UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

ABB INC.

and Case 14-CA-29219

LOCAL 2379, UNITED AUTOMOBILE
AEROSPACE & AGRICULTURAL
IMPLEMENT WORKERS OF AMERICA

COUNSEL FOR THE GENERAL COUNSEL'S
ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS

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Counsel for the General Counsel (General Counsel), pursuant to Section 102.46(d)(1) of the Board's Rules and Regulations, files the following answering brief in response to the exceptions filed by ABB Inc. (Respondent).

STATEMENT OF THE CASE

This case was heard before Associate Chief Administrative Law Judge William N. Cates, in Jefferson City, Missouri, on June 1 and 2, 2009, upon a charge filed by Local 2379, United Automobile Aerospace & Agricultural Implement Workers of America (Union) on January 16, 2008, and an amended charge filed on April 30, 2008. The Amended Complaint and Notice of Hearing issued on February 27, 2009, and alleged that on about July 17, 2007, Respondent violated Section 8(a)(1) and (5) of the Act by unilaterally changing the job description for Code 18 Electronic Electricians. An Amendment to the Amended Complaint issued on May 27, 2009, and added an allegation that between July 17, 2007 and July 31, 2007, the Union requested that Respondent bargain over the Code 18 Electronic Electrician job description and that since that time Respondent has failed and refused to do so. (GC Exh. 1(a)–(d), (s), (t), (dd), (ee)) (Citations will be abbreviated and referred to as follows: Decision of the Administrative Law Judge as "ALJD p. LL."; Respondent's Brief in Support of Exceptions

as "R. Brf."; Transcript as "Tr."; General Counsel's exhibits as "GC Exh."; and Respondent's exhibits as "C Exh.")

On September 4, 2009, Judge Cates issued his decision in which he found that Respondent violated Section 8(a)(1) and (5) of the Act on or about July 17, 2007 by unilaterally changing the job description for Code 18 Electronic Electricians; and, on or about July 26 and August 10, 2007 by failing and refusing to bargain with the Union over the Code 18 Electronic Electrician job description. (ALJD p. 20 LL. 10-13) On September 25 and October 19, 2009, Respondent requested extensions of time in which to file exceptions which were granted until November 6, 2009. On November 6, 2009, Respondent filed exceptions to the judge's decision[1].

STATEMENT OF FACTS[2]

I. Brief Overview of Operations and Bargaining History

The Respondent, a Delaware corporation, is engaged in the manufacture and non-retail sale of electrical transformers with a facility located in Jefferson City, Missouri, the only facility involved here. (ALJD p. 2 LL. 22-28, p. 18 LL. 36-37; GC Exh. 1(s)) Respondent's workforce includes a maintenance department comprised of electricians,

[1] Section 102.114 of the Board's Rules and Regulations, as amended, sets forth that, ". . . service on all parties shall be made in the same manner as that utilized in filing the document with the Board, or in a more expeditious manner however, when filing with the Board is done by hand, the other parties shall be promptly notified of such action by telephone, followed by service of a copy in a manner designed to insure receipt by them by the close of the next business day." It is unclear what manner Respondent filed its Exceptions and Brief in Support with the Board which were due on November 6, 2009. By regular mail on November 9, 2009, General Counsel received a hard copy of Respondent's Exceptions and Brief in Support signed on November 6, 2009. Contrary to the Board's Rules and Regulations, Respondent did not serve the parties in the same manner as it filed its documents with the Board nor did Respondent telephonically notify General Counsel of Respondent's November 6, 2009 filing in addition to mailing a hard copy to the Regional Office.

[2] Respondent's Brief in Support of its Exceptions contains only a partial rendition of the facts compared to those set forth by the judge and General Counsel.

mechanical technicians, and tool and die employees. The maintenance employees are classified into various job codes with higher code numbers indicating a higher degree of technical difficulty. In the late 1990's, the Respondent changed the electrician codes of employees who had been Code 15 and Code 17 electricians to Code 16 and Code 18, respectively. The classification at issue here is the Code 18 Electronic Electricians. (Tr. 75)

On May 7, 1998, the Union was certified as the exclusive collective-bargaining representative of a unit of production and maintenance employees. (ALJD p. 3 LL. 1-10; GC Exh. 1(s)) Negotiations for an initial contract started in 1998 and concluded with the parties reaching an agreement effective February 1, 1999 through January 31, 2002. (ALJD p. 12 LL. 8-10; Tr. 31, 63-64, 79-80; GC Exh. 2) Starting in early January 2002, the parties attempted to bargain a successor agreement, which failed. On February 1, 2004, the Respondent declared the parties were at impasse and implemented their last, best, and final offer entitled the Terms and Conditions of Employment for Union-Represented Employees. (Tr. 35, 66; GC Exh. 3) The parties returned to the bargaining table in late 2006 and finally reached agreement on the current contract which is effective February 1, 2008 through January 31, 2012. (ALJD p. 3 LL. 1-10, p. 14 LL. 40-43; Tr. 42; GC Exh. 4)

II. Discussion of Job Descriptions During Negotiations

Negotiations for the initial contract between the parties began after certification of the Union in May 1998. In the fall of 1998, during negotiations, the Union's chief spokesperson, International Representative Don Burgess, requested that Respondent provide the Union with a copy of all of its current job descriptions. (ALJD p. 12 LL. 8-9; Tr. 65, 80) The Respondent provided the Union with a packet of approximately 80 job descriptions, including a job description for the Code 18 Electronic Electrician dated June 15, 1995, and signed by Respondent's Human Resource Representative R. L.

Pickering and Manufacturing Manager R. Woods on August 14, 1997[3], here referred to as the "95 job description". (ALJD p. 12 LL. 10-12; Tr. 100, 148; GC Exh. 9) Burgess requested that the Union bargaining committee, comprised of employees Tom Zewe, James Rice, Larry Barr, Dennis Bax, Rocky Loucks, and Steve Rockers, review the packet of job descriptions to see if they accurately reflected the duties performed by employees. Upon completing the review and deeming them accurate, Burgess told the Respondent's bargaining committee, comprised of Human Resources Manager Stephen Buckley (the Respondent's chief spokesperson), Labor Relations Manager Susan McAdams, and Managers Roger Stegeman, John Cirrito, and Rick Woods, that the Union accepted the job descriptions as accurate and that the Union felt the parties' time would be better spent negotiating other issues. Buckley agreed that the job descriptions were negotiable and the Union could bargain over them at another time. (ALJD p. 10 LL. 38-40, p. 12 LL. 17-18; Tr. 65-66, 80, 92, 153-154) Burgess did not tell the Respondent's committee that he was waiving the Union's right to bargain over job descriptions in the future. (ALJD p. 12 LL. 15-16; Tr. 66, 80) The parties reached agreement for their initial contract which was effective February 1, 1999 through January 31, 2002. The contract did not contain language regarding job descriptions. (ALJD p. 3 LL. 5-6; GC Exh. 2; C Exh. 2)

Negotiations for a successor agreement began in early 2002. The Union's chief spokesperson, Don Burgess, had retired and was replaced by International Representative Matt Snell. The Union bargaining committee also changed and was comprised of employees Richard Jorgensen, Tom Zewe, Steve Rockers, and Bruce Bax. The Respondent's spokesperson Buckley remained the same and McAdams also remained on the Respondent's bargaining committee. (Tr. 66-67, 247) At the bargaining

[3] The AJLD at p. 10 LL. 30 erroneously reads that the 1995 Code 18 Electronic Electrician job description was signed on August 14, 1999 rather than on August 14, 1997. (GC Exh. 9)

table on January 16, 2002, Snell submitted six written information requests to the Respondent. (GC Exh. 6(a)–(f)) The parties discussed the Union's information requests. When Snell progressed to the information request referred to here as GC Exh. 6(a) at page 3, item 2, which requested, "Provide a copy of the job descriptions and codes for jobs in the plant as proposed by the company on January 15, 2002," Snell advised Buckley that the Union had a book of job descriptions previously provided by the Respondent in the first negotiations and asked if there were any changes. Respondent's spokesperson Buckley answered that there had been no changes to the job descriptions and they remained the same. (ALJD p. 14 LL. 13-15; Tr. 38-39, 68, 98; GC Exh. 7(a)-(b)) Buckley noted on the January 16, 2002 information request letter from Snell that the job descriptions had already been provided to the Union and that employee Tom Zewe confirmed the job descriptions were in the Union hall. (ALJD p. 14 LL. 18-20; Tr. 70, 98; C Exh. 1) Throughout the remainder of negotiations during 2002 through early 2004, the job descriptions were not discussed and were not part of the Respondent's February 1, 2004 implemented Terms and Conditions of Employment for Union Represented Employees. (ALJD p. 14 LL. 22-27; Tr. 40, 42, 66; GC Exh. 3)

The parties next convened for negotiations in January 2006, which resulted in an agreement effective February 1, 2008 through January 31, 2012 being reached. (GC Exh. 4) The issue of job descriptions was not discussed by the parties during these negotiations. (ALJD p. 14 LL. 40-43; Tr. 42, 68)

III. March 2005 Plant Visit by Union International Representative

In March 2005, the Respondent was contacted by Union International Representative John Morris about an intended visit to Respondent's facility to observe maintenance employees' job duties and to review job descriptions as part of the International Union's journeyman program. In preparation for the visit, Union Bargaining Chairperson Richard Jorgensen requested that the Respondent comprise a letter setting

forth the name, social security number, job title, hire date, and dates of employment in the job position for each of the maintenance department employees including Code 18 Electronic Electricians. The Respondent provided Jorgensen with these letters which Jorgensen passed on to Morris along with the job descriptions provided to the Union during negotiations in 1998, which the Union had on file. (ALJD p. 14 LL. 29-38; Tr. 110-114, 188-195)

On March 10, 2005, Morris, accompanied by Jorgensen, met with Human Resources Manager Buckley and Labor Relations Manager Susan McAdams in the Human Resources office. Morris explained his purpose was to tour the plant, observe employees, and review job descriptions. Morris indicated to Buckley and McAdams, by raising a folder of documents that he had in his hand, that he had the job descriptions of the maintenance employees. Neither Buckley nor McAdams reviewed the job descriptions provided to Morris by Jorgensen. (ALJD p. 14, LL. 29-38; Tr. 110-114, 150, 189-195, 251-253)

IV. The 1999 Code 18 Electronic Electrician Job Description

On July 16, 2007, Respondent's then Manufacturing Supervisor Eric Mercer called employee Code 18 Electronic Electrician Phillip Porter into a meeting with Project Engineer Phillip Schieffer. (All dates hereafter are in 2007 unless otherwise specified.) Schieffer described an automated transfer cart project Respondent wanted designed and installed. Mercer told Porter that he would be assigned the responsibility for designing and installing the automated transfer cart. Porter objected to the assignment, stating that it was outside the scope of his job description and raising safety concerns. Mercer promised he would investigate Porter's objections that the assignment was outside the scope of his job description and ended the meeting. (ALJD p. 14 LL. 45-46, p. 15 LL. 1-10; Tr. 224-225, 232)

Mercer then sought out his supervisor, Maintenance Manager Mike Hoffman, and questioned whether the assignment he had given to Porter was within Porter's job description. Hoffman produced for Mercer an unsigned job description dated April 1999 for Code 18 Electronic Electricians, here referred to as the "99 job description", and highlighted in yellow item 11 which read, "Design and fabricate electronic controls, etc. . . ." Hoffman explained that this language addressed the assignment given to Porter. Mercer took the highlighted 99 job description. (ALJD p. 15 LL. 6-10; Tr. 207-208, 224-228, 232-233)

The next day, July 17, Mercer called Porter into another meeting but without Project Engineer Schieffer. Mercer showed Porter the 99 job description and told him the assignment was in the scope of Porter's duties. Porter reviewed the 99 job description and noted that he was familiar with it, as he had helped write it as part of a pay-for-skills policy that had never been implemented, and returned it to Mercer. Porter maintained that the job was outside the scope of his job description and Mercer said they would have to proceed to the next step. Porter requested a shop steward which Mercer agreed to arrange. (ALJD p. 15 LL. 12-17; Tr. 209, 228-229)

Shortly thereafter, on July 17, Mercer contacted Maintenance Manager Hoffman and advised that Porter still would not accept the assignment and had asked for a shop steward. Hoffman contacted Porter's steward, James Rice, who met with Hoffman and Mercer in Hoffman's office. The task assigned to Porter was described to Rice, who argued that projects such as the one being assigned to Porter were always done on a voluntary basis and that Porter should not be required to do the assignment. Mercer then showed Rice the highlighted 99 job description, asserting that the highlighted portion covered the project assigned to Porter. Rice told Mercer and Hoffman that he had seen the job description before. Rice had seen the 99 job description during the period of time when he was a Code 18 Electronic Electrician from 2003 until about mid

2006. While in his supervisor Dave Lansford's office, Rice had seen the 99 job description on Lansford's desk and reviewed it. Rice observed that the 99 job description was unsigned and assumed it was not in effect and was something being worked on by the Respondent. (ALJD p. 15 LL. 22-25; Tr. 77-78) Rice told Hoffman and Mercer that he thought Porter could help with the job they had assigned him and that he would advise Porter that it was in his interest to help out on the job. Rice then took the highlighted job description with him. (ALJD p. 15 LL. 26-34; Tr. 86-87, 209-210, 214-218, 229-230, 232)

After meeting with Rice, Hoffman and Mercer called Porter into Hoffman's office and asked Porter if he would do the assigned job. Porter continued to refuse to do the assigned job and he was escorted by Mercer to a human resources office. Hoffman then contacted Rice who joined him, Mercer, and Porter. The 99 job description was not discussed in this last meeting on July 17 but Porter insisted the project was outside the scope of his job duties and Hoffman suspended him indefinitely pending an investigation. (ALJD p. 15, LL. 12-17; Tr. 210, 213-214)

After Porter was escorted out of the facility, Rice contacted Union Bargaining Chairperson Jorgensen and told him of Porter's suspension. (Tr. 78-79) On July 18, during a prescheduled step 3 grievance meeting over other unrelated pending grievances, Jorgensen and then Union International Representative R. D. Snow, who had replaced retiring International Representative Matt Snell, met with then Human Resources Manager Matt Boyle and asked about the status of Porter's suspension. Boyle advised the Respondent was still investigating and had not reached a decision on Porter's job status. (Tr. 45-46, 238) Jorgensen met with Boyle again on July 19 but the Respondent still had not made a decision about Porter's status. (ALJD p. 15 LL. 36-45; Tr. 46)

V. Union Requests to Bargain Over 99 Job Description

On July 26, 2007, Union Bargaining Chairperson Jorgensen and Shop Steward Rice met with Human Resources Manager Boyle and Labor Relations Manager Susan McAdams to discuss employee Porter's status. Boyle proposed that Porter take retirement or face termination. Jorgensen gave Boyle a copy of the 95 job description that the Union had in their files and the highlighted 99 job description he was given by Rice. Jorgensen asked Boyle which job description the Respondent was relying on and Boyle and McAdams said the 99 job description. Jorgensen then stated that if they were relying on the 99 job description then the Union was requesting to bargain over it. Neither Boyle nor McAdams responded to Jorgensen's request. (ALJD p. 16 LL. 1-10; Tr. 46-48, 59, 81-82, 238-239, 241, 243-244; GC Exhs. 8 and 9)

Jorgensen met with Boyle again on August 2 and August 7, to exchange proposals on Porter's employment status. Jorgensen rejected the Respondent's proposal that Porter take retirement and Boyle rejected the Union's proposal that Porter receive wages for 2 years. On August 10, Jorgensen met with Boyle and McAdams and again refused Respondent's offer to let Porter retire. Boyle then advised that Respondent had decided to terminate Porter. Jorgensen again asked if the Respondent's position was that the 99 job description applied to the assignment of Porter to the transfer cart project and Boyle said that was the Respondent's position. Jorgensen then requested that Respondent bargain over the 99 job description. Neither Boyle nor McAdams responded to Jorgensen's request. (ALJD p. 16 LL. 12-26; Tr. 49-50, 240, 242-243)

Later on August 10, the Respondent sent the Union a termination letter for Porter. On August 14, the Union filed a grievance over Porter's August 10 termination. The grievance is still pending at step 3. (ALJD p. 7 LL. 5-6; Tr. 50-51, 243; GC Exhs. 10-11)

RESPONDENT'S EXCEPTIONS[4]

I. The ALJ's Decision Allowing the General Counsel to File the Amendment to the Amended Complaint was Proper and Not Prejudicial to Respondent, Exceptions 1-6 (R. Brf. 8)

At hearing, Respondent moved to strike or in the alternative to dismiss the General Counsel's May 27, 2009 Amendment to the Amended Complaint (Amendment) which added one allegation to the February 27, 2009 amended complaint - between July 17 and July 31, 2007, the exact date being unknown to the Regional Director, the Union orally requested that Respondent bargain over the Code 18 Electronic Electrician job description. (GC Exhs. 1(s) and 1(dd)) In his Decision, the judge found that the Union had made two oral requests of Respondent, on July 26 and August 10, 2007, to bargain over the Code 18 Electronic Electrician job descriptions and that the Respondent had refused to do so. (ALJD p. 18 LL. 42-45) At hearing, and in its Exceptions, Respondent argues that the Amendment was untimely made, prejudicial, and not closely related to the allegations set forth in the Amended Complaint. (R. Brf. 8) The judge denied the Respondent's motion at hearing and in the ALJD. (ALJD p. 18 LL. 13-15; Tr. 13-15)

A. The Amendment Imposed No Prejudice on Respondent (R. Brf. 9)

Respondent contends the judge erred in denying its motion to strike or dismiss because the Amendment breached the General Counsel's October 2008 agreement with Respondent not to expand the original complaint allegations and Respondent suffered as a result of that breach because, absent that agreement, Respondent would not have agreed to General Counsel's request for a postponement of the scheduled October 21, 2008 hearing date. (R. Brf. 9) At hearing, the judge specifically addressed Respondent's

[4] For ease of understanding and reading, General Counsel has formatted her answering brief to Respondent's Exceptions by addressing Respondent's Exceptions in the same order as Respondent sets forth in its Brief.

argument holding that, if such an agreement had been entered into, the Respondent relied to its detriment and that agreement would not serve as valid grounds to dismiss allegations of a complaint, stating, "The case turns on the allegations of the facts and the defenses." (Tr. 13) The judge further pointed out that if such conduct as Respondent alleged occurred it should be addressed through other avenues and not through dismissal of the complaint. (Tr. 13)

First, as to Respondent's argument that it was prejudiced by relying on the General Counsel's agreement because it otherwise would have objected to the postponement request, the request was upon the Regional Director's own motion; and, absent Respondent's agreement to the postponement, the request would have been forwarded to the Division of Judges for ruling. Secondly, a comparison of the original complaint and the amended complaint show that, rather than an intention to expand the complaint allegations, the purpose of the October 8, 2008 postponement request was to reduce the allegations by deleting a remedy for discharged employee Porter. Certainly, Respondent did not find a reduction in the complaint allegations to be prejudicial. (GC Exhs. 1(e) and 1(s)) Moreover, Respondent's counsel, a former General Counsel of the Agency, is well aware that Counsel for the General Counsel would not have the authority to enter into a blanket, vague agreement that the complaint would *never* be expanded as this would preclude amending the amended complaint in the event the Charging Party wanted to file a new charge alleging that the Respondent had engaged in wholly new activities prior to the opening of the hearing in this matter.

In *Folsom Ready Mix, Inc.,* 338 NLRB 1172 (2003), the Board upheld the judge's granting of the General Counsel's motion to amend the complaint where Respondent was notified 4 days prior to the hearing that she intended to amend the complaint. Rule 102.17 of the Board's Rules and Regulations, as amended, allows for the amendment of a complaint, before, during, or after a hearing upon such terms as may be deemed just.

Whether it is just to grant a motion to amend a complaint depends on whether the new allegations are closely related to the allegations of the complaint (see *Payless Drug Stores,* 313 NLRB 1220, 1221 (1994)), and whether the amendments are so late that the Respondent will be prejudiced by them (see *New York Post,* 283 NLRB 430, 431 (1987)). Here, the Amendment to Amended Complaint issued on May 27, 2009, 4 days prior to the June 1, 2009 hearing date. Notably, Respondent did not seek a postponement of the June 1 hearing.

Respondent further asserts that because of the late filing of the Amendment, it was unable to prepare a defense to the new allegation because it was vague as to the date of the request to bargain and the name of the requester. (R. Brf. 9) It is well settled that the Board may find and remedy a violation even in the absence of a specified allegation in the complaint if the issue is closely connected to the subject matter of the complaint and has been fully litigated. See, *Pergament United Sales, Inc.,* 296 NLRB 333, 334 (1989); *Timken Co.,* 236 NLRB 757 (1978), enf. denied on other grounds 652 F.2d 610 (6th Cir. 1981); *Crown Zellerbach Corp.,* 225 NLRB 911, 912 (1976). The Amendment pled that the Union's request to bargain occurred between July 17 and July 31, 2007, which was the same time period in the Complaint and Amended Complaint as alleged that the unilateral change in the Code 18 Electronic Electrician job description occurred. The Respondent had ample opportunity and knowledge to discern the approximate date of the Union's request to bargain and the name of the Union official who requested bargaining since the factual circumstances and individuals involved were the same as those of allegations previously pled in the Amended Complaint.

Furthermore, the General Counsel, in her opening statement, set out the specific dates the Union requested bargaining and the name of the Union official who made the request and to whom he made the request. In her case in chief, General Counsel

presented the Union president, Richard Jorgensen, who testified that he made requests to bargain over the unilateral change to the Code 18 Electronic Electrician job description on July 26, 2007 to Human Resources Manager Matt Boyle, which testimony was corroborated by shop steward James Rice. (ALJD p. 16 LL. 1-10; Tr. 46-47, 82) Jorgensen further testified that on August 10, 2007 he again requested of Boyle and Labor Relations Manager McAdams to bargain over the unilateral change in the Code 18 Electronic Electrician job description. (Tr. 49-50) Based on the opening statement and witnesses presented in the General Counsel's case in chief, Respondent had adequate notice of the time frame and the players involved in the Amendment. In Respondent's case, both Boyle and McAdams were called as witnesses; however, Respondent only questioned Boyle about the Union's requests to bargain. McAdams was not questioned about Jorgensen's August 10, 2007 request to bargain over the job description, even though Boyle admitted that he and McAdams together met with Jorgensen on August 10, 2007. (Tr. 242) Also, McAdams, who served as the Respondent's representative at counsel table throughout the hearing, was present during Jorgensen's testimony. (Tr. 20-21) The failure to question one's own witness about a significant matter cannot be attributed to mistake or omission, and an adverse inference is warranted. *Electrical South, Inc.,* 327 NLRB 270, 284 (1998), citing *Advanced Installations,* 257 NLRB 845, 849 (1981), enfd. 698 F.2d 1231 (9th Cir. 1982). Clearly, Respondent had the opportunity to fully litigate the new allegation as all the witnesses were present at the hearing; and thus Respondent was not prejudiced or denied due process by the judge allowing the Amendment.

B. The Amendment's New Allegation is Closely Related to the Original Amended Complaint Allegations (R. Brf. 11)

Respondent asserts that the new allegation in the Amendment is not closely related to the original Amended Complaint's allegation. (R. Brf. 11) With respect to this assertion by Respondent, the judge held at hearing, and affirmed in his decision, that:

> Bargaining over the changes to the Code 18 Electronic Electrician job description flows out of and is inextricably intertwined with the unilateral change of the job description itself. Each arose from the same factual circumstances and are part of the continuing sequence of events. The bargaining request issue is sufficiently grounded in the original timely file[d] charge such as to support the complaint allegations related to the bargaining requests. The mere fact the Government waited until a few days before trial to amend the amended complaint to include the bargaining request in no way warrants a different conclusion. (ALJD p. 18 LL. 11-17)

The Board in *Redd-I, Inc.,* 290 NLRB 1115 (1988), held that unfair labor practice allegations that are otherwise time-barred by the 6-month limitations period in Section 10(b) of the Act may be litigated if they are legally and factually "closely related" to allegations of a prior timely filed charge. The Board established a three-part test for this determination: 1) the otherwise untimely allegations must involve the same legal theory as the allegations in the timely charge; 2) the otherwise untimely allegations must arise from the same factual situation or sequence of events as the allegations in the timely charge; and 3) the defenses raised to both the untimely and untimely charged allegations may, but need not be, the same or similar. The third element of the test was not a mandatory aspect of the test. Id.

In *Carney Hospital,* 350 NLRB 627, 630 (2007), the Board set forth a new guideline with respect to the second prong of the *Redd-I* test, holding that where the two sets of allegations demonstrate similar conduct, usually during the same time period with a similar object, or there is a causal nexus between the allegations and they are part of a chain or progression of event, or they are part of an overall plan to undermine union activity, we will find that the second prong of *Redd-I* has been satisfied. In *Carney*

Hospital, the timely filed charge alleged a Section 8(a)(3) discriminatory suspension of an employee who supported a union during an organizing campaign. The Union twice amended the original charge, 10 months and 12 months later, alleging Section 8(a)(1) conduct occurring during the same union organizing campaign including interrogation, threats of job loss and benefits, surveillance, implying the futility of collective bargaining, and maintenance of unlawful handbook provisions on solicitation, distribution, and disclosure of confidential information. The issue before the Board was whether a timely filed charge alleging an 8(a)(3) violation and otherwise untimely amendments to that charge alleging 8(a)(1) violations are factually "closely related" under *Redd-I* because all of the alleged conduct occurred during the same organizational campaign. In applying its newly formulated test for the second *Redd-I* prong, the *Carney Hospital* Board held that 1) the timely and untimely allegations did not involve similar conduct, 2) there was no indication that the incidents were part of a chain or progression of events, and 3) the "mere occurrence of the alleged violations during or in response to the same organizing campaign is insufficient to establish the close factual relationship required." *Carney Hospital,* supra at 631.

Here, the timely filed allegation, that the Respondent unilaterally changed the Code 18 Electronic Electrician job description on July 17, 2007, and the alleged untimely allegations, that on July 27 and August 10, 2007 the Union orally requested Respondent bargain over the July 17 unilateral change, are "closely related" under the three prong *Redd-I* test, including the more recent guideline regarding prong two as set forth in *Carney Hospital*.

First, the allegations in this case arise out of the same legal theory. Both allegations are Section 8(a)(5) violations that a) the Respondent unilaterally changed a term and condition of employment without notice and bargaining with the Union; and, b) upon notice of the change, the Union demanded bargaining and the Respondent failed

and refused to do so. Specifically, on July 17, 2007, the Respondent unilaterally changed the Code 18 Electronic Electrician job description without notice and bargaining with the Union, which change resulted in the discharge of employee Phillip Porter for refusing to comply with the unilaterally implemented job description. Next, Union President Jorgensen, after filing a grievance over Porter's discharge, met with Respondent's Human Resources Director Boyle on July 27, 2007 and discussed the existence of two job descriptions for Code 18 Electronic Electricians, the one the Union believed to be in effect dated March 1995 and signed by the Respondent's representatives in 1997 and the unsigned 1999 job description presented by Respondent to the Union as the basis for discharging Porter. Upon Boyle's clarifying to Jorgensen that the Respondent believed the 1999 job description to be in effect and the justification for discharging Porter, Jorgensen requested bargaining. The Respondent failed to respond. In a subsequent grievance meeting on August 10, 2007 between Jorgensen, Boyle, and Labor Relations Manager Susan McAdams, Jorgensen again demanded bargaining over the 1999 job description since the Respondent continued to maintain that the 1999 job description was effective. Again, Respondent failed to bargain. Clearly, the legal theories are complementary, whether a unilateral change occurred and a request to bargain over that change; and, accordingly, the first prong of the *Redd-I* test is satisfied.

Secondly, the timely and untimely filed allegations arise out of the same factual relationship as they are part of a chain or progression of events as required under *Carney Hospital,* supra. On July 16, 2007, the Respondent assigned a Code 18 Electronic Electrician Phillip Porter a project which Porter objected to as beyond the scope of the job description for his classification. The next day, July 17, 2007, Respondent presented the 1999 Code Electronic Electrician job description to Porter and the Union as the basis for Porter's assignment. Porter again refused the project and

was terminated for refusing a direct order, including performing work set forth in the job description. The Union filed a grievance and held a grievance meeting on July 27, at which time the Respondent confirmed that it was relying on the 1999 job description in discharging Porter. The Union asserted it had no knowledge of the 1999 job description and advised it believed the 1995/1997 job description which it had on file was in effect and demanded bargaining over the 1999 job description. On August 10, the parties met again to discuss Porter's discharge grievance and again the Union demanded bargaining over the implementation of the 1999 job description. Clearly, the Union's actions on July 27 and August 10, 2007, demanding bargaining over a unilateral change, are in response to the Respondent's unilateral actions on July 17, 2007, of implementing the 1999 Code 18 job description. The allegations are factually related as they comprise a progression of events; and, thus, the second prong of the *Redd-I* and the *Carney Hospital* guidelines are met.

The Respondent argues that the timely allegation, the implementation of a unilateral change without notice or bargaining with the Union, did not cause the untimely allegation that the Respondent refused to bargain. (R. Brf. 14) This argument is meritless. The Union's request to bargain is a direct result of the Respondent's implementation of the unilateral change in the job description. Respondent's failure to give notice caused the Union to make a request, which caused the Respondent to refuse to bargain. Without the former, the latter would not have occurred.

Lastly, Respondent raised defenses to the timely and amended allegations that are interrelated; that is, the Respondent asserts it provided the Union with notice of the changes to the 1999 Code 18 Electronic Electrician job description in the summer of 1999; and, thus, the Union's allegations are barred by Section 10(b) of the Act. Accordingly, while satisfying the last prong of the *Redd-I* test is not mandatory, it is met here where the defenses are similar. In addition, Respondent easily defended the

bargaining request allegation. Respondent presented Human Resources Manager Boyle who denied that Jorgensen made any oral requests to bargain. (Tr. 239-240) Clearly, this evidence was easily produced by Respondent, indicating Respondent was not prejudiced or denied due process by the filing of the Amendment as the new allegation was fully litigated. Moreover, Respondent had available another relevant witness, Labor Relations Manager Susan McAdams, who did testify and was present at counsel table throughout the proceedings, but was not questioned about the Union's August 10 oral request to bargain despite Boyle's admission that McAdams was present when Boyle met with Jorgensen on August 10, 2007. (ALJD p. 16, LL. 15-22; Tr. 242, 245-253)

In light of the above, the timely and amended allegations are clearly "closely related" as required under the Board's guidelines set forth in *Redd-I* and *Carney Hospital* and the judge's denial of Respondent's motion to strike the Amendment was proper.

II. The ALJ's Finding and Conclusion that Article III, Section 1 of the Collective-Bargaining Agreement Did Not Constitute a Waiver of the Union's Right to Bargain Over Job Descriptions was Proper Based on the Record as a Whole and Established Case Precedent, Exceptions 8-13 (R. Brf. 15)

A. The Union Did Not Clearly and Unmistakably Waive Its Right to Bargain Regarding Revisions to Job Descriptions (R. Brf. 15)

Respondent excepts to the judge's finding that the Union had not waived its right to bargain over the substance of the April 1999 Code 18 Electronic Electrician job description. (R. Brf. 15) Respondent asserts that Article III, Section 1 of the 1999-2002 collective-bargaining agreement clearly provides for management's right to "prescribe duties," which language covers Respondent's unilateral change to the Code 18 Electronic Electrician job description. (ALJD p. 18 LL. 19-32; R. Brf. 15, C Exh. 2)

In *Provena St. Joseph Medical Center,* 350 NLRB 808, 812 (2007), the Board affirmed its long held position that the purported waiver of a union's bargaining rights is

effective if and only if the relinquishment was "clear and unmistakable". The Supreme Court, agreeing with the Board, in *Metropolitan Edison Co. v. NLRB,* 460 U.S. 693, 708 (1983), held that it would "not infer from a general contractual provision that the parties intended to waive a statutorily protected right unless the undertaking is 'explicitly stated'". More succinctly, the waiver must be "clear and unmistakable". Management rights or zipper clauses will not in themselves be construed as waivers of statutory bargaining rights. See, e.g., *Hi-Tech Cable Corp.,* 309 NLRB 3, 4 (1992), enfd. 25 F.3d 1044 (5th Cir. 1994). Absent specific contract language, an employer must show that the issue was "fully discussed and consciously explored" and that the Union "consciously yielded" its interest in the matter. *Charles S. Wilson Memorial Hospital,* 331 NLRB 1529, 1530 (2000), citing *Metropolitan Edison Co*., supra. and *Georgia Power Co.,* 325 NLRB 420, 420-421 (1998), enfd. mem. 176 F.3d 494 (11th Cir. 1999).

Respondent's reliance on the holding in *United Technologies Corp.,* 287 NLRB 198 (1987) is misplaced since the facts in that case are distinguishable from the facts here. There the Board examined the language of the contract as well as bargaining history and concluded that they could not discern from history indications that the contract language in issue was intended to mean something other than that which it plainly stated. Respondent's argument here relies on looking only to the language of the contract and ignores the testimony regarding the parties' bargaining history regarding job descriptions. Ample record testimony showed that there was no evidence that the parties, at any time in any negotiations, agreed or even discussed the Union waiving its right to bargain about job descriptions. To the contrary, Respondent's own witness, former Human Resources Manager Stephen Buckley, credibly testified that during the initial negotiations in 1998, the Union advised the Respondent that it agreed that the job descriptions in effect at the time were accurate and that the Union would prefer to spend valuable time negotiating other issues. Buckley further testified that Respondent was

willing to negotiate the job negotiations at another time. (ALJD p. 10 LL. 38-40, p. 18 LL. 25-27; Tr. 92, 153-154) General Counsel witnesses Zewe and Rice both testified uncontrovertibly that at the negotiations the Union did not waive its right to bargain over job descriptions. (ALJD p. 12 LL. 15-16, p. 18 LL. 22-24; Tr. 66, 80) And, at the 2002 negotiations, the Union specifically made a request for job descriptions and was told by Buckley that no changes had been made. (ALJD p. 14, LL. 13-20, p. 18 LL. 27-29; Tr. 37-39, 66-68, 70, 96-98) Clearly, from the Union's actions of repeatedly raising the issue of job descriptions during negotiations, Buckley's own admission that the Union deferred bargaining over this subject and the undisputed testimony of Zewe and Rice, the evidence establishes the Union did not waive the right to bargain over job descriptions; Respondent cannot claim any waiver through the management rights clause alone as the bargaining history proves otherwise.

Moreover, the judge properly held, "Here the facts establish the Union did not have notice of changes to the Code 18 Electronic Electrician job description until July 17, 2007. There is simply no credible showing the Union had clear and unequivocal notice of the changes prior to the time." Based on the judge's finding, the Union did not have notice of the unilateral change to the Code 18 Electronic Electrician job description until July 17, 2009 at which time there was no collective-bargaining agreement in effect because the 1999-2002 contract including the management rights clause had expired on January 31, 2002. At the time the Union was put on notice of the unilateral change to the Code 18 job description, the parties were working under the Respondent's February 1, 2004, implemented Terms and Conditions of Employment for Union-Represented Employees. A new contract was not entered into until February 4, 2008.

It is well-settled that a waiver of the right to bargain by virtue of a management rights clause does not survive expiration of a collective-bargaining agreement. *Beverly Health & Rehabilitation Services,* 335 NLRB 635, 636 fn. 6, 663 (2001) and cases cited

therein (job descriptions are mandatory subjects of bargaining and the management rights clause of the expired contract did not survive expiration, thus employer could not rely on that clause as the means of unilaterally changing LPN job descriptions). Even if evidence had been presented that under the management rights clause the Union had waived their right to bargain over job descriptions, at the time of the unilateral change, July 17, 2007, no contract was in effect. Accordingly, Respondent cannot rely on the language of the management rights clause to justify its unilateral change as the clause was not in effect at the time of its unlawful unilateral change. *Control Services,* 303 NLRB 481, 484 (1991) (footnote omitted), enfd. 961 F.2d 1568 and 975 F.2d 1551 (3d Cir. 1992) (no waiver of right to bargain over reduction in employee work hours).

B. The ALJ's Reliance on Respondent's Willingness to Bargain Over Job Descriptions is Substantial Evidence the Union Did Not Waive Its Right to Bargain (R. Brf. 17)

Respondent also specifically excepts to the judge's reliance on evidence that the Respondent has, at times, expressed a willingness to negotiate over its job descriptions to conclude that no waiver of bargaining rights occurred. (R. Brf. 17) Respondent again relies on *United Technologies,* supra. Specifically, Respondent relies on the finding that just because the respondent in that case agreed to bargain in the past over a similar unilateral change, it was not conclusive evidence that the management rights language did not mean what it read. Notably, in that case, the one incident of bargaining that the Board refused to consider was bargaining agreed to as part of a settlement of unfair labor practice charges and not, as here, where the agreement to bargain occurred during contract negotiations.

Moreover, this argument might have merit if, as in *United Technologies*, there was evidence of only one incident of agreeing to bargain over an issue waived in the management rights clause. Here, however, there is more than one incident of the Respondent's agreement to bargain over job descriptions. First, Respondent's own

witness, Buckley, testified that the Respondent recognized the Union's right to bargain over job descriptions in the first negotiations. (ALJD p. 10 LL. 38-40, p. 12 LL. 12-18; Tr. 91) Secondly, Buckley testified that Respondent agreed to negotiate job descriptions at another time after the Union agreed at the 1998 negotiations that it was satisfied that the current descriptions were accurate and requested to spend time on other contract items. (ALJD p. 12 LL. 12-18; Tr. 92) Third, Buckley also testified that the Union made a request for copies of all job descriptions on January 17, 2002 at the beginning of the 2002 negotiations. (ALJD p. 14 LL. 10-20; Tr. 95-98) Current employee Tom Zewe credibly testified, in response to the Union's January 17, 2002 written information request that Buckley told the Union that the job descriptions the Union had at its office were the job descriptions in effect and there had been no changes. (ALJD p. 14 LL. 16-20, p. 18 LL. 27-30, Tr. 68, 70) Further, the judge credited the General Counsel's witness's testimony that the Union had never waived its right to negotiate job descriptions. (ALJD p. 12 LL. 15-16, p. 18 LL. 21-24) Finally, while not the case here, the Board has consistently held that a union that acquiesces in an employer's unilateral changes in terms and conditions of employment does not irrevocably waive its right to bargain over such changes in the future. *Midwest Power Systems, Inc.,* 323 NLRB 404 (1997), remanded on other grounds 159 F.3d 636 (D.C. Cir. 1998).

Respondent further argues that the federal court standard for determining whether a bargaining duty exists is applicable here rather than Board precedent. (R. Brf. 18) Respondent's federal court case authority is inopposite because the cases cited allege violations of Section 8(d) regarding mid-term contract modifications and not Section 8(a)(5) unilateral change allegations. In Section 8(d) cases, the sound arguable basis standard or the "covered by" analysis is appropriate. Here, however, the Amended Complaint does not allege a violation of Section 8(d) as this is not a mid-term modification issue, but rather an 8(a)(5) failure to give notice and opportunity to bargain

over a unilateral change. The judge's decision also does not allude to a Section 8(d) violation and Respondent's exceptions do not claim this case to be a Section 8(d) mid-term modification issue. Accordingly, the "covered by" analysis used in Section 8(d) cases urged by Respondent is inapplicable here.

In *Bath Marine Draftsmen's Ass'n v. NLRB,* 475 F.3d 14, 25 (1st Cir. 2007), another case relied upon by Respondent, the violation at issue was whether the respondent could merge the pension plans provided in two collective-bargaining agreements with another third plan. The terms of the preceding pension plans were specifically incorporated into the collective-bargaining agreements and were clearly bargained by the parties. Thus, where the subject at issue was "covered by" the collective-bargaining agreement, the sound arguable basis standard was appropriately applied and whether the terms of the plans allowed for the merger was a matter of contract interpretation. Here, the language the Respondent relies on for the authority to unilaterally change job descriptions is the phrase "prescribe duties" contained in the management rights clause. (C Exh. 2) It is not clear from this language that job descriptions were negotiated and incorporated into the collective-bargaining agreement. Rather to the contrary, the testimony elicited at hearing, and credited by the judge, was that the parties agreed not to bargain over job descriptions during the 1998 negotiations, but Respondent recognized the Union's right to bargain over them thereafter. (ALJD p. 12 LL. 15-18; Tr. 91-92) In the 2002 negotiations, the Union inquired as to the job descriptions and, having been told by Respondent that they had not changed, the Union decided not to bargain over them. (ALJD p. 14 LL. 13-18) And, current employee witnesses Zewe and Rice, who participated in negotiations, specifically testified that there was no discussion of the Union waiving its right to bargain over the job descriptions. (ALJD p. 12 LL. 12-16; Tr. 66, 80)

Moreover, Respondent asks the Board to conclude that the phrase "prescribe duties" equates to changing written job descriptions without notice to or bargaining with the Union. (R. Brf. 16-17) A better, more logical definition of "prescribe duties" would be that management has the right to assign duties to employees in the day-to-day operations. This is an especially logical application in light of the other rights set forth in the same sentence of the management rights clause which have to do with the day-to-day operation of the plant and direction of the work force. (C Exh. 2) No where in the management rights clause is there language regarding written job descriptions, even though Respondent admittedly relies on the written job descriptions as shown by its discharging employee Phillip Porter and by its providing the Union with numerous copies of written job descriptions, which the judge properly rejected. Accordingly, since it is clear that the authority to change the job descriptions was not negotiated in the contract, the issue is not subject to the "covered by" standard utilized by the Courts in *Bath Marine Draftsmen's Ass'n* and other cases cited by Respondent, as this is not a Section 8(d) midterm modification violation but a Section 8(a)(5) failure to bargain over a unilateral change violation.

C. The ALJ's Rejection of C Exh. 15 and 16 was Proper (R. Brf. 18)

Lastly, Respondent excepts to the judge's rejection of C Exhs. 15 and 16 relying on the footnotes in *S.H. Kress & Co.,* 212 NLRB 132 fn. 1 (1974) and *Boeing Co.,* 337 NLRB 152, 153 fn. 4 (2001). (R. Brf. 18-20) The judge rejected the Respondent's offer of C Exhs. 15 and 16, a dismissal letter of another charge and an Office of Appeals letter affirming the dismissal, holding that the documents failed to meet even the minimal standards set forth in Federal Rules of Evidence Rule 401. (Tr. 128) The General Counsel argued at hearing that the documents were irrelevant and not precedential because they were unrelated to the case before the judge and therefore should be

rejected. (Tr. 126) Counsel for the Union argued that C Exhs. 15 and 16 should be rejected because the issues involved in that case were wholly unrelated to the allegations in this case; and, the issues in that case involved changes in temporary job duties and assignments of other job classifications, not the Code 18 Electronic Electrician, and did not involve any formal written job descriptions. (Tr. 127)

Respondent asserts that in *S.H. Kress & Co.* and *Boeing Co.,* the Board did not consider prior cases for their precedential value but rather for their relevance in establishing the labor organization status of a petitioner which had been contested. Respondent's reliance on this case law is misplaced. First, both *S.H. Kress & Co.* and *Boeing Co.* are representation cases, not unfair labor practice cases; and, no legal liability was being alleged and no unfair labor practice allegations were litigated. Secondly, the holding in those cases supports the judge's rejection of C Exhs. 15 and 16 in that both cases hold that "Regional Director's decisions do not have precedential value." Lastly, Respondent asks the Board here to infer a conclusion from *Boeing Co.* that was not clearly held by the Board. Respondent contends that the Board held in *Boeing Co.* that "unreviewed" Regional Director decisions have no precedential value but because C Exh. 16 is the Office of Appeals' letter affirming C Exh. 15, the Regional Director's dismissal letter, that C Exh. 15 was reviewed and has precedential value. The Board in *Boeing Co.* offers no discussion of why a reviewed Regional Director decision would have precedential value and, as noted, *Boeing Co.* was a representation case.

However, should the Board reconsider the admission of C Exhs. 15 and 16, it is notable that 1) the charge in that case was not offered into evidence; 2) the allegations dismissed were a) the unilateral change in job <u>requirements</u>, not written job descriptions and b) the temporary assignment of job duties to employees that were within the job description of other employees, neither related to Code 18 Electronic Electricians; 3) the past practice found by the Regional Director to have existed at the time was the

assessing and changing of productivity standards to include eliminating positions and realigning work; 4) the change in job requirements had no significant impact on unit employees; and 5) the temporary assignment of duties belonging to other employees was for short periods of time when an employee from the appropriate classification was unavailable and the work needed to be performed. C Exh. 15 does not assert any conduct regarding the unilateral change to any written job descriptions or to any matter related to Code 18 Electronic Electricians. C Exh. 16, the Office of Appeals' letter affirms the Regional Director's dismissal and refers to language in the management rights clause "concerning work assignment and production levels" not to "prescribe duties." Thus, where C Exhs. 15 and 16 are wholly unrelated to the allegations in the present case, the judge properly rejected Respondent's offer of these exhibits admission into evidence.

III. The ALJ's Finding and Conclusion that the Complaint was Timely Filed is Supported by the Record and Established Board Precedent, Exceptions 7, 13-14 and 27 (R. Brf. 20)

Respondent contends that the charge and amended charge are untimely under Section 10(b) of the Act because the Union had notice as early as June 1999 that the Respondent had changed the Code 18 Electronic Electrician job description but the Union did not file this charge until January 2008. (R. Brf. 20)

A. The ALJ's Rejection of Company Exhibit 14 was Appropriate (R. Brf. 22)

Respondent first argues, at length, that the judge erred in rejecting Respondent's C Exh. 14, a packet of all the job descriptions the Respondent changed in 1999, including the Code 18 Electronic Electrician job description, which Respondent purports were provided to the Union during or just prior to contract negotiations in January 2002 (R. Brf. 22; Tr. 104) General Counsel asserts that Respondent was not prejudiced by the judge's rejection of the C Exh. 14 because Respondent was still able to present testimonial evidence as to Respondent's assertion that rejected C Exh. 14 would

establish that Respondent submitted copies of all the job descriptions it had changed in 1999 to the Union in 2002. The judge rejected the entire C Exh. 14 after the parties reviewed and agreed that the Code 18 Electronic Electrician job description included in rejected C Exh. 14 was the same as GC Exh. 8. The judge ruled that other than the Code 18 Electronic Electrician job description, he saw no other reason to admit the other unrelated job descriptions. The judge stated, "I don't believe there's any issue in this proceeding that the Company had at one time provided the Union certain job descriptions for employees at the Jefferson City, Missouri, facility. . . . I will note that the packet [rejected C Exh. 14] contains other job descriptions." (Tr. 102-103)

Moreover, Respondent's witness, former Human Resource Manager Stephen Buckley testified in response to direct examination, despite C Exh. 14 being rejected, that the exhibit was the job descriptions that were given to the Union either during or prior to the 2002 negotiations. (Tr. 104) Respondent does not assert that rejected C Exh. 14 was offered for any purpose other than to be tangible evidence to support Buckley's testimony that a packet of job descriptions was provided to the Union in 2002. Respondent's testimonial evidence provides the same evidence as would have been achieved by receipt of C Exh. 14, which would have been redundant. Respondent further erroneously argues in its exceptions that rejected C Exh. 14 would show that Respondent gave the revised 1999 job descriptions to the Union in 1999; however, Buckley's testimony regarding rejected C Exh. 14 refers to his providing the documents to the Union prior to or during negotiations in 2002, not in 1999. Regardless of the receipt or rejection of C. Exh. 14, the judge properly discredited Buckley's testimony that he provided the Union with a copy of the 1999 job descriptions during 2002 negotiations. Rather, the judge properly credited General Counsel's witnesses Zewe and Jorgensen that it first learned of the 1999 Code 18 Electronic Electrician job description on July 17, 2007. (ALJD p. 14 LL. 18-20)

At footnote 3, on page 23, of Respondent's Brief in Support of its Exceptions, Respondent mischaracterizes the evidence the judge relied upon for concluding that the Respondent did not provide the Union with copies of the 1999 job descriptions in the summer of 1999. (R. Brf. 23) Respondent finds error with the judge's conclusion that the Union would not ask for copies of job descriptions in the summer of 1999 because the Union was not aware of the April 1999 changes to the job descriptions. Respondent argues that since the Union requested copies of job descriptions in preparation for the 2002 negotiations even though it supposedly did not have notice of any changes that it is just as reasonable that the Union would have requested them in the summer of 1999. This argument fails because the Union's January 16, 2002 request was in the context of bargaining for a new contract and was part of a larger encompassing information request made in preparation for contract negotiations. Similarly, in the 1998 negotiations, the Union requested all the job descriptions in preparation for bargaining so clearly this was a routine practice of the Union during contract negotiations. The alleged request in the summer of 1999 was not in the context of contract negotiations. Respondent compares apples and oranges, requesting job descriptions in preparation for negotiations versus requesting job descriptions with no apparent need for the information or knowledge of any changes.

With respect to the judge's conclusion that the Union would not make an unprovoked request for job descriptions in the summer of 1999, in his decision the judge discredited Respondent witnesses former Hourly Employee Relations Manager Robert Pickering and former Union Chairperson Tom Shackelford's testimony that Pickering provided Shackelford with a complete copy of the revised 1999 job descriptions in the summer of 1999. (ALJD p. 12 LL. 31-44) The judge discredited Pickering because Pickering testified that he updated the Occupational Progression Channel numbers for the maintenance employees in April 1999, at the same time some of the job descriptions

were updated, but he did not testify that the Union was advised of the changes. (Tr. 163-164) Pickering illogically testified that in the summer of 1999 the Union, through Shackelford, requested copies of all job descriptions despite having no knowledge the Respondent had revised all the job descriptions in April 1999. (ALJD. p. 13 LL. 44-45, p. 14 LL. 1-4) Pickering's illogical testimony was further confounded by Shackelford's incredible testimony, which he only recalled on cross-examination, that he requested the documents because "someone" in the Union wanted them, and that he dumped the documents on a table in the Union office and took no further action, including telling the union requester that the job descriptions were available. (ALJD p. 18 LL. 9-14, 18-29; Tr. 177-180)

Respondent's argument at footnote 3 ignores the basis of the Union's January 16, 2002 written request for job descriptions compared to the lack of any basis for Shackelford's alleged summer of 1999 request for job descriptions. (R. Brf. 23) There is no evidence of any incident or notice prompting Shackelford's alleged request. And, Shackelford only recalled on cross-examination that it was he who had allegedly made a request for the job descriptions in the summer of 1999 because someone in the Union wanted them. (Tr. 182-183) However, the January 16, 2002 Union request is clearly part and parcel of a much larger encompassing information request made in preparation for contract negotiations. No contract negotiations were occurring in the summer of 1999, rather the initial contract between the parties had just been executed earlier in February 1999. Pickering admitted that the Union had not been advised of the April 1999 revisions, so there was no logical basis for Shackelford's request. Accordingly, the Respondent's argument set forth in footnote 3 is misplaced and should be rejected as the judge properly discredited Pickering and Shackelford's testimonies and instead concluded that the Union did not make a request for all the job descriptions in the summer of 1999 because it had no reason to request them as it had no knowledge

that they had been revised, unlike the Union's routine request for a copy of all job descriptions in preparation for contract negotiations in 1998 and 2000.

Finally, with respect to rejected C Exh. 14, Respondent also argues that after Respondent made an offer of proof regarding rejected C Exh. 14, because the General Counsel asked Respondent's witness Buckley one question regarding the rejected documents in C Exh. 14, the entire package of documents should be admitted. (R. Brf. 23) First, Respondent did not make an offer of proof regarding rejected C Exh. 14. (Perhaps Respondent is referring to an offer of proof it made regarding C Exhs. 3-5 which were not placed in the rejected exhibits file. (Tr. 140-144)). Secondly, as a result of Respondent's objection, General Counsel's lone question on which Respondent relies, was not completed nor was it answered by Respondent's witness Buckley. (Tr. 149) Accordingly, Respondent's argument that rejected C Exh. 14 should be admitted due to General Counsel's attempt to question Respondent's witness Buckley about the rejected exhibit is baseless.

B. The ALJ Properly Disregarded Respondent's Evidence that the Union Received Notice of the 1999 Revisions to Respondent's Job Descriptions (R. Brf. 25)

Respondent excepts to the judge discrediting Respondent's witness former Union Chairperson Tom Shackelford, now retired, and the judge's failure to credit former Hourly Employee Relations Manager Pickering's June 24, 1999 handwritten notes. (R. Brf. 25; C Exh. 9)

With respect to Shackelford, Respondent asserts that as a retired, former Union official Shackelford had no motive to testify dishonestly about receiving a packet of job descriptions from Respondent in 1999. Respondent omits, however, 1) Shackelford's admitted testimony that he had been a manager for Respondent before economic cutbacks resulted in his and other managers' demotions back into the bargaining unit; 2) that shortly after becoming the Union chairperson in 1999, the Union members sought to

have him removed from office and, after he was briefly reinstated, he resigned his Union position; and, 3) that Shackelford was less than candid about whether he had discussed his testimony with Respondent's counsel prior to the hearing, first denying any contact with any Respondent representative and then only upon redirect and attempted rehabilitation by Respondent's counsel did he admit to discussions with counsel in preparation for testifying at the hearing. (Tr. 175-176, 180-185) These omitted facts, along with Shackelford's demeanor at hearing, were the factors relied upon by the judge in discrediting Shackelford's unconvincing, illogical, and self-serving testimony. (ALJD p. 14 LL. 9-45, p. 15 LL. 1-6)

Respondent also contends that the judge was biased towards the General Counsel and/or the Union because he disregarded Respondent's witness Robert Pickering's June 24, 1999 handwritten account that Pickering delivered a complete set of Respondent's revised job description to the Union prior to June 24, 1999. (R. Brf. 25-26; C Exh. 9) First, C Exh. 9 is a request from Union shop committeeman Tom Zewe requesting copies of two specific job descriptions, Material Marshaller A and B, and not a request for a complete copy of all job descriptions. Pickering's written account does not state that a complete copy of <u>all the Respondent's job descriptions</u> were provided previously to the Union. Rather, Pickering's written account at the bottom of C Exh. 9 reads, "6/24/99 gave requested copies to Tom Z. This is the 2nd time I gave to Tom and we ran a complete copy & gave to the Union previously also. Bob Pickering." This notation can just as easily be interpreted to mean that Pickering gave a complete description of the requested Material Marshaller A and B job descriptions to the Union at a prior time. Moreover, in light of the judge's appropriate discrediting of Shackelford, as discussed above, to whom Pickering testified was the Union representative he previously gave a complete copy of job descriptions, the judge's disregarding of

Pickering's vague and ambiguous June 24, 1999 written account is proper and not evidence of bias toward the General Counsel and/or the Union.

Respondent also contends that the judge's decision was inconsistent in that the judge disregarded Pickering's written account located on the bottom of C Exh. 9 but then "relied on the absence of such a written account of Respondent delivering a complete set of revised job descriptions to the Union in September 1999 to conclude that no such delivery occurred," citing to ALJD p. 14 LL. 6-7. (R. Brf. 26; C Exh. 10). Again, Respondent attempts to mislead the Board. Respondent infers that the "absence" the judge relies on in discrediting Pickering's testimony and his June 24, 1999 written account that he had provided the Union with a complete copy of all the job descriptions is an absence of any reason why the Union would have requested a complete copy of the revised job descriptions. This is a rational conclusion by the judge in light of Pickering's own testimony during which he failed to testify that after the April 1999 revisions to the job descriptions the Respondent advised the Union of the changes. (ALJD p. 12 LL. 36-38; Tr. 160-168) Logically one would assume, as did the judge, that without notice or knowledge that Respondent had revised job descriptions in April 1999, the Union would have no cause to request copies of job descriptions as Shackelford and Pickering contend. This conclusion is further supported by the facts that just 3 months prior, in February 1999, the parties entered into their initial collective-bargaining agreement which did not include language on job descriptions (GC Exh. 2); and, that during negotiations in the fall of 1998, the parties specifically agreed the Union could request and negotiate over job descriptions at another time because the then current job descriptions were found to be accurate by the Union. (Tr. 66, 79-81, 91-92)

Further, the judge reasonably relied on another "absence" which resulted in the judge refusing to adopt one of the Respondent's unsupported assertions. (ALJD p. 14 LL. 2-8) Respondent contends that a handwritten note from Pickering at the bottom of C

Exh. 10, which is a list of job codes and titles, reading "Given to Tom Zewe 9-15-99 @ 9:00 a.m." meant that, in addition to giving Zewe C Exh. 10, that Pickering also provided Zewe at the same time with a complete copy of the complementary job descriptions. The judge did not adopt Respondent's contention, finding instead that the "absence" of a notation that Pickering provided Zewe additional documents besides C Exh. 10 relevant in light of Zewe's credited testimony that he was never provided a complete copy of the Respondent's job descriptions. (ALJD p. 13 LL. 45-46, p. 14 LL. 1-8) Clearly, the judge's conclusions were based on a logical, rational, and supported analysis of the record testimony and documentary evidence, and the judge's findings and conclusions should be affirmed.

Respondent next excepts to the judge's conclusion that the Union did not have notice on June 24, 1999 of Respondent's April 1999 change to the Code 18 Electronic Electrician job description when Union official Tom Zewe requested and received copies of job descriptions for the Material Marshaller A and B positions. (R. Brf. 26) Respondent's exception assumes facts not in evidence. Respondent relies on the Material Marshaller A and B job descriptions contained in rejected C Exh. 14 for proof that these job descriptions were dated April 1999. As described above, C Exh. 14 was rejected by the judge as irrelevant except for the Code 18 Electronic Electrician job description which the parties agreed was the same as GC Exh. 8. The Material Marshaller A and B job descriptions simply are not in the record. Additionally, C Exh. 9 was proffered to show that Union shop committeeman, Tom Zewe, a current employee, requested the job descriptions for Material Marshaller A and B on June 24, 1999, contains the above-discussed handwritten account from Pickering. This account merely reads that Pickering previously provided those job descriptions to Zewe but does not read that what Pickering provided Zewe were "April 1999" job descriptions. General Counsel witness Zewe, whose testimony was wholly credited by the judge, testified that

while he did request on June 24, 1999 copies of the Material Marshaller A and B job descriptions, he did not know that those job descriptions had been revised in April 1999 as Respondent asserted, and he did not compare the job descriptions provided by Pickering to the ones the Union had on file, which were given to the Union by Respondent during contract negotiations in the fall of 1998. (Tr. 260) Moreover, while Pickering testified that job descriptions were revised in April 1999, he did not testify that Respondent advised the Union of the April 1999 revisions; therefore, Zewe had no reason to believe the job descriptions for the Material Marshaller A and B that he was provided in June 1999 differed from those provided by the Respondent in the fall of 1998, and logically he did not compare them for changes. (Tr. 160-161, 259-260). No evidence was presented that at any time prior to July 17, 2007, did Respondent provide to the Union or advise the Union that the Code 18 Electronic Electrician job description was revised in April 1999. Respondent asks the Board to infer from Zewe's June 24, 1999 request for the Material Marshaller A and B job descriptions that the Union knew the Respondent had revised the Code 18 Electronic Electrician job descriptions. Accordingly, Respondent's exception that the judge erred is without merit where the judge properly concluded that the Union did not have notice in June 1999 of the April 1999 revisions to the Code 18 Electronic Electrician job, which is fully supported by the record.

Lastly, Respondent excepts to the judge's failure to find that the Union had prior notice of the revisions to the Code 18 Electronic Electrician job description based on Union steward James Rice's testimony that he had seen the April 1999 job description on his supervisor's desk at some point between 2003 and 2006. (R. Brf. 27) Again, Respondent attempts to mislead the Board by failing to present all of the record evidence and instead gleans only that evidence favorable to its position. Rice did testify that on July 17, 2007, when representing disciplined employee Phillip Porter, he was

shown by Manufacturing Supervisor Eric Mercer and Maintenance Supervisor Michael Hoffman the April 1999 Code 18 Electronic Electrician job description, which he had seen before on his supervisor's desk sometime between 2003 and 2006. (Tr. 77-78) Rice further testified, however, that while he had seen the April 1999 job description on his supervisor's desk, he thought it was something the Respondent was working on since it was not signed, dated, or approved by any Respondent representative; and he had not been provided a copy of it prior to the July 17, 2007 meeting with Mercer and Hoffman.

Respondent notes at footnote 6, on page 27 of its Brief in Support of its Exceptions that Rice's testimony that he did not think the Code 18 job description that he saw between 2003 and 2006 was in effect because it was not signed by a Respondent representative should be discredited because the Material Marshaller A and B job descriptions were also unsigned. Again, Respondent relies on facts not in evidence. The Material Marshaller A and B job descriptions are not part of the admitted evidence but rather are only contained in rejected exhibit C Exh. 14. At no time during the hearing were the job descriptions for the Material Marshaller A and B ever viewed by any witness including Rice, counsel or the judge, nor was any testimony elicited about the contents of those job descriptions in rejected C Exh. 14.

In addition to this testimony, Rice testified that in 2001, when he was a Code 16 Electronic Electrician, he asked his then supervisor, either Mike Hoffman or Dave Lansford, what was needed to bid into a Code 18 Electronic Electrician position and he was shown the 1995 job description, signed in 1997. (Tr. 73-74; GC Exh. 9) Respondent mischaracterizes Rice's credited testimony by asserting that Rice admitted that the Code 18 Electronic Electrician job description provided to him on July 17, 2007 was the "current job description." A fair and complete review of the transcript shows that Rice admitted that Hoffman provided Rice with the 1999 Code 18 Electronic Electrician

job description that had two to three lines highlighted which Hoffman asserted was the Respondent's basis for assigning a project to Phillip Porter. Rice testified that he agreed that the "highlighted" portion was within the current job descriptions for Code 18 Electronic Electricians. Rice did not admit that the entire 1999 Code 18 Electronic Electrician job description was in effect. (Tr. 77-79, 85-87) While there is no evidence of what lines were highlighted on the document given to Rice, a comparison of the 1995 and 1999 Code 18 Electronic Electrician job descriptions shows that many of the described duties are the same. (GC Exhs. 8 and 9)

IV. The ALJ's Credibility Findings are Supported by the Record, Exceptions 17-18, 20, 22-23, 25-26 (R. Brf. 28)

The Respondent excepts to the judge's credibility findings in which the judge wholly credits the testimony of General Counsel witnesses, current employees Tom Zewe, James Rice, and Richard Jorgensen, and discredits in whole or in part Respondent's witnesses Tom Shackelford, Robert Pickering, and Stephen Buckley. (R. Brf. 28) All three of General Counsel's witnesses testified in an honest and straightforward manner, providing candid, detailed, and lucid narratives of the events and conversations in which they participated. Their testimony was specific as to time, place, and content. All were subject to cross examination and their demeanor remained calm and their answers were straightforward, direct, and not argumentative. Nor did they alter their testimony or attempt to evade difficult questions during cross examination. Jorgensen, Zewe, and Rice's testimonies were internally consistent.

It is long-standing Board policy not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces the Board they are incorrect. *Standard Dry Wall Products,* 91 NLRB 554 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). The Supreme Court has firmly established the deference due to an administrative law judge's findings, particularly with respect to

credibility. In *Universal Camera Corp. v. NLRB,* 340 NLRB 474, 496 (1951), the Court stated:

> The "substantial evidence" standard is not modified in any way when the Board and its examiner disagree. We intend only to recognize that evidence supporting a conclusion may be less substantial when an impartial, experienced examiner who has observed the witnesses and lived with the case has drawn conclusions different from the Board's than when he had reached the same conclusion. The findings of the examiner are to be considered along with the consistency and inherent probability of testimony. The significance of his report of course, depends largely on the importance of credibility in the particular case.

In *Ewing v. NLRB,* 732 F.2d 1117 (2d Cir. 1984), in language applicable to the Board in review of an administrative law judge's credibility resolutions, the Court held,

> It is the task of trial judges to separate factual wheat from evidentiary chaff, and appellate courts must accord great deference to these determinations. The temptation to displace the trial court's judgments with our own is often strong, but the integrity of the decision-making process requires that we do so only in cases of clear error. *Fed.R.Civ.P.* 52(a). The same policies apply in the administrative context when decisions of the finder of fact are brought under review.

The Board and corps of administrative law judges repeatedly have held that testimony of current employees, which is adverse to their employer, is "given at considerable risk of economic reprisal, including loss of employment . . . and for this reason (is) not likely to be false." *Wiers International Trucks, Inc.,* 353 NLRB No. 48, slip op. 9 fn. 20 (2008), citing *Shop-Rite Supermarket,* 231 NLRB 500, 505 fn. 22 (1977). See also, *Flexsteel Industries, Inc.,* 316 NLRB 745 (1995), affd. 83 F.3d 419 (5th Cir. 1996). Notably, all three of General Counsel's witnesses, Zewe, Rice, and Jorgensen, are current employees of Respondent who have nothing to gain by testifying against Respondent or by testifying in a manner that was less than fully candid. In sum, General Counsel's witnesses should be regarded as disinterested witnesses whose testimony should be fully credited.

A. The ALJ's Discrediting Respondent's Witness Thomas Shackelford was Proper Based on His Demeanor, Evasive Testimony, Selective Memory, Lack of Full Candor and Denial of Prior Contact with Respondent's Counsel (R. Brf. 28)

Respondent excepts to the judge's discrediting of its witness Tom Shackelford's entire testimony. (R. Brf. 28) The judge held, "I am persuaded Shackelford wanted to mold and shape his testimony in a manner he perceived would help the Company without regard for being candid and telling the full and complete truth." (ALJD p. 13 LL. 38-40) The judge further held that in addition to his observation of Shackelford as he testified, there were several other factors that caused the judge to reject Shackelford's testimony: 1) his selective recollection which was clearer when lead or the answer was suggested; 2) on cross-examination he was less then fully candid when testifying to the circumstances of his tenure as a union official initially claiming it ended upon his resignation omitting, until further cross examination, that his resignation came after being removed from office by the membership, then reinstated followed by his resignation; 3) after specifically testifying he had received a copy of the Respondent's job descriptions in June 1999, his inability to recall that it was he who had allegedly requested the Respondent provide the job descriptions; and 4) lastly, and quite persuasive, he specifically denied speaking to a representative of Respondent prior to testifying despite having given a detailed recounting of a 10 year old conversation with Pickering and then only admitted he had spoken to Respondent's counsel through rehabilitation redirect examination. (ALJD p. 13 LL. 6-40)

Respondent asserts that Shackelford should be credited as there was no evidence that he should be "beholden" to the Respondent. (R. Brf. 29) Respondent relies on Shackelford's holding a Union official position in 1999 as the basis for crediting Shackelford because he surely would not have testified against the Union after having been one of its officers. Respondent fails however to point out that Shackelford was a union official who was removed from his position by the membership. While Shackelford

eventually admitted to being removed from office, he did so only after first testifying that his tenure as an official simply ended because he resigned. Only on cross-examination by Union counsel did he reluctantly provide the full background on his resignation - that he had first been removed, reinstated, and only then did he resign. Clearly, Shackelford's testimony was less than candid, omitting relevant details until pressed on cross examination. (Tr. 180, 182) Respondent also fails to highlight that Shackelford was a one-time manager for Respondent and only lost his managerial position after a reduction of several managers and return to bargaining unit positions due to the Respondent's economic decline. (Tr. 180) Clearly, Respondent's effort to cast Shackelford's testimony as credible because he should be viewed as having views more aligned with the Union than the Respondent fails in light of his evasive testimony about losing his Union position and his managerial history with Respondent.

Respondent next asserts that the judge erred in discrediting Shackelford because of his ability to recall a specific conversation that occurred 10 years prior but was unable to recall other details also occurring 10 years ago. (R. Brf. 30) Respondent points out that Shackelford was able to recall a conversation he had with former Human Resources Hourly Employee Manager Pickering because it occurred about the same time as Shackelford's birthday. Respondent argues that it is human nature not to recall other events that occurred 10 years prior but a few months later. However, Respondent fails to note that in addition to the clearly recalled conversation with Pickering occurring around Shackelford's birthday, wherein Shackelford assertedly received a packet of job descriptions, Shackelford was unable to recall that it was he who requested the job descriptions, presumably a request he also made around his birthday. (Tr. 178, 181) Clearly, Shackelford's selective recollection of events, including all of those occurring around his birthday, was a reasonable basis for the judge to discredit Shackelford's testimony.

Respondent then compares the judge's discrediting of Shackelford with his crediting of General Counsel's witness Tom Zewe. (R. Brf. 31) Respondent questions why the judge did not assume that Zewe had simply forgotten he had received the job descriptions in 1999 rather than crediting Zewe's denial that he had been given a complete packet of job descriptions. However, unlike Shackelford, the judge found Zewe's testimony credible based on his overall demeanor as well as his testimony, stating,

> When necessary to resolve conflicting testimony my findings have rested, to a degree, on witness bias established, admitted or uncontested facts, corroboration of testimony and inherent probabilities. In addition to the above considerations I was greatly impacted by impressions I formed while watching the witnesses as they testified. The impressions I gathered were based on a combination of the witnesses' mannerisms, how they spoke and their overall, "on the witness stand" bearing. I, to use a colloquial expression, "sized up" the witnesses in deciding whether their testimony struck me as fair, candid and believable. . . . In arriving at these findings, I credit the testimony of Government witnesses Jorgensen, Zewe and Rice, and where in conflict, I do not accept the testimony of Company witnesses Buckley, Pickering and Shackelford. Jorgensen, Zewe and Rice, all currently employed by the Company, appeared to be truthfully testifying, as best they could, about the job descriptions and when and how that subject came up over the years including in bargaining negotiations. (ALJD p. 11 LL. 31-38, p. 12 LL.1-6)

Respondent also contends the judge erred in discrediting Shackelford's testimony because Shackelford was less than candid about his discussion with Respondent's counsel prior to testifying at the hearing. (R. Brf. 31) The Respondent argues that Shackelford's denial when asked if he had met with "any of the Company's officials" was legitimate and therefore his further denials that he had talked with anyone about his testimony or been contacted by anyone about his testimony should be considered legitimate in the context of having talked with or been contacted by "any of the Company's officials." Respondent's own counsel saw the incredibility of Shackelford's denials and attempted to rehabilitate his testimony by asking if Shackelford had been contacted by and spoken with counsel prior to testifying. Clearly,

where Respondent's own counsel saw that Shackelford's testimony was incredible, the judge's discrediting Shackelford based in part on this testimony is equally rational.

Lastly, Respondent contests the judge's finding that after "having carefully watched Shackelford as he testified," he felt "Shackelford did not wish to be fully candid in his testimony." (ALJD p. 13, LL. 4-5, 17-18; R. Brf. 32) Respondent argues that the judge failed to describe what about Shackelford's demeanor led the judge to find Shackelford's testimony less than candid. Respondent asks for a description of Shackelford's mannerisms and physical reactions which indicate his candor or lack thereof. As set forth above, the judge did set forth his rationale for crediting and discrediting witnesses, and added,

> I am persuaded Shackelford wanted to mold and shape his testimony in a manner he perceived would help the Company without regard for being candid and telling the full and complete truth. (ALJD p. 13 LL. 38-40)

B. The ALJ's Discrediting Respondent's Witness Robert Pickering was Proper in Light of the Credited Testimony of Current Employee Zewe, the Total Rejection of Shackelford's Testimony and the Logical Sequence of Events (R. Brf. 33)

Respondent excepts to the judge's discrediting of former HR Hourly Employee Relations Manager Robert Pickering because the finding is not supported by the record. Respondent advances three arguments in support of this exception. (R. Brf. 33)

The Respondent first alleges that the judge's discrediting of Pickering's testimony is in error because the record showed that the Union had reason to know in September 1999 that the Respondent's job descriptions had been revised in April 1999. (R. Brf. 34-35) The record evidence to which Respondent refers is the Union's request for and receipt of the Material Marshaller A and B job descriptions on June 24, 1999. (C Exh. 9) However, as previously discussed above in Section III, Subsection B**,** Respondent's argument is based on evidence not admitted into the record but rather part of the rejected C Exh. 14. Respondent also reasserts its argument regarding General

Counsel's witness James Rice's testimony regarding seeing the Code 18 Electronic Electrician job description sometime between 2003 and 2006. In an effort to avoid redundancy, General Counsel's response to this assertion by Respondent can be viewed above in Section III, Subsection B where this argument was already thoroughly addressed.

Respondent next asserts that the judge erred in discrediting Pickering's testimony that in September 1999, when providing Union officer Zewe a list of job codes, he also provided Zewe with a complete packet of job descriptions. (R. Brf. 34-35) The judge did not credit Pickering's testimony, rather the judge wholly credited current employee Tom Zewe's testimony that he had never received a complete packet of 1999 job descriptions from the Respondent and because Pickering did not note on the September 1999 job code list that he had provided additional documents to Zewe. General Counsel's complete response to this Respondent argument is also set forth above in Section III, Subsection B.

Respondent lastly argues that Pickering should be credited because Zewe gave inconsistent statements. (R. Brf. 36-37) As set forth repeatedly above, the judge credited Zewe's testimony based on his "on the witness stand" bearing and "on witness bias established, admitted or uncontested facts, corroboration of testimony and inherent probabilities." (ALJD p. 11 LL. 32-33, 36) Respondent asserts that Zewe's testimony is inconsistent because he denied that he had ever received copies of any 1999 job descriptions but then admitted that he had received copies of the Material Marshaller A and B job descriptions. Respondent fails to provide the Board with all of the evidence regarding this testimony. Respondent omits Zewe's further testimony that he had never received from anybody in management "a grouping of all the job classifications of bargaining unit positions." (Tr. 259, 261) Respondent's selective use of the transcript

fails to provide a full and fair accounting of Zewe's testimony, which was wholly credited by the judge. Accordingly, this argument should also be rejected.

C. The ALJ Properly Credited General Counsel's Witness Jorgensen's Testimony that He Orally Requested Bargaining in July and August 2007 (R. Brf. 38)

Respondent ends its exhaustive rendition of the judge's errors by asserting the judge erred in finding that in July and August 2007, the Union made two oral requests to Respondent demanding bargaining over the Respondent's unilateral implementation of the 1999 Code 18 Electronic Electrician job description. (ALJD p. 16 LL. 1-10; R. Brf. 37-40) Respondent criticizes the judge's crediting of General Counsel witness, current employee Richard Jorgensen. (R. Brf. 38) The judge held,

> I credit Union Bargaining Chairman Jorgensen's testimony regarding the meeting he and Union Steward Rice had with HR Manager Boyle and Labor Relations Manager McAdams on July 26, 2007. . . . In addition to my earlier described observations regarding Jorgensen's demeanor, I note the Union consistently took the position the job descriptions were negotiable and upon learning the Company had changed the Code 18 Electronic Electrician job description it is logical and extremely likely Jorgensen again requested negotiations as he had earlier done on July 26, 2007. . . . It is clear that almost immediately, that is on July 26 and August 10, 2007, the Union requested negotiations regarding the Code 18 Electronic Electrician job description. It is clearly established the Company failed and refused to bargain as requested. (ALJD p. 16 LL. 1-3, 22-26, 31-34)

As noted above, testimony of current employees which is adverse to their employer should be given considerable weight as it is given at great economic risk, including loss of employment. *Flexsteel Industries, Inc.,* supra. Respondent contends that Jorgensen should be discredited because he gave inconsistent statements at hearing when he testified that the parties did not address job descriptions during their negotiations for the 2008 contract, yet also testified that he asked for "negotiations" during grievance meetings over Philip Porter's July 17, 2007 discharge. Respondent's argument is meritless. Jorgensen testified about negotiations for the various contracts between the parties in which he participated and credibly, without contradiction, testified

that there were no discussions about job description during the negotiations for the 2008 contract. (Tr. 42) Jorgensen also credibly testified, corroborated by steward Rice, that during a grievance meeting to discuss Porter's discharge on July 26, 2007, with HR Manager Boyle, he asked Boyle if Respondent was relying on the 1999 job description for terminating Porter and, if so, "then I'm requesting negotiations." (ALJD p. 16 LL. 1-10; Tr. 47, 82) On August 10, 2007, Jorgensen met again with Boyle, as well as Labor Relations Manager McAdams. Jorgensen asked if the Respondent still contended the 1999 job description was effective and, when told that it was, he again requested negotiations. (Tr. 49-59) Boyle testified that he recalled meeting with Jorgensen and McAdams on August 10, 2007. (Tr. 242) Notably McAdams, though a witness for Respondent, did not testify about, let alone deny, the August 10, 2007 meeting with Boyle and Jorgensen. (Tr. 245-253) Apparently, Respondent is asserting that Jorgensen's choice of the term "negotiations" when testifying about demanding bargaining on July 26 and August 10 is the sole basis for Respondent's assertion that Jorgensen should be discredited for testifying inconsistently. Presumably, if Jorgensen had instead "demanded bargaining" the inconsistent statement defense would not have been made. Semantics or poor word choice when the meaning is clearly evident should not be the basis for discrediting a witness. Rather, as noted above, "It is the task of trial judges to separate factual wheat from evidentiary chaff. . . . " *Ewing v. NLRB,* supra.

Respondent next attacks the judge's crediting of General Counsel's witness, current employee James Rice. (R. Brf. 39) Respondent contends that Rice contradicted himself during his testimony regarding when he first saw the 1999 Code 18 Electronic Electrician job description and asserts that Rice's testimony "is demonstrably false in that the second page of Counsel for the General Counsel's Exhibit 8 was signed and dated on August 14, 1997." A review of GC Exh. 8 shows that it is the 1999 Code 18 Electronic Electrician job description and that it is unsigned and undated.

Contrary to Respondent's contention, Rice credibly testified that when classified as a Code 16 Electrician between 2001 and 2003, he asked his then supervisor David Lansford or Mike Hoffman what was necessary to bid to a Code 18 Electronic Electrician, and either Lansford or Hoffman showed Rice a copy of the 1995 job description. (Tr. 73-75) Hoffman, who testified the day following Rice, did not deny Rice's assertion and Respondent did not call Lansford to rebut Rice's testimony. (Tr. 206-222) Presumably, had testimony been favorable to Respondent, Hoffman or Lansford would have testified regarding Rice's assertion that he asked about the requirements to become a Code 18 Electronic Electrician. Where the failure to question one's own witness about a significant matter cannot be attributed to mistake or omission, an adverse inference is warranted. *Electrical South, Inc.,* supra.; *Advanced Installations,* supra.

Further, on direct examination by Union Counsel, Rice confirmed his noted testimony stating that while a Code 16 sometime between 2001 and 2003 he asked his then supervisor, clarifying that the supervisor was Dave Lansford, what would be necessary to be promoted to a Code 18 and that Lansford showed him GC Exh. 9, the 1995 job description. (Tr. 83-84) Rice did testify that after he was promoted to a Code 18 Electronic Electrician, after 2003, he saw GC Exh. 8 on supervisor Dave Lansford's desk, but thought that it was "something that the Company must have been working on" because "on the back where it's supposed to be signed and dated and approved, there was no such signatures or any date. . . ." Rice further testified that as a Code 18 he had never been told that GC Exh. 8 was his job description. (ALJD p. 15 LL. 22-25; Tr. 77-78) The judge found Rice's testimony credible and concluded, "Jorgensen, Rice and Zewe, all currently employed by the Company, appeared to be truthfully testifying, as best they could, about the job descriptions and when and how that subject came up over the years including in bargaining negotiations." (ALJD p. 12 LL. 3-6) Accordingly, where

the Board's long-standing, established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces the Board they are incorrect, the Respondent's exceptions should be denied and the judge's conclusions and findings affirmed. See, *Standard Dry Wall Products,* supra.

CONCLUSION

Counsel for the General Counsel respectfully requests the Board to affirm Associate Chief Administrative Law Judge Cates' rulings, findings, conclusions, and recommended Order with respect to all arguments and matters raised in Respondent's exceptions.

December 22, 2009

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to the National Labor Relations Board's Rules and Regulations, Section 102.114, a true and correct copy of the foregoing Counsel for the General Counsel's Answering Brief to Respondent's Exceptions was served via electronic mail, on this 22nd day of December 2009, upon the following:

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