

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO BRANCH OFFICE

THE PERMANENTE MEDICAL GROUP, INC.

and

Case 32-CA-149245

NATIONAL UNION OF HEALTHCARE
WORKERS, CALIFORNIA NURSES
ASSOCIATION, AFL-CIO

D. Criss Parker, Esq. for the General Counsel.
Michael R. Lindsay, Esq.,
Alicia C. Anderson, Esq., and *Robert Spagat, Esq.*
for the Respondent.
Jonathan H. Siegal, Esq. for the Charging Party.

DECISION

STATEMENT OF THE CASE

AMITA BAMAN TRACY, Administrative Law Judge. This case was tried in Oakland, California from January 11 through 13, 2016. The National Union of Healthcare Workers, California Nurses Association, AFL-CIO (Charging Party or Union) filed the charge on March 31, 2015, and the General Counsel issued the complaint on September 30, 2015.

The complaint alleges that the Permanente Medical Group, Inc. (Respondent or Employer or TPMG) violated Section 8(a)(5) and (1) of the National Labor Relations Act (the Act) by, since about March 27, 2015, repudiating a contract reached on March 14, 2015 containing the agreed upon terms and conditions of employment for a recognized unit of its employees. Furthermore, the complaint alleges that Respondent violated Section 8(a)(5) and (1) of the Act by, since about March 27, 2015, failing and refusing to prepare, finalize, and execute the Contract. Respondent, in its answer, denied that it violated the Act as alleged.

On the entire record,¹ including my observation of the demeanor of the witnesses,² and after considering the briefs filed by the General Counsel, the Charging Party and Respondent,³ I make the following.

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FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION

Respondent, a California corporation of physicians with medical offices and places of business in Northern California and headquarters in Oakland, California, provides medical services for Kaiser Permanente members in Northern California. During the 12 months prior to the issuance of the complaint, Respondent received gross revenues in excess of \$250,000 for acute-care medical services; and that during the same time period, Respondent purchased and received goods valued in excess of \$5,000 from outside the State of California. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

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II. ALLEGED UNFAIR LABOR PRACTICES

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A. Background

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On November 18, 2010, the Union became the designated exclusive collective-bargaining representative of Respondent’s approximately 370 employees in the following appropriate unit (optical employees or optical workers):

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All full-time and regular part-time Optical Workers Unit employees covered under the terms of the October 1, 2005 collective bargaining agreement between the Employer and the Intervenor/Incumbent Union, all other employees, guards, and supervisors as defined by the Act.

¹ The General Counsel’s unopposed motion to correct the hearing transcript is granted. Although I have included citations to the record to highlight particular testimony or exhibits, my findings and conclusions are not based solely on those specific record citations but rather on my review and consideration of the entire record for this case.

² I further note that my findings of fact encompass the credible testimony and evidence presented at trial, as well as logical inferences drawn therefrom. I have carefully considered the testimony in contradiction to my factual findings, but I have discredited such testimony.

³ Abbreviations used in this decision are as follows: “Tr.” for transcript; “L.” for line; “GC Exh.” for General Counsel’s exhibit; “R. Exh.” for Respondent’s exhibit; “CP Exh.” for the Charging Party’s exhibit; “GC Br.” for the General Counsel’s brief; “R. Br.” for the Respondent’s brief and “CP Br.” for the Charging Party’s brief.

(GC Exh. 2).⁴ The Union’s constitution and bylaws indicate that “the results of any collective bargaining shall be subject to ratification by the members affected” (R. Exh. 2).

5 Thereafter, the parties began negotiating their first collective-bargaining agreement.⁵ On
 5 January 13, 2011, Respondent presented written ground rules to the Union regarding the
 bargaining process (GC Exh. 3). The proposed ground rules included such rules as: each party
 will designate only one spokesperson that is authorized to convey tentative proposals or make
 tentative agreements; and all proposals will be in writing marked with the date and time (Tr.
 238). The Union accepted Respondent’s proposed ground rules (Tr. 22). Also discussed during
 10 the ground rules negotiation was the Union’s practice to bring an overall agreement by the Union
 and Respondent to its members for ratification, but the requirement for ratification was not
 included in the ground rules agreed upon by the parties (Tr. 91–92, 127).⁶

15 The Union designated its Director Ralph Cornejo (Cornejo) as its spokesperson. Along
 with Cornejo, Union President Sal Rosselli (Rosselli), John Borsos (Borsos), optical employee
 Greg Tegenkamp (Tegenkamp), Otto Pimentel (Pimentel), and Gloria Villasenor (Villasenor)
 represented the Union during all or some of the bargaining sessions (Tr. 22).

20 From 2011 to 2015, Respondent designated three different spokespersons: Walter Yonn
 (Yonn), Mark Fisher (Fisher), and N. Christopher Comma (Comma).⁷ Since at least December
 2014, Comma, who works for Kaiser Foundation Health Plan (KFHP), served as Respondent’s
 spokesperson. Along with the spokesperson, TPMG managers Diane Ochoa (Ochoa), Steve
 French (French), and Joe Yuson (Yuson), as well as labor relations employees David Frizzell
 (Frizzell) and Sue Thergeson (Thergeson) represented Respondent during the bargaining sessions
 25 (Tr. 22).⁸ Furthermore, KFHP Group President/Executive Vice President Greg Adams (Adams),
 KFHP Senior Vice-President, National Labor Relations and Office of Labor Management

⁴ In its brief, Respondent alleges there is “conflict” in the unit description which demonstrates “why there is confusion and uncertainty as to the precise scope of the bargaining unit the alleged contract purportedly covers” (R. Br. at 4, fn. 3). Respondent raises this “conflict” for the first time in its brief. In its answer, Respondent essentially admitted to the unit description described by the General Counsel in his complaint. Furthermore, Respondent did not object to the certification being admitted into evidence, and raised no issues at the hearing. Thus, I rely upon the unit description, which was later clarified, admitted into evidence (GC Exh. 2, 6).

⁵ Service Employees International Union previously represented the optical employees at Respondent.

⁶ Cornejo stated, in a Board affidavit, “At the first session on January 13th, 2011 [Respondent’s spokesperson Walter Yonn] proposed what [sic] the ground rules. I did not believe the rules were necessary. I told [Walter Yonn] the parties needed to be flexible. Regarding tentative agreements we agreed that the parties would sign off on each tentative agreement reached with the date of agreement and that all tentative agreements were subject to an overall agreement which would require ratification by NUHW members so [sic] agree—that the parties would address and reach agreement on the non-economic issues before dealing with the economic issues” (Tr. 91).

⁷ Yonn and Fisher did not testify.

⁸ Respondent contracts with KFHP’s labor relations and executive leadership for handling its labor relations functions including contract negotiations (Tr. 368, 407). Thus, KFHP represented Respondent at the bargaining table with the Union. Throughout the record, the name “Kaiser” is used to refer to both Respondent and KFHP.

Partnership Dennis Dabney (Dabney), and KFHP Senior Vice President, Human Resources Gay Westfall (Westfall) represented Respondent during various discussions.

B. The Wage Proposal

The primary point of contention between the parties on whether they reached an agreement on the terms and conditions of employment for the optical employees is whether they agreed to a wage proposal that included retroactive wage increases.

C. Respondent’s September 7, 2012 Proposal

After months of negotiations, on September 7, 2012, Respondent presented the Union with a complete collective-bargaining proposal, effective October 1, 2012 through September 30, 2015 (GC Exh. 4). Article XII concerns wages with Section 1 stating:

Wage schedules payable are included herein in Appendix A.

October 1, 2012	2.5% ATB [across-the board]
October 1, 2013	2.5% ATB
October 1, 2014	2.5% ATB

(GC Exh. 4 (emphasis in original)). Appendix A, titled “Wage Scales,” states that “scales to be calculated and developed based on ATB increases.” At the conclusion of the proposal, Respondent noted, “The Employer reserves the right to add, modify, delete, or otherwise change proposals during the course of negotiations.”

D. Respondent’s December 18, 2012, Last, Best and Final Offer

Yonn presented to the Union on December 18, 2012, at 2 p.m., Respondent’s last, best and final offer. This last, best and final offer incorporated the paragraph and article numbers from Respondent’s September 7, 2012 proposal. Article XII, Section 1, “Wages” states:

As part of its last best and final offer, the Employer offers **3.0% ATB effective** as of the first pay period after **October 1, 2012**. The increase will be paid retroactive to that date. This increase is in place of and in lieu of any and all increases from any source whatsoever, including without limitation any provision of any agreement whether applicable or not.

October 1, 2013	2.5% ATB
October 1, 2014	2.5% ATB

(GC Exh. 5 (emphasis in original)). The proposed terms of the collective-bargaining agreement continued to be effective from October 1, 2012 through September 30, 2015. At the conclusion of the proposal, Respondent noted, “The Employer reserves the right to add, modify, delete, or otherwise change proposals during the course of negotiations.” Respondent’s last, best and final offer of December 18, 2012 was the first time Respondent offered retroactive wage increases (Tr. 26).

In May or June 2013, Union members voted on whether to accept Respondent’s December 18, 2012 last, best and final offer (Tr. 29). However, the Union members rejected Respondent’s offer at that time.

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E. Decertification Election

In the midst of the Union and Respondent’s bargaining sessions for an initial collective-bargaining agreement, the Service Employees International Union, United Healthcare Workers – West (SEIU–UHW) filed a petition for an election with Region 32 of the National Labor Relations Board (the Board). The Union intervened, and this petition resulted in an election where the Union was recertified on June 13, 2013, as the exclusive collective-bargaining representative of the optical employees. However, the unit description was clarified as follows:

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All full-time and regular part-time optical workers, including benchman journeypersons, contact lens assistants, contact lens fitters, contact lens trainees, inspectors, lead optical dispensers, optical dispensers, optical dispenser apprentices, optical equipment maintenance technicians, optical laboratory apprentices, optical services assistants, prescription stock clerk journeypersons, senior prescription stock clerks, special optical workers, surface grinder journeypersons, working foremen optical lab, and utility optical workers employed by the Employer throughout Northern California; excluding all other employees, branch managers, office clericals, guards, and supervisors as defined by the Act.

(GC Exh. 6).

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F. Respondent’s Unilateral Implementation

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Subsequently, on July 12, 2013, the Union presented a proposal to Respondent to initiate bargaining but after a caucus, Respondent declared impasse and provided notice to the Union of its intention to unilaterally implement specified articles and sections from its December 18, 2012 last, best, and final offer (which referenced paragraphs and articles from Respondent’s complete contract proposal of September 7, 2012) with all other terms and conditions of employment remaining the same (GC Exh. 7; Tr. 30). Articles and paragraphs to be implemented on August 1, 2013, included provisions on employees’ employment income security, a one percent contribution by employees to their 401(k) plans, and steward training days (Tr. 31). A change in the provisions on pensions and health insurance for active and retired employees became effective in January 2015 (Tr. 31). Respondent implemented these specified provisions during the time periods indicated.

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G. Respondent’s January 29, 2014 Comprehensive Proposal

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After implementing the specified provisions, Respondent presented the Union with a comprehensive proposal on January 29, 2014 (GC Exh. 8). This proposal rejected any Union proposals not specifically addressed within its proposal. The effective date of Respondent’s proposal was October 1, 2012, through September 30, 2015. Article XII concerned wages, and Section 1, Wages states,

Section 1 – Wages*(Last, Best and Final 12/18/2012)*

5 As part of its last best and final offer, the Employer offers a 3.0% ATB effective as of the first pay period after October 1, 2012. The increase will be paid retroactive to that date. This increase is in place of and in lieu of any and all increases from any source whatsoever, including without limitation any provision of any agreement whether applicable or not.

10 October 1, 2013 2.5% ATB
 October 1, 2014 2.5% ATB

15 (GC Exh. 8 (emphasis in original)). Respondent’s wage proposal in the January 29, 2014 proposal was the same as in its December 18, 2012 proposal. At the conclusion of the proposal, Respondent noted, “The Employer reserves the right to add, modify, delete, or otherwise change proposals during the course of negotiations.”

20 The Union submitted its comprehensive proposal for the optical employees on December 12, 2014 (R. Exh. 1).

H. Union Requests to Combine Bargaining Sessions

25 The Union also represents a unit of mental health care employees in Respondent’s Integrated Behavioral Health Services (IBHS). While the Union negotiated the collective-bargaining agreement for the optical employees, the Union also negotiated the collective-bargaining agreement for the IBHS employees. At some point, Respondent indicated that it wanted both collective-bargaining agreements to be the same or similar. The Union, on January 20, 2015, via Cornejo then requested to combine the bargaining for the two bargaining units as well as other bargaining units in the Southern California Permanente Medical Group (Tr. 38–39).

30 ⁹ Respondent, however, via Comma refused on January 28 (GC Exh. 10).

I. Respondent’s Internal Discussions Regarding Its Next Comprehensive Proposal

35 On February 4, Comma sent an email to Thergeson asking her to prepare Respondent’s comprehensive proposal for the optical employees, rejecting the Union’s counter proposal of December 12, 2014, regarding several issues including wage proposals and term of the contract (GC Exh. 28). Comma also requested Thergeson to make changes to the IBHS comprehensive proposal, and asked her to “leave a placeholder for wages as this work is underway” (GC Exh. 28).¹⁰ Thergeson agreed to make the changes Comma directed for the optical employees including removing the retroactive wage increases from Respondent’s last comprehensive proposal (GC Exh. 29).

⁹ Hereinafter, all dates are 2015 unless otherwise indicated.

¹⁰ Comma admitted that he did not ask Thergeson to put a “placeholder” in Respondent’s optical employees’ comprehensive proposal (Tr. 239).

On February 6, Thergeson sent Comma the draft comprehensive proposal for the optical employees (GC Exh. 30). The draft proposal included Comma’s directed changes which removed the retroactive wage increases proposed by Respondent since December 18, 2012 (Tr. 241). In this draft, Article XII, Wages states,

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Section 1 – Wages

The Employer rejects the Union’s proposal and offers the following modification to our Comprehensive Proposal dated January 29, 2014.

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The Employer offers a 3.0% across-the-board wage increase effective the pay period following ratification of a three year Agreement or effective date of the Agreement whichever is the latter. Upon the subsequent two anniversary dates of the initial 3% increase, employees covered by the Agreement shall receive a 2.5% across the board increase in base rate of pay.

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(GC Exh. 30 (emphasis in original)).

The original draft by Thergeson also included a question to Comma as to whether the Employer sought to modify the duration of its proposal for the optical employees since it would expire that same year. On February 11, Comma replied, informing Thergeson that the Employer would reject the contract article on duration (GC Exh. 31). Furthermore, he requested confirmation that Thergeson remove language regarding retroactive wage increases from the wage article for the optical employees.

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On February 13, Thergeson confirmed to Comma that retroactive wages had been removed from the Employer’s draft proposal for the optical employees; this email message also went to French, Ochoa and Yuson (GC Exh. 32). The draft proposal also reflected that the duration of the agreement would remain the same as the Employer’s comprehensive proposal dated January 29, 2014—from October 1, 2012 to September 30, 2015.

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That same day, French sent an email to TPMG Vice President, Chief Financial Officer Jerry Bajada (Bajada) and TPMG Vice-President of Human Resources Connie Wilson (Wilson) along with others (GC Exh. 33). French argued that it was time for Respondent “to get a contract and include ATBs plus a non-bargained incentive plan.” French provided further rationale for “getting closure” on the contract for the optical employees, explaining, “A ratification bonus of \$2K per NUHW employee to partially compensate Optical Workers for not receiving wage increases for 3+ years, but still be far less than paying full retrospective payment.”

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At some point, prior to the next bargaining session, Wilson spoke with Adams, Dabney, Westfall and Comma to ensure that they all understood that a retroactive wage proposal should no longer be offered to the Union (Tr. 454).

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Thereafter, Comma sent an email on February 16, indicating his next planned steps for bargaining with the Union (GC Exh. 34). Comma stated that he planned to “share we are prepared to reject their counters which they gave us on 12/14 and we discussed in 1/6 (I am also taking retro off the table, which was offered as a previous proposal in 2013).” Later that day,

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Westfall responded, carbon copying among others Dabney, that she would be available if a conference call was needed. That evening Dabney replied to Comma, carbon copying Westfall and KFHP in-house attorney Robert Spagat (Spagat), along with Henry Diaz (Diaz), writing,

5 I am not sure if I am fine with your approach. Did you discuss with Spagat whether we need to remove retro from table? What does that do? What are their December proposals and what has taken us so long to reject? I thought we were just going to see if Ralph had proposals to make.

10 (GC Exh. 40).¹¹

The following morning, Comma sent Thergeson an email stating, “There is some concern about removing retro from our previous proposals so we will have to leave our proposal as it was” (GC Exh. 39). Comma admitted in his Board affidavit, “The reason for my decision to remove the ATB’s and leave the old contract language in the February 17th proposal was based on advice by my legal counsel” (Tr. 253).

Thergeson complied with Comma’s request and *reinserted* the wage language from Respondent’s January 29, 2014 comprehensive proposal. Specifically,

20 **ARTICLE XII – WAGES**

Section 1 – Wages

25 ***The Employer rejects the Union’s proposal and holds to our position as stated I[sic] our Comprehensive Proposal dated January 29 to our Comprehensive Proposal dated January 29, 2014.***

30 As part of its last best and final offer, the Employer offers a 3.0% ATB effective as of the first pay period after October 1, 2012. The increase will be paid retroactive to that date. This increase is in place of and in lieu of any and all increases from any source whatsoever, including without limitation any provision of any agreement whether applicable or not.

35 October 1, 2013 2.5% ATB

¹¹ Respondent, in its brief, continued to object to the admission of this email from Dabney as privileged attorney-client communication (R. Br. at 6–7, fn. 9). At the hearing, I conducted an in camera inspection, upon the request of the parties, of this email along with two other emails after Respondent filed a petition to revoke, albeit three weeks late, claiming attorney-client privilege (R. Exh. 9; GC Exh. 51, request #6). I ruled that this email from Dabney would not be considered attorney-client privilege as it contained no legal advice from Spagat as in-house attorney. Dabney simply asked Comma to ask Spagat what legal advice he could offer. Although it was a close call, because the email communication simply conveys questions with no legal advice, I stand by my ruling that the email is not covered by the attorney-client privilege. Furthermore, even though I also ruled that Comma did not waive the privilege, he admitted in his Board affidavit to keeping the retroactive wage increases in Respondent’s comprehensive proposal after speaking with legal counsel (Tr. 253). Regardless, I give this email little weight as its contents are not dispositive to this decision.

October 1, 2014 2.5% ATB

(GC Exh. 35 (emphasis in original)). Furthermore, in Appendix A, Wage Scales, the Employer reiterated its rejection of the Union’s ATB proposal and held to its position as stated in its comprehensive proposal dated January 29, 2014. The Employer also maintained its January 29, 2014 position on the duration of the agreement—October 1, 2012 to September 30, 2015.

J. Respondent’s February 17 Comprehensive Proposal

At the February 17 bargaining session, Respondent, represented by Ochoa, Yuson, Thergeson, French and Frizzell, provided the Union, represented by Cornejo, Tegenkamp, and other unidentified Union members, with a comprehensive proposal (GC Exh. 11; Tr. 255).¹² Respondent’s proposal countered the Union’s December 12, 2014 comprehensive proposal “in its entirety.” The effective date of Respondent’s proposal was from October 1, 2012 to September 30, 2015. Respondent’s proposal covered all open issues between the parties, and any omission was unintentional. Article XII concerned wages:

Section 1 – Wages

The Employer rejects the Union’s proposal and holds to our position as stated I[sic] our Comprehensive Proposal dated January 29 to our Comprehensive Proposal dated January 29, 2014.

As part of its last best and final offer, the Employer offers a 3.0% ATB effective as of the first pay period after October 1, 2012. The increase will be paid retroactive to that date. This increase is in place of and in lieu of any and all increases from any source whatsoever, including without limitation any provision of any agreement whether applicable or not.

October 1, 2013 2.5% ATB
October 1, 2014 2.5% ATB

(GC Exh. 11 (emphasis in original)). At the conclusion of the proposal, Respondent noted, “The Employer reserves the right to add, modify, delete, or otherwise change proposals during the course of negotiations.” Respondent presented the same proposal to the Union that was provided by Thergeson to Comma that morning. The wage proposal in this proposal remained the same as

¹² A mediator was present for this bargaining session.

Respondent’s December 18, 2012 and January 29, 2014 comprehensive proposals.¹³ The comprehensive proposal contained all tentative agreements to form a contract (Tr. 347).

5 It is undisputed that Comma never stated during this bargaining session that Respondent’s wage proposal was actually a “place holder” or “dead letter” and Respondent would submit a new wage proposal at a later date (Tr. 43, 135, 258, 308). Cornejo testified credibly that Respondent never said during this bargaining session that its wage proposal should be disregarded (Tr. 44). Tegenkamp testified credibly that Respondent never stated that the wage proposal was a mistake (Tr. 135). Comma also admitted that during this bargaining session, none of Respondent’s representatives mentioned any concerns with Respondent’s comprehensive proposal including retroactive wage increases (Tr. 256–257).¹⁴

15 At this bargaining session, the Union made two proposals: a new article concerning the optical incentive plan, and modifications to the Union’s February 17 proposal concerning union staff representatives and shop stewards (R. Exh. 4). The parties reached tentative agreements on tuition reimbursement and on the list of facilities with employees covered by the collective-bargaining agreement (Tr. 136).

20 After the bargaining session ended, French and Ochoa called Wilson to inform her of a couple of matters including the fact that retroactive wage increases remained in Respondent’s comprehensive proposal (Tr. 371, 432). Wilson was “surprised” and “shocked” since “they” had agreed not to include it (Tr. 371, 455). Thereafter, a scheduled telephonic bargaining debriefing session began at 5 p.m. Comma told Wilson not to be concerned, and that a correction to the wage proposal would be made (Tr. 460–461). Comma also pointed out that the contract term ended in September 2015, which did not match Respondent’s desire for a two-year contract (Tr. 25 461). Wilson could not recall if Comma used the term “placeholder” during their phone call (Tr. 433–434, 452).

¹³ I do not credit Comma’s testimony that Respondent’s wording in Article XII whereby Respondent rejected the Union’s proposal and repeated its last, best and final offer was merely a “placeholder” or “dead letter” (Tr. 304). Even though Respondent’s wage article states that Respondent holds to its position, Comma rationalized at the hearing that since the Union previously rejected the retroactive wage proposal, the Union could no longer accept this same proposal (Tr. 349–350). Comma testified that once a proposal has been rejected, it can no longer be accepted (Tr. 341). Comma also explained that the proposal to the Union on February 17 was not a last, best and final offer so the Union could not accept it as such (Tr. 307, 348–349). Comma’s rationale is not supported by Board law. In collective-bargaining, the Board and courts do not apply common-law rules of contract formation. An offer is not automatically terminated by the rejection or counteroffer of the other party. *Kasser Distiller Products Corp.*, 307 NLRB No. 138, 903 (1992) (citing *Lozano Enterprises v. NLRB*, 327 F.2d 814, 817 (9th Cir. 1964)).

¹⁴ The General Counsel called Comma as an adverse witness under Federal Rules of Evidence (FRE) 611(c). During this portion of his testimony, Comma stated that he called for a caucus during this bargaining session, and explained to Respondent’s representatives why the retroactive wages were included in Respondent’s comprehensive proposal (Tr. 257, 316). However, on direct examination by Respondent’s counsel, Comma testified that wage proposals were not discussed during the caucus (Tr. 317, 319–320). Comma’s testimony was inconsistent and not reliable. As an FRE 611(c) witness, Comma’s memory needed to be refreshed several times with his Board affidavit which also undermined his credibility.

K. Events after Respondent’s February 17 Comprehensive Proposal

The following day, February 18, Tegenkamp sent an email to all optical stewards, summarizing the previous day’s bargaining session (GC Exh. 26).¹⁵ Tegenkamp noted, “[O]n the positive side, they gave us a complete proposal on open issues which kept the retroactive raises intact, modified some of their other proposals in a positive way and for the first time in bargaining, included a proposal to have an Incentive Plan for optical.”

Also, on February 18, Wilson wrote an email to French, Ochoa, and Managing Director of Medicaid Support Services Maryjo Williams (Williams), who worked for Wilson, with her advice on what to recommend to the Union regarding the wage and duration proposal “to completely replace what was put on the table yesterday” (R. Exh. 5). Wilson recommended no retroactive wage increases but rather future across-the-board increases and a three-year contract. Wilson then informed Ochoa, Williams and French on February 19 that she had informed the “labor strategy team” of their desired proposal (R. Exh. 5). Wilson met with Westfall and Comma, and possibly Dabney, informing them of Respondent’s strategy (Tr. 470).

L. February 21 Side Bar Meeting

In early February, Rosselli spoke with Adams about having “off-the-record discussions” to attempt to resolve the pending collective-bargaining agreements for the optical employees and IBHS employees (Tr. 45, 164, 192–193, 607). The Union sought these discussions due to the issues remaining at the bargaining table for both bargaining units including the issue of retroactive wages for IBHS employees (Tr. 46, 194). Adams admitted these discussions were not negotiations (Tr. 617). They both agreed to hold these meetings but Adams insisted that these meetings concern the IBHS contract only (Tr. 46, 374). For the Union, Rosselli attended along with Cornejo and IBHS chapter president Clement Papazian (Papazian).¹⁶ Papazian attended since these discussions were to concern only IBHS employees (Tr. 166). As a corollary, no optical bargaining unit employees attended the side bar discussions. For Respondent, Adams attended along with Dabney and Wilson.¹⁷

¹⁵ As soon as February 19, Respondent’s management and labor relations representatives became aware of the Union’s summary of the February 17 bargaining session. Comma, Spagat, Yonn, Thergeson, French, Diaz, Wilson, Williams, Ochoa, Yuson and Bajada received a copy of Tegenkamp’s email to the optical stewards which included the maintenance by Respondent of “retroactive raises” (GC Exh. 37).

¹⁶ Papazian initially appeared nervous when testifying, and could not recall many details of the sidebar meeting. However, Papazian calmed himself, and then recalled specific details from the meeting. Despite his initial apprehension, I found Papazian to be one of the more reliable witnesses.

¹⁷ Wilson took notes before the side bar meeting as to what Respondent needed to discuss regarding IBHS (R. Exh. 6 (identified as the first page of the substantive notes); Tr. 473). Significantly, the first page of her notes indicates no retroactive wages. However, based on the undisputed purpose of this side bar meeting, the reference to no retroactive wages likely concerns the IBHS employees’ contract, not the optical employees. Wilson also took notes during the meeting (Tr. 473 (identified as the second page of the substantive notes)). Wilson’s notes indicate the Union felt that Respondent was trying to “undermine” it. However, it is unclear from Wilson’s testimony and her notes to which bargaining unit her notes refer (Tr. 523–524).

Prior to this meeting, Wilson, Dabney and Adams met to prepare for the side bar meeting concerning IBHS employees (Tr. 472).¹⁸ During this meeting, Wilson testified that they discussed needing to inform “the Union that the retroactive wage proposal [for the optical employees] for 2012 had been made in error,” and they would be doing so at the side bar meeting (Tr. 472). Dabney, perhaps at this meeting, also stated that the retroactive wage increases in Respondent’s comprehensive proposal for the optical employees was in error (Tr. 545).¹⁹ Dabney testified, “A decision was made to advise them at our first sidebar meeting” (Tr. 546).²⁰ Dabney further explained, “Concerning the 2013 retro, we would let them know right up front that [it] was done in error and we were going to issue a notice to correct it” (Tr. 547).

The first side bar meeting took place on February 21 at the Oakland Airport Hilton Hotel. The meeting began with Adams emphasizing that the side bar discussions only concerned IBHS employees (Tr. 48, 167, 195, 625).²¹ Adams sought “a path forward,” and once the contract for IBHS could be completed, then they could move onto the other outstanding contracts to be completed and finalized (Tr. 48, 165–166, 195).²²

¹⁸ Adams did not recall this meeting (Tr. 608–609). Significantly, he could not recall whether he discussed with Wilson and/or Dabney the need to bring the “disconnect” regarding the retroactive wage increases for the optical employees to the Union’s attention at the side bar meeting (Tr. 609).

¹⁹ I do not credit the testimony of Dabney. Consistently throughout his testimony, Dabney could not recall key facts and provided vague answers. As KFHP’s executive responsible for labor relations, Dabney’s lack of recollection for events surrounding the critical issue of the retroactive wage increases for the optical employees was unbelievable. For example, Dabney testified that he could not recall whether he spoke to Comma after he asked him to speak to in-house attorney Spagat regarding removing the retroactive wage proposal from Respondent’s comprehensive proposal (Tr. 544). He also testified he was not sure which email messages he received (when he clearly responded to these messages), who spoke with him regarding the retroactive wage increases, and to which email message he was responding (Tr. 594–595, 604). Furthermore, Dabney could not recall anything that Adams or Wilson said in response to his affirmative suggestion that they needed to correct the error at the side bar meeting (Tr. 454). These are but a few examples where Dabney failed to respond to even the most basic question. Overall, I could not credit his testimony.

²⁰ I do not credit either Wilson or Dabney regarding this meeting. Respondent consistently insisted that the side bar meetings were only to discuss IBHS employees, not the optical employees. Furthermore, even if Wilson or Dabney determined that they needed to correct the “error” or “mistake” at the side bar meeting, neither made affirmative steps to do so at the meeting unlike Dabney’s testimony that they would correct this “error” “right up front” (Tr. 547). First, it is undisputed that Adams started the meeting emphasizing that the sidebar meeting was only to discuss IBHS employees. Only after Rosselli pointed out the inconsistency in Respondent’s position on retroactive wages between the two bargaining units did Dabney tell the Union that Respondent planned to correct its wage increase for the optical employees by sending a letter or notice (Tr. 597–598). Thus, the issue of retroactive wage increases for the optical employees only arose after Rosselli compared the two units. It is possible that Dabney or Wilson intended to mention the “error” later during the meeting, but it seems unlikely considering the purpose of the meeting. I cannot credit Adams’ testimony regarding this meeting either. Adams appeared to testify sincerely but could not recall significant events. Thus, I decline to rely upon his testimony.

²¹ I do not credit Dabney’s testimony that the side bar discussion was not limited to the IBHS employees only as this testimony is contradicted by credible testimony (Tr. 579–580).

²² The parties agreed any agreements reached during the side bar meetings would need to be brought back to the bargaining committee (Tr. 48).

During this meeting, Rosselli spoke about the issue of retroactive wages for the IBHS employees, and questioned why Respondent would offer retroactive wages for the optical employees but not for the IBHS employees (Tr. 48, 179, 198, 375, 613–614). Dabney then spoke and said that Respondent planned to send a letter or notice withdrawing retroactive wages for the optical employees (Tr. 49, 171, 179, 198, 375, 479).²³ Hearing this news, Rosselli became angry, “got red in the face, jumped up and said that’s a non-starter” (Tr. 49, 171, 198, 376, 479, 523, 550). Rosselli and Dabney engaged in a heated exchange, and Dabney then waived a piece of paper and a pen in the air, telling Rosselli to sign the collective-bargaining agreement for the optical employees (Tr. 198–199, 428, 490–491, 528–529).²⁴ Neither Adams nor Wilson intervened and told Dabney and the Union representatives that the Union could not accept Respondent’s comprehensive proposal because the wage proposal was rescinded (Tr. 428). At that time the Union declined to sign the agreement. The Union representatives then left the room to caucus.

During the Union’s caucus, Rosselli, Cornejo and Papazian agreed that they did not want to continue the side bar discussions if Respondent planned to withdraw the wage proposal for the optical employees (Tr. 51, 174, 200). They walked back into the meeting with Respondent.

When they returned to the meeting, Adams spoke to the Union representatives, saying that he felt they could continue their discussion (Tr. 175). Rosselli told Respondent’s representatives that the side bar discussions would not go forward if Respondent sent a letter withdrawing the wage proposal from Respondent’s comprehensive proposal for the optical employees (Tr. 175, 201). Dabney then told the Union representatives that Respondent would not be sending a letter withdrawing the retroactive wages for the optical employees (Tr. 51–52, 175, 201).²⁵ Thereafter, the Union and Respondent began talking about issues concerning the IBHS employees (Tr. 52, 175, 201).

²³ Wilson claimed that Respondent informed the Union of the “mistake” or “error” of including retroactive wage increases in Respondent’s February 17 comprehensive proposal (Tr. 421, 477–478). Dabney testified that he informed the Union that the retroactive wage proposal for the optical employees was made in error (Tr. 550, 558). Adams also testified that Dabney stated that the retroactive proposal for the optical employees was a “mistake” (Tr. 614). I do not credit Wilson, Adams or Dabney’s testimony on this point as it is directly contradicted by their contemporaneous email exchanges after the Union accepted Respondent’s comprehensive proposal on March 14. These emails, to which they were recipients or senders, make no mention of notifying the Union of the “mistake” or “error” during the side bar meeting.

²⁴ I particularly do not credit Dabney’s sequence of events that after the caucus he gestured to the Union to sign a piece of paper representing Respondent’s comprehensive proposal for the optical employees (Tr. 553). Also, I do not credit Cornejo’s testimony that Dabney never invited Rosselli or he to sign the optical employees’ contract as it is contrary to the credible testimony of other witnesses (Tr. 109).

²⁵ Cornejo and Rosselli credibly denied ever saying during this meeting that if Respondent sent them a letter withdrawing retroactive wage increases for the optical employees, that they would be obligated to share it with the optical employees (Tr. 52–53, 199, 201). Cornejo and Rosselli also credibly denied ever asking Respondent to delay or hold off sending a letter withdrawing retroactive wages (Tr. 53, 199, 201). Papazian credibly testified that Rosselli never asked Respondent to delay sending a letter withdrawing their wage proposal (Tr. 177). In contrast, Dabney incredibly testified that after the Union returned from the caucus, Rosselli again stated that removing retroactive wage increases for the optical employees was a “nonstarter for them in order to keep these [sidebar] conversations going”, and instead

It find that, during the February 21 side bar meeting, no one from Respondent told the Union that their February 17 comprehensive proposal contained a mistake regarding the wage proposal (Tr. 50, 177, 180, 199). And no one from Respondent told the Union that they would be submitting a correct wage proposal at a later date (Tr. 54, 176, 203).²⁶ Furthermore, no one from Respondent told the Union that retroactive wage increases would only be for 2012 and not for subsequent years (Tr. 119).²⁷ They also agreed to meet again to discuss the IBHS contract. No further discussions of the optical employees’ contract occurred during these subsequent side bar discussions (Tr. 177, 205).

M. Events after the February 21 Side Bar Meeting

The day after the first side bar meeting, Comma sent Cornejo an email the morning of February 22.²⁸ Comma wrote, “It was not our intent to include our wage proposal from January 29, 2014, in the Employer’s comprehensive proposal presented at the Optical unit table on February 17, 2015. We will provide a comprehensive proposal with a corrected wage proposal

suggested that Respondent not send the letter at that time to be able to continue the side bar meetings (Tr. 552, 589–600).

²⁶ Wilson’s testimony regarding the chronology of events during the side bar meeting shifted during her testimony. At one point Wilson testified that the Union representatives became upset when they were told that Respondent planned to send a letter to the Union withdrawing the retroactive wage proposal for the optical employees (Tr. 478—“NUHW kind of blew up”). However, later during her testimony, Wilson presented a milder version of events. Wilson testified that after either Dabney or Adams, or both, told the Union that the retroactive wage increase for the optical employees was in error, the Union went to caucus and came back to the meeting to discuss financial losses for members for both IBHS and the optical employees (Tr. 485). Towards the end of the meeting, the parties discussed whether it would be beneficial to meet again (Tr. 487). Respondent and the Union agreed it would be beneficial to meet again, despite Respondent emphasizing that retroactive wage increases for optical employees would be rescinded (Tr. 487–488). After setting dates, at the conclusion of the meeting, Rosselli asked Respondent to delay sending the letter rescinding retroactive wage increases (Tr. 486, 498–490). Wilson testified that Rosselli stated, “We’re meeting tomorrow with union members. It would be really helpful if you could not send out that letter yet” (Tr. 490). Adams agreed. I do not credit Wilson’s testimony on her version of events during the side bar meeting. If the meeting occurred as she testified, then her email dialogue subsequent to the Union’s acceptance of the February 17 comprehensive proposal would have been very different. Wilson likely would have said that Rosselli, or the Union, asked the Employer to delay sending the letter. Instead, her emails indicated that Respondent knew it failed to rescind the retroactive wage proposal, and someone at Respondent would be held accountable. During her testimony, Wilson claimed that her emails were not entirely accurate because she was on vacation at that time (Tr. 532–534). Wilson’s attempt to rehabilitate her contemporaneous emails fails.

²⁷ Dabney testified that only the 2012 across-the-board increases would be retroactive, and 2013 and 2014 would not because the agreement does not specify as such (Tr. 577–578). Furthermore, Comma testified similarly. Dabney also admitted though that he attended none of the bargaining sessions between Respondent and the Union concerning the optical employees, and had no involvement in the preparation of the proposal (Tr. 543, 586). As discussed hereafter, I reject Dabney and Comma’s interpretation of the wage proposal.

²⁸ On February 19 or 20, prior to the first side bar meeting, Dabney, Wilson, Ochoa, French, Comma, Yuson and Spagat participated in a conference call (Tr. 291–292). During the call, it was decided that Comma would send a letter to the Union withdrawing any proposal for retroactive wages.

at or before our next bargaining session on March 9, 2015. In the meantime, please consider the January 29, 2014, wage proposal to be withdrawn” (GC Exh. 12).²⁹ Comma, in his Board affidavit, admitted, “Instead of offering a new proposal on February 17, 2015, we left the old language in the proposal and were planning on offering a proposal for addressing wages at a later bargaining date” (Tr. 260–261).

The following morning, Cornejo replied to Comma’s email. Cornejo wrote, “You should talk to Dennis Dabney” (GC Exh. 13). Cornejo, in a subsequent email stated, “or greg Adams” (GC Exh. 14). Less than ten minutes later, Comma replied, “Will do. Hold on” (GC Exh. 14).

Comma testified in his Board affidavit, “I spoke with Dennis [Dabney] on the phone. I told him that I sent the letter informing Ralph [Cornejo] that we were withdrawing the wage proposal from the optical proposal and that another one would be forthcoming. Dennis told me that in side-bar conversations with Ralph and Sal [Rosselli] for the IBHS unit he had informed them that there was no retros in the optical proposal and he told me they were not happy. He told me that in an effort to keep the side-bar conversations or negotiations going, he wanted me to pull back my letter, which I did by my email dated February 23, 2015, when I informed Ralph to disregard my prior e-mail. I did not speak with Ralph regarding the wage proposal on the phone or in person at this time” (Tr. 294–295).³⁰ Comma stated that Dabney did tell him that they had withdrawn the retroactive wage increases verbally but not in writing (Tr. 295).

Approximately twenty minutes later, Comma wrote,

Please disregard.

:)

I am on a conference call but can we agree to meet at 12:00pm tomorrow? Don³¹ is in a meeting tomorrow morning that he has to attend and as you know, he is crucial to any ongoing conversation.

(GC Exh. 15).

N. Union Accepts Respondent’s Comprehensive Proposal on March 14

Three weeks later, on March 13, Rosselli, Cornejo and Tegenkamp held a conference call with the stewards of the optical employees unit (Tr. 62). The Union decided to hold the call because they had heard that the optical employees were “tired of not having a contract in place, they wanted the retroactivity” (Tr. 63, 207).³² The optical stewards generally acknowledged that

²⁹ No bargaining session appears to have taken place on March 9.

³⁰ Comma’s subsequent testimony on direct examination appeared to contradict his Board affidavit (Tr. 325).

³¹ The record is unclear as to the identity of “Don”.

³² As the years passed following the Union’s certification, many, if not all, of Respondent’s employees received wage increases through their various collective-bargaining agreements. The employees represented by the Union, however, including optical employees, have not received wage increases in at least 5 years.

the other bargaining units were not receiving retroactive wage increases (Tr. 142). Tegenkamp also added that the call was held because the Union thought that the contract should be completed “quickly” (Tr. 142–143). Rosselli, Cornejo and Tegenkamp recommended that the members should accept Respondent’s offer of February 17 (Tr. 209). During the call, the
 5 stewards decided to accept Respondent’s contract proposal (Tr. 64). The stewards recommended that Cornejo notify Respondent immediately of its decision to accept Respondent’s February 17 offer (Tr. 210). Tegenkamp acknowledged concerns that Respondent would withdraw retroactive wage increases for the optical employees (Tr. 152).

10 Accordingly on March 14, Cornejo sent a letter to Comma, accepting Respondent’s last, best, and final offer for the optical bargaining unit. Cornejo wrote,

15 This letter serves as notice that the National Union of Healthcare Workers (NUHW) accepts the Employer’s last, best, and final offer made to NUHW on 12/18/12 regarding the Optical bargaining unit and as subsequently modified by the Employer on 1/29/14 and 2/17/15.

(GC Exh. 16). Because Cornejo could not email the letter directly to Comma due to technical difficulties, Fred Seavey, the Union’s Research Director, sent Comma the letter (Tr. 65).

20 Comma admitted he received this email but when he received the email he thought it was a “joke” because he did not recognize Seavey and was “shocked” and “confused” because he had not given a “last, best and final” (Tr. 327). Despite his reaction, Comma did not immediately question the Union as to which proposal it was accepting nor did he inform the Union that there was no collective-bargaining agreement due to the lack of wage proposal for the Union to accept
 25 (Tr. 268–269).

Also on March 14, Rosselli called Adams for a previously scheduled conference call to discuss the IBHS contract (Tr. 210). Rosselli immediately told Adams that the optical stewards unanimously accepted Respondent’s last, best and final offer (Tr. 211, 622). Adams reacted
 30 positively to this news, and commented that they could now focus on the other bargaining units whose contracts continued to be negotiated (Tr. 211, 622). Adams never questioned which proposal the Union had accepted nor did he question how the Union could have accepted a contract if there was no wage proposal (Tr. 211). Adams testified that he assumed the Union accepted the last, best and final offer without the retroactive wage increases (Tr. 623, 628).

35 After the call, Adams wrote to Wilson and Dabney, along with one other official Charles Columbus (Columbus), that “Optical agreed to our final proposal this morning” (R. Exh. 12). He further relayed that Rosselli told him that the therapist in IBHS “were angry very about no retro. Some wanted to cut off our side bars. He noted that most wanted to continue.” Adams
 40 continued, “He and I, had the usual discussion of no retro, with my being very clear that we have to focus on moving this forward” (R. Exh. 12).

Thereafter, Dabney responded to an inquiry from Columbus as to what “final proposal” the Union accepted (R. Exh. 10). Columbus hoped the accepted proposal did not include
 45 retroactive wage increases, and Dabney responded, “I think it will look similar to what we have proposed. Definitely no retro.”

Respondent's Internal Email Discussions

On March 16 at 8:16 a.m., Comma sent an email to Dabney, Westfall and Diaz, forwarding the Union's acceptance of the Employer's last, best and final offer, writing, "Did we reach a deal with them or was this an email sent to me by mistake? I haven't responded" (GC Exh. 38, 41). Comma testified that outstanding bargaining issues existed at the time the Union accepted the February 17 proposal (Tr. 336). The outstanding issues included wages, the incentive plan, number of stewards and contract specialists and the appendix, medical benefits, and duration of benefits (Tr. 338).

An email discussion ensued among Respondent's management team and labor relations officials, highlighting internal confusion as to which proposal the Union accepted. Westfall queried at 8:20 a.m., "If Optical is done, I don't think we have the amendments Ralph references." Wilson, who replied to this email string while on vacation, wrote at 9:10 a.m.,

We didn't discuss Optical at our behind the scenes discussions [February 21 side bar meeting] and instead said we would talk about Optical after we reached agreement on IBHS. I assumed management presented proposals to Optical when they last met at the regular bargaining table. Is that accurate. Otherwise, we can ask Ralph to provide us with copies of they reviewed with the optical workers to make certain we are aligned? Alternatively, we can give them a copy of what we understand to be our current LBF. We do want these workers to have raises.

I am feeling the need to let Diane [Ochoa] and Steve [French] know we have reached a deal.

(GC Exh. 38, 41).

At 9:57 a.m., Wilson sent another email to Westfall, carbon copying Adams, Dabney, and Comma, writing,

I am also recalling we last offered, in error, retro increases for '12, '13 and '14. We [referring to Dabney, Adams and Wilson at the February 21 side bar meeting] told Sal and Ralph they could just accept the offer and we agreed not to retract the retros from our offer. I suspect that's why they are accepting that last full contract proposal. It's the best deal they are going to get and they know it.

(GC Exh. 38, 41; Tr. 420).³³

Westfall wrote at 10:10 a.m., "We pulled the retro letter, right? So this may be an attempt to force the retro" (GC Exh. 53). Wilson replied at 10:13 a.m., "We did and in fact Dennis, Greg

³³ Wilson testified, contrary to her email of March 16, that at the end of the February 21 side bar meeting, the Union asked Respondent to delay notifying the Union that Respondent was removing the retroactive wage proposals (Tr. 421). Wilson explained during her testimony that she did not use the term "delay notifying" or words to that effect in her emails but does not know why (Tr. 421). Furthermore, Dabney admitted that he did not reply to Wilson or anyone else on the email list to correct Wilson's version of events, as now claimed during the hearing (Tr. 591). Adams also did not reply to this email because he only opened and read the emails a couple of days before the hearing (Tr. 629–630).

and I told them they could just accept our offer with the retros included. They made a wise choice” (GC Exh. 53). Diaz then wrote, “But I understand directly from Dennis that Ralph declined to accept the agreement at that time” (GC Exh. 53).

5 At the same time, Wilson emailed Ochoa and French at 9:22 a.m., to inform them that the Union is “ready to accept a contract proposal” but that she needed to clarify the details (GC Exh. 43). French responded at 9:33 a.m., “I’m also eager to know the details, especially around retro. When we spoke last, you said you would connect with us on this point, ideally before it’s inked” (GC Exh. 43). Wilson replied at 9:39 a.m., “Definitely no retro” (GC Exh. 43). Wilson wrote
10 again, “On second thought, I suspect they are taking the retro increases that were accidentally included in our last offer [of February 17]. Sorry for the confusion” (GC Exh. 43; Tr. 419).

French responded to Wilson at 10:22 a.m., “Ok Connie..this potentially will be a very costly mistake and I really don’t know how it occurred after a long and thoughtful bargaining” (GC Exh. 44). Wilson replied at 10:29 a.m., “As you know, the misunderstanding regarding the retro was among KFHP people [between Dabney and Comma]. It’s best we stay out of it for the moment” (GC Exh. 47; Tr. 426).

In an email to Bajada at 10:39 a.m., Wilson continued to describe the inclusion of the retroactive wage increases in Respondent’s February 17, 2015 comprehensive proposal as a
20 “mistake” which “squarely rests with KFHP” (GC Exh. 48). Bajada, in turn, wanted to know if “[Kaiser Foundation] Health Plan acknowledged they have made a mistake sending the version with the retros” (GC Exh. 49). Wilson wrote, “And yes, they [KFHP] know they made a mistake. We (Steve, Diane and I) brought this to KFHP’s attention several weeks ago” (GC Exh.
25 50).

Wilson forwarded some, if not all, the back-and-forth emails of that day to TPMG Vice President, Regional Medical Group Administrator Timothy Wemple (Wemple) to keep him informed since he would be taking her position soon due to her upcoming retirement. At 10:07
30 a.m., she wrote to Wemple, “This will be very interesting. SEIU–UHW will be mad we gave retros. NUHW will use the fact that we gave retros to Optical to try and get them for the other 4 units they represent. The error of including retros rests squarely with KFHP” (GC Exh. 43). Wemple wrote to Wilson at 10:23 a.m., “Yes. Seems like Christopher [Comma] thought he could get it off the table . . . lesson learned in that process about making sure dots are connected
35 in a matrixed organization” (GC Exh. 45). Wilson replied at 10:27 a.m., “You got it. Christopher says Dennis told him he had to leave the retro language in the offer or it would be considered regressive bargaining. Dennis says that’s not what he said or meant. Gay has been upset that Dennis hasn’t been involved enough and isn’t providing clear direction. The concern [for Westfall] is that Christopher [Comma] would be blamed for this” (GC Exh. 46; Tr. 425).³⁴
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Wemple also wrote to Wilson at 11:27 a.m.,

I hope we “the medical group” don’t take the hit economically for the disconnect on the labor relations side....not sure the dollar value....and maybe it is worth it....I’m still

³⁴ In direct contrast to Wilson and Comma’s testimony, Dabney denied ever saying that withdrawal of the retroactive wage proposal would constitute regressive bargaining (Tr. 588, 595–596).

thinking through the tradeoffs on all sides....plus not quite sure how you say to optical yes retro and NUHW no retro....complicated....thanks for keeping me in the loop.

5 (GC Exh. 38, 41). Wilson responded to Wemple at 12:12 p.m., “We’ll talk more when I’m back but this has complicated things. TPMG won’t get financially penalized on this one” (GC Exh. 38, 41).

10 Meanwhile, that same day, March 16, due to Respondent’s confusion as to which proposal the Union had accepted, Comma called Cornejo for clarification (GC Exh. 54; Tr. 66, 106–107, 329).³⁵ Cornejo stated that the Union was accepting Respondent’s comprehensive proposal of February 17. Cornejo testified that Comma asked him if the Union was accepting certain specific changes to the collective-bargaining agreement including whether the Union was accepting the tuition reimbursement provision (Tr. 67). However, Comma did not ask him about the wage proposal nor did Comma state that the parties still had not reached tentative agreement
15 on certain terms (Tr. 67–68, 269, 329–330).

Thereafter, at 11:16 a.m., in an email to many of Respondent’s labor relations and human resources officials, Comma wrote,

20 [. . .]

Of note are a couple of items that we should have a position on regarding what we proposed:

25 Although we contemplated removing retroactivity regarding the wages several times, we never did. Thus, if they accept the comprehensive proposal, they will do so with retroactivity still included. The proposal however, states: “As part of its last best and final offer, the employer offers a 3.0% ATB effective as of the 1st pay period after
30 October 2012. The increase will be paid retroactive to that date. This increase is in place of and in lieu of any and all increases from any source whatsoever, including, without limitation, any provision of any agreement whether applicable or not.”

35 Does this mean that we will pay a 3% retro each year going back to 2012 for 2 ½ years versus 3 years?

[. . .]

Effects of the comprehensive:

40 Retroactive payments are included in the comprehensive proposal;

[. . .]

³⁵ Comma asked Frizzell to attend the call with Cornejo so he would have a witness (Tr. 329). Frizzell did not testify.

Please let me know our position on the above areas as we will have to prepare and send him a comprehensive tentative agreement for ratification by his members.

(GC Exh. 54).

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On March 19, Yonn, in response to these questions from Comma, stated regarding the wage proposal,

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It is not so much that retro was proposed—the proposal is retroactive if effective dates of increases are retrospective. This is of course always the case unless one of the parties proposes otherwise . . . such as “effective upon ratification”. The original pay proposals when bargaining began in early 2011?? [sic] Were of course prospective until the parties bargained past expiration. All other NUHW tables adjusted their proposals I believe to make raises prospective. We did not adjust out [sic] [last best offer] in 2012 per legal

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advice at the time. I suspect we could have done so in the several years following.

(GC Exh. 52).³⁶

Union’s Endorsement Vote

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On March 17, the Union scheduled a vote to “endorse” the optical stewards and bargaining team’s decision to accept Respondent’s final offer made during contract negotiations. The voting period ran from March 24 to March 30, depending on the location of the employees. The Union distributed a notice of the vote via mail and email to all bargaining unit employees as well as asked the local Union stewards to post and distribute the notice. The notice of vote indicated that Respondent’s final offer maintained the already implemented changes to retiree health insurance as well as higher co-pays for current employees but also included across-the-board wage increases retroactive to October 2012, October 2013, and October 2014 (GC Exh. 18). Along with the notice to vote, the Union provided to the bargaining unit employees a summary it created of Respondent’s last, best and final offer. The Union wrote, “After this very long fight to achieve the first NUHW Optical Contract in Kaiser Permanente, the bargaining committee has determined that we should accept the Kaiser’s last, best, and final offer including Kaiser’s amendments to its offer in the subsequent months through our last bargaining session on 2/17/15” (GC Exh. 19). The summary continues, stating, “Our bargaining committee felt that getting our retroactive pay in our pockets was the most important issue to our members right now. That is why they made the decision to accept the final offer and present it to our members for endorsement of their action.” Ultimately, voting concluded, and almost all members agreed to endorse the decision of the Union to accept the collective-bargaining agreement (Tr. 78, 150).

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On March 21, Comma replied to Cornejo’s March 14 letter. Comma wrote, “We are concerned that there may be some misunderstanding regarding some of the terms of our

³⁶ When confronted with Yonn’s email regarding his interpretation of the retroactive wage proposal, Dabney responded evasively (Tr. 589–590). Dabney twice responded that he did not know what Yonn’s email stated. This exchange is another example of why I cannot credit Dabney’s testimony. Rather than disagreeing or agreeing with Yonn’s interpretation, Dabney refused to provide a response to this basic question considering his many years of experience.

comprehensive proposal. We would like to meet with you at your earliest convenience to discuss this matter. In the meantime, we ask that you postpone any ratification vote” (GC Exh. 17). The following day, Cornejo responded to Comma’s email informing him that there was no ratification vote, and that the Union had already accepted Respondent’s offer via email and phone conversation. Cornejo further wrote, “There was no misunderstanding then. Hope this resolves the matter” (GC Exh. 17). Cornejo testified that the Union had already accepted Respondent’s comprehensive proposal so there was no need for a ratification vote, but rather the Union was conducting an endorsement vote of its decision to accept the contract formed on March 14 (the Contract) among its members (Tr. 70).

Union’s Request to Respondent to Finalize the Contract

On March 27, Cornejo wrote an email to Comma, requesting finalization of the Contract including pay scales and time frames for when retroactive payments would be made. Cornejo stated,

Christopher [Comma],

Since we accepted the Employer’s final offer on March 14, 2015, I think it now makes sense for us to attend to some housekeeping items, such as:

1) Final preparation and review of the contract; (Sue [Thergeson] is best able to do this, I would think.)

2) Final calculation of the new pay scales, effective 10/2012, 10/2013 and 10/2014;

3) A time frame for when retro-active payments will be made; and

4) A time frame when Kaiser will have its payroll system ready to deduct dues. (Initially, we will be providing the authorization forms until we have a process with the Employer to do that function during new employee orientation.)

Thanks,
Ralph Cornejo

(GC Exh. 20). Comma never responded to Cornejo’s email.

O. Respondent Withdraws the Wage Proposal

On March 27, during a telephone conference call side bar meeting with Adams, Dabney, Rosselli and Cornejo to discuss the IBHS negotiations, Dabney informed Cornejo and Rosselli that he would be sending a letter withdrawing the wage proposal for the optical employees (Tr. 75, 213).³⁷ Rosselli and Cornejo became angry, and Cornejo told Dabney that he could not withdraw the wage proposal for the optical employees because the Union already accepted it (Tr. 75). During this phone call, no one from Respondent claimed that they had previously

³⁷ Adams could not recall this conversation (Tr. 624).

withdrawn the wage proposal for the optical employees during the February 21 side bar meeting (Tr. 76). Nor did anyone from Respondent confront Rosselli and Cornejo with the allegation that they had asked Respondent to hold off sending the withdrawal letter.

5 Nevertheless, Dabney sent Rosselli a letter, dated March 27, on Kaiser letterhead. Dabney wrote,

Dear Sal [Rosselli]:

10 We were surprised to receive an email sent to Christopher Comma from Fred Seavey on Saturday, March 14, 2015 at 3:15 PM, purporting to accept the Employer’s “last, best, and final” offer made in the Optical bargaining unit on December 18, 2012, as amended on January 29, 2014, and February 17, 2015. Please be advised that we do not have an agreement on retroactive payment of wage increases, and therefore, we do not yet have a
15 deal on a collective bargaining agreement.

 Since the bargaining session on February 17, 2015, we have bargained in side bar session, including Greg Adams, Connie Wilson and me for management and Ralph
20 Cornejo, Clem Papazian, Dan Gizzo, and you for NUHW. At our side bar meeting on Saturday, February 21, 2015, we told you that the wage proposal made at the Optical bargaining table on February 17, 2015, was in error, and specifically, that we were withdrawing retroactive pay from our proposals. We told you that Mr. Comma was about to send a letter confirming we had withdrawn our wage proposal and that we would make a new proposal that did not include a retroactive wage payment. You asked us to hold off
25 from sending this confirming letter while we continued our side bar negotiations. You were concerned about having to manage the retroactivity issue with your bargaining teams and units while our side bar talks were continuing. We agreed to hold the letter, but were clear that we were withdrawing the retroactive payment from our wage proposal. Mr. Comma communicated this change to Ralph Cornejo via email on Sunday,
30 February 22, 2015, before he was told we had agreed to hold off on sending the letter at your request. Ralph Cornejo[sic] responded to Mr. Comma, asking that he check with me. Pursuant to our understanding from the February 21 side bar bargaining session—*i.e.*, that we had withdrawn the retroactive wage payment from our proposal but that we would keep this change confined to our side bar discussions for the time being—Mr.
35 Comma told Mr. Cornejo to disregard the email.

 We are anxious to close a deal in the Optical unit, and believe we are close. We will agree to our comprehensive proposal, as stated on January 14, 2014, and amended on
40 February 17, 2015, with the following changes: (1) a contract expiration date of September 30, 2018, and (2) a revised wage proposal of ATBs of 3%, 3%, and 2.5% on October 1, 2015, 2016, and 2017, respectively, without retroactive wage increases or payments. Please confirm whether NUHW will accept this proposal. If not, we would encourage you to make a thoughtful and reasonable comprehensive counter-proposal.

45 Please confirm at your earliest convenience whether you want to jointly communicate to the bargaining unit that there has been a misunderstanding as to whether you have completed a deal or whether you prefer to do separate communications. Per your recent

communication, we understand that no ratification voting is occurring. I will trust we will talk soon to discuss next steps.

(GC Exh. 21; R. Exh. 11).

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Rosselli did not receive Dabney’s letter until mid-April because he had been out-of-state (Tr. 212, 214), and Cornejo testified he did not receive the letter until Rosselli asked him to respond (Tr. 76, 79, 108). The Union responded to Dabney’s letter on April 14 (GC Exh. 22). Cornejo wrote, in part, “Your letter claiming we do not have an agreement is untimely, and therefore irrelevant. The informal discussions we had off-the-record, although they did not include Optical, are not bargaining. The proper place to make proposals is at the bargaining table—I think Kaiser has said that a number of times in its letters to our members.” Cornejo further wrote,

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On March 27 you proposed to change your wage offer to Optical workers. Your untimely proposals flies in the face of the wage proposal that Kaiser’s various spokespersons, including Walter Yonn, Mark Fisher, and Christopher Comma, have repeated consistently over the last 2 years. Unfortunately for you, two weeks earlier on March 14, we had already notified Kaiser that we had accepted Kaiser’s last, best, and final offer, including wages going back to October 2012. We notified your authorized Optical bargaining spokesperson of our acceptance of the offer and he raised no objection. In fact, when Sal Rosselli also notified Greg Adams of our bargaining committee’s acceptance of the offer, Greg Adam’s response was “That’s great!”

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(GC Exh. 22).

Meanwhile, on April 16, Wilson sent a letter to all optical employees (GC Exh. 42). In pertinent part, Wilson wrote,

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We are writing to you because we are concerned that you may not have complete information about events that have taken place in bargaining with NUHW [. . .] we have not reached an agreement yet with NUHW for a contract with you.

[. . .]

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During bargaining with NUHW regarding the IBHS contract, there were discussions with NUHW leadership regarding an Optical proposal made in error by Kaiser Permanente on Feb. 17, the date of the last Optical bargaining session. Once KP leadership realized that the proposal contained erroneous references to retroactive pay, no prospective pay and a contract duration ending September 2015, we notified the union about the errors and stated that we would be providing a corrected proposal. That notification occurred on February 21, 2015, during IBHS bargaining discussions with NUHW leadership. The union acknowledged this information and asked us to delay sending written notification until after their scheduled meeting with union stewards. As a courtesy, we complied with the union’s request. Consequently, we were very surprised and disappointed to see that the union communicated to Optical employees that the flawed proposal represented an agreement. We regret to advise you that this is not accurate.

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On March 21, 2015, in an email to NUHW, we stated there had been misunderstandings regarding our proposal and asked NUHW not to present it to optical membership for a vote. On March 22, 2015, NUHW confirmed to us that there would be no ratification vote. On March 27, 2015, in a letter to NUHW we repeated that the proposal made
 5 February 17 was not a valid proposal, and we asked the union to communicate this fact to you. We also offered to explain this to you jointly. On April 15, 2015, NUHW responded to our letter, stating “we have a deal, like it or not”

(GC Exh. 42).

10 Dabney, then, on April 23, sent the Union a letter, denying the existence of an agreement between the parties (GC Exh. 23). Dabney disagreed with the Union’s characterization of the side bar meeting, and instead asserted that the side bar meeting on February 22 was a negotiation session between the parties. Dabney also explains in his correspondence that on February 22, it
 15 had withdrawn “the comprehensive proposal that the Employer had held to in bargaining since December 2012.” In addition, Dabney argues that there was “no actual meeting of the minds as to the meaning of the retroactive pay proposals” because Respondent, in its now withdrawn proposal, only provided retroactive wage increases for a three-month period in 2012. Finally, Dabney emphasizes that Respondent “withdrew the entire comprehensive proposal at our
 20 meeting on February 22, 2015,” and even if the Union accepted such proposal, the wage increase would only be retroactive for a single three-month period (from October to December 2012). Dabney concludes the letter to the Union by stating that the Union has “deliberately” misrepresented the retroactive wage increases to the bargaining unit, and “would leave the full consequences of that misrepresentation to the processes of the NLRB and any suits for breach of
 25 duty of fair representation that may be brought.”

Finally, Cornejo responds to Dabney’s letter on April 24. Cornejo writes, “With all due respect, your letter makes no sense whatsoever” (GC Exh. 24).

30 Since this dispute, on August 15, SEIU filed a decertification petition for the unit of optical employees, but the General Counsel blocked the processing of the petition due to this pending unfair labor practice charge. Wilson sent a letter to the optical employees explaining why the election was not proceeding (CP Exh. 1).

35 III. DISCUSSION AND ANALYSIS

A. Credibility Findings

40 Significant credibility disputes exist in this matter. As the finder of fact I must determine whose version of events I rely upon. A credibility determination may rely on a variety of factors, including “the context of the witness’ testimony, the witness’ demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities and reasonable inferences that may be drawn from the records as a whole.” *Hills & Dales General Hospital*, 360 NLRB No. 70, slip op. at 7 (2014), citing *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), enfd. sub nom., 56 Fed. Appx. 516 (D.C. Cir. 2003). In
 45 making credibility resolutions, it is well established that the trier of fact may believe some, but

not all, of a witness’s testimony. *NLRB v. Universal Camera Corp.*, 179 F.2d 749 (2d Cir. 1950).

5 Overall, I was impressed with the testimony and demeanor of the General Counsel’s witnesses. Except for a few minor inconsistencies, Cornejo, Rosselli, Papazian and Tegenkamp all testified convincingly and consistently while providing sufficient detail of the events at issue. Moreover, Cornejo, Rosselli, and Papazian’s testimonies were corroborated by Respondent’s internal email exchange concerning the February 21 side bar meeting which is a critical event in this matter.

10 In contrast, Respondent’s witnesses’ testimonies often contradicted one another, were, at times, internally inconsistent, vague, evasive, and most importantly, contradicted the contemporaneous email exchanges among them. In addition to the credibility determinations set forth in the findings of facts, I note that Wilson, Adams and Dabney’s version of the February 21 side bar meeting differed considerably from the email exchanges that took place less than one month later. In contrast to their sworn testimony, neither Adams, Wilson, nor Dabney clarified during the numerous email exchanges of March 16 that the Union had been informed on February 21 of the “mistake” in including the wage proposal with retroactive wage increases and that the Union asked them to “hold” the letter. Thus, their testimony was implausible.

20 Furthermore, although I credited some of Comma’s testimony, much of his testimony appeared to be self-serving statements attempting to correct the errors that TPMG made when negotiating this Contract. In sum, these critical deficiencies lead me to conclude that Comma, Wilson, Adams and Dabney’s testimonies are unreliable.

25 *B. The Parties’ Contentions*

The General Counsel and the Charging Party allege that the Union accepted Respondent’s comprehensive proposal on March 14 thereby creating a binding agreement between the parties. Specifically, the General Counsel and the Charging Party argue that the parties reached a meeting of the minds with regard to the Contract, and the inclusion of the wage proposal with retroactive wage increases in Respondent’s comprehensive proposal was not a mistake of which the Union had knowledge (GC Br. at 39–47; CP Br. at 37–47). In addition, the General Counsel and the Charging Party contend that the Union never asked Respondent to delay sending a withdrawal letter for the February 17 wage proposal, and that the failure to conduct a ratification vote by Union members is not a valid basis for Respondent to claim no collective-bargaining agreement was formed on March 14 (GC Br. at 50–58; CP Br. at 48–57). Thus, Respondent violated Section 8(a)(5) and (1) of the Act by repudiating the Contract when the Union accepted Respondent’s comprehensive proposal on March 14, and by failing and refusing to prepare, finalize and execute the Contract.

40 Respondent alleges that the Contract was never ratified by the Union’s members, and therefore, no Contract exists (R. Br. at 19–28). Secondly, Respondent argues that on March 14, the Union knew that the wage proposal in Respondent’s February 17 comprehensive proposal was a mistake, which means that the Contract was voidable (R. Br. at 28–32). Finally,

45 Respondent argues that the parties lacked a meeting of the minds as to the meaning of the wage proposal (R. Br. at 32–37). Specifically, Respondent argues that the wage proposal language was ambiguous when it was made and when it was purportedly accepted. Also, according to

Respondent, no meeting of the minds could have occurred since Respondent told the Union about the error in the February 17 comprehensive proposal.

5 C. *Respondent Violated Section 8(a)(5) and (1) of the Act When it Repudiated the Contract and When it Failed and Refused to Prepare, Finalize and Execute the Contract*

10 Under Section 8(d) of the Act, the duty to bargain includes “the execution of a written contract incorporating any agreement reached if requested by either party . . .” See *H. J. Heinz Co. v. NLRB*, 311 U.S. 514 (1941). The existence of an agreement, and the terms of the agreement if one is found to exist, are questions of fact. *Metro Medical Group*, 307 NLRB 1184 (1992). However, this obligation arises only if the parties had a “meeting of the minds” on all substantive issues and material terms of the agreement. The General Counsel bears the burden of showing not only that the parties had the requisite “meeting of the minds,” but also that the document which the party refused to execute accurately reflected that agreement. If it is determined that an agreement was reached, a party’s refusal to execute the agreement is a violation of the Act. *Windward Teachers Assn.*, 346 NLRB 1148, 1150 (2006); *Valley Central Emergency Veterinary Hospital*, 349 NLRB 1126 (2007). Where a party refuses to execute a duly negotiated collective-bargaining agreement, the Board will direct it to do so and to give retroactive effect to the terms of the agreement. See *Cablevision Industries*, 283 NLRB 22, 31 (1987); *Maury’s Fluorescent*, 226 NLRB 1290, 1294 (1976).

25 Here, in applying the above principles to the facts of this matter, I find that the General Counsel has met his burden of proof that the parties reached an agreement on all substantive terms of a complete collective-bargaining agreement which Respondent repudiated and refused to prepare, finalize and execute. Accordingly, I find that Respondent violated Section 8(5) and (1) of the Act.

30 1. The Parties had a meeting of the minds for the optical employees’ Contract

35 A “meeting of the minds” in contract law is based on the objective terms of the contract rather than on the parties’ subjective understanding of the terms. Thus, subjective understandings (or misunderstandings) of the meaning of terms that have been agreed to are irrelevant, provided that the terms themselves are unambiguous when judged by a reasonable standard. “Meeting of the minds” does not require that both parties have identical subjective understandings on the meaning of material terms of the contract. *Diplomat Envelope Corp.*, 263 NLRB 525, 535–536 (1982). When the terms of a contract are ambiguous, and the parties attach different meanings to the ambiguous terms, a “meeting of the minds” is not established. *Hempstead Park Nursing Home*, 341 NLRB 321, 322 (2004); see also *Windward Teachers Assn.*, supra at 1150.

45 I find that the parties had a meeting of the minds on March 14, and thus formed a Contract. Since December 2012, Respondent proposed across-the-board wage increases for the optical employees. The wage article stated: As part of its last best and final offer, the Employer offers a 3.0% ATB effective as of the first pay period after October 1, 2012. The increase will be paid retroactive to that date. This increase is in place of and in lieu of any and all increases from

any source whatsoever, including without limitation any provision of any agreement whether applicable or not.

October 1, 2013 2.5% ATB
 5 October 1, 2014 2.5% ATB

10 The proposed language regarding the wage increases by Respondent did not change, and was in the February 17 comprehensive proposal by Respondent. Furthermore, Respondent’s proposal concerning the duration of the collective-bargaining agreement remained from October 1, 2012 to September 30, 2015.

15 Subsequently, on March 14, the Union accepted Respondent’s comprehensive proposal, dated February 17. Cornejo wrote, “This letter serves as notice that the National Union of Healthcare Workers (NUHW) accepts the Employer’s last, best, and final offer made to NUHW on 12/18/12 regarding the Optical bargaining unit and as subsequently modified by the Employer on 1/29/14 and 2/17/15.” By this point, Respondent never rescinded its comprehensive proposal in its entirety or in part, such as the wage proposal. Thus, the parties reached a meeting of the minds on March 14, and the Contract formed.

20 Although in the days after the Union’s acceptance of Respondent’s comprehensive proposal, Respondent’s management and labor relations officials clearly seemed confused as to whether the comprehensive proposal the Union accepted included the wage proposal with retroactive wage increases, the Union’s March 14 email clearly identifies which proposal they accepted. During this time, Comma contacted Cornejo again to clarify the Union’s acceptance.
 25 Cornejo explained that the Union accepted Respondent’s entire offer. When Comma and Cornejo spoke, Comma clarified some of the provisions in Respondent’s February 17 comprehensive proposal to be certain what the Union accepted. However, Comma never asked Cornejo about the wage proposal or the duration of the collective-bargaining agreement.
 30 Ultimately, Respondent’s February 17 comprehensive proposal contained all necessary terms to form a binding collective-bargaining agreement, including the duration, and the Union accepted this proposal in its entirety. On March 27, Dabney, in his letter to Rosselli, essentially admits that Respondent’s February 17 comprehensive proposal is a complete proposal except that Respondent then unlawfully rescinded its wage proposal and offered another wage proposal.
 35 Respondent also proposed changing the duration of the collective-bargaining agreement.

40 The evidence also shows that prior to the February 17 negotiation session, unbeknownst to the Union, Comma intended to rescind the wage proposal without the retroactive wage increases Respondent previously offered to the Union. Comma also contemplated changing the duration of the collective-bargaining agreement. Comma appeared to be aware that TPMG no longer wanted to offer retroactive wages to the optical employees. As such Comma directed Thergeson to change the proposal to reflect a 3.0% across-the-board wage increase effective after ratification of a three-year agreement. However, shortly before the February 17 bargaining session, Comma directed Thergeson to change the wage proposal language *back* to Respondent’s
 45 prior proposal where these across-the-board wage increases occurred in the past, necessitating retroactive pay when effectuating the collective-bargaining agreement. It is irrelevant why Comma changed the proposal at the last minute or who gave Comma this advice. Then, at the February 17 bargaining session, the Union received a comprehensive proposal with the wage

proposal language as they had been offered previously. The proposal for the duration of the collective bargaining agreement remained the same as well. The fact that Respondent planned to change the wage proposal as well as the duration of the collective-bargaining agreement is also irrelevant when analyzing whether the parties reached a meeting of the minds; Respondent’s intentions are immaterial. *Space Needle, LLC.*, 362 NLRB No. 11, fn. 8 (2015) (citing *Pittsburgh-Des Moines Steel Co.*, 202 NLRB 880, 888 (1973) (a party’s subsequent actions are judged by a reasonable standard with no consideration for unexpressed intentions)). The Union was unaware of this internal dispute, and Respondent knew exactly what it proposed in its February 17 comprehensive proposal including its wage proposal (GC Exh. 11). Wages were not even discussed during this bargaining session. Comma never told the Union that the wage provision was a “placeholder” or “dead letter”, and that Respondent would later replace this wage article with another. Comma’s intentions or subjective beliefs are immaterial. No ambiguity existed as of February 17. Almost one month later, the Union accepted Respondent’s comprehensive proposal in its entirety.

As a defense, Respondent claims that four days later, at the February 21 side bar discussion, Dabney informed the Union that Respondent planned to send a letter rescinding the wage proposal included in Respondent’s February 17 comprehensive proposal since it had made a mistake. Furthermore, Respondent claims that the Union asked Respondent not to send the letter at that time because they would be obligated to inform the bargaining unit. As such, Respondent argues, the Union could not have later accepted Respondent’s February 17 comprehensive proposal as the parties did not reach of a meeting of the minds on a collective-bargaining agreement.

Respondent’s contentions are unavailing. First, I do not credit any of Respondent’s witnesses for their version of events during the February 21 side bar discussion. Wilson’s notes before and during the side bar meetings are vague and unreliable since the notes do not specify which bargaining unit the parties discussed with regard to wages. Furthermore, although Wilson, Dabney and Adams testified consistently that they informed the Union of the mistake and that the Union asked Respondent to delay sending the letter, their collective testimony is discounted by their failure to mention these details in their March 16 email correspondences among Kaiser’s management and labor relations officials. Throughout these email correspondences, Wilson’s messages are most telling. Wilson admits that Dabney, Adams and she told the Union that they could accept the wage proposal with the retroactive wage benefits, and Respondent would not retract the retroactive wage benefits (GC Exh. 38, 41). Wilson writes, “I suspect that’s why they are accepting that last full contract proposal. It’s the best deal they are going to get and they know it” and “They made a wise choice” (GC Exh. 38, 41, 53). Thereafter, much of the email correspondences reflected TPMG’s management officials blaming KFHP for the error or mistake. None of these emails corroborates Wilson, Dabney and Adams’ testimony that they told the Union at the side bar meeting they had made a mistake or that the Union asked them to delay sending the letter.

Secondly, I do not find that Respondent actually made a mistake on February 17. Board decisions make clear, only where the facts show a mutual misunderstanding or mistake with respect to a basic term of an agreement, will the Board conclude that there was no meeting of the minds necessary to show that the parties entered a binding contract. *Butchers’ Local 120, Amalgamated Meat Cutters & Butcher Workmen of North America, AFL–CIO*, 154 NLRB 16, 26

(1965). At the February 17 bargaining session, even though Respondent’s management officials were in conflict on how to proceed with negotiations, Respondent offered the same wage proposal they had offered for the past 3 years. At the February 21 side bar meeting, even though the Union was aware that Respondent wanted to send a letter rescinding the February 17 wage proposal, Respondent ultimately retreated from this position, and continued to offer the same wage proposal. The Union, now knowing that Respondent may rescind the wage proposal at any time, spoke with their stewards in March. The Union, contrary to Respondent’s characterization of their actions as “gotcha” (R. Br. at 3), did not attempt to trap Respondent but instead acted reasonably when they met with their stewards and with the stewards’ approval accepted Respondent’s offer on March 14.

Respondent had ample time to withdraw its wage proposal, but failed to do so. One party’s error, even if made in good faith, does not excuse its refusal to execute a collective-bargaining agreement unless that error constitutes a legally cognizable mutual or unilateral mistake. Again, I do not find that Respondent made a mistake. Certainly, however, the Union learned during the February 21 side bar meeting that Respondent expressed an intention to rescind the wage proposal. In addition, the issue of retroactive wage increases clearly was a source of contention between the parties, not only for the optical employees but also the IBHS employees. The Union, strategically, took this information and decided to accept Respondent’s February 17 offer completely.

Even assuming the Union became aware of Respondent’s mistake, as it characterizes its February 17 comprehensive proposal, “rescission based on unilateral mistake should be a carefully guarded remedy and reserved for those instances where a mistake is so obvious as to put the other party on notice of the error.” *Apache Powder*, 223 NLRB 191 (1976). See also *North Hills Office Services*, 344 NLRB 523, fn. 50 and 51 (2005) (“[a] party to a contract cannot avoid it on the ground that he made a mistake where the other [party] has no notice of such mistake and acts in perfect good faith”). In this case, the mistake by Respondent is not so obvious as to have placed the Union on notice. This wage proposal with its retroactive wage increases had been in Respondent’s proposal for at least 3 years. Even at the side bar meetings, when Respondent raised the possibility of rescinding the proposal, the Union officials became justifiably angry since this proposal had been on the table for three years. Respondent then agreed not to remove the retroactive pay increases for the optical employees. Thus, in the instant case, the evidence does not establish that the Union had notice of Respondent’s purported mistake prior to its acceptance of Respondent’s comprehensive proposal on March 14. This case is clearly distinguishable from those cases where the mistake is obvious, or where the union was on notice of the alleged mistake. Thus Respondent cannot void the Contract on the grounds of a unilateral mistake.

40 2. The Contract’s language was unambiguous

Furthermore, the wage proposal presented to the Union on February 17, and accepted by the Union on March 14 clearly provides for retroactive wage increases contrary to Respondent’s assertions. Therefore, the terms of the Contract language are unambiguous. Respondent argues that its February 17 wage proposal only provides retroactive benefits for 2012, and the 2013 and 2014 wages would not be retroactive since the proposal does not specifically state retroactivity.

Respondent’s claims are nonsensical, implausible, and contrary to its expressed interpretation of the wage proposal in March 2015. Again, the February 17 comprehensive proposal incorporated Respondent’s wage proposal first proposed in December 2012. The December 2012 proposal only referenced retroactivity for the October 2012 wage increases because that wage increase was in the past. As the years progressed, Respondent continued to use the same December 2012 proposal despite the time period for subsequent wage increases having passed. Logically, these wage increases would also become retroactive after the time period elapsed.

At the hearing, both Comma and Dabney argued that the wages for 2013 and 2014 would not be retroactive thereby creating ambiguity. Essentially the 2013 and 2014 wage increases would have no effect. I disagree. In fact, Yonn, Respondent’s former chief negotiator, confirms the logical effect of wage increases when they become effective after the date passes. Yonn explains, in response to Comma’s question on this issue, “It is not so much that retro was proposed—the proposal is retroactive if effective dates of increases are retrospective. This is of course always the case unless one of the parties proposes otherwise . . . such as “effective upon ratification.” Moreover, Wilson in her email to Westfall, Adams, Dabney and Comma on March 16 admitted that Respondent offered retroactive increases for 2012, 2013 and 2014. Neither Dabney nor Comma corrected Wilson’s interpretation of the wage proposal. Even Dabney admitted in his March 27 letter to Rosselli that the February 17 wage proposal included “retroactive payment of wage increases.” Thus, for Respondent to now argue that the parties’ interpretation of the February 17 wage provision creates an ambiguity precluding the formation of a contract is disingenuous. I conclude that the terms of the wage proposal in the February 17 proposal by Respondent are not ambiguous.

3. Respondent’s other defenses

Respondent argues that because the Union failed to follow the agreed upon ground rules and its own constitution and bylaws that the members ratify the Contract, no collective-bargaining agreement could have been formed (R. Br. at 19–28). Respondent did not raise this challenge at the time the Union accepted the Contract. The General Counsel and the Union argue that a ratification vote is irrelevant under these circumstances, and simply constitutes a matter of internal Union business.

Generally, the Act does not require a labor organization to obtain employee ratification of a contract it negotiates on their behalf. *North Country Motors, Ltd.*, 146 NLRB 671, 674 (1964). The requirement for ratification is one which only a union can assume as it is an internal union matter left for it to regulate unless agreed otherwise; an employer may not intrude upon an internal union affair. Ratification is mandatory, however, when the parties agree to such as a condition precedent or when the union states that the authority to accept a collective-bargaining agreement lies with the union membership only. *Sacramento Union*, 296 NLRB No. 65 (1989). To prove either scenario, the Board requires clear evidence such as an express agreement. *New Process Steel*, 353 NLRB 111, 114 (2008), rev’d on other grounds, 560 U.S. 674 (2010) (citing *Beatrice/Hunt-Wesson, Inc.*, 302 NLRB 224 (1991) (both parties agreed to require ratification by the bargaining unit members to make tentative agreement binding); *C & W Lektra Bat Co.*, 209 NLRB 1038 (1974) (a stated intention to take any contract reached to the membership for

approval does not constitute an agreement to make ratification a condition precedent to a collective-bargaining agreement).

5 Here, the Union and Respondent discussed during the ground rules bargaining whether ratification of the collective-bargaining agreement would occur. The Union responded that its practice is to bring a full agreement to its membership for a ratification vote but the parties did not include ratification as condition precedent in its ground rules. Indeed, Cornejo indicated the Union would bring the Contract to its members for ratification. However, contrary to Respondent’s assertions (R. Br. at 19), the Union and Respondent never explicitly agreed to have the Contract ratified as a condition precedent before acceptance. In the end, the Union accepted the Contract, and conducted an endorsement vote after the acceptance to ensure that the Union members approved their actions. “The Board distinguishes between a union’s expressions of intent to seek employee ratification, which the union can modify or ignore at will, and an actual bilateral agreement with an employer to make ratification a condition precedent to the formation of a binding contract.” *New Process Steel*, supra at 114. Furthermore, the express agreement cannot be “established casually or equivocally.” *Id.* Cornejo’s comments at the ground rules negotiations did not create an express agreement. The record lacks any clear evidence that the Union agreed that its acceptance of the Contract was contingent upon the Union members’ ratification vote. The Union’s procedures after they accepted the Contract are internal union matters which are of no consequence for Respondent. See *Sunglass Products Inc., d/b/a Personal Optics*, 342 NLRB 958, 962 (2004), aff’d, 165 Fed. Appx. 1 (D.C. Cir. 2005). The Board has held in numerous cases that an employer may not rely upon a gratuitously imposed ratification requirement in defense of its failure to execute an agreement. *Sacramento Union*, supra at 16; see also *Newtown Corp.*, 280 NLRB 350 (1986); *Personal Optics*, supra at 961–962.

25 Respondent cites to *Teledyne Specialty Equipment Landis Machine Co.*, 327 NLRB 928 (1999) to support its position that the parties agreed that any agreement reached was subject to ratification by the Union members, and since no ratification vote occurred, the parties did not reach agreement. In that case, the Board affirmed the administrative law judge’s finding that the parties were aware at all times that any agreement reached during negotiations would be subject to ratification by the bargaining unit employees, as required by the union’s constitution. In addition, the parties’ no-strike provision specifically required ratification by the union’s members, and the union negotiators informed the employer that they did not have authority to reach such an agreement. The administrative law judge found that under those circumstances, ratification was a condition precedent to the collective-bargaining agreement, and no agreement had been formed because the employer withdrew the offer prior to the ratification vote.

30 I find that the facts in the *Teledyne Specialty Equipment Landis Machine Co.* are distinguishable from the circumstances presented here. Here, Respondent and the Union discussed ratification during the ground rules, but did not include this requirement in the ground rules, which Respondent proposed and the Union accepted in its entirety. Furthermore, none of the provisions in the comprehensive proposal offered by Respondent included ratification as a requirement before acceptance. The record is devoid of evidence that the parties discussed ratification as a necessary prerequisite before acceptance of a collective-bargaining agreement. Although ratification is included in the Union’s constitution and bylaws, under the circumstances here, I do not find that the parties expressly agreed to ratification as a condition precedent. Thus, this case is analogous to the circumstances in *Personal Optics*, not *Teledyne Specialty Equipment*

Landis Machine Co. In *Personal Optics*, the Board agreed with the administrative law judge that the employer violated the Act when it refused to execute the agreement reached with the union when claiming that the parties made employee ratification a condition precedent. In that case, as here, despite the union’s stated intention to obtain employee ratification, the parties never reached a bilateral agreement to require ratification for a binding agreement.

In sum, I find that Respondent and the Union reached a meeting of the minds on March 14 with regard to the Contract when the Union accepted Respondent’s February 17 comprehensive proposal. The Contract contains no ambiguity and no mistake, and no express agreement exists between the parties requiring ratification as a condition precedent. Therefore, on March 27, Respondent via Dabney repudiated the Contract by rescinding the wage proposal of February 17. Furthermore, Respondent unlawfully refused the Union’s request of March 27 to prepare, finalize and execute the Contract. Thus, Respondent violated Section 8(a)(5) and (1) of the Act when it repudiated the Contract on March 27, and when it refused to prepare, finalize and execute the Contract that same day.

CONCLUSIONS OF LAW

1. Respondent, the Permanente Medical Group, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.
2. The Charging Party, National Union of Healthcare Workers, is a labor organization within the meaning of Section 2(5) of the Act.
3. At all relevant times, the Charging Party has been the exclusive collective-bargaining representative of the following appropriate unit of employees: All full-time and regular part-time Optical Workers Unit employees covered under the terms of the October 1, 2005 collective-bargaining agreement between the Employer and the Intervenor/Incumbent Union, all other employees, guards, and supervisors as defined by the Act. Subsequently clarified as the following appropriate unit of employees: All full-time and regular part-time optical workers, including benchman journeypersons, contact lens assistants, contact lens fitters, contact lens trainees, inspectors, lead optical dispensers, optical dispensers, optical dispenser apprentices, optical equipment maintenance technicians, optical laboratory apprentices, optical services assistants, prescription stock clerk journeypersons, senior prescription stock clerks, special optical workers, surface grinder journeypersons, working foremen optical lab, and utility optical workers employed by the Employer throughout Northern California; excluding all other employees, branch managers, office clericals, guards, and supervisors as defined by the Act (the Unit).
4. Respondent and the Charging Party reached complete agreement on March 14, 2015, concerning terms and conditions of a collective-bargaining agreement when the Charging Party accepted Respondent’s last, best, and final offer made on December 18, 2012 regarding the Unit and as subsequently modified by the Employer on January 29, 2014 and February 17, 2015.
5. By repudiating, since on or about March 27, 2015, the contract reached on March 14, 2015 (the Contract) containing the agreed upon terms and conditions of employment for the Unit employees, Respondent violated Section 8(a)(5) and (1) of the Act.

6. By failing and refusing, since on or about March 27, 2015, to prepare, finalize, and execute the Contract, Respondent violated Section 8(a)(5) and (1) of the Act.
7. By engaging in the unlawful conduct set forth in paragraphs 5 and 6 above, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1), and Section 2(2), (6) and (7) of the Act.

REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, Respondent shall be ordered to cease and desist from refusing to sign the Contract reached on March 14, 2015, and shall be ordered to prepare, finalize and execute that Contract. Those contractual provisions not already implemented will be applied retroactively including the duration of the Contract.

The recommended Order will also require that Respondent make employees whole for any loss of wages and benefits suffered as a result of its refusal to sign, prepare, finalize and execute the Contract. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010), enf. denied on other grounds sub. nom., *Jackson Hospital Corp. v. NLRB*, 647 F.3d 1137 (D.C. Cir. 2011).

Respondent shall file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters. Respondent shall also compensate the employees for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year, *Latino Express, Inc.*, 359 NLRB No. 44 (2012).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended³⁸

ORDER

Respondent, the Permanente Medical Group, Inc., Oakland, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

- (a) Repudiating the Contract reached by Respondent and the Union on March 14, 2015, when the Union accepted Respondent's last, best, and final offer made on December 18, 2012 regarding Respondent's optical employees and as subsequently modified by Respondent on January 29, 2014 and February 17, 2015.

³⁸ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

- (b) Failing and refusing to prepare, finalize, and execute the Contract.
- (c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed to them by Section 7 of the Act.

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2. Take the following affirmative action necessary to effectuate the policies of the Act

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- (a) Prepare, finalize, and execute the Contract embodying the terms reached with the Union on March 14, 2015 for all employees in the following appropriate bargaining unit: All full-time and regular part-time Optical Workers Unit employees covered under the terms of the October 1, 2005 collective bargaining agreement between the Employer and the Intervenor/Incumbent Union, all other employees, guards, and supervisors as defined by the Act. Subsequently clarified as the following appropriate unit of employees: All full-time and regular part-time optical workers, including benchman journeypersons, contact lens assistants, contact lens fitters, contact lens trainees, inspectors, lead optical dispensers, optical dispensers, optical dispenser apprentices, optical equipment maintenance technicians, optical laboratory apprentices, optical services assistants, prescription stock clerk journeypersons, senior prescription stock clerks, special optical workers, surface grinder journeypersons, working foremen optical lab, and utility optical workers employed by the Employer throughout Northern California; excluding all other employees, branch managers, office clericals, guards, and supervisors as defined by the Act. Those Contract provisions not already implemented will be applied retroactively including the Contract duration. Respondent will make employees whole, with interest, for any loss of wages and benefits, in the manner set forth in the remedy section of the decision, suffered as a consequence of Respondent’s refusal to sign, prepare, finalize and execute the Contract reached with the Union on March 14, 2015.
- (b) Within 14 days after service by the Region, post at its facility in Oakland, California and all other locations where bargaining unit employees work copies of the attached notice marked “Appendix.”³⁹ Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by Respondent’s authorized representative, shall be posted by Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, Respondent has gone out of business or closed the facility involved in these proceedings, Respondent shall duplicate and mail, at its own

³⁹ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading “Posted by Order of the National Labor Relations Board” shall read “Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.”

expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 14, 2015.

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

Dated, Washington, D.C., May 2, 2016

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Amita B. Tracy
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives 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 repudiate the contract reached by the Employer and the Union on March 14, 2015 (the Contract), when the Union accepted Respondent's last, best, and final offer made on December 18, 2012 regarding the Optical bargaining unit and as subsequently modified by the Employer on January 29, 2014 and February 17, 2015.

WE WILL NOT fail and refuse, since on or about March 27, 2015, to prepare, finalize, and execute the Contract.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL prepare, finalize, and execute the Contract embodying the terms reached with the Union on March 14, 2015 for all employees in the following appropriate bargaining unit: All full-time and regular part-time Optical Workers Unit employees covered under the terms of the October 1, 2005 collective bargaining agreement between the Employer and the Intervenor/Incumbent Union, all other employees, guards, and supervisors as defined by the Act. Subsequently clarified as the following appropriate unit of employees: All full-time and regular part-time optical workers, including benchman journeypersons, contact lens assistants, contact lens fitters, contact lens trainees, inspectors, lead optical dispensers, optical dispensers, optical dispenser apprentices, optical equipment maintenance technicians, optical laboratory apprentices, optical services assistants, prescription stock clerk journeypersons, senior prescription stock clerks, special optical workers, surface grinder journeypersons, working foremen optical lab, and utility optical workers employed by the Employer throughout Northern California; excluding all other employees, branch managers, office clericals, guards, and supervisors as defined by the Act. Those Contract provisions not already implemented will be applied retroactively including the Contract duration.

WE WILL make our employees whole for any losses suffered, plus interest compounded daily, because of our refusal to sign, prepare, finalize and execute the Contract reached with the Union on March 14, 2015.

WE WILL file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters.

WE WILL compensate our employees for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year.

THE PERMANENTE MEDICAL GROUP, INC
(Employer)

Dated _____ By _____

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

Ronald V. Dellums Federal Bldg. and Courthouse, 1301 Clay Street, Room 300N, Oakland, CA 94612-5224
(510) 637-3300, Hours: 8:30 a.m. to 5 p.m.

The Administrative Law Judge's decision can be found at www.nlr.gov/case/32-CA-149245 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE
THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (510) 637-3253.