

Cross Island Telephone Services, Inc. and Communications Workers of America, Local 1105, AFL-CIO. Cases 29-CA-22290 and 29-CA-22351

November 17, 1999

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS FOX
AND HURTGEN

On July 8, 1999, Administrative Law Judge Joel P. Biblowitz issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed a brief in support of the judge's decision.

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,¹ and conclusions and to adopt the recommended Order,² as modified.³

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge, as modified below, and orders that the Respondent, Cross Island Telephone Services, Inc., Islip, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order, as modified.

Substitute the following for paragraphs 2(c)-(e).

"(c) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of back-pay due under the terms of this Order.

"(d) Within 14 days after service by the Region, post at its Islip, New York facility copies of the attached notice marked 'Appendix.'³ 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 and maintained for 60 consecutive days in conspicuous places, including all

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), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

² The judge has recommended that the Respondent be ordered to sign the parties' collective-bargaining agreement and to apply the terms of that agreement retroactively. The normal remedy for violations of the kind found here is limited to the 10(b) period, in this case 6 months prior to the filing of the charge on October 23, 1998. See *Al Bryant, Inc.*, 260 NLRB 128 fn. 3 (1982). Accordingly, we shall modify the judge's recommended remedy to provide that the Respondent shall apply the terms of its collective-bargaining agreement retroactive to April 23, 1998.

³ We shall modify the Order to accord with *Indian Hills Care Center*, 321 NLRB 144 (1996).

places where notices to employees 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. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees by the Respondent at any time since June 15, 1998.

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

James P. Kearns, Esq., for the General Counsel.

Lewis Wasserman, Esq. (Wasserman & Steen), for the Respondent.

Adrienne Saldana, Esq. (Spivak, Lipton, Watanabe, Spivak & Moss), for the Charging Party.

DECISION

STATEMENT OF THE CASE

JOEL P. BIBLOWITZ, Administrative Law Judge. This case was heard by me on May 20, 1999, in Brooklyn, New York. The second amended consolidated complaint, which severed two cases that had been settled, and which issued on April 5, 1999, was based on unfair labor practice charges and first and second amended charges that were filed on about September 1¹ and 21 and October 23 and 26, 1998, by Communications Workers of America, Local 1105, AFL-CIO (the Union) alleges that Cross Island Telephone Services, Inc. (the Respondent) refused to execute a collective-bargaining agreement with the Union, even though the parties had reached complete agreement on the terms to be incorporated into the agreement, and unilaterally modified its system of recalling laid-off employees without prior notice to the Union and without obtaining the Union's consent. It is alleged that, by this conduct, the Respondent violated Section 8(a)(1) and (5) of the Act.

FINDINGS OF FACT

I. JURISDICTION

The Respondent admits, and I find, that it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION STATUS

The Respondent admits, and I find, that the Union has been a labor organization within the meaning of Section 2(5) of the Act.

III. THE FACTS

The principal issue here is whether the Union and the Respondent agreed on all the terms of an initial collective-bargaining agreement between the parties. Testifying were Richard Morrison, executive assistant to the president of the Union and the chief negotiator for the Union, and Maria

¹ Unless indicated otherwise, all dates referred to relate to the year 1997.

Schwarting and Ted Schwarting, husband and wife and the owners of the Respondent.

The Union was certified by the Board on April 7, 1997, as the exclusive collective-bargaining representative of the Respondent's installer cable pullers and molders. At the commencement of the hearing, the parties stipulated that the Respondent has been complying with, at least, the following provisions of the contract: article X, hours and overtime, article XII, vacations, article XIII, holidays, article XIV, personal days, article XVI, sick days, and the part of article XVIII concerning salaries. There are some discrepancies between the testimony of Morrison and that of Maria (M.) and Ted (T.) Schwarting; Morrison's testimony will be recited first. Morrison testified that the parties had their first bargaining session in about May; the Respondent alleges that this first meeting took place on April 7. This meeting, like all of the others, took place at the Respondent's facility and was attended by Morrison, M. and T. Schwarting, and Lordes Delgado, a union organizer. At the first meeting, "we talked . . . how we were going to negotiate a contract." He asked if they were going to have a lawyer present, and T. Schwarting said that they were not going to have a lawyer. Morrison said that at the next meeting he would present the Schwartings with a proposal, and they could go through it page by page, and that any agreement reached would have to be ratified by the unit employees. Morrison testified that the next meeting took place at about the end of May or the beginning of June; the Respondent places this meeting on June 5. Morrison presented the Schwartings with a copy of a proposed contract containing about 30 pages. Prior to going through this proposal, the parties agreed that when there was an agreement on a subject, neither side could "turn around later and put something else in it." The procedure that he employed during the negotiations was that when they reached agreement on a provision, Morrison put "OK" on his notes, but the parties did not sign anything at that point. The parties agreed to certain provisions at this meeting, but the agreements were not finalized because the Schwarting wanted to discuss them further in private, to be further discussed with Morrison at a subsequent meeting. This meeting lasted about 3 or 4 hours, and the parties met again about 2 weeks later in about the middle of June.

At this third meeting, the parties discussed the Union's proposals again, but the Respondent did not have his salary proposal or his health care proposal prepared yet, although they briefly discussed health care. Nothing was finalized at this meeting, and the parties next met sometime in early July. At this meeting they went through the Union's proposal page by page. Very little discussion was required for certain subjects because the parties had basically agreed on these subjects at the prior meeting. For example, when they got to the recognition clause, they did not have to discuss it at this meeting because they had already agreed to it. The Respondent presented its wage proposal at this meeting. They discussed holidays, which became article XIII, and Schwarting told Morrison that a vast majority of their work is for the public schools in the city of New York, and it was mandatory that the school holidays be the employees' holidays, and they agreed on 8 holidays and 2 floating holidays, eligibility for holiday pay, and pay for employees who work on a holiday. In addition, two sections were added. The first stated that floating holidays will be based on seniority and the needs of the business, and the other said that the Respondent has to give the employees 72 hours' notice of a school closing, and then the employee(s) can use a floating

holiday, personal day, vacation day, or a nonpaid working day. Thereupon, this article was agreed to.

They next discussed health insurance. T. Schwarting said that he could not afford to pay for health insurance at that time, but that he felt that the financial condition of the Respondent would improve by August 1, 1998. They agreed that health insurance coverage for the unit employees would begin August 1, 1998, and Morrison told Schwarting that if his financial condition did not improve by then, if Schwarting notified him by May 1998, he would be willing to reopen that issue. The agreement that they reached was written as follows:

Article XVII

Health Insurance

Beginning Aug 1, 1998 all employees who have completed 6 months of service and who elect to be covered will receive Health Insurance at 50% copayment for individuals. An employee can elect a family coverage, but the employer will only pay 50% of employee's individual coverage.

There is no mention of what health insurance company would administer the plan, nor is there anything stated about whether it includes dental coverage. Morrison proposed that in exchange for waiting over a year for medical coverage, the employees each be given a bonus of \$1000 on the execution of the contract; the Schwartings referred to that proposal as "outrageous." After some discussion, the parties agreed that in lieu of the deferred medical coverage, each employee would receive a \$400 bonus to be paid on December 11; this provision became article XIX. They next discussed the Union's sick leave proposal, which provided that employees were eligible for 20 days of sick leave after 30 days of employment. At this meeting they agreed to 5 sick days, after 180 days of employment. They agreed on the dues-checkoff provision and the Union agreed to remove a successorship clause from the proposed contract. Morrison's working copy of this proposed contract has a handwritten word "OUT" on the successorship clause page. The next provision, the no discrimination clause, renumbered from article V to article IV because the previous article IV, the successorship clause, was omitted, was also agreed to. article V, union status and rights, providing for union stewards and union access to the Respondent's facility, was also agreed to at this meeting. Article VI, the grievance-arbitration provision, had six subsections lettered A through F. There was discussion of this article, and the Schwartings objected to the last part of the final sentence in paragraph B of this article. The Union agreed to remove the words: "after a written grievance is submitted in order to resolve the grievance," and this article was agreed to with that omission. Next discussed was article VII, seniority, which contained two subparagraphs. Subparagraph A provided that employees with 3 months or more of service had 120 days of recall rights. The Respondent objected to this, and the 3-month of service (subparagraph) was changed to 6 months. In addition, a subparagraph C was added, stating: "Layoffs will be in reverse seniority." With these changes, article VII was agreed to by the parties.

The following provision, article VIII, discipline and discharge, had two subparagraphs, A and B. The Respondent objected to the first sentence of subparagraph A which stated: "For the first 90 days of employment, the employer may discipline or discharge an employee at will." After some discussion, the Union agreed to change 90 days to 180 days. A similar provision in subparagraph B was changed from 90 days to 180

days, and the Union agreed to omit a sentence that read: "In the event of a discharge, the Employer shall give to the employee and the Union the reason for discharge in writing." With these changes, article VIII was agreed to. The following provisions, article IX, strike, etc., and lockout prohibition, and article X, hours and overtime, had been agreed to at the prior meeting, so they simply okayed these provisions. The following provisions, article XI, bereavement pay, and article XV, military leave, also had been agreed to at the prior meeting and were okayed at this meeting. Article XVIII, job salaries and classifications, is a combination of the Respondent's typewritten proposals of definitions and descriptions of apprentices and tech 1 and tech 2 employees, and the Union's handwritten notes of salaries and reclassification rules. This article, as adjusted, was agreed to. lead guy pay, apparently a part of article XIX, states that a tech 1 or 2, who is a leadman or a job foreman on a temporary basis, will receive an additional \$50 a week, and was also agreed to. The parties then discussed raises for the employees, article XX, and after some discussion, the parties agreed that the employees would receive a 4-percent raise on August 4, 1998, and a 4-percent raise on August 4, 1999. Article XXI, which provides the term of agreement from August 4, 1997, until August 4, 2000, with notice of termination more than 60 days prior to the expiration date or it automatically renewed for an additional year, was agreed to. Morrison testified that he believes that the August 4 date was agreed to by the parties at the suggestion of M. Schwarting because that was the start of a payroll period for the Respondent. There was no discussion of the next provision, appendix a the dues deduction card, because T. Schwarting had previously agreed to deduct dues from participating employees' pay and to forward the money to the Union once a month.

The only contract provision not fully testified to by Morrison is article XII, vacations, which states:

1. Vacations will accrue on the following schedule:

Service	Number of Days
1 Year	5 Days
3 Years	10 Days
5 Years	15 Days
10 Years	20 Days

2. Vacation selections will be scheduled in order of seniority.

3. One week of vacation will be taken in days.

4. Upon termination, an employee shall receive there [sic] accrued vacation.

5. Vacation may be carried over to the following year but must be used by the first full week of June.

The sole record evidence of Morrison's bargaining notes on this subject is "Looking for more 10 days" and "Carry over June 1 week." In addition, in two distinct portions of the hearing, Morrison testified briefly about this subject. He was asked about a call that he received from T. Schwarting sometime after the contract was ratified. He testified:

A. He was very upset because they were already taking sick days and they wanted to take vacation days and he asked me to go out and clarify with these guys what the contract was all about and that they needed to give notice for certain days and stuff like that.

Subsequently, he was asked about one of the negotiating sessions:

Q. And you discussed the sick, personal and vacation days with the Schwartings and they said they had no problem providing that, correct?

A. To what we finally agreed to, yes.

Also relevant to this issue is the fact that in his opening statement, counsel for the Respondent admitted that the Respondent agreed to certain improvements for its employees, including vacation leave, and that the parties stipulated that certain provisions, including article XII, were agreed to and followed.

At the conclusion of this final meeting in early July, T. Schwarting told Morrison that the negotiations weren't as painful as he thought it would be, and he was glad that they were able to work it out and arrive at a contract. He also said that Morrison could conduct a ratification vote among the employees during work, but that he should notify Schwarting when he wanted to conduct the vote, and Schwarting would notify the foreman on the job to let him pull the men out to discuss and vote on the contract. They shook hands, and Morrison told T. and M. Schwarting that after the employees ratified the contract, he (Morrison) would have it typed up, signed, and forwarded to Schwarting for his/her signature. At the end of July or the beginning of August, Morrison called T. Schwarting and told him that he wanted to meet with the Respondent's employees to discuss ratification of the contract. Schwarting gave him permission, so he went to two of the Respondent's jobsites, gave the employees a sheet of paper summarizing the terms of the contract, or the contract itself, and the employees voted to ratify the contract. He then called T. Schwarting, told him that the employees had ratified the contract and Schwarting said that he would begin implementing the contract. A few days later Morrison received a call from Schwarting, who said that he was very upset because employees were already taking sick days and vacation days and were unaware of the requirements for eligibility for these benefits, and he asked Morrison to speak to the employees. Shortly thereafter, he arranged with T. Schwarting for him to meet with employees on a jobsite, and he explained to them the requirements and the necessary notice that they had to give in order to take time off.

At about the end of August or early September, Morrison dropped off at the Respondent's facility a copy of the final agreement between the parties; the Schwartings said that they wanted to read it over and would get back to him. Shortly thereafter, they called Morrison and said that they had questions about a few items in the contract. Article III, dues-checkoff, provided that the Respondent would transmit the deducted dues to the Union by the 10th day of the month; they had agreed to the last day of the month, and Morrison agreed, and changed the contract to reflect it. They also had a question about section 1 of article V, union status and rights, which provides that the Union would notify the Respondent in writing of elected officers and stewards; as there would only be stewards at the Respondent's facility, they corrected the contract by deleting the words "elected officers" from this article. T. Schwarting also said that he had a problem with sections 4 and 5 of article XVI, sick days, which involved leave due to workmen's comp and disability; Morrison said that he would check with his attorney and about 10 days later he called Schwarting and told him that he would remove the two sections that he found objectionable. Those were the only objections that Schwarting referred to in that conversation.

In about October Morrison dropped off a copy of the newly revised contract at the Respondent's facility. About 2 weeks later he called Schwarting and asked him why he had not yet received a signed copy of the contract from him; Schwarting said that he was still reading it over, and "not to worry about it, he was living up to the contract anyway." Morrison spoke to T. Schwarting about the contract next in about December; Schwarting told him that he was busy, but he shouldn't worry about it, "You'll have it." The next time he spoke to Schwarting about returning the signed contract was in about May 1998. As to why he waited so long before asking him for the signed agreement, Morrison testified: "I guess everything was going okay, the contract was being lived up to." In about May 1998, while he was discussing a prevailing wage issue with Schwarting, Schwarting told him that he had hired an attorney who wanted to start negotiating the contract again. By letter dated June 15, 1998, T. Schwarting wrote to Morrison about the layoff of 11 employees effective that day. The final two paragraphs of this letter states:

Although we have not concluded our negotiations on a collective bargaining agreement, Cross Island intends to recall these employees in order of seniority if, as and when work materializes. I will honor your demand for recall rights up to 120 days under proposed Article VII, Seniority, for purposes of this layoff.

I invite you to call my attorneys, Wasserman & Steen, to discuss the impact of these layoffs, the possibility of termination of certain employees; and for the purpose of trying to conclude a collective bargaining agreement.

From about October to May and June 1998, Schwarting had never told Morrison that he believed that their negotiations for a contract had not been completed. By letter to Morrison dated June 18, 1998, Lewis Wasserman, counsel for the Respondent, confirmed that he had offered to meet with Morrison to discuss the status of the negotiations as well as other matters. After receiving this letter, Morrison met with Wasserman; he believed that the purpose of the meeting was to discuss prevailing wage issues, but Wasserman told him that he wanted "to discuss some changes that he needed in the contract . . . there were probably four or five issues that we should be able to work through them and get the contract signed." Morrison told him that he would listen to his concerns, but "I made it very clear at that point that I would not . . . we had a contract, and I wasn't going to negotiate a contract. If there were certain things that he wanted to revisit, I would be more than willing to revisit them." They did not discuss the individual issues at this meeting because Wasserman had not previously discussed them with the Schwartings.

By letter dated August 10, 1998, Wasserman attached five pages of proposals that he asked Morrison to review and asked him to advise him when they could meet to discuss these proposals. After receiving this letter, Morrison called Wasserman and said that Wasserman had lead him to believe that only four or five items were in question, whereas his letter covered every article in the contract. He told Wasserman that he would not meet with him or Schwarting on the subject unless Schwarting would first admit to him that they did have a contract. If he did so, "I would be more than willing to discuss the things that needed to be discussed, but I would not discuss every single article of the contract." The next day, T. Schwarting called him and said that "this was a contract thing" and he needed a couple of items, but he put all of them in the letter because that was

how negotiations worked. Morrison told him: "I'm not playing that game. We negotiated a contract already. When you're willing to admit that to me, then I'll sit down and talk." Schwarting then said: "I know that we agreed that we negotiated a contract, but I need changes based on what my attorney's telling me"

Morrison wrote two letters to the Schwartings on August 20, 1998. One advised them that they were in violation of article XX of the contract (contract raises) because they had not given the unit employees the specified 4-percent raise effective August 4, 1998. Shortly thereafter, Morrison was informed by the employees that the raise was given. The other letter states, *inter alia*:

It is with much regret that I sit down and write this letter. It is just over a year since we have completed negotiations and you still refuse to sign the contract. I have advised you that my members have voted and passed the contract, which you yourself authorized us to go to the work locations to conduct the balloting.

In one last attempt, I am enclosing two copies of the contract signed by me. I ask you to sign both and return one copy to me. If I don't receive this contract back within ten days, I will have no other option then to go to the NLRB.

By letter dated August 26, 1998, T. Schwarting responded by stating that significant contractual issues were still outstanding, and that they must be resolved before negotiations were concluded. The Respondent never signed the contract negotiated in 1997.

The remaining allegation here is that the Respondent unilaterally modified its system of recalling laid-off employees in reverse order of seniority in violation of Section 8(a)(1) and (5) of the Act. Article VII of the contract herein provides that an employee's seniority right of recall shall cease 120 working days after the date of the layoff, and that layoffs will be in reverse seniority. As stated *supra*, the Respondent notified Morrison on June 15, 1998, of 11 employees who would be laid off on that day in order of seniority, together with the date that they were hired. The Respondent recalled these employees in about September; the Union and the General Counsel allege that two of these laid-off employees, Erskin Nesbitt and Owen Reid, were not recalled by seniority. Morrison testified that after the recall began he called T. Schwarting and asked him why he was recalling employees out of seniority; Schwarting said: "You're not willing to work with me, I need you to work with me. I need certain guys back and not other guys." Morrison said, "Ted, I can't work with you if you don't call me." T. Schwarting testified that he did not recall Nesbitt and Reid because they were not qualified to perform the work on the job that he had to complete at that time.

M. Schwarting testified about the negotiations as well. The first meeting on April 7 was more general than specific. They told Morrison that they were not experienced with negotiations and he told them of the subjects that they would be discussing. At the next bargaining session held on June 4, Morrison gave them a proposed contract and said that they would take it page by page and discuss every issue. When they were discussing seniority, she told Morrison that they classified their employees as either technicians 1, 2, or 3, or apprentices:

So when we were working on this seniority, we said that sometimes we do not necessarily need the lowest before calling back somebody that could have been fired after them, to

come back to work. Sometimes that was not going to work out good for our business.

She testified that Morrison's response was that "we'll work it out when we get to it. And that's how we left it." The Respondent did not agree to the seniority clause at that second meeting. When they discussed the no discrimination clause, "He led us to believe it was the law." She testified that Morrison said, "[I]f it wasn't there, it didn't look good for the company, and if it was there, it was going to protect the employees as far as discrimination." When they discussed bereavement pay, whether it was at that meeting or a later meeting, "he told us it was the law, so we put it in. I'm not saying he said it was the law that it be in every contract written, but he believed, because it was the law, it should be in our contract." During these negotiations, she and her husband, during negotiations about wages, and sick and vacation days, told Morrison that, upon agreement on these subjects, they would implement these provisions and give them to their employees, and they did so during that Summer. She testified further that during the negotiations, they expressed certain concerns about the grievance arbitration provision in the proposed contract. Although it is not very clear what these concerns were, she testified: "The amount of time that we believe is written there, it does not seem to be . . . it seems to be too long and we wanted it shortened up. That you can arbitrate up to a certain . . . ninety days. We wanted that shortened, that it should be done in a timely fashion." They expressed these concerns to Morrison. She was then asked if they ever agreed with Morrison on the language of the arbitration clause. She answered: "We agreed on certain parts of it, but we did not agree on the actual time frame." On cross-examination, she was asked more specifically what the problem was with the grievance-arbitration provision. She testified: "Ninety days, and it says at the end of the sentence, after ninety days. Now, to me, is unclear. To me it should say, within thirty [sic] days. Not after ninety days. After ninety days can mean twenty years." When she was shown the grievance-arbitration clause in the contract that Morrison sent to the Respondent for signature, she could not locate the problem she was referring to, and she testified that they might have discussed it and Morrison may have agreed to remove the vague terms. She was next asked about recall rights, seniority and employee classifications.

Q. And so, yes or no, was there agreement on June 5th about the classification of employees in terms of seniority?

A. No, not on that date.

Q. Okay. At any time from that date until the date of this hearing, did you reach an agreement on the seniority and classification of employees?

A. Yes.

Q. And when did you do that?

A. I would say towards the end of June, beginning of July.

She testified further that in discussions about seniority, she told Morrison: "sometimes it's not always going to work out that way, because they are classified and they are differently skilled. It was not always going to work out that they would be called back." As to whether the parties agreed, "in all instances," to strict seniority, she testified:

As I mentioned before, we did agree, but Mr. Morrison led us to believe that he would work with us on certain instances that were not written. I did not want to agree to anything that was

not written. The words were too vague on that seniority clause.

At one or more of the meetings, she told Morrison that they were not going to sign the contract if there were any "outstanding issues", and seniority was one of the outstanding issues. She then testified that agreement was not reached on health insurance at the June 5 meeting. She was then asked, also on direct examination:

Q. Was agreement reached on health insurance at any time since June 5th until the date of this hearing?

A. All . . . well, I'm not going to go into that.

She testified that at the conclusion of the third meeting, "I don't believe at that time we were ready to do anything. We were still in disagreement on certain issues." There were still open issues at the conclusion of this meeting, and the parties next met on July 14. She testified that at the conclusion of that meeting Morrison asked them to sign the contract, but they responded that they still were not in agreement on every issue. In addition to the "open issues" that are discussed supra, she testified:

In one part that says about sick days, and it also says that for an employee to collect a weekly pay check while being out on disability or workmen's' comp up to ninety days and I was . . . that does not happen, so that would just totally be taken out and he agreed with me and told me he would take it out, but every time a contract came back, it still stated it.

That was the last bargaining session in 1997. The parties had a meeting on February 9, 1998, at which time they discussed negotiations. She testified:

there were certain things that would happen along the way as far as . . . one for instance, it was written in the contract, if you took the day before or the day after a holiday, you would not be paid for the holiday. Well, an instance came up when somebody didn't come in the day before. Well, he said that it had to be both. Well, in the contract it said either/or. So every time something came up, I had to ask him how does he perceive it and how am I supposed to perceive it, so I kept insisting that things were too vague. If it's going to be a written executed contract, that they have to be spelled out for us and things were just not spelled out clearly enough for us to feel comfortable to sign a contract.

T. Schwarting testified that he never signed the contract tendered to him by Morrison because they never reached agreement on all the issues. Schwarting testified that in about May 1998 he was experiencing problems of excessive absenteeism that were causing him difficulty covering jobs. On May 13, 1998, he wrote a memo to all employees informing them of the requirement, "as per your union contract," of giving 5 days' notice, and for the employees to "read your union contract" to learn how many leave days they were entitled to. One week later, T. Schwarting wrote a memo to an employee notifying him of the notice requirements for taking time off as contained in the union contract.

IV. ANALYSIS

The duty to bargain collectively is defined in Section 8(d) of the Act as the duty to meet and confer "in good faith with respect to wages, hours, and other terms and conditions of employment . . . and the execution of a written contract incorporating any agreement reached if requested by either party." An

employer violates Section 8(a)(5) of the Act by refusing to execute a written contract incorporating the terms of a collective-bargaining agreement reached with the union representing its employees. *H. J. Heinz Co. v. NLRB*, 311 U.S. 514, 525, 526 (1941); *Canyon Coals, Inc.*, 316 NLRB 448, 452 (1995). The crucial issue here is whether the parties had a “meeting of the minds” on all substantive issues.

Of the three witnesses, I found Morrison to be the most credible. His testimony was direct, believable and convincing. The only shortcoming to his testimony, his inability to remember the dates of the negotiating sessions is not surprising since they occurred 2 years ago. I therefore credit his testimony and find that by the conclusion of the fourth meeting, in about July, he and the Schwartings had agreed to all the terms of the contract. However, that is not the only reason that I find that the General Counsel has proven that the contract had been agreed to and should have been, on request, executed by the Respondent. After the final meeting in July, Morrison received permission from T. Schwarting to meet with the unit employees during working time in order to explain the contract to them and to conduct a ratification vote on the terms of the contract. The Respondent never explained why it would have allowed Morrison to meet with its employees during their working time to vote on a contract that did not exist. The General Counsel further argues that since the Respondent was paying its employees pursuant to the terms of the contract, and was enforcing other provisions of the contract, that reinforces its position that it had agreed to the contract. I do not fully agree with this argument. The Respondent may have been complying with these terms in order to remain competitive for employees, or simply to keep the employees content. I find more persuasive, however, the wording of T. Schwarting’s memos to the employees where he refers on a number of occasions to the employees’ union contract.

Additionally, I found M. Schwarting’s testimony alleging the lack of an agreement on certain issues confusing and unpersuasive. For example, she testified that she objected to the grievance arbitration provision because she felt that it was unclear. Yet when she was shown a copy of the final contract that Morrison wanted signed, she agreed that the unclear terms had been removed. Finally, I find that the evidence here clearly establishes that the parties understood that they had an agreement. In about late August or early September, Morrison delivered what he considered to be the agreed upon contract to the Respondent. M. and T. Schwarting called him shortly thereafter, and objected to three items that they claimed were not part of the agreement. Morrison changed those provisions as requested and delivered the revised contract to the Respondent a month later. During the following 2 months, T. Schwarting reassured Morrison that he should not worry about it, that he would get his contract. It was not until May 1998, about 7 months later, that Ted Schwarting told Morrison that he had hired a lawyer who wanted to renegotiate the contract. The Respondent never explained why it took it 7 months to realize that the contract did not properly set forth their agreement, and why it reassured Morrison during that period that everything was all right. The obvious explanation is that after agreeing to the contract, the Respondent determined that it was too difficult or expensive to comply with all of its terms and decided that it would be to its advantage to renegotiate the terms of the agreement.

The only contractual article with any uncertainty is article XII, vacations. Although not testified to as fully and completely

as the other contractual provisions, apparently inadvertently, there is enough evidence here to establish that the parties had agreed to this article as well. Morrison testified that this provision was agreed to and this article was in the contract sent to the Respondent and its inclusion was never objected to by the Respondent. More significantly, the parties stipulated that this article was agreed to and followed by the Respondent.

Respondent has a number of defenses that I find have no merit. It defends that the complaint here is barred by Section 10(b) of the Act. Although unfair labor practice charges were filed beginning on September 21, 1998, the first charge that specifically alleges that the Respondent violated the Act by failing and refusing to execute the contract was filed on October 23, 1998. The credited testimony of Morrison establishes that the first time that Schwarting indicated that he would not sign the contract was in May 1998 when Schwarting told him that he had hired an attorney who wanted to negotiate the contract again. Prior to that time, Schwarting’s comments to him were: “Not to worry” and “You’ll have it.” It is well-established law that the 10(b) period commences only when a party has clear and unequivocal notice of a violation of the Act. *Leach Corp.*, 312 NLRB 990 (1993); *Christopher Street Owners Corp.*, 286 NLRB 253 (1987). “Further, the burden of showing such clear and unequivocal notice is on the party raising the affirmative defense of Section 10(b).” *Chinese American Planning Council*, 307 NLRB 410 (1993). The Respondent had been complying with most of the substantive terms of the contract and, prior to May, had been reassuring Morrison that he would sign the contract. The first unequivocal notice of a refusal to execute occurred in May 1998, and this defense must therefore fall. Counsel for the Respondent, further argues in his brief, that the Respondent was not obligated to sign the contract because of the lack of evidence that Morrison obtained the unit employees’ ratification of the terms of the agreement. This argument also must fall for obvious reasons, most importantly that Morrison testified that he presented the agreement to the unit employees and they voted to ratify it. Counsel argues that Morrison was unable to specify the date or dates that he presented the terms to the unit employees and that it is “nearly inconceivable” that Morrison was unable to remember the location of the ratification votes. Both arguments clearly lack merit. Morrison testified that the ratification votes took place in late July or the beginning of August at two of the Respondent’s jobsites, at the invitation of Ted. Schwarting. I can’t blame Morrison for not being more specific considering that he testified about the events almost 2 years after they occurred and that the meetings occurred on jobsites that changed regularly and were, most likely, at two of many New York City public schools.

On the basis of the above, I find that in about July, August, or September, the parties had reached a full agreement that the Respondent was legally obligated to execute. By refusing Morrison’s request to sign the contract, the Respondent violated Section 8(a)(1) and (5) of the Act.

The remaining allegation is that the Respondent violated Section 8(a)(1) and (5) of the Act by refusing to recall Reid and Nesbitt in reverse order of seniority as required by its contract with the Union. Reid, who was hired on February 11, 1998, and Nesbitt, who was hired on May 18, 1998, were laid off with nine other employees on about June 15, 1998. Article VII, seniority, defines seniority as the length of an employee’s continuous service in a particular job classification or category, as

measured from the date that he was hired, and subsection C of this article states that layoffs will be in reverse seniority. The Respondent admits that it recalled out of seniority, but defends that it did so because Nesbitt and Reid were not qualified to perform the work that needed completion. Morrison testified that when T. Schwarting told him this, after the fact, he told Schwarting, "Ted, I can't work with you if you don't call me." This is a perfect example of an 8(a)(5) unilateral change violation. The Respondent bypassed the Union and its contract in recalling employees from layoffs. It is very possible that if the Respondent had expressed its concerns about the recall to Morrison prior to recalling out of seniority, he would have worked something out with the Respondent. By unilaterally abrogating article VII, in this manner, the Respondent violated Section 8(a)(1) and (5) of the Act.

CONCLUSIONS OF LAW

1. The Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union has been a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(1) and (5) of the Act by failing and refusing to execute the contract containing the terms and conditions that it had previously agreed to with the Union, and by unilaterally modifying these terms and conditions of employment by recalling employees out of seniority.

THE REMEDY

Having found that the Respondent has violated the Act, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. Principally, I recommend that the Respondent be ordered to execute the contract that Morrison has been requesting that it do since about October, and to comply with the terms of the contract retroactive to its effective date. Further, I shall recommend that the Respondent be ordered to make whole the bargaining unit employees for losses that they suffered, if any, by the Respondent's failure to execute the contract, as well as Reid and Nesbitt for its failure to recall them in reverse order of seniority, as required by the contract, and the Union in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), and *New Horizons for the Retarded*, 283 NLRB 1173 (1987). As stated above, although refusing to sign the contract, the Respondent complied with most of its substantive terms; I leave it to the supplemental hearing to determine what terms, if any, that it did not comply with.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended²

ORDER

The Respondent, Cross Island Telephone Services, Inc., Islip, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to execute the contract that it had negotiated with the Union in 1997.

² 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) Failing and refusing to comply with the contractual terms regarding recalling laid-off employees in reverse order of seniority.

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

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

(a) Forthwith, execute the collective-bargaining agreement as requested by the Union since in about October.

(b) Give retroactive effect to the terms and conditions of employment of the contract, and make whole its employees, including Nesbitt and Reid, and the Union, for any losses that they may have suffered as a result of its failure to execute the contract, as set forth in the remedy section of this decision.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security records, timecards, personnel records and reports, and all other records necessary to analyze the amount of reimbursement due.

(d) Post at its Islip, New York facility copies of the attached notice marked "Appendix."³ 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 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.

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

APPENDIX

NOTICE TO EMPLOYEES

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 fail or refuse to execute the contract agreed upon between us and Communications Workers of America, Local 1105, AFL-CIO.

WE WILL NOT unilaterally modify the contractual provision for recalling employees in reverse order of seniority.

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

WE WILL execute the contract that we agreed to with the Union in 1997.

³ 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."

DECISIONS OF THE NATIONAL LABOR RELATIONS BOARD

WE WILL give retroactive effect to the terms and conditions of employment contained in the contract, and WE WILL make whole our employees, including Owen Reid and Erskin Nesbitt, and the Union for any losses that they may have suffered by

reason of our failure to execute the agreement, or to comply with the terms of the contract, with interest.

CROSS ISLAND TELEPHONE SERVICES, INC.