

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

**INTERNATIONAL UNION OF OPERATING
ENGINEERS, LOCAL 501**

and

Case 28-CB-170340

BRADY LINEN SERVICES, LLC

**COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING BRIEF
TO RESPONDENT'S EXCEPTIONS**

Respectfully submitted,

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I. INTRODUCTION

By its Brief in Support of its Exceptions (Brief), International Union of Operating Engineers Local 501, AFL-CIO (the Respondent) urges the Board to overturn the credibility determinations, rulings, and well-reasoned conclusions of Administrative Law Judge Dickie Montemayor (the ALJ). The ALJ's decision (Decision) demonstrates a clear, thorough reading of the record and a careful analysis. Each finding is accompanied by supporting evidence based on consideration of the entire record. Counsel for the General Counsel (CGC) respectfully requests that the Board reject Respondent's exceptions *in toto* and affirm the ALJ's Decision.

Respondent filed 12 exceptions (the Exceptions), along with its Brief; however some Exceptions have no supporting argument.

II. FACTS

The facts of this case are largely undisputed. The Employer provides commercial laundry services to customers throughout the Las Vegas valley in southern Nevada, including to hotels and casinos and maintain four separate plants. (23:11-23; JTX 1).¹ The Employer has been a party to a collective bargaining agreement (CBA) with Respondent since 2009. (JTX 1). Beginning in 2013 the Employer and the Union began negotiating new CBA's for the four plants (each having slightly different wages and pensions depending on the history of the plant). (26:3-7; 97:21-25; 98:1-5). Throughout 2013, the parties met and had several bargaining sessions, however there parties did not gain any traction until the Employer engaged the law firm Kameron Zucker Abbott to assist in its negotiations with the Union. *Id.*

¹ References to the Transcript are (__:__) showing page or pages and line or lines, respectively. GCX __ refers to General Counsel's Exhibits. RX__ refers to Respondent's Exhibits. JTX__ refers to Joint Exhibits.

The crux of this case pertains to “Article 23: Apprenticeship and Training Program,” which will be referenced by three subparts. First, Article 23.01, titled “Agreement and Declaration of Trust” provides:

The Employer agrees to be bound by the Agreement and Declaration of Trust establishing the Southern Nevada Operating and Maintenance Engineers Apprenticeship and Training Trust Fund. (GCX 18).

Second, and perhaps the most critical, Article 23.02, titled “Contributions” would have been the section outlining the payment schedule and remittance amount(s) to be paid to the Southern Nevada Operating and Maintenance Engineers Apprentice and Training Trust Fund, had the Employer agreed to this paragraph. (GCX 5 p. 2). Essentially, the Joint Apprenticeship and Training Center (JATC) allows Respondent’s members to take classes for free. *Id.*

Third, Article 23.03, titled “Employment of Apprentices” provides:

Each Employer who employs at least ten (10) but less than twenty (20) engineers, excluding apprentices, may, employ said number of engineers, and employ at least one (1) apprentice engineer. Further, each Employer who employs twenty (20) or more engineers, excluding, apprentices, shall, at all times he employs said number of engineers, employ at least two (2) apprentice engineers.

The parties agree that the Employer retains the option to determine whether it will employ an Apprentice Engineer as a journeyman following his/her completion of the apprenticeship program. The seniority of a journeyman engineer who has completed an apprenticeship shall be computed from the day he/she was last hired as an Apprentice Engineer in that particular establishment. (GCX 18).

On September 8, 2014, the parties met for a negotiation session. (44:6-20). During this meeting, Respondent presented the Employer with an economic proposal, which included Article 23.02. (GCX 5 p. 2). The Employer presented a counterproposal, titled, “Brady Counter Proposal 09-08-14” which contained an outline of Article 23.02. (36:8-19; JTX 1; GCX 3 p. 57). But notably, the Employer left the financial amount for the contribution provision blank; only the language was proposed, not the economics. *Id.*

Between September 8, 2014 and August 6, 2015, the parties met about six more times on October 15, 2014, and January 23, February 20, April 23, June 24, and July 17, 2015. (36:8-19; 47:11-25; 48:7-8; 49:7-9; 52:6-14; 56:2-22; 57:2-3; 58-59; 60:18-22; 74:1-9; 80:9-11; 88:14-19; 90:23-25; JTX 1). During some of those meetings, Respondent provided the Employer with proposals regarding Article 23.02. However the Employer rejected them all. *Id.*

At no point since September 8, 2014, did Respondent even propose any offers to Respondent regarding Article 23.02. (JTX 1; GCX 7; GCX 9 p. 19; GCX 11; GCX 14; GCX 15; GCX 17(c); GCX 17(e)). Respondent admitted that the Employer communicated its rejection of Article 23.02 proposals multiple times to it via Status Spreadsheet Summaries. (147:11-25; 148:1-15). Respondent's chief negotiator, Local President and Lead Business Representative Thomas O'Mahar (O'Mahar), testified that he accepted the Employer's Status Spreadsheet Summaries and kept them in his possession. (148:4-15).

In fact, at the June 24, 2015 meeting, the Employer provided the Union with a Status Spreadsheet titled, "Brady Engineers Negotiations Status" listing the status of all outstanding proposals and showing that the Employer rejected Respondent's Article 23.02 proposals. (77:11-17; GCX 14). The Employer also presented a packet labeled at the bottom, "Brady Proposal 6_23_15," which included both non-economic and economic articles. (GCX 15). Notably it completely **excluded** Article 23.02, consistent with its previous proposals to Respondent. (GCX 15; GCX 11).

On August 6, 2015, the Employer emailed Respondent a Last, Best & Final Offer, along with a Cover Letter rejecting any outstanding proposals, and a Status Spreadsheet showing a summary of the articles included in its Last, Best & Final Offer. (89:7-13; GCX 17(b); GCX

17(c); GCX 17(e)). Both the Status Spreadsheet (describing what was in the Last, Best & Final Offer) and the Last, Best & Final Offer itself specifically **excluded** Article 23.02. *Id.*

Although Articles 23.01 and Article 23.03, were included in the Employer's Status Spreadsheet and Last, Best & Final Offer, they had been tentatively agreed upon (signed and dated) by the parties back in January 23, 2015. *Id.* It is undisputed that no agreement (tentative or otherwise) was ever reached by the parties regarding Article 23.02. (49:17-19; 90:23-25; 96:2-3; 97:9-14). Respondent also admitted that all agreements between the parties had been reduced to writing and that there were no outstanding oral agreements. (91:1-21).

After receiving the Employer's Last, Best & Final Offer, Respondent printed and compiled all the tentative agreements reached and contained in the Employer's Status Spreadsheet and presented the compilation to its membership on August 13, 2015 for a ratification vote during two separate meetings: one in the morning, and one in the afternoon. (89:17-25; 90:14-22; GCX 18). The Union's membership voted on the compiled packet as-is without any additional inserts. *Id.* Based on the packet distributed by Respondent, the membership voted to ratify the Employer's Last, Best & Final Offer. *Id.*

On August, 13, 2015, Respondent emailed the Employer its unconditional acceptance of the Employer's last, best and final offer:

The members at Brady Linen voted for ratification of the last best and final offer from Brady Linen. We will begin assembling the document for proof reading soon. (GCX 4).

Respondent's email did not make any mention of the exclusion of Article 23.02. *Id.* At no point on August, 13, 2015, did Respondent notify the Employer that Respondent thought the exclusion of Article 23.02 was a mistake. (93:1-4).

In fact, Respondent waited over a month to bring the exclusion of Article 23.02 to the Employer's attention even though in September 2015 the parties had been in regular

communication with each other via phone and email to make minor corrections such as typographical errors. (100:15-25; 101:1-6; 102:6-10). At no point during Respondent's September 2015 communications with the Employer did Respondent bring up the exclusion of Article 23.02 from the Employer's Last, Best and Final Offer. (102:13-15).

On September 25, 2015, Respondent emailed the Employer drafts of the compiled CBA's for the four plants, as well as a draft of a Memorandum of Understanding (MOU) regarding a one-time bonus. (GCX 20(a)-(f)). In each of the four CBA drafts, Respondent included an Article 23.02 paragraph that had not been negotiated or agreed upon by the parties. (103:18-25; 104:1; GCX 20(c) p. 42; GCX 20(d) p. 42; GCX 20(e) p. 42; GCX 20(f) p. 42). Nowhere in Respondent's September 25, 2015 email to the Employer did Respondent mention the insertion of Article 23.02. (107:15-19).

On October 16, 2015, the Employer emailed Respondent a PDF document of various tentative agreements. (GCX 21(a)-(b)). In this email, the Employer alerted Respondent that Article 23.02 was not part of the agreement. (107:22-24; GCX 21(a)).

On November 12, 2015, Respondent emailed the Employer revised CBA drafts for the four plants. (108:4-13; GCX 22(a)-(b)). Again, Respondent included an Article 23.02 paragraph that was neither negotiated nor agreed upon. (110:5-9; GCX 22(c)²). Respondent also emailed an attachment titled, "Corrections to Brady Draft CBA from draft 1 to draft 2," outlining the changes that were made. (108:4-13; GCX 22(a)-(b)). In this outline, Respondent wrote in pertinent part:

Section 23.02: Corrections made to all four (4) draft CBA's. The Employer's Last, Best and Final offer omitted Section 23.02 so we originally used the existing rates at the properties rather than use Employer's last proposal in the Section from September 8,

² GCX 22(c) is page 42 of the Brady Linen Lindell CBA, which was attached to the email in GCX 22(a). (151:13-20). GCX 22(c) contains the same Article 23.02 language for the other three plants. Respondent's Counsel stipulated to this so that we would not have to print out all four CBA's that were attached. *Id.*

2014 which, based on its structure would not fit well in the current CBA's. Based on your response, since the proposal was never withdrawn by the Employer, I will insert that proposal in and inform the JATC that they should prepare a supplemental billing for the additional contribution amounts for 2014 and 2015. (GCX 22(b)).

By this communication, Respondent admits that it rejected the Employer's September 8, 2014 proposal for Article 23.02, and instead inserted its own rates that had not been agreed upon by the Employer. (110:5-9; GCX 22(b)).

November 12, 2015 was the first time Respondent raised the issue of Article 23.02 with the Employer. (111:4-24). Despite allegedly knowing back on August 13, 2015, during the ratification meetings that Article 23.02 was not included in the Employer's Last, Best and Final Offer, Respondent waited **three months** to notify the Employer of its exclusion. (111:20-25; 112:1-7). Respondent testified that even though it thought back on August 13, 2015 that the exclusion was a mistake, it never occurred to Respondent to bring that mistake to the Employer's attention within those three months. (112:1-10).

On December 14, 2015, the Employer emailed Respondent that it was in agreement with all of Respondent's comments and corrections except for Article 23.02. (GCX 23). In this email Respondent reiterated that Article 23.02 was not part of the agreement. *Id.* It reads in pertinent part:

As stated prior, Section 23.02 was not included in Brady's Last, Best and Final offer and as stated on the cover letter attached sent to you with the Last, Best, and Final offer - Any outstanding union proposals, whether in the form of a formal proposal or in the form of contract language that was not in the Last, Best and Final offer was formally rejected. Therefore remove 23.02 as it was formally rejected. *Id.*

On December 17, 2015, Respondent emailed the Employer in pertinent part, "The language currently in 23.02 was not a Union proposal it was the Employer's proposal and it was never withdrawn therefor (sic) it was still active at the point the Employer made their offer." (GCX 24). However, Respondent had previously communicated to the Employer that

Respondent was using the existing rates rather than using the Employer's last proposal, thereby constituting a rejection and counteroffer. (GCX 22(b)).

On December 29, 2015, the Employer emailed Respondent in pertinent part, "As for Article 23.02 on 6/24/2015 you gave us a proposal and it was rejected and was not part of the Brady Last, Best and Final so it was rejected. Remove it as it was rejected." (GCX 25 p. 2).

About January 6, 2016, Respondent delivered final drafts of the four CBA's to the Employer, all of which included Article 23.02. (116:23-25; 117:1). Up to that point, the Employer had agreed to all of Respondent's proposed changes except for the unlawful insertion of Article 23.02. (117:15-20). Respondent's Article 23.02 only covered 2011-2015, not 2016, 2017, or 2018. (152:3-7).

About February 9, 2016, the Employer hand-delivered to Respondent four signed copies of the CBA's with Article 23.02 redacted in each. (117:24-25; 118:1-9; GCX 26(a)-(f)). The cover letter read in pertinent part:

As these CBAs are intended to memorialize the agreements made throughout our negotiations, please note that Brady has crossed out Section 23.02: Contributions ("contribution provision") since it was never agreed upon and therefore Brady is not obligated to comply with it.

It is the Company's position that the Union proposed the contribution provision on February 20, 2015 and the Company rejected the provision without offering a counter-proposal. The Union then proposed the contribution provision again on April 23, 2015. On June 24, 2015, the Company provided the Union a list of all provisions that were agreed upon and all that were outstanding. This list indicated that the Union's proposal for the contribution provision was rejected. Thereafter, the Company did not submit any proposal for the contribution provision. Finally, the Company again made its position clear on August 6, 2015 when it submitted its last, best and final proposal to the Union with a cover letter that stated, "Any outstanding union proposals, whether in the form of a formal proposal or in the form of contract language that is not identified above [referencing signed tentative agreements] is, formally rejected." Notably, there is no signed tentative agreement on the contribution provision, nor are there any proposals from the Company for the contribution provision.

Brady has every intention of complying with all topics that were collectively bargained, however, the contribution provision was never agreed upon between the parties. (GCX 26(a)).

Since February 9, 2016, Respondent has failed and refused to execute the negotiated and ratified CBA's that were signed by the Employer and tendered to Respondent.

III. CGC'S ANSWER TO RESPONDENT'S EXCEPTIONS

- 1. The ALJ did not err in finding that the Employer presented Respondent a document titled "Brady Engineers Negotiations Status" noting that the Employer was rejecting outstanding proposals.**

The Cover Letter that accompanied the Employer's August 6, 2015 Last, Best & Final Offer to Respondent makes clear that any outstanding offers were being rejected. Moreover, the very definition of a Last, Best & Final Offer clearly means everything else is off the table. The Cover Letter makes clear that the spreadsheet titled "Brady Engineers Negotiations Status" showed only the agreements or proposals contained in the Last, Best & Final Offer.

- 2. The ALJ did not err in finding that Article 23.02 was Respondent's proposal and that any outstanding union proposals were formally rejected by the Employer.**

Again, the Cover Letter and the very nature of a Last, Best & Final Offer indicate that only the agreement or proposals contained therein are still on the table. Moreover, Article 23.02 was Respondent's proposal. Since the Employer's September 8, 2014 proposal did not contain certain or definite terms (given that the financial amount was left blank), Respondent admitted to Respondent inserted the existing rates, rather than using the Employer's last proposal, thereby constituting a rejection and counteroffer. (36:8-19; JTX 1; GCX 3 p. 57; GCX 22(b)).

Additionally, Respondent cannot accept an offer that does not contain certain and definite terms.

3. The ALJ did not err in finding that the Employer had expressly withdrawn its own proposal of Article 23.02.

The Employer issued its Last, Best & Final Offer to Respondent on August 6, 2015. The last time the Employer had even brought up Article 23.02 was nearly a year ago, on September 8, 2014. Even then, it was an incomplete proposal that simply had the language but not the financials. On multiple occasions, the Employer communicated to Respondent its position on Article 23.02 during bargaining and also memorialized it via Status Spreadsheet Summaries. In fact, Respondent admitted that the Employer communicated its rejection several times to Article 23.02 proposals via Status Spreadsheet Summaries. Although O'Mahar testified that he did not read the spreadsheets, the documents were given to him and he accepted them. Therefore, Respondent had constructive knowledge if not actual knowledge. Respondent cannot simply stick its head in the sand and feign ignorance or innocence!

4. The ALJ did not err in concluding that “The mere fact that the Employer does not agree to pay for apprentice training does not otherwise render its agreement to employ apprentices “superfluous” or “ambiguous.”

Simply because the Employer is not subsidizing the apprentice training does not mean that it cannot still employ apprentices pursuant to Articles 23.01 and 23.03 in the future. Moreover, it is undisputed that the Employer has never employed apprentices because Respondent has never provided it with any, so it can still be in compliance with Articles 23.01 and 23.03 without contributing to the JATC training fund.

5. The ALJ did not err in concluding that if Respondent believed that there was no meeting of the minds it should have communicated this to the Employer prior to ratifying the contracts.

If, in fact, Respondent learned on August 13, 2015, the date of the ratification vote, that Article 23.02 was missing, and it believed this to be a mistake, logic would dictate that Respondent would pick up a phone or send an email to the Employer to verify that first before

submitting it for a vote. Respondent knew that the Employer had not made an Article 23.02 proposal in nearly a year, and even then, the last proposal was incomplete. Would this not be cause for concern, especially since it was mentioned nowhere in the Last, Best & Final Offer, or the accompanying Cover Letter and Spreadsheet? Moreover, even if Respondent believed this to be a mistake, it could not have communicated any certain or definite terms to its membership before the vote regarding the remittance amount since there was no agreement. The membership voted on the Last, Best & Final Offer as-is. Respondent had ample opportunity to follow up on this issue before it unequivocally communicated to the Employer its acceptance of the Last, Best & Final Offer.

6. The ALJ did not err in concluding that “an agreement to employ apprentices while not paying for the apprenticeship training does not render Article 23 meaningless.”

In its Brief, Respondent mischaracterizes CGC’s position. CGC had made reference to Articles 23.01 and 23.03 being meaningless not because they are meaningless as written, but rather because, in effect, they are worthless to the Employer since the Employer does not employ any apprentices. Essentially, Respondent wants the Employer to subsidize a program that its other members (employed by other employers) enjoy for free when really there is no benefit to the Employer. Curiously, Respondent claims in its Brief that the Employer’s failure to pay into the JATC would bankrupt the trust. However, there is no evidence in the record to support this assertion. There was merely brief testimony that the JATC Trust receives contributions from other employers that employ other members of Respondent. Furthermore, Respondent did not present evidence that any of the Unit employees utilize the class offerings. The Employer admitted that it only knew of three employees who attended classes at the JATC, but that the JATC does not offer any classes specifically for laundry equipment maintenance and service.

Moreover, Articles 23.01 and 23.03 are not rendered meaningless because the Employer could still agree to hire apprentices from the JATC in the future. It is not CGC's position that there are superfluous and/or illegal provisions in the CBA's. Rather, there are provisions that could be triggered in the future such as this one. For example, Nevada is a "Right to Work" state. However, there is "Union Shop" language in the CBA in the event that was to change in the future. Just because a provision may not currently have any effect does not mean it lacks any value.

7. The ALJ did not err in finding that CGC has met its burden of establishing a meeting of the minds and find that Respondent violated the Act by refusing to sign the negotiated agreement.

The evidence shows that: (1) the Employer made a Last, Best, and Final offer on August 6, 2015; (2) Respondent's membership ratified the Employer's Last, Best, and Final offer on August 13, 2015; and (3) Respondent notified the Employer that the contract had been ratified, without any conditions that same date. The evidence and testimony establish that the parties case had reached a "meeting of the minds" on August 13, 2015, thereby obligating both parties, at the request of either party, to sign a written contract incorporating the agreed-upon terms.

Despite this meeting of the minds, on November 12, 2015, three months later, Respondent raised for the first time that Article 23.02 had been excluded from the contract. Then, Respondent tried to surreptitiously insert Article 23.02 into the contract for the Employer to sign. However, the Employer discovered this unlawful insertion and redacted it before signing and dating the contract that had been ratified, and submitting it to Respondent for execution. Since then, Respondent has refused to execute the negotiated and agreed-upon contract without

Article 23.02. The record unequivocally establishes that Respondent violated Section 8(b)(3) and Section 8(d) of the Act.

8. The ALJ did not err in finding that Respondent's unilateral insertion of Article 23.02 language in an attempt to modify the language of the Last, Best and Final Offer that was ratified and agreed upon standing alone is a breach of Respondent's duty to bargain in good faith.

Section 8(d) of the Act provides that a party's obligation to bargain collectively requires either party to execute a written contract incorporating any agreement reached between the parties upon the request of the other party. An employer who fails in its obligation to execute a memorialized collective-bargaining agreement, which fully encompasses the terms of an agreement between itself and a labor organization fails to bargain in good faith, in violation of Section 8(a)(1) and 8(a)(5) of the Act. See *Grocery Warehouse*, 312 NLRB 394 (1993).

Respondent's unilateral act of incorporating Article 23.02 into the parties' CBA's after the terms had been agreed upon and ratified runs afoul of the Act's obligation to bargain in good faith under Section 8(b)(3) and frustrates the purpose behind Section 8(d)'s requirement that the parties incorporate into a document an accurate record of their agreements so that employees know the terms that are to govern the workplace for the life of the collective-bargaining agreement. The Board has held that Section 8(d) requires that a party incorporate into a written contract only those matters as to which agreement was reached. See, e.g., *Daycon Products Company, Inc.*, 357 NLRB 508 (2011); *Henry I. Siegel Co., Inc.*, 153 NLRB 1448 (1965); *Ohio Car & Truck Leasing, Inc.*, 149 NLRB 1423, 1429 (1964) (employer's unilateral addition of language to contract provision after final agreement was reached "constituted an unlawful refusal to execute a completed contract"); *Reppel Steel & Supply Co., Inc.*, 239 NLRB 358, 362 (1978). Thus, the Respondent violated its duty to bargain in good faith under Sections 8(b)(3) and 8(d)

when it altered the written CBA after its final terms had been agreed to by the parties and ratified by the Unit employees.

9. The ALJ did not err in concluding that once Respondent agreed to the last, best and final offer that it was bound to incorporate those terms into a written contract.

The expression “meeting of the minds” is based on the objective terms of the contract, not on the parties’ subjective understanding of those terms. It does not require that both parties have an identical understanding of the agreed-upon terms. Where the parties have agreed on the contract’s actual terms, disagreements over the interpretation of those terms do not provide a defense to a refusal to sign the contract. *Sunrise Nursing Home*, 325 NLRB 380, 389 (1998).

Whether there is an existence or nonexistence of an agreement is a question of fact. *Graphic Communications*, 318 NLRB 983 (1995) (citing *Metro Medical Group*, 307 NLRB 1184 (1992)). The General Counsel must show that the parties reached the requisite meeting of the minds on the agreement and that the document respondent refused to sign accurately reflects that agreement. *Hempstead Park Nursing Home and New York*, 341 NLRB 321 (2004) (citing *Paper Mill Workers Local 61 (Groveton Papers Co.)*, 144 NLRB 939 (1963)). However, where only minor discrepancies may exist, a party is not relieved of its obligation to execute an agreement. *Bennett Packaging Co.*, 285 NLRB 602 (1992). *See also Georgia Kraft Co.*, 258 NLRB 908 (1981).

Here, the Employer emailed Respondent it’s Last, Best, and Final Offer on August 6, 2015. The Unit employees ratified it on August 13, 2015, and, on that same date, Respondent emailed the Employer the following: “The members at Brady Linen voted for ratification of the last best and final offer from Brady Linen.” Respondent communicated its acceptance unequivocally and without condition. Here we have an offer, and an acceptance mirroring the

offer, therefore a meeting of the minds was reached on August 13, 2015, and Respondent is obligated to sign the agreement.

Respondent had every opportunity to read and consider the Employer's Last, Best, and Final Offer before it presented it to its membership. Because the Employer's Last, Best, and Final Offer did not include Article 23.02, and Respondent's acceptance made no mention of it, under the objective terms of the contract, Article 23.02 should be excluded. The Employer should not be punished for Respondent's mistake or hasty actions.

10. The ALJ did not err in finding that Respondent's attempt to obtain terms that it deemed more favorable than the terms which it agreed upon by simply unilaterally inserting them constitutes an unlawful refusal to execute a completed contract in violation of the Act.

As mentioned above, the Board has held that Section 8(d) requires a party to incorporate into a written contract only those terms that were agreed upon. See, e.g., *Daycon Products Company, Inc.*, 357 NLRB 508; *Henry I. Siegel Co., Inc.*, 153 NLRB 1448; *Ohio Car & Truck Leasing, Inc.*, 149 NLRB 1423 (employer's unilateral addition of language to contract provision after final agreement was reached "constituted an unlawful refusal to execute a completed contract"); *Reppel Steel & Supply Co., Inc.*, 239 NLRB 358.

The facts show that Respondent, by O'Mahar, tried to pull one over on the Employer by inserting Article 23.02 language (which he had modified to reflect past financials), without even giving the Employer a heads-up. These actions suggest that Respondent was hoping the Employer would not notice and he would be able to sneak one past the Employer. To add insult to injury, Respondent is insisting, as a condition of signing the successor contract, that the Employer agree to include an article that was never bargained for nor agreed to by the parties. The record reflects Respondent's bad faith bargaining and refusal to execute a fully-negotiated CBA.

11. The ALJ did not err in finding that O'Mahar lacked credibility.

Respondent would have the Board believe that although O'Mahar accepted the Employer's summary spreadsheets, and did not hand them back, that he never read them and had no idea what they said. O'Mahar testified that on the day of the ratification it did not give him pause that the entire article was excluded even though this was a deal breaker issue. He then waited three months to raise the issue with the Employer. Perhaps the worst offense, however, is that O'Mahar thought it was okay to insert his own Article 23.02 language, which had not been bargained or agreed to, into the compiled CBA's, and then expected the Employer to sign it. O'Mahar's testimony was filled with blaring inconsistencies and for that reason he should be wholly discredited.

12. The ALJ did not err in concluding that since February 9, 2016, Respondent has violated Section 8(b)(3) of the act by failing and refusing to execute the collective bargaining agreements between respondent and the Employer.

As Respondent aptly points out in its Brief, "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 "judged by a reasonable standard." *Vallejo Retail Trade Bureau*, 243 NLRB 762, 767 (1979), enforced 626 F.2d 119 (9th Cir. 1980).

It follows, therefore, that Respondent's subjective misunderstanding regarding Article 23.02 is irrelevant. The Employer issued its Last, Best, and Final, and then Respondent conveyed its acceptance without condition.

Respondent contends that it was expecting a revised proposal for Article 23.02 based on the representations of the Employer's chief negotiator and attorney, Gregory Kamer. However,

this could not possibly be a reasonable expectation since nearly a year had passed since the Employer's negotiator allegedly made that comment. Even if Respondent's expectation was reasonable, why did Respondent never follow up to see if a revised proposal was coming down the pipe?

When all is said and done, Respondent suffered of buyer's remorse, tried to "fix" things, and got caught with its hand in the cookie jar. The evidence and testimony make clear that Respondent has violated Sections 8(b)(3) and 8(d) of the Act.

IV. CONCLUSION

The ALJ's Decision is comprised of proper credibility determinations, thorough reasoning based on the record as a whole, and correct interpretation and application of Board law. Respondent has not shown why any applicable Board precedent or any aspect of the Decision should be overruled. Respondent's Exceptions should be dismissed entirely.

Dated at Las Vegas, Nevada, this 12th day of October 2017.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that **COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS** in International Union of Operating Engineers, Local 501, Case 28-CB-170340, was served via E-Gov, E-Filing, and E-Mail, on this 12th day of October 2017, on the following:

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