

RONALD A. VAN WERT  
ETTER, McMAHON, LAMBERSON,  
VAN WERT & ORESKOVICH, PC  
618 W. RIVERSIDE AVENUE, SUITE 210  
SPOKANE, WA 99201  
TELEPHONE: (509) 747-9100  
Attorneys for Kenworth Sales Company dba  
Kenworth Sales Spokane

UNITED STATES OF AMERICA  
NATIONAL LABOR RELATIONS BOARD  
REGION 19

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

and

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

Cases 19-CA-233407

**KENWORTH SALES'  
CLOSING BRIEF**

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Pursuant to Administrative Law Judge Ariel L. Sotolongo's request, Kenworth Sales, by and through its counsel of record, Ronald A. Van Wert of Etter, McMahon, Lamberson, Van Wert & Oreskovich, P.C., respectfully submits this Closing Brief in connection with the trial held on June 25, 2019.

The National Labor Relation Board's complaint alleging Kenworth Sales improperly refused to sign the contract proposed by IAM 751 ("the Union") should be dismissed; the Board has failed to meet its burden because the evidence shows that there was no meeting of the minds and, therefore, no contract exists. By the Union's own admissions, the Open Shop provision at issue does not make sense, is irreconcilable with the union security clause, and is

unlawful. Either one of these negates the contract; together they leave no doubt.

## **I. Argument**

The evidence admitted at trial established the following indisputable facts:

- Kenworth Sales is having a difficult time recruiting technicians because the applicants do not want to pay into the Union pension plan, which has been in a critical status for almost a decade.
- Kenworth Sales believes an open shop would improve recruiting and hiring of new technicians.
- Kenworth Sales defined open shop as one in which an employee can choose not to be covered by the Union contract at all, not pay any fees, and not pay into the pension.
- The language of the Open Shop provision does not make sense.
- The Open Shop provision cannot be reconciled with the union security clause.
- The Union ratified the contract believing the open shop provision was illegal.

### **A. The Open Shop provision makes no sense**

The Open Shop provision in the proposed agreement reads as follows:

*1.2 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.*

G.C. Exh. 13.

As Mr. Petersen testified to, and as commonsense dictates, this language was a placeholder to “hammer out the actual language” of the provision once the proposal was accepted by the Union. *Tr. 130:4-18*. Upon questioning by this Court, the Union admitted that

the provision makes no sense:

JUDGE SOTOLONGO: But in this case, I mean, did you tell your members that this provision, or this proposal was contradictory? It didn't make any sense.

THE WITNESS: Yeah, yes.

*Tr. 101:20-23.* Counsel for Kenworth Sales, as well as the Court, queried Mr. Warren on his understanding of the Open Shop provision and how he explained its meaning to the Union prior to vote, but Mr. Warrant was unable (or unwilling) to provide any cogent response.

Merriam-Webster Dictionary defines “ambiguous” as “doubtful or uncertain especially from obscurity or indistinctness” and “inexplicable.” It is indisputable that the Open Shop provision at issue here falls squarely within that definition. “When the terms of a contract are ambiguous, and the parties attach differing meanings to the ambiguous terms, a ‘meeting of the minds’ is not established.” *Hempstead Park Nursing Home & New York State Nurses Ass'n, Uan, Afl-Cio*, 341 NLRB 321, 322-23 (2004) (citing *Meat Cutters Local 120 (United Employers, Inc.)*, 154 NLRB 16, 26-27 (1965)). Here, the evidence demonstrates that the Union and Kenworth Sales did not agree on the meaning of the terms contained in the Open Shop provision at issue. It simply does not make sense as contract language. Accordingly, it does not constitute an agreement between the parties and further negotiations are necessary, as has been historically done for each negotiation between these parties for the last 9 years and was anticipated by Kenworth Sales.

#### **B. The Open Shop provision is irreconcilable with the Union Security provision**

Fundamental rules of contract law demand that each provision of a contract be interpreted in relation to the remaining provisions of the contract.

A primary principle of contract construction is that the contract be read as a whole, and

that every part therein be interpreted in relation to the entire instrument. Other fundamental rules require (a) that the contract be construed, if possible, so that its provisions are valid rather than invalid; (b) that a reasonable meaning be accorded to all its terms; . . .

*Supreme Sunrise Food Exchange, Inc.*, 105 NLRB 918, 920 (1953). The Union admitted that the Open Shop provision at issue cannot be reconciled with the Union Security provision:

Q Now, you had brought up the issue with me, as you've previously testified, regarding the regressive bargaining ULP, because you felt that an open shop provision was inconsistent with a Union security provision; isn't that correct?

A Yes.

Q So you agree that, in your mind, how you define open shop, would be irreconcilable with Union security?

A Yes.

*Tr. 86:12-19.*

“[T]he parties' actual intent underlying the contractual language in question is always paramount, and is given controlling weight.” *Mining Specialists, Inc.*, 314 NLRB 268 (1994). It is disingenuous to argue that Kenworth Sales intended to include irreconcilable provisions. The Union acted in bad faith by knowingly ratifying an irreconcilable provision and failing to further negotiate the terms to allow for the parties' intent to be represented in the agreement. The Union cannot now be allowed to insist that such a contract be signed.

**C. The Union ratified language it asserts is unlawful**

The Union admitted to ratifying the agreement despite believing the Open Shop provision was illegal and unacceptable.

JUDGE SOTOLONGO: Did you tell them that the trust had told you that at least part of it was illegal and unacceptable?

THE WITNESS: Yes.

*Tr. 101:24 – 102:1.* The Union cannot legitimately argue that Kenworth Sales intended to adopt a provision that is illegal. This difference in interpretation demonstrates that there is no meeting of the minds. Moreover, it is unconscionable for the Union to ask this Court to force Kenworth Sales to sign an agreement with a provision that the Union believes is illegal.

**D. There was no last, best and final offer or final approval of the agreement**

The evidence is consistent that Mr. Petersen never verbally or in writing stated Kenworth Sales was making its last, best and final offer. *Tr. 52:13-23.* In fact, the Union's own notes from negotiations are consistent with Mr. Petersen's testimony that he never said it was a last, best and final offer, but was Kenworth Sales' current offer. G.C. Exh. 10 (November 30 meeting: "SW: so this is your LBF? RP: This is our offer today.").

In addition, Mr. Warren, referencing the historical process followed by the parties, asked Mr. Petersen to verify the changes negotiated prior to signing the agreement. G.C. Exh. 15. Mr. Petersen never accepted the final agreement, which Mr. Warren acknowledged.

Q BY MR. VAN WERT: It says: "As we have done in the past, please verify all the changes as we agreed to from negotiations". You are indicating that as you've done in the past, you were providing it to the Employer to give the ultimate yea or nay, that is the contract.

A With that it's yes.

...

Q Okay. And it's consistent within the, you know, as your past - we talked about past practice. In the past you provide the alternate copy to the Employer to give the final yea or nay, this is what we agreed to.

A Correct.

Q And in relation to this Mr. Petersen, and nobody from Kenworth Sales ever told you and verified yes, that is correct.

A I -- no, I do not have one.

Q You never got the verification, correct?

A Correct.

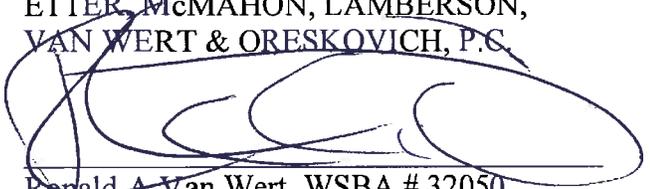
*Tr. 92:2-93:1.* Thus, the Board cannot satisfy its burden to show that Kenworth Sales refused to sign a contract incorporating an agreement between the parties.

## II. CONCLUSION

Based on the testimony and evidence presented to the Court, the Board has failed to satisfy its burden proving that Kenworth Sales violated any provisions of the NLRA. Accordingly, the Complaint against Kenworth Sales should be dismissed.

RESPECTFULLY SUBMITTED THIS 30<sup>th</sup> day of August 2019.

ETTER, McMAHON, LAMBERSON,  
VAN WERT & ORESKOVICH, P.C.



Ronald A Van Wert, WSBA # 32050  
Attorney for Kenworth Sales

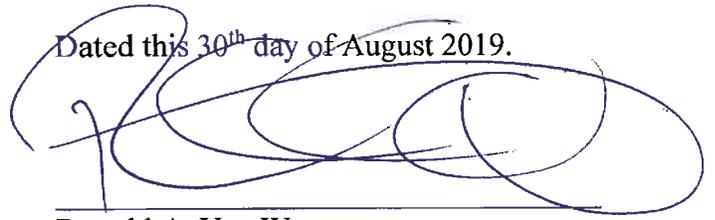
**CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing was electronically filed via the NLRB website on August 30, 2019, and sent via electronic mail to the following parties:

STEVE WARREN, BUSINESS REP.  
MACHINISTS DISTRICT LODGE 751  
9125 15THPLS  
SEATTLE, WA 98108-5190  
SteveW@iam751.org

SPENCER NATHAN THAL  
STAFF ATTORNEY  
MACHINISTS DISTRICT LODGE 751  
9125 15THPLS  
SEATTLE, WA 98108-5190  
SpencerT@iam751.org

Dated this 30<sup>th</sup> day of August 2019.

A handwritten signature in blue ink, consisting of several overlapping loops and a vertical line on the left side, positioned above a horizontal line.

Ronald A. Van Wert