

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

**KENWORTH SALES CO. d/b/a
KENWORTH SALES SPOKANE**

and

Case 19-CA-233407

**INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE WORKERS,
DISTRICT LODGE 751, AFL-CIO**

**COUNSEL FOR THE GENERAL COUNSEL'S POST-HEARING
BRIEF TO THE ADMINISTRATIVE LAW JUDGE**

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The Regional Director, on behalf of the General Counsel of the National Labor Relations Board ("General Counsel"), issued the Complaint and Notice of Hearing ("Complaint") in the above-captioned matter upon a charge filed by the International Association of Machinists and Aerospace Workers, District Lodge 751, AFL-CIO (the "Union"), alleging that Kenworth Sales Co. d/b/a Kenworth Sales Spokane ("Respondent") has been failing and refusing to sign the collective bargaining agreement reached by the parties and ratified by the Union's membership in early December 2018. The Honorable Administrative Law Judge Ariel L. Sotolongo ("ALJ") heard this matter in Spokane, Washington on June 25, 2019. Adam D. Morrison, Counsel for the General Counsel, respectfully submits this post-hearing brief and seeks to have the ALJ find that Respondent is violating the National Labor Relations Act (the "Act") as alleged by refusing to execute the parties' bargained-for and ratified collective bargaining agreement.

I. FACTS

A. The Parties

Respondent services and sells heavy highway equipment in Spokane, Washington (the "Facility"). (GC Exhs 1(c) and 1(e); 25:10-13)¹ The Union represents Respondent's service mechanics at the Facility and has for at least fifteen years. (25:17-19) The parties enjoy a stable and positive collective bargaining relationship evidenced by multiple, consecutive collective bargaining agreement and very few grievances. (27:19-24; 141:7-8) The principals for both sides in bargaining, Ric Petersen for Respondent and Steve Warren for the Union, have a ten-year, professional working relationship and have successfully negotiated several collective bargaining agreements together, including the

¹ References to the transcript appear as (—:—). The first number refers to the page; the second to the line(s). References to General Counsel Exhibits appear as (GC Exh —).

most recent one. (27:19-28:2) The parties' previous agreement, which Messrs. Petersen and Warren also negotiated, was effective from December 1, 2015, through November 30, 2018. (26:21-27:2; GC Exh 2) The parties' negotiations for the agreement at issue in this case occurred in November 2018. (28:19-21)

B. The Parties' Negotiations for the Successor Collective Bargaining Agreement

The November 2018 round of negotiations followed the same format as the previous negotiations: the parties met, made proposals and counterproposals; they eventually signed article-by-article tentative agreements for the new agreement; then, finally, the Union held a vote among its members to ratify the new collective bargaining agreement. (41:20-42:2) The negotiations for the current agreement were relatively short, with the parties only having met four times for face-to-face bargaining, on November 13, 14, 29, and 30, 2018, before reaching a tentative agreement, subject to ratification, in their final bargaining session on November 30, 2018. (28:19-21; 51:5-17)

As in the past, both sides remained fully aware that their tentative agreement for a new contract does not become an enforceable contract until it is ratified by the Union's membership. (51:1-20; 138:20-25; 149:13-20; GC Exh 12) Unlike in the past, the December 3, 2018 ratification vote occurred *after* the previous contract expired, thus implicating the Union's internal strike authorization procedures.² (51:10-17; 57:23-58:3)

The Union entered the 2018 negotiations seeking only minor changes to the previous agreement. (30:1-4; GC Exh 4) In contrast, Respondent, while largely agreeing

² The parties' previous collective bargaining agreements each contained no-strike, no-lockout articles. (GC Exh 2; 139:6-13) Thus, when the Union held ratification votes in previous years, they occurred prior to the expiration of the contract, therefore eliminating the possibility of a strike and, thus, it was unnecessary to hold a strike authorization vote in conjunction with those previous ratification votes.

to continue most terms of the previous agreement, entered bargaining seeking to address what it characterizes as a "hiring problem" by proposing a form of open shop. (GC Exh 5; 122:1-4) To that end, Respondent entered bargaining by proposing the following language: "Open Shop. Allow those who want to remain in the union and allow those who do not want to. We have had too many applicants turn us down because they do not want to be represented by a union and do not want the retirement plan required by the union." (GC Exh 5) Respondent, then, continued to propose this same language, unchanged, throughout bargaining, including in its last, best, and final offer made on November 30, 2018. (GC Exhs 5, 7, and 9)

Despite proposing this open shop language on November 13, 2018, Respondent, later that same day, signed a tentative agreement agreeing to the previous contract's union security provisions. (GC Exhs 2 and 8; 33:2-6; 40:2-7) At the parties' subsequent bargaining session, and despite already having signed a tentative agreement on union security, Respondent once again proposed the identical open shop language quoted above. (GC Exh 7) The parties did not meet again for face-to-face bargaining until November 29, 2018. (40:18-21)

During this interim period, the Union filed an unfair labor practice charge alleging that Respondent was engaging in regressive bargaining. (40:25-41:6; GC Exh 17) Specifically, the Union alleged that Respondent engaged in regressive, bad faith bargaining by signing a tentative agreement on union security on November 13, 2018, yet re-proposing the same open shop language at the following day's bargaining session. (40:25-41:6; 44:18-21) The Union would eventually withdraw this unfair labor practice

charge after the membership ratified the parties' new collective bargaining agreement, as discussed below. (62:2-6)

At the parties' next face-to-face bargaining session on November 29, 2018, the Union explained why it had filed the unfair labor practice charge. (45: 6-19) Rather than taking the opportunity to explain its position, Respondent, instead, told the Union that it understood what it was proposing, the language stands on its own, and that it has legal representation on this issue (46:11-18; 48:16-18). In response, the Union, once again, told Respondent that it was not interested in Respondent's open shop proposal and that if they would drop their insistence on it, the parties could reach an agreement for a new contract. (42:3-7)

By the fourth and final bargaining session, on November 30, 2018, the parties were down to only one unresolved issue: Respondent's open shop provision. (50:21-25) Of course, this is the same open shop language that Respondent had been making throughout bargaining, including its last, best, and final offer to the Union on November 30, 2018, and despite its TA on the existing union security provision. (GC Exhs 5, 7, and 9) Respondent confirmed that this offer was its last, best, and final offer. (GC Exh 9; 50:4-17) While the Union's bargaining team informed Respondent that it would not recommend this contract proposal to its members, it, nonetheless, agreed to hold a ratification vote on Respondent's last, best, and final offer on December 3, 2018, three days after the previous contract expired. (51:5-11; 52:17-20; GC Exh 2)

Shortly after the November 30, 2018 session, the Union drafted and sent to Respondent a complete copy of the contract proposal to be voted on by the membership and asked Respondent to confirm that it was accurate as to what Respondent was

proposing to be ratified. (53:14-54:9; GC Exh 12) This so-called "redline copy" specified what language was being kept, deleted, or amended in comparison to the previous contract, including the addition of Respondent's open shop language. (53:14-22; GC Exh 13) Union spokesperson Steve Warren did this in order to ensure complete transparency between the parties on what, exactly, was being voted on for ratification, since this would become the parties contract if the membership ratified it. (53:20-54:9; GC Exh 12)

Later that day on November 30, 2018, Respondent's bargaining spokesperson Ric Petersen specifically and unequivocally confirmed that the redline copy drafted by the Union and sent to Respondent, was, indeed, accurate as to Respondent's last, best, and final offer of November 30, 2018 and should be voted on by the membership for ratification. (55:25-56:1; 56:18-19)

C. The Union's Membership Ratified the Contract

The Union has a somewhat unorthodox ratification process, at least where the previous contract has expired and there is a possibility of a strike. (58:11-12) Under the Union's internal rules, the Union first takes a ratification vote on the contract proposal at issue. (58:11-12) If a majority reject the contract, the Union then takes a strike authorization vote. (58:18-20) However, if the strike authorization vote does not carry a two-thirds supermajority, then the previously rejected contract proposal is thereby retroactively ratified. (58:22-59:3)

That is exactly what happened when the Union held the ratification vote on December 3, 2018. (53:9-11) Initially, the Union's membership rejected Respondent's last, best, and final contract proposal. (53:9-10) However, less than two thirds of the membership subsequently voted to authorize a strike. (53:10-11) Accordingly, the

membership, by the Union's internal rules, retroactively ratified the contract. (53:11) On the evening of December 3, 2018, the Union notified the Employer by email that the membership ratified Respondent's last, best, and final offer and that the parties now had a contract. (53:11-13; GC Exh 14)

D. Respondent Refuses to Sign the New, Ratified Collective Bargaining Agreement

Since the contract's ratification, Respondent has been refusing to sign the new contract. (61:19-24; 143:8-11) On December 7, 2018, Steve Warren emailed Ric Petersen a copy of the ratified contract to sign. (GC Exh 15; 60:19-20; 61: 2-7) Since Mr. Petersen did not respond to Mr. Warren's email, Mr. Warren hand-delivered a copy of the contract to sign to Mr. Petersen on December 13, 2018. (61:8-11) To date, Ric Petersen and Respondent continue to refuse to sign the ratified contract of its own last, best, and final proposal. (61:19-24; 143:8-11)

E. The Grievance Process Would Resolve any Contract Interpretation Issues

Respondent's own last, best, and final proposal, which is the contract that Respondent refuses to sign, contains a broad grievance and arbitration procedure, as did all previous contracts between the parties. (GC Exhs 2 and 16; 140:5-15) The grievance procedure is the exclusive method for the parties to resolve "[a]ll complaints, disputes, grievances or differences that might arise over the *interpretation of [sic] application* of any part or portion of this Agreement" [emphasis added]. (GC Exh 16-Article 13.1) That grievance procedure has final and binding arbitration to resolve disputes concerning the interpretation and applicability of disputed provisions of the agreement. (GC Exh 16-Art. 13.2) Indeed, at the hearing, Ric Petersen unequivocally confirmed that the grievance

procedure could and should be used by the parties to resolve a potential dispute as to the meaning and interpretation of both Respondent's open shop language and Article 2's union security provisions. (140:12-15; 140:22-141:6; GC Exh 16) Likewise, the parties' contract contains a "savings clause" whereby any provision of the contract that is deemed to be void, does not affect the enforcement of the rest of the contract's articles or an arbitrator from deciding what article controls. (GC Exh 16-Article 17.1)

II. RESPONDENT VIOLATED THE ACT BY FAILING TO SIGN THE NEWLY BARGAINED AND RATIFIED COLLECTIVE BARGAINING AGREEMENT

Section 8(d) of the Act requires either party to a collective-bargaining agreement to execute, or assist in executing, a memorialized version of the agreement, if requested to do so by the other party. See *H.J. Heinz Co. v. NLRB*, 311 U.S. 514 (1941). The failure to do so constitutes a violation of §§ 8(a)(1), 8(a)(5), and 8(d) of the Act. See *1500 Met Drug, Inc.*, 326 NLRB No. 148 (1998); *Maury's Fluorescent & Appliance Serv.*, 226 NLRB 1290, 1293 (1976).

Obviously, this obligation to execute only arises after there has been a contract formed through a "meeting of the minds" on the substantive issues and material terms for the agreement. See *Intermountain Rural Elec. Ass'n*, 309 NLRB 1189, 1192 (1992). The General Counsel bears the burden of showing both that the parties had a meeting of the minds on the agreement and that the document which the respondent is refusing to sign accurately reflects that agreement. See *id.* In general, the Board follows the principles of contract law in determining whether the parties formed an enforceable contract. See *Ben Franklin Nat. Bank*, 278 NLRB 986, 994 (1986) (the Board generally follows contract law with slight modifications for the unique nature of collective bargaining). It is a well settled principle under contract and Board law, that ambiguities in contracts are to be

construed against the drafter, Respondent in this case. See *Intra-Roto, Inc.*, 252 NLRB 764, 770 (1980).

The law does not require the parties to agree on every possible interpretation of each term of their contract in order to have a "meeting of the minds" under Board law. See *Vallejo Retail Trade Bureau*, 243 NLRB 762, 767 (1979). The standard is much lower than that. Indeed, it is generally not the Board's role to interpret individual terms of the parties' agreement. See generally, *NRC Corp.*, 271 NLRB 1212, 1213 (1984) (where there are two or more plausible interpretations of a contract provision, the Board will avoid entering a dispute to serve the function of arbitrator in determining which party's interpretation is correct; that is the role of an arbitrator or the courts in cases brought pursuant to 29 U.S.C. § 185).

As the Board instructs, "a 'meeting of the minds' in contract law does not literally require that both parties have identical subjective understandings on the meaning of material terms in the contract. Rather, subjective understanding (or misunderstandings) as to the meaning of terms which have been assented to are irrelevant, provided that the terms themselves are unambiguous 'judged by a reasonable standard.'" *Vallejo Retail*, 243 NLRB at 767 quoting *Pittsburgh-Des Moines Steel Co.*, 202 NLRB 880, 888 (1973). A party's putative agreement to the contract is to be judged "by a party's words and conduct" . . . [making] his real or unexpressed intentions immaterial." *Pittsburgh-Des Moines*, 202 NLRB at 888. Simply put, the Board's inquiry as to whether there has been a contract formed is to ask whether the written contract that Respondent is now refusing to sign is an accurate embodiment of what the parties objectively agreed to at the

bargaining table, not their subjective interpretations of specific provisions. See *Vallejo Retail*, 243 NLRB at 767.

A. The Parties Reached a Valid and Enforceable Contract Under Board Law that Respondent is Now Refusing to Sign in Violation of the Act

By the fourth and final bargaining session, the only contractual article without a signed tentative agreement was Respondent's open shop proposal. Although the parties disagreed as to its inclusion in the new contract, Respondent's proposal on open shop never changed throughout bargaining. Indeed, its last, best, and final offer simply repeated the identical language that Respondent had been proposing since the first day of bargaining. While the Union said it would not recommend ratification of Respondent's last, best, and final offer, it, nonetheless, agreed to place it in front of the membership for a ratification vote. Both parties fully understood that if the membership ratified the contract proposal, the parties would have a valid and enforceable contract that included Respondent's open shop language; *i.e.*, both parties fully understood the ramifications of a ratification vote since every previous contract cycle followed the same ratification process. See *M & M Oldsmobile, Inc.*, 156 NLRB 903, 905 (1966) (once the parties commit to ratification, "it is for the union, not the employer, to construe and apply its internal regulations relating to what would be sufficient to amount to ratification").

Prior to holding the ratification vote, the Union took the extraordinary step of drafting a word-for-word, complete copy of Respondent's last, best, and final offer, including Respondent's open shop proposal, and had Respondent verify its accuracy before the vote. And, on November 30, 2018, Ric Petersen expressly and unequivocally confirmed to the Union that, indeed, the Union-drafted contract was an accurate embodiment of Respondent's last, best, and final offer.

On December 3, 2018, the Union's membership ratified the collective bargaining agreement, making it a valid and enforceable contract. Beginning on December 7, 2018, the Union repeatedly requested that Respondent sign the new collective bargaining agreement. However, to date, Respondent refuses, in clear violation of the Act, to execute the agreement that is a word-for-word embodiment of its own last, best, and final contract proposal.

B. The Respondent-Drafted Open Shop Language is Not Ambiguous

Respondent is likely to argue that it intended to have its open shop proposal mean something other than what the Union believed in meant. However, Respondent's written, open shop language is unambiguous on its face and consistent with Respondent's stated intent in bargaining: to have an "Open Shop . . . [that [a]llow[s] those who want to remain in the union and allow those who do not want to." Although the Union's bargaining team opposed this open shop proposal, it, nonetheless, clearly agreed to hold a ratification vote on this specific language. Likewise, both parties knew exactly what the membership was voting on and the effects of that ratification vote. As such, neither parties' subjective intent of the open shop language is relevant to this dispute under Board law. See *Vallejo Retail*, 243 NLRB at 767 (the subjective understanding or misunderstandings as to the meaning of terms which have been assented to are irrelevant, provided that the terms themselves are unambiguous).

C. The Board's Role Is Not to Interpret the Parties' Contract

The grievance process, not the Board, should be used by the parties to resolve any potential conflicts or disputes in their contract. While the language of the open shop provision itself is unambiguous, it admittedly might conflict with Article 2 of the contract,

which requires employees to pay union dues as a condition of their employment. However, it is not the role of the Board to decide which article of a contract controls. See *M & M Oldsmobile, Inc.*, 156 NLRB at 905.

By agreement of the parties in this and their prior contracts, it is the express role of an arbitrator to resolve “[all complaints, disputes, grievances or differences that might arise over the interpretation [or] application of any part or portion of this Agreement.” The Board’s role is simply to determine whether the written contract that Respondent is now refusing to sign is an accurate embodiment of what the parties agreed to at the bargaining table. See *Vallejo Retail*, 243 NLRB at 767. Indeed, there is no factual dispute that these parties agreed to this specific language. Any interpretation or application issues can and should be left to an arbitrator after going through the steps of the parties’ grievance process. Likewise, the parties’ contract contains a savings clause such that any provision that is voidable or unenforceable does not affect the other provisions’ applicability.³

IV. CONCLUSION

As described above, Respondent drafted the open shop language; Respondent repeatedly put it forward in bargaining, unchanged; and Respondent’s chief bargaining spokesman explicitly confirmed that it was accurate, prior to the ratification vote that accepted the contract. That contract, which has now been ratified by the Union’s membership, is a word-for-word, accurate embodiment of Respondent’s own last, best, and final offer. For the reasons stated above, the General Counsel respectfully requests that the Administrative Law Judge find that Respondent has been violating §§ 8(a)(1),

³ For example, if an arbitrator finds that the open shop language means employees can choose whether to be represented by the Union or not, as Respondent argues, yet the rules and law governing the pension trust prohibit this, the savings clause still protects all other terms of the contract.

8(a)(5), and 8(d) of the Act by refusing to execute the contract it both negotiated and sought to have ratified, and issue the attached proposed Order and Notice to Employees consistent with such a finding.

Dated at Seattle, Washington, this 30th day of August, 2019.



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915 Second Avenue
Seattle, Washington 98174

PROPOSED ORDER

The Respondent, Kenworth Sales Co. d/b/a Kenworth Sales Spokane, its officers, agents, successors, and assigns, shall:

1. Cease and desist from
 - (a) Failing and refusing to bargain with the International Association of Machinists and Aerospace Workers, AFL-CIO, District Lodge 751 (the "Union"), as the exclusive collective-bargaining representative of the employees in the following appropriate bargaining unit ("Unit") by refusing to sign the collective bargaining agreement reached with the Union on about November 30, 2018, and ratified by the Union's membership on December 3, 2018:

all full time and part time automotive mechanics, automotive machinists, automotive electricians, tune up men, welders, radiator repairmen, refrigerator repairmen; but excluding clerical and office employees, salesmen, administrative employees, guards and supervisors as defined in the National Labor Relations Act as amended, and all other employees presently under agreement with other Unions, parts employees, and temporary workers.
 - (b) *In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.*
2. Take the following affirmative action necessary to effectuate the policies of the Act.
 - (a) Upon request, sign the collective bargaining agreement reached with the Union on about November 30, 2018, and ratified by the Union membership on December 3, 2018.
 - (b) Make Unit employees whole for any losses they incurred as a result of Respondent not signing the collective bargaining agreement reached with the Union on about November 30, 2018, plus interest.
 - (c) Within 14 days after service by the Region, post at all of its facilities, copies of the attached notice marked Appendix.¹ Copies of the notice, on forms provided by the Regional Director for Region 19 after being signed by the 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, the Respondent has gone out of business or closed the facility involved in these

¹ 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."

proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent.

- (d) 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 the Respondent has taken to comply.

PROPOSED NOTICE TO EMPLOYEES

(To be printed and posted on official Board notice form)

FEDERAL LAW GIVES YOU THE RIGHT TO:

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

WE WILL NOT interfere with, restrain, or coerce you in the exercise of the above rights.

International Association of Machinists and Aerospace Workers, District Lodge 751, AFL-CIO (the "Union"), is the representative of our employees in the following unit in dealing with us regarding wages, hours, and other working conditions:

all full time and part time automotive mechanics, automotive machinists, automotive electricians, tune up men, welders, radiator repairmen, refrigerator repairmen; but excluding clerical and office employees, salesmen, administrative employees, guards and supervisors as defined in the National Labor Relations Act as amended, and all other employees presently under agreement with other Unions, parts employees, and temporary workers.

WE WILL NOT refuse to sign the collective bargaining agreement we reached with the Union on November 30, 2018.

WE WILL execute the collective bargaining agreement that we agreed to on November 30, 2018 and was ratified by you.

WE WILL NOT in any like or related manner interfere with your rights under Section 7 of the Act.

KENWORTH SALES SPOKANE

(Employer)

Dated: _____

By: _____

(Representative)

(Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. We conduct secret-ballot elections to determine whether employees want union representation and we investigate and remedy 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 or you may call the Board's toll-free number 1-866-667-NLRB (1-866-667-6572). Hearing impaired persons may contact the Agency's TTY service at 1-866-315-NLRB. You may also obtain information from the Board's website: www.nlr.gov.

Telephone:

Hours of Operation:

CERTIFICATE OF SERVICE

I hereby certify that a copy of the Counsel for the General Counsel's Post-Hearing Brief to the Administrative Law Judge was served on the 30th day of August, 2019, on the following parties:

E-File:

The Honorable Gerald M. Etchingham
Associate Chief Administrative Law
Judge
National Labor Relations Board
Division of Judges
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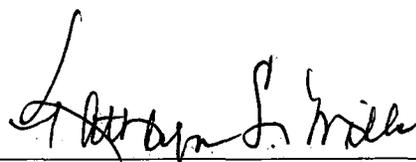
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