

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 13

NAPLETON 1050, INC. D/B/A NAPLETON
CADILLAC OF LIBERTYVILLE

and

LOCAL LODGE 701, INTERNATIONAL
ASSOCIATION OF MACHINISTS &
AEROSPACE WORKERS, AFL-CIO

Cases 13-CA-209951
13-CA-220180
13-CA-222994

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

Respectfully Submitted:

/s/ Emily O'Neill

Emily O'Neill

Counsel for the General Counsel

National Labor Relations Board, Region 13

219 S. Dearborn, Suite 808

Chicago, Illinois 60604

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

I. INTRODUCTION 1

II. RESPONDENT’S EXCEPTIONS RELATING TO THE TRIAL PROCEDURE..... 1

A. The ALJ Correctly Ruled that the Complaint Allegations are Not Time-Barred Under Section 10(b) (Respondent’s Exceptions 11-13)..... 1

B. The Regional Director’s Reinstatement of the Charge in Case 13-CA-209951 was Proper (Respondent’s Exceptions 11-12) 3

C. The ALJ Correctly Ruled that the General Counsel was not Required to Litigate the Complaint Allegations in an Earlier Proceeding (Respondent’s Exceptions 14-15)..... 3

III. RESPONDENT’S EXCEPTIONS RELATING TO THE ALJ’S LEGAL CONCLUSIONS 5

A. The ALJ Properly Found that Respondent Unlawfully Refused to Execute the Contract (Respondent’s Exceptions 5, 6, 16, 20, 22-26, 28, 29, 34)..... 6

B. The ALJ Properly Found that Respondent has Failed to Honor the Strikers’ Unconditional Offer to Return to Work (Respondent’s Exceptions 8, 30-34)..... 15

IV. CONCLUSION 18

AFFIDAVIT OF SERVICE OF: COUNSEL FOR THE GENERAL COUNSEL’S ANSWERING BRIEF TO RESPONDENT’S EXCEPTIONS 19

TABLE OF AUTHORITIES

Affinity Medical Center,
364 NLRB No. 68, slip op. at 2 (2016)..... 4, 5

B&C Contracting Co.,
334 NLRB 218 (2001) 17

C & W Lektra Bat Co.,
209 NLRB 1038 (1974)..... 11

Clow Water Systems Co.,
317 NLRB 126 (1995)..... 17

Columbia Portland Cement,
303 NLRB 880 (1991) 16

Ducane Heating Corp.,
273 NLRB 1389 (1985)..... 3

EF International Language Schools,
363 NLRB No. 20, slip op. at 1 n. 2 (2015) 1

Electrical Workers Local 98 (Telephone Man),
327 NLRB 593 (1999)..... 17

Fashion Furniture Mfg.,
279 NLRB 705 (1986)..... 8

Graphic Communications Union,
318 NLRB 983 (1995)..... 7

H.J. Heinz Co. v. NLRB,
311 U.S. 514 (1941) 7

Hardesty Co.,
336 NLRB 258 (2001)..... 17, 18

Jefferson Chemical Co.,
200 NLRB 992 (1972)..... 3

Maintenance Service Corp.,
275 NLRB 1422 (1985)..... 14

Maremont Corp.,
249 NLRB 216 (1980)..... 4

Napleton Cadillac of Libertyville (Napleton I),
367 NLRB No. 6 (2018)..... 3, 4

Observer-Dispatch,
334 NLRB 1067 (2001)..... 8

Sioux City Foundry,
323 NLRB 1071 (1997)..... 3

SKS Die Casting & Machining,
294 NLRB 372 (1989)..... 16

Sunrise Nursing Home, Inc.,
325 NLRB 380 (1998)..... 7

United Government Security Officers of America International,
367 NLRB No. 5, slip op. at 1 n. 1 (2018) 2

Walt Disney World,
366 NLRB No. 96, slip op. at 1, n. 3 (2018)..... 3

I. INTRODUCTION

Pursuant to Section 102.46 of the Board's Rules and Regulations, Series 8, as amended, Counsel for the General Counsel ("General Counsel") submits this Answering Brief to Respondent's Exceptions to Administrative Law Judge ("ALJ") Geoffrey Carter's June 24, 2019, Decision and Order. General Counsel relies upon the Statement of the Case and accompanying factual findings, as set forth in the ALJ's Decision ("ALJD") and the record of the hearing in this matter.

II. RESPONDENT'S EXCEPTIONS RELATING TO THE TRIAL PROCEDURE

Respondent's numerous exceptions alleging procedural deficiencies do not withstand scrutiny as a matter of straightforward application of well-established Board law. As follows, such exceptions should be summarily rejected.¹

A. The ALJ Correctly Ruled that the Complaint Allegations are Not Time-Barred Under Section 10(b) (Respondent's Exceptions 11-13)

Respondent argued for the first time in its post-hearing brief that the complaint allegation concerning Respondent's November 15, 2017, refusal to execute the contract is time-barred under Section 10(b). As the ALJ properly ruled, by waiting until its post-hearing brief to raise this argument, Respondent waived this defense. (ALJD 15:5-12). The Board has made clear that Section 10(b) is an affirmative defense which, if not timely raised in the answer or at the hearing, is waived. *EF International Language Schools*, 363 NLRB No. 20, slip op. at 1 n. 2 (2015), *enfd.* 673 Fed.Appx. 1 (D.C. Cir. 2017). In its exceptions, Respondent attempts to conflate this

¹ Respondent's Exception 9 objects to the ALJ's ruling permitting testimony about a May 2018 conference call on the theory that the call was a settlement conference. See ALJD 12, n. 11. Respondent did not address this exception in its Brief in Support of Exceptions and points to no evidence refuting the ALJ's finding that the parties treated the call as another bargaining discussion concerning the return to work of the strikers, rather than a settlement discussion. Accordingly, this Exception should be rejected.

newly raised 10(b) defense with its objection at hearing to the Regional Director’s reinstatement of the charge in Case 13-CA-209951.² However, as the ALJ correctly found, these two matters are entirely separate and unrelated. (ALJD at 15, n. 15). Contrary to Respondent’s unsupported assertion that “a 10(b) defense alleging an untimely charge need not spell out all of the variants on why it is untimely,” the Board has ruled that for a 10(b) defense to be valid, the Board requires that the respondent specify the allegation it asserts is untimely, which Respondent did not do until its post-hearing brief. See, e.g., *United Government Security Officers of America International*, 367 NLRB No. 5, slip op. at 1 n. 1 (2018) (general assertion of a 10(b) defense in answer insufficiently specific). Respondent’s argument at hearing concerning the Regional Director’s decision to reinstate the charge in Case 13-CA-209951 bears no relation to the discrete and specific question of whether the “failure to execute” allegation was timely filed.

Further, even if Respondent’s 10(b) argument were properly before the Board, it fails on the merits. The Union’s first charge in the instant proceeding, in Case 13-CA-209951, was filed on November 15, 2017, and alleged that Respondent violated 1) Section 8(a)(3) by refusing to reinstate employees, and 2) Section 8(a)(5) by failing and refusing to bargain with the Union in good faith. (GC Exh. 1(a)). The latter 8(a)(5) allegation squarely encompassed Respondent’s refusal to execute the contract, which had occurred earlier on the very same day that the charge was filed. Moreover, as the ALJ noted, Respondent addressed that specific allegation in its January 9, 2018, position statement, belying its argument that it was not properly put on notice of the failure to execute allegation. (GC Exh. 9 at 2-3).

² As discussed below, this objection related to the Regional Director’s reinstatement of the charge in Case 13-CA-209951, after previously dismissing it, outside of the 10(b) period while the Charging Party’s appeal of the dismissal was still pending before the General Counsel. See ALJD 14, n. 14.

B. The Regional Director's Reinstatement of the Charge in Case 13-CA-209951 was Proper (Respondent's Exceptions 11-12)

In its exceptions, Respondent revives its argument, made at hearing and referenced above, that the Complaint be dismissed on the basis that the Regional Director, having previously dismissed one of the underlying charges (Case 13-CA-209951), subsequently rescinded the dismissal and reinstated the charge 7 months after the alleged violations occurred. The ALJ's overruling of this objection at hearing, reaffirmed in his Decision, was a proper application of straightforward and well-established Board law. Respondent's reliance on *Ducane Heating Corp.*, 273 NLRB 1389 (1985), enfd. mem. 785 F.2d 304 (4th Cir. 1986), is misplaced because, unlike here, no appeal had been taken by the charging party to the Regional Director's dismissal in that case. Accordingly, when the Regional Director in *Ducane Heating* revoked the earlier dismissal, the case truly had been closed. Here, in contrast, Case 13-CA-209951 had not been closed at the time the Regional Director reinstated it because the Charging Party's appeal was still pending with the General Counsel. Thus, this case falls squarely within the Board's ruling in *Sioux City Foundry*, 323 NLRB 1071 (1997), that a Regional Director's reinstatement of a charge allegation, even after the 10(b) period, is proper if the appeal of the earlier dismissal is still pending before the General Counsel. Accord *Walt Disney World*, 366 NLRB No. 96, slip op. at 1, n. 3 (2018).

C. The ALJ Correctly Ruled that the General Counsel was not Required to Litigate the Complaint Allegations in an Earlier Proceeding (Respondent's Exceptions 14-15)

Finally, Respondent submits that the instant Complaint allegations should have been consolidated with the earlier proceedings leading to the Board's decision in *Napleton Cadillac of Libertyville (Napleton I)*, 367 NLRB No. 6 (2018). Respondent's argument that the instant allegations are litigation-barred under *Jefferson Chemical Co.*, 200 NLRB 992 (1972), is

woefully misplaced. As the Board has made clear, *Jefferson Chemical* applies only to cases involving litigation of the *same* conduct, arising from the same set of facts. See, e.g., *Affinity Medical Center*, 364 NLRB No. 68, slip op. at 2 (2016); see also *Maremont Corp.*, 249 NLRB 216, 217 (1980) (General Counsel not precluded from litigating separate allegation known at time of hearing in earlier proceeding). Here, the allegations under consideration are factually independent from those previously litigated, as most readily demonstrated by their relative remoteness in time.

Napleton I involved litigation arising from the termination and layoff of two employees in the wake of the employees' decision to unionize in October 2016, and Respondent's threat of job loss and ordering the removal of employee toolboxes at the commencement of their strike in August 2017. Notably, the threat of job loss and removal of toolboxes were belatedly consolidated with the termination/layoff proceedings, causing the litigation of those violations to be postponed. Thus, even the most recent events at issue in *Napleton I* predated the earliest violation alleged in the instant Complaint by three months.

Substantively, the present Complaint allegations concern factually discrete and independent acts relating to Respondent's unlawful conduct in the context of first-contract negotiations, which are entirely separate from Respondent's earlier acts of reprisal. Indeed, Respondent's specious argument that its own recidivism should have somehow entitled it to *further* delay the adjudication of its earlier violations underscores its callous disregard for its employees' Section 7 rights, including the right to a timely reinstatement and backpay remedy. To accept such an argument would permit Respondent to benefit from its continuous unlawful conduct by causing indefinite delay of the litigation of any charges.

Thus, because the new allegations are factually independent from the allegations litigated in *Napleton I*, it was entirely appropriate for the General Counsel to litigate the present allegations separately. See *Affinity Medical Center*, supra.

III. RESPONDENT'S EXCEPTIONS RELATING TO THE ALJ'S LEGAL CONCLUSIONS

Much like the issues raised by Respondent's exceptions to the procedural aspects of this case, the ALJ's legal conclusions involved a straightforward application of settled legal principals to largely undisputed facts. Yet, Respondent confounds the issues by inexplicably excepting to a long list of the ALJ's factual findings, which were largely derived from documentary evidence and testimony that was unrebutted and corroborated by documentation, including testimony of Respondent's own witnesses.³ To the extent Respondent's enumerated exceptions are not addressed in its supporting brief and are otherwise unaccompanied by any argument or citation to the record refuting the basis for the ALJ's crediting of witnesses, reliance on documentary evidence, findings, and conclusions, they must be rejected for failure to comport to the Board's Rules and Regulations, including Exceptions 1-4, 7,⁴ 10, 17-19, 21, and 27. See

³ See, e.g., Exception 4 (to the ALJ's citation to Respondent witness James Hendricks' testimony that he had final authority to approve a collective-bargaining agreement on Respondent's behalf (See Tr. 213:14-24)), Exception 5 (to the ALJ's citation to Hendricks' testimony regarding his understanding of the term "deal breaker" during negotiations), Exception 6 (to the ALJ's reliance on Hendricks' admission that the written collective-bargaining agreement reflected the language agreed to by the parties), Exception 7 (to the ALJ's reliance on documentary evidence for his factual finding that Respondent withdrew its unfair labor practice charge against the Charging Party within an hour of declaring the collective-bargaining agreement "good to go."), Exception 10 (to the ALJ's finding that Respondent hired employee E.R. on March 23, 2018, based on testimony of Respondent's own witness Office Manager Pam Griffin), Exception 17 (to the ALJ crediting uncontroverted testimony establishing that the parties identified seven items in dispute for a collective-bargaining agreement at the outset of the September 29 bargaining session), Exception 19 (to the ALJ's reliance on documentary evidence showing that Respondent declared the written contract "good to go" (See GC Exh. 2(a) at 3)).

⁴ Respondent's Exception 7 objects to the "ALJ's decision that found in any way that Respondent's withdrawal of an unfair labor practice charge against the Union was because a collective bargaining agreement was reached." Notably, however, the ALJ did not make any

Board's Rules and Regulations Section 102.46(a)(1)(i)(D) and (ii) (requiring that each exception "Concisely state the grounds for the exception" and providing that any exception that does not meet this requirement may be disregarded). The remaining Exceptions are addressed below. To the extent certain portions of the ALJD to which Respondent's procedurally deficient exceptions correspond are relevant to Counsel for the General Counsel's position, such exceptions are addressed in passing without waiving Counsel for the General Counsel's argument that they should be rejected.

A. The ALJ Properly Found that Respondent Unlawfully Refused to Execute the Contract (Respondent's Exceptions 5, 6, 16, 20, 22-26, 28, 29, 34)

Respondent devotes the greater part of its argument to emphasizing the parties' disagreement over the strikers' return to work. Indeed, it is undisputed that this was an important issue for both parties. However, this case does not turn on the significance of that issue. Rather, this case turns on whether the parties could reach a final and binding contract undisputedly encompassing all terms that the parties had negotiated and agreed to, notwithstanding their disagreement over that issue.

This is a matter of simple contract law. To prevail on its position, Respondent must rebut the ALJ's finding that no condition precedent related to the disagreement over strikers' return to work existed with respect to the execution of the contract. Having failed to identify any evidence establishing that the parties agreed to such a condition, Respondent has provided the Board with no basis upon which to overrule the ALJ's conclusion that the failure to execute was unlawful.

such finding and instead simply recited the undisputed fact that the charge was withdrawn without drawing any inferences therefrom. (ALJD 7:18-21).

It is well settled that an employer's failure to execute a contract embodying terms previously agreed to with a union constitutes an unlawful refusal to bargain. *H.J. Heinz Co. v. NLRB*, 311 U.S. 514 (1941). The obligation to execute arises when the parties have a "meeting of the minds" on all "substantive issues and material terms of the agreement." *Sunrise Nursing Home, Inc.*, 325 NLRB 380, 389 (1998). As the ALJ properly found, this element was satisfied when, on September 29, 2017, the parties reached a complete agreement on the terms and conditions of employment to be incorporated into a collective-bargaining agreement, which the Union thereafter finalized and sent to Respondent's chief negotiator for final review, and which Respondent approved on November 13, 2017. (ALJD at 5:19-26; 6:14-16; 7:4-13; 18:7-15). Indeed, contrary to Respondent's claim that "the parties did not agree to ALL terms of [the] contract," Respondent, in fact, has repeatedly reaffirmed that the parties successfully negotiated a collective-bargaining agreement on September 29, accurately embodied in the document the Union later sent to Respondent. For example, in its position statement to the Region dated January 9, 2018, Respondent openly admitted, "Respondent has fulfilled its obligation to bargain over all mandatory subjects of bargaining. *The parties reached agreement on all provisions of the collective-bargaining agreement, but not on the strikers and/or replacements.*"⁵ (GC Exh. 9 at 3 (emphasis added)).

⁵ Respondent, on page 10 of its brief, states that striker replacements are a mandatory subject of bargaining. This is not dispositive inasmuch as parties are, of course, free to defer mandatory issues for resolution until after ratification and execution and there is no evidence here that either party insisted on bargaining over this topic as part of their negotiations for the contract. See, e.g. *Graphic Communications Union*, 318 NLRB 983 (1995). In fact, Respondent's chief negotiator testified that no proposals on this subject were exchanged. (Tr. 232:19-233:6). Moreover, Respondent's own position statement acknowledged that all mandatory subjects of bargaining were discussed and negotiated.

With the terms of the contract finalized, the parties then turned their attention to discussing the Union's outstanding unfair labor practice charge and the strikers' return to work before concluding their September 29 bargaining session. Unfortunately, the parties were unable to resolve their differences as to both issues. Respondent argues that the parties' failure to reach agreement on the strikers' return somehow negated their agreement on the contract itself. Critically, however, Respondent is unable to point to any evidence supporting this contention, as the record is devoid of any such evidence.

While a party can place conditions on agreement to the terms of a contract, the Board requires a showing that the other party is both aware of any such condition and has expressly agreed to it to establish a valid condition precedent that will justify a failure to execute. See, e.g., *Observer-Dispatch*, 334 NLRB 1067, 1072 (2001); *Fashion Furniture Mfg.*, 279 NLRB 705, 705 (1986). Respondent cannot make this showing because the unrefuted evidence plainly establishes that the parties never even discussed, let alone agreed to, conditioning the execution of the contract on resolving the question of the strikers' return to work. (ALJD at 18: 43-45; Tr. 39:8-12; 160:8-12; 238:7-17). Rather, as detailed below, the evidence reveals that the parties viewed the contract and the strikers' return to work as entirely separate matters. Significantly, at no point did Respondent's chief negotiator James Hendricks, Respondent's sole witness to testify on this subject, either through his own testimony at hearing or in documented communications, contend that there was an express agreement to condition the formation of a contract on the parties' ability to resolve the strikers' return to work. Indeed, Hendricks acknowledged that the parties never even exchanged proposals on the resolution of the strike or the strikers' reinstatement, belying Respondents' claim that this issue was integral to the collective-bargaining agreement itself. (Tr. 232:19-233:6).

In the absence of any evidence that the parties agreed to create a condition precedent to the contract, Respondent rests its position on the Union's use of the term "deal breaker" in reference to the issue of the strikers' return during the September 29 bargaining session. However, as the ALJ found, based on credible witness testimony from both parties' negotiators, that term specifically referred only to the parties' ability to reach a deal resolving their disagreement over whether the strikers would return to work and displace the replacement workers or be placed on a preferential hiring list (a strike settlement agreement), and not to whether the parties had agreed to a contract.⁶ (ALJD at 5:37-41; 6, n. 7). Without any

⁶ The parties' treatment of the collective-bargaining agreement and a strike settlement agreement as entirely separate was consistent with industry past practice in the area, with which both Respondent and Hendricks had personal familiarity. (Tr. 62:7-10). As noted in the ALJ's Decision, when the parties met on September 29, the Union had just wrapped up negotiations for the area-wide Standard Automotive Agreement with the multi-employer association of local car dealerships. (ALJD at 4, n. 6). Because those negotiations also involved a strike, the association and the Union had to negotiate the terms of the strikers' return to work. The parties did ultimately agree to striker reinstatement terms, which were embodied in a strike settlement agreement—a stand-alone document that was negotiated separately and apart from the contract itself. (ALJD 4-5, n. 6; Tr. 58-59). Significantly, both Hendricks and Respondent were aware of the strike settlement agreement because Respondent at the time owned other dealerships that were parties to the Standard Automotive Agreement and the accompanying strike settlement agreement. (Tr. 59:21-62:6; 225:3-8). Further, Hendricks himself represented at least one of those dealerships, Cadillac of Naperville, and he and Cicinelli discussed the strike settlement agreement in their dealings related to that dealership around the same time that Respondent and the Union were negotiating the contract at issue here. (Tr. 59:21-61:8).

Although Hendricks initially denied having knowledge of the strike settlement agreement negotiated between the Union and the multi-employer association, when further pressed on cross examination, he admitted that it was possible that he had, in fact, seen such an agreement. (Compare Tr. 224:17-23 with 235:15-23). Hendricks also self-servingly denied having ever negotiated a strike settlement agreement separately from a collective-bargaining agreement, while also acknowledging that he had never included striker reinstatement terms into any contract negotiated in the context of a strike either. (Tr. 219:23-220:5; 233:7-16). Hendricks then specifically denied having any recollection of negotiating a strike settlement agreement during his representation of Saturn of Chicago. (Tr. 228:13-229:10). However, his testimony was directly refuted by Cicinelli, who very clearly recalled the Saturn of Chicago negotiations and testified that Hendricks himself had drafted a strike settlement agreement, which the parties executed after and separately from their collective-bargaining agreement. (Tr. 245:5-25). Additionally, Cicinelli credibly recited one other occasion on which he and Hendricks negotiated

supporting evidence, however, Respondent attempts to distort the Union's words to mean that without an agreement on the strikers' return to work, there would be no contract. Respondent's contention fails because both its interpretation of the Union's use of the term "deal breaker" and the significance to which it attaches are simply unsupported by the evidence of the parties' dealings.

As noted above, the parties only turned their attention to the topic of the strikers' return to work for the first time at the end of the September 29 bargaining session, *after* the parties agreed to and shook hands on all material terms of the collective-bargaining agreement, and *after* the Union's chief negotiator Sam Cicinelli told Respondent's chief negotiator James Hendricks that he would email him a copy of the agreement. (ALJD at 5-6; Tr. 34:3-37:5; 148:8-20). It was at that point in the discussion that Hendricks inquired, for the first time, as to what would happen with the strikers and the replacement workers who had been hired in their place, noting that while Respondent would agree to take certain strikers back, it was unwilling to return all of them. (Tr. 148:21-24). Cicinelli responded that it was the Union's position that all the strikers be returned to work and it would not agree to anything short of full reinstatement.⁷ (Tr. 149:3-12). Accordingly, when Hendricks remained firm that Respondent was unwilling to take back all of the strikers, the unrefuted testimony establishes that Cicinelli responded that the Union would leave the matter to the Board to decide, rather than work out a strike settlement agreement—i.e., there would be no "deal" on the strikers' return to work. (ALJD at 5:37-41; Tr.36:11-23; 79;

the same type of agreement, again after and separately from the collective-bargaining agreement. (Tr. 246:1-17).

⁷ As Cicinelli explained to Hendricks at that time, the Union's position was informed by its belief that Respondent's removal of the striking technicians' toolboxes on August 3 was an unlawful act that had converted the strike into an unfair labor practice strike, also the subject of a pending unfair labor practice charge against Respondent. (Tr. 149-151).

98:16-99:3; 149:15-19; 164:6-16). Thus, the record is devoid of any evidence suggesting that Cicinelli attached any other meaning to the term “deal breaker” than simply, the parties did not have a deal on the issue of the strikers’ return to work and instead the Union would resort to the Board for resolution.⁸

Moreover, even if the Union used the term with respect to the contract itself, his blustery declaration of a “deal breaker” in this context falls far short of establishing an express agreement necessary to create a condition precedent. The Board has stated its unwillingness to distort a forceful declaration of intent, uttered in the “ambiance of negotiations,” into terms of an agreement. See, e.g., *C & W Lektra Bat Co.*, 209 NLRB 1038, 1039 (1974). In any event, the parties’ conduct following this exchange makes clear that neither party ever intended, let alone agreed, to hold up the contract on account of the striker reinstatement issue.

The above-noted exchange was the entirety of the parties’ conversation regarding the strikers’ return to work that day. Again, at no point during the September 29 meeting or on any other occasion did the parties even discuss, let alone agree, that a failure to reach an agreement on the strikers would in any way stand in the way of executing or effectuating the contract that

⁸ On page 11 of its exceptions brief, Respondent accuses the ALJ of omitting a “critical admission” by Cicinelli. However, not only is Respondent’s purported direct quote from the transcript taken out of critical context, it is inaccurately transcribed which, together, suggest a willful attempt to mislead the Board. In fact, Cicinelli did not admit that the striker replacement issue was “ *tied to the agreement.*” Rather, in the context of discussing two entirely separate contracts that Cicinelli had negotiated years earlier, he testified that the Union, in *those* entirely separate and unrelated instances, had executed separate agreements relating to the return to work of strikers. Asked by Respondent’s counsel whether those strike settlement agreements were reached after the collective-bargaining agreement, Cicinelli responded, “That was to *tie* the agreement.” (Tr. 246). This ambiguous statement concerning an entirely separate set of events involving entirely different parties is far from an admission that the striker reinstatement issue in this case was a condition precedent to the formation of a contract and Respondent’s contention to the contrary is glaringly disingenuous.

the parties had negotiated earlier during that bargaining session.⁹ Indeed, such a condition would have been entirely inconsistent with their dealings at the table that day and in their subsequent communications. In this respect, it is undisputed that as of September 29, the parties were at impasse with regard to the strikers' return to work and there was no room for movement on that issue. As Hendricks admitted, it was clear from their discussion that there was nothing to negotiate over the strikers' return because each party stood firm in its respective position, hence Cicinelli's statement that he would refer the matter to the Board. (ALJ at 5:37-41; Tr. 233:17-23; 36:11-23; 149:15-19).

Notwithstanding their impasse on this issue, immediately following the discussion of the strikers' return, and as the meeting concluded, Cicinelli reiterated that he would send a final version of the collective-bargaining agreement to Hendricks and that he planned to take the contract to the members for ratification. (ALJD at 5:41-6:1; 234:9-12). Hendricks responded, "great, sounds good" and the parties again shook hands. (ALJD at 6:1). If Hendricks truly believed that the disagreement over the strikers' return negated the existence of a contract, he certainly would have indicated so at that point. Yet, he did not, and instead the parties' final exchange that day very clearly shows that both parties understood that the resolution of the disagreement over the strikers' return to work was an entirely separate matter, independent of the contract that the parties had reached at that point.

⁹ In its exceptions brief, Respondent makes a great deal of how it would be impractical for the parties to execute a collective-bargaining agreement while the strikers' return to work remained an open matter. This is nonsensical—as Cicinelli made clear, the Union's intention was to let its unfair labor practice charge run its course with the Board to decide whether the strikers were entitled to immediate reinstatement as ULP strikers or preferential hiring as economic strikers. Further, the employees called off the strike upon ratification of the parties' collective-bargaining agreement on November 14. (ALJD 7:18-36). Had Respondent executed the contract at that point as it was obligated to do so, there would be no strike and, thus, no violation of a no-strike provision.

Hendricks' communications with the Union following the September 29 bargaining session lend further support to the ALJ's finding that no condition precedent stood in the way of finalizing and executing the collective-bargaining agreement. Principally, upon Cicinelli sending the written contract to Hendricks for review, Hendricks' unambiguously responded that the agreement was "Good to go" without any qualification.¹⁰ (ALJD at 6:14-7:13, citing GC Exh. 2(a)).

While Respondent now contends that it never intended to finalize the contract while the striker reinstatement issue remained unresolved, its actions immediately following the "Good to go" email reveal this to be merely a disingenuous post-hoc invention. Hendricks sent the "Good to go" confirmation via email on November 13 at 8:10 A.M. (GC Exh. 2(a) at 3). Minutes later, at 8:22 A.M., he sent Cicinelli an email stating that Respondent's unfair labor practice charge against the Union, alleging failure to bargain in good faith, would be withdrawn that same day. (GC Exh. 3(a)-(b); see also Tr. 47:12-49:4; Tr. 231:21-24). Four minutes later, at 8:26 A.M., Respondent, by email from Hendricks' co-counsel Michael MacHarg to the investigating Board Agent, did withdraw its charge, an act that Hendricks subsequently relayed to Cicinelli at 8:45 A.M. (GC Exh. 10; 3(b)). Respondent's willingness to withdraw its pending failure to bargain

¹⁰ Indeed, it was only after Cicinelli demanded execution and reiterated the Union's position that the strikers were entitled to full reinstatement that Hendricks changed his tune, responding that "Any CBA had a resolution on the striker issue as inextricably intertwined into the fabric of the agreement. *I* sent you numerous messages to that effect." (GC Exh. 2(a) at 1-2 (emphasis added)). Hendricks' use of the first-person pronoun reveals, at best, a unilateral condition held and imposed by him alone, which is, of course, insufficient to form an agreement. Notably, the "numerous messages" referred to by Hendricks were not produced or offered into evidence, apart from the communications contained in the ALJ's findings of facts. (ALJD at 8, n. 9). Likewise, Hendricks' sworn testimony, "*My* position is you don't have a final agreement until we've addressed the issue [of the strikers' return to work]" reveals that he was aware that there was lack of common understanding between the parties and mutual assent on the Union's part to this purported condition. (Tr. 218:3-4).

charge—effectively acknowledging that the Union had satisfied its duty to bargain—just moments after Respondent confirmed agreement on the terms of contract as written, and while the strikers’ return to work was still unresolved, compels an inference that Respondent, like the Union, viewed the issues as separate matters. That is, Respondent also held the position that the parties’ inability to reach an agreement on the strikers’ return to work did not stand in the way of reaching a final and binding collective-bargaining agreement.

In sum, the parties’ conduct both at the table on September 29 and through their communications that followed give ample support to the ALJ’s finding that they reached a meeting of the minds on all material terms of a collective-bargaining agreement and that no condition precedent existed that stood in the way of the agreement becoming final and binding. (ALJD at 19:3-6).

Respondent’s continued reliance on *Maintenance Service Corp.*, 275 NLRB 1422 (1985), is misplaced for the reasons stated by the ALJ. In brief, that case involved the parties’ attempt to negotiate a successor agreement. The expired agreement included a separate side bar letter, restricting foremen from performing bargaining unit work. The successor agreement was silent on foremen performing bargaining unit work and contained no reference to the side bar letter. The Board found that there was no meeting of the minds “as to the *meaning of the contract* without the side bar letter concerning the working foremen issue” because the employer believed it meant that foremen would be free to perform work without restriction, while the union believed that the side bar letter had created a past practice restricting foremen from performing such work. *Id.* at 1426-27 (emphasis added). In this critical regard, ALJ Carter correctly found that case to be distinguishable inasmuch as there was no meeting of the minds as to the *contract*

itself, whereas here the parties agreed on the contract but purportedly differ as to whether the strikers' reinstatement was a separate matter or a condition precedent to the contract.

Based on the foregoing, it is submitted that the ALJ's finding that Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing to execute the parties' collective-bargaining agreement on November 15, 2017, was proper and should be affirmed.

B. The ALJ Properly Found that Respondent has Failed to Honor the Strikers' Unconditional Offer to Return to Work (Respondent's Exceptions 8, 30-34)

As the ALJ found, there can be no dispute that what had started out as an economic strike converted on November 15, 2017, when Respondent refused to execute the contract in violation of Section 8(a)(5). (ALJD at 19:34-36). The evidence of conversion is conclusive. Thus, upon ratifying the contract, the employees called off the strike and began preparing to return to work. (ALJD at 19-20). They only put the strike line back up, this time accompanied by unfair labor practice signs, upon Respondent's refusal to execute. *Id.* Indeed, Respondent's sole basis for excepting to this finding is its argument that there was no final and binding agreement and, therefore, no unfair labor practice violation.

Respondent takes issue with the ALJ's finding that the Union's March 22, 2018, offer to return to work on behalf of the strikers was unconditional. Respondent maintains that the offer was predicated upon displacing the strikers. However, as the ALJ observed, the March 22 offer contains no such limitation. (ALJD at 20, n. 19). The Union's complete offer appears on page 9 of the ALJ's Decision and, for ease of reference, is also cited here in relevant part, as follows:

I'd . . . like to formally request a meeting at your earliest convenience to discuss the return to work of the strikers. Since we do have a contract, each of the striking employees is renewing their unconditional offer to return to work So that leaves only the return to work of the strikers. *I am still waiting to resolve this issue along the terms we discussed.* But if we can't get that done and agree on the other details relating to a return to work now, let's get a date on the books in order to keep this moving.

(emphasis added)

Respondent relies on the emphasized language for its claim that the offer was not unconditional. This argument is unavailing. For one, in light of the Union's accompanying statement that it was renewing its earlier "unconditional offer to return," and its asserted willingness to discuss the details of the return to work, the language is, at best, ambiguous. As the Board has ruled, to the extent there is ambiguity contained in an offer to return to work, the employer is obligated to seek clarification before rejecting the offer and a failure to do so requires that any such ambiguity be resolved in the Union's favor. Accord *SKS Die Casting & Machining*, 294 NLRB 372, 375 (1989), *affd.* in relevant part, 941 F.2d 984 (9th Cir. 1991). Respondent's rejection requested no such clarification, nor did it communicate its purported interpretation that the offer was not unconditional. (GC Exh. 4 at 2).

Second, even if the Union's offer did contain a demand regarding the reinstatement of employees not lawfully entitled to reinstatement (because, contrary to the Union's position, the Region ultimately determined that the strikers were not unfair labor practice strikers at the time they were initially replaced, see n.7, above), the Board has declined to construe such a demand in a way that would render the entire offer conditional. For example, in *Columbia Portland Cement*, the Board found that the union's inclusion of employees who were lawfully terminated and were not entitled to reinstatement on its list of employees it demanded be reinstated did not render the offers with respect to the other employees conditional. 303 NLRB 880, 882 (1991), *enfd.* 979 F.2d 460 (6th Cir. 1992). In any event, as Cicinelli did not explicitly condition the reinstatement offers on displacement of the replacement hires, it would be improper to infer that he intended to and, accordingly, Respondent was obligated to honor the offer.

Finally, Respondent excepts to the ALJ's finding that March 22, 2018, is the stating date of Respondent's obligation to honor the striking employees' unconditional offer to return.¹¹ Respondent submits that the evidence fails to establish that Respondent, in fact, received the offer on the date it was sent, noting that Respondent did not respond until March 26. Under Board precedent, however, the ALJ was correct to impute knowledge of the Union's offer to Respondent on the date it was sent absent any evidence indicating otherwise. In similar cases involving facsimile transmissions of an unconditional offer to return to work, the Board has held that, when sent during normal business hours to a recipient that has previously accepted facsimile transmissions as an appropriate means of communication, there is a presumption that the document was received at the time it was sent, which can be rebutted. See, e.g., *Clow Water Systems Co.*, 317 NLRB 126 (1995), enf. denied 92 F.3d 441 (6th Cir. 1996); *B&C Contracting Co.*, 334 NLRB 218, 219 (2001); *Hardesty Co.*, 336 NLRB 258, 259 (2001); *Electrical Workers Local 98 (Telephone Man)*, 327 NLRB 593 (1999). Here, the Union's offer was sent during normal business hours, on a Thursday at 2:22 P.M., via the parties' normal means of communication—email. (GC Exh. 4). This is sufficient to create a presumption of receipt at that time, which Respondent has not rebutted.

¹¹ Respondent does not take exception to the ALJ's conclusion that the complaint language, citing "about March 26, 2018" as the date upon which Respondent failed and refused to reinstate striking employees, reasonably encompassed the March 22 date upon which the ALJ found the violation to, in fact, have occurred. Indeed, the ALJ's conclusion was appropriate. Although Respondent's Office Manager Pam Griffin testified that employee E.R. was hired on March 23—the first instance that the Union could have had actual knowledge that Respondent was refusing to honor the unconditional offer, General Counsel would have had no reason to know that was the operative date at the time the complaint issued, inasmuch as all the documentary evidence produced by Respondent showed that E.R.'s date of hire was March 26, including an email from Respondent's counsel confirming March 26 to be the date of hire. Compare Tr. 196 with GC Exhs. 11, 12, and 13(b) at 4.

Although Respondent now belatedly denies receipt of the Union's offer until later, Respondent failed to proffer any evidence at hearing, including testimony from Hendricks', tending to show that Hendricks did not receive it that day. (ALJD at 10: 1-3, n. 10). In the absence of such evidence, General Counsel was not required to prove actual receipt of the email on March 22.¹² *Hardesty Co.*, 336 NLRB at 259.

In sum, Respondent has failed to present any basis upon which to overrule the ALJ's finding that, since March 22, 2018, Respondent has violated Section 8(a)(3) and (1) of the Act by failing to honor the strikers' unconditional offer to return to work.

IV. CONCLUSION

Based on the foregoing, it is respectfully submitted that Respondent's Exceptions to the Decision of the ALJ are without merit and must be rejected in their entirety, and that the ALJ's Conclusions of Law be affirmed.

¹² Respondent offers no authority to support its contention to the contrary, that is, that General Counsel was required to "establish the date to a legal certainty," nor for its bald assertion that metadata tracking the receipt of an email is routinely or readily available to all email account holders, let alone a reliable source of such information.

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 13**

**AFFIDAVIT OF SERVICE OF: COUNSEL FOR THE GENERAL COUNSEL'S
ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS**

I, the undersigned employee of the National Labor Relations Board, affirm that on September 13, 2019, I served the above-entitled document by electronic mail, as noted below, upon the following persons, addressed to them at the following addresses:

Tony Renello, Service Manager
Napleton 1050, Inc. d/b/a
Napleton Cadillac of Libertyville
1050 S. Milwaukee Avenue
Libertyville, IL 60048-3287
trenello@napleton.com

ELECTRONIC MAIL

Michael P. MacHarg, Attorney
Freeborn & Peters LLP
311 S. Wacker Drive, Suite 3000
Chicago, IL 60606-6679
mmacharg@freeborn.com

ELECTRONIC MAIL

Sam Cicinelli
Automobile Mechanics Local 701,
International Association of Machinists &
Aerospace Workers, AFL-CIO
450 Gundersen Drive
Carol Stream, IL 60188-2414
samc.mech701@gmail.com

ELECTRONIC MAIL

Brandon M Anderson, Attorney
Jacobs, Burns, Orlove & Hernandez
150 N. Michigan Avenue, Suite 1000
Chicago, IL 60601-7569
banderson@jbosh.com

ELECTRONIC MAIL

Rick Mickschl, Grand Lodge Representative
International Association of Machinists and
Aerospace Workers, AFL-CIO
113 Republic Avenue, Suite 100
Joliet, IL 60435-3279
rmickschl@iamaw.org

ELECTRONIC MAIL

Mark D. Schneider, General Counsel
International Association of Machinists and
Aerospace Workers
9000 Machinists Place Room 202
Upper Marlboro, MD 20772
mschneider@iamaw.org

ELECTRONIC MAIL

September 13, 2019

Date

/s/ Emily O'Neill

Signature