

United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

DATE: September 27, 2017

TO: Paul J. Murphy, Regional Director
Region 3

FROM: Jayme L. Sophir, Associate General Counsel
Division of Advice

SUBJECT: International Brotherhood of Teamsters, Local 554-1433-8300-0000
264 (Erie Logistics, LLC) 554-1483-2083-8000
Case 03-CB-190810 725-0175-6700-0000
725-6750-6700-0000

This case was submitted for advice as to whether the Union and Employer agreed to modify the terms of a Memorandum of Agreement (MOA) between the parties, which extended the parties' collective-bargaining agreements for an additional three-year term to expire in August 2019, and if so, whether the Union violated the Act by refusing to execute a side letter memorializing the agreement. We conclude that the parties did not reach a "meeting of the minds" with regard to modifications to the MOA or the terms of the side letter. Thus, the Union did not violate the Act by failing to execute the side letter. We further conclude that even assuming that the parties had reached a meeting of the minds with regard to the terms of the side letter and thereby modified the terms of the MOA, the MOA never went into effect because it contained a condition precedent that was never met. Thus the parties' 2011–2016 collective-bargaining agreements were not extended.¹

¹ The charge also alleges that the Union violated Section 8(b)(3) and 8(d) by threatening to strike during the term of a collective-bargaining agreement. The Region has concluded that, if the parties agreed to modify the MOA, and the MOA is in effect, the Union violated Section 8(b)(3) and 8(d) by threatening to strike. The Region also apparently has concluded that, even if the parties did not agree to modify the MOA, and/or the MOA is not in effect, the Union violated Section 8(b)(3) and 8(d) because, although the original collective-bargaining agreements were set to expire in August 2016, the Union did not give adequate notice that it intended to reopen negotiations and failed to give the requisite notice to FMCS or PERB. Therefore, the automatic renewal provisions of the agreements applied, and the Union's threat to strike during the term of the renewal period was unlawful.

FACTS

For a number of years, the International Brotherhood of Teamsters, Local 264 (the Union) had been a party to a collective-bargaining agreement with Tops Markets (Tops). Tops is a supermarket chain based in Buffalo, New York with outlets throughout New York and other northeast states, including two warehouses that service Tops stores. Collectively the warehouses are referred to as the “Lancaster facilities.” The main warehouse is in Lancaster and there is a freezer warehouse in Cheektowaga, New York. The Union represents warehouse and maintenance employees as well as drivers at both locations. There are currently approximately 650 members in the bargaining unit who are covered under three separate collective-bargaining agreements: (1) frozen food associates at the frozen distribution warehouse, (2) perishable food associates at the perishable goods warehouse, including delivery drivers, and (3) maintenance associates who perform work at both locations.

Between 1987 and 2002, Tops directly employed the employees at the Lancaster facilities and was signatory to the collective-bargaining agreements with the Union that covered the warehouse employees. In 2002, Tops sold both warehouses to C&S Wholesale Grocers, Inc. (C&S), which transferred the employees to Erie Logistics, LLC (Erie), a wholly owned subsidiary of C&S. The employees continued to provide the same warehouse and distribution services under Erie’s management as they had for Tops. Following the transfer of the employees, Erie and the Union were signatory to successive collective-bargaining agreements including the most recent contracts that were effective from August 15, 2011 to August 14, 2016.

In August 2013,² Tops decided to re-acquire the Lancaster facilities. During that same month Tops and C&S approached the Union with a proposal that Tops re-acquire the warehouse operations from C&S and Erie. Thereafter, Tops, Erie, together with its parent C&S, and the Union entered into a Memorandum of Agreement dated August 28, which provided in pertinent parts:

2. The Lancaster CBAs shall each be revised as follows. Except as outlined below, current terms and conditions remain unchanged.

...

- Extension of the Lancaster CBAs to 2019 –
Within the Lancaster CBAs all references to “August 14, 2016” shall be deleted in their entirety and replaced with references to “August 10, 2019” (including within Articles 35.01 and 35.03 of the Warehouse CBA and Articles 29.01 of both the Freezer CBA and Maintenance CBA). . . .

² Hereafter all date are in 2013 unless otherwise noted.

3. This MOA is contingent on the completion of a business contract between the Company (Tops) and Erie Logistics and /or Erie Logistics' parent company, by which the Company assumes responsibility for the operations of the Lancaster Facilities. "The Effective Date" of this MOA shall be the date the Company assumes responsibility for the operations of the Lancaster Facilities.

The MOA also required Tops to sign updated participation agreements with The New York State Teamsters Conference Pension Retirement Fund (the Fund) through August 10, 2019.³ The parties contemplated that by October 1, Tops would purchase all of Erie's assets from C&S and assume direct operational responsibility for the Lancaster facilities.

Almost immediately after executing the MOA, Tops experienced delays in converting the payroll system and transferring licenses, lease assignments and permits from Erie. Tops and C&S concluded because of the delays that the transition would be smoother if Tops purchased C&S's membership interest in Erie rather than acquiring its assets. Because a membership interest purchase differs from the asset purchase agreed to in the MOA, Tops and C&S arranged a telephone conference call with the Union to discuss the membership interest purchase.

According to the senior attorney for C&S/Erie at the time, on or about October 22, he drafted some talking points and a side letter that he emailed to the representative for Tops that same day. The email stated that they could use the drafts to approach the Union regarding the acquisition of Erie by Tops. The email also stated that the attorney would reach out to the Union to schedule a time for a conference call. The talking points included the following in pertinent part:

In order to stay on schedule, it would make sense for Tops to acquire ownership of Erie Logistics in association with its assumption of control over the warehouses.

Under this plan, during a limited period immediately following the transition, bargaining unit employees would continue to be formally employed by Erie Logistics (which would now be wholly owned by Tops). This would allow Tops and C&S to push forward with completing the transaction without delay, even as

³ The details of the pension requirements are specified in the three 2011-2016 collective-bargaining agreements. They each state that Erie will participate in the Fund. Six different participation agreements were executed with the Fund through August 14, 2016 for employees covered under the contracts. There are separate participation agreements for each of the three bargaining units and different schedules to cover different groups of employees.

Tops continues to explore ways to efficiently transition employees from Erie to Tops itself.

Even though Erie would be considered the formal employer for a brief period following the transition, bargaining unit employees would immediately be part of the Tops family, and would be treated similar to other Tops employees. . . .

For all intents and purposes, employees would find the arrangement virtually indistinguishable from being directly employed by Tops - its [sic] just that for a limited period Erie Logistics would remain the official employer named in the CBA and on associated employment documents.

We believe this arrangement is largely compatible with both the spirit and text of the MOA we signed in August, but it makes sense to sign a short side letter confirming this arrangement. We can send you some draft language.

On October 30, a conference call took place between C&S, Erie, Tops, and the Union's attorney and two business agents.⁴ The attorney for C&S/Erie⁵ recalls that during the conference call he and the Tops representative tag-teamed the discussion, and that they followed the talking points but did not read them word for word. They advised the Union that Tops was still going to purchase Erie outright even though the transaction was a change from what the parties discussed during the negotiations for the MOA and that it was his position that the spirit of the MOA would remain intact. He also recalled that the Union representatives said that it seemed sensible to do whatever it took to facilitate the transaction and that the Union's attorney said that he did not see any problem with what they discussed but to "send them something in writing to look at."

That same day, the C&S/Erie attorney emailed the Union's attorney the following email:

As we discussed on today's call, it's been determined that the transition to Tops (in terms of licenses, benefits plans, employee paperwork (I-9's, etc.), and DOT driver requirements) could be expedited, compared to the time frame of a mere asset deal, by transferring to Tops the ownership interest in Eric Logistics, LLC. Although we view this structure as being largely compatible with the MOA all

⁴ In mid-October 2013, the Union held internal union elections where the incumbent officers were voted out and the newly elected officers took office on January 1, 2014. The two business agents that took part in the conference call are the only two union agents to survive the regime change.

⁵ During this period the attorney represented both C&S and Erie.

parties signed in August, the attached one page side letter is intended to ensure that everything is fully clear.

If you and Local 264 find this letter acceptable, please send me a signed copy.

The attached side letter states in pertinent part:

Specifically, to the extent that the business contract involves a transfer of ownership interest in Erie Logistics LLC, all terms and conditions of the MOA shall remain unchanged, except that Paragraph 1, Paragraph 2 (first bullet only), Paragraph 4, and Paragraph 5 (final sentence only) of the MOA (collectively, the "Successorship Provisions") shall take effect at such time as Tops takes over the direct employment of Local 264 bargaining unit members. In the meantime, assuming that the business transaction is consummated, Erie shall remain the employer bound by the Lancaster CBAs as revised pursuant to the non-Successorship Provisions of the MOA.

The side letter did not refer to the part of the MOA that addressed the three-year extension of the Lancaster collective-bargaining agreements from August 12, 2016 to August 10, 2019. Nor did it address the provision in the MOA that states that the MOA's "Effective Date" would be the date Tops assumes responsibility for the operations of the Lancaster Facilities.⁶

On November 6, the C&S/Erie attorney sent the Union's attorney an email inquiring about the status of the side letter. The Union's attorney responded and apologized for not acting sooner and indicated he would get to it by the end of the week. On November 14, the C&S/Erie attorney emailed the Union's attorney again inquiring about the status of the side letter. When he did not receive a response to his email, he called the Union's attorney that same day. During the phone conversation, the Union's attorney informed him that he was no longer working with the Union and that he should contact one of the business agents who participated in the conference

⁶ According to the Employer's brief in a related arbitration proceeding, the parties had intended this last provision to mean that the MOA would only become effective when Tops assumed *direct* control of the warehouses, i.e., by purchasing the assets of Erie (whereby Erie would cease to function), and directly operating the warehouses. "Tops never assumed responsibility for the Lancaster operation. Erie assumed that responsibility and therefore, the successor terms of the MOA making Tops the party to the union contracts never became effective." Opinion and Award, FMCS Case No. 14-58557, dated July 4, 2016 (Lewandowski, Arb.) (quoting Tops's closing argument). It is not clear why the Employer neglected to seek to amend this provision when it proposed the side letter.

call. Around mid-November, the C&S/Erie attorney called one of the agents who participated in the conference call about getting the side letter signed. The agent informed him that because a new president was taking over he needed to hear from the president about what to do because he did not want to sign anything without getting approval from the president.

In early December, the Fund met with Tops and C&S representatives. During the meeting, the Fund expressed its discomfort with the sale of Erie's membership interests and suggested that the transaction might trigger a withdrawal. According to the C&S attorney, during this same timeframe, he contacted the Union business agent again and asked about executing the side letter. He was told that the Fund did not want the Union to sign the letter and that the Union's president was hesitant to sign it because of the Fund's objections.

On December 23, the sale of Erie from C&S to Tops closed. Tops became the sole owner of Erie and stepped into C&S's shoes as Erie's parent company. The closing documents included an Instrument of Assignment and Assumption of Collective Bargaining Agreements. The C&S/Erie attorney prepared the assignment of the collective-bargaining agreements from Tops to Erie out of an abundance of caution because the Union had expressed reservations about signing the side letter in the face of the Fund's objection.

On January 13, 2014,⁷ a Tops representative asked the Union president to sign an updated version of the side letter. The Union president responded that he would show it to the Union's new attorney and get back to him, but never did.⁸

On January 21, the Fund suspended Erie based on its position that the sale threatened the financial stability of the plan. As a result, the pension service credits of the employees at the Lancaster facilities ceased on December 23, 2013 and remain frozen as of this date.⁹

⁷ Hereafter all dated 2014 unless otherwise noted.

⁸ The letter was identical to the October 22, 2013 letter except for the change in date and addressee, and it reflected that the Erie business transaction had already occurred.

⁹ Approximately 100 of the 650 bargaining unit employees are eligible to retire, but are unable to do so without a substantial reduction in their annuity because they have lost three years of service credit and would be penalized if they retire at a time when they are not working for a covered employer.

On May 27, the Fund declared that Erie/C&S owed it over \$183 million as its liability for withdrawing from the Fund. As a result, Erie/C&S was required to start making payments to the Fund within 60 days regardless of whether it challenged the declaration.¹⁰ On May 28, the Fund offered Tops the opportunity to enter the Fund as a new employer but Tops rejected the offer because of concerns that it might strengthen the Fund's withdrawal determination against C&S and expose Tops to the withdrawal assessment.¹¹

On July 28, 2014, the Union filed a grievance alleging that Tops employs the Lancaster facilities' employees, and is a party to the collective-bargaining agreements pursuant to the MOA. Therefore, according to the Union, Tops had a contractual obligation to participate in the Fund and accept the May 28 offer to enter as a new employer.

On July 4, 2016,¹² an arbitrator issued his decision denying the Union's grievance alleging that Tops employed the Lancaster facilities' employees. He concluded, among other things, that the MOA did not bind Tops because it was contingent upon Tops' assumption of control of the warehouses pursuant to paragraph 3 of the MOA. Thus, because Tops never took control of the warehouses, the MOA never took effect and Erie was still the employer of the Union-represented employees.

On July 7, the parties met to discuss the arbitrator's decision. At the meeting, the Union took the position that based on the decision, the parties' collective-bargaining agreements would expire on August 14 and that it wanted to open negotiations, but only on the pension provisions. The Union also asserted that it had the right to strike if no new agreement was reached regarding the pension by August 14. Erie insisted that the parties agreed in October 2013 that the substantive provisions of the MOA would remain intact with Erie as the employing entity, and that the contracts would therefore not terminate until 2019. By letter dated July 8, the Union's Secretary/Treasurer memorialized its position and notified Erie that the MOA never triggered and therefore the collective-bargaining agreements would expire on August 14.

¹⁰ Erie and C&S separately filed requests for review of the withdrawal liability declaration under ERISA. The dispute is the subject of a protracted arbitration that is scheduled into at least the Fall of 2017.

¹¹ Tops had indemnified C&S against any potential withdrawal liability and is therefore responsible for paying the withdrawal assessment.

¹² Hereafter all dated 2016 unless otherwise noted.

On July 19, an Erie representative saw a Union memo announcing an August 4 strike vote. There is no dispute that the members authorized a strike at this meeting. The Union also indicated to Erie that a strike was likely.

Since August 2016, Erie and the Union have entered into a series of extension agreements to provide time to explore possible solutions for the pension issue with the Fund. In every extension agreement, Erie preserved its legal position that the contracts had been extended to August 2019, and that it was not waiving any rights by signing the extensions or agreeing to negotiate the pension issue. At least twice since August 2016, as expiration dates for an extension approached, the Union expressed its willingness to strike and communicated this to its members. The most recent extension expired on April 29.¹³

On January 5, 2017, and amended on March 30, 2017, charges in the instant case were filed alleging that the Union violated Sections 8(b)(3) and 8(d) of the Act by failing to sign the side letter, which it agreed to sign, and by threatening to strike during the term of the extended collective-bargaining agreements.

ACTION

We conclude that the parties did not reach a “meeting of the minds” with regard to the terms of the side letter or modifications to the MOA. Thus, the Union did not violate the Act by failing to execute the side letter. We further conclude that the MOA never went into effect because it contained a condition precedent that was never met, and thus the parties’ 2011–2016 collective-bargaining agreements were not extended to August 2019.

As part of the obligation to bargain collectively and in good faith, Section 8(d) of the Act requires “the execution of a written contract incorporating any agreement reached if requested by either party.” Thus, if parties reach agreement, the refusal to sign and execute a contract “is a refusal to bargain within the meaning of the Act.”¹⁴ Under Section 8(b)(3), it is an unfair labor practice for a union to refuse an employer's request to sign such a negotiated agreement.¹⁵ However, the obligation to execute an

¹³ The parties have not negotiated a new extension and the Union recently acknowledged that even based on its position about the expiration date, it did not timely forestall renewal and the contract would not expire until August 14, 2017.

¹⁴ *H.J. Heinz Co. v. NLRB*, 311 U.S. at 523, 525–26 (1941).

¹⁵ *Windward Teachers Ass’n*, 346 NLRB 1148, 1150 (2006); *Graphic Communications Union District 2 (Riverwood International USA)*, 318 NLRB 983, 990 (1995).

agreement is only triggered when the employer and union have reached a “meeting of the minds” on all substantive issues and material terms of the agreement.¹⁶ A contract need not be reduced to writing to be valid when a “meeting of the minds” transpires.¹⁷ To determine if an agreement has been reached, the Board looks to see whether the parties had “a ‘meeting of the minds’ on all substantive issues and material terms of the contract.”¹⁸ Whether the parties had a “meeting of the minds” is determined “not by parties’ subjective inclinations, but by their intent as objectively manifested in what they said to each other.”¹⁹ In other words, the Board looks to the “specific language that the parties used in their communications with one another and the context in which these interactions occurred.”²⁰ The General Counsel “bears the burden of showing that the parties have reached the requisite ‘meeting of the minds.’”²¹

¹⁶ *Crittenton Hosp.*, 343 NLRB 717, 718 (2004); *Sunrise Nursing Home*, 325 NLRB 380, 389 (1998).

¹⁷ *Carpenters Local 405*, 328 NLRB 788, 793 (1999).

¹⁸ See, e.g., *Intermountain Rural Electric Ass’n*, 309 NLRB 1189, 1192 (1992).

¹⁹ See, e.g., *Crittenton Hosp.*, 343 NLRB at 718, citing *MK-Ferguson Co.*, 296 NLRB 776, 776 n.2 (1988); see also *Capitol-Husting Co. v. NLRB*, 671 F.2d 237, 243 (7th Cir. 1982) (agreements in the bargaining context between employers and unions require only “conduct manifesting an intention to abide and be bound by the terms of the agreement”), affirming 252 NLRB 43, 43 n.2, 43–44 (1980) (finding parties reached an enforceable oral agreement when the employer’s owner stated that if its competitors “give anything, he will give the same,” and the union then reached agreement with a competitor).

²⁰ *Windward Teachers Ass’n*, 346 NLRB 1148, 1150–51 (2006) (affirming ALJ’s finding that parties believed they had reached complete agreement when they concluded last bargaining session with handshakes and mutual expressions of satisfaction on their successful negotiation of a contract); *Carpenters Local 33 (Curry Woodworking, Inc.)*, 316 NLRB 367, 368–69 (1995) (finding a meeting of the minds where employer unconditionally accepted union’s offer to become a me-too signatory to a multiemployer agreement, because the parties’ past contractual relationship demonstrated that the union’s communication to the employer constituted an unconditional offer rather than an invitation to make an offer), enforced *sub nom.*, *NLRB v. Boston Dist. Council of Carpenters*, 80 F.3d 662 (1st Cir. 1996).

²¹ *Hempstead Park Nursing Home*, 341 NLRB 321, 322 (2004), citing *Intermountain Rural Electric Ass’n*, 309 NLRB at 1192.

C&S/Erie alleges, based on the parties' October 30, 2013 conference call, that the parties reached an agreement to modify the MOA to reflect the change in business transaction from a sale of assets to an outright sale. C&S/Erie asserts that the agreed-upon terms were memorialized in an October 30 side letter it sent to the Union, which the Union never signed. However, when examined under the principles set forth above, we conclude that although the Union agreed to a conference call with Tops and C&S/Erie to discuss modifying the MOA, they never reached agreement on the terms that were set out in the side letter drafted by the C&S/Erie attorney. Thus, the initial terms of the MOA, which the side letter was to modify, remained unchanged.

The evidence demonstrates that at the point C&S/Erie claims that the parties had reached an agreement regarding the side letter, the parties were just beginning discussions on its terms. Even according to the C&S/Erie attorney, the conference call was a one-sided presentation of his talking points by him and the representative from Tops to the Union rather than the normal back and forth of traditional bargaining.²² Those talking points explained the contemplated change in the form of the sale and included a statement that it made sense to sign a short side letter confirming this arrangement. According to the attorney for C&S/Erie, he then offered to send the Union some draft language. Notably, the draft language he subsequently sent the Union was drafted concurrently with his talking points around October 22—a full week prior to the conference call—which indicates that the draft side letter represented a proposal in an ongoing negotiation rather than an agreement memorializing terms agreed upon during the call. Further, although during the conference call the Union did not object to anything presented, the Union attorney also stated that he wanted them to “send them something in writing to look at.”²³ By doing so, he indicated that the parties had yet to reach a “meeting of the minds” on changing the terms in the MOA. Thus, it is clear that the conference call was only the initial stage of negotiations whereby C&S/Erie and Tops were attempting to persuade the Union to agree to their terms rather than the source of a binding agreement.²⁴

²² Cf. *Electrical Workers IBEW Local 22 (Electronic Sound)*, 268 NLRB 760, 762 (1984) (finding binding agreement where parties exchanged proposals, union put the employer's final proposal before employees, and subsequently reported their assent to employer), *enforced*, 748 F.2d 348 (8th Cir. 1984).

²³ Cf. *Id.* (noting the union representative's failure to express “caveats or reservation” as a factor in finding binding agreement).

²⁴ Cf. *Teamsters Local 771 (Ready-Mixed Concrete)*, 357 NLRB 2203, 2207 (2011) (explaining that handshakes and mutual expressions of satisfaction about the successful negotiation of a contract are “hallmark indication[s] that a binding

The language used in the email that the C&S/Erie attorney sent to the Union with the side letter attached is further indication that the parties had not reached a “meeting of the minds” during their conference call. The last line in the email requests that the Union’s attorney return a signed copy of the side letter if he and the Union “find this letter acceptable.” C&S/Erie’s attorney thereby acknowledged that the Union had not yet acceded to the terms of the side letter or its modifications to the MOA. Such conditional language signals that the requesting party knows there is no agreement.²⁵

Additionally, the communications between the parties after the C&S/Erie attorney sent the side letter to the Union do not support a “meeting of the minds” between the parties. Starting with the November 6 email sent by the C&S/Erie attorney, all of the C&S/Erie emails merely inquired about the status of the Union’s review of and willingness to sign the side letter. C&S/Erie never demanded that the Union sign the side letter to memorialize an extant agreement. Moreover, the follow-up phone conversations with the Union in November and December 2013 put C&S/Erie on notice that the Union was still undecided about whether to sign the side letter, initially because of the Union’s change in leadership and legal counsel and later because of the Fund’s objections. Finally, when the Union’s president was approached by a Tops representative in January 2014 and asked to sign an updated copy of the side letter, he responded that he would show it to the Union’s new attorney and get back to him, which he never did. Thus, the communications between the Union and C&S/Erie after the Union received the side letter is further indication that the parties never reached a “meeting of the minds” about the terms of the side letter or the modifications to the MOA.

Because the parties never reached the requisite “meeting of the minds” with regard to the terms of the side letter, we conclude that the Union’s failure to sign the side letter did not violate the Act.

agreement has been reached at the end of negotiations”); *Windward Teachers Ass’n*, 346 NLRB at 1150–52 (2006) (union reviewed, approved, and ratified contract without objecting to clause); *Graphic Communications District 2 (Riverwood International USA)* 318 NLRB 983, 990 (1995) (handshakes to seal the parties’ successful arrival at agreement).

²⁵ See *Lithochrome Corp.*, 276 NLRB 1190, 1190 n.1 (1985) (party itself did not believe that an agreement had yet been reached when that party presented a draft contract with a request that the other, “[p]lease contact me with changes or a date mutually convenient for signing.”).

Furthermore, even assuming, *arguendo*, that the parties had reached a meeting of the minds with regard to the terms of the side letter and thereby modified the terms of the MOA, we conclude that the side letter had no impact on the expiration date of the parties' collective-bargaining agreements. None of the MOA paragraphs specified in the side letter contained the language extending the parties' agreements to August 2019, and the side letter itself was silent as to the contracts' extension. The only reference to the extension of the collective-bargaining agreements is in an unmodified provision of the MOA, and we agree with the arbitrator that the MOA never took effect because the MOA contains a condition precedent that it will only go into effect when Tops assumes direct control of the warehouses.²⁶ The side letter did not modify that provision, and the parties knew how to identify specific provisions of the MOA for modification.²⁷

Accordingly, the Region should dismiss, absent withdrawal, the charges alleging that the Union violated Section 8(b)(3) and 8(d) of the Act by failing and refusing to execute the side letter because the parties did not reach a "meeting of the minds" with regard to its terms. The Region should deem the parties' 2011–2016 collective-bargaining agreements controlling for purposes of evaluating the remaining allegations.

/s/
J.L.S.

H:ADV.03-CB-190810.Response.Teamsters Local 264(Erie)(b)(6), (b)(7)

²⁶ The side letter is clear as to which terms of the MOA it purports to modify. The letter states that "[s]pecifically . . . all terms and conditions of the MOA shall remain unchanged, except that Paragraph 1, Paragraph 2 (first bullet only), Paragraph 4, and Paragraph 5 (final sentence only) of the MOA (collectively, the 'Successorship Provisions') shall take effect at such time as Tops takes over the direct employment of Local 264 bargaining unit members." In other words, the side letter codified the MOA's condition precedent rather than removing or modifying it. As of the date of this dispute, Tops had not assumed control and Erie remained the employer of the employees at the warehouses. Thus, we conclude that, for purposes of the underlying dispute, the condition precedent has not been satisfied and the MOA has not taken effect.

²⁷ See, e.g., *Electrical Workers, Local 3*, 363 NLRB No. 30, slip op. at 17 (2015) (affirming ALJ conclusion that where MOA made specific references to sections of prior contract that were to be deleted or modified but did not reference Riders, language demonstrated that the parties knew how to memorialize their agreement to delete items from the contract which did not include Riders).