UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

THE PERMANENTE MEDICAL GROUP, Inc.

Respondent

and **Case 32-CA-149245**

NATIONAL UNION OF HEALTHCARE WORKERS, CALIFORNIA NURSES ASSOCIATION, AFL-CIO

Charging Party

COUNSEL FOR THE GENERAL COUNSEL'S BRIEF TO THE ADMINISTRATIVE LAW JUDGE

To the Honorable Anita Baman Tracy
Administrative Law Judge
National Labor Relations Board
Division of Judges
901 Market Street
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I. OVERVIEW[1]

This matter is before the Administrative Law Judge upon a charge filed by the charging party, National Union of Healthcare Workers, hereinafter NUHW, and a Complaint dated September 30, 2015 issued against Respondent The Permanente Medical Group, Inc. The Complaint alleges that Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Sections 8(a)(1) and (5) of the Act.

II. THE ISSUES

(a) Whether Respondent violated Section 8(a)(5) of the Act by repudiating the collective-bargaining agreement agreed upon by the parties after NUHW's March 14, 2015 acceptance of Respondent's December 18, 2012 last, best and final offer as amended by Respondent on January 29, 2014 and February 17, 2015.

(b) Whether Respondent violated Section 8(a)(5) of the Act by failing and refusing to prepare, finalize and execute the collective-bargaining agreement between the parties after NUHW's March 14, 2015 acceptance of Respondent's December 18, 2012 last, best and final offer as amended by Respondent on January 29, 2014 and February 17, 2015.

III. FACTS

A. Background

NUHW was originally certified as bargaining representative of the unit of optical workers employed by Respondent The Permanente Medical Group (hereinafter also "TPMG") on November 18, 2010. Tr. 20; GC Exh. 2. Respondent's approximately 366 optical employees in the optical workers bargaining unit (hereinafter "the optical unit")

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[1] References to the record are as follows: Tr. for transcript; GC Exh. for General Counsel exhibits; Resp. Exh. for Respondent exhibits; and CP Exh. for Charging Party exhibits.

work in a variety of locations throughout Northern California, with approximately thirty percent of the optical unit working at the optical lab facility in Richmond, California. GC Exhs. 18 and 33; Tr. 134. Prior to the November 2010 certification of NUHW as bargaining representative, the optical unit employees had been represented by Service Employees International Union, United Healthcare Workers – West (hereinafter "SEIU-UHW"). GC Exh. 2. The optical unit employees have not received any across the board wage increase since September or October 2011. Tr. 20-21, 64, 194, 208, 443-444; GC Exh. 33.

As noted above, the optical unit employees are employed by TPMG. Tr. 20. However, TPMG has for some time opted to contract out to Kaiser Foundation Health Plan (KFHP) certain of its human resource-related and contract bargaining functions. Tr. 368; GC Exh. 48.[2]

B. The Establishment of Ground Rules at Initial Bargaining Sessions in Optical Unit

NUHW and Respondent first met for bargaining in the optical unit on or about January 13, 2011. Tr. 21; GC Exh. 3. Present for Respondent were Chief Negotiator Walter Yonn,[3] Optical Laboratory head Steve French, Optical Lab Deputy head Joe Yuson, TPMG Manager Diane Ochoa, and Kaiser contract employee Sue Thergesen. Tr. 21, 415. Present for NUHW were chief negotiator Ralph Cornejo, NUHW President Sal Rosselli,[4] Union Representative/Organizer Greg Tegenkamp, and various employee

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2 Thus, most recent Employer chief negotiator in the optical unit, Christopher Comma, for example, works for KFHP rather than TPMG. Tr. 235.

3 In many places throughout the transcript Walter Yonn is incorrectly referred to as Walter Young. Similarly, Sue Thergesen is frequently incorrectly referred to as Sue Ferguson. Counsel for the General Counsel has submitted with its post-hearing brief a motion to correct the transcript in order to request these and several other corrections.

4 Rosselli attended this initial introductory bargaining session but does not recall attending subsequent bargaining sessions in the optical unit. Tr. 190.

members of NUHW's optical unit negotiating committee including Otto Pimentel, Gloria Villasenor, and others. Tr. 21. At the initial January 13, 2011 bargaining session, Respondent presented a written list of proposed ground rules to cover future bargaining. GC Exh. 3. The General Counsel's witnesses consistently testified without contradiction from any Respondent witness that the ground rules were Respondent's idea. Tr. 23, 125, 191. Importantly, item 1 of the ground rules specified that each party was obligated to designate a spokesperson and that said spokesperson would be the only person authorized to convey proposals or make tentative agreements. GC Exh. 3. Item 3 of the ground rules stated that all proposals shall be in writing with date and time.[5] While there was some discussion at the table about certain ground rules, such as NUHW's wish for flexibility as to a rule limiting topics discussed at bargaining to those listed on a preset agenda (Tr. 23) and the issue of how many employees could serve on NUHW's negotiating team (Tr. 126), NUHW did not generally protest Respondent's proposed ground rules and agreed to them in full by no later than the second optical unit bargaining session. Tr. 91-92, 191. Importantly, neither party requested that any ground rule be included or added that would require that any collective-bargaining agreement be ratified in order to be valid and effective. Tr. 92, 115, 127, 299. Further, the General Counsel's witnesses established without contradiction that the ground rules were consistently followed by the parties thereafter. Tr. 24, 44, 126, 136.[6]

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[5] Cornejo testified that while the parties were not always consistent about following the ground rule provision requiring them to note the time of day at which a proposal was submitted, the parties did consistently follow the ground rule requiring that proposals be in writing and be dated, testimony which is borne out by the copies of parties' proposals in the record. Tr. 24; GC Exhs. 4, 5, 7, 8, 11; Resp. Exh. 1.

[6] In fact, Respondent chief negotiator Christopher Comma conceded that he did not seek to modify or rescind any of the ground rules when he succeeded Walter Yonn and Mark Fisher as Respondent's chief spokesperson in the optical unit bargaining. Tr. 236. Comma also conceded that it was his practice after taking over as chief spokesperson to follow the ground rule that proposals be made in writing and that proposals only be made by a party's chief spokesperson. Tr. 238.

C. The Parties' Subsequent Bargaining Over Wages

On or about September 7, 2012, Respondent submitted its first complete contract proposal. Tr. 24-25; GC Exh. 4. In Article XII of its proposal, Respondent proposed across the board wages increases of 2.5% on October 1, 2012, October 1, 2013, and October 1, 2014. GC Exh. 4, pg. 15. On or about December 18, 2012, Respondent submitted what it deemed to be a last, best and final offer (hereinafter "LBFO"). GC Exh. 5; Tr. 26-27, 128. In Article XII of its LBFO, Respondent proposed a 3% across the board wage increase as of October 1, 2012 (paid retroactive to that date), a 2.5% across the board increase on October 1, 2013, and a 2.5% across the board increase on October 1, 2014. GC Exh. 5, pg. 1; Tr. 26-27. After NUHW's receipt of Respondent's December 18, 2012 LBFO, a substantial hiatus in bargaining occurred as NUHW's representative status was challenged by way of a petition seeking to certify SEIU-UHW and thereby decertify NUHW as bargaining representative of the optical unit. Tr. 27.[7] However, NUHW prevailed in the election in Case 32-RC-101129 and was recertified as bargaining representative of the optical unit on June 13, 2013. GC Exh. 6; Tr. 27-28.

After NUHW's recertification, the parties returned to the bargaining table in July 2013, at which time Respondent announced that it intended to unilaterally implement certain terms of its December 2012 LBFO, terms which NUHW perceived as takeaways, on August 1, 2013 and January 1, 2015. Tr. 29-30, 236-238; GC Exh. 7.[8] On or about January 29, 2014, Respondent through new chief spokesperson Mark Fisher (replacing Walter Yonn) submitted a comprehensive contract proposal. Tr. 31, 36, 131; GC Exh. 8.

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[7] Respondent also insisted that NUHW put Respondent's LBFO to a vote of the membership, but the membership rejected Respondent's LBFO. There is no evidence that NUHW treated or characterized this vote as a ratification vote. Tr. 27-28, 109, 345-346.

[8] It is apparent that NUHW perceived Respondent to be asking takeaways and concessions from NUHW that Respondent had not been seeking from other unions with which it bargains collective-bargaining agreements. Tr. 33-35.

This January 29, 2014 proposal contained the same Article XII wage language as that contained in Respondent's December 18, 2012 LBFO, with the same reference to retroactivity.[9] It reiterated the same contract term (October 1, 2012 to September 30, 2015) as the LBFO as well. The January 29, 2014 proposal included notes regarding whether proposals had been implemented, tentatively agreed upon, or remained open. The Respondent asserted that the January 29, 2014 proposal was a complete proposal capable of acceptance by NUHW and NUHW understood it to be so. Tr. 36, 131.

Another bargaining hiatus occurred while the parties waited for NLRB Region 32 to complete its investigation into a charge filed by NUHW asserting that Respondent had failed to reach a good faith impasse prior to unilaterally implementing certain terms of its December 18, 2012 LBFO. After the Region's dismissal of this charge was upheld by the General Counsel's Office of Appeals in July 2014, the parties returned to the bargaining table in January 2015. Tr. 36-37, 131-132.[10] By this time Christopher Comma had taken over for Mark Fisher as Respondent's chief spokesperson in the optical unit bargaining. Tr. 37, 235.

D. NUHW's Efforts to Consolidate Bargaining in Multiple Units

In mid-January 2015, NUHW-represented employees engaged in a one-week strike in the Integrated Behavioral Health Services (IBHS) unit, the Southern California Psych-Social Workers unit, and the Southern California Health Care Professionals unit. GC Exhs. 9, 33; Tr. 192, 209, 246. No later than December 2014, NUHW President

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9 The exact language (GC Exh. 8, pg. 16) is "[a]s part of its last, best and final offer, the Employer offers a 3.0% ATB effective as of the first pay period after October 1, 2012. The increase will be paid retroactive to that date. This increase is in place of and in lieu of any and all increases from any source whatsoever, including without limitation any provision of any agreement whether applicable or not.
October 1, 2013 2.5% ATB
October 1, 2014 2.5% ATB".

10 In the meantime NUHW had submitted its own comprehensive proposal on or about December 12, 2014. Resp. Exh. 1.

Rosselli had sensed a frustration and impatience on the part of optical unit employees given how long the optical unit employees had been without a contract and without raises, and given that in theory the optical unit did not present or should not have presented the types of difficult issues involving the provision of mental health care services that were a part of the IBHS negotiations. Tr. 208-209. While certain optical unit stewards were telling Rosselli that many optical unit employees wanted NUHW to agree to and settle upon Respondent's most recent proposal, Rosselli urged the optical unit employees to remain patient and to allow the mid-January 2015 strike to proceed in the hope that it might cause Respondent to improve its offers in various NUHW-represented bargaining units.

In anticipation of the resumption of bargaining in January 2015, NUHW, through Cornejo, sent a letter to several Kaiser officials on January 20, 2015 in which he suggested consolidating the bargaining in the optical unit and the IBHS unit given certain common issues as between these units or tables. GC Exh. 9; Tr. 38-40. However, Respondent, through Comma, sent a letter on January 28, 2015 rejecting the proposed consolidation of bargaining in the optical and IBHS units. GC Exh. 10; Tr. 132.

E. Respondent's Preparation for the Final February 17, 2015 Bargaining Session in the Optical Unit

The reference to retroactivity had been in all Respondent wage proposals in the optical unit since December 18, 2012. Tr. 241. Knowing that a bargaining session in the optical unit was scheduled for Tuesday, February 17, 2015 and a bargaining session was scheduled in the IBHS unit for Thursday, February 19, 2015 (after a federal holiday on Monday, February 16, 2015), Comma sent an email to Respondent contract employee Sue Thergesen on February 4, 2015 (GC Exh. 28) asking Thergesen to prepare comprehensive proposals in both the optical unit and IBHS unit (including rejecting

NUHW's December 12, 2014 counterproposal in the optical unit). Tr. 239. See also GC Exh. 31. While Comma's email to Thergesen instructed Thergesen to "leave a placeholder for wages" in Respondent's IBHS proposal, Comma gave no comparable instruction to Thergesen with respect to the optical unit proposal. GC Exh. 28; Tr. 239. On February 5, 2015, Comma confirmed in an email response to Thergesen that Comma wanted Thergesen to modify Respondent's wage proposal in the optical unit to "take retro off the table" GC Exh. 29; Tr. 240. In accordance with Comma's instruction, Thergesen, on February 6, 2015, emailed Comma a draft optical unit proposal which removed any reference to retroactivity and removed any reference to wage increases as of October 1, 2012, October 1, 2013 or October 1, 2014. GC Exh. 30, Tr. 241. Instead, Thergesen's draft proposed a 3% across the board wage increase effective the pay period following ratification of a three year collective-bargaining agreement. GC Exh. 30, pg. 4.[11] On February 11, 2015, Comma and Thergesen exchanged emails in which Thergesen stressed the need to try to print a copy of Respondent's optical unit proposal on Friday February 13, 2015 knowing that Monday February 16, 2015 was a holiday, and in which Comma asked Thergesen to confirm that she had removed the retroactive language from Respondent's Article XII wage proposal. GC Exh. 31; Tr. 242.

On Friday, February 13, 2015, Thergesen emailed Respondent's optical unit proposal to Comma and other Respondent officials including long time Respondent representatives in the optical unit bargaining Steve French, Joe Yuson and Diane Ochoa. GC Exh. 32; Tr. 244. In Thergesen's email with the draft proposal attached, Thergesen specifically alerted recipients to the fact that retroactivity had been taken off the table.

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[11] On February 6, 2015, Thergesen also sent an email to Comma with a draft of Respondent's proposal in the IBHS unit, expressly noting that she had left a "place holder" with respect to wages in the IBHS unit, but making no reference to having left any comparable placeholder in Respondent's optical unit proposal. GC Exh. 31.

GC Exh. 32. Later on February 13, 2015, French (with the apparent consent of Yuson and Ochoa) sent an email to TPMG Vice President of Financial Services and CFO Gerard "Jerry" Bajada and TPMG Vice President Human Resources Constance "Connie" Wilson, with copies to Comma and others, which had attached to it a summary of a strategy designed to finalize a contract in the optical unit. GC Exh. 33; Tr. 244-245, 366, 390.[12] This summary made many salient points, noting the lucrative revenue generating capacity of the optical department, the fundamental unfairness of optical unit employees having gone longer without raises than other union-represented bargaining units at Kaiser, and that a ratification bonus to optical unit employees would be less costly to Respondent than would paying retroactive wage increases in accordance with Respondent's proposals from December 2012 up to that point. GC Exh. 33, pg. 2.

F. The Communications Between Comma and Dabney Leading Up to the February 17, 2015 Bargaining Session in the Optical Unit

On February 16, 2015, Comma sent an email to Respondent Senior Vice President Office of Labor Management Dennis Dabney, KFHP Senior Vice President of Human Resources Gay Westfall and Respondent Director of Labor Relations Henry Diaz (Tr. 436-437, 536, 540, 542; GC Exh. 34). In this email, Comma notified the recipients of his intent to reject all NUHW counteroffers and to take retros off the table at optical unit bargaining the next day. Tr. 249; GC Exh. 34. At the end of his email, Comma expressly asked all recipients "[A]re you fine with this approach?" GC Exh. 34. Westfall's email in response did not express any objection to Comma's plan to take retros off the table. Tr. 249-250; GC Exh. 34. However, in response to Comma's email asking if the recipients were fine with his approach, Dabney sent an email to Comma at 8:51 p.m. on

[12] Wilson reports directly to TPMG Executive Director and CEO Dr. Robert Pearl. Tr. 205-206, 367, 407.

February 16, 2015 in which he expressly stated "I am not sure if I am fine with your approach. Did you discuss with Spagat whether we need to remove retro from table?" GC Exh. 40.[13] While Respondent asserted attorney client privilege in order to shield the substance of the communications between Comma and Respondent in-house counsel Robert Spagat that followed, it is undisputed that Comma understood Dabney's email to constitute a request that Comma speak with Spagat, that Comma subsequently spoke by telephone with Spagat, and that the next draft proposal in the optical unit which Comma sent out after speaking with Spagat restored the retroactivity language that had been missing from the draft proposals that were being circulated earlier in February 2015. Tr. 250-252; GC Exhs. 35, 30, 31 and 32. Moreover, Comma reaffirmed on the stand the portion of his affidavit from the Region's investigation in which he indicated that the basis for his decision to leave the old contract language (containing retroactivity) in Respondent's February 17, 2015 proposal at the optical unit table was on advice of Respondent counsel. Tr. 253, 288-290, 297. Thus, while the assertion of attorney client privilege prevented NUHW and Counsel for the General Counsel from fully exploring Respondent's (and particularly Spagat's) thinking on the matter, there is ample evidence that Respondent's reinstatement (or, more properly, retention) of the wage proposal containing retroactivity in Respondent's comprehensive proposal made at bargaining on February 17, 2015, despite the abundant evidence that in the weeks prior Respondent had been planning to revoke the proposal containing retroactivity, was based on concern expressed by Dabney and/or Spagat that the sudden removal of retroactivity after its presence in Respondent's optical unit proposal since December 2012 (i.e., a period of not

[13] Despite Dabney's evasive testimony (Tr. 593-594) in response to inquiries on cross-examination as to whether he received Comma's email regarding Comma's planned approach, it is clear given the first line of Dabney's email (i.e., "I am not sure if I am fine with your approach") that Dabney did receive Comma's email.

less than two years and two months) could be viewed as regressive bargaining and could consequently draw an unfair labor practice charge from NUHW.[14]

In accordance with the instruction received from Spagat (Tr. 253), Comma sent an email to Thergesen on February 17, 2015 at 8:32 a.m. stating "[t]here is now some concern about removing retro from our previous proposals so we will have to leave our proposal as it was. Can we make the change in time?" GC Exh. 39; Tr. 274-275. In carrying out Comma's instruction, on February 17, 2015 at 10:05 a.m. Thergesen sent an email to Comma, KFHP Human Resources Practice Leader Toni Scannell, KFHP Senior Labor Relations Consultant David Frizzell and Respondent representative David Isaac with an attached revised comprehensive proposal in the optical unit, which proposal reverted to and retained the language from Respondent's December 18, 2012 LBFO (containing retroactivity) while also adding "The Employer rejects the Union's proposal and holds to our position as stated I (sic) our Comprehensive Proposal dated January 29 to our Comprehensive Proposal dated January 29, 2014." GC Exh. 35; Tr. 252, 254-255.

G. The Final February 17, 2015 Bargaining Session

The parties met for optical unit bargaining on February 17, 2015. Tr. 255. Present for Respondent were chief spokesperson Comma, Ochoa, Yuson, French, Frizzell

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[14] Initially, a contemporaneously prepared email from Connie Wilson to her apparent successor as TPMG Vice President of Human Resources, Timothy Wemple, (GC Exh. 46) expressly states that Comma told Wilson that Dabney had told Comma that Comma had to leave the retroactivity language in Respondent's proposal or it would be considered regressive bargaining. Further, Dabney conceded on cross-examination that he specifically intervened to advise Comma to seek legal counsel when Dabney learned that Comma planned to submit a Respondent proposal revoking retros. Tr. 583-584. Wilson also reluctantly conceded on the stand that she he didn't have any reason to doubt Comma when Comma informed her that Dabney had instructed Comma to retain retroactivity in Respondent's wage proposal. Tr. 410-411. As explained elsewhere herein, Wilson's attempts on the stand to distance herself from this and other emails she sent on March 16, 2015 as events were unfolding is unavailing. Such emails constitute a more accurate assessment of the facts and the parties' positions than does her trial testimony given only days before her scheduled retirement and only after Respondent had "circled the wagons" and concocted its defenses for trial. Tr. 366, 532-534. In any event, whether one concludes that Respondent was motivated by fear of a regressive bargaining charge or was motivated by something else, the evidence overwhelmingly establishes that Respondent's retention of retroactivity in its February 17, 2015 proposal was conscious and intentional, not inadvertent or mistaken. Tr. 261 (Comma confirms a plan is different from a mistake), 290, 297.

and Thergesen. Present for NUHW were Cornejo, Tegenkamp and various employee members of NUHW's negotiating team. Tr. 41, 133, 255-256. At this meeting, Respondent submitted what it labeled as a Comprehensive Proposal, stating at its outset that it responded to NUHW's December 12, 2014 comprehensive proposal (Resp. Exh. 1) and that it was intended to cover all open issues between NUHW and Respondent. GC Exh. 11; Tr. 299. The February 17, 2015 Respondent proposal contained the same language on retroactivity that had been in Respondent's proposal since December 18, 2012. Tr. 42, 117-118, 134-135, 256-257; GC Exh. 11.[15] At this meeting Comma went through each NUHW proposal that Respondent was rejecting (Tr. 160, 341) and stated aloud that it was holding to its January 29, 2014 comprehensive proposal. It is undisputed that there was no discussion of retroactivity at this bargaining session and that Respondent gave no indication of any movement off of, or contemplation of movement off of, its long held position on retroactivity dating back to December 18, 2012. Tr. 42, 134-135, 257, 308. Similarly, it is undisputed that Comma did not use the terms "placeholder" or "dead letter" to describe the wage proposal or wage article contained in Respondent's February 17, 2015 comprehensive proposal. Tr. 42, 135, 258, 342-343, 351, 372, 433-434. Nor did Comma inform NUHW at the February 17, 2015 bargaining session that Respondent's wage proposal was a mistake, was made in error, or should be disregarded because Respondent would be submitting a new or different wage proposal in the future. Tr. 43, 135, 258, 261.

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[15] The exact initial language (The Employer rejects the Union's proposal and holds to our position as stated I our Comprehensive Proposal dated January 29, 2014 to our Comprehensive Proposal dated January 29, 2014) appears to be a typographical error. Instead the intended language found in numerous places throughout GC Exh. 11 is "The Employer rejects the Union's proposal and holds to our position as stated in our Comprehensive Proposal dated January 29, 2014". See *Georgia Kraft Company*, 258 NLRB 908, 912 (1981) (minor deviations and typographical errors in proposed contract did not demonstrate lack of agreement allowing employer to refuse to execute contract).

At the February 17, 2015 bargaining session, the parties reached tentative agreements on discipline and discharge (also sometimes referred to as corrective action), facilities language (replacing a then closed Hayward facility with a newly opened San Leandro facility), and tuition reimbursement. Tr. 105, 135-136, 299-300. Immediately after the February 17, 2015 bargaining session, Connie Wilson testified that she participated in two conference calls, the first being an originally unplanned one with Ochoa, Yuson and French (all of whom were members of Respondent's negotiating committee in the optical unit) (Tr. 372-373, 432, 455, 525) and the second being a regular debriefing call with Respondent counsel Robert Spagat and others. In both of these calls the fact that retroactivity had been part of Respondent's wage proposal earlier in the day was discussed. Tr. 456, 460. Moreover, it is clear that by no later than February 19, 2015, Respondent officials Henry Diaz, Jerry Bajada, Walter Yonn, Maryjo Williams, Wilson, Comma, Spagat, French and Ochoa were aware that NUHW had issued a written summary of the February 17, 2015 bargaining session in which NUHW represented to its members that Respondent had kept employees' retroactive raises intact in its most recent proposal. Tr. 262; GC Exhs. 26, 37.[16] Despite receiving it, Comma did not contact Greg Tegenkamp or any other NUHW representatives to ask NUHW to correct this summary or to tell NUHW that the inclusion of retroactive wage increases in Respondent's February 17, 2015 proposal had been a mistake. Tr. 262, 264.

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16 NUHW rep Greg Tegenkamp testified credibly that he tried to disseminate this written bargaining update as widely as possible and did not make any effort to prevent it from coming into the possession of Respondent managers and supervisors. Tr. 137-138.

H. The IBHS Sidebar Discussions

Although the parties tentatively scheduled a future bargaining date in the optical unit (Tr. 41), it was instead decided as between Rosselli for NUHW and KFHP President and Executive Vice President Gregory Adams that the parties would convene side bar discussions in the IBHS unit in the hope that progress could be made in the IBHS unit which could then potentially provide a model or template for progress in other units such as the optical unit. The side bar discussions were originally Rosselli's idea (Tr. 45, 164, 192) but Rosselli obtained the approval of the NUHW Executive Board and the NUHW steward's council in the IBHS unit before raising the possibility of the IBHS side bar discussions with Adams. Tr. 192-193. Although NUHW wanted the side bar discussions to cover other units as well, Adams made clear from the outset that he wanted the side bar discussions to be limited to the IBHS unit. Tr. 46, 166-167, 195, 374, 485. All parties regularly used the term "off the record" in describing the side bar discussions. Tr. 165, 195, 611.

1. The February 21, 2015 IBHS Sidebar Discussion Before the Caucus

The first February 21, 2015 side bar discussion took place at the Oakland Airport Hilton and was attended by Adams, Dabney and Wilson for Respondent and Rosselli, Cornejo and Papazian for NUHW.[17] Tr. 47, 165.[18] Rosselli was the chief spokesperson for NUHW and Adams was the chief spokesperson for Respondent. Tr. 47. Although

[17] It was important from NUHW's perspective to have Papazian present as an employee member of the IBHS unit for the IBHS side bar discussions. Tr. 46, 193.

[18] Although Dabney and Wilson claim that the Respondent representatives had a "pre-meeting" in which they went over their plans for the side bar discussion later that day (Tr. 472-473, 546-547), Adams had no recollection of any such pre-meeting (Tr. 609). It is also undisputed that neither Adams, Dabney nor Wilson ever attended any of the bargaining sessions in the optical unit. Tr. 62, 150, 368, 586.

Dabney claimed during his direct examination by Respondent's counsel that he had authority to reach a collective-bargaining agreement at the side bar discussions (Tr. 546), there is no evidence from any General Counsel witness or Respondent witness that Dabney ever informed NUHW that he had power to make binding agreements on behalf of Respondent at the side bar discussions. Tr. 67, 167, 195-196, 580.[19] Wilson for Respondent also conceded during FRE Section 611(c) examination that neither Adams nor Dabney had any authority or jurisdiction as to TPMG, the Respondent entity that employs the optical unit employees. Tr. 367. Similarly, the General Counsel's witnesses consistently testified that Rosselli made clear to Respondent at the initial side bar discussion that any tentative agreements reached at the side bar discussions would have to be brought back to the regular optical unit bargaining table. Tr. 48, 166, 195.

Early in the February 21, 2015 side bar discussion, Rosselli expressed NUHW's ongoing interest in obtaining retroactive wage increases for the IBHS unit.[20] Tr. 168, 197-198, 375, 477. Adams on behalf of Respondent expressed reluctance to pay retroactive increases and stated that he wanted to focus on future prospective increases. Tr. 197. Rosselli then argued that it was fundamentally unfair for Respondent to refuse to pay retroactive increases in the IBHS unit when retroactive increases had been part of Respondent's wage proposal in the optical unit for years. Tr. 179, 197-198, 375, 477. Although there is some slight variation in the testimony of the General Counsel's witnesses as to the exact words used by Dabney at this point (Tr. 49, 171, 198, 225), it is undisputed that Dabney said that Respondent was going to be sending NUHW a letter or

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19 Dabney also conceded that he was never the chief spokesperson for Respondent in the optical unit. Tr. 582.

20 Unlike the optical unit, there is no evidence that retroactive wage increases had ever been part of Respondent's proposals in the IBHS unit.

notice and that NUHW immediately understood that the intent or purpose of such a letter or notice would be to withdraw or revoke the retroactive component from Respondent's wage proposal in the optical unit. Further the General Counsel's witnesses are consistent in their recollections that Dabney did not use the term "mistake" or "error" when referring to Respondent's February 17, 2015 comprehensive contract proposal or its component wage proposal. Tr. 50, 180, 199.[21] There is no dispute that Cornejo and especially Rosselli were immediately and visibly upset when they heard of Respondent's plan. Tr. 49, 170-172, 198, 477. Rosselli stated that what Respondent was saying was a non-starter (Tr. 49, 171-172, 198, 375-376, 478, 481-482), that there would be no reason for the parties to continue having the side bar discussions if Respondent were to take such an action, and demanded to caucus. There had not been any preexisting plan to caucus or any scheduled caucus prior to Dabney's remark. Tr. 50, 172.

At around the same moment just prior to NUHW caucusing, in the "angry exchange" in which Dabney observed Rosselli's reaction to Dabney's announcement about withdrawing retros from the optical unit wage proposal (Tr. 201), Dabney made a gesture in which he held up either a piece of paper or a pen and stated that NUHW could

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[21] While Respondent's witnesses claim that Respondent did inform NUHW that its February 17, 2015 wage proposal had been in error (Tr. 477, 613-615, 550), Respondent's witnesses should not be credited on this point. Adams' recollection of the meeting is cast into doubt by the fact that he could not even recall the dramatic moment in which Rosselli immediately demanded (and took) a caucus after Dabney's statement about Respondent's intent to send a letter (Tr. 615) and by his admission that he could not recall all of the content of the February 21, 2015 side bar discussion (Tr. 617). Wilson, as discussed elsewhere in this brief, should not be credited given that her voluminous March 16, 2015 emails to other Respondent managers and executives are far more consistent with the General Counsel's theory of the case than with her subsequent trial testimony. Further, Wilson's bias against NUHW is reflected in the emails in the record in which she expressed concern about how SEIU-UHW would react to hearing that Respondent had agreed to retroactive wage increases in a contract with NUHW and in which she urged employees to pressure NUHW to unblock a pending unfair labor practice charge in order to allow an election to decertify NUHW and certify SEIU-UHW to move forward. GC Exh. 43, CP Exh. 1; Tr. 417, 423-424, 441, 445-446, 448. Wilson's claim to only want "stability" for the optical unit (Tr. 470) is belied by such efforts to undermine NUHW and bolster SEIU-UHW. Finally, Dabney should not be credited given the numerous instances in his testimony where he could not recall basic facts (Tr. 544, 545, 551, 569) or refused to concede facts that should not reasonably be deemed to be in dispute.

sign Respondent's comprehensive proposal in the optical unit right then if NUHW wanted to. Tr. 198-199, 529, 490-491, 553, 598-599, 614. Although Dabney testified that he was "serious" when he made this proposal (Tr. 598), there is no evidence or apparent contention that NUHW accepted on the spot.[22] However, this apparent offer by Dabney belies any suggestion that Respondent's proposal was incomplete or not comprehensive. Tr. 529. There is no evidence in the record that Adams or Wilson contradicted or in way challenged Dabney's statement that NUHW could accept Respondent's proposal in the optical unit then and there. Tr. 427-428.

2. The February 21, 2015 IBHS Sidebar Discussion After the Caucus

Rosselli, Cornejo and Papazian stayed together throughout the caucus after leaving the room where the Respondent representatives remained. Tr. 174, 201. During the caucus, Rosselli checked in with Papazian and made sure that Papazian was okay with the prospect of NUHW calling off the side bar discussions in the IBHS unit entirely in order to protest and demonstrate its unhappiness over Respondent's intent to revoke retroactive wage increases from Respondent's proposal in the optical unit. Tr. 174, 200.[23] Papazian then gave his consent to Rosselli's position. Tr. 174, 200.

All three Respondent representatives were present in the room when the NUHW representatives returned from their caucus to the room in which the meeting was taking place. Tr. 174, 201. Concededly, the General Counsel's witnesses are not entirely

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22 Dabney's contention that Cornejo refused to accept because he was unsatisfied with Respondent's then-proposed contract term or duration in which the optical unit contract would have expired on September 30, 2015 (Tr. 554) is not corroborated by Adams or Wilson (Tr. 493-494, 618) and is directly contradicted by Rosselli. Tr. 203. It is also noteworthy that NUHW subsequently issued a notice to employees in which it painted the September 30, 2015 expiration date of the optical unit contract as a positive, allowing the parties to get right back to the bargaining table quickly but after the employees had received the benefit of their retroactive wage increases. See GC Exh. 19; Tr. 147-148.

23 Although Cornejo did not have a specific recollection of this aspect of the discussion (Tr. 51), the testimony of Rosselli and Papazian is mutually corroborative and the discussion appears to have been mainly between Rosselli and Papazian in any event. Tr. 174, 200.

consistent in their recollections as to who spoke first.[24] Nevertheless, their testimony is consistent that Dabney's demeanor was significantly different from how it had been just prior to the caucus (Tr. 176, 201).[25] Per the General Counsel's witnesses, Dabney assured NUHW that Respondent would not be sending any letter revoking retroactivity to NUHW. Tr. 51, 175, 201. There were no qualifiers or caveats to Dabney's statement. Tr. 51-52.[26] Neither Dabney nor any other Respondent representative announced that Respondent would go ahead and send the letter at some later time if no progress was made in the IBHS side bar discussions. Tr. 54-55, 176-177, 202-204. At no time during the February 21, 2015 did Rosselli or any other NUHW representative ask Respondent to merely delay sending a letter confirming the revocation of retroactivity from Respondent's wage proposal in the optical unit. Tr. 52-53, 177, 199, 202.[27] Nor did any NUHW representative tell Respondent that if a letter were to be issued NUHW would then be obligated to show such a letter to NUHW's members. Tr. 52, 199, 202. From

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[24] Cornejo recalls Dabney being the first to speak (Tr. 51), whereas Papazian recalls Adams being the first to speak (Tr. 175) and Rosselli recalls Rosselli speaking first (Tr. 201).

[25] Papazian described Dabney as "sheepish" and Rosselli described Dabney as "conciliatory", both of which stood in stark contrast to Dabney's demeanor and the apparent tension in the room when Dabney first announced that Respondent would be sending a letter revoking the retroactivity from Respondent's wage proposal in the optical unit. Tr. 176, 201.

[26] The superficial nature of Adams' recollection of the incident is demonstrated by his testimony that it was Adams rather than Dabney who informed NUHW that Respondent would not send a letter (Tr. 615). Further, that Adams approved not sending a letter is at least somewhat inconsistent with Dabney's testimony that he didn't need the approval of Adams (or Wilson) in order to inform NUHW that Respondent would refrain from sending a letter. Tr. 600.

[27] The contrary testimony from Wilson, that it was Rosselli who requested that Respondent delay sending a letter and that Rosselli only made such a request almost as an afterthought at the end of the February 21, 2015 side bar discussions at a time when the parties had already taken out their calendars and attempted to schedule dates for future IBHS side bar discussions, should be entirely discredited. Tr. 485-486, 489-490. First, all other witnesses (including even Dabney and Adams) testified that the parties only scheduled future side bar discussions after Respondent agreed not to send a letter, not before. Tr. 55, 175-176, 202, 552, 554, 630. Second, Wilson's own notes from the side bar discussion show the dates of future meetings at the end of her notes, not somewhere in the middle. Tr. 523; Resp. Exh. 6. Third, after Rosselli stormed off to caucus and repeatedly commented on how there was no point in convening additional IBHS side bar discussions if Respondent intended to revoke retroactivity in the optical unit, it would make no sense at all for Rosselli to capitulate entirely and agree to schedule future side bar discussions in IBHS at a time when Respondent had not yet assured NUHW that it would refrain from sending a letter revoking retroactivity in the optical unit. Tr. 521-522. Respondent simply has not offered a coherent explanation for how Rosselli

NUHW's perspective there was no difference between sending a letter and revoking retroactivity, given that the ground rules would require that the revocation be in writing in any event, and it was the fact of revoking retros rather than the mere presence of an announcement of such in a letter which so upset and concerned NUHW. Tr. 54, 177, 199, 202. After Dabney's agreement to refrain from sending the letter revoking retroactivity, the parties (logically) were able to move on to discussing other subjects during the remainder of the February 21, 2015 IBHS side bar discussion. Tr. 52, 175-176.[28]

I. The Communications Between Comma and Cornejo After the February 21, 2015 Sidebar Discussion

On Sunday, February 22, 2015, Comma sent Cornejo an email in which Comma purported to withdraw Respondent's wage proposal in the optical unit containing retroactivity language. GC Exh. 12; Tr. 55-56. Cornejo immediately concluded that Comma had sent this email without having first spoken to any of the Respondent participants in the IBHS side bar discussions the previous day, such that Comma was not aware of Respondent having backed off from its statement of intent to withdraw the wage proposal containing retroactivity. Tr. 56. Accordingly, Cornejo sent emails to Comma on the morning of February 23, 2015 advising Comma to speak with Dabney or Adams, which Comma then assured Cornejo by reply email he would do. GC Exhs. 13, 14; Tr. 57, 266-267. Comma concedes that he spoke with Dabney after receiving Cornejo's

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could so quickly pivot from outrage, a "non-starter" comment and demanding a caucus to meekly begging Respondent to refrain from sending a letter.

28 To the extent that Respondent sought to introduce through Wilson testimony regarding an alleged private conversation between Adams and Rosselli in the parking lot of the Oakland Airport Hilton after the February 21, 2015 side bar discussions, the Administrative Law Judge properly noted that such testimony would be hearsay. Tr. 492-493. Further, Wilson's version of the alleged private conversation between Rosselli and Adams makes no sense because it would hardly make sense for Rosselli to reopen the question and refuse to take yes for an answer if Respondent had already agreed not to send a letter. In any event, even in Adams' account of the alleged private parking lot discussion between Adams and Rosselli, it is

email urging Comma to do so. Tr. 294. Still on February 23, 2015, at 8:25 a.m., only twenty minutes after Comma sent his 8:05 a.m. email telling Cornejo that Comma would speak with Dabney and/or Adams as Cornejo had advised, Comma sent an email to Cornejo in which he advised Cornejo to "please disregard" Comma's earlier email of February 22, 2015 in which Comma had purported to withdraw Respondent's wage proposal containing retroactivity language. Tr. 58-59; GC Exh. 15. Although Comma's "please disregard" email does not appear to have been part of the same email chain in which Cornejo advised Comma to speak to Dabney and/or Adams and in which Comma then agreed to do so, Comma admitted on the stand that the "please disregard" language did indeed apply to his prior February 22, 2015 email to Cornejo, and Cornejo understood it as such. Tr. 60, 266-268.[29] Comma's February 22, 2015 "please disregard" email also contained a smiley face symbol. Tr. 267; GC Exh. 15. Cornejo was reassured by this "please disregard" email from Comma that Respondent was not revoking its February 17, 2015 comprehensive proposal containing retroactivity language. Tr. 60.

Two additional side bar discussions in the IBHS unit took place on February 27 and 28, 2015. In addition to the usual participants in such discussions, a Southern California based employee from an NUHW-represented Psych/Social Worker unit, Dan Gizzo, also participated in these sessions. Tr. 61, 218. It is undisputed that there was no discussion of the optical unit or of Respondent's wage proposal in the optical unit at these side bar discussions. Tr. 61, 177, 205, 213. Nor was there any discussion at these side

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clear that Rosselli's focus throughout any such conversation was on how NUHW needed retros to be paid, not that NUHW simply needed to avoid a letter being sent. Tr. 615-616, 631-632.

[29] Notably, Comma limited his statement on the subject to "please disregard" and did not utilize this email as an opportunity to reaffirm the position that Respondent has subsequently taken at trial that Respondent only agreed to refrain from sending a letter and did not agree to refrain from withdrawing its wage proposal containing retroactivity.

bar discussions about Respondent sending or not sending a letter to NUHW revoking retroactivity from its wage proposal in the optical unit. Tr. 61, 178, 205.

J. NUHW's March 14, 2015 Acceptance of Respondent's Comprehensive Contract Proposal

As previously noted, throughout December 2014 to February 2015 NUHW leaders such as Rosselli and Cornejo were experiencing considerable pressure from optical unit employees to accept Respondent's contract proposal rather than continue to fight for something better. Tr. 142-143, 192, 207-208. NUHW leaders also feared that SEIU-UHW would seek to use the years without a wage increase in the optical unit as a basis for seeking to decertify NUHW and recertify SEIU-UHW. Tr. 208. Accordingly, in a conference call between NUHW leadership and the optical unit steward's council and bargaining committee members on March 13, 2015, the participants discussed how the current offer from Respondent might be the best that NUHW could hope to accomplish under the circumstances. While there is no evidence that Comma's February 22, 2015 email to Cornejo or his February 23, 2015 email to Cornejo instructing him to disregard his February 22, 2015 email were discussed during this conference call (Tr. 151-152), NUHW certainly acted with an awareness that at some unspecified future time Respondent might actually carry out its threat to remove retros from its wage proposal in the optical unit. Tr. 152. With this in mind, the participants in this call decided to authorize Cornejo to accept Respondent's comprehensive February 17, 2015 proposal and instructed Cornejo to notify Respondent of NUHW's decision as soon as possible. Tr. 209-210, 214, 70-71. On this call, it was also decided to have an endorsement vote in order to give the optical unit employees an opportunity to express their approval of NUHW's decision to accept Respondent's February 17, 2015 contract proposal. Tr. 69-71, 143-144, 209-210. However, given what NUHW had been hearing from optical unit

stewards about the sentiments of optical unit employees, NUHW had no doubt that the optical unit members would endorse NUHW's decision to accept Respondent's proposal. Tr. 210. The participants in the call also discussed how there would be a binding agreement upon NUHW's acceptance, such that there was no discussion of waiting until after the completion of the endorsement vote to inform Respondent of NUHW's acceptance. Tr. 144, 210.

Given the outcome of the March 13, 2015 conference call, on March 14, 2015 NUHW through Research Director Fred Seavey and Cornejo emailed Comma a letter from Cornejo in which NUHW formally notified Respondent that NUHW accepted Respondent's December 18, 2012 LBFO as amended by Respondent on January 29, 2014 and February 17, 2015. GC Exh. 16; Tr. 64-65, 214, 268.[30] On the same March 14, 2015 date, in a prescheduled call between Rosselli and Adams to discuss the status of the side bar discussions in the IBHS unit, Rosselli informed Adams at the outset of the call that NUHW had decided to accept Respondent's contract proposal in the optical unit, to which Adams responded "that's great" Tr. 210-211; 79, 622; GC Exh. 22.[31] Adams confirmed that he responded in this favorable manner and that he did not ask Rosselli on this call what NUHW was accepting or what NUHW believed or understood it to be accepting. Tr. 622, 628, 211. Nor did Adams tell Rosselli that there was no outstanding Respondent wage proposal available for NUHW to accept. Tr. 628-629, 211. To the extent Adams was assuming that what NUHW had accepted did not include retroactive

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30 It appears that Comma received emails of the letter from both Seavey and Cornejo notwithstanding the computer problems Cornejo was experiencing that caused him to take the precaution of having Seavey send the letter to Comma. Tr. 65, 268.

31 There is nothing materially inconsistent between Rosselli's testimony about his call with Adams and the email which Adams subsequently sent to Wilson with copies to Dabney and Senior Vice President Chuck Columbus recounting Adams' call with Rosselli. Tr. 541, 623; Resp. Exh. 12.

wage increases, Adams made no effort during this call to confirm the correctness of this assumption. Tr. 629.

K. Respondent's Initial Inaction After NUHW's Acceptance of Respondent's Contract Proposal

As noted previously, Respondent officials were widely aware through their conference calls immediately after the conclusion of optical unit bargaining on February 17, 2015 that retroactivity remained an element of Respondent's wage proposal as conveyed to NUHW at bargaining on that date. Tr. 455-456, 460, 525.

After receiving Cornejo's acceptance letter, Comma admits that he did not immediately contact Cornejo to determine what NUHW was accepting or purporting to accept. Tr. 268-269. Nor did Comma send any email to Cornejo telling him there was no Respondent wage proposal for NUHW to accept. Tr. 268-269. Comma also did not tell Cornejo that he was confused by the dates of the Respondent proposals specifically noted in NUHW's acceptance (December, 18, 2012, January 29, 2014 and February 17, 2015) and did not ask Cornejo what amendments or modifications Cornejo's acceptance letter mentioned. Tr. 361-363. Nevertheless, within a few days after Cornejo's email to Comma accepting Respondent's December 18, 2012 LBFO as amended by Respondent on January 9, 2014 and February 17, 2015, a phone call took place between Cornejo and Comma. Tr. 66-67, 328.[32] Cornejo testified that Comma asked Cornejo whether NUHW's acceptance of Respondent's proposal included certain items that had been discussed at the final February 17, 2015 bargaining session such as tuition reimbursement and the facilities change involving the substitution of the newly opened San Leandro

[32] Although Comma testified that KFHP Senior Labor Relations Consultant David Frizzell was also a participant in the call, Cornejo credibly testified that Comma did not identify anyone else as being on the call from Respondent's end. Tr. 67, 329. Given the absence of any notes of the call showing Frizzell as having been on the call and given Respondent's failure to call Frizzell as a witness, Cornejo should be credited that Cornejo and Comma were the only participants in the call.

facility for the closed Hayward facility. Tr. 67. Comma's version of the conversation is not fundamentally different. Comma claims that he asked Cornejo what NUHW was accepting and that Cornejo stated "all of it" Tr. 329. While Comma could not recall if tuition reimbursement was discussed, Comma did not flatly deny that tuition reimbursement was discussed. Tr. 270. It is undisputed that Comma did not ask Cornejo anything about retroactive wage increases, Comma did not assert that there were any open items that the parties had not reached tentative agreements on, Comma didn't specifically ask Cornejo what NUHW was purporting to accept with respect to wages, Comma did not on this call claim to be confused about anything else about NUHW's acceptance of Respondent's proposal, and the call was very brief. Tr. 67-68, 269. While Comma claims to have been shocked and confused by NUHW's purported acceptance, Comma did not tell Cornejo that Comma didn't understand the dates of the Respondent's proposals which Cornejo referenced in his acceptance letter or that Comma didn't understand which modifications or amendments Cornejo referenced in his acceptance letter. Tr. 361-363. Nor did Comma tell Cornejo that there were still open items that the parties had not yet reached tentative agreements on. Tr. 68. To the extent that Comma testified that he felt it would have been pointless to negotiate over the phone or continue the phone conversation with Cornejo due to an alleged misunderstanding or lack of meeting of the minds, Comma conceded that he did not ask Cornejo during that phone call to meet face to face. Tr. 344.

After his call with Cornejo, Comma sent an email to Adams, Dabney, Wilson, Spagat and others (GC Exh. 54) in which Comma stated, among other things, that "[A]lthough we contemplated removing retroactivity regarding the wages several times,

we never did. Thus, if they accept the comprehensive proposal, they will do so with retroactivity still included."

Meanwhile on or about March 17, 2015, NUHW made widely available to optical unit stewards and employees a notice of an upcoming vote to endorse NUHW's decision to accept Respondent's LBFO (GC Exh. 18) as well as a summary of Respondent's LBFO (GC Exh. 19). Tr. 71-72, 144-149. These documents were mailed to the home addresses of all optical unit employees, sent by email blast with links to documents on the NUHW website, provided to stewards for posting at worksites, and posted by Tegenkamp at the Richmond optical lab where approximately 30% of the optical unit employees work. Tr. 134, 145-146. Such documents were on NUHW's public website reviewable by anyone. Tr. 148. Both these documents made clear that NUHW was operating under the impression that Respondent's proposal that NUHW had accepted contained retroactive wage increases from October 2012, October 2013 and October 2014. Tr. 145. Per the March 17 Notice of Vote, the endorsement vote was scheduled at all locations at which optical unit employees work for various dates between March 24 and March 30, 2015 inclusive.[33]

Despite the abundant dissemination of the documents reflecting NUHW's understanding that Respondent's proposal entailed retroactive wage increases for 2012, 2013 and 2014, no Respondent representative initially contacted NUHW and informed NUHW that anything about such notices was incorrect or was inconsistent with Respondent's understanding of the situation. Tr. 149. Instead, on March 21, 2015, Comma merely sent an email to Cornejo and Seavey claiming to be concerned about a

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33 There is no reference to the term "ratification" or anything like it in GC Exhs. 18 and 19 announcing the endorsement vote.

"misunderstanding regarding some of the terms of" Respondent's comprehensive proposal. GC Exh. 17; Tr. 69-70. Comma's email also asked NUHW to postpone any ratification vote. On March 22, 2015, Cornejo replied by email informing Respondent that there was no ratification vote and that NUHW had already accepted Respondent's proposal by virtue of Cornejo's March 14, 2015 emailed letter. GC Exhs. 16, 17. Cornejo's email also denied that any misunderstanding existed. Tr. 69-70. In accordance with long-settled Board law discussed elsewhere in this brief establishing the principle that ratification is an internal issue between a union and its members which is not and should not be a concern of an employer, and which a union need not notify an employer of, Cornejo was curt in his response to Comma's request that NUHW postpone any ratification vote. Tr. 70-71.

L. Respondent's Internal Deliberations About NUHW's Acceptance of Respondent's Contract Proposal, Including the Crucial Contemporaneous Emails from Connie Wilson

Connie Wilson, who was present for all IBHS side bar discussions other than a final telephonic session on March 27, 2015, and who participated in the Respondent conference calls on February 17, 2015 after the completion of optical unit bargaining for that day, worked through the end of the work day on March 11, 2015. Tr. 528. While Wilson then went to Scottsdale, Arizona to attend spring training games of the San Francisco Giants, the only days she missed work were March 12, 13, 16 and possibly March 17. Tr. 514, 528. Wilson testified that she regularly checks her email even when out of the office on vacation. Tr. 376. Wilson also conceded that she was up to speed on all events taking place in optical unit bargaining right up to the point at which she left for her long weekend in Scottsdale and would have been aware if any corrected proposals had been sent. Tr. 435-436, 528.

At 8:20 a.m. on Monday March 16, 2015, KFHP Senior Vice President of Human Resources Gay Westfall sent Wilson an email which among other things forwarded Wilson a copy of Cornejo's March 14, 2015 letter to Comma accepting Respondent's December 18, 2012 LBFO as amended by Respondent on January 29, 2014 and February 17, 2015. GC Exh. 38. At 9:52 a.m., Wilson then sent an email to French, Ochoa, Bajada and Williams (GC Exh. 43) in which she stated in pertinent part "[O]n second thought, I suspect that they are taking the retro increases that were accidentally included in our last offer." Despite claiming in false modesty in this email to be "trying to get the cobwebs out" and indicating that she would "rather not communicate further until I get the details" (GC Exh. 43), Wilson then proceeded to immediately disregard her promise of circumspection by sending additional emails to various Kaiser officials at 9:57 a.m., 10:13 a.m., 10:27 a.m., 10:29 a.m., 10:30 a.m., 10:39 a.m., 12:07 p.m. and 12:12 p.m. GC Exhs. 38, 41, 44, 45, 46, 47, 48, 49, 50, and 53.

At 9:57 a.m., Wilson sent an email to Westfall, with carbon copies or "cc's" to Dabney, Adams and Comma, in which Wilson stated "I am also recalling we last offered, in error, retro increases for '12, '13 and '14. We told Sal and Ralph they could just accept that offer and we agreed not to retract the retros from our offer. I suspect that's why they are accepting that last full contract proposal. It's the best deal they are going to get and they know it." GC Exh. 38. This email is vitally important in several respects. First, it reflects that Respondent did not revoke the wage proposal containing retroactivity at the February 21, 2015 IBHS side bar meeting. Second, it reflects Respondent's own understanding that retroactive increases were payable with respect to the 2012, 2013 and 2014 wage increases and were not limited solely to the 2012 wage increase as Respondent subsequently sought to contend. Third, it describes Respondent's proposal

as "full", not as incomplete or as failing to address items still open for negotiation. Tr. 380. Fourth, Wilson correctly surmised the pressure that NUHW leaders like Rosselli and Cornejo were feeling from the optical unit to accept Respondent's final proposal with retroactivity in the optical unit rather than continue to hold out in the illusory hope that other gains in IBHS or optical unit bargaining could be achieved. Fifth, and perhaps most importantly, neither Dabney nor Adams, both of whom had been present for the February 21, 2015 side bar discussions at the Oakland Airport Hilton, sent an email reply to Wilson telling her that she was wrong about her recitation of the facts or her insights as to the parties' positions and motivations. Tr. 270-271, 379, 421-422, 591-592.

Next, at 10:07 a.m., Wilson sent an email to TPMG Vice President of Human Resources Timothy Wemple, the person being groomed as Wilson's successor (Tr. 380) in which Wilson stated "[T]his will be very interesting. SEIU-UHW will be mad we gave retros. NUHW will use the fact that we gave retros to Optical to try and get them for the other 4 units they represent. The error of including retros rests squarely with KFHP. Never dull." GC Exh. 43. At 10:13 a.m., Wilson sent an email to Westfall in which she stated in pertinent part, consistently with her 9:57 a.m. email, that "Dennis [Dabney], Greg [Adams] and I told them they could just accept our offer with the retros included. They made a wise choice." GC Exh. 53; Tr. 516. At 10:27 a.m., possibly after speaking to Comma and/or Dabney, Wilson sent an email to Wemple stating in pertinent part that "Christopher [Comma] says Dennis [Dabney] told him he had to leave the retro language in the offer or it would be considered regressive bargaining." GC Exh. 46. At 10:29 a.m., Wilson then sent an email to optical unit supervisors and bargaining participants French and Ochoa along with Bajada and Williams in which she stated "[A]s you know, the misunderstanding regarding the retro was among KFHP people. It's best

we stay out of it for the moment." GC Exh. 47. At 10:30 a.m., despite the claim of being hampered by being out of the office and without access to her work documents (Tr. 511, 515), Wilson emailed Westfall with cc's to Henry Diaz, Dabney, Adams, Comma and Spagat that she would be available to discuss the situation the next morning. GC Exh. 53.

At 10:39 a.m., Wilson sent an email to Bajada with a cc to Wemple in which she stated "As you can see, there's some confusion right now about what NUHW-Optical thinks they are accepting. If retros are included, the mistake squarely rests with KFHP. I will stay on top of it to make sure you know what's going on and that TPMG doesn't pay for their mistake" GC Exh. 48. The remainder of this email at least implicitly suggests that TPMG should reconsider the whole concept of utilizing KFHP to perform bargaining on behalf of TPMG. Next, at 12:07 p.m., after receiving a 12:00 p.m. email from Wemple suggesting that Wemple, Wilson and Bajada schedule a meeting for the three of them to discuss the situation face to face, Wilson sent an email to Wemple and Bajada stating "Let's wait to talk until we see how this contract gets finalized. No real rush at the moment. And yes, they know they made a mistake. We (Steve [French], Diane [Ochoa] and I) brought this to KFHP's attention several weeks ago." GC Exh. 50.[34] This email once again shows that unlike the typical situation in which a party notices an inadvertent mistake and immediately seeks to apprise the other party of the mistake and to correct it, Wilson for Respondent thought it more prudent to just see how things played out, with "no real rush at the moment." Finally, after receiving an 11:27 a.m. email from

[34] Wilson admitted during her testimony that "they know they made a mistake" refers to a mistake by KFHP, not to any mistake by NUHW. Tr. 432.

Wemple in which Wemple expressed the hope that TPMG doesn't take the hit economically "for the disconnect on the labor relations side," Wilson sent a reply email in which she unqualifiedly and categorically reassured Wemple that "TPMG won't get financially penalized on this one." GC Exh. 38; Tr. 381-382.[35]

In short, the extensive series of emails sent by Connie Wilson on March 16, 2015 (along with the responses and non-responses from many recipients) demonstrably show that Wilson quickly and correctly recognized that NUHW had accepted Respondent's February 17, 2015 proposal precisely because it still contained the retroactive wage increases and NUHW knew this was the best deal it was going to get. GC Exhs. 38, 41, 43, 44, 45, 46, 47, 48, 49, 50, and 53. These same emails sent in the heat of the moment prior to and without the benefit of having heard Respondent's subsequently concocted theory for trial, and in which Wilson announced without any ifs, ands or buts that TPMG would not be penalized for KFHP's actions, readily belie Wilson's claims on the stand that she was out of the loop, misinformed or hamstrung in any respect. Said emails are far more accurate and trustworthy than Wilson's trial testimony. Tr. 381-382.

M. The Conclusion of the IBHS Side Bar Discussions

On March 27, 2015, Cornejo sent an email to Comma (GC Exh. 20) following up on NUHW's acceptance of Respondent's comprehensive contract proposal seeking to address housekeeping matters such as a time frame for when retroactive wage payments to optical unit employees would be paid. Cornejo's email also asked that Respondent prepare the final version of the contract. Tr. 74. Also on March 27, 2015, a final IBHS

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35 Dabney also apparently felt no rush to address the situation. Dabney admitted on cross-examination that when he heard rumors about some kind of vote on the contract taking place, he did not immediately contact NUHW and inquire as to how NUHW could be voting on a contract that lacked a wage proposal or component. Tr. 588.

side bar discussion was conducted by phone between Dabney and Adams for Respondent and Rosselli and Cornejo for NUHW.[36] Tr. 74-76, 212-213. In that call, Respondent increased the amount of its proposed ratification bonus in the IBHS unit, but NUHW rejected it on the spot and reaffirmed its desire for retroactivity in the IBHS unit. Then Dabney told Rosselli and Cornejo that Respondent was going to be sending a letter withdrawing the retroactivity from Respondent's wage proposal in the optical unit. While Rosselli recalled that Dabney used future tense and Cornejo recalled Dabney using present progressive (Tr. 213, 75), both witnesses are consistent in their recollection that Dabney did not use any language which suggested a belief or position on the part of Dabney that Respondent had already rescinded retroactivity in the optical unit at some point in the past such as at the February 21, 2015 side bar discussions. (Tr. 75-76, 213). During this call, Cornejo argued that Respondent was not at liberty to modify or withdraw a proposal that NUHW had already accepted. Tr. 75-76. Neither Dabney nor Adams asked about the ongoing endorsement vote or claimed that there were still open items such that the proposal which NUHW had purported to accept was in any respect incomplete. Tr. 213. To the extent Dabney is credited with having asked about the vote, it is manifest that Cornejo made clear to Dabney that the vote was not a ratification vote and that NUHW had already accepted the agreement. Tr. 570.[37]

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[36] It is undisputed that usual side bar participants Wilson for Respondent and Papazian for NUHW did not participate in this call. Tr. 113. Given the complete inability of Adams to remember this call (Tr. 624), Adams was unable to corroborate Dabney's version of events.

[37] That NUHW did not communicate to employees voting in the endorsement vote after March 27, 2015 about Dabney's statements on this call or his subsequent March 27, 2015 letter to Rosselli (GC Exh. 21) is perfectly understandable given NUHW's position that Respondent's communications were untimely and ineffectual in light of NUHW's previous March 14, 2015 acceptance. Tr. 153.

N. Optical Unit Employees Overwhelmingly Vote to Endorse NUHW's Decision to Accept Respondent's Contract Proposal

On March 30, 2015, NUHW completed the multi-day endorsement vote with respect to its March 14, 2015 acceptance of Respondent's February 17, 2015 proposal. GC Exh. 18; Tr. 149-150. Respondent's proposal was available at each voting session for any voting employee to review. Tr. 150. Approximately 70 percent of the optical unit voted and of those voting approximately 98.4 percent voted to endorse the decision of the optical unit steward council to accept Respondent's February 17, 2015 proposal. Tr. 150.

O. Respondent's March 27, 2015 Letter to NUHW Refusing to Execute and Implement the Contract and Proposing New Terms

Later on March 27, 2015, Dabney sent a letter to Rosselli (GC Exh. 21) in which Respondent for the first time made a revised wage proposal with only prospective wage increases on October 1, 2015, October 1, 2016 and October 1, 2017 and also proposed for the first time ever a contract expiration date of September 30, 2018 even though NUHW had already accepted Respondent's February 17, 2015 proposal with its September 30, 2015 contract expiration date and had touted the advantages of the early expiration date to optical unit members. See GC Exh. 19. Dabney had not mentioned any of the terms of this proposal in the phone call with Rosselli and Cornejo earlier in the day. Tr. 589. Dabney's March 27, 2015 letter self-servingly asserted that Respondent had only agreed to hold off on sending a letter rather than holding off on withdrawing retroactivity at the Feb. 21, 2015 side bar discussions.

On April 14, 2015, Cornejo on behalf of NUHW and Rosselli wrote a response letter to Dabney. GC Exh. 22. In this letter, Cornejo argued that Dabney's March 27,

2015 letter was untimely having been sent after NUHW had already accepted Respondent's proposal on March 14, 2015. Cornejo also argued that, in accordance with the agreed upon and Respondent-proposed ground rules dating back to the first two bargaining sessions in the optical unit, the proper place to make proposals is at the bargaining table in the appropriate optical unit, not in side bar discussions (which do not constitute negotiations) in the separate IBHS unit. Cornejo noted that Respondent's wage proposal had remained unchanged from December 18, 2012 up to the March 27, 2015 date of Dabney's letter, and noted that Dabney had never attended optical unit bargaining or claimed to be Respondent's spokesperson for that table or unit. Finally, Cornejo's letter noted that NUHW had already filed the instant unfair labor practice charge based on Respondent's failure to sign, implement and be bound by the collective-bargaining agreement in the optical unit.

On April 23, 2015 Dabney sent another letter to Cornejo restating many of the same arguments made in Dabney's March 27, 2015 letter. GC Exh. 23.[38] With the instant charge having already been filed and with Cornejo not sensing that any purpose would be accomplished by preparing a point-by-point refutation of Dabney's letter, Cornejo sent Dabney an email on April 24 with carbon copies to Adams, Wilson and Comma simply stating that Dabney's letter "makes no sense whatsoever" GC Exh. 24. Respondent and NUHW subsequently reached a collective-bargaining agreement in the IBHS unit, which agreement was ratified by IBHS unit members. Tr. 114-115, 163-164,

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38 In this April 23, 2015 letter, Dabney on behalf of Respondent argued for the first time that Respondent's wage proposal dating back to the December 18, 2012 LBFO only included three months of retroactive pay (from October 2012 to December 2012) and that the retroactive increases did not apply to the wage increases in Respondent's proposal on October 1, 2013 and October 1, 2014. As explained elsewhere herein, such a claim does not withstand analysis and indeed is inconsistent with the position taken by current Respondent executive and former Respondent chief spokesperson in the optical unit Walter Yonn as set forth in Yonn's March 19, 2015 email to Comma and Thergesen. GC Exh. 52.

180-181. Unlike in the optical unit, the parties agreed to monetary ratification bonuses contingent on ratification by the IBHS unit. Tr. 180-181.

IV. CREDIBILITY ANALYSIS

In assessing witness credibility in this case, it should be noted that General Counsel witness and IBHS unit member Clement Papazian remains employed by Respondent. The Board and courts have historically recognized that the testimony of such witnesses that is adverse to their employer is particularly reliable. *Homer D. Bronson Company*, 349 NLRB 512, 534 (2007); *Flexsteel Industries*, 316 NLRB 745 (1995), aff'd, 83 F.3d 419 (5th Cir. 1996). While there were moments in which Papazian appeared nervous or even admitted his nervousness on the stand (Tr. 169-171), such nerves are attributable to the gravity of the situation rather than any attempt to fabricate or mislead the Court. Indeed Papazian's apparent nervousness was most evident during his direct examination and much of his most probative testimony, or most corroborative of fellow General Counsel witnesses Rosselli and Cornejo, came out during cross-examination of Papazian by Respondent's counsel. See, e.g., Tr. 179-180. Counsel for the General Counsel also submits that the testimony of NUHW President Sal Rosselli was thorough, accurate and credible. To the extent that Cornejo or Rosselli occasionally utilized their answering time to make critical remarks about their enemies at SEIU-UHW, such remarks are at worst distractions and do not detract from their overall credibility.

Conversely, Counsel for the General Counsel also submits that the bias of Respondent witnesses Dabney and Wilson was manifest. In his testimony, Dabney refused to concede matters which should not reasonably have been deemed to be in dispute, such as when Dabney refused to acknowledge receiving Comma's February 16, 2015 email asking Dabney and others if they were fine with Comma's proposed approach

at optical unit bargaining (Tr. 603-604; GC Exh. 34) even though Dabney's response email to Comma began with the phrase "I am not sure that I am fine with your approach." GC Exh. 40.[39] Further, it is simply not credible for Dabney to claim that he did not have a concern about potential regressive bargaining (Tr. 588, 593) when the pertinent emails readily reflect that Dabney had this concern and where the only change made to the draft proposal after Dabney became involved was to restore the retroactivity language that had been in the proposal since December 2012.[40] Dabney also had substantial motivation to shade his testimony in the most favorable light for Respondent, particularly given that the events in this case have caused at least some Respondent officials to raise the possibility of TPMG no longer using representatives of KFHP to bargain TPMG contracts in the future. See GC Exh. 48.

As to Wilson, it has already been argued above that Wilson's contemporaneously sent March 16, 2015 emails are far more probative and reflective of reality in this case than is her coached trial testimony long after Respondent had "circled the wagons" and developed the various defenses it advanced at trial. Tr. 532-534. Wilson's emails are replete with admissions such as that retroactive wage increases remained part of Respondent's proposal and NUHW accepted them on such basis, that any confusion or uncertainty was among KFHP officials rather than between KFHP and TPMG officials (let alone between Respondent and NUHW), and that NUHW was wise to accept Respondent's February 17, 2015 proposal given that it still contained retroactive wage increases for 2012, 2013 and 2014. Furthermore, as argued above, Wilson's trial

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[39] Dabney's refusal to admit that Adams stated at the first IBHS side bar discussion that he was only there to talk about IBHS and not other units (Tr. 579) is also mystifying and reflective of his unwillingness to give an inch when questioned by opposing counsel.

[40] Even given an opportunity on redirect examination by his counsel, Dabney could not coherently explain what his alleged concern other than regressive bargaining was or could have been. See Tr. 601-602.

testimony regarding the February 21, 2015 side bar discussions in which she claims that the participants had their calendars out and were agreeing to dates for future side bar discussions in the IBHS unit before Respondent had agreed not to revoke retros or even agreed not to send a letter revoking retros, is entirely nonsensical, not corroborated by Dabney or Adams, and would be entirely inconsistent with Rosselli's initial outrage and demand for a caucus upon learning of Respondent's plans with respect to retroactivity in the optical unit. Further calling Wilson's credibility into question was her testimony about her March 16, 2015 discussions with other Respondent officials. Despite her self-serving claims about "cobwebs" and being "out of the loop" and not knowing more than what she learned from Westfall forwarding Wilson a copy of Cornejo's acceptance letter, Wilson's initial 9:22 a.m. email on March 16, 2015 (GC Exh. 43) states "apparently NUHW leaders have been talking with IBHS and optical workers and optical workers said they are ready to settle. Sal spoke with Greg yesterday and today Ralph sent a confirming letter to this effect." The content of this email readily demonstrates that Wilson must have spoken to Adams by this point, but instead Wilson claimed on the stand that she was just "speculating" that Rosselli and Adams had spoken. Tr. 415-416. Wilson's claim that she had not yet spoken to Adams at that point is not credible. Like Dabney, Wilson's motivation to shade her testimony to favor Respondent and to attempt to distance herself from her damaging emails, likely as one final act of loyalty from a long-time executive whose looming retirement was only days away at the time she testified at trial, is understandable and likely appreciated by Respondent but provides scant basis for crediting her dubious testimony.

V. LEGAL ANALYSIS

A. The General Framework

It has long been settled that Section 8(d) of the Act requires the parties to a collective-bargaining relationship, once they have reached agreement on the terms of a collective-bargaining agreement, to execute that agreement at the request of either party. *H.J. Heinz Co. v. NLRB*, 311 U.S. 514 (1941). This obligation arises only if the parties had a "meeting of the minds" on all material terms of the agreement. The General Counsel bears the burden of showing not only that the parties have reached the requisite meeting of the minds but also that the document which a party refused to execute accurately reflected that agreement. However, a meeting of the minds in contract law is based on the objective terms of the contract rather than on the parties' subjective understanding of the terms. Thus, subjective understandings (or misunderstandings) of the meaning of terms that have been agreed to are irrelevant, provided that the terms themselves are unambiguous when judged by a reasonable standard. *Chicago Parking Association*, 360 NLRB No. 132 (2014); *TTS Terminals, Inc.*, 351 NLRB 1098 (2007); *Vallejo Retail Trade Bureau*, 243 NLRB 762, 767 (1979), aff'd, 626 F.2d 119 (9th Cir. 1980). The term "meeting of the minds" does not require that both parties have an identical understanding of the agreed-upon terms. *Windward Teachers Association*, 346 NLRB 1148, 1150 (2006); *Ebon Services, Inc.*, 298 NLRB 219, 223 (1990), aff'd, 944 F.2d 897 (3d Cir. 1991). Where the parties have agreed upon the contract's actual terms, disagreements over the interpretation of those terms do not provide a defense to a refusal to sign the contract, much less to the existence of a contract. *Fashion Furniture Manufacturing, Inc.*, 279 NLRB 705 (1986); *Teamsters Local 617 (Christian Salvesen Distribution Service)*, 308 NLRB 601, 603 (1992). Rather interpretive disputes over

contract terms are typically resolved through the grievance procedure. *Windward Teachers Association*, 346 NLRB 1148, 1152 (2006) (it is well settled that where parties have reached agreement on specific terms of a contract, subsequent disagreement over the meaning of those terms does not excuse a refusal to execute the agreement); *Graphic Communications Union District Council 2 (Riverwood International USA)*, 318 NLRB 983, 992-993 (1995).[41]

Common law principles governing the formation of contracts are not controlling in the collective-bargaining setting. *Sierra Publishing Company d/b/a the Sacramento Union*, 296 NLRB 477 (1989); *Lozano Enterprises v. NLRB*, 327 F.2d 814 (9th Cir. 1964); *Pepsi-Cola Bottling Co. v. NLRB*, 659 F.2d 87 (8th Cir. 1981). Strict adherence to technical offer and acceptance rules can be overly simplistic in the complex give and take of collective bargaining and do not always accommodate the national policy favoring the formation of collective-bargaining agreements. *Sacramento Union*, 296 NLRB at 486; *Ben Franklin National Bank*, 278 NLRB 986, 992 (1986). More specifically, an offer is not automatically terminated by the rejection or counteroffer of the other party. *Kasser Distiller Products Corporation*, 307 NLRB 899, 903 (1992), aff'd, 19 F.3d 644 (3d Cir. 1994) (citing *Lozano Enterprises v. NLRB*); *Ben Franklin National Bank*, 278 NLRB at 993 (federal labor policy encourages the formation of collective-bargaining agreements and the common law rule that a rejection terminates an offer has little relevance in the collective bargaining setting); *Presto Casting Company*, 262 NLRB 346, 358-359 (1982), aff'd in part, 708 F.2d 495 (9th Cir. 1983), overruled on other grounds by *McClatchy Newspapers, Inc.*, 321 NLRB 1386 (1996) (complete package proposal made on behalf of

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41 Indeed Dabney conceded on cross-examination that frequently when parties during the life of a collective-bargaining agreement have disagreements about the meaning of particular terms of the agreement, they typically have an arbitrator interpret the terms rather than contend that there is no contract at all. Tr. 592.

either party through negotiations remains viable, and upon acceptance *in toto* must be executed, unless expressly withdrawn prior to such acceptance or defeased by an event upon which the offer was expressly made contingent at a time prior to acceptance. Employer took no such steps and when union abandoned all collateral demands and elected to accept this complete package, a binding agreement was consummated); *Penasquitos Gardens, Inc.*, 236 NLRB 994 (1978), aff'd 603 F.2d 225 (9th Cir. 1979) (employer violated 8(a)(5) of the Act by its refusal to enter into a written agreement based on its previously made complete contract proposal accepted by union only after union had rejected that proposal on two prior occasions). In order to find acceptance of an offer, all that is needed is conduct manifesting an intention to agree, to abide and be bound by the terms of an agreement, and that a party's words and conduct are judged by a reasonable standard with no consideration of real or unexpressed intentions. *Kasser Distiller Products Corporation*, 307 NLRB at 903; *Pittsburgh-Des Moines Steel Co.*, 202 NLRB 880, 888 (1973).

It is also well established that the formation of a binding contract can be affected by a mistake. In the case of unilateral mistake, there is considerable authority to the effect that if in the expression of the intention of one of the parties to an alleged contract there is error, and that error is unknown to and unsuspected by the other party, that which was so expressed by the one party and agreed to by the other is a valid and binding contract which the party not in error may enforce. A party to a contract cannot avoid it on the ground that it made a mistake where the other contractor has no notice of the mistake and acts in perfect good faith. *North Hills Office Services*, 344 NLRB 523, 525 (2005); *Health Care Workers Local 250 (Trinity House)*, 341 NLRB 1034, 1040 (2004); *Apache Powder Company*, 223 NLRB 191 (1976).

B. The Requisite Meeting of the Minds Has Been Established

As noted above, a meeting of the minds in contract law is based on the objective terms of the contract rather than on the parties' subjective understanding of the terms. Thus, subjective understandings (or misunderstandings) of the meaning of terms that have been agreed to are irrelevant, provided that the terms themselves are unambiguous when judged by a reasonable standard. In this case, it is manifest that the terms of the contract are unambiguous judged by a reasonable standard and that the subjective misunderstandings which Comma was apparently operating under are irrelevant. Initially, one must note that Respondent did not materially alter its wage proposal at any time between December 18, 2012 and February 17, 2015. If there had been any ambiguity as to Respondent's wage proposal, it would stand to reason that the subject would have come up at the bargaining table in the optical unit and the alleged ambiguity would have been resolved. Even if Comma subjectively believed that the February 17, 2015 Respondent proposal was a mere placeholder or dead letter, the critical factor is that he at no time expressed this belief to NUHW let alone established it as Respondent's official position. Cases such as *Kasser Distiller Products*, 307 NLRB at 903 and *Pittsburgh-Des Moines Steel Co.*, 202 NLRB 880, 888 (1973) make clear that Comma's unexpressed beliefs or intentions carry no weight in assessing whether meeting of the minds occurred judged by a reasonable objective standard. *Space Needle, LLC*, 362 NLRB No. 11, slip op. at 9 n. 8 (2015) (employer actions judged by a reasonable standard with no consideration for unexpressed intentions). While it is true that Respondent's December 18, 2012 LBFO was proposed and partially implemented prior to Comma's involvement in optical unit bargaining, Comma picked up the bargaining as he found it when he first became involved in late 2014 and he could not blithely assume that any

events predating his selection as Respondent's chief spokesperson had no relevance or were not binding upon him. Tr. 236, 314.

There is nothing inherently misleading or ambiguous about the term or concept "last, best and final offer" and Respondent's conscious choice to retain such terminology from December 2012 through February 17, 2015, and indeed through March 14, 2015, did not create any ambiguity judged by a reasonable standard. This is not a situation in which a misunderstanding can be traced to an ambiguity for which neither party is to blame or for which both parties are equally to blame. See, e.g., *Hempstead Park Nursing Home*, 341 NLRB 321, 322 (2004).[42] When such misunderstandings are due to the fault of one party, and the other party understands the transaction according to the natural meaning of the words or other acts, both parties are bound by that natural meaning. *Meat Cutters Union Local 120 (United Employers, Inc.)*, 154 NLRB 16, 26-27 (1965). In this case, Respondent is at fault insofar as it is arguing ambiguity arising out of written contract language that Respondent itself created and then retained for years without modification.

It became apparent during his testimony that Comma suffered from additional subjective misunderstandings. Comma testified at trial that he believed that proposals by Respondent such as its January 29, 2014 proposal or February 17, 2015 proposal were no longer available for acceptance by NUHW after NUHW either initially rejected them or made its December 12, 2014 counterproposal. Tr. 298; Resp. Exh. 1. However, as noted above, an offer is not automatically terminated by the rejection or counteroffer of the other party. *Kasser Distiller Products*, 307 NLRB 899, 903 (1992) (citing *Lozano*

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[42] *Oil, Chemical and Atomic Workers Local 7-507 (Capital Packaging Company)*, 212 NLRB 98 (1974) is distinguishable from the instant case. In that case the ambiguities were attributable to the fact that the parties were working exclusively with verbal proposals and counterproposals that no party ever committed to writing despite having bargained for several years.

Enterprises v. NLRB); *Ben Franklin National Bank*, 278 NLRB at 993 (federal labor policy encourages the formation of collective-bargaining agreements and the common law rule that a rejection terminates an offer has little relevance in the collective-bargaining setting). Thus, Comma was simply wrong if he believed that NUHW somehow forfeited the right to change its mind and to reluctantly accept Respondent's February 17, 2015 comprehensive proposal. Respondent's decision to retain the language from its December 2012 LBFO all the way through its February 17, 2015 comprehensive proposal was Respondent's own choice and not something that can be held against NUHW. The mere passage of time did not render Respondent's wage proposal a dead letter, as Respondent neither attached any expiration date or other limitation on NUHW's right to accept the proposal nor ever substituted a revised or corrected proposal for that contained in the LBFO.

While Comma sought to testify that there were still "open items" that precluded the reaching of an agreement (Tr. 304-305, 324, 330, 336, 338), it is readily apparent that there were no such open items because Cornejo made it clear when Comma first contacted Cornejo after receiving Cornejo's March 14, 2015 acceptance letter that NUHW was accepting "all of" Respondent's proposal. Tr. 330. As an example, Comma testified that he still considered the term or duration of the contract to be an open item (Tr. 338) but it is clear that NUHW communicated its acceptance to Respondent of the contract term set forth in Respondent's December 2012 LBFO as amended by Respondent on January 29, 2014 and February 17, 2015 and that NUHW even touted the advantages of the quick contract expiration date and the ability to get back to the table quickly in at least one of its written communications with its members. GC Exh. 19; Tr. 346-347, 359-360. Respondent's February 17, 2015 proposal (GC Exh. 11) clearly

indicated on its face that it was a comprehensive proposal intended to cover all open issues between the parties. GC Exh. 11, pg. 1. As argued by Charging Party counsel on cross-examination of Comma, Comma's explanation of why he believed that either open items, or the fact that the February 17, 2015 proposal found its genesis in the December 2012 LBFO, somehow precluded NUHW from deciding to hold its nose and accept Respondent's offer as it was, was nothing short of incomprehensible. Tr. 348-349. On further questioning, Comma ultimately conceded that NUHW was at all times free to accept Respondent's proposals even if such proposals included the takeaways that Respondent had already unilaterally implemented in the past. Tr. 358. Comma was also laboring under the legal misimpression that NUHW was required to withdraw its December 12, 2014 proposal (Resp. Exh. 1) before it was at liberty to accept Respondent's February 17, 2015 proposal, but there is no evidence that NUHW ever agreed that it would have to withdraw any of its proposals before it could accept one of Respondent's proposals on the same subject matter. As with the placeholders and dead letters and alleged need for ratification, Comma's understanding and conception of how the process was supposed to work was only in his head, not in his spoken words or actions, and he admits it was based on his general "experience" having nothing to do with the actual experience as between these particular parties. See Tr. 360-361.[43] When pressed on cross-examination, Comma finally conceded that the only truly open issue that he could think of that was not addressed by Respondent's February 17, 2015 proposal was wages (Tr. 363-364), not the numerous other allegedly open issues he tried to rely upon earlier in his testimony. And even then, one must assume that wages is only open

[43] Indeed, it was Comma's wearying and strenuous efforts to make sure that he included these "dead letter" and "placeholder" concepts in many of his answers on cross-examination, despite never having used these terms at the bargaining table, that likely caused NUHW counsel Siegel to incisively remark "fine, that's your story and your sticking to it." Tr. 353.

because of Comma's vague unspoken intent to submit a future wage proposal in place of the February 17, 2015 "placeholder"

In short, the subjective misunderstandings of Comma outlined above are irrelevant to and in no way detract from the overwhelming evidence that the parties reached a meeting of the minds on a comprehensive collective-bargaining agreement as objectively evaluated.

1. The Meeting of the Minds Extends to the Contract Language Requiring Retroactive Increases for 2012, 2013 and 2014

All evidence in the record suggests that NUHW was at all times operating under the assumption that Respondent's wage proposal called for retroactive wage increases and that such increases were payable for each year of the contract (2012, 2013 and 2014). It is undisputed that the material terms of Respondent's wage proposal did not change between December 18, 2012 and February 17, 2015. Further, NUHW widely disseminated various documents to employees that were seen by various Respondent officials and likely seen by even more given the extent of the dissemination, which demonstrated that NUHW understood Respondent's proposal to entail and include retroactive pay increases of 3% on October 1, 2012, 2.5% on October 1, 2013 and 2.5% on October 1, 2014. See GC Exh. 18 and 19. Conversely, there is no evidence in the record that Respondent ever communicated to NUHW at any time before Dabney's April 23, 2015 letter to Cornejo (GC Exh. 23) Respondent's alleged belief or understanding that the retroactive increase in Respondent's wage proposal pertained only to the October 1, 2012 increase and not the 2013 and 2014 increases.

With respect to the retroactive wage increases, this is not a case of equally plausible but different understandings of ambiguous contract language for which neither party is to blame, as in *Standard Parking d/b/a Chicago Parking Association*, 360 NLRB

No. 132 (2014). Instead, there is only one plausible or reasonable interpretation of the contract language, that of NUHW.[44] As brought out in detail on direct examination of Cornejo (Tr. 99-101), cross-examination of Tegenkamp (Tr. 156, 158-159), and cross-examination of Respondent witnesses Comma and Dabney (Tr. 420, 590-591), and as especially demonstrated in the March 19, 2015 email from Respondent official Walter Yonn to Comma (GC Exh. 52), the references in Respondent's January 29, 2014 proposal to the wage increase on October 1, 2013, and the references in Respondent's February 17, 2015 proposal to wage increases on October 1, 2013 and October 1, 2014, i.e., references to wage increases dated in the past, are utterly meaningless and non-existent if they are not paid retroactively. The Yonn email (GC Exh. 52) is especially instructive in this regard. As Yonn explains there, a proposal is automatically and by definition retroactive rather than prospective if the dates of the wage increases shown in the proposal are in the past. If a party does not want to be hindered by this common sense principle, the party is free to propose that any raises only be prospective or only be payable upon future ratification, neither of which Respondent did with respect to the optical unit here, but which Yonn's email suggests Respondent did do at all other non-optical tables at which Respondent was bargaining with NUHW. The March 16, 2015 email from Wilson (GC Exh. 38) is also consistent with the unavoidable interpretation that Respondent's wage

[44] See *Machinists Automotive Trades District Lodge No. 190 (Peterbilt Motors Company)*, 227 NLRB 486, 493 (1976) (union violated Section 8(b)(3) of the Act by refusing to sign agreement based on union representative's subjective misunderstanding as contrasted with employer representative's objectively justified conception of the parties' agreement).

proposal entailed and anticipated retroactive increases for 2012, 2013 and 2014, not merely for 2012.[45] [46]

C. The Retention of Retroactive Wage Increases in the February 17, 2015 Proposal Ultimately Accepted by NUHW Was a Conscious, Intentional, Planned Decision and Not a Mistake

As set forth in detail above, there is ample evidence that the retention of the retroactive wage increases in Respondent's February 17, 2015 proposal in the optical unit as subsequently accepted by NUHW on March 14, 2015 was an intentional conscious act on the part of Respondent. Although the draft versions of the proposal that were being circulated among Respondent officials in the weeks leading up to the February 17, 2015 bargaining session removed the reference to retroactive payments, Dennis Dabney in consultation with Respondent in-house counsel Robert Spagat stepped in on the day before the February 17, 2015 bargaining session and advised chief spokesperson Christopher Comma that the sudden removal of retroactivity from Respondent's wage proposal in February 2015, when it had been a component part of Respondent's proposal dating back to December 2012, would or could be viewed as regressive bargaining (which itself can constitute a violation of Section 8(a)(5) of the Act). Comma (and contract drafter Sue Thergesen) then acted in accordance with that instruction from

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[45] Admittedly, NUHW's December 12, 2014 comprehensive proposal proposed language which stated expressly "October 2012—3%, paid retroactively; October 2013—3%, paid retroactively; October 2014—3%, paid retroactively; October 2015—3%; October 2016—3%". Resp. Exh. 1, pg. 11. However, that NUHW "gilded the lily" by explicitly showing the word "retroactively" by each increase does not establish or support any argument that the somewhat less desirable language used by Respondent and ultimately accepted by NUHW does not require and anticipate retroactive payments for each year.

[46] While the actual drafters (French, Yuson and Ochoa) of Respondent's document comparing the costs of prospective and retroactive wage increases (GC Exh. 33) were not called as witnesses at trial, and while other Respondent witnesses claimed not to have engaged in such a mathematical comparison (Tr. 248-249, 370), it is more probable than not that the Respondent officials who were engaged in such a comparison were comparing prospective increases against retroactive increases for 2012, 2013 and 2014 rather than merely for the three-month October-December 2012 period as argued in Dabney's April 23, 2015 letter to Cornejo.

Dabney and/or Spagat. Despite the presence at the bargaining table of other Respondent supervisors and managers who had been privy to the recent drafts removing retroactivity (such as French, Yuson and Ochoa), it is undisputed that no one at the table spoke up to inform NUHW that Respondent's wage proposal was mistaken or in error, or that it was a mere "placeholder" or "dead letter" which Respondent would soon supersede with a new, different wage proposal. Thus, when NUHW departed from bargaining on February 17, 2015, it rightly and legitimately believed that Respondent's December 18, 2012 LBFO as amended by Respondent on January 29, 2014 and February 17, 2015 remained on the table and capable of acceptance by NUHW at any time.

If the proffering of Respondent's February 17, 2015 wage proposal retaining retroactivity language had been a mistake, one would think that Respondent would have contacted NUHW immediately to correct it, particularly given the fact that Respondent was concededly aware of the issue by no later than the conference calls which occurred later on February 17, 2015 after bargaining in the optical unit had concluded. However, Respondent did not do so. Instead, it at most decided that it would bring up the subject orally at separate side bar discussions in the IBHS unit, notwithstanding the optical unit ground rules requiring that proposals be made (or modified or withdrawn) in writing and by a party's chief spokesperson for bargaining in that unit. Further, the General Counsel's witnesses were consistent in their testimony that even at the February 21, 2015 side bar discussions, none of the Respondent representatives used the term error or mistake in announcing Respondent's intent to send a letter revoking retroactivity from Respondent's wage proposal in the optical unit. Instead, for all that NUHW knew, Respondent's intent was to punish NUHW for continuing to seek retroactive wage

increases in the IBHS unit rather than to seek to correct an alleged mistake in Respondent's wage proposal in the optical unit.

Further, if it had truly been a mistake for Respondent to have retained the retroactivity language, then Dabney at the February 21 side bar discussion would not have told NUHW, either seriously as he claimed (Tr. 598) or even in jest, that NUHW was still free to accept Respondent's proposal then and there. Nor would Wilson have sent her numerous March 16, 2015 emails commending NUHW for its wisdom in accepting Respondent's wage proposal with retroactive increases in the optical unit. GC Exhs. 38, 41, 53. Rather than correct its alleged mistake, Respondent opted to wait and see how things proceeded in the IBHS unit. It was only when the side bar discussions in the IBHS unit broke down on March 27, 2015 that Dabney issued Respondent's letter officially revoking its retroactive wage increase proposal in the optical unit and making for the first time a prospective wage increase proposal tied to a newly proposed contract expiration date in 2018. GC Exh. 21.

1. Assuming Arguendo the Retention of Retroactive Wage Increases Was a Mistake, It Was a Unilateral Mistake of Which NUHW Had No Reason to be Aware

As argued above, there is ample evidence that Respondent's retention of the retroactivity language in its final February 17, 2015 proposal as accepted by NUHW was conscious and intentional rather than in error or a mistake. However, even assuming arguendo that the retention of retroactivity was a mistake, it was only a unilateral mistake among Respondent's representatives rather than the type of bilateral mistake that can justify rescission or reformation of a contract. If in the expression of the intention of one of the parties to an alleged contract there is error, and that error is unknown to and unsuspected by the other party, that which was so expressed by the one party and agreed

to by the other is a valid and binding contract which the party not in error may enforce. A party to a contract cannot avoid it on the ground that it made a mistake where the other contractor has no notice of the mistake and acts in perfect good faith. *North Hills Office Services*, 344 NLRB 523, 525 (2005); *Health Care Workers Local 250 (Trinity House)*, 341 NLRB 1034, 1040 (2004); *Apache Powder Company*, 223 NLRB 191 (1976). Here Respondent's own witnesses and documents show that the mistake or "disconnect", if any, was among KFHP representatives or between TPMG and KFHP, not between Respondent and NUHW. See GC Exh. 38, 43, 50; Tr. 355, 381-382, 431-432. Moreover, even if one assumes arguendo, contrary to the credible testimony of Rosselli, Cornejo and Papazian, that Dabney did use a term like mistake or error at the February 21, 2015 side bar discussion, NUHW had no reason to know of any such mistake or to believe that it still was a mistake once Dabney both offered NUHW the prospect of agreeing to the Respondent proposal in the optical unit right then and there and subsequently agreed not to send any letter or notice withdrawing Respondent's retroactive wage proposal in the optical unit.

Numerous Board cases illustrate the flaw of Respondent's mistake argument in this case. In *North Hills Office Services, Inc.*, 344 NLRB 523 (2005), the charged party employer sent a letter proposing a 35 cent per hour wage increase for all unit employees which the union subsequently accepted. Thereafter the charged party employer implemented a 35 cent per hour wage increase for full time employees but only 15 cents per hour for part time employees. The employer claimed that it had always intended to implement a two-tiered wage increase but that its negotiator made a mistake and conveyed the offer of a uniform across the board 35 cent increase. 344 NLRB at 523. The Board rejected the employer's argument that the union should have recognized the

mistake and found that the union had no reason to think that the employer's letter proposing the 35 cent wage increase was anything other than what it purported to be. 344 NLRB at 525. The subjective intent of the employer to implement a two-tiered wage increase did not prevent the Board from finding the requisite meeting of the minds existed. 344 NLRB at 526. Similarly, in *Apache Powder Company*, the Board noted that rescission for unilateral mistake is a carefully guarded remedy reserved for those instances where the mistake is so obvious as to put the other party on notice of an error. 223 NLRB at 191. Here, there was no reason for NUHW to realize Respondent had made any mistake, let alone an obvious one, when Respondent at the February 17, 2015 optical unit bargaining simply reaffirmed the same wage proposal that had been in existence since December 2012, Comma did not claim the wage proposal was a mistake, error, placeholder or dead letter, and when Comma sent his February 23, 2015 email instructing NUHW to "please disregard" Comma's February 22, 2015 email that Comma issued without having spoken to Dabney, Adams or Wilson first. See also *Health Care Workers Local 250 (Trinity House)*, 341 NLRB 1034, 1038 (2004) (union's misunderstanding was based on its subjective misunderstanding of the contents of the employer's offer which was unknown to employer and not on its face so palpable as to put a person of reasonable intelligence on their guard).

In accordance with the unilateral mistake cases, NUHW acted in perfect good faith. NUHW simply adhered to its consistent understanding that Respondent's LBFO clearly required retroactive payment of the 2012, 2013 and 2014 wage increases in the optical unit. The evidence shows that Respondent knew early on that this was NUHW's understanding but Respondent did not take immediate action to attempt to disabuse NUHW of its alleged misunderstanding, instead opting to sit on its hands and see how the

IBHS side bar discussions played out. As Wilson's numerous March 16, 2015 emails reflect, Respondent's conscious decision to bide its time and refrain from taking steps to correct its alleged mistake ultimately blew up in its face. The doctrine of mistake simply does not provide any basis for excusing Respondent's failure to execute the collective-bargaining agreement in this case.

D. NUHW Never Suggested or Agreed that Respondent Could Rescind its Retroactive Wage Proposals in the Optical Unit So Long as Respondent Refrained from Providing Written Notice

It is anticipated that Respondent will argue that it only agreed to refrain from sending NUHW written notice of its decision to revoke its February 17, 2015 wage proposal containing retroactivity, not that it agreed to refrain from revoking retroactivity entirely. For several reasons, Respondent's argument does not withstand scrutiny. First, Rosselli made it abundantly clear to Respondent both before and particularly after the caucus during the February 21, 2015 side bar discussions that NUHW was prepared to call off the IBHS side bar discussions entirely if Respondent were to remove retroactivity from its optical unit wage proposal. Tr. 171-172, 198. Indeed, Rosselli testified credibly that he used part of the caucus to ensure that IBHS member Papazian would go along with Rosselli's plan to leave and call off the IBHS side bar discussions in protest of Respondent's apparent decision to revoke retroactivity from the optical unit wage proposal. Second, the General Counsel's witnesses were consistent in their testimony that NUHW never said anything at any time that could have caused Respondent to perceive that NUHW's concern was with Respondent issuing a letter rather than with the fact of abandoning retroactivity. Tr. 54, 172-173.

Third, Respondent's claims that Rosselli only asked Respondent to delay sending a letter rather than to entirely refrain from revoking retroactivity make no sense and

indeed fly in the face of NUHW's guiding and founding philosophy of transparency and workplace democracy. While the history of the creation of NUHW after the placement in trusteeship of SEIU-UHW is well known and not a subject of the instant proceeding, Rosselli testified credibly that NUHW is a bottom up and not top down organization. Tr. 203, 215. The idea that NUHW would agree to a "nod and a wink" arrangement with Respondent in which both sides knew of Respondent having withdrawn retroactivity, but in which Respondent would refrain from sending a letter so that NUHW would not then have to explain this development to its members, is nothing short of absurd. The record is replete with examples of NUHW keeping its members apprised of developments, not keeping them secret. There is no evidence of any NUHW policy or practice of only being obligated to convey information to members about developments in bargaining when such developments are confirmed in writing. Tr. 54, 173, 202. Rosselli testified that he had the consent of the necessary steward's councils and bargaining teams before being able to even engage in any side bar discussions at all. Tr. 192-193. There was evidence of regular conference calls with steward's councils and bargaining teams at which the status of bargaining was discussed. Indeed, NUHW was careful to ensure the presence of rank and file IBHS member Papazian and Southern California unit member Gizzo at the side bar discussions and there is no evidence of any gag order on what they were able to convey to whomever they wished about what they observed at the side bar discussions. Tr. 215-217, 226. These choices and practices by NUHW are hardly conducive to the sort of back room deal that Respondent now apparently contends that NUHW actively sought and secured.

Fourth, even if one disregards or doubts the sincerity with which Rosselli testified

to NUHW's philosophy of transparency, one cannot doubt that if word got out to NUHW members that NUHW had agreed to an arrangement by which Respondent revoked retroactivity for the optical unit but this news was concealed from the members by virtue of NUHW asking Respondent to refrain from sending a letter confirming it, the reputation of NUHW and Rosselli would be severely damaged. Moreover, SEIU-UHW would likely use such information to further pursue its ongoing goal of achieving the decertification of NUHW and the replacement of NUHW with SEIU-UHW as designated bargaining representative of the optical unit.[47] Even Adams realized and conceded that retroactive wage increases was the biggest issue from the perspective of NUHW. Tr. 613. It is simply inconceivable that NUHW would abjectly surrender on the substantive issue of retros and merely beg Respondent not to send a letter so that NUHW could somehow save face.

Thus, in light of the analysis above, Respondent's alleged mistake in including the retroactive language in Respondent's February 17, 2015 wage proposal was initially not a mistake at all. Further, even if it was a mistake, it was a unilateral mistake that does not provide a basis for Respondent's refusal to execute and implement the agreed upon collective-bargaining agreement.

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[47] Wilson, for one, was well aware of the behind the scenes role played by SEIU-UHW in this case, as evidenced in her email to other Respondent managers regarding how "mad" SEIU-UHW would be when it learned that Respondent had agreed to retroactive wage increases with NUHW (GC Exh. 43) and her letter to NUHW-represented employees criticizing NUHW for blocking a decertification election by virtue of filing and prosecuting the charge and complaint in the instant case. CP Exh. 1.

E. Respondent Cannot Legitimately Rely Upon Any NUHW Failure to Ratify the Collective-Bargaining Agreement Prior to the March 27, 2015 Date on Which Respondent Purported to Withdraw its Proposal

It is anticipated that Respondent will argue on brief that it was privileged to withdraw its February 17, 2015 comprehensive proposal, either by way of Dabney's statement at the February 21, 2015 side bar discussion in the IBHS unit or in Dabney's March 27, 2015 letter to Rosselli taking the position that Respondent had withdrawn its February 17, 2015 comprehensive proposal at the February 21 side bar discussion, insofar as the optical unit employees had not yet ratified the contract by either date. As explained in detail below, Respondent's argument in this regard is entirely unavailing.

It is well settled that a union is free to negotiate and make binding agreements with an employer with or without the formal consent or ratification of the unit employees. *North Country Motors, Ltd.*, 146 NLRB 671 (1964). A union does not lose its plenary authority to make agreements when it puts a proposal to its members for ratification. Unless the union surrenders its exclusive domain and control over contract acceptance, any ratification vote is purely advisory, and it is for the union to construe and apply its internal regulations regarding what constitutes ratification. *North Country Motors*, 146 NLRB at 674. Unless the union and employer have agreed otherwise, ratification is an internal union matter which is not subject to question by an employer. *New Process Steel, LP*, 353 NLRB 111, 114 (2008), rev'd on other grounds, 560 U.S. 674 (2010) (citing *Martin J Barry Co.*, 241 NLRB 1011, 1013 (1979)). The Board recognizes two ways a union can cede its authority to reach an agreement and make employee ratification a necessary condition to a binding contract. First, the union and employer may agree to make employee ratification a condition precedent to the acceptance of an offer. Second the union may unilaterally cede its authority to the membership, but in such instances the

employer must be given clear and timely notice that the union lacks the authority to accept an offer and that only the membership has such authority. *Sacramento Union*, 296 NLRB at 478. Because employee ratification devolves the authority to accept an offer from the exclusive bargaining representative to the employees, the Board insists on clear evidence that a union has agreed as a contractual matter to surrender a degree of its prerogatives. *New Process Steel, LP*, 353 NLRB 111, 114 (2008) (citing *Beatrice/Hunt-Wesson, Inc.*, 302 NLRB 224 (1991)); *Kasser Distiller Products Corp.*, 307 NLRB 899 (1992); *UAW Local 365 (Cecilware Corp.)*, 307 NLRB 189, 193-194 (1992). A bilateral agreement making ratification a condition precedent for contract formation is not established casually or equivocally. 353 NLRB at 114.

While Respondent introduced into the record a copy of the NUHW Constitution and Bylaws (Resp. Exh. 2) and on brief will likely point to various sections in which ratification is mentioned, such ratification language is irrelevant. The presence of a ratification process in a union's constitution and/or bylaws does not alter or detract from the fundamental principle that employers do not have a right to question a union's internal ratification procedures or rely on non-ratification or alleged defects in the ratification process as a basis for a refusal to execute an agreement. See *Newtown Corporation*, 280 NLRB 350, 351 (1986) (in view of Board's holdings that internal union matters cannot effect the validity of collective-bargaining agreements, the employer's argument that the union's constitution and bylaws prohibit it from executing an agreement absent a majority vote is incorrect as a matter of law); *Electra-Food Machinery, Inc.*, 241 NLRB 1232, 1233 n. 5 (1979), aff'd 621 F.2d 956 (9th Cir. 1980) (the Board and the courts have held that it is for a union and not for a company or others

to interpret a union's constitution); *M & M Oldsmobile, Inc.*, 156 NLRB 903, 905-906 (1966), aff'd, 377 F.2d 712 (2d Cir. 1967).[48]

With these principles in mind, it is manifest that Respondent cannot rely upon any alleged lack of ratification as a defense. First, it is undisputed that no party asked that a ratification requirement be inserted into the Respondent-drafted ground rules agreed to by no later than the second session of optical unit bargaining and that no ratification requirement was ever added to the ground rules.[49] Nor did any party produce any bargaining notes reflecting that the parties agreed that ratification would be a condition precedent to any agreement. Similarly, Comma admitted on cross-examination that there was never any discussion at any of the optical unit bargaining sessions he attended about any ratification requirement, which is to be contrasted with the IBHS unit in which Respondent actively proposed and sought payment to employees of a ratification bonus contingent on contract ratification. Tr. 344-345, 139; GC Exh. 27.[50] Similarly, Comma also admitted on cross-examination that he had no knowledge of there being any

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[48] It is also noteworthy that the Board in *Newtown* and *Electra-Food* did not find it necessary to parse or interpret the particular wording of the constitution and/or bylaws in those cases in order to conclude that it was none of the employer's business. *Newtown*, 280 NLRB at 351 n. 5; *Electra-Food*, 241 NLRB at 1233 n. 5. Counsel for the General Counsel has not located any Board authority establishing that the mere presence of a ratification requirement in a union's bylaws or Constitution can in and of itself establish ratification as a condition precedent to a binding agreement without additional evidence of an express agreement between an employer and a union that ratification would be a condition precedent. Indeed, in one Administrative Law Judge decision adopted by the Board in the absence of exceptions, the ALJ did not find the presence of a ratification requirement in a union's constitution to be controlling when there was no evidence that the employer was given a copy of the union's constitution. *International Union of Operating Engineers Local 324 (Michigan Conveyors Manufacturers Association)*, 201 L.R.R.M. (BNA) 1253, 2014 WL 4734679 (Div. of Judges, Sept. 23, 2014), adopted by 2014 WL 5767882 (Nov. 5, 2014). On cross-examination, Respondent was not able to elicit evidence from Cornejo or any other General Counsel witness that any NUHW representative ever informed Respondent at the bargaining table that NUHW's Constitution and/or bylaws required that a collective-bargaining agreement be ratified in order to be effective. Tr. 109-111.

[49] The absence of any reference to ratification in the written ground rules renders distinguishable cases on which Respondent may seek to rely on brief, such as *Teledyne Specialty Equipment Landis Machine Co.*, 327 NLRB 928 (1999) and *Good GMC, Inc.*, 267 NLRB 583 (1983).

[50] In the IBHS unit, Respondent also sought to tie retroactivity to ratification (GC Exh. 25, pg. 2), whereas there is no evidence that Respondent made any such effort in the optical unit. Tr. 128-129.

requirement that ratification occur in order for the optical unit agreement to become valid and effective if accepted by NUHW. Tr. 299.

Second, while Cornejo may have made a stray remark about ratification at the first or second bargaining session (Tr. 90-92), such union statements of intent to seek ratification fall far short of establishing an express agreement. The Board distinguishes between a union's expressions of intent to seek employee ratification, which the union can modify or ignore at will, and an actual bilateral agreement with an employer to make ratification a condition precedent to the formation of a binding contract. *New Process Steel*, 353 NLRB at 114. Unions can note that any agreement will have to be acceptable to employees or even demand ratification without the Board finding an express agreement to make ratification a condition precedent. See *Seneca Environmental Products*, 243 NLRB 624, 626-627 (1979), aff'd 646 F.2d 1170 (6th Cir. 1981) (finding no express agreement even though employer believed in good faith that union would take any agreement to employees and employees would have to find it acceptable). The Board is generally "unwilling to distort words of intention into terms of agreement, particularly where the subject is unrelated to wages and terms and conditions of employment." *C & W Lektra Bat Co.*, 209 NLRB 1038, 1038-1039 (1974), aff'd, 513 F.2d 200 (6th Cir. 1975). See also *Sunglass Products Inc. d/b/a Personal Optics*, 342 NLRB 958, 962 (2004), aff'd, 165 Fed. Appx. 1 (D.C. Cir. 2005) (finding no evidence that ratification was a condition precedent to an agreement, even though union stated its intention to take agreement to membership and urged the employer to accept some proposals because of the union's need to satisfy ratifying employees). In *Personal Optics*, the Board found that even if the union's statements led the employer to think the union would conduct a ratification vote, that was not the same thing as an agreement

between the parties and showed only that the union had a self-imposed internal ratification requirement. 342 NLRB at 958 n. 2, 962. Similar to the facts in the instant case, the union in *Personal Optics* informed the employer that a contract had been ratified only after the employee negotiating committee (not all affected employees) voted to accept the agreement. The ALJ in that case subsequently found, with Board approval, that "[I]t was for the Union, not Respondent, to determine how to effect ratification. It was for the Union, not Respondent, to determine that ratification was achieved when the negotiating committee unanimously accepted the Agreement. The Agreement was, therefore, ratified when the negotiating committee unanimously accepted it." 342 NLRB at 962. See also *Williamhouse-Regency of Delaware*, 297 NLRB 199, 199 n. 5 (1989), aff'd, 915 F.2d 631 (11th Cir. 1990) (holding that no condition precedent to an agreement had been created even though the union notified the employer at the outset of negotiations, both in writing and orally, that any agreement would have to be ratified by the membership).[51]

Third, even if there were evidence that ratification was a condition precedent, which there is not, Board law is clear that an employer does not have standing to challenge a union's ratification process. *Valley Central Emergency Veterinary Hospital*, 349 NLRB 1126, 1127 (2007); *Childers Products Co.*, 276 NLRB 709, 711 (1985), aff'd, 791 F.2d 915 (3d Cir. 1986) (because method of contract ratification was within union's

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[51] Even if Cornejo made the stray remark about the alleged need for ratification at one of the first two optical unit bargaining sessions, it is clear that Comma as Respondent's chief spokesperson did not rely upon any such remark by Cornejo in any event. Far from direct reliance on Cornejo's statement or clear express agreement between the parties as to ratification, Comma testified that he basically assumed that ratification had to occur because that was what his past experience and "parlance" told him, even though he "didn't research it" and merely "thought that was the normal democratic process that NUHW would follow". Tr. 331-332. Nor did any Respondent representative ask that Cornejo's alleged remark about ratification be added to the written ground rules. Tr. 115. *Consumat Systems, Inc.*, 273 NLRB 410, 413 (1984) (although union stated that ratification by membership was necessary for final and binding agreement, no agreement was made between employer and union that made ratification necessary and no ratification requirement was incorporated into written contract proposal prepared by employer).

exclusive domain and control, employer's refusal to honor contract, based on objections to ratification process, was unlawful). See also *Teamsters Local 662 (W.S. Darley & Co.)*, 339 NLRB 893, 899, aff'd 368 F.3d 741 (7th Cir. 2004) (2003) ("as a matter of law, it is none of the employer's business how (or even whether)" a union "obtains the employees' approval of an agreement reached between the parties. Employer awareness of improprieties in a ratification election. and even the failure to conduct a ratification election at all do not suffice to justify refusals to execute contracts embodying agreements reached") (citing *Teamsters Local 251 (McLaughlin & Moran, Inc.)*, 299 NLRB 30, 32 (1990) and *Newtown Corp.*, 280 NLRB 350, 351 (1986), aff'd, 819 F.2d 677 (6th Cir. 1987)).[52]

For all of these reasons, the Board should reject any argument by Respondent that NUHW's failure to conduct a ratification vote or the incomplete status of the endorsement vote as of March 27, 2015 provide any defense to or excuse from Respondent's obligation under *Heinz* to execute the collective-bargaining agreement in this case.

VI. CONCLUSION

Counsel for the General Counsel finally notes that the equities favor the position of NUHW here. NUHW asks for nothing more than for Respondent to honor the wage proposal that it has been making since December 2012. If NUHW had accepted on the spot back in 2012, the optical unit employees would have received the very same annual increases it now should receive retroactively, nothing more. It is hardly "gotcha"

[52] If an employer cannot object to a union's failure to conduct a ratification vote at all, it follows that an employer cannot object to a union opting to conduct an endorsement vote rather than a ratification vote as NUHW opted to do in the present case.

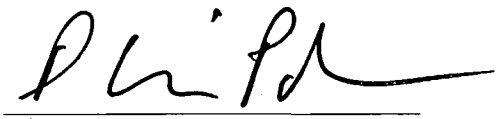
bargaining for NUHW to seek to hold Respondent to a proposal that Respondent held to for more than two years.

In conclusion, Counsel for the General Counsel submits that the foregoing and the record as a whole establishes by a preponderance of the evidence that Respondent violated Section 8(a)(5) of the Act as alleged in the Complaint (GC Exh. 1(c)). Accordingly, the Administrative Law Judge is urged to make appropriate findings of fact, conclusions of law and recommendations to the Board as are necessary to remedy Respondent's unfair labor practices, including finding that Respondent violated Section 8(a)(5) of the Act by failing to prepare, finalize and execute the contract set forth in Respondent's December 18, 2012 last, best and final offer as amended on January 29, 2014 and February 17, 2015. General Counsel seeks a recommended order requiring Respondent to (1) prepare, finalize, and execute the terms of its December 18, 2012 last, best and final offer as amended on January 29, 2014 and February 17, 2015; (2) cease and desist from its unlawful conduct; (3) make optical unit employees whole for any losses they incurred as a result of Respondent's failure to timely prepare, finalize and execute the contract arising out of NUHW's acceptance of Respondent's December 18, 2012 last, best and final offer as amended on January 29, 2014 and February 17, 2015; (4) reimburse optical unit employees for amounts equal to the difference in taxes owed upon a receipt of any lump-sum payment paid by Respondent pursuant to a Board order and taxes that would have been owed had Respondent timely prepared, finalized and executed the contract arising out of NUHW's acceptance of Respondent's December 18, 2012 last, best and final offer as amended on January 29, 2014 and February 17, 2015 and timely paid monies to optical unit employees pursuant to said contract; (5) submit the appropriate documentation to the Social Security Administration so that when back pay is

paid it will be allocated to the appropriate periods; (6) implement other terms and conditions of employment under the contract arising out of NUHW's acceptance of Respondent's December 18, 2012 last, best and final offer as amended on January 29, 2014 and February 17, 2015 to the extent not already previously implemented; and (7) post and email a notice containing provisions such as those set forth in the attached proposed notice.

DATED AT Oakland, California, this 18th day of March, 2016.

Respectfully submitted,



D. Criss Parker
Counsel for the General Counsel
National Labor Relations Board
Region 32
1301 Clay Street, Suite 300N
Oakland, California 94612-5211

PROPOSED NOTICE

FEDERAL LAW GIVES YOU THE RIGHT TO:

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT do anything to prevent you from exercising the above rights.

In recognition of these rights, we hereby notify the employees that:

The National Union of Healthcare Workers, herein called the Union,
is the representative in dealing with us regarding wages, hours and other working conditions of the employees in the following unit, herein called the Unit:

> All full-time and regular part-time optical workers, including benchman journeypersons, contact lens assistants, contact lens fitters, contact lens trainees, inspectors, lead optical dispensers, optical dispensers, optical dispenser apprentices, optical equipment maintenance technicians, optical laboratory apprentices, optical services assistants, prescription stock clerk journeypersons, senior prescription stock clerks, special optical workers, surface grinder journeypersons, working foremen optical lab, and utility optical workers employed by the Employer throughout Northern California; excluding all other employees, branch managers, office clericals, guards, and supervisors as defined by the Act.

WE WILL NOT repudiate and/or refuse to sign the collective bargaining agreement we reached with the Union on or about March 14, 2015 covering the terms and conditions of employment for Unit employees.

WE WILL NOT refuse to implement and obey the terms of the collective-bargaining agreement reached 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.

WE WILL sign the collective bargaining agreement that we reached with the Union on March 14, 2015, which is effective from October 1, 2012 through September 30, 2015 and which has been automatically renewed through September 30, 2016;

WE WILL, upon request by the Union, adhere to the collective-bargaining agreement reached with the Union and effective March 14, 2015, giving effect to its terms retroactive to March 14, 2015, and continuing those terms and conditions in effect unless

and until changed through collective bargaining with the Union. If no such request is made by the Union, we will, upon request, bargain with the Union and embody any understanding reached in a signed agreement.

WE WILL implement the terms contained therein, including but not limited to payment of retroactive wage increases to Unit employees for the years 2012, 2013 and 2014 as set forth in the agreement;

WE WILL make Unit employees whole for any loss of earnings and other benefits suffered as a result of our repudiation and refusal to sign and adhere to the collective bargaining agreement agreed to on March 14, 2015;

WE WILL make Unit employees whole for any lost interest they are due as a result of our payment to them of those retroactive wage increases.

THE PERMANENTE MEDICAL GROUP, INC.
(Employer)

Dated _____ **By:** _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. We conduct secret-ballot elections to determine whether employees want union representation and we investigate and remedy unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below or you may call the Board's toll-free number 1-866-667-NLRB (1-866-667-6572). Hearing impaired persons may contact the Agency's TTY service at 1-866-315-NLRB. You may also obtain information from the Board's website: www.nlrb.gov.

1301 Clay St Ste 300N
Oakland, CA 94612-5224

Telephone: (510)637-3300
Hours of Operation: 8:30 a.m. to 5 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the above Regional Office's Compliance Officer.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 32

THE PERMANENTE MEDICAL GROUP, INC. and NATIONAL UNION OF HEALTHCARE WORKERS, CALIFORNIA NURSES ASSOCIATION, AFL-CIO	Case(s) 32-CA-149245 Date: March 18, 2016

AFFIDAVIT OF SERVICE OF COUNSEL FOR THE GENERAL COUNSEL'S BRIEF TO THE ADMINISTRATIVE LAW JUDGE

I, the undersigned employee of the National Labor Relations Board, being duly sworn, depose and say that on the date indicated above I served the above-entitled document(s) upon the persons at the addresses and in the manner indicated below. Persons listed below under "E-Service" have voluntarily consented to receive service electronically, and such service has been effected on the same date indicated above.

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Judge Amita Baman Tracy
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March 18, 2016

Frances Hayden, Designated Agent of NLRB
Name

Signature