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Echo Transportation and Amalgamated Transit Union, Local 1338. Case 16–CA–259171

March 24, 2022

DECISION AND ORDER

BY CHAIRMAN MCFERRAN AND MEMBERS KAPLAN
AND RING

On September 13, 2021, Administrative Law Judge Charles J. Muhl issued the attached decision. The General Counsel and the Charging Party Union each filed exceptions and supporting briefs, the Respondent filed answering briefs, and the General Counsel filed a reply 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 briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

Dated, Washington, D.C. March 24, 2022

Lauren McFerran, Chairman

Marvin E. Kaplan, Member

John F. Ring, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

¹ The General Counsel and the Charging Party have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

¹ On April 15, 2021, the General Counsel, through the Regional Director for Region 16 of the National Labor Relations Board (the Board), issued a complaint against the Respondent in Case 16–CA–259171. The complaint was premised upon an unfair labor practice charge filed by the Union on April 13, 2020. On April 29, 2021, the Respondent filed an answer to the complaint, denying the substantive allegations. In its answer, the Respondent admitted that the Board has jurisdiction in this

Robin Harvey, Esq. and *Bryan Dooley, Esq.*, for the General Counsel.

Robert G. Chadwick, Jr., Esq. and *Robin Foret, Esq.* (*Seltzer Chadwick Soeffe & Ladik, PLLC*), of Plano, Texas, for the Respondent.

David K. Watsky, Esq. (*Lyon, Gorsky & Gilbert, LLP*), of Dallas, Texas, for the Charging Party.

DECISION

CHARLES J. MUHL, Administrative Law Judge. The issue in this case is whether Respondent Echo Transportation and Charging Party Amalgamated Transit Union, Local 1338 reached an initial collective-bargaining agreement covering certain of the company's bus operators. The General Counsel's complaint alleges that the parties did so on February 4, 2020; the Union requested, on the same date, that the Respondent sign a written contract reflecting the agreement; and the Respondent thereafter refused to execute it. The complaint alleges the Respondent's conduct violates Section 8(a)(5) and (1) of the National Labor Relations Act.

I conclude that the parties did not have a meeting of the minds on a substantive and material term of the agreement: whether wage increases for employees would be retroactive to the back dated start of the contract or effective upon the date the parties executed the contract. In the absence of a mutual agreement on this material term, the Respondent's refusal to execute the agreement was lawful. Furthermore, even if the parties did agree to prospective wage increases, the agreement which the Union requested the Respondent sign contained provisions making the wage increases retroactive instead. Because the document did not reflect the meeting of the minds assertedly reached by the parties, the Respondent's refusal to execute it did not violate Section 8(a)(5) and (1).

ALLEGED UNFAIR LABOR PRACTICES

On July 15, 2021, I heard this case via videoconferencing. On August 19, 2021, the General Counsel, the Respondent, and the Charging Party filed posthearing briefs, which I have read and considered. On the entire record, I make the following findings of fact and conclusions of law.¹

FINDINGS OF FACT²

Echo Transportation (the Respondent) provides passenger transportation pursuant to a contract with Dallas Area Rapid Transit (DART). On October 18, 2018, the Board certified

case, it is a Sec. 2(2), (6), and (7) employer, and the Union is a Sec. 2(5) labor organization.

² In order to aid review, I have included citations to the record in my findings of fact. The citations are not necessarily exclusive or exhaustive. In assessing witnesses' credibility, I have considered their demeanors, the context of the testimony, the quality of their recollections, testimonial consistency, the presence or absence of corroboration, the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences that may be drawn from the record as a whole. See *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), *enfd.* sub nom., 56 Fed. Appx. 516 (D.C. Cir. 2003). Where needed, I discuss specific credibility resolutions in my findings of fact.

Amalgamated Transit Union, Local 1338 (the Union or ATU Local 1338) as the exclusive collective-bargaining representative of a unit of the company's employees. The unit includes full-time and regular part-time bus operators who provide service on DART bus routes at the University of Texas at Dallas (UTD) and Southern Methodist University (SMU).

During bargaining for an initial contract, the Respondent's lead negotiator was Attorney Robert Chadwick. Its bargaining team included John Ferrari, the CEO and president of Echo Transportation. The Union's lead negotiator was Ken Kirk, a vice president of the International Amalgamated Transit Union. Kenneth Day, the president and business agent of ATU Local 1338, also was on the Union's bargaining team.³

A. The November 21 and December 13, 2019 Bargaining Sessions

During bargaining for an initial contract, the Respondent and the Union met six times in person. Their final two in-person bargaining sessions were held on November 21 and December 13, 2019. Day's bargaining notes for the second to last session state that the Union provided a proposal on wages to the Respondent. Following the parties' discussions, the Respondent was "to provide best and final" at the next session. At the last session, the Respondent passed out a contract draft entitled "Interim Tentative Agreement." Day's notes stated "Last, Best, Final" at the top and that the company passed out a "tentative agreement." The proposal was 16 pages long and contained 27 articles. Contract provisions included wages, health insurance, paid time off, discipline, grievance and arbitration, union security and dues checkoff, work schedules, and management rights. The Respondent's wage proposal in Article 23 called for operators to earn an hourly wage based upon the amount of time that had passed since the dates the company entered into contracts with SMU and UTD. The starting date of the UTD contract was October 1, 2016, and the starting date for the SMU contract was June 26, 2013. Operators would earn \$15 per hour from 0 to 2 ½ years after the starting date; \$15.50 per hour from 2 ½ to 3 years; \$16 per hour from 3 to 5 years; and \$17 per hour for anything greater than 5 years.⁴ The Respondent also proposed, and the parties discussed, that the company would not pay for employees' physicals required by the U.S. Department of Transportation (DOT). The parties also conferred about operators' pre-tripping job duties and the Union requested additional information on that topic. In the Respondent's proposal in Article 27 concerning the duration of the agreement, the term of the

contract as well as its start and end dates were left blank. The parties did not discuss that article at the last session. Near the end of the meeting, the union representatives advised the Respondent's negotiating team that they would take the proposed agreement to their membership for a ratification vote.⁵

B. The E-Mail Communications Between Chadwick and Day from January 7 to February 4, 2020, Concerning Contract Terms

After the December 13, 2019 bargaining session, all of the communication between Chadwick and Day concerning the collective-bargaining agreement was through email.

At a meeting on January 5, 2020, unit employees ratified the contract.⁶ They also raised to Day the following questions: would wage increases be retroactive (retro pay); what would be the term of the agreement; what tasks were drivers required to perform during their pre-trip inspections of buses; was the company currently paying for DOT physicals; and when would the bonus to employees, included in the Respondent's contract with DART, be paid. On January 7, Day told Chadwick that, after discussions with the members, they were still in need of "clarifications and responses" on the above issues, each of which he listed in his email.⁷

In a January 13 response, Chadwick proposed a contract term of 3 years, back dated to start on January 1, 2019, and run to December 31, 2021. For retro pay date, Chadwick wrote "N/A."⁸ On pre-inspection, Chadwick said the Respondent still was reviewing procedures based upon input from the last bargaining session and would respond to the Union later. On DOT physicals, Chadwick stated the Respondent was not paying for operators' physicals and would not agree to do so. On employee bonuses, Chadwick wrote that the Respondent currently was processing payments on the first payroll date after receipt of money from DART, unless the time period was too short for normal processing. In that case, Chadwick stated, the payment was made on the next payroll date. Chadwick concluded by saying "all positions taken by Echo are subject to negotiation."⁹

On January 15, Day replied. He said the Union only was interested in a 2-year contract from January 1, 2019 to December 31, 2020. He also said the Union was requesting pre-trip information and retro pay. On DOT physicals, Day stated: "Needs Further Discussions." Day concluded by telling Chadwick that the Union did not want the discussions dragged out much longer.

description of the Respondent's proposal makes clear. If the issue needed to be resolved and a credibility determination made, I would find Day and Chadwick each assigned the proposal their preferred title, with the Union calling it a best and final and the Respondent an interim tentative agreement. I also would credit Chadwick's testimony regarding his explanation of the title, given Day's lack of recall.

⁶ All dates hereinafter are in 2020 unless otherwise specified.

⁷ Tr. 24–25; GC Exh. 5, p. 38.

⁸ Chadwick testified that he wrote "N/A" to mean "not applicable." (Tr. 81.) In this context, "N/A" objectively means either "not applicable" or "not available." *Merriam-Webster Dictionary*, MERRIAM-WEBSTER.COM, <https://www.merriam-webster.com/dictionary/Na> (last visited September 7, 2021).

⁹ GC Exh. 5, p. 37.

³ Tr. 18–19, 74–75.

⁴ Although the record evidence does not specifically establish that these wage rates were increases, all parties treat them as such.

⁵ GC Exhs. 2–4; Tr. 19–24, 131. Day and Chadwick provided conflicting testimony concerning whether the Respondent's proposal was a last, best, and final offer or a tentative agreement. Day did not recall any specific discussions concerning why the document was titled "Interim Tentative Agreement," but testified that Chadwick said at the meeting that it was the company's best and final offer. (Tr. 58.) In contrast, Chadwick testified that he did not tell Day the proposal was the best and final version but instead explained that it was titled "Interim Tentative Agreement" because the parties still had issues that were not discussed. (Tr. 77.) I find the title of the agreement irrelevant. Whatever the draft is titled, it contained a complete collective-bargaining agreement, as the

He asked the Respondent to immediately send available dates if another meeting was required.¹⁰

On January 21, Chadwick answered. He stated the Respondent was “fine” with a 2-year contract and a term of January 1, 2019 to December 31, 2020. He said the Respondent would provide the pre-trip information shortly. On retro pay, Chadwick stated that the company’s position “was previously set forth in my January 13, 2020 email” (when he wrote “N/A”) and that the Respondent had not received any information leading it to reconsider its position. He responded the same way with respect to the issue of who would pay for DOT physicals. In conclusion, he reiterated that all the positions taken by the Respondent were subject to negotiation.¹¹

Day replied on January 23, telling Chadwick that retro pay had been included in a prior union proposal.¹² He also said that the Union’s position on pre-trip was what the law required of a driver. He asked Chadwick to review the proposal and then discuss with Day so that they could put the contract discussions behind them. On January 28, Chadwick answered, telling Day he was not sure he understood Day’s reference to “retro.” He also asked Day what law he was referring to regarding pre-trip. Day responded on that same date. He told Chadwick that “retro” was in reference to retro pay, but added: “However in the interest in trying to resolve this I am open to discussing maybe a signing bonus?” On pre-trip, Day said he was referring to DOT regulations. On January 31, Chadwick replied, telling Day that the Respondent was not willing to discuss retro pay or a signing bonus. He added that the company disagreed with Day’s interpretation of DOT regulations. Chadwick closed by asking Day: “Is there any[thing] further you need from us?”¹³

On February 4, Day wrote to Chadwick: “Without forfeiting any of our rights or positions ATU will be sending the signed agreement for signature from [an] Echo representative.”¹⁴

C. The E-Mail Communications Between Chadwick and Day from February 5 to March 17 Concerning the Execution of the Contract

On February 5, Chadwick asked Day to “[p]lease forward the signed agreement to my office so that I may review.” Thereafter on that same date, Day asked Chadwick to send Day a clean copy of the agreement with the start and end dates filled in on the

signature page. On February 10, Day reiterated that request to Chadwick, but the very next day, Day asked Chadwick if the Respondent and the Union could meet in person to review the agreement and simultaneously sign it. Day changed course after Kirk, the international union’s vice president, advised him to do so to ensure that they signed a contract to which they had agreed. They ultimately scheduled such a meeting for February 14.¹⁵

At some time during the week of February 10–14, Chadwick drafted a revised collective-bargaining agreement. He made only two changes to the agreement. First, Chadwick changed the document’s title from “Interim Tentative Agreement” to “Agreement.” Second, he altered the duration provision in Article 27 to read:

This Agreement shall be in full force and effect as of the 1st day of January 2019, to and including the 31st day of December 2020, provided, however, that Articles 6, 11 and 23 shall only be in force and effect prospectively upon the execution of this Agreement by the Company and the Union. This Agreement may be extended beyond this duration only by mutual written agreement of the parties.

Article 6 addressed union security and dues checkoff. Article 11 dealt with employees’ accrual of paid time off from work. Article 23 set forth employees’ wages. Chadwick drafted this revision in preparation for the February 14 meeting to reflect the Respondent’s position that wage increases and the other items would be prospective from the date the contract was executed. Prior to February 14, Chadwick provided the draft agreement to Ferrari. However, he did not provide it to Day at the same time, because he was awaiting authorization from Ferrari to do so. Chadwick expected to provide the proposal to the Union at the February 14 in-person meeting.¹⁶

On the morning of February 14, Ferrari advised Chadwick that he would be unable to travel to Dallas (where Chadwick and Day were located) from Houston (where Ferrari worked) that day and needed to reschedule the meeting. Ferrari also said he wanted to review the revised agreement one more time before the signing meeting. Chadwick then notified Day that Ferrari could not make their scheduled meeting that day “to sign the Agreement on behalf of Echo.” Chadwick said he would reach out to Day the following week to reschedule. From February 25 to March

¹⁰ GC Exh. 5, pp. 36–37.

¹¹ GC Exh. 5, pp. 35–36.

¹² Day identified the proposal as union no. 6. The record does not establish what this proposal was, but Day’s notes of the November 20, 2019 bargaining session state “Parties T/A Union #6.” (GC Exh. 2, p. 2.)

¹³ GC Exh. 5, p. 33–35.

¹⁴ GC Exh. 5, p. 33. Day testified that he wrote “Without forfeiting any of our rights or positions” because of the parties’ disagreement over drivers’ pre-trip inspection tasks and the Respondent’s obligation to comply with DOT regulations regarding pre-trip inspections. (Tr. 32.) Chadwick testified that he did not understand what Day meant by the language and did not know whether the Union had agreed to no retro pay. (Tr. 84.) Ferrari also stated he did not understand the language Day used. (Tr. 120–121.) As will be discussed fully below, these subjective inclinations concerning the meaning of Day’s statement are not relevant to resolving the legal issue presented by this case.

¹⁵ R. Exh. 5, GC Exh. 5, pp. 29–32; Tr. 34.

¹⁶ R. Exh. 6. I credit Chadwick’s testimony concerning why he drafted the revised duration provision and why he did not provide that provision to the Union after he drafted it. (Tr. 88–89, 105.) Chadwick’s demeanor when providing the testimony was assured and trustworthy. Moreover, Ferrari corroborated the testimony in part when he confirmed that he wished to review the revised agreement prior to the meeting with the Union. (Tr. 122–123.)

The General Counsel and the Union argue that Chadwick prepared the revised duration provision not as a proposal, but to reflect the parties’ agreement on the duration provision as well as the agreement that employees would not receive retro pay. Chadwick’s revised language defeats this argument. Not only did Chadwick write that wage increases would be prospective only, but also that union dues payments and paid time off accrual would be treated the same. However, Chadwick and Day had not discussed the latter two topics at all in their email negotiations, so the language could not reflect an agreement reached by the parties. Rather, it reflected the Respondent’s bargaining positions.

12, the two exchanged numerous emails trying to schedule a date for the meeting. At one point, Chadwick told Day that Ferrari was available on March 19 and Day ultimately told Chadwick he was available on that date.¹⁷

Having not received a response from Chadwick thereafter, Day asked Chadwick again on March 17 about the proposed March 19 meeting date. Also on March 17, Ferrari told Chadwick he would not be coming to Dallas for the meeting that week due to coronavirus and the lock down of the country. He further noted that the Respondent had shut down 95 percent of the company and was operating on a skeleton crew. Chadwick passed along the information to Day and told him the contract signing had to be postponed as a result.¹⁸

D. The Union Signs and the Respondent Refuses to Sign the December 13, 2019 Interim Tentative Agreement

On March 20, the Union's attorney, David Watsky, sent Chadwick a letter demanding that the Respondent sign the "already ratified" collective-bargaining agreement. Watsky included a copy of the December 13, 2019 "Interim Tentative Agreement" (ITA). The copy was signed by Day on March 19 and included the start and end dates of January 1, 2019 to December 31, 2020, which Day hand wrote into the duration clause.¹⁹

On March 24, Chadwick sent a response letter to Watsky. In it, he began by saying that the Respondent was "fully prepared to finalize the collective-bargaining agreement" through electronic communications with the Union. He noted the company's acquiescence to the Union's desire for an in-person meeting to finalize the contract. Chadwick then described the impact that the coronavirus was having on the Respondent and his own law firm, concluding that the company's cancellation of the March 19 meeting was unsurprising and due to safety concerns. He further stated the Respondent "remains agreeable" to the Union's request for a face-to-face meeting to finalize the contract. In response to Watsky's demand that the Respondent sign the ITA, Chadwick said only that the demand "showed a lack of respect for the extensive bargaining that has taken [place] since that date, including the mandatory subject of retro pay." The remainder of Chadwick's letter set forth disagreements over the factual history of bargaining, as well as disdain for the tenor of Watsky's March 20 letter. He attached a "Timeline of Events" to the letter setting forth his take on the bargaining history. Chadwick concluded

the letter by saying the Respondent was "receptive to a return to good faith discussions regarding the path forward." However, he refused to sign the ITA which Day had executed and Watsky had sent to Chadwick.²⁰

E. The Respondent's Response to the Union's Unfair Labor Practice Charge

On April 13, the Union filed an unfair labor practice charge with the Board in this case, alleging in relevant part that the Respondent had refused to bargain in good faith with the Union. At the time, the charge did not allege a refusal to execute the ITA.

On May 1, Chadwick sent another letter to Watsky in response to the charge filing. In the "Background" section of the letter, Chadwick described in detail the "drastic" measures that the Respondent had to take in response to the coronavirus pandemic. After doing so, he stated that "what may have been economically feasible for the company before the crisis is no longer the case." With respect to collective bargaining, Chadwick stated that negotiations on the contract continued past December 13 into February 2020. He also said that the Respondent did not refuse to bargain by refraining from sending a revised contract proposal which ignored the realities of the pandemic. Chadwick then proposed that the Respondent and the Union continue negotiations via videoconference. He also attached a revised contract proposal which he said was a "crisis proposal" and acknowledged that it was materially different from the proposals the parties discussed between December 13, 2019 and February 2020. In particular, the proposed wage rates now were lower. Finally, Chadwick noted that he also sent his letter to the Board agent handling the investigation of the Union's unfair labor practice charge.²¹

Analysis

Did the Respondent Reach Complete Agreement with the Union on a Contract and Thereafter Unlawfully Refuse to Execute it?

The General Counsel's complaint alleges that, on February 4, 2020, the Respondent and the Union reached a complete agreement on terms and conditions of employment for unit employees to be incorporated in a collective-bargaining agreement. The complaint further alleges that, since that date, the Union has requested that the Respondent execute a written contract containing that agreement. Finally, the complaint alleges that, since February 4, 2020, and specifically on May 1, 2020, the

Respondent was refusing to execute the agreement Watsky sent him on March 20, he instead offered a revised contract which he acknowledged was materially different than the prior proposal. Offering the new proposal effectively amounted to a rejection of the Union's March 20 request that the Respondent sign the attached contract, as argued by counsel for the General Counsel at the hearing. (Tr. 50.) Finally, because Chadwick carbon copied the Board agent on the letter and set forth the Respondent's position in response to the charge allegations, the letter effectively constitutes a position statement of the Respondent with admissions of a party opponent. See, e.g., *Raley's*, 348 NLRB 382, 501-502 (2006); *United Technologies Corp.*, 310 NLRB 1126, 1127 fn. 1 (1993), enf. mem. 29 F.3d 621 (2d Cir. 1994). Because the Respondent denied the General Counsel's complaint allegation that it refused to execute an agreement via the May 1, 2020 letter, any statements in the position statement which conflict with that denial are admissions against interest. Accordingly, Chadwick's May 1 letter is received into evidence.

¹⁷ GC Exh. 5, pp. 24-28; R. Exhs. 7, 9 (p. 1).

¹⁸ GC Exh. 5, p. 23; R. Exh. 10.

¹⁹ GC Exh. 7.

²⁰ GC Exh. 8.

²¹ GC Exh. 9. At the hearing, I sustained the Respondent's relevancy objection to the admission of Chadwick's May 1, 2020 letter to Watsky. Having fully considered the matter now, I reverse my initial ruling and admit GC Exh. 9 into the record. The General Counsel's complaint alleges that the Respondent refused to execute an agreed-upon collective-bargaining agreement on both February 4 and May 1, 2020. In initially sustaining the objection, I relied upon the lack of any discussion in the document concerning the refusal-to-execute allegation. However, the reason the letter did not include that discussion was due to the Union's charge, at that time, only containing a general refusal-to-bargain allegation, not a refusal-to-execute allegation. The Union included the latter allegation in a first amended charge that was not filed until April 12, 2021. Moreover, although Chadwick did not directly state that the

Respondent failed and refused to execute the agreement in violation of Section 8(a)(5) and (1) of the National Labor Relations Act (the Act). The General Counsel's theory is that the parties' agreement consisted of the ITA; a 2-year contract term beginning January 1, 2019 to December 31, 2020; and wage increases which only would be paid prospectively.

Section 8(d) of the Act, which addresses the obligation to bargain collectively and in good faith, requires "the execution of a written contract incorporating any agreement reached if requested by either party." Thus, if an employer and union reach an agreement, a party's failure, upon request, to execute a contract embodying the agreed on terms constitutes an unlawful refusal to bargain. *H.J. Heinz Co. v. NLRB*, 311 U.S. 514, 525–526 (1941). However, if a party has not assented to an agreement, the Board has no authority to order the party to execute the agreement. *H. K. Porter Co. v. NLRB*, 397 U.S. 99 (1970).

A collective-bargaining agreement is formed only after a "meeting of the minds" on all substantive issues and material terms of the contract. *Sunrise Nursing Home*, 325 NLRB 380, 389 (1998); *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." *Intermountain Rural Electric Assn.*, supra at 1192; *Teamsters Local 287 (Reed & Graham)*, 272 NLRB 348, 351 (1984). A "meeting of the minds" is determined "not by the parties' subjective inclinations, but by their intent as objectively manifested in what they said to each other." *MK-Ferguson Co.*, 296 NLRB 776, 776 fn. 2 (1989). 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 1076, 1081 (1992) (citing *NLRB v. Electra-Food Machinery*, 621 F.2d 956 (9th Cir. 1980)), enfd. 997 F.2d 881 (5th Cir. 1993). The question simply is whether the parties intended to form a contract. *Ibid.*

To summarize the facts here, the Respondent provided the ITA to the Union for consideration at their December 13, 2019 bargaining session. The ITA was a complete collective-bargaining agreement containing numerous substantive terms. The only incomplete provision was duration, because it was missing the contract length, start date, and end date. At the session, Day informed Chadwick he would take the proposal to a ratification vote. The members then ratified the contract. Thereafter, the Respondent and the Union engaged in further negotiations via emails between Day and Chadwick from January 7 to 31. Those negotiations were initiated by the Union to address substantive issues which its members had raised during the ratification vote meeting.²² During the email negotiations, Day and Chadwick agreed that the term of the contract would be 2 years and run

retroactively from January 1, 2019 to December 31, 2020. However, the Respondent steadfastly refused the Union's proposal for wage increases to be retroactive. Chadwick first responded "N/A," subsequently reiterated that response, and finally confirmed explicitly that the company was "not willing" to discuss retro pay. That was where negotiations stood as of January 31.²³

The General Counsel argues that the parties reached a meeting of the minds on all substantive terms of a contract, including retro pay, when, on February 4, Day wrote to Chadwick: "*Without forfeiting any of our rights or positions, ATU will be sending the signed agreement for signature from an Echo representative.*" (Emphasis added.) The General Counsel further contends that the agreement is reflected by the Respondent's ITA sent to Chadwick on March 20, which Day signed after writing in the agreed-upon term, start date, and end date. In contrast, the Respondent argues that the parties never reached a meeting of the minds on retro pay, a material term, and thus no contract was formed.

I conclude the Respondent lawfully refused to execute the agreement the Union requested it sign. Arriving at that conclusion begins with determining whether Day's February 4 statement constituted acceptance of the Respondent's position that wage increases would not be retroactive. I find that it does not. Admittedly, a party's assent to an unsigned document with the intent of signing the document later is all that is needed to find an acceptance of an offer. See, e.g., *New Orleans Stevedoring Co.*, 308 NLRB at 1081; *Kelly's Private Car Service*, 289 NLRB 30, 39 (1988), enfd. sub nom. 919 F.2d 839 (2d Cir. 1990).²⁴ Such conduct manifests an intention to agree and to abide and be bound by the terms of the agreement. *Capitol-Hustling Co. v. NLRB*, 671 F.2d 237, 243 (7th Cir. 1982). Day's statement indicated he would be signing the ITA, thereby assenting to the agreement. However, Day's inclusion of the prepositional phrase "without forfeiting any of our rights or positions" makes the intent of his statement objectively indeterminable with respect to retro pay. In particular, "positions" could refer to the Union's position on what pre-trip duties were required of drivers by DOT regulations. But it also could mean the Union's bargaining positions on all outstanding issues, including retro pay. If the latter, Day's last stated position was that retro pay should be included in the contract. Not forfeiting that position would amount to a rejection, not acceptance, of prospective wage increases. The statement lacks the clarity of those the Board has found sufficient to demonstrate an agreement. See, e.g., *Polycon Industries, Inc.*, 363 NLRB 294, 300 (2015) (parties reached agreement on last outstanding issue when employer's counsel stated he was "fine" with union's proposed union security language); *New Orleans Stevedoring Co.*, supra at 1082 (employer's bargaining representative agreed to proposed contract when he told union representative it "looked okay to him");

²² Although Day labeled those efforts as seeking contract "clarifications," the issues raised included the term of the agreement and whether employees would receive retroactive wage increases. These are material terms which the parties had to reach agreement on for a contract to be formed. *Sheridan Manor Nursing Home, Inc.*, 329 NLRB 476, 478 (1999); *Lincoln Hills Nursing Home, Inc.*, 257 NLRB 1145, 1153 (1981).

²³ As to the other outstanding issues, the Respondent rejected the Union's proposal that the company pay for the DOT physicals of

employees. The two sides also disagreed concerning what pre-trip duties the DOT regulations required of drivers and never resolved that issue. Finally, Chadwick informed Day when the DART bonuses would be paid to employees.

²⁴ Although the cited cases dealt with verbal acceptance of an offer, the same principle obviously applies to email communication as well.

Lemon Tree, 231 NLRB 1168, 1173 (1977) (parties reached agreement on a contract where union representative stated “Well, I think that wraps it up” and employer representative responded “Yes, I guess it does.”). Even here, Chadwick agreed to the Union’s proposed contract length and start and end dates by telling Day he was “fine” with them. In contrast, Day did not say he was fine with no retro pay and his actual statement does not objectively convey that intent. Being unable to determine Day’s intent means that Day’s statement did not result in a meeting of the minds on retro pay, a material term. It is well settled that mutual agreement on all material terms is an essential element of a binding collective-bargaining agreement. *Sheridan Manor Nursing Home, Inc.*, supra. Without agreement on retro pay, no contract was formed.²⁵

The remaining question is whether the ITA itself, which Day signed with the agreed-upon contract term and start and end dates, reflected an agreement that pay increases would be prospective only. I conclude that it does not, because the ITA actually reflects the exact opposite. The ITA’s duration clause stated the contract “shall be in full force and effect” as of its start and end dates. Chadwick and Day agreed in their email negotiations to a retroactive January 1, 2019 start date. The written contract otherwise contained no express or implied terms that the wage provision would be effective on the execution date of the contract. Thus, the only possible interpretation of the wage and duration provisions, taken together, is that the wages set forth in the agreement would take effect retroactively as of the January 1, 2019 start date. The Respondent had in no uncertain terms rejected that approach. That is exactly why Chadwick prepared a revised draft of the duration provision—to account for the Respondent’s position that no retroactive wage increases would be given. When a document submitted by a party does not reflect a meeting of the minds assertedly reached by the parties, the refusal to execute such document is lawful. *Shaw’s Supermarkets, Inc.*, 337 NLRB 499, 499 fn. 2, 505 (2002). Here, the Union demanded the Respondent execute the ITA with the agreed-upon back dated start date. The ITA failed to reflect the asserted meeting of the minds that wage increases would not be retroactive.

In advocating for finding a violation, the General Counsel and the Union rely heavily on the facts that the Respondent did not seek clarification from Day regarding what his February 4 statement meant or raise any further questions about substantive contract provisions. Although accurate, I conclude these facts do not alter the outcome. Almost immediately after Day sent his alleged acceptance on February 4, Chadwick asked him to forward the signed agreement to Chadwick’s office “so that [he] may review,” i.e., to examine the agreement again.²⁶ Shortly thereafter, Day himself asked that the parties hold an in-person meeting to “review and exchange signatures simultaneously.” Then Chadwick prepared a revised duration provision which specifically stated wage increases would be prospective from the

date of the contract’s execution. Although he did not send the revised proposal to the Union, no need existed for him to do so. The parties already had agreed to meet to review and sign the agreement. In the next 6 weeks, Day and Chadwick tried numerous times to schedule and hold the meeting. They were unable to do so due to Ferrari’s unavailability and ultimately the coronavirus pandemic. Before a meeting took place, the Union signed the ITA and demanded the Respondent execute it. In Chadwick’s March 24 response, he stated the Respondent remain prepared to meet in person to “finalize” the agreement, i.e., to put the agreement in final form and give it final approval.²⁷ The Union chose to file an unfair labor practice charge instead. Given these events, the Respondent’s failure to seek clarification regarding what Day’s February 4 statement meant and to raise any substantive concerns about the contract provisions is understandable. Those concerns were to be addressed in the in-person meeting to review and finalize the contract.

The General Counsel also argues that, to reflect the parties’ meeting of the minds on retro pay not being included in the contract, only a small mistake in drafting would need to be corrected. Parties are not relieved of an obligation to execute an agreed-on contract by the need for minor changes or alterations in language. *Kelly’s Private Car Service*, 289 NLRB at 40. Again, I have concluded that the parties did not have a meeting of the minds that wage increases only would be prospective. Even if they did, though, the change cannot be said to be minor. The executed contract requires employees to receive retroactive wage increases to January 1, 2019; the parties’ claimed meeting of the minds does not require those increases. Certainly, no employee objectively would view the elimination of a wage increase for nearly 15 months of a contract’s 24-month term as a minor one. This was a serious difference, the correction of which does not constitute a minor alteration. See *Waxie Sanitary Supply*, 337 NLRB 303, 310–311 (2001); *The Henry Bierce Co.*, 307 NLRB 622, 628–629 (1992). Moreover, neither Day nor Watsky ever told Chadwick that the Union was willing to make changes to the contract language to reflect an agreement to forgo retro pay. See *Fashion Furniture Mfg.*, 279 NLRB 705, 706 (1986) (citing *Ace Machine Co.*, 249 NLRB 623, 637 (1980)).

For all these reasons, I conclude that the Respondent’s refusal to sign the collective-bargaining agreement that the Union presented to it did not violate the Act.

CONCLUSIONS OF LAW

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

The Charging Party, Amalgamated Transit Union, Local 1338, is a labor organization within the meaning of Section 2(5) of the Act.

²⁵ The General Counsel contends that, when Day sent the February 4 statement, he had a full understanding that the contract would not include retroactive pay. Day also testified that he included the phrase “without forfeiting our rights or positions” in reference to the dispute over what pre-trip duties DOT regulations required of employees. However, again, these subjective inclinations are irrelevant to the formation of a meeting of the minds.

²⁶ *Merriam-Webster Dictionary*, MERRIAM-WEBSTER.COM, <https://www.merriam-webster.com/dictionary/review> (last visited September 7, 2021).

²⁷ *Merriam-Webster Dictionary*, MERRIAM-WEBSTER.COM, <https://www.merriam-webster.com/dictionary/finalize> (last visited September 7, 2021).

The Respondent did not violate Section 8(a)(5) and (1) in any of the manners alleged in the complaint.

On these findings of fact and conclusions of law and on the

entire record, I issue the following recommended²⁸

ORDER

The complaint is dismissed.

²⁸ 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.