

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Washington D.C.

UTILITY WORKERS UNION OF AMERICA,
AFL-CIO (UWUA); INTERNATIONAL CHEMICAL
WORKERS UNION COUNCIL-UFCW (ICWUC); AND
THE UWUA-ICWUC JOINT STEERING
COMMITTEE

and

Case 21-CB-14820

SOUTHERN CALIFORNIA GAS COMPANY

COUNSEL FOR SOUTHERN CALIFORNIA GAS COMPANY'S
OPPOSITION TO INTERNATIONAL CHEMICAL WORKERS UNION
COUNCIL'S, UTILITY WORKERS UNION OF AMERICA'S, AND JOINT
STEERING COMMITTEE'S MOTIONS FOR SUMMARY JUDGMENT

AFFIDAVIT OF SARA FRANKE FILED CONCURRENTLY HEREWITH

Under Board Rule 102.24(b), Counsel for Charging Party Southern California Gas Company files this opposition to the Respondent Unions' motions for summary judgment.

Southern California Gas Company joins in the arguments advanced by the Counsel for the Acting General Counsel in its opposition papers, and incorporates and relies on those arguments and the supporting evidence herein.

I. Brief Factual Background

The Collective Bargaining Agreement at issue here ("CBA" or the "Agreement") is the successor agreement to the January 2005 collective bargaining agreement between Southern California Gas Company ("SCG" or the "Charging Party"), Utility Workers Union of America, AFL-CIO and the International Chemical Workers Union Council, UFCW, AFL-CIO (collectively, Respondents).

Bargaining for this successor agreement was almost completely concluded by on or about January 31, 2009.¹ At that time, SCG and the Respondents signed a tentative agreement (“TA”) that was subsequently ratified by the members. (Affidavit of Sara Franke [hereinafter “Franke Affidavit”] at ¶ 3).² For the ensuing nine months, the parties engaged in the steps necessary to complete the negotiations on one final issue (pertaining to sick pay language) and to prepare the final booklet version of the Agreement. (Franke Affidavit at ¶ 4). The final booklet version, which is printed and handed out to employees, is the one used by both union and management in all discussions and grievances, is signed by all parties, and the printed version shows all of the signatures. This final printed version is the official Collective Bargaining Agreement (Franke Affidavit at ¶ 4).³ The booklet, which was the Agreement for the period March 1, 2009 to September 30, 2011, was ready for signature on November 12, 2009. (Franke Affidavit at ¶ 5) To get to this point where the booklet version was final and ready to sign, numerous drafts of the Agreement had gone back and forth between the Respondents and SCG. Despite agreement between the parties, the Respondents announced at the November 12 meeting that they refused to sign. (Franke Affidavit at ¶ 6) The booklet was not executed by the Respondents for another four months, until on or about March 23, 2010 (Lewis Affidavit, ¶ 15). Significantly, during the many months of exchanging drafts prior to November, the “side letter” that supposedly was the basis for the refusal to sign, was exchanged between the parties in exactly the same form that it was presented in November, was never edited or corrected by either party, and appears in the signed Agreement exactly as it was presented in the November 12 meeting. (Frank Affidavit at ¶ 8) Nothing changed, except that in February of 2010, pursuant to an unfair labor practice charge filed by SCG, the National Labor Relations Board (NLRB) determined that a complaint was going to issue against Respondents for failing to sign the Agreement. (Franke Affidavit at ¶ 9) Then and only then, did they finally sign the Agreement that they now freely admit had been bargained for and agreed to in January of 2009. The bargaining process demands that parties act in good faith; resort to the NLRB should not be necessary in order to get execution of a completed agreement.

¹ Indeed, Respondents UWUA’s and JSC’s Motion for Summary Judgment confirms, at p.3, ¶ 6: “On or about January 31, 2009, the Employer and Respondents reached complete agreement on terms and conditions of employment of the unit.”

² The Tentative Agreement is attached as Exhibit H to the Affidavit of John Lewis filed in support of ICWUC’s Motion for Summary Judgment (hereinafter, the “Lewis Affidavit”).

³ The term “booklet” is therefore also a reference to the CBA.

The Respondents now claim that they refused to sign the Agreement in November of 2009 because SCG and the Utility Workers began a discharge arbitration on November 4, 2009. (Lewis Affidavit, ¶ 17). The claim is that SCG's position in that arbitration over its interpretation of the Agreement justified their refusal to sign the very Agreement that the arbitrator was designated to interpret. (Id.) Not only is the Respondents' statement of the nature of the dispute incorrect, but the very phrasing of the issue demonstrates how frivolous it is. The language of the Agreement, including any dates on any documents, had been exchanged, approved, edited, and negotiated PRIOR to November of 2009. If there were a dispute over the interpretation of that language, or the significance of dates on letter agreements, it was for the arbitrator to decide.

The existence of a dispute over the interpretation of the agreed upon language is NOT an excuse to refuse to sign the document, nor is it a basis to try to re-open negotiations after the final agreement has been concluded. Indeed, the frivolous nature of the Respondents' position is confirmed by the fact that at the time they finally signed the Agreement, the arbitration had not even concluded. (Franke Affidavit at ¶ 7) As this complaint goes to hearing, the arbitration has not yet been briefed, and no decision has been rendered. (Id.) Thus, the deal between the parties is now signed because the NLRB intervened, and the written deal is exactly what was presented to the Respondents in November of 2009. What the "side letter" may or may not mean is still awaiting decision, but the Respondents now acknowledge that the "side letter," as it has been written throughout the editing process, is what the parties negotiated. (See the 2009-2011 CBA attached as Exhibit I to ICWUC's Motion for Summary Judgment.)

All of the Respondents' arguments in the summary judgment motions are nothing more than an attempt to reargue their contract interpretation to the NLRB. This case is simple. The parties reached an agreement on the language of the new CBA in early November 2009. They arranged to meet on November 12, 2009 to sign the CBA, as they have done for all prior CBAs. The Union refused to sign in order to gain a tactical advantage in an arbitration. SCG sought relief from the NLRB. But for the Region's intervention, the CBA would not be signed. Although they eventually signed after learning of the Complaint, their delay is unjustified and unlawful.

II. Brief Procedural History

In November 2009, when the booklet containing the agreed upon terms was ready for signature and the Respondents refused to sign it, SCG filed a charge in Case 21-CB-14820 alleging that the Joint Steering Committee for Respondents failed and refused to execute a successor agreement in violation of Section 8(b)(3) of the Act.⁴ In February 2010, the Regional Director of Region 21 indicated that a complaint would be issued, and there was some discussion between the Region, the Respondents and SCG about a possible settlement. Settlement was not achieved, and on March 31, 2010, the Regional Director of Region 21 issued a Complaint and Notice of Hearing, to which Respondents filed an answer on April 13, 2010. (Franke Affidavit at ¶ 9.)⁵

On May 7, 2010, SCG filed an amended charge to dismiss the local unions as they are not signatories to the CBA.⁶ Thus, the amended charge alleged that Utility Workers Union of America (“UWUA”), International Chemical Workers Union Council-UFCW (“ICWUC”), and the UWUA-ICWUC Joint Steering Committee (“JSC”) (collectively “Respondents”) violated Section 8(b)(3) of the Act by failing and refusing to execute and delaying in executing the CBA from on or about November 12, 2009 to on or about March 23, 2010. On June 4, 2010, the Regional Director issued an Amended Complaint and Notice of Hearing dismissing the locals.⁷

On June 18, 2010, Respondents each filed separate answers to the Amended Complaint.⁸ Also on June 18, respondent ICWUC filed its Motion for Summary Judgment. On June 23, Respondents UWUA and JSC filed their Motion for Summary Judgment. The hearing in this matter is set for June 30, 2010. Respondents’ Motions for Summary Judgment must be denied on the following grounds.

⁴ The original charge is attached as Exhibit A to the Lewis Affidavit.

⁵ The Complaint/Notice of Hearing and the Answer thereto are attached as Exhibits C and D respectively to the Lewis Affidavit.

⁶ The Amended Charge is attached as Exhibit B to the Lewis Affidavit.

⁷ The Amended Complaint is attached as Exhibit E to the Lewis Affidavit.

⁸ These answers are Exhibits 6-8 to the Acting General Counsel’s MSJ Opposition.

III. Material Issues of Fact and Law Preclude Summary Judgment.

Respondents' Answers to the Amended Complaint create obvious triable issues of fact. For example, Respondent ICWUC denied the allegation set forth in paragraph 9(b) of the Amended Complaint that "[s]ince on or about November 12, 2009, the Employer has requested that Respondents execute a written contract embodying the agreement described above in paragraph 9(a)." (See Exhibit 6 to the Acting General Counsel's Opposition) This denial directly contradicts SCG's position, which it consistently has maintained throughout this case, that the ICWUC refused to sign the booklet until March. However, SCG contends, and indeed the Respondents' briefs appear to admit, that the meeting of November 12, 2009 was for the purpose of signing the agreement so the booklet could go to printing, and that at that meeting, Respondents refused to sign - ostensibly because of SCG's arguments in the completely unrelated arbitration only eight days before. Accordingly, the core issue here is disputed and summary judgment must be denied.

Moreover, Respondent ICWUC also has denied the allegations in paragraph 9(c) of the Amended Complaint that "[f]rom on or about November 12, 2009, to on or about March 23, 2010, Respondents failed and refused to execute and delayed in executing the agreement described above in paragraph 9(a)." Similarly, Respondent ICWUC denies, either entirely or in part, allegations in paragraphs 1,4,5,6,8,10 and 11 of the Amended Complaint. All of these issues are averred by SCG, and indeed in the very motion that ICWUC brings, it appears to acknowledge, at a minimum, that it refused to sign the Agreement in November 2009, which it then signed, without amendment, in March 2010. Thus the very internal inconsistencies within Respondents' own briefs compel the denial of their motions.

Triable issues of fact are also created by Respondent ICWUC's affirmative defenses to the Amended Complaint. The defenses claim, *inter alia*, that Section 10(b) of the Act bars certain of the allegations; that neither the charge, amended charge, nor the Complaint were properly served on Respondents; and that the amended charge should be deferred pending the outcome of the arbitration. The facts necessary to support and/or refute these defenses, coupled with the denials in Respondent's Answer, create material issues of fact and law that preclude summary judgment.

IV. Signing and Ratifying the Tentative Agreement Does Not Amount to Executing the CBA.

In their motions, the Respondents appear to take the position that signing and ratifying the tentative agreement in January of 2009 (“TA”) renders de minimis the failure to and delay in signing the booklet – which the parties treat as the official CBA. This argument has no merit.

Preliminary, the long term implications of such a premise are extremely problematic. If the Respondents’ position were viable, then parties could routinely refuse to execute the formal, agreed upon collective bargaining agreements that contain all terms and conditions of employment, and simply respond to every complaint or grievance with a reference to someone’s notes, or to individual pages of “struck” and “unstruck” language from a tentative agreement. The process of negotiating an agreement was never intended to result in a complicated process of cut and paste in order to determine the operative agreement between the parties. Such a position would allow the parties to continue disputing the terms espoused by the other while relying on partial summaries in tentative agreements. This would not give any certainty or assurance to their members or company officials who rely on the booklet to understand the bargained for terms and conditions of employment and to assess their rights and responsibilities under it. Accordingly, the finality espoused by Respondents to a TA flies in the face of longstanding Board precedent that treats Section 8(d) refusals to sign any agreement reached between the parties as a *per se* violation. See, e.g., UAW, Local 2029 (Nutone), 2005 NLRB LEXIS 3 (2005). There, the ALJ found that the union violated Section 8(b)(3) when it refused to sign the actual collective bargaining agreement, even though it had signed and ratified the tentative agreement. Thus, it is an independent obligation to sign the collective bargaining agreement, not just the tentative agreement.

Indeed, the very situation presented in this case is one in which the Unions refused to acknowledge an admittedly agreed upon portion of the TA because they suddenly decided they did not like the way SCG interpreted its meaning. It is preposterous to take the position that a party can refuse to sign an agreed upon deal just because they THINK the other party might ARGUE that it means something different from what they THINK it is supposed to mean. The agreed language is the agreed language. The arbitrator will decide who is right about what it means. One side does not get to refuse to sign off on and attempt to renegotiate the agreed

language, 9 months into the agreement, because they are afraid they might lose an argument in an arbitration about what that language means. Such tactical reasons do not excuse a Section 8(d) obligation.

Furthermore, it is established Board law that a delay in signing an agreement reached by the parties based on extraneous reasons is unlawful. Respondents' rely on *American Federation of Musicians*, 202 NLRB 620, 621 (1973), for the proposition that this case implicates an issue "of such obviously limited impact and significance that we ought not to find that it rises to the level of constituting a violation of our Act." (UWUA's and JSC's Motion for Summary Judgment at p. 6, lines 8-10). In that case, however, the alleged violation was an empty threat of coercion that was rescinded before the Board even issued a complaint, thus, there was no indication that the rescission was based on fear of Board action. Also, there was no evidence of any prior practice or pattern of harassment. On those specific facts, the Board found that "the alleged misconduct here is of *such obviously limited impact and significance* that we ought not to find that it rises to the level of constituting a violation of our act." *Id.* at 621 (emphasis added). Here, the violation is not based on an "empty threat," but on the core value of the bargaining relationship – the signing of the collective bargaining agreement.

Notably, the case on which the *American Federation of Musicians* panel based its decision, *NLRB v Columbia Typographical Union No 101, International Typographical Union of North America, AFL-CIO [The Evening Star Newspaper Co and The Washington Daily News]*, 470 F 2d 1274 (C A D C, 11/10/72), denying enforcement of 193 NLRB No 167, further underscores the fact that the violation here cannot credibly be characterized as "de minimis" There, the violation that the Board characterized as "one of those infinitesimally small abstract grievances" was the local union executive committee's issuance of a fine to a supervisor for failure to notify the local that he had performed work reserved for unit members under the agreement. However, long before issuance of a complaint by the General Counsel, the International union reversed the local's ruling and the amount of the fine was returned to the supervisor. Also, there was no suggestion that the International acted under compulsion or fear of the Board, or that the local or International had acted in bad faith in any way. Such is far from the case here.

This is not the case of one small infraction that was immediately remedied without damage before the Board became involved. In fact, the Collective Bargaining Agreement was not finally signed until just one week before the Region issued its Complaint, and over a month after the Board had given notice of its intention to issue a complaint, and the possibility of settlement had been discussed. Furthermore, the agreement had been reached many months before and was not executed due solely to the Respondent unions' delays. Moreover, both SCG and the unit members have been prejudiced by depriving them of the benefit of a final printed collective bargaining agreement.

Finally, this dispute must not be characterized as "infinitesimally small" because it goes to the heart of the collective bargaining relationship – which in turn is at the heart of the Act itself. Accordingly, any argument that Respondents' conduct was nothing more than a "de minimis" violation is not well taken and must be rejected. Such an assertion is directly contrary to Board law establishing that the failure to execute the CBA is a *per se* violation of the Act.

Also, Respondents' position is just plain illogical from a practical perspective. If all that were needed to finalize the parties' agreement were a *tentative* agreement, why waste time memorializing the final terms in a signed booklet that gets distributed to the company (its supervisors) and the union members as the final collective bargaining agreement between the parties? Why not just hand out pages of notes showing all kinds of edits and strike outs? It is in all parties' best interests to participate in a bargaining process that is expeditious and conducted in good faith, without needless, superfluous steps and delay. Clearly, the final signed document, clean, printed, and distributed, has value to both sides. Indeed, in this case, nearly 9 months was spent bringing that document into existence. For Respondents to then refuse to sign it for tactical reasons is the epitome of bad faith.

Finally, Respondent's "de minimus" argument directly contradicts one of the most fundamental principles of labor law, namely, the collective bargaining agreement is the heart of the relationship. As stated by the 9th Circuit Court of Appeal, "Collective bargaining, as contemplated by the Act, is a procedure **looking toward the making of a collective agreement** between the employer and the accredited representative of his employees concerning wages, hours and other conditions of employment." *Lozano Enterprises v. NLRB*, 327 F.2d 814, 818 (9th Cir. 1964) (emphasis added). Once that agreed language has been determined, one party

cannot simply refuse to sign it unless and until the federal government steps in and says it must be signed.

Furthermore, the fact that one agreement or partial agreement is executed is not an excuse to refuse to execute other agreed upon documents. A party is not free to pick and choose which agreements to sign. For example, in *Active Transportation Company, L.L.C.*, 340 NLRB 426, 434 (2003), the Board upheld the ALJ's decision stating "Section 8(D) of the Act includes within the definition of the duty to bargain collectively the requirement that the parties execute a written contract incorporating **any** agreement reached if requested by either party. Respondent has not satisfied this obligation." (In accord, *UAW, Local 2029 (Nutone)*, 2005 NLRB LEXIS 3 (2005)). If the party waits to act until the threat of federal intervention has been announced, that party cannot then claim that its behavior is of little import. The bargaining process would grind to a halt if federal intervention were the only way that a signed collective bargaining agreement could be achieved.

Respondents' assertion that the TA was ratified and its terms implemented, therefore rendering execution of the CBA meaningless belies both the core purpose of the Act and relevant Board law on the issue of delay in executing an agreement.

In *NLRB v. South Atlantic District Longshoremen ILA (LYKES Bros.)*, 443 F.2d 218, 219-220 (5th Cir. 1971), bargaining with a separate local of clerks and checkers did not begin until a few days after the longshoremen and employers reached agreement. Although the longshoremen locals had reached full agreement with the employer, they refused to execute the agreement until a contract had been agreed upon by the clerks and checkers. The Board held that the delay in that case was caused by an extraneous issue and would therefore not overcome a violation of the act: "When parties to a collective bargaining agreement reach a final agreement on the terms of the agreement, they have a duty to execute that agreement by *written contract* and *this duty may not be avoided by injecting extraneous issues in to the negotiations.*" (Emphasis added.) There the Board held that the delay in signing agreements that had already been negotiated was unlawful.

Similarly, in *Standard Oil Co.*, 137 NLRB 690 (1962), the Board found that the union violated Section 8(b)(3) by refusing to sign, after reaching agreement, contracts covering its

bargaining unit at certain refineries until negotiations satisfactorily concluded at another local at a different company unit: “By thus importing this *extraneous issue* into the bargaining situation at refineries Nos. 1 and 2, Local 395 clearly failed to meet its bargaining obligations under the Act.” 137 NLRB 691 (emphasis added).

Here, Respondents engaged in the same improper delaying tactics – tactics which the Board has characterized as unfair labor practices – by injecting into the issue of signing the booklet a completely extraneous issue – the November 4 commencement of an arbitration proceeding over an interpretation of language in the Agreement that had been agreed to by the parties. Since the arbitration TO THIS DAY has yet to be decided, and since the Respondents have now signed a document IDENTICAL to the one presented to them on November 12, 2009, it is obvious that the arbitration was extraneous to the negotiation of the contract. Respondents simply interjected an irrelevant issue in an effort to renegotiate the document they had already accepted. It is a basic tenet of Board law that “in fulfilling its Section 8(d) mutual, on-going obligation to bargain in good faith, neither party may engage in dilatory tactics and conduct which result in unreasonable delay in any aspect of the collective bargaining process, including the execution of a memorialized agreement.” *Waxie Sanitary Supply and Building Material*, 337 NLRB 303, 310 (2001). Thus, Board law establishes that delays in signing agreements caused by extraneous issues will not overcome a violation of the Act.

V. SCG Has Been Harmed by the Respondents’ Improper Dilatory Tactics.

In its moving papers, Respondents UWUA and JSC make the completely baseless contentions that harm is an essential element of this violation, and that the harm from a violation caused by undue delay lies in the loss of earnings to members. (See MSJ of UWUA/JSC at p.5:20-22). This contention fails for at least two obvious reasons. First, it presumes that tangible, provable harm to one of the parties is the essence of the charge. It is not. As noted above, it is well-settled that refusal to sign any agreement reached by the parties is a *per se* unfair labor practice, and therefore, no harm need be shown. The essence of the charge is that the process requires good faith compliance on both sides. It is the detriment to the process itself that constitutes the essence of the violation. The dispute at issue is not about whether the Agreement was followed: it is about whether the Respondents unduly delayed executing the Agreement.

Furthermore, the long term harm to the NLRB if only its actual intervention in the process results in the completion of the process is obvious.

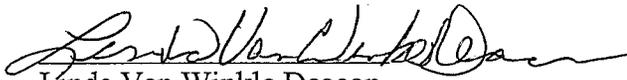
Secondly, the argument focuses only on one possible harm to Respondents' members – and conveniently ignores any harm to SCG, or to the process as a whole. Putting the argument back on Respondents demonstrates how baseless it is. If SCG had refused to sign the agreement, and had stated that it did not matter because the first year wage increases had been granted, Respondents would not have walked away from the table, convinced that no signed agreement was necessary. Would Respondents be willing to stipulate that from now on, no signed agreement need be created as long as there is a TA identifying changes only with no corresponding complete agreement memorializing all terms and conditions including those not modified in recent negotiations? SCG would not. The long term confusion created by such a position is evident.

Respondents' action meant that SCG had no signed CBA to distribute to its employees and no clean document to give to its managers to enforce. Furthermore, SCG was harmed by the fact that the Respondents went back on their word to sign the agreement, and forced SCG to use litigation to achieve what should have happened as a matter of course. Indeed, the very arbitration that Respondents used as an excuse for not signing, demonstrated the harm caused by not signing. By Respondents' own admission, there was an arbitration over the meaning of a collective bargaining agreement, but the operative CBA was not a document that could be submitted to the arbitrator for his review because Respondents strategically refused to sign it, leaving the arbitrator with an outdated version. Parties to agreements should not be forced to cobble together their presentations out of old notes, summaries, and pages full of edits, simply because one of the actors refuses to live up to his obligation to sign the completed agreement. Respondents cannot have it both ways. Having admitted that there was a completed, negotiated agreement between them and SCG by January of 2009, there simply is no excuse for the bad faith dilatory tactics of failing/delaying to sign until March 23, 2010.

VI. Conclusion

Based on the aforementioned, Southern California Gas Company respectfully submits that Respondent Unions' Motions should be denied. Section 102.24(b) of the Board's Rules and Regulations states that, "[t]he Board in its discretion may deny the motion where the motion itself fails to establish the absence of a genuine issue, or where the opposing party's pleadings, opposition, and/or response indicate on their face that a genuine issue may exist." Based on the pleadings, the motion, and this Opposition to the motion, genuine issues of law and fact exist which require a hearing. Therefore, the Unions' Motions should be denied.

Respectfully,



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STATEMENT OF SERVICE

I hereby certify that a copy of **Counsel for Southern California Gas Company's Opposition to International Chemical Workers Union Council's, Utility Workers Union of America's, and Joint Steering Committee's Motions for Summary Judgment** in Case 21-CB-14820 was submitted by E-filing to the Office of the Executive Secretary of the National Labor Relations Board on June 28, 2010. The following parties were served with a copy of the same document by electronic mail.

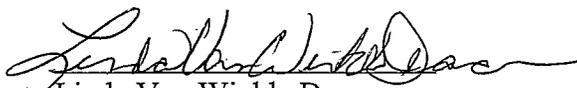
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Dated at Los Angeles, California, this 28 day of June, 2010.