

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

**UTILITY WORKERS UNION OF  
AMERICA, AFL-CIO (UWUA), et al.**

Case 21-CB-14820

and

**SOUTHERN CALIFORNIA GAS COMPANY**

MOTION OF RESPONDENT INTERNATIONAL CHEMICAL WORKERS UNION  
COUNCIL/UFCW TO DISMISS AND/OR STAY COUNSEL FOR THE ACTING GENERAL  
COUNSEL'S LIMITED EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S DECISION  
AND OPPOSITION TO SUCH EXCEPTIONS

Now comes the INTERNATIONAL CHEMICAL WORKERS UNION COUNCIL/UFCW ("ICWUC"), pursuant to NLRB Rules 102.46 and 102.47, and hereby opposes, and moves to dismiss and/or stay, the limited exceptions previously filed on behalf of the Acting General Counsel in this case. The ICWUC hereby incorporates by reference as though fully re-stated herein the "Motion of Respondents Utility Workers Union of America, AFL-CIO and UWUA-ICWUC Joint Steering Committee to Dismiss Counsel for the Acting General Counsel's Limited Exceptions to Administrative Law Judge's Decision" and relies on the arguments set forth therein to support its instant motion to dismiss and/or stay, as well as its opposition to, the limited exceptions.

Given the Board's budgetary outlook, the ICWUC simply does not understand the Acting General Counsel's refusal to accept victory in this case and allow the parties to promptly proceed to compliance, particularly given the parties' willingness to exceed the requirements of the order. Instead, the Acting General Counsel's unnecessary efforts serve only to delay the respondents'

compliance with the order, while, unfortunately, wasting precious taxpayer resources on needless and unessential further litigation. Rather than extend that litigation, which the ICWUC could (and some believe, should be) doing,<sup>1</sup> the ICWUC, instead, wishes to proceed to prompt compliance with

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<sup>1</sup>The ICWUC considered filing cross-exceptions, since it strongly disagrees with the Judge's Decision and a number of legal, as well as factual, findings by the Judge, as well as her exclusion of certain evidence from the Record. (That evidence would show that the ICWUC had a good-faith basis for again slowing down the booklet/handbook approval process, since the employer *again* was attempting to effectively misuse that process to remove "just cause" protections from the handbook for over 800 part-time employees, even though there had been NO such discussion, or agreement, between the parties to do so; eventually, an arbitrator agreed with the unions' position on that matter).

Furthermore, the parties had agreed – when engaging in the process of reformulating the effectuated Tentative Agreement into a more accessible booklet/handbook form – that they would not sign-off on the booklet until it was "printer ready," which meant that they had to even agree on correcting typo's and formatting before agreeing on a document to send to the printer. (T. 58, 95, 103, 106-07, 161, 226). Thus, *any* disagreement over the booklet/handbook draft was sufficient to justify the unions not yet signing-off on the document. Significantly, even the Company admitted that, until there was agreement on the entire booklet/handbook, both parties reserved the right to re-open other parts of their tentative agreements on other parts of the booklet/handbook in order to make sure that the document accurately reflected their actual Tentative Agreement reached in January, 2009. (T. 241-43). In other words, there was no final "meeting of the minds" on the document to be sent to the printer until the parties agreed to *everything* (not just "substantially" everything) in the proposed handbook; if problems not previously discovered were later discovered, either party could bring that matter up for resolution *before* final agreement was reached. The unrebutted testimony established that this is exactly what happened: Before the employer even provided the union with its most recent re-draft of the handbook, the unions on the morning of November 12, 2009, brought up a new matter that had come to its attention, just as the procedure permitted them to do, *i.e.*, the part-time problem.

The evidence was unrebutted that the unions proofread all of the employer-prepared drafts of the booklet/handbook every time that a re-draft was provided to them before concurring with that draft, or parts thereof. It was not disputed that the employer did not return a re-draft, with changes proposed the evening before, to the unions for proofreading until *after* 4:00 p.m. on November 12, 2009, nor that, *prior to* that time that day, the unions had raised the part-time issue as a matter that – as with others earlier – needed clarification before the handbook could be finalized, clearly establishing that, contrary to the Judge's decision, there was NO meeting of the minds -- even before the employer returned the corrected draft around 4:00 p.m. -- on a "printer ready" document. Whether there was, or was not, agreement on some of the draft was irrelevant, since there had to be agreement on the entire document before it would be signed-off on and sent

the Judge's order (and is willing to do even more, as set forth below, to meet any legitimate concerns of the Acting General Counsel). The Board should allow the ICWUC to proceed to compliance by dismissing (or, at a minimum, staying until compliance is achieved, then dismissing) the Acting General Counsel's exceptions (subject to the union being held to its representations regarding compliance).

Such further litigation is unnecessary, since the ICWUC is willing (1) regarding Exception No. 1 to have the revised electronic-notice requirements now provided for by Picini Flooring, 356 NLRB No. 9 (2010) followed here;<sup>2</sup> (2) regarding Exception Nos. 2 and 3 to physically post notices at the ICWUC's offices, including those outside Los Angeles, in Akron and Cincinnati, Ohio, where

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to the printer. Since the unions sought to re-open the issues of the part-time employees' "just-cause" rights – in order to clarify exactly what the parties had, and had not, agreed to, on that matter -- *before* the so-called final draft of the booklet/handbook was even provided, let alone proofread, there clearly was NO – and could have been NO -- complete agreement on a "printer ready" document. *See*, "International Chemical Workers Post-Hearing Brief" at pp 13-19 (attached). Unfortunately, the Judge erroneously failed to even consider this un rebutted and crucial evidence.

Nevertheless, since the ICWUC, as the other respondents, wants to put this matter behind it, so that it can concentrate on the up-coming contract renewal negotiations, it has chosen to acquiesce to this Decision and, if Region 21 would permit, commence appropriate compliance, rather than further delay resolution of this matter through filing what the ICWUC believes would be its own meritorious cross-exceptions. The ICWUC sees no reason to engage in what, effectively, would be primarily an academic exercise regarding the issues surrounding this case. Everyone needs to move forward. Unfortunately, it is the Acting General Counsel, not the ICWUC, that effectively is causing a delay in that compliance through this unnecessary litigation.

<sup>2</sup>The ICWUC has a website – [www.icwuc.org](http://www.icwuc.org) – and it is willing to "post" the revised notice on that website. The ICWUC does not customarily communicate, as a general matter, with union members – other than in case-specific matters with union officers or staff and, on occasion, witnesses – through emails. Thus, it sees no reason for the Board having to address this issue further.

it customarily post notices;<sup>3</sup> and (3) regarding Exception No. 4 to post a notice with the corrected date of March 23, 2010.

Consequently, there simply is no good reason to permit compliance in this case to be further delayed by allowing the Acting General Counsel's Limited Exceptions to remain a stumbling block. They should be dismissed and the matter allowed to proceed promptly to compliance.

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<sup>3</sup>The Acting General Counsel unnecessarily and improperly seeks to add *specific* addresses outside of Los Angeles at which it seeks to have the ICWUC physically post the notice. However, the Record does not support the adding of those *specific* addresses. The only "evidence" in the Record referenced by the Acting General Counsel to support this Exception are copies of the Charge, Amended Charge, or affidavits of service (GCX-1(a) -1(c), 1(e), 1(g) -1(I), and 1(k)), none of which establish that the service-addresses thereon are actual current, or even past, offices or union halls of the ICWUC (or for that matter, the other Respondents).

Furthermore, there is no evidence in the Record, contrary to the Acting General Counsel's assertion, that the ICWUC-affiliated local unions maintain offices throughout California. Thus, there is not sufficient evidence in the Record to support amending the order to include the *specific* addresses at issue. (Moreover, the Union notes that the Amended Charge and Amended Complaint dropped the local unions as respondents). Again, since the ICWUC is willing to physically post the notice in its offices (neither it, nor the ICWUC-affiliated local unions, have a union hall), the Acting General Counsel's exception is unnecessary.

Moreover, the undersigned is advised that a number of the addresses, that the Acting General Counsel seeks to have *specifically* added to the order, are private residences of officers, or former officers, of some of the local unions. The ICWUC really doubts that the Board wants to litigate whether it is appropriate, or even constitutional, to require the posting of a notice in a private residence, with a Board agent thereafter seeking to visit that residence later to insure posting, particularly given the scant evidence in the Record on these addresses. Such a requirement also would appear to be not only unnecessary, but also unprecedented. There is no basis, then, to grant this exception, which should be dismissed.

Respectfully submitted,

s/Randall Vehar

Randall Vehar, ICWUC/UFCW

Assistant General Counsel/Counsel  
for the ICWUC

ICWUC Headquarters

1799 Akron-Peninsula Road

Akron, Ohio 44313

330/926-1444

330/926-0950 (fax)

[Rvehar@icwuc.org](mailto:Rvehar@icwuc.org)

[Rvehar@ufcw.org](mailto:Rvehar@ufcw.org)

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing documents was submitted by eFiling to the Office of the Executive Secretary of the National Labor Relations Board on January 6, 2011. The following parties' counsel were served with a copy of this same document by electronic mail on the same date:

Ellen Greenstone, Esq.

Rothner, Segall, Greenstone & leheny

[Egreenstone@rsgllabor.com](mailto:Egreenstone@rsgllabor.com)

Christopher Bissonnette, Senior Counsel

Southern California Gas Company

[Cbissonnette@sempra.com](mailto:Cbissonnette@sempra.com)

Linda Van Winkle Deacon, Esq.

Bate, Peterson, Deacon, Zinn & Young LLP

[Ldeacon@bpdzylaw.com](mailto:Ldeacon@bpdzylaw.com)

Irma Hernandez

Region 21, NLRB

[Irma.hernandez@nlrb.gov](mailto:Irma.hernandez@nlrb.gov)

s/Randall Vehar

Randall Vehar

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 21

UTILITY WORKERS UNION OF AMERICA,	)	
AFL-CIO (UWUA): INTERNATIONAL	)	NLRB Case No. 21-CB-14820
CHEMICAL WORKERS UNION COUNCIL-	)	
UFCW (ICWUC): and THE UWUA-ICWUC	)	
JOINT STEERING COMMITTEE	)	
	)	
Respondents	)	
	)	
-and-	)	
	)	INTERNATIONAL CHEMICAL
SOUTHERN CALIFORNIA GAS COMPANY	)	WORKERS UNION COUNCIL
	)	POST-HEARING BRIEF
Charging Party	)	

Now comes the International Chemical Workers Union Council (“Chemical Workers”) of the United Food and Commercial Workers (“UFCW”) and hereby timely files this Post-Hearing Brief requesting that the Amended Complaint against it be dismissed in its entirety. The Chemical Workers also rely on the arguments raised by the other respondents at the hearing and in their brief, which is incorporated by reference.

I. PROCEDURAL BACKGROUND

On November 13, 2009, the Southern California Gas Company (“SCG” or “Company”) -- prematurely in the Chemical Workers’ view -- filed the original charge in this case (“Charge”) alleging that the “Joint Steering Committee of the Utility Workers Union of America and Locals 132, 170, 483, 522; and International Chemical Workers Union Council/UFCW and Locals 47, 78, 350

and 995" violated Section 8(b)(3) of the Act,<sup>1/</sup> asserting in part that the Company and the union:

“...agreed to a new CBA which was memorialized in a tentative agreement (TA) **signed by the Union on 1/31/09** and ratified on or about 2/25/09. The TA contains strike-through language agreed to by both parties for all major issues but one (i.e., an agreement pertaining to sick time benefits). This single remaining issue was resolved after the new agreement was ratified. The Union reviewed several comprehensive drafts of the new CBA, suggesting only minor edits. The parties reached full agreement on all terms and scheduled the Union’s Joint Steering Committee (JSC) to meet on 11/12/09 **for a final proofreading** of the agreement and to sign it. The Union refused, stating for the first time that it would not sign unless the Company **altered a major letter agreement on part-time ‘at will’ status** that has been in the CBA **since 1994** and was the subject of a union proposal rejected during 2008 negotiations as reflected in the 2009 TA **signed by the Union**. The Union stated that unless the Company altered the previously-agreed upon letter agreement which is part of the CBA, the Union would not sign the CBA despite their agreement on all terms in violations of Section 8(d).”

(GC-1(a))(emphasis added).<sup>2/</sup> Despite a contractual requirement that the Company serve the Chemical Workers Council at a specified address (GC-3, ¶2.5(A), p. 21), the Charge only listed the address and contact information for the Utility Workers, but not for the Chemical Workers or any of the local unions affiliated with the Chemical Workers. (GC-1(a)). Consequently, the Charge was not mailed by NLRB Region 21 to the Chemical Workers. (GC-1(c)). On March 31, 2010, the

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<sup>1/</sup>During the telephone conference call with the Judge on the subpoena issues, Counsel for the Utility Workers and the Joint Steering Committee (“JSC”) stated that she had viewed the charge and Complaint -- neither of which are models of clarity -- as being just against the Joint Steering Committee of the Utility Workers, the Chemical Workers, and their locals, not individually against the Utility Workers or Chemical Workers (or their respective locals) as separate respondents.

The Charge also incorrectly identifies the UFCW-chartered locals (that also are affiliated with the International Chemical Workers Council) as Locals 47, 78, 350, and 995, when their proper names are UFCW Locals 47C, 78C, 350C, and 995C. Neither the locals, nor the JSC, are parties to the labor agreements. Only the Utility Workers and Chemical Workers are parties to the contracts.

<sup>2/</sup>References to the General Counsel’s, Charging Party’s, Respondent Utility Workers, and Respondent Chemical Workers exhibits will be cited, respectively, as “(GC-\_\_\_),” “(CP-\_\_\_),” “(RU-\_\_\_),” and “(RC-\_\_\_),” and to the transcript as “(T.\_\_\_).”

original Complaint and Notice of Hearing (GC-1(d)) was served by certified mail, but, again, as with the Charge, it was not mailed to the Chemical Workers (GC-1(e)).

Subsequently, on May 7, 2010, the Company filed an Amended Charge against the “Utility Workers Union of America, AFL-CIO (UWUA); International Chemical Workers Union Council- (UFCW-ICWUC); and the UWUA-ICWUC Joint Steering Committee.” The Amended Charge dropped all of the locals as respondents. (GC-1(g)). The Amended Charge added the following allegation to the original assertions:

“From on or about November 12, 2009, to on or about March 23, 2010, the Union failed and refused to execute and delayed in executing the CBA.” (GC-1(g)).

As with the Charge, the Amended Charge only provided the address for the Utility Workers, but not for the Chemical Workers. The Amended Charge was not mailed to, or otherwise served on, the Chemical Workers at their Akron, Ohio, headquarters, or the Chemical Workers Council’s California address specified for service in the labor agreement. (GC-1(I)).<sup>3/</sup>

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<sup>3/</sup>While the Chemical Workers is not challenging -- *for purposes of this case only* -- whether the mailing of the Charge or the Amended Charge to the UFCW and to the UFCW locals affiliated with the Chemical Workers, or the mailing of the Charge to the Utility Workers, or its locals, constituted effective service on the Chemical Workers Council (T. 10-11), it emphasizes that all locals were dropped as respondents in the Amended Charge.

Furthermore, in appropriate circumstances, service of a charge on one member of a joint representative arguably should not be considered service on the other members, particularly where their respective interests may diverge or be in conflict with each other and when there was a contractual obligation to serve the Chemical Workers. For instance, the Utility Workers and Chemical Workers compete for new hires to be a member of their respective unions. (GC-3, ¶2.2(c), p. 9-11). Moreover, service on a labor organization’s parent or subordinate-affiliated local may not be considered service on that labor organization because of their separate legal identity and interests. Indeed, the Inspector General for the Board recently recognized the separate legal identity of local unions from their affiliated international unions in finding that Member Becker had not violated any ethical obligations by participating in an SEIU local case despite him having represented the international, but not this local, previously. (Appendix “A”).

On June 4, 2010, an Amended Complaint and Notice of Hearing was issued and mail-served (finally) on the Chemical Workers at its Akron, Ohio, headquarters. In part, the Amended Complaint alleged that the Utility Workers and Chemical Workers had been the joint exclusive collective-bargaining representative of a Unit referred to in Section 2.2(A) of a series of collective-bargaining agreements, the most recent being effective, by its terms, from March 1, 2009, through September 30, 2011. (Amended Complaint, ¶7-8(a))(GC-3, ¶2.2(A)). The Amended Complaint did not allege that the JSC is a labor organization.

The General Counsel alleged that on or about January 31, 2009, the Company, the Chemical Workers, the Utility Workers, and the JSC “reached *complete agreement* on terms and conditions of employment of the Unit to be incorporated in a collective-bargaining agreement, which by its terms was to become effective on March 1, 2009.” (Amended Complaint, ¶9(a))(emphasis added). The Chemical Workers has admitted to these essential facts. It is undisputed that this “*complete agreement*” was signed on January 31, 2009, *i.e.*, the Tentative Agreement (“TA”) (GC-12), was ratified on or about February 25, 2009, and, despite some suggestion to the contrary, promptly put into complete effect, including effectuating retroactive wage increases and processing and arbitrating grievances, including discharges occurring after March 1, 2009. (T. 279-84, 353)(Chemical Workers Answer, ¶9(a)).

The General Counsel further alleged that since about November 12, 2009, the Company has requested that the Chemical Workers and the other respondents -- despite them already having done so on January 31, 2009 -- execute a written contract embodying the “complete agreement” that was

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The Chemical Workers simply have decided that this is not the case in which they wish to litigate the adequacy-of-service issue.

reached on or about January 31, 2009. The General Counsel alleged that the Chemical Workers (and other respondents) purportedly failed and refused to execute and delayed in executing the “complete agreement” described in Paragraph 9(a) of the Amended Complaint. (Amended Complaint, ¶9). Because the Chemical Workers, in fact, had signed and executed the “complete agreement” reached on or about January 31, 2009, at the time that those terms and conditions were agreed upon, the Chemical Workers denied that it failed to execute “a written contract embodying the agreement described” in Paragraph 9(a) of the Amended Complaint. (Chemical Workers Answer, ¶9(a)–(c).

The Chemical Workers also raised five affirmative defenses in its Answer, including a failure to allege facts in the Amended Complaint sufficient to constitute a violation of the Act; a general statute of limitations defense; a more specific limitations defense based on the filing of the Charge 6 months after execution and signing of the labor agreement on January 31, 2009; improper service; and a deferral defense.<sup>4/</sup> The Chemical Workers effectively withdrew the improper service defense and part of the general limitations defense at the hearing. (T. 10-11).

Hearings were held on June 30 and July 1, 2010, and post-hearing briefs are due to be filed by August 6, 2010.

## II. STATEMENT OF THE FACTS

In 1970, the Southern California Gas Company was formed through the merger of two companies. One of the companies had employees represented by the Utility Workers, while the other

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<sup>4/</sup>The General Counsel had admitted into the record five (5) volumes of transcripts from a Utility Workers arbitration hearing which addressed, in part, whether the unions and the Company had agreed on January 31, 2009, to eliminate all “just-cause-type” protections for part-time employees. (T. 46–55). The Counsel for General Counsel was directed to specifically identify before the close of the hearing the specific testimony that she would be relying on from those transcripts. (T. 54–55). This identification never occurred.

employer's employees were represented by the Chemical Workers. After the merger, the two unions became joint representatives of the over-all, now-merged bargaining unit, though each local union continued to handle matters within its specific jurisdictional area in this corporate-wide unit consisting, currently, of about 5,600 employees over 800 of which are part-time unit employees. (T. 21, 221, 389-90). While successive labor contracts still do not so require -- and still do not clearly reflect -- a joint steering committee as a party to the labor agreement, the Chemical Workers and the Utility Workers have established a joint steering committee to handle certain various matters regarding their duty to bargain. Successor contract negotiations for the agreement to replace the 2005 Contract (GC-2) admittedly were handled by the JSC, though local-specific grievances normally are handled by the respective union and/or local, though corporate-wide grievances might be addressed (if both unions agree) at the JSC level.<sup>5/</sup>

The unions and the Company reached a tentative agreement for a successor to the 2005 Contract on October 18, 2008, but that first TA was not ratified. (T. 75-76)(GC-11). During the negotiations that led to this first (rejected) TA, there were discussions regarding two Letter Agreements regarding part-time employees. The first relevant Letter Agreement, *i.e.*, the 1994 Letter Agreement, which originally was executed on March 9, 1994, and continued as part of subsequent agreements, addressed a number of matters, including *when* part-time employees would become part of the bargaining unit -- and, thus, incur a dues-paying obligation -- as well as acknowledging that part-time employees were terminable "at will." (GC-2, p. 189). During the negotiations that led to

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<sup>5/</sup>For purposes of this proceeding, the Chemical Workers and Utility Workers have admitted that the JSC was authorized by them to negotiate and execute the successor labor agreement to the 2005 Contract. (T. 18-19). That is the only "agency" issue necessary for the Judge to consider in resolving this case.

the first TA, the JSC made a proposal suggesting several changes to this Letter Agreement. For instance, instead of a part-time employee becoming a member of the unit after 520 hours of “continuous” employment in a 12-month period, the JSC proposed that a part-time employee would become a part of the unit after 520 hours of “cumulative” employment in a 12-month period. (GC-8). Ultimately, the Company accepted this portion of the Union’s proposal. (GC-9).

Also, the JSC proposed that the “at will” language in the last paragraph of this 1994 Letter Agreement be deleted (GC-8), since it believed that the language was superfluous, given a subsequent 2005 Letter Agreement found at page 195 of the 2005 Contract (GC-2, p. 195) that modified the 1994 Letter Agreement’s “at-will” provision. That Letter Agreement dated January 1, 2005, reflected an evolution of expanding rights over several contracts for part-time employees; it provided in relevant part that, “Part-Time employees with 6 months of service will be afforded ***all rights under Article VI*** for ***any discipline*** received from Section 6.3A or Section 6.3B” (GC-2, p.195) (emphasis added).<sup>6/</sup> Since California is an “at will” employment state, *see*, Calif. Labor Code, Sec. 2922, it was axiomatic that, during the first 6 months of a part-time employee’s service, that employee would continue to be an “at will” employee -- *without regard to any language in (or deleted from) the 1994 Letter Agreement* -- since the part-time employee would not receive the just-

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<sup>6/</sup>Section 6.3A involves discipline for unsatisfactory job performance, while Section 6.3B involves discipline for misconduct. (GC-2, p. 122). Part-time employees were first accorded Section 6.3B rights in the 2002 CBA and Section 6.3A rights in the 2005 CBA. (T. 393-94)(GC-36, pp. 16-17).

Section 6.5 sets forth the “for cause” disciplinary procedure to follow for all Section 6.3 disciplinary actions, including Section 6.3A and 6.3B discipline. (GC-2, p. 125). Section 6.8 then establishes the Grievance/Arbitration Procedure for resolving Section 6.5 disciplinary-procedure disputes. (GC-2, pp. 133-34).

cause-type protections under Article VI of the Contract until she had completed her 6 months of service. Thus, the “at will” language, having been superceded and modified in relevant part by the 2005 Letter Agreement, now was superfluous.

While the Company accepted the JSC’s proposal to change the word “continuous” to the word “cumulative,” the Company rejected the JSC’s proposal to eliminate the superfluous “at will” language. (GC-9). However, there was no discussion by the parties -- and nothing in either TA -- to suggest that the “just-cause-type” protections provided by the 2005 Letter Agreement were being eliminated from the successor 2009 Contract simply because the Company had rejected the JSC’s proposal to eliminate the superfluous “at-will” language, or because of the re-dating of the two Letter Agreements to March 1, 2009. (T. 158)(GC-29)(GC-31).<sup>7/</sup> The change to the 1994 Letter Agreement was incorporated into the first TA (GC-11, Item 24, p. 9), but that TA was rejected by a membership vote in October, 2008. (T. 75-76).

Following rejection of the first TA, John Duffy took over for Louis Correa as the chairman (and chief negotiator) for the JSC.<sup>8/</sup> Upon resuming negotiations after the holidays, the parties focused on what they believed were the main reasons for the membership’s rejection of the first TA. The parties did not focus on the 1994 or 2005 Letter Agreements because neither side had indicated that they wanted any different changes from what they had previously discussed prior to agreeing

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<sup>7/</sup>While the parties admittedly agreed to other changes to the 2005 Letter Agreement for the 2009 Contract, those changes did not deal with the “at will” or probationary status of part-time employees prior to them achieving 6 months of service. (GC-3, pp. 190, 196, bold type).

<sup>8/</sup>The largest local in the Unit, Local 132, had been put under trusteeship by the Utility Workers and John Duffy became the Trustee of Local 132. Trustee and Chairman Duffy met with the company on December 10, 2008, and suggested that, because of the holidays, the parties wait until the new year to resume full negotiations (T. 44).

to the first TA. On January 31, 2009, the parties entered into a “complete agreement” for the successor contract to the 2005 Contract, *i.e.*, the second TA. (GC-12)(Amended Complaint ¶9a) (Chemical Worker Answer, ¶9a). This second TA contained the same substantive language as the first TA on the changes to the 1994 Letter Agreement, except that the effective date was changed due to the later date of ratification (which was acknowledged in Item 23)(GC-11, p. 8, Item 24)(GC-12, pg. 8, Item 23). Item 23 of this second TA contained the entire reference to the dues-related changes to the 1994 Letter Agreement:

“23. **Union Dues** -- Effective 4/1/09, part-time employees will begin paying dues after 520 hours of cumulative employment (Company counter to U-83A dated 7/31/08, accepted 9/18/08; modified implementation date due to timing of ratification)”

(GC-12, p. 8). There was nothing in Item 23 to suggest to the membership, before they ratified the TA, that they might be approving the loss of “just-cause” rights for over 800 employees. (T. 77-82). There is no reference in the TA to an expansion of the “at-will” employment status to part-time employees with 6 or more months of service, or any suggestion that the 2005 Letter Agreement discipline rights were being affected. The only language in the second TA that is related to the 2005 Letter Agreement can be found at GC-12, ¶¶ 4, 5, and 29(c), pp. 2 and 9)(GC-3, p. 196). The second TA has no language suggesting that the 2005 Letter Agreement’s Article VI discipline rights were negated or diminished, or that the Letter Agreements should be re-dated. There simply is no evidence of any prior discussions that part-time employees -- *even after 6 months of service* -- under the 2009 Contract, *unlike under the 2005 Contract*, would continue to be “at will” employees and no evidence of any discussion that re-dating the Letter Agreements would have a substantive impact. (T. 132, 143, 158, 191).

The Chemical Workers had strong reason -- in addition to the language of the 2005 Letter Agreement -- to know that part-time employees, after 6 months, enjoyed “just-cause” protections under the 2005 Contract, when they were terminated allegedly for either unsatisfactory job performance or misconduct, since *all* provisions of Article VI of the 2005 Contract applied to them, per the precise terms of the 2005 Letter Agreement, when they were fired for such alleged reasons. Indeed, Chemical Workers Vice President John Lewis was the only witness to testify about the evolutionary negotiations history that led to the parties’ agreement regarding the 2005 Letter Agreement language regarding discipline. Lewis, who was part of the negotiations team when this language came into the Contract, part of which came into the 2002 Contract, while the remainder came into the 2005 Contract, knew that the 2005 Letter Agreement was intended to modify the 1994 Letter Agreement regarding the “at-will” and part-time employee discipline issues. (T. 293-94)(GC-43: Lewis arbitration testimony, pp. 75–81). No one rebutted Lewis’ testimony about those negotiations.

In addition to his first hand knowledge from the 2002 and 2005 negotiations, Vice President Lewis also had communications with a Company labor-relations advisor, David Sullivan, in 2008, who, after checking on the matter, confirmed Lewis’ understanding. (T. 401-02). Lewis also received a letter from Company Attorney Deacon -- consistent with Lewis’ understanding of the negotiations history -- acknowledging that the 2005 Letter Agreement had modified the 1994 Letter Agreement to provide such protection.<sup>9/</sup> Nevertheless, even without consideration of Sullivan’s or

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<sup>9/</sup>The Chemical Workers re-news its request that RC-1 and Lewis’ testimony about Sullivan be admitted into the record. Indeed, the Counsel for the General Counsel submitted evidence on Lewis’ communications with Sullivan, when she introduced GC-43, pp. 82-84. Thus, the matter already had been raised by this Record and Lewis should have been permitted to address it. Lewis’ communications with Company Labor-Relations Advisor Sullivan in late 2008 is evidence of a past

Deacon's communications with Lewis, Lewis' testimony was un rebutted that such part-time employees had such arbitrable "just-cause" protections under the 2005 Contract; indeed, the 2005

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practice of interpreting the 2005 Letter Agreement as modifying a part-time employee's "at will" status after 6 months of service. This evidence pre-dated the parties entering into at least the second TA and pre-dated November 4, 2009, when the Company, for the first time, took the opposite position with the Utility Workers at the Margaret Madrigal discharge arbitration. Therefore, this information might be admissible evidence in an arbitration proceeding to support the unions' position that certain discharged part-time employees still enjoy just-cause/arbitration protections under the 2009 Contract, just as they had under the 2005 Contract. Such evidence, then, goes to whether Lewis had a good-faith reason to be concerned that the Company -- prior to the signing of the Handbook -- was trying, by a slight-of-hand, to eliminate these just-cause protections. It goes to Lewis' state of mind and to explain why he (and the Chemical Workers) did what they did -- or didn't do -- between November 12, 2009, and March, 2010.

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Similarly, RC-1, Deacon's letter to Lewis, reinforces that Lewis had every reason to believe that there was a past-practice of applying the 2005 Letter as modifying the "at-will" language in the 1994 Letter. That Letter from Attorney Linda Van Winkle Deacon -- one of the Company's attorneys at the hearing -- while taking the position that a part-time employee did not have a right to have his grievance *over a job bid* arbitrated, acknowledged that this restriction on *which* part-time employee grievances could be arbitrated was modified by the 2005 Letter Agreement:

"The Letter of Agreement of January 1, 2005 modifies this to the extent that it provides rights for qualifying part-time employees (those with 6 months of service) under Article VI (Dispute Resolution) of the CBA, but they are limited to discipline received under Section 6.3A or 6.3B (Demotion, Discharge or Layoff Due to Unsatisfactory Job Performance or Misconduct)."

(RC-1, p.1). Because the grievance that was at issue dealt with a job bid, rather than discipline, the Company was taking the position that it was not arbitrable. However, this January 2, 2008, Letter -- which pre-dated both TAs -- reinforced Vice President Lewis' understanding that the 2005 Contract provided for arbitration of certain disciplinary matters regarding part-time employees once such an employee had 6 months of service with the Company.

As discussed more fully below, when Vice President Lewis discovered that the Company was attempting to create a *different* negotiating history on November 4, 2009, suggesting that no part-time employee, even those with 6 months service, had such just-cause protections, it became necessary for Lewis to ensure that this *new* bargaining history would not go unnoticed or unaddressed *before* the parties finalized the Handbook, just as the parties had addressed other disputes -- such as the sick-leave pre-approval/pre-selection and "occurrence" issues -- *before* either would agree to finalize the "booklet" or printable Handbook version of the contract.

Letter Agreement, on its face, supports his testimony: All protections of Article VI for certain types of disciplines -- which include “just cause” and arbitration protections under Sections 6.5(A) and 6.8 -- apply to part-time employees with at least 6 months of service.

Despite the Company’s refusal to delete the superfluous “at-will” language, matters proceeded and a “complete agreement” on all matters was reached on January 31, 2009; subsequently, ratification of this agreement -- the TA (GC-12) -- occurred; and full implementation promptly ensued.

After ratification, the parties began the process of incorporating the second TA, as it amended the 2005 Contract, into a more user-friendly “booklet” or Handbook. The Company was responsible for reducing the contract to a more user-friendly “booklet” or Handbook format. However, the Company did not provide even a part of this draft “booklet” to the JSC for review, comment, and proof-reading until more than a month later in early April, 2009. (T. 83). Apparently, at that time, the Company saw no need to rush the process. Multiple changes and drafts of portions of the Handbook were required in part because the Company had left out important parts that were agreed to in the TA, or inserted language that was not agreed to on January 31, 2009. It is not necessary for the Chemical Workers to review all of the changes that occurred between April 4, 2009, and November 12, 2009. It is undisputed that there were many. (RU-5).

The Company acknowledged that the union was “great” in finding typos in the multiple drafts of the “booklet” that went back and forth between the parties, but their differences involved more than just these typos, including the JSC complaining that the Company had left important language of the new contract out of the Handbook (T. 94-106). JSC member Nancy Logan testified extensively about language that the Company had left out of the drafts or inappropriately inserted.

(T. 287-313)(RU-5). The Company's Director of Labor Relations, Sara Franke, admitted there may have even been more lists of edit requests than what the General Counsel offered into evidence. (T. 107-08).

One of the biggest obstacles to completing this process was the Company's unjustified insistence on inserting a pre-approval/pre-scheduled requirement into a new right whereby employees could "use their short-term Annual Accrued Sickness Allowance for their own medical and dental appointments, **without it counting as an occurrence...**" under the attendance policy. (GC-12, p. 4)(emphasis in original)(GC-3, p. 67). The Company's first draft of the Handbook failed to contain any of the new sick-leave language found in Section 4.4(B) of the Contract. (GC-14). Franke claimed this was because agreement on the sick-leave matters occurred at the end of negotiations and there was no strike-through proposals or language, so it purportedly took longer to prepare. (T. 164). Curiously, the Company -- intentionally or negligently -- left out the agreed-upon "occurrence" language from its draft of the TA, requiring a re-draft at the unions' insistence. Later, the Company *again* left out the "occurrence" language in the Handbook draft. Again, the unions had to insist that the agreed-on TA language be used in the Handbook. (T. 357-58).

Still, changes to the Handbook draft continued to be made even after the morning session on November 12, 2009, in part because the unions continued to find errors, or areas requiring clarification. (T. 91) (GC-15).

In deciding this case, it is important to understand the process between April and November, 2009, and thereafter; why the parties were being so particular about certain matters; and what goal the parties were (supposed to be) attempting to reach: Reducing the second TA into a more user-friendly Handbook or "booklet" form *that was "printer ready,"* which meant that even typos and

format had to be corrected *before* the booklet would be sent to the printer. (T. 58, 95, 103, 106-07, 161, 226). They were not negotiating a new contract; that was completed on January 31, 2009. While Labor Relations Director Franke suggested -- using the ambiguous pronoun “we” -- that the unions had agreed to a deadline of November 12, 2009, to complete this process (T. 56, 102), Logan, who had proof-read every previous draft herself, testified otherwise. According to Logan, while the Company between June and November, 2009, commented that the booklet had to go to the printer, she credibly testified that there was no agreement by the unions to have this done by November 12, 2009. (T. 328-34).<sup>10/</sup> Lewis credibly corroborated Logan’s testimony that there was no such agreement. (T. 406-408). While there was no agreement by the unions to such a deadline, they still were attempting to accommodate the printer’s needs if the parties could reach agreement on finalization of the “booklet.” (T. 358-59, 375).

Until the Company’s “budget” issue came up, the process appeared somewhat leisurely with neither side rushing matters. Obviously, this was because the parties never treated the situation as there not being a new contract in place and applicable since ratification in February, with the contract being effective March 1, 2009. <sup>11/</sup>

Under the nebulous ground rules for the process of preparing the 2009 Handbook, there was nothing to prevent the parties, if they discovered an error in a later draft -- which also had existed

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<sup>10/</sup>From the unions’ perspective -- unlike most failure-to-execute-a-contract case -- there was no need to rush through proof-reading any particular draft, since the 2009 Contract *already* had been signed, ratified, *and implemented*. Instead, it appears that only the Company had budgetary reasons for submitting the “booklet” to the printer by November 13, 2009, so its costs would be reflected in the 2009, rather than the 2010, budget. (T. 56, 102).

<sup>11/</sup>While the body of the second TA suggests a different effective date, the next to last page of the second TA made clear that the Contract would become effective just after midnight, February 28, 2009, *i.e.*, March 1, 2009 (GC-12, next to last page).

in an earlier draft but had not been previously discovered or raised -- from bringing up that matter so it could be addressed *before* the “booklet” was finalized, as Franke admitted. (T. 241-43). This aspect of the process is critical to understanding one of the Chemical Workers’ defenses, *i.e.*, that the part-time issue was timely raised *before* there had been any final agreement on a “printer-ready” version of the Handbook.

On November 4, 2009, prior to any finalization of the “booklet,” the Utility Workers’ arbitration of part-time, 8-year employee, Margaret Madrigal, commenced. (GC-36, p. 7). The Chemical Workers were not present for this hearing. (GC-36, p. 2). This grievance, which challenged Madrigal’s May 1, 2009, discharge, was challenged by SCG as not being arbitrable because she purportedly had no just-cause-type protections under the 2009 Contract as an “at-will” employee per the 1994 (now re-dated) Letter Agreement. (GC-36, p. 17). Apparently, the Company was taking this position, at least in part, because it had rejected the JSC’s proposal to eliminate the superfluous “at will” language from the 1994 Letter Agreement. (GC-36, pp. 9, 17). In response, Utility Workers Attorney Greenstone argued that the “most recent” 2005 Letter Agreement modified the 1994 Letter Agreement, but Attorney Bissonnette interrupted her, claiming that the 2005 Letter Agreement no longer was the “most recent” Letter Agreement per the March, 2009, Contract, apparently since the Company’s most recent *draft* of the Handbook had re-dated *both* Letter Agreements to March 1, 2009, even though the TA made no mention of such re-dating and re-dating had not been discussed. (T. 158)(GC-36, pp. 28-29). This unprecedented position of the Company -- if it prevailed -- would constitute over 800 part-time employees losing their just-cause protections. Not surprisingly, an uproar ensued.

Chemical Workers Vice President Lewis did not learn of this part-time employee “at-will”

problem until the morning of November 12, 2009. On that morning, Lewis was informed by the Utility Workers that the Company had taken the position in the Madrigal arbitration several days earlier that part-time employees under the 2009 Contract had no just-cause rights. (T. 392)(GC-36, p. 8).<sup>12/</sup> The hearings in that arbitration consisted of five days between November 4, 2009, and May, 2010. Lewis later testified on the fifth day. (GC-36, GC-37, GC-38, GC-42, and GC-43).

Of course, Lewis had good reason to know that the 2005 Letter Agreement modified the 1994 Letter Agreement, at least in the 2005 contract, so that part-time employees would only be “at will” for the first 6 months of their service and, thereafter, they could challenge their discharge for misconduct or poor work performance as unjust through arbitration. Since Lewis understood that Madrigal had more than 6 months of service, the Company’s position, if it were accepted by the Arbitrator, would constitute the loss under the new 2009 Contract of one of the most important rights that an employee, part-time or full-time, can have under a union contract -- just-cause protection. (T. 393).

This was an alarming development and a substantial change from the parties’ position during the 2008-2009 successor-contract negotiations. Certainly, there had been absolutely nothing in the ratified TA to suggest to the membership, when they were considering ratification, that the parties had agreed to such a radical change, a change directly contrary to the evolutionary history of extending more and more contractual rights in the past decade to part-time employees. Given the Company’s apparent efforts several days before in the arbitration proceeding to create a *new*

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<sup>12/</sup>SCG Attorney Bissonnette asserted in that arbitration that the Company had “never arbitrated a discharge case for a part-time employee...” (GC-36, p. 9), even though that was not accurate; they had. For instance, the discharge of 2-year part-time employee David Gibson was arbitrated applying a ‘just cause’ standard (with cause being found). (Appendix B: Award of Arbitrator Kaufman, pp. 2, 5, 9).

negotiating, or background, or past-practice history *prior to* the parties executing the 2009 Handbook, Lewis needed to review the matter further -- just as the parties had been reviewing their differences over the sick-leave issues throughout the Summer of 2009 -- *before* agreeing to finalize the language in the Handbook. Otherwise, this newly-created pre-execution history might well be used later by an arbitrator (or the Company) to establish that the unions -- by *thereafter* signing the Handbook on November 12, 2009 -- had acquiesced in the Company's view that the parties had agreed to the loss of just-cause protections for *all* part-time employees. Lewis knew that there had been no such agreement to eliminate these just-cause protections and, certainly, no notification to the membership of such a change before their ratification of the TA. For Lewis to do nothing in response risked the Chemical Workers -- if not being unethical -- violating its fair representation duty to the part-time unit employees. No self-respecting union could ignore this major development. The unions had to do something in order to make sure just-cause rights would not be lost so cavalierly.

Consequently, the JSC, with Chemical Workers approval, indicated at the beginning of the morning meeting on the "booklet" on November 12, 2009, that it would not sign the Handbook "as is," a final draft of which still had not yet even been provided to the JSC by the Company. (The last *complete* draft had been provided in June, 2009. (T. 332-34)). That morning, *before* the Company accepted and incorporated proposed union changes emailed to it the evening before, the JSC proposed clarifying language -- just as the parties had done with many of the other disputes that they had between them throughout the Summer of 2009 when attempting to reduce their TA to "booklet" form -- to better reflect what the unions understood their January 31, 2009 TA to provide on the two Letter Agreements. JSC Vice Chair Helen Olague-Pimental offered two clarifying alternatives on

the morning of November 12, 2009, that would resolve the JCS's concern *without changing the substance of what had been agreed to in the TA*. The JSC was not proposing any substantive changes to either the 1994 or the 2005 Letter Agreement, but was only seeking to make sure that the language from the 2005 Contract that had not been changed in both the 1994 and 2005 Letters on "at-will" and discipline would retain the same relationship to each other in the 2009 Contract -- that is, the 1994 "at will" language was followed (or superceded in part) by the "more recent" 2005 Letter Agreement language regarding Article VI protections.

This could be done in several different ways. (T. 62-64, 404). One would be to do what had been done with some other letter agreements, such as separating out the e-bid agreement and putting it into a separate letter agreement. (T. 364-67). The "at-will" language, which had not changed since 1994, easily could be separated out and placed in its own separate 1994 Letter Agreement -- separate from the 2009 dues-changes -- and the part-time employee language regarding Article VI rights from the 2005 Letter Agreement similarly could be placed in a separate 2005-dated Letter Agreement, separate from the 2009 unrelated changes to the original 2005 Letter Agreement. The suggested clarifications changed nothing substantively from the TA and retained both the "at-will" language and the effective dates when these respective provision came into the Contract. They did nothing more, substantively, and were consistent with not only the TA, but also with Lewis' testimony as to what the parties agreed on in 2002 and 2005 (and how the Company, thereafter, had applied these Letter Agreements, just as Sullivan and Deacon had confirmed to Lewis).

On the other hand, it was the Company that, effectively, was attempting -- through slight-of-hand -- to change their January 31, 2009, agreement to eliminate 800+ employees' "just-cause" rights, all without any discussion of that issue.

After Ms. Olague-Pimental made her alternative proposals, the Company went back upstairs to its offices and (only then) incorporated the corrections to the Handbook that the unions suggested the prior evening, before returning at about 4:19 p.m. with what the Company -- but not the JSC -- referred to as the final blue-line contract. Regardless of the part-time Letter Agreement issue, this so-called "final" version still would not have been signed at that time, because both Vice President Lewis, who had not authorized anyone else to sign for him, and the JSC Second Vice Chair Jackie Allen (President of Chemical Workers Local 995C), had to leave at about 2:00 p.m. for another meeting and were not present to participate in any proof-reading or signings. (T. 99, 405-06).

Their absence was significant, though unrelated to the part-time dispute. Allen had played a large role in such proof-reading throughout the process according to Franke (T. 102, 173). Lewis had one particular section he had been responsible to proof-read. (T. 412). Also, JSC Utility Worker member Nancy Logan also had been insistent and very careful in proof-reading all of each draft (except certain appendices) returned to the JSC by the Company. (T. 346). Consequently, given the size of the draft Handbook, it goes without saying that this proof-reading could not have been accomplished when the entire "booklet" was not even presented for review until 4:19 p.m. (The Company never explained why this draft had not been provided to the JSC the first thing in the morning of November 12, 2009, around 9:00 to 10:00 a.m., when the meeting started, rather than at the end of the day).

Furthermore, the Company clearly was not willing to execute the 2009 Handbook without the parties simultaneously executing a side letter agreement (GC-35)(that is not contained in GC-3) resolving the sick-leave dispute. The sick-leave issue had been the major bone of contention for months that had held up finalization of the Handbook. While Franke elsewhere in her testimony

waffled on this issue, she made clear that the Company would not sign the Handbook without simultaneous execution of the sick-leave side agreement. (T. 126, 133). Thus, it is significant that the Company did not present the side agreements for signature to the JSC on November 12, 2009. (T. 250).

Because the parties *already* had a signed collective-bargaining agreement on January 31, 2009, effective March 1, 2009, that had been ratified and effectuated, there was no need -- as in those cases where an employer is refusing to sign and effectuate a previously-agreed-upon verbal contract -- to rush to complete the reduction of the contract into “booklet” form, at least not from the union members’ perspective. They had an enforceable contract. Indeed, the parties were arbitrating a May, 2009, discharge that occurred under the 2009 Contract. It was only the Company -- which had caused the delays throughout the Summer by insisting on adding pre-approval language to the sick-leave provision that had not been agreed to *or ratified* -- that now wanted to rush this Handbook to the printer in order to keep the printing costs within its 2009 budget. Curiously, the Company apparently, but inexplicably, had not seen fit to expedite providing the first draft of the Handbook to the JSC before April 4, 2009, or provide a full draft after June until 4:19 p.m. on November 12, 2009. If anything, it was the Company’s own doing that caused them to miss the November 13 printer’s dead-line.

Nevertheless, the critical fact, here, is that, under the process followed by the parties, the JSC properly and timely raised the part-time issue *before* the Company had agreed to the unions’ November 11, 2009, proposed changes. Thus, there was no agreement on a “printer-ready” document, before or after the part-time issue was raised. Arguably, a good-faith impasse on the “booklet” existed at that point without an agreement on a “printer-ready” Handbook. The next day,

the Company prematurely filed its Charge even before proof-reading could be completed on the belatedly-provided complete draft of the Handbook.

As in 2008, when negotiations were suspended until January, 2009, due to the holidays, it appears no further meetings were held on the “booklet” while proof-reading of the 4:19 p.m. Handbook draft continued, but was not completed until after Thanksgiving, sometime in early December, 2009. (T. 345). Lewis, who did proof-reading throughout the process of one particular section, did not even receive his copy of the 4:19 p.m. draft until the next JSC meeting that he attended. (T. 412). Eventually, and after proof-reading had been completed, as with many impasses, something happened to change the situation.

Vice President Lewis received information that would alleviate his concerns about the Company creating an improper and adverse interpretive history in either late February or early March, 2010. At that time, JSC Chairman Duffy told Lewis about the January 14, 2010, testimony of Sara Franke in the Madrigal discharge grievance case. Franke had testified that the relationship between the so-called 1994 Letter Agreement and the so-called 2005 Letter Agreement (though both Letters, now, would be re-dated to March 1, 2009) still would be the same in the 2009 Contract as they had related to each other in the 2005 Contract. (T. 406-07). (GC 37, pp. 123-28). In other words, just as Lewis knew from the 2002 and 2005 negotiations [and his communications with Sullivan and Company Attorney Deacon], the 2005 Letter modified in part the 1994 Letter “to the extent that it provides rights for qualifying part-time employees (those with six months of service) under Article VI (Dispute Resolution) of the CBA, but they are limited to discipline received under Section 6.3A or 6.3B (Demotion, Discharge or Layoff Due to Unsatisfactory Job Performance or Misconduct).” (RC-1, p.1).

Presumably, Utility Workers Counsel Ellen Greenstone probably wanted to review the transcript of Franke's testimony before giving any advice to the Utility Workers or the JSC on the matter. While this Record does not reflect when the transcript became available, one might assume that it was not available for several weeks since the next arbitration hearing after the January 14-15, 2010, hearings was not until March 4, 2010. (GC-37, p. 1)(GC-38, p. 1)(GC-42, p. 1). This may explain the delay in Duffy -- a National Vice President headquartered outside of California -- assuring Lewis that Franke's testimony now had helped to defuse the controversy. (T. 351).

Lewis found out about Franke's testimony from Duffy probably in late February or early March, 2010. (T. 406-07). Upon learning of Franke's testimony, Lewis now had at least some evidence to support him, if he should be confronted with Attorney Bissonnette's similar arguments in a future arbitration. Lewis now had a "negotiating," or background, or past-practice history that pre-dated the Chemical Workers' authorization to sign the 2009 Handbook. Lewis now had evidence that he could argue to an arbitrator that part-time employees, after 6 months of service, still enjoyed "just-cause"-type protections under the 2009 Contract *as they had under the 2005 contract*. Consequently, at that point, the Chemical Workers were agreeable to executing the 2009 Handbook.

Initially, Duffy was authorized to, and did, convey to Franke by his March 10, 2010, letter that the parties had agreed to execute the 2009 Handbook. While Duffy may have included the wrong draft with his March 10, 2010, letter, there was no dispute that Duffy had conveyed to Franke by March 10, 2010, the unions' intention and that Franke, then, wanted all the union representative signatures not just Duffy's, and that it was Franke who suggested March 23, 2010, for the date of signing. Then, on March 23, 2010, once the Company changed the name of one of the signatories and the new, March, 2010, print-out was proof-read, the Handbook was executed.

### III. LAW AND ARGUMENT

#### A. The Amended Charge should be dismissed for having been untimely filed.

Both the Charge and the Amended Charge allege that the unions “agreed to a new CBA which was memorialized in a tentative agreement (TA) signed by the Union on 1/31/09 and ratified on or about 2/25/09.”<sup>13/</sup> The General Counsel, however, did not allege that the January 31, 2009 TA resolved all matters *except for the sick-leave issue*. Instead, the General Counsel alleged that on or about January 31, 2009, the parties reached “complete agreement on terms and conditions of

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<sup>13/</sup>While the Charge and Amended Charge allege that the TA represented an agreement on all major issues *except for sick-time benefits*, the Amended Complaint alleged no such sick-leave exception; it alleged that the parties reached “complete agreement” on the contract, an allegation admitted by the Chemical Workers and the other respondents. The General Counsel’s opening statement also did not suggest that there was not “complete agreement” on January 31, 2009, with the sick-leave issue still to be resolved. (T. 14–15). Thus, the General Counsel now is bound by those facts and the Charging Party may not expand on the Amended Complaint allegations. Moreover, the evidence reflected that the language in the eventually-agreed-upon “booklet” contained the same language as had been in the TA on this sick-leave issue. *Compare* GC-12, TA, ¶ 23, p. 8, *with* GC-3, p. 67).

Nevertheless, even if there were a difference of opinion between the unions and the Company regarding exactly *what* they had agreed upon regarding the sick-leave benefits back on January 31, 2009, the fact that the parties, later, following ratification, resolved that dispute in mid-contract should be of no consequence to this case. It is not unusual, during the term of a labor agreement, for parties to differ over what they previously had agreed upon and, sometimes following a grievance and sometimes without a grievance, entering into a mid-contract memorandum to clarify the matter. (T. 40). That does not mean that the parties had not, *previously*, entered into, signed, and effectuated an over-all “complete” collective-bargaining agreement on January 31, 2009. That is a fair characterization of what happened here.

Eventually, Duffy in a private side-bar discussion, reached an agreement with the Company that, instead of the language proposed in the Handbook by the Company, the Company would use the language regarding the sick-leave changes *just as provided for by the second TA*, as the JSC had insisted, but that the JSC would acknowledge that “the Company will continue to administer the Attendance Policy as modified by the Company to clarify the new Agreement.” (GC-13). While this Letter Agreement was executed on March 23, 2010, at the same time that the Handbook was executed, it was not included in the Handbook. (GC-3 and GC-13)(T. 85-86, 133).

employment of the Unit to be incorporated in a collective-bargaining agreement, which by its terms was to become effective on March 1, 2009.” (Amended Complaint, ¶9(a)). By admitting to these essential facts, *i.e.*, that “complete agreement” was reached on January 31, 2009, the Chemical Workers has restricted the General Counsel to his own pleadings on this matter. The evidence was un rebutted that the Chemical Workers (as did the Utility Workers) signed the TA, *i.e.*, the collective-bargaining agreement, on January 31, 2009)(GC-12, last page). What the parties signed on January 31, 2009, was their “complete agreement,” as pled by the General Counsel and admitted to by Respondents.

Significantly, there is no dispute that, upon ratification, the parties put this collective-bargaining agreement into effect, retroactively implemented wage-rate and other changes as provided for in the TA, and even processed and arbitrated grievances up through November 4, 2009, and thereafter. If either party would have had a need to do so, the signed TA was sufficient for a federal court to enforce the parties contractual obligations contained therein under 29 U.S.C. Section 185. *See, Rabouin v. NLRB*, 195 F.2d (2d Cir. 1952). One seriously doubts that the Company would argue that the TA, including its Section 2.2(E) no-strike obligations, was not enforceable, if one of the locals had engaged in a strike over the Madrigal grievance.

The original Charge in this case was not filed until more than 6 months later. If the General Counsel now is contending that the TA signed on January 31, 2009, did not reflect the parties “complete agreement” reached in January, such an allegation is inconsistent with his own Amended Complaint and, therefore, such an argument must be disregarded, not only because it is inconsistent with the pleadings, but such an argument is not supported by a timely charge. Consequently, to the extent that this case involves a failure-to-execute a collective-bargaining agreement -- as opposed

to putting that agreement into a more user-friendly format -- the allegation is untimely and, for that reason alone, should be dismissed.

Similarly, to the extent that the Amended Complaint alleges that the Chemical Workers unlawfully delayed in executing “the agreement described above in paragraph 9(a),” which is the “complete agreement” reached “[o]n or about January 31, 2009,” this allegation also should be dismissed, both for limitation reasons, as well as for a failure to state a claim.

Under extant Board law, the failure to execute a labor agreement is a discrete, one-shot deal that triggers the running of the limitations period, the “continuing violation” theory having been rejected by the Board. *See, Chambersburg County Market*, 293 NLRB 654 (1989). Here, the General Counsel’s “delay” allegation parallels the argument that the Chemical Workers was engaged in a “continuing violation” of the Act, a theory no longer recognized by the Board. *Id.* Thus, it is doubtful that there is a cognizable claim here for a “delay” in executing an agreement. The “complete agreement” at issue that the parties reached “[o]n or about January 31, 2009,” that was to become effective on March 1, 2009, by the terms of the General Counsel’s own pleadings, was reached on *that* date, January 31, 2009, and the Chemical Workers signed that “complete agreement” on *that* date. The Chemical Workers were not obligated to sign the “complete agreement” a second time.<sup>14/</sup> The Chemical Workers’ failure, if there was one, to sign the “complete agreement” reached on January 31, 2009, would be a discrete event and no “continuing violation” theory can extend the time in which to file such an unfair labor practice charge. *Id.* If there was a “delay” in executing

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<sup>14/</sup>The Chemical Workers do not dispute that they may have had a duty to work with the Company to reduce the TA to a more user-friendly format, but that is what they did. But the pleadings do not allege a violation of that duty; the pleadings only allege a delay in executing the “complete agreement” described in paragraph 9(a).

this “complete agreement,” then that delay began on or about January 31, 2009, through the next 6 months, *i.e.*, until July 31, 2009, the last day that a “delay” charge, if such a charge is even cognizable under the Act, could have been filed. Again, for this reason alone, the Amended Complaint should be dismissed against the Chemical Workers.

B. The Amended Complaint fails to allege facts sufficient to constitute a violation of the Act.

The General Counsel alleges in his pleadings that there was a “complete agreement” on January 31, 2009, between the parties and that it was *this* particular agreement that the Chemical Workers refused to execute, or delayed in executing, between November 12, 2009, and March 23, 2010. Yet, whatever agreement the parties reached on January 31, 2009, it was at least somewhat different from the three documents that they, eventually, executed -- as a package -- on March 23, 2010, a package that the Company insisted on (though two of those documents were not even presented to the Chemical Workers on November 12, 2009). Whatever alleged package agreement there may have been on a printer-ready “booklet” and side-agreements (and the Chemical Workers denies an agreement on a completed, printer-ready “booklet” as of November 12, 2009), that alleged package differed somewhat from the January 31, 2009, “complete agreement,” the agreement specifically referenced by the pleadings.<sup>15/</sup>

The alleged November 12, 2009, agreement to supposedly execute the blue-line 2009 Handbook, the side-agreement containing the sick-leave resolution, and the side-agreement regarding the e-bid matter was not the “complete agreement” described in Paragraph 9(a) of the Act, since it

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<sup>15/</sup>The TA evidenced no agreement, for instance, regarding the sick-leave pre-approval language and the executed 2009 Handbook did not contain that language, but the Company in its Amended Charge erroneously alleged that the parties had not resolved that issue as of January 31, 2009; they had: there was no agreement in the TA that employees had to have pre-approval to exercise this new right and the executed Handbook contained no such obligation.

addressed additional matters, as even the Company has asserted. In fact, the pleadings do not allege a failure to execute -- or a delay in executing -- this alleged three-document package, which the parties purportedly did not reach agreement on until *after* January 31, 2009, indeed, the two side agreements were reached *after* that date. Instead, Paragraph 9(b) – (c) refers only to the January 31, 2009, “complete agreement.” Consequently, by its very terms, the Amended Complaint has limited its allegations to a failure to execute, or a delay in executing, the January 31, 2009, “complete agreement,” not a delay in executing the three-document package that the parties -- at some point *after* January 31, 2009 -- purportedly reached agreement on.

Moreover, it is not even clear whether the General Counsel -- as opposed to the Company -- is alleging that the “complete agreement” identified in the pleadings would include one, two, or all three of the documents eventually executed as a package on March 23, 2010. Unfortunately, the pleadings are not a model of clarity and certainly do not adequately put the respondents on notice of what actually is being alleged. As such, the Amended Complaint fails to allege sufficient facts to support a violation of the Act supported by a timely charge. The Amended Complaint should be dismissed.

C. The Amended Charge should have been deferred pending resolution of the Madrigal grievance being arbitrated.

The General Counsel inexplicably had five volumes of an arbitration transcript entered into the Record. The extent of the Record in that arbitration only reinforces the Chemical Workers’ position that this matter should be deferred. In part, that grievance proceeding should decide a factual issue critical to this case, *i.e.*, whether the January 31, 2009, “complete agreement,” contrary to SCG’s contention, provides for arbitrable “just-cause” rights for part-time employees, such as

Margaret Madrigal, an 8-year part-time employee, who was terminated for misconduct, *i.e.*, falsification of Company records. (GC-36, p. 7, 16-17). If the arbitrator decides that the 2009 Contract, in fact, provides such arbitrable rights, then this would strongly support the Chemical Workers' position that it had a good-faith basis on insisting -- prior to finalization of the 2009 Handbook -- that (a) the 2009 Handbook *either* be clarified -- consistent with the TA as it amended the 2005 Contract -- to reflect that the Article VI discipline language was a "more recent" agreement regarding part-time employees than the earlier 1994 "at-will" Letter Agreement, or (b) the Company, despite Attorney Bissonnette's arguments, provided some assurance from its 2009 chief negotiator, Sara Franke, that she did not see the relationship between the 1994 and *subsequent* 2005 Letter Agreements changing simply because they both were being re-dated to March 1, 2009, due to *unrelated* changes in those letter agreements.

Since this arbitration may effectively resolve a critical issue in this case important to determining whether the Chemical Workers were acting in good faith to protect the integrity of their contract, the matter should have been deferred, if not under normal deferral policy, because of the unique facts of this case. If the Utility Workers prevail on the "just cause" standard issue in the Madrigal arbitration, it would be even clearer that it was the Company -- not the unions -- that had been insisting, *improperly*, on re-dating Handbook language to support *its* unwarranted view that part-time employees had no arbitrable "just-cause" rights.

Consequently, the Amended Charge should be deferred.

- D. Even if the General Counsel had pled and alleged that the Chemical Workers had unlawfully failed to execute, or delayed in executing, a more user-friendly “booklet” form of the “complete” January 31, 2009, agreement, the Amended Complaint should be dismissed, because there was not a sufficient agreement between the parties, as of November 12, 2009, on a *printer-ready* “booklet” that required the Chemical Workers to execute that “booklet.”

Even if the General Counsel had properly and sufficiently pled what somewhat seems to be his theory, there can be no finding that the Chemical Workers violated the Act, because there was not a sufficient meeting-of-the-minds as of November 12, 2009, so as to require the unions to execute the Company’s so-called, final, “printer-ready,” blue-line Handbook (and the other two side-agreement that were part of the package). First, it is clear that these three documents were a package and that the Company demanded that all three be executed simultaneously. (T. 126). It simply is inconceivable that the Company -- after having delayed resolution of this matter for months by its position on the sick-leave issue -- would have signed the Handbook without the Chemical Workers and Utility Workers also signing the side sick-leave agreement. Labor Relations Director Franke made that point when JSC Chairman Duffy sent his March 10, 2010 letter without including the side agreements. (T. 126).

Second, and more importantly, the somewhat nebulous ground rules that the parties were following throughout the Spring, Summer, and early Fall of 2009 during the process of preparing the “booklet” form of the 2009 Contract clearly reflect that, at any time before final agreement was reached, the parties could raise concerns, point out errors, even-typos or format issues, require clarifications, etc. that, even if they existed in earlier drafts of the Handbook, still could be raised prior to finalization. Franke acknowledged this process. (T. 241-43).

Consequently, simply because the unions may not have raised clarification issues, or concerns, about the re-dating of the 1994 Letter Agreement and 2005 Letter Agreement earlier in

the process -- what previously had appeared to be mere “housekeeping” issues -- this did not mean that the Chemical Workers (or other respondents) were precluded from raising these concerns, even as of the morning of November 12, 2009, so long as they were raised prior to reaching final agreement on the so-called blue-line Handbook. Indeed, the unions’ concerns regarding the re-dating of these two Letter Agreements were raised *before* the Company negotiators went back upstairs after the morning meeting on November 12. Only *after* the Company went upstairs, incorporated numerous concerns and changes that union officials had presented the evening of November 11, 2009, and returned at 4:19 p.m. did the Company clearly accept the earlier-proposed November 11 proposed union changes. Significantly, the concerns raised the previous evening were not even incorporated into a draft and, thus, accepted by the Company, until hours *after* the JSC had raised the Letter Agreement re-dating concerns. Thus, these re-dating concerns were timely raised *before* finalization, or the alleged finalization, of the “booklet.” Consequently, there was no meeting-of-the-minds about the final draft even before the Chemical Workers knew whether the various *other* proposed changes from the day before would all be accepted by the Company. If there was no meeting-of-the-minds, there can be no unlawful failure-to-execute (or an unlawful delay thereof).

Furthermore, the process that was being followed, here, was significantly different from the process of reducing a verbal agreement to written form, the process that often is involved in refusal-to-execute cases. In that type of a case, the Board may well find that, so long as the substance of the verbal agreement has been substantially incorporated into a written document, both parties may be required to execute that written document.

However, that was not the process here. The test was not merely whether the Handbook substantively reflected the TA before the parties would sign the booklet. There *already* was a

written, signed labor agreement. Instead, the process here involved the re-formulating of that written agreement into a more user-friendly “booklet” form for “printer-ready” purposes. As their actions reflected, the parties were not going to agree to send this “booklet” to the printer until every “T” was properly crossed, every “I” was properly dotted, every page was properly numbered, all the formatting was correct, etc. (T. 226-27). This was a much more precise process than a substantial-compliance test might require. This “booklet” had to be perfect, or almost perfect, before it would be sent to the printer. That meant that, as had been followed throughout the process, the Chemical Workers and other respondents would carefully proof-read the entire draft *each* time that it was returned to the union representatives. By the time the SCG finally got the JSC a complete draft at 4:19 p.m., there certainly was not sufficient time to proof-read the entire draft that business day. While the union officials may not have *again* told the Company negotiators that they would have to proof-read the 4:19 p.m. draft, it should have been understood and “gone without saying,” as Franke so often suggested, that the union officials would continue to do just as they had done every other time -- proof-read the entire document. If the Company had provided the draft at 9 or 10:00 a.m. that morning, as it could have done even before it became aware of the part-time dispute, then the JSC may have been able to have completed proof-reading that day before Lewis and Allen had to leave at 2:00 p.m. There was no reason the draft could not have been provided hours before 4:19 p.m., while the Chemical Workers representatives were still present.

Such proof-reading clearly was necessary since the Company had not provided an entire draft of the Handbook since June, 2009, even though it had provided, in different and separate installments, portions of earlier drafts at various times. (T. 332-34). Consequently, at least part of the reason for the unions not signing the Handbook on or after November 12, 2009, was

attributable to their need to proof-read the document. Then, as had occurred the previous year after the October, 2008, rejection of the first TA, the Thanksgiving, Christmas, and New Years holidays intervened, furthering slowing down the process. Since the printer's dead-line had not been met, there was no longer a need to rush the matter.

Nevertheless, the Chemical Workers, in particular, had additional good-faith reasons even thereafter for not executing the so-called, final, blue-line version of the Handbook. John Lewis was a participant in the 2002 and 2005 negotiations and, therefore, knew that the 2005 Letter Agreement modified the 1994 Letter Agreement and, thereby, extended all rights provided under Article VI of the 2005 Contract, including just-cause and arbitration rights, to part-time employees with 6 months or more of service. Thereafter, Lewis had been assured by a Company labor-management official and a Company attorney that such rights were enjoyed by such part-time employees under the 2005 Contract, so he had reason to be concerned that the Company, now, *prior* to the finalization of the 2009 Handbook, apparently was representing that the 2005 (now re-dated to the 2009) Letter Agreement no longer was "more recent" than the 1994 (new re-dated to the 2009) Letter Agreement and, as such, the 2009 Contract provided no arbitrable just-cause rights for over 800 part-time employees. Lewis knew there was no such representation, tentative agreement, discussion, or communication to the membership of that "loss" prior to their ratification of the first or second TA. It would have been extremely irresponsible -- and possibly a fair-representation breach -- for Lewis not to take some sort of action, or not to refuse to sign the 2009 Handbook, without first assuring himself that there was at least some evidence that he -- as a potentially future Chemical Worker representative in arbitration -- could argue against the Company's new position.

The question before the Judge is whether Lewis was acting in good-faith regarding these

matters, not how strong the underlying arguments, for or against, his concerns were. While the Judge has expressed some opinion that the negotiating history that arbitrators might consider, when interpreting a labor agreement, may not take into account matters away from the table, the Chemical Workers respectfully disagree with that suggestion. While the Board may not often look to matters away from the table in deciding surface bargaining allegations,<sup>16/</sup> that does not necessarily mean that an arbitrator -- or even courts -- may not consider past practice, extrinsic evidence, or the parties' actions away from the table in interpreting ambiguous (or even unambiguous) language. So long that it is possible that an arbitrator might consider the Company's pre-execution position on the issue *followed by* the Chemical Workers apparent subsequent acquiescence to that position, as evidence supporting the Company's position, then it was reasonable for Lewis to be concerned about that matter.

It is not out of the realm of possibility that some arbitrators -- indeed, maybe an arbitrator deciding this very issue -- may disagree with the Judge's view. For instance, in what many labor-management representatives refer to as the "Bible" of arbitration, HOW ARBITRATION WORKS, by Elkouri & Elkouri (BNA 6<sup>th</sup> Ed. 2003 at p. 457), those editors state that, "The examination of the situation of the parties at the time of the negotiations so as to view the circumstances as the parties viewed them, and to judge the meaning of the agreement accordingly, may require more than testimonial evidence." For instance, a union's "Negotiations Bulletin" was found to provide a

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<sup>16/</sup>While the Board infrequently utilizes a party's non-bargaining misconduct as tainting the bargaining process, the Board may evaluate "the content of the employer's bargaining proposals in conjunction with its conduct away from the bargaining table in order to determine whether there was a bad-faith motivation behind the proposal." M.K. Morse Co., Case 8-CA-23792, 1991 WL 250954 (NLRBGC), 1991 NRLM GCM LEXIS 84. (Appendix C). Here, that is exactly the reason for the unions' concerns about SCG's actions on November 4, *i.e.*, how did those actions reflect on the draft Handbook being presented.

“useful clue” as to the parties’ intention regarding what their agreement entailed. *See, Los Angeles Herald Examiner*, 45 LA 860, 862 (Kadish, 1965). Similarly, handouts used at a union’s ratification meetings also may provide a clue to the parties’ intent. *Gardinier Inc.*, 77 LA 535, 539 (Phelan, 1981). Furthermore, it is not unusual for an arbitrator to look to past practice or how certain terms are used in an industry, or how similar contractual language has been applied by the employer in the past -- evidence that concerns matters away from the negotiating table -- in interpreting labor contracts.

Similarly, courts also may consider extrinsic evidence and the “surrounding circumstances” regarding matters away from the negotiations table, including how the contractual language has been understood or applied in the past, such as how a management secretary explained certain contractual rights to retiring employees, when interpreting a labor contract. *See, e.g., Local 836, UAW v. Echlin, Inc.*, 670 F.Supp. 697 (E.D. Mich. 1986); *see also, UAW v. Cadillac Malleable Iron Co.*, 728 F.2d 807 (6<sup>th</sup> Cir. 1984), *upholding*, 1982 WL 20483, 113 LRRM 2525 (W.D. Mich. 1982). The management secretary’s assurances to retiring employees, that was relied on to interpret the contract in *Cadillac Malleable*, are really no different from Sullivan’s and Deacon’s assurances to Lewis on how the 2005 Letter Agreement was understood to provide “just cause” rights to certain part-time employees.

Here, the question is not whether an arbitrator *would*, but whether an arbitrator *could*, take into consideration that the Chemical Workers had acquiesced to signing the Company-prepared 2009 Handbook on November 12, despite knowing that the Company had taken the position -- *previously* -- that a mere re-dating of the 1994 and 2005 Letter Agreements, coupled with the Company’s refusal to delete superfluous language from the JSC’s proposal, some how had resulted *sub silentio*

in a loss of “just-cause” rights for over 800 employees. It certainly is not beyond the realm of possibility that an arbitrator could find that the unions had acquiesced to the Company’s view of the matter by -- *after knowing that view* -- still signing the yet-to-be finalized Company-prepared Handout without at least obtaining some kind of assurance that the re-dating, alone, did not result in the loss of “just-cause” rights. Because an arbitrator *might* so interpret such an acquiescence *against* the unions’ position, their fair-representation duty demanded that they seek at least some type of clarification, or assurances, before finalizing and executing what the Company and, apparently the General Counsel, now erroneously refer to as, in fact, “the Contract.”

Consequently, the JSC *timely* raised this issue and, in good-faith, proposed alternative language for the Handbook that did not substantively change either of the Letter Agreements, but only clarified the matter, just as the parties had done with the sick-leave issues, the e-bid issues, and other matters. And, the JSC raised this issue -- as the process permitted -- even before the Company had agreed to incorporate the corrections presented to it the night before. Thus, there was no meeting-of-the-minds for a perfect, or near perfect, “printer-ready” document as of November 12, 2009 (or earlier).

Similarly, there was no unreasonable delay after November 12, 2009, by the Chemical Workers. Presumably, if this had occurred in September, rather than just before the Company wanted to rush the document to the printer for budgetary reasons, the part-time employee dispute would have been addressed just like these other disputes were addressed, *i.e.*, in a more leisurely, deliberative fashion. The only difference on November 12, 2009, was Franke’s budgetary concerns, concerns that were not important enough for her to get a draft prepared for review by 10:00 a.m. on November 12. Clearly, the facts do not show an agreement on a printer-ready draft before November

12, 2009. And, contrary to Franke's testimony, there was no agreement by the unions to complete the preparation of the "booklet" by November 13, 2009.<sup>17/</sup> Yet, once the printer's deadline was past, time no longer was critical and the leisurely practice could resume.

Consequently, while the Chemical Workers submit that there is no such violation as a "delay" in signing a labor contract -- as opposed to a discrete violation for an initial refusal to sign such a document -- the Chemical Workers submit that, even if there were such a "delay" violation cognizable under the Act, the delay must be in bad faith and it must be an unreasonable delay before such a violation has occurred. Here, the reason for the Chemical Workers' alleged delay in executing the Handbook was in good faith and it was not unreasonable: There was no finalized, agreed-upon, "printer-ready" Handbook ready to sign on November 12, 2009! Thereafter, the process continued, as it has throughout the prior 8 months, with proofing and efforts, often away from the table, to resolve or clarify the remaining issues.

Regardless of whether the JSC told the Company that it would not sign until all critical

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<sup>17/</sup>Two witnesses for the union denied credibly any such agreement. (T. 329, 408). On the other hand, Franke was not a credible witness. She frequently, despite entreaties from both counsel and the judge to answer only the question asked, engaged in self-serving comments, often at the expense of not even answering the question. On several occasions she denied that she had ever referred to the Handbook (or its earlier "drafts") as a "booklet," even though that is the exact term that she utilized to refer to these documents, twice, in her affidavit opposing the Chemical Workers' summary judgment motion. (T. 222-24)(GC-1(y), ¶¶ 4-5). Several times, she stated that the document, even with the 4:19 p.m. designation on it, that the Company presented on the afternoon of November 12, 2009 for signing, was the "exact" document that was presented for signing on March 23, 2010, only to, finally, retract this statement, when she realized that the "exact" document was not presented in March, because a change in the names of the signatories had to be incorporated. (T. 228, 233-34). Finally, while Franke had a reason (budgetary) to slant her testimony to suggest a need to rush the Handbook to the printer, the unions had no such need to enter into an agreement to rush completion of the already long-delayed "booklet" by agreeing to a November 12, 2009, deadline. Indeed, the testimonial and circumstantial evidence supports the unions' position that there was no such agreement, particular given the fact that the unions, even as of the evening of November 11, 2009, continued to provide comments, concerns, and proposed corrections to the draft.

members were able to be present and/or have an opportunity to have the document proof-read before their signatures, directly or through proxy, could be placed on the document, it is reasonable to expect that the Company, based on past practice, should know this. Given the recent history, with the JSC finding that the Company had either inserted, or deleted, language from the draft “booklet” that did not accurately reflect the parties’ January 31, 2009, TA, it would not be reasonable to expect the JSC to do otherwise.

Similarly, given the parties past practice of taking a recess from negotiations during the winter holidays, it was reasonable to expect -- and it goes without saying -- that such a hiatus from late November until early January could be expected, particularly since the November 13 printer’s deadline had not been met.

Lewis was reasonable and acting in good faith, when he (and the other Chemical Workers members of the JSC) continued to refuse to sign the 2009 Handbook until they had received assurances from Duffy, after he had consulted with the Utility Workers counsel, that Franke’s testimony supported the unions’ view of the matter. Lewis was doing nothing more than what the parties had done regarding other disputes, clarifications, or changes throughout the Spring, Summer, and Fall, when the unions were attempting to make sure that the Company’s drafts of the Handbook accurately reflected what the parties actually had agreed to (or not agreed to) on January 31, 2009. Once those assurances were provided, Lewis authorized Duffy to proceed with execution of the Handbook.

Once the Company was aware by March 10, 2010 (or slightly earlier), that the unions now were prepared to execute those documents, it simply was a matter of finding a convenient time for all (or most) of the persons, who would be signing the documents, to meet for that purpose.

Given these circumstances, it cannot be said that the Chemical Workers acted with a lack of good faith; they did not. They had good-faith reasons to slow the process down, based on the Company's recent history of insertions and deletions of matters into the Handbook improperly; the issue was huge as to whether more than 800 part-time employees would lose "just-cause" rights; and the Chemical Workers had a duty of fair representation to make sure that, through signing a document *after* knowing of the Company's improper interpretation of the parties' actions, these rights would not be so cavalierly disregarded.

The Judge should take into account that the Company clearly would not have signed the 2009 Handbook without the unions simultaneously signing the side-agreement (which is not contained in the Handbook) regarding sick-leave. There simply is nothing in the TA regarding any agreement by the parties -- and there is absolutely no "strike-out" language on which the Company can rely -- to support an argument that the parties had agreed on January 31, 2009, that employees must obtain pre-approval or pre-schedule sick-leave to use for a doctor's appointment. Yet, the Company would not finalize the Handbook until that issue was resolved. It was resolved by the Company, finally, agreeing to take the pre-approval/pre-schedule language out of the 2009 Handbook and use just the language on this matter from the TA (though the unions acquiesced in, but did not necessarily agree with, the Company's statement that it was continuing to contain this obligation in its policies). If anything, it has been the Company that was attempting to effectively change the TA by not preparing an *appropriate* draft of the Handbook that delayed these matters unreasonably, not the unions.

While the Amended Complaint refers to a delay between November 12, 2009, and March 23, 2010, the Judge should not ignore the improper delay caused by the Company's actions between February 1, 2009, and November, 2009. The pre-November, 2009, delay caused by the Company

was more than sufficient to justify the JSC members being that much more cautious -- later -- in reviewing the Company's drafts on and after November, 2009.

#### IV. CONCLUSION

For the reasons stated above, the Amended Complaint should be dismissed against the Chemical Workers (and other respondents). The Amended Complaint, by its terms, does not allege sufficient facts to support a violation of the Act and/or is not supported, in whole or in part, by a timely charge. Furthermore, the Amended Charge should have been deferred to arbitration. Finally, the facts, themselves, in this case, do not support a violation of the Act. The Amended Complaint must be dismissed.

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Respectfully submitted,

s/Randall Vehar

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Randall Vehar (Ohio Bar No.0008177)  
UFCW Assistant General Counsel/  
Counsel for ICWUC  
1799 Akron Peninsula Road  
Akron, OH 44313  
330/926-1444  
330/926-0950 FAX  
[RVehar@ufcw.org](mailto:RVehar@ufcw.org)

---

Robert W. Lowrey (Ohio Bar No. 0030843)  
UFCW Assistant General Counsel/  
Counsel for ICWUC  
1799 Akron Peninsula Road  
Akron, OH 44313  
330/926-1444  
330/926-0950 FAX  
[RLowrey@ufcw.org](mailto:RLowrey@ufcw.org)

CERTIFICATE OF SERVICE

I hereby certify that on the 6<sup>th</sup> day of August, 2010, a copy of the foregoing was emailed to the following persons and was filed electronically with the Division of Judges:

Christopher M. Bissonnette, Esq.  
Sempra Energy  
555 West 5<sup>th</sup> Street - GT 14 G 1  
Los Angeles, CA 90013-1034  
[cbissonnette@sempra.com](mailto:cbissonnette@sempra.com)

Linda Van Winkle Deacon, Esq.  
BATE, PETERSON, ZINN & YOUNG, LLP  
888 S. Figueroa Street, 15<sup>th</sup> Floor  
Los Angeles, CA 90017  
[ldeacon@bpdzylaw.com](mailto:ldeacon@bpdzylaw.com)

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Attorneys for Southern California Gas Company

Irma Hernandez, Esq.  
National Labor Relations Board  
Region 21  
888 South Figueroa Street, 9<sup>th</sup> Floor  
Los Angeles, CA 90017-5449  
[NLRBRegion21@nrb.gov](mailto:NLRBRegion21@nrb.gov)  
[Irma.Hernandez@nrb.gov](mailto:Irma.Hernandez@nrb.gov)

Attorney for the General Counsel

Ellen Greenstone, Esq.  
ROTHNER, SEGALL, GREENSTONE & LEHENY  
510 South Marengo Avenue  
Pasadena, CA 91101-3115  
[egreenstone@RSGLABOR.com](mailto:egreenstone@RSGLABOR.com)

Attorney for Joint Steering Committee and Utility Workers

s/Randall Vehar  
Randall Vehar, Esq.



**United States Government**  
**NATIONAL LABOR RELATIONS BOARD**  
**OFFICE OF INSPECTOR GENERAL**  
Washington, DC 20570-0001

July 20, 2010

The Honorable Darrell E. Issa  
Ranking Minority Member  
Committee on Oversight and Government Reform  
United States House of Representatives  
Washington, DC 20515-6143

Dear Congressman Issa:

Pursuant to your request of June 15, 2010, I completed an inquiry into Member Craig Becker's participation in the decision St. Barnabas Hospital and Committee of Interns and Residents, Local 1957, SEIU, dated June 3, 2010.

During the course of the inquiry, I collected information at the National Labor Relations Board, verified information, and consulted with the Office of Government Ethics. After doing so, I determined that Member Becker's participation in the St. Barnabas Hospital decision did not violate Government ethics regulations, the President's Ethics Pledge found in Executive Order 13490, or the ethics agreement that he executed prior to his appointment as a Board Member.

In making that determination, I found that Member Becker was assigned to the case in the normal course of business and that he took no action in that assignment process. I also found that Member Becker's ruling on motions for his recusal found in the decision Service Employees International Union, Nurses Alliance, Local 121RN (Pomona Valley Hospital Medical Center) and Carole Jean Baderscher, dated June 8, 2010, is applicable, in part, to the St. Barnabas Hospital matter. I have enclosed a copy of that decision with this letter.

Both the Government ethics regulations, at 5 CFR 2635.502, and the Ethics Pledge require that Member Becker not participate in certain matters. The Ethics Pledge cited in your letter requires that Member Becker "not for a period of 2 years from the date of [his] appointment participate in any particular matter involving specific parties that is directly and substantially related to [his] former employer or former clients. . . ." For purposes of the Ethics Pledge, "former employer" is defined as "any person for whom the appointee has within the 2 years prior to the date of his or her appointment served as an employee, officer, director, trustee, or general partner. . . ." The definitions for the Ethics Pledge also state that "directly and substantially related to my former employer or former clients" means "matters in which the

Appendix "A"

appointee's former employer or a former client is a party or represents a party." The regulation has a similar proscription on participating in matters involving a former employer, but the time limit is 1 year.

In the Pomona Valley Hospital Medical Center decision, Member Becker accurately states that the Federal courts and the National Labor Relations Board both recognize that international unions and their affiliated local unions are separate legal entities. Member Becker was employed by the Service Employees International Union (SEIU), the international union, not the Committee of Interns and Residents, Local 1957, SEIU. Because the two are considered separate legal entities, and SEIU was not a party or representing the local union, neither the regulation nor the Ethics Pledge automatically required Member Becker's recusal in the St. Barnabas Hospital matter based solely upon his employment with SEIU.

Aside from his status as a former employee of SEIU, there are also certain situations involving local unions that are affiliated with SEIU that may require Member Becker to recuse himself from participation. Some of those issues were identified in his ruling on the recusal motions in the Pomona Valley Hospital Medical Center decision. Those particular situations were not present in the St. Barnabas Hospital matter. Member Becker has not represented the Committee of Interns and Residents, Local 1957, SEIU, in the St. Barnabas Hospital matter or any other matter within the 2 years prior to his appointment. When asked, Member Becker stated that during his employment with SEIU, he did not provide advice or in any way assist SEIU; the Committee of Interns and Residents, Local 1957, SEIU; or attorneys for either entity with regard to the St. Barnabas Hospital matter. The attorney of record for the Committee of Interns and Residents, Local 1957, SEIU, confirmed that Member Becker had not in any manner assisted or provided advice in the St. Barnabas Hospital matter. A review of the Agency's records of parties and their representatives found that SEIU's attorneys did not represent or make an appearance for the Committee of Interns and Residents, Local 1957, SEIU, in the St. Barnabas Hospital matter.

In addition to the ethics regulation and the Ethics Pledge, Member Becker executed an ethics agreement prior to his appointment. That agreement states in part that Member Becker "will not participate personally and substantially in any particular matter involving specific parties in which either the SEIU or the AFL-CIO is a party or represents a party, unless [he is] first authorized to participate, pursuant to 5 CFR 2635.501(d)." In making his determination with regard to his recusal from decisions involving local unions affiliated with SEIU, Member Becker acted in accordance with his ethics agreement and 5 CFR 2635.501(d) by consulting with and receiving advice from the Designated Agency Ethics Official. The advice he received was that his participation in those decisions would not violate the ethics regulations or the Ethics Pledge and would be consistent with the National Labor Relations Board's past practice. That advice was based upon the analysis that an international union and an affiliated local union are two separate legal entities. Therefore, as with the ethics regulation and the Ethics Pledge,

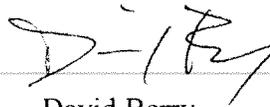
Honorable Darrell E. Issa  
Page 3  
July 20, 2010

Members Becker's participation in the St. Barnabas Hospital decision was in compliance with the ethics agreement.

The determinations and analysis outlined in this letter are limited to the recusal requirements of the ethic's regulations, the Ethics Pledge, and the ethics agreement.

I appreciate your interest and concern with regard to the National Labor Relations Board. If you or your staff has any questions, please contact me at (202) 273-1960 or [david.berry@nlrb.gov](mailto:david.berry@nlrb.gov).

Sincerely,

A handwritten signature in black ink, appearing to read "D. Berry", is written over a horizontal line.

David Berry  
Inspector General

Enclosure

cc: Chairman  
Member Becker

1 OFFICE OF THE GENERAL COUNSEL  
 2 SEMPRA ENERGY  
 3 Larry I. Stein (SBN 67679)  
 4 555 West Fifth Street, Suite 1400  
 5 Los Angeles, CA 90013  
 6 Telephone (213) 244-2958  
 7 Facsimile (213) 629-9620  
 8 Attorneys for Employer  
 9 SOUTHERN CALIFORNIA GAS COMPANY

BEFORE THE IMPARTIAL ARBITRATOR

WALTER N. KAUFMAN

10 In the Matter of the Arbitration between:

11 SOUTHERN CALIFORNIA GAS  
 12 COMPANY,

13 Employer,

14 and

15 UTILITY WORKERS UNION OF  
 16 AMERICA, LOCAL 483, AFL-CIO

17 Union.  
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19 Re: Grievance of David Gibson  
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Appendix B

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I.

ISSUE

Was the grievant discharged for "just cause"?

II.

STATEMENT OF FACTS

There is little dispute about the operative facts.

A. Falsification is a Basis for Termination

Falsification results in termination for employees with less than 5-years of seniority. (Employer Exhibit 1) Falsification of a meter read is a basis for termination. Falsification is generally observed when there is a change in the meter resulting in the meter being reset. The Company has consistently terminated employees for that offense. (Employer Exhibit 2)

Falsification falls under Section 6.3(b) of the Collective Bargaining Agreement governing misconduct, rather than 6.3(a), which covers performance issues. (Joint Exhibit 1)

Unlike performance issues, misconduct does not require or even contemplate progressive discipline. (Joint Exhibit 1)

B. Grievant Was Trained Extensively on The Subject of Falsification

Mr. Gibson testified clearly on this point:

Q. And based upon the training you received had you been trained to only enter the numbers you see on a meter?

A. Yes.

Q. And never to rely on the past numbers, is that correct?

A. Yes. (TR. p. 112, l. 23- p. 113, l. 3).

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The training was extensive as shown by Employer Exhibits 3-5. In one form or another grievant was trained on the subject of not falsifying meter reads almost monthly during his two-year tenure.

On June 22, 2001, grievant was expressly counseled on a possible meter read-through and informed that this could be a basis for termination. In a read on June 14, 2001 grievant's read was 9973. Because of a dial change the read should have been 4973. Had he pressed the "V" key to see the prior read he would have seen a 9 on the first dial. Thus it was possible that grievant had violated policy and committed a terminable offense by relying on the prior read to get the 9 on the first dial. However, because this was a difficult read, over a fence and down an angle which made the first dial difficult to read, Mr. Lyles, grievant's supervisor gave him the benefit of the doubt. But he was carefully warned about misuse of the "V" key and that it could result in termination. (TR p. 34, l. 2 - 25, and Employer Exhibit 6).

C. The August 30, 2002 Read

Unlike the June 22, 2001 read, the meter at 14192 Arrow Boulevard, in the City of Fontana was an easy read. There were no obstructions, the glass dial was new, and the weather was good.

As grievant testified:

- Q. The meter that you were reading on August 30, that was a brand new dial, wasn't it?
- A. I now know that, yes.
- Q. And it was not obscured in any way?
- A. No. (TR. p. 115, l. 1-4).

As Mr. Stern stated in his opening: "Mr. Gibson photographed the meter in question. And, I'm sorry, I only have the one copy of this, but that's the meter. That has got to be the easiest meter to read in the business. As you can see, there is nothing obstructing your view, and you will

1 hear testimony, there were no dogs, no German Shepherds, Pit bulls, Rottweilers in the yard." (TR.  
2 p. 12, l. 21-p. 13, l. 1). As Mr. Stern went on the state:

3 "It's right out there in the open. It's the easiest meter to read." (TR. p. 13, l. 3-4).

4 Easy though it may have been, it is undisputed that the read grievant recorded was not  
5 correct. Grievant read the meter as 0532 which was consistent with the prior month's read of 0515.  
6 Grievant would have had access to the prior read by means of the "V" key, if he correctly entered 00  
7 on the first 2 dials.

8 Because of the dial change the correct read should have been 00 and two additional  
9 numbers which could have been 32. The 00 on the first two dials was because the meter dial had  
10 been changed, resulting in the meter being reset at 0000, 16 days before grievant read the meter. The  
11 new number had not yet been entered into the computer so if Mr. Gibson read the meter as 00 and  
12 two additional numbers, his hand held would have buzzed indicating an error.

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14 **D. Subsequent to Mr. Gibson's Termination, Errors Were Discovered on His Routes**

15 During his career Mr. Gibson has had a problem with his error rate. (Employer  
16 Exhibit 10) After his termination, in the first months of reading his route, 23 errors were discovered,  
17 in the second month 16. This is far higher than his recorded rate of 2. The reason may be discerned  
18 from Employer Exhibit 9.

19 This shows that on one meter read on March 25, Mr. Gibson entered a read of 723.  
20 Each regular read of his thereafter continued with the number 7 going to 764 and 792. After his  
21 termination the meter was read at 693 and ultimately verified in October as still being at 699. See  
22 Employer Exhibit 9, see also TR. p. 50, l. 18 - p. 51, l. 23.

23 This indicates that either grievant misread the meter three times, since 699 is lower  
24 than any of the 700 entries, or, that having made an error he tried to hide it by continuing to read in  
25 the 700 amounts hoping that the usage would eventually catch up to his reads, hiding his mistake.

26 In his testimony grievant offered no explanation.  
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III.ARGUMENTA. BURDEN OF PROOF

It is presumptuous to believe that I would have anything to add to the long simmering debate as to the proper burden of proof in discharge cases. The Company's position is that the proper burden of proof should be greater than the 51% standard of a mere preponderance of the evidence, and less than the 98-99% standard of beyond a reasonable doubt. The Company would suggest a clear and convincing standard somewhere in-between the two extremes.

B. UNDER ANY STANDARD THE EVIDENCE SUPPORTS TERMINATION1. All Procedural Requirements Were Met

There is no doubt but that grievant received extensive training on the issue of falsification. He was trained on the subject during his initial job training and at monthly meetings thereafter. He acknowledges his responsibility to enter the numbers read and not to rely upon a prior read of the meter. Further, although discipline for misconduct does not involve progressive discipline, grievant was warned in another possible falsification matter and given the benefit of the doubt.

The consistency requirement is also met. The Union acknowledges that 25 years ago it entered into an agreement with the Company with respect to termination as the remedy for falsification for employees with less than 5-years service. Grievant had only 2-years service as a part-time employee. The Company presented a list of employees terminated for the same offense. The Union acknowledged in sworn testimony that this issue is so clear that it seldom challenges termination for falsification of meter reads.

2. There Are No Mitigating Circumstances

Grievant was a short-term part-time employee with only 2-years of service. As acknowledged by counsel, the meter in question was the easiest read possible.

1           3.       **The Dial Read on August 30, 2002 Was A Falsification Rather Than An Error**

2                   Detecting a meter reader who is falsifying meter reads by relying on past reads and  
3 then adding a little bit to the number is difficult. In fact, since an error is only an error once caught  
4 by the Company for purposes of determining unit error rate, any such activity may never even be  
5 counted, or defined, as an error. When a meter reader reads through a changed meter is the time that  
6 evidence of falsification most commonly occurs, which could be, and often is, but the tip of the  
7 iceberg. As is shown by Exhibit 9, and the testimony of grievant's supervisor, such is the case here  
8 since post termination reads of grievant's meters indicated a dramatically higher error rate than his  
9 monthly average while employed.

10                   The other difficult issue in proving falsification is that meter readers work alone. Only  
11 the numbers can tell the tale. There will never be witnesses. In this case the numbers point to only  
12 one conclusion -- termination.

13                   a.       **1 in 10**

14                   It is uncontested that the prior read on the meter was 0515. It is also  
15 uncontested that when the meter was changed on August 14 it read 0000. It is further uncontested  
16 that on August 30 grievant should have read 00 and then two additional numbers for the last two  
17 dials, such as 0032. Instead he reported 0532. The five is the same number as would show up had he  
18 hit his "V" key to check the prior read. There were ten numbers on the dial 0 was correct and any  
19 other number but 5 would have been treated as a mere error. Thus, the coincidence of grievant's read  
20 being the same as that of the prior read is only a 1-10 chance. In fact, it is less than that. As is shown  
21 by Employer Exhibit 11 on a dial the correct read of 0 is on the top. 5 is the furthest number on the  
22 dial from 0. This makes it a very unlikely misread. It is true that grievant had a misread of a 5 and 0  
23 on the penny hand, that is the smallest energy dial on one prior read which is unexplained, but unlike  
24 the instant case that dial might have been obscured or obstructed. (TR. p. 114, l. 19-22).

25                   b.       **What Every Roulette Player Should Know**

26                   Avoid the double zero. Roulette wheels which have two zeros, of course, have  
27 much worse odds than those with a single zero only. This dial if correctly read had a double zero.  
28

1 This impacts the odds. If grievant had read the meter as 5532, it might have made some sense. For  
2 some inexplicable reason when an arrow was pointed to the top at zero, he would have seen it as  
3 pointing to the bottom at 5, but this did not happen. On two dials, which were next to one another, he  
4 correctly reported one as 0 seeing the arrow going to the top and purportedly due to a reading error he  
5 did just the opposite with the adjacent dial. It is respectfully noted that this makes no sense. The  
6 one-in-ten chance of this being a mere error rather than a falsification dramatically changes. The  
7 chance of this being a mere error is, it is respectfully argued, far less than 10%. Note, that grievant  
8 denies any possibility that he made an entry error. He is adamant that he entered the numbers that he  
9 intended to enter. (TR. p. 120, l. 10-14).

10 c. Three Sevens Is Only Lucky on Slot Machines

11 The meters that were grievant's responsibility were, after his termination on  
12 September 11, 2002 read by other meter readers. As has been noted, significant numbers of errors  
13 were detected. On one meter in three successive reads the second dial was read as 7. After the first  
14 read the number crept up from 723 in March, to 764 in April, to 792 in July, however, in October 21  
15 after his termination, the meter was conclusively shown to be 699. There are two possible  
16 conclusions. Over a period from March through July grievant misread the meter three times or,  
17 having misread the meter in March he was attempting to make just incremental increases until such  
18 time as usage would catch up and his error would go undetected. This is not insignificant, inasmuch  
19 as he had some problems with his error rate, which if it continued over a significant period of time  
20 could have resulted in discipline up to and including termination. The point is this, if he was  
21 attempting to cover up an error he was falsifying, which it is respectfully suggested, makes it more  
22 believable that he had a state of mind to falsify on August 30, of 2002.

23 d. There is Clear and Convincing Evidence That Grievant Made A False  
24 Entry

25 Based upon the foregoing the possibility that grievant made an error rather than  
26 falsification is, as shown in the foregoing dramatically less than a 10% possibility. Honest and  
27 accurate meter reading is crucial to the Company because it ensures the accuracy of bills and the  
28

1 regularity of Company revenue. Meter readers such as grievant, are not physically observed, nor can  
2 their mind be read. Intent must be inferred. The empirical evidence points unequivocally to  
3 falsification. That should be enough.

4 e. The Issue of Motive Is a Red Herring.

5 If a falsification occurred it is terminable no matter what the motive.  
6 Grievant's motive could still have been classic motive of seeking to save time and get paid for less  
7 work. Other than grievant's testimony, there is no evidence that grievant did not sit in his truck and  
8 use the "V" key to see past reads and record a large number of meters without ever going to the  
9 meters. During summer this might only be defected by a changed meter or dial such as occurred in  
10 June of 2001 and August of 2002.

11 Alternatively it is possible that grievant having walked by the subject meter on  
12 his way to the next meter before entering the read decided not to go back and reread the meter. (TR.  
13 p. 113, l. 7-13). He preferred to push forward and rely on the prior read, rather than walk back. And  
14 it is hard to know, if that happened, which would have taken the greater time, but a meter read  
15 progressing from one house to another may well have been reluctant to break his rhythm and pace.

16 Finally, it is possible, based upon grievant's concern with his error rate that on  
17 this occasion, and others he chose to rely on the past read believing that it might yield a lower error  
18 rate than his own observations.

19 It is certainly not part of the employer's burden to show motive. Certainly,  
20 since he denies the event, there is no testimony as to motive by grievant. However, it is respectfully  
21 believed that the employer has at least shown possible reasons or motives for grievant falsifying the  
22 meter read.

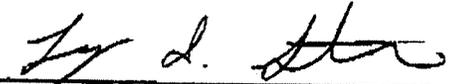
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IV.

CONCLUSION

Based on the foregoing it is clear that the Employer acted reasonably, appropriately and for just cause in terminating grievant. The discharge should be sustained.

DATED: January 6, 2004

By   
LARRY I. STEIN

1991 WL 250954 (N.L.R.B.G.C.)

TO Frederick Calatrello, Regional Director Region 8

\*1 SUBJECT M.K. Morse Company

Case 8-CA-23792

November 1, 1991

## DIGEST NO.S:

530-6067-2020, 530-6067-2030-5050, 530-6067-2060-3375, 530-6067-2080-4300, 530-6067-2090

This Section 8(a)(5) case was submitted for advice as to whether the Employer engaged in surface bargaining.

## BACKGROUND

After losing an election to represent the employees of M.K. Morse (Employer) in November 1986, the United Steelworkers of America (Union) filed charges (initial charges) alleging numerous violations of Section 8(a)(1), (2) and (3). The Region issued complaint alleging that the Employer unlawfully interrogated and threatened employees,<sup>[FN1]</sup> disparaged the Union, created an impression that the employees were under surveillance, assisted a rival group of employees in challenging the Union, discriminatorily enforced a no-solicitation rule, disciplined employees engaged in Union campaigning, and screened applicants for employment as to their Union sympathies. The hearing on the initial charges was held in January and February, 1988.

In late 1988, the Union filed several additional charges (1988 charges)<sup>[FN2]</sup> alleging that since the organizational campaign the Employer engaged in conduct violative of Section 8(a)(1), (3), (4) and (5). The alleged conduct included, inter alia, several instances of unlawful interrogation, discipline, layoffs and unilateral changes in terms and conditions of employment. These charges were held in abeyance pending the decision of the ALJ regarding the initial charges.

On March 31, 1989, the ALJ found merit to all of the allegations contained in the complaint and recommended a remedial bargaining order pursuant to Gissel.<sup>[FN3]</sup> On January 17, 1990, the United States District Court for the Northern District of Ohio granted Section 10(j) relief, enjoining further conduct violative of Section 8(a)(1), (2) and (3), and ordering the Employer to recognize and bargain with the Union. In July 1990, the Union filed additional charges alleging unlawful discipline of Union adherents and an unlawful unilateral change in vacation policy.<sup>[FN4]</sup>

On May 14, 1991, the Board affirmed the findings and conclusions of the ALJ as to the initial charges in all relevant respects.<sup>[FN5]</sup> Since then, the Employer has expressed a willingness to comply with the Board Order and to settle the unremedied 1988 charges.

## FACTS

Pursuant to the district court order, the parties began bargaining on April 9, 1990. During the ensuing months,

both sides made concessions and the parties reached tentative agreement on several economic and noneconomic issues. As noted above, in July 1990, the Union filed charges (1990 charges) alleging that the Employer unlawfully disciplined four Union adherents and unilaterally changed its vacation policy. On November 20, 1990, the Employer raised the issues of union security and contract duration for the first time in negotiations, and expressed its reluctance to enter into a multi-year contract. However, neither party made a proposal regarding union security or contract duration.

\*2 On December 18, 1990, the Employer orally made a final offer which included all previously agreed-upon terms, effective dates of January 15, 1991 to January 14, 1992, and a maintenance of membership clause for union security. The Employer submitted its final offer in writing to the Union in late February 1991.<sup>[FN6]</sup> The Union membership rejected the offer on March 2.

On March 11, the parties met again for bargaining, at which time there were approximately fourteen issues left to be resolved. The Employer first proposed the contract term contained in its previous final offer, but later offered a one-year contract effective March 1, 1991 to February 29, 1992. The Employer again proposed a maintenance of membership clause for union security. The Union proposed a two-year contract with a modified union shop clause, whereby current employees would have the option of joining the Union, but all new hires would be required to become Union members. The Employer rejected both of these Union proposals. Before the end of the March 11 bargaining session, both parties had made concessions and resolved approximately nine of the outstanding issues. On April 13, the Union membership rejected the Employer's proposal.

By letter dated April 15, the Union informed the Employer that its March 11 offer had been rejected. The Union's letter also indicated that there were only five unresolved issues and suggested that the parties submit these issues to interest arbitration. On April 30, the Employer rejected the Union's proposed interest arbitration, but indicated a willingness to bargain further "to resolve the issues which continue to separate the parties."

On May 22, the parties held their final bargaining session. The Employer proposed a one-year contract with the effective date to be the date of ratification. The parties discussed other remaining issues and, after the Employer made a concession regarding employee co-payment of insurance premiums, that issue was resolved. The Union offered to accept the Employer's proposed one-year contract in return for an agency shop clause; the Employer rejected this offer. The Union then requested that the parties submit the remaining issues to interest arbitration. The Employer refused, and stated that its position was its last and best offer, and that the offer would remain open until June 5.

On June 19, the Employer held a meeting for its employees in response to rumors regarding a possible strike. The Employer gave the employees a typewritten set of common questions regarding the parties' bargaining and corresponding answers. In response to a question about whether, in light of the bargaining order, the Employer was required to be a union shop, the answer stated that union security was a negotiable issue. The answer indicated that, to date, the Union's position in negotiations was that the Employer should be a union shop, but that the "Company's position is that M.K. Morse Company will not be a union shop." (Emphasis in original.)

\*3 On July 8, the Union membership rejected the Employer's final offer, authorized a strike without setting a strike date, and instructed the bargaining committee to negotiate further with the Employer. By letter dated July 9, the Union informed the Employer that its final offer had been rejected, and that a strike had been authorized, and may be necessary "due to the Company's unfair labor practices." The Union then invited the Employer to bargain further or submit the remaining issues to interest arbitration.

By letter dated July 11, the Employer indicated that it had bargained in good faith for 14 months and that the parties had resolved most issues. The Employer responded to the Union's strike threat by noting that it was engaged in settlement negotiations regarding the outstanding charges and that a Union strike over those charges would be "ludicrous." The Employer then rejected the proposal to send the remaining issues to interest arbitration, and stated:

Based on the Steelworkers' insistence of maintaining their position on the open issues we are at impasse. While you claim that impasse is due to bad faith bargaining, the real reason would appear to be economic, an agenda item on which we both negotiated and made concessions. That final package was on the table for you to consider from May 22, 1991 to June 5, 1991. Since we assume our May 22nd offer was rejected by the Union, because we did not hear from you we see no reason to meet further.

On July 26, the Union filed the instant charge, and informed the Employer by letter that since the Employer rejected interest arbitration, the parties ought to meet and continue negotiating the remaining issues. By letter dated July 29, the Employer responded:

[u]nable to negotiate issues further, we advised you on May 22, 1991, that our offer would expire on June 5, 1991, if not accepted by that time. Since you did not respond we have concluded that you have found that offer to be unacceptable.

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#### ACTION

We conclude that the Employer did not violate Section 8(a)(5) since the substance of the Employer's proposals, in light of its unremedied unfair labor practices, does not constitute bad-faith bargaining.

Whether an employer's bargaining conduct establishes that it is engaged in lawful hard bargaining or unlawful surface bargaining depends upon the totality of the circumstances.<sup>[FN7]</sup> In *Reichhold II*, the Board held that "specific proposals might become relevant" in bad faith bargaining determinations, and stated:

That we will read proposals does not mean, however, that we will decide that particular proposals are either "acceptable" or "unacceptable" to a party. Instead, relying on the Board's cumulative institutional experience in administering the Act, we shall continue to examine proposals when appropriate and consider whether, on the basis of objective factors, a demand is clearly designed to frustrate agreement on a collective-bargaining contract.<sup>[FN8]</sup>

\*4 Applying this standard in *Reichhold II*, the Board held that although a supervisor's threat was violative of Section 8(a)(1), and although the employer violated Section 8(a)(5) by insisting that the no-strike clause contain a nonmandatory subject of bargaining, i.e., a waiver of access to the Board's processes, the employer nevertheless had not engaged in surface bargaining based on the totality of its conduct.<sup>[FN9]</sup> Subsequent to *Reichhold II*, the Board has evaluated the content of the employer's bargaining proposals in conjunction with its conduct away from the bargaining table in order to determine whether there was a bad-faith motivation behind the proposal.<sup>[FN10]</sup>

We note first that the Region has concluded that the Employer here did not engage in any dilatory or other obstructive tactics at the bargaining table. Indeed, the Employer bargained with the Union twenty times over fourteen months, made concessions throughout and reached tentative agreement on most issues. In these circumstances, we conclude that the Employer's insistence on its maintenance of membership clause does not constitute bad-faith bargaining. The Employer's insistence on its clause, standing alone, constitutes lawful hard bargaining rather than unlawful insistence upon a permissive or illegal term. Cf. *Reichhold II*. Moreover, the content of the Employer's bargaining proposals, in light of its unlawful nonbargaining conduct, is insufficient evidence of bad-

faith bargaining.

Generally, in order for nonbargaining misconduct to taint collective bargaining, there must be some nexus between the two, or the misconduct must be of such an egregious nature that only one conclusion may be drawn, viz., that the employer intends to frustrate all attempts to reach agreement.<sup>[FN11]</sup> In *Litton Microwave Cooking Products*, supra, the Board determined that employer misconduct, which is strikingly similar to the Employer's misconduct in this case, was not evidence of bad-faith bargaining. There, the employer unlawfully interrogated and threatened employees prior to the representation election. During bargaining, but away from the table, the employer unlawfully disciplined several employees and made one unlawful unilateral change to a work rule. At the bargaining table, the employer met with the union 53 times over 17 months, gave detailed reasons for its proposals, and reached agreement with the union on several issues. The employer insisted on proposals regarding a zipper clause, dues checkoff, absenteeism and recognition; the Board evaluated each proposal and found no surface bargaining.<sup>[FN12]</sup> In concluding that the employer's misconduct away from the table did not constitute sufficient evidence of bad-faith bargaining, the Board stated:

Typically, away from the table misconduct has been considered for what light it sheds on conduct at the bargaining table, but without evidence that a party's conduct at the bargaining table itself indicates an intent to reach agreement it has not been held to provide an independent basis to find bad-faith bargaining.<sup>[FN13]</sup>

\*5 Similarly, in *American Rubber and Plastics Corp.*,<sup>[FN14]</sup> the employer engaged in numerous Section 8(a)(1) and (3) violations, including one statement that it intended to talk to the union but not say anything. At the bargaining table, however, the employer engaged in no dilatory tactics, furnished all requested information, and, after seventeen sessions, reached agreement on numerous items. The Board found no bad-faith bargaining.<sup>[FN15]</sup>

Here, although the Employer clearly engaged in numerous acts of unremedied misconduct, both before and during bargaining, including unlawful interrogations, disciplinary acts and unilateral changes in terms and conditions of employment, none of the conduct is related to the Employer's bargaining position. Thus, the unilateral change involving vacation policy was not an issue in controversy at the bargaining table.<sup>[FN16]</sup> Moreover, the Employer statements during interrogations shed no light upon its future bargaining posture. Additionally, the Employer's maintenance of membership proposal is not the embodiment of a prior unlawful statement or threat regarding union security.<sup>[FN17]</sup> Cases finding surface bargaining because the employer's pre-bargaining or away-from-the-table misconduct is connected to its subsequent bargaining posture are distinguishable. For example, in *Hedaya Bros., Inc.*,<sup>[FN18]</sup> the employer engaged in substantial 8(a)(1) and (3) conduct including threats to close if either of two petitioning unions were elected; threats not to negotiate and not to sign a contract; and threats to reduce wages if either union were elected. Despite the appearance of good-faith bargaining at the negotiating table, the Board found that the employer's bargaining was unlawful. The Board noted that the employer's economic bargaining proposals to freeze or reduce wages were consistent with its prior unlawful threats.<sup>[FN19]</sup> Therefore, based on the totality of the Employer's conduct, including the absence of unlawful tactics at the bargaining table, we conclude that there is insufficient evidence that it has bargained in bad faith.

*Clesco Mfg.*, supra, upon which the Union heavily relies, is readily distinguishable. The employer there stated prior to bargaining that it believed the employees would be better off without a union, and that bargaining would be a waste of time. At the outset of bargaining, the employer insisted on a one-year contract extension and refused to discuss any other issues. The union filed 8(a)(5) charges which the employer settled after agreeing to bargain and "not assume an inflexible position during negotiations."<sup>[FN20]</sup> During postsettlement bargaining, the employer discussed other issues, but insisted upon a fixed contract termination date which, at the time bargaining ended, would have resulted in a contract of about three months duration. The Board found that the em-

ployer violated Section 8(a)(5) by insisting on an unreasonable contract duration of less than one year, since this conduct was in furtherance of its unlawful pre-bargaining statements. In the instant case, the Employer did not make any statements indicating that it would bargain in bad-faith over union security. Moreover, the Employer, while first proposing contract duration dates and terms of less than one year, did not insist upon this. Indeed, it ultimately proposed a contract with a full one-year term from date of ratification.

\*6 Finally, the Employer's rejection of the Union's July requests to resume bargaining does not constitute evidence of bad-faith bargaining because the parties were at impasse as of June 5. An impasse occurs when the parties reach "that point .. in negotiations when the parties are warranted in assuming that further bargaining would be futile." [FN21] "An impasse require[s] a deadlock, and for such a deadlock to occur, 'neither party must be willing to compromise.' " [FN22] Impasse can occur over the parties' deadlock on one "critical issue [that] creates a complete breakdown in the entire negotiations." [FN23] An impasse may be broken by a change of position, by continuous or further bargaining, or by anything that creates a new possibility of fruitful discussion even if it does not create the likelihood of agreement, including implicit or explicit bargaining concessions. [FN24]

Here, we conclude that the parties were at an impasse on June 5 when they became deadlocked over the issue of union security. The Employer and Union met some 20 times over a period of fourteen months. Both made concessions, and tentative agreement was reached on nearly all of the issues. However, during the last three bargaining sessions [FN25] it became clear the parties remained far apart on the issues of union security and contract duration. Although the Employer eventually moved in its proposal to have a contract of less than one year to a proposal of one year, it at no time wavered from its maintenance of membership union security proposal. On May 22, when the Employer made its last final offer, the Union tested the Employer's position on union security by offering to accept a one-year contract in exchange for a compromise on union security, i.e., it proposed an agency shop clause. The Employer rejected this offer, and the Union allowed the Employer's deadline for acceptance of its final offer to pass. Thus, as of June 5 it was clear that the Employer was unwilling to compromise further, and the parties were at impasse over union security. The fact the Union believed there was room for movement on several other unresolved issues does not warrant a different result where, as here, the parties are deadlocked over one "critical issue" that created "a complete breakdown in the entire negotiations." [FN26]

We noted that, after the Union rejected the Employer's final offer, its membership authorized a strike and the Union requested that the parties either submit the remaining issues to interest arbitration or meet for further bargaining. However, no further bargaining occurred after June 5, and neither party changed its position regarding union security in such a way that would indicate there was any "new possibility of fruitful discussion." [FN27] In these circumstances, the Union's threat to strike cannot be said to have broken the impasse. [FN28]

For all the foregoing reasons, absent withdrawal, the Region should dismiss the instant charge.

\*7 Robert E. Allen  
Associate General Counsel  
Division of Advice

FN1 The threats consisted of statements by the Employer that the employees would "pay" for it if the Union won the election.

FN2 Cases 8-CA-20816, -20908, -21227, and -21228.

FN3 NLRB v. Gissel Packing Co., 395 U.S. 575 (1969).

FN4 Case 8–CA–22906. The Region has concluded that these allegations have merit.

FN5 302 NLRB No. 147.

FN6 Hereafter all dates are in 1991 unless otherwise indicated.

FN7 Reichhold Chemicals, Inc., 288 NLRB 69 (1988) (Reichhold II).

FN8 Id.

FN9 Id. at 70.

FN10 See Litton Microwave Cooking Products, 300 NLRB No. 37 (September 28, 1990); J.R.R. Realty Co., 301 NLRB No. 67 (January 31, 1991); Clesco Mfg., 292 NLRB 1151 (1989).

FN11 Id.

FN12 Litton, 300 NLRB No. 37, slip op. at 8–18.

FN13 Id., slip op. at 19 (citation omitted).

FN14 200 NLRB 867 (1972).

FN15 Accord: Church Point Wholesale Grocery Co., 215 NLRB 500 (1974).

FN16 See, e.g., Litton, *supra*.

FN17 There is no contention that the Employer's "question and answer" meeting with the employees involved unlawful statements regarding union security or any other matter.

FN18 277 NLRB 942 (1985).

FN19 Id. at 945. See also Oldfield Tire Sales, 221 NLRB 1275, 1276 (1975) (employer's unlawful away from table statements which were designed to undermine support for the union indicated lack of sincerity at bargaining table). Finally, see J.R.R. Realty Co., 301 NLRB No. 67, *supra*, slip op. at 2, n. 2 (citations omitted), where the Board stated:

In agreeing with the judge that the parties' negotiations did not result in a good-faith impasse, we additionally rely on the Respondents' pervasive and widespread unremedied unfair labor practices including discharge of the entire bargaining unit and repudiation of the contract. In view of the breadth and severity of these violations, and the substantial period in which they remained unremedied, we will not permit the Respondents to "parlay an impasse resulting from [their] misconduct ..."

FN20 Clesco, 292 NLRB at 1156.

FN21 PRC Recording Company, 280 NLRB 615, 635 (1986), *enfd* 836 F.2d 289 (7th Cir.1987).

FN22 NLRB v. Powell Electric Manufacturing Company, 906 F.2d 1007, 1011–12 (5th Cir.1990) (citation omitted), *enfg* in rel. part, Powell Electrical Manufacturing Company, 287 NLRB 969 (1987).

FN23 Sacramento Union, 291 NLRB 552, 554 (1988).

FN24 PRC Recording, 280 NLRB at 636 (quoting Gulf States Mfg. v. NLRB, 704 F.2d 1390, 1399 (5th Cir.1983)).

FN25 December 18, 1990, March 11, and May 22.

FN26 Sacramento Union, 291 NLRB at 554.

FN27 Id.

FN28 See Geiger Ready Mix of Clay County, Inc., Case 17-CA-14464, Advice Memorandum dated October 26, 1989 (employer free to implement final offer despite fact strike occurred after date of impasse since strike, without more, did not break impasse).

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