

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

AIRO DIE CASTING, INC.,
A SUBSIDIARY OF LEGGETT &
PLATT, INCORPORATED

and

JOHN A. KORNIDES, An Individual

Case 6-CA-34853

and

ELIZABETH P. GRUSS, An Individual

Case 6-CA-34854

and

FACTORY WORKERS LABORERS' LOCAL
UNION 1357 a/w LABORERS' INTERNATIONAL
UNION OF NORTH AMERICA, AFL-CIO

Case 6-CA-34937
6-CA-34961
6-CA-34976
6-CA-35019
6-CA-35084

Gerald McKinney, Esq.
for the General Counsel.
Timothy G. Hewitt, Esq., and
David Cofer, Esq.
Latrobe, Pennsylvania,
for the Respondent.
George H. Love, Jr., Esq.
Youngstown, Pennsylvania,
for the Charging Party.

DECISION

Statement of the Case

PAUL BOGAS, Administrative Law Judge. This case was tried in Pittsburgh, Pennsylvania, on August 7, 8, 9, and 10, 2006. The consolidated complaint is based on a seven charges. John A. Kornides (Kornides) and Elizabeth P. Gruss (Gruss), individual employees, each filed a charge on September 6, 2005, and amended those charges on March 6, 2006. Factory Workers Laborers' Local Union 1357 (Local 1357 or the Union) a/w Laborers' International Union of North America, AFL-CIO (the International Union), filed charges on October 31, 2005, November 22, 2005, December 7, 2005, January 17, 2006, and March 6, 2006. Local 1357 filed amendments to its first charge on November 22, 2005, and March 6, 2006, to its second charge on March 6, 2006, and to its final charge on April 28, 2006. The Director of Region Six of the National Labor Relations Board (the Board) issued a consolidated complaint and notice of hearing on April 27, 2006, and an amended consolidated complaint and

notice of hearing on June 7, 2006. The Regional Director filed a further amendment to the consolidated complaint on July 21, 2006, and at the start of trial I granted the General Counsel's unopposed motion to further amend the complaint.¹

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The consolidated complaint, as amended (the complaint), alleges that in the aftermath of a strike by its employees, Airo Die Casting, Inc., a Subsidiary of Leggett & Platt, Incorporated (the Respondent or the Company), violated the National Labor Relations Act (the Act) by, inter alia, falsely declaring impasse, making multiple unilateral changes to employees' terms and conditions of employment, delaying the provision of information requested by the Union, threatening and otherwise coercing former strikers, discriminatorily refusing to reinstate two former strikers for a period of approximately 7 months, and discriminatorily demoting another former striker. The Respondent filed timely answers in which it denied that it had committed the unfair labor practices alleged in the complaint. On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following Findings of Fact and Conclusions of Law.

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Findings of Fact

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I. Jurisdiction

The Respondent, a corporation with an office and place of business in Loyalhanna, Pennsylvania (the facility), is engaged in the manufacture and non-retail sale of aluminum die castings. In conducting those business operations, the Respondent annually sells and ships goods valued in excess of \$50,000, directly from the facility to points outside the Commonwealth of Pennsylvania. The 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 and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

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II. Alleged Unfair Labor Practices

A. Background Facts

The Respondent manufactures aluminum die castings at its facility in Pennsylvania. It is one of 18 companies within the Leggett & Platt Aluminum Group, which, in turn, is a division of Leggett & Platt, Incorporated. Daniel Krinock is the Respondent's president and Mary Lukacs is its human resources manager.² William "Ricky" Teague, is a vice president for human resources with the Leggett & Platt Aluminum Group, and participated in the negotiations involved in this case, at times as the Respondent's chief negotiator.

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In 1976, on the basis of an examination of union authorization cards, the Respondent recognized the Construction and General Laborers' Local Union No. 1451, AFL-CIO (Local 1451), which was affiliated with the Laborers' District Council of Western Pennsylvania (the District Council), as the exclusive representative for a bargaining unit consisting of production

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¹ The trial amendment, which concerned only paragraph 19(c) of the complaint, changed that paragraph to read as follows: "From in and about late October 2005, until January 19, 2006, Respondent delayed in furnishing the Union with the information requested by it as described above in paragraph 19(a)."

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² Lukacs has responsibility over payroll and benefits matters. She also has the authority to hire and discipline employees.

and maintenance workers at the Respondent's Pennsylvania facility.³ The Respondent and Local 1451 entered into their initial bargaining agreement in July 1976, and subsequently executed a number of successor agreements.⁴ The most recent collective bargaining agreement states that it is effective from January 1, 2002, to January 31, 2005.⁵ In 2005, between 250 and 300 employees were in the bargaining unit.

By mid January 2005, a number of bargaining unit members had become dissatisfied with the representation being provided by Local 1451 and with the role of the District Council. On January 15, the Local 1451 bargaining committee informed the Respondent that the employees were forming a new local. The new entity – Local 1357 -- received a provisional charter from the International Union on January 24, a fact that the Respondent was aware of and confirmed with the International Union. On January 25, the International Union transferred the members of Local 1451 to Local 1357.⁶ By May 19, 2005, Local 1357 provided the Respondent's Director of Human Resources with cards signed by 293 of the approximately 300 unit members, authorizing Local 1357 to act as their bargaining representative. Although the Respondent's answer denies that Local 1357 is the representative of the unit employees,⁷ the

³ At trial, the parties stipulated to the following definition of the bargaining unit and agreed that the unit was appropriate for purposes of collective bargaining:

All production and maintenance employees, including truck drivers of the Company employed at its Pennsylvania plant, but excluding all office clerical employees, guards, watchmen and supervisors as defined in the Act.

⁴ The agreements were signed by officials of the Respondent and Local 1451, as well as by officials of the District Council. The Council was not an actual party to the contracts. Its officials signed as a formality because they had participated in the negotiations to provide assistance to Local 1451. The Council does not represent employees, but rather assists affiliated locals to organize, negotiate contracts, maintain jurisdiction, represent their membership, and enforce contracts. Participating locals pay an affiliation fee to the District Council.

⁵ That contract also provides that the agreement will continue in full force from year to year thereafter unless either party gives the other notice of a desire to change or terminate the agreement at least 60 days prior to the termination of the agreement. No evidence was presented specifically showing that the Respondent, Local 1451 or Local 1357 gave such notice. However, there is no dispute in this case that the most recent agreement expired. The complaint alleges that the agreement was effective from January 1, 2002, through January 31, 2005, General Counsel's Exhibit (GC Exh.) 1(JJ), paragraph 14(a), and the Respondent does not deny that in its answer, GC Exh. 1(LL). During opening statements, and in its brief, the General Counsel stated that the most recent contract expired on January 31, 2005. Transcript at Page(s) (Tr.) 11, 12, 19; General Counsel's Brief at 9. Similarly, the Respondent's Brief makes reference to the most recent contract expiring on January 31, 2005. Respondent's Brief at 10. The Respondent's president testified that the contract expired on January 31, 2005, and a negotiator for the Respondent's parent corporation also testified that the most recent contract had expired. Tr. 62, 844. In their testimonies, a union business agent and the Union's attorney both referred to the most recent contract as "expired." Tr. 141, 223, 436. Given this record, despite the lack of specific evidence that any party gave notice of its desire to terminate the contract, I conclude that the expiration of the collective bargaining agreement on January 31, 2005, is not in dispute.

⁶ Local 1451 continued to exist, but not as a representative of the bargaining unit at-issue here.

⁷ In its answer to the complaint the Respondent denied both that Local 1357 was a labor organization and that it was the bargaining representative of the unit employees. During the course of the trial, the Respondent changed its position regarding the status of Local 1357, and

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record shows that during negotiations the Respondent did, in fact, agree to recognize Local 1357 as the representative of the unit employees based on the authorization cards. In a July 11 letter, the Respondent's attorney and chief negotiator stated that "[d]uring the process of bargaining, based upon membership cards provided, the Employer has agreed to replace Local Union No. 1451 with Local Union No. 1357." General Counsel's Exhibit (GC Exh.) 42, at page 2.⁸ The Respondent also took other concrete actions by which it implicitly recognized Local 1357 as the representative of unit employees for purposes of collective bargaining. For example, the Respondent's officials met repeatedly to negotiate with the Local 1357 bargaining committee. The Respondent submitted a contract proposal that identified Local 1357 as the representative of the employees, GC Exh. 32, and processed grievances that it knew were submitted by Local 1357, GC Exh. 17, 20, 20a. The Respondent addressed July 15, 2005, correspondence about alleged picket line misconduct not to Local 1451, but to the business manager of "Local 1357." GC Exh. 23. There is no evidence that after the Respondent began bargaining with the Local 1357 committee in May 2005, its agents ever again sought to negotiate with Local 1451. Indeed, despite the efforts of counsel for the Respondent to muddy this issue, even the Respondent's president testified that his understanding was that Local 1357 had represented the unit employees since early 2005. Transcript at Page (Tr.) 61-62. The evidence clearly shows that the Respondent recognized Local 1357 as the bargaining representative of unit employees no later than July 11, 2005, and probably earlier than that.⁹

stipulated that it was, in fact, a labor organization for purposes of the Act, Tr. 212, but continued to deny that Local 1357 was the collective bargaining representative of unit employees. In its posthearing brief, the Respondent did not raise that denial as a legal defense to any of the alleged violations.

⁸ This letter was addressed to a federal mediator, with copies provided to the Local 1357 bargaining committee.

⁹ To support its denial that Local 1357 was the recognized representative of the unit employees, the Respondent offered the testimony of Teague, who served as the Respondent's chief negotiator from December 2004 until June 12, 2005, and continued to participate in negotiations as a member of the Respondent's bargaining committee thereafter. At trial, Teague testified that the Respondent never accepted Local 1357 as the replacement for Local 1451, that he "knew nothing of Local 1357," and believed he had been bargaining with Local 1451 at all times. Tr. 884-85. Given the facts presented, I am flabbergasted by Teague's willingness to make such statements under oath. In addition to the evidence discussed above, I note that it was Teague himself who directed the July 15, 2005, letter about alleged picket line misconduct to Local 1357. Moreover, Teague admitted that he never raised any concerns about the status of Local 1357 with George Love – the attorney and chief negotiator for Local 1357. Teague personally met to negotiate on multiple occasions with the Local 1357 bargaining committee, which had a different composition than the Local 1451 bargaining committee. On the stand, Teague complained that the International Union never provided him with documentation of Local 1357's legal status, but when pressed he conceded that he did not feel he needed such documentation because Dave Weber -- an official of the International Union who had also been on the Local 1451 bargaining committee -- had provided him with satisfactory verbal confirmation of Local 1357's legal status. Tr. 881-82, 884. Given the relevant facts, I reject Teague's testimony that the Respondent did not recognize Local 1357 as the representative of bargaining unit employees. Indeed, Teague's testimony on that subject, including his statement that he "knew nothing of Local 1357," was so incredible in light of the record evidence that it casts a cloud over his testimony as a whole. On the basis of Teague's testimony and after considering his demeanor and the record as a whole I conclude that Teague was not a credible witness in this proceeding, and I give his testimony regarding disputed matters very little, if any, weight.

5 See *Terracon, Inc.*, 339 NLRB 221, 223 (2003) (union may become recognized bargaining representative of unit when the union proves majority status and either the employer agrees to recognize the union upon such proof, or the Respondent implicitly recognizes the union by statements or actions that evidence a commitment to negotiate with the union), *affd. sub nom. International Union of Operating Engineers, Local 150 v. NLRB*, 361 F.3d 395 (7th Cir. 2004). While Local 1357 was initiating its operations, it had some limited connection to the District Council. The record shows that the District Council supplied Local 1357 with \$5000 in start-up funds, and provided an attorney, Dominic Bellisario, to assist Local 1357 in negotiations for a brief period. Bellisario was the same attorney who the District Counsel had provided to assist Local 1451 during the 2004-2005 contract negotiations preceding the creation of Local 1357. On December 31, 2005, Local 1357 and the District Council severed any remaining ties.

15 B. Negotiations Prior to Creation of Local 1357

20 The Respondent and Local 1451 began negotiating for a new contract in December 2004. The Respondent's bargaining team consisted of Teague, who served as chief negotiator, and Lukacs. Krinock attended the initial bargaining session, but only came to one or two other sessions during 2005. The Local 1451 bargaining team consisted of attorney Bellisario, Thad Rager, Robert Hillman, David Simpson, Cindy Upholster, and Dave Weber (a representative of the International Union). Bellisario served as primary spokesperson for Local 1451.

25 On December 8, 2004, Local 1451 gave the Respondent its initial proposal, and on December 15, the Respondent provided an answer to that proposal. By the end of January 2005, the parties had met 15 times and reached tentative agreements on 21 items. The most important issues dividing the parties at that time concerned the health insurance benefit. Under the last contract, health insurance was provided through a plan that the District Council made available to affiliated locals. The Respondent paid 100 percent of the premiums for participating unit employees. The Respondent stated that it was concerned about the cost of the District Council plan and made a presentation on the possibility of substituting a health insurance plan offered by the Respondent's parent company -- Leggett & Platt, Inc.

30 Other significant issues on which the parties had not reached agreement by the contract's January 31, 2005, expiration date included wages, the defined benefit pension plan, and management rights. Regarding pension, the Union proposed that the Respondent's contribution for each employee, which was \$1.62 per hour, be increased by 10 cents per hour during each year of a 3-year contract. The Respondent did not agree to those increases and also proposed switching pension plans. The pension fund that the parties have been using since at least 1982 is a labor-management trust fund that is administered jointly by labor and management trustees. Over 800 employers participate in this joint pension fund, which is known as the Laborers' International Union of North America (LIUNA) national pension fund. The Respondent proposed switching out of the joint labor-management pension fund and into Leggett & Platt's own pension fund. The Respondent stated that it was concerned about the LIUNA plan's viability because of the recent failures of other defined benefit pension plans. For its part, the Local 1451 committee stated that it was uncomfortable with the prospect of committing employees' pension funds to a plan controlled by the employer. The Respondent was also seeking an expanded "management rights" provision in the contract, which would give it more flexibility regarding the scheduling of shifts and which, specifically, would make it easier for the Respondent to operate continuous shifts – i.e., shifts 24 hours a day, 7 days a week.

On January 15, during the second month of negotiations, the Local 1451 committee informed the Respondent that employees were forming a new local – later chartered as Local 1357-- and that it would be impossible to reach an agreement before the current contract expired on January 31 because any proposal would have to be considered by the new local.

C. Negotiations Between Respondent and Local 1357

Negotiations for a new contract were suspended for a time while Local 1357 held elections for officers, obtained authorization cards from the unit members, and generally got up and running.¹⁰ While Local 1357 was initiating its operations, the Respondent presented what it called the “Company’s last best and final offer made on January 31, 2005” to Local 1451. That offer included the 21 tentative agreements previously reached plus a number of other proposals. The other proposals included a 5-year contract term, with wage increases of 3 percent for each of 3 years and 3.5 percent for the remaining 2 years. Regarding the pension benefit, the Respondent agreed to continue participating in the LIUNA joint labor-management pension fund, but proposed lesser increases in contributions -- 5 cents per hour during 3 years of the contract’s 5-year term, with no increases during the remaining 2 years. Regarding what had been the most contentious issue – health insurance – the Respondent proposed switching from the District Council’s health and welfare plan, under which the Respondent paid 100 percent of premiums, to the Leggett & Platt plan, under which the employees would contribute weekly premiums of \$5 per individual and \$12 per covered family.

Bargaining sessions between the Respondent and Local 1357 began in early May 2005. On May 19, 2005, the union membership voted to reject the Respondent’s “last best and final offer” of January 31 and to initiate a strike on June 12, 2005, unless the parties reached an agreement prior to that time. At a bargaining session on June 1, Teague made a presentation regarding new contract terms, which he said did not constitute a formal proposal, but rather a “sub-posal.” He said he would present the sub-posal as a formal proposal if the union committee agreed to recommend the terms to the membership. The Union stated that it would not recommend the sub-posal terms, but would submit those terms to the membership for a vote if Teague presented them as a formal proposal. Teague declined to make the sub-posal a formal proposal under those circumstances.

On the evening of June 12, the bargaining unit began its strike. During the strike, both sides selected new chief negotiators, but continued to bargain. Attorney Timothy Hewitt took over for Teague as the Respondent’s chief negotiator.¹¹ Teague continued to participate in the negotiations and attended some, but not all, of the subsequent bargaining sessions. In early July, Bellisario ceased to represent Local 1357 and later that month Local 1357 retained George Love to serve as their attorney and chief negotiator.¹² Members of Local 1357’s executive

¹⁰ Local 1357 nominated officers in February 2005, elected its officers on March 16, 2005, installed its officers in April 2005, and received a regular/non-provisional charter on April 15, 2005.

¹¹ Hewitt, who did not testify, was one of the Respondent’s two trial attorneys in this proceeding.

¹² The record shows that while Love was a long-time attorney, he had no prior experience in labor law matters and had never previously negotiated a labor contract. The record did not reveal the specific experience of the Respondent’s counsel, Hewitt, but Hewitt’s correspondence came on letterhead from “Industrial Relations, Inc.,” indicating that he held himself out as a specialist in such matters.

committee, including Kenneth Cogan (president) and Simpson (business manager) also participated in the bargaining sessions.¹³ The parties began to use a federal mediator to assist in the negotiations.

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The first bargaining session with Hewitt and Love both serving as chief negotiators took place on August 4. A few days earlier, on or about July 28, the Respondent had provided the Union with a new comprehensive contract proposal. In important respects the Respondent's new proposal offered employees substantially less than the "Last Best and Final Offer" that the Respondent had made 6 months earlier on January 31. Previously the Respondent had offered annual wage increases of 3 percent for the first 3 years of a 5-year contract, and 3.5 percent for the final 2 years. The new proposal offered 3 percent increases for each of the 5 years – thus reducing the wage increases for the final 2 years. Regarding the pension benefit, the Respondent's January 31 proposal accepted continued use of the LIUNA joint labor-management pension plan, and included five-cent increases in the Respondent's pension contribution rate during 3 years of a 5-year contract. In its new proposal, the Respondent was still accepting continued use of the LIUNA plan, but eliminated all increases to the contribution rate during the 5-year duration of the agreement. The Respondent's earlier proposal on health insurance called for employees to contribute \$5 weekly for each covered family member, but only up to a maximum of \$12 weekly per family. The new proposal included no such cap, meaning that an employee could pay more than \$12 weekly for family coverage depending on the number of covered family members.

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The Respondent also proposed to delete language that was in the expired contract, and had been in contracts since 1976, which prohibited the Respondent from subcontracting bargaining unit work while there were any unit employees on layoff. In addition, the Respondent sought to add new language to the management rights clause stating that the Respondent had authority to "determine job content, to create or change jobs and assign jobs to particular classifications; to consolidate or combine job duties," "to schedule the number of straight or overtime hours to be worked," "to add to or reduce the number of shifts," and "to reasonably establish, modify, or change work schedules."¹⁴

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¹³ Cindy Upholster, Thad Rager, and Dave Weber, who had been on the Local 1451 bargaining committee were not among those elected as officers of Local 1357 in March 2005. Later, Thad Rager replaced Mike Aukerman as a member of the Local 1357 executive board.

¹⁴ The management rights provision in the most recent contract (GC Exh. 2, Article II), without the changes proposed by the Respondent, provides as follows:

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2.1 Except as expressly limited by the other sections of this agreement, the Management of the plant and the direction of the work force are vested exclusively in the Company and the Company shall continue to have all rights customarily reserved to Management, including the right to hire, promote, demote, suspend, transfer, discipline, maintain efficiency, discharge for just cause, the right to layoff or recall employees because of lack of work or other legitimate reasons; the right to schedule hours, job assignments and staffing levels; and the right to establish and enforce plan rules and regulations; provided that in the exercise of such rights and functions contained in this Article, Union members shall not be discriminated against as such. In addition, the products to be manufactured, services to be rendered, the location and extent of plant facilities and operations, the schedules of production, the materials and equipment to be used, the decision to make or buy, contract, sub-contract, relocate any work or equipment, the methods, processes and means of manufacturing, the quality of material and workmanship required, as well as the selling prices, methods of selling and distribution of products, are solely and exclusively the responsibility of the Company.

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On August 8, Local 1357 replied to the Respondent's July 28 proposal. Local 1357 stated that it accepted the tentative agreements that the Respondent had previously reached with Local 1451 on 21 items. Local 1357 indicated that it would agree to a contract duration of 5 years, rather than the 3 years preferred by the Union, if the Respondent provided wage increases of 3.5 percent for each year of the contract, instead of 3 percent. Regarding increases to the Respondent's pension contributions, the Union proposed essentially what the Respondent had offered in its January 31, proposal – i.e., increases of 5 cents per hour during 3 of the 5 contract years. This represented a significant move by Local 1357 from the previous union proposal of 10-cent increases for each year of the contract. In its August 8 offer, the Union also proposed setting employees' weekly contributions to health insurance premiums at \$5 per week, regardless of the number of covered family members. This represented a concession by the Union since, as discussed above, the employees had not previously been required to contribute anything towards their health insurance premiums.

About 10 days later, on August 18 or 19, the Respondent cut its pension proposal further. In the proposal that Hewitt provided to Love at that time, the Respondent proposed not only to eliminate all increases to the \$1.62 hourly contribution rate during the duration of the contract, but to *reduce* its contributions by over 50 percent to 80 cents per hour effective January 1, 2006. This reduction would lessen the pension benefits that employees received for years of service worked under the reduced contribution level, but would not affect the pension benefits they received for years of service prior to implementation of the proposed reduction. Under this proposal, the Respondent did not offer to take any portion of the 82 cents per employee/per hour that it was cutting from the Company's pension contributions and use it for the benefit of employees. In other words, the Respondent was apparently proposing to retain that money for its own purposes. The Respondent's proposal also gave management the option of discontinuing participation in the LIUNA joint labor-management pension fund and instead offering employees the chance to participate in a Leggett & Platt pension plan.

Hewitt, in an August 19 letter to Love, stated that the Respondent wanted the option of switching pension plans because the LIUNA joint labor-management fund was "financially risky" and "financially troubled." Earlier, at a meeting in late June or early July, the Respondent had told the Respondent that the LIUNA plan was underfunded by \$700,000. The Respondent did not show that it had any basis for these characterizations of the LIUNA plan's financial status and, based on the record evidence, the characterizations were inaccurate. The LIUNA fund's attorney, James Ray, credibly testified that the plan was not underfunded and more than exceeded the funding requirements under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. Section 1001 et seq.¹⁵

2.2 The Company shall also have the right to direct the work force with particular emphasis on its right to maintain flexibility in the assignment of employees and this right is recognized by the Union in view of the new technology and overall operation involved in the plant.

2.3 In advance of the establishment of any work rules, the Company shall consult with the Union.

¹⁵ Ray testified confidently, clearly, and with apparent candor. He has been counsel to the LIUNA fund for nearly 3 decades and was shown to have extensive experience regarding the laws and regulations relating to pension funds, including two terms serving on the U.S. Secretary of Labor's ERISA advisory council, most recently in 2002 by appointment of Secretary Elaine Chao. No meaningful contradictions in his testimony were shown. Based on Ray's testimony, and after considering his demeanor and the record as a whole, I consider him to be a

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Although the Respondent was seeking authority to withdraw from the LIUNA fund, Hewitt wrote, in his August 19 letter, that the Company might "decide not to exercise the option of withdrawing from the [LIUNA] pension plan depending upon withdrawal liability" – i.e., depending on the size of the penalty the Respondent would have to pay if it withdrew from the fund.¹⁶ Hewitt said that "the current contribution level of \$1.62/hour would continue" in the event that the withdrawal liability figure led the Respondent not to withdraw from the LIUNA plan. GC Exh. 29. He stated that the LIUNA fund would not make the withdrawal liability figure for a 2005 withdrawal available until mid-September 2005. Despite Hewitt's representation that the Respondent's decisions about whether it wanted to withdraw from the LIUNA plan and whether it would seek to reduce pension contributions were based on a withdrawal liability calculation that would not be available for another month, Hewitt's August 19 letter included the following statement regarding impasse: "If the Union does not vote to ratify the agreement and we continue to be at impasse and the Union abandons its strike, we are still prepared to return employees to work in an orderly fashion with the understanding that we will continue to negotiate in good faith and that we may exercise our right to implement our proposals at impasse." Hewitt also stated that while he hoped the employees would ratify the agreement, "we reserve our right pursuant to law to implement any or all of the terms of the Employer's last proposal, if they do not."

The employees ended their strike on August 29, and the parties met for their first post-strike negotiating session on September 12. Witnesses for both sides agree that the pension issues were the most serious ones dividing the parties during the period after the strike. At the September 12 meeting, the Respondent did not change its position regarding the issues and Hewitt expressed the view that the union membership might approve the Respondent's proposal if they had better information about it. On September 20, Hewitt provided Love with a complete revised contract proposal. In this version, the Respondent altered its July 28 comprehensive proposal by incorporating the Respondent's more recent pension proposal of cutting its contributions to 80 cents per hour and permitting the Company the option of withdrawing from the LIUNA joint labor-management pension plan. The September 20 proposal, also reinserted the \$12 per week cap on employee health insurance premium contributions for family coverage that it had previously offered, but dropped from its July 28 proposal.

On September 7, 2005, the Respondent received some preliminary information on the withdrawal liability figure that the parties had been awaiting. The information came in the form of a letter from the LIUNA fund administrator, Mark Speakes, who told Hewitt that while the fund could not yet provide a figure for a 2005 withdrawal, it could state that if the Respondent had left the plan in 2004, the withdrawal liability figure would have been \$2,131,890. Speakes stated that a figure for a 2005 withdrawal could not be provided until later in the year since it would be

very reliable witness.

¹⁶ According to Ray's credible, and uncontradicted, testimony, "withdrawal liability," was created under federal law in 1980 to encourage employers to stay in pension funds by requiring employers that withdraw from a fund to pay a portion of the unfunded vested liabilities that exist in the fund as a whole. The portion of those liabilities that an employer must pay upon withdrawing from the LIUNA fund is based on the ratio of that employer's contributions over the 5-year period culminating at the end of the prior calendar year, relative to the pool of the other approximately 800 contributing employers. An employer does not have to pay withdrawal liability unless it withdraws from the fund, or reduces its contributions to such a low level that it is considered to have partially withdrawn. Ray testified credibly that the fact that the LIUNA plan had unfunded vested liabilities did not mean that it was underfunded.

5 based on the January 1, 2005 actuarial valuation, which was not yet available. In a subsequent conversation, Speakes informed Hewitt that the figure for a 2005 withdrawal would not be available until after December 1. The \$2,131,890 figure was significantly greater than what the Respondent expected to incur for leaving the plan. On September 20, 2005, Hewitt informed Love that, while the Respondent was still proposing that the company have the option of withdrawing from the LIUNA pension fund, the "substantial withdrawal liability" was a factor that would "certainly provide greater economic incentive for the Employer to remain in the plan." GC Exh. 31.

10 On September 29, the Union's executive committee put the Respondent's September 20 proposal to a vote by the membership, but the membership rejected that proposal by a vote of 195 to 3. When the parties next met for a bargaining session, on November 15, they still did not have the figure on 2005 withdrawal liability. As a result, the parties mentioned, but did not discuss, the pension issues that were dependant on that information. However, Hewitt did take a moment to speculate pessimistically about the financial status of the LIUNA fund, stating that staying in that plan, rather than switching to the employer's plan, "might be throwing money into a hole." Love credibly testified that his ability to make proposals on the pension issues was hampered by the continued unavailability of the 2005 withdrawal liability information that both parties understood might affect their positions on those issues. The discussions during this session focused on the health insurance issue, although the parties also discussed management rights, and in particular Respondent's desire to switch to 12-hour shifts that would run continuously, 7-days a week.

25 The next day, November 16, the Union provided the Respondent with a new contract proposal. In this proposal, the Union made some movement towards the Respondent's proposals. The Union offered to agree to the Respondent's proposal to move out of the LIUNA joint labor-management plan and into a different pension fund. The proposal suggested that such a move would be acceptable to the Union if the Respondent permitted "all employees who are not vested . . . [to] become vested before monies are moved." The Union continued to seek increases in the Respondent's pension contribution levels during the contract term. The Union also stated that it would agree to the Respondent's proposal to limit pay increases to 3 percent per year, as long as the contract duration was 3 years, rather than the 5 years sought by the Respondent. The Union also presented another health insurance plan for the Respondent's consideration.

40 In a letter dated November 23, 2005, Hewitt expressed extreme disappointment with the Union's November 16 proposal, which he asserted "appears to be designed to prevent the parties from reaching an agreement." Nevertheless, the Respondent tentatively agreed to a union proposal on contract language regarding documentation of wage increases. He also recognized that his understanding was that the Union committee was considering acceptance of the Respondent's health insurance proposal – which had been the main point of contention between the parties before Hewitt took over as the Respondent's chief negotiator.¹⁷ In response to the Union's new proposal regarding pension benefits, the Respondent stated:

50 ¹⁷ The Respondent's proposal was to use a Leggett & Platt health plan, rather than the District Council health plan that was provided for by the prior contract. The record indicates that the District Council only made its health coverage available to affiliated employees, and that bargaining unit employees would not have been able to continue in that health plan once Local 1357 disaffiliated from the District Council. The record shows that disaffiliation occurred no later than December 31, 2005.

As advised, the withdrawal liability information for current withdrawals should be available after December 1, 2005. Once that information is provided, the Employer will reconsider its proposal. At this time, the Employer has no change to its pension proposal.

* * *

If we receive any additional information from the Pension Administrator that changes our position, I will let you know if we need a meeting.

10 In other respects, Hewitt stated that the Respondent was not modifying its proposals.

The parties' next negotiating session was held on December 13. This was approximately the eighth session between the Respondent and Local 1357. In the days before that meeting, Hewitt called Love and stated that the Respondent would consider taking a portion of the 82 cents per hour it wanted to cut from pension contributions and returning that portion to employees in the form of increased wages. More specifically, Hewitt suggested that the Union propose returning 50 cents of the pension cut in this fashion. The other 32 cents that the Respondent was cutting from its hourly pension contributions would apparently not be returned to employees. Prior to the December 13 negotiating session, Love told Hewitt that the Union's executive committee was considering the type of arrangement Hewitt had suggested, and that the parties could discuss it further at the December 13 meeting.

When the parties met on December 13, they still did not have the withdrawal liability information that Hewitt had previously indicated might lead the Respondent to reconsider its proposals for a reduction in pension contributions and withdrawal from the LIUNA pension plan. Nevertheless, the Union suggested that it would be willing to accept the Respondent's proposal to reduce the Company's pension contributions by 82 cents per hour, provided that 55 cents of the reduction was returned to employees in the form of a wage increase. As stated above, Hewitt had previously approached the Respondent about such an arrangement, although he had suggested returning 50 cents, rather than 55 cents, to the employees. The Union's new position on this subject represented a very significant change from the one in its most recent, November 16, formal proposal, which provided for increases in the Respondent's contributions. Discussion of the pension issues was, however, hampered at the December 13 meeting by the unavailability of the withdrawal liability calculation. At any rate, the Respondent did not agree to take any portion of the money that was being cut from pension contributions and return it to employees in the form of wages or other benefits.

At the December 13 meeting the parties also discussed health care. The Union reiterated its willingness to agree to the Respondent's proposal to cover the unit employees through a Leggett & Platt plan, although there appear to have been issues remaining regarding employee contributions and the possibility of reciprocal concessions on other issues. The Union also took a new position regarding wages that represented a move towards the Respondent's proposal. The Union stated that it would be willing to agree to the 5-year contract duration sought by the Respondent, with wage increases of 3 percent during each of the contract's first 3 years, and increases of 3.5 percent for the last two years of the contract. This was, in fact, what the Respondent itself had previously offered on January 31 in its "last, best and final" offer, however, the Respondent had since reduced its proposal to provide the lower increases of 3 percent during each year of a 5-year contract. The Union also proposed to

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surrender entitlement to "gain sharing" under the prior contract in exchange for the guaranteed wage increases. If the Respondent's team had agreed to these terms, the Union was prepared to present them as a formal written proposal.¹⁸

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Despite the movement that the Union made, and despite the fact that the 2005 withdrawal liability calculation that the parties had been awaiting was still unavailable, Hewitt announced at the December 13 session that the parties had reached impasse regarding the pension issue. Hewitt stated that the Respondent would have no choice but to implement the 82-cent reduction in hourly, per-employee, pension contributions effective January 1, 2006, in order to avoid increased withdrawal liability for 2006. He told the Union that the Respondent had "no choice" because of the "looming January 1 deadline." In a subsequent letter, Hewitt again stressed this supposed deadline, stating that the "reduction in the rate of contribution from \$1.62 to \$.80 . . . must be implemented prior to any participating employee working even one (1) hour in 2006 or the Company will be responsible for another year of withdrawal liability based upon the \$1.62 contribution rate." GC Ex. 35. As is discussed fully below, this representation by the Respondent was untrue and January 1 was a false deadline. At any rate, Love responded to Hewitt's assertions by stating that the parties were not at impasse. According to Love, the parties were not deadlocked on the pension issue because they were considering alternatives to address the Respondent's desire to withdraw from the LIUNA joint labor-management pension fund while permitting the unit employees who were not yet vested to become vested, and were trying to reach an agreement about what would happen to the money that the Respondent proposed to cut from pension contributions. The parties were also exploring other types of retirement benefits, including 401(k) plans.

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Soon after the December 13 meeting, the Respondent received the 2005 withdrawal liability calculation from the LIUNA fund administrator, and Hewitt forwarded that information to Love prior to December 20. That information showed that the Respondent's liability if it chose to withdraw from the LIUNA plan in 2005 would be \$2,600,876. This figure was an increase from the \$2,131,890 calculation for a 2004 withdrawal.

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Hewitt, in a December 20, 2005, letter to Love, discussed a number of subjects, including health insurance, the increased withdrawal liability calculation, impasse, and the Respondent's plan to implement its proposal to reduce pension contributions. Regarding health insurance, Hewitt recognized that progress had recently been made, stating that "the health insurance proposal did not seem to be an issue and there did not seem to be any objection with respect to the Employer's insurance proposal." On the subject of the higher withdrawal liability figure, although Hewitt had previously stated that a large withdrawal liability figure would make it less likely that the Respondent would want to withdraw from the LIUNA fund, Hewitt now took a

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¹⁸ Lukacs, Love, and Cogan testified about the December 13 meeting. This account is based primarily on the credible testimony of Cogan. Although I have no doubt that Cogan has an interest in the outcome of this matter, he gave the fullest, most detailed, account of what was said. Moreover, his testimony was consistent with his contemporaneous notes of the meeting and with Love's testimony. Cogan's testimony about the meeting was contradicted in some respects by the testimony of Lukacs. Lukacs' testimony on those subjects, however, was vaguer and less complete than Cogan's, and in most instances was based on her general impressions regarding the state of negotiations over a period of time, not on a specific memory of what was said at the meeting on December 13. For these reasons, I found Cogan a more credible than Lukacs regarding the December 13 meeting. Hewitt, the Respondent's lead negotiator on December 13, did not testify and Teague did not attend the December 13 meeting.

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different tact -- stating that the high withdrawal figure supported the Respondent's refusal to "continue to be at risk for this growing liability" by "continuing to participate in the fund."¹⁹

5 In the December 20 letter, Hewitt asserted again that "the Union and the Company are at impasse on the pension issue." He made this statement even though the parties had not met to negotiate since receipt of the 2005 withdrawal liability calculation they had long been awaiting and which Hewitt had repeatedly said might lead the Respondent to reconsider its pension proposals. Moreover, Hewitt made no response to either the Union's November 16 proposal to
10 withdraw from the LIUNA plan once unvested employees were permitted to vest, or the Union's favorable response to Hewitt's own overture about the parties sharing the money that the Respondent wanted to cut from pension contributions. As noted above, those two possible courses for progress on the pension issue had not been discussed at a bargaining session since the parties received the 2005 withdrawal liability calculation, and the parties' December 13
15 discussions regarding pension issues had been hampered by the unavailability of that calculation.

Hewitt also warned the Union that it was the Respondent's "intention to implement the pension proposal . . . and to notify the Pension Plan Administrator of the reduction in the rate of
20 contribution from \$1.62 to \$.80 commencing January 1, 2006." He characterized the parties as "hopelessly deadlocked" on the pension issue, but stated that "the Company remain[ed] prepared to return to the bargaining table," if the Union changed its position.

In a December 21 response to Hewitt's letter, Love stated that the Union "did not agree
25 that an impasse has been reached," and believed that the Respondent's declaration of impasse was driven by its determination to cut pension contributions prior to the New Year. Love said that the Respondent's proposal to reduce pension contributions had been made late in the negotiations and never really negotiated. Love also reiterated the terms of the Union's November 16 proposal, including that the Union would agree to withdrawal from the LIUNA
30 pension plan if employees not yet vested in that plan were permitted to vest. Love stated that although the "Holiday Season" was approaching, the Union remained "willing to explore solutions to our differences at any time." He said that the Union and the Respondent would only be "hopelessly deadlocked if the Employer refuses to bargain in good faith."

The parties did not meet again prior to arrival of the January 1, 2006, "deadline"
35 described by the Respondent. The Respondent proceeded to implement its proposal to reduce hourly pension contributions from \$1.62 to 80 cents per employee effective January 1, 2006. Hewitt, in a December 20, 2005, letter, informed the LIUNA fund administrator that the Respondent would be cutting its contribution level as of the first hour in calendar year 2006.
40 The Respondent tendered its first actual payment for the period being calculated at the lower rate on February 16, 2006.²⁰ By letter dated January 9, 2006, Hewitt informed Love that the

¹⁹ In the letter, Hewitt also argued, at some length, that the Respondent had contributed
45 more to the plan than the vested benefits of its employees and "[i]n short, was being held responsible for shortages of the plan when our account is fully funded." In his sworn testimony, Ray, the fund's attorney, stated that the Respondent had not, in fact, contributed more to the LIUNA fund than the Respondent had in liabilities. Ray testified that, as of 2005, the present value of the vested benefits of the Respondent's employees was \$5.3 million, whereas the Respondent's contributions over the entire history of its participation amounted to approximately
50 \$1.2 million. Regarding this issue, I credit Ray's sworn testimony over the unsworn representations made by Hewitt in the December 20 letter to Love.

²⁰ According to Ray, the LIUNA fund has declined to accept the Respondent's reduced
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Respondent was, in fact, now calculating pension contributions at the hourly rate of 80 cents, rather than \$1.62, per employee. Hewitt also opined that "It is clear that the parties are at impasse," and warned that the Respondent "must implement the balance of our bargaining proposal in the very near future." Two days later, in a letter dated January 11, Love responded that the parties "should go back to the bargaining table as soon as possible" and that he would contact the federal mediator to set up dates.

The Respondent's brief, which was signed by Hewitt, states that during a telephone conversation between Hewitt and Love on December 19, Love "confirmed that impasse existed" and that the "union was not going to make any further offers." Respondent's Brief at 18 and 19. Although Hewitt presents this bombshell in the Respondent's brief as fact, not a shred of sworn evidence was cited to support it. Instead, Hewitt relies entirely on his own December 20 letter to Love purporting to summarize their December 19 telephone exchange. GC Ex. 35. This is true despite the fact that Hewitt himself was present throughout the proceedings as one of the Respondent's trial attorneys and could have testified under oath about Love's supposed admission. At any rate, Love *did* testify under oath, and denied Hewitt's claim that he had confirmed that impasse existed or stated that the Union would make no further proposals. Tr. 510. Moreover, in a December 21 response to Hewitt's letter, Love disputed Hewitt's characterization of the December 19 conversation. GC Ex. 36. Given this record, I reject the Respondent's unsupported assertions about what transpired during the December 19 telephone conversation. The efforts of the Respondent's counsel to present his own unsworn contentions regarding the course of negotiations as if they were admissions by the Union's attorney are, to put it as kindly as possible, unhelpful.

The record also shows that the looming January 1, 2006, "deadline" to which Hewitt repeatedly referred and which he used to justify his assertion that the parties were at impasse was a *false deadline*. The evidence is clear that the Respondent's contributions on or after January 1, 2006, would have no effect whatsoever on Hewitt's stated concern – i.e., liability for withdrawal from the LIUNA fund in 2006 -- since the 2006 withdrawal liability figure was fixed based on the Respondent's contributions as of the end of 2005. See *supra* footnote 16 (withdrawal liability calculation for a given year based on contributions through the end of the *prior* calendar year). Contributions made in 2006 would not even be considered in the calculation. Moreover, Ray testified, credibly and without contradiction, that to the extent a reduction in the Respondent's contributions for 2006 might have an effect on the Respondent's liability for a withdrawal in 2007 (as opposed to 2006), such effect would be "infinitesimal."²¹ Finally, January 1, 2006, was not a deadline for reducing the contributions since those contributions could be reduced at any time during the year and the withdrawal liability for 2007, to whatever minimal extent it would be effected by such a change, would depend on the total contributions actually made through the end of 2006, not on the contribution level used on January 1, 2006, or any other particular date. In other words, the Respondent's claim that it would be "locked-in" to the level paid on January 1, 2006, for the rest of the year was simply false. Indeed, there was no credible evidence that the Respondent even had a reasonable basis for any of its representations to the Union committee about the necessity of reducing

pension contributions.

²¹ For reasons discussed earlier, I found Ray a very credible witness. Moreover, his assessment that the contribution reduction proposed by the Respondent would have a negligible impact on the Respondent's 2007 withdrawal liability calculation was plausible given the magnitude of the other factors influencing that calculation. Those factors included the contributions made to the fund over a 5-year period by the approximately 800 other participating employers, and the performance of the fund's investments.

pension contributions by January 1. Although the record shows that Hewitt repeatedly made such representations to the Union, he did not testify about the basis for those representations, or about anything else. Teague testified that his "understanding" was that if the Respondent contributed at the higher level for even a single hour in 2006, it would be "locked in," however, his testimony did not show that he had a reasonable basis for that understanding.²²

Love, Teague, and Lukacs testified regarding their personal views as to whether impasse existed. Love testified that impasse did not exist. Tr. 460, 515-16. He recounted that the parties were still discussing whether they could agree to a withdrawal from the LIUNA plan that was premised on allowing unvested employees an opportunity to vest, and to a compromise that would involve returning a portion of the pension contribution reduction as a wage increase. According to Love, the parties simply "ran out of time" before the Respondent's January 1 "deadline" because they had been waiting for the withdrawal liability calculation which did not become available until "very late in the game" – about 2 weeks before January 1 and at the start of the of the holiday season. Tr. 560.²³

Regarding the testimony of the Respondent's witnesses about whether they believed that impasse existed, I begin by noting that the Respondent failed to present the testimony of Hewitt, even though he was the chief negotiator during the months leading up the declaration of impasse, and the individual who made the declaration of impasse. Hewitt was the witness in the best position to testify on behalf of the Respondent about circumstances surrounding the declaration of impasse, and his failure to testify and subject himself to cross-examination is cause for some suspicion. Instead, the Respondent relied primarily on the testimony of Teague, who testified that the parties were at impasse on December 31, 2005, Tr. 872-73. I give his testimony little weight for a number of reasons. First, Teague did not even attend the December 13 session. That was the key session for purposes of determining whether the parties were at impasse because it was the last one before the January 1 implementation, and the one at which Hewitt declared impasse. In addition, at that session the Union made an informal proposal along the lines of one that Hewitt had broached with Love a few days earlier – i.e., that the Union would accept the 82-cent reduction in hourly pension contributions if a portion of that reduction was returned to employees in the form of wages. During that session, the Union also discussed its willingness to agree to withdraw from the LIUNA plan as long as unvested employees were given an opportunity to vest. Because Teague did not have first hand knowledge of that key meeting, his opinion about impasse was not fully informed. Lastly, I note that, for reasons previously discussed, Teague showed himself to be lacking in credibility regarding disputed matters.

Lukacs testified that the parties were "pretty much at impasse with the pension" at the December 13 meeting. Tr. 788. I do not consider her testimony on this point to be entitled to much weight. First of all, I note the lack of certainty in her statement – "pretty much" at impasse is not the same thing as at impasse, even in layperson's terms. Secondly, Lukacs admitted that

²² At any rate, for reasons discussed above, I found Teague to be substantially lacking in credibility as a witness. See footnote 9, supra

²³ I considered Love a fairly credible witness. His testimony regarding significant matters was quite consistent and was generally consistent with the documentary evidence. He did appear to struggle at times to remember dates and details and in some instances gave testimony only when prompted by leading questions from counsel for the General Counsel. However, overall, Love gave the impression that he was doing his best to testify accurately and truthfully regarding the matters at issue.

5 she generally was not included in the pre-negotiation meetings that the Respondent's bargaining team had before meeting with the Union bargaining committee. Therefore, it appears unlikely that she was fully informed about the strategies, authorities, and analyses of the Respondent's chief negotiators. Third, Lukacs stated that, as far as she knew, both sides made the same pension proposals on December 13 that they had been making for some time. That testimony indicates that she was not aware that Hewitt had recently made an overture to the Union about returning, in the form of wage increases, some of the money that the Respondent wanted to cut from pension contributions. Nor was she aware that the Union's new proposal along those lines on December 13 came close to mirroring the terms of Hewitt's suggested compromise. Finally, I was not impressed with Lukacs' demeanor as a witness. During questioning by both sides, she was rather petulant – giving the impression that she considered testifying an unwarranted imposition on her time and energy. She reacted to a number of questions about disputed matters in which she was involved by indicating that she could not possibly be expected to remember such details. In several instances she answered that she could not remember without pausing for even a moment to search her memory.

D. The Strike

20 As discussed above, on May 19, 2005, the union membership voted to go on strike effective June 12, 2006. The understanding was that the strike would be averted if the parties reached a contract during the intervening weeks, and this understanding was communicated to the Respondent. However, no agreement was reached, and the union membership began a strike at approximately 11 pm on June 12. At the outset, all unit employees participated. The Respondent continued to operate the facility during the strike by using management personnel, personnel from other Leggett & Platt facilities, and temporary replacement workers. In addition, over the course of the strike a number of unit employees decided to resign their union memberships and return to work. At trial, witnesses for both sides referred to these individuals as "crossover employees" or "crossovers." In order to complete work during the strike, the Respondent moved workers between jobs and shifts. The Respondent operated the plant for two shifts of 12 hours each, rather than for 3 shifts of 8 hours each, as was the case before the strike.

35 At some point during the strike, the Respondent also hired two replacement workers on a permanent basis. The Respondent informed the Union that these individuals were being hired to permanently replace the two unit employees with the least amount of seniority – individual charging parties Kornides and Gruss. Kornides and Gruss were both classified as "general finishers," an entry-level position that does not require specific skills or prior experience.

40 During the strike, the Respondent informed the bargaining unit employees that they could return to work under the terms of the most recent contract. This offer was reiterated by Krinock in a July 19 letter to employees, in which he stated that, "as previously advised, the Company has continuing work available to you under the terms of the expired Collective Bargaining Agreement." On August 18, 2005, after the employees had been on strike for approximately 9 weeks, Love sent Hewitt a facsimile correspondence, in which he stated: "The executive board of the union voted unanimously to return to work This is of course under the terms of the expired contract." The next day, Love sent Hewitt a second facsimile correspondence in which he stated:

50 [W]e are willing to return to work under the existing terms and conditions of the expired contract, with or without an extension agreement and end the strike immediately. Please advise me as soon as possible if the company position has now changed, I understood that a return to work was an open option.

5 That same day, Hewitt responded in a letter stating that: "Continuing work is available under the conditions which existed prior to the strike with those terms and conditions being available for a reasonable period of time pending the outcome of bargaining."

E. Unit Employees Return from Strike

10 On August 29, the bargaining unit returned to work, ending the strike. All the temporary workers who the Respondent had retained during the strike were relieved of their duties. When the former strikers returned to work, Krinock gathered the employees, supervisors, and managers together for a meeting during each shift. The testimony regarding Krinock's statements indicates that there was little variation in what he said during these meetings. First
15 Krinock welcomed the employees back. Then he stated that he recognized that everybody "hurt a lot" during the strike, but that it was important to "move on" because the Respondent needed to get back to work. He said he wanted everybody to respect one another and that management was going to show such respect. He stated that if there was anyone who could not work under those conditions, or did not want to be there, the Respondent would grant that individual a permanent layoff and not contest his or her claim for unemployment insurance. Of
20 the approximately 300 unit employees, 25 or so never returned after the strike. Another 14 resigned over the course of the two weeks following Krinock's speeches. At the time of trial, the total number of unit employees who either did not return from the strike, or subsequently resigned, was about 45.

25 F. Kornides and Gruss Denied Reinstatement

As stated above, Kornides and Gruss were the bargaining unit employees with the least seniority, and both were classified as general finishers. During the strike, the Respondent hired
30 two employees as permanent replacements for striking employees. The Respondent informed the Union that the two employees who had been permanently replaced were Kornides and Gruss. Apparently the Respondent did not contact Kornides and Gruss directly to inform them that they had been replaced, but Gruss testified that the Union's attorney informed her by letter.

When the strike ended, Kornides and Gruss appeared for work on August 29 along with
35 the other former strikers. Upon reporting, each was required to meet with Lukacs. Lukacs met with them separately, although Hillman, the vice-president of the Union, attended both meetings. Lukacs informed Kornides and Gruss that they had been permanently replaced and could not return to work that day. Lukacs told them that they were not being terminated, but rather were subject to recall. She stated that they might be returned to work in as little as 3
40 days, depending on how many of the strikers resumed working. The Respondent did not recall Kornides and Gruss to work until April 3, 2006 – over 7 months later. Approximately 2 months before their recall, Lukacs contacted both Kornides and Gruss about an opening for a maintenance worker. Based on Lukacs' description of the qualifications for the maintenance position, Kornides and Gruss agreed with Lukacs that they were not qualified for that position.
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G. Wareham and Grazier

Jeffrey Wareham is employed by the Respondent as a quality control manager. One of
50 the employees Wareham supervises directly is Arthur Grazier. Grazier was a quality control group leader during the period leading up to the strike and held that position immediately upon his return from the strike. As a group leader, Grazier was the "go-to" person for customer complaints and also provided training to other employees. Because of his group leader designation, Grazier received an additional 20 cents per hour in wages. Grazier participated in

the strike, engaged in some confrontational behavior while supporting the strike, and was one of six employees who Teague accused of picket line misconduct in a July 15 letter to the Union. Grazier testified, without contradiction, that he was "very active" in union activities.

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When Grazier returned from the strike he attended the "welcome back" presentation by Krinock. Shortly thereafter, Wareham held his own meeting with employees under his supervision, including Grazier. Wareham explained to the employees that he was going to have to change the way the quality control department operated because they had fewer employees. Wareham welcomed back the former strikers and asked if they "would have any problem communicating with the crossover employees." Neither Grazier nor anyone else said that they would have a problem.²⁴

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On an occasion in late October or early November 2005, Grazier, by his own account, "got a little loud" during a conversation with a co-worker about the negotiations for a new labor contract. This occurred near Wareham, who overheard some of the conversation, which Wareham understood to turn on Grazier's view of what the current contract provided for regarding overtime pay for work on Sundays. Wareham called Grazier into his office and told Grazier he needed to learn to "keep his opinions to himself." Grazier responded, "I'm 43 years old and if I have something to say, I'll say it." Wareham showed Grazier a contract provision that, according to Wareham, demonstrated that Grazier was mistaken about the Sunday overtime issue. Then Wareham told Grazier, "If you are going to be loud and spouting off, at least be right. . . . [Y]ou are lead man and, you know, I expect you to lead in the right direction." Grazier responded, "[Y]ou can stick this lead man 20 cents up your ass." Then Grazier left Wareham's office.

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²⁴ According to Grazier's testimony, Wareham also warned that if any returning striker could not get along with the crossover employees that individual would "be taken out of quality control and . . . assigned to the general finishing department." Grazier testified that such a reassignment would constitute a reduction in status and pay. Grazier stated that he discussed Wareham's statement with Hillman, but Hillman did not corroborate this. Grazier did not specifically mention reporting Wareham's statement to Cogan, but Cogan stated that Grazier had complained about it to him. For his part, Wareham denied that he made the statement about transferring employees to the general finishing department. That denial was corroborated by Christopher Horrell, another employee who attended the meeting. Horrell is currently supervised by Wareham and was one of the crossover employees. On this record, I conclude that the General Counsel has failed to show that Wareham warned returning strikers that they would be reassigned to general finishing work if they did not get along with the crossover employees. Both Grazier and Wareham had a personnel interest in the outcome of this matter. In Grazier's case, his testimony sometimes reflected an effort to conform his account of what was said to his impression of the meaning behind those statements. For example, when initially testifying about Krinock's "welcome back" speech, Grazier testified that Krinock said if there was "any union member there that couldn't work under them circumstances" (i.e., "moving on" from the strike) the Respondent would "grant them layoff and not mess with their unemployment." Tr. 390. However, when pressed on that point he admitted that Krinock had not directed the comment to "any union member," but rather to "anyone here," Id. -- a group that included supervisors and managers. When recounting a subsequent exchange with Wareham, Grazier omitted any reference to his own use of vulgar language, and it was only when confronted on cross-examination that he admitted to using that language. Compare Tr. 401 at lines 1-5 with Tr. 412 at lines 4-12.

On the day of this exchange, Wareham remained after the end of his own shift because he hoped that Grazier would return to apologize. Grazier did not do so, and at one point another employee came to Wareham's office and told him that Grazier had recounted telling Wareham to take the lead person designation and "shove it." Subsequently, Wareham notified Lukacs that Grazier was no longer a group leader. As a result, Grazier's pay was reduced by 20 cents per hour. Wareham testified that the reduction in Grazier's duties and pay was not a disciplinary action, and Wareham apparently made no disciplinary report regarding the incident. Wareham stated, rather, that he understood that Grazier had resigned from the group leader designation. Wareham conceded that he never asked Grazier whether he meant to resign his group leader duties. By the same token, after discovering that his 20-cent group leader differential had been eliminated, Grazier did not complain to Wareham or file a grievance stating that he had not meant to resign. While testifying, Grazier never denied that by telling Wareham to "stick this lead man 20 cents up your ass," he had meant to resign his group leader duties.

H. Edward Byers' Duties

Edward Byers is a working foreman in the shipping department. He is paid on an hourly basis, is a bargaining unit employee, and participated in the strike. At the time of trial he had been employed by the Respondent for over 12 years, the last 8 or 9 of those years in the shipping department. Prior to the strike he had a wide range of duties, which included: ensuring product flow out of the facility; overseeing the flow of raw materials in and out of the facility; monitoring the work of shippers, receivers, and drivers; figuring out how best to use carriers and carrier routes; negotiating contracts with carriers within corporate guidelines; working with other departments to develop packaging for new products; determining how to utilize floor space within the shipping and receiving department; and inspecting the outside buildings and grounds. A number of these duties were not set forth in Byers' written job description, however, Byers had acquired the additional duties over the course of time and had been performing them for a number of years. The record does not reveal who, if anyone, was performing these duties before they became Byers' responsibility. Hillman testified that the Union believed all the tasks performed by Byers had always been bargaining unit work. Prior to the strike, Byers worked an average of 10 to 12 hours of overtime each week, and was not required to seek approval before doing so. His work station was in an office where he had the use of two desks, a computer with e-mail and internet access, a cell phone, a fax machine, and a copier. Two secretaries assisted him.²⁵

When Byers returned to work on August 29, following the strike, Vincent Battaglia, the Respondent's production manager, told him that changes had been made by Nancy Hauser, the Respondent's controller.²⁶ Battaglia stated, in general terms, that Byers' duties had been changed and that his work would now be confined to shipping and receiving. Byers would no

²⁵ In its brief the Respondent states that Byers "admitted that many of the duties he had performed before the strike were supervisory or managerial and did not constitute bargaining unit work." Respondent's Brief at 30. This is not a fair characterization of the record. The testimony indicates that, in an affidavit given to the Board, Byers stated that *some* of his duties *might* have involved the use of managerial or supervisory authority. Tr. 370-71. Byers testified that he did not believe he was a managerial or supervisory employee, Tr. 381-82, and that he did not have any concerns that he was outside the bargaining unit, Tr. 373. The Respondent has not claimed that Byers was a nonunit employee, and Byers did not recall the Respondent describing the tasks at-issue as nonunit work. Tr. 379-80.

²⁶ The Respondent admits that Battaglia and N. Hauser are supervisors and agents of the Respondent for purposes of the Act.

longer be located in his office work station, or have use of the computer and the cell phone, and would no longer be working overtime. About a week later, N. Hauser met with Byers about the change in duties. At that meeting, Byers was told that he would no longer be ensuring the flow of raw materials in and out of the facility, scheduling carriers, negotiating contracts or rates with carriers, developing packaging, determining how to utilize floor space in the department, or inspecting the buildings and grounds. These duties were reassigned to nonunit employees. Byers complained about the changes, and Battaglia told him that they were "based upon the Company needing a company person or personnel to in effect have a paper trail which was based upon 9/11 and Sarbanes-Oxley or whatever the bill was." Since the changes were made, Byers has not had the opportunity to earn overtime pay, but his regular hourly wage rate has not been reduced.

The Union did not consent to the changes made to Byers terms and conditions of employment or to the reassignment of some of his work to nonunit employees. Nor was the Union given notice and an opportunity to bargain regarding those changes.

I. Cooper and Rellick

Patrick Cooper is employed by the Respondent as a shift facilitator, and is a supervisor and agent of the Respondent for purposes of the Act. One of the employees who Cooper supervised at the time the strike ended was Christopher Rellick. Rellick was a casting employee who had been employed by the Respondent for about 3 years, and participated in the strike.

Soon after the employees returned from the strike, two of Rellick's co-workers and two foremen reported to Cooper that Rellick was refusing to perform certain aspects of his position²⁷ and was complaining that he hated his job and did not think that the employees should have returned to work. Rellick testified that he had, in fact, told one of these co-workers that he was not happy to be back from the strike "because nothing had been settled" and he "did not know what was going to happen in the future."

At work the next evening, Cooper asked Rellick whether there was "a problem with anything that was going on at work." Rellick said that he did not have "a problem with anything." Cooper reminded Rellick about the "welcome back" speech that Krinock had given, and said that Rellick "should leave" if he was not happy working there. Rellick replied that he was there "to work." Cooper stated, "[I]f I have to take you upstairs to my office, [you will] be fired and . . . w[ill] not be able to collect unemployment." Rellick asked if he was being accused of something, and Cooper responded, "I have to do what I have to do."²⁸

²⁷ The record does not show whether these reports to Cooper were accurate.

²⁸ This account is based on a combination of Cooper's and Rellick's testimonies. I have accepted Rellick's testimony that Cooper threatened that Rellick would be fired and denied unemployment compensation, over Cooper's testimony that he did not make such statements. The record shows that Rellick's testimony about the exchange was consistent, but that Cooper repeatedly contradicted himself. Compare Tr. 767 (Cooper testifies that he asked Rellick if it was true that he hated being there.) with Tr. 770 (Cooper testifies that he did not ask Rellick if he hated being there.); Compare Tr. 767 (Cooper testifies that when he asked if Rellick heard Krinock say that employees did not have to be there if they did not want to be, Rellick said that "he didn't remember that") with Tr. 771-72 (Cooper testifies that when he asked if Rellick heard Krinock say that employees did not have to be there if they did not want to be, Rellick "sort of nodded" but said nothing); Compare Tr. 767-69 (Cooper testifies to multiple responses by

Continued

When Rellick completed his shift, he discussed Cooper's remarks with Cogan. After this discussion, Rellick and Cogan met with Lukacs on either September 1 or 2. Rellick told Lukacs that he had decided to accept Krinock's offer of the layoff. Lukacs asked "Why?" and Rellick responded, "Let's just say that things just didn't work out and I'm going to accept that layoff." Lukacs said that "I'm sorry you feel that way about it." Lukacs asked him what was wrong, but Rellick said "Let's just leave it go." Cogan later informed Lukacs about what Rellick had told him regarding the conversation with Cooper, but the Union did not file a grievance regarding it.

J. Lukacs' Conversation with Hauser

Jan Hauser has worked for the Respondent for over 7 years as a general finisher. In early October 2005, she went to Lukacs' office, to ask how many vacation days she had left that year. While the two were alone in Lukacs' office, Lukacs asked J. Hauser whether she was paying her union dues. J. Hauser responded "yes." Then Lukacs said, "Well, you don't have to, because we have no contract."²⁹

The Respondent's counsel elicited testimony from Lukacs that, approximately 3 months after the strike, two employees expressed concern to her that they would lose their jobs if they did not pay their union dues, and that she had told those employees that she did not believe that this was true. However, neither Lukacs, nor anyone else, claimed that J. Hauser had expressed concerns that she would lose her job for not paying union dues. Nor did the evidence show that such concerns had ever been expressed to Lukacs by any employees prior to the October meeting between J. Hauser and Lukacs.

K. Shift and Job Assignments

Under the most recent bargaining agreement, the Respondent must use the bid process when assigning an employee to a new shift on a permanent basis.³⁰ On the other hand, the Respondent has long had authority to make *temporary* shift reassignments without using the bid process as long as the employee consents to the temporary reassignment. In the event there are no volunteers, the Respondent may reassign the least senior employee on a temporary basis. The Respondent does not have to obtain the Union's approval before making such reassignments. Similarly, while the bargaining agreement requires the Respondent to use the bid process when assigning an employee to a new permanent job, the Respondent has the authority to fill temporary job openings without using the bid process.³¹ The credible evidence

Rellick during the conversation.) with Tr. 772 (Cooper testifies that Rellick "never replied . . . on any part of it."). Based on the testimony, the demeanor of the witnesses, and the record as a whole, I credit Rellick's testimony over Cooper's regarding the disputed statements.

²⁹ I credit Hauser's clear and confident testimony regarding this exchange. Lukacs testified, but her testimony on the subject was far less confident. She testified that she remembered Hauser coming to her office to ask about vacation days, but stated that she could not remember the details of their conversation. Tr. 783. When asked if she told Hauser that she did not have to pay union dues, Lukacs responded, "I don't remember." Tr. 782.

³⁰ The Respondent's facility operates on a 3-shift schedule. The first shift, also known as daylight shift, begins at 7am and ends at 3pm. The second shift, which is also referred to as the afternoon shift or swing shift, begins at 3pm and ends at 11pm. The third shift, also known as the midnight shift or graveyard shift, starts at 11pm and ends at 7am.

³¹ There was some testimony suggesting that under certain circumstances only the employee with the least seniority could be reassigned to a job other than his or her bid job.

Continued

shows that the Union has also recognized the Respondent's authority to assign an employee to perform any type of work that falls within that employee's job classification.

5 As discussed above, about 25 unit employees did not return at the end of the strike, and another 14 or so resigned during the subsequent weeks. The vacancies caused by these resignations were not spread evenly over job categories and shifts. In order to compensate for the staffing imbalances that resulted, and ensure the completion of priority work, the Respondent made temporary shift assignments and temporary job assignments more frequently during the period immediately after the strike than it had done before the strike. However, the record does not show that this change in frequency persisted.

15 The Union president, Cogan, testified that the "main thing" was that since the strike the Respondent had been using temporary assignments rather than posting the jobs for bid by employees. However, Simpson, another union official who was called by the General Counsel, testified that the frequency of temporary assignments was generally no greater than before the strike. Tr. 241. I find that the record fails to establish the existence of a prior, established, practice or policy that dictated when the Respondent would meet a staffing need through the use of a temporary assignment, and when the employer would meet such a need by posting a permanent job or shift assignment. To the extent that there was an increase in the use of temporary assignments for a period immediately after the strike, the evidence did not demonstrate that this increase resulted from any change in standards, rather than from the application of pre-strike standards for non-bid transfers to the altered circumstances created by the resignations of a large number of bargaining unit employees.

25 The General Counsel presented evidence that in a September 8, 2005, memorandum to various managers and supervisors, Krinock listed the job titles and shift assignments of 28 unit employees who had left the company, and stated: "We will ultimately be bidding the jobs that were left open by these departures and right sizing all departments and shifts. In the meantime coordinate the remaining personnel to assure that our top priority jobs are being shipped and our customer needs are being met." The record suggests that not all of those 28 positions were ultimately filled through the bid process. Indeed, in late October or early November 2005, the Respondent posted a bid sheet listing 15 to 20 vacancies, but ultimately chose to fill only 3 of those vacancies based on bids. The uncontradicted testimony was that many employees had signed up to be considered for those vacancies, and that the bid sheets were filled, or nearly filled, at the time the Respondent took down the posting. The Respondent's witnesses did not provide any direct explanation for the Company's decision not to fill the other 12 to 17 positions posted for bid. This episode is, in my view, cause for suspicion that something was in flux regarding how such determinations were made post-strike. However, cause for suspicion is not the same as evidence demonstrating either the existence of an established practice or a significant change from that practice. Moreover, the record suggests that other factors would have influenced the Respondent's decisions about whether to make permanent assignments after the strike, even if the general parameters used to make such decisions were unchanged. Krinock credibly testified that the Respondent's staffing needs were decreasing around the time of the strike due to the loss of several major customers. He also credibly testified that, during the period when managers were filling-in for the striking employees, those managers had identified inefficiencies in the manufacturing process and that by correcting those inefficiencies had been able to increase the amount of work that each employee could produce.

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 However, this practice was only mentioned, not described in any way that would permit me to determine whether it constituted an established practice or, if so, whether it had been meaningfully departed from.

5 The General Counsel also presented evidence regarding three individual employees who were reassigned. One of the employees, Tom McIntyre, had been working as a layout technician, but was reassigned to a job as a floor inspector when the employee who held the position did not return from the strike. This reassignment was made without use of the bid process and yet McIntyre continued to work in the floor inspector assignment at the time of trial, almost a year after the reassignment. Another employee, Rob Buchanan, was transferred from the midnight shift to the afternoon shift without use of the bid process. Buchanan remained on 10 the afternoon shift for 5 or 6 months before being returned to the midnight shift. The evidence also indicates that Don Siko, a crossover employee, was assigned to the daylight shift during the strike and remained in that position after the strike for a little over 3 months until December 2, 2005, when he resigned. Although these are rather extended reassignments, the evidence did not show that their durations exceeded any pre-strike limits on how long a "temporary" 15 reassignment could last.

20 The General Counsel argues that the Respondent changed its practices by reassigning employees to new shifts without their consent. However, the General Counsel presented no real evidence to support this assertion. Instead, the General Counsel argues that the fact that the Respondent did not call any employees to testify that they transferred voluntarily "strongly suggest[s] that most of these temporary transfer of shifts [were] not voluntary." GC Brief at Page 14. However, the General Counsel had the opportunity to call employees as witnesses, and failed to elicit testimony from any who said they were transferred *involuntarily*. This despite the fact that it is the General Counsel's burden to show that there was a change to an 25 established practice. Moreover, Krinock testified that no one was involuntarily reassigned to a different shift. Tr. 808. Wareham testified that he asked if Buchanan would temporarily transfer to the afternoon shift given the lack of employees on that shift, and that Buchanan had consented and stated that he "would be glad to do it." Tr. 716.³² The evidence shows, 30 moreover, that all the former strikers who started working on August 29 were assigned to their established shifts and that no unit employee was "bumped" from his or her shift as a result of the reassignments of Buchanan and Siko.

L. Assignment of Unit Work to Process Technicians

35 Process technicians, also referred to as process engineers, were a group of nonunit employees at the Respondent's facility. Prior to the strike, the Respondent and Local 1451 had a practice of permitting process technicians to perform unit work when unit employees were on break or vacation, or were sick or injured. The record indicates that, after the strike, the frequency with which the Respondent used process technicians to perform bargaining unit work 40 temporarily increased from once every couple of weeks, to daily. This change continued for a period of several months after the strike. Hillman, vice-president of Local 1357, testified that, after the strike, he saw process technicians performing some specific unit tasks that he had not

45 ³² This testimony concerned a "verbal act" -- i.e., the giving of consent -- and therefore was nonhearsay. See *U.S. v. Moreno*, 233 F.3d 937, 940 (7th Cir. 2000) (utterance of consent amounts to a "verbal act," and is not inadmissible hearsay). At any rate, no objection was made to Wareham's testimony about what Buchanan said to him. Grazier testified that Buchanan had confided that he would rather be on the midnight shift. Tr. 416. The Respondent objected that 50 Grazier's testimony on that subject was hearsay, and I conclude that it is entitled to little weight. Even assuming, for purposes of argument, that Buchanan preferred the midnight shift, that would not prove that he did not volunteer to be reassigned to the afternoon shift when asked to help address a staffing shortage.

observed them doing prior to the strike. However, Simpson, another union official, testified that the difference in how the process technicians were being used after the strike was a matter of frequency and of the fact that, in the past, there had not been unit members awaiting recall when the process technicians were performing unit work. The record evidence indicates that the circumstances under which process technicians were called upon to perform unit work – e.g., when unit employees were on break, on vacation, sick, or injured – did not change.

On September 9, 2005, the Union filed a grievance concerning the issue of the unit work being performed by nonunit employees. The Respondent denied the grievance. In a letter dated September 15, 2005, Lukacs informed the Union that "[m]anagement personnel are helping out by running breaks due to the fact that some of our shifts are short people," but that this would stop "when the shifts are balanced."

M. Subcontracting

The most recent contract between the parties states that "The Company shall have the right to subcontract normal bargaining unit work only when such subcontracting does not result in a layoff or there are no employees on layoff." The same language appears in every prior labor agreement in the record, including the initial contract reached in 1978. In the negotiations for a new contract, the Respondent was seeking to amend this provision to delete the clause that precluded subcontracting when there were employees on layoff, but the Union had not agreed to such a change. Krinock testified to a number of types of work that the Respondent had subcontracted prior to the strike. However, the Respondent did not show that any of that work was subcontracted at a time when unit employees were on layoff.

The record shows that, following the strike, the Respondent subcontracted a number of different types of work, including central melt work, the rebuilding of equipment (machine 7), relining one furnace, and patching another furnace. This was all work that bargaining unit employees were capable of performing and, at least in the case of the central melt work and machine rebuilding, had been responsible for performing in the past.³³ Kornides and Gruss, two unit employees, were on layoff when this work was subcontracted. The Respondent did not deny the allegation that it took this action without giving the Union notice or an opportunity to bargain.³⁴

In its brief, the Respondent claims that the bargaining agreement states that the prohibition on subcontracting while employees are on layoff only applies when the laid off employees are "qualified to perform the contracted work." Respondent's Brief at 28. However, this is false. The agreement in no way limits the prohibition on subcontracting to situations in

³³ The conclusion that the Respondent subcontracted this work after the strike is based on the testimonies of Grazier and Hillman. Krinock testified about the subcontracting issue, but did not clearly deny that unit employees had previously been responsible for performing some types of work that were being subcontracted after the strike. When asked if the Respondent might have subcontracted unit work after the strike, Krinock initially responded: "No sir. Not that I'm aware of." However, when questioned further Krinock admitted that "we may have" engaged in such subcontracting. Tr. 817. Later, Krinock testified that the Respondent had engaged in subcontracting after the strike, using a company called Arc Master to perform production work. Tr. 828.

³⁴ In its answer to the complaint, the Respondent denied that its post-strike subcontracting represented a change in its practices, but it did not deny that it engaged in the post-strike subcontracting without giving the Union notice or an opportunity to bargain.

which the laid off employees are capable of performing the specific contracted work. The Respondent does not even cite to any testimony indicating that its misstatement of the rule reflects the parties understanding of the contract's contrary language. The rule stated by the Respondent would not be an unreasonable one, but it was not the rule the parties agreed to.

N. Overlap Meetings

For a period of at least 4 years prior to the strike, the Respondent had an established practice of permitting quality inspectors the option of working 15 minutes of overtime at the end of their shifts in order to communicate information to personnel on the incoming shifts.³⁵ The quality inspectors were paid for the extra 15 minutes when they chose to stay for one of these "overlap meetings." If their hours totaled over 40 for the week, the additional 15 minute periods were compensated at the higher, overtime, rate. In the case of Grazier, the extra pay attributable to attendance at these overlap meetings amounted to approximately \$1000 per year, although it appears that during the 6 months leading up to the strike his participation had tapered off.

Upon the strike ending, Wareham eliminated the 15-minute overlap procedure. He testified that he did this because attendance at the overlap meetings had been poor. Instead, Wareham began to rely on the use of logbooks in which employees recorded information. Nine to 12 months after the strike ended, the Respondent instituted what are referred to as "pass down meetings" for the sake of communications between shifts. These meetings are more structured than the old overlap meetings. Wareham assigns one inspector from each shift to attend these meetings, rather than permitting all of the inspectors the option of participating. In its answer, the Respondent denies that it changed the overlap procedures, but does not deny that it failed to give the Union prior notice or an opportunity to bargain. Similarly, in its brief, the Respondent argues that elimination of the 15-minute overlap meetings was not a violation of any bargaining obligation, but does not assert that it bargained with the Union before eliminating the overlap meetings. Wareham's testimony, read as a whole, gives rise to a reasonable inference that he made the change without notifying the Union.

O. Requests for Seniority Lists

Prior to October 2005, Hillman had asked Lukacs for seniority lists on approximately 10 to 15 occasions and in almost all cases Lukacs had supplied the lists the same day or the next day. Sometimes Lukacs simply printed the seniority list on the spot. In late October 2005, Hillman again asked Lukacs for a seniority list. On this occasion Lukacs stated, without further explanation, that she could not get the list for Hillman. About a week later, Hillman and/or Cogan requested the seniority list again, but still it was not supplied. Hillman and Cogan told

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³⁵ In its brief, the Respondent states that the practice with respect to these overlap meetings "had changed from time to time over the years." Respondent's Brf. at 29. The Respondent makes this claim without any citation to the record, and I am aware of nothing showing that multiple, or meaningful, changes were made to this practice during the 3 years that preceded the strike.

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Love that Lukacs had not supplied the requested seniority information. Love orally requested the seniority list from Hewitt at the December 13 bargaining session, but the list was not provided.³⁶ By letter dated January 11, 2006, Love requested that the Respondent provide the Union with the seniority list. Eight days later, on January 19, 2006, the Respondent supplied the seniority information to the Union.

P. Complaint Allegations

The complaint alleges that the Respondent violated section 8(a)(5) and (1) by: falsely declaring impasse orally on or about December 13, 2005, and by letter on December 20, 2005, over the single issue of the Respondent's pension plan proposal; announcing its intention to implement a pension plan proposal as of December 31, 2005, in the absence of impasse; and, unilaterally implementing the Respondent's pension plan proposal at a time -- about December 31, 2005 -- when the Respondent had not bargained to a good faith impasse. The complaint alleges that the Respondent also violated section 8(a)(5) and (1) by failing to give the Union notice and an opportunity to bargain over the following changes and their effects: the temporary transfers of employees among shifts; the temporary transfers of employees among jobs; the routine assignment of bargaining unit work to non-bargaining unit process technicians; the subcontracting of bargaining unit work; the elimination of scheduled daily overtime for quality control inspectors; and the permanent reassignment of bargaining unit work from the shipping department working foreman to non-bargaining unit employees. The complaint also alleges that the Respondent violated section 8(a)(5) and (1) by waiting until January 19, 2006,³⁷ before supplying updated seniority rosters that the Union first requested in or about late October 2005. The complaint alleges that through its overall conduct, the Respondent failed and refused to bargain in good faith in violation of section 8(a)(5) and (1).

In addition, the complaint alleges that the Respondent violated section 8(a)(1): on or about August 29, 2005, when Wareham threatened employees with demotion if they could not get along with crossover employees; on or about September 2, 2005, when Cooper threatened employees with termination and the denial of unemployment compensation if they did not elect to take a voluntary layoff; and in or about October 2005, when Lukacs interrogated employees about their union support and solicited employees to withdraw their economic support from the Union. Finally, the complaint alleges that the Respondent violated section 8(a)(3) and (1) by discriminating against employees, and thereby discouraging membership in a labor organization, by: failing to reinstate Kornides and Gruss from August 29, 2005, until mid-April 2006; and demoting Grazier from his position as group leader in October or November 2005.

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³⁶ Hillman and Love testified with certainty about their requests for the seniority information. Lukacs testified, but could not remember whether Hillman had requested such information in late October 2005, although she said Hillman had "probably" made such a request in the fall or winter of 2005. Lukacs denied that she had ever refused to provide a seniority list when one was requested, but she did not claim specific memory either of Hillman's late October oral request or of supplying the information in response to that request. To the extent that Lukacs' testimony can be viewed as a denial either that Hillman orally requested the information in late October 2005, or that Lukacs had failed to supply it, I credit Hillman's clearer and more certain testimony over that of Lukacs. Regarding Love's testimony that he requested the information from Hewitt at the December 13 meeting, there was no significant contrary evidence.

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³⁷ See footnote 1, supra.

III. Analysis and Discussion

A. Unilateral Implementation of Reduction in Pension Contributions and Respondent's Claim of Impasse

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The General Counsel alleges that the Respondent violated section 8(a)(5) and (1) by unilaterally implementing its pension proposal on January 1, 2006, at a time when good faith impasse had not been reached regarding either the pension plan proposal or overall negotiations. In addition, the General Counsel alleges that the Respondent violated Section 8(a)(5) and (1) when, prior to such implementation, it falsely declared impasse based on the single issue of pension benefits and announced that it would implement its pension proposal. For the reasons discussed below, I conclude that the Respondent committed these violations.

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The Board has held that when, as here, the "parties are engaged in negotiations for a collective-bargaining agreement," the employer's obligation to refrain from unilateral changes regarding mandatory subjects "extends beyond the mere duty to provide notice and an opportunity to bargain about a particular subject matter; rather it encompasses a duty to refrain from implementation at all, absent overall impasse on bargaining for the agreement as a whole." *Register-Guard*, 339 NLRB 353, 354 (2003), quoting *RBE Electronics of S.D., Inc.*, 320 NLRB 80, 81 (1995); *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991), enfd. sub nom. *Master Window Cleaning v. NLRB*, 15 F.3d 1087 (9th Cir. 1994) (Table). The employer's obligation to refrain from such changes survives the expiration of the contract, and failure to meet that obligation is a violation of Section 8(a)(5) and (1) of the Act. *Newcor Bay City Division*, 345 NLRB No. 104, slip op. at 10 (2005); *Made 4 Film, Inc.*, 337 NLRB 1152 (2002).

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In this case, there is no dispute that the Respondent made a unilateral change to employees' pension benefits and that such benefits are a mandatory subject of bargaining.³⁸ The Respondent contends that it was within its rights in doing this because the parties had reached a good faith impasse in negotiations. As the party asserting impasse, the Respondent has the burden of establishing that impasse existed. *L.W.D., Inc.*, 342 NLRB 965 (2004); *CalMat Co.*, 331 NLRB 1084, 1097-98 (2000), *Outboard Marine Corp.*, 307 NLRB 1333, 1363 (1992), enfd. 9 F.3d 113 (7th Cir. 1993) (Table). The Board defines bargaining impasse as the "situation where 'good-faith negotiations have exhausted the prospects of concluding an agreement.'" *Royal Motor Sales*, 329 NLRB 760, 761 (1999), enfd. sub nom. *Anderson Enterprises v. NLRB*, 2 Fed. Appx. 1 (D.C. Cir. 2001), quoting *Taft Broadcasting*, 163 NLRB 475, 478 (1967), enfd. sub nom. *Television Artists, AFTRA v. NLRB*, 395 F.2d 622 (D.C. Cir. 1968). It is "the point in time of negotiations when the parties are warranted in assuming that further bargaining would be futile 'Both parties must believe that they are at the end of their rope.'" *AMF Bowling Co.*, 314 NLRB 969, 978 (1994), enf. denied, 63 F.3d 1293 (4th Cir. 1995), quoting *PRC Recording Co.*, 280 NLRB 615, 635 (1986), enfd. 836 F.2d 289 (7th Cir. 1987); *Patrick & Company*, 248 NLRB 390, 393 (1980), enfd. 644 F.2d 889 (9th Cir. 1981) (Table). The question of whether a valid impasse exists is a "matter of judgment" and among the relevant considerations are "[t]he bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues as to which there is

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³⁸ The Respondent has not disputed that pension contributions are a mandatory subject of bargaining. At any rate, the status of pension benefits as a mandatory subject has been recognized by the United States Supreme Court. See *Allied Chemical and Alkali Workers of America, Local Union No. 1 v. Pittsburgh Plate Glass Co., Chemical Division*, 404 U.S. 157, 159 (1971) ("Under the National Labor Relations Act, as amended, mandatory subjects of collective bargaining include pension and insurance benefits for active employees.")

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disagreement, [and] the contemporaneous understanding of the parties as to the state of negotiations." *Taft Broadcasting Co.*, 163 NLRB at 478.

5 In the instant case, the record shows that on December 13, during the same meeting at
which the Respondent declared impasse, the Union had offered to move towards the
Respondent's proposals on some of the most important issues dividing the parties. Regarding
the pension plan, the Union stated that it would be willing to agree to the 82-cent hourly
10 reduction in contributions that the Respondent was proposing if the Respondent would agree to
return 55 cents of that amount to employees in the form of increased wages. Such an
arrangement would have addressed the Respondent's stated concerns about the effects of the
current contribution level on its withdrawal liability, and would also ameliorate somewhat the
Union's concern that a reduction in contributions was a "money grab," Tr. 557, by the
15 Respondent. The Union's willingness to accept a decrease in pension contributions was a very
significant change given that the Union's most recent comprehensive proposal, made on
November 16, had sought yearly *increases* in pension contributions. This movement by the
Union came in direct response to a pre-session overture by Hewitt, in which he indicated to
Love that the Respondent would be interested in receiving a proposal along those lines from the
20 Union. The fact that the Union stated its willingness to make such a concession on December
13 is compelling evidence that at the time the Respondent declared impasse the Union officials
had not given up on negotiating a compromise regarding pension benefits, but were still making
changes to their position in hopes of finding common ground on that issue.

 The evidence also indicates that, on December 13, the Respondent was not at the end
25 of its own negotiating rope regarding the pension issue. As stated above, Hewitt had recently
made an overture to Love regarding the possibility of reaching a compromise based on the
Company taking a portion of the 82 cents per employee/per hour by which it was proposing to
reduce its pension contribution rate, and returning that portion to employees in some other form.
Not only that, but the Respondent had repeatedly told the Union that the Company would re-
30 examine its pension proposal when the parties received the pension withdrawal liability
calculation for 2005. Hewitt made that representation to the Union in letters of August 19,
September 20, and, most recently, November 23. In the September letter, the Respondent had
stated that an increase in the withdrawal liability calculation might discourage the Company from
withdrawing from the plan, and, in the August letter, the Respondent indicated that if such
35 withdrawal did not take place the contribution levels would not be reduced. The November 23
letter stated that "once that information [on withdrawal liability] is provided, the Employer will
reconsider its proposal" on pension benefits. Given these representations, the Respondent
cannot plausibly claim to have been at the end of its bargaining rope on the pension issue as of
December 13 -- only about 3 weeks after the November 23 letter and before it had received the
40 2005 withdrawal liability calculation. Based on this record, I conclude that the Respondent has
not only failed to meet its burden of showing that both parties were at the ends of their ropes
regarding negotiations over the pension benefit, but has failed to show that *either* party had
reached that point when Hewitt declared impasse on December 13.

45 The record also shows that the parties did not reach impasse regarding the pension
issues during the period between December 13 (when the Respondent prematurely declared
impasse) and January 1, 2006 (when the Respondent unilaterally implemented the pension
contribution reduction). During that interval, the Respondent finally obtained the withdrawal
liability calculation for 2005, and the Union, in turn, received that information from the
50 Respondent at some point between December 14 and December 20. By the time the parties
received the information, however, the Respondent had already declared that the parties were

at impasse and that the Company would unilaterally reduce pension contributions on January 1. These declarations were themselves unremedied unfair labor practices,³⁹ and such declarations would be expected to slow further progress in negotiations. Moreover, although Hewitt had previously suggested that an increase in the withdrawal liability calculation might reduce the Respondent's enthusiasm for the pension changes it had proposed, after receiving the new calculation, Hewitt told the Union that the increase in withdrawal liability actually reinforced the Respondent's determination to make those changes. In spite of the Respondent's declaration of impasse, and its contradictory statements regarding what an increase in withdrawal liability would mean for negotiations, Love offered, on December 21, to "explore solutions to our differences at any time," even during "the Holiday Season." Unmoved by this invitation to further negotiations, the Respondent unilaterally implemented the pension contribution reduction on January 1, 2006, without meeting to negotiate with the Union a single time following receipt of the 2005 withdrawal liability calculation. Given these circumstances, it is plain that the Respondent unilaterally implemented its proposal to reduce pension contributions before the parties had a sufficient opportunity to consider changing their positions based on the withdrawal liability information, or to discuss their proposals in light of that information. As Love put it, the parties were not at impasse, but simply "ran out of time" before the Respondent's January 1 "deadline." See *Royal Motor Sales*, 329 NLRB at 763 and 770 (union did not have critical information on the employer's proposals for a sufficient period of time and therefore the employer "acted prematurely when implementing its final offer and did not place its theory of the [union's] bargaining rigidity . . . to the test").

Even assuming for purposes of argument that the parties were at impasse regarding the issue of pension benefits, such a single-issue impasse would not legitimize the Respondent's actions since the Respondent was required to await overall impasse in the negotiations before unilaterally reducing the pension contribution levels provided for under the expired contract. See *Register-Guard*, supra; *Bottom Line Enterprises*, supra. The record in this case clearly shows that the parties had not reached an overall impasse. Going into the December 13 meeting, the parties had already reached tentative agreement on 21 issues. On December 13, the Union offered to make concessions that would significantly narrow the distance between the parties' positions on the important issues of wages, contract duration, and possibly health insurance. Indeed, according to Hewitt's December 20 letter to Love, Hewitt believed that the Union had essentially agreed to the Respondent's health insurance proposal. At the December 13 meeting, the Union also stated that it would agree to 3 percent wage increases for the first 3 years of a contract, and would accept the Respondent's call for a 5-year contract if that contract provided for increases of 3.5 percent during the final 2 years. This position mirrored a proposal on wages and contract duration that the Respondent itself had made earlier, but now the Respondent refused to accept it. This unwillingness to agree to a proposal that the Respondent itself had made earlier is suggestive of an intent on the part of the Respondent's negotiators to

³⁹ An employer bargains in bad faith when, like the Respondent here, it prematurely declares impasse, *Grosvenor Resort*, 336 NLRB 613, 615 (2001), *South Carolina Baptist Ministries*, 310 NLRB 156, 157 (1993), *Hotel Roanoke*, 293 NLRB 182, 185 (1989), or threatens to unilaterally implement a change at a time when good faith impasse has not been reached, *J. Josephson, Inc.*, 287 NLRB 1188, 1190 (1988). In addition, as is discussed below, the Respondent committed a number of other unfair labor practices that were unremedied at the time the Respondent declared impasse and unilaterally implemented its pension proposal. The Board has long held that "even if the parties have reached deadlock in their negotiations, a finding of impasse is foreclosed if that outcome is reached 'in the context of serious unremedied unfair labor practices that affect the negotiations.'" *Royal Motor Sales*, 329 NLRB at 762, quoting *Noel Corp.*, 315 NLRB 905 (1994).

avoid an agreement. In addition, on December 13, the Union stated, for the first time, that it would accept the Respondent's proposal for an 82-cent reduction in pension contributions if the Respondent agreed to offset 55 cents of that reduction with a wage increase.

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The Respondent's December 20, pre-implementation, letter makes clear that the Company was declaring impasse only on the "pension issue." Nevertheless the Respondent now argues that the parties were at overall impasse under the Board's decision in *CalMat Co.*, because "a complete breakdown in the entire negotiations" had resulted from the "single critical issue" of pension benefits. Respondent's Brief at 38; *CalMat Co.*, 331 NLRB at 1097, quoting *Sacramento Union*, 291 NLRB 552, 554 (1988), enfd. mem. sub nom. *Sierra Publishing Co. v. NLRB*, 888 F.2d 1394 (9th Cir. 1989). It is true that pension benefits were the most critical subject dividing the parties in December 2005. However, the record does not support the Respondent's claim that bargaining on that issue had caused a breakdown in overall negotiations. To the contrary, the record shows that the parties were making progress on the other major issues of health insurance, wages, and contract duration. The Union had modified its positions on most, or all, of those subjects at the December 13 bargaining session. Those concessions, *made at the very session during which the Respondent declared impasse*, demonstrated a willingness on the part of the Union to remain flexible in order to reach a new agreement. See *Royal Motor Sales*, 329 NLRB at 762 (no valid impasse when the Union had made a dead-lock breaking proposal only 2 days earlier), *Towne Plaza Hotel*, 258 NLRB 69, 78 (1981) (employer's declaration of impasse invalid where the union had significantly reduced its wage demand only 2 weeks earlier and the union never stated it was unwilling to make further concessions). Given the Union's flexibility on major issues, the Respondent was "required to recognize that negotiating sessions might produce other or more extended concessions." *Royal Motor Sales*, 329 NLRB at 772 quoting *NLRB v. Webb Furniture Corp.*, 366 F.2d 314, 316 (4th Cir. 1966), enfg. 152 NLRB 1526 (1965). "Rather than explore the possibilities raised" by the Union's December 13 offers to compromise, however, the Respondent "rushed to declare impasse and implement" its own pension proposal. *Royal Motor Sales*, 329 NLRB at 763. This action "precluded further exploration of possible tradeoffs and foreclosed any finding that good-faith bargaining exhausted the prospects of reaching an agreement." *Id.* "Having never fully tested the finality of the Union's bargaining position, Respondent is in a poor position to argue that further negotiations would have been futile." *Towne Plaza Hotel*, 258 NLRB at 78.

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The Union not only indicated continuing flexibility by its actions, but repeatedly notified the Respondent that it was not at the end of its negotiating rope. The record shows that the Union told the Respondent that the parties were not at impasse and offered to meet to explore solutions. Under the circumstances present here – most notably Local 1357's recent concessions on key issues -- "the Union's "protestations that negotiations have not reached impasse provide substantial evidence to support . . . [a] finding of no impasse." *Royal Motor Sales*, 329 NLRB at 773, citing *Teamsters Local 639 (D.C. Liquor Wholesalers) v. NLRB*, 924 F.2d 1078 (D. C. Cir 1991). Rather than indicating that there was a complete breakdown in overall negotiations, the record shows that the Union was attempting to engage in a productive exploration of the issues dividing the parties – an exploration that was cut short by the Respondent's insistence on unilaterally reducing pension contributions by its January 1 "deadline."⁴⁰

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⁴⁰ The Respondent has not cited the *Stone Container Corp.* exception under which an employer need not await overall impasse regarding certain changes that result from discrete, annually recurring, events that are scheduled to take place during contract negotiations. 313 NLRB 336 (1993); see also *TXU Electric Co.*, 343 NLRB No. 132 (corrected from No. 137), slip op. at 4 (2004). At any rate, that exception does not apply to the Respondent's January 1

Continued

In reaching the conclusion that the parties were not at impasse, I considered the fact that by time the Respondent declared impasse approximately a year had passed since the first negotiating session for a new contract. However, it would not be fair to say that the parties had been negotiating for a year at the time the Respondent made the impasse declaration. After negotiations began, the bargaining unit employees organized a new local union to represent them in contract negotiations, elected officers, and retained a new attorney (with no prior labor law experience) to serve as lead negotiator. These actions interrupted negotiations for a period of many months, and probably slowed progress for a period thereafter. Negotiations were also complicated by the fact that the Respondent introduced harsher, in some instances concessionary, proposals relatively late in the negotiations. In its January 31, 2005, proposal the Respondent had been willing to increase pension contributions, although the increases were less than what the employees had been seeking. Approximately 8 months later, the Respondent proposed not only to eliminate all pension contribution increases, but to slash contributions by over 50 percent from the current level. Similarly, in its January 31 proposal the Respondent had offered wage increases of 3 percent during 3 years, and 3.5 percent during the remaining 2 years, of a 5-year contract. On December 13, the Union stated that it was willing to accept such a proposal, but the Respondent was no longer offering it or willing to accept it. Negotiations were also slowed by the parties' lengthy wait for the 2005 withdrawal liability information. In August 2005, at the same time that the Respondent first proposed cutting its pension contributions, the Respondent indicated that its view of the pension subject might change depending on the withdrawal liability figure for 2005. That information was not received by the parties until almost 4 months later and not until *after* the Respondent declared impasse. During the interim, negotiations on the pension subject were hampered by uncertainty regarding what that information would show. The Union reasonably believed that, given Hewitt's prior representations, the withdrawal liability information might alter the Respondent's position regarding pension issues. In addition, the record does not show that there had been an inordinate number of bargaining sessions between the Respondent and Local 1357 prior to the declaration of impasse. The record establishes approximately eight such sessions, and only four of those sessions took place after Local 1357 retained attorney Love to serve as lead negotiator. See *Tom Ryan Distributors*, 314 NLRB 600, 605 (1994) (no impasse where the parties had met only eight times before employer declared impasse), *enfd.* 70 F.3d 1272 (6th Cir. 1995) (Table).

The evidence shows that the Respondent declared impasse when it did because its self-imposed "deadline" for cutting contributions to the pension fund – January 1 -- was approaching, not on the basis of the actual prospects for reaching agreement. This was made explicit in the contemporaneous pronouncements by Hewitt. At the December 13 negotiating session, Hewitt stated that he had "no choice" but to implement the pension contribution reduction because of the "looming January 1 deadline." He stressed the Respondent's determination to act by that date again in his December 20 letter to Love. An employer cannot establish impasse when the evidence shows that its declaration was based on a desire to implement a change by a particular date, rather than on the actual prospects for reaching agreement. See *CBC Industries*, 311 NLRB 123, 127 (1993) (employer's declaration of

"deadline" since the evidence establishes that pension contribution levels can be changed at any point during the year, and that the date when such a change is made has no particular significance for purposes of calculating withdrawal liability. For the same reason, the Respondent has failed to show that the January 1 "deadline" created an economic exigency or business emergency that compelled it to implement the reduction in pension benefits without reaching overall impasse. See *RBE Electronics of S.D.*, 320 NLRB at 81.

impasse not valid when motivated by employer's desire to implement cuts immediately upon expiration of the contract), *Dust-Tex Service*, 214 NLRB 398, 405 (1974) (same), enfd. 521 F.2d 404 (8th Cir. 1975) (Table). In this case, the Respondent has not shown that the parties had exhausted the actual prospects for reaching an agreement either at the time of the December 13 impasse declaration or at the time of the unilateral implementation of a pension contribution reduction on January 1.

For the reason discussed above, I conclude that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally reducing its contributions to the unit employees' pension fund on January 1, 2006, at a time when the Respondent had not bargained to a good faith impasse. In addition, I conclude that the Respondent violated Section 8(a)(5) and (1) when, on December 13 and 20, 2005, it falsely declared impasse and announced its intention to unilaterally implement a pension plan proposal.

B. Other Alleged Unilateral Changes

The complaint alleges that the Respondent violated its bargaining obligations under Section 8(a)(5) and (1) of the Act by failing to give the Union notice and an opportunity to bargain before making changes regarding the temporary transfer of employees among shifts, the temporary transfer of employees among jobs, the assignment of unit work to process technicians, the subcontracting of bargaining unit work including routine maintenance, and the scheduled daily overtime for quality control inspectors. The complaint also alleges that the Respondent violated Section 8(a)(5) and (1) by failing to give the Union notice and an opportunity to bargain before reassigning unit work from unit employee Byers to nonunit employees.

An employer violates Section 8(a)(5) and (1) of the Act when it unilaterally changes the wages, hours, or other terms and conditions of employment of bargaining unit employees without first providing the collective-bargaining representative with notice and a meaningful opportunity to bargain. *NLRB v. Katz*, 369 U.S. 736 (1962); *Ivy Steel & Wire, Inc.*, 346 NLRB No. 41, slip op. at 16-17 (2006); *Mercy Hospital of Buffalo*, 311 NLRB 869, 873-74 (1993); *Associated Services for the Blind*, 299 NLRB 1150, 1164-65 (1990). This is a requirement even if at the time of the change the collective bargaining agreement between management and the union has expired and a new agreement has not been completed. *Litton Financial Printing Div., a Div. of Litton Business Systems, Inc. v. NLRB*, 501 U.S. 190, 198 (1991). The Board has made clear that in order to constitute a unilateral change that violates the Act, the employer's action must be a material, substantial, and significant change that has a real impact on, or causes a significant detriment to, the employees or their working conditions. *Golden Stevedoring Co.*, 335 NLRB 410, 415 (2001) (quoting *Millard Processing Services*, 310 NLRB 421, 425 (1993)); *Outboard Marine Corp.*, 307 NLRB at 1339.

1. Transfers of Shifts and Jobs

The General Counsel alleges that, following the strike, the Respondent unlawfully changed its practices regarding the temporary reassignment of employees between shifts and between jobs. Based on the evidence discussed above regarding such reassignments, I find that the General Counsel has failed to show that the Respondent changed those practices. Regarding shift assignments, the record shows that, both before and after the strike, the Respondent would sometimes meet staffing needs by temporarily reassigning employees between shifts, as long as the employee consented to the change. Notice to the Union was not required – either prior to or after the strike -- when such reassignments were made. It is true that, at least for a time, temporary shift reassignments occurred more frequently after the strike

than before, but the General Counsel failed to establish that this increase was the result of any change in the Respondent's practices relating to such reassignments. The record shows that, following the strike, the Respondent was faced with staffing imbalances between shifts because a significant number of unit employees had resigned. This meant that the need for temporary reassignments between shifts arose more frequently immediately after the strike. The record does not show that the increase in such reassignments was based on a change in the practice, rather than on the application of the established practice to the unusual staffing imbalances that followed the strike. On this record, the General Counsel has failed to meet its burden of showing that the Respondent made a change to its practice regarding the temporary reassignment of employees between shifts.

For the same reason, the General Counsel has also failed to show that the Respondent changed its practice regarding the temporary reassignment of unit employees between jobs. The evidence showed that such temporary reassignments were used by the Respondent both before and after the strike. Temporary job reassignments occurred more frequently during the period immediately following the strike. However, the evidence does not show that this increased frequency resulted from a change in established practice, rather than from the application of pre-strike standards to the altered staffing circumstances the Respondent faced for a period of time following the strike.

The record does not show that the Respondent made changes relating to the temporary reassignment of unit employees between shifts and between jobs. Therefore, the allegations that the Respondent violated Section 8(a)(5) and (1) by making such changes should be dismissed.

2. Use of Process Technicians

The General Counsel alleges that the Respondent violated Section 8(a)(5) and (1) by assigning an increased amount of unit work to a group of nonunit employees known as process technicians, without prior notice to the Union. The record fails to establish that the Respondent changed its practices regarding the use of process technicians to perform unit work. Before the strike, the Respondent used the process technicians to fill-in for unit employees who were on break or vacation, or incapacitated by sickness or injury. After the strike, the Respondent continued to use process technicians under those same circumstances. The record shows that for a period of several months the frequency of such use increased substantially. However, as with the temporary shift and job reassignments, the record fails to show that this increase in frequency resulted from a change in the practice itself rather than from the consistent application of the established practice to the unusual staffing circumstances that existed for a period after the strike due to the resignations of unit employees.

The record fails to establish that the Respondent changed its practice regarding the use of process technicians to perform unit work. Therefore, the allegation that the Respondent violated Section 8(a)(5) and (1) by making such a change without bargaining should be dismissed.

3. Subcontracting

The expired contract between the parties, as well as contracts that preceded it, explicitly stated that the Respondent could subcontract bargaining unit work "only when . . . there are no employees on layoff." There was no evidence that this provision had been interpreted to mean something other than what it says, or that the subcontracting of unit work had ever been permitted before the strike during a period when unit employees were on layoff. Despite this

contractual prohibition, after the strike the Respondent began to subcontract work that bargaining unit employees had previously been responsible for performing, even though Kornides and Gruss were still on layoff. By taking such action without the Union's consent, and at a time when the parties had not negotiated a new contract or bargained to impasse, the Respondent violated Section 8(a)(5) and (1) of the Act. See *Register-Guard*, 339 NLRB at 354; *RBE Electronics*, 320 NLRB at 81; *Bottom Line Enterprises*, 302 NLRB at 374. Moreover, the Respondent admits that the subcontracting of bargaining unit work is a mandatory subject for purposes of collective bargaining. Therefore the Respondent violated Section 8(a)(5) and (1) when its subcontracted bargaining unit work at a time when unit employees were on layoff, without the Union's consent or bargaining to a new contract or impasse.

In response to a number of the allegations of unlawful changes, the Respondent asserts that its actions were permitted by the management rights provision contained in the expired contract. This argument fails because the Board has held that, unlike other provisions in a contract, the operation of a management rights provision does not survive the expiration of that contract. As the Board recently reaffirmed, "A contractual reservation of management rights does not extend beyond the expiration of the contract in the absence of evidence of the parties' contrary intentions." *Long Island Head Start Child Development Services*, 345 NLRB No. 74, slip op. at 1 (2005), enf. denied 460 F.3d 254 (2d Cir. 2006). In the instant case, there is no evidence that the parties intended for the management rights provision in the expired contract to extend beyond the expiration of the contract.⁴¹ Thus the Respondent's argument that the management rights clause in the expired contract authorized it to unilaterally depart from existing terms and conditions of employment fails.

I conclude that the Respondent violated Section 8(a)(5) and (1) following the end of the strike, by unilaterally beginning to subcontract bargaining unit work while employees were on layoff, despite a contractual prohibition on subcontracting under such circumstances and without obtaining the Union's prior consent or bargaining to a new contract or good faith impasse.

4. Elimination of Overlap Meetings

When the strike ended, the Respondent eliminated its established practice of permitting all quality inspectors the option of working 15 minutes of overtime at the end of their shifts in order to participate in "overlap" meetings with personnel on the incoming shifts. The overlap meetings had given quality inspectors the opportunity to earn approximately \$1000 in extra wages per year. The discontinuation of these meetings, and the elimination of the opportunity for extra wages, had a real impact on employees and the Respondent admits that scheduled daily overtime is a mandatory subject of bargaining. The Respondent made the change in its established practice regarding the overlap meetings without giving the Union notice or an opportunity to bargain. The Respondent argues that such a change was within its discretion under the management rights provision. Even assuming that the management rights provision would have permitted such a change during the life of the contract, this argument fails because the operation of that provision did not survive the expiration of the contract. *Long Island Head Start Child Development Services*, supra.

⁴¹ Even if the management rights provision in the parties' expired contract were still in effect it would not, under its own terms, authorize subcontracting when doing so conflicted with a specific prohibition in the contract. The provision on management rights states that such rights do not prevail where "expressly limited by other sections of this agreement." See footnote 14, supra. In this instance the Respondent's management rights are expressly limited by the contractual provision that prohibits subcontracting unit work while employees are on layoff.

I conclude that the Respondent violated Section 8(a)(5) and (1) when it eliminated the overlap meetings after the strike.

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5. Byers' Duties Changed

Following the strike, the Respondent permanently reassigned a number of duties to nonunit employees that, for 2 or more years, had been performed by Byers, a bargaining unit employee. These reassigned duties included ensuring the flow of raw materials in and out of the facility, scheduling carriers, negotiating contracts or rates with carriers, developing packaging, determining how to utilize floor space in the department, and inspecting the facility's buildings and grounds. In order to accomplish his pre-strike job assignments, Byers had routinely worked 10 to 12 hours of overtime each week. As a consequence of the post-strike changes, Byers has not had the opportunity to work any overtime since returning from the strike. In addition, Byers was barred from the office area where he had previously worked, and told that he could no longer use the computer or cell phone to which he had access prior to the strike. Before reassigning Byers' duties, the Respondent did not obtain the Union's consent, or provide the Union with notice and opportunity to bargain.

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The reassignment of a significant portion of Byers duties to nonunit employees was "a material, substantial, and significant change that ha[d] a real impact on, or cause[d] a significant detriment" to Byers. *Golden Stevedoring*, supra. Not only did it substantially alter his job, but it deprived him of the significant amounts of overtime pay he had been able to earn while assigned those duties. The Respondent, while conceding that it changed Byers' duties, argues that the change was not a mandatory subject because the duties that were reassigned involved nonunit work. I reject this argument for two reasons. First, the Respondent has not shown that any of the work that was reassigned from Byers was nonunit work. Byers, a unit employee, had been doing those tasks for a period of several years and, in some instances, longer. He testified that he did not recall the Respondent ever telling him that the tasks were nonunit work and Hillman testified that the reassigned duties had always been considered bargaining unit work. At trial, not a single company official testified that the reassigned duties were nonunit work prior to the strike and Nancy Hauser, who made the decision to reassign the duties, was not even called by the Respondent as a witness. Indeed, the Respondent has not shown that, prior to the strike, the Respondent had ever referred to those duties as nonunit work, or assigned them to nonunit employees. At any rate, the duties had been assigned to Byers, a unit employee, for several years and, under such circumstances, even if some of those duties were previously nonunit work, they became bargaining unit work by dint of being regularly assigned to Byers over a period of years. See *Bozzuto's, Inc.*, 275 NLRB 353, 355-56 (1985).

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The only support that the Respondent offers for its claim that the reassigned duties were nonunit work is the unit definition stipulated to by the parties. The Respondent argues that since the unit definition states that the unit includes "all production and maintenance employees, including truck drivers" and excludes "office clerical employees," the work reassigned from Byers was not unit work. That argument is not persuasive. The unit definition talks about types of employees, not specific duties. The stipulation does not define the types of work performed by production and maintenance employees, and neither the stipulation, nor the collective bargaining agreement, states that any of Byers' reassigned duties were not the responsibility of unit employees.

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Second, even assuming, contrary to my conclusion, that all of the work that the Respondent reassigned from Byers to nonunit employees was nonunit work, the Respondent has still failed to establish that such reassignment would not be a mandatory subject for

collective bargaining. The Respondent does not cite any authority for the proposition that an employer need not bargain before reassigning nonunit duties that have customarily been performed by unit employees. To the contrary, it is well established that once a specific job has been included within the scope of a bargaining unit by consent of the parties, the employer cannot unilaterally modify that position without first securing the consent of the union. *The Wackenhut Corporation*, 345 NLRB No. 53, slip op. at 3-4 (2005). The Board has held that a unilateral change in unit employees' terms or conditions of employment may violate the Act if it is "a material, substantial, and significant change that has a real impact on, or causes a significant detriment to, the employees or their working conditions." *Golden Stevedoring Co.*, supra; see also *Outboard Marine Corp.*, supra. It is clear that the reassignment here had such an impact on Byers – dramatically changing his job duties, eliminating his longstanding overtime opportunities, and ending his access to an office, computer and cell phone. This is true regardless of whether the reassigned duties were unit work or not.

In its brief, the Respondent also makes reference to evidence that the Respondent told Byers the change in his duties was necessitated by the "Sarbanes Oxley Law." Respondent's Brief at 30. However, the Respondent does not cite to any provisions of that law, or explain how permitting Byers to continue performing his pre-strike duties could have violated it.

I conclude that the Respondent violated Section 8(a)(5) and (1) by permanently reassigning duties from Byers to nonunit employees after the strike ended.

C. Information Requests

Paragraph 19(c) of the complaint, as amended, alleges that the Respondent violated the Act by delaying the provision of updated seniority rosters from about late October 2005 until January 19, 2006. The evidence showed that in late October 2005, the Union asked the Respondent to provide an updated seniority list for unit employees. The record establishes that the Respondent was capable of producing such a list with only a few minutes of effort. Nevertheless, the Respondent told the Union that it could not provide the list. The Union subsequently requested the same information orally on at least two occasions, and in writing on one occasion. The Respondent did not supply the requested seniority information to the Union until January 19, 2006 – approximately 3 months after it was first requested. Information about unit employees, such as the seniority list at issue here, is presumptively relevant to bargaining. See *Quality Building Contractors*, 342 NLRB 429, 431 (2004); *Western Massachusetts Electric Company*, 234 NLRB 118, 118-19 (1978), enfd. 589 F.2d 42 (1st Cir. 1978). Indeed, the Respondent does not dispute the Union's entitlement to the seniority lists.

The Board has held that an employer's "unreasonable delay in furnishing . . . information is as much of a violation of Section 8(a)(5) of the Act as a refusal to furnish the information at all." *Amersig Graphics, Inc.*, 334 NLRB 880, 885 (2001); see also *Britt Metal Processing*, 322 NLRB 421, 425 (1996), affd. 134 F.3d 385 (11th Cir. 1997) (Table); *Leland Stanford Junior University*, 307 NLRB 75, 80 (1992). The Respondent argues that its delay in supplying the information was not significant enough to constitute a violation. I disagree. "Absent evidence justifying an employer's delay in furnishing a union with relevant information, such a delay will constitute a violation . . . inasmuch '[a]s the Union was entitled to the information at the time it made its initial request, [and] it was [the employer's] duty to furnish it as promptly as possible.'" *Woodland Clinic*, 331 NLRB 735, 737 (2000), quoting *Pennco, Inc.*, 212

NLRB 677, 678 (1974). The Board evaluates the reasonableness of an employer's delay in supplying information based on the complexity and extent of the information sought, its availability and the difficulty in retrieving the information. *West Penn Power Co.*, 339 NLRB 585, 587 (2003), enfd. in part and remanded 394 F.3d 233 (4th Cir. 2005); *Samaritan Medical Center*, 319 NLRB 392, 398 (1995).

In this case the Respondent took approximately 3 months to provide the Union with simple information that Lukacs, from whom the information was first requested, was capable of making available with only a few minutes' effort. No reason is given by the Respondent to justify the delay. Under such circumstances, the Board has consistently found delays of 3 months, or even shorter, to violate the Act. See *Pan American Grain*, 343 NLRB No. 47 (2004), enfd. in relevant part, 432 F.3d 69 (1st Cir. 2005) (3-month delay unreasonable); *Bundy Corp.*, 292 NLRB 671 (1989) (delay of 2.5 months violates the Act); *Woodland Clinic*, 331 NLRB at 737 (delay of 7 weeks violates the Act). The Respondent has not identified any cases in which the Board has approved a delay of months where, as here, the information sought was simple and could have been produced easily. Instead the Respondent's ignores the oral requests made by the Union beginning in late October, and argues that the delay was not unreasonable because the first written request for the information was made on January 11, 2005. This argument fails because requests for information need not be made in writing or in any particular form in order to give rise to a duty to provide information. *A.W. Schlesinger Geriatric Center*, 304 NLRB 296, 297 fn.7 (1991). I conclude that the Union's oral request for the seniority lists in late October 2005 obligated the Respondent to produce the information, and that the Respondent delayed unreasonably when it refused to produce that information until January 19, 2006.

I conclude that the Respondent violated Section 8(a)(5) and (1) of the Act by unreasonably delaying the provision of the seniority lists requested by the Union beginning in late October 2005.

D. Alleged 8(a)(1) Violations

1. Cooper Statement to Rellick

The General Counsel alleges that Cooper, a supervisor for purposes of the Act, unlawfully threatened unit employee Rellick when, on about September 2, 2005, he stated that Rellick "should leave" if he was not happy working for the Respondent and that "if I have to take you upstairs to my office, [you will] be fired and . . . will not be able to collect unemployment." An employer violates Section 8(a)(1) of the Act by threatening an employee with discharge for engaging in protected activity. *Bestway Trucking, Inc.*, 310 NLRB 651, 671 (1993), enfd. 22 F.3d 177 (7th Cir. 1994); *Potential School for Exceptional Children*, 282 NLRB 1087, 1090 (1987), enfd. 883 F.2d 560 (7th Cir. 1989); *Steinerfilm, Inc.*, 255 NLRB 769, 769-70 (1981), enfd. in relevant part 669 F.2d 845 (1st Cir. 1982). A statement violates Section 8(a)(1) if "under all the circumstances" the remark "reasonably tends to restrain, coerce, or interfere with the employee's rights guaranteed under the Act." *GM Electrics*, 323 NLRB 125, 127 (1997). For the reasons discussed below, I conclude that the Cooper's statement to Rellick violated the Act under these standards.

It is clear that the Cooper was threatening that Rellick might be fired and denied unemployment benefits, but it is a closer question whether the threat was related to protected activities. The record shows that Cooper made the statement to Rellick in response to multiple reports from co-workers and supervisors that Rellick was refusing to perform some of his duties and was complaining that he hated his job and did not think the employees should have

returned from the strike. If Cooper had told Rellick that the threat related exclusively to Rellick's reported refusal to perform some of his lawfully assigned tasks, a violation might not be established. An employee's selective refusal to perform some, but not all, of his or her lawfully assigned tasks is not protected activity,⁴² and Cooper's threat would not violate the Act if all it would reasonably be expected to do was discourage Rellick or other employees from engaging in such unprotected activity. However, Cooper did not tell Rellick that the threat of discharge had anything to do with Rellick's supposed refusal to perform duties. Indeed, when Rellick specifically asked whether he was being accused of something, Cooper declined to clarify. Given that Cooper prefaced the threat by stating that Rellick should leave if he was not happy working for the Respondent, I believe that Rellick and others would reasonably see Cooper's threat as relating to Rellick's statements that he hated his job and did not think the employees should have returned from the strike. By discussing his view that the employees should have continued the strike, Rellick was engaging in protected activity. His statement went beyond "mere griping," both because it grew out of prior group activity and looked towards future group action, such as a resumption of the work stoppage. See *Asheville School*, 347 NLRB No. 84, slip op. at 5-6 (2006). Therefore, I conclude that Cooper's threat unlawfully interfered with protected activity.

For the reasons discussed above, I conclude that the Respondent interfered with employees' protected activity in violation of Section 8(a)(1) when Cooper threatened that Rellick would be terminated and denied unemployment compensation if he did not elect to take a voluntary layoff.⁴³

2. Interrogation and Solicitation to Withdraw Economic Support from the Union

The General Counsel alleges that Lukacs, the Respondent's human resources manager, violated the Section 8(a)(1) by interrogating J. Hauser about her support for the Union, and soliciting J. Hauser to withdraw her economic support for the Union. The record shows that, in October 2005, J. Hauser, a unit employee who worked in an entry-level position, went to Lukacs' office for the purpose of determining how many vacation days she had left. J. Hauser and Lukacs discussed that subject, then, while the two were alone in Lukacs' office, Lukacs asked J. Hauser whether she was paying her union dues. When J. Hauser responded that she was, in fact, paying union dues, Lukacs stated "Well, you don't have to, because we have no contract."

The Board has held that an interrogation is unlawful if, in light of the totality of the circumstances, it reasonably tends to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights. *Millard Refrigerated Services, Inc.*, 345 NLRB No. 95, slip op. at 4-5 (2005); *Matthews Readymix, Inc.*, 324 NLRB 1005, 1007 (1997), enfd. in part 165 F.3d 74 (D.C. Cir. 1999); *Liquitane Corp.*, 298 NLRB 292, 292-93 (1990). Relevant factors include

⁴² "The Board and the courts have long held that the refusal by employees to perform some, but not all, tasks lawfully assigned by the employer constitutes a partial strike, an activity that is not protected under Sec. 7." *Paperworkers Local 5 (International Paper)*, 294 NLRB 1168, 1170-71 fn.14 (1989).

⁴³ The General Counsel also alleges that an unlawful threat was made by Wareham. For reasons discussed earlier, I found that the General Counsel failed to establish that Wareham made the statement that is alleged to constitute a threat of demotion. See footnote 24, *supra*. Since the General Counsel failed to establish that such a statement was made, the complaint allegation regarding a threat of demotion by Wareham should be dismissed.

whether proper assurances were given concerning the questioning, the background and timing of the interrogation, the nature of the information sought, the identity of the questioner, and the place and method of the interrogation. *Millard Refrigerated*, supra; *Stoody Co.*, 320 NLRB 18, 18-19 (1995); *Rossmore House Hotel*, 269 NLRB 1176, 1177-1178 (1984), affd. sub nom. *Hotel Employees and Restaurant Employees Union Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985).

Under these standards, I conclude that Lukacs' statements to J. Hauser were coercive in violation of the Act. The questioning took place out of the presence of other employees in the office of a high ranking manager who had authority over employee benefits and disciplinary actions. The person questioned was an entry-level employee who was not shown to have voluntarily revealed that she was continuing to provide economic support, or any other type of support, to the Union. She had come to Lukacs' office with a question about benefits, not to discuss the Union or any activities related to the Union. Lukacs, unprompted by J. Hauser, initiated questioning directed exclusively at J. Hauser's union activity. See *Structural Composites Industries*, 304 NLRB 729 (1991) (violation found where employee questioned was not an open union adherent and the questioning was directed solely at the employee's union activities). Lukacs made this inquiry without assuring J. Hauser either that any response would not be held against her or that the questioning had a benign purpose. After J. Hauser answered that she was paying Union dues, Lukacs told her that she did not have to pay them -- a statement that, on this record, appears to have had no purpose other than to discourage J. Hauser from continuing to provide such economic support to the Union. Under these circumstances, I find that Lukacs' questioning of J. Hauser was coercive and would reasonably tend to interfere with the exercise of employees' Section 7 rights. The situation presented here is similar to the one in *Creutz Plating Corp.*, where an employer's general manager asked whether an employee intended to continue paying union dues once the company stopped deducting dues automatically, and when the employee responded that he would continue paying union dues, the general manager stated that the employee "should spend it on himself." 172 NLRB 1, 6 and 13 (1968). The employer in that case was found to have violated Section 8(a)(1) both by engaging in a coercive interrogation and by urging the employee not to pay union dues. Id. The same result is warranted under the similar facts presented by this case.

For the reasons discussed above, I find that the Respondent violated section 8(a)(1) in October 2005 by coercively interrogating a unit employee about her payment of union dues, and by soliciting the unit employee to stop paying union dues.

E. Allegation that Respondent Failed to Bargain in Good Faith

The complaint alleges that the Respondent failed and refused to bargain in good faith by its overall conduct, including the implementation of unilateral changes to employees' terms and conditions of employment following the strike, the false declaration of impasse, the unilateral implementation of changes to employees' pension benefits in the absence of impasse, and the extended delay in furnishing the Union with information necessary to bargaining. "In determining whether a party has violated its statutory obligation to bargain in good faith, the Board examines the totality of the party's conduct, both at and away from the bargaining table." *Flying Foods*, 345 NLRB No. 10, slip op. at 7 (2005). The Board "must decide whether a party is engaging in hard, but lawful, bargaining to achieve an agreement that it considers desirable or is unlawfully endeavoring to frustrate the possibility of arriving at any agreement." Id. The conduct of both the employer and the union is considered. Id. An employer's premature declaration of impasse lends support to a finding of overall bad faith in bargaining. *Grosvenor Resort*, 336 NLRB at 615; *South Carolina Baptist Ministries*, 310 NLRB at 157.

5 By its actions in this case, the Respondent manifested a clear intent to avoid agreement on a new contract. In an August 19 letter, after only a single negotiating session with Love – the Union’s newly retained chief negotiator -- Hewitt began referring to the parties as being at
10 impasse. At the same time, the Respondent started to make increasingly harsh proposals on the key subjects of pension benefits and wages. By the time the Respondent formally declared impasse, on December 13, the Union was offering to agree to terms that met, or exceeded, what the Respondent had earlier been seeking in its own proposals on pension benefits, wages, and contract duration, but the Respondent now refused to agree to those terms, or even to
15 acknowledge the Union’s compromises. Moreover, although Hewitt had previously told the Union that the Respondent’s position on the important issue of changes in pension benefits could be altered if the 2005 withdrawal liability calculation showed an increase in that figure, when the information showing such an increase became available, Hewitt did an about-face, and stated that the increase only strengthened the Respondent’s resolve to make the pension
20 changes. Indeed, the Respondent declared impasse on December 13 before it had even received the 2005 withdrawal liability figure, and then unilaterally implemented its pension proposal without giving the Union a reasonable period of time to react to either the new withdrawal figure or the Respondent’s changed position regarding the significance of that figure for purposes of the negotiations. The Respondent subsequently received that calculation after
its declaration of impasse and before its January 1 "deadline" for implementation, but nevertheless proceeded to unilaterally implement its pension proposal effective January 1 without once meeting with the Union about the new calculation, despite the Union’s standing invitation to a meeting.

25 The Respondent’s intent to avoid an agreement is also shown by its insistence on a false, and ultimately unreasonable, deadline for resolving the pension issue. Hewitt represented to the Union that January 1, 2006, was an externally imposed deadline for making a change to the pension contribution level for 2006, such that agreement had to be reached on the contribution level prior to that date. When Hewitt declared that the parties were at impasse and
30 that the Respondent would unilaterally implement its pension proposal, he relied on the fact that the parties could not reach agreement by that supposed deadline. The record makes clear, however, that there was no such deadline. Indeed, the Respondent has not shown that Hewitt had any basis at all for asserting to the Union that such a deadline existed. Continuing to insist that an agreement on pension benefits be reached by January 1, 2006, became even more
35 unreasonable because the key information regarding the 2005 withdrawal liability was not made available to the Union until, at the earliest, December 15.

40 The above factors are sufficient to show that the Respondent was not attempting, in good faith, to reach an agreement. That conclusion is buttressed by consideration of other behavior engaged in by the Respondent. For example, one of the Respondent’s bargaining proposals was to eliminate the contractual prohibition on subcontracting unit work while there were employees on layoff. When the Union did not agree to that change during negotiations, the Respondent unilaterally commandeered the authority it was seeking -- beginning to subcontract unit work while there were still employees on layoff. In addition, for about 3 months
45 during negotiations, the Respondent inexplicably, and unlawfully, refused to provide seniority information that was requested by the Union and which could have been produced easily with only a few minutes’ effort. As noted above, the evidence also showed that, during negotiations, the Respondent made statements to employees that constituted an unlawful threat, a coercive interrogation, and an unlawful solicitation to withdraw economic support from the Union. Finally,
50 the Respondent’s unwillingness to bargain in good faith with the Union was confirmed when, after dealing with Local 1357 as the unit employees’ representative for many months, the Respondent took the frivolous position that Local 1357 was not even the legitimate bargaining representative of the employees.

For the reasons discussed above, I conclude that the Respondent, by its overall conduct, has failed and refused to bargain in good faith with the Union as the exclusive collective bargaining representative of unit employees in violation of Section 8(a)(5) and (1).

F. Alleged 8(a)(3) and (1) Violations

1. Delay in Reinstating Kornides and Gruss

The General Counsel alleges that the Respondent violated Section 8(a)(3) and (1) of the Act when, following the Union's unconditional offer to return to work, the Respondent refused to reinstate former strikers Kornides and Gruss during the period from August 29, 2005, to April 3, 2006. Since at least the time of the Board's decision in *Laidlaw Corp.*, 171 NLRB 1366, 1368 (1968), enfd. 414 F.2d 99 (7th Cir. 1969), cert. denied 397 U.S. 920 (1970), it has been established that, "in the absence of a legitimate and substantial business justification, economic strikers are entitled to immediate reinstatement to their prestrike jobs upon making an unconditional offer to return to work." *Supervalu, Inc.*, 347 NLRB No. 37, slip op. at 2 (2006), citing *Laidlaw Corp.* supra. "One recognized legitimate and substantial business justification for refusing to reinstate economic strikers is that their jobs are occupied by workers hired as permanent replacements." *Id.* Although economic strikers who have been permanently replaced are not entitled to immediate reinstatement, under *Laidlaw* the employer "remain[s] obligated to keep their names on some type of nondiscriminatory roster until such time as openings become available, whereupon the unreinstated striker could be recalled to his or her former or substantially equivalent position." *Peerless Pump Co.*, 345 NLRB No. 20, slip op. at 5 (2005).

Kornides and Gruss were both economic strikers for whom the Respondent hired permanent replacement employees. Under the principles set forth above, they were, therefore, not entitled to immediate reinstatement to their former positions as general finishers, but were entitled to be recalled when openings occurred for those, or substantially equivalent, positions. The record in this case does not establish that such openings occurred prior to April 2006. The persons who were hired to permanently replace Kornides and Gruss were not shown to have departed the company prior to April 2006. Nor does the record show that before Kornides and Gruss were reinstated the Respondent hired any new employees for positions that either former striker was qualified to perform. On this record, I conclude that the Respondent's failure to reinstate Kornides and Gruss prior to April 2006 was not shown to violate their *Laidlaw* rights.

I have also considered the evidence concerning Kornides and Gruss under the analytical framework set forth in *Wright Line* for evaluating claims that an employer discriminated against an employee on the basis of union or protected activity. 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied, 455 U.S. 989 (1982), approved in *NLRB v. Transportation Corp.*, 462 U.S. 393 (1983). Under that framework, the General Counsel bears the initial burden of showing that the Respondent's decision not to reinstate Kornides and Gruss prior to April 2006 was motivated, at least in part, by antiunion considerations. If the General Counsel makes this showing, the burden shifts to the Company to demonstrate that it would have taken these same actions even in the absence of the protected activity. *Senior Citizens Coordinating Council*, 330 NLRB 1100, 1105 (2000). In the instant case, the evidence fails to show that antiunion considerations were a motivating factor in the Respondent's action with respect to Kornides and Gruss. The record shows that both Kornides and Gruss participated in the strike, but also shows that almost all of the other approximately 300 unit employees did so as well. There was no evidence that either of the alleged discriminatees was a particularly active or outspoken union supporter or that they engaged in any other protected activities that

would cause the Respondent to single them out from among the returning strikers for discriminatory treatment. Indeed, the uncontradicted evidence shows that Kornides and Gruss were selected for replacement during the strike because they were the two employees in the bargaining unit with the least seniority. The General Counsel does not assert, and the record provides no basis for believing, that the Respondent did not need to hire the two permanent replacement employees during the strike or that the decision to hire them was motivated by an unlawful purpose. Nor does the evidence provide a basis for concluding that the Respondent's decision not to hire any new employees for general finisher positions, or substantially equivalent jobs, between August 29, 2005, and April 3, 2005, was motivated by Kornides' and Gruss' participation in the strike. The evidence simply fails to give rise to an inference that the Respondent delayed reinstating Kornides and Gruss because of the strike or any other protected activity.

For the reasons discussed above, I conclude that the allegation that the Respondent violated Section 8(a)(3) and (1) by refusing to reinstate Kornides and Gruss during the period from August 29, 2005, until April 3, 2006, should be dismissed.⁴⁴

2. Demotion of Grazier

The General Counsel also alleges that the Respondent violated Section 8(a)(3) and (1) by discriminatorily demoting Grazier from his position as a group leader in October or November 2005. Grazier was shown to have been active in union activities. He engaged in confrontational behavior during the strike and was one of six employees who the Respondent told the Union had engaged in picket-line misconduct. Grazier ceased to be a group leader, and lost the 20-cent pay differential for that designation, in October or November of 2005, after he told Wareham, his supervisor, "you can stick this lead man 20 cents up your ass." Shortly after Grazier made that statement, Wareham received a report from one of Grazier's co-workers that Grazier had recounted telling Wareham to take the lead man designation and "shove it." For the reasons discussed below, I conclude that the General Counsel has failed to establish a violation.

The question of whether Grazier was discriminatorily demoted turns, at the outset, on whether the Respondent actually demoted him, or whether Grazier himself resigned from the group leader designation. *U.S. Plastics Corp.*, 213 NLRB 323, 331 (1974) (Whether employee "was discriminated against turns, first, on whether he was discharged or quit.") I conclude that the Respondent reasonably understood Grazier to be resigning from the group leader designation when he told Wareham he could "stick this lead man 20 cents up [his] ass." *Id.* (Employee was not discharged, but quit, when he stated that the employer could "take this [obscenity] job and shove it up his [obscenity]").⁴⁵ Indeed, Grazier testified at trial, but did not deny that he meant the statement to Wareham as a resignation from his group leader designation. Wareham, on the other hand, testified that when he discontinued Grazier's lead man designation he was not disciplining Grazier, but rather effectuating Grazier's stated intent to resign that designation. Grazier never complained to Wareham about the lead man designation being discontinued and did not file a grievance on the subject. Based on this

⁴⁴ For reasons discussed in the remedy section of this decision, I conclude that although the delay in reinstating Kornides and Gruss was not shown to be discriminatory, both of those employees are entitled to relief based on the Respondent's failure to reinstate them before beginning, in violation of the expired contract and Section 8(a)(5), to subcontract bargaining unit work.

⁴⁵ The decision in *U.S. Plastics Corp.*, does not reveal what the obscenities were.

record, I conclude that the General Counsel has not crossed the initial threshold of showing that Grazier ceased to be lead man because he was demoted, rather than because he quit those duties.

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I recognize that Grazier resigned in reaction to statements by Wareham that, while they were not alleged as violations, may have tended to interfere with protected activity. Specifically, the record shows that after Grazier became loud during a discussion with a co-worker regarding negotiations and the union contract, Wareham told Grazier to "keep his opinions to himself." Wareham also told Grazier, "If you are going to be loud and spouting off, at least be right [Y]ou are lead man, you know, I expect you to lead in the right direction." It was in reaction to these statements that Grazier resigned his duties as group leader. However, under the applicable legal standards, I conclude that Wareham's behavior towards Grazier did not amount to a constructive discharge or demotion of Grazier from his group leader designation. The Board has held that a threat to restrict protected activity, or an unfair accusation relating to an employee's protected activity, is "not the equivalent of the actual imposition of unlawful conditions of employment; it does not in any meaningful sense render the conditions of employment so intolerable as to compel an employee to leave his job." *Easter Seals Connecticut, Inc.*, 345 NLRB No. 52, slip op. at 13 (2005), quoting *Central Casket Co.*, 225 NLRB 362, 363 (1976); see also *Project Aid*, 240 NLRB 743, 750 (1979). In this instance, Wareham did not even threaten that discipline would follow if Grazier failed to refrain from the types of actions that Wareham was criticizing. Prior to Grazier resigning his group leader designation, Wareham did not alter Grazier's work station or work conditions in a way that would have interfered with Grazier's continued ability to engage in protected activity. Grazier did not testify that he found himself in a position where he believed he would be unable to freely continue his protected activities unless he resigned from the group leader designation.

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For the reasons discussed above, I conclude that the allegation that the Respondent violated Section 8(a)(3) and (1) by discriminatorily demoting Grazier from his position as group leader in October or November 2005 should be dismissed.

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Conclusions of Law

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

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2. The Union (Local 1357) is a labor organization within the meaning of Section 2(5) and is the exclusive collective bargaining representative of unit employees at the Respondent's Pennsylvania plant.

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3. The Respondent violated Section 8(a)(5) and (1) of the Act: on January 1, 2006, by unilaterally reducing its contributions to the unit employees' pension fund at a time when the Respondent had not bargained to a good faith impasse; on December 13 and 20, 2005, by falsely declaring impasse and announcing its intention to unilaterally implement a pension plan proposal; after the strike ended, by unilaterally beginning to subcontract normal bargaining unit work while employees were on layoff, despite a contractual prohibition on subcontracting under such circumstances and without obtaining the Union's prior consent or bargaining to a new contract or good faith impasse; after the strike, by unilaterally eliminating its established practice regarding overlap meetings for quality inspectors; after the strike, by permanently reassigning duties from Byers to nonunit employees; by unreasonably delaying the provision of the seniority lists requested by the Union from October 2005 until January 19, 2006; and, through its overall conduct, by failing and refusing to bargain in good faith with the Union as the exclusive collective bargaining representative of unit employees.

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4. The Respondent violated Section 8(a)(1) of the Act: in October 2005, by coercively interrogating a unit employee about her payment of union dues, and by soliciting the unit employee to stop paying union dues; and, shortly after the strike ended, when Cooper responded to protected activity by Rellick by threatening that Rellick would be terminated and denied unemployment compensation if he did not elect to take a voluntary layoff.

5. I conclude that the record does not establish the Respondent committed the other violations alleged.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. In particular, I recommend that the Respondent be ordered to place in effect all pension benefit terms required by the contract that expired on January 31, 2005, and maintain those terms in effect until the parties have bargained to agreement or a valid impasse, or the Union has consented to changes. I recommend that the Respondent be ordered to make whole the unit employees and former unit employees for any loss of benefits they suffered as a result of the Respondent's unlawful alteration of their pension benefits, as set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), *enfd.* 444 F.2d 502 (6th Cir. 1971), with interest as set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). In addition, I recommend that the Respondent be ordered to reimburse unit employees for any expenses resulting from the Respondent's unlawful changes to those pension benefits and make all contributions to the LIUNA fund that have been, or will be, required under the terms of the expired bargaining agreement, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), *affd.* 661 F.2d 940 (9th Cir. 1981), such amounts to be computed in the manner set forth in *Ogle Protections Service*, *supra*, with interest as prescribed in *New Horizons for the Retarded*, *supra*.

In addition, I recommend that the Respondent be required to make employees whole for any loss of earnings or other benefits that resulted from the other changes the Respondent made in violation of its bargaining obligations under Section 8(a)(5) and (1). Such amounts are to be computed as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, *supra*. This includes making Byers whole for losses, including the loss of overtime compensation, that he suffered as a result of the Respondent's unlawful reassignment of many of his duties to nonunit employees. Make whole relief should also be provided to remedy the losses that quality inspectors suffered as a result of the Respondent's unlawful discontinuation of the daily overlap meetings for which those employees had received additional compensation. Make whole relief should also be provided to employees who suffered losses as a result of the Respondent's unlawful subcontracting of bargaining unit work. In particular, such a remedy is warranted for Kornides and Gruss. Since the Respondent was contractually required to recall Kornides and Gruss from layoff before initiating such subcontracting, I conclude that Kornides and Gruss are entitled to a make-whole remedy covering the period starting when the Respondent first subcontracted bargaining unit work after the strike and ending when the Respondent reinstated those employees. *St. Regis Hotel*, 339 NLRB No. 96, slip op. at 2-3 (2003), 2003 WL 21713024, *3 (NLRB) (remedy includes make whole relief for employees who were on layoff as a result of the employer subcontracting work in violation of Section 8(a)(5) and (1)). Therefore, the Respondent must be

required to reimburse Kornides and Gruss for any loss of earnings and other benefits that those employees suffered due to the Respondent's unlawful conduct during such period, to be computed in the manner prescribed in *F.W. Woolworth Co.*, supra, with interest as prescribed in
 5 *New Horizons for the Retarded*, supra.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended Order.⁴⁶

10 ORDER

The Respondent, Airo Die Casting, Inc. (a subsidiary of Leggett & Platt, Incorporated), Loyalhanna, Pennsylvania, its officers, agents, successors, and assigns, shall

15 1. Cease and desist from

(a) Falsely declaring impasse and/or announcing its intention to unilaterally implement its pension proposal, or any other contract proposal, at a time when the parties have not reached a new contract or a valid, good faith, impasse in bargaining.

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(b) Unilaterally implementing its pension proposal, or any other contract proposal, at a time when the parties have not reached a new contract or a valid, good faith, impasse in bargaining.

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(c) Unilaterally reducing its contributions to the employees' pension fund at a time when the parties have not reached a new contract or a valid, good faith, impasse in bargaining,

(d) Unilaterally subcontracting bargaining unit work while employees are on layoff without bargaining to a new contract or a valid, good faith, impasse in bargaining.

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(e) Unilaterally discontinuing the established, pre-strike, practice regarding overlap meetings for quality inspectors without providing the Union with notice and an opportunity to bargain.

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(f) Permanently reassigning duties from any unit employee to nonunit employees, without providing the Union with notice and an opportunity to bargain.

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(g) Unreasonably delaying the provision of information requested by the Union that is relevant and necessary to the Union's performance of its duties as collective bargaining representative.

(h) Failing and refusing, through its overall conduct, to bargain collectively and in good faith with the Union as the exclusive collective bargaining representative of unit employees.

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(i) Coercively interrogating any unit employee about union support or union activities, and/or attempting to coerce any unit employee to withdraw support from the Union.

50 ⁴⁶ 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.

(j) Threatening that any unit employee will be terminated and denied unemployment compensation as a result of that employee engaging in protected activity.

5 (k) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

10 (a) Restore, honor, and continue employees' pension benefit terms as they existed under the collective bargaining agreement that expired on January 31, 2005, and maintain those terms until such time as the parties complete a new agreement, good-faith bargaining leads to a valid impasse, or the Union agrees to changes.

15 (b) Make whole employees and former employees for any and all losses of benefits incurred as a result of the Respondent's unlawful failure to continue providing the pension benefit terms required by the collective bargaining agreement that expired on January 31, 2005, with interest, as set forth in the remedy section of this decision.

20 (c) Make all contributions to the LIUNA pension fund that are required under the terms of the collective bargaining agreement that expired on January 31, 2005, including all required amounts that the Respondent has failed to contribute since its false declaration of impasse on December 13, 2005, as set forth in the remedy section of this decision.

25 (d) Make whole employees and former employees for any and all losses of wages and other benefits that occurred as a result of the Respondent's unlawful subcontracting, with interest, as set forth in the remedy section of this decision.

30 (e) Reinststitute the practice with respect to overlap meetings for quality inspectors as that practice existed immediately prior to the strike.

(f) Make whole employees and former employees for any and all losses of wages and benefits incurred as a result of the Respondent's unlawful discontinuation of the overlap meetings for quality inspectors, as set forth in the remedy section of this decision.

35 (g) Restore to unit employee Edward Byers all duties that were unlawfully reassigned from him after the strike, and restore to him all conditions of employment that accompanied the performance of those duties, including the conditions relating to work station, equipment, and overtime.

40 (h) Make whole Edward Byers for any and all losses of wages and benefits incurred as a result of the Respondent's unlawful reassignment of duties from him to nonunit employees, with interest, as set forth in the remedy section of this decision.

45 (i) On request, bargain collectively and in good faith with Factory Workers Laborers' Local Union 1357 a/w Laborers' International Union of North America, AFL, CIO, as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

50 All production and maintenance employees, including truck drivers of the Company employed at its Pennsylvania plant, but excluding all office clerical employees, guards, watchmen and supervisors as defined in the Act.

5 (j) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

10 (k) Within 14 days after service by the Region, post at its facility in Loyalhanna, Pennsylvania, copies of the attached notice marked "Appendix."⁴⁷ Copies of the notice, on forms provided by the Regional Director for Region Six, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60
15 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a
20 copy of the notice to all current employees and former employees employed by the Respondent at any time during the period beginning on August 29, 2005.

(l) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

25 IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

30 Dated, Washington, D.C. December 20, 2006

35 _____
PAUL BOGAS
Administrative Law Judge

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50 _____
⁴⁷ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT falsely declare impasse or announce an intention to unilaterally implement our pension proposal, or any other contract proposal, at a time when the parties are not at a valid, good faith, impasse in bargaining.

WE WILL NOT unilaterally implement our pension proposal, or any other contract proposal, at a time when the parties are not at a valid, good faith, impasse in bargaining.

WE WILL NOT unilaterally reduce our contributions to your pension fund at a time when the parties are not at a valid, good faith, impasse in bargaining.

WE WILL NOT unilaterally subcontract bargaining unit work while any employees are on layoff without bargaining to a new contract or good faith impasse.

WE WILL NOT unilaterally discontinue the pre-strike practice regarding overlap meetings for quality inspectors without providing the Union with notice and an opportunity to bargain.

WE WILL NOT permanently reassign duties from you to nonunit employees, without providing the Union with notice and an opportunity to bargain.

WE WILL NOT unreasonably delay providing information requested by the Union that is relevant and necessary to the Union's performance of its duties as collective bargaining representative.

WE WILL NOT fail and refuse, through our overall conduct, to bargain collectively and in good faith with the Union as the exclusive collective bargaining representative of unit employees.

WE WILL NOT coercively interrogate you about union support or union activities, and/or attempt to coerce you to withdraw support from the Union.

WE WILL NOT threaten that you will be terminated and denied unemployment compensation as a result of your engaging in protected activity.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

5 WE WILL restore, honor, and continue your pension benefit terms as set forth in the collective bargaining agreement that expired on January 31, 2005, and maintain those terms until such time as the parties complete a new agreement, good-faith bargaining leads to a valid impasse, or the Union agrees to changes.

10 WE WILL make you whole for any and all losses of benefits that you incurred as a result of our unlawful failure to provide the pension benefit terms contained in the collective bargaining agreement that expired on January 31, 2005.

15 WE WILL make all contributions to your pension fund that are required under the terms of the collective bargaining agreement that expired on January 31, 2005, including all amounts that we unlawfully failed to contribute since falsely declaring impasse on December 13, 2005.

WE WILL make you whole for any and all losses of wages and/or other benefits that occurred as a result of our unlawful subcontracting.

20 WE WILL reinstate the practice with respect to overlap meetings for quality inspectors as that practice existed immediately prior to the strike.

WE WILL make you whole for any loss of wages and benefits incurred as a result of our unlawful discontinuation of the overlap meetings for quality inspectors.

25 WE WILL restore to unit employee Edward Byers all duties that were unlawfully reassigned from him after the strike, and restore to him the conditions of employment that had accompanied those duties, including the conditions relating to work station, equipment, and overtime.

30 WE WILL make Byers whole for any and all losses of wages and benefits incurred as a result of our unlawful reassignment of duties from him to nonunit employees.

35 WE WILL, on request, bargain collectively and in good faith with Factory Workers Laborers' Local Union 1357 a/w Laborers' International Union of North America, AFL, CIO, as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

40 All production and maintenance employees, including truck drivers of the Company employed at its Pennsylvania plant, but excluding all office clerical employees, guards, watchmen and supervisors as defined in the Act.

45 _____
(Employer)

Dated _____ By _____
(Representative) (Title)

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