

International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, Local 365 and Cecilware Corporation.
Cases 29-CB-7574 and 29-CB-7637

April 21, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND RAUDABAUGH

On January 9, 1992, Administrative Law Judge Steven B. Fish issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, United Automobile, Aerospace and Agricultural Implement Workers of America, Local 365, Long Island City, New York, its officers, agents, and representatives, shall take the action set forth in the Order.

Craig L. Cohen, Esq., for the General Counsel.
Stephen E. Appell, Esq. (Sipser, Weinstock, Harper & Dorn), of New York, New York, for the Respondent.
Jeffrey L. Kreisberg, Esq. (Kreisberg & Maitland, P.C.), of New York, New York, for the Charging Party.

DECISION

STATEMENT OF THE CASE

STEVEN B. FISH, Administrative Law Judge. Pursuant to charges filed by Cecilware Corporation (the Employer or Charging Party or Cecilware), the Regional Director for Region 29 issued a complaint, on May 25, 1990, alleging in substance that Local 365 UAW (Local 365 or Respondent) violated Section 8(b)(3) of the Act by failing and refusing to execute a collective-bargaining agreement presented to it by Charging Party, embodying the terms agreed on by the parties and reflected in a memorandum of agreement executed by the parties, and by refusing to honor the terms of the agreement by claiming that the agreement was not binding on Respondent.

The order consolidating cases and consolidated complaint named the Local 365, UAW Welfare Trust Fund (the Fund) as party-in-interest and duly served the Fund with the document. The complaint neither named the International Union, UAW, AFL-CIO, as either a Respondent or party-in-interest nor was the International served with the complaint or any other relevant papers.

The trial of the above matter was heard before me on March 25, 1991. The Fund did not make an appearance or otherwise participate in the hearing. The International neither appeared, nor participated in the hearing. Nor did it move to intervene or otherwise attempt to become a party to this proceeding.

Briefs have been filed by Respondent and General Counsel and have been carefully considered.

Based on my review of the entire record,¹ including my observation of the witnesses, I make the following

FINDINGS OF FACT²

I. JURISDICTION AND LABOR ORGANIZATION

The Employer is a Delaware corporation engaged in the manufacture, sale, and distribution of food service equipment and related products, at its facility in Long Island City, New York. During the past year, the Employer manufactured, sold, and distributed at its Long Island City facility products valued in excess of \$500,000, of which products valued in excess of \$50,000 were shipped from the facility directly to States other than the State in which it is located. It is admitted and I find that the Employer is, and has been at all times material, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

It is also admitted and I so find that Respondent is and has been at all times material, a labor organization within the meaning of Section 2(5) of the Act.

II. FACTS

Respondent has been the recognized collective-bargaining representative for employees employed by the Employer for a number of years. The parties have executed a series of collective-bargaining agreements during this period of time, with the latest agreement, effective by its terms from August 1986 to November 21, 1989. That agreement as well as the three prior collective-bargaining agreements between the parties, dating back to the 1977 agreement, all included identical language indicating that the agreement is between the Employer and "The International Union United Automobile Implement Workers of America (UAW) and its Local 365." The signature pages of each contract provided for and included separate signatures for the Employer, Respondent, and the International, as well as for members of the negotiating committee. The director for region 9-A of the International has signed each of these contracts, while Beverly Gans, sub-regional director of region 9-A, also signed the 1983-1986 contract, where she was involved in the negotiations of the contract.

According to the unrefuted testimony of Gans, during the 1983 negotiations in which she participated, she told Richard Moore and Jerry Scharfman, executive vice presidents of and chief negotiators for Cecilware, that the agreement was a

¹ Errors in the transcript have been noted and corrected.

² While every apparent or nonapparent conflict in the evidence may not have been specifically resolved herein, my findings herein are based on my examination of the entire record, my observation of the witnesses' demeanor while testifying, and my evaluation of the reliability of their testimony. Accordingly, any testimony in the record which is inconsistent with or contrary to my findings is discredited.

“tripartite agreement,” and that the International would have to sign the agreement. However, Gans admitted that she did not tell them that if Respondent agreed to terms of a contract that the International had the power to reject these contracts. Nor did Gans testify that she told them that the Respondent could not sign the contract unless the International gave its approval.

Moore while conceding that the International had always been a signatory to past contracts between the parties, viewed the International’s participation as “rubber stamping.” Thus in the past, the parties began implementing the contract, and made them effective when the parties reached agreement and the employees ratified the contract and/or they signed memorandums of agreement. The contract was sent to the International for its signature, only after it was signed by Respondent and the Employer, and after its terms had already been implemented. Indeed in some prior years, when Respondent was responsible for preparing the actual contract, after it was ratified and implemented, it took several months before Respondent did so, and it was signed by Respondent and the Employer initially, and by the International at some subsequent time.

It is based on this history of prior dealings between the parties, that Moore viewed the International as a mere “rubber stamp” to the effectiveness of the collective-bargaining agreement.

Gans testified further that generally its locals are informed that the International must review and sign all contracts.³ She adds that in 1990, a Local reached and signed an agreement with a company named Aeroflex. However, according to Gans, she did not like some of the terms, and wrote to Aeroflex reminding it of the fact that the agreement is a “tri partite” agreement and that the International was not in agreement with the contract agreed to by the Local. Gans requested that Aeroflex negotiate further on some of the items. Aeroflex agreed to negotiate concerning the terms that the International objected to and in fact some changes were subsequently made in the agreement that had been reached with the Local.

Significantly, Gans conceded that had Aeroflex had not agreed to negotiate and make these changes, the contract originally agreed to between Aeroflex and the Local would be in effect. Gans explained, however, that in such a case the International would not have signed the agreement, and the parties would not have the support of the International if there was a strike.

Negotiations for a successor collective-bargaining agreement began on October 12, 1989, with additional meetings held on October 19 and 24 and November 9 and 20. Respondent was represented at these negotiations by Salvatore Mieli, its president, Business Representative Jeanne Conlon, and various employee members of the negotiating committee. Beverly Gans representing the International participated in some of the sessions. Moore and Scharfman either collectively or singly represented the Employer at the negotiation meetings.

During the meeting on October 24, Respondent’s representatives brought up an issue that several employees with more seniority than new employees were making less than

the new workers. After some discussion, the subject was deferred to future meetings. At the meeting of November 9, Scharfman on behalf of the Employer agreed “in principle” with Respondent that the employees (10 in number) who were making less than \$5 per hour would be raised to \$5 per hour, and then would receive whatever additional increase was agreed upon by the parties.

On or about November 20, at a meeting in the presence of the mediator, the Employer presented a document entitled “Cecilware’s Final Offer.” The document provides for an agreement effective from November 22, 1989, to November 21, 1991, which incorporates all terms of the expired contract plus specific changes outlined in the offer. The changes included a general wage increase of 30 cents per hour, per year, a ratification bonus of \$150 to all employees, and a change in the Health Insurance Program (HIP), which includes an option for employees, hired prior to August 25, 1986, to opt out of Respondent’s welfare plan and be covered by an employer-sponsored HIP plan. The plan also provided that all employees hired after August 25, 1986, would not have an option, and would be enrolled in the HIP plan.

Additionally, the proposal allowed any employee currently enrolled in the UAW plan, the option of joining HIP with family coverage by contributing \$25 per month. Finally, the proposal also provided that employees hired before November 21, 1989, who have other coverage (i.e., from a spouse) will have the option of receiving \$120 per month instead of Cecilware paying for the coverage. Miele and Gans express their disapproval of the health plan proposal, but Moore insisted that “this was it.”

Subsequent to the meeting, Respondent’s representatives and Gans met to discuss the offer. Gans mentioned that the offer did not contain the Employer’s previous agreement to bring the 10 people up to scale. They discussed filing charges against the Employer about that omission but decided not to do so. The biggest problem with the offer was the health plan proposal, which Mieli and Gans vehemently opposed, particularly the \$120 payment to employees in lieu of coverage. It was decided that Gans would call Scharfman and request further negotiations over the welfare plan, and remind him about the additional wage increase for the 10 employees that the Employer had allegedly previously agreed to include.

Gans reached Scharfman on the phone, later that day. She began by telling Scharfman their final offer did not include the raise for the 10 people that the Employer had agreed to previously. Scharfman replied “that doesn’t seem to be important, nobody seems to care about it,” and added that this is the Employer’s final offer. Gans then brought up the welfare proposal, and asserted as she had during negotiations over this plan, that she believed that many of the employees are poor, and might opt for the payments in lieu of coverage, not realizing that they would be hurt in the long run. Scharfman replied, “there is nothing we can do, this is where we’re at.” Gans asked, “Can we talk more about it?” Scharfman responded, “absolutely not, there’s nothing more to be said.”

Gans reported back to Respondent’s officials on the results of her conversation with Scharfman. It was decided by Respondent to permit the employees to vote on the Employer’s final offer, but to recommend against ratification.

³No evidence was adduced of any such requirement in the International or Local’s bylaws or constitution.

On November 20, Moore called a noncompulsory meeting of employees, on worktime, during which he distributed to employees a copy of the Employer's final offer. Moore answered any questions the employees had and explained the details of the offer. He did not recommend to the employees how they should vote on the offer.

Later that evening, a ratification meeting was held among the unit employees, Mieli, Gans, and Conlon. All spoke in favor of rejecting the Employer's offer, primarily because of the welfare proposal. They explained to the employees that the Employer's proposals would break up employees into different tiers, and that this was unfair, and would cause employees to lose benefits in the future. The representatives expressed their view that all employees should receive the same coverage and be equal.

However, many of the members stated that although they were not happy with the welfare proposal of the Employer, they were not prepared to go on strike. These employees suggested that they would vote to ratify the contract, but the union representatives should then go back to the Employer and try to "straighten out" this problem. Respondent's representatives informed the employees that it (going back to the Employer to renegotiate) is not so easy as it sounds, but they would do the best they could. Respondent's representatives informed the employees that they would try to go back to the Employer to convince it to change the welfare proposal, but that if the employees vote for the contract proposed by the Employer, they would be stuck with it. Respondent's officials added that this (meaning the ratification vote) is the place to take care of their concerns.

Notwithstanding the strong opposition to the proposed contract expressed by Mieli, Conlon, and Gans, the employees voted to ratify the Employer's final offer. Significantly, both Conlon and Gans conceded that once the employees voted to ratify this offer, that a binding contract came into existence at that time.

Nothing was mentioned at the ratification meeting about the necessity for the International approving the agreement, or the absence of the agreement by Cecilware to raise the 10 employees to scale. The Employer's offer provided that Cecilware will pay to the Fund the full cost increase of \$188, \$214, and \$245, for the Welfare Fund, over a 3-year period for employees, hired prior to August 25, 1986, who opt to continue with the existing UAW coverage.

The next day, November 21, Moore after learning of the ratification of the contract by the employees, called Mieli and asked to meet and have the terms of the final offer "signed off on," so the Employer could transcribe the final document. The parties agreed to meet at Respondent's office. Moore handed a copy of the Employer's offer, signed by Moore to Respondent. Mieli asserted that he would not sign the agreement, since it is the responsibility of the business agent and not the president to sign such an agreement. Mieli then handed the document to Conlon and directed her to sign it. Conlon signed her name, on the bottom, as well as the date and her title (business representative Local 365 UAW). The document was also signed by David Stewart, shop chairman of Respondent. No comments or reservations were made by any of Respondent's officials about any of the terms of the agreement. Nothing was said about the International having to approve the document, nor any indication that Respondent did not consider that it had a binding agreement

with the Employer as reflected in the document executed on that day.⁴

In fact, the International was not notified of the meeting to obtain the signatures of the parties, and according to Gans, she did not receive notification that the document was signed until shortly before the trial herein.

After the parties signed the document on November 21, Mieli, in the presence of Charles Gibbons, an administrator of the UAW Welfare Fund, gave Moore a letter on Welfare Fund stationery. The letter, addressed to Moore, as vice president of Cecilware, reads as follows:

Please adjust your records accordingly with the Welfare Coverage Cost as follows:

12-13-89	\$187.82
2-15-90	\$214.35
12-15-91	\$244.75

The final offer presented by the Employer and signed by the parties included figures of \$188, \$214, and \$245 for these 3 years. Moore explained that these figures were rounded off by the Employer from the figures that Respondent had provided during negotiations as the amounts required, and the amounts anticipated in the succeeding 2 years. When the document was given to Moore, neither Miele nor Gibbons expressed any reservations about the amounts of contributions due, nor did they assert that the approval of trustees of the welfare fund would be required for the adoption of these terms.

The Employer thereafter implemented, without protest from the Respondent, all the terms of employment set forth in the document signed on November 21, including the wage increase, signing bonus, payments into the welfare fund, plus the implementation of the new welfare programs.

On December 21, Moore sent a copy of a proposed new collective-bargaining agreement for signature to Respondent which incorporated the changes agreed to in the final offer signed off on by Respondent and the Employer on November 21, with the prior contract in effect between the parties. The document sent to Respondent did include a space for the International to sign, as well as for Respondent by Mieli, Conlon, and for two members of the negotiating committee.

Respondent has not executed a copy of the proposed contract as requested by the Employer. However, on January 19, 1990, Gibbons received a letter from James Wallerstein, an actuarial consultant utilized by Respondent's welfare fund. Wallerstein advised Gibbons that since under Cecilware's new welfare plan, over half of its employees had opted to switch out of the UAW fund into HIP,⁵ that it would now be actuarially necessary to increase the required contributions

⁴ To the extent that the testimony of Mieli and Conlon indicates that union officials had expressed reservations that the document was being signed for all purposes except for the welfare provision, I discredit such testimony entirely. I found Mieli to be particularly unconvincing, as he was evasive, argumentative, and inconsistent throughout most of his testimony. Moreover, I note that the document contains no such reservations, and I doubt that the Employer would have implemented the terms of the agreement, had the Respondent reserved its rights to negotiate further on welfare as contended by Conlon and Mieli.

⁵ Approximately 36 or 37 of Cecilware's employees opted to continue being covered by the UAW plan.

from Cecilware. Wallerstein set forth what in his view the new rates should be, which were \$235, \$268, and \$305 over the next 3 years.

On January 22, Gibbons sent a letter to Moore, enclosing a copy of Wallerstein's letter set forth above, and asserting that based on Wallerstein's letter, the Employer's contribution for December 1989 was calculated incorrectly, since it used \$187.82 per employee instead of \$235.55. Gibbons returned the check, and requested that Moore send in a new one for the proper amount.

Moore responded by letter dated January 29, asserting that the check submitted was not calculated using the wrong rates, but that the Employer used the \$187.82 rate that was negotiated and ratified. He characterized Gibbons as attempting to alter the agreement after the fact, since Respondent was well aware during negotiations that a percent of employees would switch to HIP.

On February 21, Mieli sent a letter to Moore, protesting the Employer's action in removing employees from the UAW Welfare Fund, and asserting that such action violates the collective-bargaining agreement's removal requirements.

Moore replied to this assertion by letter of February 28, by claiming that the memorandum of agreement signed by the parties permitted employees to choose to remove themselves from coverage in the UAW plan, and that this agreement supersedes any previous notice requirements in the prior contract.

Mieli responded by letter of March 13, and for the first time asserted that Respondent did not believe it was bound by the memorandum. Thus, Mieli asserted that at the time the agreement was signed, he informed Moore of his reservations about it, and that "you should have realized having Business Agent Conlon, the Shop Chairman and Committee person sign it would serve no purpose and would not be binding."

Moore answered Mieli in a March 23 letter, in which he related the facts at the signing which I have found above to be accurate, i.e., Mieli stated it was not the job of the president to sign, but the business agent, and he directed Conlon to sign the agreement, without expressing any reservations. Thus, Moore asserted that the memorandum is binding, and again requested that Mieli sign the contract that had been presented to him.

On April 12, a meeting of the trustees of the UAW Welfare Fund was held. Moore was present as one of the Employer Trustees, Mieli as one of the union trustees, along with Gibbons, Wallerstein, and Donald Klein, attorney for the Fund.

The subject of Cecilware's contributions was discussed. Wallerstein stated that if Cecilware continued to make inadequate contributions to the Fund, the immediate impact on the Fund would not be significant, since Cecilware represents only 27 members out of a total of 4000 members. However, he felt that such an action would set a poor precedent if other companies followed suit.

Attorney Klein recommended that the Fund communicate with Cecilware and Respondent and "request that they modify their collectively bargained agreement"⁶ to reflect the higher contributions recommended by the actuary. While the

recommendation was not passed, a similar motion, again proposed by Klein, that the administrator of the Fund send a letter to Respondent and Cecilware, "to have them revise their collective bargaining agreement" to provide for the payments recommended by the actuary, was approved.⁷

Pursuant thereto, Gibbons wrote to Respondent and Cecilware, by letter dated May 3. The letter states that on behalf of the Fund, he was writing with respect to "the level of Welfare Fund contributions and benefits which you assert you have negotiated, to be incorporated in a collective-bargaining agreement with Local 365, UAW, concerning Cecilware employees."

The letter goes on to state that the level of contributions proposed were not actuarially sound, and further urges both parties to "reconsider your bargaining position and enter into further negotiations," and that "your collective bargaining agreement be revised" to reflect the amounts deemed appropriate by the Fund.

Mieli, in response to this letter, wrote to Moore, in a letter dated May 3, indicating the availability of Respondent to meet and discuss the matter.

On June 5, Moore replied, agreeing to meet if it is made clear that there is an existing agreement binding on both parties, and that the meeting was to "amend and modify the existing Memorandum of Agreement."

By letter dated June 5, Mieli responded by asserting that the negotiations "shall be without prejudice to your contention that [sic] is already a binding agreement between us, and to our contention that there is no such binding agreement."

Moore replied by fax dated June 5, that under the terms of Mieli's June 5 letter, "there is no possibility for us to have a meeting on this matter."

Respondent has continued to refuse to sign the collective-bargaining agreement submitted to it by the Employer. The Employer has continued to apply all the terms of the agreement to the employees in the unit without objection by Respondent. The proposed agreement has never been submitted to the International for either its signature or its approval.

III. ANALYSIS

It is well established that a union violates its duty to bargain in good faith with an employer, in violation of Section 8(b)(3) of the Act, where it refuses on request to execute a written collective-bargaining agreement with the employer which incorporates whatever agreements that they have reached. *Teamsters Local 287 (Pittsburgh-Des Moines Steel)*, 193 NLRB 1078, 1086 (1971); *Avis Rent-A-Car System*, 280 NLRB 1323, 1315 (1986); *Teamsters Local 70 (Emery Worldwide)*, 295 NLRB 1123 (1989).

It is also clear, that where the parties execute a memorandum of agreement which incorporated provisions of the former contract plus additional terms agreed upon, the parties are obligated to execute a full collective-bargaining agreement containing the entire agreement between the parties. *Electrical Workers Local 1228 (RKO General)*, 130 NLRB 342, 343-344 (1977); *Retail Clerks Local 322 (Ramsey Supermarkets)*, 226 NLRB 80, 87 (1976); *Summit Tooling*, 195 NLRB 479, 488 (1972).

⁶I would note that Attorney Klein is a member of the same law firm that represents Respondent herein.

⁷I note that Moore, on advice of counsel, did not vote on either of these motions.

It is not disputed herein that on November 21, Jeanne Conlon, Respondent's business representative and Richard Moore, the Employer's vice president, execute a document entitled "Cecilware's Final Offer" (the memorandum), which consisted of seven new items plus a reference to the prior contract in existence between the parties. It is also undisputed that subsequently, the Employer requested that Respondent execute a full collective-bargaining agreement which was submitted to Respondent by the Employer, and which accurately incorporated the memorandum with the prior collective-bargaining agreement between the parties.

The issue to be decided is whether or not Conlon's signature on the memorandum created an obligation on Respondent to execute the collective-bargaining agreement presented to it by the Employer. Respondent has advanced a number of different arguments and defenses which purportedly justify its refusal to sign the agreement. I find that these defenses and contentions are insufficient to singly or collectively, warrant Respondent's failure to execute the agreement to which it had agreed, and that it has violated Section 8(b)(3) of the Act by refusing to do so.

Initially, I note the contention of Respondent's president Miele in his letter to the Employer of March 13, to wit, that the Employer should have realized that Conlon's signature on the memorandum would not be binding on Respondent. This contention is so ludicrous, that Respondent correctly and candidly, did not even include this argument in its brief. However, since it has been raised by Miele's letter, it is appropriate to consider.

Although I agree that Miele's refusal to sign the memorandum himself could reasonably have been construed by the Employer as an assertion that he (Miele) did not approve of the terms of the agreement, by no stretch of the imagination can it be concluded that Respondent was not bound because Conlon was the official that signed the memorandum. Miele directed Conlon to sign the memorandum which had been ratified by the employees, and she did so in Miele's presence. I conclude without question that both Respondent and the Employer believed that Conlon's signature, which was in accordance with the wishes of the employees who had ratified the terms therein, was sufficient to bind Respondent to the memorandum.

Respondent does argue, however, that the memorandum signed on November 21 did not include the complete agreement of the parties, because it did not include the purported previous agreement of the parties that the Employer raise wages for 10 low paid employees.

However, what Respondent conveniently ignores is that it clearly was aware of this omission prior to its execution of the memorandum. Thus, Gans realized that this purported agreement had not been included in the memorandum, called Scharfman's attention to this fact, and requested that it be included. However, Scharfman, on behalf of the Employer, refused to include this item. Notwithstanding this omission, Respondent presented the memorandum for ratification, and executed the memorandum without the inclusion of such a provision. In these circumstances, Respondent has voluntarily agreed to exclude this item from the agreement. *General Brewing Co.*, 238 NLRB 1168 (1978).

Respondent also contends that the refusal to include the agreed-upon item by the Employer, coupled with the "Employer's direct dealing with employees in holding a meeting

with employees, distributing the actual "final offer to them and urging them to ratify it," establish that the agreement was a "product of bad faith negotiation on the part of the Employer." I do not agree.

Although it does appear that the Employer did withdraw its tentative agreement with Respondent on the raise for lower paid employees, a withdrawal from a tentative agreement is not a per se violation of the Act, but represents only one factor to be considered in determining good- or bad-faith bargaining. *Aero Alloys*, 289 NLRB 497 (1988); *Cook Bros. Enterprises*, 288 NLRB 387, 388 (1988), *Merrell M. Williams*, 279 NLRB 82, 83 (1986). Here, Respondent points to no other evidence establishing or indicating bad-faith bargaining by the Employer,⁸ nor does the record so disclose.

As for the Employer's meeting with employees, I have found that it conducted a voluntary meeting, albeit on worktime, wherein it merely explained and clarified the terms of its final offer to the employees, without making a recommendation to them as to how they should vote. An employer is entitled to call a meeting and explain to employees the status of negotiations, or of proposals made to the union, or to clarify any misunderstandings employees may have concerning such proposals. *Storer Communications*, 294 NLRB 1056 (1989); *United Technologies Corp.*, 274 NLRB 609, 610-611 (1985), *enfd.* 789 F.2d 121 (2d Cir. 1986). Cf. *Globe Furniture*, 290 NLRB 841 (1988). Such conduct is neither unlawful nor indicative of bad-faith bargaining, even where the employer, unlike the Employer herein, couples these statements with comments urging employees to support the employer's proposals. *United Technologies*, *supra* at 610; *Stokely-Van Camp, Inc.*, 186 NLRB 440, 449-450 (1970).

Accordingly, I conclude that Respondent has not established that the Employer engaged in bad-faith bargaining, or that the agreement reached by the parties was the product of bad-faith bargaining or any other unlawful conduct by the Employer. Therefore, I reject Respondent's purported defense to this effect, to its refusal to execute the agreement submitted to it by the Employer.

Respondent also argues that Respondent signed the memorandum with respect to all items, except for welfare. Since, I have discredited the testimony of Conlon and Miele that such reservations were expressed by Respondent's representatives at the time that the memorandum was signed, this contention needs no further discussion, and is rejected.⁹

I now turn to the defense most forcefully argued by Respondent in its brief. Respondent asserts that the International is an "indispensable partner" to the "tripartite" agreement, and since it neither signed the memorandum nor otherwise approved the terms thereof, Respondent cannot be compelled to execute the collective-bargaining agreement.

However, where one party asserts that approval by another party or another individual of a collective-bargaining agree-

⁸ Although Respondent does refer to the Employer's meeting with employees as indicative of bad faith, as discussed *infra*, I conclude that the Employer's conduct in that regard was lawful, and not evidence of bad-faith bargaining.

⁹ I would note that in any event, the Board will not permit a party to a written agreement, which is clear and unambiguous, as this memorandum is, to vary such terms by providing a contemporaneous or prior oral understanding. *Fayard Moving & Transportation*, 290 NLRB 26, 27 (1988); cf. *Diplomat Envelope Corp.*, 263 NLRB 525, 536 (1982).

ment reached by the negotiators, is a condition precedent to a final and binding agreement, such a requirement must be conveyed to the other party by clear and unambiguous notice. *Induction Services*, 292 NLRB 865 (1984); *Metro Products*, 289 NLRB 76 (1988) *Painters Local 52 (South Central Board)*, 223 NLRB 748, 750 (1976). See also *Emery Worldwide*, supra.

Here, in my view, Respondent has fallen far short of establishing that Respondent conveyed to the Employer or that any of the parties believed, that the International's approval was a condition precedent to a final and binding agreement.

Although, in the past, as well as in the current negotiations, representatives of the International participated in negotiations, and have in the past signed prior agreements, this evidence is insufficient to establish the requisite notice to the Employer. *Electrical Workers IBEW Local 22 (Electronic Sound)*, 268 NLRB 760, 763-764 (1984), enf. 748 F.2d 348 (8th Cir. 1984); *Paperworkers Local 795 (International Paper)*, 254 NLRB 1332, 1333-1335 (1981).

Nor does the additional evidence that Gans told representatives of the Employer in 1983 that the agreement was a "tripartite" agreement, and that the International would have to sign the agreement, suffice to meet Respondent's burden. I note that Gans did not tell the Employer's representatives that if Respondent agreed to terms of a contract that the International had the power to reject such contracts, nor that Respondent could not sign the agreement, unless the International gave its approval.

It is clear to me, and I find, that no party herein, including the Employer, Respondent, and the International, regarded the approval of the International as a condition precedent to nor necessary for the agreement to be binding on Respondent.

I note that Gans was present during the present negotiations, as well as the ratification vote of employees, and at no time during the negotiations, nor at the ratification vote, did anyone mention that approval of the International was necessary for the agreement to be effective. Moreover, when the employees ratified the agreement, according to both Conlon and Gans, there was an agreement at that time. This testimony constitutes significant admissions against both Respondent and the International, that it was not necessary to obtain approval of the International as a condition precedent to the binding effect of the agreement reached.

When Respondent and the Employer met to "sign off" on the agreement ratified by the employees, Gans and the International were not present, nor did anyone, including Respondent's officials, protest their absence. The memorandum executed by Respondent and the Employer memorializing their agreement, contained no space for the International to sign, and was never presented to the International to sign. Indeed, there is no evidence that the International was ever requested to nor that it ever executed such memorandums in past negotiations, although as noted it did sign the full collective-bargaining agreements, executed many months after the agreements were implemented.

It was obvious that Respondent's officials, particularly Miele were very upset about the fact that employees had ratified the Employer's proposals despite Respondent's negative recommendation. In fact, Miele was so displeased, that he himself refused to sign the memorandum, while directing Conlon to do so, thereby attempting to distance himself from

having any responsibility for the agreement. However, at no time during this meeting did Mieli or anyone from Respondent say to the Employer that the absence of the International had any significance, much less that the International would have to approve the agreement before it becomes effective or binding on Respondent. Indeed, if that were the case, Mieli who was so upset about the terms of the agreement, could and in my view would have informed the Employer that there cannot be an agreement unless the International signs the memorandum. However, he did not do so, he directed Conlon to sign on behalf of Respondent, and accepted the implementation of the agreement, including wage increases and ratification bonuses for employees without protest.

Thus, I conclude that the parties' (Employer and Respondent) immediate implementation of and adherence to the terms of the memorandum "demonstrated their mutual acceptance and intent to be bound by it." *International Paper*, supra at 1334; *Electronic Sound*, supra at 763.¹⁰

Additionally, subsequent to the implementation of the terms of the memorandum, there were a number of letters back and forth between the parties, concerning Respondent's problems with the agreement, and its reasons for not signing the full collective-bargaining agreement presented to it by the Employer. At no time in any of these correspondences, nor in other contacts between the Employer and Respondent, did Respondent ever refer to the fact that the International had not signed the memorandum or had not otherwise approved the terms thereof, much less assert that such lack of approval was a reason for Respondent not signing the full collective-bargaining agreement.¹¹ *Ebon Services*, 298 NLRB 219 (1990), *General Brewing*, supra at 1168, 1170; *Avis Rent-A-Car*, supra at 1315; *Operating Engineers Local 525 (Clark Oil)*, 185 NLRB 609, 611 (1970).

In that connection, I note further the position of the Fund, as reflected in its letter and at the meeting of the Fund trustees, which included Mieli, on April 12. At this meeting, the trustees and the attorney for the Fund discussed various options relating to Cecilware. The recommendation made by the attorney,¹² which was eventually approved by the trustees was to request that Respondent and the Employer "modify" or "revise" their collective-bargaining agreement to provide for the increased payments now deemed necessary by the Fund's actuary. The letter from the Fund to Respondent and the Employer reflects this position, requesting that they "reconsider" their bargaining and enter into further negotiations

¹⁰ I note it is significant that in both of the above cases, prior documents included the language that the agreement was subject to the approval of the International. Notwithstanding this language, which is much stronger than the instant case (since here the words approval or subject to approval do not appear on any prior contracts), the Board concluded based on the conduct of the parties, particularly the implementation of the agreement, that no prior approval of the International was contemplated by the parties.

¹¹ In Mieli's March 13 letter to the Employer, which I again note was the first time that Respondent asserted it did not have a binding agreement, the only reason given by Mieli for such an assertion, was his contention that the Employer should have known the signature of the business agent was not binding. As also found above, this contention was so ludicrous that Respondent failed to even argue it in the brief filed by its attorney.

¹² I note that the attorney is a member of the same law firm that represents Respondent.

so that their collective-bargaining agreement “be revised” to reflect the amounts deemed appropriate.

It is quite significant, that there was apparently no discussion at the trustees meeting, nor any mention in the letter of any need for International approval. Indeed, if anyone even remotely believed that International approval was required, it would be a simple matter to have made such an assertion, and simply demand further bargaining as a matter of right. This was not done, nor even suggested by anyone, which further buttresses my view as detailed above, that no one in this case, (except perhaps for Respondent’s present attorney) regarded the signature of the International on the memorandum or their subsequent approval of the terms therein, as essential for the formation of a contract binding on Respondent and the Employer. I conclude that Moore was correct in his testimony that the signature of the International on the collective-bargaining agreement was considered by all parties, including the International itself, to be nothing more than a “rubber stamp” or a ministerial or perfunctory act. *Carpenters District Council*, 197 NLRB 905, 907 (1972); *Operating Engineers 3 (California Assn.)*, 123 NLRB 922, 930 (1959).

The only significance of the signature of the International as far as the parties herein are concerned, is candidly disclosed by the testimony of Gans, which also constitutes a significant admission against Respondent. Thus when testifying about her prior dealings with another company (Aeroflex) she detailed her successful efforts to persuade Aeroflex to change terms that she on behalf of the International did not like, which had been agreed to between Aeroflex and the local union. However, Gans conceded that had Aeroflex not agreed to renegotiate these items, that a binding agreement would be in effect, but in such a case the International would not have signed, and would not support a subsequent strike.¹³

Accordingly, based on the foregoing, I conclude that the absence of the approval of the International, was not regarded by anyone, and in fact was not necessary, in order to bind Respondent to the agreement reached, and provided no defense to Respondent’s refusal to execute the collective-bargaining agreement presented to it by the Employer.

Respondent also argues that since the International was never made a party to this proceeding, i.e., was never named in the complaint as charged party or even as party-in-interest, or invited to participate, the complaint must be dismissed on due-process grounds. Thus, Respondent contends that the International is an indispensable party to this matter, and that an order against Respondent to sign and be bound by the contract, could “arguably” bind the International to the agreement which would be improper. However, the problem with Respondent’s contention, is that no one is contending that the International is bound by the agreement reached by Respondent and the Employer, and in fact both the Charging Party and General Counsel have expressly disclaimed any assertion that the International should be compelled to execute the contract, or that it be bound by the agreement.

In these circumstances, and since I shall not order the International to sign or be bound by the agreement reached,

¹³ It is also significant to note that in the Aeroflex situation, unlike the present case, the terms of the new agreement had not been implemented, since the agreement between the local and Aeroflex had been reached prior to the termination of the expiring contract.

I find the due-process concerns advanced by Respondent on behalf of the International to be without merit.

I would further note that to the extent that the International might believe that an order to Respondent to sign the agreement, may have some adverse or indirect effect on the International, it was not without options. Thus, it is clear from the record that Gans, an official of the International was fully aware of this proceeding and the nature of the allegations, since she was a witness on behalf of Respondent. Therefore, I find that the International having constructive notice through Gans, was aware of the trial being conducted and the pertinent allegations involved, and could have if it felt its interests might be adversely affected, moved to intervene to protect its interest or position. It did not do so, which in my view waives any due-process claims it may have in this case, which as I have concluded above, will result in no order against the International itself, nor any finding that it is bound to the agreement.

This brings me to what is in my view, the real reason why Respondent refuses to execute the collective-bargaining agreement, and it is best summarized by Mieli’s own testimony, when asked by his own attorney, why he refused to sign the memorandum. Mieli responded as follows:

A. I didn’t sign because as a president of the local union I have two hats. One is with the heart and one is with the two hearts, because if we go out of business and the welfare fund, that means we have no money to pay the members, and that’s why I didn’t sign. Mr. Moore know that we were in disagreement from the first day to take off anybody from our welfare fund, and keep all the old people with the families, with children, with seven, eight dependents, and take off all the rest of the people.

What happened is simply that the employees of Cecilware over the vehement objection of Mieli, accepted Cecilware’s final offer. Mieli never fully accepted this decision, and when the trustees of the Fund received the report of the actuary that Cecilware should be paying more money, as a result of the new health plan in the parties’ agreement, he seized on this fact as support for his already formulated decision not to sign a contract which contained the welfare plan that he opposed.

In this connection, Respondent has raised several arguments dealing with the dual status of Moore and Mieli as trustees of the Fund as well as representatives of their respective clients for collective-bargaining purposes.

Initially, Respondent argues that since Moore and Mieli were both trustees and fiduciaries of the Fund, “it was necessarily understood that any agreement reached would be contingent on the blessing of the actuarial experts who guided the Fund.” However, Respondent has not adduced any evidence that there was any understanding, expressed or implied between Moore and Mieli that the agreement reached was contingent on any subsequent action of Fund or the actuaries employed by the Fund. Indeed, on the date that agreement was reached, Mieli handed Moore a copy of a letter from the Fund setting forth the rates to be paid, which conformed essentially to the rates set forth in the Employer’s final offer which became the memorandum executed by both parties. There was no reservation made at the time that these

rates were subject to possible revision, as a result of some future action by the Fund. Nor does the record reveal any past history of such developments. I therefore reject this contention of Respondent.

Respondent also argues that notwithstanding the existence of an agreement between the parties, it became impossible for Mieli to sign the agreement, and "simultaneously comply with his fiduciary responsibilities under the Employment Retirement and Income Security Act, known as ERISA." Thus, Respondent argues in effect, that once the actuary of the Fund concluded that the contributions of Cecilware were actuarially unsound, Mieli's fiduciary responsibilities as a trustee of the Fund, pursuant to his obligations under ERISA, take precedence over his responsibility under the National Labor Relations Act as president of the Respondent to execute a collective-bargaining agreement previously agreed to.

However, Respondent has not cited any provisions or sections of ERISA that either compel or even suggest that a trustee of a Fund who is also an official of a union, must or may renege on or reject a collective-bargaining agreement previously entered into or agreed to by the parties. In the absence of such a citation of such authority, I decline to imply such a rather startling and novel proposition. Indeed, such a conclusion, i.e., that the Board will imply as a result of some undefined principles under ERISA, that the trustees of a Fund can change the terms of a collective-bargaining agreement, would run afoul of the Supreme Court's admonition in *H. K. Porter & Co.*, 397 U.S. 99 (1970), that the Board may not compel either party to agree to a substantive term of a contract between the parties.

The appropriate time for Mieli to have raised objections to the amount of contributions or the effect of the Employer's proposals on the actuarial soundness of the Fund was during negotiations and prior to agreeing to terms of a new agreement. Respondent did in fact raise objections to the Employer's proposals during negotiations, and certainly should have been aware that acceptance of such a plan would result in a number of employees of Cecilware opting to withdraw from the Fund's plan. Thus, Mieli as trustee and president of Respondent, should have made sure that an actuarial study was conducted during negotiations, and prior to the ratification vote, so that the parties and the employees could be fully informed about the potential effects of the Employer's proposal on the Fund. Having failed to do so, Mieli and Respondent cannot now rely on this post agreement actuarial report to justify Respondent's refusal to execute a collective-bargaining agreement that it agreed to, was ratified by the employees in the unit, and the terms of which have been fully implemented by the Employer. Accordingly, I conclude that all of Respondent's defenses are lacking in merit, and that it has violated Section 8(b)(3) of the Act by failing and refusing to sign the agreement presented to it by the Employer.

CONCLUSIONS OF LAW

1. The Employer is an employer engaged in commerce within the meaning of Section 2(2) and (7) of the Act.
2. Respondent is a labor organization within the meaning of Section 2(5) of the Act.
3. At all times material herein, Respondent has been the exclusive collective-bargaining representative for the employees of the Employer in the appropriate unit described below:

All employees employed by Cecilware, exclusive of company executives; office employees, metal stamping personnel, guards and all supervisors as defined in Section 2(11) of the Act.

4. Respondent has violated Section 8(b)(3) of the Act by failing and refusing since on or about December 21, 1989, to sign the collective-bargaining agreement embodying the terms and conditions of employment agreed upon and ratified by the employees in the above unit, on or about November 21, 1989.

5. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has violated Section 8(b)(3) of the Act, I shall recommend that it cease and desist therefrom and take certain affirmative action necessary to effectuate the policies of the Act.

I note that in *Electronic Sound*, supra, one of the cases that I have relied on above, in concluding that Respondent had not established that International approval was a condition precedent to binding Respondent to the agreement, the Board approved the judge's somewhat limited remedy. Thus, the judge concluded that since the parties therein had in fact agreed that International approval was a condition subsequent to the continued viability of the agreement reached, that the recommended Order would so reflect, and ordered Respondent to execute and give effect to the agreement until its expiration or until the International disapproves its terms. *Id.* at 764.

However, I do not believe that such a remedy is appropriate herein. I again note that in *Electronic Sound*, supra, the prior contracts of the parties contained specific language that the agreement was subject to the approval of the International. No such language appears in any of the prior contracts herein, nor is there any record evidence that any of the parties considered the International to have a right to disapprove the agreement. To the contrary, as I have emphasized above, both the International and Respondent, as reflected in admissions by Gans and Conlon respectively believed that a contract was in existence when the employees ratified the agreement. Moreover, Gans' further admission that the significance of the International's signature on the document related only to matters involving strike benefits, fortified my acceptance of Moore's testimony that the parties treated the International's signature as a "rubber stamp."

In these circumstances therefore, I conclude that the standard remedy for this type of violation is appropriate herein. *International Paper*, supra; *Cotati Cabinet*, supra.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹⁴

ORDER

The Respondent, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America,

¹⁴If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

Local 365, Brooklyn, New York, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Refusing to bargain collectively with Cecilware Corporation by failing and refusing to sign the collective-bargaining agreement embodying the terms and conditions of employment for the Employer's employees agreed upon by the Respondent and the Employer on or about November 21, 1989.

(b) In any like or related manner engaging in conduct in derogation of its statutory right to bargain with Cecilware Corporation.

2. Take the following affirmative action necessary to effectuate the purposes and policies of the Act.

(a) On request of the Employer, sign the agreement submitted to it by the Employer on or about December 21, 1989, embodying the terms and conditions of employment for the Employer's employees agreed to on or about November 21, 1989.

(b) Post at its business office and meeting hall in Brooklyn, New York, copies of the attached notice marked "Appendix."¹⁵ Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees and members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

¹⁵ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(c) Furnish the Regional Director with signed copies of the notice for posting by Cecilware, if willing, at all places where notices to their employees are customarily posted.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES AND MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain collectively with Cecilware Corporation by failing and refusing to sign the collective-bargaining agreement embodying the terms and conditions of employment for the Employer's employees which we agreed upon on or about November 21, 1989.

WE WILL NOT in any like or related manner engage in conduct in derogation of our statutory right to bargain with the Employer.

WE WILL, on request of the Employer, sign the agreement submitted to us by the Employer on or about December 21, 1989, embodying the terms and condition of employment of the Employer's employees agreed to on or about November 21, 1989.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, LOCAL 365