

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 3**

**INTERNATIONAL UNION OF ELECTRONIC,
ELECTRICAL, SALARIED, MACHINE AND FURNITURE WORKERS,
COMMUNICATION WORKERS OF AMERICA, AFL-CIO, CLC
(IUE-CWA, LOCAL 301)**

and

Case 03-CB-146489

VON ROLL, U.S.A., INC.

**GENERAL COUNSEL'S BRIEF
TO THE ADMINISTRATIVE LAW JUDGE**

Submitted by

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TABLE OF CONTENTS

I.	STATEMENT OF THE CASE	1
II.	STATEMENT OF THE FACTS	2
	A. Historical Background	2
	B. Bargaining Begins – July to September 2013	4
	C. Bargaining Concludes – October 2013	11
	D. Contract Ratification – November 2013	16
	E. Contract Implementation – December 2013 to Present	19
III.	ARGUMENT	25
	A. The Legal Standard for Meeting of the Minds	25
	B. The Parties Reached a Meeting of the Minds in October 2013	31
	C. The Union’s Post-Bargaining Actions Manifested Consent	35
IV.	CONCLUSION	35
V.	PROPOSED CONCLUSIONS OF LAW	36
VI.	PROPOSED ORDER	36
VII.	PROPOSED NOTICE TO MEMBERS	37

TABLE OF CASES

<i>American Standard Companies, Inc.</i> , 352 NLRB 644 (2008)	28
<i>Automatic Plastic Molding Company</i> , 234 NLRB 681 (1978)	29
<i>Castro Village Bowl</i> , 290 NLRB 423 (1988)	30
<i>Chauffeurs, Teamsters, and Helpers Local Union No. 771</i> , 357 NLRB No. 173 (2011)	27
<i>Cherry Valley Apartments</i> , 292 NLRB 38 (1988)	27
<i>Chicago Parking Association</i> , 360 NLRB No. 132 (June 25, 2014)	30
<i>Ebon Services</i> , 298 NLRB 219 (1990)	25, 28
<i>Fashion Furniture Mfg.</i> , 279 NLRB 705 (1986)	30
<i>H. J. Heinz Co.</i> , 311 U.S. 514 (1941)	27
<i>Hempstead Park Nursing Home</i> , 341 NLRB 321 (2004)	25
<i>Henry Bierce Co.</i> , 307 NLRB 622 (1992)	29
<i>Intermountain Rural Electric Association</i> , 309 NLRB 1189 (1992)	27
<i>Kelly's Private Car Service</i> , 289 NLRB 30 (1988)	27
<i>M.K. Ferguson Co.</i> , 296 NLRB 776 (1988)	26
<i>Midvalley Steel Fabricators</i> , 243 NLRB 516 (1979)	28
<i>New Orleans Stevedoring Co.</i> , 308 NLRB 1076 (1992)	27
<i>Penasauitos Gardens, Inc.</i> , 236 NLRB 994 (1978)	27
<i>NLRB v. W.A.D. Rentals Ltd.</i> , 919 F.2d 839 (2d Cir. 1990)	27
<i>Paper Mill Workers Local 61 (Groveton Papers Co.)</i> , 144 NLRB 939 (1963)	27
<i>Shawn's Launch Service</i> , 261 NLRB 836 (1982)	30
<i>Sunrise Nursing Home, Inc.</i> , 325 NLRB 380 (1998)	27
<i>Teamsters Local 617 (Christian Salvesen)</i> , 308 NLRB 601 (1992)	26

<i>Timber Products Company</i> , 277 NLRB 769 (1985)	26
<i>Vallejo Retail Trade Bureau</i> , 243 NLRB 762 (1979)	26
<i>Waldon, Inc.</i> , 282 NLRB 583 (1986)	30
<i>Waxie Sanitary Supply</i> , 337 NLRB 303 (2001)	29
<i>Windward Teachers Association</i> , 346 NLRB 1148 (2006)	28

I. STATEMENT OF THE CASE

This matter was heard by Administrative Law Judge Robert A. Ringler (ALJ), on January 19 and 20, 2016. A Complaint and Notice of Hearing (Complaint) issued on June 19, 2015. The Complaint is based on the charge in Case 03-CB-146489 filed by Von Roll, U.S.A., Inc. (Employer). (GC Exh. 1[c]).¹ International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers, Communication Workers of America, AFL-CIO, CLC (IUE-CWA, Local 301) (Respondent or Union) filed an Answer to the Complaint on July 6, 2015. (GC Exh. 1[e]).

The Complaint alleges that since about April 8, 2015, Respondent has been failing and refusing to bargain collectively and in good faith with the Employer, in violation of Section 8(b)(3) of the Act.

In its Answer, Respondent admits to the following:

- That it is a labor organization within the meaning of Section 2(5) of the Act. (GC Exh. 1[e], ¶ IV).
- That the Employer meets the jurisdictional standards and is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act. (GC Exh. 1[e], ¶ III).
- That it is the exclusive collective-bargaining representative of the bargaining unit, as described in paragraph VI of the Complaint, within the meaning of Section 9(a) of the Act. (GC Exh. 1[e], ¶ VI).

¹ Throughout this brief the following references will be used: (GC Exh. ___ , p. ___) for General Counsel's exhibit; (R Exh. ___, p. ___) for Respondent's exhibit; and (Tr. ___) for transcript page(s).

- That Carmine Pallotolo, John Stewart, and Brian Sullivan held the positions set forth opposite their respective names, and are agents of Respondent within the meaning of Section 2(13) of the Act. (GC Exh. 1[e], ¶ V).

Respondent denies that it violated Section 8(b)(3) of the Act, by engaging in any of the conduct alleged in the Complaint. (GC Exh. 1[e], ¶ VIII).

II. STATEMENT OF THE FACTS

A. Historical Background

The Employer is a manufacturer of industrial insulating materials for power generation and is based in Switzerland with worldwide operations. (Tr. 28-29). Jonathan Roberts is Chief Operating Officer (COO) for the Americas based in the Employer's Schenectady, New York plant. (Tr. 29, 278). Overall production, planning, and hiring at the Schenectady site is overseen by Plant Manager Anthony Brown. (Tr. 28-29). The Schenectady plant has been in operation for many decades and was a General Electric (GE) plant until 1988. (Tr. 30). The plant has also been unionized by the Union for many decades since it was a GE plant. (Tr. 30). The Union has executed a series of collective-bargaining agreements with the Employer and its corporate predecessors. (Tr. 30). The current contract, which concerns the dispute here, has effective dates of October 1, 2013 to September 30, 2016. (GC Exh. 21; Tr. 147). The bargaining unit consists of all hourly employees. (Tr. 29). The bargaining unit members consisted of approximately 100 in 2013 and consist of approximately 90 presently. (Tr. 31).

The previous contract, effective from October 1, 2010 to September 30, 2013, defined the bargaining unit as follows in 'Article I – Union Recognition':

The Company recognizes the Union as the exclusive collective bargaining representative with respect to wages, hours and other conditions of employment for all production and maintenance employees.

(GC Exh. 2, p. 1).²

Article VIII of the 2010-2013 contract is titled ‘Wage Rates and Cost of Living Adjustments.’ (GC Exh. 2, p. 6). Article VIII, Section 2 is titled ‘Step Rates and Progression Schedules’ and states:

The Union recognizes that starting rates, progression rates, and job rates for hourly rated will vary, depending on the job and its surrounding circumstances. Employees hired after January 1, 2011 will follow the progression rates and job rates in effect as of January 1, 2011. Employees hired before December 31, 2010 will follow the progression rates and job rates presently in-effect.

(GC Exh. 2, pp. 6-7).

Thus, employees were divided into two groups for purposes of wage rates, those hired before December 31, 2010 who received a higher rate, and those hired after January 1, 2011 who received a lower rate. The term ‘step rate’ refers to an amount of money and the term ‘progression schedule’ refers to a period of time. (Tr. 33). New hires start at particular wage rates depending on their classification and the rates increase at fixed intervals in numbers of months. (GC Exh. 6; Tr. 32). The wage rates and progression schedule are referenced in the contract but are not incorporated into the body of it and have not been in any of the predecessor contracts. (Tr. 32-33).

The step rates and progression schedules are maintained on ‘wage agreements,’ which are single page tables created by the Employer’s Finance and Human Resource Departments. (GC Exh. 6; Tr. 35). From the top each wage agreement sheet states which group of employees it applies to, the general increase amount, the cost of living adjustment (COLA) amount, the

² The current contract, effective from October 1, 2013 to September 30, 2016, defines the bargaining unit as follows in ‘Article I – Union Recognition’:

The Company recognizes the Union as the exclusive collective bargaining representative with respect to wages, hours and other conditions of employment for all bargaining unit employees. (GC Exh. 21, p. 4).

The composition of the bargaining unit has not changed despite the change in terminology. The specific job classifications in the bargaining unit are listed on the wage agreement sheets. (GC Exh. 6, 22-a, 22-b, 22-c).

progression schedule, the progression steps, and finally wage rates and classifications at the bottom. (GC Exh. 6; Tr. 36-37). Under the 2010-2013 contract, and earlier years, the wage agreement sheets were updated and issued semiannually to reflect updates. (GC Exh. 6; Tr. 37). In about early October of each year the general increase was applied and in about late February of each year the COLA was applied. (GC Exh. 6, Tr. 37). Thus, for the 2010-2013 contract, four wage agreement sheets would issue each year of the contract; two in late February and two in early October with one set for employees hired before December 30, 2010 and another set for employees hired after January 1, 2011. (GC Exh. 6). Thus, twelve wage agreement sheets were issued during the entire term of the 2010-2013 contract. (GC Exh. 6).³ By looking at the same ‘wage rate’ row and ‘month of employment’ column on the progression schedule chart from one wage agreement sheet to the next, employees’ entire earnings across the length of a contract can be tracked. (GC Exh. 6; 36-37). The wage agreement sheets are and have been available to employees and the Union. (Tr. 37-38). The wage agreements have never been included in the body of the contract and keeping them supplemental has been a practice at least since the plant was part of GE in the 1980s. (Tr. 100). The 2010-2013 contract contains typed but not handwritten signatures as was past practice and was nevertheless in effect. (Tr. 34).

B. Bargaining Begins – July to September 2013

The Employer and the Union began bargaining for a successor contract in the summer of 2013.⁴ (Tr. 38). The Employer’s bargaining team consisted of COO John Roberts, Schenectady Plant Manager Anthony Brown, Head of Finance for North America Matthew Couture, and Human Resources Representative Kiersten Dellert. (Tr. 39-40, 357). The Union’s bargaining

³ The four wage agreement sheets for 2012 are contained on pages 1 - 4 of General Counsel’s Exhibit 6.

⁴ All dates are in 2013 unless otherwise noted.

team consisted of Business Agent Brian Sullivan, Union Local President Carmine Pallotolo, and Board Member and bargaining unit member John Stewart. (Tr. 40-41).

In late July the first of approximately nine bargaining sessions was held at the Glen Sanders Mansion, a hotel and conference center, in Scotia, New York. (Tr. 41). The parties did not establish any formal rules for conducting bargaining. (Tr. 42). Notepads, laptops, and copies of the contract were used by different individuals at different sessions. (Tr. 42). There was no official note taker designated by the parties. (Tr. 43). At the first sessions the parties discussed general matters, they agreed that major changes were not anticipated, and they did not exchange comprehensive proposals either in writing or orally. (Tr. 43).

In August, several bargaining sessions were held at the same location with the same individuals present. At these sessions the parties mainly addressed house-keeping items and cleaned up outdated contract language. (Tr. 44, 283, 288). During at least some of the sessions the contract was displayed on a screen and the parties went through it line-by-line to revise outdated language. (Tr. 44-45, 288). Sometimes the changes would be typed into the contract at the sessions and other times the changes would be input by Dellert after the session when she returned to her office. (Tr. 45). Updated versions of the contract were periodically e-mailed between the parties throughout negotiations. (Tr. 45).

In one of the earlier bargaining sessions, in about August, the Employer informed the Union that labor costs were a concern. (Tr. 256). To emphasize this point, the Employer presented a webcast by the CEO in Switzerland showing market and financial data from the Employer for the previous year, 2012. (Tr. 256, 284-285, 505). The Employer explained that it was concerned the Schenectady plant might be consolidated with another plant, possibly in Brazil, as a GE plant in Fort Edwards, New York had recently been closed and consolidated with

a plant in Florida. (Tr. 284). The Employer stated at this and subsequent bargaining sessions that it wanted to avoid a two-tier wage system, but that it “needed to be able to control the expansion of a person from their starting wage up, to spread it out over time. [...] The benefit is that you’re not paying that premium rate right off the get go to an employee that has not learned very much.” (Tr. 257, 290). Sullivan agreed that he did not want a two-tier system at the Employer and that the two-tier system at GE was dysfunctional. (Tr. 290). At the hearing, Sullivan acknowledged that the Employer expressed its concerns about labor costs at multiple bargaining sessions and that it would not make sense for the Employer to propose or accept increased labor costs in light of those concerns. (Tr. 505).

In September, the parties held about three or four more bargaining sessions with the same individuals present at each of the sessions, but they were moved from Scotia to the Union Hall in Schenectady. (Tr. 41, 46). In September the matter of the Cross Training Certification Program arose for the first time. (Tr. 46). The Employer’s bargaining team internally discussed this matter in early September because it wanted to find a way for employees to learn different jobs and be proficient in jobs other than the ones they currently performed. (Tr. 46-47). The Employer had never previously had such a program. (Tr. 54). In about mid-September, the Employer introduced the concept to the Union at bargaining. (Tr. 48). The Union’s initial reaction was that it was open to the concept. (Tr. 48, 487-488). Roberts and Brown created a seven-page packet titled ‘A Cross Trained Participative Work Force’ which outlined why there should be such a program and how it would work. (GC Exh. 3; Tr. 48, 296). Brown created a one-page diagram titled ‘Qualification Training Groups’ displaying the initial qualification training groups he envisioned and the possibilities for certifications in each department. (GC Exh. 4; Tr. 58, 298).

The Employer represented both documents as general outlines, explained them to the Union, provided copies to the Union, and discussed them with the Union at bargaining. (Tr. 48-50, 58).

The Employer proposed that new hires would start at the 'nine rate' a higher rate than they did at the time and that thereafter they would receive increases not according to the wage agreements applicable to existing employees, but by earning certifications through the program. (Tr. 54-55). The certifications could be earned on different machines in the various departments, such as Liquids, Solids, and Research and Development. (Tr. 30, 55). Certification on a machine could take six months or longer depending on the complexity of the machine and the skill of the employee. (Tr. 56). The program would have two broad components, qualification and certification. Qualification involves employees knowing how to physically operate the machines and certification involves employees understanding aspects of quality control (QC). (Tr. 56-57, 67-68). Thus, the program involves both hands-on and classroom training. (Tr. 56).

In response to the program proposal, accompanied by the Cross Trained Participative Work Force packet (GC Exh. 3), and the Qualification Training Groups chart (GC Exh. 4), the Union indicated it was interested in talking about and developing such a program. (Tr. 63). Sullivan stated that the GE plant in Schenectady, where the Union is also the collective-bargaining representative, already had a similar program in place. (Tr. 63-64, 492). Sullivan suggested that the program at GE might serve as an example and perhaps the Employer and the Union could arrange to go over there and learn from GE. (Tr. 64-65, 294, 492). The Employer replied that it would be interested in doing that, although afterwards the arrangement was never worked out. (Tr. 65).

The certification program was discussed at multiple sessions for at least 30 minutes each. (Tr. 67). Throughout bargaining the Employer provided the Union with an opportunity to ask

questions about the program and offered to provide more information if the Union wanted it. (Tr. 70). The Employer never refused to answer any question from the Union. (Tr. 70). The Employer invited the Union to help develop the program on multiple occasions, but the Union did not provide very much input. (Tr. 71). It was discussed that the program would benefit the Employer by providing it with more versatile employees who could shift between machines and that it would benefit the employees by providing them more access to overtime on a wider variety of machines. (Tr. 66).

In connection with its proposal to the Union for the certification program, the Employer contacted Paul Napoli, a retired engineer, in the summer of 2013 and during bargaining. (Tr. 258). While bargaining was ongoing, Napoli had tentatively agreed to return to work to teach the classroom portion of the program. (Tr. 244, 258). The Employer informed the Union that it intended for Napoli specifically to be the instructor. (Tr. 244). The Employer intended for Brown to take the lead in developing the certification program and anticipated that the classroom portion would eventually consist of PowerPoint presentations, spreadsheets, videos, and other materials. (Tr. 259). These documents could consist of hundreds of pages of technical materials and it was never the Employer's intention, or did the Union request, that such documents be included in the body of the contract. (Tr. 259). The Employer explained to the Union at numerous times during negotiations that the certification program would involve a plethora of materials that did not yet, and could not yet, exist at the time of bargaining. (Tr. 264). The Union asked questions about the certification program such as how long it would take an employee to be certified on a machine and how many certification opportunities an employee could have per year. (Tr. 240). The Employer replied that how long it took would depend on the employee and the machine, but that each employee would be offered at least one opportunity per year. (Tr. 240-241). The Employer

told the Union that it could take a year to fully develop the certification program. (Tr. 307). The Employer explained at multiple bargaining sessions that the certification program is a living program and would change as machines are added or removed from the plant. (Tr. 307-308).

The sine qua non of the Employer's certification program proposal was that new hires would earn wage increases by completing certifications instead of by the progression schedule, which would not apply to them. (Tr. 312). The Employer never proposed nor would it have ever accepted a proposal that new hires receive wage increases through both the certification program and the progression schedule. (Tr. 254-255). The proposal to implement the certification program was always dependent on eliminating the progression schedule for new hires and this fact was discussed at multiple bargaining sessions. (Tr. 312). Sullivan acknowledged that the Employer's certification program proposal was discussed at length at multiple bargaining sessions and that the Union was open to the idea of the certification program "with both feet." (Tr. 487-488). The Union acknowledged that at all times it was willing to engage in bargaining over the certification program, even at present, and that it never took the issue off the table. (Tr. 488). Sullivan also acknowledged that the Employer and Union never backed off from its certification program proposal. (Tr. 515).

In August, the Employer had announced that it was very interested in gaining the ability to assign mandatory overtime to give it more flexibility in running the plant. (Tr. 291). However, the Union absolutely rejected that proposal and mandatory overtime was ultimately not accepted into the new contract. (Tr. 291-293). Couture explained at hearing how the mandatory overtime and certification program issues are linked. (Tr. 360). Because the Employer was unable to achieve greater flexibility by the Union conceding on mandatory overtime, it was even more

interested in the certification program so that employees could increase flexibility by being able to operate multiple machines. (Tr. 360).

On September 19, the parties executed a one-month contract extension agreement which extended the expiration date to October 31. (GC Exh. 5; Tr. 65-66). No other contract extension agreements were executed. (Tr. 66). In addition to discussing the certification program, the parties bargained over health insurance, holidays, downgrading from a higher to a lower rate when moving from night to day shift, the general increase percentage, and other items in September. (Tr. 72). After having discussed the certification program for several sessions, the Union consented at one of the sessions in late September or early October to adopt such a program and that it would replace the progression schedule for new hires. (Tr. 231). The Employer's bargaining team, Roberts, Brown, and Couture all testified that the certification program, as ultimately referenced in the contract, was bargained over and agreed to by the Union. (Tr. 117-118, 131-132, 231, 324-325, 372). The parties discussed and agreed at that and other times that the certification program would be referenced in the contract but that the details for it would be 'out-of-contract', as was the practice with the wage agreement sheets. (Tr. 232-233, 326).

At various times throughout bargaining, Dellert electronically bolded, highlighted, changed the color of, or otherwise marked certain portions of the contract that were under discussion, added, deleted, or otherwise marked for revision. (Tr. 121-123). The parties did not maintain a comprehensive document, either electronically or physically, of all such changes made during bargaining. Several different marked-up versions of the contract were exchanged between July and October. (R. 1; Tr. 122).⁵ The Employer believes it most likely disposed of all

⁵ Several, or portions of several, of these marked-up drafts are contained in Respondent's Exhibit 1. However, Dellert, the likely custodian of the documents did not testify, and witnesses were not able to identify with any

these versions after the end of bargaining as it believed they were no longer useful. (Tr. 123). References to the certification program do not necessarily appear in these drafts and both parties agree that the certification program was not discussed at earlier bargaining sessions. (Tr. 488).

C. Bargaining Concludes – October 2013

In October the parties continued to hold additional sessions at the Union Hall. (Tr. 73). The parties held a bargaining session on October 1 at which the Employer distributed copies of a chart titled ‘Contract Proposal’ dated October 1. (GC. Exh. 7; Tr. 77). The document is not a comprehensive proposal but rather a running tally of topics discussed and whether there is agreement on them. (Tr. 76, 299). The rows represent topics discussed at bargaining and the columns represent each of the three years of the contract. The chart is marked with green checks or red X’s to show if a condition will go into effect and if the parties agree on it for each of the three years of the life of the contract. (GC Exh. 7; Tr. 77-78, 300). The chart and topics listed were discussed at the bargaining session. (GC Exh. 7; Tr. 79). One of the topics listed is ‘Certification Approximately equal to 1% wage increase,’ in reference to the program. (GC Exh. 7; Tr. 79). The figure of one-percent was discussed because the Union wanted to ensure that new hires would still maintain a certain pay level relative to existing employees. (Tr. 82). There was discussion that receiving a 25-cent per hour increase after completing a certification was equivalent to a one-percent wage increase for new hires. (Tr. 83). Figures of 25-cents per hour and higher per certification were discussed at this and other sessions. (Tr. 83).

particularity what methodology she may have used in marking-up the documents or whether certain markings might mean language had been agreed upon, rejected, or needed to be revisited. Moreover, no witness was able to identify when the undated documents were created (Tr. 186, 249-150), whose handwriting appears on certain pages (Tr. 173-174, 181, 185-186), confirm if these drafts were exchanged by the parties or only used internally, or if Dellert’s markings accurately reflected bargaining. (R. Exh. 1; Tr. 186, 190, 249-150). The final portion of Respondent’s Exhibit 1 is typed notes from certain bargaining sessions, but the author of the notes, Dellert, did not testify so the record does not contain any explanation of how they were created or if they are complete. (R. Exh. 1, pp. 664-670; Tr. 186).

The parties met again on October 4 at which time the Employer provided copies of an updated chart titled ‘Contract Proposal (2)’ dated October 4. (GC Exh. 8; Tr. 84-85, 304). Roberts updated the chart and would continue to do so from early October until the end of bargaining. (Tr. 85, 89). The checks, X’s, and other figures on the chart were updated when an item was agreed upon, taken off the table, or otherwise altered. (Tr. 85-86). As new topics were discussed at subsequent sessions they were added to the list of topics in the far left column. (Tr. 85-86). One such topic addressed was an overall percentage wage increase for all bargaining unit members, both existing and future new hires. (GC Exh. 8; Tr. 86).

The parties held another session on October 17, after which Roberts e-mailed another updated chart titled ‘Contract Proposal (3)’ to Sullivan and the Employer representatives.⁶ (GC Exh. 9; Tr. 87-88, 305-306). The chart summarizes what had been discussed and agreed to or not as of October 17. (GC Exh. 9; Tr. 88).

On October 24, Roberts sent Sullivan and the Employer representatives a three-page e-mail detailing the state of negotiations at that time. (GC Exh. 10; Tr. 89).⁷ In regards to the certification program, Roberts wrote:

We agree that the Certification process is a means of improving our common Goal for operational flexibility. Currently, the pay rate for the membership job classification is at the 75 percentile for the area. We have proposed that we modify the pay rate progression for new hires using the certification criteria as a means of advancing the member’s knowledge and wages. When we discussed the 2 tier approach in the past, your most important point was that we give the new hires opportunity to achieve a level similar to what the current employees make. New Hires will start at the 9 rate. The table below doubles the value of each earned certification for the new hires over the original proposal.

(GC Exh. 10, p. 2).

⁶ Brian Sullivan’s e-mail address is sully053@nycap.rr.com. (GC Exh. 9; Tr. 88).

⁷ On October 30, Roberts re-sent to Sullivan the same e-mail of October 24 as Sullivan had seemingly told Dellert he needed it re-sent. (GC Exh. 28; Tr. 102).

That paragraph is followed by the chart ‘Structure for New Hires,’ which states that the first six certifications for new hires will be at an accelerated rate of \$1.00 per hour, that the new hires will be brought in at the nine rate of \$18.82 per hour, and what the wage scenario for a new hire would look like up to the sixth year of employment. (GC Exh. 10, p. 2). The e-mail further indicates that certifications other than the first six for new hires will be for 25-cents per hour, that there will be a target of one per year, and that there will be over 20 possible certifications. (GC Exh. 10, p. 2). Roberts ended the e-mail by stating “wording changes to the contract is still a housekeeping open topic.” (GC Exh. 10, p. 3, Tr. 315).

Each of the topics referred to in the e-mail, such as the EPO and PPO medical plans, the general wage increase, the pension plan, the assigning of overtime, and the certification program had been discussed at bargaining by October 24. (GC Exh. 10; Tr. 89). Likewise, the various separate aspects of the certification program mentioned in the e-mail had been discussed at bargaining by October 24. (GC Exh. 10; Tr. 89-90). Aspects of the certification program that were discussed included, how long a certification would take to complete, how many certifications could be offered per year, the total number of certifications possible, the rate new hires would start at, and the amount an employee would earn for completing a certification and if that amount would differ depending on the employees or number of certifications. (GC Exh. 10; Tr. 89-90). The bargaining on these aspects was related because a low number of total certifications and/or a longer timeframe to complete each would weigh in favor of rewarding employees more for each certification, whereas providing a high number of total certifications and/or shorter timeframes to complete each would justify compensating employees less for each certification. (Tr. 90-92). Likewise, both parties wished to avoid creating what they referred to as a two-tier system which might, either quickly or over time, result in a great pay disparity

between existing and new employees. (Tr. 90-91). It was discussed that there would need to be a way to prevent such a disparity because the certification program would be the only means for new hires to receive wage increases, other than the general increase and COLA. (Tr. 90). The Employer's stated goal was to reduce labor costs by slowing, but not stopping, the progression rate and to still provide new hires with a means of ultimately reaching the same maximum levels as existing employees. (Tr. 295, 295). Brown explained that:

Nobody wanted to have a two tiered system like that where there was a huge difference between the pay of employees running or doing the same jobs. [...] The certification gives the employees the vehicle to get to that similar rate as existing employees. And that was something that we discussed, but it just takes a longer time to do it. Instead of an 18 month period, now it'll take, in this case, if you look at these examples [GC Exh. 10], up to six years.

(Tr. 92-93).

The Employer recognized this issue and proposed setting the starting rate for new hires at the nine rate as that is the highest rate for a production employee and is higher than had been offered to new hires in the past. (GC Exh. 10; Tr. 90). The parties also negotiated over providing new hires with a higher rate for their first six certifications with figures of 25-cents, 50-cents, and \$1.00 were discussed back and forth. (Tr. 91, 94). Roberts mentioned in his October 24 e-mail that the Employer's latest proposal "doubles the value of each earned certification for the new hires over the original proposal," i.e. the Employer had come up from 50-cents to \$1.00 at that time. (GC Exh. 10, p. 2; Tr. 90-91, 94).

The Employer qualified all discussions of the certification program by reminding the Union that the program was still in its infancy and that details on how the program was operated, such as how long it would take to complete a particular certification or how many machine certifications could be provided on, might change to make the program workable. (Tr. 96).

On October 25, Sullivan responded to Robert's e-mail of the previous day. Sullivan's response indicates that he had received Robert's e-mail and read it. Part of Sullivan's response stated "[w]e agreed that the Certification process was a supplemental issue." (GC Exh. 11). The Employer agreed with Sullivan that the certification process was a supplemental issue and it was not the Employer's intention at bargaining to suggest that the substance of the certification program be included in the body of the contract. (Tr. 99-100). As referenced in Sullivan's e-mail the term "supplemental" was used by the parties at bargaining to refer to items "outside of the contract" and the certification program and wage agreements had been considered "supplemental issues." (GC Exh. 11; Tr. 99-100). At no time during bargaining did the Employer ever represent to the Union that it already had a comprehensive written certification program. (Tr. 333).

The parties held their final bargaining session on October 31. (Tr. 104, 316). The parties had a few final matters to clean up at the start of the session and at the end all issues had been resolved. (Tr. 104, 316). Near the end of the session the parties shook hands and Sullivan stated he felt he had a "plan he could take to the Union and it was going to go for a vote on the 7th [of November]" or similar words. (Tr. 104-105). On October 31, the parties did not yet have a final typed and printed version of the contract. (Tr. 104-105, 317). A physical version did not exist because the changes agreed to on October 31 still needed to be typed into the contract. (Tr. 105, 317). The Employer explained to the Union that Dellert would input these final changes into the electronic version as she had been doing for much of bargaining and that there would be a final review by the Employer for cleanup and typos. (Tr. 105). This did not include any substantive changes as bargaining with the Union was already complete. (Tr. 105). After October 31 the Union never requested any additional bargaining sessions and none were held. (Tr. 106).

D. Contract Ratification – November 2013

The following day, November 1, Roberts wrote an e-mail to Sullivan and the other Employer representatives. (GC Exh. 13; Tr. 106-107, 317). Attached was an updated chart titled ‘Contract Final Proposal (4)’ and other information on some of the negotiating topics. (GC Exh. 13; Tr. 106-107). The chart and accompanying information accurately summarizes the terms of topics discussed and agreed upon at bargaining. (GC Exh. 13; Tr. 108, 318). The total sources and amounts of wage increases for all employees under the new contract were as follows: (1) an eight-cent per hour COLA increase for all employees in each of the three years of the contract; (2) a general wage increase for all employees of two-percent in the first year and one-percent in each of the following two years; (3) existing employees hired before December 31, 2013 would continue to earn increases under the wage agreement tables and through certifications; and (4) new hires after January 1, 2014 would earn increases through the certification program only. (GC Exh. 13). Roberts included specifics on the certification program using the same ‘Structure for New Hires’ chart he had used in the e-mail of October 24. (GC Exh. 13, p. 3).

On November 7, the Union put the new contract to a ratification vote and the membership approved the contract. (Tr. 111, 489). The Union arranged for buses to pick employees up at the plant and bring them to the Union Hall to vote. (Tr. 111).

On November 11, Dellert left the Employer and Roberts completed her remaining work of inputting the changes to the new contract. (GC Exh. 14; Tr. 111, 318). On November 11, Roberts wrote in an e-mail to Sullivan:

Today is Kiersten’s last day with Von Roll. [...] So Tony, Matt and myself will update the contract to reflect the numbers we have discussed. During our last meeting, Kiersten passed along the contract pages highlighting the language changes we had agreed to. Unless we hear otherwise from you, we will be using

that wording in the Draft we send to you. I would hope to have this to you by next week.⁸

(GC Exh. 14; Tr. 318).

After Dellert resigned, Roberts assumed the task of inputting the changes and proofreading the remainder of the contract. (Tr. 318).

On November 20, Roberts sent Sullivan and the Employer representatives an e-mail with a revised version of the contract attached. (GC Exh. 15; Tr. 114).⁹ Robert’s first bullet point in the e-mail states, “[a]ttached is the contract with the revisions we have agreed to. Please review for accuracy.” (GC Exh. 15, p. 1; 320-321). Changes in the November 20 contract version regarding the certification program agreed to by the parties are as follows:

<u>2010-2013 Contract</u>	<u>November 20, 2013 Draft</u>
•Article VII – Working Hours, Overtime, Premium Pay (GC Exh. 2, p. 3)	•Article VII – Working Hours, Overtime, Premium Pay, Certification Pay (GC Exh. 15, p. 6).
•No Article VII, Section 9 (GC Exh. 2, p. 6).	•Article VII, Section 9 9. Certification Pay Additional wages will be earned each time an employee earns a certification on a defined piece of equipment of Group of equipment as stated in the Cross Training Certification Program. Wage increases are defined under the Wage Agreement. (GC Exh. 15, p. 10).
•Article VIII – Wage Rates and Cost of Living Adjustments 3. Step Rates and Progression Schedules The Union recognizes that starting rates, and job rates for hourly rated will vary,	•Article VIII – Wage Rates and Cost of Living Adjustments 3. Step Rates and Progression Schedules The Union recognizes that starting rates, and job rates for hourly rated will vary,

⁸ The last meeting referenced by Roberts refers to October 31.

⁹ Also included on the e-mail is Annastasia Fu’Cia, the Employer’s Human Resources Director in Atlanta, Georgia.

depending on the job and its surrounding circumstances. Employees hired after January 1, 2011 will follow the progression rates and job rates in effect as of January 1, 2011. Employees hired before December 31, 2010 will follow the progression rates and job rates presently in effect. (GC Exh. 2, pp. 6-7).

depending on the job and its surrounding circumstances. Employees hired after January 1, 2014 will follow the progression rates and job rates in effect as of January 1, 2014 and as defined in the Cross Training Certification Program. Employees hired before December 31, 2013 will follow the progression rates and job rates presently in effect. (GC Exh 15, p. 11).

As noted above, Article VII, Section 9 was a new section added to the contract. (Tr. 117). The title of Article VII was also updated to reflect the new Section 9 within. (GC Exh. 15, p. 6). The language of this section was discussed at multiple bargaining sessions, the Employer consulted the Union about this section, and the language accurately reflects what was agreed to at bargaining. (Tr. 115-117). The Employer gave the Union an opportunity to review this section along with the entirety of the contract by means of Roberts' November 20 e-mail and the Union did not raise any objection or make any counterproposal. (GC Exh. 15, Tr. 117).

Likewise, the changes to Article VIII, Section 3 as outlined above from the November 20 e-mail accurately reflect what was agreed upon at bargaining. (Tr. 117-118, 131-132, 231, 324-325, 372). The Employer did not insert this language with the intent to conceal it from the Union and, along with the rest of the contract, provided it to the Union by e-mail on November 20 for review. The Employer was open to non-substantive rewording of the contract if the Union wanted to. The Union never raised any objection to this section and never made any counterproposal. (GC Exh. 15, Tr. 118). In regards to incorporating the certification program into the contract itself Sullivan stated in at least one of the October bargaining sessions that the Union did not want any of the details listed in the contract and that it only wanted references to the certification program put into the contract. (Tr. 115-116). The Employer agreed that it would not

and could not put the entire language of the certification program into the contract itself. (Tr. 116).

In addition to the language above, the Employer made corrections to the page numbers, table of contents, index, and similar items. (Tr. 115). Although the last bargaining session was on October 31, Roberts did not have a corrected version prepared to circulate until November 20, because Dellert's resignation caused a delay and he was occupied with other assignments in the meantime. (Tr. 319).

Copies of the wage agreements were provided by the Employer at times during bargaining and the Union also had its own copies. (Tr. 119). The Union never claimed that the wage agreements were incorrect in any way and never proposed making any changes to them. (Tr. 119). As part and parcel of the certification program the parties discussed at multiple bargaining sessions and agreed that the wage agreements would not apply to new hires under the new contract. (Tr. 119-120).

Sometime after November 20, Sullivan marked-up by hand the latest version of the contract and gave it to Stewart to bring to the plant. (GC Exh. 16; Tr. 128).¹⁰ On November 27, Roberts sent an e-mail to Sullivan stating he would be in Brazil the following week and "[i]f you want to sign off on the contract today, I am available. I would like to see this in effect before leaving." (GC Exh. 17). Roberts' e-mail implies that he did not yet have a returned copy of the contract from the Union and that he was still waiting for it. (GC Exh. 17).

E. Contract Implementation – December 2013 to Present

In early December, Stewart brought a copy of the contract that Sullivan had marked-up to the plant and brought it to Brown at his office. (GC Exh. 18; Tr. 127-128). Brown skimmed the

¹⁰ The mention in the e-mail of an individual named Scott signing an agreement is in reference to an unrelated matter. (Tr. 124-125).

contract at that time and recognized markings throughout the document as Sullivan's handwriting. (GC Exh. 18; Tr. 128). Brown then brought the marked-up version to Roberts' office and put it on his desk. (GC Exh. 18; Tr. 135, 343).

On about December 10, Roberts reviewed in his office the marked-up version of the contract that Sullivan had returned to him via Stewart. (GC Exh. 18; Tr. 321-322, 343). This version of the contract was marked-up twice by hand, first by Sullivan sometime in early December and then by Roberts on about December 10. (Tr. 322). Relevant portions that were marked include:

- Cover page: Sullivan corrected the start date from "11/8/13" to "10/1/13" and initialed and Roberts also initialed to confirm.
- Page 2: Sullivan corrected the start date from "November 8, 2013" to "10/1/13" and initialed and Roberts also initialed to confirm.
- Page 6: Sullivan initialed next to Article VII with the amended title "Working Hours, Overtime, Premium Pay, Certification Pay."
- Page 10: Sullivan initialed twice on the page which contains the new paragraph Article VII, Section 9, "Certification Pay."
- Page 11: Sullivan initialed three times on the page which contains the revised Article VIII, Section 3, "Step Rates and Progression Schedules," including a set of initials directly between Sections 2 and 3 of Article VIII.
- Page 36: Sullivan corrected the number of hours regarding sick and personal days and initialed and Roberts also initialed to confirm.
- Page 45: On the signature page Sullivan corrected his title, corrected the spelling of Pallotolo's name, and signed "Brian T. Sullivan." Thereafter, Roberts and Couture also signed next to their names in the signature area. (Tr. 322-323, 366).¹¹
- Sullivan also initialed over 20 other places throughout the contract.

¹¹ Although the heading block on the signature page states November 8, 2013, it was in fact signed by Sullivan in early December and by Roberts and Couture on December 10. The November 8 date references the day after it was ratified by the membership vote. (Tr. 323).

(GC Exh. 18; Tr. 322-323, 366).

Sullivan acknowledged that the markings and initials throughout the contract and the signature on page 45 are his. (GC Exh. 18; Tr. 437-438). Sullivan specifically acknowledged that he did sign the signature area on page 45 and that he reviewed the contract. (GC Exh. 18, p. 45; Tr. 447-448). However, Sullivan stated at hearing that the reason he signed it was:

[J]ust to show that's where signature should be on this thing if we were going to sign this document. Generally, it is of my opinion that we should have a separate document like a sheet that we did for a contract extension that has everybody listed on it. But I just wanted to show them that these were my changes, that Agency needed to be changed to Agent, and that's where I would sign, just to verify those were my changes.

(GC Exh. 18, p. 45; Tr. 448).

On December 11, Roberts sent an e-mail to Sullivan stating that he and Couture had signed off on the contract. (GC Exh. 19, Tr. 138). On December 12, Roberts sent an e-mail to Sullivan and Employer management stating, “[p]lease inform your shop stewards that the Agreement has been signed by Von Roll and their Leadership and that we will include a 2% wage increase in next week’s payroll.” (GC Exh. 20, Tr. 139-140).

The Employer then set about to finalize and publish the contract. In late December 2013 and January 2014, Brown and the Employer’s Human Resources Director Diane Igoe proofread the contract several more times and found additional errors, such as with the page numbers and index, which they corrected. (Tr. 139-140). They then sent it to an outside printer for publishing. The first round of publishing was to a red booklet, but Brown and Igoe found publishing errors so they destroyed those copies and sent the contract back to the printer for a corrected version. (Tr. 140). Brown informed Stewart that the Employer was making such corrections. (Tr. 141). In February 2014, the Employer then had the printer make about 120 copies of the final correct version. (GC Exh. 21, Tr. 142, 144, 328). The final version was bound in booklets with a yellow

cover, on size eight and half by 11 inch paper, and folded lengthwise. (Tr. 141-142, 144). Brown and Igoe distributed copies to all the employees and gave extra copies to Stewart to take to the Union Hall. (Tr. 142-144). The Union did not acknowledge any issues with the contract at that time. (Tr. 144). The final contract contains only typed, not handwritten, signatures of the parties. (GC Exh. 21, p. 45). The Union never requested to have handwritten signatures instead. (Tr. 145). Past contracts similarly contained only typed signatures and were nevertheless considered to be in full effect. (Tr. 145). The contract version signed by the parties in December 2013 and printed in February 2014 was retroactively implemented by the Employer to October 1, 2013. (GC Exh. 21; Tr. 147, 329). The contract remains in effect to the present. (Tr. 147).

Shortly after the ratification vote in November 2013, Brown began developing the details of the certification program. (Tr. 160). From inside the Employer, Brown received assistance from retired engineer and now certification instructor Napoli, engineers, operators, and the Research and Development department. (Tr. 160). Brown invited by e-mail and in-person, Sullivan, Pallotolo, and Stewart to join him also. (Tr. 160). However Sullivan, Pallotolo, and Stewart never actually became involved in developing the certification. (Tr. 161). They were never excluded by the Employer, but failed to follow-up with Brown to become involved. (Tr. 161). According to Brown and Roberts, the certification program is a living program and that details of how it operates continue to be revised and improved to the present. (Tr. 238, 308).

Employees began taking certification courses, on their own machines first, in Spring 2014. (Tr. 161). The first set of employees to complete certification did so by the end of Spring 2014 and then began moving on to take certification courses on additional machines. (Tr. 161-162). Completion of certification courses is documented on a 'Personnel Status Form' and 'Certification Completion Form' for each employee. (GC Exh. 27; Tr. 159-161). The Personnel

Status Form indicates the type of certification completed and amount of wage increase earned. The Certification Completion Form is signed off by a Trainer and Department Manager to verify completion. (GC Exh. 27). At present all or nearly all employees have completed at least one certification course. (GC Exh. 27; Tr. 260). Employees continue to successfully complete certificate courses and receive the accompanying wage increases at present. (GC Exh. 27; Tr. 161-162).

Following implementation the Employer continued to issue semiannually updated wage agreement sheets as it had under previous contracts. (GC Exh. 22-a, 22-b, 22-c; Tr. 148). The wage agreements are maintained in editable files by the Employer's Finance and Human Resources Departments and accessible to employees and the Union. (Tr. 148). Under the new contract three different wage agreement sheets exist for three different groups of employees. The first set is for those hired before January 1, 2011. (GC Exh. 22-a). The second set is for those hired between January 1, 2011 and December 31, 2013. (GC Exh. 22-b). These first two groups also existed under the 2010-2013 contract and differ only in the rate amount, not on the manner in which progression occurs. (GC Exh. 6). Under the new contract, a third set of wage agreement sheets came into existence for a third group of employees, those hired after January 1, 2014. (GC Exh. 22-c). The third group differs from the first two in that the progression schedule is completely replaced by the certification program. (GC Exh. 22-c). For all three groups the same general increases are applied every October and the same COLA increases are applied every February. (GC Exh. 22-a, 22-b, 22-c; Tr. 151). Thus, for all groups two wage agreements are issued each year for a total of six over the life of the contract from 2013 to 2016. (GC Exh. 21, 22-a, 22-b, 22-c; Tr. 151). Although a third category was created for employees hired January 1,

2014 and after, no new employees were hired from the end of bargaining until about April 2014. (Tr. 153).

From late January or early February 2014 onwards, the Union and all its members were in physical possession of the finalized contract as published in the yellow booklet format. (Tr. 141-142, 498-499). However, it was not until November 2014, 10 months after receiving the contract and 12 months after signing it, that the Union first claimed there was an issue with Article VIII and the certification program when a member brought it to the Union's attention. (Tr. 503-504). In the intervening months the parties behaved as if a contract was in effect and the Union gave no indication anything was amiss. During these months the Union never tried to schedule any bargaining sessions and never tried to schedule a formal signing ceremony. (Tr. 493, 496). Sullivan admitted at hearing that previous contracts were considered effective even without a formal ceremony and that "once the Membership votes it is what it is." (Tr. 493-494). The Union never filed an unfair labor practice charge against the Employer in connection with this matter. (Tr. 329-330).

On November 17, 2014, the Union filed a grievance against the Employer regarding 'unjust pay' and claiming that the verbiage in Article VIII, Section 3 of the contract was inaccurate and without effect. (GC Exh. 24). Brown gave the Union a written response with the Employer's position denying the grievance and asserting that employees were being paid the correct amounts under the new contract. (GC Exh. 24, p. 5; Tr. 154-155). The Union filed a second related grievance on January 23, 2015 and Brown again responded in writing denying the grievance. (GC Exh. 25; Tr. 155-156). The Employer denied both grievances and the Union never proceeded further to take them to arbitration. (Tr. 154-156). Shortly afterwards, in about January or February 2015, the parties held informal settlement discussions to try to resolve the

issue. (Tr. 208-209). When those discussions were unsuccessful the Employer filed an unfair labor practice charge on February 18, 2015 which led to the instant matter. (GC Exh. 1(a)). On April 8, 2015, in continued efforts to resolve the matter, the Employer's Head of Human Resources, Annastasia Fu'Cia, sent a letter to Sullivan asking him to again execute the contract, but the Union still refused. (R. Exh. 13-a).

The Employer was open to the Union suggesting non-substantive changes to the language at all times up until the contract was published. (Tr. 324). The Employer never attempted to put any language into the contract or any draft version without the Union realizing it. (Tr. 325). The Employer never attempted to mislead or deceive the Union in any way regarding the certification program, wages, or any terms of the contract. (Tr. 119, 325, 330). The Employer never tried to change the definition of "existing employee" or "new hire." (Tr. 110). The Employer took the Union's act of putting the new contract to a ratification vote as an indicia that bargaining had concluded and that the parties were in agreement. (Tr. 261-263).

III. ARGUMENT

The evidence and applicable case law establish that Respondent violated Section 8(b)(3) of the Act, by failing and refusing to execute the parties' 2013-2016 collective-bargaining agreement.

A. The Legal Standard for Meeting of the Minds

A "meeting of the minds" is based on the objective terms of the contract, not on the parties' subjective understanding of those terms. *See Hempstead Park Nursing Home*, 341 NLRB 321, 323 (2004). The standard does not require that both parties have an identical understanding of the agreed-upon terms. *See Ebon Services*, 298 NLRB 219, 223 (1990). The subjective understandings or misunderstandings as to the meaning of terms which have been agreed to are

irrelevant, provided that the terms are unambiguous judged by a reasonable standard. *See Vallejo Retail Trade Bureau*, 243 NLRB 762, 767 (1979). Where the parties have agreed on the contract's actual terms, disagreements over the interpretation of those terms do not provide a defense to a refusal to sign the contract. *See Teamsters Local 617 (Christian Salvesen)*, 308 NLRB 601, 603 (1992). A meeting of the minds between parties is reached not by their subjective inclinations, but rather by their intent as objectively manifested in what they said to each other. *See M.K. Ferguson Co.*, 296 NLRB 776, 776 n. 2 (1989). Thus, the relevant inquiry is whether the parties agreed on the objective terms of the contract. Here the evidence establishes such an agreement.

The fact that the parties had not formulated the contours of the certification program beyond the compensation elements to include the details of which machines would be tested, by whom, in what order, and the exact process, does not undermine a meeting of the minds claim by itself. In *Timber Products Company*, 277 NLRB 769, 770 (1985), the Board found a violation where the employer refused to execute the contract. The union accepted the employer's final contract offer even though a complete pension plan had not been finalized at the time of the acceptance. The offer contained specified benefit levels that the employer was willing to give to employees and the employer proposed that many of the terms of the plan would be the same as that already provided. The Board concluded that although a complete pension plan had not been finalized at the time of the union's acceptance, the employer had offered specified benefit levels which it would provide and consequently the lack of administrative details was deemed not fatal and the employer was obligated to provide a pension plan containing the enumerated benefits. *Id.* The parties have an obligation to execute as long as the agreement reflects a meeting of the

minds on substantive and material terms of the agreement. *See Sunrise Nursing Home, Inc.*, 325 NLRB 380, 389 (1998); *Intermountain Rural Electric Association*, 309 NLRB 1189 (1992).

The burden is on the General Counsel to show a meeting of the minds existed and that the document that a party refused to execute accurately reflected that agreement. *See Kelly's Private Car Service*, 289 NLRB 30, 39 (1988), *enfd.* sub nom. *NLRB v. W.A.D. Rentals Ltd.*, 919 F.2d 839 (2d Cir. 1990); *Cherry Valley Apartments*, 292 NLRB 38, 40 (1988); *Paper Mill Workers Local 61 (Groveton Papers Co.)*, 144 NLRB 939, 941-942 (1963). If it is determined that an agreement was reached, a party's refusal to execute the agreement is a violation of the Act. *See H. J. Heinz Co.*, 311 U.S. 514, 525-526 (1941). In determining whether the General Counsel has made that showing, the Board is faced with the issue of intention: "Did the parties *intend* to have a contract?" *New Orleans Stevedoring Co.*, 308 NLRB 1076, 1081 (1992), *enfd.* 997 F.2d 881 (5th Cir. 1993). The Board is not strictly bound by the technical rules of contract law when it decides whether, in the circumstances, the employer and the union have arrived at an agreement which must be reduced to writing and executed by the parties. *Penasaitos Gardens, Inc.*, 236 NLRB 994, 995 (1978).

A meeting of the minds can be determined by the parties' words and actions, "tone and temperament," that an agreement had been reached. *Chauffeurs, Teamsters, and Helpers Local Union No. 771*, 357 NLRB No. 173 (2011). There, the Board found that the finality of the agreements were inarguable, as the parties had discussed the remaining few matters, and that the Union would get the employees to ratify the agreement. *Id.* at 9. Handshakes and mutual expressions of satisfaction, which occurred in this case, are "hallmark indication[s] that a binding agreement has been reached at the end of negotiations," and when parties conclude a session

with such, it is clear evidence of a successful negotiation of a contract. *See Windward Teachers Association*, 346 NLRB 1148, 1151 (2006).

Absence of a written agreement or signed or initialed document of any kind memorializing the agreement is grounds for finding that no “meeting of the minds” occurred, whereas on previous drafts, agreed upon points were initialed by one or both of the parties. *American Standard Companies, Inc.*, 352 NLRB 644 (2008). The Court in *Midvalley Steel Fabricators* found that when a party later shifts its position on agreed-upon terms, that party has failed to bargain in good faith, a violation of Section 8(b)(3) of the Act. 243 NLRB 516 (1979). Also, in circumstances similar to this case, the Court found assent to contract terms when one party looked over a draft of the contract, “indicated that it seemed ‘all right,’” and did not notify the other party of any mistakes or any absent language. *Id.* When a party does not take issue with particular language or proposals, it cannot later use those proposals or that language as the basis for not signing a contract. *See Ebon Services, supra.*

The instant matter can be analogized to *Windward Teachers Association*, 346 NLRB 1148, 1151 (2006). In that case, the Board found a violation where one party admitted to reviewing several versions of an agreement along with the disputed language at issue in the case without objecting to the language it later challenged. The party’s failure to object after acknowledging that it reviewed the disputed language reinforced a meeting of the minds finding. 346 NLRB at 1151. In the instant case, the Union had multiple chances to review the agreement (General Counsel’s Exhibit 15) following Robert’s November 20 e-mail and particularly failed to state any objection.

The Union may argue that the facts in *Windward* are distinguishable because in the cited case the charged party *acknowledged* reading the disputed language while failing to state any

objection until much later. The Union will likely argue in this case that it never read the particular paragraph of the contract now at issue and cannot be held accountable. This defense is without merit. It strains belief based on the bargaining history where certifications were discussed at the table and in writing at great length that the Union would not have understood the inseparability of the two prime components of the wage proposal and read the contract before both initialing and signing the contract as embodied in General Counsel's Exhibits 15 and 18.

Further, the fact that the Employer typed Article VII, Section 9 and Article VIII, Section 3 into the contract at a computer away from the table rather than at it, similarly did not materially or substantively change the parties' prior agreement at the table. The language here is essentially an elaboration or restatement of terms to which the parties had agreed that compensation would be formed by both certifications and the progression schedule.

The instant case can be contrasted with cases where the Board finds that a lack of a meeting of the minds may be inferred when a draft agreement contains discrepancies which "seriously [alter the] meaning of a respondent's proposals" or when discrepancies "may be traced to ambiguity for which neither party is to blame" or to "differences in the understanding of the parties." See *Henry Bierce Co.*, 307 NLRB 622, 628, n. 24 (1992) (no meeting of the minds where some proposals were never even discussed during bargaining); *Automatic Plastic Molding Company*, 234 NLRB 681, 682, 688 (1978) (adding to proposal that alters its meaning undermines a meeting of the minds finding). See also *Waxie Sanitary Supply*, 337 NLRB 303, 310-311 (2001) (no violation found where there was no bargaining on the subject of the contract's effective date and one party acknowledged unilaterally setting the effective date of contract, a substantive and material term). However, inadvertent errors or "some minor deviation" from proposals are not indicative of any lack of agreement between the parties. See

Castro Village Bowl, 290 NLRB 423, 432 (1988); *Fashion Furniture Mfg.*, 279 NLRB 705 (1986); *Shawn's Launch Service*, 261 NLRB 836, 837 (1982). The two contractual articles that appeared for the first time in typed form in Roberts' November 20 e-mail to Sullivan were squarely within what the parties had discussed during bargaining. (See e.g., Tr. 117-118, 131-132, 231, 324-325, 372).

This is not a case where the parties have differing views over what contract language means. Contrast with *Chicago Parking Association*, 360 NLRB No. 132, n. 4 (June 25, 2014) (finding no refusal to execute violation where parties did not substantively discuss the wage changes in dispute and the parties had equally plausible, but different, understandings of the ambiguous agreement to have wage scales "proportionate to the prior agreement" thus creating ambiguity for which neither party is to be blamed). In the current case, the parties discussed certifications and the rates to be paid to different classes of employees over specific periods of time and without any withdrawal of the proposal by the Employer. (GC Exh. 10; Tr. 90-91).

Additionally, the instant case can be distinguished from *Waldon, Inc.*, 282 NLRB 583, 585-586 (1986). In that case, there was no meeting of the minds over wages where an employer's failure to discover the omission of one of the contract's wage grades before signing a draft of a contract prepared by the union. The draft the employer signed by mistake was *inconsistent* with the employer's proposal on the topic. For this reason, there was evidence that there was no meeting of the minds. However, in the instant case, the November 20 e-mail version of the contract (General Counsel's Exhibit 18) that the Union signed does not have terms inserted in error or inconsistent with proposals. Instead, its objective terms are in fact terms to which the parties agreed on and discussed.

B. The Parties Reached a Meeting of the Minds in October 2013

The Union's argument that there was no meeting of the minds regarding the certification program rests on either or both of two equally implausible claims. First, the Union may claim that the certification program was discussed but never agreed to and that the 2013-2016 contract went into effect with the matter having been dropped. Second, the Union may claim that the certification program was in fact adopted, but that it was misled about or misunderstood the connection between the certification program and the progression schedule being abolished for new hires.

Here, the Employer first introduced the cross training certification program proposal to the Union at a bargaining session in about mid-September. The Employer's oral proposal was accompanied by a packet and chart with concepts for how the certification program would operate. (GC Exh. 3, 4). The Union's response from the very beginning, including Sullivan's, was that it was open to the idea of a certification, had prior experience with such programs from the GE plant, and that it would probably go along with such a plan as long as it thought the wage components were satisfactory. Brown testified that the proposal was discussed at multiple bargaining sessions for at least 30 minutes each and Sullivan testified that it was discussed at length at multiple sessions and that the Union was interested "with both feet." (Tr. 67, 487).

The fact that the Union understood what it was bargaining over in regards to the certification program is evinced by the parties having engaged in substantive bargaining over the wage component of the program. Initially, the Employer proposed that all employees would receive a 25-cent increase for each certification, regardless of whether the employee was existing or new, or if the employee was on his or her first, fifth, or tenth certification. However, the Union raised concerns that this was too slow of a progression for new hires as it would increase a

new hire's pay only by \$1.50 over six years, assuming one certification is completed per year. Thereafter, the Employer recognized that such a rate of increase was too slow and offered a 50-cent and then \$1.00 increase for the first six certifications completed by new hires. Thus, instead of \$1.50, new hires could increase by \$6.00 over the first six years. It is implausible that all three Union negotiating team members could have been in the dark for multiple bargaining sessions as to the significance of this arrangement. The fact that the Union must have understood the situation is further supported by the Union having made intelligent counterproposals to raise the increase from 25-cents to \$1.00. The Union must have understood that the certification program was to *replace* the progression schedule for new hires and not be in *addition* to it. For the Union to have believed otherwise would have defied logic.

If indeed the Union was under the impression that new hires would receive wage increases from both sources, then in short order new hires would become some of, or the, highest paid employees in the plant. Such an outcome would be nonsensical for the Employer because it wanted to control labor costs and avoid tension between employees, and for the Union because it knew the Employer wanted to control labor costs and it wanted to have a seniority based system. The General Counsel's position that the Union was on notice that the progression schedule would not apply to new hires is also supported by the fact that only the new hires were singled out to receive \$1.00 instead of 25-cents for certifications, and only for the first six certifications. Likewise, the Union could not have possibly believed that the Employer was simply giving employees yet another means of earning wage increases unless it was also taking something away. In collective-bargaining there is always a *quid pro quo*. Here the new hires got certification increases and gave up the progression schedule in a straight forward give and take.

The Union may also argue that since the entirety of the certification program was never presented to it in writing at the table or in any of the draft contracts circulated, that it thought the matter had been dropped or would not be in effect for the 2013 to 2016 contract. This claim is equally illogical. From their admittedly lengthy discussions on the certification program the Union knew very well that the certification program was “in its infancy,” “a work in progress,” a “living program,” and that the Employer expected it would take at least a year to roll it out completely. Thus, the Union’s ex post facto claim that it did not understand the program or how it could have been agreed to if not complete is disingenuous feigned ignorance. The claim that the Union at any point in time expected the entirety of the certification program to be incorporated into the body of the contract is absurd and the Union never held any such belief in good faith. As testified to by Brown, the certification program consists of hundreds of pages of PowerPoint slideshow presentations, videos, handouts, and technical, mechanical, and engineering instructions on how the machines work. PowerPoint presentations, videos, mechanical instructions, and related items are not materials that any Employer or Union would ever propose to incorporate into the body of a collective-bargaining agreement.

The meeting of the minds between the Employer and Union is also demonstrated by Union Business Agent Brian Sullivan’s signature on the contract. (GC Exh. 15, p. 45). The version signed by Sullivan came about as follows. The parties finalized oral agreements on October 31. Dellert and then Roberts input the final changes into the electronic version between October 31 and November 20. The Union went ahead and held a ratification vote on November 7 without needing to wait for a typed version of the contract. On November 20, Roberts e-mailed to Sullivan what he believed to be an updated and correct version of the parties’ agreement and he invited Sullivan to review the entire contract for accuracy. (GC Exh. 15). Sometime before

December 10, Sullivan printed the version from Roberts' e-mail, reviewed it, initialed various pages, made a few minor corrections, signed the signature block, and then gave it to Stewart to bring to the Employer. (GC Exh. 18). Roberts received the signed version from Sullivan, agreed to the corrections, he and Couture signed it, and the Employer implemented it. (GC Exh. 18, 21). The Union then remained silent about the matter and behaved as if a contract was in effect, following and applying all its provisions, for the next 11 months.

Sullivan admitted at the hearing that he reviewed the contract and that the signature is his. (GC Exh. 18, p. 45; Tr. 448). However, Sullivan then claimed that he did not intend for his signature to indicate his agreement with the document despite the fact that he signed in the signature block and made no notation that the signature represented anything other than his consent. Sullivan then claimed at hearing that the purpose of his signing the signature block and returning the document to the Employer was not to agree to the contract, but "just to show that's where signatures should be on this thing if we were going to sign this document." (GC Exh. 15, p. 45; Tr. 448). Sullivan's unbelievable explanation should be rejected. His explanation of his actions is essentially that he was just giving the Employer a preview, or demonstration, of what his signature is going to look like on some future yet to be agreed-upon and printed contract. The General Counsel argues that the plain meaning of Sullivan's signature should be accepted, rather than the convoluted explanation he offered at hearing. The Union and Sullivan are wrong and insincere. Sullivan's signature is not "where signatures *should be* on this thing if we *were going to sign* this document," but *is where it is* and is in fact tantamount to *executing* the agreement. All the actions taken by the Union establish an agreement--when Sullivan signed his name in early December, and earlier when the parties shook hands on October 31 and when the Union put

the contract to a vote on November 7, there was a full meeting of the minds between the Union and Employer.

C. The Union's Post-Bargaining Actions Manifested Consent

The fact that the parties had a meeting of the minds in late 2013 and that the Union's intention at the time was to have a fully executed agreement is laid bare by the Union's behavior after the end of negotiations. After Roberts received the signed version from Sullivan, added his own signature, and then e-mailed the parties on December 11 and 12 there was complete silence from the Union. The Union never contacted the Employer to correct Roberts' December 11 and 12 announcements that the deal was done, never attempted to schedule more bargaining sessions after October 31, never attempted to schedule a formal signing ceremony, never communicated any hint of concern that a contract was not in effect, and gave every outward impression that a normal three year contract was in effect. Not until November 2014, 11 months later, did the Union raise for the first time that there was an issue with the contract by filing a grievance. The real explanation is not that the Union suddenly remembered 11 months later that they had never finished bargaining a contract or that it suddenly realized the language of Article VIII had been surreptitiously altered, but probably that it realized it had misrepresented the deal to its membership or that the certification program was not as popular with the membership as it expected. Upon realizing this, the Union likely decided to refuse to abide by the contract it had already bargained for.

IV. CONCLUSION

The evidence establishes that Respondent violated Section 8(b)(3) of the Act, by failing and refusing to execute the parties' collective-bargaining agreement. Thus, Counsel for the General Counsel respectfully submits that, for all the reasons set forth above, Respondent

violated Section 8(b)(3) of the Act. Counsel for the General Counsel respectfully requests that the ALJ issue a decision and recommended order granting the relief sought herein.

V. PROPOSED CONCLUSIONS OF LAW

1. Von Roll, U.S.A., Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. Respondent is a labor organization within the meaning of Section 2(5) of the Act.
3. Respondent violated Section 8(b)(3) of the Act, by failing and refusing to execute the parties' collective-bargaining agreement.
4. Respondent's unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

VI. PROPOSED ORDER

Respondent, International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers, Communication Workers of America, AFL-CIO, CLC (IUE-CWA, Local 301), its officers, agents, successors, and assigns, shall

1. Cease and desist from:
 - (a) Failing and refusing to bargain collectively and in good faith the Employer.
 - (b) Failing and refusing to execute the collective-bargaining agreement submitted by the Employer to Respondent for signature on April 8, 2015.
 - (c) In any like or related manner interfering with, restraining or coercing members in the exercise of the rights guaranteed them by Section 7 of the Act.
2. Take the following affirmative action necessary to effectuate the policies of the Act.
 - (a) On request of the Employer, execute the collective-bargaining agreement, which was submitted to Respondent for signature on April 8, 2015.
 - (b) Within 14 days after service by the Region, post at its business office and meeting places copies of the attached notice. Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

- (c) Within 21 days after service by the Region, file with the Regional Director a sworn statement of a responsible official on a form provided by the Region attesting to the steps the Respondent has taken to comply.

VII. PROPOSED NOTICE TO MEMBERS

FEDERAL LAW GIVES YOU THE RIGHT TO:

- Form, join, or assist a union;
- Choose a representative to bargain with us on your behalf;
- Act together with other employees for your benefit and protection;
- Choose not to engage in any of these protected activities.

WE WILL NOT do anything to prevent you from exercising the above rights.

WE WILL NOT fail and refuse to sign the collective-bargaining agreement, which was submitted to us by Von Roll USA, Inc. for our signature on April 8, 2015, and which embodies the terms of our November 2013 agreement with Von Roll USA, Inc. on the terms and conditions of a successor collective-bargaining agreement.

WE WILL, on request, execute the collective-bargaining agreement, which was submitted to us by Von Roll USA, Inc. on April 8, 2015 for our signature.

DATED at Albany, New York, this 19th day of February, 2016.

Respectfully submitted,

/s/ John J. Grunert

JOHN J. GRUNERT

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