JD–21-09
Battle Creek, MI

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

KNIGHT PROTECTIVE SERVICE, INC.

and

Cases GR-7-CA-51139
GR-7-CA-51388

LOCAL 206, UNITED GOVERNMENT SECURITY OFFICERS OF AMERICA (UGSOA)

Colleen J. Carol, Esq., for the General Counsel.
Meredith S. Campbell, Esq., and *Stacey Schwaber, Esq.,* of Rockville, Maryland, for the Respondent.[1]
Jeffrey C. Miller of Dowling, Michigan, for the Charging Party.

DECISION

Statement of the Case

PAUL BUXBAUM, Administrative Law Judge. This case was tried in Kalamazoo, Michigan, on March 18, 2009. The original charge was filed March 19, 2008, and a second charge was filed July 21. That charge was amended September 3. The first complaint was issued May 29, 2008, and a consolidated amended complaint followed on October 8. On February 19, 2009, the Regional Director filed a final consolidated amended complaint and a compliance specification.

The amended complaint alleges that the Company unilaterally eliminated paid lunchbreaks for bargaining unit members and that this constituted a change in the conditions of their employment that was implemented without first affording the Union a meaningful opportunity to bargain about that change and its effects. This course of conduct is alleged to have violated Section 8(a)(5) and (1) of the Act.[2] The Company has filed answers to the various

[1] Fred S. Sommer, Esq., of Rockville, Maryland, was also on the brief for the Respondent.

[2] The amended complaint also alleged that, after it implemented the new policy regarding lunchbreaks, the Company unlawfully failed to comply with the Union's subsequent requests for various items of information relevant to its duties as representative of the unit's employees. At the commencement of the trial, with the consent of all parties, counsel for the General Counsel moved to withdraw this set of allegations, specifically pars. 13, 14, and 15 of the amended complaint and so much of par. 16 as related to a failure to provide information. I granted this motion.

complaints and to the compliance specification, denying the material allegations made against it.

For the reasons set forth in detail in this decision, I find that the Company provided the Union with timely notice of the change in lunchbreak policy and afforded the Union a meaningful opportunity to discuss that change with its managers, including the solicitation of alternative suggestions from the Union. I further find that the Union, through its authorized representative, waived any further need to bargain about the change. As a result, I conclude that the Company did not violate the Act in the manner alleged by the General Counsel in this case.

On the entire record,[3] including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

Findings of Fact

I. Jurisdiction

The Company, a corporation, provides security guard services to the United States Government at various locations throughout the United States, including the Hart-Doyle-Inouye Federal Center in Battle Creek, Michigan. In conducting these business operations, it annually performs services valued in excess of $50,000 in states other than the State of Michigan. The Company admits[4] and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

A. The Facts

The Respondent, Knight Protective Service, is a Maryland corporation that provides security guard services to the federal government at a variety of facilities scattered throughout 11 states. Among those facilities is the Hart-Doyle-Inouye Federal Center in Battle Creek, Michigan. That Federal Center is a 13-story building that houses a variety of government organizations. Knight's services there are provided under the terms of a contractual agreement with the Federal Protective Service (FPS), an arm of the Department of Homeland Security. In turn, liaison between FPS and the various government agencies that occupy the Federal Center is provided through a building security committee known, in a fine example of governmental parlance, as the Protection and Assurance Committee.

The security services provided by Knight at the Battle Creek location involve two types of guard functions. First, the Company provides guards that staff posts located at the main entrance and two side entrances to the facility. Prior to the events in this case, three security officers were stationed at the main entrance, while two guards were assigned to each of the

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[3] The transcript of these proceedings is remarkably accurate. Only two items require correction. At tr. 52, ll. 14—15, counsel actually asked, "so in between that request that you made to bargain and this went up, did you have any contact . . . ?" At tr. 238, l. 1, "exists" should be "exits." Any additional errors are not significant or material.

[4] See the Company's answer to the consolidated amended complaint, pars. 2, 3, 4, and 5. (GC Exh. 1(dd).)

side-entrance posts. In addition to manning these guard posts, the Company also fields so-called rove guards. These individuals split their time between foot patrols inside the building and vehicle patrols of the perimeter.

Approximately 4 years ago, the Company's security guards based in western Michigan obtained representation by the Union. The bargaining unit consists of guards stationed at various federal installations in that state. The largest group of unit members is the complement of guards assigned to the Battle Creek Federal Center. Of a total unit of approximately 50 guards, roughly 37 work at that facility.

Once the unit members obtained representation, the parties entered into a collective-bargaining agreement (CBA) that had effective dates from December 1, 2005 through November 30, 2008.[5] The agreement did not contain any specific provisions regarding lunchbreaks for the guards. It did commit the Employer to provide an opportunity to the Union to negotiate with it regarding certain changes in terms and conditions of employment. Recognizing that the government was the prime contractor, the parties acknowledged that:

> Nothing in this Agreement shall be construed to prevent institution of any change prior to discussion with the Union where immediate change is required by the United States Government. The company will, however, negotiate with the Union concerning the effects of any such change.

(CBA, Art. XXIX, Sec. A; GC Exh. 3, p. 15.)

More generally, the management rights provision in the parties' CBA also addressed the Company's obligations toward the Union in the event of certain developments. It provided, in pertinent part, that:

> Subject to the express limitations of this Agreement, the Company retains the sole and exclusive right in its discretion to manage its business . . . assign [employees] . . . determine the starting and quitting time, to establish or discontinue or change operations . . . or plant rules, provided, however, that with respect to any action which results in a change in established work rules, existing hours of work, or the size of the work force, the Company shall give prior notice to the Union before taking such action and shall afford the Union a reasonable opportunity to negotiate on such matters to the extent practicable and consistent with the Company's operational requirements.

(CBA, Art. XXX; GC Exh. 3, p. 17). Finally, the CBA provided a multi-step grievance procedure for disputes arising under its terms. This procedure culminated in arbitration of those disputes that could not otherwise be adjusted to the parties' satisfaction. See, CBA, Arts. VIII and IX; GC Exh. 3, pp. 8—10.

[5] Although the collective-bargaining agreement indicates that it covered a period commencing in December 2005, it was actually signed and executed on April 21, 2006. (GC Exh. 3, p. 24.) In any event, it is clear that this agreement was in effect during the events under consideration. It has since been succeeded by a new agreement.

During the events involved in this case, the Company's key onsite management official was Captain Ronald Umbarger. Since June 2005, he has been the Area B supervisor responsible for Knight's operations in western Michigan, including at the Battle Creek Federal Center. His office is located in the Federal Center. Umbarger reports to Sidney Bogan who is the contract manager stationed in Detroit. Finally, the Company's human resource manager is Donna Snowden. Her office is at the corporate headquarters in Maryland.

Local 206 has officers consisting of a president, vice president, chief steward, treasurer, and recording secretary. In March 2007, William Hopkins, a security guard at the Battle Creek Federal Center, assumed the office of president. He testified that the manner in which he was selected for this role was rather peculiar since he did not seek the position, but was elected by write-in votes. In April 2007, Dennis O'Brien, a security guard stationed at a federal installation in Lansing, Michigan, became the Union's vice president. Shortly thereafter, in July 2007, Jeffrey Miller, a guard assigned to the Battle Creek facility, assumed the office of chief steward.

At this point, it should be noted that Local 206 maintained a somewhat unusual division of labor among its officials. This arose from Hopkins' status as a reluctant, write-in selection for the position of its president. He testified that he did not want the job and occupied the position as a "figurehead."[6] (Tr. 56.) In consequence, he testified that he did not generally have an active role in union affairs. There was consistent testimony from witnesses for both sides that Hopkins rarely discussed workplace issues with management officials. For example, Human Resources Manager Snowden reported that she had never had any interactions with Hopkins. In addition, he did not serve as a union negotiator during collective bargaining.

Given Hopkins' desires, the evidence demonstrates that it fell to the Union's vice president to assume the lead role in discussions with management. For example, Hopkins testified that it was O'Brien's role as vice president to interact with the Company's officials.[7] This was confirmed by Umbarger who reported that he usually communicated with the Union's various vice presidents. Finally, O'Brien also reported that he was responsible for "any communications with the company that needed to happen." (Tr. 173.) Indeed, after his selection as vice president, he telephoned Snowden and advised her that, "I would be the person that she would be talking to within the union." (Tr. 173.) Snowden confirmed the nature of this conversation, testifying that O'Brien told her that he would be "the face of the union." (Tr. 207.) O'Brien had a similar conversation with Umbarger.

With this background in mind, it is now appropriate to turn to the events that have ignited this controversy between the parties. Matters began with a review of building security conducted in connection with the duties of the Protection and Assurance Committee in March 2007.[8] As a result, on March 29, the Committee adopted a proposal to reduce the contract

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[6] The term "figurehead" was employed by counsel for the Company. Hopkins readily concurred in its applicability to the manner in which he viewed his role as union president. Interestingly, O'Brien also testified as to Hopkins' role. He was called as a witness by the Company and had not been present during the testimony by Hopkins. When asked what he understood regarding Hopkins' desires as president, he replied, "[h]e was going to be a figurehead president." (Tr. 175.)

[7] In addition to Hopkins' wish to remain in the background, the designation of O'Brien to assume the most prominent role as the Union's spokesperson may well have resulted from his unique background. He possesses a master's degree in labor relations and, in connection with his prior employment, had served as a union negotiator for over 25 years.

[8] All dates hereafter are in 2007 unless otherwise indicated.

security force by eliminating one guard position at each of the three building entrances. (R. Exh. 5.) Umbarger testified that, while the Company was not given any official notice of this proposal, management did begin to hear "some rumbles" about a reduction in staffing. (Tr. 133.)

By that summer, matters had become somewhat clearer. As a result, on June 27, the Company posted a notice in the guards' break room informing the unit members that three guard posts were going to be eliminated effective October 1. The memo also advised that, "the post orders and duty hours are subject to change as well." (GC Exh. 4.) The notice concluded by indicating that the Company would be meeting with FPS to finalize these plans. Hopkins testified that the Union did not make any effort to raise the issues presented in this notice with the Employer.

On September 18, the Protection and Assurance Committee formally made its final approval of the staffing reductions. (R. Exh. 4.) The Company received notification of this decision on Thursday, September 20.[9] Most importantly for purposes of this case, the loss of three staff positions had the indirect effect of causing a problem with lunch periods for the remaining guards on the day shift. Historically, the day-shift guards took a 20-minute lunch period during their paid time on the job. Before the layoff of three guards, the two officers posted to the side entrances would alternate their lunchbreaks so that the post was always staffed. As the side entrances were now reduced to one guard each, this system would no longer be feasible. Similarly, reduction of the new two-person guard force to only one individual at the main entrance during the lunchbreak would pose an unacceptable security risk.

Umbarger reported that he understood that the mandated staff reduction would present a problem regarding lunch periods for the reduced complement of day-shift guards.[10] He testified that one alternative would be to hire additional part-time guards to cover the vacant posts while the full-time officers ate lunch. This would pose an increased cost of labor to the Company. However, this increased operating expense could be avoided if the full-time guards were required to sign out for a 30-minute lunch period. A consequence of this revision would be that those employees would no longer be paid for the time spent on their lunchbreak. In other words, their paid work time would be reduced by 30 minutes per shift. The amounts saved in this manner would be used to compensate the newly-hired relief guards.

In an effort to avoid this adverse consequence to his full-time guards, Umbarger contacted FPS to suggest alternative solutions. He proposed using the rove guards to cover the unattended posts during the lunchbreaks. Unfortunately, FPS declined to authorize this procedure due to the possible impact on building security caused by the diversion of the rove guards from their intended functions. Umbarger's second alternative suggestion, that guards be temporarily transferred from post to post to cover lunch, was also rejected by FPS for the same reason.

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[9] In his testimony, Umbarger was unable to pinpoint the date on which he received final notification of the implementation of the reduction in staff. He testified that it was "probably a few days or—within a week" of the time that the decision had been made. (Tr. 136.) Documentary evidence establishes the precise date as September 20. Thus, in an email written by Umbarger to Snowden on September 24, he reports, "I only received this final disposition on how the posts would actually be affected last Thursday." (GC Exh. 16, p. 1.) The Thursday preceding this email was September 20.

[10] As one would expect, Umbarger testified that it would not be possible to solve the problem by eliminating lunchbreaks entirely.

Faced with this dilemma, Umbarger consulted with Bogan, his superior in Detroit. He was told that the Detroit operation had resolved the identical issue by using relief guards and reducing the hours of the full-time officers. Umbarger also consulted with Snowden and a deputy contract manager in Detroit, Ky Mason.[11] Eventually, it was decided to employ the same procedure adopted in Detroit. Implementation of this solution would not cost the Company any money. It would, however, result in a loss of income for the day-shift security guards.

Union President Hopkins testified that, on September 20, he was approached by Umbarger and invited to a private meeting in the latter's office. Umbarger informed him that they were going to lose the three guard posts referenced in the June memorandum. He added that, "they're also going to lose their lunch hours, that they're going to have to sign for their lunch hours, sign in and out for their lunch hours."[12] (Tr. 49.) Hopkins testified that he responded by observing to Umbarger that, "we didn't have a chance to negotiate any of that through the union." (Tr. 49.) Hopkins reported that Umbarger responded with words to the general effect that the decision has been made by FPS and "there's nothing you could do about it."[13] (Tr. 49—50.) Hopkins testified that this was his first notification of the impact of the downsizing on the lunchbreaks. He also noted that Umbarger did not provide a specific date for the change in lunch procedure but he conceded that the change had not yet been implemented at the time of their conversation.

On the following day, Hopkins wrote a letter to Umbarger containing a formal request for negotiations between the Union and management concerning the lunchbreak issue. He cited the language in the parties' collective-bargaining agreement that required the Company to afford the Union a reasonable opportunity for such negotiations and suggested that, "a meeting is in order." (GC Exh. 5.) He observed that the topics for such negotiations could include the following items:

> "What guards/Post's will be affected?" "Are there other options?" "If not, should the positions be re-bid?" "Can the lunch times in question be absorbed by the Company?"

(GC Exh. 5.) [Quotation marks in the original.] He concluded by observing that, since "there is little time left to resolve this issue, I await eagerly, your reply." (GC Exh. 5.) Umbarger confirmed that he received this letter on that date. He was unable to remember whether he discussed the letter with Hopkins at that time. In contrast, Hopkins reported that Umbarger told him that it was "FPS' decision." (Tr. 51.)

It will be recalled that the Union's vice president, O'Brien, worked at another facility located in Lansing. He stated that he first heard about the lunchbreak issue in Battle Creek

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[11] At different points in the testimony, Deputy Contract Manager Mason's first name is given as Ky or Connie.

[12] In her brief, counsel for the General Counsel contends that the Union was not given adequate notice of the nature of the change in lunchbreak policy at any time prior to the posted general announcement of that change to all affected employees. (See, GC Br., at pp. 4—5.) As this quotation from Hopkins' testimony demonstrates, Umbarger informed him of the material terms of the change in policy during this meeting, a point well in advance of any announcement to the workforce.

[13] Hopkins was careful to stress that this was not an exact quote, but reflected the "general text" of Umbarger's assertions. (Tr. 50.)

from his own supervisor. He also testified that he received a telephone call from Hopkins informing him of the Company's plan to hire relief guards and require the regular guards "to sign out every time they went to lunch." (Tr. 178.) According to O'Brien, Hopkins then asked him "to make some contact with Captain Umbarger" regarding the issue. (Tr. 178.) By contrast, Hopkins testified that he never discussed the lunch matter with O'Brien until after O'Brien had already spoken to Umbarger.

The conflict between the accounts of O'Brien and Hopkins about whether Hopkins directed O'Brien to discuss the lunch issue with Umbarger represents one of the relatively few credibility issues in this trial. I conclude that O'Brien's account is the more trustworthy. In particular, I base this on consideration of the complete context, including Hopkins' undisputed history of reluctance to act as the Union's negotiator and O'Brien's past assumption of this role. In addition, I have considered the likelihood that O'Brien would have been designated to handle the issue for the Union due to his extensive educational background and experience in labor relations. Furthermore, I find it unlikely that O'Brien would engage in an unauthorized mission with respect to the lunchbreak issue in Battle Creek given that it had no personal impact on his job in Lansing.[14] On balance, I find that, consistent with the Union's past practices, Hopkins requested that O'Brien contact Umbarger to discuss the lunchbreak issue on behalf of the Union.

Umbarger and O'Brien both testified that they did have a conversation about the lunchbreak issue. Umbarger described their discussion as "lengthy" and "in depth." (Tr. 141.) O'Brien characterized it as lasting approximately an hour and as consisting of "negotiations." (Tr. 178.) As with a number of events in this case, neither witness was able to be precise about the date of their interaction.[15] Umbarger estimated that it was "probably that week of [September] 20th through the 25th, in that arena." (Tr. 166.) O'Brien noted that it was in mid-September. Both witnesses agreed that Umbarger explained his efforts to avoid the adverse impact on the guards' compensation by proposing the use of rove guards, a solution that was rejected by FPS. O'Brien indicated that Umbarger also told him that he had suggested that guards be transferred from post to post to cover the lunchbreak, but this suggestion was also turned down.

According to O'Brien, in addition to describing his own efforts to devise a more palatable solution to the problem, Umbarger solicited input from the Union's representative. He testified as follows:

> COUNSEL: Did Mr. Umbarger ask you whether you had any other possible suggestions?
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> O'BRIEN: Yes, and I had no other suggestions.

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[14] In addition, my assessment of the demeanor and presentation of the two witnesses reinforces my conclusion. While I did not find either witness to be engaged in any intentional effort to distort his account, Hopkins struck me as a diffident informant, a presentation consistent with his self-described passive handling of the duties involved in his role as union president. On the other hand, O'Brien exhibited a sense of calm and confidence coupled with an air of objectivity when describing these events. I found O'Brien to be a generally reliable witness.

[15] In fairness to the witnesses generally, it must be observed that the trial testimony occurred a-year-and-a-half after the events at issue.

COUNSEL: And at some point, there was a formal communication from Mr. Umbarger concerning what was actually going to happen, correct?

. . . [There followed a colloquy between counsel and the witness to explain the meaning of this question.]

COUNSEL: At the conclusion of that conversation?

O'BRIEN: Yes.

COUNSEL: He said this is what I'm going to do?

O'BRIEN: No, he said this is what Knight is going to do.

(Tr. 179—180.) O'Brien emphasized that Umbarger made this definitive assertion of the Company's decision only after having first solicited alternatives from O'Brien. He informed O'Brien that the change would be implemented on October 1. Umbarger also testified that O'Brien indicated to him that he was satisfied with their discussion, observing that "he understood what I was trying to do and why I was doing it so." (Tr. 164.)

On the same day of his discussions with Umbarger, O'Brien telephoned Snowden. He testified that he began by asserting that payment for time spent at lunch constituted a past practice. He reported that Snowden readily agreed, but contended that, because the Company was now required to pay relief guards, "that kind of does away with the past practice argument." (Tr. 182.) O'Brien reported that he expressed assent to this contention, adding that, "in my experience, things like that do negate the past practice." (Tr. 193—194.) Snowden also testified that O'Brien telephoned her and advised her that he had discussed the lunchbreak issue with Umbarger. Both Snowden and O'Brien reported that O'Brien's ultimate conclusion was that he was satisfied with the Company's response to his inquiries. As Snowden put it, O'Brien told her that, "he was satisfied, he understood exactly what had happened." (Tr. 208.)

Still later on that same day, O'Brien briefed the Union's executive committee regarding his contacts with management.[16] As he described it, "I told them that I had talked to Captain Umbarger and Ms. Snowden and could see no other way around." (Tr. 184.) He also informed the committee that he was satisfied with the manner in which the negotiations had been conducted. Members of the committee responded by criticizing O'Brien's conduct, telling him that, "they didn't feel that I had negotiated hard enough and that they were going to file a grievance." (Tr. 184—185.) O'Brien replied that, "if they were going to file a grievance, they better file it immediately. But I told them that I really didn't think that they had anything to grieve." (Tr. 185.)

Umbarger testified that after his conversation with O'Brien, he proceeded to post a formal notice to the guards about the lunchbreak changes. Although that notice bears the date of September 24, Umbarger reported that he posted it on the next day. It informed the unit members that, "due to the recent loss of three post positions," there would be a change in

[16] The description of what transpired during this discussion is based on O'Brien's uncontroverted and entirely credible testimony about it. It is noteworthy that, while other members of the Union's executive committee testified in this trial, they never disputed O'Brien's account of what was said during this discussion.

lunchbreak procedures to become effective on October 1. (GC Exh. 6.) The notice explained that new guards would be hired to provide lunchbreaks for the post guards on the day shift. When taking their lunchbreak, the post guards "will sign **IN** and **OUT** of service." (GC Exh. 6.) [Emphasis in the original.] Miller, the Union's representative at the trial of this matter, testified that he understood from this language that the lunch breaks would no longer be taken during paid work time.

Four days after the posting of the formal notice regarding the new lunchbreak procedures, Umbarger initiated a conversation with Hopkins about the topic. This occurred at Hopkins' post in the Federal Center. Hopkins testified that Umbarger told him that he had "negotiated" about the matter with O'Brien and, "that everything would be status quo just as he said it was going to be, and that was that and nothing he could do about it, and basically said he's sorry, but there's nothing he can do about it." (Tr. 53.) Hopkins replied by informing Umbarger that he was upset about it, observing that "they didn't give us a chance to negotiate."[17] (Tr. 53.)

As indicated in the Company's notice to its employees, the change in lunchbreak procedure became effective on October 1. The resulting loss of wages was reflected in the paychecks issued on October 25. As has already been described, the entire matter was the source of controversy and acrimony among the members of the Union's executive committee. In consequence, O'Brien resigned his position as vice president during October. Chief Steward Miller became the new vice president on October 17. He attended training from the International Union and returned to duty at Battle Creek on October 25.

Immediately after Miller returned to duty, the Union filed a grievance regarding the lunchbreak issue. The Company denied this grievance as untimely filed.[18] The grievance continued to progress through the steps of the grievance procedure contained in the parties' CBA with the Company continuing to assert that it was both untimely and lacking in merit because, "[i]n late September 2007, Captain Umbarger met with Denny O'Brien . . . they did discuss the reduction of three posts and the lunchbreaks for the day shift workers. Vice President O'Brien indicated that he was satisfied that Knight's actions were consistent with, and not a violation of, the collective bargaining agreement." (GC Exh. 14, p. 1.)

On March 19, 2008, the Union filed the original charge in this case alleging that the change in lunchbreak procedure constituted a violation of Section 8(a)(5) of the Act. The Regional Director issued the original complaint incorporating that allegation on May 29, 2008. Finally, it should be noted that the Company continues to employ the procedures implemented on October 1. As a result, day-shift guards at the Battle Creek Federal Center no longer receive

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[17] Hopkins also asserted that this conversation represented the first that he had heard about O'Brien's discussions of the issue with management. Having already credited O'Brien's testimony that he had briefed the Union's executive committee days earlier, I reject Hopkins' recollection in this regard.

[18] The Company based this conclusion on the parties' CBA, which requires that grievances be filed within 7 working days "from the date the complaining party discovered the facts or should have discovered the facts giving rise to the grievance." (CBA, Art. VIII, Sec. D; GC Exh. 3, p. 9.) Because the Company posted its notice during the last week of September, it contends that the grievance that was filed on October 26 was untimely. The Union takes the position that the grievance was timely because it was filed within 7 days of the October 25 receipt of the first paychecks that failed to include compensation for lunchbreaks. Resolution of this dispute is not properly before me and I take no position on it.

compensation for the time spent on lunchbreaks.[19]

B. Legal Analysis

The fundamental question that must be resolved in this case is whether the Company violated its obligation under Section 8(a)(5) of the Act to bargain collectively with the Union. Section 8(d) defines that duty, in pertinent part, as the performance of the obligation to "confer in good faith with respect to wages, hours, and other terms and conditions of employment." In its leading case on the subject of unilateral changes to conditions of employment, the Supreme Court observed that the Board has authority to remedy an employer's behavior, "which is in effect a refusal to negotiate, or which directly obstructs or inhibits the actual process of discussion, or which reflects a cast of mind against reaching agreement." *NLRB v. Katz,* 369 U.S. 736, 747 (1962). The Court went on to hold that unilateral action "without prior discussion with the union does amount to a refusal to negotiate . . . and must of necessity obstruct bargaining, contrary to the congressional policy." Infra., at 747. Thus, I must assess whether the Company's course of conduct constituted a refusal to negotiate or manifested a closed state of mind against reaching an agreement with the Union.

At the time that the Company changed its policy regarding payment of wages for time spent during the lunchbreak, the parties' relationship was governed by a collective-bargaining agreement. If that agreement had addressed the issue involved here, any unilateral modification of the terms of that agreement would have constituted a violation of Section 8(d). In such circumstances, the Board has explained that the sole question is "whether the employer has altered the terms of a contract without the consent of the other party." *Bath Iron Works Corp.,* 345 NLRB 499, 501 (2005), affd. 475 F.3d 14 (1st Cir. 2007). In this case, there is no contention that the parties' collective-bargaining agreement addressed the question of whether the employer was obliged to pay unit members for time spent on lunchbreak. In her opening statement, counsel for the General Counsel conceded that the contract was "not specific as to whether or not they're paid for the [lunch] break, how long the break is, any of the details about the break."[20] (Tr. 20.) My careful review of the agreement confirms the accuracy of this statement.

Although not required by the parties' contract, it is undisputed that the Employer had a clearly-established past practice of paying unit members assigned to the day shift at Battle Creek for the time that those employees spent on their daily lunchbreaks.[21] In *Lafayette Grinding Corp.,* 337 NLRB 832 (2002), the Board summarized its views regarding the legal effect of such an established past practice. It noted that an established practice becomes an implied condition of employment premised on the presumed mutual agreement of the parties. As a result:

> It is well settled that a practice not included in a written contract can become an implied term and condition of employment by

[19] The parties have since reached agreement on a new CBA. (GC Exh. 2.) As was the case with its predecessor, the new contract does not address the lunchbreak issue. During the negotiations for the new contract, the Company made several offers to discuss the lunchbreak issue. The Union's negotiator repeatedly declined these offers, explaining that, "it's not the right place or time to discuss it, and we'll let the NLRB make that decision." (Tr. 213.)

[20] See also, GC Br., at p. 2.

[21] Indeed, the Employer continues to pay unit members for time spent on their lunchbreaks on all other shifts at Battle Creek and on all shifts at the other facilities staffed by unit members.

> mutual consent of the parties. Any unilateral change in an implied term or condition of employment violates Section 8(a)(5) and (1) of the Act. [Some internal punctuation omitted.]

337 NLRB at 832.

In *Bath Iron Works,* supra., the Board clearly defined those matters at issue when an employer is alleged to have violated its statutory duties regarding such an implied condition of employment. It held:

> In terms of principle, the "unilateral change" case does not require the General Counsel to show the existence of a contract provision; he need only show that there is an employment practice concerning a mandatory bargaining subject, and that the employer has made a significant change thereto *without bargaining.* The allegation is *a failure to bargain.* [Italics in the original.]

345 NLRB at 501.

As just indicated, at the outset it is necessary to determine whether the topic of an alleged unilateral change is a mandatory bargaining subject and whether the change imposed is a significant one. Interestingly, the annals of labor law are filled with cases involving the legal impact of unilateral changes to lunch policies.[22] The Board's precedents establish that rules about lunch and policies that grant compensation for nonwork activities are of vital interest to employees and that this interest is underscored when those rules affect their wages. See, for example, *Rangaire Co.,* 309 NLRB 1043 (1992), affd. 9 F.3d 104 (5th Cir. 1993) (cessation of past practice of granting an extra 15 minutes of paid lunch on Thanksgiving constituted an unlawful unilateral change in a mandatory subject of bargaining); *Kurdziel Iron of Wauseon, Inc.,* 327 NLRB 155, 156 (1998), enf. 208 F.3d 214 (6th Cir. 2000) (unilateral reduction of the length of the lunchbreak involved "the core of subjects to which the statutory bargaining obligation applies"); and *Verizon New York, Inc.,* 339 NLRB 30, 31 (2003), enf. 360 F.3d 206 (DC Cir. 2004) (unilateral elimination of payment for time spent donating blood was unlawful because, "the issue of whether employees will be paid while they engage in nonwork activities is a mandatory subject of bargaining").[23] Most pertinently, in *Mackie Automotive Systems,* 336 NLRB 347, 350 (2001), the Board held that, "the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally, without notice to or consultation with the Union, discontinuing its practice of paying unit employees for their lunchbreak."

From the foregoing, I readily find that the elimination of payment of wages to unit

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[22] On my own docket, I have had occasion to consider whether lunchbreak policies constitute terms and conditions of employment. In *Lakewood Engineering and Manufacturing Co.,* JD-65-04, 2004 WL 1909910 (August 24, 2004), I held that an employer violated Section 8(a)(1) of the Act by imposing discipline on employees who were engaged in the concerted activity of holding a nondisruptive protest about temporary changes to their lunch schedule. By odd coincidence, Ms. Carol also represented the General Counsel in that case.

[23] In fact, even the Supreme Court has weighed in on the importance of lunch, observing that "the availability of food during working hours and the conditions under which it is to be consumed are matters of deep concern to workers, and one need not strain to consider them to be among those 'conditions' of employment that should be subject to the mutual duty to bargain." *Ford Motor Co. v. NLRB,* 441 U.S. 488, 498 (1979).

members during their lunchbreaks was a significant and material alteration of the terms and conditions of their employment giving rise to an obligation to bargain on the part of their employer. Before considering whether the employer in this case has discharged its obligation to bargain, I will address two preliminary issues regarding the authority of the two key participants to act on behalf of their respective principals.

In its original charge, the Union asserted that the Company had not demonstrated that Umbarger possessed the authority to enter into negotiations regarding the lunchbreak issue. (GC Exh. 1(a).) If the Company's negotiator lacked authority to treat with the Union regarding the subject matter at issue, this would be a potent indicator of bad faith. For example, in *Professional Eye Care,* 289 NLRB 1376, 1392 (1988), the Board adopted a judge's determination that bad faith was established when the employer's agent was unprepared to bargain because he was, "uninformed regarding terms and conditions of Respondent's employees and had not either consulted the coowners or obtained sufficient bargaining authority." Nothing comparable occurred in this case. Umbarger was fully informed about the issue involved. He was a supervisor of the bargaining unit members whose lunchbreak was being affected and his office was located in the same building that was the situs of the issue. It is undisputed that he negotiated with FPS on behalf of the Employer regarding the change. In addition, the testimony and documentary evidence establish that he consulted with superior authorities in the company's management, including the human resource manager. I conclude that Umbarger was an active and informed agent and supervisor of the Company, possessed of appropriate authority to conduct the negotiations regarding the lunchbreak issue.

The Union has also contended that its vice president, O'Brien, lacked authorization to enter into negotiations with the Employer regarding the lunchbreak issue. Once again, the evidence is very much to the contrary. In the first instance, it is noteworthy that O'Brien possessed high office within the Union. The Board considers this to be compelling evidence of agency status. *Penn Yan Express,* 274 NLRB 449 (1985). Beyond this, the evidence regarding the particular authority of this union's vice presidents shows that the holder of that position was actually the foremost representative of the Union in its interactions with the Employer. There was a clear consensus among the witnesses for both sides that the Union's vice presidents were in the forefront of most efforts to represent the unit members. This was particularly true given the incumbent president's clear desire to stay in the background and act primarily as a figurehead.[24] I find that O'Brien clearly possessed actual authority to represent the Union in discussions with management regarding the lunchbreak issue. That authority was inherent in his role as vice president and was also specifically conferred upon him by delegation from President Hopkins. Furthermore, it is immaterial that some members of the Union's executive committee later disapproved of the manner in which O'Brien discharged his duties. As the Board has noted in another case involving the agency status of a union organizer, "a principal is liable for his agent's actions, even if the principal did not authorize or ratify the particular acts." *Electrical Workers Local 98*, 342 NLRB 740, 742 (2004), enf. 251 Fed. Appx. 101 (3d Cir. 2007).[25]

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[24] I could not help but observe the same practice during the trial proceedings in this case. Union President Hopkins participated as a witness. However, he did not represent the Union in the proceedings. That role was filled by the current vice president, Miller. It was the vice president who spoke as the Union's authoritative representative in this case.

[25] It is also clear that the Union clothed O'Brien with apparent authority. It was certainly reasonable for management to conclude that he was the agent authorized to discuss the lunchbreak issue with them. This would have been entirely consistent with his role as vice president, including the past history of his interactions with management regarding the terms

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I will now address the General Counsel's contention that the Employer's course of conduct violated the duty to bargain contained in the Act. In conducting this analysis, I wish to emphasize the phrase, "course of conduct." The General Counsel cites certain discrete behaviors by the Employer as supporting his overall conclusion that there was a breach of the bargaining obligation. I agree that, viewed in isolation, some of the Employer's actions are troubling. Where I part company with the General Counsel is in my conclusion that the ultimate consideration must be the overall assessment of the Employer's behavior made with full consideration of the complete context of these events.[26] Thus, while that behavior was certainly less than perfect, I find that it was sufficient to meet the minimum standards imposed by the statute and the Board's precedents. Because the Company provided adequate notice directly to the Union prior to implementation of the change in lunchbreak policy and engaged in discussions with the Union about that policy to the extent of soliciting suggestions from the Union, I conclude that a realistic appraisal of the totality of the circumstances presented here fails to establish that the Company's overall conduct violated Section 8(a)(5) of the Act as alleged.

The relevant events in this case began when Umbarger received final notification from FPS that the staffing of the guard posts would be reduced to the extent that coverage of those posts during lunchbreaks became a problem for the Employer.[27] For reasons already

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and conditions of employment for unit members. See my discussion of the apparent authority of union stewards as adopted by the Board in *Battle Creek Health System,* 341 NLRB 882, 892—894 (2004), and the Board's analysis of the same issue in *Tyson Fresh Meats, Inc.,* 343 NLRB 1335, 1336—1338 (2004). In another odd coincidence, I conducted the trial in *Battle Creek Health System* at the selfsame Federal Center that constitutes the workplace at issue in this case.

[26] In determining the appropriate scope of my inquiry, I have placed reliance on the Board's definitive discussions of the parameters of the analysis involving closely related topics. In *Regency Service Carts, Inc.,* 345 NLRB 671 (2005), the Board stressed the importance of gaining a perspective on the entire course of conduct of the parties when evaluating an allegation of another form of misconduct involving bad faith, that of surface bargaining. It observed that, "[i]n determining whether a party has violated its statutory obligation to bargain in good faith, the Board examines the totality of the party's conduct, both at and away from the bargaining table." 345 NLRB at 671. It added that the ultimate decision must be made, "[f]rom the context of the party's total conduct." 345 NLRB at 671. Similarly, in determining whether an impasse exists, the Board requires the factfinder to give full consideration to the "overall course of conduct." *ACF Industries, LLC,* 347 NLRB 1040, 1044 (2006). The dissent in that case also acknowledged the importance of consideration of the "surrounding context" and "all the circumstances." Ibid, at 1044, 1045. In my view, the same broad focus is required in the evaluation of an employer's asserted lack of good faith in cases involving allegedly unlawful unilateral changes. This is particularly true in this case because the General Counsel, although conceding that management engaged in discussions with the Union about the lunchbreak issue, contends that those talks were fatally marred by an unalterable intention to proceed with the original plans. Thus, the need to assess the Employer's intent is identical to what is required in surface bargaining cases.

[27] I view the fact that the elimination of paid lunchbreaks was a direct response to cutbacks mandated by FPS as a further indication of a lack of bad faith on the part of this employer. This was not a rapacious corporation seeking to implement a plan to increase its profits at the expense of its workers' paychecks. Knight gained no additional profit whatsoever from the change it made regarding lunchbreaks. Ironically, the party that pocketed the savings from the

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discussed, I have concluded that this occurred on September 20. Having received this bad news, Umbarger took steps to negotiate a solution with FPS. His proposals were designed to avoid the loss of unit members' lunch pay. Unfortunately, they were rejected for security reasons. Umbarger also conferred with other management officials and learned that the Company had resolved the same problem in Detroit by hiring temporary replacement guards and recouping the added labor costs by requiring the permanent guards to sign out during their lunch periods.

It is highly noteworthy that the uncontroverted evidence reveals that Umbarger provided formal notice to the Union of the Company's plan to eliminate lunch pay on September 20. As a Circuit Court has observed, "[n]otice, to be effective, must be given sufficiently in advance of actual implementation of a decision to allow reasonable scope for bargaining." *International Ladies' Garment Workers Union, AFL-CIO v. NLRB,* 463 F.2d 907, 919 (DC Cir. 1972) [Citation omitted.] Without doubt, it cannot be contended that there was any delay in providing such notice in this case. The Company informed the Union of the decision on the same day that it was itself given notice of the staffing reductions.

In my view, equally significant was the manner in which Umbarger chose to convey the unhappy tidings. He held a private meeting with Union President Hopkins in his office. This stands in stark and illuminating contrast to the actions of many employers whom the Board has found to have engaged in unlawful conduct. Thus, a hallmark indicator of conduct that violates Section 8(a)(5) in this area of labor law is the decision of an employer to provide notice of a change in terms and conditions of employment directly to the affected workers, bypassing their representative. In what is perhaps the most illustrative example of the impact of such a procedure, *Roll and Hold Warehouse and Distribution Corp.,* 325 NLRB 41, 42 (1997), the Board explained why such an action represented a severe form of misconduct under the Act. It noted:

> One of the purposes of initial notice to a bargaining representative of a proposed change in terms and conditions of employment is to allow the representative to consult with unit employees to decide whether to acquiesce in the change, oppose it, or propose modifications. A union's role in that process is totally undermined when it learns of the change incidentally upon notification to all employees . . . . See also *Ciba-Geigy Pharmaceuticals Div.,* [264 NLRB 1013] at 1017 ("most important factor" dictating finding that employer's announcement of change was "fait accompli" was that it was made without "special notice" in advance to the union, the union's officers "having become aware of this merely because they themselves were employees").

In its opinion enforcing the Board's decision in *Roll and Hold,* the Seventh Circuit shed additional light on the crucial importance of the manner in which notice was provided directly to the unit members without advance word being given to their chosen representative. Thus, the Court noted that it was "skeptical of the Board's fait accompli finding," but prepared to enforce the Board's order based on the Board's conclusion regarding the importance of direct notification to the employees. The Court explained,

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staff cutbacks was the American taxpayer. If ever the nature of an alleged unilateral change itself may provide insight into the existence of unlawful motivation, this is certainly not such a case.

> We find more convincing the Board's second reason for finding that no opportunity for meaningful negotiation existed here: that by presenting the plan directly to employees before notifying the Union, the Union's negotiating role was significantly undermined . . . . When an employer first presents a policy to its employees without going through the Union, the Union's role as the exclusive bargaining agent of the employees is undermined.
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> Therefore, while we do not view Roll's new attendance policy as a fait accompli, and we do not believe that the evidence strongly suggests that the employer was unwilling to negotiate in good faith had it been asked, we accept the Board's conclusion that the full blown discussions of the new policy with employees prior to notifying the Union violated Sections 8(a)(5) and (1).

NLRB v. Roll and Hold Warehouse and Distribution Corp., 162 F.3d 513, 519—520 (7th Cir. 1998). [Citations omitted.]

Just as evidence that an employer announced a change in policy directly to the unit members is powerful proof of unlawful conduct, compliance with the requirement of prior announcement to the employees' representative is strongly probative of lawful behavior. In this case, the Company gave full deference to the Union's important role as negotiating agent for its members by providing immediate and private notice directly to the Union's highest local official.

It is equally significant that the notice to Hopkins was made prior to the actual implementation of the new lunchbreak procedures. Umbarger met with Hopkins on September 20 and the new policy did not take effect until October 1. Thus, notice was provided to the Union 10 days before implementation. I have carefully considered whether this gave the Union sufficient time to exercise its prerogatives under the Act. If notice is provided at a point that is too proximate to implementation, it is evidence that the employer lacks any intention of good-faith bargaining and is merely informing the union of a fait accompli. See, for example, *Ciba-Geigy Pharmaceuticals Division,* 264 NLRB 1013, 1017 (1982), enf. 722 F.2d 1120 (3d Cir. 1983) ("To be timely, the notice must be given sufficiently in advance of actual implementation of the change to allow a reasonable opportunity to bargain.") and *Alcoa, Inc.,* 352 NLRB 1222, 1223 (2008), citing *Ciba-Geigy*.

In calculating whether the notice provided was timely, it is vital to consider the nature of the change itself. It is apparent that a complex alteration of terms and conditions of employment will require more time for a union to study, discuss with its members, and evaluate than a simple and straightforward one. In this case, the change in workplace conditions did not involve such inherently difficult subjects as health insurance, pension plans, subcontracting of work, or alterations to the work processes of bargaining unit members. Instead, the change in lunchbreak policy, while clearly adverse to the interests of the unit members, was easily understood. In addition, it is evident that there were a very limited number of options that could have been pursued when considering any counterproposals or suggestions. Although the parties have now had a full year-and-a-half to ponder the issue, nobody has proposed any solutions to the Employer's dilemma beyond those that were considered and discussed prior to implementation.

The circumstances dictated that there would be only a very narrow range of alternatives to the Company's plan. It was impossible to eliminate lunch periods. For security reasons, FPS would not authorize the temporary transfer of guards from post-to-post or from roving to stationary assignments to cover lunchbreaks. Apart from the alternative actually selected by the Company, this left only one possibility. It is interesting to note that Union President Hopkins' letter to Umbarger written on the day after he received notice of the new lunchbreak policy already contained a complete grasp of this essential reality. As he put it in the letter, the real issue that could be placed on the negotiating table was his query, "[c]an the lunch times in question be absorbed by the Company?" (GC Exh. 5.)

Given the limited nature of the change in conditions of employment and the paucity of alternative solutions, I find that the provision of notice to the Union 10 days in advance of implementation was reasonable and consistent with the statutory requirement of good faith. The situation is very similar to that presented in *Jim Walter Resources,* 289 NLRB 1441, 1142 (1988), where the Board held that notice provided in a similar time frame was lawful. As the Board explained:

> Here, the Respondent provided the Union with at least 10 days' notice of the change. The Board has on occasion found as little as 2 days' notice adequate; it has frequently found notice ranging from 4 to 8 days sufficient. Therefore, we cannot agree with the judge that 10 days did not provide a meaningful opportunity to bargain. [Footnote omitted.]

In addition to the manner of presentation and the timing of the notice to the Union, I have also considered Umbarger's choice of language. While Hopkins' recollection of the language employed by Umbarger was somewhat vague, he was of the impression that the issue was presented as something required by FPS and that nothing could be done about it. Whatever Umbarger's precise choice of words, I have no doubt that he presented the matter as having already been decided by the Company. He did nothing improper by doing so. As another administrative law judge has noted in a decision subsequently adopted by the Board:

> The Board has held that it is not unlawful for an employer to present a proposed change in employees' terms and conditions of employment as a fully developed plan. Board law requires only that, after reaching a decision concerning a mandatory subject, that the employer delay implementation of the decision until it has consulted with the employees' bargaining representative. The Act does not require the employer to delay the decision making process itself.

Bell Atlantic Corp., 336 NLRB 1076, 1088 (2001). [Citations omitted.] The Board has made the same point itself, observing that, "an employer's use of positive language in presenting its proposal does not constitute an indication that a request for bargaining would be futile."[28]

[28] In my opinion, any other approach would actually impede bargaining rather than facilitating it. If the Board required employers to present notice of changes in working conditions in vague or tentative form, unions would have difficulty in gauging appropriate responses. This is illustrated by events in this case. It will be recalled that, during the preceding June, the Company informed the unit employees that staffing was going to be reduced by FPS and that, "the post orders and duty hours are subject to change as well." (GC Exh. 4.) To me, it is not

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Mercy Hospital of Buffalo, 311 NLRB 869, 873 (1993). Because Umbarger presented notice directly to the Union and sufficiently in advance of implementation, his use of positive language was not indicative of any lack of intent to bargain about the change.

While I have found that the Employer's conduct to this point was entirely consistent with its statutory responsibilities, what occurred next is more problematic. Having received advance notice of the lunchbreak change, Hopkins immediately seized the opportunity to demand negotiations. In a letter delivered to Umbarger on September 21, he advised the Company that he was eager to negotiate as required by their contract. In addition, he made specific suggestions regarding the topics for such negotiation. The Company did not respond to Hopkins' letter at any point before O'Brien's telephone call to Umbarger to discuss the same issue.

I have already indicated that all of the witnesses shared an inability to give precise details about the events under consideration, particularly about the timing of those events. In consequence, when reconstructing the chronology and sequence of key transactions between the parties, I have placed particular reliance on the contemporaneous documentary evidence. I have resorted to that evidence in an effort to determine how much time expired between Umbarger's receipt of Hopkins' letter on September 21 and O'Brien's telephone call to him. O'Brien was only able to report that his call was made in the middle of September. Umbarger believed that he received the call sometime between September 20 and 25. Fortunately, there is an item of documentary evidence introduced by the General Counsel that sheds light on this question. It consists of an exchange of emails between Umbarger and Snowden on September 24. At 2:10 p.m. on that date, Umbarger provided Snowden with an account of his activities regarding the lunchbreak policy. He noted that Hopkins had written him to demand negotiations. He went on to explain that he had been busy working on the new procedure for lunch and had finished developing it.

At this point in his email, Umbarger makes the following key statement:

> Given that this information [from FPS] only became available to me with seven working days until it is to be implemented, I have not been able to exchange any information with the Union as of yet, however I will be informing the Union President today of what this new procedure consists of.

(GC Exh. 16, p. 1.) I readily infer from this description of his activities that Umbarger had not yet spoken to O'Brien. It is clear to me that he was focused on developing the new lunch policy and recognized that he needed to respond to Hopkins' letter. If he had already engaged in his discussion with O'Brien, he would surely have included this information in his account to Snowden. Therefore, I find that the telephone conversation between Umbarger and O'Brien took place either in the afternoon of September 24 or very shortly thereafter. This is also consistent with the timing of the Company's formal written announcement of the change addressed to its employees. While that notice indicates that it was drafted by Umbarger on September 24, he testified that he posted it on the following day.

From this chronology, it follows that, although Umbarger clearly recognized his need to respond to Hopkins' letter, he did not do so during the 3-day period between his receipt of the

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surprising that the Union never responded. The notification provided in that language simply lacked the degree of specificity to allow for the formulation of a response.

letter and his discussion with O'Brien. Umbarger's email provides useful insight into his motivation and thought process relating to his failure to respond to Hopkins during that period. He intended to complete the development of the new policy prior to formulating that response. I have no doubt that it would have been wise for Umbarger to convey his thinking to Hopkins. For example, he could have written a note to Hopkins explaining that he planned to finish developing the details of the new policy before scheduling a meeting. It would have been even better if he had taken the opportunity to propose a specific date for their later discussion consistent with his need for some additional time to complete those arrangements. His failure to do these things could certainly have given rise to a subjective perception by Hopkins that the Union's demand for bargaining was being ignored.

While Umbarger's failure to respond to Hopkins' letter for 3 days is evidence that supports the General Counsel's view of the case, I do not find it dispositive. In other words, taken in context, it is not probative of a conclusion that the Company lacked a good-faith intent to comply with its duty to bargain with the Union. There are two compelling reasons to come to this result. First, Umbarger's email to Snowden clearly recognizes his duty to respond to Hopkins. Indeed, he tells Snowden that he intends to speak with Hopkins, "today." (GC Exh. 16, p. 1.) Second, Umbarger's subsequent actions belie any conclusion that he was hostile to negotiations or uninterested in exploring the Union's reaction to the lunchbreak changes. When contacted by O'Brien he engaged in a full discussion of the issue, explaining the unsuccessful steps he had taken to avoid the adverse impact on the unit members and actively soliciting suggestions from the Union. Thus, when viewed in context, Umbarger's failure to respond to Hopkins within the 3-day period prior to his discussion with O'Brien does not serve to justify a finding that the Company violated its bargaining obligations under the Act.

The key events in this case culminated with the telephone conversation between Umbarger and O'Brien. Both participants in that conversation testified about its contents. Their testimony was entirely consistent and credible.[29] It revealed that they spent an hour discussing the narrow issue presented. The limited range of alternatives was explored. Of crucial significance, O'Brien testified that Umbarger specifically asked him for any suggestions. Not surprisingly, O'Brien was unable to offer anything new in reply. It was only after hearing this response that Umbarger told O'Brien that the new policy would begin on October 1. The conversation ended with O'Brien's indicating to Umbarger that he was satisfied with the course of their discussion. Immediately thereafter, a similar conversation took place between O'Brien and Snowden. It was evident from the accounts of those two witnesses that O'Brien made an effort to discover from Snowden whether there was any possibility of movement in the Company's position at the highest corporate level in Maryland. When he saw that this was not going to happen, he also informed her that he was satisfied with the information he had received during his discussions with the two managers.

[29] In particular, it is noteworthy that there is nothing in either the record or in the demeanor of O'Brien as a witness to suggest that he was altering his account of the events out of any improper motive. While his account aided his employer's case, there was nothing about his manner that suggested an obsequious desire to curry favor with that employer. It is also true that his account could be viewed as some sort of retribution against the Union's executive committee resulting from their criticism of his negotiating efforts. Again, I did not perceive this to be the case. While O'Brien may have felt defensive about his lack of success in obtaining any concessions, I did not observe anything to indicate that it would have caused him to engage in such a flagrant form of misconduct as that which would be involved in intentionally distorting his sworn testimony.

As the Board recently stated in *Alcoa, Inc.,* supra, at 1223, an employer has no duty to offer "substantive concessions; its duty was merely to give the Union adequate notice and an opportunity to bargain."[30] Having examined the contents of the conversations that O'Brien had with both Umbarger and Snowden, I conclude that the Company did provide a meaningful opportunity to bargain. It listened to the Union's concerns, explained the reasoning behind its own position, and solicited alternative suggestions. In so doing, it complied with the law. Of course, I recognize that the Company never budged from its original stance. Clearly, management felt strongly about the issue. This was illustrated in Snowden's rather vehement response to Umbarger's email of September 24. As she put it, "KPS is not in the business of giving away money." (GC Exh. 16, p. 1.)

Counsel for the General Counsel perceives something cynical and suspicious in the fact that the Employer chose not to make any accommodation to the Union's desire for its members to continue to receive paid lunchbreaks. She asserts that the fact that Umbarger made "no concessions, no back and forth of proposals or ideas" in his discussion with O'Brien proves that the Employer possessed bad faith underlying its negotiating tactics. (GC Br. at p. 14.) In my view, this reflects a misunderstanding of the nature of the obligations imposed on the parties by the terms of the Act.

In our system of carefully delineated administrative regulation of private economic activity, the fundamental reality as to the issue in this case is that an employer must bargain in good faith but, having done so, it is not under any legal obligation to alter its ultimate decision. As the Fifth Circuit has explained:

> It is true, of course, that an employer may make changes without the approval of the union as the bargaining agent. The union has no absolute veto power under the Act. Nor do negotiations necessarily have to exhaust themselves to the point of the so-called impasse. But there must be discussion prior to the time the change is initiated. An employer must at least inform the union of its proposed actions under circumstances which afford a reasonable opportunity for counter arguments or proposals.

NLRB v. Citizens Hotel Co., 326 F.2d 501, 505 (5th Cir. 1964). [Citation omitted.]

Much more recently, the Board has described the same limitations on its authority in a decision citing its relevant precedents. It held:

> Under Section 8(d) of the Act, an employer and its employees' representatives are mutually required to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . . but such obligation does not compel either party to agree to a proposal or require the making of a concession . . . [.] Both the employer and the union have a duty to negotiate with a sincere purpose to find a basis of agreement, but the Board cannot force an employer to make a

[30] The Board's language tracks the statutory proviso that the obligation to engage in good-faith bargaining, "does not compel either party to agree to a proposal or require the making of a concession." Sec. 8(d).

> concession on any specific issue or to adopt any particular position. [Internal quotation marks and multiple citations omitted.]

Regency Service Carts, Inc., 345 NLRB 671 (2005).

Upon careful review of the record, I conclude that the Employer in this case provided the required notice to the Union, engaged in the necessary discussion with that Union, and offered the Union the mandated opportunity to present counter arguments or proposals. Having done all of this, it discharged its legal obligations under the Act.[31] The fact that it did not choose to alter its original decision is immaterial to this inquiry.

Beyond this, there remains a final step in the analysis. In its answer to the amended complaint, the Company raised the defense of waiver.[32] The Board recognizes this affirmative defense under tightly controlled circumstances. In *Provena St. Joseph Medical Center,* 350 NLRB 808, 811 (2007), the Board provided a comprehensive justification and restatement of its standard requiring clear and unmistakable evidence to support an application of the waiver doctrine. It held:

> The clear and unmistakable waiver standard, then, requires bargaining partners to unequivocally and specifically express their mutual intention to permit unilateral employer action with respect to a particular employment term, notwithstanding the statutory duty to bargain that would otherwise apply. The standard reflects the Board's policy choice, grounded in the Act, in favor of collective bargaining concerning changes in working conditions that might precipitate labor disputes.

There can be no doubt that in his letter to Umbarger, Hopkins made an obvious assertion of the Union's right to bargain over the lunchbreak policy. Subsequently, such bargaining took place between O'Brien and Umbarger. At the conclusion of their discussion, O'Brien expressed his understanding of the Employer's position and satisfaction that the matter had been appropriately addressed between the parties.[33] He repeated similar assurances to

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[31] It was apparent that O'Brien's negotiating efforts led to bad feeling between him and other members of the Union's executive committee. It is not my place to evaluate the participants' conduct. I feel obliged, however, to observe that any realistic assessment of O'Brien's efforts must include the recognition that, in the end, the Company was not legally required to continue its practice of paying unit members during their lunchbreaks. Of course, the situation would have been entirely different if the Company had committed itself to that course by agreeing with the Union to enter into a collective-bargaining agreement containing such a provision. Absent such a contractual obligation, its only duty was to provide the Union with adequate notice and a meaningful opportunity to bargain.

[32] The Company also pled the affirmative defense of statute of limitations as authorized by Section 10(b) of the Act. It did not pursue this defense at trial or in its brief. As a result, it has abandoned it. See, *Wisconsin Bell, Inc.,* 346 NLRB 62, at fn. 8 (2005). In any event, the defense lacks merit. The Company initially announced the new lunchbreak policy on September 20 and implemented it on October 1. The initial charge was filed by the Union less than six months later on March 19, 2008.

[33] I reject counsel for the General Counsel's contention that the record does not reveal what O'Brien actually meant when he stated that he was "satisfied." (GC Br. at p. 13.) To the contrary, the testimony shows that he told Umbarger that he was satisfied with their negotiations and considered the entire matter to have been resolved. (See, tr. 142.) That uncontroverted

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Snowden at the end of his additional conversation about the issue with her.

I conclude that O'Brien's statements to Umbarger and Snowden constituted precisely the sort of clear and unmistakable waiver of any further right to bargain required under the Act. Thus, as the Board described in *Allison Corp.,* 330 NLRB 1363, 1365 (2000):[34]

> To meet the "clear and unmistakable" standard . . . it must be shown that the matter claimed to have been waived was fully discussed by the parties and that the party alleged to have waived its rights consciously yielded its interest in the matter.

This is precisely what happened between O'Brien and Umbarger and, again, between O'Brien and Snowden. In my view, the facts are legally indistinguishable from those described by the Board in *AT&T Corp.,* 337 NLRB 689, 691—693 (2002). In that case, the employer announced layoffs related to the closure of a facility in Tucson. The union's representative "spoke at length with [the employer's manager] by telephone . . . and was provided detailed information about the reasons why Tucson was selected for closure. Significantly, at the conclusion of the call, no request for further information or bargaining was made." Although the union filed an unfair labor practice charge alleging an unlawful unilateral change, the Board concluded that the union had waived further bargaining. It noted that, "a union must exercise due diligence to ensure that its demand to bargain is continuous." 337 NLRB at 693. The same reasoning applies in this case.

In sum, I conclude that the record demonstrates that the Company provided timely and adequate notice directly to the Union regarding the change in lunchbreak policy. Thereafter, it engaged in meaningful discussions with the Union's authorized representative, including the solicitation of alternative suggestions from the Union. As a consequence, the Company fulfilled its bargaining obligation under Section 8(a)(5).

In reaching this outcome, I wish to emphasize my finding that Umbarger's discussion with O'Brien represented a "meaningful" opportunity to bargain. I recognize that an employer could follow all of the procedural rules in the playbook but still be in violation of the Act if it harbored a fixed intention to proceed with its decision under all circumstances. I understand that the General Counsel's theory in this case is that the Company harbored such a "lack of intent to ever alter its predetermined course" regarding the lunchbreak policy. (GC Br. at p. 11. See also my discussion with counsel for the General Counsel at tr. 128.) I do not agree that this is a fair characterization of Umbarger's mindset. The Company's compliance with the procedural requirements for bargaining, coupled with Umbarger's own efforts to avert the loss of pay for his employees by negotiation with FPS, undercut any such implication. What the General Counsel characterizes as Umbarger's expressions as to the futility of bargaining are more likely a reflection of his recognition that, given FPS' stance, the only remaining alternatives were for the employees to absorb the loss or for their employer to do so. I find that, had O'Brien been able to propose a creative third course, Umbarger would have considered it with an open mind. Of course, in actuality, after being solicited to do just this by Umbarger, O'Brien was unable to make such a suggestion for the simple reason that no feasible third alternative existed. Given this, the Company chose to exercise its lawful right to proceed with its decision to deflect the costs of the government's new requirements onto its employees. Having complied

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and credible testimony demonstrates that he made a clear and unmistakable waiver of any further bargaining rights under the Act.

[34] The language from *Allison* has recently been cited with approval in *California Offset Printers, Inc.,* 349 NLRB 732, 734 (2007).

with its duties under the Act, it was lawful for it to do so.

Much earlier in this decision, I noted that the Board has previously considered the lawfulness of an employer's elimination of a past practice of providing paid lunchbreaks to its workers. The similarities and crucial differences between that case and the present circumstances are illustrative in divining the appropriate outcome here. Thus, in common with the instant case, the employer in *Mackie Automotive Systems*, 336 NLRB 347 (2001), was faced with a change in its customer's policy that rendered it economically disadvantageous to continue paying its employees during their lunchbreaks. Although the parties were currently engaged in collective bargaining for an initial agreement, the company unilaterally eliminated the paid lunch. It implemented this change on the same day it received notice from the customer and without any effort to "provide the Union with advance notice of and an opportunity to bargain about this change." 336 NLRB at 347. Indeed, the union only learned of the change a week after it had been implemented. At that point, the union demanded bargaining and the company flatly refused, claiming the right to impose the change unilaterally. Not surprisingly, the Board rejected this position and concluded that the company's conduct violated Section 8(a)(5).

All of this stands in illuminating contrast to what happened here. Unlike the employer in *Mackie*, this Respondent, when faced with the identical issue, gave direct, immediate, and adequate notice to the Union well in advance of implementation. Upon contact from the Union, the Employer engaged in a full discussion of the issue and solicited suggestions. Having followed this course, it met its legal obligations as set forth in *Mackie.* Finally, I further conclude that the Union's representative made a clear and unmistakable waiver of any further need for bargaining. The General Counsel has failed to meet his burden of proving that the Company engaged in any violation of the Act in this case.[35]

Conclusion of Law

The Company did not violate the Act in the manner alleged by the General Counsel in the consolidated amended complaint dated February 19, 2009, as further amended at trial.

[35] In particular, I conclude that the General Counsel failed to prove his theory of the case, that the Employer made "a final, unalterable decision before it communicated the change to the Union, and because it never had any intention of bargaining with the Union about the change, it presented the Union with a *fait accompli* and thus violated Section 8(a)(5) of the Act." (GC Br., at p. 1.)

On these findings of fact and this conclusion of law and on the entire record, I issue the following recommended[36]

ORDER

The complaint is dismissed.[37]

Dated, Washington, D.C., June 29, 2009.

Paul Buxbaum
Administrative Law Judge

[36] 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.

[37] As I have found that the Company did not violate the Act, there is no reason to address the compliance specification that was consolidated with the amended complaint in this case.