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YP Midwest Publishing, LLC d/b/a Dex YP and District 4, Communications Workers of America (CWA), AFL-CIO. Case 07-CA-218455

August 26, 2021

DECISION AND ORDER

BY MEMBERS KAPLAN, EMANUEL, AND RING

On June 18, 2020, Administrative Law Judge Melissa M. Olivero issued the attached decision. The General Counsel and the Charging Party Union each filed exceptions and a supporting brief. The Respondent filed a brief in response to each set of exceptions.

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 conclusions² and to adopt the recommended Order dismissing the complaint.

ORDER

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

Dated, Washington, D.C. August 26, 2021

Marvin E. Kaplan, Member

William J. Emanuel, Member

¹ The General Counsel and the Charging Party Union 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), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

² Concluding that the Board's decision in *Apache Powder Co.*, 223 NLRB 191 (1976), was controlling, the judge found the Respondent's drafting error should have been clearly obvious to the Union. We agree.

The parties' understanding, as memorialized in their Memorandum of Understanding (MOA), was that the Respondent would *acknowledge the provision of a 401(k) benefit* in the drafting of the new collective-bargaining agreement. There is nothing ambiguous about that provision. Further, the MOA was silent on what any specific 401(k) benefit to be included in the contract would be, and the parties never reached any agreement in that regard. Accordingly, it should have been obvious to

John F. Ring,

Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Steven E. Carlson, Esq., for the General Counsel.
David L. Zwisler, Esq., for the Respondent.
Matthew R. Harris, for the Charging Party.

DECISION

STATEMENT OF THE CASE

MELISSA M. OLIVERO, Administrative Law Judge. This case was tried in Detroit, Michigan, on April 23, 2019. District 4, Communications Workers of America (CWA), AFL-CIO (District 4 or Union or Charging Party), filed the charge in case 07-CA-218455 on April 13, 2018, alleging that since about October 6, 2017, YP Midwest Publishing, LLC, d/b/a Dex YP (Respondent) failed to continue in effect all the terms and conditions of a collective-bargaining agreement by unilaterally changing its contribution formula to employees' 401(k) plans from the amount established pursuant to the agreement. (GC Exh. 1(v).)

The consolidated complaint initially issued in this case on February 28, 2018. (GC Exh. 1(m).) The General Counsel later issued an order further consolidating cases, second consolidated complaint, and notice of hearing (complaint) on June 28, 2018. (GC Exh. 1(x).) The complaint in this matter contained allegations made in charges filed by Charging Parties Local 4103, Communications Workers of America (CWA), AFL-CIO (Local 4103), in cases 07-CA-206794 and 07-CA-206810, Local 4034, Communications Workers of America (CWA), AFL-CIO (Local 4034), in cases 07-CA-207970 and 07-CA-208090, and Local 4100, Communications Workers of America (CWA), AFL-CIO (Local 4100), in cases 07-CA-216815 and 07-CA-216834 against Respondent. (GC Exh. 1(a), (c), (e), (g), (q), (r).) Two of the charges were amended prior to the issuance of the complaint. (GC Exh. 1(i), (k).) After a partial settlement of these matters, the General Counsel issued an order severing cases, approving partial withdrawal request and withdrawing complaint allegations in cases 07-CA-207970 and 07-CA-208090 (Local 4034), and complaint paragraphs 5, 6, and 11 through 15, on

the Union that the inclusion of a specific matching percentage of 5 percent did not reflect the parties' understanding and was a drafting error. Finally, the Respondent's clear rejection of the Union's proposal for a 5 percent match was more than sufficient to have made it obvious to the Union that the inclusion of the 5 percent paragraph in the new collective-bargaining agreement was a drafting error. There was simply no basis for the Union to assume that the Respondent had changed its position on that proposal in the interim.

The Union excepts to the judge's reliance on parol evidence in determining the parties' intent regarding the matching amount rather than simply relying on the text of the agreement. For the reasons set forth in her decision, we agree with the judge that although the parol evidence rule generally prohibits the admission of earlier statements used to vary or contradict the terms of an agreement, it does not "exclude testimony offered to establish that in fact no agreement was reached in the first place." *Apache Powder Co.*, 223 NLRB at 191.

January 23, 2019. (GC Exh. 1(ee).) This left only allegations from cases 07-CA-206794, 07-CA-206810, 07-CA-216815, 07-CA-216834, and 07-CA-218455 and complaint paragraphs 9 (07-CA-206794), 10 (07-CA-206810), 17 (07-CA-216815), 16 (07-CA-216834), and 8 (07-CA-218455) remaining. (GC Exh. 1(a), (c), (i), (q), (r), (v), (ee).)

At the outset of the hearing, the General Counsel, Respondent, and two of the remaining Charging Parties (Locals 4103 and 4100) reached informal settlement agreements. Therefore, the General Counsel withdrew paragraphs 9, 10, 16, and 17 of the complaint and cases 07-CA-206974, 07-CA-206810, 07-CA-216815, and 07-CA-216834. (Tr. 7.) I granted the General Counsel's motion to sever these allegations from the complaint and remanded them to the Regional Director for further action. (Tr. 7-8.) Thus, the only remaining charge in the case is 07-CA-218455 and only complaint paragraphs 8 and 19(b) remain.

Specifically, the General Counsel alleges that the parties' collective-bargaining agreement contains a provision wherein Respondent matches employee contributions to its 401(k) plans at no less than 100 percent for each employee dollar contributed to individual accounts, up to 5 percent maximum contribution. The complaint further alleges that since about October 16, 2017, Respondent failed to continue in effect the terms and conditions of the agreement . . . by unilaterally changing its contribution formula to employees' 401(k) plans from the amount established pursuant to the parties' collective-bargaining agreement. As set forth fully below, I find that the General Counsel has not established that Respondent violated Section 8(a)(5) and (1) of the Act as alleged in the complaint.

The parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. On the entire record, including my own observation of the demeanor of the witnesses,¹ and after carefully considering the briefs filed by the parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

YP Midwest Publishing, LLC, d/b/a Dex YP, a corporation, has been engaged in providing marketing and consulting services, from its facility in Maryland Heights, Missouri, where it annually performs services valued in excess of \$50,000, for various enterprises located in states other than the State of Missouri. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. (GC Exh. 1(bb).)

II. ALLEGED UNFAIR LABOR PRACTICES

A. Respondent's Business and Labor Relations

On June 30, 2017, Dex Media Holdings, Inc., acquired several entities, including YP Holdings, LLC, Print Media, LLC, and yellowpages.com. (Tr. 18, 56, 82.) Following the acquisition,

Dex Media Holdings and YP Midwest Publishing became known as Dex YP. (Tr. 56, 82.) Respondent sells print media, including a telephone directory, and digital media, including online advertising. (Tr. 17.)

Beth Dickson is the Assistant Vice President of Labor Relations for Respondent. (Tr. 55.) Robert Baker is Respondent's Human Resources Business Partner, and, prior to June 30, 2017, his title was Senior Manager, Human Resources. Steve Flagler was previously Respondent's Senior Manager of Labor and Employee Relations. (Tr. 82.) Brian Herman was previously a labor and employment attorney at YP; he left shortly after the company was acquired by Dex. (Tr. 102.) Keith Halpern was previously Respondent's Vice President of Labor and had authority to bind the company in contract negotiations.² (Tr. 83, 114-115.) Respondent admits, and I find, that Robert Baker is a supervisor of Respondent within the meaning of Section 2(11) of the Act and an agent of Respondent within the meaning of Section 2(13) of the Act. (GC Exh. 1(bb).) I further find that Flagler and Halpern, both of whom represented Respondent at the bargaining table, were agents of Respondent within the meaning of Section 2(13) of the Act. (Tr. 82.)

Teri Pluta served as the full-time Administrative Director to the District 4 Vice President from August 2015 until her retirement in 2018. (Tr. 131, 157.) Shannon Kirkland became the Staff Representative for District 4 in August 2016. (Tr. 24.) Pluta began bargaining with Respondent for a collective-bargaining agreement in June 2016, prior to YP's acquisition by Dex, and was eventually replaced by Kirkland. (Tr. 134-135.) Following the acquisition, Respondent assured District 4 that all of its collective-bargaining agreements remained in place and that its obligation to bargain with the Union remained unchanged. (GC Exh. 3; Tr. 18.)

Respondent admits, and I find, that since at least June 30, 2017, the International Union has represented the following appropriate unit of employees as the exclusive collective-bargaining representative:

All Staff Associates I, Staff Associates II, Staff Associates III, Staff Associates IV, Service Representatives, Customer Service Specialists, and Art Technicians employed by Respondent in a work location listed in Exhibit A of the collective bargaining agreement between Respondent and the International Union District 4, which is effective for the period of August 14, 2016 to August 10, 2019, excluding supervisory, confidential, managerial, and professional employees and guards as defined by the Act.

(GC Exh. 1(bb); Tr. 18.) The bargaining unit is represented by a number of different local unions, including those previously involved in this case. (Tr. 134.) District 4, representing employees in Illinois, Indiana, Michigan, Ohio, and Wisconsin, has been the designated servicing representative for a bargaining unit of Respondent's employees. (GC Exh. 1(x), 1(bb); Tr. 18, 24, 132-133.) Respondent admits, and I find, that the International Union

encompass the credible testimony and evidence presented at trial, as well as logical inferences drawn therefrom.

² Halpern, who did not testify at the hearing, was Flagler's supervisor. (Tr. 83.)

¹ Although I have included citations to the record to highlight particular testimony or exhibits, my findings and conclusions are not based solely on those specific record citations, but rather on my review and consideration of the entire record for this case. My findings of fact

and District 4, Communication Workers of America (CWA), AFL–CIO, are labor organizations within the meaning of Section 2(5) of the Act. (GC Exh. 1(bb).)

B. The Retirement Savings Plans

YP Holdings maintained a Retirement Savings Plan program for its employees prior to its acquisition by Dex Media Holdings. (R. Exh. 3.) The plan, effective August 24, 2015, was a defined contribution plan within the meaning of Section 401(k) of the Internal Revenue Code of 1986 (2015 Retirement Savings Plan). (R. Exh. 3, p. 1.) Section 5.2.1 of the 2015 Retirement Savings Plan stated:

Matching Contributions . . . [T]he Employer will contribute to the Trust on behalf of each Participant who elected Basic Deferrals during a payroll period a Matching Contribution determined in accordance with Paragraph (1) or (2) as applicable.

1. Generally. For each pay period, the Employer will contribute to the Trust on behalf of each Participant who elected Basic Deferrals for such pay period, other than an Eligible Bargaining Unit Participant, a Matching Contribution equal to 80% of the Basic Deferrals made on behalf of such Participant for such pay period.

2. Eligible Bargaining Unit Participants. For each pay period, the Employer will contribute to the Trust on behalf of each Eligible Bargaining Unit Participant who elected Basic Deferrals for such pay period a Matching Contribution equal to 67% of the Basic Deferrals made on behalf of such Eligible Bargaining Unit Participant for such pay period.

(R. Exh. 3, p. 27.) The Basic Deferral amount was an amount from 0–6 percent of an employee’s compensation. (R. Exh. 3, p. 24.) For an employee who was not a member of the bargaining unit who contribute 6 percent of his or her compensation, this would have meant a maximum 4.8 percent match ($0.06 \times 0.80 = 0.048$ or 4.8 percent). For an employee who was a member of the bargaining unit, this would have been a maximum 4.02 percent match ($0.06 \times .67 = 0.0402$ or 4.02 percent). (R. Exh. 3.)

In 2016, YP Holdings created a new 401(k) program for its employees (2016 Retirement Savings Plan). (R. Exh. 4.) This plan was effective July 1, 2016, prior to YP Holdings’ acquisition by Dex Media Holdings. Regarding YP Holdings’ matching contributions, the 2016 Retirement Savings Plan Summary Plan Description (SPD) stated:

Company Matching Contributions

When you contribute to the Retirement Savings Plan, YP will match a percentage of your basic contributions once you satisfy the eligibility requirements described below. These contributions are called “company matching contributions.”

Eligibility Requirements for Matching Contributions

You are eligible to receive company matching contributions

immediately if you are a non-union employee. All union employees will be eligible to receive company matching contributions after attaining one year of vesting service . . .

Amount of Matching Contributions

The Company will match 80% of your basic contributions for before-tax, after-tax, and Roth contributions each pay period. This means that you can choose whether your contributions will be deducted from your base pay on a before-tax or after-tax basis. YP does not match any supplementary contributions, including catch-up contributions, that you may make to the Plan.

(R. Exh. 4, p. 12.) Contributions up to 6 percent of an employee’s compensation were considered basic contributions under the 2016 Retirement Savings Plan. (R. Exh. 4, p. 9.) Thus, at the highest level, an employee contributing 6 percent of his or her compensation to this plan would have received an employer match of 4.8 percent ($0.06 \times 0.80 = 0.048$ or 4.8 percent).

There is no evidence that YP Holdings ever provided a 5 percent match of unit employees’ contributions to its 401(k) plan prior to its acquisition by Dex Media Holdings. Furthermore, since the acquisition, there is no evidence that Respondent ever provided a 5 percent match of unit employees’ contributions to its 401(k) plan. (Tr. 63.) According to records submitted by Respondent, the highest match for unit employees by YP Holdings was 4.8 percent in 2017.³ (R. Exh. 5.) YP Holdings’ Retirement Savings Plans were not referenced in any way in the parties’ 2013 contract. (Tr. 171.)

C. Bargaining for 2016 Memorandum of Agreement

The General Counsel called a single witness during his case-in-chief: Shannon Kirkland. Kirkland was not at the bargaining table until the very end of negotiations in 2016. (Tr. 39–41.) On rebuttal, the General Counsel called Teri Pluta. Pluta, along with Greg Spikes, Sean Lockwood, and Danielle Brewer-Collier, represented the Union in bargaining for the Memorandum of Agreement (MOA). (Tr. 90, 157.) Kirkland eventually replaced Pluta. (Tr. 90, 157.) Steve Flagler, senior manager of labor and employee relations, Keith Halpern, vice president of labor, and Robert Baker, senior manager, human resources, represented Respondent in bargaining. (Tr. 83.)

Beginning in June 2016, the parties met several times over a three-month period to negotiate for a collective-bargaining agreement. (R. Exh. 6, 8; Tr. 83, 88.) At the bargaining table, the Union proposed raising the 401(k) match to 6 percent for unit employees. (R. Exh. 1; Tr. 89, 165.) This proposal was rejected. (R. Exh. 6; Tr. 89, 165.) The Union later proposed a 5 percent 401(k) match for unit employee contributions to the 401(k) plan. (R. Exh. 8; Tr. 92, 165.) The 5 percent match was also rejected. (R. Exh. 6; Tr. 93, 167.) Respondent did not agree to a 5 percent match at the bargaining table. (Tr. 177.)

Around September 2016, several important issues remained on the table, including Respondent’s 401(k) program. (Tr. 139.)

³ The General Counsel did not submit any payroll or similar records showing the amount of Respondent’s match of its employees’ contribution to its 401(k) plan.

According to Pluta, she and Halpern had a “sidebar,” during which they discussed the 401(k) plan. (Tr. 139–140.) Pluta said, “we’ll have a deal as long as . . . you have language in the contract that guarantees the 401(k).” (Tr. 140.) Halpern agreed, but did not want to work out the language at that time.⁴ (Tr. 140.)

D. The Parties’ 2016 Memorandum of Agreement and Contract

On September 16, 2016, Respondent and District 4 entered into a Memorandum of Agreement (MOA). (GC Exh. 2; R. Exh. 2.) The MOA was signed and initialed by Pluta on behalf of District 4 and Halpern on behalf of Respondent. (R. Exh. 2.) The 2016 MOA stated:

. . . the parties have met and engaged in good faith bargaining for the purpose of arriving at a successor collective bargaining agreement to the agreement that expired on August 13, 2016. The Union and Employer collectively have reached agreement and the predecessor agreement shall only be revised as specifically set forth herein.

(R. Exh. 2.)

The version of the MOA physically signed and initialed by Pluta and Halpern contains the following language concerning the 401(k) plan:

24. The Company agrees to acknowledge the provision of a 401(k) benefit to bargaining union [sic] employees in the drafting of the collective bargaining agreement.

(R. Exh. 2, p. 20.) The signatures on the MOA are dated September 16, 2016. (R. Exh. 2, p. 1.)

The MOA went into effect after it was ratified by District 4’s membership and Respondent’s Board of Directors. (GC Exh. 2.) Halpern and Patrick Moore drafted a memorandum, dated September 22, 2016, summarizing the terms of the MOA for Respondent’s Board of Directors. (R. Exh. 7.) Flagler and Herman reviewed the memorandum before it was presented to the board. (Tr. 96.) The 401(k) program was not mentioned in the memorandum. (R. Exh. 7.) Flagler testified that if the parties had agreed to a change in the 401(k) program, it would have been mentioned in the memorandum. (Tr. 97.) District 4’s members ratified the MOA in October 2016. (Tr. 26.) The Agreement was to be effective from August 14, 2016, through August 10, 2019. (GC Exh. 2, p. 51.)

On April 10, 2017, Pluta reached out to Brian Herman by way of an email.⁵ (GC Exh. 8.) In her email, Pluta indicated that she had not yet received a copy of the 2016 MOA to proofread. (GC Exh. 8.) She asked Herman to advise her of the status of the agreement. (GC Exh. 8.) Herman replied that he would have something for Pluta by April 21 and thanked her for her patience. (GC Exh. 8.) Herman emailed Pluta a redlined copy of the agreement on April 21, 2017. (GC Exhs. 7 and 8.)

As she had difficulty reading the redlined version of the MOA sent by Herman, Pluta typed her own version of the MOA

without redlining. (GC Exhs. 2; Tr. 107.) Pluta returned her complete version of the MOA to Flagler attached to an email on September 14, 2017. (GC Exhs. 10, 11.) Appendix C to the complete version of the 2016 MOA contained the following language:

The benefits set forth in the YP Midwest Publishing LLC Benefits Outline Summary (“Benefits Summary”) shall remain in effect for bargaining unit employees through December 31, 2016.

. . .

The Company 401K [sic] matching rate for all bargaining unit employees will be no less than 100% for each employee contributed to individual accounts up to 5% maximum contribution. If during the term of the Agreement, the Company maximum contribution % is increased for non-represented, non-bargained [sic] employees, the % shall also be increased for bargained employees.

(GC Exh. 2, p. 133.)

This language appeared in both the redlined copy of the MOA sent by Herman to Pluta and the version sent by Pluta to Flagler. (GC Exhs. 2 and 7.)

E. The 2018 Grievance

In October 2017, Kirkland became aware of what he termed a “change” Respondent’s 401(k) program. (Tr. 28.) Kirkland learned of the change through a conversation with Jim Simons, the Vice President of Local 4009, in which Simons informed Kirkland that there were “changes” in Respondent 401(k) program.⁶ (Tr. 28–29.)

On October 19, 2017, Kirkland sent an email to Dickson. (GC Exh. 4.) In his email, Kirkland stated, “it has been brought to the Union’s attention that Dex/YP is currently matching employees’ 401K contributions at 80 percent up to a maximum of 6 percent. Can you confirm the rate Dex/YP is matching employees’ contributions?” (GC Exh. 4.) Dickson responded that same day, stating that Flagler would be reaching out to preview the 2018 401(k) program. (GC Exh. 4.) Kirkland advised Simons to file a grievance, which he did shortly after October 19.⁷ (Tr. 32.)

On October 20, 2017, Flagler sent an email to Pluta and Kirkland. (R. Exh. 9.) Attached to his email was a copy of Respondent’s “Benefit Grid for 2018.” (R. Exh. 9.) This benefit grid indicated that the 401(k) program had a 4.8 percent match for employee contribution. (R. Exh. 9.)

In March 2018, Kirkland received a copy of Respondent’s 2018 version of the 401(k) plan (2018 Retirement Savings Plan). (Tr. 35.) This plan set forth the following calculation for Respondent’s matching of its employees’ contributions. (GC Exh. 5, p. 15.) As set forth more succinctly in the Summary Plan Description (SPD):

The Company will make a matching contribution equal to

⁴ As Halpern did not testify at the hearing, Pluta’s testimony on this point stands uncontroverted.

⁵ Halpern was no longer employed by Respondent at that time. (Tr. 116.)

⁶ Kirkland did not explain with any specificity what he found out or the exact nature of the change.

⁷ The grievance was not presented as evidence at the hearing.

100% of the first 3% of eligible pay you contribute to the Plan, plus 60% of the next 3% of eligible pay you contribute to the Plan.

(GC Exh. 6, p. 5). This formula works out to a 4.8 percent match for employees contributing 6 percent of their compensation to the 401(k) plan $((1.00 \times 0.03) + (0.60 \times 0.03) = (0.03 + 0.018 = 0.048$ or 4.8 percent)). The 2018 Retirement Savings Plan became effective January 1, 2018. (GC Exh. 5 and 6.)

F. The Board Charge and Complaint

The charge relevant here was filed on April 13, 2018. (GC Exh. 1(v).) The attachment to the charge alleged as follows, in relevant part:

On or about January 1, 2018, the Employer unilaterally modified the collective bargaining agreement (“CBA”) by implementing a 401(k) contribution matching structure other than that *specifically negotiated* and memorialized in the CBA.

The CBA was reduced to writing and signed on or about September 16, 2016. The CBA is effective through August 10, 2019.

The applicable provision of the CBA provides, “The Company 401K matching rate for all bargaining unit employees will be no less than 100% for each employee dollar contributed to individual accounts up to 5% maximum contribution. If during the term of the Agreement, the Company maximum contribution % is increased for non-represented, non-bargained employees, the % shall also be increased for bargained employees.”

On or about January 1, 2018, the Employer distributed a plan document [GC Exh. 6] . . .

Upon information and belief, the Employer has implemented the terms of the plan as depicted . . . above.

The Employer implemented the plan depicted . . . above, without notice to the Union and without providing it an opportunity to bargain.

The foregoing constitutes a violation of Sections 8(a)(5) and 8(d) of the Act.

(Emphasis added.) (GC Exh. 1(d).)

The complaint in this case alleges, at Paragraph 8:

(a) The collective bargaining agreement . . . contains a provision wherein Respondent matches employee contributions to 401(k) plans “no less than 100% for each employee dollar contributed to individual accounts up to 5% maximum contribution.”

(b) Since about October 16, 2017, the Respondent failed to continue in effect the terms and conditions of the agreement . . . by unilaterally changing its contribution formula to employees’ 401(k) plans from the amount established pursuant to the parties’ collective bargaining agreement as referenced above . . .

(c) The terms and conditions of employment described above . . . are mandatory subjects for the purposes of collective bargaining.

(d) Respondent engaged in the conduct described above . . . without Charging Party District 4’s consent.

(GC Exh. 1(x).) Later in the complaint, the General Counsel alleges that Respondent has been, “failing and refusing to bargain collectively and in good faith with Charging Party District 4 . . . within the meaning of Section 8(d) of the Act in violation of Section 8(a)(1) and (5) of the Act.” (Id.) The complaint is dated June 28, 2018. (Id.)

DISCUSSION AND ANALYSIS

A. Witness Credibility

A credibility determination may rely on a variety of factors, including the context of the witness’ testimony, the witness’ demeanor, 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. *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.* 56 Fed.Appx. 516 (D.C. Cir. 2003). Credibility findings need not be all-or-nothing propositions—indeed, nothing is more common in all kinds of judicial decisions than to believe some, but not all, of a witness’ testimony. *Daikichi Sushi*, 335 NLRB at 622. Some of my credibility findings are incorporated into the findings of fact set forth above.

I found Kirkland to be a credible witness. He appeared forthright and steady while testifying and his testimony did not waver on cross-examination. However, Kirkland was not at the bargaining table for most of the negotiations for the 2016 MOA. (Tr. 37.) He could not recall the Union’s specific proposals regarding Respondent’s 401(k) match. (Tr. 38.) Additionally, his testimony regarding the changes to Respondent’s 401(k) program was vague. However, on the whole, I found Kirkland’s testimony to be worthy of belief.

I did not find much of Pluta’s testimony credible. Pluta, who was called as a rebuttal witness, was the head of the Union’s bargaining team during negotiations for the 2016 MOA. She also signed the MOA on behalf of the Union and exchanged versions of the MOA with Respondent. She sparred with Respondent’s counsel on cross-examination, gave contradictory testimony, and testified in an equivocal manner.

Pluta gave contradictory testimony. For example, she initially testified that when she received the “redlined” version of the contract from Respondent, it was her, “understanding that employees got [a] 5 percent [match].” (Tr. 148.) On cross-examination, she more forcefully testified that it was her understanding that employees would be getting a 5 percent match. (Tr. 167.) She later admitted that Respondent rejected the 5 percent match at the table. (Tr. 167.) Testimony of other witnesses and Respondent’s bargaining notes support that Respondent never agreed to a 5 percent match of employees’ 401(k) contributions. Pluta herself eventually agreed that Respondent did not agree to a 5 percent match at the bargaining table. (Tr. 177.)

Pluta further quibbled with Respondent’s counsel. On cross-examination she engaged in following exchange:

Q. But there’s a difference between an acknowledgement of [the 401(k)] and a 5 percent match, wouldn’t you agree?

A. Not necessarily. If there’s language in the contract that says

that you will get something, that's a guarantee you'll get something unless the Employer takes it away arbitrarily and we end up in some kind of litigation or something. But to me, if there's language in the contract, it's a guarantee to our members. Just like the general wage increases. If it says you get a two percent wage increase on October 1st, it's a guarantee to our members that we get it.

Q. Can you show me anything where the Company guaranteed to you, during the process of negotiations, that you would get a 5 percent match?

A. I never said that they did.

...

Q. So, they didn't guarantee you a 5 percent match, correct?

A. You said can I show you anything that guaranteed.

Q. So, is the answer yes or no? Can you show me anything that they guarantee a 5 percent match?

A. I cannot show you anything they guaranteed. They said in writing that they guaranteed us a 5 percent match.

(Tr. 168–169.)

This testimony is directly at odds with her testimony that Respondent rejected the 5 percent match at the table.

Specifically, I do not accept Pluta's testimony that Respondent agreed to a 5 percent match. (Tr. 167.) First, this testimony conflicts with her testimony and credible evidence that Respondent rejected the proposed 5 percent match. (R Exh. 6; Tr. 167.) Pluta further contradicted herself by testifying that the 5 percent was "not necessarily" what was agreed to. (Tr. 167.) She finally admitted that Respondent did not agree to a 5 percent match at the table. (Tr. 177.) Given her demeanor and conflicting testimony, I reject Pluta's assertion that Respondent ever agreed to a 5 percent match. Therefore, I credit Pluta's testimony only where it is uncontroverted, is contrary to the Union's interest, or is corroborated by other, more reliable testimony, or by credited evidence.

I found Beth Dickson's testimony credible. She appeared calm and sure while testifying and almost all of her testimony was supported by documentary evidence. However, I reject her testimony that she "got" the 4.8 percent match amount from the 2015 Retirement Savings Plan. (Tr. 68.) As set forth in the 2015 Retirement Savings Plan, bargaining unit employees received only a 4.02 percent match. (R. Exh. 3.) Moreover, the 4.8 percent match amount in the 2018 Retirement Savings Plan echoes the 4.8 percent match amount in the YP Holdings' 2016 Retirement Savings Plan. Despite this minor misstep, I otherwise credit Dickson's testimony, as it is supported by the documentary evidence presented and otherwise uncontroverted.

Finally, I found Steve Flagler's testimony credible. Flagler testified in a candid manner. He admitted difficult points on

cross-examination. For example, he admitted that he "missed" the 5 percent match amount that found its way into the various versions of the MOA exchanged between himself and Pluta. (Tr. 95.) His testimony was also supported by other evidence. His testimony regarding Respondent's rejection of the Union's proposed 5 percent match was corroborated by Baker's bargaining notes and the testimony of other witnesses. Therefore, I have credited Flagler's testimony.

B. Respondent did not Violate the Act as Alleged

The agreement signed by the parties following negotiations states as follows regarding Respondent's 401(k) match:

24. The Company agrees to acknowledge the provision of a 401(k) benefit to bargaining union [sic] employees in the drafting of the collective bargaining agreement.

(R. Exh. 2, p. 20.) This language was ratified by both the Union's membership and Respondent's Board of Directors.

However, the language that found its way into the final version of the MOA stated as follows:

The benefits set forth in the YP Midwest Publishing LLC Benefits Outline Summary ("Benefits Summary") shall remain in effect for bargaining unit employees through December 31, 2016.

...

The Company 401K [sic] matching rate for all bargaining unit employees will be no less than 100% for each employee contributed to individual accounts up to 5% maximum contribution. If during the term of the Agreement, the Company maximum contribution % is increased for non-represented, non-bargained [sic] employees, the % shall also be increased for bargained employees.

(GC Exh. 2, p. 133.) The record evidence conclusively established that a 5 percent match was never agreed to in bargaining. In fact, the Union's bargaining team initially proposed a 6 percent match and later a 5 percent match. Both of these proposals were rejected by Respondent's bargaining team.

During the hearing, the General Counsel maintained a standing objection to parol evidence. The parol evidence rule requires that when the parties have reached an agreement and have expressed it in writing, to which all parties have assented is a complete and accurate integration of that contract, parol or other evidence of antecedent understandings and negotiations will not be admitted for the purpose of varying or contradicting the writing. *Apache Powder Co.*, 223 NLRB 191, 194 (1976). However, the parol evidence rule does not operate to exclude testimony offered to establish that no agreement was reached in the first place.⁸ *Apache Powder Co.*, 223 NLRB at 194; see also, *Service Employees International Local 32B-32J*, 258 NLRB 530, 433 (1981) ("the parol evidence rule does not operate to exclude testimony offered to establish that in fact no agreement was reached

⁸ The Charging Party's citation to the NLRB Division of Judges' Bench Book regarding application of the parol evidence rule is unavailing. As stated on page i of the Bench Book, "It is not a digest of

substantive law. Nor should it be cited as precedent or considered a substitute for issue-specific research." Moreover, I have reviewed the cases cited therein and do not find them controlling in this case.

in the first place.”) The evidence admitted at the hearing in this case established that the parties never agreed to a specific matching amount for employee contributions to Respondent’s 401(k) plan.

In *Apache Powder*, the parties agreed to increase pension multipliers, but did not agree to change a so-called pension break date. 223 NLRB at 191. As in the instant case, the union in *Apache Powder* proposed changing the pension break date, but the proposal was rejected by the employer. *Id.* Thereafter, the parties signed and ratified an agreement, mistakenly containing a changed pension break date. *Id.* The respondent in *Apache Powder* refused to sign a finalized agreement containing the changed pension break date but honored the remaining terms of the agreement. *Id.*

The judge in *Apache Powder*, as affirmed by the Board, cited *Corbin on Contracts* for the proposition that parol evidence may be introduced for the purpose of ascertaining the correct interpretation of an agreement, as well as to establish the nonexistence of an agreement. 223 NLRB 191, 194 fn. 7 (1976), citing 3 *Corbin Contracts* § 573, 580. The Board, affirming the judge’s decision, considered parol evidence to establish that no agreement had been reached on the pension break date. *Id.* The Board further found that rescission was the proper remedy for such an obvious mistake.⁹ *Id.*

The only agreement reached by the parties at the bargaining table regarding the 401(k) benefit was that Respondent would acknowledge its provision to its union-represented employees in the collective bargaining agreement. No agreement was reached regarding the amount of Respondent’s match of employee contributions. The Union twice proposed a specific match percentage and Respondent rejected these proposals. The Union’s witnesses admit this fact. Therefore, I cannot find that there was any meeting of the minds regarding the amount of Respondent’s match of its employees’ 401(k) program contributions. Instead, I find that the parties only agreed to memorialize the existence of Respondent’s 401(k) program in the MOA.

Moreover, evidence regarding prior match amounts shows that Respondent and its predecessor have never matched represented employees’ contributions at 5 percent. Under its 2015 Retirement Savings Plan, Respondent’s predecessor, YP Holdings, matched bargaining unit employee contributions up to 4.02 percent. Under the 2016 Retirement Savings Plan, YP Holdings matched employee contributions up to 4.8 percent. YP Holdings’ 401(k) plan was not mentioned in its collective-bargaining agreement with the Union. As found above, after acquiring YP Holdings, Respondent bargained with the Union and the parties agreed only to memorialize the existence of the 401(k) program in the MOA. Then, in its 2018 Retirement Savings Plan, Respondent again announced that it would match employee contributions to the 401(k) program up to 4.8 percent.

Here, the Union and Respondent reached an agreement merely

⁹ The Board in *Apache Powder* found that the language in the contract was so palpably at odds with the pension provisions of the existing contract as to put the Charging Party on notice of an obvious mistake by the respondent. 233 NLRB at 191. The judge stated, “Whether this situation is viewed, as contended by the General Counsel, as one of unilateral mistake, or as contended by [r]espondent, as one of mutual mistake, there was in my view no agreement.” 233 NLRB at 195.

that the MOA would acknowledge the provision of a 401(k) benefit to employees. No specified amount of employer match was ever established. When an agreement is drafted after ratification, courts have held that the agreement reached at the bargaining table controls, notwithstanding execution of documents that vary from the negotiated agreement. *NLRB v. E-Systems, Inc.*, 103 F.3d 435 (5th Cir. 1997), denying enforcement of 318 NLRB 1009 (1995). Thus, the negotiated agreement that the MOA would contain a memorialization of the existence of Respondent’s 401(k) program controls. Based on the evidence, I draw the logical inference that the Union must have known that Respondent matched its employees’ contributions to the 401(k) plan at less than 5 percent, as its bargaining team proposed increasing the match amount at least twice during bargaining. Thus, I find that Respondent was not bound to follow the language in the contract because does not accurately reflect the agreement of the parties.¹⁰

I find the cases relied upon by the General Counsel and Charging Party in their briefs unpersuasive. For example, the General Counsel and Charging Party rely upon *Kal Kan Foods*, 288 NLRB 590 (1988), for the proposition that when the parties to a contract express their agreement in writing, any other expression made prior to or contemporaneous with the writing is inadmissible. (GC Br., p. 14.) In *Kal Kan Foods*, the judge, as affirmed by the Board, stated that an attempt to orally modify a fully integrated contract will not be permitted under the parol evidence rule and a deviation from those terms will be regarded as a breach of contract. 288 NLRB at 593. However, in *Kal Kan Foods*, there was no evidence that the parties never reached agreement on a specific contract term. Instead, the judge considered the respondent’s argument that the absence of an integration clause (i.e., one which says the contract is the final expression of the bargain) suggested that the contract was not fully integrated. *Id.* In this case, the language contained in the physically signed version of the MOA makes clear it was an integrated agreement. The version of the MOA signed after negotiations by the parties specifically states, “. . . the parties have met and engaged in good-faith bargaining for the purpose of arriving at a successor collective-bargaining agreement to the agreement that expired on August 13, 2016. The Union and Employer collectively have reached agreement and the predecessor agreement shall only be revised as specifically set forth herein.” Despite this statement, the final version of the MOA contains different language regarding Respondent’s 401(k) match amount. Thus, I find that the facts of this case are distinguishable from those in *Kal Kan Foods*.

The General Counsel further cites *Air-Vac Industries*, 259 NLRB 336 (1984), for the proposition that, “in view of meticulous language of supplemental agreement, respondent could not assert that parties intended agreement to be conditioned on the respondent receiving higher contract rates from a third party.” In

¹⁰ The General Counsel submitted a “Track Changes” document purporting to show that Flagler first inserted the language concerning a 5 percent match into the MOA. (GC Exh. 9.) However, I afford the document little weight as it was prepared by the General Counsel with no accompanying testimony as to its reliability. Regardless of who first inserted the language into the MOA, I find that the language clearly misstated the agreement of the parties reached during bargaining.

Air-Vac Industries, the judge, affirmed by the Board, stated that, “The Board has consistently applied [the parol evidence] rule in refusing to permit a party to a collective-bargaining agreement to vary the terms thereof by proving a contemporaneous or prior oral agreement or undertaking.”¹¹ 259 NLRB at 342. In this case, however, there is an actual written and signed agreement (R. Exh. 2) that contradicts the language of the final version of the MOA (GC Exh. 2). In *Apache Powder*, the judge, as affirmed by the Board, found that the parol evidence rule does not operate to exclude evidence that no agreement ever existed. 233 NLRB at 194. The evidence in this case establishes exactly that. Thus, I find *Apache Powder* controlling. 233 NLRB 191 (1976).

The General Counsel also cited *Norris Industries*, 231 NLRB 50 (1977) and *Ebon Services*, 298 NLRB 219 (1990) for the proposition that Respondent should be bound by the written terms of the MOA. (GC Br., p. 22.) I find both cases distinguishable from the instant case. In *Norris Industries*, the Board stated that a party is bound by language it had the opportunity to review even if the matter was never consciously discussed or explored during bargaining sessions. 231 NLRB at 63. Conversely, in the instant case, the issue of the 401(k) match was explored, numerous times, during bargaining sessions. The evidence establishes that the agreement reached by the parties at the bargaining table differs completely from the language in the final version of the MOA. In *Ebon Services*, the Board agreed with the judge that the parties reached a complete meeting of the minds on all substantive terms of a contract when the employer’s representative read over the union’s proposed contract page-by-page and agreed to its terms. 298 NLRB at 223. In *Ebon Services*, the respondent refused to sign the contract because it could not afford the wage provisions it contained. 298 NLRB at 224. However, in this case, both parties signed and ratified the MOA containing language that the final version of the agreement would contain an acknowledgement of the provision of a 401(k) benefit to bargaining unit employees in the drafting of the final agreement. The language contained in the final version of the MOA contains an erroneous statement regarding what the parties agreed to in bargaining. Thus, unlike *Ebon Services*, this case involves a mistake, made by the parties after the initial version of the MOA was both signed and ratified, by the inclusion of language in the final version of the MOA that directly contradicted the agreement reached by the parties. Thus, I find that *Norris Industries* and *Ebon Services* are distinguishable from the instant case.

Moreover, even if the Board or reviewing court should find that parol evidence should have been excluded and the 401(k) match amount contained in the MOA should be enforced, I find that there was no unilateral change or midterm modification. An employer has a contractual duty to adhere to the terms of an agreement as long it remains in force. *PG Publishing Co.*, 368 NLRB No. 41, slip op at 3 (2019), citing *Des Moines Register & Tribune Co.*, 339 NLRB 1035, 1036–1037 (2003), review denied sub nom. *Des Moines Mailers Union, Teamsters Local No. 358 v. NLRB*, 381 F.3d 767 (8th Cir. 2004). An allegation that an employer has violated Section 8(a)(5) by unilaterally changing a term or condition of employment may be defended against on

several grounds, including by denying that it changed a term or condition of employment at all. *MV Transportation, Inc.*, 368 NLRB No. 66, slip op. at 17 (2019).

In the charge filed in this case, the Union alleged that Respondent violated the Act by implementing a 401(k) contribution matching structure other than that *specifically negotiated* and memorialized in the CBA. As found above, Respondent and the Union negotiated no such 401(k) contribution matching structure. In fact, the evidence shows that Respondent specifically rejected a 5 percent match amount.

The allegations in the complaint are phrased differently than in the charge. In the complaint, the General Counsel, who bears the burden of proof, alleged that the collective-bargaining agreement contained a provision wherein Respondent agreed to match employee contributions to its 401(k) plans at no less than 100 percent for each employee dollar contributed to individual accounts up to 5 percent maximum contribution. The complaint goes on to allege that since about October 16, 2017, Respondent failed to continue in effect the terms and conditions of the agreement by unilaterally changing its contribution formula to employees’ 401(k) plans from the amount established pursuant to the parties’ collective-bargaining agreement. The General Counsel alleges that Respondent engaged in this conduct regarding a mandatory subject of collective-bargaining without the Union’s consent. Ultimately, the General Counsel alleged that Respondent failed and refused to bargain collectively and in good faith with Charging Party within the meaning of Section 8(d) of the Act and in violation of Section 8(a)(1) and (5) of the Act.”

The General Counsel did not establish that any “change” occurred with regard to the amount matched by Respondent of employee contributions under the 401(k) plan. In his case-in-chief, the General Counsel adduced evidence that the post-ratification version of the MOA stated that Respondent would match employee contributions up to a maximum of 5 percent, and, that in October 2018 the Union became aware of a “change” in the matching percentage 401(k) plan. The General Counsel’s evidence only established that Respondent did not follow the language in the post-ratification version of the MOA in matching employee contributions. As I have found, however, the language in the post-ratification version of the MOA was not what was agreed to by the parties during bargaining. Even disregarding that finding, the evidence offered by Respondent compels me to find that no change occurred. The testimony and exhibits clearly established that, since 2016, Respondent and its predecessor matched employee contributions to their various retirement savings plans at a maximum of 4.8 percent. Thus, the evidence demonstrated that Respondent maintained the same 4.8 percent 401(k) match rate for employee contributions in its 2018 Retirement Savings Plan announcement as its predecessor had in its 2016 Retirement Savings Plan. There was no evidence that Respondent or its predecessor ever matched employee contributions to their 401(k) plans at 5 percent. Instead, Respondent continued the 4.8 percent match rate, unchanged, from its 2016 Retirement Savings Plan into its 2018 Retirement Savings Plan.

In sum, I find that the evidence in this case clearly establishes that the parties never reached an agreement regarding the amount

¹¹ Citing *Gollin Block & Supply Co.*, 243 NLRB 350 (1979).

of Respondent's match of employee contributions to its 401(k) plan. I further find that the language in the MOA setting forth a 5 percent match amount does not accurately reflect the agreement reached, by the parties during bargaining. Finally, I find that even if the evidence concerning the parties lack of agreement on the 401(k) match amount is disregarded, the evidence establishes that Respondent did not make any change to its employees' terms and conditions of employment by continuing its 4.8 percent match of employee contributions to its 401(k) plan.

CONCLUSIONS OF LAW

(1) The Respondent has been 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 within the meaning of

Section 2(5) of the Act.

(3) The General Counsel has not established by a preponderance of the evidence that Respondent failed to continue in effect all the terms and conditions of a collective-bargaining agreement by unilaterally changing its contribution formula to employees' 401(k) plans from the amount established pursuant to the agreement in violation of Section 8(a)(5) and (1) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹²

ORDER

The complaint is dismissed.

Dated, Washington, D.C. June 18, 2020.

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.