for Local 284 and the "Global Agreement." (T. 73)

Prior to receiving Mr. Brown's drafts of the collective bargaining agreement and the "global agreement," Respondent and Local 284 prepared and distributed documents to the bargaining unit employees informing them that tentative agreements had been reached between Respondent and Local 284. Local 284's flyer was prepared by Mr. Doll and sent to Local 284 either late on May 27 or early on May 28, 2015 for distribution by Local 284. (T. 226) Respondent's letter dated May 28, 2015, prepared by Ms. Hice and Mr. Brown (T. 806, 611), was distributed to the Columbus bargaining unit employees on May 28, 2015. (T. 806; JX 1, ¶ 8) The Local 284 flyer and Respondent's May 28, 2015 letter (SX 6) Both advised the bargaining unit employees that a tentative collective bargaining had been reached between Respondent and Local 284 on which they would be given the opportunity to vote in the near future.

Based on the evidence introduced at the hearing, Respondent's May 28, 2015 letter distributed on May 28, 2015 would have been received by the bargaining unit employees prior to the Local 284 flyer which would have been received by Local 284 from Mr. Doll at the earliest late on May 27, 2015 well after Local 284 would have the opportunity to get it in the mail for

delivery on that date. At the earliest, the Local 284 flyer would have been mailed to the bargaining unit employees on May 28, 2015.

Respondent's May 28, 2015 letter not only hailed as "great news" the reaching of a tentative agreement for a first contract between Respondent and Local 284, Respondent also advised the bargaining unit employees that it had "achieved the primary goal that it has had since last summer when a majority of our employees signed a petition stating that they no longer wanted to be represented by this Union. You see, we entered into the Tentative Agreement because the Union finally agreed to allow you to vote in a secret ballot decertification election to decide if the Union will continue to represent you." (SX 6) Obviously, Respondent was advising the bargaining unit employees that a "meeting of the minds" had been reached on the "global settlement" that incorporated the agreement between Respondent and Local 284 that a decertification election would be held without any further delay caused by the pending unfair labor practice charges.

Included with Mr. Brown's May 29, 2015 email were drafts of the "global agreement," which Mr. Brown titled "Settlement Agreement and Release," and the agreed upon collective bargaining agreement between Respondent and Local 284. (T. 76; SX 7) In Mr. Doll's June 3, 2015 email to Mr. Brown, Mr. Doll set forth various objections to the additions Mr. Brown included in the "global agreement" that were never discussed or agreed to on May 26, 2015. In regard to Mr. Brown's draft of the collective bargaining agreement between Respondent and Local 284, Mr. Doll indicated that he had not completed his review of the proposed collective bargaining agreement and would get back with Mr. Brown if there any questions or concerns. (SX 9) At no time thereafter did Mr. Doll or Local 284 express any concerns or questions with the draft collective bargaining agreement Mr. Brown submitted with his May 29, 2015 email.

(SX 7) Local 284 submits that the evidence introduced at the hearing, especially the bargaining notes for May 26, 2015, support the position of Local 284 and the General Counsel that the "Settlement Agreement and Release" submitted by Mr. Brown with his May 29, 2015 email did not accurately reflect what the parties had agreed to be included in the "global agreement" on May 26, 2015. (GCX 6; RX 4 and RX 5)

On June 8, 2015 Respondent and Local 957 had a previously scheduled negotiation session. However, Respondent, represented by Mr. Brown and Ms. Hice, and Local 284, represented by Mr. Doll, Mr. Jay and Mr. Verst, met on two separate occasions to discuss the "global agreement." (T. 78-82, 315-318, 424-429) During the morning meeting on June 8, 2015 between Respondent and Local 284 Mr. Doll explained that the "global agreement" could not include a release, would not include Local 1199 or the IBT and that the expiration dates included in Mr. Brown's May 29, 2015 draft would also not be included. After the conclusion of that meeting, Mr. Doll sent to Mr. Brown an email dated June 8, 2015 which included Local 284's draft "Settlement Agreement" for the "global agreement." (SX 13)

Respondent and Local 284 met in the afternoon on June 8, 2015 with the same representatives that attended the first meeting on June 8, 2015. During this meeting, Respondent wanted to again include Local 377 into the "Global Agreement" because Local 377 had filed objections to the election based on issues with the Excelsior list provided by Respondent to Local 377. (T. 78-82) Mr. Brown had been made aware that Local 377 had issues with the Excelsior list provided to Local 377 by Respondent as a reason why Local 377 refused to be included into the "global agreement." The second page of Mr. Brown's May 26, 2015 notes includes the word "Excelsior" in relationship to Local 377, indicating that Respondent was advised that a problem with the Excelsior list was one of the reasons Local 377 refused to be a

part of the "global agreement." (RX 4, p. 2) Respondent provided the Local 284 representatives a revised "global agreement" at the end of the afternoon meeting on June 8, 2015 (RX 9) and shortly thereafter emailed a slightly revised version of the "global agreement" at 5:17 p.m. on June 8, 2015. (SX 14) (Both documents included Local 377 as a party.)

Respondent, through Mr. Brown, and Local 284, through Mr. Doll and Mr. Jay, next had discussions concerning the "global agreement" on June 19, 2015, a day on which Respondent and Local 957 had scheduled negotiations. During the morning of June 19, 2015 Mr. Brown sent an email to Mr. Doll indicating that Respondent needed to see Local 284's revised "Global Agreement" "very soon" in order to avoid being required to begin preparations for picketing, which Mr. Brown described as being "very expensive decisions." (GCX 9) Pursuant to this request, Mr. Doll sent by email to Mr. Brown Local 284's proposed settlement agreement dated June 19, 2015. (SX 15)

During the midafternoon on June 19, 2015 Mr. Brown met with Mr. Doll and Mr. Jay to review Local 284's June 19, 2015 proposed settlement agreement and compared it with the draft settlement agreement provided by Mr. Brown on June 8, 2015. Ms. Hice did not attend the June 19, 2015 meetings. As Mr. Brown and Mr. Doll reviewed each one of the paragraphs of the documents, Mr. Brown commented that he had "no problem" with or that he was" okay" with the language contained in the Local 284's June 19, 2015 proposal. (T. 88-89) Mr. Brown on behalf of Respondent never indicated on June 19, 2015 that there were any questions or problems with Local 284's proposed settlement agreement that had been reviewed and agreed to on June 19, 2015.

Later in the day on June 19, 2015 Mr. Brown, on behalf of Respondent, submitted to the Local 957 bargaining committee Respondent's last, best and final offer for a collective

bargaining agreement. During Mr. Brown's presentation, Mr. Brown stated to all of the individuals present, including Dan Kirk from Local 284, that Respondent was aware that by agreeing to a four (4) year collective bargaining agreement with Local 957 that all of the collective bargaining agreements expiration dates were lining up with each other and that the Company was taking a big risk in agreeing to these expiration dates. (T. 92) Clearly included in Mr. Brown's statement was the understanding that the collective bargaining agreement between Respondent and Local 284 included an expiration date of February 9, 2019.

At the conclusion of that meeting on June 19, 2015 Respondent and Local 284 had a written collective bargaining agreement that was consistent with the agreements reached on May 26, 2015 and an agreement on the "global agreement" consistent with the substantive terms agreed to on May 26, 2015.

Notwithstanding complete agreement on the written collective bargaining agreement between Respondent and Local 284, including on the expiration date of February 9, 2019, later in the evening on June 19, 2015 Mr. Brown, during a meeting with Mr. Doll, Mr. Jay and Mr. Crawford, presented a revised duration clause for the Local 284 collective bargaining agreement that changed the expiration date from February 9, 2019 to February 9, 2018. (T. 92-96, 325-327; SX 16)

The Local 284 bargaining unit employees ratified the collective bargaining agreement that was submitted by Mr. Brown with his May 29, 2015 email without change. (SX 24) Even though Local 284 requested that Respondent provide a "global agreement" consistent with the agreement reached on June 19, 2015 between Respondent and Local 284 (SX 17), Respondent responded with an email from Mr. Brown dated June 24, 2015 stating: "However, given the Union's strident and final rejection of the Company's proposal to change the expiration date of

the Columbus contract to February, 2018, we see no reason to engage in a meaningless exercise of addressing other remaining issues of contention with respect to the Global Settlement Agreement." (SX 18)

Local 284 submits that the failure of Respondent to sign the ratified collective bargaining agreement which was the same as the documents submitted by Respondent on May 29, 2015, and Respondent's refusal to sign the "Global Agreement" the specific language on which was agreed to on June 19, 2015 constitutes a violation of Sections 8(a)(5) and 8(a)(1) of the Act. For this reason, Local 284 requests that the Administrative Law Judge find that the allegations contained in the complaint were proven by Counsel for the General Counsel.

Credibility Analysis

Credibility determinations rely on a variety of factors including the context of the witness' testimony, the witness' demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities and reasonable inferences that may be drawn from the record as a whole. Durable D Construction Group, 339 NLRB 303, 305 (2003); Daikichi Sushi, 335 NLRB 622, 623 (2001) In the instant case, the Administrative Law Judge is going to have to make certain credibility determinations based on the evidence presented at the hearing. Based on the inconsistent testimony of Respondent's witnesses, compared to the weight of the respective evidence and/or established/admitted facts, Local 284 submits that those credibility determinations should be made against Respondent's witnesses.

Mr. Brown and Ms. Hice both testified that at the end of the meeting on May 26, 2015 there was no agreement reached on the collective bargaining agreement between Respondent and Local 284 and no agreement reached on the "global agreement." (T. 607, 804) Instead, Mr. Brown and Ms. Hice testified only a "framework" of an agreement was reached on May 26,

2015. (T. 607-608,804-805) However, the contemporaneous notes taken on May 26, 2015 by Mr. Doll (GCX 6) Mr. Brown (RX 4) and the notes of Ms. Hice (RX 5) all demonstrate that the last two items opened for negotiations on the collective bargaining agreement between Respondent and Local 284 and the "global agreement" were whether Local 377 was going to be included in the "global agreement" and the Respondent's insistence on its wage proposal. Respondent proposed to withdraw its prior insistence that Local 377 be a part of the "global agreement" but would not change its wage proposal. Local 284 accepted the Respondent's wage proposal with the agreement that Local 377 would not be included in the "global agreement." The testimony of Mr. Brown and Ms. Hice provided during the hearing that no agreements were reached on May 26, 2015 on the collective bargaining agreement between Local 284 and Respondent or on the "global agreement" is simply not accurate.

Mr. Brown and Ms. Hice also testified that Respondent's May 28, 2015 letter to the bargaining unit employees about the tentative agreement reached on May 26, 2015 was created in response to Local 284's flyer dated May 26, 2015. (T. 610-614, 804-810) Respondent stipulated that its May 28, 2015 letter to the bargaining unit employees was distributed on May 28, 2015. (JX 1, ¶ 8) The uncontradicted evidence introduced at the hearing established that Local 284's flyer dated May 26, 2015 was not drafted until late on May 27, 2015 or early on May 28, 2015 and submitted to Local 284 by email after it was drafted by Mr. Doll. (T. 226) The earliest Local 284 could have mailed or otherwise distributed the flyer dated May 26, 2015 to the bargaining unit employees would have been in the afternoon of May 28, 2015.

Moreover, Mr. Brown testified that Respondent described the negotiated collective bargaining agreement as a "tentative agreement" in order to be consistent with Local 284's flyer dated May 26, 2015. (T. 613-614) However, neither Mr. Brown nor Ms. Hice, who testified that

the Local 284 flyer was "premature," explained the positive nature of its May 28, 2015 letter using terms such as "great news" when describing the tentative collective bargaining agreement between Local 284 and Respondent. (SX 6) Obviously, Mr. Brown and Ms. Hice were attempting to explain away the positive nature and "good news" contained in the May 28, 2015 letter including the language explaining how pleased Respondent was that the bargaining unit employees would finally be able to get to be involved in a secret ballot vote on the decertification petition.

Mr. Brown also testified at the hearing that after the review of Respondent's June 8, 2015 draft of the "global agreement" with Local 284's June 19, 2015 draft of the "global agreement" and agreeing that there was no problems with any of the paragraphs contained in Local 284's June 19, 2015 draft, that there were serious substantive issues yet to be resolved. (T. 672-679) However, in his July 2, 2015 letter (SX 20) Mr. Brown wrote in regard to the "global agreement" the following: "A number of the disputed issues were resolved either by compromise or developments through the course of time (i.e. concerns related to Local 377). The Company was also prepared to withdraw certain settlement conditions on the basis of good faith assurances by the Union (i.e., that the IBT would cease its support in activities regarding the corporate campaign). I indicated that the proposal was constructive and that I saw no areas of contention that likely could not be resolved but that would have to be reviewed by Company General Counsel Brooke Hice, ..." (SX 20, p. 8) Even though Mr. Brown spoke with Ms. Hice after presenting its proposal to Local 957, Mr. Brown never indicated on June 19, 2015 that Ms. Hice had any issues with the "Global Agreement." (SX 20, p. 8) Obviously, Mr. Brown is attempting to create a disagreement on the content of the "global agreement" when no such disagreements existed as of midafternoon on June 19, 2015.

Based on the examples above, which does not include all of the examples of inconsistent testimony given by Mr. Brown and Ms. Hice, Local 284 submits that all credibility determinations made by the Administrative Law Judge should be in favor of the witnesses of Counsel for the General Counsel and against witnesses for the Respondent.

IV. CONCLUSION

Based on the foregoing arguments, citations of authority and the record as a whole, Local 284 submits that Counsel for the General Counsel clearly satisfied its burden of proof and established that Respondent and Local 284 reached an agreement on the terms and conditions of a collective bargaining agreement between Respondent and Local 284 on May 26, 2015, a collective bargaining agreement that was ratified by the Local 284 bargaining unit employees and which Respondent refuses to sign. Additionally, Local 284 submits that Counsel for the General Counsel has met its burden of proof in establishing that Respondent and Local 284 reached an agreement on all of the terms and conditions of the "global agreement" on May 26, 2015 and that the June 19, 2015 proposed "global agreement" submitted by Local 284 to Respondent includes the agreement reached for the "global agreement" on May 26, 2015. Local 284 requests that the Administrative Law Judge find Respondent violated Section 8(a)(5) and Section 8(a)(1) of the Act by refusing to sign the agreed upon collective bargaining agreement between Respondent and Local 284 and the agreed upon "global agreement."

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Motion for an Extension of Time to File Post Hearing Briefs was served upon Counsels for the Respondent, Stephen J. Sferra, Esq. (ssferra@littler.com) and Craig M. Brown, (cmbrown@littler.com), Counsel for the General Counsel, Jonathan D. Duffey, Esq. (jonathan.duffey@nlrb.gov) by electronic mail on this 19th day of January, 2016.