

United Brotherhood of Carpenters and Joiners of America, Local Union No. 405, AFL-CIO and Office and Professional Employees International Union, Local 29, AFL-CIO. Case 32-CA-16540

June 23, 1999

DECISION AND ORDER

BY MEMBERS FOX, LIEBMAN, AND HURTGEN

On March 9, 1999, Administrative Law Judge Joan Wieder 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 the brief and has decided to affirm the judge's rulings, findings,¹ and conclusions² 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 Brotherhood of Carpenters and Joiners of America, Local Union No. 405, AFL-CIO, Santa Clara County, California, its officers, agents, and representatives, shall take the action set forth in the Order.

Valerie Hardy-Mahoney, Esq., for the General Counsel.
Amy V. Martin, Esq. (Van Bourg, Weinberg, Roger & Rosenfeld), of Oakland, California, for the Respondent.
Lynn Rossman Faris, Esq. (Leonard, Carder, Nathan, Zuckerman, Ross, Chin & Remar), of Oakland, California, for the Charging Party.

¹ The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

² The record establishes that the Respondent failed to produce documents in compliance with a properly served subpoena duces tecum, without having filed a motion to revoke the subpoena pursuant to Board Rule 102.31(b). Moreover, the Respondent's chief witness, Carpenters Local 405 Secretary-Treasurer Robert Baldini, on the advice of counsel instructed Phil Hennessy, Local 405's former business manager, not to appear to testify at the hearing in compliance with the subpoena. The General Counsel stated on the record that if the Region chose to pursue this matter for disciplinary purposes pursuant to Sec. 102.177 of the Board's Rules and Regulations, it would do so in a separate proceeding. The judge accordingly took no further action in this connection. We note, however, that it is well established that the failure of a witness to appear on behalf of a party for whom he/she would be expected to give favorable testimony may appropriately give rise to an inference that the witness's testimony would be unfavorable. *Olive Garden*, 327 NLRB 5, 7 (1998); *Jim Walter Resources, Inc.*, 324 NLRB 1231, 1233 (1997).

DECISION

STATEMENT OF THE CASE

JOAN WIEDER, Administrative Law Judge. This case was tried on October 5, 1998,¹ at Oakland, California. The charge was filed by Office and Professional Employees International Union, Local 29, AFL-CIO (the Charging Party), on January 8, 1998, against the United Brotherhood of Carpenters and Joiners of America, Local Union No. 405, AFL-CIO (Respondent). An amended charge was filed on March 12, 1998. The Regional Director for Region 32, issued a complaint and notice of hearing on March 31, 1998, alleging Respondent violated Section 8(a)(5), (1), and (d) of the National Labor Relations Act (the Act). The complaint, which was amended at hearing, asserts Respondent and the Charging Party reached a complete successor collective-bargaining agreement on or about August 18, which the Charging Party requested Respondent execute and, since on or about October 21, Respondent has failed and refused to execute the successor collective-bargaining agreement.

Respondent's timely filed answer to the complaint, as amended, admits certain allegations, denies others, and denies any wrongdoing, asserting the Respondent and the Charging Party had not reached a complete successor collective-bargaining agreement and thus it had no duty to execute an incomplete agreement.

I. JURISDICTION

Based on Respondent's answer to the complaint, I find it meets one of the Board's jurisdictional standards and the Union is a statutory labor organization.

II. THE ALLEGED UNFAIR LABOR PRACTICES

Respondent is the result of a merger of several local unions.² The Parties agree the following employees constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time employees performing work described in and covered by "Article 1. Recognition" of the September 1, 1994 through August 31, 1997 collective-bargaining agreement between the Union and Respondent (herein called the Agreement); excluding all other employees, guard, and supervisors as defined in the Act.

The Agreement is the trade union agreement for Santa Clara County, California. In 1994, the Agreement was negotiated by a group of employers who are trade unions and negotiate as a group every 3 years on behalf of their respective union employers. They do not have a master agreement, rather, they sign single employer agreements.

On May 23, Elizabeth Alonso, the Charging Party's secretary-treasurer since October 3, 1994, sent the group of trade union employers individual reopener letters. The letter to Respondent was addressed to Phil Hennessy, its business manager. In response to the reopener letters, Alonso received a telephone call

¹ All dates are in 1997 unless otherwise indicated.

² Carpenters Local 316 and Carpenters Local 280 merged into Carpenters Local 405 in 1994 and the staffs of these locals were also merged. There is no claim this merger affected the collective-bargaining relationship between Respondent and the Charging Party and the facts do not support such a claim. The Charging Party has had a collective-bargaining relationship with Locals 316 and 280 between 40 and 50 years. It has had a collective-bargaining relationship with Respondent since 1994.

from John Neece, the chief executive officer of the Santa Clara, San Benito Building and Construction Trades Council.

Respondent denies Neece acted as its agent during the negotiations for a successor agreement in 1997.³ I find Neece's admission he acted as spokesperson for Respondent and the other trade union employers present during the 1997 negotiations for a successor collective-bargaining agreement, convincing. Neece testified in an open and forthright manner. He appeared to be trying to assist in the development of a full and accurate record. Hennessy, did not appear and testify. There is no credible refutation to Neece's testimony. In July 1998, Robert Baldini became Respondent's secretary-treasurer. There was no indication whether Hennessy held any supervisory or managerial position with Respondent at the time of this hearing. After several conversations, Alonso and Neece agreed to meet on August 7, to commence negotiations for successor agreements. Present for the employer unions were Neece, Baldini for Respondent,⁴ Paul Arsenaault for Sheet Metal Workers Local 104, Art Castillo for Painters Local 507, and Lloyd Williams for Plumbers Local 393.

There were two negotiating sessions, the first on August 7 and the last on August 15. On August 7, prior to the commencement of negotiations with the Charging Party, the trade union locals bargaining as a group, including Respondent, met and Baldini indicated to Neece Respondent was concerned that some of its employees were being compensated over the scale set in the collective-bargaining agreement. At the time of the negotiations Baldini was field representative for the Northern California Carpenters Regional Council. Neece informed Baldini that over scale compensation was his problem and he did not indicate when, if at all, Baldini could negotiate with the Union over that matter. There is no claim or evidence Baldini or Neece ever informed the Charging Party about Respondent's over scale compensation concern during the group negotiating sessions or prior to the Charging Party's ratification of the agreement. It is unrefuted some, if not all, of Respondent's clerical staff was receiving compensation over the scale of the contract wage rates set in the 1994 and 1997 collective-bargaining agreements, pursuant to voluntary actions taken by Respondent and/or its predecessors. The wage scales in the agreement are minimums.

At the commencement of the negotiations with the Charging Party, Neece informed the Charging Party: "Basically we're there as individuals, but we're in a group for convenience purposes." Present for the Charging Party were Alonso and Sandy Bailey, a bargaining unit member. After introductions, Alonso asked Baldini if he had authority to bargain on behalf of Respondent. Baldini said, "[Y]es, that he had been directed to be there on behalf of Carpenters 405." Alonso asked this question because:

He wasn't the business manager for Carpenters 405. And in the past we had a problem with the Carpenters District Council, where someone had sat in on negotiations and subsequently we received a letter from the employer saying that that person did not have authority to bargain on their behalf. And so I wanted the record clear from the beginning. I wanted to know whether or not he had authority to bargain.

Baldini testified the Respondent's executive board instructed him "to find an avenue through negotiations to bring them down

to where—at the contract level, so the staff would be working the same level as the contract." He also testified the executive board was to ratify any negotiated agreement. I do not credit Baldini's testimony. He appeared to engage in surmise, on occasion he appeared to be tailoring his testimony to fit Respondent's litigation theory, and at times his answers were not responsive to the questions. He appeared reticent to answer several questions during cross-examination. In sum, his demeanor was not believable and his testimony will be credited only where it is credibly corroborated or is an admission against interest. I also note key elements of his testimony were not corroborated and were convincingly controverted.

Moreover, a review of Respondent's executive board minutes did not support his claim the executive board discussed its ratification as a condition precedent to the adoption of any negotiated agreement. The minutes for July and August also do not contain any reference to the forthcoming negotiations with the Charging Party. Baldini admitted the executive board minutes are presented to its membership and the executive board members have an opportunity to make corrections. Baldini also admitted there were no corrections made to the minutes for July and August. Baldini did not dispute Alonso's testimony that he represented to the Union at the commencement of negotiations he had the authority to negotiate a collective-bargaining agreement on behalf of Respondent. Baldini also did not dispute Neece's testimony Neece told the Charging Party during negotiations he was the Employers' spokesperson. At no time during the negotiations did Baldini disassociate Respondent from the proposals Neece made on the Employers' behalf.

The September 2 executive board minutes contain a reference to the collective-bargaining agreement language as follows: "Proposed recommended freeze wages until in line with contract for job classification." Baldini could not explain why the claimed executive board action in July or August that Respondent's bargaining position was to freeze the clericals' wages until they met the minimums in any collective-bargaining agreement was not included in the minutes until after the collective-bargaining agreement was negotiated and ratified.

For the previously stated reasons, I do not credit Baldini's uncorroborated testimony the executive committee limited his authority to negotiate a collective-bargaining agreement. Baldini admitted informing the executive board on or before September 2, the Charging Party had ratified the agreement. Baldini admitted the recording secretary is supposed to write down everything that occurs at an executive board meeting, but indicated on occasion they fail. Baldini did not claim any omission could not be corrected at a later date at a subsequent meeting. There is no record of such a correction.

I credit Alonso's testimony. She appeared direct and truthful. She readily admitted Neece advised the Charging Party "he was there as a spokesperson and he went through the usual, which is advising us that they're each there individually as a convenience, but that nobody is bound to anything, that they're each acting individually. And so that's always been my understanding from the very outset of negotiations."

The Charging Party presented its proposals to the Employers at the commencement of negotiations. There were certain proposals that did not apply to all the Employers in the group and Alonso suggested these matters be tabled and dealt with separately with the appropriate Employer in side letters. This suggestion was

³ It is undisputed Neece acted as spokesperson for the group of trade unions negotiating the 1994 collective-bargaining agreement and he historically performed that role.

⁴ This was the first time Baldini participated in negotiations for a collective-bargaining agreement.

accepted. Baldini never raised the issue of over scale wages⁵ as one of these matters being deferred for consideration in side letters during this or the August 15 negotiating sessions according to Alonso, Neece, and Baldini. The Charging Party and union employers reached several agreements during this negotiating session including the duration of the collective-bargaining agreements, increasing life insurance benefits, and modifying for clarification the verbiage concerning the health and welfare plan.

Baldini admitted Neece carved out three items for consideration in side letters and these exceptions did not include freezing the wages of Respondent's clericals until they were reduced to the minimums contained in any negotiated agreement.⁶ He also admitted he never carved out for individual bargaining the over scale wage issue during the group negotiations or at any time prior to the Union's ratification of the employer groups final offer. He never informed the Charging Party that Respondent would not be bound by the group negotiations on all matters other than those three items Neece specifically deferred to consideration for individual employer side letter negotiation. The only comment Baldini made during this negotiating session was to inquire if there were any side letters between the Union and Respondent. Alonso said she would investigate and provide the information at a later date.

During the August 15 negotiations, all the previously mentioned employer representatives were present except Costillo, who authorized Neece to bargain on his Union's behalf. At the beginning of the meeting, Alonso detailed the matters proposed as the subjects of side letters and asked each employer if they agreed to dealing with these issues separately in side letters, all agreed. There was no mention of over scale wages.

The employer group presented the Union with a counterproposal to modify article 11 of the 1994 collective-bargaining agreement as follows:

Effective September 1, 1997, an increase to the hourly taxable wage rate for all classifications at the rate of 3.4%

The 3.4% increase to the full charge bookkeeper/secretary will provide for a 66 cent increase to the present rate of \$19.30 per hour.

Effective September 1, 1998, a minimum 2.7% increase to the hourly taxable wage rate or the cost of living percentage increase in the Bay Area Cost-of-Living Index of Urban Wage Earners and Clerical Workers for the period ending July 1, 1997 through June 30, 1998, whichever is greater.

Effective September 1, 1999, a minimum 2.7% increase to the hourly taxable wage rate or the cost of living percentage increase in the Bay Area Cost-of-Living Index of Urban Wage Earners and Clerical Workers for the period ending July 1, 1998 through June 30, 1999, whichever is greater.

⁵ About 10 to 14 years ago, two of Respondent's current employees were given merit increases by their predecessor local(s), Locals 316's and/or 280's executive board(s). A third employee also was granted over scale wages sometime thereafter. Respondent obviously interpreted the proposal in the same manner as Alonso in 1994 and 1997 when Hennessy and the executive board authorized Rodriguez-Chavez to pay the clericals the 3.4-percent wage increase across the board and the increased health and welfare and pension payments.

⁶ These items were: extra compensation for clericals who performed dispatch duties, cash out for sick leave, and increases to the amount of cash out up to 90 days. Respondent does not have clericals performing dispatch duties so the first item did not pertain to Respondent.

Article 11 of the 1994 collective-bargaining agreement is entitled "CLASSIFICATIONS AND MINIMUM WAGE SCALES." The 1994 agreement refers to minimum raises for the classifications specified therein. It also has the following provision: "Nothing shall prevent the Employer from paying higher than the minimum wage herein set forth." The Employers' final proposal, which reflected the parties' agreement, also provided: "The above proposals are made on the behalf of the employers bargaining units this 15th day of August, 1997." Respondent reserved for consideration in side letter negotiations a question concerning sick leave. The final proposal reflected this reservation by noting, under the heading "sick leave" that issue "May be negotiated by Local 29 with the individual employer bargaining units." There was no similar notation referencing future negotiations under the article 11 portion of the final proposal.⁷

Alonso was certain that at no time was there any discussion that some clericals would be excluded from the wage increase for any reason or limiting it to those clericals who were currently not earning over scale. There was no agreement the wage increase applied to base wages. The employers chose to use the secretary rate as the base for any calculations of proposed increases. Alonso explained:

And [the employers] chose that rate because they said the majority of the bargaining unit people that were represented under that contract fall in the secretary bookkeeper classification.

So, since some employers had one and some employers had five, it was easier for them to pick a most common wage rate and then figure three percent on that or five percent or whatever the percentage was. And that's where the secretary base wage comes from. It was never anything that we brought up. It's how the Employer choose [sic] to calculate any proposed wage increases.⁸

Baldini did not say anything at this time concerning the wage increase. Baldini did not make a separate wage proposal to the Charging Party during the August 7 and 15 negotiating sessions. The employers' proposal was made as a group proposal without caveats or provisos. Alonso and Neece understood the 3.4-percent increase was across the board for all employees, including those making over scale.⁹ According to Alonso, "this is the way it's always been applied. The wage increase has been two percent or

⁷ It is uncontroverted this proposal was intended as the final statement of agreement between the parties.

⁸ Alonso accurately recalled the proposal and negotiations as follows:

Three point four percent on wages for September '97. We agreed to their five cents on the pension and we withdrew the cash out at retirement, which was the section H that we were holding on. So, yeah, at this point, then, there was a complete package. They came back with the 3.4 percent and explained that it was the best that they could do and that it was their best final offer and that they hoped that we would support it when we presented it to our members. They wanted us to take it to our members and support it.

⁹ Baldini could not recall exactly how the proposal was presented. He asserted that any comments made during the negotiations informed the Charging Party the 3.4-percent increase would only apply to certain of Respondent's represented employees. He claimed since bargaining was based on the secretary bookkeeper rate, the Charging Party should have inferred from the negotiations that only the base rate was subject to the increase. Inasmuch as he could not recall what was said, I find his surmise is further basis to not credit his testimony. The proposal was in writing and Baldini did not claim he did not see or hear the final wage offer.

three percent to whatever you currently make.” Neece admitted the proposal was an across-the-board wage increase. He testified:

Q. So, anybody that was covered by the collective bargaining agreement would get the wage increase?

A. I would assume so.

Q. And when this proposal was presented, Mr. Baldini did not get up and say, “Well, wait a minute, this really doesn’t apply to Local 405. We need separate negotiations on wages”, did he?

A. Not with 39 he didn’t say that. Within the group. We told him he’d have to take that up on his own.

The Union informed the employer group it would support the Employers’ final offer and present it to the members for ratification. After negotiations concluded on August 15, Baldini wanted to arrange negotiations on two issues; one Alonso referred to as telephone hours which she informed Baldini was a managerial matter and not subject to negotiations, and the other was sick leave. Baldini again inquired if there were any side letters between Respondent and the Charging Party. Alonso informed him she would research the matter and get back to him.

The Charging Party held a ratification vote on August 18 and the Employer’s proposal was unanimously ratified. Alonso sent all the Employer’s notice of the ratification and called Neece with the results around August 19. Alonso’s notification letter, which was sent to Respondent as well as the other employers in the group, dated August 21, stated the Charging Party’s members “voted unanimously to accept the changes to the terms and conditions of the current collective-bargaining agreement as attached.” The letter also requested the employers implement the specified “wage and pension increases as appropriate, effective September 1, 1997.” Respondent implemented the wage and pension increases on September 1. Such action is evidence Respondent intended to be bound by the agreement negotiated by the group with Neece as its spokesman and understood the wage increase to be across the board.

In mid-September, Baldini telephoned Alonso and said, “[H]e wanted to follow up on some matters.” Alonso agreed to meet with him to discuss the matters that had been tabled. Alonso and Baldini met on September 16. As here pertinent, Baldini:

Raised the issue of wages. And he stated that he was in agreement with the contract, but when he took it to his board they were very upset over the fact that some of our bargaining unit members in their employ were actually making over contract wages. And so they were proposing to freeze the clerical’s wages until such time as everybody else caught up to them.

Alonso was surprised and mentioned to Baldini that Respondent had already implemented the increases, effective September 1 pursuant to instructions from Hennessy. She also mentioned this was the first time Baldini raised the issue of wages, at no time during bargaining had he indicated Respondent had any concerns about wages, when the employer proposal was ratified, it was on the basis the Charging Party’s members would all get the same package. Alonso indicated she considered Respondent’s action bargaining in bad faith and would have to consult to determine the best method of handling the matter.¹⁰ Respondent failed to dem-

¹⁰ Alonso’s notes, made contemporaneously to this conversation, are consistent with her testimony. The notes indicate that the first time Baldini informed Charging Party Neece said he could negotiate wage rates with the Charging Party at a later date, she informed him the wage

onstrate Baldini claimed he was not authorized to bind Respondent prior to September 16. Several days later, Alonso telephoned Baldini to advise him the Charging Party was going to file charges with the National Labor Relations Board.

On September 29, Respondent’s counsel wrote Alonso to advise her that he had been requested to assist Respondent with their negotiations because there “appears to be some outstanding issues and misunderstandings concerning the terms of the agreement . . .” On October 1, Alonso sent Hennessy a copy of the negotiated collective-bargaining agreement and in the cover letter to the agreements, asked Respondent to “sign and return all copies.” The matters deferred for consideration in negotiations of side letters were not included in this collective-bargaining agreement sent to Respondent. In a response dated October 30, Respondent’s counsel asserts there was no agreement; that the wage and pension provisions were unilaterally implemented by clerical staff without prior approval of the membership or officers of Respondent. The letter also advised that Respondent would not execute the tendered agreement, that further negotiations were needed.

I find the bare claim the pension and wage provisions of the August 15 agreement were unilaterally implemented by clerical staff, unconvincing. Maria Rodriguez-Chavez is a current employee of Respondent.¹¹ One of her duties is the preparation of the payroll for Respondent’s employees. The last week in August, to prepare the first payroll in September 1997, Rodriguez-Chavez approached Hennessy and “I brought it to his attention that the increase was—the dollar amount I itemized out for him for each of the staff members at the time and he said, ‘Go ahead with the increase on your next paycheck,’ which, I guess that first week in September started on a Monday, so it would have been called in that first Friday in September, 1997.” Rodriguez-Chavez’ testimony is uncontroverted. Respondent did not detail Hennessy’s job duties and it did not claim he was not its agent in authorizing the implementation of the August 15 agreement. Moreover, Respondent does not argue Hennessy exceeded the scope of his authority by this action prior to this proceeding.

Rodriguez-Chavez also testified the health and welfare and pension trust funds billed Respondent in amounts consonant with the September 18 agreement. According to Rodriguez-Chavez, Hennessy¹² also authorized these increases when she presented him with the bills, which are then routinely presented to the Respondent’s executive board for approval. This testimony was also unrefuted. Rodriguez-Chavez testified in a convincing manner and her testimony is credited. Factors supporting this conclusion are she testified pursuant to subpoena and contrary to her employers’

increases had already been implemented by Respondent across the board and she reminded him during negotiations they reviewed the one issue deferred for consideration in side letter negotiations with Respondent, which was the sick leave issue.

¹¹ Rodriguez-Chavez has worked for Respondent since the previously described merger. Prior to the merger, she worked for Local 1280 for 10 years.

¹² Hennessy did not appear and testify although he was subpoenaed. According to Baldini, Hennessy showed him the subpoena, “I was instructed to tell him not to show.” Counsel for the General Counsel stated:

The General Counsel will not be asking the LJ to take any action with respect to the issues of alleged misconduct that have been raised, pursuant to the new single rule for misconduct by attorneys, 102.177. And if the Region pursues this, it will not be on pursuit through you or through this proceeding.

Accordingly, there is no basis to make any inferences based on Hennessy’s failure to appear and testify in this proceeding.

interests and, her supervisor, Baldini, was in the courtroom when she testified.

Rodriguez-Chavez also testified it was not a practice for Respondent's executive board to ratify collective-bargaining agreements. Specifically, she recalled:

That has never been a practice that—that ratification process was not something that I've ever seen in the executive board minutes that we prepare. We don't keep a book. We don't keep the actual book of the executive board or union meeting minutes, but we do a—we do an outline and we get something back after they've met. We get a hand—like the notes are made by the recording secretary. That comes back to us for retyping and review at the meeting.¹³

Rodriguez-Chavez routinely reviews the executive board minutes to determine which bills she has been authorized to pay. She receives a copy of the executive board minutes after each meeting. Baldini reviewed the executive board minutes and could not find any reference to a requirement the executive board ratify the collective-bargaining agreement he negotiated as Respondent's designated agent. Alonso also convincingly testified she was never notified any collective-bargaining agreement had to be ratified by Respondent's executive board.

Subsequent to the October 30 letter, Alonso discovered there was an error in the copy of the agreement she sent Hennessy. The error was the inclusion of language that pertained only to Cement Mason Local 400. Corrected pages were sent to Respondent on October 21. The corrected pages did not relate to the wage issue raised by Baldini on September 16. On October 23, Alonso replied to Respondent counsel's letter advising him negotiations were concluded, the agreement had been ratified by the Charging Party's members and the only outstanding issue was the execution of the agreement. None of the matters the Parties agreed to in August were to be negotiated separately in side letters were included in the collective-bargaining agreement sent to Respondent for execution because those matters had not yet been negotiated.

Analysis and conclusion

Based on Neece's and Alonso's testimony, as well as Baldini's admissions he never informed the Charging Party he was not authorized to negotiate on behalf of and bind Respondent, I find that Baldini and through his representations, Neece, acted as agents for Respondent during the August negotiating sessions. The determination of Neece's agency is governed by the common law principals of agency, "whether actual or implied authority is present is sufficient." *NLRB v. Electrical Workers Local 3*, 467 F.2d 1158,

¹³ Subsequently, Rodriguez-Chavez clarified the process as follows:

The executive board meets the first Tuesday of the month. Any correspondence that is received previous to that that would have some pertinence where they would want to discuss that correspondence is brought to the secretary, usually Billie Geren. I'm the back up on that particular thing. And she would type out the agenda. These are the items. You know, maybe it perhaps it would be 10, maybe it would be 20 items. And they're brought up, you know, these are items I want for discussion at the meeting.

I don't sit in at the meeting, I don't know who runs it. But they take whatever support document, along with the agenda, into the meeting. They do their business. After the meeting is over, handwritten notes are made on that agenda and then that's treated as the minutes of the executive board. There's also a recording secretary who, at some time, repeats that same information into a book.

1159 (2d Cir. 1972); *Laborers Local 341 v. NLRB*, 564 F.2d 834 (1977), affirming *Laborers Local 341 (Bannister-Joyce-Leonard)*, 223 NLRB 1112 (1976).

Respondent argues there was no such agency and if one is found, Neece's and Baldini's actions were beyond the scope of their authority because Respondent required, as a condition precedent, the Respondent's executive board ratify such agreement. I find such a claim is unsupported by the evidence and without merit under applicable precedent. While Baldini claimed the minutes of the Board meeting would contain this condition precedent, there was no mention of Respondent's board's ratification of any contract as a condition precedent to agreement. Such a condition was not shown to be standard practice. Baldini admittedly never informed the Union or Neece of such a condition. Moreover, as held in *Laborers Local 341 (Bannister-Joyce-Leonard)*, Id.:

To Borrow from *Sunset Line and Twine Co.*, 79 NLRB 1487, 1509 (1948), it is of no consequence that Respondent had not specifically authorized or indeed may have specifically forbidden the act in question. It is enough if the principal actually empowered the agent to represent him in the general area within which the agent acted. [Citing *Associated Transport, Inc.*, 203 NLRB 844, 847 (1973); *F. F. Mengel Construction Co.*, 196 NLRB 440, 442 (1972); *Batterman Construction, Inc.*, 166 NLRB 532, 539-540 (1967).]

Neece's agency was inferable from his announcement in front of Baldini and the other employer representatives in the group at the commencement of negotiations, that he was the spokesman. While he also noted the employers were not bound by what he said as their spokesperson, he claimed at the second negotiating session, without condition, that he was relaying the Employers' final offer. Baldini did not object to these statements or modify Neece's role on behalf of Respondent. Baldini was specifically asked if he had authority to negotiate on behalf of Respondent and he replied he was so authorized.

Respondent authorized Baldini to participate in the group negotiations. He was Respondent's representative at the negotiations. There is no evidence Baldini or his appointed spokesman, Neece, or any other representative of Respondent, informed the Union of any restrictions on Baldini's, then Neece's, authority to bargain to agreement. To the contrary, as noted above, Baldini represented he had such authority, hence so did Neece, as his inferable spokesman-agent. *Electrical Workers Local 211 (U.S. Capital Telecommunications)*, 279 NLRB 874, 875 (1986). Neece's and Baldini's agency is also inferable from Respondent's implementation of the agreement that was ratified by the Union and was the agreement proposed by Neece on behalf of all the Employers. Respondent had the obligation to clearly communicate any limitations on Baldini's and/or Neece's bargaining authority directly to the Union. Its failure to do so further demonstrates they had the authority to bind Respondent in the negotiations. *University of Bridgeport*, 299 NLRB 1074 (1977). Similarly, Respondent's failure to notify the Union it imposed the requirement that Respondent's Board was to ratify the agreement, requires the conclusion Baldini and Neece had the authority to bind Respondent without ratification by its Board. Id.

Further confirming Neece's agency is Baldini's conspicuous failure to object to Neece's final offer or claim to the Union Respondent wanted to negotiate wages separately. There was no indication the Union could not rely on Neece's representation the final offer was being made on Respondent's behalf, particularly since Baldini was present at the time it was made and the Union

indicated it would take that offer to its members for ratification. Baldini never informed Neece or the Union further action by Respondent was needed prior to reaching agreement. Baldini's silent yielding to Neece's representations concerning the final offer as that of all the employers in the group, indicates Baldini, as Respondent's representative, intended for Neece to act as its agent and authorized Neece to make the offer on behalf of Respondent.

Respondent also argues Baldini mistook the meaning of Neece's final offer, believing the increase only concerned base wages. I find this claim unpersuasive. Baldini was present during the negotiations and never informed the Charging Party the Employers' offer carved out any exceptions concerning Respondent. Neece corroborated Alonso's testimony that Baldini never informed the Charging Party of its concern its clericals were being paid more than the minimum wage rate. The proposal was by Neece on behalf of all the employers participating in the group negotiations, without any reservation other than those matters reserved for negotiation of side letters, which clearly did not include Respondent's employees wage rates.

As held in *NLRB v. Donkin's Inn, Inc.*, 429 F.2d 138, 141 (9th Cir. 1976), cert. denied 420 U.S. 895 (1976):

In the context of labor disputes, and particularly section 8(a)(5) violations, however, the technical question of whether a contract was accepted in the traditional sense is perhaps less vital than it otherwise would be. Rather, a more crucial inquiry is whether the two sides have reached an "agreement," even though that "agreement" might fall short of the technical requirements of an accepted contract.

Respondent is attempting to reform the agreement. I find baseless Respondent's claim of unilateral mistake. There was no showing the parties prior to the agreement agreed to any manner of reformation. Respondent does not claim the Union engaged in fraud or otherwise misled it or induced inequitable conduct. Here there is no difference between the verbal agreement and written agreement which would provide a basis for reformation or excuse Respondent from execution. As found in *Norris Industries*, 231 NLRB 50 (1977), there must be an antecedent agreement which the written instrument evidences and the mistake must have been in the drafting of the instrument, not in the making of the contract. The mistake must be relievable in equity based on some intentional act. When there is no question of fraud, bad faith, or inequitable conduct, and the claim to reformation of a contract is based solely on mistake, the mistake must be mutual. There is no mutuality here. Baldini acquiesced to the across-the-board wage increase. If his agreement was negligent, such is not a defense to the charge. *Id.*

Respondent implemented the terms of the agreement. It was only at a later date that Respondent attempted to disavow the agreement. It was only after acceptance that Respondent claims Baldini was under a mistaken belief concerning the wage increase. There is nothing in the terms of the final offer that would support the finding there was a clear mistake or would permit a finding other than Respondent, after the offer was accepted, wanted to change the terms of the collective-bargaining agreement. The Union and the Employers were aware on August 15, after caucusing, that Neece would make a comprehensive final offer to the Union, including an "across the board" 3.4-percent increase in wages. Baldini did not object to or modify this portion of the offer during the negotiating session or prior to the Union's ratification of the offer. When the final offer was made, Respondent was informed the offer would mature into a final contract upon union

ratification. Still Respondent did not to alter or rescind this offer prior to ratification.

I find Respondent's claim of unilateral mistake to be without merit. The issue of base wages was not raised during the two negotiating sessions, only during a prenegotiation employers meeting. The agreed-upon language was clear, unambiguous. There was no mention of base rate. There is no basis to find a mutual mistake. The Union was never informed about Respondent's concern over the units over scale wages. The agreed upon wage rate was not altered in the written agreement.

Respondent's claim the agreement to enter into side letters indicates there is no final agreement is also without merit. The parties agreed at the commencement of negotiations that three items, none involving wages, would not be included in the agreement under negotiation as a group, but would be the subjects of side letters to be negotiated after the bargaining resulted in a agreement on the other terms and conditions of employment. A side letter is a agreement annexed to a collective-bargaining agreement. *Fire Fighters*, 304 NLRB 401 (1991). It is implicitly an agreement beside the collective-bargaining agreement, which becomes part of the contract. The parties agreed at the commencement of negotiations three issues would be the subject of side letters and would be included in the collective-bargaining agreement negotiated by the group.

The parties reached a meeting of the minds on the side issues. The record clearly discloses the parties went over the substantive matters they intended to include in the collective-bargaining agreement and the side letter issue were deferred and explicitly excluded from the negotiations. That the parties agreed to defer issue to side agreements does not substantively change the agreement. *Granite State Distributors, Inc.*, 266 NLRB 457 (1983); *Midvalley Steel Fabricators, Inc.*, 243 NLRB 516 (1979). There was no contingency established that if the parties failed to reach agreement on side letters the collective-bargaining agreement negotiated by the group would be null and void. The efficacy of the collective-bargaining agreement was not deferred until the side agreements were negotiated. On the contrary, the parties agreed to a collective-bargaining agreement which was binding upon union ratification and the side agreements were deferred for later consideration. Such agreements assist the parties in reaching agreement by deferring matters which are not critical to the overall agreement to later negotiations.

Neece made an unconditional final offer on behalf of Respondent and the other Employers in the group. Respondent was free to disavow the offer prior to the Union's acceptance. It failed to withdraw or modify this offer. The Union accepted the offer by its ratification. Thus, I find at the time the Union ratified the offer, there was an agreement. The fact the collective-bargaining agreement was not reduced to writing at that time does not alter the nature of the agreement. *NLRB v. Truckdrivers Local 100*, 532 F.2d 569, 571 (6th Cir. 1975); cert. denied 429 U.S. 849 (1976); *NLRB v. Haberman Construction Co.*, 641 F.2d 351, 355-356 (5th Cir. 1981) (en banc). "All that is required is conduct manifesting an intention to abide and be bound by the terms of an agreement. *Id.* at 356. Baldini's silence during the final offer, Respondent's failure to withdraw or modify the offer, and Respondent's implementation of the agreement all provide substantial evidence Respondent intended to be bound by Neece's final offer. That Respondent and the Union met to discuss the terms of the issues deferred to subsequent two side agreements does not revoke or rescind any terms of the agreement ratified by the union. *Capitol-Husting C.o. v. NLRB*, 671 F.2d 237, 242 (7th Cir. 1982).

While the Union erroneously included terms in the written agreement submitted to Respondent that applied to another of the employer group, not Respondent, the Union readily admitted and corrected the error. Respondent does not claim this error is a basis for its refusal to execute the written agreement. That the Union initially incorrectly incorporated a provision in the written contract submitted to Respondent that applied only to another employer does not indicate a lack of agreement and does not relive the Respondent's obligation to execute the agreed upon collective-bargaining agreement. *Kelly's Private Car Service*, 289 NLRB 30, 40 (1988).

The Union did not deviate from the final wage offer and it promptly removed the erroneous provision from the written collective-bargaining agreement submitted to Respondent, showing good faith. The parties intent was clear. The language was not ambiguous. There was no indication to the Union Respondent intended to deviate from the past practice of across the board wage increases even though its unit employees were earning over scale. The Union should be able to rely on the terms of the final offer present by the employers group. Thus, I conclude a meeting of the minds occurred incurring for Respondent the obligation to execute the collective-bargaining agreement. *Hospital Employees Local 1199 (Lenox Hill Hospital)*, 296 NLRB 322 (1989); *Luther Manor Nursing Home*, 270 NLRB 949 (1984).

Section 8(d) of the Act requires bargaining collectively in good faith including "the execution of a written contract incorporating any agreement reached if requested by either party." Where, as here, the parties reached an agreement, the Respondent's failure to execute the agreement incorporating the agreed upon terms violates Section 8(a)(5) and (1) of the Act unless there is a basis for rescission. The comment by Neece at the last negotiating sessions that the Employers' proposal was their last and final offer, which the Union accepted to bring to its members for ratification, demonstrated the parties intended to form a contract. *New Orleans Stevedoring Co.*, 308 NLRB 1076, 1081 (1992).

Assuming arguendo, the evidence in the best light for Respondent demonstrated Baldini made a mistake by not telling the Union there were limits to his and Neece's authority and Respondent wanted a wage package that differed from the final offer, such a finding would not relieve Respondent from its obligation to execute the collective-bargaining agreement. As held in *Apache Powder Co.*, 223 NLRB 191 (1976): "we agree 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." I find if Baldini did make a mistake, it was not obvious to the Union and this case does not present such an unusual instance. The Charging Party should be permitted to rely on the collective-bargaining agreement made at the last negotiating session.

Accordingly I conclude the General Counsel met his burden of proving there was a "meeting of the minds." There was no evidence there was a need to alter the corrected written agreement submitted to Respondent for execution. Respondent violated Section 8(a)(5) and (1) and Section (d) of the Act by refusing to execute the collective-bargaining agreement. *H. J. Heintz Co. v. NLRB*, 311 U.S. 514 (1941).

CONCLUSIONS OF LAW

1. The United Brotherhood of Carpenters and Joiners of America, Local Union No. 405, AFL-CIO is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Office and Professional Employees International Union, Local 29, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. The following employees of the Respondent constitute an appropriate unit for the purposes of collective-bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time employees performing work described in and covered by "Article 1. Recognition" of the September 1, 1994 through August 31, 1997 collective-bargaining agreement between the Union and Respondent (herein called the Agreement); excluding all other employees, guard, and supervisors as defined in the Act.

4. At all times material, the Union has been the exclusive collective-bargaining representative of the Respondent's employees in the above unit.

5. By refusing since on or about October 21, to sign and comply with the collective-bargaining agreement agreed on between it and the Union on August 15, and ratified by the Union on August 18, Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(5) and (1) and (d) of the Act.

6. This unfair labor practice affects commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found Respondent has engaged in unfair labor practice conduct within the meaning of Section 8(a)(5), (1), and (d) of the Act, I shall recommend that it be ordered to cease and desist therefrom and that it take certain affirmative action to effectuate the policies of the Act.

I recommend Respondent be ordered, on request, to execute the collective-bargaining agreement it agreed to on August 15, with the effective dates, from September 1, 1997, through August 30, 2000, as submitted by the Union on October 21. The Respondent shall make whole the employees in the bargaining unit for losses, if any, which they may have suffered by the Respondent's refusal to sign the agreement, in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

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

ORDER

The Respondent, The United Brotherhood of Carpenters and Joiners of America, Local Union No. 405, AFL-CIO, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Failing and refusing to bargain with the Union in good faith by failing and refusing to sign and execute the memorandum or, implement and comply with the terms of the collective-bargaining agreement it agreed on between it and the Union since October 21, which agreement comports with the Employers' final proposals August 15 1997, and reflected in the Union's August 21, 1997 request for implementation letter.

¹⁴ If 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.

(b) In any other like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

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

(a) Sign, implement, and comply with the terms of the collective-bargaining agreement it agreed on between it and the Union, described above.

(b) Make whole its employees in the bargaining unit for any losses, if any, which they may have suffered by its failure to sign, implement, and comply with the terms of the collective-bargaining agreement it agreed on between it and the Union.

(c) Within 14 days after service by the Regional Director, post at its San Jose, California office copies of the attached notice marked "Appendix."¹⁵ Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained by it for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by other material. In the event that during the pendency of these proceedings, Respondent has gone out of business or closed the facility involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current and former employees employed by the Respondent at any time since October 5, 1997.

(d) Within 21 days after service by the Regional Director, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

APPENDIX

NOTICE TO MEMBERS
POSTED BY ORDER OF THE

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."

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.

Section 7 of the Act gives all employees the following rights.

- To organize
- To form, join, or assist any union
- To bargain as a group through representatives of their own choosing
- To act together for collective bargaining or other mutual aid or protection
- To refrain from any or all such activity except to the extent that the employees' bargaining representative and employer have a collective-bargaining agreement which imposes a lawful requirement that employees become union members.

Accordingly, we give you these assurances:

WE WILL NOT fail to bargain with the Union in good faith by refusing to sign, implement, and comply with the collective-bargaining agreement we agreed on with Office and Professional Employees International Union, Local 29, AFL-CIO on August 15, 1997, which was ratified by the Union on August 18, 1997, and sent to us for execution on October 21, with an effective date of September 1, 1997, through August 31, 2000.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce any of you in the exercise of rights guaranteed you by Section 7 of the Act.

WE WILL sign, implement, and comply with the terms of the collective-bargaining agreement agreed to with the Union on August 14, 1997.

WE WILL make whole our unit employees for any losses they may have suffered by reason of our unfair labor practices.

UNITED BROTHERHOOD OF CARPENTERS
AND JOINERS OF AMERICA, LOCAL UNION
NO. 405, AFL-CIO