

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
WASHINGTON D.C.**

**YP MIDWEST PUBLISHING, LLC,  
d/b/a DEX YP**

**Respondent**

**and**

**07-CA-218455**

**DISTRICT 4, COMMUNICATIONS  
WORKERS OF AMERICA (CWA), AFL-CIO**

**Charging Party**

**GENERAL COUNSEL'S BRIEF IN SUPPORT OF EXCEPTIONS  
TO ADMINISTRATIVE LAW JUDGE'S DECISION**

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## INTRODUCTION

On June 18, 2020, Administrative Law Judge Melissa M. Olivero issued a Decision in this case concluding that Respondent did not violate the Act when it modified a provision of its collective bargaining agreement with the Union regarding terms pertaining to employees' 401(k) plans. Respectfully, the ALJ's Decision is riddled with errors both factual and legal; the most significant being the Judge's admission of, and reliance on, parol evidence to override the clear and unambiguous terms of the parties' contract.

The following facts are undisputed:

- The parties had a collective bargaining agreement effective from August 14, 2016 to August 10, 2019 [GC 2; GC 1(bb) at 6].
- The collective bargaining agreement provides a 401(k) benefit for bargaining unit employees including a matching rate of no less than 100%; a 5% maximum matching contribution and an agreement to increase the Company maximum contribution percentage for unit employees if the percentage is increased for non-represented, non-bargained employees [GC 2 at 133].
- On January 1, 2018, without the Union's consent, Respondent modified the 401(k) matching contribution rate in the parties' collective bargaining agreement to 100% of the first 3% of employee contribution and 60% of the next 3% of employee contribution, for a maximum employer match of 4.8% [GC 6; ALJD at 14, 17 at LL. 28-30; R 9].

Respondent argues that it was at liberty to change the 401(k) language in the parties' contract without the Union's consent because, it claims, the language is inconsistent with what the parties agreed to during their face-to-face bargaining sessions; bargaining which took place a year before the parties reached final agreement on the terms of the contract [ALJD at 6].

Respondent's entire case is built on parol evidence. To get this evidence in the record, Respondent claimed that the contract language at issue was the result of mistake and/or fraud. But Respondent's proffered basis for the admission of parol evidence in this case was an entirely false representation to the ALJ that the Union inserted the 401(k) language in the contract draft and that Respondent's agents "didn't catch it." [Tr. at 15, 95 at LL. 8-22]. This simply isn't true.

The evidence shows, and indeed the ALJ found, that it was Respondent, not the Union, that inserted the 401(k) language in the first draft of the contract that it sent to the Union on April 21, 2017 [ALJD at 8, lines 17-18; GC 7 and 8]. Respondent's claims of mistake and fraud were a sham.

Ultimately, the only thing the parol evidence showed was that the parties did not reach agreement on the 401(k) matching contribution during its face-to-face negotiations in June to September 2016. The General Counsel has never claimed otherwise. The only agreement the parties reached during the 2016 negotiations in this regard was that Respondent would draft language regarding a 401(k) plan for bargaining unit employees for inclusion in the parties' contract. Specifically:

***The Company agrees to acknowledge the provision of a 401(k) benefit to bargaining union (sic) employees in the drafting of the collective bargaining agreement*** [ALJD at 7; R 2 at 20].

On April 15, 2017, Respondent did just that, sending the Union a draft contract which included the following language:

***The Company 401(k) matching rate for all bargaining unit employees will be no less than 100% for each employee dollar contributed to individual accounts up to 5% maximum contribution. If during the term of the Agreement, the Company maximum contribution % is increased for non-represented, non-bargained employees, the % shall also be increased for bargained employees*** [ALJD at 8; GC 7 at 138].

On September 15, 2017, the parties mutually assented to the language Respondent inserted in the draft contract regarding the 401(k) when they reached final agreement on the written CBA [GC 2 at 138; GC 9 and 10].

In her Decision, the ALJ concluded that the parties never reached agreement on the 401(k) language in the 2016-2019 contract, relying in large part on parol evidence, that during face to face bargaining, the Union proposed and Respondent rejected the 5% maximum matching

contribution that Respondent inserted in the draft contract and sent to the Union nearly ten months later. The ALJ further concluded that the parties agreed only to “memorialize the existence” of the 401(k) program in their contract; and that the 401(k) language in the contract “directly contradicted” the agreement reached by the parties to acknowledge the provision of a 401(k) benefit in their contract [ALJD at 14, 16].

The ALJ should not have considered parol evidence in this case because the parties’ 2016-2019 contract is a completely integrated written agreement; the 401(k) language is clear and unambiguous; and Respondent’s claims of mistake and/or fraud are entirely baseless. Even if the parol evidence is considered, it shows only that the parties did not agree to specific terms with regard to the 401(k) language during their face-to-face negotiations that occurred during June to September 2016. Instead, they reached agreement during the drafting process, just as they had agreed to do in their September 16, 2016 MOA.

The ALJ obliged Respondent’s request to negate the 401(k) language in the parties’ contract – language inserted in the draft agreement by Respondent and agreed to by the parties. The General Counsel respectfully asks the Board to reject the Judge’s rewriting of the contract and find that Respondent violated Section 8(a)(5) of the Act as alleged.

### **STATEMENT OF THE CASE**

On April 13, 2018, District 4 of the Communications Workers of America (CWA), AFL– CIO (the Union) filed the charge in Case 07-CA-218455 [GC 1(v)].<sup>1</sup> Following investigation of the charge, on June 28, 2019, the General Counsel issued a complaint<sup>2</sup> alleging

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<sup>1</sup> Throughout this brief, references to the transcript will be delineated as [Tr followed by page number(s)]; General Counsel exhibits as [GC followed by exhibit number]; Respondent exhibits as [R followed by exhibit number]; and Administrative Law Judge’s Decision as [ALJD followed by page number].

<sup>2</sup> The complaint that issued on June 28, 2019, consolidated several cases arising from charges filed by three of the Union’s affiliated Locals. On January 23, 2019, the Regional Director of Region 7 issued an Order Severing Cases, Approving Conditional Withdrawal Request and Withdrawing Complaint Allegations (paragraphs 5, 6, 11-15) in Cases 07-CA-207970 and 07-CA-208090 [GC 1(ee)]. At the outset of the hearing, the General Counsel moved to

that Respondent violated Section 8(a)(5) of the National Labor Relations Act by failing to continue to abide by all terms and conditions of the parties' collective bargaining agreement when it unilaterally changed the contribution formula to bargaining unit employees' 401(k) plans from the formula established by the parties' collective bargaining agreement [GC 1(x)].<sup>3</sup> On July 19, 2018, Respondent filed a timely answer to the complaint, denying the substantive allegations and asserting several affirmative defenses [GC 1(bb)]. On April 23, 2019, a hearing was conducted in Detroit, Michigan, before Administrative Law Judge Melissa M. Olivero. On June 18, 2020, Judge Olivero issued a Decision in which she concluded that Respondent did not violate the Act as alleged and recommended that the complaint be dismissed [ALJD at 18]. Pursuant to Section 102.46 of the Rules and Regulations, the General Counsel files the attached Exceptions to several of the ALJ's findings, conclusions, and recommendations as they are contrary to the law and evidence, and unsupported by the record.

### **STATEMENT OF THE FACTS**

Respondent is a corporation that sells print and digital media, including a telephone directory, online advertising and other digital products [ALJD at 3; Tr at 17]. On June 30, 2017, Dex Media Holdings Inc. (Dex), acquired ownership interests in several entities related to the operations of YP Holdings LLC, including YP Midwest Publishing (YP) [ALJD at 3; Tr at 18, 27; GC 5 at 1]. Pursuant to this acquisition, the combined companies of Dex Media Holdings and YP Midwest Publishing became DexYP [ALJD at 3; Tr at 56, 82]. The Union represents a unit of employees working in the Company's Midwest Region, including operations in

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sever from the complaint Cases 07-CA-206794, 07-CA-206810, 07-CA 216815 and 07-CA-216834 pursuant to informal Board settlement agreements entered into by Respondent and Charging Party Locals 4103 and 4100; the Administrative Law Judge granted the General Counsel's motions to sever and withdraw complaint allegations 9, 10, 16, 17 [Tr at 7-8].

<sup>3</sup> At the hearing, the Administrative Law Judge also granted the General Counsel's motion to amend paragraph 7(a) of the complaint to include in the bargaining unit description the job classification: account executives premise at the work locations listed in Exhibit B of the parties' collective bargaining agreement [ALJD at 2; Tr at 8]

Michigan, Ohio, Illinois and Indiana, known as the “YP Midwest Publishing LLC Unit” [ALJD at 4; Tr at 25; GC 2 at 3; R 7]. The bargaining unit is comprised of employees who are represented by a number of different Locals [ALJD at 4; Tr at 25, 134]. On the same day Dex announced its acquisition of YP, Respondent recognized the Union as the exclusive collective bargaining representative of the unit and advised the Union that “the CBAs remain in place and our obligation to bargain with (the Union) remains unchanged” [ALJD at 3; Tr at 18; GC 3].

Approximately one year prior to the acquisition, YP and the Union entered into negotiations for a successor to their collective bargaining agreement which was set to expire on August 13, 2016 [ALJD at 6; Tr at 136; R 2]. The bargaining sessions commenced around June 2016 and lasted for about three months [ALJD at 6; Tr at 88, 136]. The Union’s bargaining committee was chaired by District 4 Administrative Assistant to the Vice-President Teri Pluta [ALJD at 3; Tr at 131, 136]. Pluta was brought in to lead negotiations for the Union on an emergency basis due to a staffing shortage [Tr at 135, 157]. Prior to these negotiations, Pluta had very little direct involvement with YP or the YP bargaining unit [Tr at 135]. Joining Pluta on the Union’s bargaining committee were two bargaining unit employees, Greg Spikes and Sean Lockwood, and a non-employee Union representative, Danielle Brewer-Collier [Tr at 90, 157-160; GC 2 at 51]. Shannon Kirkland, who had recently been appointed Staff Representative by District 4, joined the negotiations around July or August [ALJD at 3; Tr at 25, 157]. Like Pluta, Kirkland was unfamiliar with YP and the YP bargaining unit [Tr at 25-26]. Representing YP during negotiations were its Vice-President of Labor Relations Keith Halpern, Senior Manager of Labor and Employee Relations, attorney Steve Flagler, and Human Resources official Robert Baker [ALJD at 3; Tr at 82, 137].

The main focus of the negotiations was a new sales compensation plan introduced by YP (i.e., “Go to Market”) [Tr at 88, 162; R 7]. Another significant issue during negotiations was

YP's effort to bring the bargaining unit employees' benefits in line with the benefits of management [R 7 at 1; GC 2 at 133]. One of the Union's priorities during the negotiations was getting language in the collective bargaining agreement guaranteeing a 401(k) benefit [Tr at 138; R 6 at 4]. Although YP had provided a 401(k) benefit to bargaining unit employees for several years, there was nothing in the parties' 2013-2016 collective bargaining agreement regarding the plan or its terms [ALJD at 14; Tr at 137-138, 112, 128, 171].

Early in the negotiations, the Union made two proposals regarding the 401(k)'s matching contribution [ALJD at 6; Tr at 165, 91-92; R 1, 6 and 8]. At the time the Union made its proposals, YP was providing bargaining unit employees with an 80% match for employee contributions up to 6% of compensation for a maximum contribution rate of 4.8% [ALJD at 5; Tr at 64; R 4 at 9, 12]. On June 17, the Union submitted a proposal to YP's bargaining committee seeking a matching rate of 100% for each employee dollar contributed to individual accounts up to 6% of compensation for a maximum contribution of 6% [ALJD at 6; Tr at 165; R 1]. YP rejected the Union's proposal the same day [ALJD at 6; Tr at 165; R 6]. According to YP's bargaining notes, YP lead negotiator Keith Halpern countered with a 4.8% match and told the Union's committee that a 6% match "would (be) over the 5% for everyone right now" [R 6]. On June 29, the Union submitted a second 401(k) proposal to YP's bargaining committee [Tr at 165; R 6 and 8]. This time, the Union proposed a matching rate of 100% for each employee dollar contributed to individual accounts up to 5% of compensation for a maximum contribution of 5% [ALJD at 6; Tr at 165; R 6 at 2; R 8]. Again, YP rejected the Union's proposal [ALJD at 6; R 6 at 2; Tr at 165].<sup>4</sup> In what appears to be a description of the Union's proposal, YP's bargaining

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<sup>4</sup> The ALJ's finding that the parties "explored" the 401(k) match "numerous times" during their June to September 2016 face-to-face negotiations [ALJD at 16] is baseless. To the contrary, Respondent's bargaining notes for June 17 and 29, evince only a perfunctory discussion of the issue [R 6].

notes for June 29 include this notation: “Revised, same match as non-represented” [R 6]. The parties did not reach agreement at the table on the terms of the 401(k) matching contribution and the subject did not come up again until the very end of parties negotiations [ALJD at 6; Tr at 166].<sup>5</sup>

The parties’ last face-to-face meeting was on September 16, 2016 [ALJD at 6; Tr at 166]. A number of issues remained outstanding and YP was becoming impatient [Tr. at 139]. Halpern explained to Pluta that he was under a lot of pressure to get an agreement because the “Go-to-Market” sales compensation component was very important to YP [Tr at 139, 166; see also R 7]. Pluta and Halpern engaged in several sidebar discussions outside of the presence of the other bargaining team members in an attempt to reach an agreement [ALJD at 6; Tr at 139]. As the bargaining stretched into the evening, the parties got very close to a deal [Tr at 141]. According to Pluta: “It came down to that very last thing of we’ll have a deal as long as you insert – as long as you have language in the contract that guarantees the 401(k)” [ALJD at 6; Tr at 140]. Halpern agreed to include language regarding the 401(k) in the contract [ALJD at 6; R 7 at 4]<sup>6</sup> but told Pluta that he didn’t want to draft the language at that time [ALJD at 6; Tr at 140]. Pluta testified: “Keith said to me that he would draft us some language to put into the contract, knowing that the Union wanted a guarantee of the 401(k) for the duration of the contract” [Tr at 166-168]. The parties memorialized their discussion regarding the 401(k) along with the other agreements they had on several subjects in a document titled Memorandum of Agreement (MOA) [ALJD at 6; R 2]. As Pluta and Halpern had discussed, the MOA did not contain any specific terms regarding the 401(k) plan. Instead, the parties left the specifics for the drafting process. In this regard,

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<sup>5</sup> The Union never replaced or otherwise withdrew their June 29, 401(k) proposal.

<sup>6</sup> Halpern memorialized this agreement in his bargaining notes with this notation: “401(k) in bargaining agreement” [R 6 at 4].

Respondent's labor counsel, Steve Flagler, testified: "We agreed to do that (MOA Item 24) without any detail behind what the plan terms were or what the match was, just the fact that they did have that benefit, that benefit available to them" [Tr at 93]. The September 16, 2016 MOA stated simply:

The Company agrees to acknowledge the provision of a 401(k) benefit to bargaining union (sic) employees in the drafting of the collective bargaining agreement [R 2 at 20].

The MOA was signed and initialed by Pluta on behalf of District 4 and Halpern on behalf of Respondent [ALJD at 6; R 2].

A few weeks later, in October 2016, the bargaining unit ratified the September 16, 2016 MOA [ALJD at 7; Tr at 26]. Around this same time, Halpern submitted a memorandum to YP's Board of Managers for approval of the MOA [ALJD at 7; R 7]. Halpern's memorandum does not set forth specific terms with regard to any employee benefits, including the 401(k) plan. Instead, the memorandum advises the Board of Managers that YP had achieved one of its "main goals" of the negotiations to: "Align union benefits and policies with management policies and benefits" [R 7 at 1]. It is undisputed that at that time, Respondent's non-management employees had a 5% match [R 6 at pg. 1; Tr. at 123-125, 101-102].

More than *seven months* passed before YP provided the Union with a draft of the successor collective bargaining agreement [ALJD at 7; GC 8; Tr at 141-142]. By this time, Keith Halpern had left the Company [ALJD at 3; GC 8 at 1-2]. On April 21, 2017, YP attorney Brian Herman sent Pluta the Company's first draft with the changes set forth in the MOA [ALJD at 7; GC 7 and 8; Tr at 141-43]. In the accompanying e-mail, Herman stated: "Teri, please see attached. We'll still need to work on formatting, but let's get the content agreed upon first" [GC 8 at 1]. The draft Herman sent to Pluta was the parties' 2013-2016 agreement with redline changes from the MOA [GC 2; Tr at 141]. The exact language of each change in the MOA was

inserted in the 2013-2016 agreement [Compare R 2 and GC 7] – with one exception. As the parties had agreed, the Company drafted proposed language regarding the 401(k).

The Company 401(k) matching rate for all bargaining unit employees will be no less than 100% for each employee dollar contributed to individual accounts up to 5% maximum contribution. If during the term of the Agreement, the Company maximum contribution % is increased for non-represented, non-bargained employees, the % shall also be increased for bargained employees [GC 7 at 138].

Over the next five months, the parties exchanged drafts [Tr at 102-104]. Pluta noticed a few errors in the Company's draft which she brought to their attention [Tr at 172-173]. For example, Respondent transcribed incorrectly the amount of "automobile reimbursements" to employees [Tr at 173]. As reflected in the MOA, the parties had agreed during bargaining to a reimbursement amount of \$315 [R 2 at 17]. However, the Company's draft listed this amount as \$350 [GC 7 at 82; GC 9 under the heading: "Page 71: Inserted – Steve Flagler – 4/20/2017 7:27:00 PM"]. Pluta advised the Company of the error and it was changed to accurately reflect the parties' agreement [GC 2 at 70; Tr at 173]. There was no further discussion between the parties regarding the 401(k) plan language Respondent inserted in the contract [Tr at 150].

On September 14, Pluta sent Steve Flagler what she described as the "Final CWA/YP 2016 Contract" [ALJD at 7; GC 10]. Pluta told Flagler: "I removed all of the red and inserted the wages for the Staff Associate Titles that you created. This should be good to be posted and printed for the CWA Locals" [ALJD at 7; GC 10]. On September 15, Flagler replied: "Thank you! I will get it posted on the intranet as soon as I can. Can you give me a rough idea of how many printed copies are needed?" [GC 10]. Later that same morning, Flagler e-mailed Pluta and advised her that the parties' 2016-2019 contract was on the employee intranet [GC 11].

Approximately one month later, District 4 Staff Representative Shannon Kirkland was contacted by a vice-president of one of the CWA Locals representing the unit employees who

told him that Respondent was not matching the unit employees’ 401(k) contributions at the 100% rate with a maximum 5% contribution as set forth in the parties’ recently published 2016-2019 collective bargaining agreement [ALJD at 8]. Instead Respondent was matching employee contributions at the 80% rate with a maximum 6% contribution (i.e., a maximum 4.8% match) [ALJD at 8; Tr at 30]. On October 19, Kirkland sent an e-mail to Respondent’s Vice President of Human Resources, Elizabeth Dickson, stating: “it has been brought to the Union’s attention that Dex/YP is currently matching employees’ 401(k) contributions at 80% up to a maximum of 6%. Can you confirm the rate Dex/YP is matching employees’ contribution” [ALJD at 8; GC 4]. Dickson returned Kirkland’s e-mail but she did not confirm the matching rate as Kirkland had asked [GC 4]. Instead, she Dickson wrote back: “I believe Steve is planning to reach out to you to preview 2018 benefits including 401(k). I think you will be pleased with these plans. Thanks.” [GC 4]. On October 20, Flagler sent Pluta and Kirkland a single-page document described in Flagler’s e-mail as “Dex Benefit Grid for 2018” [R 9; Tr at 98-99]. It included this section on the employer matching contribution.

401(k)	Fidelity	Immediate eligibility for enrollment and match, 2 year cliff vesting   100% match of first 3% deferred; 60% of next 3% (total 4.8% match)
Tuition Reimbursement	EdAssist	Up to \$8,000 reimbursement for tuition and eligible expenses annually

Note: Portions may be overridden by specific 2018 CBA provisions.

Soon after sending this document, the parties met to discuss the changes to benefits [Tr at 32, 151-153].<sup>7</sup> At the meeting, the Union told Flagler that the contract provided for a 100% match up to 5% [Tr at 152]. Flagler did not dispute the Union’s assertion that the Company was not paying the correct match. He simply told Pluta and Kirkland that he would look into it [Tr at

<sup>7</sup> In her recitation of the facts, the ALJ ignored entirely the parties’ meeting to discuss Respondent’s modification of the 401(k) language in the parties’ contract [See ALJD at 8, LL. 36-42].

153]. But Flagler never got back to the Union [Tr at 153-154]; not even after it filed the instant charge [Tr at 153-154]. Around this same time (i.e., October 2017), Kirkland requested that Respondent provide the Union with a copy of the Summary Plan Description (SPD) for the unit employees' 401(k). Five months passed before Respondent provided the document to the Union in March 2018 [ALJD at 8; Tr at 34-35; GC 5]. In the introductory section, the SPD stated:

The Company hereby establishes this DexYP Savings Plan as a profit-sharing plan described in Code section 401(a) with a cash or deferred arrangement described in Code section 401(k) effective at the stroke of midnight between December 31, 2017 and January 1, 2018.

Effective as of the stroke of midnight between December 31, 2017 and January 1, 2018, the Dex Media, Inc. Savings Plan; the YP Holdings, LLC Retirement Savings Plan; and the YP Holdings, LLC 401(k) Success Sharing Plan were merged into this Plan.

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[GC 5 at 1].

Contrary to the parties' collective bargaining agreement, the SPD established a 4.8% maximum employer matching contribution under the following terms:

- (1) Each Member shall be allocated a Safe Harbor Company Matching Contribution equal to (i) 100% of the first 3% of Compensation such Member contributed to the Plan for that payroll period in the form of Elective Contributions, Designated Roth Contributions, After-Tax Contributions or combination thereof and (ii) 60% of the next 3% of Compensation such Member contributed to the Plan for that pay period in the form of Elective Contributions, Designated Roth Contributions, After-Tax Contributions or combination thereof...

[GC 5 at 15; ALJD at 9].

After receiving the SPD confirming that Respondent had indeed modified the contribution formula that Respondent inserted into the draft contract and sent to the Union on April 21, 2017 and to which the parties mutually assented to on September 15, 2017. The Union filed the instant charge on April 13, 2018 [GC 1(v); ALJD at 9].

## **QUESTIONS PRESENTED**

1. Did the Administrative Law Judge err in admitting and relying on parol evidence for the purpose of varying the clear and unambiguous 401(k) language in the parties' 2016-2019 collective bargaining agreement, a writing regarded by the parties as the final embodiment of their agreement. [Exceptions 1-13, 51].
  
2. Even if parol evidence is considered, did the Administrative Law Judge nonetheless err in concluding that Respondent was at liberty to modify the parties' collective bargaining agreement based on the Judge's finding that the parties' September 16, 2016 agreement to "acknowledge the provision of a 401(k) benefit to bargaining union [sic] employees in the drafting of the collective bargaining agreement" precluded Respondent from offering and the Union accepting the 401(k) language, including the 5% matching contribution, that Respondent inserted into the contract draft and sent to the Union on April 21, 2017, and to which the parties mutually assented on September 15, 2017. [Exceptions 14-51].
  
3. Did the Administrative Law Judge err by relying on the Board's decision in *MV Transportation*, 368 NLRB No. 66 (2019) because this is a contract modification case, not a unilateral change case [Exceptions 35-36, 51].

## **APPLICABLE LAW AND ARGUMENT**

Sections 8(a)(5) and 8(d) of the Act establish an employer's obligation to bargain in good faith with respect to wages, hours, and other terms and conditions of employment. The proviso to Section 8(d) states that where there is in effect a collective bargaining agreement, the duty to bargain collectively also means that no party to the contract shall terminate or modify the contract, save in situations where the party seeking the modification has complied with certain

designated preconditions. Neither party, however, may be required to discuss or consent to modifications of particular terms and conditions, defined within a contract for some fixed period, which would become “effective” before some designated contract reopening date.” Section 8(d); See also, *Norris Industries*, 231 NLRB 50, 63 (1977). In her Decision, the ALJ concluded that Respondent was privileged to modify the clear and unambiguous 401(k) provision in the parties’ collective bargaining agreement because, in her view, the contract language doesn’t “accurately reflect the agreement reached by the parties during the negotiations that resulted in the referenced collective bargaining agreement.” The ALJ’s Decision in this regard is premised entirely on parol evidence that should not have been admitted much less considered by the Judge. But, even if parol evidence is considered, it does not warrant the Judge’s decision to invalidate and negate the language agreed to by the parties.

**I. The Administrative Law Judge Erred in Admitting and Relying on Parol Evidence for the Purpose of Varying the Clear and Unambiguous 401(k) Language in the Parties’ 2016-2019 Collective Bargaining Agreement [Exceptions 1- 13]**

The threshold issue in this case is whether the ALJ should have admitted and considered parol evidence offered by Respondent to negate the terms of the parties’ contract. The 2016-2019 collective bargaining agreement is a completely integrated written agreement and the 401(k) provision is clear and unambiguous. Thus, as a matter of contract law, the collective bargaining agreement is the sole expression of the parties’ intent and supersedes all other preceding or contemporaneous understandings and agreements. Board precedent prohibits the use of parol evidence to vary the clear and unambiguous terms of a collective bargaining agreement. *Contek Int., Inc.*, 344 NLRB 879, 883–84 (2005) citing *Quality Building Contractors*, 342 NLRB 429 (2004); and *NDK Corp.*, 278 NLRB 1035 (1986). *NLRB v. Electrical Workers Local 11*, 772 F.2d 571, 575 (9th Cir. 1985) (where contract language is unambiguous, parol evidence is not only unnecessary but also irrelevant). Indeed, the Board has

consistently held that when parties “[expressed] in a writing to which they have [all] assented as the complete and accurate integration of that contract, evidence, whether parol or otherwise, of antecedent understandings and negotiations, will not be admitted for the purpose of varying or contradicting the writing.” *Apache Powder Co.*, 223 NLRB 191, 194 (1976), citing 3 Corbin Contracts §573 (1960); see also, *Aei2, LLC*, 343 NLRB 433, 436 (2004) citing *America Piles, Inc.*, 333 NLRB 1118, 1119 (2001); *Sommerville Construction Co.*, 327 NLRB 514 (1999); *W. J. Holloway & Son*, 307 NLRB 487 (1992); *Sheet Metal Workers Local 208 (Mueller Co.)*, 278 NLRB 638, 645 (1986); *Kal Kan Foods, Inc.*, 288 NLRB 590 (1988) (when the parties to a contract express their agreement in a writing intended to be the final embodiment of their agreement, any other expression made prior to or contemporaneous with the writing, is inadmissible to vary the terms of the writing).

In the instant case, Respondent does not claim, and the ALJ did not find, that the parties’ 2016-2019 contract is anything less than a completely integrated written agreement. The Board has recognized that an agreement is integrated where the parties thereto adopt a writing or writings as the final and complete expression of the agreement. *Apache Powder Co.*, 223 NLRB 191, fn. 5 (1976) citing Restatement of the Law, Contracts Section 228. Here, after exchanging and reviewing drafts over a period of five months, the Union sent Respondent what it described as the “Final CWA/YP 2016 Contract” [ALJD at 7; GC 10], remarking: “This should be good to be posted and printed for the CWA Locals” [ALJD at 7; GC 10]. The next day, Respondent’s labor attorney, Steve Flagler, replied: “Thank you! I will get it posted on the intranet as soon as I can. Can you give me a rough idea of how many printed copies are needed?” [GC 10]. Later that same morning, Flagler e-mailed Pluta and advised her that the parties’ 2016-2019 contract was on the employee intranet [GC 11]. Clearly, the parties viewed the contract as the final and complete expression of the 2016-2019 agreement.

The Respondent also does not contest that the 401(k) provision is clear and unambiguous.

Indeed, it is unequivocal:

The Company 401(k) matching rate for all bargaining unit employees will be no less than 100% for each employee dollar contributed to individual accounts up to 5% maximum contribution. If during the term of the Agreement, the Company maximum contribution % is increased for non-represented, non-bargained employees, the % shall also be increased for bargained employees [GC 2 at 133].

Faced with the clear and unambiguous 401(k) language, Respondent asked the ALJ to admit parol evidence, claiming it would show mistake or fraud in the execution of the contract. To be sure, the Board has recognized that in certain instances parol evidence may be admissible to show mistake of the parties to a contract, or fraud. *Sheehey Enterprises, Inc.*, 353 NLRB 803, citing *Horizon Group of New England*, 347 NLRB 795, 800 (2006) citing *NDK Corp.*, 278 NLRB 1035, 1041 (1986); *Positive Electrical Enterprises*, 345 NLRB 915, 921 (2005). In *Sheehey*, the Board considered whether a judge erred in refusing to consider parol evidence based on an employer's assertions of mistake and fraud. The Board acknowledged these exceptions to the parol evidence rule, but ultimately upheld the judge concluding that neither "fraud in the execution" nor mistake was established because the respondent had the opportunity to read and consider the agreement and the union did not deprive the respondent of the opportunity to ascertain the agreement's true nature. *Sheehey* at 803-804.

In the instant case, Respondent, over the objections of the General Counsel and the Union, offered parol evidence in the form of testimony from its former Senior Manager of Labor and Employee Relations, attorney Steve Flagler, to show mistake and fraud. During its opening statement, Respondent's counsel previewed his client's defense:

"An MOA was kind of a summary of all of the changes that were reached during the negotiation process. Transitioning from the signed MOA into what became the collective bargaining agreement, **the Union drafted that contract**

(emphasis added). Now, unfortunately, there was an inclusion of a 5% percent (sic) match. Whether it was by mistake, whether it was by intent, whether it was simply be a scrivener's error, I'm not exactly sure how the 5 percent got into the contract, so it was unfortunate that was included. More unfortunate is that the Company didn't catch it when it was presented with the opportunity to sign the collective bargaining agreement" [Tr at 15].

During direct examination, attorney Flagler confidently posited that he "wrote a draft incorporating the items from the MOA into the prior agreement and I sent it to the Union" [Tr at 94].<sup>8</sup> When asked by Respondent's counsel about the 401(k) language, specifically, Flagler referencing GC 2, page 133, testified: "**So this<sup>9</sup> was written by Teri Pluta and was in – we later learned, in the version she had sent us** as – which purported to be the contract updated with the terms from the MOA" [Tr at 95]. Flagler was then asked: "And in looking at the 5 percent reference on page 133, did you notice that when you were in that process?" He responded: "We did not. We missed that" [Tr at 95].<sup>10</sup>

During cross examination, Flagler's testimony about the origin of the 401(k) language in the draft contract was called into question.

Q. BY MR. CARLSON: Mr. Flagler, the document that went back and forth between the parties, that was a Microsoft Word document; is that right?

A. Yes.

Q. Okay. And are you aware that there's a feature on Microsoft Word that allows people to go and see what changes were made to a document and who inserted what and when?

A. Yes.

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<sup>8</sup> During his direct examination, Flagler was not asked and did not explain why he would have sent the Union a initial draft of the contract incorporating every item from the MOA except for Item 24, pertaining to the 401(k).

<sup>9</sup> During his direct examination, Flagler was not asked and did not explain whether "this" referred to all of the language on page 133, just the 401(k) language, just the matching contribution formula, etc. [Tr at 95]. He eventually clarified his testimony during cross-examination [Tr. at 103-104].

<sup>10</sup> Flagler identified himself, fellow YP labor relations attorney Brian Herman, and human resources official and Company bargaining committee member Robert Baker as the individuals who reviewed the contract drafts on behalf of Respondent [Tr at 95, 102, 115-116, 118].

Q. Okay. Mr. Flagler, isn't it true that actually the language that appears on page 133, including the final paragraph, that that language was inserted by you on April 20th, 2017, at 7:18 p.m.?

A. I don't recall that, but I'm guessing you have some kind of document that suggests that's the case.

Q. Well, wait a minute. You testified earlier that Ms. Pluta put the language in, in at least the final paragraph, and now you're saying you don't recall if you put it in or she put it in?

A. No, I said my recollection is that she put that language in. You gave me something else that may be the original draft I sent and you've suggested that I put that language in, but I've not said that I recall doing that.

Q. Mr. Flagler – I'm sorry, Your Honor.

JUDGE OLIVERO: That's okay.

(General Counsel's Exhibit 9 marked for identification.)

Q. BY MR. CARLSON: I'm going to hand you what I've marked for identification as General Counsel's Exhibit 9, and I'd ask you to take a look through there and you're directed specifically to page 77, but please feel free to review the entire document.

A. (Reviews document.)

Q. Have you had a chance to look at that?

A. Yes.

Q. Does that help refresh your recollection about whether or not you inserted that final paragraph on page 133 of GC-2 into the draft?

A. That is what this document shows, though I still don't recall ever putting that into the draft of the contract [Tr at 108-109].

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JUDGE OLIVERO: I'm going to ask a couple questions while we're – okay, GC-7.

THE WITNESS: Yes.

JUDGE OLIVERO: All right. Do you know what this document is?

THE WITNESS: I mean, it's a marked-up copy of the contract.

JUDGE OLIVERO: Okay. Did you participate in the drafting of GC-7?

THE WITNESS: I don't know. I mean, I participated in –

JUDGE OLIVERO: Um-hum.

THE WITNESS: – drafting the amended version of the contract. I can't say for certain what this particular version is.

JUDGE OLIVERO: Okay. And –

THE WITNESS: I'm not trying to be difficult. I just want to be precise.

JUDGE OLIVERO: No, that's okay. We want to go with what you remember. Now, as far as GC-9 goes, do you have any reason to dispute that you put in the language in page 77 regarding the 401(k) match?

THE WITNESS: You know, the reason – the reason I have disputed that is because I don't recall doing it and because that was not consistent with what we had bargained [Tr at 110-111].<sup>11</sup>

Contrary to Respondent's representations to the Judge and the direct testimony of its lead witness, Mr. Flagler, the evidence shows – and the ALJ found – that the 401(k) language was in the very first draft sent by Respondent's labor and employment attorney, Brian Herman, to the Union on April 21, 2017 [ALJD at 8, lines 17-18].

Inexplicably, the ALJ “buried” her finding of this essential fact, suggesting throughout the decision that there is doubt or uncertainty that Respondent inserted the 401(k) language in the parties' collective agreement [Compare ALJD at 8, lines 17-18; GC 7 and 8; and Tr. at 102, 142 with ALJD at 12, lines 27 and 45; ALJD at 15, fn. 10]. The ALJ's distortion of this undisputed evidence is a serious error which the Judge compounded with several egregious oversights. For example, the ALJ ignored Respondent's unexplained failure to introduce into evidence the e-mail and draft contract without the 401(k) language that Respondent contends it sent to the Union [Tr. at 95]. This glaring hole in Respondent's case most certainly warrants an adverse

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<sup>11</sup> In her decision, the ALJ stated that she accorded “little weight” to GC 9 which appeared to attribute authorship of the 401(k) language in the draft contract to Flagler [ALJD at 15, fn. 10]. This ruling seems somewhat discordant with the Judge's comments when she received GC 9 in evidence [Tr. at 144-146]. Nevertheless, it is of little consequence here given the ALJ's finding that the 401(k) language was in the very first draft contract sent by Respondent to the Union on April 21, 2017 [ALJD at 8, lines 17-18].

inference that no such documents exist [Tr. at 15, 94-95]. The Board has long held that the failure to produce evidence in the possession of a party that may reasonably be assumed to be favorable to its position raises an adverse inference. *RCC Fabricators, Inc.*, 352 NLRB 701, fn. 5, 711-712 (2008) citing *Martin Luther King Sr. Nursing Center*, 231 NLRB 15 at fn. 1 (1977) (where relevant evidence which would properly be part of a case is within the control of the party whose interest it would naturally be to produce it, and he fails to do so without satisfactory explanation, trier of fact may draw an inference that such evidence would have been unfavorable to him).

Similarly, the ALJ should have drawn an adverse inference from Respondent's unexplained failure to call to testify its Human Resources Senior Manager Robert Baker, a current employee and admitted agent. The proper inquiry in determining whether an adverse inference may be drawn from a party's failure to call a potential witness is whether the witness may reasonably be assumed to be favorably disposed to that party. An adverse inference may be drawn regarding any factual question on which the witness is likely to have knowledge and it may be inferred that the witness, if called, would have testified adversely to the party on that issue. *Desert Pines Golf Club*, 334 NLRB 265, 268 (2001) citing *Electrical Workers Local 3 (Teknion, Inc.)* 329 NLRB 337, fn. 1 (1999).

Baker, a witness who may reasonably be assumed to be favorably disposed to Respondent, was on the Respondent's bargaining team in 2016, and he participated in the review of contract drafts in 2017 [ALJD at 3, Tr. at 83, 118-121]. Thus, Baker undoubtedly has knowledge regarding the events underlying the instant matter including, but not limited to: (1) why Respondent drafted the 401(k) language (including the 5% matching contribution formula) it sent to the Union on April 21, 2017, if Respondent did not intend to propose that the language be included in the parties' contract; (2) who, on Respondent's behalf, inserted the 401(k)

language (including the 5% matching contribution formula) in the contract draft it sent to the Union on April 21, 2017; and (3) why Respondent inserted the 401(k) language (including the 5% matching contribution formula) in the contract draft it sent to the Union if Respondent did not intend to propose that the language be included in the parties' contract.

In sum, the totality of the evidence unequivocally establishes that Respondent inserted the 401(k) language in the draft agreement it sent to the Union on April 21, 2017. Absent from the record is any evidence as to how or why the 401(k) language came to be in the contract. If Respondent can't explain why it put the language in the contract, then it cannot, and did not, establish that its insertion was a mistake.<sup>12</sup> Furthermore, the ALJ also erred by failing to make a specific finding that Respondent presented no evidence whatsoever in support of its entirely baseless claim that the Union attempted to defraud Respondent by inserting the 401(k) language in the draft contract [Tr. at 15]. Fraud in the execution arises when "a misrepresentation as to the character or essential terms of a proposed contract induces conduct that appears to be a manifestation of assent by one who neither knows nor has reasonable opportunity to know of the character or essential terms of the proposed contract *Horizon Group of New England*, 347 NLRB 795, 796-97 (2006) citing *Restatement (Second) of Contracts* § 163 (1981). That is most certainly not the case here. Under these circumstances, the ALJ should not have considered the parol evidence and her decision in this regard should be overturned by the Board.

**II. Even If Parol Evidence Is Considered, the Administrative Law Judge Nonetheless Erred in Concluding that Respondent Was at Liberty to Modify the 401(k) Language in the Parties' Contract Without the Union's Consent [Exceptions 14-51]**

The ALJ concluded that Respondent was privileged to modify the clear and unambiguous 401(k) matching contribution clause in the parties' collective bargaining agreement because, in

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<sup>12</sup> It should be noted that despite the Union raising the issue with Respondent in October 2017 [ALJD at 8], there is no evidence of Respondent attributing the 401(k) language to a mistake until the Union filed the instant charge.

her view, the 401(k) provision doesn't "accurately reflect the agreement reached by the parties during the negotiations that resulted in the referenced collective bargaining agreement" and the parties did not have a "meeting of the minds" regarding the 401(k) language [GC 1(bb) at 7]. Respectfully, the ALJ's decision is contrary to the facts and well established law. Thus, even if the evidence of events outside the parties' contract is credited and considered, Respondent did not establish its defense and the ALJ erred in rescinding the 401(k) language in the parties' agreement.

The parol evidence in this case established two key facts. First, on April 21, 2017, Respondent proposed the very language it asked the ALJ to rescind. Second, on September 15, 2017, after exchanging draft copies of the contract over a period of five months, during which its two labor law attorneys and a senior human resources official reviewed the proposed contract, Respondent agreed to all of its terms. At no time between sending the first draft to the Union and the parties' agreement to the "Final CBA" did Respondent point out any discrepancy between the contract language and what it now claims to be the intention of MOA, Section 24, to merely "acknowledge" a 401(k) plan in the contract. Instead, Respondent engaged in a course of conduct evidencing a binding "manifestation of assent."

To reiterate, the pertinent facts are as follows. At the last in person bargaining session on September 16, 2016 [ALJD at 6; Tr at 166] the parties were close to reaching an agreement. As described by the ALJ:

[Pluta] and Halpern had a "sidebar," during which they discussed the 401(k) plan. (Tr. 139–140.) Pluta said, "we'll have a deal as long as . . . you have language in the contract that guarantees the 401(k)." (Tr. 140.) Halpern agreed, but did not want to work out the language at that time. (Tr. 140.) [ALJD at 6].<sup>13</sup>

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<sup>13</sup> Steve Flagler, the only person on Respondent's bargaining team who testified at the hearing acknowledged that he was not present during the parties' sidebar discussions [Tr. at 115]

The parties' memorialized this agreement in the September 16, 2016 MOA, stating simply:

The Company agrees to acknowledge the provision of a 401(k) benefit to bargaining union (sic) employees in the drafting of the collective bargaining agreement [R 2 at 20].

The MOA was signed and initialed by Pluta on behalf of District 4 and Halpern on behalf of Respondent [ALJD at 6; R 2].

On April 21, 2017, YP attorney Brian Herman sent Pluta the Company's first draft with the changes set forth in the MOA [ALJD at 7; GC 7 and 8; Tr at 141-43]. In the accompanying e-mail, Herman stated: "Teri, please see attached. We'll still need to work on formatting, but let's get the content agreed upon first" [GC 8 at 1]. As the parties had agreed, the Respondent drafted proposed language regarding the 401(k).

The Company 401(k) matching rate for all bargaining unit employees will be no less than 100% for each employee dollar contributed to individual accounts up to 5% maximum contribution. If during the term of the Agreement, the Company maximum contribution % is increased for non-represented, non-bargained employees, the % shall also be increased for bargained employees [GC 7 at 138].

The parties exchanged drafts [Tr at 102-104] and there was no further discussion regarding the 401(k) plan language Respondent inserted in the contract [Tr at 150]. On September 14, Pluta sent Steve Flagler what she described as the "Final CWA/YP 2016 Contract" [ALJD at 7; GC 10]. Pluta told Flagler: "This should be good to be posted and printed for the CWA Locals" [ALJD at 7; GC 10]. On September 15, Flagler replied: "Thank you! I will get it posted on the intranet as soon as I can. Can you give me a rough idea of how many printed copies are needed?" [GC 10]. Later that same morning, Flagler e-mailed Pluta and advised her that the parties' 2016-2019 contract was on the employee intranet [GC 11].

Simply put, Respondent's April 15, 2017, was an unconditional offer regarding the 401(k) language to be included in the contract. Respondent never withdraw or modified the offer.

The Union accepted the offer. On September 15, 2018, the parties agreed that they had a finalized contract.

The Board has found a “meeting of the minds” in very similar circumstances. In *Windward Teachers Association*, 346 NLRB 1148 (2006), the ALJ found that the parties did not have a meeting of the minds on the terms of a clause in a collective bargaining agreement about the payment of bonuses that the Respondent union argued failed to reflect understandings reached by the parties during a bargaining session. The Board disagreed with the judge, finding that the parties did not have a meeting of the minds at the bargaining session regarding the *terms* of the bonus clause to be incorporated in the final contract (emphasis in original) and that there was “no agreement on the specific language to be used.” *Id.* at 1151. The Board continued, “[m]ore fundamentally, however the credited evidence shows the Respondent received, reviewed, and ratified a final agreement that incorporated the bonus clause language the parties had agreed to in [the] draft stipulation of agreement ...” *Id.* at 1151-1152.

Just as in *Windward*, the parties here did not have a meeting of the minds with regard to the terms or specific language to be incorporated in the final agreement in the September 16, 2016 MOA. Indeed, the credited evidence establishes that Respondent’s lead negotiator Keith Halpern told the Union’s lead negotiator that the parties would work out the language in the drafting process [ALJD at 6]. The parties *did* reach meeting of the minds when the Union assented to the 401(k) language Respondent inserted in the draft contract it sent to the Union on April 21, 2017. And, just as in *Windward*, Respondent received, reviewed and ultimately assented to a final agreement with the 401(k) language.

In *Ebon Services*, 298 NLRB 219 (1990), the Respondent employer argued that the parties did not reach a full and final agreement, since the union’s proposal included terms and items that were never discussed at any of the parties’ bargaining sessions. The Board concluded

that the parties reached a complete meeting of the minds on all substantive terms of a contract when the employer's representative read over the union's proposed contract page by page and agreed to all of its terms. There was no ambiguous language over which the parties had a mutual misunderstanding and the employer never informed the union of any discrepancies. *Id.* at fn. 2, 223 (1990) citing *Midvalley Steel Fabricators* 243 NLRB 516 (1979).

Respondent argues that its failure to "catch" the 5% matching contribution – and perhaps the rest of the 401(k) language in the draft contract – should allow it to unilaterally modify the parties' contract. But Respondent may not be excused from honoring the contract by its later realization that, through the fault of its own agents, it was unaware of one of the details of the contract it made. If its failure to "catch" the 401(k) language was a mistake, it was Respondent's mistake alone; the Union was not at fault and in no way misled Respondent. To allow Respondent to negate the 401(k) provision allows for the exercise of buyer's remorse under circumstances where rescission is not justified.

Indeed, it is well established that the formation of a binding contract may be affected notwithstanding a mistake by one of the contracting parties. *Health Care Workers Union, Local 250*, 341 NLRB 1034, 1037 (2004). The Board has consistently found that a party is bound by contract language it had the opportunity to review even if the matter was never consciously discussed or explored during bargaining sessions. *Norris Industries*, 231 NLRB 50, 63 (1977); *Ebon Services*, 298 NLRB 219, fn. 2; 223 (1990). In *Norris*, the employer proposed to terminate the medical group insurance of employees on medical leaves of absence and incorporated this proposal in a letter of understanding that was signed with a contract between the parties. The union sought reformation of the parties' contract to remove the disputed "termination of coverage" language, claiming that the parties never agreed to it during negotiations. The Board held that the employer's termination of insurance coverage for employees on medical leave was

lawful. The employer's written proposal was twice submitted to the union and its representatives had the opportunity to review it. In so finding, the Board affirmed the ALJ's conclusion that the union's silence regarding the proposed language – whether chargeable to negligence or based upon some purely subjective misconception – was sufficient to warrant the employer's belief that consensus had been reached. *Norris Industries*, 231 NLRB 50, 60-66 (1977).

Similarly, in *Contek International*, supra, although the employer read and signed a short-form agreement that bound it to the long-form multiemployer agreement, it never read the long-form agreement. Contrary to the terms of the multiemployer agreement, the employer asserted that it had agreed only to a site-specific agreement, and that its unilateral mistake regarding what it had agreed to privileged it to rescind acceptance of the multiemployer agreement. The Board in *Contek* recognized that “unilateral mistake *may be* grounds for rescission of a contract,” but held that an employer failing to read a contract before giving its assent was “not the kind of obvious error justifying rescission.” *Contek* at 879; see also *Sheehy Enterprises, Inc.*, 353 NLRB 803 (2009), reaffd. after remand, 355 NLRB 478 (2010), enfd. 431 Fed.Appx. 488 (7th Cir. 2011).

In *Hospital Employees Local 1199 (Lenox Hill Hosp.)*, 296 NLRB 322, 325–26 (1989), the judge concluded that rescission was not appropriate where the employer's proposal was unambiguous and clear and the union negotiator made a mistake in misinterpreting the plain language of the proposal. The judge found that the union's mistake was unilateral resulting from the union representatives lack of care not from any obvious cause that should have alerted the employer. The Board found that the employer's representative cannot be blamed for not knowing that the union representative was making a mistake and that the union should be held to the representations made by its negotiator and that the employer should be able to rely on the bargain it made. *Id* at 325-326.

The ALJ's reliance on *Apache Powder Co.*, 223 NLRB 191 (1976) is misplaced. In *Apache*, the parties had been negotiating for a pension increase. In the employer's last offer, its negotiator put down an earlier date than the date discussed by the parties; the mistake had the effect of granting a much larger pension increase than the one under discussion. The administrative law judge's decision in *Apache* emphasized that the employer had made an obvious mistake that should have placed a reasonable person on guard; therefore, no meeting of the minds occurred. A mistake of one party, which is known to the other, affects the validity of the agreement. The Board upheld the administrative law judge, holding that "rescission for unilateral mistake is, for obvious reasons, a carefully guarded remedy reserved for those instances where the mistake is so obvious as to put the other party on notice of an error. We find that the instant case presents such an unusual instance." *Apache Powder Co.*, 223 NLRB 191 (1976).

In the present case, the 401(k) language – including the 5% matching formula – that Respondent proposed to the Union on April 21, 2017, and the parties mutually assented to on September 15, 2017, is not "so palpably at odds" with either the parties' September 16, 2016 agreement [R2 at 20] to "acknowledge the provision of a 401(k) benefit to bargaining union [sic] employees in the drafting of the collective bargaining agreement," or the 4.8% matching contribution match in effect at that time as to put the Union on notice of an obvious mistake by the Respondent [ALJD at 14-15]. With regard to the latter, it is important to remember that Teri Pluta was brought in to lead negotiations for the Union on an emergency basis due to a staffing shortage [Tr at 135, 157]. Prior to the negotiations at issue in this case, Pluta had very little direct involvement or familiarity with the YP bargaining unit or their terms and conditions of employment [Tr at 135]. There was no language in the parties' 2013-2016 contract regarding the 401(k) [Tr. at 112]. When the Union first received Respondent's draft contract in April 2017,

ten months had passed since the Union made its proposals regarding the 401(k) match in June 2016. Respondent rejected the proposals after very little discussion; in one instance apparently indicating to the Union that the employees were receiving a 5% match – “6% (match) would (be) over the 5.0% for *everyone* right now (emphasis added)” [R 6 at 1]. In responding to the Union’s proposal for a 5% match, Respondent described the 4.8% match as “really the same” [R 6 at 3]. Also, a 5% match was consistent with the Company’s stated goal of “aligning union benefits and policies with management benefits and policies” [R 7 and GC 2 at 133]. Additionally, Respondent is in no position to argue that the Union should have recognized that the 401(k) language was a mistake. Respondent had two attorneys – one with 25 years of experience in labor relations – and a senior human resources official review the contract over a period of five months, and they didn’t notice the “mistake.” This case is clearly distinguishable from *Apache* and those “unusual” cases where the mistake was obvious, or where the Union was on notice of the alleged mistake. The “carefully guarded remedy” of rescission was clearly not appropriate here. *Id.* at 191.

### **III. The ALJ’s Misplaced Reliance on the Board’s *MV Transportation* Decision**

Near the end of her decision the ALJ stated: “even if the Board or reviewing court should find that parol evidence should have been excluded and the 401(k) match amount contained in the MOA should be enforced, I find that there was no unilateral change or midterm modification” [ALJD at 16]. In support, the ALJ cited the Board’s decision in *MV Transportation, Inc.*, 368 NLRB No. 66, slip op. at 17 (2019) for the proposition that “[a]n allegation that an employer has violated Section 8(a)(5) by unilaterally changing a term or condition of employment may be defended against on several grounds, including by denying that it changed a term or condition of employment at all” [ALJD at 16]. This is, to be certain, a precise recitation of the law in unilateral change cases. But the instant matter is not a unilateral change case, it is a contract

modification case. The General Counsel made this very point during the hearing when objecting to Respondent's offer of evidence of matching contributions made to the employees in 2017.

MR. CARLSON: I would also object, Your Honor –

JUDGE OLIVERO: Yes.

MR. CARLSON: – as to relevancy. The issue is what the contract said ... Whatever YP Holdings was matching is irrelevant. What's relevant is the contract because this is a contract modification case, not a unilateral change case.

JUDGE OLIVERO: Well, I agree with your statement. I'm going to admit Respondent's 5 over objection, and you can argue what weight, if any, I should give to this document in the brief [Tr. at 62-63].

In *Bath Iron Works Corp.*, 345 NLRB 499 (2005), the Board explained that the unilateral change case and the contract modification case are “fundamentally different in terms of principle, possible defenses, and remedy. In terms of principle, the ‘unilateral change’ case does not require the General Counsel to show the existence of a contract provision; he need only show that there is an employment practice concerning a mandatory bargaining subject, and that the employer has made a significant change thereto without bargaining. The allegation is a failure to bargain. In the ‘contract modification’ case, the General Counsel must show a contractual provision, and that the employer has modified the provision. The allegation is a failure to adhere to the contract. In terms of defenses, a defense to a unilateral change can be that the union has waived its right to bargain. A defense to the contract modification can be that the union has consented to the change. In terms of remedy, a remedy for a unilateral change is to bargain; the remedy for a contract modification is to honor the contract. [Where] the General Counsel's sole allegation is the allegation of unlawful modification of the contracts within the meaning of

Section 8(d), the Board is limited to determining whether the employer has altered the terms of a contract without the consent of the other party.” *Id.* at 501.<sup>14</sup>

Thus, it is clear that *MV Transportation* is inapposite to the instant case, and the ALJ’s application of that case was in error. But even if *MV Transportation* and the other unilateral change cases cited by the ALJ were relevant in the present case, Respondent’s modification of the contribution formula from a maximum 5% dollar for dollar match to a 4.8% graduated match is not encompassed within the plain language of the parties 2016-2019 contract and Respondent has not shown that the Union waived its right to bargain over this modification.

In *MV Transportation, Inc.*, 368 NLRB No. 66 (2019), the Board overruled *Provena St. Joseph Medical Center*, 350 NLRB 808 (2007), and held that in determining whether an employer’s unilateral action is permitted by a collective-bargaining agreement, the Board should apply a “contract coverage” analysis. Under the “contract coverage” standard, the Board first examines the plain language of a collective-bargaining agreement to determine whether the action undertaken by the employer is encompassed within the provisions of the contract. The question is whether the employer’s action fell within the compass or scope of contractual language granting the employer the right to take such action unilaterally. However, if the agreement does not cover the employer’s disputed action and that action materially, substantially, and significantly changed a term or condition of employment, the employer will

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<sup>14</sup> In a contract modification case, if an employer has a “sound arguable basis” for its interpretation of a contract and is not “motivated by union animus or . . . acting in bad faith,” the Board ordinarily will not find a violation. *Id.* citing to *NCR Corp.*, 271 NLRB 1212, 1213 (1984). “In such cases, there is, at most, a contract breach, rather than a contract modification.” *Id.* citing to *NCR*, *supra* at fn. 6. However, the Board further explained that the “sound arguable basis” doctrine applies only where “the issue of whether the contract has been modified . . . turns on the resolution of two conflicting interpretations” of the contract. *Id.* In the instant matter does not involve dueling contract interpretations. Respondent seeks to negate the clear and unambiguous 401(k) language in the parties’ collective bargaining agreement. As such, this case is limited to determining whether Respondent altered the terms of the parties’ collective bargaining agreement without the Union’s consent.

have violated Section 8(a)(5) and (1), unless it shows that the union clearly and unmistakably waived its right to bargain over the change.

Here, the Respondent cannot show that the parties contract granted it the discretion to implement a reduction in the matching contribution. There is nothing in these provisions that speaks in any way to reducing the maximum contribution or altering the 100% dollar for dollar matching contribution. Indeed, the only authority the contract grants to Respondent with respect to modifying the terms of the 401(k) provision unilaterally is to increase the maximum contribution percentage, in the event that the “Company maximum contribution % is increased for non-represented, non-bargained employees” [GC 2 at 133]. Because the agreement does not cover Respondent’s modification of the 401(k) language, the next consideration is whether the Union waived its right to bargain over these material changes to terms and conditions of employment. Here, the record establishes that upon hearing that there might be an issue with the Company complying with the 401(k) language, Union Staff Representative Shannon Kirkland immediately sent an e-mail to Respondent’s Vice President of Human Resources, Elizabeth Dickson, stating: “it has been brought to the Union’s attention that Dex/YP is currently matching employees’ 401(k) contributions at 80% up to a maximum of 6%. Can you confirm the rate Dex/YP is matching employees’ contribution” [ALJD at 8; GC 4]. Dickson returned Kirkland’s e-mail but she did not confirm the matching rate as Kirkland had asked [GC 4]. Instead, Dickson wrote back: “I believe Steve (Flagler) is planning to reach out to you to preview 2018 benefits including 401(k). I think you will be pleased with these plans. Thanks.” [GC 4]. Shortly thereafter, the parties met to discuss the changes to benefits [Tr at 32, 151-153].<sup>15</sup> At the meeting, the Union told Flagler that the contract provided for a 100% match up to 5% [Tr at

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<sup>15</sup> In her recitation of the facts, the ALJ ignored entirely the parties’ meeting to discuss Respondent’s modification of the 401(k) language in the parties’ contract [See ALJD at 8, LL. 36-42].

152]. Flagler did not dispute the Union’s assertion that the Company was not paying the correct match. He simply told Pluta and Kirkland that he would look into it [Tr at 153]. But Flagler never got back to the Union [Tr at 153-154]; not even after it filed the instant charge [Tr at 153-154]. The Union filed a grievance [ALJD at 8]. Around this same time (i.e., October 2017), Kirkland requested that Respondent provide the Union with a copy of the Summary Plan Description (SPD) for the unit employees’ 401(k). Five months passed before Respondent provided the document to the Union in March 2018 [ALJD at 8; Tr at 34-35; GC 5]. Within a few weeks of receiving the SPD confirming that Respondent would be changing the contractual matching contribution formula, the Union filed the instant charge.<sup>16</sup> The Union did not waive bargaining over the 401(k) modification – not by word, not by deed.

In sum, the Board should overturn the ALJ’s alternate conclusion that the complaint should be dismissed because the General Counsel’s evidence “only established that Respondent did not follow the language in the post-ratification version of the MOA in matching employee contributions” and “did not establish that any ‘change’ occurred with regard to the amount matched by Respondent of employee contributions under the 401(k) plan.” These are irrelevant considerations in a contract modification case.

### **CONCLUSION**

For the reasons set forth here, the General Counsel asks the Board to find that the Administrative Law Judge erred in concluding that Respondent did not violate the Act when it modified the 401(k) language in the parties’ 2016-2019 collective bargaining agreement without the Union’s consent. The General Counsel respectfully urges the Board to find and conclude

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<sup>16</sup> Additionally, the Union did not waive its right to bargain because the change to the 401(k) contribution was announced and implemented as a *fait accompli*. *Alaris Health at Rochelle Park*, 366 NLRB No. 86 (May 10, 2018) citing *Pontiac Osteopathic Hospital*, 336 NLRB 1021, 1023-1024 (2001) and *Ciba-Geigy Pharmaceuticals Division*, 264 NLRB 1013 (1982), *enfd.* 722 F.2d 1120 (3d Cir. 1983).

that Respondent has engaged in unfair labor practices as alleged in the complaint and to recommend an appropriate remedial order.

Dated at Grand Rapids, Michigan, this 18<sup>th</sup> day of August, 2020.

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