UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

TRUSTONE FINANCIAL FEDERAL CREDIT UNION, Respondent, and OFFICE AND PROFESSIONAL EMPLOYEES INTERNATIONAL UNION, LOCAL 12, Charging Party.	Cases 18-CA-158210 18-CA-163034 18-CA-165634

POST-HEARING MEMORANDUM OF LAW

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I. INTRODUCTION:

The Respondent, TruStone Financial Federal Credit Union, respectfully requests dismissal of the allegations in the General Counsel's initial and amended Complaints. The parties' dispute is the result of an ambiguity inherent in the National Labor Relations Board's ("NLRB") Certification of the Union as the exclusive representative of certain Respondent employees. As a result of that ambiguous Certification, the Respondent entered into a series of Neutrality Agreements with the Office Professional Employees International Union, Local No. 12 ("Union"). The parties' Neutrality Agreements reflect the Respondent's agreement with the Union regarding the scope of the bargaining unit which the Union represents, and the Respondent's commitment to neutrality in response to Union organizing. The parties' Neutrality Agreements establish a simple procedure through which the Union may easily and expeditiously establish that it represents a majority of employees at new branches, such as those at issue in this litigation, and which are outside the bargaining unit which the parties agree that the Union represents. In light of the Respondent's contractual commitment to neutrality in the face of Union organizing at any branch where employees are not Union represented, the Respondent will not exercise what would otherwise be its right, protected under the Act, to lawfully resist Union organizing at those locations. Nevertheless, the Union has never even attempted to show that four employees at "Burnsville", or merely five employees at "Boone Avenue", desire Union representation. Respondent General Counsel Phil Young's testimony in that regard was not controverted or challenged in any way during the Administrative Law Judge's trial regarding the General Counsel's allegations. In light of those Neutrality Agreements, the Respondent now

operates seven branch locations which are, without dispute, outside the scope of the bargaining unit which the Union represents, and which the Union has not ever attempted to represent.[1]

In July and September of 2015, the Respondent announced its decision to close two obsolete branches ("Olson Memorial Highway" and "Apple Valley"). The Respondent communicated directly and transparently with both the Union and its employees regarding its decision to close those two branches. The Respondent gave the Union the opportunity to bargain with the Respondent regarding those branch closures. Nevertheless, the Union waived its right to do so. The Respondent subsequently opened two new branches ("Boone Avenue" and "Burnsville"). In light of the Neutrality Agreements between the Respondent and the Union, these two new branches are outside the scope of the bargaining unit which the Union represents. Nonetheless, the Respondent presented its employees with the option of either working at a branch within the unit, or working at one of the new branches. With respect to employment at the Boone Avenue and Burnsville locations, Respondent offered "parity" in terms of the wages and benefits, relative to what those employees were eligible to receive under the parties' labor Agreement.

The Respondent did not violate sections 8(a)(1), (3), or (5) of the Act in the course of its closure of the Olson Memorial Highway and Apple Valley branches or subsequent opening of the Boone Avenue and Burnsville branches. Nor did the Respondent violate the Act in any of the other ways alleged by the General Counsel. For example, the Respondent did not violate the Act when it asked its employees not to engage in discussions unrelated to member business while those employees were executing financial transactions on behalf of those members. Nor

[1] At the conclusion of this Memorandum is an Appendix which provides the history of the Respondent's branch openings and the dispute regarding the scope of the Union represented bargaining unit, and the Union's failure to establish its representative status at those new branch locations.

did the Respondent violate the Act when it ended a meeting with an employee for the purpose of distributing a Notice of [verbal] Discipline, and during which a Union representative became disruptive and obstructionist. For the reasons set forth more fully in this Memorandum, the Respondent respectfully requests that the Board dismiss each and all of the General Counsel's allegations.

II. FACTS:

A. The NLRB's 1979 Certification, Respondent Branch Locations, and Subsequently Acquired or Opened Branch Locations Outside the Bargaining Unit.

The Respondent is a member owned, not for profit, federally regulated credit union. (Tr. at 198.) The Respondent provides a range of financial services, including checking accounts, savings accounts, auto loans, home loans, etc. (Tr. at 199.)

On March 5, 1979, the Regional Director for Region 18 of the National Labor Relations Board ("Board") issued a Certification Of Representative (G.C. Ex. No. 2) ("Certification"). The Board's Certification provides that the Union is the exclusive representative of all employees in the Unit described in that Certification. (*Id.*) The Board's Certification described the Unit as follows:

> All full-time and regular part-time office and clerical employees; excluding managerial employees, temporary employees, student work program employees, professional employees, watchmen, guards and supervisors as defined in the Act.

(*Id.*) The Board's Certification fails to define the geographic scope of the bargaining unit which the Union represents:

Since the Board's 1979 Certification of the Union, the Respondent has opened and acquired various branch locations. As of January 11, 2016, the Respondent recognized the Union as the representative of Respondent employees who worked at the following five branch locations:

1. Roseville, MN;
2. St. Cloud, MN;
3. Plymouth, MN (the Respondent's administrative or processing center);
5. Maple Grove, MN; and
5. Minneapolis, MN.

The specific locations of those branches, and the dates when the Respondent opened or acquired those branches, are reflected in Respondent Ex. No. 1.

Since 2011, the Respondent has opened or acquired nine additional branch locations, which are outside the bargaining unit which the Union represents. The locations of those branches, and the dates when the Respondent acquired or opened those locations, are reflected in Respondent Ex. No. 2.[2] Those branches are as follows:

1. Highland, (St. Paul), MN;
2. Northeast Minneapolis, MN;
3. Kenosha, WI;
4. Northside Kenosha, WI;
5. Cudahy, WI;
6. Boone Avenue, Golden Valley, MN;
7. Burnsville, MN;
8. Oak Creek, WI; and
9. Nicholson Avenue, Cudahy, WI.

(Respondent Ex. No. 2; Tr. at 202-203.)

Respondent's employees who work in positions and at locations which the Union represents, are covered by a comprehensive labor Agreement ("labor Agreement"). (G.C. Ex. No. 3.) That labor Agreement provides, in Article 1.01 with respect to "recognition," that:

> The Employer recognizes the Union as the sole collective bargaining agent for all Full Time and Part Time office and clerical Employees, excluding Field Representatives, Managerial Employees, Temporary Employees, Student Work Program Employees, Professional Employees, Watchmen, Guard, Confidential Employees and Supervisors as defined in the Act per Case No. 18-RC-12178.

[2] The General Counsel did not object to that Exhibit, provided that the record notes that the list reflects two branches ("Boone Avenue" and "Burnsville"), which the General Counsel contends should be in the Union represented bargaining unit.

(*Id.* at 3.)

Article 1.05 of the parties' labor Agreement reflects certain specific "Employer Rights." That Article provides, more specifically, that:

> The Employer retains the exclusive right to manage all aspects of the Employer's operation, to direct control, and to schedule its operations and work force and to make any and all decisions affecting the Employer[s] operation, whether or not specifically mentioned below to:
>
> . . . .
>
> 2. Select and determine the number of Employees, including the number assigned to any shift, department, classification or <u>location</u>;
>
> 3. Increase or decrease the number of Employees working in any shift, unit, department, schedule or <u>location</u>;
>
> . . . .
>
> 5. Determine the <u>location</u> of and move equipment, materials or supplies;
>
> . . . .
>
> 14. Expand, <u>reduce</u>, <u>consolidate</u>, or reorganize any Department, operational unit or any and all other aspects of the Employer's operations;
>
> 15. <u>Make any and all other staffing, scheduling, assignment, operations, or other adjustments the Employer deems necessary</u> in light of the Employer's operations, availability of staff, workforce, skill levels, weather, or any other financial, regulatory, operational, qualitative, or other objective or consideration.

(G.C. Ex. No. 3 at 4 (emphasis added).)

Article 1.05, regarding the Respondent's "Employer Rights," closes by observing that:

> Nothing in the above provision is intended to limit any other rights of the Employer specifically and expressly covered, provided that in the exercise of any of the above rights, the Employer shall not violate any provision of this agreement. To the extent any employer rights conflicts with any provision of this Agreement, the Agreement shall prevail.

(*Id.*)

Article 18 of the parties' labor Agreement reflects a detailed grievance and arbitration procedure, which culminates in binding arbitration. (*See generally* G.C. Ex. No. 3, at pp. 17-18.)

The parties' current labor Agreement has been in effect from October 1, 2014 through September 30, 2016. (G.C. Ex. No. 3.) G.C. Ex. No. 3 represents an unsigned version of that labor Agreement, which the Respondent honored as in effect between the parties, even though the parties' representatives did not sign that labor Agreement until ten months later. (Tr. at 212-213.) Union Representative Murphy admitted that the labor Agreement between the Respondent and the Union (G.C. Ex. No. 3) was a binding agreement, even though it was not signed. (Tr. at 42-43.)

B. <u>The Parties' First, Second, and Final Neutrality Agreements.</u>

Phil Young serves as the Respondent's General Counsel. (Tr. at 198.) Mr. Young serves as the Respondent's chief spokesperson and negotiator with respect to labor agreements with the Union, and is also responsible for strategic decisions with respect to the Respondent's labor relations matters. (Tr. at 199.) As the Respondent's General Counsel, Mr. Young has had discussions over the course of years with various Union representatives, including Beth Branca and Jennifer Burke. (Tr. at 204.)

Ms. Branca last communicated with the Respondent regarding labor relations matters in 2011. (*Id.*) Ms. Burke, who negotiated with the Respondent regarding the parties' second and final Neutrality Agreements described below, last interacted with the Respondent regarding labor relations matters in the late spring of 2013. (Tr. at 205.)

1. <u>The Parties' First Neutrality Agreement.</u>

During the first half of 2011, over a period of approximately two months, Mr. Young negotiated the first "Neutrality Agreement" with Union representative Beth Branca ("First Neutrality Agreement"). (Tr. at 206.) The parties' First Neutrality Agreement resulted from

discussions which Mr. Young initiated with then Union representative Branca, during which he explained that the Respondent was preparing to open a branch in the Highland neighborhood of St. Paul, Minnesota (the "Highland branch"). (Tr. at 207.) The parties subsequently entered into their First Neutrality Agreement (G.C. Ex. No. 4) which explains the Respondent's plans with respect to its Highland branch. That First Neutrality Agreement provided in relevant part as follows with respect to the Respondent's rationale for excluding the new Highland branch from the Union represented bargaining unit:

> As of the date of this Neutrality Agreement ("Agreement"), the Employer is preparing to begin operating a new location, which will provide financial services to participating Members. In an effort to operate successfully in an environment for financial services which is increasingly competitive, demanding, and dynamic, the Employer plans to operate its new branch in Highland Park in St. Paul ("Highland Branch") with a staffing structure, compensation plan, and operational characteristics, which are significantly different from those in place at the Employer's other branches….
>
> In view of the foregoing, and in view of the Parties' mutual desire to continue their healthy relationship, the Parties have entered into this Agreement. This Agreement is designed to protect and respect the rights of employees hired for the Employer's Highland Branch, while also recognizing the Union's interest in protecting employees' right of free choice.

(G.C. Ex. No. 4. at p. 1)

Mr. Young and Ms. Branca reached agreement upon the parties' First Neutrality Agreement, pursuant to which the Respondent would take a position of "neutrality" if the Union attempted to organize (i.e., pursue becoming the representative of) Respondent employees at that branch. (Tr. at 207; G.C. Ex. No. 4.) More specifically, the parties' First Neutrality Agreement provided as follows with respect to the position of neutrality which that Agreement required that the Respondent maintain:

> 1.2 "Neutrality" means as follows:

A. The Employer and/or the Union will not engage in any communication or other conduct that evidences, either directly or indirectly, a negative, derogatory, or demeaning attitude toward the Employer or the Union (including the Employer's or Union's officers', agents', or employees' motives, integrity, character, or performance) or about labor organizations or employers generally.

B. The Employer will not engage in any communications or conduct that directly or indirectly, demonstrates or implies opposition to unionization of its employees.

C. Employer will not resist or oppose unionization by the Union or attempt to discourage employees regarding unionization by the Union.

D. The Employer will advise its employees that it is neutral regarding the issue of representation by the Union and whether or not the employees select the Union as their collective bargaining representative. The Employer and Union will advise employees that they have a respectful, working relationship.

E. The Employer will not provide any support or assistance of any kind to any person or group that is supporting or opposing the selection of the Union as the bargaining representative of the employees.

F. The Employer and the Union recognize that the employees have a legal right to express their opinion provided such expression is lawful and consistent with the Employer's rules and regulations.

(G.C. Ex. No. 4 at p. 2.)

That First Neutrality Agreement clarified the scope of the bargaining unit which the Union represented, by specifically providing that:

> The Parties' 2010 Agreement applies to the Employer's bargaining unit employees assigned to work at the Employer's following locations: Apple Valley, Golden Valley, Maple Grove, Minneapolis, Roseville, St. Cloud, and the Employer's Plymouth administrative center ("2010 Facilities").

(G.C. Ex. No. 4 at p. 1.)

The parties' First Neutrality Agreement specifically excluded the branch which the Respondent was then preparing to open in the Highland neighborhood of St. Paul, Minnesota.

Respondent's employees who work at the Respondent's Highland branch are outside the Union represented bargaining unit, and are not covered by the parties' labor agreement. Traci Murphy, who served as the Union's business agent as of the date of the Board's January 11, 2016 hearing, played no role in the Union's negotiation of that First Neutrality Agreement (G.C. Ex. No. 4) with the Respondent (Tr. at 206).

2. The Parties' Second Neutrality Agreement.

As the Respondent neared completion of its negotiation of its First Neutrality Agreement (G.C. Ex. No. 4) with the Union, Mr. Young, on behalf of the Respondent, and Ms. Branca, on behalf of the Union, discussed "….the fact that the [First] Neutrality Agreement would be a template going forward as TruStone continued to open new branches." (Tr. at 210.) Mr. Young subsequently sent then Union representative Branca a second Neutrality Agreement ("Second Neutrality Agreement"). (Respondent Ex. No. 3.) Ms. Branca, on behalf of the Union, agreed to that Second Neutrality Agreement. (Tr. at 210.) The Respondent negotiated with the Union, through Ms. Branca, with respect to the Second Neutrality Agreement, regarding the "Northeast" branch. (Tr. at 212.) Neither the Union nor the Respondent ever signed that Second Neutrality Agreement. (Respondent Ex. No. 3 at 6; Tr. at 212-213.) Nonetheless, the Respondent operates its "Northeast Minneapolis Branch" outside the bargaining unit, pursuant to that Second Neutrality Agreement. The Union has never contended that it represents Respondent employees who work at the Respondent's "Northeast Minneapolis Branch." (*See* Tr. at 43-44, 48.)

The Union's failure to sign that Second Neutrality Agreement was not unprecedented, as it sometimes took the Union months to sign agreements. For example, as Mr. Young testified:

> That it took a long time. We concluded a contract at the end of February of 2013 which I negotiated with Ms. Burke and which was finally executed by OPEIU in December of that year.

(Tr. at 212.)

3. The Parties' Final Neutrality Agreement.

In September, 2012, the Respondent began negotiations with the Union regarding a new labor agreement. The parties completed those negotiations in February, 2013. (Tr. at 214.) During the course of those negotiations, the parties exchanged proposed neutrality agreements. On January 11, 2013, the Union, through Union representative Jennifer Burke, proposed yet a third, or "final" Neutrality Agreement ("Final Neutrality Agreement"). (Respondent Ex. No. 4; Tr. at 215).

The Union's proposed January 11, 2013 Final Neutrality Agreement reflects various provisions critical to this dispute. That proposed Final Neutrality Agreement defined the scope of the Union represented bargaining unit, by providing that:

> The Parties' ~~2010~~ 2012 Agreement applies to the Employer's bargaining unit employees assigned to work at the Employer's following locations: Apple Valley, Golden Valley, Maple Grove, Minneapolis, Roseville, St. Cloud, and the Employer's Plymouth administrative center ("~~2010~~ 2012 Facilities").

(Respondent Ex. No. 4 at p. 1.)

The Union's proposed January 11, 2013 Final Neutrality Agreement further provides that:

> This Neutrality Agreement shall be applicable to any existing facilities which have not been covered by a Union contract and any facilities purchased by the Employer or opened by the Employer after the effective date of this Neutrality Agreement, excluding mergers with an existing entity forming a new corporate entity, in the State of Minnesota, hereafter referred to as "New Branch" or "new Branches".

(Respondent Ex. No. 4 at p. 1 (emphasis in original).)

On January 25, 2013, the Respondent provided the Union with a copy of the parties' "final Neutrality Agreement" (Respondent Ex. No. 5; Tr. at 216.) According to Respondent representative Phil Young:

> Exhibit 5 [the Final Neutrality Agreement] represents the agreement which Ms. Burke (Union representative) and I came to on January 11th of 2013 when we negotiated it as part of the contract negotiations for that time. This was the Neutrality Agreement we agreed to on a going-forward basis for new branches for TruStone.

(Tr. at 217.)

That Agreement (Respondent Ex. No. 5) represented the Final Neutrality Agreement between the Respondent and the Union. (Tr. at 218.) Respondent's General Counsel Phil Young testified unequivocally that the parties' Final Neutrality Agreement is in effect to date. (Tr. at 240.) That Final Neutrality Agreement between the Respondent and the Union is in effect, and the Respondent honors that agreement. (Tr. at 225.)

The parties' Final Neutrality Agreement provides, with respect to "New Branches", that:

> For purposes of this Neutrality Agreement, the terms "New Facilities" or "New Branches" shall mean facilities and branches purchased by the Employer or opened by the Employer in the State of Minnesota after the effective date of this Neutrality Agreement, excluding any facility or branch which is acquired by the Employer as a result of the merger with, acquisition of, or purchase and assumption of another financial institution.

(Respondent Ex. No. 5 at 1-2 (emphasis in original).)

Very critically, the Final Neutrality Agreement reflects the Respondent's contractual obligation to a position of neutrality if the Union undertakes organizing activities [at any branch outside the Union represented bargaining unit, such as either Boone Avenue or Burnsville] designed to establish the Union as the representative of employees at any new branch, by providing that:

> The Parties believe that Union representation is a matter of personal choice, and acknowledge that if a majority of the employees at the ~~Northeast~~ New Branches which were represented by a Union, the Employer will respect that choice. The Union and Employer agree they will not allow anyone to be intimidated or coerced with respect to this issue.

(Respondent Ex. No. 5 at 2.) As with the parties' First Neutrality Agreement, the Final Neutrality Agreement provides that:

> 1.2. "Neutrality" means as follows:
>
> A. The Employer and/or the Union will not engage in any communication or other conduct that evidences, either directly or indirectly, a negative, derogatory, or demeaning attitude toward the Employer or the Union (including the Employer's or Union's officers', agents', or employees' motives, integrity, character, or performance) or about labor organizations or employers generally.
>
> B. <u>The Employer will not engage in any communications or conduct that directly or indirectly, demonstrates or implies opposition to unionization of its employees.</u>
>
> C. <u>Employer will not resist or oppose unionization by the Union or attempt to discourage employees regarding unionization by the Union.</u>
>
> D. <u>The Employer will advise its employees that it is neutral regarding the issue of representation by the Union</u> and whether or not the employees select the Union as their collective bargaining representative. The Employer and Union will advise employees that they have a respectful, working relationship.

(Respondent Ex. No. 5 at 2 (emphasis added).)

At trial, the Board failed to present any testimony or evidence which disputed the Respondent's position that its Final Neutrality Agreement remains in effect, and applies to the Respondent's new Boone Avenue and Burnsville locations. (*see* Tr. at 225.)

Since the parties entered into their Final Neutrality Agreement, the Agreement, the Respondent has opened and acquired new branch locations. (Tr. at 219.) The branches which the Respondent operates as outside the Union represented bargaining unit are identified in Respondent Ex. No. 3.[3] Of critical importance:

[3] Subject to the Board's objections regarding the "Boone Avenue" and "Burnsville" branches.

1. The Union has never, with the exception of the Boone Avenue and Burnsville locations, ever taken the position that it represents employees at any other Respondent branch opened since the parties entered into their First, Second, and Final Neutrality Agreements;
2. The Union never advised the Respondent that the parties' Final Neutrality Agreement has expired;
3. The Union has never attempted to repudiate the terms of the parties' Final Neutrality Agreement.

(Tr. at 219-220.)

4. <u>The Union's Current Union Representative Has No Knowledge of the Parties' Neutrality Agreements and Limits on the Scope of the Unit which those Agreements Create.</u>

In December, 2014, the Union hired Traci Murphy as a Union Representative. (Tr. at 15 and 19.) Ms. Murphy has never been an employee of the Respondent. (Tr. at 39.) Ms. Murphy's commencement of employment with the Union on December 1, 2014, represented the first time when she interacted with the Respondent in any capacity. (Tr. at 39.) Union Representative Murphy testified that she was only familiar with the Neutrality Agreement related to the Respondent's Highland branch. (Tr. at 48.) She did not know anything about the basis of the Respondent's position that employees who work at that branch are not included in the bargaining unit. (*Id.*) Ms. Murphy's employment with the Union never overlapped with Ms. Branca's employment with the Union. (Tr. at 40.) Union Representative Murphy was not employed at the Union at the time that former Business Manager Branca signed the parties' first Neutrality Agreement in May 2011. (Tr. at 38.) Ms. Murphy also testified that she was not involved in her Union's negotiations with the Respondent which began in late 2012, and which ran into 2013. (Tr. at 49.) She also admitted that she had never seen any communications

between the Respondent and the Union regarding the "Final Neutrality Agreement." (*Id.*) In fact, with respect to former Union Representative Jennifer Burke, with whom the Respondent negotiated the Final Neutrality Agreement, Ms. Murphy testified that she did not know when Ms. Burke's status as a Union Representative began or ended. (*Id.*) Ms. Murphy also admitted that her and Ms. Burke's service at the Union never overlapped, and that she (Murphy) never spoke with Ms. Burke regarding whether the Respondent had a Neutrality Agreement. (Tr. at 50.)

5. The Union's Current Representative Mistakenly, and Despite Overwhelming, Uncontroverted Evidence to the Contrary, Thinks that the Scope of the Union Represented Bargaining Unit is "Unlimited".

Ms. Murphy admitted that the Respondent's employees who work at the Highland branch, the Northeast branch, and branches in Wisconsin, are not represented by the Union, even though they work in classifications identified in the parties' Collective Bargaining Agreement. (Tr. at 43-44.) Ms. Murphy nevertheless testified that "[t]he Union's and myself's understanding is that there is no geographical union - - no geographical span to our bargaining unit." (Tr. at 41.) She described the bargaining unit which the Union represents as "unlimited and outlined in the current Collective Bargaining Agreement." (*Id.*) She further explained that she thinks that the parties' Collective Bargaining Agreement applies "[a]t any - - any Trustone employee regardless of where that employee works [?]" (Tr. at 41-42.)

With respect to Respondent's employees who work at branch locations including those in St. Paul's Highland neighborhood, Northeast Minneapolis, and in Kenosha, Wisconsin, Ms. Murphy was unable to explain why those employees were not in the bargaining unit which her Union represents, other than to observe "I - - they were never organized during my time or prior to my time to my knowledge". (Tr. 50-51.) The same is true with respect to the Respondent's employees who work at the Cudahy, Wisconsin branch. (Tr. at 51-52.)

C. **Respondent's Opening of New Branch Locations, Compliance with the Parties' Labor Agreement, and Offer of Options for Affected Employees.**

As the Respondent prepared to open its new Boone Avenue and Burnsville locations, Respondent offered every employee affected by the closure of the Olson Memorial Highway and Apple Valley branches the option of working at the new branches (Boone Avenue and Burnsville), which the Respondent was preparing to open, or to transfer to other, existing locations, within the bargaining unit which the Union represents. (G.C. Exs. 6 and 13.) The Respondent did not terminate a single employee during that process. (Tr. at 52.) Every Respondent employee who worked at either of those branches has had the opportunity to be employed at the Respondent's new branches. (*Id.*) Alternatively, employees could have moved to other Respondent locations, including the Respondent's administrative center. (*Id.*) The Union also admits that not one Respondent employee has sustained a reduction in their wages or benefits because of their decision to move to either a new branch or to the Respondent's Plymouth processing center. (*Id.*)

As the Respondent evaluated how to set wage rates for employees would work at its new Boone Avenue and Burnsville locations, the Respondent understood that employees who worked in bargaining unit positions were compensated slightly differently, under the parties' labor Agreement, than were employees who worked in positions outside the bargaining unit. (Tr. at 221.) For example, bargaining unit employees were eligible to receive years of service awards, while employees who worked in positions outside the bargaining unit are not eligible for years of service awards. (*Id.*) The Respondent also knew that there were certain, modest differences, among bargaining unit and non-unit employees, in terms of employees' contributions towards the cost of health insurance. (*Id.*) When asked whether, in setting wage rates for employees at its new Boone Avenue and Burnsville locations, the goal was to improve the overall value to

employees of their wages and benefits at the new location, keep the overall value of those wages and benefits at the new locations at parity with what employees had experienced at their prior locations, or to have employees receive reduced wages and benefits in those new locations, Mr. Young testified that "we [the Respondent] wanted parity." (Tr. at 222.)

As the Respondent prepared to close its Olson Memorial Highway and Apple Valley locations, and to open its new Boone Avenue and Burnsville locations, the Respondent also remained mindful of its obligations under its labor Agreement with the Union. More specifically, Article 15.02 of that Agreement (G.C. Ex. No. 3 at p. 16) provides specific procedures which the Respondent is to follow in the event of a branch closure. The Respondent gave notice to employees, and explained to them the rights which they had under the labor agreement, because of the closing of the Olson Memorial Highway and Apple Valley branches. (Tr. at 223.)

On July 24, 2015, Respondent's General Counsel Phil Young sent Union Representative Murphy a letter (G.C. Ex. No. 5) in which he apprised Ms. Murphy regarding the Respondent's decision to close the Respondent's Olson Memorial Highway branch. In his July 24, 2015, Mr. Young further apprised Ms. Murphy that:

> on August 3, 2015, we plan to provide current Branch employees with information regarding the wages and benefits which we will offer at the New Branch if they are interested in working at that New Branch. If those employees seek positions at other branches within the scope of the bargaining unit represented by your Union and encumbered by the parties' Labor Agreement, they are of course free to do so, and will continue to be covered by the terms of the parties' Labor Agreement.

(G.C. Ex. No. 5.) Mr. Young's July 24, 2015 letter closed by observing that:

> To the extent that you wish to bargain regarding our closing of the Branch, please immediately notify me according, so that we may schedule those negotiations.

(*Id.*)

On September 15, 2015, General Counsel Young sent Ms. Murphy a letter (G.C. Ex. No. 12). In that letter, Mr. Young explained the Respondent's decision to close its Apple Valley branch. Mr. Young further advised Ms. Murphy that:

> Branch bargaining unit employees will be free to exercise their rights under the parties' labor Agreement to transfer to other TruStone locations. Those employees may also seek employment at a new branch which TruStone will begin to operate at….Burnsville ("New Branch") beginning October 13, 2015.

Mr. Young's September 15, 2015 letter further apprised Ms. Murphy that:

> On September 21, 2015, we plan to provide current Branch employees with information regarding the wages and benefits which we will offer at the New Branch if they are interested in working at that New Branch. If those employees elect to seek positions at other branches within the scope of the bargaining unit represented by your union and covered by the parties' labor agreement, they are of course free to do so and we will continue to be covered by the terms of the parties' labor agreement.

(*Id.*)

As with Mr. Young's first letter to Ms. Murphy, his September 15, 2015 letter to Ms. Murphy again invited the Union to contact the Respondent to negotiate regarding the Golden Valley branch closing, observing that:

> To the extent that you wish to bargain regarding our closing of the Branch, please immediately notify me accordingly, so that we may schedule those negotiations.

(G.C. Ex. No. 12.)

Despite Mr. Young's July 24, 2015 letter to Ms. Murphy, Ms. Murphy admits that she never contacted Mr. Young to schedule negotiations regarding the closing of the Olsen Memorial Highway branch. (Tr. at 54.)

Union Representative Murphy admitted that the Respondent had given employees who work at the closed branches notice of the right to exercise their rights under the parties' Collective Bargaining Agreement. (Tr. at 46.) Furthermore, Union Representative Murphy admitted that the Employer had accommodated employees who wished to move to locations

where they would work with Union representation. (Tr. at 47.) Union Representative Murphy further admitted that the Respondent had accommodated those employees who chose to exercise their rights in order to move to locations where they would be covered by the labor Agreement between the Union and the Respondent. (*Id.*)

On August 3, 2015, Respondent, through its Vice President of Human Resources Gary Maki, provided explanatory memoranda to employees who worked at the Respondent's Olsen Memorial Highway which was about to close. An "example" of one such memorandum is G.C. Ex. No. 19. Respondent provided Union Representative Murphy with a copy of its memoranda to employees. (Tr. at 54.) Union Representative Murphy admitted that the Respondent was very transparent and forthcoming in communicating with the Union regarding the closure of both the Olsen Memorial Highway and Apple Valley branches. (*Id.*)

As the Respondent prepared to close its Apple Valley branch, the Respondent communicated with the Union and Respondent employees in the same fashion as it had with the Union and employees regarding the closure of the Respondent's Olsen Memorial Highway branch. For example, the Respondent notified the Union regarding the impending closure (G.C. Ex. No. 12), and on or about September 21, 2015, the Respondent distributed memoranda and Employee Branch Election Form to Apple Valley branch employees. (G.C. Ex. No. 13.)

As the Respondent had done with its former Olson Memorial branch employees, the Respondent allowed its Apple Valley branch employees to decide whether they wished to transfer to an existing Respondent location, or to the Respondent's new, Burnsville location. An example of one of the Respondent's memoranda to an employee is G.C. Ex. No. 13. In the spirit of transparency, the Respondent provided the Union with a copy of those memoranda to employees. (*See* G.C. Ex. No. 13.)

D. **No Respondent Employee Has Lost Employment, Nor Has Any Respondent Employee Suffered a Reduction in Their Wages or Benefits, Because the Respondent Opened Its New Boone Avenue and Apple Valley Locations.**

Not one Respondent employee has lost their job because of the Respondent's closing of its Olson Memorial Highway and Apple Valley branches. (Tr. at 52.) In fact, as the Union admits, every Respondent employee who worked at either of those branches has had the opportunity to be employed at the Respondent's new branches. (*Id.*) Alternatively, employees could have moved to other Respondent locations, including the administrative center. (*Id.*) The Union also admits that not one Respondent employee has sustained a reduction in their wages or benefits because of their decision to move to either a new branch or to the Respondent's Plymouth processing center. (*Id.*)

E. **The Union Has Failed to Pursue its Two Grievances Arising From Respondent's Closure of its Olson Memorial Highway and Burnsville Branches.**

Although the Union filed grievances arising from the Respondent's establishment of the new Boone Avenue branch, and a new branch in Burnsville (Tr. at 44), and although the Union filed the first of those grievances on August 12, 2015, as of January 11, 2016, the Union has not even pursued the appointment of an arbitrator to hear that grievance (Tr. at 45), nor has the Union taken any other steps to pursue the prosecution of that grievance (Tr. at 46). Apart from the Union's meeting with the Respondent in November, 2015, the Union has done nothing to prosecute those grievances. (Tr. at 224.) The Union acknowledged that it had made information requests as part of its August and October grievances, and that the Respondent's had responded to those information requests. (Tr. at 35-36.)

F. **The Union Has Done Nothing to Establish Itself as the Representative of Employees of the New Branches.**

Furthermore, the Union has taken no action, apart from the unfair labor practice litigation, to establish its representative status through a proceeding before the National Labor Relations Board. (Tr. at 224-225.) When asked "…. has OPEIU done anything to establish its representative status at what I am referring to as the "new branches," the Golden Valley branch at Boone Avenue?" Union Representative Murphy replied "No." (Tr. at 47.) Ms. Murphy admitted that the Union has done nothing to establish its representative status with respect to employees who work at the Respondent's new location in Burnsville. (*Id.*)

G. **Ms. Weber's July 31, 2015 Meeting with Employees and Union Representative Williams.**

On July 21, 2015, Respondent Human Resources Manager Karen Weber met at the Respondent's Apple Valley location with two employees of that branch (Lisa Sheppard and Susan Knudsen). (Tr. at 244.) Ms. Weber's visit to the Respondent's Apple Valley branch on July 31, 2015 was in order to participate in meetings regarding the presentation to Ms. Knudsen and Ms. Sheppard of Notice(s) of [verbal] Discipline. (Tr. at 248-249.) Ms. Weber had prepared those Notices, which merely documented verbal counselings for attendance, in advance of the July 31, 2016 meeting. (Tr. at 247.) In addition to Ms. Weber, Apple Valley branch manager Schack and assistant manager Taxis attended those meetings on behalf of the Respondent. (Tr. at 248, 251.) In addition, Ms. Weber contemplated that a Union representative would attend that meeting. (Tr. at 248.) Although Ms. Weber's meeting with Ms. Sheppard was scheduled to begin at 10:00 a.m., Ms. Weber delayed the commencement of that meeting, in part, in order to accommodate Union representative Williams, who had indicated that she wished to speak with Ms. Sheppard before that meeting began. (Tr. at 248-249.)

Although the purpose of that meeting was for the Respondent to deliver a Notice of [verbal] Discipline for attendance and unplanned absences (Tr. at 249), Ms. Weber anticipated and permitted Union representative Williams to attend that meeting, pursuant to Article 23.01 of the parties' labor agreement, which provides that:

> In the event a meeting is held for disciplinary purposes, the affected employee shall have the right to have the Union Steward and/or Union Representative present.

(Tr. at 250.) Ms. Weber accommodated Ms. Williams' presence pursuant to that provision in the parties' Agreement. (Tr. at 250.)

Ms. Weber began her July 31, 2015 meeting with Ms. Sheppard and Ms. Williams as Ms. Weber had begun prior discipline related meetings. (Tr. at 250-251.) Ms. Williams had never objected to how Ms. Weber had begun those meetings. (Tr. at 251.) Ms. Williams did not object to Ms. Weber's introductory comments regarding participants' role in that meeting. (Tr. at 251.) Branch Manager Schack then proceeded to read the verbal disciplinary notice to Ms. Sheppard. (Tr. at 252-253.) After Ms. Schack concluded that reading, Ms. Williams began asking questions of Ms. Schack. (Tr. at 253.) Ms. Williams proceeded to ask questions about the basis for the discipline. (Tr. at 253-254.) Ms. Weber viewed Ms. Williams' questions as inquisitive, and as an effort to obstruct the meeting, which the Respondent initiated simply in order to deliver its verbal Notice of Discipline to Ms. Sheppard. (Tr. at 254.) As Ms. Weber had conducted other meetings with Ms. Williams, Ms. Weber did not anticipate that Ms. Williams would interrogate Ms. Schack or assistant branch manager Taxis, with respect to the basis for the Respondent's discipline of Ms. Sheppard. (Tr. at 254.)

Ms. Weber viewed Ms. Williams' conduct as inconsistent with the purpose of their July 31, 2015 meeting. (Tr. at 254-255.) Ms. Weber knew Ms. Williams would have the opportunity to speak with Ms. Taxis and Ms. Schack about the basis for that meeting, through a

formal grievance procedure. (Tr. at 255.) In light of Ms. Williams' obstructionist conduct, Ms. Weber saw no point in continuing the meeting. (Tr. at 260.) Ms. Weber then apologized to Ms. Sheppard, because she (Weber) had hoped to achieve a common understanding regarding the use of preplanned PTO and what to do when unexpected events arose. (Tr. at 260.) At no time during that meeting did Ms. Weber intend or act to undermine the Union's role as the representative of Ms. Sheppard, nor did Ms. Weber indicate to either Ms. Williams or Ms. Sheppard that they could not grieve the Respondent's verbal discipline of Ms. Sheppard. (Tr. at 261.) The conduct which Ms. Williams displayed during her July 31, 2015 meeting with Ms. Weber and Ms. Sheppard was unprecedented in Ms. Weber's experience. (Tr. at 261.)

After Ms. Weber concluded her meeting with Ms. Sheppard and Ms. Williams, Ms. Weber allowed Ms. Williams to take additional time to meet with Respondent employee Knudsen. (Tr. at 261.) Ms. Weber began her meeting with Ms. Knudsen and Ms. Williams as she had begun her earlier meeting with Ms. Sheppard and other participants. (Tr. at 262.) Ms. Williams did not object to how Ms. Weber began that meeting. (Tr. at 262.) As Ms. Weber began the meeting, she invited Ms. Schack to read the Notice of [verbal] Discipline. (Tr. at 262.) Ms. Weber then asked Ms. Knudsen if Ms. Knudsen had any questions. (Tr. at 262.) Ms. Knudsen raised a question regarding how her attendance had been calculated, to which Ms. Weber and Ms. Schack replied. (Tr. at 263.)

Union Steward Williams testified, albeit erroneously, that the labor Agreement between the Union and the Respondent provides that a Union steward may be present in order to "represent" an employee. (Tr. at 121.) Ms. Williams also testified incredibly that "I was not able to speak to Karen or anybody else in the room about the employee or what they were asking." (Tr. at 122.) Ms. Williams dishonestly testified that Ms. Weber did not allow her to

speak at all. (Tr. at 122.) Although Ms. Williams denied having repeatedly interrupted Ms. Weber, Ms. Williams admitted that at one point during the meeting, she indicated that she was on the same level as management. (Tr. at 123.)

III. ARGUMENT:

A. The Respondent Did Not Violate Sections 8(a)(1), (3), or (5) of the Act Through its Closure of its Olson Memorial Highway and Apple Valley Branches, or Otherwise.

1. The Parties' Labor Agreement Protects the Right of the Respondent to Close Branches.

Article 1.05 of the parties' labor Agreement provides, with respect to the Respondent's "Employer Rights," that:

> The Employer retains the exclusive right to manage all aspects of the Employer's operations, to direct, control, and to schedule its operations and workforce and to make any and all decisions affecting the Employer s [sic] operation, whether or not specifically mentioned below to:
>
> 2. Select and determine the number of Employees, including the number assigned to any shift, department, classification or location;
>
> 3. Increase or decrease the number of Employees working on any shift, unit, department, schedule or location;
>
> 5. Determine the location of and move equipment, materials or supplies;
>
> 12. Establish, change, combine and determine job content and qualifications;
>
> 14. Expand, reduce, consolidate, or reorganize any Department, operational unit, or any and all other aspects of the Employer's operations;
>
> 15. Make any and all other staffing, scheduling, assignment, operations, or other adjustments the Employer deems necessary . . . .

(G.C. Ex. No. 3 at p. 4.)

Article 15.02 of the parties' Agreement sets forth the procedure through which the Respondent may permanently reassign employees to different locations, ". . . . due to the closing or restructuring of a branch, ..." (G.C. Ex. No. 3 at p. 16.)

2. The Respondent Communicated With its Employees and the Union Regarding its Branch Closures, and Invited the Union to Negotiate. The Union Waived its Right to Negotiate.

The Respondent communicated with the Union and Respondent's employees at the two branches to be closed. The Respondent also regularly communicated with both the Union and its employees regarding the Respondent's commitment to comply with the applicable provisions of the parties' labor Agreement. For example, on July 24, 2015, Respondent General Counsel Young sent the Union a letter, which indicated that unit employees would be free to exercise their rights under the parties' labor Agreement. (G.C. Ex. No. 5.) Mr. Young's July 24, 2015 letter also invited the Union to negotiate regarding issues related to Respondent's closure of the Olson Memorial Highway branch. (*Id.*) As Union Representative Murphy acknowledged, she did not respond to the Respondent's invitation to negotiate. On September 15, 2015, Mr. Young sent Union Representative Murphy a letter regarding the Respondent's closure of its Apple Valley location. (G.C. Ex. No. 12.) Again, Mr. Young invited Union Representative Murphy to negotiate. (*Id.*) She failed to respond to Mr. Young's invitation. (Tr. at 54.)

Similarly, the Respondent advised bargaining unit employees of their options in the wake of the Respondent's closure of their respective branches. Respondent provided copies of those communications to the Union. (*See* G.C. Exs. No. 6 and 13.)

3. The Respondent's Contractual Commitment to a Position of Neutrality with Respect to the Union's Potential Organizing at the New Boone Avenue and Burnsville Locations Demonstrates the Respondent's Lack of Anti-Union Animus.

The parties' Final Neutrality Agreement, which applies to the Respondent's new Boone Avenue and Burnsville locations, reflects the Respondent's commitment to a position of neutrality with respect to Union organizing at those locations. Merely by way of example, that Final Neutrality Agreement provides, in relevant part, that:

A. The Employer and/or the Union will not engaged in any communication or other conduct that evidences, either directly or indirectly, a negative, derogatory or demeaning attitude toward the Employer or the Union . . . .

B. The Employer will not engage in any communications or conduct that directly or indirectly demonstrates or implies opposition to unionization of its employees.

C. Employer will not resist or oppose unionization by the Union or attempt to discourage employees regarding unionization by the Union.

D. The Employer will advise its employees that it is neutral regarding the issue of representation by the Union . . . .

(Respondent Ex. No. 5, at p. 2.) Respondent's contractual commitment to neutrality is the antithesis of some employers' anti-union animus.

4. The Respondent Did Not Terminate, Suspend, or Discipline Any Employee in Conjunction with the Branch Closings.

The record regarding this case is undisputed but that the Respondent did not terminate any bargaining unit employees in conjunction with its closing of the Olson Memorial Highway and Apple Valley branches. (Tr. at 52.) Similarly, the Respondent did not suspend any employees in conjunction with those closings. (*Id.*)

5. The Respondent Accommodated Every Employee's Preferences with Respect to Their Work Locations.

As the Respondent prepared to close its Olson Memorial Highway and Burnsville locations, the Respondent gave employees who worked at those locations the opportunity to transfer to an existing location within the bargaining unit which the Union represents, or to work at a new location which the Respondent was then establishing. (Tr. at 52.) The Respondent invited employees to express their preference regarding where they would work, through completion of an "Employee Branch Election Form." (G.C. Ex. No. 19.) Of the Respondent employees who worked at the Respondent's former Olson Memorial Highway location, five employees elected to work at the Respondent's new, Boone Avenue location, and five employees

elected to move to the Respondent's Minnesota processing center. (Tr. at 176.) At the Respondent's Apple Valley location, all five employees elected to accept new positions at the Respondent's new, Burnsville location. (Tr. at 34.)

6. The Respondent Did Not Reduce Any Employees' Wages or Benefits, But Instead Maintained Those Wages and Benefits at "Parity" With What They Previously Received.

Respondent General Counsel Phil Young testified that as the Respondent determined the wage rates and benefits that it would offer employees who elected to work in new positions at its new locations, its goal was to simply maintain "parity" with respect to what employees earned in bargaining unit classifications. (Tr. at 220-222.) Those bargaining unit employees who elected to move to positions in other facilities within the bargaining unit continued to be paid at the wage rates, and to receive the benefits they received while working in bargaining unit locations. Those employees who elected to move to new positions at new branches were paid at parity, relative to their prior, collectively bargained for wage rates and benefits.

B. The Respondent Did Not Violate Sections 8(a)(1), (3), or (5) of the Act Through the Respondent's Opening of its New "Boone Avenue" and "Burnsville" Locations.

1. The Parties' Labor Agreement Acknowledges the Respondent's Right to Determine the Location of Its Operations.

The parties' labor Agreement acknowledges that the Respondent has a right to determine the location of its operations. (*see* G.C. Ex. No. 3 at p. 4.) That labor Agreement also anticipates that the Respondent may close branches, and reassign branch employees. (*Id.*) The Respondent communicated in a forthright manner with the Union regarding its closure of its Olson Memorial Highway and Apple Valley branches. (*See* G.C. Exs. No. 5 and 12.)

The Respondent structured its Boone Avenue and Burnsville locations so that the offer of services differed than those offered, for example, at the Respondent's closed Apple Valley location.[4] As the Respondent explained in the parties' First Neutrality Agreement:

> In an effort to operate successfully in an environment for financial services which is increasingly competitive, demanding, and dynamic, the Employer plans to operate its new branch in Northeast Minneapolis ("Northeast Branch") with a staffing structure, compensation plan, and operational characteristics, which are significantly different from those in place at the Employer's other branches.

(Respondent Ex. No. 3 at p. 8.)

2. <u>The Parties' Final Neutrality Agreement Defines the Scope of the Bargaining Unit which the Union Represents, and Excludes the Respondent's New Boone Avenue and Burnsville Locations from that Bargaining Unit.</u>

The Respondent entered into a series of Neutrality Agreements with the Union, towards the end of defining the scope of the bargaining unit which the Union represents. The Union has acknowledged that Respondent's employees who work at the Respondent's Highland branch are outside the Union represented bargaining unit. (Tr. at 43-44, 50-51.) Similarly, the Union has acknowledged that, pursuant to the Second Neutrality Agreement, employees who work at the Respondent's Northeast Minneapolis branch are outside that unit. (*Id.*) In 2013, the parties agreed upon the Final Neutrality Agreement, pursuant to which the Employer agreed to take a

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[4] The Board General Counsel contends that "the changes between the Apple Valley and Burnsville facilitates are mostly cosmetic" and that, other than the addition of commercial lending services, "there is no evidence that there has been any other change in products or services." (G.C. Post-Hearing Br. at 6.) These statements do not fully and accurately reflect the record. For example, Susan Knudsen testified that the Burnsville branch has a drive-through and safe deposit boxes, neither of which existed at the Apple Valley branch. (Tr. at 129-130.) She also testified that, unlike at the Apple Valley branch, tellers at the Burnsville branch can open accounts, such as checking accounts and new member savings accounts, like bankers can. (*Id.* at 130.) Ms. Knudsen further testified that, in addition to adding commercial lending services, the Burnsville branch also offers full-time investment services and mortgage lending services, which the Apple Valley branch did not offer on a full-time basis. (*Id.* at 154, 166-167.) These changes do not merely constitute "mostly cosmetic" changes.

position of neutrality with respect to Union organizing at other branches. The Employer agreed to take that position of neutrality at ". . . . facilities and branches purchased by the Employer or opened by the Employer in the state of Minnesota after the effective date of this Neutrality Agreement . . . ." (Respondent Ex. No. 5.)

In essence, the Union received the benefit of Respondent's neutrality, in exchange for the Union's agreement with the limited scope of the bargaining unit which the Union represents. That fact pattern is fundamentally similar to the fact pattern which the Eighth Circuit Court of Appeals reviewed in *NLRB v. Waymouth Farms, Inc.*, 172 F.3d 598 (8th Cir. 1999). That case involved a dispute regarding an employer's relocation of a manufacturing facility. In that case, the Court of Appeals refused to enforce a Board order, to the extent that order required the employer to bargain with a union regarding a new collective bargaining agreement at a new facility. In *Waymouth*, the Court observed that:

> We found no basis for such remand. In our view, the language of the initial collective bargaining agreement is clear and the Union is bound by it. The Union accepted the geographical limitation clause in exchange for a union security clause. It is bound by its decision.

Id. at 601. In the instant case, the Respondent agreed to a position of neutrality with respect to future Union organizing provided the Union entered into Neutrality Agreements which limited the scope of the Union represented bargaining unit. That Agreement excluded "new branches" (such as Boone Avenue and Burnsville) from the scope of the Union represented bargaining unit.

3. <u>The Parties' Final Neutrality Agreement, Which Limits the Scope of the Union Represented Bargaining Unit, is Enforceable.</u>

The fact that the Final Neutrality Agreement is unsigned and contains an expiration clause is of no consequence because parties are bound by labor agreements even upon expiration of those agreements and labor agreements are binding and enforceable even when unsigned.

First, a labor agreement remains in effect even though that agreement contains an expiration clause and the expiration date has passed. See The Developing Labor Law, Ch. 13.II.A, pp. 899-903 (6th ed. 2012) ("The obligation to refrain from unilaterally changing terms and conditions of employment continues after contract expiration and until good faith bargaining results in an impasse.") (collecting cases). Under this body of law, the Final Neutrality Agreement, which the parties agreed upon and which never came to an impasse, is still in effect. Thus, the fact that it contains an expiration date is irrelevant and cannot support the General Counsel's argument that the Agreement is no longer enforceable.

Second, a labor agreement does not need to be signed to be enforceable. *See Savant v. APM Terminals*, 776 F.3d 285, 290 (5th Cir. 2014) (explaining that fact that agreement is not signed by the employer and the union "is not dispositive"). In fact, the agreement does not need to be in writing at all. *See, e.g., N.L.R.B. v. Haberman Contr. Co.*, 641 F.2d 351, 355-56 (5th Cir. 1981) (en banc) (collecting cases) ("It is well settled that a union and employer's adoption of a labor contract is not dependent on the reduction to writing of their intention to be bound.") Instead, such an agreement is enforceable where the parties' conduct "manifest an intention to abide and be bound by the terms of [the] agreement." *See, e.g., Savant*, 776 F.3d at 290 (5th Cir. 2014) (quoting *Haberman*, 641 F.2d at 356); *S. Cal. Painters & Allied Trade Dist. Council No. 36 v. Best Interiors, Inc.*, 359 F.3d 1127, 1133 (9th Cir. 2004) (quoting *Haberman*, 641 F.2d at 356). This conduct test uses an objective standard, analyzing "the parties' manifested mutual assent." *United Paperworkers Int'l Union, AFL-CIO, CLC v. Wells Badger Indus., Inc.*, 835 F.2d 701, 703-04 (7th Cir. 1987). Thus, where the agreement is written but unsigned, the court will enforce the agreement where the evidence shows that the parties' conduct reflected an intention to be bound by the agreement. *See Savant*, 776 F.3d at 290 (holding that employee was

bound by unsigned Memorandum of Understanding between union and employer requiring employees to arbitrate federal statutory discrimination claims).

In light of the case law, the fact that the Final Neutrality Agreement is unsigned and contains an expiration clause does not undermine the degree to which the Agreement is binding on the parties. Importantly, the parties never signed their Second Neutrality Agreement, regarding the Respondent's "Northeast" branch, and that Agreement contains an expiration date that has long since passed. (*See* Respondent Ex. No. 3.) Nevertheless, that branch operates outside the Union represented bargaining unit, and the Union has never claimed to represent Northeast branch employees. This is compelling evidence that the Union agrees that an agreement need not be signed in order to be enforceable and that an expiration clause does not preclude an agreement from still being in effect. Lastly, the uncontroverted evidence presented at the hearing before the ALJ demonstrates that the parties' intended to be bound by the Final Neutrality Agreement and understood that employees of new branches would not be within the unit.

4. The Respondent's and the Union's Conduct Demonstrates Their Understanding that Employees of New Branches Are Not Within the Unit.

A union's course of conduct with respect to a group of employees dictates whether that group is considered part of a particular bargaining unit. Accordingly, it is well settled that where a union has historically excluded a group of employees from a unit, that group of employees is not part of that unit. *See e.g., N.L.R.B. v. Horn & Hardart Co.*, 439 F.2d 674, 681 (2d Cir. 1971) (agreeing with Board that creating a separate unit which must choose its own representation is appropriate with respect to "unrepresented employees who have historically been excluded from [an] existing unit"); *United Parcel Serv.*, 303 NLRB 326, 327 (1991) (in absence of majority support, clerks not covered by union through multiple CBAs could not be considered part of

unit); *SunarHauserman*, 273 NLRB 1176, 1176-77 (1984) (holding that five positions were not part of bargaining unit because union had historically excluded them from the unit); *King Radio Corp.*, 257 NLRB 521, 526 (1981) (holding that accretion of certain employees into bargaining unit was inappropriate where bargaining history "conclusively show[ed] that the . . . employees have always been consciously excluded from the [bargaining unit]").

One of the Board's seminal accretion cases, *Laconia Shoe Co.*, 215 NLRB 573 (1974) is instructive. There, the employer and a union incorporated a group of shipping and receiving employees into a unit of production and maintenance employees, despite the former not having been historically recognized as part of that unit (and while the former was in talks with a different union about representation). *Id.* at 574. In finding that the shipping and receiving employees had not accreted, the Board observed that although the employees had been subject to the same terms and conditions that were negotiated with the union, these employees were not eligible for the pension program and were not required to be members of or pay dues to the union. *Id.* at 575. Because these employees were historically excluded from the union, the Board held that the employees could not accrete to the unit and, instead, "the [employer] could lawfully have recognized the [union] for these employees only if they chose to be represented by the union." *Id.*

Such is the case here. Starting with the Highland and Northeast Minneapolis locations, and followed by various Wisconsin branches, both the Respondent and the Union have recognized that all employees at new Respondent branches are excluded from the bargaining unit of the Union. Accordingly, employees at those new locations must affirmatively choose to be represented by the Union—a choice the Respondent would honor under the Final Neutrality Agreement.

5. The Board Did Not Introduce Any Testimony Contradicting that of the Respondent's General Counsel Regarding the Effect of the Neutrality Agreement.

Respondent's General Counsel, Phil Young, testified unequivocally, and in the absence of contrary evidence, that the parties' Final Neutrality Agreement is in effect to date and that Respondent is honoring the Agreement. (Tr. at 225, 240.) There is no testimony that contradicts Mr. Young's regarding the parties' understanding and conduct reflecting the existence of a neutrality agreement that narrowed the scope of the unit to seven specific branches and carved any new branches out of that scope.

Because Mr. Young's testimony is contradicted, it must be accepted as true. *See, e.g.*, *Almond v. ABB Indus Sys., Inc.*, 56 Fed. Appx. 672, 675 (6th Cir. 2003) (quoting 9A Wright & Miller, Federal Practice and Procedure § 2527 n. 9) ("'[T]he testimony of an employee of the [party] must be taken as true when it disclosed no lack of candor, the witness was not impeached, his credibility was not questioned, and the accuracy of his testimony was not controverted by evidence . . . ."); *Quinn v. S.W. Wood Prods., Inc.*, 597 F.2d 1018, 1024 (5th Cir. 1979) (citing *Chesapeake & Ohio Ry. Co. v. Martin*, 283 U.S. 209 (1931)) (same); *Coe v. N. Pipe Prods., Inc.*, 589 F. Supp. 2d 1055, 1076-77 (N.D. Iowa 2008) (explaining that on summary judgment nonmoving party must controvert statements of fact attributed to witness with other testimony as opposed to generally asserting that witnesses were "interested" or "impeached"); *see also Martin*, 283 U.S. at 218 ("Where . . . the evidence of a party to the action is not contradicted by direct evidence, nor by any legitimate inferences from the evidence, and it is not opposed to the probabilities, nor, in its nature, surprising or suspicious, there is no reason for denying to it conclusiveness."); *N.L.R.B. v. Purity Food Stores, Inc.*, 354 F.2d 926, 928-31 (6th Cir. 1965) (citing *Martin*, 283 U.S. at 216) (supplementing analysis of Board's findings of fact with

additional testimony from employer witnesses "which was not rejected, directly or indirectly, or impeached, and which appear[ed] inherently credible" and reversing Board decision).

Not recognizing the Final Neutrality Agreement, in light of the uncontroverted evidence, would allow the Union to unfairly profit from its action of simply not signing the Agreement. This cannot occur.

6. The Parties' Final Neutrality Agreement Protects Employee Free Choice at the Respondent's New Branches.

In the Final Neutrality Agreement, the Union agreed that the parties' labor Agreement would not apply to "any facilities purchased by Employer or opened by the Employer after the effective date of the Neutrality Agreement." (Respondent Ex. No. 4 (emphasis added).) The Union in effect agreed to the limited scope of the bargaining unit it represented, in exchange for securing the Respondent's commitment to a posture of neutrality at any branch where the Union did not represent employees. The Eighth Circuit has recognized that where such an exchange is made, the Union loses its representation over employees in the event of a purported relocation. *N.L.R.B. v. Waymouth Farms, Inc.*, 172 F.3d 598, 601 (8th Cir. 1999).

In *Waymouth Farms*, the employer relocated a facility to another location seven miles away. *Id.* at 600. However, years earlier, the Union, in exchange for a union security clause, agreed to a CBA provision explicitly limiting the Union's representation to certain employees at the employer's plant in a specified location "and at no other geographic locations." *Id.* at 601. In no uncertain terms, the Eighth Circuit declared "[t]he Union accepted the geographic limitation clause in exchange for a union security clause. It is bound by its decision." *Id.* The court accordingly found that the union's representation did not extend to the relocated facility. *Id.* In the instant case, the Union accepted an explicit limitation in the Final Neutrality Agreement, and further assented through its course of conduct. Accordingly, the Union is

"bound by its decision." If it seeks to represent the employees at the new facilities it must establish majority support.

The Board's reliance on *King Soopers* to establish continued representation is misplaced. That case simply states the general proposition that under normal circumstances an employer must continue to negotiate with employees at a facility where the facility has relocated. *See King Soopers, Inc. v. N.L.R.B.*, 254 F.3d 738, 742 (8th Cir. 2001).[5] However, unlike here, *King Soopers* did not involve a bargained-for exchange, as embodied in the parties' Neutrality Agreements. To the contrary, the court there specifically noted that the recognition provisions at issue were silent on the effect of a relocation and further pointed out that neither party presented any evidence of any discussions about the effect a relocation would have on union representation. *Id.* Due to the lack of even a conversation on this topic, the court rejected the employer's contention that the mere identification of the geographic location of the store in the unit description of the CBA could be read as a limitation on union representation in the event of relocation. *Id.* at 743-44. In fact, the court in *King Soopers* distinguished its facts from *Waymouth* on the exact basis it is distinguishable here: "[T]he bargaining history [in *Waymouth*] indisputably showed" that the union had bargained away its right to automatically represent employees if the facility was relocated. *Id.* at 744. *King Sooper* thus does not apply here.

Therefore, the existence of the Final Neutrality Agreement precludes a finding of a violation of the Act.

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[5] The other cases General Counsel cites for this proposition are also inapplicable. *See N.L.R.B. v. Rock Bottom Stores, Inc.*, 51 F.3d 366, 370 (2d Cir. 1995) (dispute over which employees would be considered "transferees" to relocated facility for purposes of relocation test); *Westwood Import Co. v. N.L.R.B.*, 681 F.2d 664, 665 (9th Cir. 1982) (same).

C. **The Respondent Did Not Violate Sections 8(a)(1), (3), or (5) of the Act, When the Respondent Allowed Employees to Choose Their Work Locations, and Established the Wages, Hours, and Terms and Conditions of Employment for Respondent Employees Who Elected to Work at Branch Locations Outside the Scope of the Bargaining Unit Which the Union Represents, or Otherwise.**

The General Counsel contends that the Respondent unilaterally implemented wage increases and changes in employees' benefits as a result of the Respondent opening the new Boone Avenue and Burnsville branches, and directly dealt with employees regarding those changes. However, the Respondent's actions were not unlawful because employers are not required to bargain with the Union regarding the terms and conditions of employment for employees outside the bargaining unit. *See* 29 U.S.C. §§ 158(a)(5), 159(a); *Omaha Typographical Union, No. 190 v. NLRB*, 545 F.2d 1138, n.4 (8th Cir. 1976) ("This work was outside the scope of the bargaining unit's work and was not a mandatory subject of bargaining."). Here, the employees at the new branches were outside the scope of the bargaining unit as dictated by the Final Neutrality Agreement.

Further, all the Respondent did was present employees with their options—either work for a branch within the unit or work at one of the new branches. Respondent offered "parity" in terms of the wages and benefits which it offered at the Boone Avenue and Burnsville locations, relative to what those employees were eligible to receive under the parties' labor Agreement. The Respondent did not want employees' choice to be influenced by financial differences. For these reasons, the Respondent's meeting with employees in which the Respondent presented employees with their options and answered any questions was not a violation of the Act.

D. **The Respondent Did Not Violate Section 8(a)(1) or (5) of the Act, Because it Offered to Negotiate with the Union Regarding the Respondent's Closure of its Olson Memorial Highway and Apple Valley Branches, But the Union Waived its Right to Engage in the Bargaining which the Respondent Invited.**

The Respondent gave the Union the opportunity to bargain with the Respondent regarding its branch closures. The Respondent advised Union Representative Murphy with two different letters regarding the Respondent's branch closures. (G.C. Exs. No. 5 and 12.) Although those letters invited the Union to schedule negotiations regarding the Respondent's branch closures (*see id.*), the Union chose not to do so. (*See, e.g.,* Tr. at 54.) The union thus waived its right to bargain with the Respondent regarding the closure of the Olson Memorial Highway and Apply Valley Branches. *See NLRB v. Alva Allen Indus.*, 369 F.2d 310, 321 (8th Cir. 1966) (A "union cannot charge an employer with refusal to negotiate when it has made no attempts to bring the employer to the bargaining table."); *U.S. Lingerie Corp.*, 170 NLRB 750, at *3 (1968) (finding waiver when Union was aware that Respondent was planning to remove its New York plant operations to Georgia "yet made no attempt to bring the issues relating to the planned removal to the bargaining table"); John E. Higgins, Jr., The Developing Labor Law, Ch. 13.VII.A.3 at p. 1086-1091 (6th ed. 2012) (collecting cases).

In compliance with Article 15.02 of the parties' labor Agreement (G.C. Ex. No. 3), Respondent first gave notice to employees, and explained to them the rights which they had under the labor agreement, because of the closing of the Olson Memorial Highway and Apple Valley branches. (Tr. at 223.)

E. **Respondent Did Not Violate Section 8(a)(1) of the Act, Through Its Direction to Employees with Respect to Communications During Working Time, While Those Employees were Engaged in Financial Transactions with Respondent Members.**

The General Counsel inaccurately alleges that the Respondent unlawfully ordered its employees to cease discussing terms of employment. The Respondent merely requested that

employees not engage Respondent's members in discussions related to the opening of a new branch, which had not been publicly disclosed. (Tr. at 160.) The Respondent never prohibited employees discussing terms and conditions of employment with each other. (*Id.*) Ms. Knudsen admitted that the only individuals who told her to "keep [her] mouth shut or be fired" were other non-supervisory employees. (*Id.* at 162.) No manager or supervisor of the Respondent ever threatened her with discharge. (*Id.*)

It was certainly permissible for Respondent to request that its employees not engage Respondent's members in discussions unrelated to member business while those employees were executing financial transactions on behalf of those members. Thus, the General Counsel's claim should be dismissed.

F. <u>The Respondent Did Not Violate Section 8(a)(1) of the Act During Human Resources Manager Weber's July 31, 2015 Meeting with Employees and Union Representative Williams.</u>

The General Counsel contends that the Respondent engaged in unlawful conduct during Ms. Weber's July 31, 2015 meetings with Ms. Sheppard and Ms. Knudsen, in which Union representative Williams was in attendance. The purpose of the meeting was to distribute verbal Notices of Discipline that Ms. Weber had prepared in advance of the July 31, 2016 meeting and which merely documented verbal counselings for attendance. (Tr. at 247.) *Weingarten* rights did not attach to either meeting since the meetings were not for purposes of investigation, but were instead solely for the purpose of informing the Respondent's employees regarding a disciplinary decision. *See In Baton Rouge Water Works Co.*, 246 NLRB 995 (1979); *Northwest Engineering*, 265 NLRB 190 (1982). Nonetheless, the Respondent permitted Union representative Williams to attend that meeting, pursuant to Article 23.01 of the parties' labor Agreement. (Tr. at 250.)

Not only were those meetings not governed by *Weingarten* principles, Ms. Williams did not have a right, protected under the Act, to repeatedly act in a disruptive manner in the meeting involving Ms. Sheppard, or inhibit the Respondent's ability to conduct the meeting and deliver the discipline. Because Ms. Williams did so, the Respondent was fully within its rights to end the meeting. *See New Jersey Bell*, 308 NLRB 277, 279 (1992); *Yellow Freight System, Inc.*, 317 NLRB 115, 117-118 (1995). Therefore, the Respondent did not violate the Act in the course of its July 31, 2015 with its employees and Ms. Williams.

IV. CONCLUSION:

For the reasons stated above, Respondent respectfully requests that the General Counsel's allegations in NLRB cases 18-CA-158210, 18-CA-163034, and 18-CA-165634 be dismissed in their entirety, and that the Board deny the General Counsel all relief sought through its Complaints in those cases.

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ATTORNEYS FOR RESPONDENT TRUSTONE FINANCIAL FEDERAL CREDIT UNION

APPENDIX

HISTORY OF BRANCH OPENINGS AND DISPUTE REGARDING SCOPE OF UNION REPRESENTED BARGAINING UNIT, AND UNION'S FAILURE TO ESTABLISH ITS REPRESENTATIVE STATUS AT NEW BRANCH LOCATIONS.

DATE:	EVENT:
March, 1979	NLRB Region 18 issued Certification of Union as Respondent's office and clerical employees. NLRB Certification lacks any geographical limitations. (G.C. Ex. No. 2.)
2010	Respondent negotiated with Union regarding limits on scope of Union represented bargaining unit. (Tr. at 206-207.)
May, 2011	Respondent and Union entered into First Neutrality Agreement. (G.C. Ex. No. 4.)
2011	Respondent opened "Highland Branch", outside scope of Union represented bargaining unit, per First Neutrality Agreement. (Respondent Ex. No. 2.)
2011	Respondent and Union entered into Second Neutrality Agreement. (Respondent Ex. No. 3.)
2011	Respondent opened "Northeast Minneapolis Branch", outside scope of Union represented bargaining unit, per Second Neutrality Agreement. (Respondent Ex. No. 2.)
2012	Respondent acquired and began operating branch in Kenosha, WI, outside bargaining unit. (Respondent Ex. No. 2.)
2012	Respondent acquired and began operating branch in Northside Kenosha, outside bargaining Unit. (Respondent Ex. No. 2.)
2013	Respondent acquired and began operating branch in Cudahy, WI, outside bargaining unit. (Respondent Ex. No. 2.)
January, 2013	Union proposed "new branch Neutrality Agreement". (Respondent Ex. No. 4.)

DATE:	**EVENT:**
January 25, 2013	Respondent sent Union Final Neutrality Agreement. (Respondent Ex. No. 5.)
July 24, 2015	Respondent notified Union regarding impending closure of Olson Memorial Highway Branch. (G.C. Ex. No. 5.)
August 3, 2015	Respondent notified employees regarding closure of Olson Memorial Highway branch. (G.C. Ex. No. 6.)
August 12, 2015	Union Grieved Respondent's alleged relocation of work from Olson Memorial Highway branch to Boone Avenue branch. (G.C. Ex. No. 11.)
August 18, 2015	Union filed first unfair labor practice charge. (G.C. Ex. No. 1(a).)
September 15, 2015	Respondent notified Union regarding closure of Apple Valley branch. (G.C. Ex. No. 12.)
September 21, 2015	Respondent notified employees regarding closure of regarding closure of Apple Valley branch. (G.C. Ex. No. 13.)
October 13, 2015	Union filed grievance regarding alleged relocation of Apple Valley branch work to Burnsville branch. (G.C. Ex. No. 15.)
November 13, 2015	Regional Director issued initial Complaint. (G.C. Ex. No. 1(g).)
November 24, 2015	Respondent answered Regional Director's initial Complaint. (G.C. Ex. No. 1(i).)
2016	Respondent acquired and began operating branch in Oak Creek, WI. (Respondent Ex. No. 2.)
2016	Respondent acquired and began operating branch in Cudahy, WI. (Respondent Ex. No. 2.)