

UNITED STATES OF AMERICA  
NATIONAL LABOR RELATIONS BOARD

NTN BOWER CORPORATION,

Respondent,

and

INTERNATIONAL UNION, UNITED AUTOMOBILE  
AEROSPACE & AGRICULTURAL IMPLEMENT  
WORKERS OF AMERICA, AFL-CIO

Charging Party

Case Nos. 10-CA-37271  
10-CA-37484  
10-CA-37545  
10-CA-37652  
10-CA-37692  
10-CA-37762  
10-CA-37820

UNION'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS  
TO THE ADMINISTRATIVE LAW JUDGE'S DECISION AND ORDER

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## I. INTRODUCTION

These cases now come before the National Labor Relations Board pursuant to a May 10, 2010 Decision and Order by the Honorable John H. West, Administrative Law Judge (“ALJ”), who conducted a hearing in this case in Birmingham, Alabama on June 8 - 12, 2009, and July 14 and 15, 2009.

This case was prompted by NTN Bower Corporation’s (“respondent” or “company”) unlawful actions during, and after, a year-long strike by the Union. Specifically, the company refused to furnish timely and appropriate responses to Union requests for information, made unilateral changes to the working conditions of bargaining unit employees, imposed unilaterally and without bargaining to impasse unlawful requirements or prerequisites for reinstatement on returning strikers, refused to reinstate former strikers after the strike had concluded, interfered with the Union’s access to bulletin boards within the plant, engaged in unlawful surveillance. As we show below, ALJ West’s Decision and Order and recommended remedy is due to be affirmed in all respects.<sup>1</sup>

## II. FACTUAL BACKGROUND AND STATEMENT OF THE CASE

These cases stem from NTN Bower Corporation’s (“company” or “respondent”) multiple violations of the National Labor Relations Act (“Act”) during an approximate year long strike by the Union at the respondent’s Hamilton, Alabama plant and following the Union’s unconditional offer

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<sup>1</sup> The respondent has excepted to four categories of findings and conclusions of law in Judge West’s decision: the failure to reinstate the former strikers, the failure to bargain over the shortened work week, the failure to bargain and denial of access to the plant for Union representatives and the failure to provide information regarding the replacement workers after the strike ended. Since the respondent did not except to the Judge’s other findings and conclusions of law in which he found that the respondent had violated the Act, the respondent has waived those claims and the Judge’s findings of fact and conclusions of law are due to be affirmed. See, NLRB Rules and Regulations, section 102.46(b)(2); and *B&M Linen Corp.*, 338 NLRB 5 (2002).

to return to work in July of 2008 on behalf of all the former striking employees.<sup>2</sup> After the issuance of the Fifth Amended Consolidated Complaint, a hearing was held before the Honorable Administrative Law Judge, John H. West in Birmingham, Alabama on June 8-12 and July 14 and 15, 2009. Each party was represented by counsel and had the opportunity to present their proofs.

The Union, which has had a collective bargaining relationship with the respondent for many years, began a strike at the respondent's Hamilton, Alabama facility on or about July 25, 2007. The Union made an unconditional offer to return to work on behalf of the former strikers on July 23, 2008. At the same time, the Union agreed to accept the company's last, best and final offer and the parties shortly thereafter executed a successor collective bargaining agreement. (Jt. Ex. 1).

The crux of the claim in this case now is that company refused to reinstate former striking employees and dismiss temporary employees hired after the strike began and still working when the strike ended. When the strike ended, there were approximately 26 temporary employees working at the facility doing bargaining unit work. (Jt. Ex. 3). Between August 11 and 25, 2008, the company reinstated approximately 24 former strikers. By the end of August 2008, the company still had approximately 20 temporary employees working doing bargaining unit work. The company also terminated approximately 19 permanent replacement employees between August 1, 2008 and May 20, 2009 but other than the 24 former strikers reinstated between August 11 and 25, 2008, no other strikers have been reinstated. The company did not cease using temporary employees to perform

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<sup>2</sup>In order to avoid unnecessary and duplicative briefing, the Union adopts and incorporates by reference the General Counsel's statement of the case and statement of facts in its answering brief except as set forth herein and sets forth those facts it believes necessary to supplement the argument in the Union's brief. Additionally, references to the transcript and exhibits herein will be as follows: Transcript, "Tr. \_\_", Joint Exhibits, "JX\_\_", General Counsel's Exhibits, "GCX\_\_", Charging Party's Exhibits, "CPX\_\_" and Respondent's Exhibits, "RX\_\_".

bargaining unit work until approximately April of 2009, although its use of them decreased after August of 2008. (Jt. Ex. 3).

On several occasions after the unconditional offer to return to work was made and the parties began operating under the new contract, the company unilaterally and without notice to or bargaining with the Union, made changes in mandatory terms and conditions of employment. Specifically, and still at issue in this case is the respondent's denial of Union representatives access to the facility and its unilateral modification of the work week of the employees.

### III. ARGUMENT

#### A. The Company Failed To Replace Temporary Employees With Former Strikers In Violation Of The Act.

The respondent's first exception contends that Judge West was wrong when he found that the respondent had violated §§8(a)(1) and (3), when it indisputably failed to replace temporary employees with former strikers after the strike had come to a conclusion.<sup>3</sup> The respondent offers four arguments as to why it was not required to immediately reinstate former strikers: (1) the temporary agency employees hired from 2007 through 2009 did not hold substantially similar equivalent positions to the former strikers since they did not receive benefits, received lower rates of pay, and were hired for the short-term, (2) the bargaining history does not support Judge West's conclusion that the CBA limits the use of temporary workers to the supplemental labor pool, (3)

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<sup>3</sup> The respondent does not dispute that it retained and even hired temporary employees after the Union made an unconditional offer to return to work on July 25, 2008 on behalf of the striking employees. Indeed, the seniority list provided by the respondent (Jt. Ex. 3) shows that the respondent retained as many as 26 temporary employees after the strike ended and the unconditional offer to return to work was made. In fact, the respondent hired at least 17 temporary employees after the Union's unconditional offer to return to work was made. (Jt. Ex. 3, p. 9).

Judge West's finding limiting the use of temporary workers to the supplemental labor pool creates a contradiction in the terms of the CBA, and (4) the Union conceded the company's interpretation of the CBA by failing to pursue its grievance past the third step of the grievance procedure.

The company's justifications for their exceptions are inconsistent with prevailing board law. It is well-settled that a company's failure to reinstate former economic strikers, who have not been permanently replaced, after the Union has made an unconditional offer to return to work constitutes a violation of §§8(a)(1) and (3) of the Act. *The Laidlaw Corporation*, 171 NLRB 1366, 1369-1370 (1968); *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 378 (1967). Where former economic strikers have been replaced by temporary workers, a company is obligated to reinstate the former economic workers within five days of receipt of an unconditional offer to return to work. *SKS Die Casting & Machining, Inc. v. NLRB*, 941 F.2d 984, 990 (9th Cir. 1991); see also, *Harvey Manufacturing, Inc.*, 309 NLRB 465, 469-470 (1992)(The Board held "the economic strikers' entitlement to immediate reinstatement comprehends the discharge of temporary replacements occupying the strikers' prestrike or substantially similar jobs."); and *Hansen Brothers Enterprises*, 279 NLRB 741 (1986)("where striker replacements are only temporary, an offer to return to work which demands no more than the discharge of those replacements is perfectly appropriate.").

In order for the company to be relieved of its obligation to reinstate former economic strikers, it had to prove one of the following two exceptions: (1) the former economic striker has "acquired regular and substantially equivalent employment," or (2) failure to reinstate the former economic striker was based on a "legitimate and substantial business reason." *Laidlaw*, 171 NLRB at 1370. Here, the company does not attempt to show that the former economic strikers acquired other substantially equivalent employment. Further, while there are numerous ways that a company may

meet the “legitimate and substantial business justification” test<sup>4</sup>, the company fails to offer any legitimate business justification. Each justification offered by the company is addressed in turn.

1. The Temporary Employees Hired By The Company Held Substantially Equivalent Jobs To Those Of The Former Strikers

The Company attempts to make the case that the positions held by temporary employees is not “substantially equivalent” to those previously held by the former strikers. In an effort to assert this point the Company points out that the temporary employees did not receive benefits, received lower pay rates and were only hired for the short-term. The Company claims, that pursuant to *Certified Corporation*, 241 NLRB 369 (1979), this is sufficient to make the positions held by the temporary workers distinct from those previously held by the former strikers.

This justification is not supported by existing law. The primary case relied upon by the Company, *Certified Corp.*, based its finding that temporary workers hired by the respondent in that case held distinct positions from those of the former strikers, on a completely unique set of facts. In that case the temporary worker in question was hired on a part-time basis, while all the former strikers were hired on a full-time basis. *Certified Corp.*, 241 NLRB at 373. In this case the temporary workers hired by the Company were working full-time in bargaining unit jobs, doing bargaining unit work, throughout the strike, and after.

Second, the distinctions that the Company cites are not “substantial” to the position, but are merely requisites of temporary employment. As Judge West points out “[t]he fact that a company

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<sup>4</sup> A company may meet this burden by showing that there has been a decline in business or curtailed production, *Bushnell’s Kitchens*, 222 NLRB 110, 118 (1976), that the striker is unable to perform the type of work required, *Salinas Valley Ford Sales*, 279 NLRB 679, 680 (1986), or that a striker has attempted to diminish a company’s product quality during a strike. *Diamond Walnut Growers v. NLRB*, 113 F.3d 1259 (D.C Cir. 1997).

uses a temporary employee to do the job of a bargaining unit member does not make that job a temporary job.” ALJD at 103. Finally, the Company has failed to cite any case which suggests that distinctions in benefits, pay rates, or length of employment terms, transform a bargaining unit position into something completely different. As such, Judge West was correct to find that “[t]emporary employees were performing the bargaining unit members' jobs.” ALJD at 103.

2. The Bargaining History Between The Union And The Company Supports The Conclusion That Temporary Workers Were To Be Used Solely In Conjunction With The Supplemental Labor Pool

The CBA contains provisions for the use of temporary employees (Articles I and XXXIX), and creates a Supplemental Labor Pool from which individuals could be drawn to fill in for absenteeism and short-term increases in production. The Supplemental Labor provision allows the use of both bargaining, and non-bargaining, unit employees. The Temporary Employees provisions state that the company has the right to hire temporary employees and that they are not part of the bargaining unit. The Company argues that because the Union had, at some point, objected to inclusion of a Supplemental Labor Pool, and were well aware of the Temporary Employees provision, they understood the parameters of the CBA to distinguish between the use of temporary employees in place of striking workers, and the use of temporary employees as part of the Supplemental Labor Pool.

Contrary to the company’s stated position, the testimony of Brown and Roberts was undisputed that the Company’s chief negotiator, Gary Aubry, told the Union Representatives more than 20 times that the temporary employees were contemplated for use only in limited situations. Brown's testimony was undisputed that on December 4, 2007, he specifically asked Aubry about the reach of Article XXXIX and that Aubry, on behalf of the Company, confirmed that it was limited

to the use of temporaries "in conjunction with the supplemental labor pool." (Tr. 1430).

Both the Union and the Company agreed that temporary employees could only be used in conjunction with the supplemental labor pool, if that pool was created. However, until the Company unilaterally instituted the current CBA, no labor pool was created. Additionally, it is undisputed that the Union did not give the Company the right to utilize temporary employees to perform bargaining unit work without restriction nor did the Union give the Company the right to use temporary employees in place of former strikers who had made an unconditional offer to return to work.

Since Company did not staff the bargaining unit labor pool once the strike ended it did not have the right to use temporary employees to do bargaining unit work. Respondent's contention that there were no jobs for the former strikers is directly contradicted by evidence showing that the Company retained or hired temporary replacements after the Union made the unconditional offer to return to work on July 23, 2008. As such, bargaining history does not weigh against Judge West's finding that the CBA only authorized the use of temporary workers in conjunction with the supplemental labor pool.

3. Judge West's Finding That Temporary Employees Can Only Be Used In Conjunction With The Supplemental Labor Pool Is An Internally Consistent Reading Of The CBA

The Company attempts to argue that the ALJ decision is internally inconsistent, in finding that the CBA limits the use of temporary employees to the Supplemental Labor Pool. The Company argues that such an interpretation renders meaningless the terms of Article XXVII on pages 89 and 90 of the CBA, which allows the Company to use non-bargaining unit workers in place of laid off workers in specified situations. The company claims that to give full meaning to the CBA, it must be read to allow for the use of temporary workers both as replacements for laid off workers, and in

the supplemental labor pool.

The company's contentions with respect to the internal consistency of the CBA are unfounded. The purpose of the Supplemental Labor Pool is to allow the Company to draw from a pool of laborers who can fill in during instances of absenteeism and short-term fluctuations in production. A proper interpretation of the Supplemental Labor Pool provision allows for the pool of laborers to be utilized to fill vacancies caused by layoffs. If that is the case, it is not inconsistent to find that the use of temporary workers is limited the Supplemental Labor Pool. As previously noted, the Company's own chief negotiator agreed that temporaries were to be used "in conjunction with the supplemental labor pool." (Tr. 1430).

The straightforward contract interpretation dictates that the provisions of the Agreement pertaining to the use of temporary workers (Article I, XXXIX, and XXVII) be limited by subsection (h) of the Supplemental Labor Pool Agreement, which states that temporaries will "not be employed until a minimum of 5 % of the workforce has been employed as Labor Pool employees." To read the Agreement as conferring an unlimited right to utilize temporary employees would render the limiting language utterly meaningless and, as the Company has agreed, and the Fifth Circuit has observed, "the law abhors an interpretation that results in the language of a contract having no meaning at all," *In re Hill*, 981 F. 2d 1474, 1487 (5th Cir. 1993). Judge West was correct in finding that the provisions of the CBA, when read together, required that the use of temporary workers be limited to the supplemental labor pool.

4. The Union Does Not, And Has Never, Consented To The Use Of Temporary Employees For Any Purpose Other Than The Supplemental Labor Pool

The Company contends that the Union's alleged failure to pursue a grievance past the third

step grievance over the use of temporary employees was a tacit consent to the Company's interpretation of the CBA.<sup>5</sup> However, Board law requires more than a mere contention to support consent to CBA interpretations. In fact, the company bears the burden to prove by substantial evidence that strike replacements were indeed permanent by showing that there was a "mutual agreement" with the replacements that they were actually permanent. *Target Rock Corp.*, 324 NLRB 373 (1997). Moreover, when an employee's *Laidlaw* rights are at issue, the Board requires that there be a clear and unmistakable waiver. See, *Pirelli Cable*, 331 NLRB 1538, 1540 (2000)(Waiver of employees' rights under *Laidlaw* must be "clear and unmistakable" pursuant to *Metropolitan Edison Co., v. NLRB*, 460 U.S. 693, 708 (1983)).

Waivers of statutory rights are not to be lightly inferred, but instead must be "clear and unmistakable." *Metropolitan Edison Co. v. NLRB*, 460 U.S.693, 708 n.112 (1983). Proof of a contractual waiver is an affirmative defense and it is the Respondent's burden to show that the contractual waiver is explicitly stated, clear and unmistakable. *Allied Signal, Inc.*, 330 NLRB 1216, 1228 (2000) and *General Electric Co.*, 296 NLRB 844, 857 (1989) enfd. w/o op. 915 F.2d 738 (D.C. Cir. 1990). In this case, in order for the Company to prevail on its claim that Article XXXIX

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<sup>5</sup> This claim by the company is disputed. When asked about the grievance and whether the respondent had refused to arbitrate it, the company's human resources director at best could answer that she didn't recall whether the company had refused to arbitrate the matter. (Tr. 1372). This "can't recall" denial hardly establishes that the Union clearly and unmistakably waived the returning strikers' *Laidlaw* rights. Thus, such a claim, that the Union tacitly consented by not pursuing a grievance to arbitration, cannot operate as a waiver of the employees' statutory right under *Laidlaw* to reinstatement upon an unconditional offer to return to work. See, *Bill's Electric, Inc.*, 350 NLRB 292 (2007); *Retlaw Broadcasting*, 310 NLRB 984, 991 (1993); and *Wright v. Universal Maritime Service*, 525 U.S. 70 (1998) (Collective bargaining agreement's arbitration clause did not operate as a clear and unmistakable waiver of an employee right to a judicial forum to resolve ADA claim).

conferred an unmitigated right to utilize temporary employees, it would have to show that the Union clearly and unmistakably waived the employees' *Laidlaw* rights to reinstatement. *Metropolitan Edison Co.*, 460 U.S.693, 708 n.112. The history of contract negotiations, however, fails to demonstrate that the subject was discussed and consciously yielded or the Union clearly and unmistakably waived its interest in the matter.

There is no express mention in the agreement of an intention by the Union to waive the employees' statutory right of reinstatement. The Company has not demonstrated that the Union expressly, at the bargaining table, made a conscious relinquishment, clearly intending and expressly bargaining away the employees' statutory right to reinstatement. With respect to the history of the contract negotiations, the Company failed to show that the Union, at any time, waived the rights of the employees to be reinstated upon an unconditional offer to return to work. Furthermore, the Union's strategic decision, assuming *arguendo* that it made one, not to pursue a particular grievance to its procedural conclusion does not sustain the company's substantial burden to provide evidence of a clear and unmistakable waiver.

NTN Bower has admitted to hiring temporary workers to replace striking employees, from 2007 through 2009. Even after the strike ended on July 23, 2008, NTN Bower continued to use temporary workers, and even went so far as to hire new temporary workers to fill vacancies. Because the Company failed to replace the temporary workers with former economic strikers who had made an unconditional offer to return to work, and because the Company's justifications fail to meet the burden of proving either of the two exceptions, as explained above, its actions constitute an unfair labor practice in violation of §§8(a)(1) and (3) and Judge's West findings are due to be affirmed.

B. The Company Unilaterally Reduced the Workweek Without Collectively Bargaining the Issue in Violation of the Act

The respondent contends in its second exception that it did not fail to collectively bargain in violation of §8(d) and §§8(a)(1) and (5) of the Act when it unilaterally chose to reduce the workweek in March of 2009. The company offers two justifications to support this argument: (1) reducing the number of scheduled days of production due to lack of demand for Company's products is not a mandatory subject of bargaining, and (2) the company did not unilaterally alter the terms of the CBA. Neither justification finds support in current Board law.

1. The Alteration of a Workweek Provision is a Mandatory Subject of Bargaining

The company contends that reduction in the number of scheduled days of production due to lack of demand for company's products is not a mandatory subject of bargaining. The company argues that a decision to partially close a plant or otherwise reduce employees may be taken unilaterally so long as labor costs are not a factor which prompted the change. *Dubuque Packing Co.*, 303 NLRB 386 (1991). The company contends that this is true even when the shutdown is temporary. *Geiger Ready-Mix Co.*, 315 NLRB 1021, 1023 n. 15 (1994).

The Company's reliance on *Dubuque Packing Co.* to prove that reduction in the workweek is not a mandatory subject of bargaining is misguided. *Dubuque Packing Co.* dealt specifically with the relocation of bargaining unit workers, not the reduction in their hours or days worked. In *Mid-State Ready Mix*, the Board explained that the *Dubuque* decision was devised solely "for determining the nature of relocation decisions, and [the Board] did not purport to extend it to other type of management decisions that affect employees." 307 NLRB 809, 810 (1992). Contrary to the Company's contention, the Board has held that "unilateral decisions regarding the length of the unit

employees' workday and workweek . . .involved material, substantial, and significant changes in terms and conditions of employment which are *mandatory subjects of bargaining.*" *Wire Products Mfg. Corp.*, 329 NLRB 155, 169 (1999); *see also Paramount Poultry*, 294 NLRB 867, 869 (1989)(finding that "decisions to reduce the workweek. . .were themselves bargainable.").

Here the Company contends that it shortened the workweek in response to a decline in the orders for its services. The Board has routinely found that even when the cause of reduction in hours for bargaining unit employees is a decline in orders, the amount of hours worked and length of the workweek remain mandatory subjects of bargaining. *See Dickerson-Chapman, Inc.*, 313 NLRB 907, 942 (1994); *Korns Bakery*, 326 NLRB 1083, 1089 (1998) (finding that unilateral reduction in bargaining unit employee's workweek from 5 days to 4 days without bargaining was unlawful). In fact, the Board has gone so far as to say that the unilateral actions of company affecting it employees' hours are a "strong indication that the company is not bargaining in good faith." *Illiana Transit Warehouse Corp.*, 323 NLRB 111, 122 (1997). The Board went on to explain that "company's have been found to violate Section 8(a)(5) by instituting the following changes without bargaining or notice to the Union: hours worked, change in work schedules." *Id.*

In fact, in a case cited by respondent to support its contention that *Dubuque* exempts the company from bargaining over a shortened workweek, the Board explains that "the exemption from bargaining provided by these cases applies *only to permanent plant shutdowns, not to temporary shutdowns*, because permanent change in the direction and scope of an enterprise can hardly be said to exist where a plant shutdown is only temporary in character." *Geiger Ready-Mix Co.*, 315 NLRB 1021, 1031 (1994). It is clear from the Board cases cited that alterations to the workweek are a mandatory subject of bargaining pursuant to the Act.

2. By Reducing the Workweek Without Bargaining to Impasse, the Company Violated the Act

The company contends that it did not unilaterally alter the terms of the CBA. Several arguments are made in support of this contention. First, the company believes that the CBA does not guarantee bargaining unit employees five days of work per week, but simply provides the parameters for when bargaining unit employees can work (eight hours per day, five days per week, not including weekends). The company seems to believe that the CBA does not contain a mandatory workweek provision, and thus any actions taken in reducing the workweek were not modifications of the CBA. Without conceding that the CBA does not contain such a provision (the workweek provision very clearly states that the normal workweek is to be eight (8) hours a day, five (5) days per week, with workdays being Monday through Friday), the presence of a mandatory workweek provision is moot. Because scheduling and hours are a mandatory subject of bargaining, any alterations to the normal course of conduct without bargaining constitutes a unilateral change in violation of §8(a)(5).

Second, the company argues that the CBA gives the Company the express authority “to schedule production,” which the Company takes to grant it the right to shorten the work week without bargaining. *S-B Mfg. Co.*, 270 NLRB 485, 489-491 (1984). The Company contends that the Judge applied the wrong standard in determining that the Company violated §8(d), 8(a)(1) and (5). Rather than applying a “sound and arguable interpretation” standard (*Bath Iron Works Corp.*, 345 NLRB 499, 500, 502 (2005)) being advocated by the respondent, the Judge found that the CBA did not provide for alterations to the workweek, and thus applied a “clear and unmistakable waiver” standard.

In relying on *Bath Iron Works*, the Company argues that the Union allegations are of “contract modification” as opposed to “unilateral change.” This is incorrect. As the Board explained in *Bath Iron Works*, a “contract modification” case requires a showing that the Company has modified an express term of the contract, while a “unilateral change” case merely requires a showing that “there is an employment practice concerning a mandatory bargaining subject, and that the company has made a significant change thereto *without bargaining*.” 345 NLRB 499, 500, 502. Throughout the proceedings and briefs the Union has alleged the Company’s action constituted a “unilateral change” to a mandatory subject of bargaining. The inclusion of a workweek provision within the Agreement does not make the subject any less mandatory. The Board makes clear in *Bath Iron Works* that where the issue is a “unilateral change” the correct standard of for determining waiver is whether it was “clear and unmistakable,” regardless of whether the terms are within the contract. *Id*; citing *Regal Cinemas vs. NLRB*, 317 F.3d 300, 314 (D.C. Cir. 2003). The Company admits that the ALJ uses the “clear and unmistakable waiver” standard, which was fair and proper in this case.

Finally, the Company argues that it has reduced work force in the past, with Union cooperation. Even if this is true, the Board has held that a union’s past acquiescence in unilateral changes does not operate as a waiver of its right to bargain over such changes in the future. *Windstream*, 352 NLRB 44, 50 (2008) (Citing *Bath Iron Works*, 302 NLRB 898, 900–901 (1991) and *Exxon Research & Engineering Co.*, 317 NLRB 675 (1995). The Company also cites to the transcript and accuses the Judge West of altering the transcript to reflect that the Union did not bargain as to the shortened work week, while the transcript indicates that it did. The Company alleges that because the Judge lacked authority to change the witness’s answer, it must be assumed

that the Union did bargain with, and know about, the shortened week.

To this point, the Judge gave the following explanation:

Most importantly, in view of the record, as summarized in the next two preceding paragraphs (not including the show cause order), this correction should be made. Also taken into consideration is the fact that (a) the trial notes of the Union and the judge show that Perry answered "No" to the involved question on rebuttal, and (b) Respondent does not cite its trial notes and, therefore, it does not assert that its trial notes show that Perry answered "Yes." The transcript in this proceeding is hereby corrected on page 1386, line 17 by deleting the "Yes" and substituting "No" therefore the order to show cause, and the responses filed thereto are hereby made a part of the record. Pg. 112, Lines 35-45.

It is important to note that at no time has the Company contended that the correct response was "yes," nor has the Company argued that it did in fact bargain with the Union as to the shortened workweek. Instead, the Company merely states that because it cannot determine what the answer was to the question of whether the parties bargained, it should be *assumed* that it did in fact bargain. The Company presents no evidence to support this assumption. As such, the Judge's finding that the Company violated the provisions of the Act by failing to bargain on a mandatory subject of bargaining, namely the length of the workweek, should stand.

C. The Company Refusal to Allow Union Representatives Access to the Plant in Violation of the Act

The respondent offers two arguments in support of its contention that it did not fail to collectively bargain when it refused and restricted access to the plant to Union representatives. First, the respondent once again contends, that the Judge used the wrong standard of review in applying the clear and unmistakable waiver doctrine, when he should have applied the "sound and arguable interpretation" standard. Second, the respondent argues that it has a right to control access of Union

officers to the plant, because they are inactive employees and thus akin to non-employees. It argues that it has a right to restrict, or prohibit access, to its property by non-employee Union members citing *NLRB v. Babcock & Wilcox Co.*, 351 US 105, 112 (1956) and *Lechmere, Inc. v. NLRB*, 502 US 527, 534 (1992). The respondent further contends that it has the right to restrict or limit access of off-duty and off-site employees to outside, non-working areas of the employer's property as long as the policy is clearly disseminated and applied in a non-discriminatory manner. *ITT Industries Inc.*, 341 NLRB 937 (2004); *Hillhaven Highland House*, 336 NLRB 646 (2001); *Tri County Medical Center*, 222 NLRB 1089 (1976).

First, as stated above, the "sound and arguable interpretation" standard is only applied when dealing with a modification to an express term in a contract. Where the Union alleges, as it does here, that the respondent unilaterally, and without bargaining, changed the terms of a mandatory subject of bargaining, the Board applies the "clear and unmistakable waiver" doctrine. What is alleged here is not a modification of the express terms of the Agreement, but a unilateral change in the actions of the Employer. The Union claimed, and the Judge found, that prior to the strike the respondent allowed access to employee and non-employee union representatives. While the respondent interprets the Union's claim as one pertaining to a specific term of the contract, the allegation, and the Judge's finding, was predicated on a unilateral change in past practice. In fact, the Board has held that a union's right of access is a mandatory subject of bargaining which survives the expiration of the collective bargaining agreement. *Oaktree Capital Management*, 353 NLRB No. 127 (2009). Furthermore, the "continued right of access also guarantees to a union, the right to distribute literature within a plant, and an employer who restricts this right violates Sec. 8(a)(1) of the Act." *Value City Department Stores*, 1991 WL 1283295 (N.L.R.B. Div. of Judges, 1991).

Because the allegations in this case pertain to a “unilateral change” the Judge’s application of the “clear and unmistakable waiver” standard was fair and proper.

The respondent also contends that it has a right to control the access of Union representatives in the working areas of its facility. The cases cited by the respondent, *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956); *see also Lechmere, Inc. v. NLRB*, 502 U.S. 527, 534 (1992), are simply inapposite. Prior to the strike both Perry and Caudle were employed by the respondent. It is admitted that after the strike Perry and Caudle did not return to work, but they did not lose their status as employees under the Act. There is no basis upon which to find that they were “non-employees” as alleged by the respondent. Section 2(3) of the Act expressly “include[s] any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment.” As such, Perry and Caudle were “employees” within the definition of the Act and were former striking employees subject to reinstatement. The Employer’s argument, that Perry and Caudle were unreinstated, and thus “non-employees”, is without any basis in fact or precedent and should be rejected. Additionally, both Perry and Caudle are Local Union officers and the respondent failed to adduce any evidence that prior to the strike it restricted access of Local Union officers if they were no actively at work.

The respondent cites several cases which hold the facial validity of a no-access rule for off-duty employees and visitors. However, the allegations and findings here pertain to the application, not the facial validity, of the respondent’s unilaterally implemented rules. As in *Citrus Valley Medical Center*, which is cited by the respondent, the application of respondent’s rules have not been uniformly applied. As the judge stated in that case, an employer cannot “allow off-duty employees

access to the interior of its facility for such a wide range of events while at the same time denying them access for Section 7 events.” 2008 WL 4657784 (2008). In this case Judge West found that “[t]he credible evidence of record demonstrates that the longstanding practice at the facility was that employee union representatives, who were not scheduled to be at work at that time - who were off duty, could arrive at the facility and post notices on Union bulletin boards without being escorted by” the respondent. In addition, the Union offered undisputed testimony that visitors and off-duty employees were being allowed in the break room and into restrooms where the Union representatives were not allowed to go.

While an Employer may have a right to restrict inactive employees’ access to working areas of the facility, it does not have a right to restrict their access to non-working areas, unless it uniformly restricts access for all off-duty and inactive employees, for all purposes. *Tri-County Medical*, 222 NLRB 1089. Judge West found that the respondent failed to present any to suggest that a written rule existed within the Agreement defining employees as only those who are on the payroll. Nor did Judge West find evidence that the Agreement specified that former strikers not on active payroll should be treated as visitors. As such, no “clear and unmistakable waiver” existed allowing the respondent to unilaterally alter the previous rule allowing Union Representatives unsupervised access to the Union bulletin boards outside of the working areas.

D. The Company Refused to Honor the Union’s Request for Information Regarding Prospective Members of the Bargaining Unit in Violation of the Act

The cases cited by the respondent to invoke the “clear and present danger” exception to the per se obligation of the Employer to turnover the addresses and telephone numbers of bargaining unit employees (which the permanent replacements were after the strike had concluded) and the

applications for employment of replacement workers are distinguishable from the facts of this case. See *Tenneco Automotive*, 2008 WL 1786082 (NLRB Div. of Judges, 2008); *Grinnell Fire Protection Systems v. NLRB*, 272 F.3d 1028, 1030 (8<sup>th</sup> Cir. 2004); *JHP & Assoc., LLC v. NLRB*, 360 F.3d 904, 912 (8<sup>th</sup> Cir. 2001); *Dynatron/Bondo Corp.*, 305 NLRB 574 (1991); *Detroit Newspapers*, 326 NLRB 700, 708-709 (1998).

For instance, in contrast to *Grinnell*, the Union did not have ample time or opportunity to inform the replacement employees of their rights as Union members. Further, as elicited by the respondent, many of the replacement employees lived over 30 miles from the plant, and thus were not part of the community. As explained by Judge West “information contained in the permanent replacement employees' applications such as telephone numbers, job skills, addresses, and the like are essential for a union that hopes to provide effective representation to the approximately 140 permanent replacement employees with no established lines of communication.”<sup>6</sup>

The evidence presented does not support the respondent's contention that resentment has persisted after the conclusion of the strike. In fact, the replacement employees who testified stated that since the conclusion of the strike, they have not been harassed, have not had their property damaged, and have not been threatened. Because the respondent has failed to provide any evidence to support its accusation that a clear and present danger remains even after the conclusion of the strike, its failure to turnover important, and necessary information regarding bargaining unit employees constitutes a violation of the Act.

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<sup>6</sup>Further, unlike in *Tenneco Automotive* the replacement employees in this case testified that they only opposed the release of their names while the strike was ongoing. Additionally, the replacement employees emphatically stated that after the strike had concluded they had no problems getting along with the former strikers who had returned to work.

IV. CONCLUSION

The Judge's decision in this case is more than amply supported by the credible record evidence. Furthermore, the Judge correctly applied the law to the facts of this case. The Union respectfully submits that the respondent's exceptions are due to be overruled and the Judge's findings and conclusions of law and proposed remedy be affirmed in all respects.

Respectfully submitted,

s/George N. Davies

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Date: August 25, 2010

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Answering Brief of the Union was electronically filed with the National Labor Relations Board and served by U.S. mail postage paid to:

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On this the 25<sup>th</sup> day of August, 2010.

s/George N. Davies  
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