

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

NAPLETON 1050, INC. d/b/a NAPLETON CADILLAC
OF LIBERTYVILLE,

and

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

INTERNATIONAL ASSOCIATION OF
MACHINISTS & AEROSPACE WORKERS,
AUTOMOBILE MECHANICS LOCAL 701,
AFL-CIO.

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

Respondent timely filed Exceptions and a Supporting Brief in the above-captioned matter on August 8, 2019, and Counsel for the General Counsel (the "CGC") timely filed its Answering Brief on September 13, 2019. Respondent respectfully submits the following Reply in compliance with Section 102.46(e) of the Board's Rules and Regulations.

I. SUBSTANTIVE EXCEPTIONS

A. Meeting of the "Mind"

The CGC's Answering Brief¹ is paeen to deception, designed to distract from the real, underlying issues and focus the attention on anything other than the facts and law. The CGC simply articulates that if the union agrees with itself, then a contract is formed. The CGC seeks to reform contract law, by only requiring a meeting of one mind to form a contract, and not a

¹ Herein referred to as "CGC Ans. Brf." and a page ___.

“meeting of the minds.” From the inception, the CGC’s arguments are misformed. The CGC states, “[t]o 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.” (CGC Ans. Brf. p. 6) This is completely wrong.

A condition precedent is defined as a condition that is to be performed before the agreement becomes effective, and which calls for the happening of some event or the performance of some act after the terms of the contract have been arrested on, before the contract becomes binding upon the parties. (*Black’s Law Dictionary*, 6th Ed.) This contractual construct is irrelevant to this proceeding. ALJ Carter correctly cites *Teamsters Local 287 (Granite Rock Co.)*, 347 NLRB 339 (2006), enfd. 293 Fed.Appx. 518 (9th Cir. 2008) for the notion that ratification can be a condition precedent to forming a contract. However, that concept has zero bearing on this case. It is a red herring.

This case does not need the construct of a condition precedent because *the parties never agreed on a contract*. The CGC was correct, stating that this is a simple matter of contract law. However, the CGC is wrong on whether a contract was ever reached. The record shows that the parties never came to an agreement on the issue of striker replacements, and therefore, no contract was ever formed. Thus, there was no meeting of the minds.

In every meeting, in every piece of correspondence, at *all* times, Respondent and the union discussed the issue of striker replacements. **The union** itself even acknowledged that the issue was a “deal breaker.” (ALJD, p.5) Both parties were steadfast in their positions; Respondent insisted that strikers go on a list, while the union insisted upon immediate reinstatement effectuated by bumping. There was no need for lengthy discussions or memos, the

parties were locked into their respective positions. No agreement on this issue was forthcoming, and none ever came.

The CGC posits that the parties never discussed conditioning the execution of the contract on resolving the striker replacement issues. (CGC Ans. Brf. p.8) This is true because Respondent was not engaged in gamesmanship, but was focused on reaching a **complete** collective bargaining agreement, not one that left the central, most critical issue unresolved. Only the union, in its desperate effort to distract from the real issue, argue that the strike settlement agreement was a distinct document that somehow was not integral to entering into a collective bargaining agreement. All of the focus on the issue of conditions is a distraction from whether the parties achieved agreement.²

The nebulous idea that a stand-alone strike settlement agreement is required or ordinary in the course of labor relations is the union's greatest misdirection. Unfortunately, ALJ Carter fell for it.³ The fact that this union negotiated strike settlement agreements in other instances is evidence of absolutely nothing. In evidentiary terms, it does not credibly reflect on whether or not a contract was reached here. The CGC curiously argues that, "Respondent attempts to distort the union's words [deal breaker] to mean that without an agreement on the strikers' (sic) return to work, there would be no contract." (CGC Ans. Brf. pp. 9-10) Quite the contrary, no

² The CGC lacks candor by asserting that Hendricks stated the parties never exchanged proposals on striker reinstatement. (CGC Ans. Brf. p.8) The CGC continued the line of questioning and asked Hendricks, "as far as the striker replacement issue, there really wasn't anything to negotiate over, correct?" Hendricks answered no and the questioning continued, "the employer had their position, and the unit (sic) had their position, correct? Hendricks said "that is correct." (Tr. 233)

³ Intending no disrespect, it should be noted that ALJ Carter's background is not in labor relations. While his legal credentials are impeccable and enviable, he has not served his entire career understanding the operations of labor relations. He worked as a clerk, for the DOJ, and as an appellate attorney for the EEOC prior to his current service.
NLRB.gov/whoweare/divisionofjudges/divisionofjudgesdirectory

distortion is necessary, considering that words should be given their plain meaning. The inability of the parties to agree on the “deal breaker” or the “800 pound gorilla,” simply foils the formation of a contract.

The notion that the union was comfortable leaving the issue of striker replacements to the NLRB for resolution is complete mashugana. If this was the case – as explained in Respondent’s initial filing – the union would have been in violation of the No Strike provision the moment the contract was executed. Moreover, the resulting CBA would be nonsensical. For instance, would striking employees be able to draw “guarantee pay” because they were not booking hours while working the picket line? The resulting uncertainty would create a carnival atmosphere with grievances mounting by the thousands. The result would be the absolute opposite of “industrial peace and stability.”⁴

The CGC next argues that Respondent’s withdrawal of an unfair labor practice charge compels an inference is a borderline State Bar disciplinary issue. The Board’s own requirements mandate that no reason be attached to the withdrawal. The undersigned sent the withdrawal request. At no time, was the undersigned called as a witness, nor even informally questioned regarding the rationale behind the withdrawal.⁵ There is no evidentiary value to the withdrawal of an unfair labor practice charge, and the CGC requesting an inference therefrom is unethical.

Finally, the CGC’s answering brief makes abundantly clear that the parties never achieved a “meeting of the minds” requisite to contract formation. As laid out in CGC Ans. Brf.

⁴ CGC attempts to argue that the cessation of picketing in November 2017 somehow resolves the striker replacement conundrum. (CGC Ans. Brf. p.12, fn. 9) The mere fact that picketing has stopped does not mean that the issue of what to do with the striker replacements remained a wedge issue. Picketing does not equal striking.

⁵ Perhaps the client no longer wished to prolong the investigation. Perhaps they saw no value in “poking the bear.” Or, maybe they did not think a remedy was important. In any event, the withdrawal has no legal bearing.

p.13, fn. 10, it is positively demonstrative that union representative Cicinelli had achieved a meeting of his own mind, but that Respondent's counsel was absolutely steadfast of another mindset. The CGC could not phrase this difference better than it did in its footnote, where it states that Hendrick's and Cicinelli's divergent beliefs were "insufficient to form an agreement." (*Id.*) Hendricks believed that a resolution of the striker issue was "inextricably intertwined" to an agreement. Cicinelli, of course, claims the contrary. Nonetheless, the result is the same, the parties failed to agree.⁶

Lastly, the CGC urges that *Maintenance Service Corp.*, 275 NLRB 1422 (1985) is distinguishable. Once again, any discernible difference requires the thinking that a strike settlement is either: (1) a separate and distinct contractual entity; or (2) a contractual "condition precedent." Neither is true. The parties failed to come to an agreement on what to do with striker replacements. The CGC repeatedly calls this an "impasse," and Respondent agrees with that characterization. The parties had achieved impasse on the issue of striker replacements. Thus, by its legal definition, the talks had reached the point of stalemate, and accordingly, no collective bargaining agreement was reached. See, *NLRB v. Katz*, 369 U.S. 736 (1962).

II. Strikers Conditional Offer of Return

The CGC's misdirection was not limited to arguments concerning contract formation. Countering Respondent's position that the union's offer to return to work was conditional, the CGC emphasizes the union's statement regarding the return to work of strikers, "I am still waiting to resolve this issue along the terms we discussed." (CGC Ans. Brf. p.15, ALJD p.9) This statement, made by the union representative refers to displacing the permanent replacements. The record shows that Respondent's representative responded with a letter that

⁶ In the same footnote, the CGC also admits that Hendricks "was aware that there was lack of common understanding between the parties and mutual assent on the Union's part."

specifically addressed the issue and stated that the strikers would remain on a preferential re-hire list. (ALJD p. 10, lines 15-20) Nonetheless, the CGC argues that an offer to return to work that contains a demand that striker replacements be laid off is either “unconditional” or ambiguous. (CGC Ans. Brf. P. 16) This argument defies logic.

If there was ambiguity, the ambiguity would be construed against the union. Thus, when Hendricks made clear that the *Laidlaw* list remained in effect, he rejected the conditional offer.⁷ Thus, the CGC is left with the naked assertion that conditioning the right of the returning strikers to displace replacements does not mean exactly what it says.

Finally, the CGC draws a false equivalence between cases involving facsimile transmission and electronic mail. A “fax” is like mail, there is a presumption that it is read upon receipt. There are a host of reasons supporting this presumption, not the least of which is the impossibility of proving when somebody reads a document. In contrast, an email that is sent can be definitively established as to when it is received and opened. As the Complaint date alleged, that March 26 was the date of refusal to reinstate strikers. In its effort to expand this date, the CGC seeks to put the burden on *Respondent* to argue against itself. However, any actual proof of the date of receipt would be in possession of the sender of the email.

Moreover, the record demonstrates that Hendricks replied to the correspondence within minutes. (ALJD p.6, Tr. 47, 231) Accordingly, it was reversible error to impute a receipt prior to any timely response, which was on March 26. In light of the Complaint allegation that March 26 was the date of any unlawful refusal to reinstate, it is reasonable to infer that the Region’s investigation, which was in possession of all relevant correspondence, should be given

⁷ The CGC’s position that this is a demand regarding employees not lawfully entitled to reinstatement misses the mark entirely. This case is not about lawfully terminated strikers or any dispute centered around such concept.

precedence. Notwithstanding the foregoing, the refusal to reinstate is immaterial, because there is no unfair labor practice upon which to predicate a requirement for reinstatement. Accordingly, no finding of a date of “refusal” is actually required.

III. PROCEDURAL EXCEPTIONS

Respondent again urges that this matter be dismissed on the merits, which would moot all of the procedural defect arguments. Nonetheless, they are addressed again herein. As stated in Respondent’s Brief in Support of its Exceptions, the timeline of the Napleton matters are as follows:

- October 31, 2016 - Union is certified as exclusive collective bargaining representative;⁸
- August 1, 2017 - Union strikes NCDC and Respondent;
- September 18, 2017 - Strike against NCDC is resolved;
- September 29, 2017 - Negotiations resume for CBA at Napleton;
- November 15, 2017 - Charge 13-CA-209951 is filed (alleging refusal to reinstate);
- January 3-5, 2018 - *Napleton I* is heard before ALJ Goldman;
- February 23, 2018 - 13-CA-209951 is dismissed;
- April 4, 2018 - ALJ Goldman issues Decision in *Napleton I*;
- May 2, 2018 - Exceptions to ALJ Goldman’s Decision filed;
- May 14, 2018 - Charge 13-CA-220180 is filed;
- June 28, 2018 - 13-CA-209951 is reinstated;
- June 29, 2018 - Charge 13-CA-222994 is filed;
- September 28, 2018 - Board issues Decision in *Napleton I*; and

⁸ Tr. 23.

- February 8, 2019 - *Napleton I* is appealed to the US Court of Appeals, for the D.C. Circuit.

A. This Case Should be Dismissed Under *Jefferson Chemical*

The record shows that Charge 13-CA-209951, which alleges that Respondent “failed and refused to bargain in good faith with the union as the collective bargaining representative,” was being investigated at the same time charges in *Napleton I* were filed.⁹ The record also shows that Respondent’s counsel asserted that there was a *Jefferson Chemical* issue with this case. (Tr. 191) Under *Jefferson Chemical*, “[t]he General Counsel is duty bound to investigate all matters which are encompassed by the charge, and to proceed appropriately thereafter.” *Jefferson Chemical Co.*, 200 NLRB 992, n.3 (1972). Moreover, the General Counsel is prohibited from litigating conduct that arises from the same facts. *Affinity Medical Center*, 364 NLRB No. 68, slip op. at 2 (2016). The GC had all the facts for the charges here that it had in *Napleton I*. Bifurcating the cases is an abuse of prosecutorial power.

B. The Board Improperly Reinstated 13-CA-209951

Ducane Heating Corp. states that “a dismissed charge may not be reinstated outside the 6-month limitations period of [Sec.] 10(b) absent special circumstances in which a respondent fraudulently conceals the operative facts underlying the alleged violation.” *Ducane Heating Corp.*, 273 NLRB 1389 (1985), enfd. mem. 785 F.2d 304 (4th Cir. 1986). There is no provision in *Ducane Heating* for prolonging Section 10(b) for an appeal. The only allowance for prolonging Section 10(b)’s 6-month period is the respondent’s acts of fraudulent concealment. ALJ Carter’s ruling, which he adopted from *Sioux City Foundry Co. v. N.L.R.B.*, 154 F.3d 832,

⁹ Charge 13-CA-187272, was filed on January 27, 2017, and alleged that Respondent “failed to bargain collectively and in good faith with the Union.”

837 (8th Cir. 1998), effectuates the mirror image of what *Ducane Heating* sought to prevent – the potentiality of fraud by the NLRB. This cannot be the NLRB’s goal.

C. The Case Should be Dismissed Under Section 10(b)

First, Respondent did not waive its 10(b) defense. Respondent raised this issue on both days of the hearing. (ALJD p. a5, fn 15) Second, charge 13-CA-222994, was filed on June 29, 2018. The basis for that charge was “the Employer’s refusal to execute a collective bargaining agreement” on November 14, 2017. (See CGC Exh. 1(e)) The charge was clearly outside of the 6 month window allotted for by Section 10(b). Moreover, the record shows that the boilerplate refusal to execute charge (that has zero factual explanation or support), in the timely filed charges have no relation to charge 13-CA-222994. Accordingly, as stated in Respondent’s brief in support of its Exceptions, this case is analogous to *Precision Concrete v. NLRB*, 334 F.3d 88 (DC Cir. 2003), *denying enforcement* to 337 NLRB 211 (2001), and thus charge 13-CA-222994 was untimely.

IV. CONCLUSION

For the reasons stated in its original Exceptions and Brief in Support and contained herein, Respondent respectfully submits that its Exceptions be granted and the Complaint dismissed in its entirety.

Respectfully submitted,

FREEBORN & PETERS LLP

By: /s/ Michael P. MacHarg

Dated: September 27, 2019

Michael P. MacHarg (mmacharg@freeborn.com)
Tae Y. Kim (tkim@freeborn.com)
Freeborn & Peters LLP
311 S. Wacker Drive, #3000
Chicago, IL 60606
(312) 360-6000
(312) 360-6520 – Fax

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

NAPLETON 1050, INC. d/b/a NAPLETON CADILLAC
OF LIBERTYVILLE

and

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

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

CERTIFICATE OF SERVICE

Pursuant to NLRB Rules and Regulations 102.113 and 102.114, I certify that before 5:00 p.m. on August 8, 2018, I served a portable document format (pdf) copy of Respondent's Exceptions to The Decision and Recommended Order of the Administrative Law Judge, upon Christina Hill, National Labor Relations Board Region 13, through the NLRB's electronic filing system.

On this same date, I certify that I served a copy of Respondent's Exceptions to The Decision and Recommended Order of the Administrative Law Judge upon the following by email and/or regular mail:

Emily O'Neill and Catherine Schlabowske, Attorneys, National Labor Relations Board Region 13, 219 South Dearborn Street, Suite 808, Chicago, IL 60604

Geoffrey Carter, Administrative Law Judge, National Labor Relations Board,
1015 Half Street SE, Washington, DC 20570-0001 (Email: Michael.rosas@nlrb.gov)

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

Brandon Anderson, Jacobs Burns Orlove & Hernandez, 150 N. Michigan Avenue, Suite 1000, Chicago, IL 60601-7569

Sam Cicinelli, Automobile Mechanics Local 701, International Association of Machinists & Aerospace Workers, AFL-CIO, 450 Gundersen Drive, Carol Stream, IL 609188-2414

William H. Haller, General Counsel, International Association of Machinists and Aerospace Workers IAMAW, Legal Department, 9000 Machinists Place, Room 202, Upper Marlboro, MD 20772-2687

/s/ Michael P. MacHarg_____

Dated: September 27, 2019

Michael P. MacHarg (mmacharg@freeborn.com)
Tae Y. Kim (tkim@freeborn.com)
Freeborn & Peters LLP
311 S. Wacker Drive, #3000
Chicago, IL 60606
(312) 360-6000
(312) 360-6520 – Fax

5020975v1/32207-0001