

IN RE ARBITRATION BETWEEN:

IBEW #292

and

FMS CORPORATION

DECISION AND AWARD OF ARBITRATOR

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October 17, 2011

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FMS Corporation.

DECISION AND AWARD OF ARBITRATOR
Wage opener grievance

APPEARANCES:

FOR THE UNION:

Brendan Cummins, Miler, O'Brien and Cummins,
Peter Lindahl, Financial Secretary and Business Rep.

FOR THE EMPLOYER:

Greg Peters, Seaton, Peters and Revnew
Marie Bronson, HR Director

PRELIMINARY STATEMENT

The hearing in the matter was held on September 12, 2011 at 7300 Metro Blvd. Edina, MN. The parties presented oral and documentary evidence at that time and submitted post-hearing Briefs on September 29, 2011 at which point the record was closed.

CONTRACTUAL JURISDICTION

The parties are signatories to a collective bargaining agreement dated January 1, 2010 through December 31, 2011. The grievance procedure is contained at Article IV. The parties stipulated that there were no procedural arbitrability issues and that the matter was properly before the arbitrator.

ISSUES

The Union stated the issues as follows:

1. Does Section 8.10 of the contract require that any agreed-upon wage change for Year 2 of the contract must be "effective January 1, 2011"?
2. If so, did the Employer violate Section 8.10 of the contract by refusing to implement the agreed-upon 2% wage increase on the contractually required effective date of January 1, 2011?
3. If not, did the Employer violate Section 8.10 of the contract by refusing to implement the agreed-upon 2% wage increase upon the date of ratification, March 8, 2011?
4. If the arbitrator finds a contract violation, what is the appropriate remedy?

The Employer stated the issues as follows:

1. During the recent wage opener, did the Parties reach an agreement on all terms with respect to 2011 wages?
2. If so, did FMS fail to implement the Parties' agreement?
3. If so, what is the appropriate remedy?

The issues as determined by the arbitrator are as follows:

1. Does Section 8.10 require that any agreed-upon wage change for Year 2 of the contract must be “effective January 1, 2011”?
2. Was the contract ratified effective March 8, 2011 and did the Parties reach an agreement on all terms with respect to 2011 wages?
3. What shall the remedy be for any contractual violation found on the facts presented on this record?

RELEVANT CONTRACT PROVISIONS

ARTICLE I, SECTION 1.2 TERMINATION

Either party desiring to change or terminate this Agreement must notify the other in writing at least sixty (60) days prior to December 31, 2011, or any anniversary date.

ARTICLE IV SECTION 4.1 GRIEVANCES

All differences disputes and grievances that may arise between the Union and the Employer relative to the interpretation or the adherence to the terms of this Agreement shall be taken up as follows: ***

ARTICLE IV SECTION 4.4

All differences as hereinbefore referred to, which are not satisfactorily disposed of through the established channels of grievance procedure, shall be referred to either party to arbitration for settlement. *** The decision of the arbitrator shall be final and binding on all parties and shall be limited to the interpretation of, or adherence to, this contract.

ARTICLE VIII, SECTION 8.10 WAGES RATES – JOB CLASSIFICATIONS

The wage rate to be paid under the terms of this Agreement to employees in each occupational classification shall be at least those appearing in Schedule A. A wage freeze effective January 1, 2010 and a wage opener effective January 1, 2011.

UNION’S POSITION

The Union took the position that the terms of Section 8.10 required that the effective date of any wage adjustment pursuant to the wage opener language found in that provision was January 1, 2011. Further, if the arbitrator finds that the wage opener language does not compel the Employer to make retroactive payments to January 1, 2011, the parties ratified and agreed to the wage increase effective March 8, 2011 and the Employer must be compelled to pay the agreed upon 2% wage increase from that date forward. In support of this position the Union made the following contentions:

1. The Union characterized the Employer's position here as a "heads I win, tails you lose" proposition effectively resulting in a bad faith bargaining by compelling the Union to agree to waive a future grievance in exchange for agreeing to a wage increase.

2. The Union argued most strenuously that the language of Section 8.10 says and means that all wage increases are "effective January 1, 2011." The Union cited the negotiations history of not only this Agreement but also those in the past and asserted that when there has been the term "effective" that has always been interpreted and applied to mean "effective" on the date set forth directly behind it: here that was January 1, 2011. Accordingly, the clear and unambiguous language calls for any wage increase to be effective on January 1, 2011.

3. The Union noted that the words of a contract must be interpreted to have some meaning. The most reasonable meaning of the word "effective" is that it must mean that the wage changes, if any are effective January 1, 2011, just as the clause reads. While the term wage opener was inserted in this contract it was clear from prior contracts and from the bargaining history of this one that the Union always understood that the increase would be effective January 1, 2011.

4. The Union also noted that the parties specifically changed the start date of the contracts from past years from May 1 to April 30 of each year to January 1 to December 31. This change signaled what the Union termed a clear message about when any changes in the contract, including wage increases, would be effective. Here the parties specifically used "year 1, year 2 and year 3" to designate the years, all running from January 1st to December 31st of each successive year.

5. The sole change from prior years to this Agreement was the substitution of the words "wage increase" to "wage opener." The Union asserted that this change in language did not alter the longstanding understanding and relationship that has traditionally existed between these parties regarding when changes in the contract would take effect.

6. Mr. Lindahl testified that he clearly understood that the wording of Section 8.10 preserved the “effective” date language and that any change in wage rates made pursuant to the wage opener language would take effect on January 1st. Moreover, during negotiations, he specifically told the Employer that “retroactivity was not on the table” meaning that any wage adjustment would be retroactive – there was no doubt of that in the Union’s mind and that this understanding was supported by the clear language of Section 8.10. See, e.g. Union Exhibit 1 at p. 16.

7. The Union gave appropriate notice to the Employer of its intent to open the wage discussions, just as Section 8.10 contemplates, and the parties negotiated the wage increase. The Union made it clear right away that it intended any wage adjustment to be effective and be paid from January 1, 2011. The parties had a robust negotiations and made proposals and counter proposals across the table; the Union’s first proposal was for example a 5% wage increase. The Employer countered with a lower proposal but, significantly, in the Union’s eyes, agreed that the wage increase would be effective January 1, 2011. Even though this proposal was made during December 2010 this proposal fully supported the Union’s understanding and the Union’s proposals that the wage increase once negotiated would go into effect on January 1, 2011.

8. The Union noted that the Employer’s initial position was clear that the wage increase would be effective January 1st and even offered bonuses in the form of cash lump sum payments to employees if the wage issue was ratified prior to January. The Employer’s offers were far too low however and the membership rejected it 57 to 1. It was not until after January 1st that the Employer’s proposals changed and the negotiators indicated it would not be retroactive. The Union further noted that even after the Employer remained firm in its 2% increase the Union still maintained that it would take the position that any wage increase would be effective January 1st per Section 8.10.

9. When the parties met on January 26th the Union made it clear that while it would allow the membership to vote on the Employer's proposal, it would do so with a neutral recommendation. The Union noted that the Union negotiator is not a lawyer and simply brought up the language regarding the effective date being retroactive to January 1st to make it clear that the Union would insist on this as part of any wage agreement. It was not, as the Employer asserted, a waiver of that term once that language was not inserted into the agreement.

10. Finally, after considerable discussion wherein the parties submitted several proposals and counterproposals for a wage increase, the Union continued to advise the Employer of its interpretation of Section 8.10. When the parties met on February 23, 2011 the Union agreed that it would recommend the 2% as long as that was retroactive to January 1st.

11. Significantly, and in a radical change to the Employer's proposals to that point, on March 1st the Employer responded through counsel claiming that its proposal *did* keep Section 8.10 "as written." The Employer withdrew its previous offer and submitted a revised offer of 2% and stated that the language "will remain as written." This outward manifestation by the Employer signaled that it had acceded to the Union's demands that the wage increase was effective January 1, 2011.

12. Moreover, the fact that the Employer insisted on a no retroactivity clause can only mean that even it understood that Section 8.10 meant that any wage increase would be effective January 1, 2011; otherwise it would not have proposed that. Once the Employer conceded that Section 8.10 would "remain as written" the signal was clear – the Employer had agreed to the Union's demands.

13. The Employer's insistence later that this meant no retroactivity simply assumed they were correct in their interpretation of the language. In addition, the Union was legitimately puzzled by the Employer's position since it proposed both the "as written" language and the "no retroactivity" language in its proposal since they are mutually exclusive of one another in this context. At that point the Union felt quite certain that it had gotten what it had been asking for all along and that it had a legitimate grievance if the Employer persisted in its position regarding retroactivity.

14. The Union argued most aggressively that the concession by the Employer that Section 8.10 would remain “as written,” in the context of what the Union was asserting all along, was clearly interpreted as an agreement to the Union’s demands. Accordingly, the bargaining history showed that the Employer agreed to the Union’s interpretation of Section 8.10 during bargaining and is now seeking to renege on that and trying to gain through grievance arbitration what it could not through negotiation. The Union argued that this principle is axiomatic in labor relations.

15. The Union further asserted that even if there was some latent disagreement over the meaning of the phrase “as written” in light of the language of article 8.10; and over the meaning of the term wage opener effective January 1, 2011, that was a proper subject for arbitration later. The Union argued too that the Employer did not condition ratification on the waiver of its grievance rights until after the ratification vote by the Union on March 8, 2011. That was too little too late - the vote had already been taken and the contract had been ratified with the Union preserving its right to grieve the meaning of Section 8.10.

16. The Union further asserted quite strenuously that the Employer may not condition ratification of the agreement on the waiver of a future right to grieve a disputed portion of the labor agreement. Such would be bad faith bargaining at the very least.

17. The Union also asserted that the Union membership was in fact given accurate information about the offer and was told that the Employer had offered wage increases effective March 8, 2011 and prospectively but that the Union would seek to grieve the January 1st effective date issue. The Union argued that this was the Union’s right under the grievance procedure, which was never a disputed part of the agreement and that a Union may always grieve a matter under the labor agreement that is the subject of a dispute between the parties. Indeed, the argument goes, that is exactly what arbitration is for.

18. After the Employer reneged on its agreement to even make the wage increases effective upon the date of ratification, i.e. March 8th, the Union filed ULP charges with the Board. The Employer filed charges as well and both charges were eventually either dismissed or withdrawn. The Union argued though that the so-called “findings” by the Board agent are of no binding effect here and do no impact the decision. Moreover, the Board took no evidence, and did not hear from any witnesses regarding the bargaining history or the discussion surrounding them. Accordingly any findings by the Board are of no force and effect here. Only the arbitrator is empowered to interpret the parties’ agreement.

19. The Union argued in the alternative that the parties reached agreement on all material terms of the CBA on March 8, 2011 when the membership ratified the wage increase of 2%. They were told that this would be effective March 8th on a prospective basis only and that the Union was considering a grievance to try to get retroactivity pay. There were no guarantees nor were there any untruthful statements made to the Union membership as a part of that vote. The Employer must thus abide by the agreement reached just as it would any contract. There was an offer and acceptance of that offer and at that moment a contract; a meeting of the minds on the wage increase at least, was formed. The Union cited several arbitral and legal precedents for the notion that once here has been an agreement on such matters, the fact that there may be disputed portions of the agreement does not negate the formation of a contract. Those matters are explicitly left for arbitration. Moreover, the grievance procedure was always a part of the labor agreement and the parties never discussed waiving part of it as a part of the negotiations for the wage increase.

20. The essence of the Union’s case is thus that the language of Section 8.10 is clear and requires that any wage increase be effective January 1, 2011. Further that the bargaining history supports the claim by the Union that the parties agreed to leave Section 8.10 “as written” and that this concession by the Employer demonstrated an agreement to make the pay retroactive “effective January 2, 2011,” just as it was written.

21. Finally, even if the arbitrator is persuaded that Section 8.10 does not grant retroactivity, the clear evidence shows that the wage increase was ratified March 8, 2011 and that the facts support the claim that there was a contract reached on that question as of that time. The agreed on 2% wage increase must therefore be effective March 8, 2011 and ongoing on a prospective basis.

The Union seeks an award ordering payment of the wage increase effective January 1, 2011 or, in the alternative, as of March 8, 2011.

EMPLOYER'S POSITION:

The Employer took the position that there was no contract violation here and that there was in fact no agreement on the wage opener issue since there was no “meeting of the minds” between the parties on the wage increase. In support of this the Employer made the following contentions:

1. The Employer noted that the wage freeze was in effect until December 31, 2010. The parties commenced wage negotiations for 2011 pursuant to the 60-day notice given by the Union but it was clear that any wage changes could not be effective until at least January 1, 2011 at the very earliest. The parties were unable to successfully come to terms on the 2011 wages despite several attempts and an offer of a bonus to the employees if they were able to do so by December 31st.

2. The Employer noted too that the negotiator from the Union drafted the current Section 8.10 and that Mr. Lindahl was not there for the negotiations leading up to the current labor agreement; he was only there for the wage opener piece. The Employer asserted that this language is clear and requires only that the wages for 2011 can be renegotiated as of January 1, 2011 but that there is nothing in the language nor in the negotiations here requiring that any change be effective that date.

3. The Employer further asserted most strenuously that the language from prior contracts was indeed changed from “wage increase” to “wage opener” and, as in any collective bargaining agreement; a change in language strongly implies a change in meaning. Here that change in meaning was exactly as the Employer suggests and requires only that the wage for 2011 can be *renegotiated* – nothing more nothing less.

4. The Employer argued that this language is clear and unambiguous but that even if there is a latent ambiguity, it must be construed against the Union since the Union drafted the language. Moreover, the Employer relied on standard dictionary definitions of the term “reopener” and noted that the words “wage opener” clearly refers to the reopening of a contract on the subject of wages. A “reopener” is defined as “an act or instance of reopening negotiations, as on the provisions of a contract.” Similarly, a “reopening clause” is defined as “a clause in a collective bargaining agreement providing for reconsideration of an issue during the life of the agreement.” These terms are well understood in labor relations and the Union did nothing to provide any evidence that these parties intended something different from what is normally and customarily understood by these terms. Indeed the Employer noted that the Union’s main negotiator for the original language was not called at this hearing and that Mr. Lindahl has in fact never negotiated any such agreements until this one.

5. The Employer also noted that while it offered a signing bonus of sorts if the contract was ratified prior to December 31, 2010, once that date came and went, no such bonus was offered again. The Employer asserted that it never agreed to retroactivity for the effective date of the contract and was absolutely clear with the Union that retroactivity of the wage increase was not agreeable. The Employer pointed to multiple messages it gave the Union both in writing and verbally at the negotiation table that could not have clearer – no retroactivity of the wage increase. Further, the Employer made it clear to the Union that the Union’s interpretation of 8.10 was simply wrong and that it gave only the right to reopen the wages for 2011 but was never drafted nor intended to automatically make any agreed upon wage increase effective January 1, 2011. The effective date would be and was a matter of negotiation between the parties – the Employer asserted that retroactivity to January 1st should not be assumed and continued to hold to that position right up until today.

6. To make the Employer's position even clearer to the Union prior to a proposed February 1st vote, FMS' counsel sent an e-mail that contained the following text, "a wage increase of 2% effective upon ratification. This increase shall only apply to work after ratification." See Joint Exhibit 21 and Company Exhibit 1. In response to that the Union said there would be no vote; thus making it clear that the Union was well aware of the Employer's position and its insistence on no retroactivity.

7. The Employer noted that it was only at this time for the first time that the Union asserted that the original language of Article 8.10 required retroactivity. This had never been raised until late February 2011 and was obviously inserted by the Union's counsel. This had never been part of the Union's position prior to this time. In fact the parties had been negotiating over this very subject as if the language of 8.10 did not require retroactivity. This fact should be taken into consideration by the arbitrator as a clear indication that the Union raised this last minute position to somehow counter what it certainly knew from the Employer's position throughout the entire negotiations – i.e. that there would be no retroactivity of the wage increase.

8. The Employer immediately educated the Union and its counsel of the fallacy of its position. The Employer then sent the following counter to the Union: its same proposal:

Section 8.10 will remain as written and the minimum wage rates set forth in Appendix B will be increased 2% effective upon ratification. *This increase will only apply to work performed after the ratification vote.* See Joint Exhibit 25. (Emphasis added).

9. The Employer asserted most strenuously that the term "wage opener" would be effective on January 1, 2011, but the wage rates in Exhibit B would prospectively be increased by 2% but that there was nothing different about the proposal. The fact that the Union clung to its unfounded assumption that wage opener language of Section 8.10 automatically meant that the wage increase would be effective January 1st did not change the language nor did it alter the Employer's clear statement in its last offer that the increase would only apply to work performed after the ratification vote, which had not happened as of late February 2011.

10. When the Union finally decided to allow the membership to vote on this on March 8, 2011, the Employer found out that what the Union leadership was telling its members was wrong. It learned that the Union was telling its members that the ratification would be effective at least as of March 8th but that the Union would attempt to grieve retroactivity. This was absolutely not what was on the table and did not accurately reflect the Employer's offer.

11. Somewhat shocked by this obvious attempt to twist the offer, the Employer immediately sent a message indicating that it would not agree to retroactivity as follows:

Consistent with my March 1 letter, my client is willing to implement a 2% raise for work performed on or after March 8, 2011. However, your letter appears to also claim retroactive pay back to January 1, 2011. You and your client have been repeatedly informed that any pay increase is prospective only (after ratification) and retroactive pay is not (and has not been) on the table. Please confirm that the Union does not believe the bargaining unit members are owed retroactive pay to January 1, 2011. At that point, my client will implement the pay increases for work on or after March 8, 2001 and we can move on.

On the other hand, if the Union claims retroactive pay to January 1, 2011 is owed, it intentionally presented a materially incorrect offer to its members and is attempting to enforce the same. Thus, you and your client's conduct is, among other things, bad faith and since the membership did not ratify a valid offer, the Parties do not have a deal. If you want to schedule another bargaining session, please contact me. See Joint Exhibit 30.

12. The Employer took the position that since the Union membership did not vote on the actual offer made by the Employer there was no "meeting of the minds" and no formation of a contract on the wage increase issue. Accordingly, the Employer takes the position and argued quite strenuously that there was no obligation to honor the ratification vote since that vote was based on inaccurate representations to the membership.

13. The Employer pointed to the conclusions reached by the NLRB after their investigation of this entire matter. Both parties filed charges but the NLRB did not find grounds to proceed with any charges against the Employer and noted that the Union simply made inaccurate assumptions about the Employer's offer. The NLRB further completely supported the Employer's position with respect to the interpretation of the wage opener language of Section 8.10 and noted that

The contract reopener language, the contract merely says the reopener is effective Jan. 1, not that any agreements reached have to be retroactive or effective on Jan. 1. The reopener being effective Jan. 1 simply means that the contract expired as to wages on

Jan. 1, 2011, and all Section 8(d) requirements thereafter apply (duty to bargain in good faith and to notify appropriate agencies of intent to strike, etc.), including the caveat that neither party is required to agree to any proposal (and retroactivity is a mandatory subject). See Company exhibit 3.

14. The Employer noted that the NLRB concluded that the Union took a “self styled ratification vote” designed to get the 2% increase and that it essentially took the risk that the Employer would go along with it. It didn’t and without contractual agreement on all terms there is no contract and no wage increase now at all.

15. The essence of the Employer’s case is that the Union is wrong about the interpretation of the term “wage opener” in Section 8.10 and that it lacked adequate proof or evidence in support of that position. The Employer further asserted that there is no jurisdiction to enforce an agreement that was not reached. The Employer noted that it offered to sit down and continue to negotiate the wage issue after the Union’s ill-advised vote on March 8th but that the Union has never responded to that. It continued to grieve the effective date issue, which was clearly something they were told would result in a no agreement on the wage issue.

The Employer seeks an award denying the grievance in its entirety.

MEMORANDUM AND DISCUSSION

FACTUAL BACKGROUND

FMS is a powder coated metal parts manufacturer based in Bloomington, Minnesota. FMS and the Union have a long history and bargaining relationship. There was no dispute that the language of Section 8.10 was inserted into the contract for the 2010 -2011 contract and that this language was different from the language that had appeared on that section from prior years. Prior to this contract the language had read “wage increases” effective on a certain date, whereas this language included only “wage opener” language.

There was no dispute that due to the bad economy the Employer pushed for and got a wage freeze for 2010 and that is reflected in the language of Section 8.10. The parties agreed to a wage opener “effective January 1, 2011” and that too is reflected in the language. The initial question is whether that term means that the wage opener was effective on January 1st or whether any wage increase negotiated between the parties is effective on that date irrespective of when that agreement is reached. On this record it is abundantly clear that the Employer’s interpretation is supported by the clear language and the bargaining history that ensued over this language.

WAS THE WAGE OPENER LANGUAGE INTENDED TO RENDER A WAGE INCREASE EFFECTIVE JANUARY 1, 2011?

While there was a considerable difference of opinion regarding the renaming of the words in Section 8.10 the underlying facts were for the most part straightforward and undisputed. The parties negotiated the language of Section 8.10 as part of the 2010-2011 contract. There was a wage freeze in place for all of 2010 and on that point there was no dispute at all. The Union was required to open wage discussions pursuant to Section 8.10 at least 60 days prior to January 1, 2011 and it did so. On that point there as no dispute either.

The question here is whether the term “effective January 1, 2011” means only that the wage discussion can be reopened at that point or whether a wage increase must be effective on that date regardless of when the parties come to terms on that. There was evidence to suggest that the parties have a history of going past the expiration dates of their contracts and that in the past they have negotiated language making the wage increases effective on a date certain.

The Union argued that the sole difference between prior contracts and the current language was the “minor” change in the wording from “wage increase” to “wage opener” and that since the increases were always effective on a date certain so too should the notion of a wage opener.

The obvious fallacy in this argument is that the language changed and with it the understanding of what it meant changed with it. It is axiomatic that language in a labor agreement must mean something. Here it was clear that the parties negotiated a wage freeze for 2010 with no firm agreement as to any wage increase after that. This was especially true in this context since there was a wage freeze negotiated for 2010 and no firm date set forth in the agreement for a wage increase; only a firm date for a wage opener. What they did negotiate was a wage opener to allow further bargaining during the life of the contract for a wage increase, if any, on January 1, 2011.

Second, there was some merit to the Employer's argument that the commonly understood meaning of wage opener language is just as the Employer suggested. It means that there is the opportunity to reopen wage discussions commencing on a certain date. It is generally understood in the labor relations community that a wage opener is just that – an opener to discuss wages. It is not an agreement for a wage increase nor is it a commitment to implement such an increase unless there is some more specific language setting forth those agreements. Here of course there is no such language and the terminology says only that there will be a wage opener. There was no further agreement or understanding about when that wage change will be effective. That is for negotiation between the parties. Accordingly, the terminology of Section 8.10 supports the Employer's interpretation and meant only that the parties could recommence negotiations over the 2011 wages.

DID THE PARTIES NEGOTIATE FOR AN EFFECTIVE DATE OF JANUARY 1, 2011 AS THE EFFECTIVE DATE FOR THE WAGE INCREASE?

There remains the question of whether there was some agreement during the bargaining for the wage increase that demonstrated an intent to make the wage increase effective January 1, 2011. On this record there was not. The evidence on this record showed the contrary.

The evidence showed that the Employer offered a “signing bonus” if the matter was concluded prior to January 1st and indeed there were several of these that went along with the negotiations. The Union asserted that this shows that the Employer understood that the wage increase would be effective on January 1st but the evidence did not bear that out. The Employer certainly wanted the wage discussions concluded prior to that date but getting bonuses were always couched in terms of a settlement before January 1st and indeed once that date came and went those bonuses were taken off the table. On this record, there was insufficient evidence to demonstrate that the parties intended January 1st to be the effective date based on the offer of those bonuses and the subsequent withdrawal of them.

After January 1, 2011 the parties continued to negotiate for the wage increase. Several offers went back and forth over the course of approximately two months. The details of these were not strictly germane to this analysis but suffice it to say that the Union brought up the notion of retroactivity and was immediately met with a clear and unmistakable response from the Employer that retroactivity would not be part of the Employer’s offers and that any negotiated wage increase would be effective now upon ratification and on a prospective basis. The record showed that the Employer could not have been clearer about this.

Further, at one point the Union negotiators suggested adding language that would have made the effective date of the increase January 1, 2011 but this language did not find its way into the agreement. It is again axiomatic that the general rule for language that was proposed and rejected in this manner is that that language was not included and contractual intent must therefore have been something different. Here the evidence demonstrates that the parties did not negotiate for a wage increase effective January 1, 2011 but for a different date and that the Employer’s clear offer was for that to be upon ratification.

The Union argued that when the Employer changed its offer late in the game to a statement that Section 8.10 would “remain as written” that signaled an intent to acceded to the Union's demands and that the effective date would be January 1, 2011. The evidence was undisputed that there was a ratification vote by the Union on March 8, 2011 and that the wage increase proposal passed and was ratified by the Union.¹

Two things militated against this argument by the Union. First it would have been a quantum leap to assume that the language implied an effective date of January 1, 2011, given the history of this negotiation. It was also a risk for the Union to have assumed that since the language of Section 8.10 never said nor meant that there was an automatic effective date. As noted above, while the Employer’s offer did change in its wording somewhat it was a misreading of the language and of the negotiations to assume that it meant a complete reversal of the Employer’s position.

Second and most importantly, the very next sentence of the Employer’s explicit offer was to the contrary of what the Union was assuming. It clearly says that the effective date will be upon ratification and delineates that the wage increase would be prospective only. The evidence showed too that the Union understood that the offer was not for an effective date of January 1st but was rather for an effective date of March 8, 2011. as discussed more below in terms of whether the wage increase was ratified, it was clear that the Union communicated that the wage increase would be effective “at least” on March 8, 2011, or words to that effect and that the Union would attempt to grieve an earlier effective date.

In short, there was nothing in these negotiations that would have led to the reasonable belief that the effective date was anything other than March 8, 2011.

¹ See below for the discussion of whether this was a valid vote, but the vote itself was on March 8, 2011 and resulted in a valid ratification of the wage increase negotiated by the parties.

WAS THERE A MEETING OF THE MINDS REGARDING THE 2% WAGE INCREASE AS VOTED ON BY THE UNION MEMBERSHIP ON MACH 8, 2011?

Next there was the issue of whether there is a “meeting of the minds” at all and the effect of the ratification vote taken March 8, 2011. As noted above, the Union finally did vote on the Employer’s offer on March 8, 2011 and the measure passed. The issue here is whether the Union misrepresented the offer in such a way as to negate the effect of the vote. The Employer argued that the Union misstated the offer to the membership in a material enough way that there could be no agreement on the terms of that offer. Specifically that the Union leadership gave the members the impression that there was a valid grievance to make the effective date January 1st based on the language of Section 8.10. On this record, it was clear that the Union leadership did not misstate the offer so as to invalidate or negate the effect of the ratification vote and that there was in fact a “meeting of the minds” and a valid ratification of the offer on March 8, 2011 and that the wage increase must be paid as of that date.

In the common law, unless there is a meeting of the minds, there is no contract and the parties go their separate ways. See, *Simpson on Contracts*, 2nd Edition West Publishing, 1965. See also, Restatement of Contracts, Section 22. This is sometimes referred to as mutual assent and requires that parties manifest to each other mutual assent or agreement to the same bargain at the same time. If they do not then under common law no contract is created. The notion being that unless there is an agreement on everything there is no agreement on anything.

That is typically not what happens in labor agreements however. Elkouri has perhaps the best pronouncement on this issue as follows: “when the parties attach conflicting meanings to an essential term of their putative contract, is there then no “meeting of the minds” so that the contract is not enforceable against an objecting party? Hardly. The voidability of a presumed contract arises only in the limited circumstances where neither party knew, or should have known, of the meaning placed on the term by the other party, or where both parties were aware of the divergence of meanings and assumed the risk that the matter would not come to issue.” Elkouri and Elkouri, *How Arbitration Works*, 6th Ed. at p. 428.

Elkouri further cites *Colfax Envelope v Graphic Communications Union, Local 458-3M*, 20 F. 3d 750, 145 LRRM 2974 (7th Cir. 1994), that “when parties agree to even patently ambiguous terms, they submit to have any dispute resolved by interpretation. That is what courts and arbitrators are *for* in contract cases – to resolve interpretative questions founded on ambiguity.” *Id* at p. 429-30.

Thus, in a case where the Union insisted that casual employees be covered for weekend bonuses and where the parties signed the agreement with the weekend bonus for casual employees in it, that clause was part of the contract and enforceable by arbitration. The Employer had argued that it never intended that it be there and that there was no mutual assent and that there was no contract since there was no mutual assent. The arbitrator ruled that there was but it was clear that the parties did intend to have that included and to have an arbitrator decide the matter. See, *SEIU Local #113 and St. Francis Regional Medical Center*, FMCS case # 060209-53378-7, (Jacobs 2006).

Here it was clear that even though the Employer thought the Union leadership was taking something different than what had been proposed to the membership the facts did not bear that out. The Union leadership told its members the truth – it told them that the Employer was taking the position that the wage increase would be effective prospectively from March 8, 2011. That was true.

The Union further told the membership that it would consider grieving the question of retroactivity under Section 8.10. There was no evidence of any sort of guarantee nor of any statement made that was untruthful or designed to dupe the membership into voting for something the Employer had not offered. The Union discussed a possible grievance; nothing more and nothing less. On these facts that discussion did nothing to obviate or negate the clear import of the ratification vote.

What the Employer is in effect trying to do is to back out of the ratification by asserting that the Union membership did not understand what they were voting on. The Union understood exactly what it was voting on – that the agreement would be effective at least upon ratification and that they might try to grieve the question of retroactivity per the language of Section 8.10 and the bargaining history here.

The Union was incorrect in the interpretation of Section 8.10 but that did not change the effect of the ratification vote. As discussed above, the Union's interpretation did not find sufficient support either in the wording or the history but that served only to defeat the claim for retroactivity to January 1, 2011. It did not serve to defeat the claim that there was in fact a valid labor agreement as of the ratification vote taken March 8, 2011 and that the wage increases must be paid retroactively now to that date.

What the Employer was apparently trying to do was to use the negotiations to ward off a future grievance. That it may not do. First, that was never a condition of the negotiations. In fact the Employer's position insisting that the Union drop its proposed grievance was not made until after the vote. At that point it was too late – there was a contract with respect to the wage increase in all material respects. It was a 2% increase and it was from at least March 8, 2011 and ongoing.

Second, frankly, such a position may well come perilously close to bad faith bargaining in that a Union always has the right to grieve a disputed portion of the contract – here that was the language of Section 8.10.² Whether they are correct or not, as discussed above, is immaterial to that question. The Union can bring a grievance over any portion of the labor agreement. It could certainly have done so here by ratifying the agreement and grieving it later, just as it did.

² Certainly, the arbitrator has no power or authority to render an opinion about an unfair labor practice. That of course is the province of the NLRB. Similarly, the Board typically does not render decisions regarding contract interpretation. See e.g. *McDonnell Douglas Corp.*, 324 NLRB 1202, 1204 (1997); *Collyer Insulated Wire*, 192 NLRB 837 (1971). Here while the Board rendered some “conclusions” these were not based on a record hearing and appeared to have been rendered on some conjecture. See also, *IBEW 1395 v. NLRB*, 797 F.2d 1027, 1030 (D.C. Cir. 1986) (holding that the NLRB is not entitled to deference on questions of contract interpretation).

Further, there was considerable merit to the Union's assertion, the decision of a regional office of the NLRB to dismiss an unfair labor practice charge does not constitute an adjudication on the merits: It is well settled that the dismissal of a prior charge by a regional director, even where identical conduct is involved, does not constitute an adjudication on the merits, and no res judicata effect can be given to these actions. *Kelly's Private Car Service*, 289 NLRB 30, 39 (1988) *enf'd* 919 F.2d 839 (2d Cir. 1990); See also *Ball Corp.*, 322 NLRB 948, 951 (1997); *B.A.F. Inc.*, 302 NLRB 188, 193 (1991) *enf'd* 953 F.2d 1384 (6th Cir. 1992). The statements made in dismissing the ULP charges were of little evidentiary value here and were given little weight either way. This decision was based on the record and the evidence adduced at this hearing. Here there was no evidence of misrepresentation as charged by the Employer and the statements regarding the Union's motivations were simply unfounded on this record.

Whether that grievance has merit or not is an entirely separate question and one that does not negate the effect of a ratification vote. There was a valid offer and acceptance of the offer and once there has been acceptance there is a valid binding agreement; just as there would be in any contract under common law.

While it may be to state the obvious, the grievance procedure was also already part of the labor agreement. On that part of the contract there was no dispute. The grievance procedure exists for this very sort of dispute and there is no question that the parties had that in their agreement. Such a provision can only mean that the parties know that there may be disputes about the very language they just negotiated and that those disputes may be grieved at any time during the life of that contract.

Such an argument strikes at the very heart of labor relations and cannot be awarded here. Further, to say that there was no contract where there may be a latent dispute about a particular part of the labor agreement; whether that dispute comes up immediately after the vote or a year later is not relevant. Such disputes do not obviate the existence of an agreement.

Accordingly while the language of Section 8.10 does not support the claim for retroactivity to January 1, 2011, the clear facts of this case demonstrate a contract that was formed on March 8, 2011 with respect to the wage increases. The Employer is order to pay the agreed upon 2% wage increase to all affected employees from March 8, 2011.

AWARD

The grievance is **SUSTAINED IN PART AND DENIED IN PART**. The Employer shall make retroactive payments based on the ratification of the CBA effective March 8, 2011.

Dated: October 17, 2011

Jeffrey W. Jacobs, arbitrator

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