

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

EL PASO DISPOSAL, L.P.

and

INTERNATIONAL UNION OF OPERATING  
ENGINEERS, LOCAL 351, AFL-CIO

Cases 28-CA-21654  
28-CA-21666  
28-CA-21672  
28-CA-21677  
28-CA-21681  
28-CA-21817

and

PAUL URBINA  
Petitioner

and

INTERNATIONAL UNION OF OPERATING  
ENGINEERS, LOCAL 351, AFL-CIO  
Union

Case 28-RD-969

John Giannopoulos, Esq., of Phoenix, Arizona,  
appearing on behalf of the General Counsel.

Charles P. Roberts, III, Esq. and Mark R. Flora, Esq.,  
for Constangy, Brooks & Smith, LLC  
of Winston-Salem, North Carolina and Austin, Texas,  
respectively, appearing on behalf of the Respondent.

Juan De La Torre, Business Representative, of El Paso, Texas,  
appearing on behalf of the Charging Party/Union.

Paul Urbina, of Chaparral, New Mexico,  
appearing on behalf the Petitioner.

**DECISION**

**BURTON LITVACK; Administrative Law Judge**

**Statement of the Case**

The original and amended unfair labor practice charges in Case 28-CA-21654 were filed by International Union of Operating Engineers, Local 351, AFL-CIO, herein called the Union, on November 14, 2007 and January 30, 2008, respectively; the original and amended unfair labor practice charges in Case 28-CA-21666 were filed by the Union on November 21, 2007 and

January 30, 2008, respectively; the unfair labor practice charge in Case 28-CA- 21672 was filed by the Union on November 23, 2007; the unfair labor practice charge in Case 28-CA-21677 was filed by the Union on November 30, 2007; the original and amended unfair labor practice charges in Case 28-CA-21681 were filed by the Union on December 3, 2007 and January 30, 2008, respectively; and the original and amended unfair labor practice charges in Case 28-CA-21817 were filed by the Union on March 6 and April 30, 2008, respectively. The decertification petition in Case 28-RD-969 was filed by Paul Urbina on December 20, 2007. After investigations of each of the above-described unfair labor practice charges and the decertification petition, on April 30, 2008, the Regional Director of Region 28 of the National Labor Relations Board, herein called the Board, issued an order further consolidating cases, a second consolidated complaint, and a notice of hearing. The second consolidated complaint alleges that El Paso Disposal, L.P., herein called Respondent, engaged in unfair labor practices within the meaning of Sections 8(a)(1), (2), (3), and (5) of the National Labor Relations Act, herein called the Act. Respondent timely filed an answer to the second consolidated complaint on May 13, 2008, denying the alleged unfair labor practices and asserting certain affirmative defenses. Pursuant to the aforementioned notice of hearing, on May 28-30, June 17-19, and July 15-17, 2008, in El Paso, Texas, these matters came to trial before the above-named administrative law judge. During the hearing<sup>1</sup>, each party was permitted to call and examine witnesses on its behalf, to cross-examine witnesses of the other parties, to offer into evidence any relevant documentary evidence, to argue its legal positions orally, and to file a post-hearing brief. Said documents were filed by counsel for the General Counsel and by counsel for Respondent and have been carefully considered and analyzed. Accordingly, based upon the entire record herein, including the post-hearing briefs and my conclusions as the credibility of the several witnesses,<sup>2</sup> I make the following:

## Findings of Fact

### I. Jurisdiction

At all times material herein, Respondent, a limited partnership, has maintained an office and place of business in El Paso, Texas and has been engaged in the business of providing waste disposal services to business and residential customers. Further, at all times material herein, Respondent, in conducting its above-described business operations, has purchased and received at its above facility goods valued in excess of \$50,000 directly from points located outside the State of Texas. Respondent admits that, at all times material herein, it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

---

<sup>1</sup> During the hearing, counsel for the General Counsel was permitted to amend the complaint to add allegations of alleged violations of Section 8(a)(1), Section 8(a)(1) and (3), and Section 8(a)(1) and (5) of the Act. Respondent denied each of said allegations. Additionally, in its post-hearing brief, counsel for the General Counsel withdrew paragraphs 7(i)(1) and 10(c) from the second consolidated complaint. Finally, subsequent to the hearing, counsel for the General Counsel and counsel for Respondent each filed a motion to correct the transcript, and, insofar as each agrees with the other and/or does not object to a proposed correction, said motions are granted. However, whenever said motions differ, as such do not appear to be material, the transcript shall remain unchanged.

<sup>2</sup> Prior to administering the oath to each witness, I admonished each to not testify unless he intended to tell the truth to the best of his recollection. Regrettably, as I have too often discovered, not all witnesses took said admonition seriously.

## II. Labor Organization

Respondent admits that, at all times material herein, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

5

### A. The Issues

The second consolidated complaint alleges and the General Counsel argues that Respondent engaged in acts and conduct violative of the Act prior to, during, and subsequent to a concerted work stoppage and strike by its maintenance employees bargaining unit and drivers bargaining unit employees, which commenced on November 21, 2007. Thus, the second consolidated complaint alleges and the General Counsel argues that, prior to the said strike, at various times during 2006 and 2007,<sup>3</sup> Respondent violated Section 8(a)(1) and (5) of the Act by failing and refusing to bargain in good faith with the Union, as the collective-bargaining representative of its maintenance employees bargaining unit, including delaying in responding to the Union's requests to schedule times for bargaining, delaying in setting dates for bargaining, refusing to meet at reasonable times or for reasonable durations for bargaining, failing to make timely proposals or counter-proposals, making proposals that were predictably unacceptable to the Union, informing the Union that they would have to bargain from scratch, and bargaining with no intention of reaching an agreement; by dealing directly with employees in its maintenance employees bargaining unit and employees in its drivers bargaining unit and thereby bypassing the Union as the collective-bargaining representative of said employees; by recognizing and bargaining with a "company union" as the exclusive bargaining representative of certain of its employees; by failing and refusing to furnish the Union with certain information, necessary and relevant to the Union's performance as the bargaining representative for Respondent's maintenance employees and drivers, which information the Union had requested by letter; and by unilaterally, and without giving prior notice to the Union as the collective-bargaining representative of said employees and affording it an opportunity to bargain, changing the manner in which it paid longevity bonuses to employees in its maintenance employees and drivers bargaining units and granting a wage increase to an employee. The second consolidated complaint next alleges and the General Counsel argues that, prior to the strike, on October 11, 2007, Respondent engaged in acts and conduct violative of Section 8(1) and (2) of the Act by directing employees to form an organization to deal with it concerning wages, hours, and other terms and conditions of employment.

The second consolidated complaint further alleges and the General Counsel argues that, prior to the strike, on October 11, 2007, Respondent engaged in acts and conduct violative of Section 8(a)(1) of the Act, by interrogating its employees about their union membership, sympathies, and activities, soliciting its employees' complaints and grievances and promising that it would remedy them if they refrained from supporting the Union as their bargaining representative, and discouraging its employees from supporting the Union by creating the impression the Union had authorized it to deal directly with employees regarding their grievances, labor disputes and terms and conditions of employment. The second consolidated complaint also alleges and the General Counsel argues that, prior to the strike, on November 14, 2007, Respondent engaged in acts and conduct violative of Section 8(a)(1) of the Act by informing employees that it would be futile for them to continue to support the Union as their collective-bargaining representative, promising employees improved and increased benefits if they ceased supporting the Union, soliciting employees to cease supporting the Union, threatening employees with loss of benefits and regressive bargaining proposals at the

---

<sup>3</sup> Unless otherwise stated, most of the events herein occurred during 2007.

5 bargaining table with the Union because they selected and continued to support the Union as  
their bargaining representative, discouraging employees from supporting the Union by telling  
them that it would refuse to bargain over the Union's bargaining proposals, soliciting employee  
complaints and grievances, promising to employees increased benefits and improved terms and  
conditions of employment if they ceased supporting the Union as their bargaining  
representative, threatening its employees with permanent replacement because they engaged  
in a concerted work stoppage and strike, threatening employees by inviting them to resign  
because they had engaged in union and other protected concerted activities, and soliciting  
employees to decertify the Union. Finally, it is alleged and argued that, prior to the strike,  
Respondent engaged in acts and conduct violative of Section 8(a)(1) of the Act by discouraging  
10 its employees from supporting the Union by informing them that their annual wage increase was  
being withheld because they selected the Union as their bargaining representative; threatening  
employees with unspecified reprisals because they participated on the Union's bargaining  
committee; by creating the impression among its employees that their union and other protected  
concerted activities were under surveillance by it; by threatening employees by telling them that  
15 a strike was inevitable, and by threatening its employees with discharge and other unspecified  
reprisals if they engaged in union or other protected concerted activities, including a concerted  
work stoppage and strike.

20 The second consolidated complaint alleges and the General Counsel argues that, on  
November 21, 2007, Respondent's employees in its maintenance employees bargaining unit  
and its drivers bargaining unit ceased work concertedly and engaged in a strike; that said strike  
was caused by Respondent's aforementioned unfair labor practices; and that said strike was  
prolonged by Respondent's below-described unfair labor practices. In this regard, the second  
consolidated complaint next alleges and the General Counsel argues that, after the above-  
described employees, on December 4, 2007, made an unconditional offer to return to work,  
25 Respondent engaged in acts and conduct violative of Section 8(a)(1) and (3) of the Act by failing  
and refusing to immediately reinstate the former striking employees to their former or  
substantially equivalent positions of employment, instructing the former striking employees to  
report to its human resources department and sign a preferential recall list indicating their desire  
to be reinstated and failing and refusing to adhere to said preferential hiring arrangement with  
respect to positions which became available in its maintenance and drivers units on or after  
30 December 4, 2007. Next, the second consolidated complaint alleges and the General Counsel  
argues that, since November 21, 2007 Respondent has engaged in acts and conduct violative  
of Section 8(a)(1) and (5) of the Act by failing and refusing to abide by the Union's request to  
furnish it with necessary and relevant information pertaining to the strike replacement  
employees and violative of Section 8(a)(1), (3), and (5) of the Act by changing the manner in  
35 which it tendered the wages earned by its employees, in its maintenance employees bargaining  
unit and in its drivers bargaining unit, by failing to direct deposit such wages. Further, the  
second consolidated complaint alleges and the General Counsel argues that, in late November  
or early December 2007, Respondent engaged in acts and conduct violative of Section 8(a)(1)  
and (3) of the Act by terminating its employee, Jose Macias, and preventing him from returning to  
work because it mistakenly believed he had engaged in the above-described concerted work  
40 stoppage and strike. Finally, the second consolidated complaint alleges and the General  
Counsel argues that, on or about November 21, 2007, Respondent engaged in acts and  
conduct violative of Section 8(a)(1) of the Act by intimidating its striking employees by  
summoning the El Paso police department to monitor their activities and, while they engaged in  
a lawful and peaceful demonstration, engaging in surveillance its employees strike activities by  
45 taking photographs of said employees while engaged in picketing.

The second consolidated complaint alleges and the General Counsel argues that,  
subsequent to the concerted work stoppage and strike, Respondent engaged in acts and

conduct violative of Section 8(a)(1) and (5) of the Act, in January 2008, by unilaterally, without affording the Union notice and an opportunity to bargain, changing its sick leave policy and violative of Section 8(a)(1) and (3) of the Act by terminating its employee, Juan Castillo, by informing him that he had been permanently replaced.

5 Respondent essentially denies the commission of any of the alleged unfair labor practices. Specifically, it affirmatively asserts that the strike, which commenced on November 21, 2007, was neither caused by nor prolonged by any unfair labor practices which might have occurred and that all strikers were permanently replaced prior to their unconditional offer to return to work and were not entitled to immediate replacement. Respondent further  
10 affirmatively asserts that the alleged unlawful unilateral change, with regard to the manner in which it paid longevity bonuses to employees, is time-barred by Section 10(b) of the Act. With regard to the allegations, pertaining to alleged bad faith bargaining, Respondent contends that, at all times, it bargained in good faith, meeting regularly with the Union, making proposals and counter-proposals, compromising on numerous contract provisions, and reaching agreement  
15 “on all but a handful of issues.”

## B. The Alleged Unfair Labor Practices Committed Prior to the November 21, 2007 Strike

### 1. The Allegation that Respondent Failed and Refused to Bargain in Good Faith with the Union

20 Respondent, a limited partnership engaged in the business of providing garbage pick-up and disposal services to business and residential customers in El Paso, Texas, is a wholly-owned subsidiary of Waste Connections, Inc.,<sup>4</sup> a State of California corporation, which owns and operates 138 garbage-hauling companies, 48 landfill companies, transfer stations, and  
25 several recycling companies located throughout the United States. Waste Connections’ nationwide operations are divided into four regions, with its western region comprising 32 subsidiaries (or districts) operating in California, Texas, New Mexico, Arizona, and Wyoming; as of December 31, 2007, Waste Connections, Inc. subsidiaries employed approximately 4,978 workers, with 381 (eight percent) represented by labor organizations or working under the terms  
30 and conditions of collective-bargaining agreements. At all times material herein, Darrell Chambliss has been the executive vice-president and chief operating officer of Waste Connections, Inc.; until his retirement in June 2008, Gene Dupreau was the vice-president of the western region; George Wayne has been the vice-president of its southwest division<sup>5</sup> and Respondent’s district manager;<sup>6</sup> Armando Lopez has been the operations manager for  
35 Respondent; and Michael Olivas has been Respondent’s maintenance manager. Lopez, who reports to Wayne, is directly responsible for and oversees the day-to-day functions of Respondent’s garbage truck drivers and their routes and the compactor and container maintenance departments, and, in late 2006, Wayne placed Lopez in charge of the fleet maintenance department. As maintenance manager, Olivas reports to Lopez and is  
40 immediately responsible for supervising the employees, who work in the fleet maintenance department. Subsequent to being victorious in a representation election on September 19, on

---

<sup>4</sup> Prior to being purchased by Waste Connections, Inc., Respondent had been a privately held company.

<sup>5</sup> Wayne oversees Waste Connections’ operations in Texas, New Mexico, and Arizona and reported to Dupreau.

<sup>6</sup> Wayne oversees the managers of the other Waste Connections, Inc. facilities within the Southwest division and is directly in charge of Respondent.

September 28, 2006, the Union was certified by the Regional Director of Region 28 of the Board as the exclusive collective-bargaining representative of Respondent's compactor maintenance, container maintenance, and fleet maintenance employees, herein called the maintenance employees bargaining unit, which is comprised of employees working in mechanic, welding, and truck washer positions, and, on October 12, 2006, after being victorious in a representation election on September 27, the Union was certified by the aforementioned Regional Director as the exclusive collective-bargaining representative of Respondent's front load drivers, residential drivers, relief drivers, roll off drivers, buggy drivers, storage unit drivers, Poly Cart drivers, and bulk drivers, herein called the drivers bargaining unit.

The second consolidated complaint initially alleges that Respondent failed and refused to bargain in good faith by delaying in responding to the Union's demand for bargaining, by delaying in setting dates for bargaining, and by refusing to meet at reasonable times and for reasonable durations for bargaining. As to these, Victor Aguirre, a business agent for the Union, had been in charge of the organizing campaigns for both bargaining units and, on October 2, 2006, he sent two letters to Wayne, demanding that Respondent meet and bargain with the Union for a collective-bargaining agreement for the maintenance employees bargaining unit and requesting that Respondent provide it with information pertaining to the wages, classifications, fringe benefits policies, and any disciplinary actions for said employees.<sup>7</sup> Ten days later, on behalf of Respondent, Waste Connections' chief operating officer Chambliss replied by letter, stating that Respondent understood its obligation to enter into bargaining and, after suggesting possible meeting locations, that "we are in the process of reviewing our calendars to determine what dates the members of our bargaining committee are available to meet. I will respond with proposed dates as soon as possible." Chambliss also wrote that Respondent would provide the requested information "as soon as practical." On October 16, Aguirre replied to Chambliss, offering a conference room at the Union's office building as a meeting location and noting he was waiting for Chambliss to respond with proposed meeting dates. Four days later, Respondent's attorney, Kenneth R. Carr sent a letter to Aguirre with an enclosure of the information, which the latter had requested. In his letter, which Carr mailed to the Union's previous 7717 Lockheed, El Paso address, the attorney wrote that Respondent needed "additional time" to respond with proposed meeting dates, that, on the previous day, he had become aware he had been selected by the Governor of Texas to fill an appellate court vacancy, and that, therefore, Respondent required time to find another attorney.<sup>8</sup> Having heard nothing further from Respondent, on November 1, Aguirre sent an e-mail to Chambliss, stating that he had not yet received any of the requested information and that he was waiting for the promised proposed meeting dates. Four days later, Chambliss sent an e-mail to Aguirre, stating that he was "surprised" Aguirre had not received the requested information as Carr had assured

---

<sup>7</sup> The heading of the bargaining demand letter states the Union's address as being 7717 Lockheed in El Paso and lists the phone number. In the body of the letter, Aguirre noted that the Union's mailing address should be 1200 Golden Key Circle in El Paso and gave the same telephone number for reaching him.

<sup>8</sup> Aguirre did not receive this letter until January or February, 2008.

him such had been sent to the Union.<sup>9</sup> With regard to bargaining, Chambliss wrote that, given attorney Carr’s judicial appointment, Respondent had commenced a search for another attorney, anticipated hiring an attorney “before the end of November,” and would instruct the attorney to contact Aguirre with proposed meeting dates. In fact, on November 28, Mark Flora, an attorney, who lives and works in Austin, Texas, sent an e-mail to Aguirre, advising the latter he had been retained by Respondent to represent it during contract bargaining with the Union for employees in both bargaining units; however, rather than suggesting meeting dates, Flora requested Aguirre to contact him “to discuss scheduling.” The next day, Aguirre and Flora spoke over the telephone and the former sent an e-mail to Flora, giving the latter the Union’s 1200 Golden Key Circle, El Paso, Texas address and suggesting bargaining dates on December 8, 11-15, and 18-21. The following day, Aguirre again sent an e-mail to Flora, advising the latter he would have to be in San Antonio, Texas during the week of December 11 through 16 and suggesting they meet during that week in that city. Flora replied via e-mail the next day, stating that, as he would be in trial through December 11 and was taking vacation the last two weeks in December. He added that he would be available to meet in San Antonio late in the week of December 11 through 16.

Eventually, Aguirre and Flora met in San Antonio on December 14 at a Holiday Inn Select hotel. Juan De la Torre, another business agent, accompanied Aguirre and, according to the latter, after introducing themselves, Flora mentioned his background with General Motors and his bargaining history with the United Autoworkers Union. “And then we talked about the units for El Paso Disposal. . . . whether we were going to negotiate either both units at once or just the mechanics first. Mr. Flora said that his client had requested that we negotiate for the mechanics first . . . . then we also talked about some outstanding unfair labor practices that we had filed. We talked about the Union’s . . . [interest] in getting a first-time agreement” and, “to show good faith,” the Union’s interest in “work[ing] out” the outstanding unfair labor practice charges. According to Aguirre, as to whether the bargaining should be for one or both bargaining units, the Union’s desire was to negotiate for both units together as its leverage was the drivers bargaining unit inasmuch as maintenance work had historically been subcontracted out. He told this to Flora, but the latter said that his client did not want to bargain first for the two units together as “the pay system for the drivers is very complicated.” Finally, they discussed the Union’s information requests, and Flora committed he would “get us” whatever the Union had not yet received. Mark Flora’s recollection of this meeting with Aguirre and De la Torre is that he began by asking why the Union was there, the parties discussed general availability, and they agreed to set formal bargaining dates at a later time. According to Respondent’s attorney, he does not recall Aguirre either saying the Union was “eager” to start bargaining or asking about requested information.<sup>10</sup> Further, he denied telling Aguirre that Respondent wanted to first bargain over the maintenance employees bargaining unit-- “. . . I was expecting to bargain

---

<sup>9</sup> During direct examination, Aguirre denied receiving the requested information until some time in January 2008; however, during cross-examination, upon having his memory refreshed with a pre-trial affidavit, he recalled sending an e-mail, dated December 4, 2007, acknowledging receipt of the requested information.

On or about November 11, Aguirre sent another information request to Respondent, asking for the same information, pertaining to Respondent’s garbage truck drivers as he had requested for the maintenance employees bargaining unit, and additional information for the latter employees.

<sup>10</sup> There is no dispute that, at some point prior to the parties’ first bargaining session on January 30, 2007, Respondent submitted to the Union all of the information, which Aguirre had requested.

their contracts simultaneously so that did not come from me.”<sup>11</sup> By early January 2007, Aguirre and Flora had reached agreement to have the parties’ initial bargaining session on January 30, and there is no record evidence as to why the parties were unable to schedule a negotiating meeting for earlier in that month.<sup>12</sup>

5 As scheduled, the parties held their initial bargaining session on January 30, and, thereafter, the parties met for negotiations on a scant 13 other occasions prior to the bargaining unit employees’ November 21 concerted work stoppage and strike-- February 13, March 22, April 10, May 22, May 31, June 28, July 17, August 9, August 29, September 11, October 4, October 12, and November 13 (at which meeting, Respondent presented its last, best, and final offer). With regard to this schedule, except for May, August, and October, of just once monthly meetings over 12 months, Aguirre testified that “. . . there was a pattern there. . . . We would always try to get more time in for negotiations . . . from the first time we met. We would be requesting more meeting dates. . . . They would respond with meeting options that were not very much as far as the number of days or a whole lot of time to negotiate.” For example, immediately after the parties’ second bargaining session ended on February 13, Aguirre sent an e-mail to Flora, detailing his available bargaining dates for the next two months-- March 5-9, 19-23, 26-30 and April 2-6, 9-13, 16-20, and 23-27. Six days later, Flora replied, “I am trying to get everyone’s schedule together and respond to you with dates. Please be patient and you will hear from me soon.” Later that day, Flora sent another e-mail to Aguirre, and, notwithstanding having been given 15 available days in March and 20 days in April, only told Aguirre to “write in 3/22 and 4/10” as agreeable dates for the resumption of the bargaining. Further, the record evidence is that Aguirre often demanded that the parties bargain over consecutive days and during weekends. As to this, George Wayne conceded that “there were times that [Aguirre] said he wished we could meet more often,” and Dupreau recalled “. . . him . . . periodically saying . . . we should try to do two day stretches. But . . . that would probably be an unreasonable request.”

25 Respondent’s apparent difficulty in agreeing to a more frequent bargaining schedule appears to have stemmed from the makeup and internal dynamic of its bargaining team. Thus, at each negotiating session, Respondent’s “bargaining unit” consisted of Flora, the spokesperson, who resides and works in Austin, Texas, Dupreau, who lives in Northern California not far from the Waste Connections, Inc. headquarters, which is located near Sacramento, and Wayne, and Dupreau “felt” it necessary to attend each meeting of the parties. On this point, Dupreau testified that attorney Flora “had the authority to represent us and to bargain with us” but not to enter into agreements (“not without our permission”). He added that “. . . between the three of us, we had the authority to make the decisions that were required.”<sup>13</sup> Moreover, as with Dupreau, it appears that Respondent also required Wayne’s presence at

<sup>11</sup> Flora recalled that this discussion occurred during the parties’ initial bargaining session.

<sup>12</sup> It does not appear that the Union would have been prepared for an earlier meeting. Thus, prior to the bargaining session, Flora asked Aguirre to be prepared to present contract proposals for bargaining. During cross-examination, asked if he had difficulty meeting with employees in order to prepare these proposals, Aguirre said he was unable to recall. However, after having his memory refreshed with a pretrial affidavit, he remembered having difficulties arranging meetings with employees in January, and, because of this, he was unable to provide any contract proposals to Flora prior to the meeting.

<sup>13</sup> Later, Dupreau contradicted his earlier testimony, stating that either he or Wayne had to be with Flora at a bargaining session in order to “carry on.” Asked by me, if such meant that he did not necessarily have to be at each bargaining session, Dupreau said, That’s correct.” Nevertheless, he was, in fact, present at each meeting.

each bargaining session. In fact, I note that Respondent canceled a scheduled April 17 bargaining session because Wayne had received a jury duty notice for that day. As to why Respondent's bargaining team was unable to meet and bargain more frequently and, perhaps, on consecutive days, Dupreau, whose practice was to fly into El Paso on the night before each bargaining session, dismissively averred ". . . just like Mr. Aguirre, we're all busy folks. And, you know, we plan these out well in advance on our calendars, and so forth. And I had many other obligations that I had to live up to." Likewise, Flora recalled that, on at least three occasions, Aguirre sought consecutive days of bargaining "thinking that would accomplish more" but that was ". . . very difficult for my schedule and Mr. Wayne's schedule, and Mr. Dupreau's schedule to put that together." Further, Aguirre testified that, at "just about every meeting we had," he complained about the slow pace of bargaining, and, according to Flora, besides blaming busy schedules, whenever Aguirre did complain about this and say the employees were becoming tired of the bargaining, "I said it was a difficult process to bargain a first contract."

Besides the seeming languid pace of the parties' negotiations, the bargaining sessions themselves were of short duration. Thus, notwithstanding Aguirre's February 22 demand to Flora-- "I would like to make plans to work all day. I really do not want to drag this thing on for a long time," and Flora's response-- "No problem. I agree and will let my people know that they should be prepared to work 9:00 a.m. to 5:00 p.m. on the scheduled days," except for their January 30 meeting, which began in the afternoon, Aguirre could recall "maybe one" lasting an entire day. In fact, as the record establishes, the pattern for most of the parties' bargaining sessions was usually to begin at approximately 9:00am, to break for an hour and a half lunch until 1:30 p.m. or 2:00 p.m., and to conclude bargaining at between 3:00 p.m. - 4:00 p.m. The bargaining normally ended at this early hour as Dupreau's practice was to return to Northern California in the evening after a bargaining session, normally making a 6:30 p.m. flight.<sup>14</sup> Despite Aguirre's above demand to Flora, Dupreau insisted that the meetings ended always ended early by "mutual agreement" of the parties<sup>15</sup> and that Aguirre never complained. Contrary to Dupreau, Aguirre testified that he often complained "about working full days," and Flora admitted that the duration of each meeting was dependent upon "on people's flight schedules," that meetings "sometimes" ended early in order for Dupreau to catch a flight home, and that "my flight schedule was also a factor as I was coming in and out" of Austin.

Accordingly, over the course of almost 15 months from certification of the Union as the exclusive bargaining representative of the maintenance employees bargaining unit until the November 21 strike, the parties met on just 14 occasions for bargaining and only for approximately five hours of bargaining at each session. Each party's attitude with regard to the pace of the bargaining is clear. Thus, the Union was not reticent in complaining about what it perceived as the slow pace of the bargaining. In an e-mail to Flora dated May 3, Aguirre wrote, "We need to speed things up. Let's plan to meet longer and have more days at once. Many of the members, both drivers and mechanics are getting impatient and want to start engaging in disruptive behavior. Some are suggesting strike and are putting more pressure on me to get this done." Four days later, Flora reiterated how Respondent viewed the pace of bargaining and the parties' bargaining generally-- "As you know because of starting from scratch, first contracts take a while to negotiate and we have made some progress. . . . I would hope that you would strongly discourage disruptive behavior while we continue to work toward a first contract."

<sup>14</sup> Dupreau admitted every session "typically" ended in the afternoon between 3:00 p.m.-4:00 p.m.

<sup>15</sup> Aguirre specifically denied ever having requested that a bargaining session end early.

Turning to the second consolidated complaint allegations that Respondent failed and refused to bargain in good faith with the Union by failing to make timely proposals or counter-proposals, making proposals that were predictably unacceptable to the Union, informing employees that the Union would have to bargain from scratch, and bargaining with no intent to reach an agreement, I note that the parties' initial bargaining session was held at 1:30 p.m. on January 30 in a conference room in the building where the Union's office is located. Respondent was represented by its bargaining committee (Flora, Dupreau, and Wayne), including Armando Lopez and Mike Olivas, and the Union was represented by Aguirre and De la Torre, who apparently was present at each bargaining session, and an employee bargaining committee consisting of Juan Castillo, Eduardo Holguin, and Hector Hernandez<sup>16</sup> By all accounts, this was a brief meeting. As he had done in San Antonio, Flora began by asking the three employees why they had a union, and, according to Flora, the vast majority of the meeting time was consumed by the employees' bargaining committee members' responses. Then, according to Aguirre, the parties discussed the future bargaining process-- "Mr. Flora said that they would be interested in negotiating the [non-economic sections] first. . . . And we were . . . anxious to get done with negotiations because these guys had been requesting to be represented for . . . about three years." Thus, as a showing of "good faith," Aguirre agreed to discuss the non-economic contract provisions first. Contradicting Aguirre, according to Flora, the Union proposed ". . . that we bargain the maintenance unit first and that we not bargain simultaneously. Their position was that the majority of the settled provisions would then be applicable to the drivers leaving only the wages . . . for the drivers. . . . We agreed to that." Finally, the Union then presented its initial contract proposals to Respondent,<sup>17</sup> passing proposed language for in excess of 20 provisions including grievance/arbitration, no strike-no lockout, dues checkoff,<sup>18</sup> hours of work and overtime, seniority, discipline and discharge, and several others. There was no substantive discussion of them.

The next bargaining session was held on February 13 at the same location. The Union presented proposed language on shop stewards, and Respondent presented the Union with proposed language on ten contract provisions-- preamble, recognition, complete agreement, management rights, non-discrimination, hours of work, merit shop, introductory period, alcohol/substance abuse, and discharge/discipline. According to Aguirre, the parties spent some time discussing Respondent's proposals "one-by-one," with Flora saying his client would not agree to dues checkoff and Aguirre responding that he had never negotiated a collective-bargaining agreement without such a provision. The parties met again for bargaining on March 22 at 9:00 a.m. The Union presented counter-proposals on management rights and complete agreement, and Respondent provided proposed language on discretionary unpaid leave of absence, department of transportation, job posting, shop steward, safety and health, grievances, no strike-no lockout, discipline and discharge, and work rules. According to Flora, during the meeting, Aguirre said that the Union would be willing to accede to Respondent's management rights proposal in exchange for the latter's acceptance of dues checkoff and that the Union would agree to no strike-no lockout if the parties could agree upon

---

<sup>16</sup> Apparently, the same individuals were present at each bargaining session; therefore, I shall not repeat their names.

Employees Castillo and Hernandez were maintenance employees, and Holguin was a driver.

<sup>17</sup> Inasmuch as the scope of the bargaining unit provision excludes drivers, the proposed contract provisions must have been meant for the maintenance employees bargaining unit.

<sup>18</sup> Aguirre recalled telling Flora that Respondent's refusal to accede to this would be a "deal breaker."

grievance/arbitration language,<sup>19</sup> positions the Union maintained throughout the course of bargaining. Respondent's grievance language contained a 60-day cap on backpay, and Aguirre told him the Union would not agree to any cap on such damages.<sup>20</sup> Finally, during this bargaining session, the parties reached tentative agreements on the preamble language, recognition, non-discrimination, alcohol and substance abuse policy, jury duty, union visitation, separability and savings clause, and duration of agreement.

The parties next bargaining session was held on April 10. Either at the March 22 negotiating meeting or immediately after, Respondent requested the Union's economic proposals, and, on March 23, Aguirre attached these to an e-mail to Flora. The Union's economic proposals included articles on uniforms, holidays, funeral leave, longevity bonus,<sup>21</sup> wages,<sup>22</sup> fringe benefits,<sup>23</sup> vacations,

<sup>19</sup> According to Aguirre, ". . . we requested dues checkoff from the beginning" and "it was about the third or fourth meeting" when the Union "ended up tying" the proposal to Respondent's management rights proposal.

<sup>20</sup> Agreeing, Aguirre said "that we would not agree to a cap on [backpay awards]. I felt really strongly about not giving up the possibility of [an employee receiving] backpay . . . ."

<sup>21</sup> As presented to Respondent, the Union's longevity bonus demand was less than to what the maintenance employees and drivers were then entitled. While I shall discuss Respondent's longevity bonus program in detail *infra*, I note that the Union's proposal did not include either certificates or a watch after 10 years of service.

The second consolidated complaint alleges that Respondent violated Section 8(a)(1) and (5) of the Act by unilaterally changing its longevity award program. The record establishes that, in February, Respondent failed to give a longevity bonus award check to a driver at the time of his employment anniversary date and that, in October, Respondent failed to give a longevity bonus award check and a watch to a maintenance employee. The record also establishes that, prior to the April 10 bargaining session, Aguirre had been aware that Respondent's existing practice was to give longevity bonus awards to its employees at or near their employment anniversary dates and that Respondent had not given the Union notice of any change in said practice. I shall find that Respondent's failure to give a watch to the latter employee constituted an unlawful unilateral change.

<sup>22</sup> The second consolidated complaint alleges that Respondent violated Section 8(a)(1) and (5) of the Act by, unilaterally, without giving notice to the Union or affording it an opportunity to bargain, granted a raise in pay to an employee. While I shall discuss this in detail *infra*, the record discloses that Respondent changed the job, which had been assigned to a driver, and, in so doing, gave him a raise in pay. In making the foregoing change, Respondent was forced to transfer another driver to a different type of truck and change his pay from hourly to incentive. Respondent failed to give the Union notice of any of these changes, and I shall find that the transfer of the latter driver and the subsequent change of his method of pay constituted unlawful unilateral changes.

<sup>23</sup> These (medical insurance, prescription drugs, vision plan, life insurance, long term disability, 401(k) profit sharing plan, flexible spending, and a cafeteria plan) appear to have been photocopies of the employees' existing benefits plans.

With regard to the 401(k) profit sharing plan, said plan contains the following qualification language for participation: "You must be 21 years of age to contribute, and must not be part of a collective bargaining agreement."

sick leave,<sup>24</sup> and severance payment. With regard to the latter proposal, according to Aguirre, it was submitted in lieu of Respondent's existing 401(k) plan, in which the maintenance employees had been entitled to participate but in which they seemingly would no longer be eligible to participate.<sup>25</sup> With regard to what occurred that day, Flora was uncontroverted that it was ". . . another unproductive day. We discussed again a bunch of micro issues-- radios in the container shop, overtime issues, respiratory protection, a food fund for employees, missing tools. The Union started the day and we couldn't seem to get . . . past the micro day-to-day issues. . . . After lunch, the Union explained the economic demands."<sup>26</sup> This discussion concerned "just an explanation so that we knew exactly what each demand was and what they were seeking with each demand and what they were hoping to accomplish with each demand . . . I probably gave my pie talk, that the pie is only so big. How big they cut it up was entirely up to them."<sup>27</sup> Flora added that no tentative agreements were reached that day.

The parties next met for bargaining on May 22 at the Wyndham Hotel, which is located near the El Paso airport. During the meeting, the parties made progress, reaching tentative agreements on the merit shop, introductory period, safety and health, job posting, disciplinary leaves of absence, department of transportation, and layoffs provisions. Also, as it had at previous meetings, the Union offered to accept Respondent's management rights proposal if the latter agreed to accept dues checkoff. Denying an unequivocal refusal, Flora testified that "we attempted to find alternatives to dues checkoff such as greater access to the facility but to "no avail." On this, Aguirre contradicted Flora, testifying that the latter told him that Respondent had never negotiated a collective-bargaining agreement, which included dues checkoff. Further, as to whether Flora proposed alternatives, Aguirre said, "to the best of my recollection, that never happened." Finally, asked by counsel for the General Counsel, if, during this bargaining session, the Union offered to accept Respondent's entire contract proposal in return for

---

<sup>24</sup> The Union's sick leave proposal differs from that which Respondent then provided to its employees. Thus, while demanding eight rather than the current five days of annual sick leave, the Union failed to include a carry-over provision in its proposal.

The second consolidated complaint alleges that, on January 1, 2008, Respondent engaged in acts and conduct violative of Section 8(a)(1) and (5) of the Act by unilaterally, without giving notice to the Union or affording it an opportunity to bargain, changing its sick leave policy. The record establishes that Respondent's practice, as set forth in writing, was to require a doctor's note after an employee is absent for two or more consecutive days and that, in 2007 and 2008, Respondent changed this policy, with regard to its fleet maintenance employees, by requiring them to provide a doctor's note after being absent for just one day after specified holidays. There is no evidence that Respondent gave notice to the Union, and, while this will be discussed in detail *infra*, I shall find that Respondent engaged in the alleged unlawful unilateral change.

<sup>25</sup> There is no dispute that, prior to the bargaining, some maintenance bargaining unit employees had been participating in the 401(k) profit sharing plan. Aguirre conceded that, despite the exclusionary language, no one from Respondent said employees would no longer be able to participate.

<sup>26</sup> According to Flora, "We would just get bogged down in these micro issues and never get to the negotiation issues on many days."

<sup>27</sup> There is no dispute that Respondent only rejected and never specifically countered the Union's severance pay proposal. In fact, according to Flora, there were "very limited discussions about the benefits themselves," and, instead, the discussion was over the cost of the entire package, with the Union demanding that Respondent cover 90 percent of the cost and Respondent offering to cover no more than 72 percent.

Respondent's acceptance of just cause for discharges and progressive discipline, Flora replied, "Yes," but Respondent would not agree.

5 The parties met again nine days later on May 31 also at the Wyndham Hotel. The parties spent the morning reviewing all of the open non-economic contract articles, and, once again, when the Union proposed to accept management rights in exchange for dues checkoff, Respondent refused. According to Flora, they did settle the shop steward provision and were "close" to agreeing upon the attendance and general work rules articles, with Respondent assenting to draft revised language on both. While unable to recall whether the parties reviewed their respective schedules in order to arrange future meetings or whether Aguirre stated he was available any day during the summer for bargaining, asked if Aguirre said he would cancel all prior arrangements in order to conclude work on their collective-bargaining agreement, Flora recalled Aguirre saying ". . . he was going to be as flexible as he could. And that may have been near the summer . . . ."

15 Despite Aguirre's desire for the parties to meet more often and on consecutive days if necessary, the record establishes that they did not meet again for bargaining for almost a month-- on June 28. On that day, they met again at the Wyndham Hotel. While he could not recall Aguirre insisting they bargain through lunch, Flora testified that the meeting was "heated," with much time spent discussing the termination of an employee, Ruben Colsota, two days before the meeting-- ". . . we wasted the vast majority of the morning talking about [his situation]." Once actual contract bargaining commenced, the parties discussed several provisions including grievance/arbitration, dues checkoff, and progressive discipline. Again, Aguirre complained to Flora about the slow pace of bargaining, and, as previously, Flora, averred, ". . . it was a difficult process to bargain a first contract," and people have "busy schedules." Nineteen days later, on July 17, at the Wyndham Hotel, the parties met for only their eighth day of bargaining. After additional discussion regarding the termination of employee Colsota, the remainder of the day was consumed with the exchange of proposals and counter-offers. In particular, the grievance/arbitration clause was the subject of extensive discussion with the Union rejecting Respondent's 60-day cap on backpay awards and, for the first time, offering a counter-proposal-- a 365-day cap, which Respondent rejected. Also, the parties discussed an accelerated or "turbo arbitration provision." Further, the parties discussed the discipline and discharge provision language, about which, according to Flora, the parties were "close" to agreement, the work rules provision, and a new time and attendance system.

35 The parties met twice during August for bargaining. Their first session occurred on August 9 and appears to have been productive. Thus, the grievance/arbitration provision language was extensively discussed with Respondent attempting to make the 60 day backpay cap more palatable to the Union by proposing to hasten the arbitration process with a "local panel of arbitrators." The Union again countered with a 365-day backpay cap and rejected Respondent's proposal. Also, after revised language was discussed, the parties agreed upon the language of the proposed attendance, hours of work, discipline and discharge, complete agreement, and work rules articles. The parties' next bargaining session that month was held on August 29, and, according to Flora, "it was a non-productive meeting." The record does disclose that the parties did discuss Respondent's reluctance to accede to dues checkoff and that, according to Flora's bargaining notes, he probably suggested a possible alternative to the Union's demand. Also, while admitting he wrote "Victor/Union very frustrated," in his bargaining notes for the day. Flora maintained this referred to ". . . the session start[ing] out with discussions regarding Mario Ortiz, his failure to give one-hour notification, Francisco Gonzalez . . . who is a supervisor . . . allegedly denying water, and the whole thing started out dealing with all of these micro issues which again consumed probably the morning and much emotion." He denied Aguirre's "frustration" concerned the pace of bargaining-- "No. It had to do with those

three issues.” However, in his bargaining notes for the day, after writing “Victor . . . does not think that we are moving forward,” George Wayne referred to Aguirre as saying he was “running out of patience” and “we are going to do what we have to do.”

5 The next bargaining session for the parties was held on September 11 at the Wyndham Hotel and began with another discussion regarding employee Ortiz, who had been suspended for not following Respondent’s no call/no show policy. Then, according to George Wayne, Aguirre informed Respondent that, prior to the meeting, the employees in both bargaining units had met and voted unanimously to strike.<sup>28</sup> With regard to the bargaining, Respondent offered a counter-proposal on its grievance/arbitration language-- increasing the backpay award cap to 10 90 days. Next, as the remaining language issues concerned the linked dues checkoff and management rights and grievance/arbitration and no strike-no lockout, the parties turned their attention to, and discussed, the Union’s economic proposals, which had been presented to Respondent in April. These included uniforms, holidays, sick leave, funeral leave, longevity bonus, incentives, fringe benefits, severance pay,<sup>29</sup> and wages, which set forth an immediate 21 percent increase in pay for the maintenance employees.

15 The parties met twice for bargaining during October. Their first session that month was on October 4, and, for the first time, they met in the presence of a federal mediator. At this meeting, Respondent offered counter-proposals on grievance/arbitration, which increased the backpay cap to 120 days, and on most economic items, and the parties reached a tentative 20 agreement on the bereavement leave article. With regard to the Union’s severance pay plan, Respondent rejected it, with Flora writing in his notes the Union wanted the plan in lieu of a pension/retirement plan but stating at the hearing “I don’t know why they [proposed] it.” Two aspects of Respondent’s economic proposal concern the General Counsel. First, while, according to Respondent’s employees’ manual, eligible employees then accrued five sick leave 25 days in a year, the company offered three such leave days in its sick leave proposal. Next, Respondent initial wage proposal was a 1 percent across-the-board offer, for which Respondent did not offer any business justification. In this regard, prior to the advent of the Union, Respondent historically had given its maintenance bargaining unit employees a yearly wage increase; in 2005, said increase had been approximately four percent and, in 2006, said increase had been approximately two percent. Further, while, in 2007 during the period of 30 bargaining, the maintenance bargaining unit employees received no wage increase, Respondent’s non-union employees received wage increases averaging 4.2 percent, and, for 2008, in its budget, Respondent anticipated a wage increase for maintenance employees of in excess of three percent.

35 Eight days later on October 12, the parties met again. Prior to this bargaining session, the Union submitted a counter-proposal on wages, which, according to Aguirre, without regard to future wage increases, set forth an immediate wage increase or “bump,” which Flora calculated at 20.6 percent, designed to equalize the pay for all of the employees in the maintenance bargaining unit in terms of their respective job classifications and seniority. During the meeting, Respondent offered a counter-proposal on wages to the Union, a 1.25 percent 40 raise in each year of the collective-bargaining agreement, and, probably after lunch, the Union countered by reducing its demand to an immediate 18.2 percent increase for the employees. Also, during the meeting, Respondent offered counter-proposals on vacations, sick leave (four days), uniforms, holidays, and fringe benefits. There is no dispute that the parties engaged in

45 <sup>28</sup> As will be discussed *infra*, this meeting occurred on September 8.

<sup>29</sup> In his bargaining notes, George Wayne writes that the Union wanted this “in lieu of a pension plan.”

substantive discussions on these issues, and agreement was reached on the number of holidays and on vacations. However, it appears that no substantive discussion occurred on such subjects as incentives, severance pay, and the longevity bonus. On these, as George Wayne wrote in his bargaining notes, "all held until we settle wages." Towards the end of the meeting, the matter of the preparation and presentation of a last, best, and final offer by Respondent was raised. According to Flora, the Union requested that the company do so, and Respondent agreed-- "The feeling was that at the end of that meeting . . . we had made tremendous progress, we had resolved all of the non-economic issues for the most part but for [management rights and dues checkoff and grievance/arbitration and no strike-no lockout], and all that was left was economics, and we were close enough that we should put a final offer together." Aguirre specifically denied that the Union requested that Respondent prepare and present a last, best, and final offer, testifying "No. . . . [Respondent] said that they were going to give us their best and final offer," and George Wayne corroborated him and contradicted Flora, stating ". . . at the end of the meeting . . . Mark Flora said to [Aguirre], "Well, I guess we should . . . . put it into a last, best, and final offer form. . . . I'll put everything together."

One month later, on November 13, the parties, with a federal mediator present, met again at the Wyndham Hotel, and, as promised, Respondent presented its last, best, and final offer to the Union.<sup>30</sup> Said document consisted of 32 enumerated articles of which the parties previously had tentatively agreed upon 23. The nine remaining articles of the document include management rights, grievance/arbitration, no-strike-no lockout, wages, uniforms, holidays, fringe benefits, sick leave, and longevity bonus provisions; Respondent did not include a dues checkoff provision. Specifically, Respondent offered to the Union unchanged language on management rights, grievance/arbitration, no strike-no lockout, similar fringe benefits to which they were currently entitled, a revised wage proposal (an immediate 1.5 percent raise, a 1.75 percent raise in 2008, and a two percent raise in 2009), a longevity bonus, which was similar to what the employees were then entitled, and a revised sick leave proposal, offering employees four days of sick leave each year but no carry-over of unused days. Upon receipt of the last, best, and final offer, the Union bargaining party left the room<sup>31</sup> in order to caucus and consider what they had been offered, and, for the remainder of the day, rather than face-to-face bargaining, the parties met separately with the federal mediator, making proposals through him. Thus, after considering what Respondent proposed, the Union authorized the mediator to present counterproposals to Respondent-- five days of sick leave, Respondent's proposed grievance/arbitration procedure, with a 365-day cap on backpay arbitration awards, in exchange for a no strike-no lockout provision, Respondent's management rights provision in exchange for a dues checkoff provision, an immediate \$1,000 bonus to each bargaining unit employee, and five percent raises in each of the first two years of the contract term. Later, the federal mediator informed the Union that Respondent agreed to five sick leave days, offered to increase the grievance/arbitration procedure backpay cap to 150 days, and rejected the Union's wage increases and dues checkoff proposals. Aguirre informed the mediator that he would take the revised last, best, and final offer to the maintenance bargaining unit employees for acceptance or rejection. Of course, as will be discussed *infra*, the employees rejected the last, best, and final offer and authorized a concerted work stoppage and strike, which commenced on November 21. The parties met once more on December 4; however, by all accounts, no progress was made on resolving their differences. There have been no further bargaining sessions.

<sup>30</sup> During an e-mail exchange prior to the meeting, Aguirre requested that Flora send him a copy before the parties met; citing instructions from Respondent, Flora refused to do so.

<sup>31</sup> According to Flora, as he arose to leave, Aguirre said ". . . that they don't think that we will strike their ass. And then they left the room."

5 With regard to its last, best, and final offer, Respondent proposed a management rights  
 article, which permitted Respondent, consistent with its obligations under the collective-  
 bargaining agreement, to suspend, discipline, and terminate employees, to promote and demote  
 employees, to assign work and transfer employees from job to job, and to contract and  
 subcontract bargaining unit work. However, while obviously broad, it does not appear that the  
 proposed management rights article is atypical, and, during the bargaining, the details said  
 provision did not engender much, if any, discussion. Rather, Aguirre continually linked the  
 10 Union's acceptance of the provision to Respondent's acceptance of dues checkoff, the absence  
 of which he considered an absolute impediment to a final agreement. Placing matters in  
 perspective, according to the Union business representative, management rights is "their  
 business" and dues checkoff is "our business," and "we never agreed to a contract without dues  
 checkoff." As to Respondent's proposed grievance/arbitration procedure article, again it does  
 not appear that the Union specified any objections to the language;<sup>32</sup> rather, Aguirre objected to  
 15 the inclusion of a cap on Respondent's backpay or damages exposure. With regard to the latter  
 point, while the General Counsel argues that the aforementioned cap on backpay awards was  
 "predictably unacceptable" to the Union, the record establishes that, at least, three other  
 subsidiaries of Waste Connections, Inc. have negotiated collective-bargaining agreements, in  
 which the grievance/arbitration procedures contain caps on backpay awards similar to that  
 proposed by Respondent. As previously stated, the Union linked acceptance of a no strike-no  
 20 lockout provision to a grievance/arbitration procedure, to which it could agree, and, in this  
 regard, I note that Respondent's proposed no strike-no lockout language prohibits its employees  
 from engaging in a work stoppage or strike and picketing or refusing to cross a picket line and  
 subjects employees, who engage in said activities, to discipline up to and including discharge.  
 There is no record evidence that the Union raised any objections to the language of  
 Respondent's no strike-no lockout proposed article.  
 25

The economic proposals, included in Respondent's last, best, and final offer, differ from  
 what Respondent then offered to its employees in two aspects. First, as to its sick leave  
 proposal, while ultimately accepting the Union's demand for five sick leave days a year,  
 Respondent failed to include any carry-over language. In this regard, I note that Respondent's  
 30 sick leave policy then in effect permitted employees to carry over a maximum of 15 sick leave  
 days from year to year. Next, while Respondent's proposed longevity bonus provision set forth  
 the identical bonus payments, which its employees already received for 10, 15, and 20 years of  
 service, it did not include awarding a company watch to employees, who completed 10 years of  
 service. The awarding of a watch is specified in the existing policy. Further, while  
 35 Respondent's proposed language set forth the awarding of all longevity bonus payments during  
 a ceremony at the end of a year, its existing practice was to give the bonus to a recipient  
 employee shortly after his anniversary date. Finally, with regard to Respondent's proposed  
 wage increases during the term of a collective-bargaining agreement (an immediate 1.5 percent  
 wage increase, 1.75 percent in 2008, and a 2 percent wage increase in 2009), it appears that  
 40

---

<sup>32</sup> Grievances are broadly defined as complaints concerning the interpretation, application  
 of, or compliance with the provisions of the collective-bargaining agreement. Further, I note that,  
 in discipline situations, the language of the proposed article limits an arbitrator to deciding  
 45 whether the Employer proved that the employee committed the alleged offense. The arbitrator  
 is specifically precluded from modifying the imposed penalty if he or she finds that the employee  
 is, in fact, culpable.

the company's proposed 1.5 percent increase in wages during the first year was well below the increase in the El Paso area consumer price index for 2007.<sup>33</sup>

Two other aspects of Respondent's last, best, and final offer are raised as issues by the General Counsel. First, as a fringe benefit for employees, Respondent offered its existing 401(k) savings plan, in which bargaining unit employees were able to participate. In this regard, attorney Flora merely photocopied and included the same appendix, including the 401(k) plan language, which had been submitted by the Union with its initial economic offer, dated April. 10. Said proposal, as noted above, contains language which specifically excludes employees, who are covered by a collective-bargaining agreement, from participating in the plan. Thus, by the language of Respondent's proposal, the employees, who nominally are covered by the collective-bargaining agreement, would be unable to participate in a fringe benefit plan incorporated into the document. Noting this anomaly, Flora testified that, on November 13, he and Aguirre discussed the 401(k) plan in detail and neither noticed the exclusionary language-- "That's exactly what I'm telling you. . . . No one saw it." In fact, according to Flora, his bargaining notes indicated ". . . clearly that on October 12<sup>th</sup>, we said we had an agreement on 401(k) and that Respondent's answer to the Union's severance proposal in lieu of the 401(k) plan was "no." However, close scrutiny of Flora's bargaining notes for October 12 reveals no such agreement and no mention, at all, of the 401(k) plan. Likewise, George Wayne's bargaining notes for that day mention nothing about agreement on the 401(k) plan; rather, he noted that, as to incentives, severance, and longevity bonus, the parties agreed to ". . . hold until we settle wages." Finally, in this regard, while Aguirre conceded that, at no point during the bargaining, did Respondent say the maintenance employees would no longer be eligible to participate in the 401(k) plan, he could not recall whether the parties discussed it, in detail, on November 13 and only realized the presence of the exclusionary language while reviewing Respondent's entire final offer.

Second, as noted above, Respondent did not include a dues checkoff provision in its last, best, and final offer. In this regard, there is no dispute that the Union proposed inclusion of a dues checkoff provision; that the matter was raised and discussed often during the bargaining; that Victor Aguirre told Respondent he would not agree to a collective-bargaining agreement without dues checkoff; that Respondent's answer would either be outright rejection or ". . . we're not going to do the dues checkoff at this time," and that, demonstrative of his sincerity, Aguirre continually linked Respondent's acceptance of said article to the Union's agreement to Respondent's management rights provision. Further, according to Mark Flora, whenever the Union raised the issue, Respondent orally<sup>34</sup> proposed alternatives. "One was access to collect the dues themselves. The other was the ability to get out of the dues checkoff provision on very short notice . . . on three days notice or something to that effect" without waiting a full year.<sup>35</sup> Flora added that neither was acceptable to the Union. Contrary to Flora, whose notes for the August 29 bargaining session contain a reference to an alternative to dues checkoff, as to whether Respondent ever proposed alternatives to dues checkoff, Aguirre was adamant-- "To the best of my recollection that never happened." Finally, notwithstanding that Respondent deducts health insurance premium payments from its employees' paychecks, when asked what for Respondent's concern as to accepting dues checkoff, George Wayne answered ". . . we didn't feel like we should be the collecting agent for the Union."

<sup>33</sup> I take official notice of the 4.1 percent increase in the consumer price index for 2007 as computed by the Department of Labor's Bureau of Labor Statistics.

<sup>34</sup> Flora conceded making no written counterproposal on dues checkoff.

<sup>35</sup> Flora insisted that "under current law," employees ". . . have a very narrow window within 60 days to get out of the dues paying obligation."

Analysis of counsel for the General Counsel’s post-hearing brief discloses that he essentially posits two points, allegedly establishing that Respondent failed and refused to bargain in good faith with the Union in violation of Section 8(a)(1) and (5) of the Act. First, he argues that Respondent refused to meet and confer with the Union at reasonable times for the purpose of collective bargaining. Second, he contends that Respondent’s acts and conduct, both at and away from the bargaining table indicate that it engaged in surface bargaining with no intent of reaching a collective-bargaining agreement with the Union. The guiding principles with regard to the above allegations are clear. Thus, Section 8(a)(5) and Section 8(d) of the Act require an employer and the collective-bargaining representative of its employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment or the negotiation of an agreement; however, such obligation does not compel either party to agree to a proposal or require the making of a concession. *Regency Service Carts, Inc.*, 345 NLRB 671, at 671 (2005). While the Act “presupposes a desire to reach ultimate agreement . . .” and bargaining with a sincere intent to settle differences in order to achieve an agreement (*NLRB v. Insurance Workers*, 361 U.S. 477, 485 (1960); *Atlanta Hilton Hotel and Tower*, 271 NLRB 1600, 1603 (1984)), “the Act itself does not attempt to compel” adjustments, concessions on any issue, adoption of any particular positions, or agreements. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45 (1939); *Atlanta Hilton*, *supra*. Nevertheless, in order to meet its statutory obligation to engage in good faith bargaining, an employer is required to make reasonable efforts to compromise its differences with the labor organization, which represents its employees. *Regency Service Carts*, *supra*. Therefore, the Act prohibits “mere pretense at negotiation with a completely closed mind and without a spirit of cooperation and good faith. *NLRB v. Holmes Tuttle Broadway Ford*, 465 F.2d 717, 719 (9<sup>th</sup> Cir. 1072); *Mid-Continent Concrete*, 336 NLRB 258, 259 (2001). Further, an employer no less violates the Act when it “engage[s] in a pattern of conduct evidencing a preconceived determination not to reach agreement except on its own terms, irrespective of the Union’s bargaining powers, approach, or techniques.” *Pease Co.*, 237 NLRB 1069, 1070 (1978). In determining whether an employer has violated its duty to bargain in good faith, within the meaning of Section 8(a)(5) and Section 8(d), the Board considers its conduct, both at and away from the bargaining table and must determine whether the employer is engaging in lawful rigorous bargaining rather than bargaining designed to frustrate an agreement. *Public Service Co. of Oklahoma (PSO)*, 334 NLRB 487, at 487 (2001); *Overnight Transportation Co.*, 296 NLRB 669, 671 (1989); *Atlanta Hilton*, *supra*, at 1603. “The Board considers several factors when evaluating a party’s conduct for evidence of surface bargaining. These include delaying tactics, the nature of the bargaining demands, unilateral changes in mandatory subjects of bargaining, efforts to bypass the [labor organization involved], failure to designate an agent with sufficient bargaining authority, withdrawal of already-agreed-upon provisions, and arbitrary scheduling of meetings.” *Regency Service Carts*, *supra*; *Atlanta Hilton*, *supra*.

Finally, regarding guiding principles, I am cognizant that first contract bargaining is at issue herein, and these negotiations “usually involve special problems.” *N.J. McDonald & Sons, Inc.*, 155 NLRB 67, 71 (1965). As the Board has noted, the parties are meeting across the table for the first time “often with residual bad feelings from acrimonious organizing campaigns and without significant experience in collective bargaining or any history to guide them.” *APT Medical Transportation*, 333 NLRB 760, 761 (2001). Given their newly created relationship, the manner in which each party acts in resolving or exacerbating their differences is critical to establishing the tone of such, and, when confronted by allegations of bad faith bargaining, it is the Board’s responsibility is to ascertain whether the party, which is alleged to have committed the unfair labor practices, has engaged in “fair dealing” designed to enhance mutual trust and confidence or bargaining tactics designed to frustrate or scuttle the process. *Id.* Based upon the foregoing principles and the record as a whole, I believe that, during the bargaining process,

Respondent exhibited a consistent disdain for the Union and, by various acts and conduct, failed and refused to bargain in good faith with the Union.

Initially, I think that, during the course of the instant bargaining, Respondent engaged in patently unlawful dilatory tactics, which had the effect of prolonging and frustrating the bargaining process. In this regard, a period of four months elapsed between the certification, by the Board, of the Union as the exclusive representative for purposes of collective bargaining of Respondent's maintenance bargaining unit employees and the commencement of contract bargaining. More particularly, from October 2, 2006, the date on which the Union first demanded to bargain, until its former attorney, Kenneth Carr, informed the Union of his judicial appointment, 15 days passed by with Respondent's chief operating officer Chambliss' excuse being the members of the bargaining committee required time in order to "review" their calendars. Further, while perhaps some time delay may have been legitimate for Respondent to have selected another attorney, in fact, six weeks elapsed until, on or about November 28, attorney Flora contacted the Union. Surely, George Wayne and/or Gene Dupreau were capable and authorized to have arranged a bargaining session with the Union sometime during this approximately eight week period between October 2 and November 28. Indeed, Flora's authority to bargain on Respondent's behalf is questionable inasmuch as Dupreau averred that Flora was not authorized to reach agreements with the Union without the approval of Wayne and himself. Moreover, while Aguirre informed Flora that he was ready to commence bargaining and suggested several days in December, as he was in trial for the first two weeks and had scheduled vacation the last two weeks, except for an introductory meeting, Flora claimed he was unavailable for bargaining the entire month of December. Respondent offered no explanation for either Wayne's or Dupreau's unavailability during that month. Accordingly, in the face of Respondent's dilatory behavior, the Union was unable to arrange an initial bargaining session until January 30, 2007-- approximately four months after its certification and two months after Flora introduced himself as Respondent's attorney. While some delay, necessitated by selecting an attorney, participating in litigation, and, perhaps, enjoying a vacation, in scheduling and participating in an initial bargaining session may be reasonable, the Board has long held that collective-bargaining negotiations are as important as any business transaction. *Reed & Prince Mfg. Co.*, 96 NLRB 850, 852 (1951). In this regard, it is inconceivable that Respondent would have delayed negotiations, in a like manner, for increasing its customer base or securing a bank line of credit, and the Board has long held that such delay in meeting for initial contract bargaining is clear evidence of bad faith. *Fruehauf Trailer Services*, 335 NLRB 393 at 393 (2001); *Reed & Prince Mfg. Co.*, *supra*, at 858.

Tuning to the issues, during the actual period of bargaining, concerning the scheduling of bargaining sessions, the long intervals between meetings, and the lack of bargaining on consecutive days and the amount of actual bargaining time at each bargaining session, the record is patently clear that Respondent failed and refused to regularly meet with the Union at reasonable intervals for the purpose of bargaining. In this regard, what is most audacious and compelling is the paucity of negotiating sessions--14 over a period of 11 months and, except for May, August, and October, a schedule of just one meeting a month-- between the parties. In my view, the onus for this enervated bargaining rests squarely upon Respondent, who, I believe, exhibited patent bad faith by persistently delaying the pace of negotiations. Thus, I find that, manifested by its numerous across-the-table comments and e-mail complaints, the Union was never taciturn and always vociferous in demanding that Respondent quicken the pace of bargaining, consent to more bargaining sessions, and agree to bargain for consecutive days and over weekends. I further find that, faced with the Union's demands, Respondent continually, and disingenuously, entreated for "patience," complained about "other obligations," its negotiators' "busy schedules," requested time to coordinate schedules, and blamed the slow pace of bargaining on "our calendars" and the difficult "process" of first-time bargaining. Indeed,

Dupreau considered the Union’s request that the parties meet on consecutive days an “unreasonable” one. Demonstrative of Respondent’s dilatory tactics and apathetic attitude toward bargaining, I note that, after the parties’ February 13 bargaining session, Aguirre sent an e-mail to Flora, which detailed his availability for bargaining on 15 days in March and 20 days during April and to which Flora replied, agreeing to meet on just two of the suggested dates, and that, upon being confronted with evidence of Respondent’s excuses for never agreeing to a more frequent bargaining schedule, Gene Dupreau acerbically replied, “. . . we’re all busy folks.” Further exacerbating and indicating its torpid approach to bargaining, Respondent failed to grant to its attorney Flora full authority to enter into tentative agreements and required both Dupreau and George Wayne to accompany Flora at each bargaining session in order to assent to proposed agreements. I believe the latter to be true as Dupreau was contradictory regarding the necessity of his attendance at each bargaining session between the parties and as Respondent cancelled a previously scheduled bargaining session because Wayne had received a notice of jury duty.

With regard to the duration of the bargaining sessions, notwithstanding Flora’s commitment to Aguirre to “. . . let my people know that they should be prepared to work 9 to 5 on the scheduled days,” Respondent’s actual pattern and practice were antipodal and resulted in obstructing and prolonging the bargaining. Thus, perhaps with the exception of a single bargaining session, as documented above, actual across-the-table discussions at each bargaining meeting consumed no more than five hours, and the meetings “typically” ended in mid-afternoon, between 3:00 and 4:00, in order to enable Dupreau to make a 6:30pm flight back to his home in Northern California. While the latter insisted that the meetings always ended early by “mutual agreement” of the parties, Flora admitted the duration of each meeting was dependent “on people’s flight schedules,” meetings “sometimes” ended early in order for Dupreau to catch a flight home, and “my flight schedule was also a factor as I was coming in and out” of Austin. In my view, the foregoing patently demonstrates Respondent’s efforts to impede the bargaining process by delay, and its attitude is best exemplified by Flora, who wrote in an e-mail to Aguirre, “As you know because of *starting from scratch*, first contracts take a while to negotiate . . . .” (emphasis added)

The Board has long found Respondent’s moratory tactics and excuses for its dawdling as evidencing a lack of good faith in the bargaining process. At the outset, it is clear that the obligation to bargain in good faith “encompasses the affirmative duty to make expeditious and prompt arrangements, within reason, for meeting and conferring. Agreement is stifled at its source if opportunity is not accorded for discussion or so delayed as to invite or prolong unrest or suspicion. It is not unreasonable to expect of a party to collective bargaining that he display a degree of diligence and promptness in arranging for [bargaining] sessions when they are requested and in the elimination of obstacles thereto, comparable to his other business affairs of importance.” *J.H. Rutter-Rex Mfg. Co.*, 86 NLRB 470, 506 (1949). In this regard, a party indicates its intent to frustrate the bargaining process and to bargain in bad faith by delaying the scheduling of future meetings. *Regency Service Carts, supra*, at 672; *Lower Bucks Cooling & Heating*, 316 NLRB 16, 22 (1995). Herein, whenever the Union demanded an increased number of meetings and at a more frequent schedule, Respondent stonewalled, repeating the hackneyed and effete excuses discussed above. Flora’s and Dupreau’s references to their other obligations, their busy calendars and schedules, their need to coordinate schedules, and “we’re all busy folks,” equate to what the Board has facetiously characterized as the “busy negotiator” defense, to which it has repeatedly given no deference whenever raised in the bargaining context. “Considerations of personal convenience, including geographical or professional conflicts do not take precedence over the statutory demand that the bargaining process take place with expedition and regularity.” *Fruehauf Trailer Services, supra*, at 404; *Caribe Staple Co.*, 313 NLRB 877, 893 (1994); *Milgo Industrial, Inc.*, 229 NLRB 25, 31 (1977).

Further illustrative of Respondent’s dilatory approach to the bargaining was its requirement that, in order to ratify any agreements reached by Flora, both Dupreau and Wayne be present at each bargaining session. Flora’s unlawful lack of actual bargaining authority<sup>36</sup> became a significant impediment to the pace of bargaining inasmuch as Flora could only schedule bargaining sessions when his, Wayne’s, and Dupreau’s calendars permitted each to attend and as Flora was forced to cancel a previously scheduled meeting due to Wayne’s notice of jury duty. Moreover, whenever Flora, Dupreau, and Wayne did meet with the Union, Dupreau and Flora invariably curtailed the bargaining by ending sessions no later than 4:00pm in order to make airline flights back to their homes.<sup>37</sup> An employer demonstrates its bad faith by limiting the duration of bargaining sessions, and, as noted above, bargaining is “stifled” when there is insufficient opportunity for full discussion of the parties’ positions. *J.H. Rutter-Rex, supra; Lower Bucks Cooling & Heating, supra*. Finally, I note that this matter is similar to the bargaining pattern, found unlawful by the Board in *Calex Corp.*, 322 NLRB 977 (1997). Therein, the parties met and bargained on just 19 occasions over a 15 month period, and the Board found an unlawful “pattern of delay” evidenced by, among other acts, “. . . the Respondent’s repeated refusal of the Union’s requests for more frequent meetings . . . .” *Id.*

While counsel for Respondent dispute the existence of evidence establishing that their client engaged in dilatory or evasive tactics in scheduling meetings or that any meeting ended early when the parties were engaged in productive discussions, its main defenses to the allegations of dilatory bargaining are that any unfair labor practice findings are time-barred pursuant to Section 10(b) of the Act and that, notwithstanding any delay, the parties made considerable progress during the bargaining to the point that Respondent was able to make a final offer on November 13. Initially, with regard to the statute of limitations defense, it is true that the Union did not file its unfair labor practice charge, alleging overall bad faith bargaining until March 6, 2008 in Case 28-CA-21817. From this, counsel argue that the relevant date herein is September 6, 2007 and that the Act’s six-month statute of limitations precludes any finding of unfair labor practices, regarding the parties’ bargaining, prior to that date. They further argue that, pursuant to *Bryan Manufacturing Co.*, Respondent’s actions prior to September 6 may only be utilized to shed light upon its acts and conduct subsequent to said date. *Local Lodge 1424 v. NLRB*, 362 U.S. 411 (1960). Contrary to Respondent’s attorneys, I note that the bad faith bargaining allegations of the second consolidated complaint are found in paragraph 10(q); that, in their answer, they failed to affirmatively assert a Section 10(b) defense as to the above second consolidated complaint paragraph;<sup>38</sup> and that said defense was first raised in Respondent’s counsels’ post-hearing brief. In this regard, Section 10(b) is not

---

<sup>36</sup> In *United Brotherhood of Carpenters & Joiners, Local 1780*, 244 NLRB 277, 281 (1979), in finding that a respondent failed to bargain in good faith, the Board held that, while the respondent “. . . [was] not required to be represented by an individual with final authority to enter into an agreement, this privilege is subject to the proviso that such a limitation does not act to inhibit the progress of negotiations.” I believe the record warrants a conclusion that, by requiring the presence of both Dupreau and Wayne at each bargaining session, Respondent signaled to the Union that Flora was not fully authorized to reach agreements and, thereby, clearly hampered and slowed the pace of bargaining between the parties.

<sup>37</sup> I am cognizant that there exists record evidence that, at several meetings, the start of actual bargaining was delayed by discussions of employees’ work grievances and like matters. While said discussions may have curtailed actual bargaining time, the effect of such discussions clearly was exacerbated by the parties’ scant number of bargaining sessions and the short duration of their meetings.

<sup>38</sup> Respondent’s affirmative Section 10(b) defense was only asserted as to paragraphs 10(a), (b), and (c) of the second consolidated complaint.

jurisdictional in nature. Rather, it is an affirmative defense, and, if not timely raised, is waived. *Public Service Co.*, 312 NLRB 459, 461 (1993); *DTR Industries*, 311 NLRB 833, 833 at n. 1 (1993); *McKesson Drug Co.*, 257 NLRB 468, 468 at n. 1 (1981). Inasmuch as counsel first raised the Section 10(b) of the Act issue in their post-hearing brief and failed to plead it as an affirmative defense in their answer to the second consolidated complaint, I find that it was not timely raised and has been waived. *Public Service Co.*, *supra*; *DTR Industries*, *supra*. Further, as to counsels' contention that Respondent's unlawful dilatory tactics did not inhibit the parties from reaching agreement on many provisions of the collective-bargaining agreement, if Respondent had agreed to the Union's repeated requests for more bargaining sessions and on a more frequent schedule and for bargaining on consecutive days and during weekends and, when the parties did meet, if Respondent had not arbitrarily ended the bargaining in order for its negotiators to catch flights home, perhaps the parties might have reached agreement upon an entire collective-bargaining agreement. Therefore, counsels' contention must be rejected. *Calex Corp.*, *supra*, at 978. Based upon the foregoing, I find that Respondent failed and refused to bargain in good faith with the Union by purposefully delaying and truncating contract negotiations, thereby unlawfully prolonging and frustrating the collective bargaining process and engaging in conduct violative of Section 8(a)(1) and (5) of the Act.. *Fruehauf Trailer Services*, *supra*, at 398.

Turning to the General Counsel's next contention that Respondent engaged in surface bargaining with no intent of reaching agreement on a collective-bargaining agreement with the Union, I note, at the outset, that the parties did reach agreement on in excess of 20 contract provisions. In this context, counsel for the General Counsel's contention has two facets-- Respondent's alleged unlawful acts at and away from the bargaining table. Initially, with regard to Respondent's actions during bargaining, counsel's concern is with Respondent's bargaining demands. In analyzing the General Counsel's contentions as to this issue, my guiding principle is as stated by the Board in *Regency Service Carts*, *supra*-- "Although the Board does not evaluate whether particular proposals are acceptable or unacceptable, [it] will examine proposals when appropriate and consider whether, on the basis of objective factors, bargaining demands constitute evidence of bad-faith bargaining." *Id.* at 675. At the outset, counsel points to Respondent's proposed broad management rights article, which gives it discretion in creating workplace rules and in disciplinary decisions, its proposed grievance/arbitration provision, which restricts an arbitrator to deciding only whether the employee committed the alleged offense, and its proposed no strike-no lockout article, which prohibits employees from engaging in any strike or picketing during the contract term and argues that , "taken as whole, these proposals establish that Respondent insisted on unilateral control on virtually all significant terms and conditions of employment for unit employees . . . and would have damaged the Union's ability to function as the employees' bargaining representative." In urging that I find Respondent's proposals demonstrative of bad faith, counsel cites to *Regency Service Carts*, *supra*, in which the Board analyzed an employer's management rights, grievance./arbitration, and no strike-no lockout contract proposals and, after noting that, under the said provisions, the employer's employees and their union would not be able to challenge the company's decisions on layoff, discharge, discipline, wage increases, leaves of absence, and subcontracting, concluded that the three proposed contract articles would require the union to substantially cede its representational function so as to irreparably damage its ability to act as the employees' bargaining representative. *Id.* at 675. However, unlike the grievance/arbitration proposal in *Regency Service Carts*, Respondent's proposed article does not contain any language, excluding from arbitration any grievance that questions Respondent's exercise of its rights as set forth in the proposed management rights article, and unlike the proposed no strike-no lockout provision in the cited decision, Respondent's proposal does not specifically prohibit its employees from engaging in an unfair labor practice strike. Moreover, there is no evidence that Respondent objected to the language of Respondent's management rights proposal. Rather, at

all times, Aguirre linked acceptance of it to Respondent's acceptance of a dues checkoff article and even opined that management rights is "their business" and dues checkoff is "our business." Likewise, other than objecting to the inclusion of a cap on backpay, the Union specified no objections to the language of Respondent's grievance/arbitration provision, and I note that, at least, three other labor organizations have negotiated grievance/arbitration provisions, which contain similar backpay caps, with subsidiaries of Waste Connections, Inc.. Finally, as with the above two provisions, the Union never raised any objection to the language of Respondent's proposed no strike-no lockout article, instead linking acceptance of it to a grievance/arbitration provision, to which it could agree. Accordingly, contrary to counsel for the General Counsel, I do not discern any bad faith from Respondent's proposals on management rights, grievance/arbitration, or no strike-no lockout.

Counsel for the General Counsel next attacks several of Respondent's economic proposals as evidence of bad faith and as indicia of surface bargaining. Initially, with regard to Respondent's wage increase proposals, counsel points out that, notwithstanding that the maintenance bargaining unit employees had received higher wage increases in the past, that the employer's 2008 operating budget anticipated a wage increase for maintenance employees in excess of 3 percent, and that non-union employees had already received a wage increase of in excess of 4 percent, in its last, best, and final offer, Respondent offered to the maintenance bargaining unit employees only an initial 1.5 percent wage increase, a 1.75 percent in 2008, and a 2 percent increase in 2009, increases significantly less than the 4.1 percent increase in the consumer price index for the El Paso, Texas area. As to whether Respondent's proposals indicate a failure to bargain in good faith, counsel points to *Milgo Industries, supra*, in which the employer proposed a 25-cents an hour wage increase proposal, a raise significantly less than the rise in the cost-of-living index. The Board concluded that the offer was an indicia of bad faith bargaining as such ". . . was far below [what] any self-respecting union could take back to its employees." *Id.* at 25 and 31. Contrary to counsel, the record evidence herein is that Respondent did exhibit some willingness to compromise on its annual wage increase proposals, twice slightly increasing its offers, and Respondent's final offer wage increase proposals were not significantly lower than the raise, which the maintenance employees received in 2006. In my view, the fact that Respondent's proposed annual wage increases may have been disappointing to the Union and the employees does not itself equate to bad faith, and I shall not engage in second-guessing the legitimacy of the offer. Nevertheless, counsel urges that I consider Respondent's wage increase offers in the context of its proposals in other economic areas, two of which were offers of less than to what the employees were then entitled. First, as to Respondent's sick leave proposal, counsel points out that, while Respondent ultimately acceded to the Union's demand for five sick leave days in a year, which, of course, was the number of sick leave days to which the maintenance bargaining unit employees were then entitled, it failed to provide for the carry-over of unused sick days when, at the time, employees were permitted to carry over as many as 15 unused sick leave days into the next calendar year. While counsel cites this as an example of lack of good faith, I note that the Union's April 10 sick leave bargaining proposal also did not include a carry-over provision. Next, while in its longevity bonus proposal, Respondent failed to include awarding a watch to employees, who completed ten years of service, a benefit to which employees were then entitled and proposed awarding the longevity bonuses during a ceremony at the end of each year, the Union's April 10 longevity bonus proposal likewise did not include a watch after 10 years of service, and Respondent's proposal to distribute the bonuses at an annual event is almost identical to the written version of its longevity bonus plan. In these circumstances, as with its wage increase offers, as counter-proposals to the Union's own proposals on sick leave and longevity bonus, I do not believe either of Respondent's final offers was illustrative of bad faith.

Next, counsel for the General Counsel attacks, as indicative of bad faith, Respondent's inclusion in the 401(k) proposal, set forth its last, best, and final contract offer, of the language excluding employees, who are covered by a collective-bargaining agreement, from participating in the plan and its rejection of a dues checkoff provision. Regarding the former, counsel dismisses Flora's explanation, that the inclusion of the language was an oversight and a copying mistake, as Respondent's "oops" defense. While I believe Flora was less than candid in testifying that he and Aguirre discussed the 401(k) plan in detail on November 13 or that his bargaining notes showed agreement on the plan on October 12, I find it difficult to also believe that Flora, an experienced attorney and negotiator, would have deliberately incorporated the exclusionary language in Respondent's 401(k) offer. Thus, I fail to see any utility for him doing so, and, if Respondent had meant to bar the maintenance bargaining unit employees from participating, Flora simply could have omitted the plan from Respondent's final offer. In this regard, Aguirre admitted that, at no point during negotiations, did Respondent specify that the maintenance employees would no longer be eligible to participate in the 401(k) plan. Accordingly, I credit Flora that the inclusion of the exclusionary language was an oversight and a mistake and find no bad faith in this regard. On the other hand, I do find bad faith in Respondent's continual rejection of a dues checkoff provision. As to this, there is no dispute that the matter was raised and discussed often during negotiations and that whenever Aguirre told Respondent he would not agree to a collective-bargaining agreement without dues checkoff, Flora's response was either outright rejection or no agreement "at this time."<sup>39</sup> Board law is that an employer is not required to accede to a Union's demand for a dues checkoff provision. *Litton Microwave Cooking Products*, 300 NLRB 324 (1987). However, an employer is required to bargain in good faith over the term, and any opposition "must reflect a legitimate business purpose." *NLRB v. J.P. Stevens & Co.*, 538 F.2d 1152, 1165 (4<sup>th</sup> Cir. 1976); *Sivalls, Inc.*, 307 NLRB 986, 1009 at n. 46 (1992). During the instant bargaining, there is no record evidence that Respondent ever asserted a business justification for rejection, and, whenever the Union asserted the necessity for including a dues checkoff article, other than suggesting an alternative on one occasion, Respondent merely rebuffed the Union's demand. George Wayne succinctly enunciated Respondent's philosophical rationale for doing so-- ". . . we didn't feel like we should be the collecting agent for the Union." Such a philosophical rejection of dues checkoff may constitute evidence of bad faith as [this provision] generally imposes no burden upon an employer. *CJC Holdings*, 320 NLRB 1041, 1047 (1996); *Langston Cos.*, 304 NLRB 1022, 1050 (1991). In its defense, counsel for Respondent argue that, at all times, they were holding onto dues checkoff as a bargaining chip to be offered in exchange for a contract provision, which it wanted in a final agreement. Of course, this assertion is incapable of proof and is belied by the facts that the parties' bargaining had essentially ended on November 13 and that Respondent had yet to offer its bargaining chip-- not even in exchange for management rights, which provision the Union had always indicated it would accept in exchange for dues checkoff.

Finally, concerning Respondent's conduct at the negotiating table, I have considered the fact that, on October 12, after only 12 bargaining sessions, in the context of its own dilatory bargaining tactics and its failure to designate a representative with sufficient bargaining authority and aware that the maintenance bargaining unit employees had authorized a strike if the parties failed to reach an agreement, Respondent abruptly, and unexpectedly, announced its intent to

---

<sup>39</sup> Given his corroborative bargaining notes, I think that on, at least, one occasion-- during the parties' August 29 bargaining session-- Flora probably did propose an alternative to dues checkoff.

present a last, best, and final offer to the Union at their next bargaining session.<sup>40</sup> In this regard, I credit Aguirre, as corroborated by Wayne, that the Union never requested that Respondent do so and note that Respondent announced its intent at a time when the parties had not yet commenced bargaining on some subjects, including longevity bonus and the Union's demand for a severance pay provision in lieu of the existing 401(k) plan.<sup>41</sup> Further, while Aguirre heretofore had adhered to his positions on several items, there is no evidence that he was unwilling to compromise, and "it is commonplace that experienced negotiators make concessions cautiously and that negative initial reactions are later reconsidered in order to reach agreement." *Cotter & Co.*, 331 NLRB 787 at 787 (2000). Moreover, I note that, in the month between the October 12 and November 13 bargaining sessions, Flora rejected Aguirre's request to view Respondent's final offer prior to its formal presentation on the latter date and that such would have permitted the Union time to prepare reasoned and unhurried counter-proposals. Given the circumscribed bargaining which preceded it and in the context of these negotiations as a whole, I believe that Respondent acted in abject bad faith, with an intent to frustrate further bargaining and to force a strike,<sup>42</sup> when it presented its premature last, best, and final offer to the Union on November 13. *Id.*

Regarding Respondent's acts and conduct away from the bargaining table, I initially note that, in an e-mail to Aguirre, dated May 7, Flora established the tenor of how his client perceived the parties' bargaining, warning that they would be negotiating, in effect, from "scratch" for a first contract. While his statement may not be considered an unfair labor practice because it was not made directly to employees, the implication of Flora's comment was, of course, that the bargaining would proceed without regard for the employees' existing wages and benefits. Further illustrative of Respondent's deleterious attitude toward its bargaining obligation, I note that, on two instances during 2007, while bargaining between the parties was on-going, Respondent unlawfully unilaterally changed aspects of its employees' terms and conditions of employment without giving notice to the Union or affording it an opportunity to bargain. Thus, as I shall discuss *infra*, I believe that, without giving notice to the Union, Respondent changed its longevity award policy, in October, by failing to give a watch to an employee on his tenth employment anniversary date and, in June, transferred a driver to a different truck and changed his method of pay. Moreover, notwithstanding that Respondent's practice, as set forth in writing, is to require a doctor's note after an employee is absent or two or more consecutive days, on January 1, 2007, prior to the commencement of bargaining and without informing the Union, Respondent changed this policy with regard to its fleet maintenance employees, requiring them to provide a doctor's note after being absent for just one day after specified

---

<sup>40</sup> I recognize that Respondent's presentation of a last, best, and final offer is not alleged, in the second consolidated complaint, as an act of bad faith bargaining. Nevertheless, the issue was fully litigated, and I shall consider it.

<sup>41</sup> Given the disparity between his testimony and his own and Wayne's bargaining notes, I specifically do not credit Flora that he and Aguirre reached agreement on the 401(k) plan on October 12.

<sup>42</sup> As I shall discuss *infra*, upon becoming aware that its employees in both bargaining units had voted to authorize a strike, Respondent began actively preparing for continuing operations during a concerted work stoppage and strike by its maintenance employees and drivers to the extent that it had purchased tools for the use of strike replacements and had arranged for workers, who were employed by other subsidiaries of Waste Connections, a so-called Blue Team, to come to El Paso and work during the imminent strike. Further, given its unlawful animus, as exhibited by Respondent's unlawful threats toward supporters of the Union, I believe Respondent's intent, at all times, was to permanently replace any strikers, all of whom were obviously Union adherents.

5 holidays., and, also during that year, Respondent, without affording notice to the Union, changed its practice, regarding its longevity bonus plan by no longer adhering to its practice of distributing bonus checks to employees in the pay period closest to their anniversary dates.<sup>43</sup> The Board has long held that there exists a “nexus” between an employer’s unlawful unilateral changes in its employees’ terms and conditions of employment and its conduct during negotiations and that such acts are indicative of bad faith, “. . . communicat[ing] to employees that there is no need for the Union as their collective-bargaining representative.” *Grosvenor Resort*, 336 NLRB 613, 617 (2001); *Mid-Continent Concrete*, 336 NLRB 258, 261 (2001). In the foregoing circumstances, including its conduct away from the bargaining table, I believe that Respondent demonstrated its patent bad faith and frustrated the bargaining process with the Union by engaging in dilatory tactics regarding the scheduling of bargaining sessions, failing and refusing to meet regularly with the Union and at reasonable intervals, unreasonably limiting the duration of negotiating sessions, failing to designate an agent with sufficient bargaining authority, refusing to accede to a dues checkoff provision, and imposing a premature last, best, and final offer on the Union at a time when the parties had not yet engaged in bargaining on several subjects. Accordingly, the conclusion is warranted that, by its above acts and conduct, Respondent failed and refused to bargain in good faith with the Union in blatant violation of Section 8(a)(1) and (5) of the Act,<sup>44</sup> and I find merit to paragraph 10(q) of the second consolidated complaint.

## 2. The Alleged Unlawful Unilateral Changes

20 The second consolidated complaint alleges that, prior to, during, and subsequent to bargaining with the Union, Respondent engaged in three unlawful unilateral changes in its maintenance employees’ and drivers’ terms and conditions of employment without giving notice to the Union or affording it an opportunity to bargain. Initially, I consider the allegation pertaining to changes in the longevity bonus program. The record establishes that, at least, since 2004, Respondent has maintained a longevity bonus plan for its employees and that, while there have been changes over the years, as of October 2006, Respondent awarded longevity bonuses on the following bases-- after 10 years of service, employees are given a certificate of appreciation, a company watch, and a check in the amount of \$1,000; after 15 years of service, employees are given a certificate of appreciation and a check in the amount of \$2,000; and, after 20 years of service, employees are given a certificate of appreciation and a check in the amount of

<sup>43</sup> Noting that said acts were outside the Section 10(b) of the Act statute of limitations period, I discuss them in order to shed light upon Respondent’s attitude toward bargaining with the Union.

<sup>44</sup> I do not believe that Respondent engaged in unlawful surface bargaining. While many of the necessary factors exist, I note that, when bargaining did occur, the parties exchanged numerous proposals and counter-proposals, made compromises to their respective bargaining positions, and reached in excess of 20 temporary agreements. Further, both parties assumed unyielding positions on issues. In this regard, of course, the Union would not accept Respondent’s management rights provision unless the latter agreed to dues checkoff, and the Union linked acceptance of no strike-no lockout to grievance/arbitration. Moreover, as set forth above, I do not believe that any of Respondent’s bargaining proposals may be characterized as of the type that no labor organization could accept or as predictably unacceptable.

I realize that the issues as to whether Respondent acted in bad faith by failing to designate a responsible agent for bargaining and by forcing the last, best, and final offer on the Union were not alleged in the second consolidated complaint as violations of Section 8(a)(1) and (5) of the Act. However, I believe each was fully litigated, and I believe it appropriate to make findings and conclusions as to the legality of Respondent’s acts and conduct.

\$5,000. Further, while, according to the longevity bonus plan, as set forth in writing, the longevity bonuses were to be handed out by the chairman of the board during a recognition service at a company function during the year in which payment of the bonus was due, there is no dispute that, prior to 2007, bonus checks were distributed to recipient employees shortly after their employment anniversary dates. In these regards, Humberto Valles, a buggy driver for Respondent, testified that his 15-year anniversary date was February 12, 2007 and that, on that day, he spoke to his supervisor, telling him he was approaching his anniversary date. According to Valles, his supervisor told him he would probably receive his check with his regular paycheck “the following week.” However, Valles, who received his 10 year longevity bonus check “close” to his anniversary date, did not receive his bonus check the next week, and he went to Respondent’s human resources office in order to ascertain why he had not been given the bonus. He spoke to Graciela Silva, the human resources manager, who told him “. . . that it would be at year end, that we would receive our bonuses at year end.” In fact, Valles was given a 15-year longevity bonus check in December. Likewise, Jesus Duran, a welder, whose anniversary date was October 9, testified that he was due a 10 year longevity bonus award in 2007, that he expected to be given a certificate, a watch, and a check, and that he expected to receive the entire award at or near his anniversary date. However, Duran did not receive his certificate and bonus check until December 4 in the mail, and he was uncontroverted that Respondent failed to give him the tenth anniversary watch, to which he was entitled. There is no record evidence that Respondent notified the Union of this change in its longevity award program.

Victor Aguirre, who denied receiving notice from Respondent about any changes in its longevity bonus award plan, testified that, in 2007, he did not learn that Respondent had not been distributing the longevity bonuses at or near the anniversary dates of its maintenance employees and drivers until sometime during the summer “. . . right after one of the negotiating sessions” at a meeting of the employees in both bargaining units. “Somebody had complained about not getting their bonus like they used to or like they should have.” In this regard, the record reveals that, as part of its economic proposals, which the Union presented to Respondent at the parties’ April 10 bargaining session, the Union included a longevity award proposal, which called for payment of the bonus “on the following pay period after [the employee’s] anniversary date.” During cross-examination, Aguirre denied learning, in February, that Valles had not been given a longevity bonus and maintained he did not become aware of the Valles situation until later during the summer. Further, he was unable to recall any company representative telling him, on April 10, that the longevity plan, as written, provided for the chairman of the board to present the bonus checks at an annual event. With regard to discussions about the longevity bonus program that day, Aguirre said, “I know we talked about it later that summer but not in April . . .” and added that, other than correcting mistakes in the amounts of the awards, “. . . I don’t think we discussed when he’s getting paid or when it was supposed to be paid.” Mark Flora contradicted Aguirre, testifying that the latter raised the longevity bonus awards during the April 10 meeting as an alleged unilateral change. According to Flora, “Victor brought it up because at that point they had an individual in the maintenance unit who had been impacted. . . . his anniversary date had come and gone and he had not gotten a longevity bonus,” and he asked “. . . have you discontinued longevity bonuses?” Flora recalled that Wayne replied “. . . that they were going to follow the policy as written, which is that the longevity bonuses will be distributed at the end of the year in a ceremony.” Finally, Armando Lopez’ bargaining notes for April 10 contain the following exchange regarding the Union’s longevity bonus proposal:

Victor—Employees not getting Bonus pay for longevity-- Co pays when employee is eligible-- Not following policy-- Did we do away with it

George-- not following policy-- Policy-- At end of year Exec. officer gives out bonus-- Now following policy--

5 The second alleged unilateral change involves an alleged change in Respondent's sick leave policy on January 1, 2008. According to this policy, as set forth in Respondent's employees' handbook, "if an employee is absent for two or more consecutive days due to illness or injury or the illness or injury of a member of the employee's immediate family . . . the employee must present a health care provider's statement certifying the medical necessity for the absence am its beginning and expected ending dates." Also, according to the handbook, "Sick leave benefits are susceptible to being abused. Abuse of sick leave benefits may result in disciplinary action." Armando Lopez has been Respondent's operations manager since June 10 2004 and, in said capacity was responsible for overseeing the day-to-day functions of Respondent's truck drivers in its operations department and the employees in the compactor maintenance and container maintenance departments. Shortly after being hired, on July 1, 2004, after consulting with Graciela Silva, Lopez posted and distributed a memorandum to all of the employees for whom he was responsible. In said document, entitled "Use of Sick 15 Leave Benefits," Lopez changed the sick leave reporting requirement as follows:

20 Too frequently we have been short-handed and operational problems have arisen because of the extremely high number of employees who have been calling in sick the day before or the day after a holiday or festive day. For this reason, any employee who wishes to be paid for a sick day which is claimed either the day before or the day after a holiday or festive day must bring in a doctor's certificate even though it is only a one-day absence. . . .

25 Following the foregoing on the document was a list of observed (paid) holidays and unobserved festive days for 2004. The record establishes that, inasmuch as there had been no changes in the employee departments for which he was responsible, Lopez did not feel the need to publish the same memorandum in calendar years 2005 and 2006. Nevertheless, there is no dispute that this same sick leave policy remained in effect for those two years.

30 Then, in mid-2006, George Wayne gave Lopez' additional responsibilities, appointing him in charge of the employees (mechanics, welders, and truck washers) in Respondent's fleet maintenance department. According to Lopez, "So, with this respect, I did make a change on the memo . . . to address those particular employees . . . with my signature on it." This new memorandum was issued on or about January 1, 2007 and was addressed and distributed to the employees in the four departments, including the fleet maintenance department, for which he recently had been made responsible. Said document, entitled "Use of Sick Leave Benefits," 35 reads as follows:

40 Too frequently we have been short-handed and operational problems have arisen because of the extremely high number of employees who have been calling in sick the day before and the day after a holiday or festive day. For this reason, any employee who wishes to be paid for a sick day which is claimed either the scheduled work day before or the scheduled work day after a holiday or festive day must bring in a doctor's certificate even though it is only a one-day absence. . . .

45 As with the 2004 document, following the policy statement, Lopez listed the observed (paid) holidays and unobserved festive days for calendar year 2007. There is no dispute that, on or about January 1, 2008, Lopez distributed an identically-worded document to all the employees in the four departments for which he is responsible. Finally, with regard to this allegation, Lopez

admitted that, prior to issuing the January 1, 2007 and January 1, 2008 documents, he neither gave notice to or bargained with the Union and that he failed to give copies of the documents to the Union.<sup>45</sup>

5 Respondent's third alleged unlawful unilateral change concerns Francisco Gonzalez, who was hired, by Respondent, in November 2006 as a bulk driver, which requires a Class B drivers' license. The truck, which Gonzalez operated, is akin to a roll-off truck but with a mechanical arm attached behind the driver's cab, utilized for picking up bulk items such as refrigerators, stoves, and sofas at residential sites. The record establishes that, on the days  
10 when it had no scheduled bulk runs, Respondent assigned Gonzalez, who has a Class A drivers' license, to drive a tractor/trailer truck and placed him with another driver, Juan Vasquez, who was to train him in the delivery of storage containers to large stores, including Wal-Mart and K-Mart. Gradually, Gonzalez became proficient in driving the tractor/trailer truck, and Respondent was able to utilize Vasquez as an additional roll-off driver. By June 2007, Gonzalez was able to drive a tractor/trailer truck on a full-time basis, and Respondent then transferred Vasquez to drive a roll-off truck on a full-time basis, which assignment changed his  
15 payment method from hourly to incentive rate. On June 7, Armando Lopez recommended a \$.75 cents an hour raise in pay for Gonzalez, and, shortly thereafter, Respondent acted upon Lopez' recommendation. There is no dispute that Respondent undertook the above employment actions without notice to or affording the Union an opportunity to bargain.<sup>46</sup> Finally, with regard to Gonzalez, asked whether, prior to the Union, Respondent had made similar  
20 adjustments in pay when an employee's job or responsibilities had been upgraded, Lopez answered, "Sure. . . . when there is a need for us to upgrade somebody to a swing driver, the responsibilities do change. And . . . so the drivers move from a simple driver responsibility to a swing driver or lead driver responsibility, then yes, the rate of pay is increased." Lopez added that this was Respondent's practice before the Union was certified.

25 Initially, as to Respondent's alleged unilateral change regarding its longevity award program, I find merit in Respondent's attorneys' argument that no violation of the Act may be found as to Respondent's change in its existing practice concerning when longevity bonus payments were made. Thus, the underlying unfair labor practice charge in Case 28-CA-21654 was filed, by the Union, on November 14, 2007, and, in their answer to the second consolidated  
30 complaint, counsel asserted that the alleged change occurred outside the statute of limitations period of the Act. As stated above, Section 10(b) sets forth the Act's six month statute of limitations for alleging the commission of unfair labor practices. Accordingly, in order to find a violation of the Act as to this allegation, Respondent must be found to have unilaterally changed its practice, concerning when longevity bonus awards are given to employees, subsequent to  
35 May 14. In this regard, the Board has long held that the Section 10(b) period begins to run when the "act" giving rise to the unfair labor practice is known. *P & C Lighting Center*, 301 NLRB 828, 833 (1991); *Al Bryant*, 260 NLRB 128, 135 at n. 19 (1982). As counsel point out, "the requisite notice may be actual or constructive" (*CAB Associates*, 340 NLRB 1391, 1392 (2003)), and "a party will be charge with constructive notice of an unfair labor practice where it could have discovered the alleged misconduct through the exercise of reasonable diligence."  
40 *St. Barnabas Medical Center*, 343 NLRB 1125, 1126-1127 (2004). Herein, there is no dispute that Respondent failed to give employee Valles his longevity bonus award in February. While the second consolidated complaint asserts that the Union did not gain knowledge of Respondent's alleged unilateral change until October, presumably when employee Duran did

45 <sup>45</sup> Lopez did not know if anyone had provided copies to the Union.

<sup>46</sup> There is record evidence that the Union raised the issue of Francisco Gonzalez' pay raise at the August 29 bargaining session.

not receive his longevity bonus award check, Victor Aguirre testified that he first became aware that an employee had not received his longevity bonus award sometime during the summer. Contrary to the General Counsel, I believe that Aguirre had become aware of Respondent's unilateral change prior to the parties' April 10 bargaining session. In this regard, I believe Aguirre fabricated regarding discussions pertaining to the longevity bonus that day and specifically credit Flora, as corroborated by Lopez' bargaining notes for the day, that not only did Aguirre raise the subject of a possible change in paying the longevity bonus but also Wayne informed him Respondent intended to adhere to the longevity bonus award policy, as written, and distribute the awards at the end of the year. In these circumstances, I believe Aguirre had actual notice of Respondent's change in its practice for the payment of longevity award checks in April beyond the Act's six month statute of limitations. However, employee Duran was uncontroverted that Respondent failed to present him with a watch for his tenth employment anniversary award. There is no dispute that the awarding of a watch is a facet of Respondent's longevity bonus program or that Respondent's failure to do so represented a change in Respondent's employees' terms and conditions of employment. In *Longhorn Machine Works*, 205 NLRB 685, 689 (1973), the Board found that an employer's discontinuance of a practice of awarding tenth anniversary gold watches without giving notice to a union or affording it an opportunity to bargain was unlawful. Likewise, as there is no record evidence that Respondent informed the Union of this change in its longevity award practice, I believe Respondent's unilateral change was violative of Section 8(a)(1) and (5) of the Act.

Turning to the alleged unilateral change involving Respondent's sick leave policy,<sup>47</sup> there is no dispute that, as set forth in its employee manual, Respondent's sick leave policy mandates that employees provide doctors' notes after missing two days of work due to illness. Respondent contends that its policy change, regarding requiring employees to provide a doctor's note for absences the day before and the day after specified holidays and festival days, has been in effect since 2004-- long before the Union's certifications herein. With regard to Respondent's truck drivers in its operations department and the employees in its container maintenance and compactor maintenance departments, I agree that Armando Lopez' January 2007 and January 2008 memos announced no change in Respondent's sick leave policy. However, Respondent did not give Lopez overall authority over the mechanics, welders and truck washers in its container maintenance department until just before the Union was certified as the exclusive bargaining representative for its maintenance employees, and Lopez did not publish his January 1, 2007 memorandum until after said certification-- at a time when Respondent was obligated to bargain with the Union over changes in the bargaining unit employees' terms and conditions of employment. Moreover, there is no dispute that Respondent failed to give notice to the Union of said change in its sick leave reporting policy or afford it an opportunity to bargain. Counsel for the General Counsel correctly points out that the Board has held that an employer's changes in sick leave and sick leave reporting policies may violate Section 8(a)(1) and (5) of the Act. *Flambeau Airmold Corp.*, 334 NLRB 165 at 165 (2001); *Kendall College of Art*, 288 NLRB 1205, 1213 (1988). However, in order to be violative of the Act, a unilateral change must be "material, substantial, and significant." *Flambeau*

<sup>47</sup> In his post-hearing brief, counsel for the General Counsel first announced that he seeks a finding that Respondent's January 1, 2007 memorandum was issued in violation of Section 8(a)(1) and (5) of the Act, and there is no indication in the record that he informed counsel for Respondent of his intent to do so. Clearly, this memorandum was issued outside the Section 10(b) period and, given that Respondent's attorneys obviously had no opportunity to object on said basis, I believe it would deny Respondent due process to make an unfair labor practice finding based on this document. Accordingly, I shall consider it only insofar as it sheds light upon Respondent's alleged unlawful act in January 2008.

*Airmold, supra*. I believe that, as to Respondent’s container maintenance department employees, said change was substantial and significant in that it altered a work rule, set forth in Respondent’s employee manual, and that it required employees to go to the expense of obtaining doctors’ notes for minor illnesses in situations where they had not previously been obligated to do so. I do not mean to denigrate the necessity for or the reasonableness of Respondent’s policy change; rather, I point out only that its change clearly had an adverse pecuniary effect upon those fleet maintenance department employees, who never would have felt a necessity for going to a doctor for a minor illness, which, at most, might result in missing one day of work. Thus, after January 1, 2007, before and after certain specified dates, their choice was to work while ill or go to a doctor and pay for an examination and an illness excuse for merely one day of missed work. As in *Flambeau Airmold*, Respondent’s rule change impaired employees’ discretion in use of their sick leave benefit as they deemed necessary. Accordingly, I find that, by issuing its January 1, 2008 memorandum without giving notice to the Union or affording it an opportunity to bargain, Respondent engaged in a unilateral change in violation of Section 8(a)(1) and (5) of the Act.<sup>48</sup>

Finally, as to Respondent’s alleged unlawful unilateral changes, concerning the raise in pay given to employee, Francisco Gonzalez, and the change in the job assignment and method of pay for employee, Juan Vasquez, counsel for the General Counsel contends that the Board has held that altering work assignments and changing rates of pay without notice to or bargaining with a union after certification constitute unlawful unilateral changes, that Respondent’s actions are not in dispute, that Respondent failed to give notice to the Union prior to its actions, and that, therefore, it acted in violation of Section 8(a)(1) and (5) of the Act. As to the raise in pay for Gonzalez, contrary to the General Counsel, I agree with counsel for Respondent that their client was merely lawfully continuing a past practice of adjusting wages when employees acquired increased or upgraded job duties. In this regard, Lopez was uncontroverted that, prior to the Union’s certification, Respondent had a practice of awarding raises to drivers, who had been given increased or upgraded job responsibilities. Board law is clear that, in defending against an unlawful unilateral change allegation, an employer must establish “. . . a past practice that would justify making such [a change] without bargaining.” *Goya Foods of Florida*, 347 NLRB 1118, 1120 (2006). Further, rather than relying upon an asserted historic right to act unilaterally, an employer “. . . must establish a past practice that would justify making the changes without bargaining.” *Five Star Mfg.*, 348 NLRB 1301 at 1301 n. 4 (2006); *Goya Foods of Florida, supra*. Herein, based upon Lopez’ uncontroverted testimony, I believe Respondent has established a past practice of granting raises to drivers for the same reason it took its actions with regard to employee Gonzalez after the Union’s certification. Moreover, as the Union received notice of the pay raise for Gonzalez and raised it during bargaining, Respondent’s act hardly seems “significant” enough to justify finding an unlawful unilateral change. However, the changes for Vasquez involved a transfer to a different type of truck which, in turn, necessitated a change in his payment method from hourly to incentive pay. As Vasquez’ job transfer inherently affected his method of pay, I believe such constituted a material change in his terms and conditions of employment such as to require notice to and bargaining, upon request, with the Union. Accordingly, as Respondent gave no notice to the Union so as to afford it an opportunity to bargain with regard to Vasquez, I find Respondent acted in violation of Section 8(a)(1) and (5) of the Act. *California Gas Transport, Inc.*, 347 NLRB 1314, 1360 (2006).

<sup>48</sup> I note that, finding the January 1, 2007 memorandum unlawful would not add additional language to the Order in this document.

### 3. Respondent's Alleged Unlawful Failure and Refusal to Provide Information to the Union

5 The second consolidated compliant alleges that, since on or about November 13, Respondent has violated Section 8(a)(1) and (5) of the Act by failing and refusing to provide certain information to the Union. In this regard, on the above date, after the end of the bargaining session at which the Union received and responded to Respondent's last, best, and final offer, Victor Aguirre mailed to George Wayne an information request of approximately 40 pages, divided into in excess of 200 paragraphs and subsections covering every conceivable area of the bargaining units' terms and conditions of employment as well as numerous other areas dubitably germane to the bargaining process or to the Union's representative status, which it verbatim copied from a book written by an attorney, whose law firm represents labor organizations. In a subsequent series of letters, attorney Flora replied, providing responses to each specific information request; there is no evidence that Aguirre or any other Union official ever questioned the adequacy of Flora's responses. Notwithstanding the length of the Union's November 13 request and the absence of any limiting language in the second consolidated complaint, in his post-hearing brief, counsel for the General Counsel himself limited the breadth of the allegation to the first paragraph of the information request<sup>49</sup> and Aguirre's request that Respondent furnish the Union with a list of current employees including their names, dates of hire, rates of pay, job classifications, last known addresses, and phone numbers. During cross-examination, asked whether he had previously received the information in the first paragraph, Aguirre replied, "That was about a year prior to [the new request]. I didn't have a current list." As to Respondent's response to the Union's request for the information in the first paragraph, in a letter, dated January 30, 2008, Flora wrote, "After extensive review and consideration of your [information request] . . . . The requested information was previously provided on October 20, 2006.

25 The Board has long held, and there can be no doubt, that certain information, pertaining to an employer's employees, is presumptively relevant and must be transmitted to a labor organization upon request. Such information includes the names dates of hire, rates of pay, job classifications, last known addresses, and telephone numbers of bargaining unit employees. *Watkins Contracting, Inc.*, 335 NLRB 222, 224 (2001). One may infer from Flora's response to Aguirre's request that, as Respondent had already provided similar information, it had no duty to comply with the Union's demand that it furnish any additional information; however, I agree with counsel for the General Counsel that Aguirre's demand may be read as a request for updated information. The Board has held that, upon request, an employer is required to furnish updated presumptively relevant information to a labor organization. *Id.* at 222, n. 1; *Long Island Day Care Services*, 303 NLRB 112, 130 (1991). While counsel for Respondent assert that the entire information request was made in bad faith and intended to harass Respondent, inasmuch as the General Counsel now concentrates on just one aspect of said request, I need not pass on Respondent's defense, noting that, during his cross-examination, Aguirre explained the Union's reasonable need for the above-described information. As Respondent failed to raise a specific defense to its failure and refusal to provide the requested information to the Union, I find that its act violated Section 8(a)(1) and (5) of the Act.

45 <sup>49</sup> At no point, either during the hearing or prior to the time for the filing of briefs, did Counsel for the General Counsel for the General Counsel inform counsel for Respondent of his limited view of the extent of the allegation.

#### 4. Respondent's Alleged Violations of Section 8(a)(1) of the Act

##### a. August

5 One of the employee-members of the maintenance employees' bargaining committee was Juan Castillo, a welder/mechanic in Respondent's fleet maintenance department, who was off from work on a workers' compensation leave of absence during most of the collective bargaining. The record discloses that, during one of the August negotiating sessions, George Wayne uttered an unsolicited comment regarding employee Castillo. According to Victor Aguirre, Wayne asked if the Union was paying for Castillo's time while attending the bargaining. 10 Aguirre replied, yes, the Union was paying for his time; Wayne responded, "Well, you need to send us a check because we're paying for his time while he's out on workmen's compensation."<sup>50</sup> Wayne did not dispute Aguirre's version of the incident, testifying that he recalled asking Aguirre whether the Union was paying Castillo for his presence at the bargaining session-- ". . . the context of my asking that was if we're paying him workers' comp to be here then shouldn't we be getting that compensation sent to us?" While not specifically recalling Aguirre's response, Wayne observed that the former ". . . didn't like the question. . . . He thought 15 it was-- it may have been one of his bullshit answers or . . . something of that nature." Wayne averred that his purpose was to make a point that Respondent should have received an "offset."

20 Initially, inasmuch as Wayne concedes that the incident occurred, I credit Aguirre's version of what was said. Counsel for the General Counsel asserts what defines the unlawful nature of Wayne's conduct was his requirement that employee Castillo choose between engaging in Section 7 protected activity and his statutorily-proscribed workers' compensation benefits, and "the Act does not permit an employer to force employees to choose between the two." I would find merit in counsel's argument if the choice given to Castillo was either sit at home and receive workers' compensation for his time off from work or attend the bargaining 25 session without receiving such compensation. Such would have been a patently unlawful "Hobson's choice." However, Aguirre admitted to Wayne that the Union was paying Castillo for his presence at the meeting. Thus, the employee actually was being paid twice for his time spent at the bargaining table-- by the Union and by Respondent's workers' compensation insurance carrier. In such a context, while Wayne's comment may have been mean-spirited, it was hardly an unreasonable question, and I do not believe it crossed the statutory threshold so 30 as to arise to the level of a Section 8(a)(1) violative comment. Accordingly, I shall recommend dismissal of paragraph 7(b) of the second consolidated complaint.

35 Next, there is no dispute herein that Respondent gave its maintenance bargaining unit employees' raises in pay in 2005 and 2006 but had not given said employees a raise in 2007. Jose Castillo, a diesel mechanic, testified that, one day in August, during a meeting attended by the first and second shift mechanics, one employee asked Mike Olivas, Respondent's maintenance manager,<sup>51</sup> who supervises the welders, mechanics, and truck washers in the fleet maintenance department, whether or not Respondent would give the employees a raise that year. Olivas replied ". . . that the company couldn't give us raises because the Union was in 40 and the Union thought they were going to give us raises." During cross-examination, Castillo

---

50 According to Aguirre, Wayne's remark so upset him that, after the bargaining session that day, he sent a letter, protesting his behavior, by fax, to Wayne. Also, according to Aguirre, Castillo was upset by what Wayne said and decided to take vacation time for that day's 45 bargaining session.

<sup>51</sup> Respondent admits that Olivas is a supervisor within the meaning of Section 2(11) of the Act.

recalled Olivas saying that there was nothing he could do about raises for the employees and that the matter was involved in the negotiations between the Union and Respondent. Also, he added that “. . . he couldn’t do nothing [sic] until the Union was out.” Olivas testified that, during 2007, the fleet maintenance employees “frequently” asked him about a wage increase for them. His response was “that at the time I didn’t have any control over it because there was a  
 5 negotiation going on and once that was settled then we would know yes or no.” Asked if he discussed with the employees what he could do to help them, Olivas replied “. . . I told them the best I can do is help you guys out as much as I can with the overtime and give you as much overtime as possible . . . .” Finally, Olivas specifically denied telling employees they would not be receiving a raise because of the Union.

10 Castillo impressed me as being a veracious witness. In contrast, Olivas’ demeanor, while testifying, was that of a witness attempting to embellish his testimony so as to bolster Respondent’s defenses to the allegations of the second consolidated complaint. In these circumstances, as between the two witnesses, I rely upon Castillo’s version of this conversation and find that, in response to an employee’s question about a potential raise for the mechanics,  
 15 Olivas said that Respondent could do nothing because of the Union and could do nothing unless the Union was out. Further, while I believe Olivas referenced the on-going negotiations as the reason for Respondent’s failure to have given the employees a raise in 2007, he probably also offered to give the employees increased overtime in order to assuage them for the lack of a wage increase. The Board has long held that an employer violates Section 8(a)(1) of the Act by placing the onus on a labor organization for its failure to give an expected wage increase to its  
 20 employees and that an employer’s misconduct, in this regard, is exacerbated in the context of a newly certified union.<sup>52</sup> *Aluminum Casting & Engineering Co.*, 328 NLRB 8, 15-16 (1999), enfd. in pertinent part 230 F. 3<sup>rd</sup> 286 (7<sup>th</sup> Cir. 2000); *Marshall Durbin Poultry Co.*, 310 NLRB 68, 69 (1993). Further, as herein, such comments, as uttered by Olivas, “. . . tend to coerce employees into withdrawing their support for the Union . . . particularly where . . . the parties are  
 25 engaged in contract negotiations over a wage increase.” *Kentucky Fried Chicken*, 341 NLRB 69, 78 (2004). Accordingly, I find that, by Olivas’ comment, Respondent engaged in conduct violative of Section 8(a)(1) of the Act.

#### b. October

30 The record establishes that, during the parties’ October 4 bargaining session, as he had at previous bargaining sessions, Aguirre raised the bargaining unit employees’ frustration at the perceived lack of progress during negotiations. To this, Aguirre testified, “. . . [Gene] Dupreau said . . . I don’t think they’re that frustrated. . . . I think . . . they’ve been here forever . . . . The  
 35 average number of years [is] fairly high. And . . . our turnover is really low. If they were really unhappy and frustrated, they would have left a long time ago . . . .” According to Aguirre, he disputed Dupreau’s assessment of the employees’ mood and “. . . invited him to visit with them about seeing how frustrated they were.” Someone then raised the issue that, if Dupreau accepted Aguirre’s invitation and spoke to the employees about their frustrations, such might constitute direct dealing and trigger the filing of an unfair labor practice charge.<sup>53</sup> Aguirre  
 40 responded, saying Dupreau would be able to meet with the employees, and he would not file an

<sup>52</sup> In the latter circumstance, the implication of an employer’s statement is that its failure to give employees an expected wage increase is “punishment” for their selection of union representation.

<sup>53</sup> George Wayne recalled that it was Mark Flora who said “. . . we didn’t want to do something that would be considered direct dealing” and that the Union said it was “in favor of this.”

unfair labor practice charge, alleging direct dealing. He added that he wanted Dupreau to meet the employees and hear their level of frustration. On this point, during cross-examination, Aguirre admitted that he expected Dupreau to find out the maintenance employees' complaints, grievances, and problems and that these complaints, grievances, and problems would be similar to that which the employees' negotiating committee had raised during the parties' bargaining. While there is little dispute about what was said at the bargaining session, Dupreau asserted that it was an employee bargaining representative, whom he later identified as Juan Castillo, who first "requested" that he meet with the employees because there were "issues," about which Castillo believed the company should be aware. According to Dupreau, he then turned to look at Aguirre and asked what he thought about what Castillo said, and the former said ". . . that he didn't have any problem with it." Asked what he understood he would be asking about, Dupreau said, "Well, I would be asking them . . . why they were there, what was going on, what they felt was happening."

The next scheduled bargaining meeting was to be held on October 12, and Dupreau arranged to meet with the maintenance bargaining unit employees on the day before—October 11. Again, there is no real dispute over the events of that day. Thus, the record establishes that the maintenance employees were informed that Dupreau would meet with each one of them individually, and, in fact, Dupreau met with all the first shift employees on such a basis. During the meetings with the day shift maintenance employees, which were conducted in a private conference room with the door closed<sup>54</sup> and which lasted well into the afternoon, Dupreau, who was accompanied by an interpreter, Javier Prado, utilized a script, upon which he printed a series of self-instructions and questions. According to Dupreau, he began with the first two ("Explain agreement with Union regarding meetings" and "Find out where employee expectations are"),<sup>55</sup> and, invariably, ". . . the gates seemed to open and then it was kind of whatever topics they wanted to talk about." Hector Hernandez, a mechanic, who was a member of the Union's employee bargaining committee, testified that he was aware of what would occur on October 11 as ". . . Mr. Dupreau sent out word to us through the supervisor that he was going to have a meeting with each . . . one of us individually." As to what was said, according to the employee, Dupreau asked ". . . why we had accepted the Union. . . . I told him because of all the abuse there that was taking place [by] all of the supervisors and . . . the managers." Hernandez added that there existed "favoritism" and "mistreatment" by the supervisors and that whenever employees asked to speak about these problems ". . . we were told that there were many other employees that could come in and take our place, that the doors were open, that we could leave if we didn't like the work." Hernandez further testified that Dupreau took notes as he spoke, ". . . and he said he was going to investigate concerning about what we had talked about."

Jesus Duran testified that he was aware that Dupreau was going to speak to the employees on October 11, and that, on said date, he was summoned to an office where he met with Dupreau and Javier Prado. According to Duran, ". . . Dupreau told me that the reason he wanted to speak to me was that he asked permission of the Union to speak." Then, "the gentleman asked me what were by reasons for having gone to an organization like the Union?" Duran replied that he wanted the Union ". . . because I had had many problems from the supervisors of the company . . . they would not pay any attention to me" when he wanted to

<sup>54</sup> Asked if he believed Aguirre understood the questioning of employees would be one-on-one in a formalized, closed door setting, Dupreau conceded that there was no discussion as to the mechanics of the questioning but nevertheless believed Aguirre understood there would be confidentiality and privacy during his meetings with the employees

<sup>55</sup> Among the questions was "has the Union done anything they promised to do?"

5 speak to them. Besides problems with his supervisors, Duran told Dupreau one reason for him going to the Union was that only when the employees “were organized with the Union” did the Respondent discuss a contract with the employees. Duran further testified that, toward the end of their conversation, he asked Dupreau why it was only now that he decided he wanted to speak to the employees, and Dupreau replied that “. . . he came here only to find out a way to fix the problems between the company and us.”<sup>56</sup>

10 Jesus Ramirez, a second shift mechanic for Respondent, testified that he was aware Dupreau would speak to employees on October 11 as Mike Olivas told the workers “a person from the corporation” would be coming to speak to them individually about their “concerns” and they should “prepare” to speak with him. According to Ramirez, when he arrived at work in the afternoon, “. . . Olivas said that . . . Dupreau had already talked to . . . everybody from the morning . . . individually . . . and that [he] was very tired . . . and had other things he needed to do and . . . wasn’t going to have time to interview each of us individually.” Continuing, Olivas said Dupreau would have time to speak only to one person, who could act “. . . in representation of the entire second . . . shift.” Olivas said the employees should decide amongst themselves who should “come forward” and speak to Dupreau, and they had five minutes to decide. Ramirez testified that each second shift employee appeared to have his own list of “concerns,” which he had prepared, and each wanted to speak to Dupreau. Five minutes elapsed, and Olivas came out and asked if they had reached an agreement “. . . because this gentleman is waiting.” At this point, several people “wanted to come forward, others did not want other people to speak,” and “there was confusion and there was anger.” Eventually, a vote was taken, the majority voted for Ramirez, and “. . . they decided that I should go.” Thereupon, Ramirez met with Dupreau, who was accompanied by Javier Prado as an interpreter. “Mr. Dupreau [asked me] to explain to him . . . our concerns or anxieties and why we had decided to bring the Union into the company,” and “I told him that there were a lot of things that people wanted to explain or say, but the way things had been carried out was not the correct way to do it because I was only going to explain . . . my concerns . . . I couldn’t speak for the entire group . . .” Continuing, Ramirez then mentioned several employee concerns-- favoritism, nepotism, unfair treatment, and discriminatory punishment by the supervisors. According to Ramirez, Dupreau was taking “notes” of everything, and, when he finished, the former said “. . . that he was going to go and consult with his superiors, and that was all.”

30 Gene Dupreau testified that, on October 11, his introductory comments to each employee, with whom he spoke, consisted of him explaining “. . . the agreement that I had with the Union” and “. . . why I was able to have this conversation.” Then, he told the employees that the Union representatives believed it would be a “good idea” for him to meet with each employee and learn about why they were “upset.” Then, he asked the employees “what are your expectations of this process” and “what do you think is going to happen?” Asked, in general, what he heard from the employees, Dupreau said the “biggest” issue was “supervisor communication” with other issues being uniforms, higher wages, and benefits. Dupreau further testified that his goal was to determine what actually was “bothering” the employees and, to this end, he always pressed them to “go into more detail.” According to Dupreau, at the end of each conversation, “I just told them that I appreciated their time and shook their hand . . .” He denied telling employees what he would do with the information, which he received. During cross-examination, counsel for the General Counsel extensively questioned Dupreau regarding his notes of his conversations with the maintenance employees on that day. Thus, Dupreau conceded writing “Doesn’t feel Union would be necessary. . . . they have not done anything as yet” while he spoke to employee, Eusebio Zapata. Asked what question he asked, Dupreau

<sup>56</sup> Duran also recalled Dupreau writing notes of their conversation on a yellow legal pad.

obliquely averred what he wrote was “just part of” what the employee spoke about and “. . . I would assume that he just felt like that was the case. So other than that, I have no knowledge.” Dupreau confirmed, during his conversation with an employee, writing that the latter had not received much communication from the Union but could not recall what precipitated the response. He recalled noting that employee, Javier Bustamonte, complained about a supervisor telling him, if he (Bustamonte) wanted water, the former could charge him for it and that he investigated but determined there was no merit to the allegation. Dupreau denied telling Bustamonte that he would investigate the complaint. On this point Dupreau admitted investigating other complaints, which employees raised that day, but denied telling any employee that he would do so. Next, he admitted asking employee, Jose Macias, “What do you expect from the Union “and the latter replying he wanted someone to listen to the employees about their wages, benefits, and job conditions. Dupreau further admitted asking Macias, “Had the Union done anything [to date]” and the latter replying “nothing as of yet.” While speaking to employee, Carlos Rivera, Dupreau noted “the reason for the Union is not health insurance,” but, as to whether his question was why did the Union come in, Dupreau said, “. . . I don’t know that I asked him that or if he just went on and it was just a part of what he was saying.” Also, while speaking to an employee, Hector \_\_\_\_\_, Dupreau confirmed writing “Purpose voting for Union, no one really listening to their needs,” but denied asking why the employee voted for the Union-- “No, I didn’t ask that question. . . . it doesn’t sound like something he would have said either. However, I think he made the statement, ‘No one really listening to their needs.’ And I put that in there, editorialized.” Finally, Dupreau denied, and there is no record evidence, that, at the bargaining session the next day, any Union representative complained about anything he might have asked or said to an employee the previous day.

Initially, Respondent asserts that Aguirre, on behalf of the Union, waived his right to file unfair labor practice charges, alleging that Respondent unlawfully interrogated employees and unlawfully solicited grievances from them on October 11, as such “. . . was precisely what Aguirre asked Dupreau to do” during the bargaining session on October 4. In this regard, citing *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 705-06 (1983), counsel for Respondent contend that a Union may waive employees’ Section 7 rights as long as said waiver does not impinge upon the employees’ right to select a bargaining representative. Further, citing *Queen of the Valley Hospital*, 316 NLRB 721 (1995), counsel note that, rather than waiving the maintenance employees’ Section 7 rights, what the Union waived was its own right to file unfair labor practice charges regarding Dupreau’s meetings with the maintenance employees. Contrary to counsel, the record clearly establishes that, rather than generally waiving the Union’s right to file unfair labor practices over anything Dupreau might say to employees during meetings with employees, on October 4, in reaching his agreement with Respondent in this regard, Aguirre explicitly waived only the Union’s right to file unfair labor practices, alleging unlawful direct dealing. Specifically, I find that this particular issue was the only allegation about which Mark Flora was concerned might be the subject of an unfair labor practice charge, that, in order to allay his concerns, Aguirre forswore filing an unfair labor charge on this point, and that there exists no record evidence the Union waived its right to file an unfair charge alleging any other perceived violation of the Act. Accordingly, noting that Respondent does not assert that the Union waived any of the maintenance employees’ Section 7 rights, I find no merit to this asserted waiver defense.

Turning to the merits of the allegations in the second consolidated complaint as to the events of October 11, as to whether Dupreau unlawfully interrogated maintenance employees that day, I note that Dupreau failed to specifically deny the testimony of either Jesus Duran or Jesus Ramirez, and each employee appeared to have testified in a candid manner. Therefore, crediting Duran and Ramirez and relying upon each employee’s version of his conversation with Dupreau, I find that, during his conversation with Duran, Dupreau asked the employee what his

reasons were for going to the Union and that, during his conversation with Ramirez, Dupreau asked why Ramirez and his fellow employees had decided to seek representation by the Union. Further, Dupreau admitted asking another employee, Jose Macias, what he expected from the Union and whether the Union had done anything to date. The Board holds that, while

5 interrogation of employees is not *per se* unlawful, “. . . the test is whether, under all the circumstances, the interrogation reasonably tends to interfere with, restrain, or coerce employees in the exercise of rights guaranteed by the Act.” *Millard Refrigerated Services, Inc.*, 345 NLRB 1143, 1146 (2005); *Sunnyvale Medical Clinic*, 277 NLRB 1217 at 1217 (1985); *Rossmore House*, 269 NLRB 1176 (1984), *affd.* 760 F. 2d 1006 (6<sup>th</sup> Cir. 1985). In considering

10 the totality of the surrounding “circumstances,” the Board considers such factors as whether the employee, who is the subject of the interrogation, was an open and active Union adherent, the background, the nature of the information sought, the identity of the questioner, and the place and method of interrogation, and whether the employer communicates a valid purpose for the interrogation to the employee or gives assurances against reprisals. *Millard Refrigerated Services, supra*; *Sunnyvale Medical Clinic, supra* at 1146. Herein, the types of questions, which Dupreau posed to the above employees, are those which the Board normally finds coercive and

15 violative of the Act. *Assn. of Community Organizations For Reform Now (Acorn)*, 338 NLRB 866, 870 (2003); *Multi-Ad Services*, 331 NLRB 1226, 1227 (2001). Moreover, the questioning of the employees occurred in a private conference room with the door closed, Dupreau was a Waste Connections corporate official, there is no record evidence that either Duran, Ramirez, or Macias was a known supporter of the Union or that Dupreau gave them any assurances against

20 reprisals, and, other than stating the Union had given him permission to do so, Dupreau offered no valid purpose for interrogating the employees. *Multi-Ad Services, supra*. Accordingly, I find that, during his meetings with employees on October 11, Dupreau unlawfully coercively interrogated them in violation of Section 8(a)(1) of the Act. *North Hills Office Services*, 344 NLRB 1083, 1094 (2005); *Acorn, supra*; *Viacom, Inc.*, 256 NLRB 245, 252 (1981).<sup>57</sup>

25 Next, as to whether Dupreau unlawfully solicited grievances from the employees with whom he spoke, Board law is quite specific that an employer’s solicitation of grievances standing alone does not constitute a violation of the Act. Rather, absent a past practice, the “essence” of the violation is a promise, express or implied, to remedy such grievances. *Maple Grove Health Care Center*, 330 NLRB 330 at 330 (2000); *Capitol EMI Music*, 311 NLRB 997, 1007 (1993). At the outset, I note that there is no record evidence that Respondent had a past

30 practice of soliciting and remedying employee grievances. Further, I specifically credit the candid and uncontroverted testimony of employee Duran that, after listening to him explaining why employees had sought representation from the Union, Dupreau told Duran he was there to “fix” the problems between Respondent and its employees. Also, I specifically credit the

35 forthright and uncontroverted testimony of employee Ramirez that, after listening to him explicate the various concerns of the second shift maintenance employees, Dupreau said he was going to “consult with his superiors” about them. Clearly, the latter’s comment to Duran constituted an express promise to remedy grievances, and, in the surrounding circumstances, Dupreau’s comment to Ramirez likewise must be considered an implied promise to correct the employees’ “concerns.” Finally, I think that, as the foregoing occurred in the context of contract

40

---

<sup>57</sup> As a defense, Respondent’s attorneys point out that the employees seemed eager to respond to Dupreau’s questions that day. While some of his questions may have been in accord with Respondent’s agreement with the Union and while the employees may have willingly and eagerly responded to those questions, the fact that employees also answered Dupreau’s unlawfully posed questions does not detract from the coercive nature of them. In

45 fact, rather than remaining silent, given the surrounding circumstances, employees may well have felt compelled to respond.

bargaining, Dupreau’s comments to Duran and Ramirez are particularly egregious, sending a message to employees that Union representation is unnecessary for correcting their work problems. Accordingly, I find that, during his conversations with employees on October 11, Dupreau solicited grievances from employees and expressly and impliedly promised to remedy them in violation of Section 8(a)(1) of the Act. *Chartwells, Compass Group, USA, Inc.*, 342 NLRB 1155, 1168-69 (2004); *Maple Grove Health Care Center, supra*.<sup>58</sup>

Regarding the allegations that Respondent violated Section 8(a)(1) and (2) of the Act by directing its employees to form a company union and then dealing directly with said entity and violated Section 8(a)(1) and (5) of the Act by bypassing the Union and dealing directly with the maintenance employees with regard to their wages, hours, and other terms and conditions of employment, I believe the General Counsel has taken an insignificant incident and has crafted the proverbial mountain out of molehill. In this regard, there is no dispute that, late in the afternoon on October 11, Mike Olivas informed the second shift maintenance workers that Dupreau was too tired to interview all of them and that he preferred meeting with just one second shift employee and being made aware of all the work-related grievances, problems, and frustrations of his co-workers by this individual. Accordingly, Olivas directed the employees to vote on which of them would meet with Dupreau. In asserting that this fact matrix somehow equates to a violation of Section 8(a)(1) and (2) of the Act, counsel for the General Counsel relies upon *E.I. Dupont & Co.*, 311 NLRB 893, in which the Board noted that the threshold question for such a violation is whether the entity involved is in fact a labor organization. In this regard, according to the Board, the body is a labor organization within the meaning of Section 2(5) of the Act if employees participate, the organization exists, at least in part, for the purpose of “dealing with” an employer, and these dealings concern conditions of work, grievances, labor disputes, wages, rates of pay, or hours of work. *Id.* at 894. The principal issue, of course, is whether the entity-- presumably, the second shift maintenance employees-- exists, in part, for the purpose of dealing with the employer-- a fact which counsel presumes without any analysis. As to this, it is clear that the term “dealing with” is broader than the term “collective bargaining.” *NLRB v. Cabot Carbon Co.*, 360 U.S. 203, 211-12 (1959). The latter term connotes a situation wherein parties meet and compromise their positions in order to reach an agreement whereas the former does not entail a process in which the parties seek to compromise differences. Rather, “dealing with” suggests a bilateral pattern or process during which “over time” employees make proposals to management and the latter responds to these proposals by acceptance or rejection. The central tenet is the existence of a pattern or practice of proposals; if there are just isolated occurrences of employee proposals and management responses, the element of dealing is missing. *E.I. Dupont, supra*. Clearly, there is no evidence that this “group” of second shift employees existed for the purpose of dealing with Respondent. Thus, there is no record evidence that said employees, through employee Ramirez, proposed anything or that

---

<sup>58</sup> The record establishes that Respondent and the Union reached an agreement on October 4 to permit Dupreau to meet with the maintenance bargaining unit employees and to ascertain their frustrations and problems with Respondent. Further, Aguirre agreed not to file an unfair labor practice charge, alleging direct dealing, with regard to Dupreau’s questioning in this limited regard. Nevertheless, the General Counsel alleges, and counsel for the General Counsel argues, that, during his meetings with the employees on October 11, Dupreau created a false impression that he was authorized to deal directly with them in violation of Section 8(a)(1) of the Act. There is no merit to this allegation. First, of course, I believe the Union waived its right to file an unfair labor practice charge on this point. Next, what Dupreau told the employees was exactly what the Union had agreed to on October 4. Finally, while Dupreau listened to the employees’ concerns, there is no record evidence that he engaged in any bargaining with any of them.

management, through Dupreau rejected or agreed to anything. Further, by all accounts, these October 11 meetings were a one-time occurrence. In these circumstances, there can be no finding of a violation of Section 8(a)(1) and (2) of the Act. I so find and shall recommend dismissal of paragraph 8 of the second consolidated complaint.

5           Likewise, I find no merit to the alleged violation of Section 8(a)(1) and (5) of the Act. As to this, counsel’s reliance upon the Board’s decision in *Armored Transport, Inc.*, 339 NLRB 374 (2003), is misplaced. Thus, the Board determined there was direct dealing in violation of Section 8(a)(1) and (5) of the Act as, while it was engaged in contract negotiations with a union, the respondent sent a letter, containing new bargaining proposals, to the bargaining unit employees before it submitted the same proposals to the union and, thus, affording the latter an opportunity to consider the proposal or to bargain. Herein, of course, over the course of the bargaining, the Union had presented myriad employee grievances and complaints to Respondent at the bargaining table, and Aguirre’s purpose for permitting Dupreau to speak to the maintenance employees was to confirm the employees’ frustrations. In these circumstances, I do not believe Respondent bypassed the Union and dealt directly with its employees. Accordingly, I shall recommend dismissal of paragraph 10(i) of the second consolidated complaint.

### c. November

20           The record establishes that, in early November, about three weeks prior to the strike, which commenced on November 21, Mike Olivas held a monthly safety meeting for the first and second shift mechanics and welders in a company office. According to Jesus Duran, “I recall . . . that some of the co-workers asked him what was going on with the raise that the company was going to give us. Mike . . . answered . . . that he could do nothing about the raise because of the Union and he didn’t know what was going to happen.” Duran further testified that, on another occasion, as he was on his way to punch out for the day, he heard Olivas speaking to some employees in an office, saying “Boys, I can’t do anything about the raise, but what I can do is I can give you overtime.” Corroborating Duran as to the monthly safety meeting, Jesus Hernandez testified that either Duran or another employee, Eduardo Turrubiate, “. . . made the comment they hadn’t given us the raise [for] that year. And Mike Olivas said that, since we had come into the Union right now, they could not give out any raises.” As set forth above, Olivas testified that employees “frequently” asked him about a wage increase for 2007 and that his response was “that at the time I didn’t have any control over it because there was a negotiation going on and once that was settled then we would know yes or no.” He specifically denied blaming the lack of a raise in 2007 on the presence of the Union and said he told employees, in lieu of a raise, he would give as much overtime as possible.

35           With regard to the respective credibility of Jesus Duran and Jesus Hernandez, I previously noted that the former impressed me as being frank while testifying. Likewise, I found Hernandez to have been trustworthy while testifying. In contrast, as I noted earlier, Olivas appeared to be a mendacious witness, one not worthy of belief. Accordingly, I credit the corroborative testimony of Duran and Hernandez over that of Olivas and find that, during a safety meeting in early November, he blamed the presence of the Union for Respondent’s failure to give an expected wage increase to employees in 2007. As I wrote above, by placing the onus upon a labor organization for its failure to give an expected wage increase to its employee, an employer violates Section 8(a)(1) of the Act. *Kentucky Fried Chicken, supra*; *Aluminum Castings & Engineering Co., supra*; *Marshall Durbin Poultry Co., supra*. Moreover, such comments, as uttered by Olivas, tend to erode employee support for a labor organization and are particularly coercive in circumstances as herein when contract negotiations are

ongoing. *Kentucky Fried Chicken, supra*. Accordingly, I find Olivas' comments to Duran and Hernandez were violative of Section 8(a)(1) of the Act.

5 Next, in the early morning hours of November 14, at approximately 4:00am, the day after it presented its last, best, and final contract offer for the maintenance bargaining unit employees to the Union, Respondent held a mandatory meeting for all the employees in its drivers bargaining unit,<sup>59</sup> and, other than on a few points, there is no dispute as to what occurred. Thus, Respondent informed the employees of the meeting the night before, posting a notice for the meeting by a time clock. At the meeting the next morning, representing the employer were Gene Dupreau, George Wayne, and Armando Lopez, and, utilizing a printed summary, Dupreau and Wayne began their presentation by explaining each of the provisions of the company's 10 aforementioned final contract offer to the Union. According to Mario Ortiz, a driver, Dupreau ". . . was telling us about how the negotiations for the mechanics were going, that the company has already gave then their final offer, and it wasn't going to change, and he read some of the stuff that supposedly was on the new contract for us, the drivers and the mechanics, and one of drivers mentioned, 'Well, why are we here? That is the mechanics contract.'"<sup>60</sup> To this, 15 Dupreau replied, "'Pretty much, it was for both of you.'"<sup>61</sup> He added that the company would not bargain any longer, that, in case the employees were to engage in a strike, ". . . the company would . . . continue servicing the customers" and "we would be . . . replaced permanently."<sup>62</sup> A driver, Mike Garza, then asked how we get rid of the Union, and "the response from management was . . . there are ways of doing it and they didn't exactly tell him how." Another 20 employee, Jesus Dominguez, a front load driver, recalled that Wayne and Dupreau began Respondent's presentation, explaining Respondent's contract offer to the maintenance employees, and recalled Dupreau ". . . saying that he was already done with negotiations with the Union. . . . He said that the contract they had negotiated was going to be the same for the drivers and, if we didn't like it, that was it." As to the terms of the contract, according to 25 Dominguez, "I know that they were just talking about our sick leave, vacations, and what we were going to get [for our wages.]" Also, he said "there was no longer any negotiations, and, if we didn't like it, there was the door. . . . [Dupreau and Wayne] said . . . that they were no longer going to work with us and, if we didn't like the contract, there was a door, and, if we went on strike, we would all be [permanently replaced],"<sup>63</sup> and "they would hire people to replace our positions."<sup>64</sup> A third employee, Adan Vasquez, a roll-off driver, testified that ". . . Gene Dupreau 30 started talking about the contract . . . going over the contract, skipping pages. He brought out . . . the company was going to buy us boots and . . . something about the sick days . . ." Then, Wayne ". . . started talking about the [agreement] with the mechanics hadn't been reached . . . and he kept on giving a little bit about the negotiations with the mechanics. After a while, he just said . . . 'if anybody [goes] on strike . . . anybody that is going to go on strike is going to be 35 permanently replaced.'"<sup>65</sup> At this point, a "couple of drivers" asked how they could get rid of the

---

<sup>59</sup> Apparently, some maintenance employees also attended.

<sup>60</sup> Ortiz testified that neither Dupreau nor Wayne said one reason for the meeting was that a potential strike would involve both the drivers and the mechanics.

40 <sup>61</sup> During cross-examination, Ortiz confirmed Dupreau saying ". . . it's going to be pretty much the same."

<sup>62</sup> Ortiz denied that either Dupreau, Wayne, or Lopez said the strike would be over economics and did not recall the word ever being mentioned.

45 <sup>63</sup> Dominguez understood this warning to be in the context of the reason for the strike-- ". . . what they were giving us on the contract."

<sup>64</sup> According to the employee, neither Wayne nor Dupreau used the term economic strike.

<sup>65</sup> Like Dominguez, Vasquez never heard the term, economic strike, uttered.

Union, and “I think it was George that said . . . they have got to sign a petition . . . and try to vote them out.”

Two other employees testified about what occurred during this meeting. The petitioner in Case 28-RD-969, Paul Urbina, a residential driver for Respondent, testified that he attended the early morning drivers’ meeting and that Dupreau had Respondent’s final contract offer for the maintenance employees with him-- “he read us what was going on and how much the mechanics were going to get.” However, he denied that Wayne told the drivers they would get the same as was offered to the mechanics. Further, he recalled an employee, named Mike, asking how the employees could “get rid of the Union”<sup>66</sup> and that Dupreau said “. . . that there was going to be an economic strike.” Rick Diaz, a relief driver for Respondent, testified that he attended the November 14 driver meeting, that he recalled Mike Garza raising his hand and asking “how can we get rid of the Union,” that someone else asked about a strike, and that, in response, “. . . I think what was said . . . if people went on strike, then the company had the right to replace.” Contradicting Urbina, Diaz denied that the company representative mentioned the type of strike; rather, he just used the term “strike.”<sup>67</sup>

Gene Dupreau testified that Wayne, Lopez, and him conducted the meeting for Respondent; that he was the primary spokesperson, and that, while speaking to the drivers, he spoke from a printed summary of the final offer for the mechanics bargaining unit. According to Dupreau, Respondent’s purpose for holding this early morning meeting was “. . . I wanted to pull those guys together to explain [the final offer] to them.” He testified that, as he spoke to the assembled drivers, what he did was to go down the list of contract articles, explaining whether what was being offered to the Union was the same as previously offered or whether the offer been altered during the bargaining.<sup>68</sup> Specifically, as to the fringe benefits, Dupreau told the employees that “we were following the current practice. We would continue to have the same 401(k), the same contributions to health care, and . . . obviously we had the right to revise those at any time.” Asked why he explained the contract offer to the drivers when, at the time, Respondent and the Union was bargaining for the maintenance workers, Dupreau replied, “the union had grouped them all together in terms of “. . . if they were to go on strike or something like that . . . . And so, while we had not been given the chance to negotiate with the drivers, we just felt like the drivers . . . would be interested to . . . know what the maintenance facility bargaining . . . looked like.” Asked if was clear that the contract offer, which he summarized, was not a collective-bargaining agreement for the assembled drivers, Dupreau replied, “just

---

<sup>66</sup> While I shall go into this in more detail *infra*, Urbina testified that he distributed two decertification petitions-- one with undated signatures and another with signatures dated in December. As to the first, according to Urbina, he began distributing it “. . . I would say about two weeks” before the November 21 strike. Finally, he averred that employee Mike did not know about the decertification petition and that Mike subsequently signed it. As to the petition, which contains the undated signatures, there is no record evidence as to how many of the 30 drivers, who signed, did so after November 14.

<sup>67</sup> Diaz was contradictory as to when he signed the first decertification petition. Thus, after initially testifying he did so “after” the November 14 drivers meeting, he later testified “I signed the petition first, before we had the meeting.” Of course, his signature is undated.

<sup>68</sup> Specifically, as to management rights, Dupreau said the “bottom line” was that Respondent would continue to run the company “just as it does today.”

what I told you.” Finally, Dupreau recalled employee questions<sup>69</sup> regarding what would happen if they decide to strike and recalled Wayne responding, saying “. . . that anyone that participated in an economic strike would be permanently replaced . . .”<sup>70</sup> George Wayne corroborated Dupreau that they explained Respondent’s last, best, and final contract offer for the maintenance employees to the assembled drivers, utilizing a summary of the various provisions.

5 As to this, Wayne recalled, Dupreau told the drivers that he would not go through everything as some “. . . are just virtually the same thing we currently have. So, he went through the ones that were different.” Wayne denied that Dupreau said anything about permanent replacements or raised the possibility of a strike. Also, he recalled that one of the drivers posed a question, asking how do we get rid of the Union, and that he “probably” was the one who responded,

10 saying “. . . the same way that you got them in . . . by an election.” Finally, during direct examination, Wayne was unable to recall a driver asking, since it did not pertain to them, why Respondent required the drivers to attend a meeting during which management explained its maintenance employees’ contract offer to them. However, the next day, during friendly cross-examination, Wayne was able to recall, with specificity, the question, the identity of the questioner, and his response. Thus, he recalled that Julio Serna asked the question, and “I told

15 him that in our negotiations, the Union had told us on several occasions . . . they were going to take members out on strike and that included the drivers. I told him that we had never had any negotiations . . . related to the drivers up to this point . . . And that I thought that if they were going to be asked to . . . strike, they ought to understand what it was over.” Two months later, Wayne further recalled answering the employee “. . . that in our opinion . . . if people went out, it would be over economics. And if they went out, it would be an illegal or economic strike that the Company’s position has always been that we would have the right under the law, to replace those people that walked off permanently, and we would.” Finally, Armando Lopez<sup>71</sup> testified that “we met at the fleet maintenance shop early in the morning before the drivers would go out on their normal route. . . . I was there . . . and . . . George and Gene informed the employees of

20 our . . . most recent [bargaining session with the Union] . . . . [George and Gene] informed the drivers of the Union’s notification . . . that they were willing to go out on strike.” The drivers were told that, if they chose to engage in a strike, they could do so. “But we felt that it was . . . an economic strike. And . . . the employees would be permanently replaced. Lopez was able to recall one of the drivers asking “why are we even here” because it was the mechanics’ contract. According to Lopez, Wayne or Dupreau replied that the contract was the last, best, and final

25 offer to the Union for the maintenance employees but “. . . this contract is relevant to you also.”

30

As to what was said by the management representatives during the early morning drivers meeting on November 14, I shall rely upon the respective testimony of the three employees, Mario Ortiz, Jesus Dominguez, and Adan Vasquez, each of whom impressed me as

35 testifying in a frank and veritable manner, truthfully attempting to recall what was said . In contrast, Dupreau appeared to be testifying disingenuously and, as exemplified by his excuse for not bargaining on a more frequent basis, was an arrogant witness not worthy of belief. Likewise, neither Wayne nor Lopez seemed to exhibit any degree of candor while testifying. In particular, on this point, regarding an employee question why the drivers were required to attend a meeting about Respondent’s contract offer to the maintenance employees, after initially being

40

<sup>69</sup> During cross-examination, Dupreau conceded that one driver did ask why the drivers were there if what he was talking about was an offer to the maintenance employees. He recalled Wayne’s answer as being “. . . that this was an offer that was going to be made to the maintenance facility and that since we hadn’t had the opportunity to negotiate with the drivers, we wanted them to see that.”

45

<sup>70</sup> Dupreau could not recall whether an employee asked how they could get rid of the Union.

<sup>71</sup> I note that Wayne and Lopez prepared together for their testimony at the trial.

unable to recall such a question, the next day, Wayne dubitably was able to remember, with specificity, the question, the identity of the employee, and his response, and, two months later, he was able to recall additional aspects of his answer. Further, I think that any corroborative testimony between the two witnesses may best be explained by their joint trial preparation. As to Paul Urbina and Rick Diaz, neither impressed me as testifying honestly. In particular, I note that Diaz was inconsistent as to when he signed the initial decertification petition and that the two witnesses contradicted each other as to whether the management representative merely said strike or specified an economic strike as the precipitous cause for replacing them.<sup>72</sup> In these circumstances, I find that, on November 14, utilizing a summary of Respondent's last, best, and final contract offer to its maintenance employees, Wayne and Dupreau explained the company's various proposals, including sick leave, and said that the company would not change or engage in further bargaining about any aspect of it. I further find that, in response to an employee asking why the company was holding a meeting for its drivers in order to explain its contract offer to the maintenance employees, the two company officials said the contract ". . . was for both of you"<sup>73</sup> and, ". . . if we didn't like it, there was the door" and that they then warned the drivers, if any of them joined the maintenance employees and engaged in a strike, they would all be permanently replaced. Finally, in response to an employee asking how the drivers could get rid of the Union, Wayne replied that they would have to sign a petition and vote the Union out.

In his post-hearing brief, counsel for the General Counsel contends that, by telling the assembled drivers, at a time when contract bargaining for them had not as yet occurred, that Respondent's last, best, and final offer contract proposals for the maintenance employees were also meant for them and that Respondent would not alter said offer, Dupreau and Wayne unlawfully conveyed the message that bargaining with the Union would be futile. I agree. The clear implication of their comment was that it would be futile for the drivers to support the Union in bargaining on their behalf as they would only be offered what Respondent offered to the maintenance employees. Moreover, Wayne or Dupreau reinforced their warning of futility by stating that Respondent would never deviate from the proposals in its final offer. As such comments signal to the listening employees that they would gain nothing more from the employer at the bargaining table than they would without a bargaining agent, the Board has held similar warnings of the futility of support for a union or for engaging in collective bargaining violative of Section 8(a)(1) of the Act. *North Hills Office Services, supra; Aqua Cool*, 332 NLRB 95, 96 (2000). Accordingly, I believe that Wayne's and Dupreau's comments equated to warnings of the futility of bargaining and, therefore, were patently violative of Section 8(a)(1) of the Act. *Id.* Further, after stating that Respondent's last, best, and final contract offer to the maintenance employees was, also, for them, Wayne or Dupreau warned that, if any of the drivers did not like it, "there was the door." The Board has long held that similar employer "invitations" to quit ". . . implicitly threaten discharge because they convey the impression that the employer considers complaining about working conditions and engaging in union activity incompatible with continued employment." *Equipment Trucking Co.*, 336 NLRB 277 at 277

<sup>72</sup> The record does not permit a finding as to when Urbina began distributing his first decertification petition amongst the drivers. Thus, while he testified he did so approximately two weeks prior to the November 21 strike or a week prior to the November 14 drivers meeting, the signatures are undated. Moreover, Diaz was contradictory as to whether he signed the document prior to or subsequent to the November 14 drivers meeting. In these circumstances, I am loath to credit Urbina's testimony that, when Mike Garza asked his question, he did not know a petition was already being distributed amongst the drivers.

<sup>73</sup> On this point, I note that Armando Lopez admitted that Wayne told the drivers Respondent's final offer for the maintenance employees was also "relevant" for them.

(2001); *Metta Electric*, 338 NLRB 1059, at 1059, n.1 (2003); *Peter Vitalie Co.*, 310 NLRB 865, 869 (1993); *Padre Dodge*, 205 NLRB 252 (1973). Clearly, Respondent's comment must be interpreted as such an unlawful invitation to quit, a threat of discharge, and what is particularly pernicious herein is that Wayne's and Dupreau's demand required Respondent's drivers to make a Hobson's choice-- accept its above-described unfair labor practice or be subject to discharge. Accordingly, Respondent's comment constituted an implicit threat of discharge violative of Section 8(a)(1) of the Act. *Id.* Next, I note that in presenting Respondent's last, best, and final contract offer for the maintenance employees to the drivers, Dupreau and Wayne specifically discussed Respondent's sick leave proposal. I have previously analyzed this offer and noted that it did not include a carry-over provision whereas Respondent's existing sick leave program did permit employees to carry over as many as 15 sick days to the next calendar year. Inasmuch as the Union's sick leave proposal for the maintenance employees likewise did not include a carry-over provision, I did not believe Respondent's proposal evinced bad faith. However, as of November 14, the Union had made no collective-bargaining proposals, on behalf of the drivers to Respondent, and Wayne and Dupreau told the drivers the same proposal would be offered to them. In these circumstances, citing *Laser Tool, Inc.*, 320 NLRB 105 (1995), counsel for the General Counsel argues that Wayne's and Dupreau's conduct "amounted to" an unlawful threat of regressive bargaining. In the cited decision, the employer warned that, if employees selected a Union to represent them, it would bargain from scratch, and the Board adopted the administrative law judge's conclusion that said statement ". . . constitute[d] an announcement that the Respondent would engage in regressive bargaining, leav[ing] the impression that it would not bargain in good faith and clearly impl[y]ing employees could lose existing benefits . . . ." *Id.* at 310-11. I agree that, considered in context, Wayne's and Dupreau's comment likewise constituted a threat to engage in regressive bargaining violative of Section 8(a)(1) of the Act. *Id.*; *Heartland of Lansing Nursing Home*, 307 NLRB 152, 158 (1992).

The second consolidated complaint also alleges that, by bypassing the Union and dealing directly with the drivers over their terms and conditions of employment, Wayne and Dupreau, on behalf of Respondent, engaged in conduct violative of Section 8(a)(1) and (5) of the Act. I find merit to this allegation. Thus, I have found that, in presenting Respondent's last, best, and final contract offer for the maintenance employees to the drivers, Wayne and Dupreau averred that said final offer would be the same for the drivers. I have also found that they uttered this warning at a time when the Union had made no contract offer to Respondent on behalf of the drivers bargaining unit and at a time when Respondent had made no contract offer to the Union regarding the drivers' wages, hours, or other terms and conditions of employment. Assuming that the final offer for the maintenance employees also constituted a contract offer to the drivers, Respondent acted without affording the Union either an opportunity to consider the proposal or to bargain about it, and "this conduct by the Respondent is a clear violation of its duty to bargain with the Union in violation of Section 8(a)(1) and (5) of the Act. *Armored Transport, Inc., supra.*

Next, I have credited the testimony of employees Duran, Dominguez, and Vasquez that either Dupreau or Wayne, acting on behalf of Respondent, warned that, if the drivers did engage in a strike against Respondent, they would be permanently replaced. In the context of its other threat of discharge and other warnings, violative of Section 8(a)(1) of the Act, I likewise view the above comment as an unlawful threat of discharge in order to dissuade employees from engaging in a concerted work stoppage and strike or in other protected concerted activities. However, I do not rely upon the rationale of counsel for the General Counsel. He argues that, inasmuch as Respondent had not yet hired any permanent replacements, Wayne's or Dupreau's comment constituted an unlawful threat of termination and, for support, relies upon the Board's decision in *Noel Corp.*, 315 NLRB 905 (1994). Therein, a union had announced a

5 strike against the employer by its employees would commence at midnight, and, shortly after 10:00 p.m., the employer held an employees meeting during which the operations manager warned that any striker would be permanently replaced at a time when no permanent replacements had as yet been hired. The Board initially noted that it had previously held that an employer, who informed lawful economic strikers they had been permanently replaced when, in fact, the employer had not obtained such replacements, violated Section 8(a)(3) of the Act because the false statement “. . . effectively resulted in withholding from strikers the right to return to their unoccupied jobs solely because they engaged in a strike.” *Id.* at 907. The Board further noted that, in *American Linen Supply Co.*, 297 NLRB 137 (1989), it had extended this rationale to false statements about permanent replacements made to employees shortly before the commencement of a strike. Therefore, the Board concluded, as the employer’s actions were virtually identical to those of the employer in *American Linen*, its false statement likewise constituted an unlawful termination threat. *Id.* However, I think that the touchstone for the Board’s holding was the employer’s “. . . emphasis on a rapidly approaching deadline, and the necessity to make a choice at that deadline indicated to employees that a choice to strike would result in immediate permanent replacement.” *Id.* In contrast, Respondent’s instant warning mentioned no specific date for a strike, made no reference to having already obtained permanent replacements, and, most significantly, did not require an immediate decision by any driver to continue working or engage in a strike.

20 Counsel for Respondent are correct that, in *Eagle Comtronics, Inc.*, 263 NLRB 515, 516 (1982), the Board held “. . . that an employer does *not* violate the Act by truthfully informing employees that they are subject to permanent replacement in the event of an economic strike. . . . Unless the statement may be fairly understood as a threat of reprisal against employees or is explicitly coupled with such threats, it is protected by Section 8(c) of the Act. Therefore . . . an employer may address the subject of striker replacement without fully detailing the protections enumerated in [*The Laidlaw Corporation*, 171 NLRB 1366 (1968) affd. 414 F. 2d 99 (7<sup>th</sup> Cir. 1969), cert. denied 397 U.S. 920 (1969)], so long as it does not threaten that, as a result of the strike, employees will be deprived of their rights in a manner inconsistent with those detailed in *Laidlaw*.” *Id.* at 515-16. Further, counsel is correct that, in the foregoing context, an employer lawfully may refer ambiguously to a strike and not explicitly to an economic strike. *George L. Mee Memorial Hospital*, 348 NLRB 327, 328 (2006). Clearly, the scenario, contemplated under *George L. Mee Memorial Hospital* and *Eagle Comtronics* is an economic strike, which is initiated by a labor organization for its members’ gain, and not an unfair labor practice strike, which is undertaken to protect the unlawful acts of the employer.<sup>74</sup> *Unifirst Corp.*, 335 NLRB 706, 707 (2001). Further, while standing alone the word “strike” is redolent with ambiguity, in *Eagle Comtronics, supra*, the Board articulated its policy of resolving in an employer’s favor any ambiguity “. . . occasioned by a failure to articulate employees’ continued employment rights when informing them about permanent replacement in the context of an economic strike.” *Id.* However, as the Board explained in *Unifirst Corp.*, *Eagle Comtronics* applies only to statements unaccompanied by threats, and when “. . . ambiguous comments about striker replacements are part and parcel of a threat of retaliation for [supporting a union] . . . any ambiguity should be resolved against the employer.” *Id.*; *L.S.F. Transportation, Inc.*, 330 NLRB 1054, 1066 (2000). Herein, I believe that Dupreau’s or Wayne’s warning about permanent replacement went beyond mere mention of the consequences of an economic strike and that said comment must be viewed in the contexts of their use of the word “strike,” modified by neither “economic” nor

74 The difference in reinstatement rights is significant. Thus, unlike an economic striker, upon an unconditional offer to return to work, an employer must immediately reinstate an unfair labor practice striker. *Nortek Waste*, 336 NLRB 559, 565 (2001); *Mauka, Inc.*, 327 NLRB 803 (1999).

“unfair labor practice,” and of Respondent’s surrounding unfair labor practices, specifically Wayne’s and Dupreau’s implied threat of discharge if the drivers supported the Union in bargaining on their behalf. Further, contrary to counsel, given my previous conclusions that Respondent unlawfully engaged in extensive bad faith bargaining for the maintenance employees bargaining unit, unlawfully warned the drivers that supporting the Union’s bargaining on their behalf would be futile and that it would engage in regressive bargaining, and unlawfully bypassed the Union and dealt directly with the drivers on November 14, the record warrants the inference that, in these circumstances, rather than a strike for economic reasons, the drivers likely understood Respondent’s management officials as referring to an unfair labor practice strike. As “any strike caused by an employer’s bad-faith bargaining in retaliation for a union election victory is not an economic strike,” I believe that *Eagle Comtronics, supra*, does not privilege Respondent’s warning of permanent replacement for any driver who decided to engage in a strike. *Unifirst Corp., supra*, at 708. For the foregoing reasons, I find that, by warning the drivers that, if any of them engaged in a strike, he would be permanently replaced, Respondent implicitly threatened the drivers with discharge in violation of Section 8(a)(1) of the Act. *Id.*

Finally, counsel for the General Counsel points to Wayne’s response to a driver’s question, concerning how they could get rid of the Union, that they must sign a petition and vote the Union out and argues that this “stimulated” support for a decertification petition in violation of Section 8(a)(1) of the Act. As to this, I believe that the employee’s question and Wayne’s response came near the end of the November 14 meeting and after Wayne and Dupreau made several statements and threats violative of the Act. I further believe that the record warrants the conclusion that Respondent’s drivers did not commence their initial decertification petition until after Wayne’s comment. Thus, the only testimony that drivers were in the process of distributing their initial decertification petition prior to November 14 was offered by Paul Urbina and Rick Diaz; however, I reiterate my views that Urbina was not a reliable witness and that Diaz was a contradictory one. Therefore, believing Urbina and Diaz to have been unreliable witnesses, I find that Respondent’s drivers did not commence distributing their initial decertification petition until after Wayne’s response to driver Mike Garza’s question on November 14. Nevertheless, while counsel contends that, in the context of Respondent’s unfair labor practices during the drivers meeting, Wayne’s response “stimulated support for the decertification petition,” his remark was not unsolicited, and it is not unlawful for an employer to respond to questions asked by employees about decertification. *Kentucky Fried Chicken, supra*, at 78; *Weisser Optical*, 274 NLRB 961 at 961 (1985). Moreover, there is no evidence that Respondent had any direct involvement in the planning for or the distribution of either of the two decertification petitions herein. In these circumstances, I do not believe Wayne’s response to Garza’s question was violative of Section 8(a)(1) of the Act.

Next, the second consolidated complaint alleges that Respondent violated Section 8(a)(1) of the Act by threatening employees that a strike was inevitable. In this regard, employee Jesus Duran testified that, one day in early November, “I was leaving . . . work. I was walking by and I saw that [Michael Olivas] had tools on the floor as though it was a swap meet, and . . . I heard one of the mechanics ask him, what were those tools for . . . I am almost sure that it was Jacinto Juarez, a mechanic . . . Mike Olivas answered him that [the tools] were for the mechanics that were going to replace us.”<sup>75</sup> Likewise, Adan Vasquez testified that, on November 14, the Monday prior to the November 21 strike, he and another employee, David Reyes, noticed sets of tools arrayed in a work bay next to the office. They observed Olivas in

<sup>75</sup> Respondent does not provide tools for its mechanics. According to Mike Olivas, “In this industry, you have to provide your own” tools.

the office, and “we asked him what was going on with the tools, and he . . . said that it was tools for other mechanics that were coming in case we went on strike.” Mike Olivas did not dispute this testimony. According to him, Respondent did procure tools, and the tools arrived at Respondent’s maintenance yard “probably” a week before the strike. What Respondent purchased consisted of tool boxes, tool chests, and “various amounts” of tools, and he performed the inventory of the items in the shop area. As he did so, he was approached by several employees, who had observed the tools, and they asked “. . . hey, what are you doing . . . and I said I’m inventorying the tools. And they said why . . . and I said that there was a rumor that there was going to be a strike and I’m inventorying the tool box to make sure we have enough tools to proceed with the work that’s got to be done. . . . They asked [who] are for . . . and I told them that I believe there’s a blue team assembled already . . . so that we could continue servicing the customers and working on the trucks.” Finally, with regard to Olivas’ displaying the newly purchased tools for the use of potential strike replacements, the record establishes that, as of November 14, the maintenance bargaining unit employees and the drivers bargaining unit employees had jointly voted on two occasions to authorize a strike against Respondent and that, as will be discussed *infra*, during the second strike vote meeting, Victor Aguirre reviewed, in detail, the dismal state of the contract negotiations resulting from Respondent’s perceived bad faith bargaining and discussed the consequences of an economic strike as opposed to an unfair labor practice strike, in particular noting the possibility the company would hire replacement workers during the strike.

Based upon the foregoing, there is obviously no dispute as to what occurred. Thus, I find that, in anticipation of a potential strike by its maintenance bargaining unit employees, Respondent purchased work tools, tool boxes, and tool chests, which were to be utilized by strike replacements if, in fact, its employees engaged in a concerted work stoppage and strike, that this equipment arrived at Respondent’s maintenance facility in mid-November, and that, in plain sight of the employees in both bargaining units, Mike Olivas displayed the tools ostensibly for purposes of taking inventory. I further find that, when asked by Respondent’s mechanics and drivers why Respondent had purchased the tools, Olivas averred that they were intended for the use of replacement workers in the event the maintenance employees engaged in a strike. While counsel for the General Counsel argues that conveying the inevitability of a strike is coercive and violative of Section 8(a)(1) of the Act, counsel for Respondent assert that, given the two strike votes, Olivas was merely acknowledging what was obvious to Respondent’s employee and management-- that, if not inevitable, a strike was highly likely. In support of his position, counsel for the General Counsel relies upon two Board decisions-- *Grove Valve and Regulator Company*, 262 NLRB 285 (1982) and *Unifirst Corp.*, *supra*. In *Grove Valve*, a management official made an election campaign speech, emphasizing the resulting “mess” an economic strike would cause to the lives of employees and their families and stating he had been “directed” to continue plant operations “regardless” of what occurred, and the company conducted “tours of prospective striker replacements through the plant.” The Board concluded that, in the context of other conduct, including the tours of the plant, the management official’s speech “. . . unlawfully emphasized the inevitability of strikes and threatened the loss of strikers’ jobs . . . .” *Id.* at 285. In *Unifirst Corp.*, the former company president, in an election campaign speech, told listening employees that, if they selected the union as their bargaining representative, he would not abide by the union’s rules, that he would cause a strike, and that he would bring in other workers to continue operations. The Board found that the president’s striker replacement comments, viewed in the context of his warning selection of a union would result in a strike “engineered” by the respondent, constituted an unlawful veiled threat of job loss. In contrast, counsel for Respondent relies upon several Board decisions, in which it found employer comments not to be unlawful. For example, in *Patrick Industries*, 318 NLRB 245 (1995), during an election campaign speech, a company vice-president warned, in effect, that, if the company said no to every union bargaining demand, the union’s only weapon would be to

5 call a strike; that, in the event a strike occurred, economic strikers could be permanently replaced; and that permanently replaced employees “run a high risk of losing [their jobs].” The Board concluded that the respondent had not threatened its employees with job loss as the company had a legal right to continue operating during a strike and as it had a legal right to hire replacement employees in order to do so. *Id.* at 255. Herein, rather than, as in the above-cited  
10 decisions of the Board, hypothetical comments uttered in the midst of an election campaign, Olivas displayed the tools and informed employees of their purpose at a point when all parties, including the bargaining unit employees, were acutely aware of the distinct possibility, if not probability, of a strike, which was the Union’s right to call at what it considered the optimum time. Moreover, given the status of contract bargaining between the parties, it is doubtful that any employee believed, or held out hope, that negotiations would take a satisfactory turn so as to avert a strike. Finally, I think that Olivas merely confirmed what the employees already knew - that Respondent had the right to continue operating the facility with replacement workers during a strike. In these circumstances, I do not believe that, by displaying tools and his comments to employees, Olivas unlawfully conveyed the inevitability of a strike and shall recommend the dismissal of the second consolidated complaint allegations in this regard.  
15

20 The second consolidated complaint next alleges that, on or about November 20, Olivas unlawfully created the impression of surveillance and unlawfully threatened employees by informing them they would be terminated if they engaged in a strike. In this regard, there is no dispute that, on that day, early in the evening at approximately 6:00pm, Olivas returned to the maintenance facility and held a meeting of all the second shift maintenance employees in the shop office. Jesus Ramirez testified, “Mike Olivas . . . said that we were going to have a small meeting. That they had . . . become aware . . . through the news . . . that there was . . . the possibility that there was going to be a strike.” Continuing, Olivas said that if the employees took that “step,” he would not be able to do “anything” for them; that “. . . we have tools, you have seen the tools, we already have tools so that we are prepared in the event you guys go on  
25 strike, we can bring these guys in that are staying over at the hotels . . . the company is not going to stop working so don’t force me to take measures against you guys that I don’t want to take.” He added that what would happen “. . . is that you are going to be replaced, you guys are going to be permanently replaced by those other people . . . we already lined up . . . . You are going to be fired. . . .” Questioned by me as to whether Olivas had used the terms  
30 “permanently replaced” and “fired,” Ramirez changed his testimony, replying “he just said that we [would] automatically be fired and replaced, but he did not use the word, permanently.” According to Jose Castillo, Olivas called the meeting and employees gathered in the office. “He said that he already knew that we were going on strike because of the news and that he had fourteen specialists ready to replace us. He said it in Spanish--`The company is going to fire you if you go on strike.’” Castillo further testified that he was aware the employees had  
35 authorized a strike but did not know when it would occur. A third employee, Umberto Hernandez, a mechanic, testified that, during the meeting, Olivas “. . . told us if we were to go on strike, to consider us being fired. That he already had fourteen specialized mechanics. And he even had some tools out there that he said were for the mechanics that were going to be substituting for us.” During cross-examination, Hernandez recalled Olivas saying “. . . that the company had lined up replacements for the employees if they went out on strike” and admitted  
40 Olivas said the company would replace them with the fourteen specialized mechanics. But, when asked if Olivas said the employees would be replaced and not fired, Hernandez reiterated,  
45

“He said we could consider ourselves as being fired.”<sup>76</sup> According to Olivas, he did come back to the yard to speak to the employees about a potential strike that evening. “I had gone home for the day, and about 6:30 . . . George Wayne called and he said I have a press release stating that the Union was going to go out on strike tomorrow.” He then asked Olivas to return to the shop and “. . . see what’s going to happen . . . .” Olivas further testified that he returned to the shop, gathered all the employees in the office, “. . . and I said I have a report . . . . that there will be a strike. I pleaded with them not to walk out and to think about their families and . . . anybody involved in this situation and to think about what they were doing . . . because we knew . . . there was a strike team ready to come to help.”<sup>77</sup> The employees’ only response, Olivas recalled, was that this was the first indication they had about a possible strike. Asked if he told the employees what would happen in the event of a strike, Olivas replied, “I remember saying . . . that they would be permanently replaced if they were to walk out.” He specifically denied telling employees they would be fired or terminated.

With regard to what was said during this November 20 meeting, I credit the versions of employees Ramirez, Castillo, and Hernandez over that of Olivas. Each employee impressed me as being a forthright witness, honestly attempting to recall what was said. In contrast, as I have previously stated, Olivas’ impressed me as being a deceptive witness, misleadingly testifying in a manner calculated to bolster Respondent’s defense to the alleged unfair labor practices. Accordingly, I find that, early in the evening on November 20, upon being alerted to the possibility of a strike the next day, Olivas returned to Respondent’s maintenance facility, gathered the second shift maintenance employees together in an office, and, during the course of the meeting, said that there were news reports the employees were preparing to strike the next day, warned that, in the event of a strike, Respondent had, at least, fourteen specialized mechanics on call to replace them and had purchased tools for their use and explicitly threatened that, if the employees joined the strike, they should consider themselves as having been fired. Counsel for the General Counsel is correct that it is unlawful for an employer to threaten employees with termination if they engage in a strike, and, therefore, I find Olivas’ blatant threat to the second shift maintenance employees violative of Section 8(a)(1) of the Act. *Insta-Print, Inc.*, 343 NLRB 368, 376 (2004). As to whether Olivas also unlawfully created the impression that Respondent had been engaging in surveillance of their Union activities by stating he had heard news reports of their pending strike, that Olivas, in fact, unusually returned to the plant to hold this meeting convinces me he probably truthfully told the employees he had heard such a news report.<sup>78</sup> Further, I note, of course, that the strike did commence the next day, an event about which, I believe, the listening employees were well aware. In these circumstances, I find no merit to the latter allegation.

<sup>76</sup> A fourth employee, Alfonso Macias testified regarding this meeting. “It was an emergency meeting that he called because he was at home and he said that he hear the news . . . that we would be on strike the following day “at 12:01am.” Then, Olivas “. . . just kept looking at everybody and nobody say anything, so he said, ‘Well, if you don’t got any questions . . . the meeting is over.’”

<sup>77</sup> The strike team, to which Olivas referred, was the so-called “blue team.” This is comprised of individuals from “other parts of the country” who work for Waste Connections subsidiaries. According to him, the blue team employees arrived in El Paso “a day or two after the strike went off . . .” and worked for “about three weeks,” using the tools, which Respondent had purchased. Olivas characterized each member of the blue team as a volunteer.

<sup>78</sup> If Respondent had surreptitiously learned of the strike or if Olivas was not being straightforward with the employees, I think he would have held a similar meeting with the day shift employees or with the employees of both shifts together. As there is no record evidence of such a meeting, I am convinced Olivas’ explanation to the employees was true.

### C. Respondent's Employees' November 21, 2007 Strike

#### 1. The Allegation that the Strike was Caused by and/or Prolonged by Respondent's Unfair Labor Practices

5

On November 13, 2007, with Respondent's presentation to the Union of its last, best, and final contract offer and the parties' inability to reach agreement on the terms of a collective-bargaining agreement on that date, negotiations between Respondent and the Union effectively ceased. I have previously concluded that, during the 11 months of contract negotiations, insouciantly and with seeming disdain for its statutory obligation to bargain in good faith, Respondent frustrated the negotiating process by, among other unfair labor practices, engaging in dilatory practices regarding the scheduling of meetings, failing and refusing to meet regularly with the Union and at reasonable intervals, unreasonably limiting the duration of bargaining sessions, and failing to designate an agent with sufficient bargaining authority. The record reveals that Respondent's employees in both the maintenance employees and drivers bargaining units were disheartened and angered by their employer's aforementioned bargaining tactics. Thus, Victor Aguirre testified that, at more than half of the bargaining sessions, he told Respondent's negotiators the employees ". . . were really upset that nothing was getting done" and that, at almost every meeting, he asserted the negotiations were proceeding too slowly. In particular, during one of the parties' May bargaining sessions, ". . . I remember telling the Company that [the membership was] extremely frustrated and that we needed to get something done." Also, according to Aguirre, one day in June he received a telephone call from Mark Flora, who ". . . asked me to call the employees and get them to retract from-- they were going to have a sick-out. And Mr. Flora called it a wildcat-- a wildcat strike" and threatened to terminate any employee who failed to come to work.<sup>79</sup> Aguirre immediately telephoned Juan De la Torre and asked him to speak to the members of the negotiating committee in order to calm them. Further, George Wayne testified that, at the parties' August 29 negotiating meeting, Aguirre complained that he did not think the negotiations were "moving forward" and said ". . . that his people were getting restless, didn't feel . . . that the [process] was moving fast enough for them and he said the drivers wanted to do a sickout but he's discouraging it."

20

25

30

35

40

45

In this context, on September 8, Aguirre held a meeting, which lasted approximately an hour, with employees of both bargaining units in a room across the street from a church in El Paso. Twenty-nine employees attended along with the employees' negotiating committee, Aguirre, and Juan de la Torre. According to Aguirre, "We talked about the status of negotiations. And they were expressing concern with the slow process that was taking place. We looked at different options. . . . that we had as a Union. And . . . people from the committee made comments to the effect that . . . this company does not want to get an agreement. . . . And there were just several people talking about the different options and stuff. And so at some point I said . . . we can keep going the way we're going, just meeting with the company, or we can take action . . . do something also. And so I believe somebody made a motion to let the committee make a decision to strike," and ". . . the membership gave the committee the right to [call] a strike." Asked some of the specific issues that arose regarding the bargaining, Aguirre said he told the employees that Respondent was not moving on important issues, including grievance and arbitration, and he mentioned the company's insistence upon a cap on backpay damages. Asked whether the length of time the bargaining was taking arose, Aguirre answered, "They wanted to know why it was going to be a year since they had voted and there was nothing to show for it." Another issue raised and discussed was water rationing by the

<sup>79</sup> Flora failed to deny Aguirre's testimony as to this incident.

50

5 supervisors, a matter which greatly angered the drivers because August had been an extremely warm month. Two employees, who attended this meeting corroborated Aguirre that Respondent's conduct during contract bargaining was an issue raised by the latter prior to the strike authorization vote. Thus, Jesus Dominguez recalled Aguirre saying "that they were working with the company for our contract . . . and they weren't getting any cooperation," and Adan Vasquez remembered Aguirre going into detail about the bargaining not "going too hot."<sup>80</sup>

10 Two months later, in the evening of November 13, scant hours after the failure of bargaining over Respondent's last, best, and final offer, Aguirre<sup>81</sup> held another meeting with employees of both bargaining units at the same location as the September meeting. Testifying during direct examination, Aguirre stated that he told the 40 workers, who were present, ". . . that there was no way that we were going to get an agreement for sure at this time, that the company had no desire to reach agreement with us, period. That we tried, that we had given in a lot of concessions to the company. And we could never see anything from them, any signs of good faith bargaining. And that we were going to have to do something else, other than the bargaining, just because the company had no desire. . . . I told them that we were not going to be able to get an agreement with this company, period. They don't want one." Aguirre further testified that he discussed Respondent's last, best, and final offer, pointing out that Respondent had proposed fewer benefits than the employees then enjoyed. Specifically, he mentioned sick leave, stating that Respondent was only offering four days a year. At that point, according to Aguirre, "we discussed the strike. . . . We agreed that we were going to have the committee call for the right time. Because we wanted it to be an effective strike. . . . And then I told them that we were going to be filing unfair labor practice charges because we didn't want this to be an economic strike. Because I know that they could have been replaced." The employees were obviously "concerned" about this possibility, and Aguirre told them such could happen in an economic strike, "but if this is an unfair labor practice strike, you can't" be permanently replaced. He then assured the employees they "clearly" would be engaged in an unfair labor practice strike based upon Respondent's "several" unfair labor practices. Asked whether he told the employees he would be filing unfair labor practice charges involving the bargaining, Aguirre replied, "About everything. About changing the conditions of employment. . . . We talked about that." Asked if the employees understood they were voting for an unfair labor practice strike rather than an economic strike, Aguirre answered, "I explained the differences between strikes. . . . And I told them, 'In my view, this is an unfair labor practice strike. Let's vote on it.' And they did." Asked, by me, to be specific regarding Respondent's unfair labor practices, which he particularized to the employees as the basis for an unfair labor practice strike, Aguirre responded, "What I told them was that the company was not acting in good faith. . . .

35  
40  

---

<sup>80</sup> Juan De la Torre was present throughout the hearing but failed to testify at the trial. In this regard, I note that he was available to either the General Counsel or Respondent to call as a witness.

<sup>81</sup> Juan De la Torre assisted Aguirre in conducting the meeting.

They kept dragging their feet. That is the exact words I used. 'They were dragging their feet,' that they didn't have an intent to reach an agreement, and that they had made unilateral changes.<sup>82</sup> During cross-examination, asked if, during the November 13 meeting, the main things he discussed were that he couldn't reach agreement on a decent economic package or on a grievance/arbitration procedure, Aguirre said, "If that is what my affidavit says . . . . I don't recall every single word I told them. I am sure that came up though." Also, Aguirre testified that, prior to the strike authorization vote, he told the employees that they had three options-- accept Respondent's last, best, and final offer, continue bargaining, or engage in a strike. Then, several employees stood and voiced their frustrations with their employer, saying they were tired of the company mistreating them and not paying "good money." Juan Castillo arose and said he was unable to obtain a car loan because his wages were too low. Jesus Duran then said the company needed to be taught a lesson and it was time for the employees to show solidarity. Hector Hernandez said he was prepared to risk the house, which he had recently purchased because he could no longer tolerate the way Respondent treated its employees with low wages, unsafe conditions, and the lack of dignity. Finally, Mario Ortiz said that he was always opposed to a strike and it was the last thing he wanted. Finally, I note that, in none of the Union's unfair labor practice filings in November or December 2007 did it allege that Respondent had engaged in bad faith bargaining.

Three employees, who attended the November 13 meeting, testified with regard to what Aguirre said to the maintenance employees and drivers. According to Mario Ortiz, prior to the strike vote, Aguirre spoke regarding the reasons for a strike-- ". . . I don't remember the exact words he used" because employees were speaking amongst themselves; however, he ". . . talked about the contract . . . as far as trying to get a contract . . . and it is not working." The employees then voted to authorize the bargaining committee to call a strike. Jesus Dominguez recalled Aguirre saying ". . . that they weren't going anywhere with the company, that they weren't cooperating with us, and that we were all willing to go on strike, and we had a vote." Specifically, he recalled the business agent saying ". . . they weren't really sitting down with [us], enough time . . ." and ". . . they weren't cooperating with us" at the bargaining table. He also recalled Aguirre characterizing the strike, on which the employees would vote, as a "labor strike to see if we could . . . get our benefits for the contract . . ." Asked what Aguirre said he did not like about the bargaining, Dominguez recalled him ". . . telling us about what we were asking, for our vacations, our sick leaves . . . our down times." Asked if Aguirre spoke about Respondent's

---

<sup>82</sup> Aguirre testified that he purposely did not allege failure to bargain in good faith in his initial unfair labor practice charge, filed in Case 28-CA-21654 on November 14, 2007, because it would have been "really hard to prove bad faith bargaining."

Aguirre further testified he specified several other alleged unfair labor practices, committed by Respondent, to the employees during the November 13 meeting, including a unilateral change involving the employees' longevity bonus, telling employees that it had 14 employees to replace them, informing employees on November 12 that no agreement would be reached the next day, telling employees that the Union did not want to negotiate and the last, best, and final offer was the best offer they would get from the company, and meeting directly with the employees and negotiating to "get the Union out." Aguirre also mentioned other acts, which he asserted, he told the employees were unfair labor practices. These included purchasing tools and telling employees the tools were to be used by strike replacement workers. During cross-examination, Aguirre conceded, in the evening of November 13, he could not have mentioned two of the above alleged unfair labor practices, which occurred on November 14. Also, during cross-examination, he conceded that he made no mention of any of the foregoing allegations in a pre-trial affidavit, dated January 14, 2008, in which he discussed what he told the employees on November 13.

conduct apart from the contract bargaining, the witness contradicted the former, replying, “No, sir.” During cross-examination, asked for the meaning of “labor” strike, Dominguez said such a strike involve such factors as the job not being safe, “favoritism,” and not paying for down time. He added that employees’ comments at the meeting in favor of a strike concerned the manner in which they were being treated by their supervisors and their dislike for the company’s contract proposals. During redirect examination, Dominguez recalled other employees’ comments supporting of a strike, including that the bargaining was taking too long. On this point, he recalled employees asking Aguirre “why it was taking so long, the bargaining” and the business agent replying “that the company wasn’t cooperating with us.”<sup>83</sup> Also, employee, Adan Vasquez, testified concerning what Union officials said during the meeting. According to him, “. . . they told us to take a vote and see who wanted to be part of the strike because the company wasn’t going to budge for anything. . . . There was a little bit of discussion on proposals . . . the company wasn’t willing to work with us . . . at all.” Specifically, Aguirre said “. . . the negotiations weren’t going so hot. . . . He said on the arbitration negotiations . . . the company was willing to budge for anything . . . the company wasn’t even willing to negotiate anything.” Vasquez could not recall whether Aguirre discussed Respondent’s conduct not having to do with the contract bargaining. Further, prior to the strike vote, Aguirre spoke about the type of strike, which the employee would undertake-- “. . . it was not an economic strike; it was all on fairness towards all of the employees.”<sup>84</sup> During cross-examination, Vasquez testified, in explaining the purpose of the strike, Aguirre said that the company was not budging on the Union’s proposals and a strike could force Respondent to agree to more of the Union’s terms and that a strike was necessary as the employees had to stand together and fight for what they believed. He also recalled Aguirre saying he did not think the strike would last very long and would give the employees a stronger hand in forcing the company to accede to its demands. Finally, under questioning by me, Vasquez recalled Aguirre mentioning employees’ longevity bonuses but not as a reason for the strike and denied Aguirre mentioning, as reasons for the strike, the company had interfered with employees’ rights by saying it had 14 strike replacements ready to replace them in the event of a strike or it would never reach an agreement with the Union.

Four employees testified as to why they voted in favor of the strike against Respondent. According to Mario Ortiz, he did so because of his aversion to the medical waste in the containers, which he had to pick up, and to force Respondent “to move things along quicker” in order to “get a contract.” Jesus Duran voted in favor of the strike “. . . because of the mistreatment we received from the supervisors” and “. . . because we wanted to organize ourselves with the union and we were not seeing that any progress was being made in the negotiations between the union and the company . . . .” Asked why he voted for the strike, Jesus Dominguez initially testified that he was unable to speak to his supervisor as the latter would never believe what he said and that “they just wouldn’t cooperate with us.” Later, under questioning by counsel for the General Counsel, asked whether the fact that bargaining was taking so long was a factor in his participation in the strike, Dominguez said, “Yes, sir.” Finally, Jesus Ramirez, who did not attend the November 13 meeting but, nevertheless, participated in the strike, testified that he did so because “we were a close knit group . . . and I would see a lot of the injustices upon my colleagues. I saw mistreatment, I saw discrimination, and . . . I was a witness [to an incident during which a co-worker was called a ‘wetback’ by a supervisor].”

---

<sup>83</sup> Dominguez said this was a factor in the strike vote.

<sup>84</sup> To Vasquez, this meant “too much favoritism” by the supervisors toward certain employees.

One minute after midnight on November 21, 2007, 55 workers in both bargaining units (29 drivers and 26 maintenance employees) commenced a concerted work stoppage and strike against Respondent. The record reveals that, during the strike, employees picketed outside Respondent's yard and maintenance facility with signs reading, among other messages, "Please support our ULP strike against El Paso Disposal;" "On Strike over Unfair Labor Practices;" "Unfair Labor Strike Against El Paso Disposal;" and "Unfair Labor Practice Strike." Asked whether the above wording meant that his job was unsafe, that the employer was giving favoritism to some employees, and that the employer would not pay for down time, Jesus Dominguez answered "yes" to each. The strike continued for 14 days until December 4 when, on behalf of Respondent's striking drivers and mechanics, the Union made an unconditional "request" to return to work "effective immediately." The next day, December 5, Mark Flora sent a letter to Aguirre, informing the latter that Respondent considered the strike to have been motivated by economic concerns, that all of the strikers had been replaced by "a full complement of permanent replacements," and "that no vacancies currently exist." Flora instructed Aguirre to have each of the former strikers report to Respondent's human resources department and sign a preferential recall list, "indicating their desire to be reinstated should a vacancy occur." Upon receiving Flora's letter, Aguirre advised the former strikers to follow the attorney's instructions. Thereafter, 52 of the 54 striking employees signed the list, and, to date, only three drivers and three maintenance employees have been recalled to work from the list.

Obviously, the credibility of Victor Aguirre is crucial for a determination as to the underlying rationale for Respondent's employees' concerted work stoppage and strike on November 21. Assessing his demeanor, while testifying, and his testimony in the context of the entire record, I found him to be an enigmatic and perplexing witness, one who, I believe, was veracious concerning most of his testimony but patently duplicitous regarding certain aspects of it.<sup>85</sup> In this regard, I believe Aguirre fabricated portions of his testimony concerning what he said to the employees during the November 13 meeting. In particular, noting he was explicitly contradicted by employee Jose Dominguez, I think he paltered about discussing perceived unfair labor practices not involving the bargaining with the employees. Otherwise, noting that Respondent understood the employees in its bargaining units were agitated over the perceived slow pace of bargaining, I think Aguirre testified candidly that he discussed this aspect of the contract bargaining with the employees during both the September 8 and the November 13 meetings and that, besides mentioning various Respondent proposals, with which the Union had issues, he discussed Respondent's unlawful dilatory tactics, terming its foot dragging an unfair labor practice, and addressed the employees' concerns as to the slow pace of the bargaining. On the latter point, I believe he was corroborated by employees, Mario Ortiz and Jose Dominguez, the latter, in particular, recalling Aguirre saying Respondent was not sitting down with the Union for "enough time." Based upon the foregoing and the record as a whole,<sup>86</sup> I find that, during his meeting with the employees in both bargaining units on September 8, prior to the employees' vote to authorize a strike, Aguirre discussed the state of the contract negotiations, including the slow pace of bargaining and Respondent's perceived lack of movement on various contract issues, and listened as employees expressed their anger,

---

<sup>85</sup> For example, I think portions of his testimony regarding the bargaining were feigned. In my experience, this is not unusual. Sadly, witnesses often alternate between truth and falsehood in order to support legal and factual positions, and it is my obligation to ascertain-- some would say divine-- the reality from the deceit.

<sup>86</sup> I have not drawn any adverse inference from the fact that Juan De la Torre failed to testify in corroboration of Aguirre. As to this, I note he was available at the hearing for either party to call him as a witness.

complaining about numerous concerns, including the “slow process” of bargaining, and asking why almost a year had elapsed since the election without any agreement on a contract.

5 I further find that, during his meeting with the employees in both bargaining units on November 13, prior to the employees’ vote, affirming their previous authorization of a strike, Aguirre again discussed the state of the bargaining, including the breakdown in bargaining over Respondent’s last, best, and final offer and mentioned Respondent’s positions on some contract provisions, including grievance/arbitration and its economic offers. Also, I find that, during said discussion, after again listening to employees’ complaints about many matters, including that the bargaining was taking too long, Aguirre emphasized “that the company had no desire to reach agreement with the Union;” said the employees had three options (accept Respondent’s final offer, continue bargaining, or strike); informed the employees, if they chose the latter option, about the differences between an economic strike and an unfair labor practice strike; said, in his view, they would be striking over Respondent’s unfair labor practices; and, on this point, specified that Respondent had not bargained in good faith (“What I told them was that the company was not acting in good faith. . . . They kept dragging their feet. That is the exact words I used. ‘They were dragging their feet,’ that they didn’t have an intent to reach an agreement . . .”).<sup>87</sup> Finally, I find that, while clearly, employees understandably had personal concerns and reasons for voting for, and participating in, the strike against Respondent, Mario Ortiz, Jesus Duran, and Jesus Dominguez each mentioned the contract bargaining as a factor underlying his decision, and, in particular, Duran mentioned the lack of progress in negotiations and Dominguez mentioned the excessive time taken for the bargaining.

25 The General Counsel alleges that Respondent’s employees’ November 21 through December 4 concerted work stoppage was an unfair labor practice strike and that Respondent violated Section 8(a)(1) and (3) of the Act by not immediately reinstating the former strikers after the unconditional offer to return to work, submitted on their behalf by the Union. Contrary to the General Counsel, counsel for Respondent contend that Respondent’s employees’ strike was motivated by economic reasons and personal and work-related grievances, that each of the strikers was permanently replaced, and that their client properly required each striker to sign a preferential hiring list, from which it has been recalling strikers whenever jobs become available. On this latter point, the General Counsel contends that, assuming the employees had been engaged in an economic strike, Respondent violated Section 8(a)(1) and (3) of the Act by failing to adhere to the preferential hiring and returning former strikers to positions which became available in the maintenance employees and drivers bargaining units. With regard to the General Counsel’s contention that Respondent’s employees engaged in an unfair labor practice strike, Board and court law, on these points, is clear and well-established. Thus, in *Golden Stevedoring Co.*, 335 NLRB 410 (2001), the Board held, “. . . that a work stoppage is considered an unfair labor practice strike if it is motivated at least, in part, by the employer’s unfair labor practices, even if economic reasons for the strike were more important than the unfair labor practice activity. . . . It is not sufficient, however, merely to show that the unfair labor practices preceded the strike. Rather, there must be a causal connection between the two events. . . . In sum, the unfair labor practices must have ‘contributed to the employees’ decision to strike.’” *Id.* at 411; *RGC (USA) Mineral Sands, Inc.*, 324 NLRB 1633, 1634 (2001). Concerning the latter

45 <sup>87</sup> While I have found, and believe, that Aguirre spoke about what he perceived as Respondent’s unfair labor practices during bargaining, I do not mean to discredit the recollections of the employees. Thus, that Vasquez recalled that Aguirre also said the company was not budging on proposals, a strike could result in Respondent could force Respondent to agree to more of the Union’s terms, and a strike was necessary as the employees had to stand together do not detract from my findings.

conclusion, analysis of its decisions discloses that the Board has used numerous phrases<sup>88</sup> to emphasize the same point-- the state of mind of strikers must be that their concerted work stoppage and strike was at least, in part, motivated by their employer's unfair labor practices. *Pennant Foods Co.*, 347 NLRB 460, 469 (2006). Put another way, rather than concentrating upon the words of the union representative, the proper inquiry should be whether the employees "actually" voted to strike at least, in part, because of their employer's unfair labor practices. *California Acrylic Industries, Inc. v. NLRB*, 150 F. 3<sup>rd</sup> 1095, 1102 (9<sup>th</sup> Cir. 1998). Further, whenever a reasonable inference may be drawn that an employer's unfair labor practices played a part in the decision of the employees to strike, said concerted work stoppage is an unfair labor practice strike. *Post Tension of Nevada, Inc.*, 352 NLRB 1153, 1162-1163 (2008); *Child Development Council of Northeastern Pennsylvania, supra*. Also, the burden is on the employer to establish that the strike would have occurred even if it had not committed unfair labor practices. *Post Tension of Nevada, supra*. Finally, there is no dispute that, once unfair labor practice strikers make unconditional offers to return to work, they must be returned to their former positions of employment or, if said positions no longer exist, to substantially equivalent ones even if permanent replacements must be discharged in order to do so. *Pennant Foods Co., supra*, at 470; *Cal Spas*, 322 NLRB 41(1996).

Bluntly stated, utilizing the foregoing legal framework, I think that Respondent's unfair labor practices, committed during the bargaining process, were contributing factors underlying the November 21 through December 4 strike and, therefore, agree with the General Counsel that, from its inception, the aforementioned strike by Respondent's employees in both bargaining units was an unfair labor practice strike.<sup>89</sup> In this regard, I believe that the effect: I think intentional, of Respondent's unlawful, dilatory acts and conduct was to prolong and slow the pace of the parties' bargaining to the extent that, during the summer of 2007, the employees, in both bargaining units, became angry and vented their displeasure with the delay and resulting lack of progress by threatening a mass sickout, an action from which, at Respondent's urging, Victor Aguirre was forced to dissuade them from taking. Thus, I find that the employees' September 8 and November 13 strike votes were taken in the context of Respondent's dilatory tactics, refusals to meet regularly with the Union and at reasonable intervals during the course of the bargaining, and unreasonable limitations on the duration of meetings. Further, I have found that, during the meeting on September 8 prior to the employees' strike vote, Aguirre discussed the state of negotiations, and the assembled employees complained about the "slow" process of bargaining and the fact that a year had passed, since the election, without a result from the bargaining. Also, I have found that, during the meeting on November 13, prior to the strike vote, employees again expressed their exasperation, becoming agitated over the perceived excessive length of time for the bargaining, and, after explaining the differences between an economic strike and an unfair labor practice strike and expressing his view that a strike would be an unfair labor practice strike, Aguirre specified as unfair labor practices Respondent's failure to bargain in good faith, including "dragging" its feet during the bargaining. Moreover, the record evidence is ineluctable that,

<sup>88</sup> Did the employer's unfair labor practices "have anything to do with" causing the strike? *Child Development Council of Northeastern Pennsylvania*, 316 NLRB 1145, 1145 at n, 5 (1995); Were they a "contributing cause" of the strike? *R & H Coal Co.*, 309 NLRB 28 at 28 (1992). Was the unfair labor practice conduct "one of the causes" of the strike? *Boydston Electric*, 331 NLRB 1450, 1452 (2000).

<sup>89</sup> In these circumstances, I find it unnecessary to discuss or make any findings regarding the reinstatement rights of Respondent's striking employees if the strike is ultimately deemed to have been an economically-motivated strike. Simply stated, I believe the record evidence is that Respondent's employees engaged in an unfair labor practice strike.

while Respondent's employees may have had other, perhaps dominant, personal and employment-related reasons for voting in favor of, and engaging in, the strike, they also were motivated by Respondent's unfair labor practices during the bargaining process. In this regard, Jesus Duran mentioned the lack of progress in the negotiations and Jesus Dominguez mentioned the excessive time taken for bargaining as being factors, among others, in their  
 5 respective decisions to vote in favor of the strike on November 13.<sup>90</sup> Finally, as to the motivation underlying the strike, there is not a scintilla of record evidence that, during the strike, the Union's representatives or Respondent's employees, by word or deed, indicated the strike was motivated by any factor other than Respondent's perceived unfair labor practices.<sup>91</sup>

10 I do not believe that Respondent met its burden to establish that the strike would have occurred absent its unfair labor practices. Thus, contrary to the contentions of Respondent, I have concluded that the employer engaged in serious unfair labor practices prior to and during the period of the bargaining and that said acts, at least in part, provoked the employees to vote for, and engage in, the strike. Further, the courts of appeals cases, which are relied upon by  
 15 counsel, are distinguishable. Thus, unlike in *Pirelli Cable Corp. v. NLRB*, 141 F. 3<sup>rd</sup> 503 (4<sup>th</sup> Cir. 1998), the evidence herein is that Respondent's employees had been angered and frustrated by Respondent's unfair labor practices prior to the strike votes and that, in voting to strike, they were motivated, in part, by the prolonged bargaining resulting from said unlawful acts. Moreover, in *California Acrylic Industries, supra*, other than statements of a union official that their employer had committed an unfair labor practice, there was no record evidence that  
 20 employees were motivated by said unfair labor practice in voting to strike. Herein, of course, prior to the two strike votes, employees complained about the excessive time taken by the bargaining, and two employees testified that Respondent's unfair labor practices contributed to their respective decisions to vote in favor of a strike. Finally, unlike *F.L. Thorpe & Co. v. NLRB*, 71 F. 3<sup>rd</sup> 282 (8<sup>th</sup> Cir. 1995), in which, except for one worker, no other striking employee testified that the employer's unfair labor practices were discussed at union meetings as a reason for  
 25 continuing the employees' strike against the employer, the record evidence herein is that the effect of Respondent's unfair labor practices upon the parties' bargaining was discussed at the strike vote meetings, and two employees (Duran and Dominguez) testified that they were motivated, in part, by Respondent's unfair labor practices in deciding to vote for a strike. Accordingly, based upon the foregoing and the record as a whole, I reiterate that, as

30 \_\_\_\_\_  
<sup>90</sup> While I believe the two employees were referring to Respondent's unfair labor practices committed during the bargaining process, as explained to them by Aguirre, I recognize the possible ambiguity in the testimony of each, particularly that of Duran. However, any such ambiguity must be resolved against Respondent. Thus, in my view, the perceptions of the two  
 35 employees-- that there had been a lack of progress in the bargaining and the bargaining was taking an excessive amount of time-- are inextricably intertwined with the reality of Respondent's unfair labor practices-- particularly its dilatory bargaining, its refusal to meet regularly with the Union and at reasonable intervals, and its unreasonable limitations on the duration of meetings-- so as to equate. Moreover, I think that these unfair labor practices, which evidence a clear lack of good faith, were of a type sufficiently serious and ". . . likely to have  
 40 significantly interrupted or burdened the course of the bargaining process." *C-Line Express*, 292 NLRB 638 at 638 (1989).

<sup>91</sup> I note that the picket signs, carried by the striking employees, conveyed the message that the strike was an unfair labor practice strike and not one to obtain a collective-bargaining agreement. The Board has viewed the message, conveyed on picket signs, as indicative of the  
 45 type of strike in which employees are engaged. *R & H Coal Co.*, 309 NLRB 28 at 28 (1992). However, given that picket signs may merely be reflective of a savvy Union's strategy, I place little weight on this factor.

Respondent's employees voted to engage in their strike against their employer, motivated, at least, in part by Respondent's unfair labor practices during the bargaining process, the November 21 through December 4 strike, from its inception, indubitably must be viewed as an unfair labor practice strike. *Post Tension of Nevada, supra* at 1163; *Pennant Foods, supra*. In these circumstances, as the record evidence is that, after their collective unconditional offer to return to work on December 4, Respondent failed and refused to immediately reinstate the former strikers to their jobs, I find that Respondent engaged in conduct, violative of Section 8(a)(1) and (3) of the Act. *Id.*; *Sproule Construction Co.*, 350 NLRB 774, 774 at n. 2 (2007).<sup>92</sup>

<sup>92</sup> I have determined that Respondent's employees engaged in an unfair labor practice strike and were entitled to immediate reinstatement upon the Union's unconditional request to return to work on their behalf. Nevertheless, the second consolidated complaint also alleges that, since on or about December 5, 2007, by requiring former strikers to report to its office and sign a preferential recall list indicating their desire for reinstatement, Respondent interfered with the former strikers' rights to be recalled upon conclusion of their strike against Respondent in violation of Section 8(a)(1) and (3) of the Act. The facts, with regard to this allegation, as set forth above, are not in dispute. Thus, on December 4, on behalf of Respondent's striking drivers and mechanics, the Union made an unconditional offer to return to work; the next day, Respondent informed the Union that all the former strikers had been permanently replaced and that there were no available jobs and informed the Union that each former striker would have to sign a preferential recall list. Pursuant to Respondent's instruction, almost all former strikers did sign the list. Counsel for the General Counsel argues that, assuming *arguendo*, the former strikers were economic strikers, pursuant to *Laidlaw Corporation*, 171 NLRB 1366 (1968), upon their December 4 unconditional offer to return to work and because Respondent's operations were fully staffed by permanent replacement workers, the company was obligated to place the former strikers on a preferential recall list and that Respondent's imposition of an affirmative obligation on the former strikers to return to Respondent's facility and execute such a list was an unlawful infringement upon their rights under *Laidlaw*. Arguing to the contrary, counsel for Respondent contend that an employer's request that employees sign a preferential recall list is not inherently discriminatory unless reinstatement is conditioned upon execution of the recall list.

Inasmuch as Board law on this issue is clear, I agree with counsel for the General Counsel. In its seminal *Laidlaw, supra*, decision, the Board ruled that economic striking employees, who have been permanently replaced and who, at the conclusion of the strike, make unconditional offers to return to work, remain employees and are entitled to full reinstatement when jobs become available unless they have obtained regular and substantially equivalent employment elsewhere or unless the employer establishes that its failure to reinstate was for legitimate and substantial business considerations. *Id.* at 1369-1370. In *Champ Corp.*, 291 NLRB 803, 881 (1988), concluding that the requirement was an "impermissible precondition for reinstatement," the Board found that an employer, who, after a union had previously made an unconditional offer to return to work on behalf of all strikers, required the former strikers to sign a form, stating they wished to be placed on a preferential hiring list, violated Section 8(a)(1) and (3) of the Act. Likewise, in *Pirelli Cable Corp.*, 331 NLRB 1538, 1539 (2000), the Board found a violation of Section 8(a)(1) and (3) of the Act when, a day after the employer and the union had reached an agreement providing that former strikers would be placed on a preferential hiring list, the employer sent letters to the former strikers, requiring, as a condition precedent to placement on the list, that they state whether they wished to be placed on the list or whether they had found other employment. In *Peerless Pump Co.*, 345 NLEB 371 (2005), a case directly on point, the Union made an unconditional offer to return to work on behalf of all of the respondent's striking employees. Thereafter, the respondent sent letters to the former strikers, informing them "if you are interested in being reinstated at the earliest possible date,

Continued

## 2. Respondent's Alleged Unfair Labor Practices Committed During the Strike

The second consolidated complaint alleges that Respondent engaged in conduct, violative of Section 8(a)(1) and (5) of the Act, by, since on or about November 21, 2007, failing and refusing to furnish the Union certain information. In this regard, the record establishes that, on the day the strike commenced, November 21, Victor Aguirre sent a letter to George Wayne, in which, after stating that the Union wanted to “verify” that Respondent was paying replacement workers and non-strikers no more than the wage rates contained in its last, best, and final contract offer to the Union, he requested the following information:

The names and addresses of all the employees performing bargaining unit work. Each such employee's current position, date of hire, starting wage rate, and current wage rate, for replacement whether it is temporary or permanent. For permanent replacements, the name of the employee whose position the replacement is taking.

The Union assures that it will share the information about replacements only with the Union leadership and the Union attorney, and will not use it for the purpose of harassment or intimidation.

On that same day, Mark Flora sent a reply letter to Aguirre, stating that Respondent intended to operate throughout the strike with permanent replacements and with Waste Connections employees on “temporary assignment” to Respondent; that the Union does not represent temporary employees; and that, as permanent replacements are hired, “I will revisit your latest information request and provide what information, if any, the Union is legally entitled to.” Thereafter, on November 30, Flora sent a letter, with an attachment, to Aguirre. In his letter, Flora wrote that Respondent was “extremely concerned” about the safety of the permanent replacements, which it had hired and with the confidentiality of all its employees and listed nine asserted incidents of harassment of the permanent replacement employees. In those circumstances and with safety and confidentiality concerns, Flora wrote, he was furnishing the requested information to the Union but with “a partial identifier” for the permanent replacements. The attachment contains lists of the permanent replacement employees for Respondent's striking employees in each department; however, as Flora stated, Respondent provided only the first name and last initial for each permanent replacement employee, his date of hire, and his rate of pay. On December 12, Flora sent another letter to Aguirre in which, after stating Respondent's continued safety concern, Flora expressed Respondent's willingness to provide the full name of each replacement employee and his address upon Aguirre's agreement not to disclose the information beyond the Union's leadership and attorney. Flora requested that Aguirre execute an enclosed “Nondisclosure Agreement” document and committed to providing an “updated permanent strike replacement list, together with full names and

we need for you to come to the plant and sign the preferential rehire list.” The Board determined that “the Respondent's imposition of an affirmative obligation on former strikers to come to the plant to sign the list itself is an unlawful infringement upon these employees' *Laidlaw* rights. . . . Imposing prerequisites on strikers to preserve their rights to their pre-strike jobs violates employees' Section 7 rights, absent a legitimate and substantial business justification.” *Id.* at 375. While Flora did not explicitly state that signing the preferential recall list was a condition precedent for recalling former striking employees' to work, I can not conceive of any other reason for such a requirement, and Respondent has neither offered any nor asserted any business justification for the requirement. In these circumstances, in agreement with the General Counsel, I find that Respondent's requirement, that each former striker execute the preferential recall list, was violative of Section 8(a)(1) and (3) of the Act.

addresses upon receipt of the executed document. At the hearing, Flora acknowledged having no knowledge as to whether the El Paso police arrested anyone in connection with any of the nine asserted incidents of harassment, which are mentioned in his November 30 letter, and Respondent presented no evidence as to the occurrence of any of them. As of the date of the hearing, Respondent had yet to provide a complete list of the permanent replacement employees, containing the complete name of each, to the Union, and no Union official had executed Flora’s nondisclosure agreement.

Board and court law is clear and of longstanding validity. Thus, “the Board has repeatedly held that a union is presumptively entitled to be furnished, on request, with the names and payroll information concerning bargaining unit employees, *including strike replacements*. The employer can rebut the presumption by showing that divulging the information will be unduly burdensome or that harassment of employees is likely to result.” *Grinnell Fire Protection Systems Co.*, 332 NLRB 1257 at 1257 (2000); *Detroit Newspapers*, 327 NLRB 871 (1999), quoting from *Service Electric Co.*, 281 NLRB 633, 639-640 (1986); *Page Litho, Inc.*, 311 NLRB 881, 882 (1993). Counsel for the General Counsel argues that, herein, Respondent has not met its burden of showing a “clear and present danger”<sup>93</sup> that the remainder of the information, which the Union sought-- the complete names and addresses of the strike replacement employees, would have been misused by the latter. In defense, citing to *Good Life Beverage Co.*, 312 NLRB 1060, 1061 (1993), counsel for Respondent argue that, when an employer has a legitimate concern, a “bona fide interest,” regarding the furnishing of relevant information to a labor organization, while it may not simply refuse to comply with the request, it is entitled to discuss these concerns with the labor organization before turning over the information, and, if the labor organization refuses to cooperate, a duty to furnish the information may no longer exist. Contrary to Respondent’s counsel, *Good Life Beverage* involves only asserted confidentiality concerns, and the United States Court of Appeals for the Eighth Circuit has pointed out, strike replacement employees do not have “an extreme privacy interest” in their names, which are commonly known in the workplace. *Grinnell Fire Protection Systems v. NLRB*, 272 F. 3<sup>rd</sup> 1028, 1030 (8<sup>th</sup> Cir. 2001). Further, while Respondent’s counsel may have legitimately expressed harassment and safety concerns during the strike, those became non-existent after the conclusion of the strike on December 4, and, in any event, the existence of any asserted harassment of strike replacement employees during the strike is of dubitable validity. Thus, not only did Respondent fail to offer any evidence-- either testimonial or documentary—in support of any of its asserted claims of harassment but also Flora conceded the lack of any police involvement in any of them. In the foregoing circumstances, absent any evidence of “a clear and present danger” of harassment, I find no merit to Respondent’s defense and further find that, by failing to provide the requested information, pertaining to the complete names and addresses of the permanent replacement employees, to the Union, Respondent violated Section 8(a)(1) and (5) of the Act as alleged in the second consolidated complaint.

The second consolidated complaint alleges that, in late November or early December 2007, Respondent violated Section 8(a)(1) and (3) of the Act by terminating employee, Jose Macias, and preventing him from returning to work because it mistakenly believed that he had participated in the strike. As to this allegation, Jose Macias, who worked for Respondent as a truck painter in its body shop, testified that, at the time Respondent’s employees strike began (November 21), he was on vacation-- “. . . before the strike took place, I was out of the state of Texas. . . . I suppose it was about a week before [the strike that] I went

---

<sup>93</sup> *Page Litho, supra*.

on vacation.”<sup>94</sup> According to Macias, his vacation lasted two weeks; he did not know his co-workers had commenced a strike while he was away; and he first became aware of the strike when he reported for work after his vacation and observed “. . . all of the people outside with signs.” On the day he returned to work, he entered the yard area at his normal 6:00am starting time, observed no employees inside working, and went to Mike Olivas’ office. “I told [Mike] . . . I showed up for work, and he said, why are showing up here, , , , because there is nobody here. . . . they had gone on strike. . . .” Macias testified that, after speaking to Olivas, he left the yard facility, and “I went to my house.” The following morning, Macias further testified, he again went to Respondent’s facility, entered, and, on this occasion, went to the human resources office. Entering the office, he went to the reception counter, but “they didn’t let me go in.” Instead, Graciela Silva came outside to speak to him. He asked “. . . what was happening because I had shown up to go to work, and then she told me . . . that my position . . . was already occupied” and “. . . that if [I] wanted to work there, to put my name down in a book so that it would be obvious that I wanted to work.” During cross-examination, Macias conceded his vacation was for just a week from November 19 through November 26 and, when asked if he ever joined the pickets outside the facility, Macias said “. . . after I went and I spoke with Gracie, and after what she told me, . . . I stayed there. . . . I stood off to a side of them. I didn’t really join in because I had never been involved so I was just kind of waiting on stand-by to see.” Shown a copy of the preferential rehire list, Macias identified his printed name and signature, with a date (12-5-07) and a time (12:56), six lines from the top. Finally, he stated that the only time he spoke to Silva was on the day he signed the preferential rehire list.

Confirming that Macias was a painter in the body shop and was on vacation at the time of the strike, Mike Olivas testified that he did have a conversation with the alleged discriminatee during the strike, presumably on the day after his vacation ( November 27). “He came in and he asked me was he fired and I told him, no, and that I understood that he was on vacation. He said he didn’t know what to do. He started crying and praying and said he didn’t know what to do. I told him I couldn’t make that decision for him and that the best thing to do was for him to make a decision or to go speak to Gracie . . . but that I could not make the decision for him of yea or nay. . . . He was also scared because the strike was going on and . . . there were people outside. . . . He . . . said I’m just scared. There’s a lot of guys outside and I’m getting pressure. He goes I don’t know what to do. . . . I said to let me know what you want to do. You’ve got the option to either stay here or go talk to Gracie and let me know what you want to do.” They finished speaking, and, according to Olivas, “I didn’t hear from him after that.” During cross-examination, Olivas testified that, “after a while,” he did ask Silva if Macias had spoken to her, “. . . and she said no. . . . he hadn’t been there.” Eventually, according to Olivas, after waiting “a good while” for Macias to return to work during the strike, he hired a permanent replacement, Enrique Herrera, for Macias. In this regard, General Counsel’s Exhibit No. 60, the list of permanent replacements for the strikers, which Flora sent to Aguirre on November 30, shows Herrera as being hired on November 22 before Macias returned from his vacation. As to this, Olivas averred, “He was interviewed but didn’t come back in or we waited to hire him. That’s not his actual hire date.” Continuing, Olivas claimed he interviewed Herrera, the only painter hired as a striker replacement, but could not recall the date. Graciela Silva denied that she spoke to Macias during the course of the strike and denied telling him he had been permanently replaced. As to whether she spoke to Macias about signing the preferential rehire list, Silva said, “I might have had some sort of a conversation.” Finally, Silva identified documents, showing that Macias was on vacation from November 19 through 26 and that he failed to report for work from November 27 through November 30.

---

<sup>94</sup> Macias went to Kansas in order to visit his step-daughter.

5 Certain facts, with regard to the allegation pertaining to Jose Macias are easily  
determined. Thus, he was on vacation from November 19 through 26, which period coincided  
with the first week of the unfair labor practice strike by Respondent's employees against their  
employer; on or about November 27, he reported to Respondent's facility, spoke to Michael  
Olivas, and then left for home; and on December 5, he returned to Respondent's facility, spoke  
10 to Graciela Silva, and printed his name on and affixed his signature to the preferential rehire list.  
Further, I think that, mistakenly believing Macias was a striker, Respondent hired a permanent  
replacement for him, an individual named Enrique Herrera, on November 22. In this regard,  
I believe Olivas, who, as I previously noted, impressed me as being a witness attempting to  
embellish his testimony in order to bolster Respondent's position at trial, dissembled in claiming  
15 that the above date was not Herrera's date of hire and that he waited "a good while" before  
replacing Macias. Three issues remain for resolution-- the conversation between Macias and  
Olivas, whether Macias joined the strike, and the conversation between Macias and Silva. As to  
these, while he impressed me as being an honest witness, Macias' memory of events was  
obviously poor. Nevertheless, as between Olivas and him, given the former's lack of candor,  
I shall rely upon Macias and find that, when he reported for work after his vacation, Olivas told  
20 him, nobody was working because they had all gone on strike. Further, I find that Macias then  
left the maintenance yard, and, noting the alleged discriminatee's admission, while he did not  
carry a picket sign, he nevertheless joined the striking employees by standing with the strikers  
and honoring the picket line for the remainder of the strike. Finally, noting that he was  
uncontroverted by Silva, who admitted she might have had a conversation with him, I also find  
25 that Macias reported to Respondent's human resources department the day after the conclusion  
of the strike (December 5), spoke to Siva, who told him he had been permanently replaced and  
would have to sign the preferential rehire list in order to be recalled for work when available, and  
then signed the said list.

25 Counsel for the General Counsel posits two theories for alleging Macias was discharged  
in violation of Section 8(a)(1) and (3) of the Act-- that Macias was an unfair labor practice striker,  
who, upon the unconditional offer to return to work, made on his behalf, should have been  
offered immediate reinstatement to his former position, and that, believing Macias was a striker,  
Respondent hired a permanent replacement for him, thereby, in effect, terminating him. With  
regard to the second theory, a determination as to whether Respondent violated Section 8(a)(1)  
30 and (3) of the Act must be analyzed pursuant to the burden-shifting framework, set forth in  
*Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F. 2d 899 (1st Cir. 1981), *cert. denied* 455 U.S.  
989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983),  
pursuant to which the General Counsel has the initial burden of proving that the employee's  
protected activity was a motivating factor in the employer's action. If the General Counsel  
35 meets the initial burden, the burden of proof then shifts to the employer to establish that it would  
have taken the adverse employment action even in the absence of the employee's protected  
activity. For purposes of meeting its initial burden, it is enough for the General Counsel to have  
proven that the employer knew or suspected that the alleged discriminatee engaged in union  
activities. *Embassy Vacation Resorts*, 340 NLRB 836, 838 (2003). Clearly, by hiring a  
40 permanent replacement employee for Macias the day after the strike commenced, Respondent  
obviously suspected or believed he had joined, or would join the strike, upon returning from  
vacation. Further, inasmuch as, on November 14, Wayne and Dupreau implicitly threatened  
employees with discharge if they engaged in a strike and as, on the night before the  
commencement of the strike, Olivas directly threatened to discharge employees who engaged  
45 in a strike, Respondent's blatant animus toward any employee, who supported or participated in  
such a protected concerted act, is manifestly certain. Moreover, Olivas' comments when  
Macias returned to Respondent's maintenance facility after his vacation are significant. Thus,  
obviously surprised to see the alleged discriminatee inside the facility, Olivas discouraged him  
from seeking a work assignment by pointing out that none of his fellow employees were working

and were, instead, outside striking. In these circumstances, I think Macias might reasonably have believed he had been terminated. *Grosvenor Resort*, 336 NLRB 613, 617-618 (2001). In these circumstances, I believe, counsel for the General Counsel met his burden of proof, establishing that Respondent was unlawfully motivated by permanently replacing-- thereby, in effect, terminating—Macias, whom, it suspected, had joined the strike.

5

As to whether Respondent then met its burden of proof, I note that its defense to the alleged unlawful act and counsel for the General Counsel's alternate theory for the alleged violation conflate. Thus, Respondent's counsel asserts that "Macias was not terminated. Instead, he joined the strike and was lawfully permanently replaced." Indeed, as I have concluded, the record does establish that, when he left Respondent's facility on or about November 27, Macias joined the strike. However, contrary to Respondent's counsel, I have previously determined that, rather than economically motivated, from its inception, Respondent's employees' strike was an unfair labor practice strike. Therefore, Respondent was obligated to have reinstated Macias pursuant to his unconditional offer to return to work, and it is not in dispute that Respondent failed to offer reinstatement to any of the former strikers after the unconditional offer to return to work, by the Union on their behalf. Accordingly, either by terminating Macias on November 27 or by failing to immediately reinstate him on or about December 5, Respondent engaged in conduct violative of Section 8(a)(1) and (3) of the Act.<sup>95</sup>

10

15

20

25

30

35

The second consolidated complaint next alleges that Respondent engaged in acts and conduct violative of Section 8(a)(1) of the Act by engaging in surveillance of its employees protected concerted activities by photographing striking employees, who were picketing outside of Respondent's facility, and by summoning the El Paso police to investigate purported incidents of misconduct by its employees, who were peacefully picketing outside its El Paso facility. With regard to the photographing of striking employees, who were engaged in picketing, General Counsel's Exhibit No. 75 consists of a series of photographs of the picketing employees and of the signs, which they were carrying. As to these, George Wayne testified that the pictures were taken by one of Respondent's salespersons, Troy Roberts. According to Wayne, "I asked his supervisor to find one of the people there that had a camera and to go and take pictures only of the signs." As to how Respondent obtained the photographs, Wayne added, "They were downloaded and provided to us, to me" by Roberts. Employee, Mario Ortiz recalled the incident and recognized Roberts, whom he knew to be a salesperson or "somebody in the office," as the photographer. With regard to summoning the police, there is no dispute that, on one occasion during the strike, Respondent telephoned to the El Paso police department and requested that officers be sent to the location of the picketing. According to Wayne, the incident occurred on Thanksgiving Day, and ". . . I believe that . . . it was Mike Olivas who called the police . . . because of the aggressiveness of the strikers and getting in front of trucks and getting up into our property and hanging on trucks and we were concerned about that." Wayne further testified

40

45

<sup>95</sup> At the hearing, I granted counsel for the General Counsel's motion to amend the second consolidated complaint to allege the discharge of Macias as a violation of the Act. In their post-hearing brief, counsel for Respondent asserts that the allegation is time-barred by Section 10(b) of the Act. As I mentioned above, Section 10(b) is an affirmative defense and, unless timely raised, it is waived. *Public Service Co.*, *supra*; *DTR Industries*, *supra*. At the time counsel for the General Counsel raised the proposed amendment at the hearing, rather than asserting a Section 10(b) defense, counsel for Respondent accepted that the allegation, regarding Macias was ". . . encompassed within the failure to recall strikers ' and "doesn't really bother me too much." He never raised the statute of limitations as a procedural objection to the proposed amendment. In these circumstances, I find counsels' Section 10(b) defense as not timely raised and, therefore, waived.

50

that, while no striking employee was arrested, “I was called over because the police were going to talk to the people and ask them to move back but they needed somebody to . . . give them instructions to do that and Mr. Olivas wanted me to be the one and I was there and came over and did so. . . . [The strikers] were coming up into the property and they could certainly stay on the right-of-way sidewalks . . . but we were requesting that they not come physically onto the maintenance facility property.” Olivas testified that he did call the police on the second day of the strike because he had reports strikers were blocking the vision of drivers, who were attempting to turn their vehicles into the entrance to Respondent’s maintenance yard.<sup>96</sup> Olivas asserted the same thing happened to him that day when a striker “obstructed” his “way” into the yard by walking “real slow” in front of his truck. Olivas asked the striker what he was doing, and the employee “got out of the way and let me through.” The record evidence is that the public sidewalk, which fronts Respondent’s maintenance yard, is intersected by a driveway heading toward the facility’s gate, and, during cross-examination, Olivas maintained that “this particular gentleman, as I was pulling in, was already to the asphalt past the sidewalk. He was near the gate really and that’s where he stood.” There is no record evidence that any striker was arrested because of his actions while picketing and there is no evidence that the picketing was anything but peaceful.

With regard to the photographing of the strikers and their signs, Board law is explicitly clear. Thus, “. . . an employer’s mere observation of open, public union activity on or near its property does not constitute unlawful surveillance. Photographing . . . such activity clearly constitute[s] more than mere observation . . . because such pictorial recordkeeping tends to create fear among employees of future reprisals.” Further, “. . . photographing in the mere belief that something might happen does not justify the employer’s conduct when balanced against the tendency of that conduct to interfere with employees’ right to engage in concerted activity. . . . Rather, the Board requires an employer engaged in such photographing . . . to demonstrate that it had a reasonable basis to have anticipated misconduct by the employees.” *National Steel & Shipbuilding Co.*, 324 NLRB 499 at 499 (1997); *Hercules Drawn Steel Corp.*, 352 NLRB 53 (2008); *Engelhard Corp.*, 342 NLRB 46, 61 (2004); *F.W. Woolworth Co.*, 310 NLRB 1197 at 1197 (1993). There can be no dispute that Respondent was responsible for the photographing at issue herein. Thus, while the photographing was accomplished by one of Respondent’s non-bargaining unit, non-striking employees, Respondent concedes that such was done at its behest. Further, while Respondent’s attorneys argue that, as their client was aware the Union would contend that the strike was motivated by perceived unfair labor practices, it “. . . had the right to document the picket signs for possible use in defending such an allegation,” it is clear that only a reasonable anticipation of misconduct by striking employees may be asserted as justification for photographing employees, who are picketing during a strike. *Id.* Finally, the fact that pickets appear to be smiling and “virtually posing” in the photographs is explained by the fact the photographer was a fellow, albeit non-striking, employee, one whom they recognized. Had they known that Roberts was acting at Respondent’s behest, their facial expressions and reactions certainly would have been different. In agreement with the General Counsel, I find that Respondent violated Section 8(a)(1) of the Act by photographing its employees while picketing in support of their strike against Respondent.

As to the alleged unlawful summoning of the El Paso police to investigate asserted incidents of misconduct on the second day of the strike, given that Wayne and Olivas contradicted each other as to the asserted acts of the picketing striking employees, I find such

---

<sup>96</sup> There is no record evidence as to exactly where the picketing employees supposedly were standing. In any event, Respondent’s attorney stated he was not offering Olivas’ testimony for its truth.

5 testimony about strikers' alleged misconduct not credible. Further, while Olivas was uncontroverted that, on one occasion on the second day of the strike, a picketing employee, who evidently was standing in the driveway area between the public sidewalk and the gate, impeded his own truck as he attempted to drive into the entrance to the facility that day, Wayne was inconsistent as to whether the asserted acts of misconduct by picketing strikers or their  
5 asserted trespass on Respondent's private property precipitated Olivas' call to the police. Counsel for the General Counsel argues that calling the police to eject individuals engaged in union activities, claiming they were trespassing when they were not, violates the Act. Taking a contrary position but without citing any case authority, Respondent's attorneys contend that "an employer has a fundamental right to request police assistance in a strike situation, and there is  
10 no requirement that any particular justification be established." In support of his position, counsel for the General Counsel relies upon *Barkus Bakery*, 282 NLRB 351 (1986). Therein, union agents, who were stationed on property adjacent to that owned by the employer, distributed union literature to the employer's employees as they parked their cars on the adjacent property. In order to stop the union activity, the employer requested that the police  
15 eject the union agents from the adjacent property. Police officers arrived at the adjacent property and, as some of the employer's employees stood nearby, spoke to the union agents. The Board concluded that the employer violated Section 8(a)(1) of the Act by calling the police to attempt to eject the union's agents from property other than its own. *Id.* at 351, n. 2. Herein, even assuming Olivas' candor, upon the latter's request to move from in front of his truck, the striker immediately complied. Thus, after a solitary and momentary act of trespass and in the  
20 context of otherwise peaceful and lawful protected concerted activity, Respondent telephoned for the El Paso police to visit the scene of the picketing. In the foregoing context, I find that, rather than to investigate misconduct or to enforce its property rights, Respondent's sole purpose for summoning a show of force by the police was to harass the strikers. Therefore, Respondent engaged in conduct violative of Section 8(a)(1) of the Act.

25 The second consolidated complaint next alleges that, Respondent engaged in conduct violative of Section 8(a)(1) and (5) of the Act by unilaterally, without notice to the Union or affording it an opportunity to bargain, changing the terms and conditions of employment of the employees in the maintenance employees and drivers bargaining units by changing the manner in which it paid them their wages. The second consolidated complaint also alleges that  
30 Respondent's act was taken in retaliation for its employees' exercising their right to strike in violation of Section 8(a)(1) and (3) of the Act. In these regards, there is no dispute that, rather than directly depositing its striking employees' final pre-strike paychecks, Respondent mailed these checks to the employees' home addresses. While conceding that the foregoing occurred but without offering any explanation for Respondent's actions, George Wayne testified that,  
35 other than that one instance, Respondent previously direct deposited employee paychecks, has continued to direct deposit paychecks subsequently, and has not changed its past practice. Wayne added that, notwithstanding employee selections of direct deposit, Respondent's practice regarding other types of checks, such as longevity bonus awards, final checks, and checks prior to an employment separation for a period of time, is to give these directly to  
40 employees. Counsel for the General Counsel argues that Respondent's unilateral act had the insidious result of ". . . ensu[ing] that strikers would have to take time off of their picket line activities to retrieve and cash their checks" and, as it occurred immediately after the onset of the strike, such clearly was done in retaliation for its employees' exercising their right to strike. In so  
45 arguing, counsel relies upon *Sivalls, Inc.*, *supra*. In the cited decision, the Board adopted the administrative law judge's decision that an employer's unilateral change in its practice of distributing employee paychecks, a change which would not have been implemented absent a union's election victory, was violative of Section 8(a)(1), (3), and (5) of the Act. *Id.* at 103. Contrary to counsel for the General Counsel, inasmuch as it appears that Respondent's mailing of their pre-strike paychecks to the striking employees was a one-time aberration from its

existing practice of direct depositing paychecks, I agree with Respondent's attorneys that no unlawful unilateral change occurred. *Beverly Health & Rehabilitation Services*, 346 NLRB 1319, 1354 (2006); *Flambeau Airmold Corp.*, 334 NLRB 165, 177 (2001). However, I do agree with counsel for the General Counsel that Respondent's act was unlawfully motivated. Thus, I have previously concluded that, having threatened to terminate any employee who engaged in a strike, Respondent harbored unlawful animus against its striking employees. Moreover, the timing of Respondent's act, occurring as the employees commenced their strike, is additional evidence of unlawful motivation. In these circumstances, I agree that, by mailing their final pre-strike paychecks to its striking employees rather than following its normal practice of direct depositing them, Respondent acted in retaliation against its striking employees in violation of Section 8(a)(1) and (3) of the Act. *Sivalls, Inc.*, *supra*.

#### **D. Respondent's Alleged Unfair Labor Practices Subsequent to the Conclusion of the Strike**

The second consolidated complaint alleges that Respondent violated Section 8(a)(1) and (3) of the Act by terminating employee, Juan Castillo, by informing him he had been permanently replaced. In this regard, I have previously discussed that Castillo, a welder/mechanic in Respondent's fleet maintenance department since his hire in September 2002, was off from work on a workers compensation leave of absence during part of 2007, served on the employees' bargaining committee during the period of the contract negotiations, and, due to his aforementioned leave of absence, remained off from work during the period of the strike. The record establishes that, notwithstanding the foregoing, Respondent considered him to be a striker. In this regard, I note that, in the document which Respondent provided to the Union pursuant to its request for information regarding the permanent replacement employees, Castillo is listed as one of the replaced striking employees, and Respondent identified his replacement as Paul C.<sup>97</sup> At some point in December, after Mark Flora informed the Union that all of the striking employees had been permanently replaced, Respondent attempted but was unable to contact Castillo with regard to removing his work tools from Respondent's facility. Also, on or about December 10, a welding position became available when a replacement welder was terminated, and, according to George Wayne, in this same time period, after having been confused as to whether a worker, who had been absent from work due to being on workers compensation leave, could be considered a striker, he sought legal advice from Respondent's attorneys and came to the conclusion that such an individual could not be considered a striker. Eventually, most likely in early January, Castillo did return to Respondent's maintenance facility and spoke to Mike Olivas. In an e-mail message, dated March 10, 2008, to George Wayne concerning his conversation with Castillo, Olivas wrote that, during their conversation, "I did tell him he was permanently replaced when he came to the shop wanting to talk to me." Apparently, Castillo also came to the maintenance facility a short while later and again spoke to Olivas. According to the latter (writing in the above e-mail), Castillo ". . . asked me if he was fired. I told him he was permanently replaced. He began getting loud and saying he was fired. At that time, Dave Torrey and David Ginapp were here in the shop. I asked Mr. Castillo to wait while I brought in both Daves. I then repeated that he was permanently replaced."<sup>98</sup>

<sup>97</sup> Paul C. was hired on November 21, the first day of the strike.

<sup>98</sup> An incident occurred on January 7, 2008 when Castillo accompanied Jose Macias to the maintenance facility so that the latter to pick up his work tools. Apparently, while Macias sorted out his own tools, Castillo got into an argument with supervisor, Benito Beanes, who asked Castillo to leave the shop.

A welding position having become open a month earlier, on January 8, 2008, Graciela Silva sent a letter to Castillo, stating that Respondent had been notified by his treating physician “. . . that you are able to return to work full duty without restrictions/limitations” and offering Castillo a welding job in the container maintenance department on the day shift and with the same compensation and benefits. Castillo failed to reply, and, on February 5, Silva sent him another letter, saying “I need to meet with you immediately to determine whether you remain interested in returning to work at El Paso Disposal.” Thereafter, on March 5, Castillo sent the following letter to Respondent;

I received your letter to me dated January 8, 2008, in which you acknowledged receiving my doctor’s letter releasing me back to work without restrictions/limitations. You indicate that you had a welder’s position for me if I was to return to work for El Paso Disposal.

I must decline this offer of employment for reasons I am sure you already know. After I received a note from my doctor, saying I would be out for some time, I turned that note over to Mike Olivas, my fleet manager. After a couple of months, he called me and told me to pick up my belongings. I asked him if I had been fired and he said, ‘you’ve been permanently replaced.’ I obviously took this to mean I had been fired.

On January 7, 2008, I went to El Paso Disposal to help Jose Macias remove his belongings because he too had been fired. As I was helping Mr. Macias, [Benito Beanes saw me, asked what I was doing there, said I was fired, and threatened to call the police if I did not leave].

I was totally humiliated by Mr. Beanes. Consider this my formal rejection of your offer of employment.

Subsequently, on March 24, Silva wrote to Castillo, stating that, as he had not timely responded to her two previous letters, as the position, which had been offered to him, was not in supervisor Beanes department, and as he had declined the offers of employment, “. . . we have no option than to accept your resignation of employment effective March 10, 2008.

The General Counsel has two theories as to Juan Castillo. The first is that he was a striker and was permanently replaced, and the second is that he was unlawfully terminated in January 2008. The record is silent as to whether Castillo, who was on a workers compensation leave of absence at the time, joined in his co-workers’ unfair labor practice strike against Respondent; however, there is no dispute that Respondent considered him a striker. Thus, George Wayne conceded that Respondent mistakenly classified him as such, and Respondent permanently replaced Castillo with Paul C. on November 21. As to whether Respondent was unlawfully motivated in “terminating” Castillo, Counsel for the General Counsel and Respondent’s attorneys agree that the issue, involving Castillo, is not whether he was actually discharged but whether, in the above-described circumstances, he could reasonably have believed he had been terminated by Respondent. In this regard, “. . . the test is whether ‘the words or actions of the employer would lead a reasonable and prudent person to believe his (her) tenure has been terminated.’” *Post Tension of Nevada*, supra at 1153, n. 1; *North American Dismantling Corp.*, 331 NLRB 1557 (2000). Utilizing this template, I agree with Respondent’s counsel that, based upon what occurred in early January 2008, Juan Castillo could not reasonably have concluded he had been discharged. Thus, while the record is silent as to exactly when certain of the above-described events occurred, I conclude that, sometime in the first few days of January 2008, Castillo, who previously had been instructed to retrieve his work tools from Respondent’s maintenance yard and, based upon that, believed he had been terminated and obviously aware he had been medically cleared to return to work, went to Respondent’s maintenance facility in order to find his tools and to clarify his employment status;

that he met with Olivas, who told the alleged discriminatee he had, in fact, been permanently replaced; that, a few days later, Castillo again went to Respondent's maintenance facility and confronted Olivas; and that, during the said confrontation, Castillo asked if he had been fired and Olivas again said the former had been permanently replaced. I further conclude that, at approximately the same time in early January, having previously concluded that, as he was on a workers compensation leave of absence during the strike, Castillo should not have been considered a striker or as having been permanently replaced, Respondent became aware Castillo had been cleared, by his doctor, for a return to work and, as a welder position had become open a month earlier, by letter dated January 8, offered the job to Castillo. In my view, in arguing that a prudent employee (Castillo) would certainly believe he had been terminated, counsel for the General Counsel erroneously views Castillo's two conversations with Olivas, during which the latter said Castillo had been permanently replaced, in a vacuum. Rather, within no more than a day or two of his supervisor's statements, Castillo received Respondent's offer of a position as a welder. I think, given the close proximity of the two events, the prudent employee would have viewed Olivas' statements and Respondent's job offer as a continuum and, understandably, have reacted with confusion, immediately contacting his employer in order to ascertain his exact employment status.<sup>99</sup> Indeed, inasmuch as he rejected Respondent's offer of employment in his March 5 letter, Castillo himself did not believe he had been terminated by Respondent in January. Accordingly, I find the second consolidated complaint allegation, that Respondent terminated Juan Castillo in violation of Section 8(a)(1) and (3) of the Act, without merit and shall recommend that it be dismissed. However, inasmuch as Respondent believed Castillo was a striker and abruptly permanently replaced him, as with the other unfair labor practice strikers, Respondent should have offered him immediate reinstatement to his welding job or, given Castillo's on-going workers compensation leave of absence, immediately reinstated his status as an employee. Having done neither, Respondent violated Section 8(a)(1) and (3) of the Act.

#### **E. The Viability of the Decertification Petition in Case 28-RD-969**

The petition in Case 28-RD-969 was filed by Paul Urbina on December 20, 2007. As stated above, this was the second of two petitions, which he filed with Region 28, in order to decertify the Union as the Section 9(a) representative of Respondent's drivers. In this regard, Urbina testified that the ". . .first petition was already in progress before the strike. . . I would say about two weeks." As to the genesis of his decertification petition, he further testified he was among the drivers, who attended the November 14, 2007 4:00 a.m. mandatory drivers meeting, during which Respondent's managers committed serious unfair labor practices<sup>100</sup> and, responding to driver, Mike Garza's question, "how can we get rid of the Union," George Wayne

<sup>99</sup> If I understand his argument, counsel for the General Counsel contends that the January 8 offer of employment was nothing more than Respondent's attempt to mitigate its damages by stopping the backpay period. I reject counsel's constricted view of the record evidence. I think Olivas simply was unaware of Respondent's change of mind as to Castillo's employment status. In fact, there is no record evidence that upper level management was aware of Olivas' actions until his e-mail to Wayne.

<sup>100</sup> These include unlawfully bypassing the Union and dealing directly with the assembled drivers, unlawfully warning the drivers it would be futile for them to support the Union in bargaining with Respondent because it would never deviate from the proposals contained in its last, best, and final contract offer to the maintenance employees, unlawfully inviting drivers to quit if they did not like the terms of the said final offer, which would be the same for them, unlawfully threatening to engage in regressive bargaining, and unlawfully implicitly threatening to fire any driver who engaged in a strike.

5 said they would have to sign a petition and vote them out. Notwithstanding what he heard at this meeting, according to Urbina, he began distributing the first petition as “. . . I figured that the Union was no help. We didn’t need the Union there.” Urbina testified that, of the 30 signatures on this putative decertification petition, he solicited just five. Then, after stating that the remainder of the signatures came as a result of the drivers distributing the document amongst them, Urbina changed his testimony, stating, “I approach them all, every single one,” and “I just said we wanted to sign this petition to get the Union out.” However, inasmuch as the signatures on the petition were undated, the Region did not permit Urbina to file his decertification petition. Then, shortly after Respondent’s employees’ ended their unfair labor practice strike with an unconditional offer to return to work, at which point Respondent unlawfully refused to immediately reinstate the former strikers, including in excess of 25 drivers, Urbina commenced distributing a second decertification petition and was careful to have each signing driver place a date next to his signature. With regard to his technique, Urbina said he approached each driver, and “I told them that I had done the first petition wrong and that we needed . . . a signature and then date it.” In all, 50 drivers, obviously including some permanent replacement drivers, signed the second decertification petition, with all doing so between December 10 and December 18, 2007.

20 Rick Diaz also testified regarding the two decertification petitions, stating that he signed both “. . . because I was against the Union being in our company.” In this regard, I note that he was contradictory as to when he signed the first petition. Thus, after initially testifying he did so “after” the November 14 drivers meeting, he later changed his testimony, stating “I signed the petition first, before we had the meeting.” As to the first decertification petition, contradicting Urbina, Diaz testified that he solicited some of the signatures-- “I spoke to some drivers.” As to how he and Urbina accomplished their solicitations, “he would get some people that [he] was used to talking to. And I would get other drivers that I was accustomed to talking to.” They approached drivers “separately,” and neither was present when the other solicited signatures. According to Diaz, he kept his signed petition in a folder, which he carried. Finally, a third petition signatory, Alberto Telles, a front load driver, testified that he signed as “I didn’t agree with the Union. . . . I didn’t want a union.” He added, “I don’t need nobody to talk for me. I can talk for myself.”

30 I have previously expressed my perturbation as to the candor of both Urbina and Diaz. Neither impressed me as testifying truthfully, and, therefore, I shall not give credence to the account of either witness. In these circumstances, I believe that the impetus for Urbina’s decertification campaigns came from George Wayne’s comment during the November 14 drivers meeting and that Urbina and Diaz commenced collecting signatures immediately thereafter. I further conclude that Respondent’s serious unfair labor practices, including those committed during the drivers meeting on November 14, including, in particular, unlawfully bypassing the Union and engaging in direct dealing with the drivers, and its failure to immediately reinstate the former strikers, including in excess of 25 drivers, at the conclusion of their strike, were of a type which would tend to cause employee disaffection with the Union, by undermining the Union’s perceived authority as the employees’ bargaining representative and to interfere with the employees’ free choice in an election. At the outset in these regards, the Board will generally dismiss a decertification petition where there are concurrent unfair labor practices which interfere with employee free choice in the election and are “inherently inconsistent” with the petition itself. “The Board considers conduct that taints . . . an incumbent union’s subsequent loss of majority support to be inconsistent with the petition.” *Overnight Transportation Co.*, 333 NLRB 1392, 1393 (2001). Not all unfair labor practices will taint a decertification petition. Rather, “where a case involves unfair labor practices other than a general refusal to recognize and bargain, a causal connection must be shown between the unfair labor practices and the subsequent employee disaffection with the union in order to find

that a decertification petition is tainted, thereby, requiring that it be dismissed.<sup>101</sup> *Id.*; *Lee Lumber & Building Material Corp.*, 322 NLRB 175, 177 (1996), *affd.* in part and remanded in part 117 F. 3<sup>rd</sup> 1454 (D.C. Cir. 1997); *Williams Enterprises*, 312 NLRB 937, 939 (1993), *enfd.* 50 F. 3<sup>rd</sup> 1280 (1995). To determine whether a causal relationship exists between unfair labor practices and the subsequent employee expression of disaffection, the Board has identified several relevant factors. These include the length of time between the unfair labor practices and the filing of the decertification petition; the nature of the unfair labor practices, including their “lasting effect; any possible tendency to cause employee disaffection from the union; and the effect of the unfair labor practices upon employee morale. *Penn Tank Lines, Inc.*, 336 NLRB 1066, 1067 (2001); *Overnight Transportation Co.*, *supra*; *Master Slack Corp.*, 271 NLRB 78, 84 (1984). Finally, the *Master Slack* test is an objective one, and it is not relevant to inquire of employees why they chose to reject their union. *Saint Gobain Abrasives, Inc.*, 342 NLRB 434 at 434, n. 2 (2004).

Utilizing the foregoing analytical framework, with respect to the proximity in time between Respondent’s unfair labor practices and the filing of the above-decertification petition, the nexus is compelling. Thus, I believe Urbina commenced collecting drivers’ signatures immediately after of Respondent’s serious unfair labor practices aimed directly at its drivers on November 14 and within 5 days of Respondent’s December 5 unlawful failure to reinstate at least 25 former striking drivers.<sup>102</sup> Next, considering the nature of Respondent’s unfair labor practices, I note that, on November 14, Wayne and Dupreau unlawfully bypassed the Union and engaged in direct dealing with the drivers and unlawfully implicitly threatened the drivers with termination for engaging in support for the Union. In accord with the latter threat, Respondent’s unlawful failure to reinstate the active union supporters, who participated in the strike, most certainly resonated with both the non-striking drivers and the replacement drivers, reinforcing their fears that they likewise might lose employment if they manifested or engaged in any support for the Union. *Penn Tank Lines, supra*, at 1068; *Koons Ford of Annapolis*, 282 NLRB 506, 508 (1986). Further, by engaging in unlawful direct dealing, Respondent minimized the necessity for collective bargaining and emphasized for the drivers that there existed no necessity for representation by the Union. *Id.*; *Williams Enterprises, supra*, at 940. As noted by the Board, the final two of the above factors focus on the effect of Respondent’s unfair labor practices upon the employees’ protected concerted activities, and, in this regard, the Board and the courts have determined that the discharge of active union adherents— and, in the instant matter, I believe, the refusal to reinstate strikers—likely would have “lasting inhibitive” and deleterious effects on a substantial percentage of the workforce, remaining in their collective memories for a long time. *Penn Tank Lines, Inc., supra*; *NLRB v. Jamaica Towing*, 632 F. 2d 208, 213 (2<sup>nd</sup> Cir. 1980). Based upon the foregoing, and the record as a whole, I reiterate my views that Respondent’s unfair labor practices were of a type which would reasonably have resulted in employee disaffection from the Union so as to have diluted its support amongst the drivers and that, therefore, a causal connection existed between said unfair labor practices and the instant decertification petition. In these circumstances, I shall recommend to the Board that the instant decertification petition be dismissed.

---

<sup>101</sup> In cases, involving a refusal to recognize and bargain with an incumbent union, the causal relationship is presumed. Inasmuch as Respondent’s bargaining unfair labor practices herein involve the maintenance employees and not the drivers, I shall not presume a causal relationship involving the drivers.

<sup>102</sup> For purposes herein, I draw no distinction between the two decertification petitions. The record establishes that most, if not all, of the drivers, who signed the first petition also signed the second. Further, in my view, the fact that more drivers signed the second illustrates the disaffection with the Union caused by Respondent’s unfair labor practices.

### Conclusions of Law

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

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

3. The following employees of Respondent (herein called the maintenance unit) constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(a) of the Act:

All compactor maintenance employees, container maintenance employees, and fleet maintenance employees employed by Respondent in El Paso, Texas; excluding all drivers, dispatchers, sales employees, office clerical employees, janitors, guards, and supervisors as defined in the Act

4. The following employees of Respondent (herein called the drivers unit) constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(a) of the Act:

All front load drivers, residential drivers, relief drivers, roll off drivers, buggy drivers, storage unit drivers, Poly Cart drivers, and bulk drivers employed by Respondent in El Paso, Texas; excluding all other employees including compactor maintenance employees, container maintenance employees, fleet maintenance employees, dispatchers, sales employees, office clerical employees, janitors, guards, and supervisors as defined by the Act

5. During its bargaining with the Union for its maintenance employees, by engaging in dilatory tactics regarding the scheduling of bargaining sessions, failing and refusing to meet regularly with the Union and at reasonable intervals, unreasonably limiting the duration of negotiating sessions, failing to designate an agent with sufficient bargaining authority, refusing to accede to a dues checkoff provision, and imposing a premature last, best, and final offer on the Union, at a time when the parties had not yet engaged in bargaining on several subjects, Respondent failed and refused to bargain in good faith in violation of Section 8(a)(1) and (5) of the Act.

6. By unilaterally, and without giving notice to the Union and affording it an opportunity to bargain, changing its longevity award policy, changing the terms of its sick leave policy applying its fleet maintenance employees, and changing a driver's job assignment and method of pay, Respondent engaged in acts and conduct violative of Section 8(a)(1) and (5) of the Act.

7. By, since November 13, 29007, failing and refusing to furnish necessary and relevant information, pertaining to the names, last known addresses, telephone numbers, dates of hire, rates of pay, and job classifications of employees in both bargaining units, to the Union and, since on or about November 30, 2007, by failing and refusing to furnish necessary and relevant information to the Union pertaining the complete names and addresses of all strike replacement employees, Respondent has engaged in acts and conduct violative of Section 8(a)(1) and (5) of the Act.

8. By, on November 14, 2007, bypassing the Union and dealing directly with its drivers with regard to contract terms, Respondent engaged in acts and conduct violative of Section 8(a)(1) and (5) of the Act.

5 9. By, since December 5, 2007, failing and refusing to immediately reinstate its employees in both bargaining units, who engaged in the November 21 through December 4, 2007 unfair labor practice strike and, on whose behalf, on the latter date, the Union made unconditional offers to return to work, Respondent engaged in acts and conduct violative of Section 8(a)(1) and (3) of the Act.

10 10. By, on November 27, 2007, permanently replacing, thereby, in effect, discharging, its employee, Jose Macias, because it suspected he had joined the above-described unfair labor practice strike, Respondent engaged in acts and conduct violative of Section 8(a)(1) and (3) of the Act.

15 11. By not following its normal practice of directly depositing paychecks and, instead, mailing final pre-strike paychecks to its employees in order to harass them for engaging in a strike, Respondent engaged in acts and conduct violative of Section 8(a)(1) and (3) of the Act.

20 12. By, in August and November 2007, placing the blame on the Union for its failure to give an expected wage increase to its employees in the maintenance bargaining unit, Respondent engaged in acts and conduct violative of Section 8(a)(1) of the Act

13. By, on October 11, 2007, coercively interrogating employees as to their Union activities and sympathies and the Union activities and sympathies of their fellow employees, Respondent engaged in acts and conduct violative of Section 8(a)(1) of the Act.

25 14. By, on October 11, 2007, while engaged in bargaining with the Union, soliciting grievances from its maintenance employees and expressly and impliedly promising to remedy them, thereby implying its employees do not need Union representation to correct work problems, Respondent engaged in acts and conduct violative of Section 8(a)(1) of the Act.

30 15. By, on November 14, 2007, at a time when bargaining with the Union for them had not yet occurred, telling its drivers that its last, best, and final contract offer to its maintenance employees was also meant for them, Respondent impliedly warned its drivers that supporting the Union's bargaining would be futile in violation of Section 8(a)(1) of the Act.

35 16. By, on November 14, 2007, telling its drivers that the last, best, and final contract offer to the maintenance employees was also meant for them and, if they did not like it, "there was the door," Respondent thereby implicitly threatened its drivers with discharge in violation of Section 8(a)(1) of the Act.

40 17. By, on November 14, 2007, threatening its drivers that it would engage in regressive bargaining with the Union during contract bargaining on their behalf, Respondent engaged in acts and conduct violative of Section 8(a)(1) of the Act.

45 18. By, on or about November 14, 2007, in the context of other unlawful threats, warning its drivers that they would be permanently replaced if they engaged in a strike, without specifying the type of strike, Respondent implicitly threatened its drivers with discharge for engaging in a protected concerted activity in violation of Section 8(a)(1) and (3) of the Act.

19. By, on November 20, 2007, threatening its employees with discharge if they engaged in a strike, Respondent engaged in acts and conduct violative of Section 8(a)(1) of the Act.

5 20. By taking photographs of its employees, who were engaged in peaceful picketing during the course of their strike against it, Respondent engaged in acts and conduct violative of Section 8(a)(1) of the Act.

10 21. By summoning police to come to the location of peaceful picketing by its employees, who were engaged in a strike against it, in order to harass said employees, Respondent engaged in acts and conduct violative of Section 8(a)(1) of the Act.

22. Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

15 23. Unless specifically found above, Respondent engaged in no other unfair labor practices.

### REMEDY

20 I have found that Respondent engaged in serious unfair labor practices. Accordingly, I find that it must be ordered to cease and desist from engaging in said acts and to take certain affirmative actions designed to effectuate the policies and purposes of the Act. Initially, as I have found that, during the bargaining with the Union over the maintenance employees, Respondent's unfair labor practices utterly frustrated the negotiations and were incompatible with its obligation to bargain in good faith. Therefore, I shall recommend that it be affirmatively ordered to bargain in good faith with the Union. Moreover, inasmuch as I have found that  
25 Respondent's employees' concerted work stoppage and strike was caused by Respondent's unfair labor practices and that, notwithstanding their unconditional offer to return to work on December 4, 2007, Respondent unlawfully has failed and refused to offer immediate reinstatement to the former strikers, I shall recommend that Respondent be ordered to offer  
30 immediate reinstatement to their former, or substantially equivalent, positions, discharging, if necessary, any replacements hired after November 21, 2007 and to make each former striker whole for any wages or other benefits lost as a result of its unlawful conduct, as computed on a quarterly basis from December 5, 2007 to the dates of proper offers of reinstatement, less any net interim earnings, as prescribed in *F.W. Woolworth*, 90 NLRB 289 (1959), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Likewise, as I have found  
35 that Respondent unlawfully terminated employee, Jose Macias, because it believed he had been a striking employee, I shall recommend that Respondent be ordered to offer immediate reinstatement to Macias to his former position or a substantially equivalent position, if his former position no longer exists, and to make him whole, with interest, from the date of his discharge in the manner set forth for the former striking employees. Further, I shall recommend that Respondent restore its longevity award policy, as such pertains to the awarding of watches, and  
40 its sick leave policy, as applied to its fleet maintenance employees, to the *status quo ante* and to bargain with the Union, upon request, after notifying it of any proposed changes.<sup>103</sup> Finally, I shall recommend that Respondent post a notice, informing its employees of its serious unfair labor practices.

45 <sup>103</sup> As such was a one-time event and not a change in policy, I shall not recommend that Respondent be ordered to restore the *status quo ante* with regard to the change to driver Vasquez' job assignment or his method of pay.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended.<sup>104</sup>

5

## ORDER

The Respondent, **El Paso Disposal, L.P.**, located in El Paso, Texas, its officers, agents, successors, and assigns, shall

10

### 1. Cease and desist from

15

(a) During the course of bargaining with the Union for its maintenance employees, engaging in dilatory tactics regarding the scheduling of bargaining sessions, failing and refusing to meet regularly with the Union and at reasonable intervals, unreasonably limiting the duration of negotiating sessions, failing to designate an agent with sufficient bargaining authority, refusing to accede to a dues checkoff provision, and imposing a premature last, best, and final offer on the Union, at a time when the parties had not yet engaged in bargaining on several subjects;

20

(b) Unilaterally, and without first giving notice to the Union and affording it an opportunity to bargain, changing its longevity award policy applying to the awarding of tenth anniversary watches, changing the terms of its sick leave policy applying to its fleet maintenance employees, and changing its employees' job assignments and methods of pay;

25

(c) Failing and refusing to furnish necessary and relevant information, pertaining to the names, last known addresses, telephone numbers, dates of hire, rates of pay and job classifications for employees in its maintenance employees and drivers bargaining units to the Union;

30

(d) Failing and refusing to furnish to the Union necessary and relevant information, pertaining to the complete names and addresses of all strike replacement employees;

(e) Bypassing the Union and dealing directly with its drivers with regard to contract terms;

35

(f) Failing and refusing to offer immediate reinstatement to unfair labor practice striking employees, who made unconditional offers to return to work, to their former, or substantially equivalent, positions of employment;

(g) Permanently replacing, thereby, in effect, discharging, employees, whom it suspected of participated in the unfair labor practice strike by its employees;

40

(h) Not following its normal practice of direct depositing paychecks and, instead, mailing final pre-strike paychecks to its employees in order to harass them for engaging in a strike;

45

---

<sup>104</sup> 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.

50

(i) Placing the blame upon the Union for its failure to give an expected wage increase to its maintenance employees;

5 (j) Coercively interrogating employees as to their Union activities and sympathies and the Union activities and sympathies of their fellow employees;

10 (k) While engaged in bargaining with the Union, soliciting grievances from its maintenance employees and expressly and impliedly promising to remedy them, thereby implying said employees do not need Union representation to correct work problems;

15 (l) At a time when bargaining with the Union on their behalf had not yet occurred, by telling its drivers that its last, best, and final contract offer to the maintenance employees was also meant for them, impliedly warning them that supporting the Union’s bargaining would be futile;

20 (m) By telling its drivers that the last, best, and, final contract offer to the maintenance employees was also meant for them and, if they did not like it, there was the door, thereby implicitly threatening its drivers with discharge for supporting the Union;

25 (n) Threatening its drivers that it would engage in regressive bargaining with Union during the latter’s contract bargaining on their behalf;

30 (o) In the context of other unlawful threats, telling its drivers that they will be permanently replaced if they engaged in a strike, without specifying the type of strike, thereby implicitly threatening its drivers with discharge for engaging in a protected concerted activity;

35 (p) Threatening its employees with discharge for engaging in a strike;

(q) Taking photographs of its employees, who are engaged in peaceful picketing during the course of a strike against it;

40 (r) Summoning the police to come to the location of peaceful picketing by its employees, who are engaged in a strike against it, in order to harass said employees;

45 (s) 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.

50 (a) On request, bargain, in good faith, with the Union as the exclusive representative of the employees in the above-described appropriate units concerning terms and conditions of employment and, if agreements are reached, embody these in signed collective-bargaining agreements;

55 (b) Restore the *status quo ante* with regard to our longevity awards policy, as such pertains to the awarding of tenth anniversary watches, and our sick leave policy, as such pertains to its fleet maintenance employees, and, prior to making any changes in these policies, notify the Union and, upon request, afford it an opportunity to bargain;

(c) Within 14 days from the date of this Order, insofar as it has not already done so, offer the employees, named below, immediate and full reinstatement to their former positions of employment or, if those positions no longer exist, to substantially equivalent positions, discharging, where necessary, any permanent replacement employees, who were hired on or after November 14, 2007, without prejudice to their seniority or any other rights or privileges previously enjoyed:

5

10

15

20

25

30

Daniel Arenas	Francisco Villalobos
Francisco Aveytia	Felix Arteaga
Jasen Cardenas	Carlos Avalos
Samuel Castro	Juan J. Castillo
Francisco Cazares	Jose F. Castillo
Jose L. Cisneros	David L. Chavez
Jesus Dominguez	Manuel Cordova
Enrique Felix	Jesus Manuel Duran
Victor Flores	Rito Esquivel
Arturo Gasca	Jesus Miguel Gonzalez
Fernando Gomez	Luis M. Gonzalez
Mario Gomez	Hector Hernandez
Francisco Gonzalez	Juan De Dios Hernandez
Rafael Hernandez	Humberto M. Hernandez
Eduardo Holguin	Vincente A. Juarez
Javier Jacques	Victor Loera
Victor Medrano	Elias Lopez
Roberto Meza	Pedro Luna
Roberto Ortiz	Alfonso Macias
Mario Ortiz	Moises Pereyra
Adrian Perez	Victor Manuel Puertas
Jesus Ramirez	Miguel Rascon
Alejandro Reyes	Jose L. Rivas
Carlos Rivera	Humberto Valles
Eduardo Turrubiate	Juan B. Vargas
Eusuebio A. Zapata	Adan Vasquez
David Reyes	Jose Macias
Manuel Ramirez	

35

(d) Make each of the above-named employees whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the decision;<sup>105</sup>

40

(e) Within 14 days from the date of this Order, remove from its files any reference to the unlawful refusals to reinstate the above-named employees, and within 3 days thereafter notify the employees, in writing, that this has been done and that the unlawful refusals to reinstate will not be used against them in any way;

45

---

<sup>105</sup> While the matter should be left to the compliance stage of the proceeding, I note that Juan Castillo was on a workers compensation leave of absence at the time of Respondent's failure to reinstate his employment status on December 5, 2007. Therefore, I believe any backpay for him should be calculated from the date on which his doctor cleared him to return to work.

50

**(f)** Within 14 days from the date of this Order, offer Jose Macias immediate and full reinstatement to his former position, or if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed;

5 **(g)** Make Jose Macias whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the decision;

10 **(h)** Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of Jose Macias, and within 3 days thereafter notify Jose Macias, in writing, that this has been done and that the discharge will not be used against him in any way;

15 **(i)** 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;

20 **(j)** Within 14 days after service by the Region, post at its facility in El Paso, Texas, copies of the attached notice marked “Appendix.”<sup>106</sup> Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent’s authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 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 copy of the notice to all current employees and former employees employed by the Respondent at any time since January 1, 2007.

30 **(k)** Within 21 days after service by the Region, mail a copy of the attached notice marked “Appendix”<sup>107</sup> to all employees in Respondent’s two bargaining units, who participated in the November 21 through December 5, 2007 strike. These individuals will not normally be expected to visit Respondent’s facility and see the attached notice. The notice shall be mailed to the last known address of each of the employees after being signed by the Respondent’s authorized representative.

35 **(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.

---

40 <sup>106</sup> If this Order is enforced by a Judgment of the 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.”

45 <sup>107</sup> If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading “MAILED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD” shall read “MAILED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD.”

**IT IS FURTHER ORDERED** that the second consolidated complaint be, and the same hereby is, dismissed insofar as it alleges violations of the Act not specifically found and that the decertification petition in Case No. 28-RD-969 be, and the same hereby is, dismissed.

5

Dated, Washington, D.C., April 27, 2009.

10

\_\_\_\_\_  
**Burton Ltvack**  
**Administrative Law Judge**

15

20

25

30

35

40

45

50

## 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**, during the course of bargaining with International Union of Operating Engineers, Local 351, AFL-CIO, herein called the Union, for our maintenance employees, engage in dilatory tactics regarding the scheduling of bargaining sessions, fail and refuse to meet regularly and at reasonable intervals, unreasonably limit the duration of negotiating sessions, fail to designate an agent with sufficient authority, refuse to accede to a dues checkoff provision, and impose on the Union a premature last, best, and final contract offer, when the Union and us have yet to engage in bargaining on several subjects.

**WE WILL NOT**, unilaterally, and without first giving notice to the Union and affording it an opportunity to bargain, change the terms of our longevity awards program, pertaining to the awarding of tenth anniversary watches, and our sick leave policy, applying to our fleet maintenance employees.

**WE WILL NOT** fail and refuse to provide necessary and relevant information, pertaining to the names, last known addresses, telephone numbers, dates of hire, rates of pay, and job classifications for employees in its maintenance employees and drivers bargaining units, to the Union.

**WE WILL NOT** fail and refuse to provide necessary and relevant information, pertaining to the complete name and addresses for all strike replacement employees, to the Union.

**WE WILL NOT** bypass the Union and deal directly with our drivers with regard to contract terms.

**WE WILL NOT** fail and refuse to offer immediate and full reinstatement to unfair labor practice strikers, who made unconditional offers to return to work, to their former, or substantially equivalent, positions of employment.

**WE WILL NOT** permanently replace, thereby, in effect, discharging, employees, whom, we suspect, joined the unfair labor practice strike against us.

**WE WILL NOT** fail to follow our normal practice of direct depositing paychecks and, instead, mail final pre-strike paychecks to our employees in order to harass them for engaging in a strike.

**WE WILL NOT** place the blame upon the Union for our failure to give an expected wage increase to our maintenance employees.

**WE WILL NOT** coercively interrogate our employees as to their Union activities and sympathies and the Union activities and sympathies of their fellow employees.

**WE WILL NOT**, while engaged in bargaining with the Union on their behalf, solicit grievances from our maintenance employees and expressly or impliedly promise to remedy them, thereby employing that our employees do not need Union representation to correct work problems.

**WE WILL NOT**, at a time when bargaining with the Union on their behalf had not yet occurred, tell our drivers that our last, best, and final contract offer to the maintenance employees was also meant for them, thereby impliedly warning them that supporting the Union's bargaining would be futile.

**WE WILL NOT** tell our employees that the last, best, and final contract offer to the maintenance employees was also meant for them and, if they do not like it, there is the door, thereby implicitly threatening the drivers with discharge for supporting the Union.

**WE WILL NOT** threaten our drivers that we will engage in regressive bargaining with the Union during the latter's contract bargaining on their behalf.

**WE WILL NOT**, in the context of other unlawful threats, tell our drivers that they will be permanently replaced if they engage in a strike, without specifying the type of strike, thereby implicitly threatening our drivers with discharge for engaging in a protected concerted activity.

**WE WILL NOT** threaten our employee with discharge if they engage in a strike.

**WE WILL NOT** take photographs of our employees, who engage in peaceful picketing during the course of a strike.

**WE WILL NOT** summon the police to come to the location of peaceful picketing by our employees, who are engaged in a strike against us in order to harass said employees

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

**WE WILL**, on request, bargain in good faith with the Union, as the exclusive representative of our employees in the below-described appropriate units, concerning their terms and conditions of employment and, if agreements are reached, embody these in signed collective-bargaining agreements. The bargaining units are:

All compactor maintenance employees, container maintenance employees, and fleet maintenance employees employed by us; excluding all drivers, dispatchers, sales employees, office clerical employees, guards, and supervisors as defined in the Act

All front load drivers, residential drivers, relief drivers, roll off drivers, buggy drivers, storage unit drivers, Poly Cart drivers, and bulk drivers employed by us; excluding all other employees including compactor maintenance employees, container maintenance employees, fleet maintenance employees, dispatchers, sales employees, office clerical employees, janitors, guards, and supervisors as defined in the Act

**WE WILL** restore the *status quo ante* with regard to our longevity award program, as such pertains to the awarding of tenth anniversary watches, and our sick leave policy, as such pertains to our fleet maintenance employees, and, prior to making any changes in said policies, we will notify the Union and, upon request, afford it an opportunity to bargain.

**WE WILL**, within 14 days of the Board's Order, insofar as we have not already done so, offer our below-named former striking employees, on whose behalf the Union made unconditional offers to return to work, immediate and full reinstatement to their former jobs or, if these jobs no longer exist, to substantially equivalent jobs, discharging, where necessary, any permanent replacement employees hired on or after November 21, 2007, without prejudice to their seniority or any other rights or privileges previously enjoyed.

Daniel Arenas	Francisco Aveytia	Jasen Cardenas
Samuel Castro	Francisco Cazares	Jose L. Cisneros
Jesus Dominguez	Enrique Felix	Victor Flores
Arturo Gasca	Fernando Gomez	Mario Gomez
Francisco Gonzalez	Rafael Hernandez	Eduardo Holguin
Javier Jacques	Victor Medrano	Roberto Meza
Roberto Ortiz	Mario Ortiz	Adrian Perez
Jesus Ramirez	Alejandro Reyes	Carlos Rivera
Eduardo Turrubiate	Eusebio A. Zapata	Francisco Villalobos
Felix Ortega	Carlos Avalos	Juan J. Castro
Jose F. Castillo	David L. Chavez	Manuel Cordova
Jesus Manuel Duran	Rito Esquivel	Jesus Miguel Gonzalez
Luis M. Gonzalez	Hector Hernandez	Juan De Dios Hernandez
Vincente A Juarez	Victor Loera	Elias Lopez
Pedro Luna	Alfonso Macias	Moises Pereyra
Victor Manuel Puertas	Miguel Rascon	Jose L. Rivas
Humberto Valles	Juan B. Vargas	Adan Vasquez
David Reyes	Jose Macias	Manuel Ramirez

**WE WILL**, within 14 days of the Board's Order, offer Jose Macias immediate and full reinstatement to his former job or, if said job no longer exists, to a substantially equivalent job without prejudice to his seniority or other rights or privileges previously enjoyed.

**WE WILL** make the employees named above whole for any earnings and other benefits suffered as a result of our unlawful discrimination against them, with interest.

**WE WILL**, within 14 days of the Board's Order, remove from our files any references to our unlawful discharge of Jose Macias and our unlawful failures and refusals to reinstate the former unfair labor practice strikers, and **WE WILL**, within 3 days thereafter, notify them, in writing, that this has been done and that our unlawful actions will not be used against any of them in any way.

**El Paso Disposal L.P.**

\_\_\_\_\_  
(Employer)

Dated \_\_\_\_\_ By \_\_\_\_\_  
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: [www.nlr.gov](http://www.nlr.gov).

2600 North Central Avenue, Suite 1800, Phoenix, AZ 85004-3099  
(602) 640-2160, Hours: 8:15 a.m. to 4:45 p.m.

**THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE**

**THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (602) 640-2146.**

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

EL PASO DISPOSAL, L.P.

and

INTERNATIONAL UNION OF OPERATING  
ENGINEERS, LOCAL 351, AFL-CIO

Cases 28-CA-21654  
28-CA-21666  
28-CA-21672  
28-CA-21677  
28-CA-21681  
28-CA-21817

and

PAUL URBINA  
Petitioner

and

INTERNATIONAL UNION OF OPERATING  
ENGINEERS, LOCAL 351, AFL-CIO  
Union

Case 28-RD-969

Table of Contents

Statement of the Case .....	1
Findings of Fact .....	2
I. Jurisdiction .....	2
II. Labor Organization.....	3
A. The Issues .....	3
B. The Alleged Unfair Labor Practices Committed Prior to the November 21, 2007 Strike.....	5
1. The Allegation that Respondent Failed and Refused to Bargain in Good Faith with the Union .....	5
2. The Alleged Unlawful Unilateral Changes .....	26
3. Respondent's Alleged Unlawful Failure and Refusal to Provide Information to the Union .....	32
4. Respondent's Alleged Violations of Section 8(a)(1) of the Act .....	33
a. August.....	33
b. October .....	34
c. November.....	40
C. Respondent's Employees' November 21, 2007 Strike .....	51
1. The Allegation that the Strike was Caused by and/or Prolonged by Respondent's Unfair Labor Practices .....	51
2. Respondent's Alleged Unfair Labor Practices Committed During the Strike .....	60
D. Respondent's Alleged Unfair Labor Practices Subsequent to the Conclusion of the Strike.....	67
E. The Viability of the Decertification Petition in Case 28-RD-969 .....	69
Conclusions of Law .....	72
ORDER.....	75
APPENDIX.....	80