

JPH Management, Inc., d/b/a Mid-Wilshire Health Care Center and Health Care Workers Union, Service Employees International Union, Local 399, AFL-CIO. Case 31-CA-24055

December 20, 2001

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN
AND WALSH

On April 9, 2001, Administrative Law Judge Lana H. Parke issued the attached decision. The Charging Party filed exceptions and a supporting brief, and the Respondent filed an answering brief.

The Board has considered the decision and record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions only to the extent consistent with this Decision and Order, and to adopt the recommended Order as modified and set forth in full below.

We find, contrary to the judge, that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union about the Respondent's decision to rescind the July 1999 wage increase.

The relevant facts are as follows. The Respondent owns and operates a nursing home facility. Since at least 1996, the Union has been the designated bargaining representative for employees in the relevant unit. The parties' most recent collective-bargaining agreement expired on June 30, 1999.² The Respondent and the Union negotiated over the terms of a successor collective-bargaining agreement during May and June. At the June 22 meeting, the parties reached a tentative agreement. The unit employees ratified this tentative agreement on June 24. Sometime after the employees ratified the tentative agreement, union negotiator David Estrada presented it

¹ The Charging Party 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.

In addition, the Charging Party contends that the judge's rulings, findings, and conclusions demonstrate bias. On careful examination of the judge's decision and the entire record, we are satisfied that the Charging Party's contentions are without merit.

The Respondent contends that the Charging Party's exceptions should be rejected because they are not in compliance with the Board's Rules and Regulations. We deny this request because the Charging Party's exceptions are in substantial compliance with the Board's Rules and Regulations. Finally, the Respondent contends that because the Charging Party did not present a case at the hearing, but merely "piggy-backed" on the General Counsel's case, it waived its right to file exceptions. We reject this contention.

² All dates refer to 1999 unless otherwise indicated.

to the Respondent's administrator, Tad Yokoyama. Yokoyama stated that he would have to take the tentative agreement to the Respondent's president, Jeoung Lee, for her review and approval. Yokoyama left the tentative agreement in Jeoung Lee's office in her absence. Yokoyama also gave a copy to the payroll office, and wrote a note to Andy Garcia, a payroll official, explaining that it was a tentative agreement. Jeoung Lee never approved the tentative agreement.

On July 1, the Respondent implemented the wage provisions set forth in appendix A of the tentative agreement.³ The paychecks reflecting these wage increases were signed by Il Hie Lee, the Respondent's vice-president. (Il Hie Lee ordinarily signed paychecks in Jeoung Lee's absence.) In early August, upon her return from Korea, Jeoung Lee told Yokoyama that she did not approve of the wage increases and that she wanted to change wages back to what they were before July 1. She thus ordered the removal of the wage increases from employees' next paychecks. On August 9, Yokoyama informed employees that the wage increases given in July were being rescinded.

On August 10, Jeoung Lee met with employees. She told them that the wage increases were not part of the tentative agreement, and that the 30-cent increases were based on the date of hire and were not effective for everybody on July 1. She also stated, *inter alia*, that the increase was too costly and nobody had told her that they had signed a contract on her behalf. Without notifying the Union, the Respondent rescinded the July wage increases. This rescission was reflected on employee paychecks distributed on or about August 10.

After the rescission, the Union filed a grievance alleging, *inter alia*, violations of the 10-year wage scale set forth in appendix A of the tentative agreement. On August 10, Jeoung Lee, accompanied by Gary Jarvis (who had helped negotiate the agreement for the Respondent) and Yokoyama, met with the Union to discuss the grievance. On August 11, Yokoyama met again with the Union. On August 16, the Union filed the underlying charge. On August 17, union negotiator Elizabeth Barba wrote a letter to Jeoung Lee in response to the parties' August meetings. In this letter, Barba protested the August wage reduction, asserted the Union's position that it had a binding collective-bargaining agreement with the Respondent, demanded compliance with the wage scales and retroactive pay, and requested another meeting with the Respondent regarding the grievance.

³ Appendix A contained wage rates effective July 1, and set a 10-year wage scale.

Respondent again met with the Union. Following this meeting, Yokoyama sent two letters to Blanca Correa, a union organizer. In his letter of February 24, 2000, Yokoyama informed Correa that the Respondent would reinstate the rescinded 30-cent/hour wage increase of July 1. And in his letter of March 16, 2000, Yokoyama informed Correa that the Respondent had completed its collection and calculation process regarding the retroactive reinstatement of the wage increase. Yokoyama also stated that the retroactive payment was distributed on March 10, 2000, and that that distribution completed the retroactive payment to all qualified employees covered by the July 1 wage increase.

We adopt the judge's finding that the Respondent did not violate Section 8(a)(5) and (1) by refusing to sign the tentative agreement. The complaint also alleges that, "[o]n or about August 10, 1999, Respondent unilaterally rescinded wage increases granted to employees in the Unit pursuant to the agreement reached between Respondent and the Union on June 22, 1999, without giving notice to or affording the Union an opportunity to bargain with Respondent about the conduct." The judge dismissed this allegation. The Charging Party has accepted, inter alia, to this dismissal.

In dismissing this allegation, the judge essentially found that, in light of the fact that no final agreement had been reached, the Respondent had mistakenly implemented the wage increase. The judge also found that the Respondent was entitled to correct this mistaken implementation, but that it had to notify the Union and bargain over how the mistake would be corrected. According to the judge, by not notifying the Union and bargaining over the rescission, the Respondent had unilaterally changed employees' wages. The judge implicitly found that, by failing to notify and bargain with the Union regarding the rescission of the wage increases, the Respondent had, in fact, violated Section 8(a)(5).⁴ Notwithstanding this apparent finding, the judge went on to find that, after the Union filed a grievance regarding the rescission, the Respondent entered into a course of fruitful discussions with the Union which demonstrated that the "Respondent clearly accepts the concept and obligation of collective bargaining."⁵ The judge also noted that the Respondent had made concessions to the Union during the course of these discussions. In light of the Respondent's postrescission behavior, the judge found that the unilateral change did not justify a remedial order.

⁴ Under Sec. 8(a)(5), it is an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees"

⁵ See sec.II,B,2 of the judge's decision.

We disagree. As stated above, on July 1, the Respondent implemented wage increases pursuant to its tentative agreement with the Union. On August 9, Yokoyama informed employees that the July wage increases were being rescinded. On August 10, Jeoung Lee met with employees and informed them that their wage increases were not part of the tentative agreement. That same day, the Respondent, without notifying the Union and bargaining about the matter, rescinded the July wage increases. This rescission was reflected on employee paychecks distributed on or about August 10. Thus, it appears that employees had been receiving a wage increase for over 5 weeks.

Contrary to the judge, we find that the unilateral rescission of the wage increase justifies the issuance of a cease and desist order.⁶ It is well settled that, during contract negotiations, an employer may not make unilateral changes to represented employees' terms and conditions of employment without bargaining to impasse. See *NLRB v. Katz*, 369 U.S. 736, 742-747 (1962); *Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967), enfd. sub nom. *Television Artists AFTRA v. NLRB*, 395 F.2d 622 (D.C. Cir. 1968). Wages are, of course, a mandatory subject of bargaining. See *NLRB v. Borg-Warner Corp.*, 356 U.S. 342, 348 (1958). Here, on August 10, the Respondent rescinded employees' wage increases without notifying the Union and bargaining with the Union. This constitutes a violation of Section 8(a)(5). The Respondent was obligated to bargain with the Union when it decided to rescind the wage increases. This violation was not rendered moot because the Respondent, having previously ignored its bargaining obligation, subsequently discussed the matter with the Union and ultimately reinstated the wage increases. Accordingly, we shall issue a cease and desist order.⁷

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge, as modified and set forth in full below, and orders that the Respondent, JPH Management, Inc., d/b/a Mid-Wilshire Health Care Center, Los Angeles, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Rescinding unit employees' wage increases without notifying and bargaining with the Union.

⁶ The General Counsel did not allege that the implementation of the wage increases violated the Act.

⁷ Because the Respondent retroactively reinstated the wage increases to unit employees as of March 2000, a backpay remedy is not necessary.

(b) In any 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 actions necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its facility in Los Angeles, California, copies of the attached notice marked "Appendix."⁸ Copies of the notice, on forms provided by the Regional Director for Region 31, 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 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 employed by the Respondent at any time since August 10, 1999.

(b) 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.

MEMBER LIEBMAN, concurring.

I join in the Board's decision. I write separately only to highlight certain aspects of the Respondent's conduct that, had they been squarely challenged, might have presented a different case.¹

Based on the judge's determination that the Respondent's negotiators clearly communicated to the Union that the Respondent's president (Jeoung Lee) had to approve any final contract, I agree that the Respondent did not violate Section 8(a)(5) by refusing to execute the tentative collective-bargaining agreement.

A closer case would have been presented, however, were the issue whether the Respondent had breached its duty to bargain in good faith by appointing negotiators without the authority to carry on meaningful bargaining,

⁸ 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."

¹ The General Counsel has not filed exceptions. The Charging Party's single exception with respect to execution of the agreement is denominated as an exception to the judge's credibility determinations, although various supporting arguments are advanced.

including the authority to reach a final agreement. This is particularly significant since it appears that the Respondent's president was unavailable (or treated as if she were) during the negotiations and for more than a month after the tentative agreement was reached. This arrangement, not surprisingly, led to turmoil. Surely, even if the negotiators legitimately lacked authority to finalize an agreement without the president's approval, her extended absence (and the resulting failure to finalize the agreement) raises serious questions about the Respondent's good faith. In this era of instantaneous communications, putting the principal out of touch for an extended period, while depriving negotiators of meaningful bargaining authority, combine to reflect a bad-faith approach to bargaining. See, e.g., *S-B Mfg. Co.*, 270 NLRB 485, 492 (1984).

One apparent consequence of the president's absence, moreover, was the implementation of the wage increase called for by the tentative agreement. That step, though ultimately rescinded, is at least some evidence that the Respondent intended to be bound by the tentative agreement and that it could properly be held to the contract on an adoption-by-conduct theory. See, e.g., *E.S.P. Concrete Pumping, Inc.*, 327 NLRB 711, 712-714 (1999).

Given the posture of this case, however, the Board is not called on to decide these issues.

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.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT rescind unit employees' wage increases without notifying the Union and bargaining with the Union.

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

JPH MANAGEMENT, INC. MID-WILSHIRE
HEALTH CARE CENTER

Anne P. Pomerantz and Steven Wyllie, Esqs., for the Acting General Counsel.

Thomas A. Lenz, Esq., of Cerritos, California, for the Respondent.

James G. Varga and Monica T. Guizar, Esqs., of Los Angeles, California, for the Charging Party.

DECISION

STATEMENT OF THE CASE

LANA H. PARKE, Administrative Law Judge. This case was tried in Los Angeles, California, on February 12 through 14, 2001. The original and first amended charges were filed by Health Care Workers Union, Service Employees International Union, Local 399, AFL-CIO (the Union or Local 399) against JPH Management, Inc., d/b/a Mid-Wilshire Health Care Center (Respondent) on August 16 and October 26, 1999, respectively.¹ A complaint issued October 28, alleging that Respondent violated Section 8(a)(5) and (1) of the National Labor Relations Act (the Act). Motion to transfer case to the Board and for summary judgment for failure to file answer was filed by counsel for the General Counsel on January 19, 2000. On August 15, 2000, the National Labor Relations Board (the Board) issued its Decision and Order granting in part and denying in part Motion for Summary Judgment and remanding.²

In its decision, the Board concluded that Respondent had not effectively denied a portion of the complaint alleging that Respondent, on or about August 9, 1999, failed and refused to bargain collectively with the Union by dealing directly with represented employees about their wages and terms and conditions of employment. The Board concluded that Respondent had engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, ordered it to cease and desist from dealing directly with represented employees about their wages and terms and conditions of employment and to take certain affirmative action to effectuate the policies of the Act. The Board denied the General Counsel's Motion for Summary Judgment with respect to the allegations set forth in complaint paragraphs 10(a) and (c). Amended complaint issued on October 24, 2000.

At issue herein is whether Respondent unlawfully failed to bargain with the Union by refusing to sign an agreed-upon collective-bargaining contract (the 1999 agreement) and by unilaterally rescinding wage increases granted to employees.

On the entire record, including my observation of the demeanor of the witnesses,³ and after considering the briefs filed by the Acting General Counsel and Respondent, I make the following

¹ All dates are 1999 unless otherwise indicated.

² *JPH Management, Inc.*, 331 NLRB 1032 (2000).

³ Where not otherwise noted, the findings are based on the findings in *JPH Management, Inc.*, id., pleadings, the stipulations of counsel, and/or unchallenged credible evidence.

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation, owns and operates a nursing home for the elderly at its facility in Los Angeles, California, where it annually purchases and receives goods valued in excess of \$40,000 from other enterprises located in California, each of which other enterprises has received such goods in substantially the same form directly from points located outside the State of California. Respondent annually, in the course and conduct of operating its nursing home, derives gross revenues in excess of \$100,000. I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Facts

1. Background

Jeoung Lee (J. Lee) is president of Respondent. Her husband, Il Hie Lee (Il Lee), is vice president. Although Respondent is a corporation, witnesses spoke of J. Lee as the "owner." Clearly, she is Respondent's primary authority figure.

Since at least 1996, the Union has been the designated exclusive collective-bargaining representative of Respondent's full-time and regular part-time dietary employees, housekeeping employees, nursing employees, clerical employees, laundry employees, maintenance employees, and activity assistants employed at its Los Angeles, California facility. Respondent and the Union were parties to a collective-bargaining agreement covering these employees, which was effective by its terms from July 1, 1996, through June 30, 1999.

2. 1999 collective bargaining

In 1999, Respondent and the Union conducted six negotiating sessions for the terms of a successor agreement on the following dates: May 11 and 18, June 1, 11, 15, and June 22. David Estrada, union director of education and training, and Elizabeth Barba (Estrada and Barba, respectively) represented the Union at all six sessions. Tad Yokoyama, Respondent's administrator, and Gary Jarvis, Respondent's insurance consultant and agent for negotiations (Yokoyama and Jarvis, respectively), represented Respondent at all six sessions.⁴ An employee bargaining committee consisting of Maria Silvia Calderon (Calderon), Karen Geban (Geba), Sonia Miron (Miron), and Rodolpho Ortiz also attended negotiations.

⁴ Yokoyama terminated his employment with Respondent in April 2000. Jarvis testified that he operates a risk management company called Safety Solutions and an insurance agency called Gary L. Jarvis Insurance Agency in Orange County, California. He is the insurance agent for Respondent with health care provider Kaiser Permanente and has conducted safety planning for Respondent. Because of Jarvis' business background and because health care was an anticipated issue, sometime in May, Yokoyama asked him to attend negotiations between Respondent and the Union. Neither Jarvis nor Yokoyama had participated in labor contract negotiations before.

According to Jarvis, prior to commencement of negotiations, J. Lee, who speaks broken English, met with him and Mr. Yokoyama. She told them to go to the negotiating meetings and bring back information. Yokoyama was to be chief spokesperson. Yokoyama testified that his role was to represent J. Lee at negotiations, to give information requested by the Union during negotiations, and to collect any information or agreement and present it to J. Lee. If Yokoyama said that Jarvis was the person who actually spoke during negotiations.

Estrada testified that in April, while setting negotiation dates, Yokoyama told Estrada that he would be chief spokesperson for Respondent. According to Estrada, there was no mention of J. Lee whom he knew to be the owner of Respondent. Testimony regarding the 1999 negotiating sessions is as follows:

a. May 11 negotiating meeting

According to Estrada, Jarvis told the negotiating group that he was an insurance salesman hired by Respondent to assist Yokoyama and that Yokoyama had the authority to negotiate. Estrada testified that Yokoyama said he would be the one to reach final agreement. Under cross-examination, Estrada more specifically testified that Yokoyama said, "I have the authority to reach final—to negotiate this contract and reach final agreement for the company," and Jarvis added, "That is correct. Tad has full authority to reach final agreement for the company." Estrada further recalled that Jarvis said J. Lee had empowered Yokoyama with the authority to negotiate and reach final agreement for the company. Estrada denied there was any discussion that a final agreement would need to be approved by J. Lee.

Yokoyama testified that Estrada asked why J. Lee was not present at negotiations, and that Jarvis answered that she was extremely busy and could not attend. According to Yokoyama, Jarvis told the Union that J. Lee would be the final person to approve any contract. In discussing proposals, Estrada said the Union was looking for substantial wage and benefit increases. Yokoyama said Respondent was not thinking in those terms.

Geban testified that in response to Estrada's asking who represented Respondent, Yokoyama and Jarvis said they were there on behalf of J. Lee, to bargain and get a contract. She recalled that Yokoyama said that J. Lee was busy and could not attend negotiations. She denied that either Yokoyama or Jarvis ever said that J. Lee had to approve or review the terms of any contract.

Calderon, under direct examination, testified as follows:

Q. Did anybody say anything about who could sign the contract for the company?

A. Mr. Tad.

Q. And what did Mr. Tad say?

A. They say they represent the company and they go—they have the power and the—to negotiate the contract.

Q. Do you recall if they said anything specifically about signing a contract?

A. No.

Under cross-examination, Calderon testified that in the beginning of nearly every meeting, Estrada asked why J. Lee was not there. According to her, each time the question arose, Jarvis

and Yokoyama responded that they were "there to represent to do it and sign the contract."⁵

b. May 18 negotiating meeting

In his direct testimony Estrada said the Union proposed that Respondent pay for health insurance for employees and their families, a significant increase from its practice of paying a small percentage of the insurance cost of the employees only. Yokoyama commented that J. Lee did not have a lot of money to spend, and that she didn't think the people needed the pay raise. Estrada asked that J. Lee come to the negotiations. Yokoyama said that was not necessary, that he had the authority to negotiate for J. Lee. Under cross-examination, Estrada more expansively testified that Yokoyama said that J. Lee felt employees were receiving adequate fringe benefits and wages. Estrada said, "If that is true then we need to get Mrs. Lee down here so she can look at these workers in the face. . . . and tell them. . . . they are making too much money and they have adequate fringe benefit" Estrada said he would like to have J. Lee present. Yokoyama said, "I have authority for the company and I represent the company, we don't need Mrs. Lee."

c. June 1 negotiating meeting

The parties exchanged written proposals. Estrada could not recall specifics of Respondent's proposals.

d. June 11 negotiating meeting

Estrada testified that seniority language was agreed to, but was otherwise vague about what had transpired.

e. June 15 negotiating meeting

Estrada handed Yokoyama a 10-day "Notice to Strike," informing him that the Union intended to engage in an open ended strike against Respondent beginning July 1. Estrada could not recall whether any proposals were exchanged or agreements reached. He denied that there was any discussion of anyone in higher management having to oversee or approve negotiations.

f. June 22 negotiating meeting

This meeting lasted 8 to 9 hours. Linda Gonzalez, a Federal mediator, attended. According to Estrada, the parties reached a final agreement pending ratification by the unit employees. The parties initialed a six-page document entitled "Mid Wilshire Convalescent Hospital Inc., Tentative Agreement, Summary of the Agreement," which included an appendix of wage rates effective July 1, 1999.⁶ According to Estrada, the parties discussed the fact that the bargaining unit employees needed to vote on the provisions before the agreement could be considered final. Yokoyama said he understood that the employees needed to vote on the agreement. Estrada asked if a ratification meeting could be held at Respondent's facility on June 24, and Yokoyama agreed. Estrada testified that there was no discus-

⁵ This is in direct contradiction to her earlier testimony that she could not recall anything being said about signing the contract. I cannot accept Calderon's testimony that Yokoyama and/or Jarvis said they would sign any contract.

⁶ The document, introduced as GC Exh. 7, bears the initials of Estrada and Yokoyama next to every provision heading, including those on appendix A, which set forth the 10-year wage scale.

sion about J. Lee or anyone else in management having to approve any agreement and that Yokoyama said he would proceed immediately to make arrangements to implement the wages and fringe benefits effective July 1. The tentative agreement included a provision that copayment costs for doctor visits and drug prescriptions would be reduced at the beginning of 2000. According to Estrada, the parties also agreed to extend the pay scale from 6 to 10 years, increase the scale levels, and provide for a 30-cent across the board wage increase effective July 1 and another effective July 1, 2000. Estrada testified that in addition to the annual across the board increases, as soon as an employee completed the specified periods of employment, the employee moved to a new wage level.

According to Yokoyama, after the parties reached a tentative agreement, the Union asked if Respondent was going to sign the contract. Yokoyama told them that he could not sign the contract without J. Lee signing the contract, that she would be the final person to approve the contract. Yokoyama testified that he reminded the Union that he would initial each point, but the final approval would have to be made by J. Lee. He testified that he had never seen appendix A to the 1999 agreement until the June 22 meeting but that he thought it was all right to initial it because J. Lee would have to review the appendix or anything in the contract.⁷

Jarvis testified that the Union distributed a summary of the proposed contract provisions. According to Jarvis, at that as well as other meetings, Yokoyama said that any tentative agreement had to be taken back to J. Lee for her final disposition on it. Jarvis said he told the Union, "Tad has to take this back to his team and get it ratified also." Jarvis testified that after he and Yokoyama were given the summary of provisions, Estrada asked, "When is Mrs. Lee going to look at this?"⁸

Miron testified that at this meeting Yokoyama and Jarvis said they wanted "the contract, and they want to sign it. They want to finish that." When asked if Respondent's representatives had said that J. Lee had to approve the agreement, Miron testified that either Yokoyama or Jarvis said they "was [sic] to talk to J. Lee about it." She could not recall if anyone from the Union said anything in response.⁹

⁷ Yokoyama's affidavit given to the Board during the investigation stage of the case on September 21, 1999, was received into evidence. The affidavit states, "On 6/22, neither Gary nor I mentioned Mrs. Lee or whether she had to approve the 6/22 agreement before it became a binding agreement. Gary and I concentrated on reviewing the terms of the agreement that I eventually initialed." That is not consistent with Yokoyama's testimony at the hearing. However, his affidavit also reflects statements that are consistent with his testimony that he and Jarvis told the Union J. Lee would have to approve the final contract. I don't find this inconsistency to vitiate his credibility.

⁸ Jarvis' testimony tended to be conclusionary and marked by animosity toward the Union's bargaining tactics. It was difficult to determine whether his testimony reflected specific statements of individuals or inferences he drew from discussions in the meetings. However, he specifically testified that Yokoyama said he would take the summary agreement back to J. Lee, and I find that testimony to be credible.

⁹ Miron appeared reluctant to give this testimony, but there was no confusion in her answer. In redirect examination, Miron was asked if, during the negotiations, Yokoyama or Jarvis ever said that J. Lee had to approve the contract. Miron said she did not remember. Her failure to

3. Events following ratification

The unit employees ratified the 1999 agreement on June 24. Following the ratification vote, Estrada and the bargaining committee signed the full draft of the 1999 agreement and presented it to Yokoyama in his office. Estrada testified that Yokoyama said he wanted to review the draft and compare it to his notes. According to Estrada, Yokoyama said he would implement the provisions of the agreement, especially the wage provisions, effective July 1.

Yokoyama testified that when Estrada presented him with the draft agreement, Yokoyama said he would have to take it to J. Lee for her review and approval. He thereafter personally left the draft agreement in J. Lee's office in her absence.¹⁰ Yokoyama did not know whether J. Lee saw the draft agreement prior to her return from Korea. He also gave a copy to the payroll office, writing a note to Andy Garcia who did the payroll explaining that it was a tentative agreement.

On July 1, Respondent implemented the wage provisions set forth in appendix A of the 1999 agreement. The paychecks reflecting the wage increases were signed by Il Lee who ordinarily signed paychecks in J. Lee's absence. In early August, upon her return from Korea, J. Lee told Yokoyama that she did not approve of the wage increases and that she wanted to change wages back to what they were prior to July 1.¹¹ She ordered the removal of the wage increases from the next paychecks. On August 9, Yokoyama informed employees that the wage increases given in July were being rescinded. According to Geban, he told employees the contract wasn't clear.

On August 10, J. Lee held a meeting with employees. She told employees that the increases were not part of the agreement, that the 30-cent increases were based on the date of hire and were not effective for everybody on July 1, that started a new contract. She said that the increase was too costly and nobody had told her that they had signed a contract on her behalf and that she was confused because her mother had passed away. Without notifying the Union, Respondent rescinded the July 23 wage increases, which rescission was reflected on employee paychecks distributed on or about August 10.¹²

remember either man using the words posed in the question does not alter her testimony on direct that Yokoyama or Jarvis said they were to talk to J. Lee about the contract, and I find that Yokoyama or Jarvis did, in fact, make such a statement.

¹⁰ J. Lee was out of the country and absent from the Company for about a month following her mother's death. She went to Korea to bury her mother who had been a patient at Respondent's facility and had died sometime between June 22 and July 23.

¹¹ I accept Yokoyama's testimony regarding the wage increases, and I reject Estrada's testimony that Yokoyama told him the wage increases would be implemented July 1. Therefore, it is reasonable to conclude that the wage increases were mistakenly implemented by Respondent's bookkeeping department and signed by Il Lee who does not appear to have had any significant role in Respondent's labor relations or day-to-day management.

¹² Counsel for the Acting General Counsel asserts that J. Lee's statements at the August 10 meeting are an admission that a contract existed. I cannot draw such an inference. While J. Lee may have referred to the 1999 agreement as a "contract," there is evidence she had limited English skills. Moreover, she reportedly referred to the "contract" as having been signed. In fact, no agent of Respondent ever

Estrada testified that when he learned the wage increases were rescinded, he telephoned Yokoyama who told him that somebody at corporate had rescinded the wage increases. Yokoyama apologized for the confusion and said he would get back with Estrada to discuss it further.

In August, the Union filed a grievance with Respondent alleging, inter alia, violations of the 10-year wage scale set forth in appendix A of the 1999 agreement. On August 10, J. Lee, accompanied by Jarvis and Yokoyama, met with the Union to discuss the grievance. On the following day, Yokoyama met again with the Union. On August 16, the Union filed the initial underlying charge with the Board. By letter, dated August 17, Barba wrote to J. Lee a response and overview of the parties' August meetings. In pertinent part, Barba protested the August reduction of wages, asserted the Union's position that it had a binding agreement with Respondent, and demanded compliance with the wage scales and retroactive pay. Barba requested a meeting with Respondent on the grievance issues.

Respondent thereafter met with the Union. No specific evidence was adduced at the hearing regarding the substance of the meetings. However, two letters from Yokoyama to the Union refer to the meetings. By letter dated February 24, 2000, Yokoyama wrote to Blanca Correa (Correa), union organizer. In pertinent part, the letter reads:

Per your request after our telephone conversation on Tuesday, February 22, 2000, I am writing this letter to notify you of our implementation of the \$.30/hour increase that was part of the CBA effective 7/1/99.

Initially, Mid-Wilshire Health Care Center's interpretation of the \$.30 increase was that the increase was to be given at each Union member's anniversary [sic] date/date of hire not the across the board increase for all members from July 1st. So, we have been increasing the rates of all Union members in the amount of \$.30/hour, on their anniversary [sic] date/date of hire.

After a meeting recently, Mrs. Lee decided to start paying the \$.30/hour according to the Union's CBA effective July 1, 1999. Therefore, the payment for retroactive increase of \$.30/hour was distributed from about the week starting on February 7, 2000. Initial distribution of retroactive [sic] payment was for all the Union employees with the anniversary [sic] date/date of hire from July 1–December 31. For employees with anniversary [sic] dates in January–June, we are in the process of gathering all the data necessary to calculate and process a payment as soon as possible. I will inform you when the payments will be made as soon as I receive that information.

By letter dated March 16, 2000, Mr. Yokoyama wrote again to Ms. Correa. The letter, in pertinent part reads:

This is a follow-up letter from the February 24, 2000 correspondence concerning the implementation of the

signed the full draft of the 1999 agreement. Therefore, it appears that J. Lee must have been referring to the initialed tentative agreement. In absence of supporting evidence that she regarded the 1999 agreement as a binding contract, I cannot find any admission.

\$.30/hour increase that was part of the CBA effective 7/1/99.

We have completed our process of collection and calculation of all the retroactive payment of \$.30 per hour increase for all the effected [sic] employees with the anniversary date/date of hire from January through June. The retroactive payment was distributed on Friday, March 10, 2000.

This completes the retroactive payment to all the qualified employees who are covered by the July 1, 1999 Collective Bargaining Agreement. Please contact me if you have any questions concerning the retroactive increases.¹³

In April 2000, Samuel C. Park (Park) replaced Yokoyama as Respondent's acting administrator.

At some point, the State of California legislated that certain monies, so-called "pass-through wage increases" be paid to nursing facilities such as Respondent to go directly to specified health care workers as a pay supplement. Thereafter, the Union filed a charge against Respondent concerning its failure to supply information and to bargain about the 1999 California Legislative Wage Pass-Through. Sometime in June 2000, the Union requested a meeting with Respondent to discuss the 1999 wage pass-through. In July 2000, J. Lee, Park, and Lenz met with Estrada and other members of the bargaining committee. Lenz provided the Union with requested information relating to the 1999 wage pass-through.¹⁴

According to Park, at the July 2000 meeting, Estrada said that the increase set out in the 1999 agreement had been given to employees and then taken back, and by so doing, Respondent had violated the contract. The Union took the position that employees were entitled to two increases per year by the terms of the 1999 agreement.¹⁵ Park testified that Respondent's posi-

¹³ Counsel for the Acting General Counsel argues that these two letters constitute further admissions by Respondent that a binding collective-bargaining agreement existed. I cannot reasonably draw that inference. Yokoyama was entirely inexperienced in labor negotiations. His use of the term "CBA," under all the circumstances, appears to be nothing more than a reference to the initialed 1999 agreement, which, although put into final draft, was neither signed by Respondent nor accepted by it. The fact that Respondent had implemented all the terms of the 1999 agreement except for the wage and health benefit provisions also fails to show that Respondent considered itself bound by the terms of the 1999 agreement. The letters are part of a course of discussion with the Union aimed at resolving the Union's grievance over Respondent's August wage changes. Counsel for the Acting General Counsel points out Yokoyama testified in cross-examination that even as of the year 2000, he thought there was a final agreement with the Union. Given his other testimony regarding the need for J. Lee's approval, I cannot infer from that statement that Yokoyama believed he bound Respondent to the 1999 agreement when he initialed it. The statement is susceptible of more than one meaning. Perhaps Yokoyama believed that the discussions, which took place in August and February 2000, resulted in a final agreement. Without further explication, which neither party chose to make, no reliable inference is possible.

¹⁴ The charge concerning the pass-through wages settled by bilateral agreement in August 2000, while the parties were already meeting over the matter.

¹⁵ Park was referring to the Union's construction of the 1999 agreement that in each of the years 1999 and 2000, employees were to be

tion was that the language of the 1999 agreement provided for only one yearly increase, which would occur when an employee moved from one anniversary scale to the next. According to Park, J. Lee said that she did not approve the wage scale provision because it did not make sense. Park said the Union pointed out that Yokoyama had looked at the provision and initialed it. J. Lee, Park, and Lenz met separately to discuss the wage scale and increase and upon returning to the meeting said that Respondent did not agree to the Union's interpretation of the wage language of the 1999 agreement and that no binding agreement had been reached in 1999. Estrada testified that the 2000 discussions were restricted to discussion of Respondent's proposals to settle the outstanding unfair labor practice complaint. When pressed, he admitted the 2000 meetings, at least in part, included discussion of the 1999 agreement.¹⁶

On August 15, 2000, the Board issued its Decision and Order granting in part and denying in part Motion for Summary Judgment and remanding. The Board concluded:

By bypassing the Union and dealing directly with employees in the Unit about their wages and terms and conditions of employment on or about August 9, 1999, the Respondent has failed and refused to bargain collectively with the exclusive collective-bargaining representative of its employees, and has thereby engaged in unfair labor practices.

In August 2000, Park, Lenz, and Eleana Liu (Liu), Respondent's chief financial officer met with the Union. According to Park, Estrada brought up the health insurance copayments, saying the union position was that the copayments should be \$10. Park said that J. Lee had decided that Respondent would keep its established \$15 copayment because it had increased the percentage of premiums paid by Respondent based on seniority. Park testified that Estrada said the Union had a better health plan and that he could give Respondent information on that.

In October 2000, Lenz, Park, Liu, and two other employees of Respondent met with the Union. According to Park, the parties' positions with regard to the wage increase set out in the 1999 agreement were essentially the same, and Respondent informed Estrada that they were still looking at the health plan information the Union had furnished.

Park testified that during the 2000 meetings, the Union consistently maintained that a binding contract existed between the Union and Respondent. Respondent consistently maintained that the 1999 agreement had never been finally agreed to and

given a general increase and then another increase would occur as they moved from one scale level to another within their first 10 years of employment.

¹⁶ I found Estrada to exhibit a resistance to Respondent's questions about the 2000 meetings that bordered on evasion. He appeared reluctant to testify to what had occurred in the meetings and insisted that if he had taken notes of the meetings, he did not keep them. In response to questions as to whether meetings had taken place and what subject matter was discussed, he generally responded that he did not recall and only furnished more specific information when pressed. I rely on Park's testimony regarding the 2000 meetings. Park's manner was straightforward and candid, and much of his testimony was supportive of the Union's position.

that the 2000 meetings were negotiations of two unresolved provisions: health and welfare and wages. By 2000, according to Park, Respondent was following all the terms of the 1999 agreement except for the health and welfare clause and the wage scale.

Park also identified a series of letters addressed to Estrada from Lenz, copies of which he received. Estrada denied having received any of the letters. In this, as in other testimony, I found Estrada to be a resistant, somewhat hostile witness. However, there was no evidence adduced that the letters were actually mailed to Estrada, and I do not find it necessary to reach the question of whether he received the letters. Essentially, the letters do no more than set forth the parties' positions to which Park credibly testified.¹⁷

B. Analysis and Conclusions

1. Respondent's refusal to sign the 1999 agreement

Section 8(d) of the Act addresses the obligation to bargain collectively and requires the execution of a written contract incorporating any agreement reached if requested by either party. The Acting General Counsel and the Charging Party assert that Respondent and the Union reached binding agreement on unit employment terms and conditions in June 1999, and that Respondent's subsequent refusal to execute a contract embodying the agreed-upon terms constitutes a refusal to bargain within the meaning of Section 8(a)(5) and (1) of the Act. The crux of the case is whether the parties reached complete and final agreement on all material terms of the tentative agreement. If they did, Respondent's acknowledged refusal to execute a contract is a violation of the Act as an unlawful refusal to bargain. *H. J. Heinz Co. v. NLRB*, 311 U.S. 514 (1941). Contrarily, if, as Respondent urges, there was no agreement or "no meeting of the minds," then it was not unlawful for Respondent to refuse to execute the written contract presented to it on June 24, as the Board has no authority to order an employer to execute an agreement it has not accepted. *H. K. Porter Co. v. NLRB*, 397 U.S. 99 (1970).

The duty to bargain carries an obligation to appoint a negotiator with genuine authority to carry on meaningful bargaining regarding fundamental issues. *Schmitz Meat, Inc.*, 313 NLRB 554 (1993); *Wycoff Steel*, 303 NLRB 517 (1991). However, as long as negotiations are not thereby stymied or inhibited, an employer is not required to appoint an individual possessing final authority to enter into an agreement. *Wycoff Steel*, supra. The law is also clear that an agent assigned to negotiate a collective-bargaining agreement is clothed with "apparent authority to bind the principal in the absence of clear notice to the

¹⁷ Respondent argues that the letters confirm the Union's participation in renewed negotiation of the 1999 settlement and thus demonstrate the Union's acknowledgement that no binding agreement existed. That inference cannot be drawn. The Union may attempt to reach a settlement of its dispute with Respondent over the 1999 agreement without abandoning its position that a binding agreement exists. It is clear from Park's testimony that in the course of the 2000 meetings, the Union never altered its position that the 1999 agreement was binding. The testimony regarding the 2000 meetings is significant only insofar as it reflects the parties' stances on the 1999 agreement and as Estrada's manner of testifying further eroded his credibility.

contrary.” *Las Vegas Sands, Inc.*, 324 NLRB 1101 (1997), enf. 172 F.3d 57 (9th Cir. 1999). Therefore, if the agent does not have authority to bind his principal, notice of that must be clearly and unambiguously given. *Induction Services*, 292 NLRB 863 (1989). If an employer’s agent does not clearly communicate the existing condition precedent of his principal’s approval of any agreement, the employer’s refusal to sign the agreement is unlawful. *Las Vegas Sands, Inc.*, supra at 1109. If, however, negotiators on the other side are apprised in advance of a requirement that any final and binding agreement is dependant on approval by the employer and that the agreement fashioned by the parties is only a tentative one, then either party has the right to reject it after presentation to its principal. *Seiler Tank Truck Service*, 307 NLRB 1090 (1992). The burden of proof on the issue of whether an agreement exists is on the Acting General Counsel. See *Demolition Workers Local 95*, 330 NLRB 352 (1999); *Teamsters Local 287 (Reed & Graham)*, 272 NLRB 348 (1984).¹⁸

The dispositive issues in this case are what authority Yokoyama and/or Jarvis possessed to bind Respondent by their negotiations and whether Yokoyama and/or Jarvis conveyed to the Union that J. Lee’s approval was a condition precedent to any final and binding collective-bargaining agreement. Those issues can only be resolved by determining the respective credibility of witnesses to the 1999 negotiations.¹⁹ After a careful review of the record and the parties’ arguments, I have concluded that Yokoyama’s testimony of what was said during the 1999 negotiations must be accepted. In reaching this conclusion, I have considered the fact that J. Lee did not testify, and no explanation for her absence was given. However, she could not have testified to what occurred during the 1999 negotiations, and I do not find her failure to testify to warrant an inference that her testimony would have been unfavorable to Respondent’s position. When she returned from Korea, she took immediate steps to disavow any approval of the 1999 agreement. I also note that Barba who, along with Estrada, negotiated for the Union in 1999 was not called as a witness, although

¹⁸ Respondent argues that there was a misunderstanding between the parties as to what the wage scale (appendix A to the 1999 agreement) really meant; therefore, no meeting of the minds occurred. I do not find it necessary to reach this issue. However, I note that under Board law, bargaining parties need not have identical subjective understandings of the meaning of material terms in a contract as long as the terms are unambiguous “judged by a reasonable standard.” *Teamsters Local 471 (McGarvey Coffee)*, 308 NLRB 1 (1992), and cases cited therein. I find the terms of the wage provision and wage scale in the 1999 agreement to be clear and unambiguous.

¹⁹ The Acting General Counsel, citing *University of Bridgeport*, 229 NLRB 1074 (1977), argues that the implementation of the wage and certain other terms of the 1999 agreement, standing alone, shows the authority of Yokoyama and Jarvis to bind Respondent. The argument would carry force if the terms had been implemented while J. Lee was actively involved in the daily operation of the Company from June 24 through July. The evidence, however, suggests that because of the critical illness and death of her mother, she did not review the 1999 agreement prior to her return from Korea. It is the Acting General Counsel who bears the burden of proof, and the Acting General Counsel has not shown that J. Lee reviewed and approved the implementation of the wage or other provisions.

her testimony would presumably be more compelling than the testimonies of the employee negotiating committee. No explanation for her absence was given. I have also considered the fact that Yokoyama no longer works for Respondent and, therefore, is a more neutral witness than Estrada.

Not only have I found Yokoyama’s manner and demeanor as a witness to be more convincing than Estrada’s, I note that the circumstances of the negotiations and other testimony support a conclusion that not only did Yokoyama communicate the necessity of preapproval by J. Lee, but that the Union understood that to be the case. Both Jarvis and Yokoyama were inexperienced in labor negotiations. It is unlikely that they would be given carte blanche to bind Respondent. Estrada admitted that in responding to wage and benefit proposals, Yokoyama referred to J. Lee’s opinion on the subject. According to Calderon, Estrada asked why J. Lee was not at negotiations at nearly every meeting. At one point, Estrada demanded that J. Lee be present at negotiations. The persistent urging to have J. Lee present suggests that Estrada was aware J. Lee’s approval of contract terms was necessary. When testifying as to the words used by Yokoyama and Jarvis, members of the Union’s negotiating team recalled the two claimed the authority to “negotiate” or “bargain.” The authority to negotiate is not intrinsically equivalent to the authority to reach final agreement; moreover, Miron specifically recalled Yokoyama or Jarvis saying they had to talk to J. Lee about the contract. Finally, the document initialed on June 22, specifically stated it to be a tentative agreement. Estrada contended that the agreement reached on June 22, was tentative only insofar as it depended on employee ratification, and the Acting General Counsel asserts that the evidence establishes that the only condition precedent to the contract’s execution was the ratification vote. However, there is nothing on the face of the tentative agreement to support that argument. Appendix A was admittedly prepared shortly before its presentation to Yokoyama, and I find his testimony that he initialed it without significant review because he knew J. Lee would review it to be persuasive. In light of these factors as well as my acceptance of Yokoyama’s testimony, I have concluded that Yokoyama and Jarvis possessed the authority to negotiate and engage in meaningful bargaining for Respondent but did not have the authority to enter into a final agreement. I also conclude that Respondent clearly and unambiguously conveyed to the Union that J. Lee’s approval was a condition precedent to any final and binding collective-bargaining agreement.²⁰

In reaching the above conclusion, I am mindful that there are discrepancies in the testimony of nearly every witness that require close scrutiny. I am also mindful that the Acting General Counsel bears the burden of proving that an agreement exists. I do not consider the Acting General Counsel to have met that burden. Accordingly, the complaint allegation that Respondent

²⁰ Respondent also argues that Yokoyama was unfairly pressured into initialing the 1999 agreement by the strike notice and union pressure tactics. Since I have concluded that no final agreement was reached, it is not necessary to resolve this argument. However, there is no evidence that the Union engaged in impermissible bargaining tactics.

failed to bargain with the Union by refusing to sign a collective-bargaining agreement fails, and it shall be dismissed.

2. The alleged unilateral change

The Acting General Counsel argues that when, on August 10, Respondent rescinded the July wage increase, it unilaterally manipulated and altered some employees' wages without affording the Union notice or the opportunity to bargain. It appears that Respondent inadvertently implemented a wage increase it was not obligated to grant as no final collective-bargaining agreement had been reached. While Respondent was entitled to rectify its mistake and was not required to continue giving wage increases it had mistakenly implemented, it was not free to take corrective action without first notifying the Union and bargaining over how the matter would be straightened out. See *Charles S. Wilson Memorial Hospital*, 331 NLRB 1529 (2000). Respondent decreased unit employees' wages following its July implementation of increases without notifying the Union of its proposed action. Respondent thereby unilaterally altered the wages of employees. Employee wages constitute mandatory subjects of bargaining. The unilateral altering of an employment term that is a mandatory subject of bargaining is an unfair labor practice. See *Tidewater Group, Inc.*, 333 NLRB 273 (2001); *SAE Young Westmont-Chicago, LLC*, 333 NLRB No. 59 (2001) (not reported in Board volumes).²¹

²¹ There is no evidence that any particular employee suffered a reduction in wages from the preimplementation rates as a result of Re-

While it is clear that Respondent unilaterally took steps to correct the mistaken implementation of the 1999 agreement wage scale and that such is a violation of Section 8(a)(5) of the Act, it is also true that Respondent immediately entered into discussion with the Union upon its filing a grievance over the changes. In the course of the discussions, which continued into 2000, Respondent appears to have made significant concessions to the Union. Inasmuch as Respondent immediately and fruitfully negotiated with the Union concerning the unilateral changes, and as Respondent clearly accepts the concept and obligation of collective bargaining, it does not appear that the unilateral changes involved justify a remedial order. *Whiting Milk Co.*, 145 NLRB 1458 (1964); *Nocona Boot Co.*, 116 NLRB 1860 (1956). Accordingly, the allegation of the complaint alleging that Respondent unilaterally rescinded wage increases shall also be dismissed.

Having found both allegations of the complaint to be without proven merit, it follows that the complaint shall be dismissed in its entirety.

[Recommended Order for dismissal omitted from publication.]

Respondent's wage rescission, and neither the Union nor the Acting General Counsel so argues.