UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO BRANCH OFFICE

HSCGP, LLC d/b/a TRIOS HEALTHCARE

and **Case 19–CA–321939**

OFFICE AND PROFESSIONAL EMPLOYEES' INTERNATIONAL UNION LOCAL 8

Adam D. Morrison, Esq., for the General Counsel.

Glenn A. Bunting, Esq. and *Colin J. Finnegan, Esq.* *(Constangy, Brooks, Smith & Prophete LLP),* for the Respondent.

DECISION

STATEMENT OF THE CASE

MARA-LOUISE ANZALONE, Administrative Law Judge. I heard this case on September 10 and 11, 2024, in Richland, Washington. Charging Party Office and Professional Employees' International Union Local 8 (the Union or Local 8) filed a charge on July 18, 2023, and the Regional Director for Region 19 issued an order consolidating cases, consolidated complaint and notice of hearing on December 14, 2023 (the complaint). At issue in this case is whether HSCGP, LLC d/b/a Trios Health (Trios) violated Section 8(a)(5) and (1) and 8(d) of the National Labor Relations Act (the Act) by failing and refusing to execute a memorandum of understanding to which it had allegedly agreed.

At trial, all parties were afforded the right to call, examine, and cross-examine witnesses, to present any relevant documentary evidence, to argue their respective legal positions orally, and to file post-hearing briefs. On October 23, 2024, post-hearing briefs were filed by Counsel for the General Counsel (hereinafter, the General Counsel) and Respondent and have been carefully considered.[1] Accordingly, based upon the entire record herein, including the post-hearing briefs and my observation of the credibility of the witnesses, I make the following

[1] Abbreviations used in this decision are as follows: "Tr." for transcript; "GC Exh." for General Counsel's Exhibit; "R. Exh." for Respondent's Exhibit; "GC Br." for the General Counsel's post-hearing brief and "R. Br." for Respondent's post-hearing brief.

FINDINGS OF FACT

A. Jurisdiction

At all times material herein, Respondent, a Delaware limited liability corporation with an office and place of business in Kennewick, Washington, has been engaged in the business of providing healthcare services. During the 12-month period immediately preceding the issuance of the instant complaint, Respondent, in the normal course and conduct of its above-described business operations, received gross revenues in excess of $250,000 directly from points outside the State of Washington, and purchased and received goods at its Kennewick, Washington facility valued in excess of $50,000 directly from points located outside the State of Washington. It is alleged, Respondent admits, and I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that Charging Party is a labor organization within the meaning of Section 2(5) of the Act.

Based on the foregoing, I find that this dispute affects commerce and that the National Labor Relations Board (the Board) has jurisdiction of this case, pursuant to Section 10(a) of the Act.

B. Factual Background[2]

Respondent operates an acute-care hospital in Kennewick, Washington, where, since 2008, Local 8 has—along with Service Employees International Union 1199NW (SEIU)—jointly represented a bargaining unit of technical and service employees (the Unit). (Tr. 20–21.) In 2022, Trios and the Union engaged in months' long collective-bargaining negotiations, reaching an agreement in August of that year. (GC Exh. 3; Tr. 26–27.) This case, however, concerns an agreement allegedly reached by the parties after that collective-bargaining agreement (the 2022 CBA) was reached. Specifically, the General Counsel contends that in April 2023, the parties reached complete agreement on a memorandum of understanding regarding certain pay premiums that been discussed during the 2022 contract negotiations but not codified in the 2022 CBA.

The pay premiums at issue pertain to work performed by Hospital employees designated as leads, preceptors and orienteers. Such employees take on additional duties within their departments: leads assist with scheduling, as well as procuring supplies and equipment, and orienteers train new employees. Preceptors act as teachers and mentors to students interning at the hospital, as part of the student's healthcare-related educational degree or certification program. (Tr. 23–24.)

1. The parties' representatives

The General Counsel's main witness in this proceeding was Local 8's Field Representative Angie Wedekind (Wedekind). For the past 5 years, she has served as its lead negotiator with

[2] The following errors in the transcript are hereby corrected: on page 41, l. 2, "session" should read "section"; on p. 238, l. 10, "JUDGE ANZALONE" should read "THE WITNESS"; and on p. 334, l. 18, "A" should read "JUDGE ANZALONE."

respect to the Unit employees. Respondent's main witness was its Human Resources Business Partner Christine Moreland (Moreland). Wedekind described Moreland as the Union's "first point of contact" within Respondent's human resources department who is typically present at grievance and investigative meetings. (Tr. 18–19, 21, 29.)

Moreland also serves a scheduling function, including scheduling meetings between the parties; Wedekind explained, "[a]ny meetings or questions or concerns that we have, they go through Christine first." (Tr. 29.) Such meetings include meetings of the parties' joint Labor/Management Committee (LMC). According to the 2022 CBA, the purpose of the LMC "is to foster improved communications between the Employer and the employees." It is undisputed that the committee's function is purely advisory. (Tr. 150; R. Exh. 4.)

2. The 2022 origins of the premium pay concept

As discussed, during the 2022 negotiations, the parties discussed the idea of establishing a program that would award wage premiums to employees serving in the lead, preceptor and orienteer roles. According to one member of Respondent's negotiating team, "[t]here was passion surrounding the idea for [the] SEIU/OPEIU folks to adopt a preceptorship and a lead program" but the parties could not reach "common ground" over the subject. (Tr. 294–296.)

While it appears that at least one proposal was made by each side regarding the new premiums, the executed 2022 CBA does not include any language regarding premium pay for performing the lead, preceptor or orienteer position. It appears that, at their final bargaining session, the premium pay program emerged as one of the last topics unresolved between the parties. At that point, Respondent proposed, and the Union agreed to, a Memorandum of Understanding stating as follows:

> TRAINERS/PRECEPTORS/LEADS:
>
> Upon request, the Hospital agrees to discuss with the Labor/ Management Committee the potential development and utilization of a clinical Training/Preceptor or Lead Program where operationally justified within the Hospital. Said discussion shall include consideration of a Training/Preceptor differential for designated employee trainers/preceptors.

(R. Exh. 2; Tr. 28.) For clarity, this document will be referred to as the "2022 MOU."[3]

3. The contractual prohibition on shift-differential "pyramiding"

While the 2022 CBA as executed did not contain any provision for the new pay premiums, it did contain language prohibiting an employee from simultaneously earning two forms of other,

[3] Wedekind, who was admittedly not present when the 2022 MOU was finalized and signed, claimed to have previously attended a sidebar in which the parties agreed that "if we could agree to all of the other [contractual] terms. . . we could agree to this MOU and come back to the table and negotiate a MOU for this pay." (Tr. 147, 151–152.) I found this testimony to be rehearsed and self-serving and disregard it.

established premium pay (a practice referred to as "stacking" or "pyramiding"). That section is entitled, "No Pyramiding" and states:

> There shall be no pyramiding of overtime and other premium pay paid at a rate of time and one-half or double time. When an employee is eligible for both time and one-half (1½) and double time (2x) pay, the employee shall receive the highest rate of the two pay rates during those hours that the employee is so eligible.

(GC Exh. 2 at 17.) As explained below, this contractual language would become material to the parties' later discussions on the new pay premiums.

4. The parties' meetings regarding new premium pay rates

During April 2023,[4] the parties held two meetings regarding the new pay premiums. The meetings were scheduled between Moreland, Wedekind and her SEIU counterpart, Tori Augspurger (Augspurger). Wedekind testified that, despite the wording of the 2022 MOU, the meetings were "not set up as a Labor-Management Committee meeting," in that it was not referred to that way in the correspondence setting up the meeting. While the parties' scheduling correspondence simply referred to the meetings referring to preceptors (i.e., "Preceptor Program Committee Meeting," "Preceptor Meeting," etc.), the record contains no past practice of referring to prior LRC meetings other than by reference to their subject matter. (GC Exhs. 4, 6.)

The attendees at the two meetings were generally consistent. Wedekind and Moreland were the lead speakers for the labor and management sides, respectively. Along with Wedekind and Augspurger, present for the Union were employee-stewards Ruvim Berezovskiy (Berezovskiy) and Charelle Woods (Woods). Accompanying Moreland were various department heads and managers, including Kim Martinez (Medical/Surgical) and Kristy Kuhn[5] (Diabetes Education, Nutrition Services, Environmental Services, Emergency Management), as well as Respondent's education supervisor, Heather Rabben. (Tr. 30–31, 33, 40, 46–47, 80, 82, 188–191, 195, 214–215; GC Exh. 2.)

The identities of the attendees did not align neatly with those expected to attend either an LMC meeting or a contract negotiation session. That said, two individuals were notably absent from Respondent's team at each meeting. Although he was typically present for LMC meetings, Human Resources Director Brian (Director Woods), did not attend either of the April meetings. Also absent was Respondent's outside counsel, Glenn Bunting (Bunting), who had served as lead negotiator during the 2022 contract negotiations. Bunting had not been present for negotiations for prior mid-term negotiations (which in recent years had been limited to expedited negotiations to address COVID-related issues). (Tr. 58–59, 150.)

[4] Unless otherwise noted, all dates hereinafter refer to the year 2023.

[5] Kuhn credibly testified that she had no recollection of attending the first meeting. (Tr. 234, 239–240.)

a. The April 5 meeting

The parties first met on April 5. The General Counsel's witnesses consistently testified that the meeting began with Wedekind providing Moreland with an untitled, single-page document that contained the Union's proposal on the new pay premiums. (GC Exh. 5; Tr. 34, 83–84, 123, 190.) I do not credit Moreland's testimony to the contrary. I note that, in general, both she and Wedekind appeared at times to tailor their testimony (in Moreland's case, often through selective recall) to support their respective positions as to whether the parties in fact had a "meeting of the minds" regarding the premium pay rates under discussion. For that reason, I have relied primarily on the testimony provided by other witnesses to the meetings.

In this regard, I do not credit Wedekind's testimony that she asked Moreland—within the first 10 minutes of the meeting—whether she had authority to negotiate, and that Moreland responded in the affirmative.[6] According to Wedekind, all meeting attendees were present for this exchange. Berezovskiy, however, did not corroborate her on this point—by his recollection, the subject only came up in the second meeting. Woods did testify consistently with Wedekind but her testimony was noticeably overzealous; initially asked to identify who took the lead speaking position for management, she offered, "Christine Moreland was the lead for the management. She's the one that had the authority to run the negotiation." Furthermore, her claim that Moreland's authority was discussed during this meeting was impeached by her Board affidavit in which—consistent with Berezovskiy—she only referenced the subject of Moreland's authority being raised during the second meeting. (Tr. 43–44, 88–89, 102–103, 140, 199.)

The bulk of the meeting consisted of the parties reviewing various aspects of the Union's proposal, including discussing the duties of the lead, preceptor and orienteer positions. Based on the testimony of the General Counsel's witnesses, I find that the parties agreed, consistent with the Union's draft, that the premium pay for leads would be $3 per hour. There appears to have been significantly less consensus on the preceptor and orientateer pay premiums; a lengthy discussion ensued regarding the difference between the new-hire training given by orienteers and the more clinical/educational nature of the training delivered by preceptors. Wedekind and Woods claimed that, after this discussion, the management team agreed to the separate premiums to be assigned to each role. This assertion does not jibe with what occurred at the parties' second meeting (discussed below), and I do not credit it. (Tr. 36, 41–42, 85–87, 156, 161, 192–193.)

Another subject discussed during the first meeting was the practice of premium "stacking" or "pyramiding" (referenced above). The parties agreed that the new pay premiums would be exempted from the 2022 CBA's "No Pyramiding" provision (Sec. 13.8), meaning that an employee eligible for one of the new pay premiums could simultaneously earn overtime. (Tr. 51–52, 93–95, 162.) It does not appear, however, that the parties discussed whether the new pay premiums could be 'internally' stacked—for example, whether an individual acting as both a lead and a preceptor could earn the two premiums simultaneously. (Tr. 161–163, 206, 239, 433–434.)

[6] Moreland specifically denied that anyone asked her at this meeting whether she had authority to negotiate. She further denied that she or any other manager conveyed to the Union-side participants that they, in fact, had the authority to bargain. Neither Martinez nor Rabban recalled any discussion about whether Moreland had authority to conduct negotiations. (Tr. 216, 302–306, 375–376, 431.)

The parties additionally agreed to minor language changes during this meeting. (This is evidenced by the wording changes reflected in the draft Wedekind would provide in the subsequent meeting, such as replacing the phrase "normal rate of pay" with "regular rate of pay," as well as replacing a lengthy definition of worked vs. nonworked hours with a simpler concept of "all compensated hours"). Both Wedekind and Woods credibly testified that they left the meeting understanding that the union needed to "clean up the verbiage" in their draft and "make it more precise." I do not believe, however, that this wordsmithing assignment was viewed as the final step in the parties' substantive negotiation process. Indeed, Wedekind herself admitted as much, testifying that the parties ended the meeting by another meeting for April 12, with the understanding that she would "create a document that reflected our language changes, modifications, additions, and bring that to the next meeting for—for negotiation." (Tr. 42–43, 88.)

b. The April 12 meeting

As planned, the parties reconvened on April 12, at which time Wedekind presented a revised proposal—now captioned "Memorandum of Understanding"—that contained signature blocks.[7] This draft reflected the wording changes referenced above, as well as language stating that the new forms of premium pay would not be subject to Section 13.8 ban on "pyramiding" overtime. (GC Exh. 7.)

Next, one of the items that (at Moreland's request) had been "tweaked" verbiage-wise was discussed more substantively. This was language specifying that an employee designated as a "permanent" lead or a preceptor would receive the corresponding premium for all hours worked. Moreland, however, now took issue with the entire concept of permanent leads and permanent preceptors, stating a concern that establishing such positions would cause the assigned employees to "burn out" while depriving others the opportunity to perform these roles. Wedekind agreed to abandon the "permanent" premium concept and strike the relevant language from the draft. (Tr. 49–51, 92–93, 197–198.)

Next, despite Wedekind and Woods' claims that separate premiums had been agreed to for preceptor and orienteer pay, a lengthy discussion ensued regarding the potential overlap between the job duties of new hire orientation (a task assigned to an orienteer) and more extensive training of a newly hired employee (a task assigned to a preceptor). Wedekind testified that the Union "heard" Respondent's concerns about the potential overlap and agreed that it made sense to "put them together and present it as one level of a differential pay." (Tr. 54–55, 61.)

The parties also discussed the issue of internal "stacking" of two forms of the new premium pay with each other. There was, however, no agreement as to whether this practice would be

[7] I credit Wedekind's testimony—as corroborated by Berezovskiy and Woods—that this document (admitted as GC Exh. 7) was in fact provided to management during the meeting. I do not credit Moreland's uncorroborated testimony that a stripped-down version of this document without signature lines or an "MOU" caption was the document discussed, in part because no such document was produced by Respondent.

permitted. As Respondent's witness Kuhn testified, Respondent's expressed position was that the premiums could not be "stacked," that is, that an individual could earn the lead premium and the newly recognized orienteer/preceptor premium at the same time. Kuhn's testimony on this issue went unrebutted by any other credible evidence and was corroborated by General Counsel's witness Berezovskiy, who recalled a discussion about potentially "stacking" lead pay and preceptor pay, but "could not recall if there was a consensus" on the subject. (Tr. 161–163, 206, 236–239, 433–434.)

Wedekind, for her part, equivocated when asked whether internally stacking the new premiums was discussed; she initially responded, "we discussed the possibility." She then immediately backtracked, stating, "We -- I -- I can't say that we explicitly discussed the possibility of them doing a lead pay and a preceptor pay at the same time." She then reiterated that the parties had in fact discussed the inapplicability of Section 13.8 to the new premiums (a subject that had been resolved on April 5) she then appeared to feign confusion between the two concepts. Finally, asked by both Respondent's counsel and the undersigned whether the internal pyramiding subject was in fact discussed, she claimed that, to her recollection, the subject was never discussed. (Tr. 162–164.) Wedekind's demeanor in answering his line of questioning leads me to believe that her initial answer (which aligns with the testimony of Kuhn and Berezovskiy) was the most reliable and that the parties had, in fact, discussed the possibility that an individual could act in two of the new roles at the same time.

Witnesses agreed that the meeting ended with a promise by Wedekind to provide Moreland with a revised document that: (a) omitted the references to permanent preceptors and leads, and (b) "combined" the preceptor and orienteer premium categories into a single differential. Moreland's response to this statement was to pledge that she would submit that document, once received, to "corporate" for approval.[8] This appears to set off alarm bells for the Union-side participants. According to Woods' affidavit testimony, they had until this point believed that Moreland "had the authority to make a deal" because she had never before mentioned that the MOU would be "subject to further revision by anyone else." According to Berezovskiy, Wedekind then pressed Moreland "if she could get [the MOU] approved."[9] Moreland's response was evasive; by Wedekind's admission, she stated, "please send it on and—and we'll move forward with it." (Tr. 55, 102–103, 199, 203–204, 222, 241, 431, 435.)

[8] This version of events is supported by the testimony of is consistent with the testimony of several witnesses, including Berezovskiy (who testified that Moreland promised to get the revised document "signed and approved"); Woods (who understood that "it wouldn't take that long to get it signed off"); and Martinez (who recalled that, "at the very, very end" of this meeting, Moreland stated that she would submit the Union's document to either "HSC" or Respondent's "corporate office"). (Tr. 95, 198, 216.)

[9] I do not credit Wedekind's claim that she had already asked and been assured about the extent of Moreland's authority at the beginning of the meeting. Wedekind related this logically unlikely version of events, which was explicitly denied by Respondent's witnesses, only after prompting from Counsel for the General Counsel, and it appeared rehearsed. While she was partially corroborated by Woods (who claimed that the "authority" exchange took place at the beginning—but *not* the end—of the meeting), Woods was impeached discredited by her affidavit, in which she admitted that the Union-side participants' belief that Moreland had bargaining authority was in fact based on her failure to reveal earlier that the MOU would be subject to review and approval by anyone other than herself. (Tr. 102–103, 217, 227, 239, 302–306, 375–376, 431.)

5. The parties' conduct following the April 5 and 12 meetings

On April 28, Wedekind, copying Augsburger, emailed Moreland a new MOU document (April 28 MOU), with a cover email stating, "Hi Christine, Here is that MOU for your review." The attached draft removed the paragraphs regarding permanent leads and permanent preceptors. It also combined the prior draft's language on preceptor and orienteer pay under a single heading captioned, "Preceptor Pay/Orienteer" and stating that an employee providing basic orientation was not eligible for preceptor pay, and that an employee performing more academic, preceptor duties was not eligible for orienteer pay. Significantly absent was any discussion of internal "stacking" of more than one premium pay. The document contained signature blocks but was unsigned on behalf of the Union. (GC Exh. 8.)

On May 17, not having heard back from Moreland, Wedekind emailed her again; this time, she stated, "Can you please let us know where things are with the MOU. People have been waiting a long time for these increases." Moreland responded 4 minutes later, stating:

> We have reviewed the MOU you sent over and we have sent it to our HSC for the signatures. [Director] Woods and I are going to be following up with them this week to see when we should have something back from them.

(Tr. 63; GC Exh. 9.) On May 24, what Wedekind emailed Moreland again. This time she stated, "Do you have a timeline for when we can expect this document to be signed?" Two minutes later, Moreland responded, "We have a meeting scheduled with HSC (corporate) tomorrow morning and I should have more information at that time." Four hours later, Wedekind emailed Moreland again, stating, "I want to let you know that we are willing to negotiate the start date for these upgrades. Please keep me posted." (GC Exh. 10)

On June 13, Wedekind emailed Moreland again, this time asking, "I'm wondering what is happening with our MOU for Lead pay?" Once again, Moreland responded within minutes stating "it is still with our corporate office. I just emailed them again following up to see when they were going to approve and send back so we can get it to you. I haven't heard anything further." (GC Exh. 11.)

On June 26, Wedekind addressed the issue of the April 28 MOU with Director Woods during a labor-management meeting. According to Wedekind, she asked him "what the status was" and then complained that "this had been going on for far too long" and demanded to know when the Union could "expect an answer."[10] According to her, Director responded that he would get back to her by the end of the week, but he did not. (Tr. 68.) On July 2, Wedekind emailed Director Woods and Moreland, copying representatives for the Union and Local 1199NW, stating:

> When we met for our labor-management meeting on Monday, June 26, you assured us that we would have answers to our questions

[10] I credit this version of the conversation as related by Wedekind, as opposed to the more tailored versions she offered a minute later, which included her asking "when can we expect the MOU" and when "would [we] get the MOU back from corporate." (Tr. 68–69.)

> regarding the PCU Department closure along with the MOU's for lead/preceptor/training pay and ownerships. To this date we have not received any of that information.
>
> This is beyond frustrating and, in some cases, is bordering on charges under the NLRB. More so, it is a complete lack of respect to the employees at TRIOS Healthcare.
>
> As you are aware, I am on vacation until Thursday, July 6. I am very hopeful that all the information we have requested will be in my emailed box upon my return.

(GC Exh. 12.) Director Woods did not respond, nor did anyone else on behalf of Respondent. (Tr. 69.) On July 17, Wedekind filed the unfair labor practice charge underlying the instant proceeding. (GC Exh. 1(a).)

Approximately 1 month after the Union filed its unfair labor practice charge, Moreland emailed Wedekind a significantly revised version of the April 28 MOU, which was signed on behalf of Respondent. This document included language reserving to Respondent the decision of whether or not to utilize any employee as a lead or a preceptor. The draft also omitted the entire concept of an orienteer bonus, stating instead that all staff were expected to participate in the general orientation process of new employees. Finally, the draft stated that "preceptor pay shall not be paid in addition to lead pay." According to Moreland, the revised draft was the result of her meeting with managers, as well as consulting with Respondent's legal counsel and then ultimately receiving approval from "corporate." (Tr. 361–371; GC Exh. 13; R. Exh. 8.)

ANALYSIS

A. The Unfair Labor Practice Allegation

Where a party refuses to execute a duly negotiated collective-bargaining agreement (commonly referred to as a "*Heinz* violation"), the Board will direct it to do so and to give retroactive effect to the terms of the agreement. As indicated above, at issue here is whether Respondent violated Section 8(a)(1)(5) and 8(d) of the Act by refusing to execute a memorandum of understanding that had been reached in negotiations with the Union over new forms of premium pay. The General Counsel argues that, by the conclusion of the April 12 meeting, a "meeting of the minds" (i.e., a complete agreement on all substantive terms) had occurred between the parties with respect to the new pay premiums, and that that therefore Respondent should be bound by the terms of the April 28 MOU memorializing that understanding.

B. Credibility

The key aspects of my factual findings above incorporate the credibility determinations I have made after carefully considering the record in its entirety. The testimony concerning the material events underlying the General Counsel's allegations contain certain conflicts. I have based my credibility resolutions on consideration of a witness' opportunity to be familiar with

the subjects covered by the testimony given; established or admitted facts; the impact of bias on the witness' testimony; the quality of the witness' recollection; testimonial consistency; the presence or absence of corroboration; the strength of rebuttal evidence, if any; the weight of the evidence; and witness demeanor while testifying and the form of questions eliciting responses. As set forth below, I have credited the testimony of Respondent's witnesses (and, at times, General Counsel witnesses) over that of the General Counsel's lead witness Wedekind when it came to the issue of whether a "meeting of the minds" occurred between the parties.[11]

C. Duty to Execute a Fully Negotiated Collective-Bargaining Agreement

The General Counsel argues that Respondent is bound to honor the unsigned April 28 MOU (GC Exh. 8) because it was verbally agreed to by Wedekind. Respondent contends that no such agreement was reached based on two rationales. First, Respondent argues that it cannot be held to any agreement reached by Moreland, because she lacked authority to negotiate on Respondent's behalf. Alternately, Respondent argues that, because material issues regarding the new pay premiums were left unresolved by the parties, no meeting of the minds occurred such that it should be bound by the April 28 document.

I find Respondent's second argument—that no meeting of the minds occurred—meritorious and therefore find it unnecessary to determine whether Moreland lacked authority to bargain. See generally *Teamsters Local 771 (Ready-Mixed Concrete)*, 357 NLRB 2203, 2205 (2011) (inherent in the obligations specified in Section 8(d) is the requirement that parties designate responsible representatives with "genuine authority to carry on meaningful bargaining regarding fundamental issues").

1. The *Heinz* obligation and meeting of the minds

Section 8(d) of the Act requires "the execution of a written contract incorporating any agreement reached if requested by either party." Prior to the enactment of Section 8(d), the Supreme Court had already reached essentially the same result; in *H.J. Heinz Co. v NLRB*, the Court held that, once the parties have reached an oral agreement, it is unlawful for one of the parties to fail to reduce to writing and apply that agreement. 311 U.S. 514, 526 (1941). This rule also applies where parties voluntarily agree to modify an existing contract in mid-term. See, e.g., *Graphic Communications Local 554 (World Color Press)*, 306 NLRB 844 (1992), enfd. 991 F.2d 1302 (7th Cir. 1993); *Hydrologics, Inc.*, 293 NLRB 1060 (1989); *Pacific Coast Metal Trades Dist. Council (Lockheed Shipbuilding Co.)*, 282 NLRB 239 (1986).

Section 8(d) also codified an important caveat to this mandate, noting that the obligation to execute a signed agreement "does not compel either party to agree to a proposal or require the making of a concession. . . ." This recognizes the long-established principle that the Board lacks the authority to compel a party to agree to any substantive contractual provision of collective-bargaining agreement. Thus, the Board may not order a party to execute an agreement to which

[11] I agree with Respondent that the General Counsel's request for an adverse inference based on Respondent's nonproduction of notes from the April meetings is without merit, as the credible record evidence fails to establish that the notes in question ever existed. See Tr. 200–201, 216, 220, 235, 326, 383, 437.

it has not assented. *H. K. Porter Co. v. NLRB*, 397 U.S. 99 (1970); *New Orleans Stevedoring Co.*, 308 NLRB 1076, 1081 (1992), enfd. 997 F.2d 881 (5th Cir. 1993). Accordingly, the obligation to execute a collective-bargaining agreement arises only once the parties have had a meeting of the minds on all substantive issues and material terms of the agreement. The General Counsel bears the burden of showing that the parties have reached the requisite meeting of the minds, *Hempstead Park Nursing Home*, 321 NLRB 321, 322–323 (2004) (citing *Intermountain Rural Electric Assn.*, 309 NLRB 1189, 1192 (1992)), and additionally that the document which the Respondent refused to sign accurately reflected that agreement. *Windward Teachers Assn.*, 346 NLRB 1148, 1150–1151 (2006); *Kelly's Private Car Service*, 289 NLRB 30, 34 (1988), enfd. 919 F.2d 839 (2d Cir. 1990). To do so, the General Counsel must prove that the parties' objectively manifested intent, as demonstrated by their communications with each other, as well as their "tone and temperament," shows that they agreed on all substantive issues and material terms contained in the alleged agreement. *Crittenton Hospital*, 343 NLRB 717, 718 (2004); *Diplomat Envelope Corp*., 263 NLRB 525, 535–536 (1982), enfd. 760 F.2d 253 (2d Cir. 1985).

In determining whether an agreement has been reached by the parties, the Board is not strictly bound to "the technical rules of contract law but is free to use general contract principles adapted to the collective-bargaining context." *New Orleans Stevedoring Co*., 308 NLRB at 1081 (citing *NLRB v. Electra-Food Machinery*, 621 F.2d 956, 958 (9th Cir. 1980)). In this regard, verbal acceptance of the terms of collective-bargaining agreement will bind a party. *Capitol-Husting Co. v. NLRB*, 671 F.2d 237, 243 (7th Cir. 1982) (in order to find acceptance of an offer, all that is needed is conduct manifesting intention to agree, to abide and be bound by the terms of an agreement). Such verbal acceptance may take the form of assent to an unsigned document with the intent to sign later. See *New Orleans Stevedoring Co.*, 308 NLRB at 1081; *Kelly's Private Car Service*, 289 NLRB at 39.

The classic "hallmark indication" of a binding contract having been reached is the conclusion of a meeting (or series of meetings) "with handshakes and mutual expressions of satisfaction on the successful outcome of their endeavor." See *Windward Teachers Assn.*, 346 NLRB at 1150–1151 (citations omitted). Conversely, evidence that, throughout the course of negotiations, the parties "stood pat" in their disagreement over at least one substantial and material contract provision will be found to indicate that they never reached a complete agreement. *Intermountain Rural Electric*, 309 NLRB at 1193. Since many cases lack evidence of such recognizable indicia of manifested intent, the Board also affords significant weight to whether, following an alleged "meeting of the minds," the parties behaved as if they had, in fact, successfully entered into a new, binding contract. See *Windward Teachers Assn.*, supra. It is also appropriate to evaluate the parties' conduct against the backdrop of their prior negotiations. *IBEW Local 938*, 200 NLRB 850 (1972), enfd. 492 F.2d 1240 (4th Cir. 1974).

2. The General Counsel failed to establish a "meeting of the minds."

Based on the application of the above principles, I find that the General Counsel has fallen short of meeting its burden of proof that the parties had reached a "meeting of the minds" on all

substantive issues regarding premium pay for leads, preceptors and orienteers, and that the April 28 MOU submitted to Respondent for execution accurately incorporates any such agreement.

Initially, the parties' written agreement to discuss the "potential development" of a "Training/Preceptor or Lead Program" within the framework of a joint labor-management advisory committee and the fact that they did so in the absence of Respondent's chief negotiator for the recent contract negotiations strongly suggests that their two April meetings served as brainstorming sessions as opposed to negotiations. Indeed, rather than the "give and take" format associated with striking a bargain between opposing parties, their interactions essentially involved the Union refining the terms of its "ask" on premium pay based on what Moreland indicated Respondent was definitively *un*willing to provide. Put differently, having left the issue out of the settled contract, it is not clear what, if any, consideration the Union even had to "bargain" with in order to convince Respondent to raise wages for certain work already being performed by Unit employees.

That the parties had not, as of April 28, agreed to all substantive terms regarding the new pay premiums is evidenced by the fact that their last meeting ended in a manner similar to their first—rather than handshakes and an agreed-upon implementation date for the new pay rates, they simply agreed that Wedekind would revise the Union's proposal to reflect Moreland's expressed concerns (this time, her opposition to permanent lead and preceptor positions), and would additionally "collapse" the concepts of orienteer and preceptor pay. While the Union's April 28 MOU arguably accomplished these goals, the credible record evidence demonstrates that it did not address the "elephant in the room": whether an employee could earn lead pay along with one of the other new premiums.

While the potential for such "stacking" was discussed and language added to clarify that other, established premium pay (i.e., overtime and double-time) could be earned on top of the new premiums, the issue of simultaneously earning more than one of the new pay premiums (for example, lead pay plus orienteer pay) was never resolved. Moreover, the evidence establishes that Respondent had expressed at the table that it would be opposed to such a practice. The ability to earn multiple premiums in one shift is certainly a substantial, material and basic contract term. That the parties had not reached a full agreement is evidenced not only by the absence of the tell-tale, congratulations that would be expected to accompany such an event, as well as the rather conspicuously absent discussion of an implementation date for the new pay rates.

Moreover, following the parties' April 12 meeting, the Union did not behave as if it had, in fact, successfully entered into a new, binding memorandum of agreement. There is no evidence that the Union made any effort to broadcast to its members its success in negotiating pay premiums on their behalf. When, two weeks later, Wedekind emailed Moreland what she claimed was a final document, it contained no signature on behalf of the Union and her cover email made no reference to having it executed on Respondent's behalf (instead stating, "Here is that MOU for your review"). When Respondent did not respond, she accused Moreland not of refusing to reduce their deal to writing but rather of delaying in giving her a "status" update and an "answer" on the MOU.

Based on the above, I find that there had been no meeting of minds on this issue and, absent such, no complete agreement reached on the new pay premiums. See *Intermountain Rural Electric Assn.*, supra; *Sunrise Nursing Home*, 325 NLRB 380, 389 (1998). Consequently, I find that Respondent did not violate the Act when it refused to execute the March 28 agreement.

For the reasons set forth above, the allegation that Respondent violated Section 8(a)(5) of the Act by failing and refusing to execute a complete written agreement reached with the Union is dismissed.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization with the meaning of Section 2(5) of the Act.

3. Respondent did not violate the Act as alleged.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[12]

ORDER

The complaint is dismissed in its entirety.

Dated: Washington, D.C. February 27, 2025

Mara-Louise Anzalone
Administrative Law Judge

[12] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.