

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

PESSOA CONSTRUCTION COMPANY,)	
)	
Respondent,)	
and)	Case Nos. 5-CA-34547
)	5-CA-34761
LABORERS' INTERNATIONAL)	5-CA-35083
UNION OF NORTH AMERICA,)	
)	
Charging Party.)	

RESPONDENT'S MOTION FOR CLARIFICATION OF JUDGE'S DECISION

Respondent Pessoa Construction Company ("Pessoa" or "Employer") respectfully moves the Board pursuant to Section 102.24 of the Board's Rule and Regulations for a limited remand to the Administrative Law Judge in this case to obtain a clarification of the Section 8(a)(3) portion of his Decision (JD-06-10) for the reasons set forth below, *i.e.*, a failure to address any legal standards or law.

1. The Regional Director for Region 5 issued an Order Consolidating Cases, Second Consolidated Complaint and Notice of Hearing issued on September 11, 2009. Pessoa filed an Answer to the Second Consolidated Complaint and Notice of Hearing on October 2, 2009.

2. Relevant to the present motion is the allegation in paragraph 7(b) of the Second Consolidated Complaint that on October 23, 2008, the Company "discharged its employee William Membrino." Therefore, the Regional Director alleged that the actions set forth in paragraph 7 discriminated in regards to terms and conditions of employment and thereby discouraged membership in the union in violation of Sections 8(a)(1) and (3) of the Act.

3. The hearing was held on October 19-23, 2009 and November 2-5, 2009 in Washington, D.C. Counsel for the General Counsel and Pessoa presented their evidence. Charging Party presented no witnesses of its own. Counsel for the General Counsel and

Charging Party presented no rebuttal witnesses to answer Pessoa's case. The Complaint was heard by Administrative Law Judge Arthur J. Amchan.

4. Briefs were filed by Pessoa and counsel for the General Counsel on Wednesday January 6, 2010. Judge Amchan issued his decision on Tuesday January 26, 2010.

5. The Judge analyzes the Section 8(a)(3) allegations relating to William Membrino on pages 12-13 of the Decision. Copy attached.

6. Nowhere in the Decision does the Judge identify, cite and/or discuss the burdens of proof pertaining to this allegation against Pessoa raised before him. The Board has stated that the "General Counsel must prove that antiunion animus was a substantial or motivating factor in the employer's decision to make adverse employment decisions, a burden that does not shift, and that an employer can avoid the finding it violated the Act by demonstrating by a preponderance of the evidence it would have taken the action even if the union had not been involved." Wright Line, 251 N.L.R.B. 1083 (1980). The General Counsel must first show under his Wright Line burden that the protected activity motivated the adverse employment action. See e.g., Operating Engineers, Local 470 v. NLRB, 350 F.3d 105 (D.C. Cir. 2003).

Furthermore, the Supreme Court in NLRB v. Transportation Management Corp., 462 U.S. 393 (1983), reaffirmed that the Act permits employers to undertake adverse employment actions for reasons unrelated to union activities. Id. at 394. In particular, the Supreme Court found that an employer violates the Act where its reasons are pretextual or have no basis other than union activities. For the converse:

He does not violate the NLRA, however, if any antiunion animus that he might have entertained did not contribute at all to an otherwise lawful discharge for good cause.

452 U.S. at 398.

The Court explained that “[a]n employer could escape the consequences of a violation by proving that without regard to the impermissible motivation, the employer would have taken the same action for wholly permissible reasons.” 462 U.S. at 399. If the prima facie case is not rebutted, then the employer must show legitimate reasons that it would have taken the same action regardless of the employee’s alleged protected activities. GHR Energy Corp., 294 N.L.R.B. No. 76 (1989). This is done by producing evidence of legitimate nondiscriminatory reasons for the action. Hyatt Hotels Corp., 296 N.L.R.B. No. 36 (1989).

When the employer produces sufficient evidence of a legitimate business reason for its action, the General Counsel must show the employer’s reason is a pretext and produce substantial evidence to support that burden to overturn the employer’s proof. Sam’s Club v. NLRB, 160 F.3d 191, 201 n.21 (4th Cir. 1998); W.C. McQuaide, Inc. v. NLRB, 133 F.3d 47, 49 (D.C. Cir. 1998). In the instant case, Mr. Membrino was found by the employer to have acted recklessly in causing thousands of dollars of damage to his company issued truck and was discharged for that reason.

Pessoa further showed that it had a Section 8(c) right to discuss its views on unionization and that individual employee efforts to bargain for wages after a union is certified as Mr. Membrino repeatedly did is strictly prohibited under the Act. Dissatisfied employees who circumvent their exclusive representatives are not only subject to legal action, but are unprotected as to their concerted activities and may be fired without recourse. Emporium Capwell Co. v. Western Addition Community Org., 420 U.S. 50, 72 (1975); NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 192 (1967).¹

¹The Union was certified on July 28, 2008. Mr. Membrino’s demand for a pay raise from Pessoa during the Section 10(b) period were therefore in direct denigration of the Union’s

(continued...)

7. Pessoa presented in its brief to the Judge the caselaw cited above and that Mr. Membrino's discharge was for "cause" under Section 10(c) of the Act. However, for unexplained reasons, the Judge completely failed to cite to extant law in support of his recommended conclusion that the alleged violation of Section 8(a)(3) of the Act (the discharge of Mr. Membrino) had been proven.

8. In Faurecia Exhaust Systems, Inc., 353 N.L.R.B. No. 354 (2008), the Board remanded a recommended decision to the Administrative Law Judge where he had discussed and applied Wright Line, but failed to provide any analysis of the Employer's response to the prima facie case. "What is not clear, however, is the judge's Wright Line analysis in rejecting the Respondent's rebuttal defense. Specifically, we cannot discern whether it is based on a dual-motivation analysis or a pretext finding." Slip op. at 2. "In sum, because we are unable to discern the precise analytical basis for the judge's conclusion that the Respondent did not meet its Wright Line burden of demonstrating that [the employee] was lawfully disciplined, we cannot determine at this time whether the judge correctly found that the Respondent violated Section 8(a)(3) by disciplining [the employee]." Slip op. At 3.

9. Judge Amchan's only remark regarding the Employer's response and defense to the General Counsel's case is that Pessoa's prior knowledge of Mr. Membrino's union activities before his discharge "establishes the General Counsel's prima facie case, which Respondent has failed to rebut." ALJD at 12. Respondent adduced un rebutted evidence that Mr. Membrino's alleged explanation for putting his truck at risk was to support an absolutely unsafe act (to allegedly help an operator) and that Mr. Membrino's parking his truck three feet from a moving

¹(...continued)
exclusive bargaining rights on wages and terms and conditions of employment.

Gradall excavator was reckless—an act resulting in significant damage to Pessoa’s property. Judge Amchan agreed to the first point: “the record indicates that it is unsafe for anyone to work around the Gradall when the operator is in the operator’s cab....,” ALJD at 8 ll.26-27, but he did not discuss the recklessness of Mr. Membrino’s actions or verity of the actual grounds relied upon by Pessoa’s decisionmaker for Mr. Membrino’s discharge, which the Wright Line analysis would compel. “We do not substitute our business judgment for that of the employer.” FES, 331 N.L.R.B. No. 20, Slip op. at 5 n.10 (2000).

10. Pessoa is without any remedy short of having the Board remand this matter to obtain these explanations. The pending Exceptions to the Administrative Law Judge’s Decision will include argument showing failure of the Judge to explain whether his ruling in the Section 8(a)(3) portion of the case was under a pretext, a dual motivation analysis or some other legal theory.

11. Here, it is even less possible for the Board to discern the Judge’s adherence to caselaw because there is even less explanation than the Board felt was sufficient to cause a remand for an inadequate explanation by the judge in Faurecia Exhaust Systems, Inc.

12. In the present case, the possibility of remand is highly likely after the Board’s review of Exceptions now due on February 23, 2010, if clarification is not directed. To have this case progress to a Decision of the Board in these unusual circumstances and resulting in a remand for grounds obvious beforehand, would only cause undue delay to the parties and prejudice to Respondent when the question can be quickly resolved by a remand to the Judge while the case is still relatively fresh.

CONCLUSION

WHEREFORE, Respondent Pessoa Construction Company respectfully requests that this

Motion to Remand for limited Clarification be granted.

Respectfully submitted,

PESSOA CONSTRUCTION COMPANY

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Dated: February 5, 2010

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the Motion for Clarification was served by email on the following persons on this the 5th day of February 2010:

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LABORERS' INTERNATIONAL UNION
OF NORTH AMERICA

Stephanie Cotilla Eitzen and Shelly Skinner, Esqs.

for the General Counsel.

Michael Avakian, Esq., (Springfield, Virginia)

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for the Charging Party.

DECISION

Statement of the Case

ARTHUR J. AMCHAN, Administrative Law Judge. This case was tried in Washington, D.C, from October 19-23 and from November 1-3, 2009. The Union, Laborers' International Union of North America, filed its first charge on September 24, 2008. It filed a second charge on February 17, 2009, alleging that Respondent, Pessoa Construction Company, violated the Act in terminating William Membrino on October 23, 2008 and a third charge on June 26, 2009, alleging that Respondent had not bargained with it in good faith.¹

The General Counsel issued his most recent Complaint on September 11, 2009. The primary issues in the case are whether Respondent violated Section 8(a)(3) and (1) in terminating William Membrino and whether Respondent violated Section 8(a)(5) and (1) by failing to bargain with the Union in good faith in the sixth months prior to the filing of the June 26, 2009 charge.

On the entire record,² including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

¹ Respondent argues that this entire case should be dismissed on the grounds that it was not served with the Union's charges in accordance with the Board's regulations. This argument has no merit. The Board's regulations at section 102.14 allow service of the charge by regular mail. The first two charges were served by the Region by regular mail. As to the third charge, it was mailed to the wrong address and then emailed to Respondent's counsel, who is an agent of the Respondent for such matters. I view the email to be the functional equivalent of regular mail; indeed, it is a better mechanism of service in that it assures receipt.

² Tr. 164, line 9 incorrectly records this Judge addressing Respondent's counsel by his first name. The speaker was most probably one of the counsels for the General Counsel.

Findings of Fact

I. Jurisdiction

5 Respondent, Pessoa Construction Company, is a highway construction contractor with
its principal office in Fairmont Heights, Maryland. Pessoa performed services valued in excess
of \$50,000 outside of the State of Maryland during the year prior to the issuance of the
Complaint. Respondent admits and I find that it is an employer engaged in commerce within the
10 meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within
the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices³

15 The Union conducted an organizing drive amongst Respondent's employees beginning
in about February 2008. The drive culminated in a Representation election conducted on July
14, 2008. The Union won the election and on July 28, 2008, was certified as the collective
bargaining representative of Respondent's laborers, pipe-layers, carpenters, finishers, truck
drivers and equipment operators.

20 Respondent initially retained attorney Brian Hudson to represent it in its interaction with
the Union. Shortly after the election, Respondent proposed to lay-off a large number of
employees due to a precipitous decline in business. Hudson contacted Union Representative
Orlando Bonilla and negotiated with Bonilla concerning the lay-off procedure.

25 *Complaint Paragraph 5(a) alleged Section 8(a)(1) statement by Julio Pessoa in June or July
2008*

30 The General Counsel alleges in Complaint paragraph 5 that in or around June 2008,
Respondent's President and Owner, Julio Pessoa, violated Section 8(a)(1) of the Act when he
told employees that if they did not want to work for him, they should go work for the Union.

35 This allegation is based on the testimony of William Avelar, who worked as a dump truck
driver for Respondent, from August 2007 until July 31, 2008. Avelar served as the Union's
observer at the July 14, 2008 election. Two weeks later Julio Pessoa fired him. The Union filed
an unfair labor practice charge concerning Avelar's termination, but the General Counsel
dismissed the charge.

40 Avelar testified that on the day he was fired, July 31, 2008, he went to Julio Pessoa's
office and that Julio Pessoa told him that he didn't want to work, that Avelar just wanted to hang
out with "those people," and that he was tired of that shit. In an affidavit given to the General
Counsel during the investigation of the charge, Avelar said that Julio Pessoa told him that
Avelar wouldn't want to work for the company, to go on with the Union and that he was tired of
some shit and go find another job. Avelar testified with the assistance of an interpreter. He also
testified that most of his conversation with Julio Pessoa on July 31, was conducted in Spanish.

45 Julio Pessoa testified at some length about the circumstances surrounding the discharge
of Avelar and his conversation with Avelar on July 31, 2008, Tr. 1767-1772. Pessoa testified

50 ³ I dismiss paragraph 5(b) of the Complaint in that the record does not support the allegation
that Julio Pessoa threatened employees with a loss of pay because they engaged in union
activities on or about September 23, 2008, see Tr. 345.

that he did not tell Avelar, "that if he wanted to work, he should go work with the Union." It is too difficult to determine from this record what Pessoa said to Avelar on July 31.

5 However, assuming that Pessoa mentioned the Union, either implicitly or explicitly, when discharging Avelar, the General Counsel's allegation of a Section 8(a)(1) violation is inconsistent with its refusal to file a Complaint alleging that Avelar's discharge violated Section 8(a)(3). If Pessoa indicated that Avelar's termination was related to his union activities, the General Counsel should have alleged a Section 8(a)(3) violation. If, on the other hand, Pessoa said that he was firing Avelar because he engaged in union activity instead of performing his 10 job, his statement would not violate Section 8(a)(1), assuming that Pessoa had a nondiscriminatory reason for making this statement. I infer from this record that the latter is the case and I find that the General Counsel has not established that Respondent violated Section 8(a)(1) as alleged in Complaint paragraph 5(a).

15 *Termination of William Membrino*

William Membrino worked for Respondent for about three years and then went to work for the State of Maryland. In June of 2007, Respondent rehired Membrino at a salary of \$1,000 per week. Membrino generally drove a dump truck. In about January 2008, Respondent 20 changed the compensation of Membrino and several other employees from a salary to an hourly wage pursuant to an investigation by either State of Maryland or Federal wage and hour inspectors.

As an hourly employee, Membrino's compensation decreased particularly as 25 Respondent's business declined. On several occasions, Membrino spoke to Julio Pessoa about increasing his compensation. Although Membrino signed a union authorization card, he was on leave on July 14, and did not vote in the representation election. After he returned from his leave, he mentioned this fact to Julio Pessoa, who complained to Membrino that employees who had indicated that they would vote against union representation must have voted for it. 30

The September 30, 2008 Union Meeting

The Union scheduled a meeting for Respondent's employees at the Seat Pleasant Community Center on the evening of September 30, 2008 in order to gain employee input for its 35 upcoming contract negotiations. This Community Center is located approximately three miles from Respondent's yard. Beforehand, Union Organizer Raymin Diaz passed out flyers about the meeting to employees near Respondent's yard. Diaz invited several non-unit individuals who worked for Pessoa to the meeting, including foreman Augustin Remdon.

40 *Complaint paragraphs 5(c) and 6: creating the impression of surveillance*

I hereby dismiss the allegation in Complaint paragraph 6 to wit that Respondent, by James Moss, created an impression amongst employees that their union activities were under 45 surveillance. However, I find that Respondent, by Julio Pessoa, violated Section 8(a)(1) on October 13, 2008, as alleged in Complaint paragraph 5(c). Both instances concerned statements allegedly made to or overheard by William Membrino in conjunction with regard to the September 30, 2008 union meeting.

I credit Membrino's testimony at Tr. 348. Membrino entered the office of dispatcher James 50 Moss on September 30, and saw and heard Moss talking with employees Michael Moltz and Jose Ramirez. Moss asked Membrino if he was going to the meeting. Then Moss said that he and others were going to the union meeting as spies, that they would wear disguises and see

who said what at the meeting. I see no reason for Membrino to fabricate this testimony. I credit Membrino's testimony over that of Moss, who contradicted Membrino's account.

5 Nevertheless, I conclude that Moss was not acting as agent of Respondent when he made these remarks. Board law regarding the principles of agency is set forth and summarized in its decision in *Pan-Oston Co.*, 336 NLRB 305 (2001). The Board applies common law principles in determining whether an employee is acting with apparent authority on behalf of the employer when that employee makes a particular statement or takes a particular action. Apparent
10 authority results from a manifestation by the principal to a third party that creates a reasonable belief that the principal has authorized the alleged agent to perform the acts in question. Either the principal must intend to cause a third person to believe the agent is authorized to act for him, or the principal should realize that its conduct is likely to create such a belief.

15 The Board also stated in *Pan-Oston, supra*, that the test for determining whether an employee is an agent of the employer is whether, under all the circumstances, employees would reasonably believe that the employee in question was reflecting company policy and speaking and/or acting for management. The Board considers the position and duties of the employee in addition to the context in which the behavior occurred. It also stated that an employee may be
20 an agent of the employer for one purpose but not another.

While I find that Moss was Respondent's agent for many purposes, such as communicating work assignments, I conclude he was not Pessoa's agent when conversing with other employees in his office about the union meeting. There was no reason for Membrino to believe that Moss was authorized by Respondent to make these remarks.

25 On the other hand, I find that Julio Pessoa violated the Act on October 13, 2008, when as discussed below, he discussed Membrino's attendance at the union meeting with Membrino and let Membrino know that he was aware of what Membrino asked the union representatives. It is not a violation of the Act for an employer to observe open union activity, *Fred'k Wallace & Son*, 331 NLRB 914 (2000). However, an employer creates an impression of surveillance when
30 it indicates, as did Julio Pessoa, that it is closely monitoring the extent of an employee's union involvement, *Emerson Electric Co.*, 287 NLRB 1065 (1988).

35 *Membrino and others attend the union meeting; Membrino asks questions of the union representatives*

40 Only five individuals who worked for Pessoa attended the September 30, union meeting. Four of them travelled to the meeting together: Augustin Remdon, a foreman; Jose Ramirez, a truck driver who was Respondent's election observer on July 14; Michael Moltz, who delivers supplies to the jobsites and Romulo Cruz Ventura, a skilled concrete finisher. Moltz is the only person, aside from Julio Pessoa and Respondent's accountant, who is authorized to sign checks for Respondent. Some time later, William Membrino arrived at the meeting alone.

45 Membrino asked the union representatives questions about whether he was entitled to be paid more for travel time from Respondent's yard to its jobsites than he was receiving. Membrino also asked whether Julio Pessoa's statements to him that he could not grant Membrino a wage increase because of the Union were correct.⁴ Membrino stayed at the

50 ⁴ Generally, an employer must maintain the status quo in the period between the filing of the representation petition and a representation election, as well as while bargaining for an initial contract.

meeting when the other four individuals employed by Pessoa left the meeting together. Moltz was the only other person employed by Pessoa who spoke at the meeting.

Julio Pessoa inquires about Membrino's attendance at the union meeting and questions Membrino about it

5

The next day in the cafeteria at lunch, Julio Pessoa asked Michael Moltz if Membrino had attended the union meeting the night before. Moltz replied that Membrino was at the meeting.⁵ That was the only question Pessoa asked Moltz about the meeting.

10

On October 13, 2008, Membrino went to Julio Pessoa's office and again asked him to increase his compensation. Pessoa told Membrino that he heard somebody was at the union meeting requesting pay for travel time. Membrino responded that he knew that Pessoa knew that he was asking about travel pay at the union meeting.

15

Pessoa said he could not afford to pay Membrino travel time, but that he was considering leaving company vehicles at the jobsite and so that employees would have to drive to the jobsite on their own.⁶

Membrino is told to leave his dump truck at the Route 231 jobsite instead of at Pessoa's yard

20

Four days after Membrino discussed his attendance and inquiries at the union meeting with Julio Pessoa, Respondent put a notice in with his paycheck. It informed him that starting Monday, October 20, Membrino would be required to report for work at the Route 231 jobsite and to leave his dump truck there at the end of the workday. Membrino lives within approximately a 5 minute drive from Respondent's yard in Fairmont Heights. The Route 231 jobsite was located in Prince Frederick, Maryland, 35-40 miles from Fairmont Heights.

25

The notice stated that someone would be assigned to drive Membrino back to Respondent's yard at the end of the day. One other dump truck driver, Nicholas Cappetta, who had worked for Respondent for two weeks, received a similar notice.

30

Respondent employed several other truck drivers at the Route 231 jobsite: Jose Ramirez, Brian Loving, Percell Smith, who sometimes drove a lowboy rather than a dump truck, and two female drivers, whose first names are Bonnie and Laura, Tr. 1278. None of these drivers received a notice instructing them to report to the jobsite and to leave their vehicles there at the end of the day.⁷

35

⁵ On direct examination, Moltz testified that Julio Pessoa first asked him if he had attended the meeting. However, in the affidavit Moltz gave during the investigation of the charge, he did not relate this assertion. On cross examination, Moltz indicated that Pessoa did not ask him if he went to the meeting because he already knew that Moltz had done so. Furthermore, I infer that Julio Pessoa knew that Moltz went to the meeting since one of his secretaries, Stella Sims, typed up the questions that Moltz intended to pose to the union representatives.

40

⁶ Membrino's account of this conversation is unrebutted and therefore I credit it.

45

⁷ The only other major project that Respondent may have had in October 2008 was in Lusby, Maryland, which is 15 miles further from Respondent's yard than the Route 231 jobsite. Thus I infer that all of Respondent's dump truck drivers were primarily working at jobsites 35 miles or more from the yard. If it made economic sense to leave Membrino's dump truck at the Route 231 jobsite, the same logic applied to all other dump trucks and dump truck drivers. Moreover, Respondent's November 5, 2008 letter to the Union, G.C. Exh. 15, states that

50

Continued

There is a temporal relationship between Membrino's attendance at the union meeting, his October 13 conversation with Julio Pessoa and the directive issued to him regarding his dump truck. On the other hand, Respondent has not established any temporal relationship
 5 between the directive and the factors it cites in arguing that the directive was the result of legitimate nondiscriminatory business considerations. Respondent relies on the high cost of diesel fuel and the fact it no longer had projects other than the Route 231 job on which to use Membrino and his dump truck. There is no showing in this record when Membrino's truck became exclusively dedicated to the 231 site and when diesel prices reached a level at which
 10 Respondent determined it was wasteful for Membrino to drive his truck from the yard to his jobsite every day.

Respondent violated Sections 8(a)(5), (3) and (1) in requiring Membrino to leave his dump truck at the Route 231 jobsite. Respondent violated Section 8(a)(5) and (1) in unilaterally changing the terms and conditions of the employment of William Membrino and Nicholas Cappetta.
 15

In order to establish a violation of Section 8(a)(3) and (1), the Board generally requires the General Counsel to make an initial showing sufficient to support an inference that the alleged discriminatee's protected conduct was a 'motivating factor' in the employer's decision.
 20 Then the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of protected conduct, *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 889 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 399-403 (1983); *American Gardens Management Co.*, 338 NLRB 644 (2002). Unlawful motivation and anti-union animus are often established by indirect
 25 or circumstantial evidence.

I find that the change in Membrino's working conditions by requiring him to report for work at the jobsite, rather than the yard, and to leave his truck at the jobsite was discriminatorily motivated and thus violated Section 8(a)(3) and (1) as alleged in Complaint paragraph 7(a).⁸
 30 This change occurred approximately two weeks after Julio Pessoa learned of Membrino's attendance at the September 30, 2008 union meeting. I infer animus and discriminatory motive from the timing of the change, Pessoa's comments to Membrino on October 13, and the unexplained failure to make the same change in the working conditions of other drivers. The General Counsel made a sufficient showing of discrimination to shift the burden to Respondent
 35 to establish a nondiscriminatory reason for this change.

Respondent had only one work location as of that date, on Maryland Route 231.
 40

Laura and Bonnie do not appear on a list of employees provided to the Union on November 5, 2008, G.C. Exhibit 15. However, from Keith Reeder's testimony and from the fact that drivers Membrino and Cappetta were terminated on October 23 and 27 respectively, I infer they were hired in the fall of 2008.

Jose Ramirez's testimony strongly indicates that Respondent discriminated against Membrino in instructing him to leave his truck at the 231 jobsite. At the same time Ramirez continued to drive his truck to the jobsites from Respondent's yard. If Respondent's instruction to leave the trucks at the jobsite was nondiscriminatory, Ramirez would have received the same instructions as Membrino, since the only two jobs of any magnitude were Route 231 and possibly Lusby, both at least 35 miles from Respondent's yard.
 45

⁸ Cappetta was merely an innocent bystander of this discriminatorily motivated change, *RCN*, 333 NLRB 295, 303 (2001).
 50

Respondent did not meet this burden by showing, for example, that it had nondiscriminatory reasons for not requiring Jose Ramirez, Brian Loving and other drivers to report for work at their jobsite. Moreover, the policy of requiring drivers to leave their trucks at the Route 231 jobsite was in effect for a very short period of time, i.e., a month and a half, despite the fact that Respondent's work at the Route 231 site continued into the late summer or early fall of 2009. Respondent apparently used its dump trucks for snow removal in the winter of 2008-09, but there is no explanation as to why the policy was not reinstated in the spring.

Respondent's unilateral change in the working conditions of Membrino and Nicholas Cappetta violated Section 8(a)(5) as also alleged in Complaint paragraph 7(a) and 9. It is settled law that when employees are represented by a labor organization, their employer violates Section 8(a)(5) by unilaterally changing their terms and conditions of employment, regardless of the employer's motive, *NLRB v. Katz*, 369 NLRB 736, 747 (1962). During negotiations, an employer's obligation to refrain from unilateral changes in the wages, hours and other terms and conditions of employment of bargaining unit employees extends beyond the duty to provide notice to the Union and an opportunity to bargain about a subject matter. It encompasses a duty to refrain from implementing such changes at all, absent overall impasse on bargaining for the agreement as a whole, *Bottom Line Enterprises*, 302 NLRB 373 (1991).

As a result of Respondent's October 16, change in policy regarding reporting to the jobsite and leaving their trucks at Route 231, Membrino and Cappetta bore the burden of paying for the fuel necessary to reach the Route 231 jobsite, unless they were able to get a ride to the jobsite. Indeed, Respondent contends that it shifted the cost of fuel between its yard and the jobsite to these employees in part because it believed the price of fuel was economically burdensome. Thus, this was a sufficiently significant change in the terms and conditions of Membrino and Cappetta's employment to put the new policy into the category of a mandatory subject of bargaining, *United Parcel Service*, 336 NLRB 1134 n. 5 (2001). Thus, Respondent could not make such a change until the parties reached an overall impasse in bargaining, let alone without providing the Union notice of the proposed change and an opportunity to bargain about it, *Union Child Day Care Center*, 304 NLRB 517 (1991). Moreover, it appears that the two drivers were no longer to be paid for any travel time to the jobsite.

The Accident of October 23, 2008

On Thursday, October 23, 2008, a Gradall hydraulic excavator operated by Sherman McCane backed into William Membrino's dump truck, damaging the front hood of the dump truck. At the end of the workday, Julio Pessoa fired Membrino. Respondent contends that Membrino had no reason to position his truck in the location in which it was struck and that the accident was Membrino's fault. Moreover, Respondent contends that Membrino demonstrated complete disregard of his obligations to it by failing to visit Julio Pessoa's office at the end of the workday to discuss the accident. Thus, Respondent contends it fired Membrino for legitimate nondiscriminatory reasons.

Just prior to the accident, on the morning of October 23, Sherman McCane was breaking up asphalt with his Gradall hydraulic excavator and loading the debris into William Membrino's dump truck in a church parking lot across a street from the Prince Frederick shopping center. The Gradall is a vehicle with two cabs, one for driving on the open road and another for operating the hydraulic boom. The Gradall is capable of performing a variety of functions with different bucket attachments to its boom.

Towards the middle of the day, McCane prepared to perform a different task with the Gradall machine. To do so required him to drive to a storage area at the Prince Frederick

shopping center, remove the bucket that was attached to Gradall's hydraulic boom and attach a different bucket.

Membrino testified that McCane asked him to help him change the bucket and that he had done so for several years. McCane denied this and testified that he always changes the buckets by himself. I credit Membrino. Membrino testified to a completely plausible rationale to explain what occurred on October 23, whereas McCane and Respondent's other witnesses testified with very general denials.⁹ Membrino testified as follows at Tr. 443:

Q. Can one person change the bucket?

A. One person can, but with his Gradall, it's an older Gradall, so while he's changing the bucket, it would self-adjust, so it would move slightly, the hydraulics, because this is hydraulic power. So it would move slightly. So Sherman would have to hold the control steady, while on the top of the bucket there's a big bolts, so we would have to break the bolts loose, to loosen the bolts to change it. And then once we'd get it changed, Sherman would have to adjust it. There was like a little gripper hand. Once you put the bucket down, you flip it out to release the bucket. So his Gradall, he needed -- you could do it by yourself, but it's best to use two people because it would always move.

Also see Tr. 541, and Tr. 1413, where Sherman McCane testified that this Gradall was probably a 1995 model vehicle.

I also rely on Membrino's testimony that his assistance obviated the need for McCane to climb up to and down several times from the Gradall's operator's cab and would save time, see Tr. 1414-20. The deck onto which the operator steps when leaving the operator's cab is 4 ½ to 5 feet above the ground, Tr. 1372. Although the record indicates that it is unsafe for anyone to work around the Gradall when the operator is in the operator's cab, it is highly plausible that McCane, who is in his sixties, would take a labor-saving short cut. Indeed, Julio Pessoa's testimony indicates that Pessoa himself thought it plausible that McCane had done so. When asked if he inquired as to whether McCane had asked for Membrino's assistance, Pessoa testified:

Yeah, I asked him. He said, Me? No. Did I ever have anybody change the bucket for me? You're not supposed to, but you never know. That's what the report says.

Tr. 1836.

Pessoa's discussion of his telephone conversation with Membrino also indicates that he believed that McCane may have asked Membrino for assistance in changing the bucket.

So later, a little bit, I don't know, five-something, he called me, Sherman's still there with me and I put the telephone -- I mentioned to him, I said, Sherman is in here. Why didn't

⁹ McCane testified that he didn't have any operating problems with the Gradall in question. I do not consider this a rebuttal of Membrino's testimony that the hydraulic boom drifted. Moreover, I view McCane, who has worked for Pessoa for approximately 30 years, to be every bit as biased in this matter as Membrino. In addition to his long-standing employment relationship with Respondent, McCane has a vested interest in placing responsibility for the October 23 accident entirely on Membrino. Moreover, I discredit McCane's testimony generally due to his failure to put in writing his version of the accident in writing on October 23, 2008, as required by Respondent handbook, G.C. Exh. 17, p. 41.

5 you come and see me? Oh, nobody told me. No, I did my report on the field. I said, Didn't Juan tell you to come see me? No. Juan is downstairs. Do you want me to put him on the phone? He said, No, I'll be there in a little bit. But on the meantime, he told me, Yeah, Abilio called and said something about you're pretty mad and I'm fired. I said, I don't know, maybe you're taking the words out of my mouth. Maybe that's the best way to do it, you know. Okay, I'll be back there. I said, Go ahead and come in and I might give you the check and be done with it, you know. So he came in with his kids, maybe, I don't know, I'd say maybe 45 minutes, a half an hour later. He come back and he said, I'm fired? I said, William, I don't know what to tell you. A matter of fact, if I don't know, I feel maybe you tried to create an accident, but I think I know you better than that.

10 So as far as I'm concerned, your mind is not on the job because this is uncalled for. There's no reason what's happened there. By the time I hear the report, did you ever help the man change the bucket? He don't need you and you know that. You were present with it all before, right? You told me so. So what does it take to change the bucket? And he proceeded, you know.

15 And I said, Listen, I just want to hear one thing from you, what the truck was doing there. I was going to help Sherman change the bucket. I said, William, you know what Sherman had to do with a Gradall before he get them in position to change the bucket. Did you give him enough room for the man to maneuver to finish his turn, even 20 if your intention was to change the bucket? I said, Enough is enough, and I don't think your mind is on your job. You're somewhere else. So why don't you go straighten yourself and then come back.

25 Tr. 1837-39.

While most of Respondent's witnesses testified that changing a Gradall bucket is always a one-person job, none of them addressed Membrino's testimony that the tendency of the boom to creep made this task more difficult than it would be otherwise. Furthermore, Superintendent Keith Reeder testified that there may be situations in which an operator needs assistance in changing a bucket, Tr. 1288-89. While the example given by Reeder involves the bolts on the bucket, his testimony leaves open the possibility of other situations in which an operator might need or want assistance, such as Membrino's uncontradicted testimony regarding the tendency of the boom of Sherman McCane's Gradall to creep.

35 McCane drove the Gradall across a road to the area where the buckets were stored. Membrino drove his dump truck to the same area and pulled in or was pulling in behind the Gradall when McCane backed the Gradall into the side of the front hood of Membrino's dump truck. The fiberglass hood of Membrino's vehicle, Respondent's newest dump truck, was badly damaged. A light on the rear of the Gradall was broken.

40 Membrino or McCane called Respondent's job superintendents, Abilio Machado and Keith Reeder, to inform them that an accident had occurred. Machado, the senior superintendent, arrived in the storage area first. He determined that both vehicles were useable and told McCane and Membrino to go back to work when they finished changing the bucket. 45 Machado also took photographs of both vehicles.

Reeder told Membrino and McCane that they would have to fill out accident reports. He did not tell them that they must talk to Julio Pessoa, Tr. 1332. Neither Machado nor Reeder asked either Membrino or McCane why Membrino's truck was behind the Gradall or suggested 50 that either one had done anything improper.

At the end of the workday, Membrino gave his keys to Superintendent Keith Reeder. Reeder either told Membrino and McCane again that they would have to give a written statement about the accident or collected statements that Membrino had written during the afternoon.¹⁰ Membrino wrote and signed the following statement and drew a diagram of the position of the vehicles:

Pull (sic) into lot to help Sherman change the bucket on Gradall. Pulling behind him then got out of truck to help then I heard the Gradall hit the hood of the dump truck.

10 G.C. Exh. 86.

McCane insisted that he did not know what happened and declined to write out a statement. Membrino wrote out a statement for McCane, which McCane signed:

15 Truck in blind spot. Don't know what happened.

G.C. Exhs. 86 and 116.

20 It is significant that McCane at no time suggested that Membrino should not have followed him from the area in which they were working to the area in which the buckets were stored. Even at the trial, when I asked McCane, "where did you think his [Membrino's] truck was?" McCane answered, "I don't know. I don't know how his truck got there. I know he drove it there, but I don't know exactly where," Tr. 1375. If this accident occurred in a manner consistent with Respondent's assertions, one would expect that on October 23, 2008, McCane would have told either Machado, Reeder, dispatcher Juan Infante or Julio Pessoa that he thought that Membrino's truck was back where they had been working and that he had no idea that Membrino had followed him to the storage area.

30 At 5:21 p.m. Reeder faxed the statements and his note about McCane's unwillingness to author a written statement to Respondent's headquarters. Membrino did not admit fault either in writing or orally at this time. McCane neither blamed Membrino for the accident nor contradicted Membrino's claim that he was in the lot to help McCane change buckets. He also did not tell anyone that Membrino was not supposed to help him. I discredit the testimony of Respondent's witness that Membrino did admit fault or that Membrino was not in the lot to assist McCane swap out the buckets.

40 More specifically, I find Abilio Machado's testimony to be a complete fabrication in so far as he claims that Membrino admitted to him that he was at fault and that Machado related this to Julio Pessoa. If Membrino admitted fault to anyone on October 23, it would be recorded in the contemporaneous accident reports.¹¹ However, I make no finding as to who was at fault in

45 ¹⁰ I credit Membrino's testimony that he gave his statement to Reeder at the end of the workday. It is unlikely that he wrote his statement at mid-day and held on to it for several hours until he turned his truck keys to Reeder. It is also unlikely that Reeder held onto the statements for several hours and faxed them at 5:21 p.m. It is more likely that Reeder faxed the statements to Respondent's main office from its office at the jobsite shortly after he received them.

50 ¹¹ I thus decline to credit any of Machado's testimony in support of Respondent's defense. I specifically find his testimony on redirect examination at Tr. 1563-4, that Respondent has a policy that employees who are involved in an accident "should to go to the office and get with Michelle so she can do a formal report," to be false. Michelle Rocha's testimony at Tr. 1461

Continued

the accident or whether either Membrino's conduct or McCane's conduct at the time of the accident was proper or safe. I believe these issues are totally irrelevant to whether or not Respondent would have discharged Membrino but for his attendance and conduct at the September 30 union meeting.

5

When Membrino returned to the Pessoa yard, he talked to Respondent's dispatcher, Juan Infante. According to Membrino, he asked Infante if he had to take a drug test. Infante said he did not and Membrino left to pick up his children.

10

I also rely on Infante's testimony in discrediting the testimony of Respondent's witnesses that Membrino admitted to being at fault in the accident. Infante, who no longer works for Respondent, recalled that McCane came into his office before Membrino. Infante wrote on an Incident/Event Report form that McCane told him that he had turned his Gradall around to change the bucket and backed into Membrino's dump truck. Infante recorded that McCane told him that the front hood of the dump truck was damaged and that a light on the counterweight of the Gradall was also broken. Infante did not record any statements by McCane as to who was at fault or that indicated that Membrino admitted fault in the accident. Infante's report was based on entirely on speaking with McCane.

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Infante testified that he sent Membrino to talk to either Julio Pessoa or Michelle Rocha, a project superintendent who is Julio Pessoa's daughter. However, Infante also recalls that Membrino went upstairs as directed. I conclude that this occurred when Membrino returned to Respondent's yard after speaking with Julio Pessoa on the telephone. Infante testified that Membrino was upset; there was no reason for Membrino to be upset until after he talked to Julio Pessoa. Moreover, neither Infante nor Sherman McCane testified that McCane was instructed to report to either Julio Pessoa or Michelle Rocha. McCane testified that on his own initiative he called Stella Sims, one of Respondent's secretaries, asking whether he could talk to Julio Pessoa, Tr. 1390.¹²

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McCane's testimony and that of General Superintendent Abilio Machado and equipment operator Juan Carlos Martinez makes it clear that Respondent did not have a rule or policy that anyone involved in an accident resulting in damage to Respondent's property was required to speak to either Julio Pessoa or any other management official. It is also clear that employees were generally not subject to discipline for failing to do so. Respondent's handbook, G.C. Exh. 17 at page 41 sets forth Respondent's policy with regard to the reporting of injuries and accidents. Membrino complied with this policy by filling out the proper forms and reporting the accident to his supervisors and dispatcher Juan Infante.

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Membrino testified that Abilio Machado called him at about 6:30 p.m. to tell him that he had been fired.¹³ Membrino then called Julio Pessoa. Membrino and Pessoa's accounts of the

does not include this self-serving detail. Neither Machado nor Reeder testified that they instructed Membrino to see Julio Pessoa or Rocha after work. Reeder communicated the only company policy, i.e., that employees involved in an accident must fill out a report.

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¹² Thus, I find the Michelle Rocha's recollection is incorrect as stated at Tr. 1462, insofar as she recalls her father telling her to instruct Infante to send Membrino *and* McCane to see him. I find that Julio Pessoa told Ms. Rocha to tell Infante to send Membrino to see him after he had talked to Membrino and told Membrino that he was being fired.

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¹³ I discredit the testimony of Abilio Machado and Julio Pessoa regarding the content of their conversations on October 23, particularly the testimony of Julio Pessoa suggesting that he was acting upon a recommendation of Machado in deciding to fire Membrino.

Continued

telephone call are not significantly different. Membrino's account is as follows:

5 Yeah. I called and they transferred me to his office and I said, Hey, what's going on? I'm fired? He said, What's going on with you? He said, What are you doing? He said, Yeah, I think your head is not on the company no more. He said, Sherman was in here talking to me. You didn't come talk to me. So I think, you know, your head is somewhere else. You need to, you know, just go ahead about -- you know, go ahead part ways.

Q. What did you say?

10 A. I said, So you're firing me for what reason? And he said, Well, your head is not in with the company no more. I said, Mr. Pessoa, that's not a reason to fire me. I said, you know, I wasn't even in the truck when the accident occurred. I said, How are you going to fire me for not being involved in the accident? He said, Well, Will, you know, your mind is just somewhere else, Will. You need to -- you know, we just need to go ahead and part ways. You know, you're just not -- your head is not in with the company no more.

Tr. 494.

20 The damage to the dump truck driven by Membrino on October 23, was repaired in-house by Respondent's mechanics. To repair the damage to the hood, Respondent bought materials for \$509. However, the resale value of the truck may have appreciably diminished by repairing the truck in this manner, rather than by doing more extensive repairs.

25 *Analysis with regard to 8(a)(3) and (1) allegations regarding William Membrino*

30 Respondent knew that Membrino engaged in protected union activity by attending the September 30, 2008 union meeting and discussing his concerns with union representatives. Respondent's animus towards this activity is established by Julio Pessoa's inquiry to Michael Moltz regarding Membrino's attendance at the meeting, his statements to Membrino on October 13, and his discriminatory actions taken against Membrino with regard to leaving his truck at the Route 231 jobsite. This establishes the General Counsel's prima facie case, which Respondent has failed to rebut. Respondent's discriminatory motive is also established by its disparate treatment of Membrino compared to other employees, its reliance on a policy in terminating Membrino which, assuming it existed, was never communicated to him, and its termination of Membrino without providing him an opportunity to explain his conduct.

Disparate Treatment

40 Respondent did not terminate every employee who was involved in an accident and failed to see Julio Pessoa the same day. For example, in August 2009, Juan Carlos Martinez accidentally struck a mini excavator with the arm of his Gradall when the mini-excavator, another piece of construction equipment operated by Sherman McCane, slipped down a hill. The windshield and a window of the mini-excavator were broken and a door was damaged.

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 Machado's testimony at Tr. 1510-11 indicates that he did not talk to Julio Pessoa about the accident until he returned to Respondent's yard at the end of the day. If Machado believed that Membrino was at fault and deserved to be terminated, it is highly unlikely that all he would have done at the time of the accident would have been to tell Membrino and McCane to go back to work, and then waited five or six hours to tell Julio Pessoa that Membrino should be fired.

Martinez, who had a dental appointment that day, neither wrote an accident report nor went to see Julio Pessoa the same day. He did go to see Julio Pessoa after being told that \$900 would be taken out of his paychecks to pay for the damage. Martinez told Pessoa that the cost of repairs should be divided between him and McCane. Pessoa did not fire Martinez for failing to fill out a report or coming to see him the day of the accident. He did tell Martinez that he could either pay for the damage or "hit the road." Martinez quit. Thus, Membrino was treated disparately from Martinez and other several other employees who were charged or were required to reimburse Respondent for damage to property rather than being terminated.

The employment of two of Respondent's dump truck drivers ended in 2008 as a result of incidents in which they pulled out onto a public road with the bed of the dump truck raised, thus pulling down overhead wires. With regard to one of them, Nicholas Cappetta, it is not clear whether he was terminated as a result of this accident or simply never returned to work. However, assuming Cappetta was terminated, his situation is not comparable to that of Membrino in that Cappetta had worked for Respondent for three weeks, not several years as had Membrino. Similarly, the other driver, John Branham, had worked for Respondent for only five months.

Respondent also fired a foreman who moved a Komatsu excavator too close to a ditch, causing the vehicle to fall in. Respondent fired the foreman for trying to blame the operator who refused to move the vehicle because the operator believed the foreman's instructions were unsafe. In this case, as with Cappetta and Branham, the economic consequences to Respondent, in either lost production time, cost of repairs or compensation to the utilities, were far greater than they were with respect to the October 23, accident.

The starkest disparity in Respondent's treatment of Membrino is that compared to its treatment of Purcell Smith. Smith has had several accidents which had economic consequences for Respondent. However, in several in which he was clearly at fault, he was not terminated but merely had to reimburse Respondent. Most glaring are two incidents which occurred in 2007 in which Smith *intentionally* cut the wires to his vehicle's GPS system, G.C. Exh. 112. Smith was still working for Respondent at the time of the trial in this matter.

Other Indicia suggesting discriminatory motive on which I rely

Adverse personnel decisions taken against Union supporter on the basis of policies of which they had no prior notice is a strong indication of discriminatory motive, *Lowe's Companies, Inc.* 266 NLRB 653, 654 (1983); *Roadway Express, Inc.*, 242 NLRB 716, 720 (1979). Assuming that Respondent had a policy that any employee involved in an accident had to report to Julio Pessoa, there is no evidence that such a policy was ever communicated to Membrino.

Julio Pessoa decided to fire Membrino before giving him the opportunity to defend his conduct. This also supports an inference that Respondent's motive in terminating Membrino was discriminatory and unlawful, *Embassy Vacation Resorts*, 340 NLRB 846, 848-49 (2003).

Collective Bargaining: Alleged Surface Bargaining

On September 5, 2008, Orlando Bonilla, the Union's business manager, emailed Brian Hudson, then Respondent's attorney, informing Hudson that he wanted collective bargaining negotiations to begin no later than September 27. Hudson responded that he would talk to his client.

October 9, Richard Macdonell, one of Respondent's project superintendents, called Bonilla to inform him that Hudson no longer represented Respondent. Macdonell notified Bonilla that Respondent had new counsel on October 29. On November 6, the Union and Respondent held their first bargaining session. Bonilla was the principal union negotiator, Macdonell and Michael Avakian, its new attorney, represented Respondent. The parties met on approximately 15 dates between November 6, 2008 and June 18, 2009, which was their last bargaining session.

At the first session, the Union presented a contract proposal without a schedule of wages and benefits. The company provided the Union with all the information it had previously requested, such as its health insurance plan and company handbook.

The Union and Respondent tentatively scheduled a second bargaining session for November 13 or 14, 2008. Respondent postponed that session stating it did not want to meet again until the Union presented it with a complete proposal including proposed wages and benefits.

On November 24, the Union provided Respondent with a schedule of wages and benefits. On December 2, Respondent, by Avakian, requested information regarding the Union's Health and Welfare Fund. He suggested meeting on December 17 or 18, 2008. In his response, Bonilla, on behalf of the Union, suggested meeting on several dates in January 2009. However, for reasons that are not apparent from this record, the second bargaining session did not take place until February 13, 2009.

During bargaining the parties signed off on tentative agreements on a number of issues. One tentative agreement (TA) with some relevance to this case was initialed on April 22, 2009, G.C. Exh. 47, p. 14-15. Respondent agreed to call the Union for laborers or apprentice laborers for work covered by the Agreement. The Union was required to provide laborers within 48 hours; if it did not, Respondent was free to obtain employees from other sources. Respondent was permitted to hire employees in classifications other than laborer from any source.¹⁴

In another tentative agreement, the Union agreed to reduce the number of unpaid holidays and Respondent agreed to pay employees double time if they had to work on those holidays. The parties also tentatively agreed to a grievance and arbitration procedure.

The parties never agreed on a wage and benefit package and Respondent never retreated from its position that union membership and/or payment of agency fees should be optional for its employees.

Bargaining over wage rates began in earnest in April. Respondent agreed not to reduce the wage rates of any of its current employees and to pay no less than the Davis-Bacon rates or Maryland prevailing wage rates on projects subject to those statutes. Respondent contends that virtually all of its work is covered by either Davis-Bacon or the Maryland prevailing rate.

Negotiations focused on a wage scale for newly hired employees on private projects. Respondent's initial proposal on February 13, 2009 contained the following rates (G.C. Exh. 33 p. 16):

¹⁴ The Union informed Respondent that Laborers Local 657 had 17 welders, 11 operating engineers, 45 truck drivers and 1,750 laborer journeymen registered with its hiring hall, G.C. Exh. 28.

- 5 Carpenter \$20 per hour
- Mason/Finisher \$12.11
- Erosion and Sediment Manger \$18
- Flaggers \$7.65
- Laborers \$11
- Maintenance of Traffic Manager \$19.50
- Equipment Operator \$14
- 10 Truck Driver \$12.54
- Welder \$14

15 Some, but not all, of these proposed rates were considerably lower than what Respondent was paying it employees in November 2008. Respondent's truck drivers were being paid between \$23 per hour and \$28.75. Equipment operators were being paid between \$17 per hour and \$27.50. Laborers, the only classification for which Respondent would be required to use the union hiring hall, were being paid between \$12.00 per hour and \$15.50, G.C. Exh. 15.

20 During the course of bargaining Respondent raised and lowered proposed wage rates, G.C. Exhs. 33, 47, 57, 64, and 65.¹⁵ For carpenters, a classification Respondent says it does not employ, the rate went from \$20 to 18 to \$16 per hour in its last proposal. Respondent's proposed wage rates for laborers went from \$11 to \$13.50 for skilled laborers and then down to \$12 per hour for skilled laborers. For semi-skilled laborers, Respondent proposed \$11, then \$10 and then \$10.50. For unskilled laborers the company proposals went from the original
25 (undifferentiated by skill) of \$11 to \$10 to \$9.50 per hour.

30 Respondent's proposed wage rate for equipment operators went from \$14 to \$18 for heavy equipment operators and then to \$17. For small equipment operators, its proposals went from \$14 to \$13 and then to \$12.50 per hour. Pessoa's proposed wage rate for erosion and sediment manager dropped from \$18 on February 13, to \$14 per hour on April 15. Its proposed wage rate for maintenance of traffic manager also dropped from \$19.50 on February 13, to \$14 on April 15.¹⁶

35 The proposed rate for truck drivers went up for those who need a commercial drivers license from \$12.54 to \$17 and then down to \$15. For drivers not needing a CDL the rate went from \$12.54 to \$13 and then to \$11.50.

40 At the last session, on June 18, 2009, the Union asked for a response to an offer it had made on June 12. Respondent's representatives stated that there was no change in their offer. Bonilla and other union representatives allege that after a caucus and telephone call to Julio Pessoa, Richard Macdonell told them that Julio Pessoa said he did not want the Union to get

45 ¹⁵ The General Counsel and Charging Party also allege that Respondent made verbal proposals regarding wage rates for different classifications, on April 30, and again on May 27, Exhs G.C. 51 and 62. Some of these alleged proposals were far more regressive than those made in writing. Respondent denies that it made any verbal wage proposals, Tr. 1691. I decline to credit the testimony that the wages reflected in the handwritten portions of G.C. Exhibits 51 and 62 were proposed.

50 ¹⁶ The General Counsel's brief at page 69 implies that Respondent changed the wage rates for carpenters, erosion and sediment manager and maintenance of traffic manager after the Union had agreed to those rates. That is not clear from this record.

credit for giving his employees a wage increase. Macdonell denies making such a statement, Tr. 1704-05. I decline to credit the union accounts regarding Macdonell's statements. First of all, they are too obviously self-serving and secondly, I have no more reason to credit the union witnesses in this regard than I do to credit Macdonell.

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The Union then proposed a 3.5% wage increase for current employees, a decrease from the 6% previously proposed. Bonilla testified that after another caucus, Macdonell told him that Julio Pessoa's response was that his employees were already overpaid.

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At some point in the bargaining Respondent's negotiator Avakian told the Union that its revised wage schedule was predicated on what it was currently bidding for new work, Tr. 877-78. He may have said this more than once, Tr. 878.

Did Respondent violate Section 8(a)(5) and (1) in failing to bargain in good faith?

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Section 8(d) of the Act defines the duty to bargain collectively as "the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . . but such obligation does not compel either party to agree to a proposal or require the making of a concession." Good-faith bargaining "presupposes a desire to reach ultimate agreement, to enter into a collective bargaining contract." *Public Service Co. of Oklahoma (PSO)*, 334 NLRB 487, 487 (2001), *enfd.* 318 F.3d 1173 (10th Cir. 2003) (quoting *NLRB v. Insurance Workers*, 361 U.S. 477, 485 (1960)). However, "[a] party is entitled to stand firm on a position if he reasonably believes that it is fair and proper or that he has sufficient bargaining strength to force the other party to agree." *Atlanta Hilton & Tower*, 271 NLRB 1600, 1603 (1984) (citing *NLRB v. Advanced Business Forms Corp.*, 474 F.2d 457, 467 2d Cir. 1973)).

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In determining whether a party has violated its statutory duty to bargain in good faith, the Board examines "the totality of the employer's conduct, not just isolated aspects of it." *Logemann Bros. Co.*, 298 NLRB 1018, 1020 (1990). From a party's total conduct both at and away from the bargaining table, the Board determines whether the party is "engaging in hard but lawful bargaining to achieve a contract that it considers desirable or is unlawfully endeavoring to frustrate the possibility of arriving at any agreement." *Public Service Co.*, *supra* at 487.

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Because this case involves a new bargaining relationship and negotiations for a first contract, the Board should "exercise special care in monitoring the . . . bargaining process and closely scrutinize behavior which 'reflects a cast of mind against reaching agreement.'" Good-faith bargaining, of course, "presupposes a desire. . . to enter into a collective bargaining contract." *NLRB v. Insurance Agents' Union*, 361 U.S. 477, 485 (1960).

The General Counsel relies on several factors in arguing that Respondent engaged in surface bargaining:

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1) The October 16, 2008 unilateral change in the terms and conditions of the employment of William Membrino and Nicholas Cappetta. I have found this change to have violated Section 8(a)(5) and (1). Although the Union did not file a charge alleging surface bargaining until June 26, 2009, it alleged the October unilateral change as an 8(a)(5) violation, as well as an 8(a)(3) violation. Thus, I find this change is a factor that should be considered in determining whether Respondent's conduct, as a whole, was intended to frustrate the possibility of reaching any agreement. The 8(a)(3) violation, i.e., discriminating against Membrino simply

5 because he attended a union meeting and shared his concerns with union representatives should also be a factor in this determination. On the other hand, it is also relevant that there are no other alleged instances of unilateral changes and that the October change concerned the working conditions of only two of Respondent's employees [which is one of the reasons I find it discriminatory].

10 2) The delay in the commencement of negotiations. The parties did not meet for over three months after the Union was certified and then did not meet again for another three months. However, I do not consider this evidence of an intent to frustrate the possibility of agreement. First of all, Section 10(b) of the Act precludes finding a "surface bargaining" violation prior to December 26, 2008. Although conduct prior to that date may be considered as background to the alleged violation, that conduct in some ways cuts against the General Counsel. Respondent suggested meeting in 15 December 2008 and the Union was responsible for the parties' failure to meet that month. While the Union suggested dates in January 2009, the record is silent as to the reason the parties did not meet in January. Once the parties met on February 13, they met regularly through June 18, 2009.

20 3. Respondent's alleged refusal to agree to any wage increase because it did not want employees to credit the Union with a wage increase. The allegation is based totally on the testimony of union witnesses regarding an alleged statement by Richard Macdonnell at the June 18, 2009 bargaining session. As stated herein, I decline to find that Macdonnell made the statement attributed to him.

25 4. Refusing to agree to a union security clause. Although objection to union security may be an indication of a fixed intention not to reach an agreement, it is not a *per se* violation of Section 8(a)(5) and (1).

30 5. Failing to cloak representatives with the authority to bargain. The General Counsel argues that since Respondent's bargaining representatives, Michael Avakian and Richard Macdonnell, called Julio Pessoa on several occasions prior to responding to union wage proposals, Respondent failed to cloak these negotiators with sufficient authority to meet its obligations under Section 8(a)(5). The General Counsel did not cite any cases to support this contention. I conclude that consultation with a party's 35 principal on a limited number of key issues does not indicate an intent to frustrate reaching an agreement. I distinguish the instant case from a situation in which a representative is required to consult with his principal on virtually every issue.

40 6. Regressive wage proposals; proposals lower than what Respondent paid relatively new employees prior to certification. During the course of negotiations Respondent lowered its proposed wages for several classifications of employees. It told the Union that its changes were based on what it was currently bidding. It also proposed wages lower than those paid to employees hired in 2008 in some job classifications.

45 Respondent's proposed rates for truck drivers were considerably below what it was paying any of its truck drivers in November 2008. However, while it true that two equipment operators hired in 2008 were being paid between \$18 and \$20 an hour, Ramon Gamero, hired in 2007, was being paid \$17 an hour, the same rate proposed for new heavy equipment operators in Respondent's final proposal, G.C. Exh. 15. Javier Bautista, a laborer hired in 2004, 50 was being paid \$12 an hour in November 2004, the same wage proposed for newly hired skilled laborers in Respondent's last proposals.

Given the terrible state of the American economy in the latter part of 2008 and early 2009, and Respondent's lack of work, I conclude that its explanation for the changing wage proposals, i.e., its bidding practices, is facially reasonable and I cannot conclude that these changes are an indication of surface bargaining.

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I cannot conclude on the basis of the totality of Respondent's conduct at the bargaining table and away from it that it engaged in surface or bad faith bargaining. Thus, I dismiss Complaint paragraph 13 and paragraph 16 insofar as it alleges a violation of Section 8(a)(5) with respect to Complaint paragraphs 10(b), 12 and 13.

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Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

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The Respondent having discriminatorily altered the terms and conditions of employment of William Membrino, and then discriminatorily discharging him, it must offer William Membrino reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Respondent must also make Nicholas Cappetta whole for any loss of earnings, benefits and expenses that resulted from its unlawful unilateral change in the terms and conditions of his employment.

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On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹⁷

ORDER

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The Respondent, Pessoa Construction Company, Fairmont Heights, Maryland, its officers, agents, successors, and assigns, shall

1. Cease and desist from:

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(a) Discharging or otherwise discriminating against any employee for supporting Laborers' International Union of North America or any other union.

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(b) Making unilateral changes in the terms and conditions of employment of bargaining unit employees.

(c) creating an impression that employees' union activities are under surveillance.

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

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¹⁷ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

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

5 (a) Within 14 days from the date of the Board's Order, offer William Membrino full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

10 (b) Make William Membrino whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the decision. The make-whole remedy includes compensation for any expenses incurred by William Membrino as a result of the October 16, 2008 directive regarding his use of Respondent's dump truck and any decrease in his compensation as a result of that directive.

15 (c) Make Nicholas Cappetta whole for any expenses incurred as a result of the October 16, 2008 directive and any loss of compensation resulting from that directive until the end of his employment on October 27, 2008.

20 (c) Within 14 days from the date of the Board's Order, remove from its files any reference to William Membrino's unlawful discharge and the October 16, 2008 directive, and within 3 days thereafter notify him in writing that this has been done and that these adverse personnel actions will not be used against him in any way.

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

30 (e) Within 14 days after service by the Region, post at its Fairmont Heights, Maryland headquarters copies of the attached notice marked "Appendix."¹⁸ Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 13, 2008.

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

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¹⁸ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Dated, Washington, D.C., January 26, 2010.

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Arthur J. Amchan
Administrative Law Judge

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APPENDIX

NOTICE TO EMPLOYEES

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

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

WE WILL NOT discharge or otherwise discriminate against any of you for supporting Laborer's International Union of North America or any other union.

WE WILL NOT create an impression that employees' union activities are under surveillance and/or that we are monitoring employees' union involvement.

WE WILL NOT make unilateral changes in the terms and conditions of your employment without notifying the Laborer's International Union of North America of our intention to do so and offering the Union the opportunity to bargain over any proposed changes. During collective bargaining negotiations WE WILL NOT make any unilateral changes unless we reach an overall impasse in our negotiations.

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

WE WILL, within 14 days from the date of this Order, offer William Membrino full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make William Membrino whole for any loss of earnings, and other benefits, resulting from his discharge and other discrimination, less any net interim earnings, plus interest. WE WILL also make William Membrino whole for any expenses he incurred as the result of our discrimination against him.

WE WILL make Nicholas Cappetta whole for any expenses or loss of earnings resulting from our unlawful unilateral change in his working conditions between October 16, and October 27, 2008.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharge and other discrimination against William Membrino and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge and other discriminatory actions will not be used against him in any way.

PESSOA CONSTRUCTION COMPANY

(Employer)

Dated _____ By _____
(Representative) (Title)

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

103 South Gay Street, The Appraisers Store Building, 8th Floor

Baltimore, MD 21202-4061

Hours: 8:15 a.m. to 4:45 p.m.

410-962-2822.

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

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 410-962-3113.