Hempstead Park Nursing Home *and* New York State Nurses Association, UAN, AFL–CIO. Case 29–CA–25339

February 27, 2004

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS SCHAUMBER AND WALSH

The central issue in this case is whether the Respondent unlawfully failed and refused to execute the draft collective-bargaining agreement submitted to it by the Union. The judge found that the Union's draft accurately reflected the parties' agreement and concluded that the Respondent violated Section 8(a)(5) and (1) of the Act by its refusal to execute the agreed-upon contract.[1] The Respondent has excepted to the judge's finding, contending that the parties did not agree to the pension plan provision set forth in the Union's draft. For the reasons set forth below, we find that the General Counsel failed to establish that the parties reached agreement on the pension plan provision. Accordingly, we shall reverse the judge's decision and dismiss the complaint.

Facts

The relevant facts are not in dispute. The Respondent operates a nursing home in Hempstead, New York. The Union and the Respondent have maintained a collective-bargaining relationship for some years.[2] The most recent collective-bargaining agreement between the parties expired on February 28, 2001. The parties stipulated that they agreed on a new collective-bargaining agreement by a written Memorandum of Agreement (MOA) signed by the Union on March 21, 2002,[3] and the Respondent on March 22. The MOA contained the substantive terms of a collective-bargaining agreement, but was not a fully integrated contract. The opening page of the MOA states:

> Any and all terms and conditions of employment of the March 1, 1998 to February 28, 2001 agreement, letters of understanding, or otherwise, not specifically addressed by this Memorandum of Agreement shall remain unchanged, and are hereby incorporated into this Memorandum of Agreement.

One of the terms of 1998–2001 contract (1998 contract) that was "specifically addressed" by the MOA was section 9.03, "New York State Nurses Association Pension Plan." This section of the 1998 contract set forth the amounts (per annum per full-time employee) the Respondent was obligated to contribute to the pension plan. The amounts due varied over the life of the 3-year contract. Of significance here is the fact that under the 1998 contract, section 9.03 set the rates for pension contributions essentially on a calendar-year basis. Thus, the following time periods were specified: March 1 to December 31, 1998; January 1 to December 31, 1999; January 1 to December 31, 2000; and January 1 to February 28, 2001 (the last 2 months of the contract).

The relevant portion of the MOA at issue reads as follows:

> 9.03 *NEW YORK STATE NURSES ASSOCIATION PENSION PLAN*
>
> Insert new rates as determined by Trustees.
> yr 1–$0
> yr 2–4968
> yr 3–5613

Another portion of the 1998–2001 contract that was revised was section 9.02, "New York State Nurses Association Benefits Fund." That portion of the MOA looked very similar to section 9.03:

> 9.02 *NEW YORK STATE NURSES ASSOCIATION BENEFITS FUND*
>
> Insert new rates as determined by Trustees.
> 971 b[4]
> yr 1–$7979
> yr 2–8810
> yr 3–9647

The relevant portion of section 9.02 of the draft collective-bargaining agreement reads

Effective 3/1/02–2/28/03	$7,979.00 per annum
Effective 3/1/03–2/29/04	$8,810.00 per annum
Effective 3/1/04–2/28/05	$9,647.00 per annum

[1] On March 27, 2003, Administrative Law Judge Raymond P. Green issued the attached decision. The Respondent filed a letter in lieu of formal exceptions and a supporting brief. The Respondent's letter substantially complies with Sec. 102.46(b)(1) of the Board's Rules and Regulations. The General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief, and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

[2] The Union represents the employees in the following bargaining unit:

> All full-time, part-time, per diem and temporary employees licensed or otherwise lawfully entitled to practice as a registered professional nurse employed by the Employer to perform registered professional nursing as a Staff Nurse, Assistant Head Nurse or Nurse Practitioner, excluding the Director of Nursing, Associate Director of Nursing, Unit Directors, Nursing Care Coordinators or Supervisors of Nursing.

[3] All dates are in 2002 unless otherwise noted.

[4] This number is not explained in the record.

There is no provision in 9.02 of the draft collective-bargaining agreement mentioning the Trustees of the Benefits Fund.

On April 5, approximately 2 weeks after the signing of the MOA, the Union's Pension Plan and Benefit Fund Office sent the Respondent a letter, which stated in pertinent part:

> In reviewing the MOA, there is not a clear definition of the effective dates and duration of the contract. The Fund Office's interpretation is as follows:
>
> Section 9.03–NYSNA Pension Plan
> Effective 03/01/02–12/31/02: $0
> Effective 01/01/03–12/31/03: $4,968
> Effective 01/01/04–12/31/04: $5,613
> Effective 01/01/05–02/28/05: To be determined by Trustees.

In September, the Union sent the Respondent a draft of a fully integrated contract for signing which incorporated the Fund's interpretation of section 9.03.

On November 12, the Respondent wrote the Union, noting that it had reviewed the contract for language and that corrections needed to be made with respect to the effective dates of the pension plan contributions. The Respondent requested that these dates read as follows:

> 03/01/02–02/28/03 = $0
> 03/01/03–02/29/04 = $4,968
> 03/01/04–02/28/05 = $5,613

Thus, under the Respondent's interpretation, the term "yr," as used in the MOA, refers to full 12-month periods, not a calendar year.

In a letter to the Respondent dated November 18, the Union stated that the dates in the pension plan section should not be changed: "The pension contributions are determined on a calendar year basis, from January 1st through December 31st of each year." The Respondent refused to execute the Union's draft agreement.

Judge's Decision and the Respondent's Exceptions

The judge noted that while the MOA specified the pension rates for "year 1," "year 2," and "year 3," the MOA did not specifically address the beginning or ending dates of any given year. In light of the past practice and the terms of the prior agreement, which the MOA incorporated to the extent not specifically modified, the judge concluded that it was "more than reasonable" to conclude that the MOA incorporated the calendar-year dating method of the predecessor contract. As such, "from March 1, 2002 and for the remainder of the first year, the rate would be $0 and then, as in the past, the negotiated rates would go into effect as of the first of each year." The judge further found that the MOA covers the rate of contribution for the last 2 months of the contract by stating that rates are to be determined by the Trustees. Accordingly, under the judge's analysis, the Respondent's reading of the MOA was not consistent with the words contained in the document. Thus, the Respondent's refusal to execute the Union's draft collective-bargaining agreement constituted an 8(a)(5) and (1) violation.

The Respondent excepts to the judge's finding, arguing, inter alia, that the MOA explicitly addressed the issue of pension rates and the dates of those rates. Therefore, the calendar-year dating method of the prior agreement was not incorporated into the new agreement. In addition, the Respondent contends that there is no evidence in the record to support the judge's finding that it agreed to allow the setting of rates by the Trustees of the plan for the last 2 months of the agreement. We find that the MOA is ambiguous and thus that the General Counsel has failed to prove that the parties reached agreement on the pension plan provision

Analysis and Conclusion

A. Legal Principles

Pursuant to Section 8(d) of the Act, either party to a collective-bargaining agreement is obligated to execute, or assist in executing, a memorialized version of the agreement if requested to do so by the other party. *H. J. Heinz Co. v. NLRB*, 311 U.S. 514 (1941). However, this obligation arises only after a "meeting of the minds" on *all* substantive issues and material terms has occurred. See *Intermountain Rural Electric Assn.*, 309 NLRB 1189, 1192 (1992). The General Counsel bears the burden of showing that the parties have reached the requisite "meeting of the minds." Id. at 1192.

A "meeting of the minds" in contract law is based on the objective terms of the contract rather than on the parties' subjective understanding of the terms. Thus, subjective understandings (or misunderstandings) of the meaning of terms that have been agreed to are irrelevant, provided that the terms themselves are unambiguous "judged by a reasonable standard." *Vallejo Retail Trade Bureau*, 243 NLRB 762, 767 (1979), enfd. 626 F.2d 119 (9th Cir. 1980). However, when the terms of a contract are ambiguous,[5] and the parties attach differing meanings to the ambiguous terms, a "meeting of the minds" is not established. "When . . . misunderstandings may be traced to ambiguity for which *neither party* is to blame, or for which *both parties* are equally to blame, and the

[5] Ambiguity is defined, inter alia, as the "maintaining of two or more logically incompatible beliefs or attitudes at the same time or alternately." *Webster's Third New International Dictionary 66* (3d ed. 1966).

parties differ in their understanding, their seeming agreement will create no contract." *Meat Cutters Local 120 (United Employers, Inc.)*, 154 NLRB 16, 26–27 (1965) (emphasis in original).

Applying these principles to the present case, we find, for the reasons set forth below, that the parties, attached reasonable but incompatible meanings to certain terms within the pension plan provision set forth in the parties' MOA[6] and that the General Counsel, therefore, failed to show that the parties reached a "meeting of the minds" on the provision. Accordingly, we conclude that the Respondent was not obligated to execute the Union's draft collective-bargaining agreement containing the Union's understanding of the pension plan provision.

1. The Union's understanding

The Union's understanding of the effective dates of the pension plan contributions stems from the language of the MOA stating that "all terms and conditions of employment" of the prior contract, "not specifically addressed" by the MOA, "shall remain unchanged, and are hereby incorporated into this" MOA. Because the MOA refers only to "yr 1," "yr 2," and "yr 3," without beginning or ending dates, the Union maintains that the calendar year dating method of the prior contract was incorporated by reference into the MOA.

The incorporation of the calendar year dating method of the prior contract into the MOA results in a 2-month period at the end of the contract where no rates have been set. However, under the Union's understanding, this contingency is addressed by the language in the MOA stating: "Insert new rates as determined by Trustees." In light of this language, the Union contends that the parties agreed to have the Trustees determine the rates for that 2-month period.

2. The Respondent's understanding

The Respondent's understanding is based on its view that the calendar-year dating method of section 9.03 of the prior contract was *not* incorporated into the MOA because section 9.03 was one of the terms that the MOA *did* "specifically address." In addition, the MOA uses the terms "yr 1," "yr 2," and "yr 3," and a "year" is a 12-month period. Further, it is undisputed that the effective dates of the successor contract are March 1, 2002, to February 28, 2005.[7] Therefore "yr 1" refers to March 1, 2002, to February 28, 2003; "yr 2" refers to March 1, 2003, to February 29, 2004; and "yr 3" refers to March 1, 2004, to February 28, 2005. According to the Respondent, the three references to "yr" logically correspond to first, second, and third years of the successor contract.

The Respondent's understanding also accounts for the presence of the following phrase in the MOA: "Insert new rates as determined by Trustees." The Respondent maintains that what appears in the MOA immediately below that phrase qualifies it and spells out exactly what those new rates are to be. In this connection, the Respondent points to the fact that the same phrase appears in the part of the MOA addressing section 9.02 of the prior contract, which sets the rates for contributions to the New York State Nurses Association Benefits Fund. Immediately below that phrase, the MOA similarly specifies the rates for "yr 1," "yr 2," and "yr 3." Notwithstanding the presence of "Trustees" language in the benefits fund provision of the MOA identical to that present in the pension fund provision, the Union's draft contract simply inserted the benefit fund rates specified in the MOA and did *not* provide, as it did in the case of the pension fund, that some rates were to be determined by the fund trustees. Furthermore, the Union's draft contract interpreted "yr" in section 9.02 of the MOA exactly as the Respondent interprets "yr" in section 9.03, i.e., to correspond to a full 12-month period. In other words, the Respondent reasonably contends that the "Trustees" and "yr" language in section 9.03 of the MOA should not have a meaning different from that the Union itself accords the identical language in section 9.02.

We find that the meaning of the MOA is unclear. Even if we assume that the General Counsel is correct and that the parties agreed to calculate the years in section 9.03 on a calendar year basis, the issue becomes the rate of contributions for the last 2 months of the contract. Our dissenting colleague would adopt the judge's finding, as the most reasonable interpretation, that the "Insert new rates as determined by Trustees" phrase meant that these last 2 months should be determined by the Trustees. We disagree that this is the most reasonable interpretation.

The first problem with the judge's interpretation is that the phrase appears as a general heading in section 9.03 of the MOA, not as a separate rate to be plugged into the final 2 months of the new contract. If the phrase is meant to supply the missing rate for the final 2 months of the contract, it would seem reasonable to insert the phrase after the rate for "yr 3," instead of writing it as a general heading over all the years.

Second, as noted above, the identical phrase appears in section 9.02 of the MOA, but there is no corresponding mention of the trustees in section 9.02 of the draft collective-bargaining agreement. That is, the parties used the

[6] As explained below, the terms in the pension plan provision that have given rise to two different meanings are the terms "yr 1," "yr 2," and "yr 3," which set the dates for the pension plan contributions.

[7] The Union's own draft contract sets forth those effective dates. Therefore, the dissent clearly errs in contending that there is any uncertainty as to when "year 1" began.

phrase in regard to section 9.02 of the MOA, but it is not repeated in the collective-bargaining agreement.[8] It would be consistent with this approach for the parties to use the phrase in regard to section 9.03 of the MOA, but not repeat it in the collective-bargaining agreement. Viewed in this light, the phrase is simply introductory to the rates which follow. The rates become part of the contract, not the introductory phrase. Our colleague would nonetheless give independent meaning to the phrase, and indeed would have it explain a term to which it is not adjacent.

Our colleague also says that we have offered no plausible explanation of the meaning of the "trustee" phrase. We believe that we have done so. In any event, it is not the Respondent's burden to do so. It is the General Counsel's burden to prove not just a plausible interpretation, but also the *correct* interpretation, i.e., one that will be so clear as to preclude all others. In our view, the General Counsel has not done so. This is a case of ambiguity, and we simply do not know what the parties agreed to.

Finally, our colleague notes that the parties stipulated that they reached agreement on all terms of a new contract. However, the problem is that they disagree as to what that agreement was. Accordingly, it has not been established that there was a meeting of the minds.

3. Conclusion

In sum, we find that the terms of the MOA as stated in the pension plan provision are ambiguous because they give rise to two reasonable, yet incompatible interpretations. Further, there is nothing to indicate that either party is to blame for this ambiguity. In these circumstances, we find that the General Counsel did not carry his burden of proving the requisite "meeting of the minds" on the effective dates of the pension plan contributions. Accordingly, we conclude that the Respondent did not violate Section 8(a)(5) by refusing to execute the document embodying the Union's understanding of the pension plan provision of the MOA.

[8] Our colleague does not explain why the parties used the phrase in sec. 9.02 of the MOA, a provision that runs on a contract-year basis and thus does not have a 2-month gap.

Contrary to the dissent, the parties did litigate this issue. The record contains the evidence that is the fruit of that litigation. The evidence is relevant to the Respondent's argument that the disputed "trustee" phrase in sec. 9.03 does not mean what the judge concluded it meant. The similar language in sec. 9.02 of the MOA is relevant to an analysis of this issue.

The dissent also argues that our interpretation of the phrase is speculative. Even if it is, the dissent also speculates as to the meaning of the phrase. At bottom, no one can be certain as to what the phrase means, in either sec. 9.02 or 9.03. In sum, the evidence is inadequate to support a finding that the parties had a meeting of the minds.

ORDER

The complaint is dismissed.

MEMBER WALSH, dissenting.

The parties stipulated that they reached agreement on *all* the substantive terms of a new collective-bargaining agreement and that their Memorandum of Agreement (MOA), which contained a pension plan provision, embodied this agreement. Nevertheless, the majority concludes that the General Counsel failed to prove that the parties reached a "meeting of the minds" on the pension plan provision. The majority's conclusion is based on the finding that the Respondent and the Union had reasonable but incompatible understandings of the terms setting the effective dates of the pension plan contributions in the MOA. The evidence does not support this finding. The evidence shows that the Union's understanding of the terms is reasonable, but the Respondent's is not.

Contrary to the majority's assertion, the General Counsel has established that the Respondent and the Union reached agreement on all the substantive terms of a new collective-bargaining agreement. Further, the General Counsel has shown that the document submitted to the Respondent by the Union accurately reflected that agreement. Accordingly, the General Counsel has proven that the Respondent violated Section 8(a)(5) by refusing to execute the agreed-upon contract.

I. FACTUAL BACKGROUND

The parties stipulated that they reached agreement on a successor collective-bargaining agreement,[1] which was executed in the form of a Memorandum of Agreement containing the substantive terms of the new contract on March 22, 2002.[2] The MOA was not a fully integrated contract. It stated, "Upon ratification, the parties agree to execute a formal document integrating the terms of the MOA and the expired agreement." The MOA also contained explicit language noting that matters not addressed by the MOA would be incorporated from the previous contract. It stated:

> Any and all terms and conditions of employment of the March 1, 1998 to February 28, 2001 agreement, letters of understanding, or otherwise, not specifically addressed by this Memorandum of Agreement shall remain unchanged, and are hereby incorporated into this Memorandum of Agreement.

The provision of the MOA at issue here involves the Respondent's employee pension plan. The revised pen-

[1] This contract would have been in effect from 2002–2005.

[2] Hereinafter all dates are in 2002 unless otherwise noted.

sion plan provision as set forth in the MOA reads as follows:

Insert new rates as determined by Trustees.

yr 1–$0
yr 2–4968
yr 3–5613

On April 5, the Union's Pension Fund office sent the Respondent a letter noting that there was no clear definition of the effective dates and duration of the contract with respect to the revised pension plan provision. Thus, the Fund office interpreted the dates of the provision as follows:

3/1/02–12/31/02 = $0
1/1/03–12/31/03 = $4968
1/1/04–12/31/04 = $5613
1/1/05–2/28/05 = To be determined by Trustees.[3]

The letter also stated that the Respondent should notify the Fund office immediately if the effective dates were incorrect. The Respondent, however, never replied to the Fund office's letter.

On September 10, the Union sent the Respondent six copies of the fully integrated contract for signing. The draft contract incorporated the pension plan dates and figures as the Fund office had interpreted them in its April 5 letter. The Union requested that the Respondent review, sign, and return the signed contracts to union headquarters offices in New York. When the Union did not receive the signed copies of the contract, it sent the Respondent two reminder letters, one in October and one in November, each requesting that the Respondent execute and return the signed copies.

By letter dated November 12, the Respondent notified the Union that it would not sign the contract unless the Union changed, inter alia, the effective dates of the pension plan to read:

03/01/02–02/28/03 = $0
03/01/03–02/29/04 = $4,968
03/01/04–02/28/05 = $5,613

On November 18, the Union advised the Respondent that it would not change the effective dates of the pension plan "because the pension fund contributions are determined on a calendar year basis from January 1st through December 31st of each year." Thereafter, the Respondent refused to sign the contract.

[3] The fully integrated contract proffered by the Union stated that the rate of contribution for these 2 months would be determined by an actuary and approved by the Trustees. The previous agreement provided for rates to be determined by an actuary not to exceed a specified monetary amount.

II. JUDGE'S DECISION

The judge correctly found that the Respondent violated the Act by failing and refusing to sign the collective-bargaining agreement. The judge noted that the MOA provides that terms of the prior contract will be incorporated where not specifically addressed. Because the MOA does not contain any specific dates for the Respondent's contribution to the pension plan, the judge, applying past practice and the terms of the prior contract, determined that "from March 1, 2002 and for the remainder of the first year, the [Respondent's rate of contribution] would be $0 and then, as in the past, the negotiated rates would go into effect as of the first of each year." The judge found that while the negotiated rates would not cover the last 2 months of the agreement, "the Memorandum of Agreement covers that contingency by stating that rates are to be determined by the Trustees."

Therefore, the judge found that the Union's interpretation of the MOA was correct in light of past practice, and that the fully integrated contract sent to the Respondent in September reflected that agreement. Thus, the Respondent's refusal to sign the proffered contract constituted a violation of the Act. The judge's conclusion is correct.

III. ANALYSIS

Section 8(d) of the Act requires the execution of a written contract incorporating any agreement reached if requested by either party. *H. J. Heinz Co. v. NLRB*, 311 U.S. 514 (1941). The General Counsel must show not only that an agreement was reached, but that the document, which the respondent refused to execute, accurately reflected that agreement. See *Paper Mill Workers Local 61 (Groveton Papers Co.)*, 144 NLRB 939, 941–942 (1963). If it is determined that an agreement was reached, the respondent's refusal to execute the contract is a violation of the Act. See *H. J. Heinz Co.*, supra at 525–526.

The majority contends that the General Counsel failed to show that an agreement was reached on the pension plan provision of the new contract because the parties attached reasonable but incompatible meanings to certain terms of the provision. While the majority's statement of the law on "meeting of the minds" is accurate, it is erroneously applied to the facts presented here. As discussed below, the evidence does not support the majority's key finding that the terms for the effective dates of the pension plan contributions (i.e., "yr 1," "yr 2," and "yr 3") are subject to two reasonable but incompatible interpretations.

The MOA, in plain language, states that the terms and conditions of employment of the predecessor agreement

will remain unchanged and are incorporated into the new agreement if "not specifically addressed by this Memorandum of Agreement." Because the MOA did not give specific dates in the pension plan provision, the Union properly incorporated the calendar year dating method of the pension plan provision from the previous agreement.[4] As noted above, this dating method left the last 2 months of the agreement without a set rate of contribution. The Union then properly construed the phrase, "Insert new rates as determined by Trustees," as addressing the method for determining the rates of the last 2 months of the contract.

By contrast, the Respondent's understanding of the MOA runs afoul of the language of the agreement. First, the reference to "yr 1," "yr 2," and "yr 3" cannot be construed as specifically addressing the dates of the pension plan provision. Even if this reference is construed to mean the first year of the new agreement, it is still necessary to look outside of the MOA to find the date for the beginning of "yr 1." The MOA itself mentions no day, month, or specific year in the pension plan provision. In sum, there are no dates in the pension plan provision. As dates of the agreement are not specifically addressed in the MOA, the calendar-year dating system of the preceding agreement is, by the terms of the MOA, incorporated into the MOA.[5]

Further, the opening words of the MOA's pension plan provision are: "Insert new rates as determined by Trustees." If the provision does not contemplate incorporating the dating system of the preceding agreement, then the direction to "insert new rates" is essentially meaningless. "Insert" into what, if not into the framework of the predecessor agreement?

Second, the reference to Trustees cannot simply be read out of the MOA. The Respondent and the Union demonstrated their willingness to be bound by the Trustees language in the pension plan provision of the MOA when they signed the separate page of the MOA that contained that language. Yet, the Respondent's interpretation of the phrase, "Insert new rates as determined by Trustees," renders the phrase meaningless. If, as the Respondent asserts, it did not agree to allow the Trustees to set contribution rates, then the question must be asked: Why did it consent to having this phrase inserted in the pension plan provision of the MOA? In its exceptions, the Respondent asserts that "the union, when it gives demands, asks for the employer to 'insert new rates as determined by the Trustees' and then, *immediately below that, spells* out what those new rates are to be." If the Respondent's explanation is to be properly understood, the phrase regarding the Trustees is merely pro forma language because the rates of contribution listed in the revised pension plan provision had already been determined. This explanation is wholly insufficient.[6]

First, if all the rates, as the Respondent contends, had already been set, there would have been no need for the parties to incorporate this additional language requiring that new rates be inserted as determined by the Trustees. Second, the parties' predecessor agreement made no mention of the Trustees being given the discretion to approve pension plan contribution rates. In the preceding contract, that discretion had been given to an actuary whose discretion was limited by a set maximum amount. The absence of a role for Trustees in the previous contract gives rise to the inference that the insertion of the Trustees' phrase in the MOA was a substantial and material change to the preceding contract and not just pro forma language introducing new rates.

In sum, the facts show that the Union's understanding of the pension plan provision of the MOA is reasonable while the Respondent's is not. Contrary to the majority,

[4] The dates and rates of contribution of the previous pension plan were as follows:

03/01/98–12/31/98 = $2,900
01/01/99–12/31/99 = $0
01/01/00–12/31/00 = Determined by actuary; to be tax deductible up to a $2,000 maximum.
01/01/01–02/28/01 = Determined by actuary; to be tax deductible up to a $2,600 maximum.

[5] The majority's reliance on the benefits fund provision (sec. 9.02) of the MOA is misplaced because that section of the prior contract did not follow a calendar-year dating method. Instead, that section set the rate of benefit fund contributions on a contract-year basis running from March 1 of 1 year to February 28 of the following year. In contrast to the pension plan provision in sec. 9.03, the benefit fund provision in sec. 9.02 did not have the additional 2-month period, required by the calendar-year method, for which no rates were set forth. Thus, contrary to the majority, it would have been superfluous for the parties to have made any mention of the Trustees in sec. 9.02 of the draft collective-bargaining agreement because, like the prior agreement, the benefit rates had already been set forth for each contract year.

The parties did not litigate the basis for the insertion of the phrase "Insert new rates as determined by the Trustees" in sec. 9.02 (benefit fund) of the MOA. Nor did the Respondent allege that the absence of that phrase in the draft collective-bargaining agreement fails to reflect the parties' agreement. Any rationale for the insertion of the phrase in sec. 9.02 of the MOA is, therefore, wholly speculative.

[6] In arguing that it is not reasonable to find that the Respondent would have agreed to give Trustees the discretion to determine rates, the Respondent asserts that it would never have given the Union "unlimited discretion" in determining the rate of contribution. However, the Trustees language in the pension plan provision does not give discretion solely to union officials. Trustees of a pension and/or benefit fund, under the Taft-Hartley Act, must be comprised of joint union and employer officials. See 29 U.S.C. § 186(c)(5)(B). The presence of both employer and union officials among the Trustees ensures that appropriate checks-and-balances exist in determining the Respondent's rate of contribution to the pension plan during the last 2 months of the collective-bargaining agreement. The Union does not have sole discretion in the matter.

there is no ambiguity in the terms of the pension plan provision of the MOA and hence, no ground for finding that there was no "meeting of the minds" on the terms of the provision. The real question presented by this case, therefore, is whether the draft contract the Union sent to the Respondent in September accurately reflected the agreement. For the reasons discussed above, the General Counsel showed that it did. Accordingly, the Respondent was obligated to execute the fully integrated contract. The Respondent's failure to do so constitutes a violation of Section 8(a)(5) of the Act.

Kathy DrewKing, Esq., for the General Counsel.
Morris Tuchman, Esq., for the Respondent.
Richard J. Silber, Esq., for the Union.

DECISION

STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge. I heard this matter on March 6, 2003. The charge was filed on December 23, 2002, and the complaint was issued on January 17, 2003. In pertinent part, the complaint alleged that on or about March 21, 2002, the Union and the Company reached a complete agreement on a new contract to replace an agreement that ran from March 1, 1998, to February 28, 2001. The complaint further alleged that since September 10, 2002, the Employer has failed and refused to execute a written collective-bargaining agreement despite requests to do so by the Union.

Based on the evidence as a whole, and after consideration of the arguments of counsel, I make the following

FINDINGS AND CONCLUSIONS

I. JURISDICTION

It is admitted that the Respondent is engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. It also is admitted that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. CONCLUDED FINDINGS

Section 8(d) of the Act states:

> For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession.

Prior to the enactment of Section 8(d), the Supreme Court reached essentially the same result in *H. J. Heinz Co. v NLRB*, 311 U.S. 514 (1941). In that case the Court held that once the parties have reached an oral agreement, the employer may not refuse to sign it.

> The freedom of the employer to refuse to make an agreement relates to its terms in matters of substance and not, once it is reached, to its expression in a signed contract, the absence of which, as experience has shown, tends to frustrate the end sought by the requirement for collective bargaining. A businessman who entered into negotiations with another for an agreement having numerous provisions with the reservation that he would not reduce it to writing or sign it, could hardly be thought to have bargained in good faith. This is even more so in the case of an employer who, by his refusal to honor, with his signature, the agreement which he has made with a labor organization, discredits the organization, impairs the bargaining process and tends to frustrate the aims of the statute to secure industrial peace through collective bargaining.

In *Grocery Warehouse*, 312 NLRB 394 (1993):

> We agree with the judge . . . that the Respondent violated Section 8(a)(5) . . . by failing and refusing to assist in the reduction to writing of the November 27, 1991 agreement and to sign the final collective-bargaining agreements. The Union reduced the November 27, 1991 agreement to writing on or about April 2, 1992. The Respondent subsequently mailed corrections to the Union on January 4 and 11 1993 and the Union did not object to these corrections. The judge failed to include all of these documents in her description of the collective-bargaining agreements to be signed by the Respondent. In order to effectuate the policies of the Act, we find that the Respondent must be required to sign the agreements the Union forwarded to the Respondent on or about April 2, 1992 as modified by the Respondent's corrections of January 4 and 11, 1993, that are not disputed by the Union.

In *Amalgamated Clothing Workers v. NLRB*, 324 F.2d 228 (2d Cir. 1963), the court held that the duty to bargain under Section 8(d) included "the obligation to assist in reducing the agreement reached to writing."

In *Georgia Kraft Co.*, 258 NLRB 908, 912 (1981), the Board held that some minor deviations and typographical errors in the proposed contract did not demonstrate a lack of agreement, allowing the Respondent to refuse to execute a signed collective-bargaining agreement. The Board stated:

> A review of this document reflects some minor deviation from the proposals submitted by Respondent and agreed to by the Union . . . We nonetheless conclude that any deviation is not indicative of lack of agreement . . . but is rather the result of Respondent's own refusal to acknowledge the existence of an agreement, as well as its refusal to assist the Union in reducing the agreement to writing.[1]

The prior collective-bargaining agreement ran for a term from March 1, 1998, to February 28, 2001. That agreement covered a unit of:

> All full-time, part-time, per diem and temporary employees licensed or otherwise lawfully entitled to practice as a regis-

[1] See also *New Orleans Stevedoring Co.*, 308 NLRB 1076, 1081 (1992).

> tered professional nurse employed by the Employer to perform registered professional nursing as a Staff Nurse, Assistant Head Nurse or Nurse Practitioner, excluding the Director of Nursing, Associate Director of Nursing, Unit Directors, Nursing Care Coordinators or Supervisors of Nursing.

The parties stipulated that they agreed on a new contract, which was executed in the form of a Memorandum of Agreement on March 22, 2002. That Memorandum contained the substantative terms of an agreement but was not a fully integrated contract. In that regard, the opening page states: "Upon ratification, the parties agree to execute a forma document integrating the terms of the MOA and the expired agreement." The Memorandum also states:

> Any and all terms and conditions of employment of the March 1, 1998 to February 28, 2001 agreement, letters of understanding, or otherwise, not specifically addressed by this Memorandum of Agreement shall remain unchanged, and are hereby incorporated into this Memorandum of Agreement.

Insofar as relevant to the present case, the following two provisions of the Memorandum of Agreement are noted.

First, at page 9, the parties agreed to delete all references to "clinical-division" in paragraph 5.06 of the previous contract, which dealt with the recall of laid-off workers. In the old contract, the relevant language was; "Whenever a vacancy occurs with a clinical division, employees from that clinical division who are on layoff and have the ability and qualification to do the work shall be recalled in accordance with their clinical division seniority in the reverse order in which they were laid off."

Second, at 17 of the Memorandum of Agreement, which deals with pension contributions, it states:

> Insert new rates as determined by Trustees.
>
> yr 1–$0
> yr 2–4968
> yr 3–5613

In the previous contract, paragraph 9.03 describes the Union's Pension Plan and sets forth amounts to be paid by the employer. In pertinent part, that agreement provided that effective commencing March 1, 1998 (the date of the agreement), to December 31, 1998, the employer was to contribute $2900 per annum, per full-time employee; that effective January 1 to December 31, 1999, such contributions will be $0 per annum, per such full-time employee; that effective January 1 to December 31, 2000, the contribution was to be at a rate to be determined by an actuary up to a $2000 maximum per full-time employee; and that effective January 1 to February 28, 2001, the contribution was to be at a rate to be determined by an actuary up to a $2600 maximum per full-time employee.

Thus, under the terms of the expired contract, after the first 9 months of the agreement and until December 31, a specific contribution amount was described. Thereafter, and for the remaining term of that agreement, changes in the amounts were to go into effect on the first day of each year (January 1), and the amounts were flexible in that they were to be determined by an actuary with a maximum agreed upon by the parties.

On or about September 10, 2002, the Union forwarded to the Respondent, a proposed draft of a full contract. On October 18, 2002, the Union sent a followup letter because the proposed draft previously sent, had not been signed and returned. Another such letter was sent by the Union on November 7, 2002.

On November 12, 2002, the Respondent by its attorneys sent a letter to the Union, which acknowledged receipt of the union's letters and offered the following modifications.

> Page 14. Recall. 5.06: Delete the words "bargaining unit."
>
> Page 24. Pension Plan: Par.1. Correct "December 31, 2002" to read "February 28, 2003; Par. 2. Correct "December 31, 2003" to read "March 1, 2003: Par. 3. Correct "January 1, 2004" to read "March 1, 2003"; Correct "December 31, 2004" to read "February 28, 2004".
>
> Once these corrections are made, please send corrected pages only for further review and approval. Client will check "Minimum Hiring Rate" for accuracy.

On November 18, 2002, the Union responded by stating in pertinent part:

> The language in Section 5.06 needs to remain the way it is written. At no point in negotiations did we ever agree to delete the words "bargaining unit" from these paragraphs.
>
> The language in Section 9.03 needs to remain the way it is written also. The pension contributions are determined on a calendar year basis, from January 1st through December 31st of each year.

On April, 5, 2002, Michael E. Behan, chief operating officer of the Pension Plan and Benefit Fund, wrote to the Respondent, gave his opinion about the intent of the agreement and asked that the proposed contract be signed and returned. He stated, inter alia:

> The Fund Office has reviewed a copy of the Memorandum of Agreement . . . that was executed on March 21 and March 22, 2002.
>
> In reviewing the MOA, there is not a clear definition of the effective dates and duration of the contract. The Fund Office's interpretation is as follows:

Section 9.03–NYSNA Pension Plan	
Effective 03/01/02–12/31/02:	$ 0
Effective 01/01/03–12/31/03:	$4968
Effective 01/01/04–12/31/04:	$5613
Effective 01/01/05–02/28/05:	To be determined by the Trustees

Notwithstanding the repeated attempts to have the proposed agreement signed and returned, the Respondent has refused to do so because of its belief that the proffered document does not accurately reflect the agreement that was reached on March 22. However, it appears that in all respects, except for the pension plan payments, the Respondent has complied with all of the other terms of the Memorandum of Agreement, including all other incorporated terms and conditions of employment.

With respect to the recall provision, the Respondent's counsel concedes that the inclusion of the words, "bargaining unit" to replace the words "clinical division" do not detract from the intent of the parties as embodied by the Memorandum of Understanding. That is, by eliminating seniority within each "clinical division," the parties obviously intended to make seniority applicable within the "bargaining unit." (Clearly seniority was not to be based on employment outside the bargaining unit.) To this extent then, the inclusion of the words "bargaining unit," merely states the obvious and as counsel acknowledges, is consistent with the intent of the agreement. This objection therefore has no merit.

With respect to the pension fund contributions, the Respondent contends that the parties agreed that the Employer would have a zero contribution for the first full year of the agreement, (from March 1, 2002, to February 28, 2003): a $4968 contribution for the second full year and a $5613 contribution for the third full year. Respondent also asserts that it never agreed that for a 2-month period, from January 1 to February 28, 2005, the rate was to be determined by the Trustees

But the Respondent's reading of the Memorandum is not, in my opinion, consistent with the words contained in that document. While it is correct that the Memorandum states that in year 1, the rate would be $0, that in year two it would be $4968 and that in year three it would be $5613, the document does not define the beginning or ending dates of any given year. Accordingly, in light of the past practice and the terms of the prior contract, which to the extent not specifically modified, were incorporated by reference into the new agreement, it is more than reasonable to conclude that the meaning of words in the Memorandum of Understanding is that from March 1, 2002, and for the remainder of the first year, the rate would be $0 and then, as in the past, the negotiated rates would go into effect as of the first of each year. Moreover, while it is true that the negotiated rates would not cover the last 2 months of the contract, the Memorandum of Agreement covers that contingency by stating that rates are to be determined by the Trustees.

In this case, both the Union and the Employer agree that they reached a new contract. What they disagree about is the interpretation of that contract, essentially insofar as it effects only the pension fund contributions. It is my opinion, that the Union's interpretation of the agreement is correct and that the integrated contract tendered to the Employer on September 10, 2002, accurately reflects that agreement. I therefore conclude that the Employer's refusal to execute and return the proffered contract, constituted a violation of Section 8(a)(1) and (5) of the Act.[2]

REMEDY

Having found that the Respondent, Hempstead Park Nursing Home has violated the Act, I shall recommend that it cease and desist and take certain affirmative action designed to effectuate the policies of the Act.

As I have concluded that the Respondent has failed and refused to execute the contract proffered to it on September 10, 2002, I shall recommend that it sign and return this contract to the Union immediately.

To the extent that the Respondent has not made payments to the Pension Fund in accordance with the terms of the 2002 to 2005 collective-bargaining agreement, I shall recommend that it make such payments, with interest, to be computed according to the practice set forth in *Merryweather Optical Co*., 240 NLRB 12l3, 12l6 fn. 7 (l979).

[Recommended Order omitted from publication.]

[2] At the hearing, and apparently for the first time, the Respondent's counsel suggested that the matter would better be resolved by having it decided by arbitration. The Respondent did not indicate in its answer that it sought to have this matter deferred to arbitration and it did not offer, at any time, to waive the time limitation provisions contained in the grievance/arbitration provisions of the contract. Therefore, I will not defer this case.

The cases cited by the Respondent are not, in my opinion, apposite. Those cases (*Westinghouse Electric Corp*., 313 NLRB 452 (1993); *Atwood & Morill Co*., 289 NLRB 794, 795 (1988); *Thermo Electron Corp*., 287 NLRB 820 (1987); *NCR Corp*., 271 NLRB 1212, 1213 (1984); and *Vickers, Inc*., 153 NLRB 561 (1965)), all involved cases where it was alleged that companies made unilateral changes in the terms of existing contracts and where there were genuine issues regarding the interpretation of those contracts. None involved situations where it was alleged that a company or union had refused to execute an agreed-upon contract.