

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

NTN BOWER CORPORATION

and

Cases 10-CA-37271
10-CA-37484
10-CA-37545
10-CA-37652
10-CA-37692
10-CA-37762
10-CA-37820

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

COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING BRIEF

John D. Doyle, Jr.
Counsel for the General Counsel
National Labor Relations Board
Birmingham Resident Office
1130 22nd Street South, Suite 3400
Birmingham, Alabama 35205
(205) 933-3011
August 25, 2010

TABLE OF CONTENTS

Table of Contents	ii
Statement of the Case	1
Statement of the Questions Presented	2
Statement of the Facts	3
I. Introduction	3
A. The Respondent’s Business and Management	3
B. Bargaining for a Successor Agreement to the 2001-2006 Collective-Bargaining Agreement	4
1. Bargaining History of Article 39, “Temporaries”	5
2. Bargaining History of Article 4, Section 11, “International Representatives”	8
II. The Strike	9
A. The Respondent Continues Operations with Replacements.	9
B. Strike Incidents	10
C. The Union Requests Replacement Employees’ Names and Addresses	11
D. The Union Ends its Strike and Tensions Subside	11
E. The Respondent Continues Utilizing Temporary Employees.	12
F. The Respondent Provides the Names of Permanent Replacement employees but Continues to Withhold the Addresses	13
III. Interference with Employee Union Officer Access	14
A. Rules Relating to Plant Access	14
1. Union Bulletin Boards	14
2. Relocation of the Union Office	14
3. Plant Rules Restricting Employee Union Representatives’ Access to Respondent’s Facility and Bargaining Unit Employees	15
B. Surveillance	16
1. Surveillance by Gary Franks, November 17, 2008 ..	16
2. Surveillance by Mike Shotts, November 24, 2008 ..	17

3. Surveillance by Gary Franks, December 1, 2008 ..	18
4. Surveillance by Gary Franks, December 10, 2008 .	19
IV. The Respondent Alters the Workweek	19
Argument	23
I. The Administrative Law Judge Correctly Determined that the Respondent Violated the Act by Failing to Return Former Strikers to Active Employment	23
A. The Respondent Failed to Carry Its Burden of Proving that It Had a “Legitimate and Substantial Business Justification” To Deny Reinstatement to Returning Strikers	24
B. The Respondent Did Not Establish that the Union’s Agreement to Article 39 of the Collective-Bargaining Agreement Waived Employees’ <i>Laidlaw</i> Rights	25
II. The Administrative Law Judge Correctly Concluded that the Respondent Violated Section 8(a)(5) by Unilaterally Changing the Workweek Without Bargaining and by Refusing to Furnish the Union with Requested Information Regarding the Change	27
A. The Respondent’s Decision to Reduce Workweeks from Five Days to Four Days was a Mandatory Subject of Bargaining	28
B. The Administrative Law Judge Correctly Applied the the Unilateral Change Legal Standard, Rather than the Contract Modification Standard	29
C. The Administrative Law Judge Properly Corrected the Transcript	32
D. The Administrative Law Judge Correctly Concluded that Respondent Unilaterally Changed the Work Schedules of Employees in Violation of Section 8(a)(1) and (5).....	34.
III. The Administrative Law Judge Correctly Determined that Respondent Violated Section 8(a)(1) of the Act by Engaging in Surveillance of Employee Union Officers and by Promulgating Rule Restricting their Access	34
A. The Respondent unlawfully denied, impeded and restricted the access of its Employee Union representatives.....	34
B. The Respondent Unlawfully Engaged in Surveillance and Monitoring of its Employee Union Representatives.....	37
C. The Respondent changes to the terms and conditions of	

employment restricted Union access and were unlawfully made unilaterally	37
IV. The Administrative Law Judge Correctly Determined that Respondent Violated Section 8(a)(5) of the Act by Refusing to Provide the Union with the Addresses of Current Employees	41
Conclusion	42
Certificate of Service	43

STATEMENT OF THE CASE

Administrative Law Judge John H. West issued a Decision and recommended Order in this matter on May 10, 2010, concluding that the Respondent, NTN Bower Corporation, had violated the Act by refusing to reinstate economic strikers, by making unilateral changes to a bargaining unit's workweek, by interfering with employee union officers' access to unit employees, and by refusing to furnish the addresses of current bargaining unit employees to the International Union, United Automobile, Aerospace, & Agricultural Implement Workers of America, AFL-CIO-CLC. The Respondent filed exceptions and a supporting brief on July 6, 2010. Those exceptions address some aspects of the administrative law judge's Decision and recommended Order, but leave other parts undisturbed on appeal. On July 15, 2010, the Board's Executive Secretary granted an extension of time for the filing of Answering Briefs, until August 25, 2010.

This Answering Brief is filed pursuant to Rule 102.46 of the Board's Rules and Regulations. It will begin by stating the questions presented by the Respondent's exceptions. This Answering Brief will then discuss the judge's findings of fact, providing record citations. Next, this Brief will provide argument concerning each of the categories of violations addressed by the Respondent's exceptions, furnishing legal authorities that address the points raised by the Respondent's exceptions. The Brief will conclude by urging that the Board should affirm the administrative law judge's Decision and adopt the recommended Order.

STATEMENT OF THE QUESTIONS PRESENTED

The Respondent's exceptions present four general questions:

- I. Did the administrative law judge correctly determine that Respondent failed to carry its burden of proving "legitimate and substantial business justifications" for not returning former strikers to active employment?
- II. Did the administrative law judge correctly conclude that the Respondent's changes to the workweek without bargaining with the Union violated Section 8(a)(5) of the Act?
- III. Did the administrative law judge correctly determine that Respondent violated Section 8(a)(1) of the Act by engaging in surveillance of employee union officers and by promulgating a rule restricting their access to employees at the plant?
- IV. Did the administrative law judge correctly determine that Respondent violated Section 8(a)(5) of the Act by refusing to provide the Union with the home addresses of current employees?

This Brief will argue that the Board should answer each of these questions in the affirmative.¹

¹ As to a number of the administrative law judge's findings and conclusions, no exceptions have been taken. Thus, no party has taken exceptions to the administrative law judge's findings 3a, 4a, 5a, and 5b that the Respondent violated Section 8(a)(1), (3), and (5) of the Act by instituting a requirement that former strikers sign a "Return to Work Log" as a condition of returning to active employment. Similarly, there are no exceptions to the administrative law judge's findings 5e, 5g, and 5i, that the Respondent violated Section 8(a)(5) of the Act by refusing to furnish the Union with requested information concerning a picket line incident, employee work histories, and other documents. Finally, there are no exceptions to the administrative law judge's findings that there were no coercive statements concerning the return to work log other than by Gary Franks and David Wiginton, nor to his conclusion that there was no violation as to the Respondent's refusal to furnish the Union with the names and address of permanent replacement employees during the strike.

STATEMENT OF THE FACTS

I. Introduction

A. The Respondent's Business and Management

The Respondent manufactures tapered roller bearings at its Hamilton, Alabama facility (Tr. 269, 550; GC Exh. 1(oo) and 1(ss), paragraph 2 of each).² Various customers, including Caterpillar, John Deere, and International, use tapered roller bearings to manufacture transmissions, rear ends, and other components of heavy trucks and heavy industrial and agricultural equipment (Tr. 269, 553). The Union has represented employees at the plant since before the Respondent assumed operations there from a predecessor in the mid-1980s (Tr. 16-17, 123, 1439).

At all material times Stacy Sinele, who is based at Respondent's Macomb, Illinois, plant, served as human resources director, Gary Franks served as human resources manager for the Hamilton, Alabama facility, and Janice Irvin served as Mr. Franks' assistant. (Tr. 59-60, 67, 176; GC Exh. 1(oo) and 1(ss), paragraph 6 of each). Craig Allen served as the plant manager in Hamilton from about February 1994 until late 2008 when Johnny Knight succeeded him as plant manager (Tr. 550). Supervisors at the facility include Mike Shotts, Mike Duvall, David Wiginton, James Manscill, and Danny Skirby. (Tr. 176-177, 1398; GC Exh. 1(oo) and 1(ss), paragraph 6 of each). Labor Relations Consultant Gary Aubry was the Respondent's spokesperson for

² Throughout this Brief, references to the transcript and exhibits will be abbreviated as follows:

Administrative Law Judge's Decision	ALJD	(followed by page number)
Transcript	Tr.	(followed by page number)
General Counsel's Exhibits	GC Exh.	(followed by exhibit number)
Charging Party's Exhibits	CP Exh.	(followed by exhibit number)
Respondent's Exhibits	R. Exh.	(followed by exhibit number)
Joint Exhibits	Jt. Exh.	(followed by exhibit number)

negotiations. Gary Franks, Stacey Sinele, Janice Irvin, Craig Allen, James Manscill and Danny Skirby also attended negotiations on Respondent's behalf. (Tr. 1081-85, 1398.)

B. Bargaining for a Successor to the 2001-2006 Agreement

In February 2006, the parties commenced negotiations for an agreement to succeed the one expiring in April 2006 (Tr. 372, 1082; Jt. Exh. 2). International Representative Mike Brown was spokesperson for the Union's negotiating team, which included Local President Jackie Peoples and Committee Members Gary Roberts, and D.J. Cantrell (Tr. 136, 1440). Tony Perry, who was vice president of the Union throughout the negotiations, became local president in November 2008, after Peoples resigned from office³ (Tr. 272, 1441). At all material times Ivan Caudle served as the Union's recording secretary, and Hilda Nolen served as a union steward (Tr. 33, 123).

The parties held upwards of 20 bargaining sessions between February 2006, and July 2007 when, after a hiatus from bargaining, the Respondent returned with a regressive proposal that prompted the Union to commence an economic strike on July 25, 2007.⁴ (GC Exh 1(oo) and 1(ss), paragraph 10 of each, GC Exh. 58; R Exh. 67; Tr. 34, 60, 86-87, 124, 1082-83, 1143-44, 1282). Negotiations continued during the strike, with Respondent tendering a Last, Best, and Final Offer on November 8, 2007, which it implemented unilaterally on December 31, 2007 (Tr. 1285; R. Exh. 68). The Union ultimately accepted that proposal on July 23, 2008, and ended its strike (R. Exh. 64).

³ Peoples resigned in connection with disabling mental health challenges and he was unavailable to testify at hearing (Tr. 272, 1441).

⁴ This Brief will provide further details below regarding the Respondent's continued operations during the strike and certain events that occurred during the strike.

1. Bargaining History of Article 39, "Temporaries"

The 2001-2006 collective-bargaining agreement had no provisions regarding temporary employees. In February 2006, Respondent proposed using a limited number of non-unit temporary employees to cover spikes in production levels and unit employees' absences (Tr.1398-1400, 1442-43; GC Exh. 53, p. 71). In April 2006, the parties discussed various options for having lower-paid and lower-skilled employees cover the staffing needs that attend temporary bursts of increased production and covering other employees' vacations and other leave (Tr. 1406-07, 1448).

During the course of the negotiations, the parties alternately used the terms "x pool," "labor pool," "supplemental labor pool," and "utility pool" to loosely describe a group of lower paid and flexible assignment individuals; various proposals emerged (Tr. 1401, 1419-20, 1446). Union representative Brown suggested that the parties establish lower-paying "utility department" positions within the bargaining unit, similar to an arrangement the Union has with another employer (Tr. 1408-09). The Respondent's April 21, 2006, list of "must haves" included having flexibility to use up to 15% of the work force as either a "utility workforce" or "temporary employees" (Tr. 1411; GC Exh. 56). On May 16, 2006, the Respondent proposed a "Utility Department" to consist of low-pay grade bargaining unit employees who would perform assigned tasks in any department (GC Exh. 57). The Respondent's "Last, Best, and Final Proposal" dated May 18, 2006, formally withdrew the earlier proposal for temporary employees and substituted the utility department proposal it had introduced two days earlier (GC Exh. 58, p. 1). Although the Union rejected the Respondent's May 18, 2006, Last, Best, and

Final Proposal, employees continued working at that time under the terms and conditions of the expired contract (Tr. 80, 86).

On July 23, 2007, Respondent withdrew the May 18, 2006, proposal, and substituted a regressive proposal that, among other things, resurrected Respondent's earlier language on temporary employees rather than a utility department (R. Exh. 67; Tr. 1417-18, 1450). Brown testified that he asked Respondent's chief negotiator Aubry why Respondent had returned to a proposal for temporary employees and that Aubry replied that if the parties could reach final agreement on a utility pool or department, the Respondent would retract the proposal for temporary employees (Tr. 1419). The administrative law judge found Brown to be a credible witness, whereas he did not find Aubry to be a credible witness (ALJD 100-01). On October 2, 2007, Respondent proposed a hybrid "Supplemental Labor Pool" composed partly of bargaining unit "Labor Pool" employees and partly of non-unit "Temporaries," which it revised on October 17, 2007 (GC Exh. 59, last page; CP Exh. 2, p. 1). The Union requested that Respondent modify this program, so that Respondent would not use non-unit temporary employees until first staffing bargaining unit "labor pool" positions with 5% of the bargaining unit. On November 8, 2007, Respondent tendered a "Last Best Final" offer, which provided that "Temporaries ... Will not be employed until a minimum of 5% of the workforce has been employed as [bargaining unit] Labor Pool employees" (R. Exh. 68, p. 157). The November 8, 2007, "Last Best Final" proposal also contains an Article 39, "Temporaries," which simply reads "The Company reserves the right to utilize temporaries" (R. Exh. 68, p. 105).

The parties met on December 4, 2007, and Brown asked Respondent's spokesperson Aubry why Respondent included "Article 39 – Temporaries" in its November 8, 2007, Last, Best, and Final offer when there was specific language about "Temporaries" included in the "Supplemental Labor Pool" document (Tr. 1430; R. Exh. 68, pp. 105, 157). According to Brown's testimony, which the administrative law judge credited, Aubry replied that Article 39 was meant only to make it clear that the Respondent could use temporaries. Brown pressed Aubry by asking, "In conjunction with the labor pool?" and Aubry replied, "yes" (Tr. 1430-31; ALJD 100-01).

The Union expressed tentative agreement to the Supplemental Labor Pool arrangement, but did not include that document in its December 21, 2007, proposal, because its acceptance of the Supplemental Labor Pool, at that point, was conditioned on obtaining movement from Respondent in other areas (Tr. 1431-32). Ultimately, the Union accepted the Respondent's November 8, 2007, "Last Best Final" offer, and executed the contract (Tr. 1432-33; Jt. Exh. 1; R. Exh. 68). The collective-bargaining agreement includes Article 39, which simply states that Respondent can utilize temporary employees (Jt. Exh.1).

In August 2008, the Union filed a grievance regarding the Respondent utilizing leased temporary employees it had secured during the strike to perform bargaining unit work after the strike's conclusion (Tr. 1433-34). The parties held a third-step grievance meeting on August 27, 2008, with Gary Franks and Stacey Sinele attending for the Respondent while Mike Brown and Jackie Peoples represented the Union (Tr. 1434). The parties reviewed the Supplemental Labor Pool language, and its provisions that the Respondent could use up to 10% of the workforce as unit labor pool employees, and

another 5% as temporaries (Tr. 1435). Brown then pointed out that this provision did not permit Respondent to use temporary employees until it had a bargaining unit labor pool at least 5% as large as the overall unit workforce, and noted that Respondent had not established any bargaining unit labor pool (Tr. 1435). Sinele then said that she thought the language was somewhere else and she identified Article 39 – Temporaries (Tr. 1435). Brown then told Sinele, “you and I both know that Gary Aubry said that that was only to make it clear that they could use temporaries in conjunction with labor pool,” and Sinele did not respond (Tr. 1435). This testimony by Brown was undisputed and the administrative law judge found Brown to be credible (Tr. 100-01).

The administrative law judge credited the undisputed testimony of Union representatives Mike Brown and Gary Roberts that, over the course of negotiations, Aubry explained at least 15 to 20 times that the purpose of the temporary employees would be to avoid overtime extensions, to cover absenteeism and for periodic production increases, and that he never suggested any other use for temporary employees (Tr. 1431, 1433, 1435-36, 1444-56, 1453; ALJD 100-01).

2. Bargaining History of Article 4, Section 11, “International Representatives”

Article 4, Section 11, titled “International Representatives,” establishes the procedure that the Union’s international representatives should follow when they visit the facility to represent bargaining unit employees (Jt. Exhs. 1, 2, Article 4, Section 11 of each). There was no change from the 2001-2006 collective-bargaining agreement to the current one, and neither party proposed any changes to those sections during the negotiations (Tr. 1125). Although the Respondent later claimed that the procedure applied to unreinstated economic striker employee Union representatives, the parties

had never applied the section to any persons other than those specified in the title: “International Representatives” (Tr. 146).

II. The Strike

A. The Respondent Continues Operations with Replacements

Approximately 220 of Respondent's 223 unit employees went on strike on July 25, 2007 (Tr. 34, 181, 589, 1143-44, 1293). Respondent began securing permanent replacement employees by advertising in regional newspapers for full-time production employees and securing temporary employees from staffing agencies, including Key Staff Source (Tr. 181-82; GC Exh. 7). Human Resources Director Sinele explained in a September 27 letter to the Union that temporary employees who hired through these temporary agencies were not permanent replacements (GC Exhs. 7, 31, 35; Tr. 59, 179, 181, 182, 1293).

Permanent replacements received health and insurance benefits, an annual \$75 safety shoe contribution, holiday pay and other privileges after completing 90-day probationary periods (Tr.185-88; GC Exh. 7). During company-wide meetings attended exclusively by permanent replacement employees and Respondent's managers, Plant Manager Craig Allen promised the permanent replacements that they were permanent, full-time employees, and that their employment would continue after the strike ended (Tr. 50, 595-96). In contrast, the temporary replacement employees worked for staffing agencies who leased their services to the Respondent, rather than working directly for Respondent (Tr. 31-35, 255-56, 596-97, 1132, 1154-55). Temporary employees received their pay and benefits from the staffing agencies, and they received no

assurances of continued employment after the strike (GC Exh. 7, p. 12; GC Exhs. 31-35; Tr. 50, 191, 196, 591-96).

B. Strike Incidents

Respondent retained Special Response Corporation, (hereinafter "SRC") to provide security at the plant during the strike, and it documented strike incidents (R. Exh. 24). Evidence of strike-related incidents consumed over 600 pages of transcript and over 1,700 pages of documentary evidence (Tr. 382-1078; R. Exh. 24, 28).

The incidents included scattered nails and flat tires,⁵ other vehicle damage⁶ sometimes by projectiles;⁷ blocking ingress and egress;⁸ shouting of "scab," crude names,⁹ lewd sexual comments,¹⁰ racial and ethnic slurs,¹¹ and invitations to fight;¹² occasions where replacement employees exited their vehicles and fights broke out;¹³ following and/or driving menacingly around individuals who had left the plant;¹⁴ photographing employees who were leaving;¹⁵ and threats of violence.¹⁶

The overwhelming majority of incidents could not be attributed to any particular perpetrator, much less to a Union representative. Union President Tony Perry was present for one contentious picket line exchange; Respondent's witness explained that Perry acted to defuse the situation, telling an angry striker to calm down and to leave the replacement employee alone (Tr. 703, 713-14, 730). As to another incident, a

⁵ Tr. 634-35, 656-58, 705-06, 744-46, 824-25, 863, 937, 995 1035, 1050-51.

⁶ Tr. 634-35, 659, 906, 930-32, 963, 981-82.

⁷ Tr. 742-43, 755, 1007, 1019, 1026, 1037, 1042.

⁸ Tr. 656, 701, 808, 904-06, 912, 961-62.

⁹ Tr. 702, 711, 741, 822-23, 862-63, 886, 964, 988-89.

¹⁰ Tr. 628, 633.

¹¹ Tr. 680-82, 904-06, 912, 930-32.

¹² Tr. 702-03, 822-23, 964.

¹³ Tr. 418, 471-72, 760, 761, 764-65, 771-72; R. Exh. 28, p. 418.

¹⁴ Tr. 628-30, 632, 633, 682-84, 883-89, 933-34, 986-87.

¹⁵ Tr. 636.

¹⁶ Tr. 741, 747, 781, 790, 884-85, 05-06, 1062-63; R. Exh. 39.

dangerous car chase, the victim was a long-time supervisor who testified with confidence that the perpetrator was not a striker, but must have been a zealous outsider who attended a special rally (Tr. 894-96).

By letter dated October 23, 2007, Respondent's Human Resources Director Sinele advised Union representative Brown of certain strike incidents, noting that she knew the Union did not "condone" or "direct" the incidents but asking him to try to control them and advising that the Respondent would discharge striker perpetrators (GC Exh. 9). The Respondent did not discharge or discipline any employees for strike misconduct, nor did it ignore any misconduct (GC Exh. 9; Tr. 75, 109). A security officer attributed video taping activities to Union Recording Secretary Ivan Caudle and former Union President Jackie Peoples, but video-taping was ubiquitous at the time, and undertaken chiefly by Respondent's security force (Tr. 425, 446-47, 448).

C. The Union Requests Replacement Employees' Names and Addresses

By letter dated September 17, 2007, the Union requested the names and addresses of permanent replacement employees, in order to communicate with them (GC Exh. 4; Tr. 353). On September 27, 2007, Respondent expressly refused to provide the names and addresses, representing that it had a "reasonable belief" that supplying such information would threaten the safety of permanent replacement employees (GC Exh. 5).

D. The Union Ends Its Strike and Tensions Subside

By letter dated July 23, 2008, the Union made an unconditional offer to return to work on behalf of the striking employees (R. Exh. 64; GC 1(ss), paragraph 11; Tr. 227, 597). The employees ceased picketing activities and there were no further picket line

events or altercations (Tr. 653, 675, 735, 910, 928, 957, 978, 993, 1002, 1071). Respondent concluded its arrangement with security contractor SRC after the strike ended (Tr. 390).

E. The Respondent Continues Utilizing Temporary Employees after the Union has Ended its Strike

Even though the strike had ended and the Union had made its unconditional offer to return to work on July 23, 2008, Respondent continued to use temporary employees to perform bargaining unit work. The following chart is extrapolated from Respondent's Seniority List (Jt. Exh.3). It reflects not only temporary employees that Respondent declined to terminate after the Union's July 23 unconditional offer to return to work, but also those that Respondent hired after July 23:

Name	Position	Hire Date	Termination Date
Cedric Hobbs	Temp	1/9/08	9/8/08
Austin Bridges	Temp	1/9/08	11/4/08
Lydell Blanchard	Temp	3/11/08	8/21/08
Amechie Lowe	Temp	4/2/08	9/9/08
Myron Blaylock	Temp	4/15/08	8/22/08
Corey Plunkett	Temp	4/17/08	9/9/08
Kenneth Woodrum	Temp	5/2/08	9/24/08
Johnny Little	Temp	5/19/08	9/9/08
Donald Williams	Temp	6/23/08	8/19/08
Ricky Smith	Temp	6/30/08	10/31/08
Frederic Wright	Temp	6/30/08	9/10/08
Roger Mayhall	Temp	6/29/08	7/30/08
Isiah Jones	Temp	7/9/08	8/22/08
Andrew Loden	Temp	7/16/08	9/9/08
Kenneth Blanchard	Temp	7/16/08	9/9/08
Kevin Childs	Temp	7/31/08	8/22/08
Jeremy Stewart	Temp	8/24/08	10/9/08
Britani Pack	Temp	8/25/08	9/11/08
Josh Brown	Temp	8/25/08	8/25/08
Robert Kelly	Temp	8/26/08	9/9/08
Corey Plunkett	Temp	10/14/08	4/17/09
David Gillion	Temp	10/22/08	12/19/08
Stacey Smith	Temp	10/22/08	1/9/09

Justin Baker	Temp	10/23/08	4/17/09
Tim Broyler	Temp	11/5/08	4/17/09
Edward Dill	Temp	11/6/08	11/7/08
Tina Terrell	Temp	12/16/08	4/17/09
Donald Loague	Temp	12/16/08	12/19/08
Danny Sartin	Temp	12/16/08	12/19/08

(Tr. 243, 244, 246, 247; Jt. Exh. 3, pp. 7-9.)

As of July 23, 2008, when the Union tendered the strikers' unconditional offer to return, Respondent was utilizing 15 temporary employees (Jt. Exh. 3). When temporary employee Roger Mayhall departed on July 30, 2008, Respondent replaced him with another temporary employee, Kevin Childs, on July 31, 2008, rather than recalling a striker (Jt. Exh. 3). As of August 1, 2008, Respondent had 15 temporary employees working at the plant (Jt. Exh. 3). During August, the Respondent brought in four new temporary employees, and six departed, lowering the complement of temporary employees to 13 as of September 1, 2008 (Jt. Exh. 3). The Respondent continued to lease temporary employees, placing four more into the plant in October 2008, two in November 2008, and three in December 2008 (Jt. Exh. 3). Respondent continued using at least some temporary employees until April 17, 2009 (Jt. Exh. 3; Tr. 348, 349).

F. The Respondent Provides the Names of Permanent Replacement Employees but Continues to Withhold their Addresses

On July 25, 2008, Respondent supplied the Union with the names of the permanent replacement employees (GC Exh. 1(oo) and 1(ss) paragraph 24 of each). The Respondent continued to withhold the addresses, however, and at hearing on June 8, 2009, Respondent Human Resources manager Stacy Sinele confirmed the Respondent's continued unwillingness to provide the permanent replacement employees' addresses (Tr. 69-70).

III. Interference with Employee Union Officer Access

A. Rules Relating to Plant Access

1. Union Bulletin Boards

Article 29 of the collective-bargaining agreement provides that the Union may use three bulletin boards located in the plant to communicate with its members and other bargaining unit employees. Since 2001, the language in Article 29 remains unchanged (Jt. Exh. 1, 2). Prior to the strike, employee Union officers entered the plant while off-duty and posted materials on the bulletin boards (Tr. 258; Jt. Exh. 2, Article 29, p. 91; Tr. 1248, lines 17-24). On November 4, 2008, Union Recording Secretary Ivan Caudle and Union President Tony Perry visited the plant around lunch time in order to post a notice of an upcoming union meeting, but the Respondent did not permit them to enter the plant or post the materials (Tr. 289-92). Since that time, Respondent has required Perry and Caudle to call ahead and make appointments prior to posting materials on the bulletin boards, and has had a manager escort them throughout the plant (Tr. 129, 291-92).

2. Relocation of the Union Office

Pursuant to a long-established arrangement, the Respondent has furnished an office within the plant for the Union to use in representing employees; since about 2005, this office was located at the west end of the Roll Grind Department, in the production area of the plant (Tr. 126, 295-96, 300, 308-09, 311-12, 351-52, 554). The Union utilized the office to store its grievance files and benefits information, and to prepare and process grievances (Tr. 126, 295-96, 308-09, 311-13). Employee union officers accessed the office both during and outside their work hours, and the Respondent

issued them keys to the office (Tr. 126, 309-11). By letter dated October 23, 2008, Union President Tony Perry advised the Respondent of the Union's intention to staff the Union office 2-3 days a week (GC Exh. 36). On November 11, 2008, Perry supplemented his October 23, 2008, letter, specifying the intended office hours (GC Exh. 37).

By letter dated November 12, 2008, Human Resources Manager Gary Franks advised Perry that the Respondent assumed that the individuals who would be staffing the office were not current employees citing the "International Representatives" article of the collective-bargaining agreement, which provides that authorized representatives of the Union not in the employ of the company, if called upon to participate in the resolution of grievances, shall be granted access to the plant in a location designated by the company (GC Exh. 38). Franks' letter further designated a room in the office area of the plant "for the purpose of non-employee representatives of the Union to conduct their business" (GC Exh. 38). Although Respondent's manager Craig Allen conceded at hearing the Tony Perry is still an employee of Respondent, Respondent has not permitted him to return to the Union office, nor has it turned over the Union's grievance records and benefits documents maintained there (Tr. 312-13, 599, 1128). It was undisputed that there was no bargaining prior to this event (Tr. 290-98, 598, 1345).

3. Plant Rules Restricting Employee Union Representatives' Access to Respondent's Facility and Bargaining Unit Employees

Employees customarily take one or more 15 minute breaks per shift in the internal break room or outside smoking areas at the facility (Tr. 130-32, 1126). Employees' break times vary based on their start times and whether they will be working overtime (Jr. Exh. 1, p. 36; Tr. 306-07). In the past, employees took breaks in

any break room they chose and conversed with other employees in the break rooms regarding a variety of topics (Tr. 130-33, 306-07). Similarly, employees enjoyed access to any of the bathroom facilities located through the plant (Tr. 131-32; 300).

Contrary to this long-standing practice, Human Resources Manager Franks told Perry on November 17 that he could only use the main break room at the facility and that when he entered the main break room that he could not speak with anyone in the break room (Tr. 300, 301-05, ALJD 108). In addition to restricting employee union representatives to the main break room, Franks told Perry on November 17 that he could only use the bathroom up front, across the hall from Franks' office (Tr. 300-01, ALJD 108). There was no bargaining concerning a change to rules of break room and bathroom usage (Tr. 59, 303, 347, 597, 1126, 1128, 1343-44).

B. Surveillance

1. Surveillance by Gary Franks, November 17, 2008

On November 6, 2008, Union Recording Secretary Ivan Caudle telephoned Human Resources Manager Franks and made an appointment to post a notice about a regular union meeting slated for November 9 (GC Exh. 25). When Caudle arrived at the facility, Franks escorted him to each union bulletin board and watched him post the notices (GC Exh. 25; Tr. 291). Since then Caudle has posted materials on the union bulletin boards in December 2008 and January 2009. Each time, he calls and makes an appointment with Human Resources Manager Franks, and Franks escorts him to every Union bulletin board (Tr. 130). Gary Aubry testified that he had not negotiated any rule with the Union that required supervisory escort of employee union

representatives to post notices on the Union bulletin boards in the production areas of the facility (Tr. 1125, 1128-29; GC Exh. 25).

The first day that Perry arrived at the facility to staff the Union office, November 17, 2008, Human Resources Manager Franks informed Perry that Plant Manager Knight had told him that if Perry needed to walk inside the plant that Perry had to first contact Franks and Franks would escort him inside the plant (Tr. 300-01). Human Resources Manager Gary Franks testified that the practice of former Local Union President Jackie Peoples was to enter the plant on his day off and walk through production areas in connection with his representation duties (Tr. 1223). Despite the prior practice of Peoples, whenever Perry posted notices on the three union bulletin boards Franks escorted him; Franks rationalized the distinction by maintaining that Perry's presence in the former union office would cause a disruption because no one knew Perry (Tr. 1224, lines 1-3). He said, "These are all new people" (Tr. 1224, lines 10-11).

2. Surveillance by Mike Shotts, November 24, 2008

On or about November 24, 2008, Perry visited the facility to staff the Union office. After checking in at the guard shack, Perry went into the main employee break room where he encountered Carl Palmer and Gary Childress, former strikers recalled to active employment in August 2008. As they were talking, Assistant Plant Manager Shotts entered and called Perry to the side. Shotts asked Perry if Human Resources Manager Franks had reviewed the "dos and don'ts" with him and Perry answered yes. Shotts told Perry that from that moment forward he should purchase what he needed and return to the new union office. Perry asked Shotts if he could sit in the break room; Shotts responded that Perry should purchase what he wanted from the vending

machines and return to the relocated union office. Shotts did not state why Perry was not allowed to sit in the break room. Assistant Plant Manager Shotts did not testify during the hearing and the administrative law judge credited Perry's account (Tr. 314-16, 336; ALJD 98).

3. Surveillance by Gary Franks, December 1, 2008

One smoking area at Respondent's facility is located outdoors in the front of the building. Perry and other bargaining unit employees smoke in this area. Perry has never seen Human Resources Manager Franks even smoke at the facility, and Franks testified that he is not a smoker (Tr. 319-20, 1242). While Perry stands there smoking, bargaining unit members approach him and they speak with him. On or about December 1, 2008, Perry was in the relocated union office. He stood up and left the office and Franks escorted him. Perry walked outside and started smoking and Franks stood nearby. Perry testified that Franks stands next to him 95% of the time that he speaks out front, and that although Perry had informed Franks that employees were concerned to talk with Perry while Franks stood by, Franks merely responded, "this is a free world, that he can go outside whenever he wants to" (Tr. 322). Franks escorted Perry back into the building after Perry finished smoking his cigarette on December 1, Franks advised that he was just doing as he was told concerning the break room and then informed Perry that he had to first contact Franks if he needed to go to the break room and he would escort him (Tr. 320-21). The Union and Respondent had not bargained about any rule that prohibited employee union representatives from entering the break room without supervisory approval or any rule that required that a supervisor escort employee union representatives (Tr. 321, 246, 1242).

When Franks was not standing next to Perry while Perry smoked, he would stand behind the glass double doors at the front of the building and watch Perry (Tr. 319-21). Perry's testimony concerning Franks watching him while standing behind Respondent's glass doors was corroborated by Jerry Wade Lindsey, who was recalled to work at Respondent's facility in August 2008. In addition to Franks, Lindsey testified that he had seen Assistant Plant Manager Michael Shotts standing inside the glass doors, watching Perry as he talked with employees (Tr. 52-57).

4. Surveillance by Gary Franks, December 10, 2008

On or about December 10, 2008, Perry requested access to the Union office near the Roll Grind Department. Franks denied the request and stated that Respondent had designated an office up front for the Union to conduct union business. At 2:30 p.m. that day, Perry informed Human Resources Manager Franks that he needed to post another notice concerning a regular union meeting. After Franks read the notice, he escorted Perry to each union bulletin board (Tr. 324-26, lines 1-2; Tr. 345). During the hearing, Franks testified that prior to the 2007 strike that he had never escorted employee union representatives to post notices. (Tr. 125, lines 8-12). During this visit,

IV. The Respondent Alters the Work Weeks

In a letter dated February 5, 2009, Human Resources Manager Franks advised the Union "We are announcing today that during the month of March, we will be required to work shortened work weeks in March 2009" (GC Exh. 40). In a letter dated February 10, 2009, Mike Brown requested bargaining over the workweek modification and he requested that Respondent furnish information as to the reason Respondent was seeking to shorten its workweeks, such as analysis of a business decline and any

internal analysis or reports on the matter (GC Exh. 19). By letter dated February 20, 2009, Stacy Sinele responded, providing a conclusory representation that business conditions were not good, and stating the amount of production it sought to run, but with no specific indication as to reasons for the revised production goals, nor as to why Respondent could not simply use other, contractually permissible, means of decreasing production, such as layoffs (GC Exh. 20). Respondent carried through on its stated intention to alter the workweek, and selected which bargaining unit employees would not work on Fridays in March (GC Exh. 40).

In a letter dated March 4, 2009, Attorney Davies reiterated the Union's position that Respondent's workweek modification was a change and that Respondent had a duty and responsibility to bargain with the Union before the change was implemented (GC Exh. 21). He also requested that the Respondent articulate its rationale for unilaterally changing the workweek and provide the information that Mike Brown requested in his February 10 letter (GC Exh. 21). On March 12, 2009, the Union filed a grievance and requested the following information for those bargaining unit members who worked Fridays in March 2009: employees' names, clock numbers, department, pay scale, and overtime charts (GC Exh. 22, p. 3). The Respondent declined to provide the requested information (Tr. 223, 367).

On or about April 17, 2009, Franks informed Perry that Respondent would extend the four-day workweek beyond March well into September 2009. Perry demanded bargaining about Respondent's changes, and Franks responded that he would contact Corporate Human Resources Director Sinele (Tr. 331-33). Sinele testified that since the parties had signed the contract that she had not bargained with the Union about any

changes to the workweek or work hours of bargaining employees. (Tr. 1346-47). Gary Aubry and Plant Manager Allen testified that they did not bargain with the Union about any changes to the work week, prior to Franks' February 5 letter (Tr. 599, 1129-30). Mike Brown and Tony Perry corroborated the testimony of Aubry and Allen. (Tr. 150-51, 331-33, 599). The Respondent did not adduce any testimony at hearing from Franks suggesting that he had bargained the workweek issue with the Union. (Tr. 174-267, 1164-1259).

The transcript indicated that, contrary to his testimony during the General Counsel's case-in-chief (Tr. 150-51, 153) Tony Perry answered in the affirmative to an inquiry on rebuttal to a question as to whether he had met and bargained with the company concerning shortened weeks that started in March 2009 (Tr. 1386). On April 9, 2010, the administrative law judge issued an order to show cause requiring the parties to show cause why the transcript should not be ordered corrected to disclose that Perry answered "No" to the question (ALJD 112). Noting that his trial notes reflected that Perry had answered "no" to the question, that the Union's response to the order to show cause disclosed that the trial notes of the Union's counsel similarly reflected that Perry had answered "No" to the question, and that the Respondent had not cited its counsel's trial notes in responding to the order to show cause and therefore Respondent had not asserted that its counsel's trial notes reflected that Perry had answered "Yes," the judge ordered the transcript corrected to reflect that Perry had answered "No," rather than "Yes."

On April 20, 2009, Perry tendered Franks an information request for certain OSHA forms, and additional information about the shortened workweeks (Tr. 333).

Perry reiterated the Union's position that Respondent and the Union had to bargain and negotiate about a decision to alter the work hours and workweek of bargaining unit members (Tr. 333). Once again, Franks said that he was awaiting Sinele's response to the Union's request to bargain about the shortened workweek (Tr. 333, 599, 1129-30, 1346, 1347; Jt. Exh. 1, p. 25).

On or about April 27, 2009, Perry observed a shutdown schedule for the months of May, June and July posted in a break room (Tr. 334-35). Perry went to Franks' office and asked Franks why he had not tendered the Union notice about the workweek modifications for the three-month period; Franks responded that it was posted to give employees notice about the shutdown (Tr. 334-35). Respondent and the Union never negotiated about Respondent's modification of the workweek (Tr. 334). On or about April 30, 2009, Perry asked Franks for a copy of Respondent's shutdown schedule that Franks had posted on Respondent's bulletin boards but Franks declined to tender it, indicating that he needed to speak with Human Resources Director Sinele first (Tr. 335). Perry reiterated the Union's position was that the parties had to first bargain about the shortened workweeks (Tr. 334-35). Franks eventually tendered Perry the shutdown schedule on May 6, 2009 (Tr. 339).

The Union made an additional request for information dated May 14, 2009. The Union's May 14 letter also requested that Respondent's bargain about the workweek modification (GC Exh. 26). The Union's May 14 letter further requested documents, analysis, studies, notes, reasons, and conversations that detailed why Respondent had modified the workweek beginning in March (Tr. 330-31; GC Exh. 22, 26, 40; Jt. Exh.1). In that letter Union representative Mike Brown also informed Human Resources

Manager Franks that by modifying the workweek again in May 2009, Respondent was continuing to violate Article 15 of the contract, because the parties had not bargained about changes to the workweek (GC Exh. 26). Brown also requested that Respondent meet and discuss Respondent's modification of the workweek. Respondent's workweek modifications resulted in lost wages for bargaining unit members who did not work those days beginning in March and continuing thereafter (Tr. 340, 341, 348).

ARGUMENT

I. The Administrative Law Judge Correctly Determined that the Respondent Violated the Act by Failing to Return Former Strikers to Active Employment

The administrative law judge found that the Respondent violated Section 8(a)(3) of the Act by refusing to reinstate former strikers whom it had not permanently replaced. In *NLRB v. Fleetwood Trailer Co.* the Supreme Court explained that "unless the employer who refuses to reinstate strikers can show that his action was due to 'legitimate and substantial business justifications,' he is guilty of an unfair labor practice." 389 U.S. 375, 378 (1967) citing *NLRB v. Great Dane Trailers*, 388 U.S. 26, 34 (1967). Examples of legitimate and substantial justifications are that the employer has hired permanent replacement employees, or that changed business conditions have required it to adapt its operations. *Id.* The administrative law judge concluded that the Respondent did not establish "legitimate and substantial justifications" and that its failure to reinstate former strikers therefore violated Section 8(a)(3) (ALJD, pp. 104, 126). The Respondent disputes this, claiming 1) that it had a legitimate and substantial reason to retain and replenish its complement of contract labor temporary employees, and 2) that the Union had waived strikers' rights to be reinstated in preference to the

use of temporary employees by accepting the collective-bargaining agreement and its Article 39. This section will address each of these arguments in turn.

A. The Respondent Failed to Carry Its Burden of Proving that It Had a “Legitimate and Substantial Business Justification” to Deny Reinstatement to the Returning Strikers

Under *NLRB v. Fleetwood Trailer and Laidlaw Corp.*¹⁷ an employer is obligated to reinstate former economic strikers upon their offer to return to work, unless it affirmatively proves a “legitimate and substantial business justification” for not doing so. An employer’s use of contract labor or temporary employees to perform bargaining unit work is not a “substantial and legitimate business justification” to deny reinstatement to former strikers. *Oregon Steel Mills*, 300 NLRB 817, fn. 5 (1990) *enfd.* 47 F.3d 1536 (9th Cir. 1995). The Respondent’s Brief in support of exceptions cites cases wherein the Board has held that a specific job opening may not trigger *Laidlaw* reinstatement rights because the position is not substantially equivalent to the former striker’s job (R. Brf. 12). The fundamental issue here is not whether a particular job opening should have been awarded to a striker, but rather that Respondent refused to reinstate economic strikers it had not permanently replaced while using a significant number of contract labor temporary employees to perform bargaining unit work.

Accordingly, the record fully supports the administrative law judge’s conclusion that the Respondent did not prove a legitimate and substantial business justification for refusing to reinstate strikers it had not permanently replaced. The Board should adopt this finding and the section of the judge’s recommended Order that applies to it.

¹⁷ 171 NLRB 1366, 1469-70 (1968) *enfd.* 414 F.2d 99 (7th Cir. 1969) *cert. denied* 397 U.S. 920 (1970),

B. The Respondent Did Not Establish that the Union's Agreement to Article 39 of the Collective-Bargaining Agreement Waived Employees' *Laidlaw* Rights.

The Respondent also contends that by agreeing to Article 39 of the collective-bargaining agreement the Union ceded to it an unlimited discretion to use temporary employees to perform bargaining unit work, thereby waiving the strikers' *Laidlaw* rights. The Board is reluctant to infer a waiver of statutory rights. *New York Mirror*, 151 NLRB 834 (1965). One asserting that a party has waived statutory rights under the Act must affirmatively prove that the waiver was "clear and unmistakable." *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 fn.112 (1983). The Respondent maintains that the plain language of the agreement, the bargaining history, and the Union's failure to arbitrate a grievance implicating the clause in question establish a waiver. The administrative law judge properly rejected each of these contentions.

Article 39 of the collective-bargaining agreement, "TEMPORARIES," simply provides "The Company reserves the right to utilize temporaries." The language is general and makes no mention of *Laidlaw* reinstatement rights whatsoever. Even standing alone, this clause would not be close to establishing a waiver of the former strikers' rights to reinstatement. Moreover, it does not stand alone. Another section of the contract, the "Supplemental Labor Pool" Employees agreement of November 8, 2007, included as page 76 of the collective-bargaining agreement, states that "Temporaries ... will not be employed until a minimum of 5% of the workforce has been employed as Labor Pool employees." The Supplemental Labor Pool agreement is an explicit restriction on the use of "temporaries" and it was undisputed that the condition precedent stipulated as necessary for the Respondent to use temporaries at all – that a

minimum of 5% of the workforce first be employed as Labor Pool employees – was never met.

Beyond the plain language of the contract, the bargaining history of the clauses disclosed that the Union did not clearly and unmistakably waive former strikers' *Laidlaw* rights by executing the contract. The administrative law judge credited the testimony of Union negotiating representatives Mike Brown and Gary Roberts that the Respondent's spokesperson Gary Aubry repeatedly assured them that the temporary employees would be used only in limited circumstances and never suggested a broader use of the Respondent's proposal about temporaries, such as a waiver of strikers' *Laidlaw* rights to displace temporary employees when ending their strike. Much of this testimony was not even disputed. Accordingly, the administrative law judge correctly concluded that the bargaining history did not establish a waiver by the Union of the former strikers' *Laidlaw* rights.

Finally, the Respondent contends that the Board should conclude that the Union waived employees' *Laidlaw* reinstatement rights by failing to arbitrate a grievance that implicated the twin "temporaries" provisions of the collective-bargaining agreement. In connection with noting that there was discussion of these provisions during an August 27, 2008 third-step grievance meeting, Respondent argues that "By not pursuing its grievance to arbitration, the Union has conceded the Company's Interpretation of the contract" (R. Brf. 19). The Respondent's Brief in support of exceptions goes on to note that the contract afforded the Union ninety regular work days from that meeting to appeal the grievance to arbitration and that, otherwise, the grievance was considered settled based upon the last company answer (R. Brf. 20). The Respondent, which

bears the burden of proof in connection with its waiver argument, did not adduce the third-step answer/alleged settlement into the record. To indulge the Respondent's theory of "waiver by grievance settlement," the Board would have to infer a "clear and unmistakable waiver" from a purported grievance settlement that is not a part of the official record. This alleged grievance settlement would have become effective no sooner than 90 working days after the August 27, 2008, meeting – sometime in 2009 - yet Respondent claims that it retroactively waived the *Laidlaw* rights of strikers who offered to return to work in July 2008, and even though the Union had filed the charge in Case 10-CA-37545 on September 25, 2008, alleging that the Respondent had violated the Act by failing to return the former strikers to work. Manifestly, this aspect of Respondent's exceptions is due to be overruled.

II. The Administrative Law Judge Correctly Concluded that the Respondent Violated Section 8(a)(5) by Unilaterally Changing the Workweek Without Bargaining with the Union and by Refusing to Furnish the Union with Requested Information Regarding the Change

The Respondent has taken exception to the administrative law judge's conclusion that the Respondent violated Section 8(a)(1) and (5) of the Act by refusing to furnish the Union with requested information concerning the changes to unit employees' workweek, and by making the change unilaterally and without bargaining with the Union. First, Respondent contends that the change from a five day workweek to a four day workweek is an entrepreneurial decision to make a fundamental change in the scope of the business and therefore Respondent was not obligated to bargain concerning it. Secondly, the Respondent maintains that the judge should have applied the contract modification standard rather than the unilateral change standard and should have found that the Respondent had a "sound arguable basis" for its action.

Thirdly, the Respondent argues that the administrative law judge should have refrained from correcting an aspect of the transcript and based on the uncorrected transcript, found, presumably,¹⁸ that the Respondent had met its obligation to bargain before making the change to workweeks. This section of the Brief will address each contention in turn.

A. The Respondent's Decision to Reduce Workweeks from Five Days to Four Days was a Mandatory Subject of Bargaining

Respondent argues that its unilateral decision to reduce the work schedule of its employees is not a mandatory subject of bargaining (R. Brf. 22). The Respondent, citing *Dubuque Packing Co.*, 303 NLRB 386 (1991), *Geiger Ready-Mix Co.*, 315 NLRB 1021, 1023 fn. 15 (1994) and *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981) contends that the change from a five-day workweek to a four-day workweek constituted an entrepreneurial decision regarding the scope of its business and therefore does not implicate the duty to bargain (R. Brf. 22). As distinct from a line of cases wherein the Board and the Court have recognized that the decision to change the direction of a business or close a portion of it may be immune from the duty to bargain collectively, this case merely involved producing *fewer* tapered roller bearings, and is directly susceptible to bargaining. Decreases in production can be achieved through layoffs, furloughs, unpaid leave, shortened workdays, and by a host of other methods in addition to shortened workweeks, all of which are subject to bargaining.

That issues affecting employee schedules are mandatory subjects of bargaining is a well-settled point of law. *United Cerebral Palsy of New York*, 347 NLRB 603, 607

¹⁸ Respondent does not specifically set forth what findings it contends the judge should have made based on the uncorrected transcript. This Brief will argue that even if the administrative law judge had not corrected the transcript, there would be no basis for reversing any of his factual findings.

(2006) citing *Meat Cutters, Local 189 v. Jewel Tea Co.*, 381 U.S. 676, 691 (1965). The Supreme Court has endorsed the Board's view that specific hours and days of the week during which employees work are mandatory subjects of bargaining. *Meat Cutters Local*, 381 U.S. at 686; see *Postal Service*, 308 NLRB 358 (1992). The Board has held that pressing business events such as the loss of important contracts or accounts, operation at a competitive disadvantage, and supply shortages do not excuse the obligation to bargain over hours of work and other conditions of employment. See *RBE Electronics of S.D., Inc.*, 320 NLRB 80, 81 (1995) and cases cited therein. Accordingly, the Respondent was obligated to bargain regarding the workweeks and further obligated "to provide information that is needed by the bargaining representative for the proper performance of its duties." *NLRB v. Acme Indus. Co.*, 385 U.S. 432, 436 (1967); see also *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956). Information that relates to the terms and conditions of employment of bargaining unit employees is considered presumptively relevant to a union's representational duties and requires no explicit showing of relevance. *Beverly Health & Rehabilitation Services*, 346 NLRB 1319, 1326 (2006), citing *Stanford Hospital and Clinics*, 338 NLRB 1042 (2003).

B. The Administrative Law Judge Correctly Applied the Unilateral Change Legal Standard, Rather than the Contract Modification Standard

Citing *Bath Iron Works*,¹⁹ the Respondent contends that the administrative law judge should have used the "sound arguable basis" standard applicable to contract modification cases in assessing the allegations regarding the Respondent's change to the workweek, rather than the "clear and unmistakable waiver" standard applicable in unilateral change cases. This contention is without merit because this is a unilateral

¹⁹ 345 NLRB 499, 500, 502 (2005)

change case, not a contract modification case. Because unilateral change cases are sometimes confused with contract modification cases, this section of the Brief will discuss the varying characteristics of the two categories of cases.

Unilateral change cases involve allegations that an employer has changed a term and condition of employment, without bargaining with the union in good faith. An employer defending its action based on contract language must show that the contract *privileged* its conduct and that the union clearly and unmistakably waived bargaining on the issue. The remedy requires the employer to restore the term or condition if requested by the union, make restitution, and refrain from making further unilateral changes without bargaining. See generally *Bath Iron Works*, 345 NLRB at 502.

In contrast, contract modification cases involve allegations that an employer has unilaterally modified a term or condition of employment of a collective-bargaining agreement without the union's consent. The General Counsel must establish that the collective-bargaining agreement *forbade* the conduct, and an employer can escape liability merely by establishing that it had a sound arguable basis for contending that the contract did not prohibit the action. The remedy requires the employer to restore the status quo and refrain from further changes during the contract term without the union's consent. *Id.*

In summary, the identifiers of a unilateral change case are: 1) the change was to a term and condition of employment, 2) without bargaining, 3) an employer defending based on the contract must show that the contract *privileged* the conduct, 4) the clear and unmistakable waiver standard applies, and 5) the employer ultimately can make changes after remedying its violation once it bargains in good faith to agreement or

impasse. The identifiers of a contract modification case are: 1) the change was to a contract term, 2) without the union's consent, 3) the General Counsel must show that the contract *forbade* the conduct, 4) the sound arguable basis standard applies, and 5) after restoring the status quo and making employees whole the employer must keep the condition in place for the term of the contract, absent the union's consent. *Id.*

The workweek pleadings were clearly alleged as unilateral changes, not as a contract modification. Thus, the Fifth Amended Consolidated Complaint in this matter, GC Exh. 1 (oo) alleged workweek and other subjects were "mandatory subjects for the purposes of collective bargaining" (para. 22), rather than alleging that they were "terms of a collective bargaining agreement." Similarly, the complaint alleged that the Respondent undertook the change "in the absence of good faith bargaining impasse in negotiations" (para. 21.) rather than "without the Union's consent" (GC Exh. 1(oo)). The pleading has none of the markings of a contract modification of the case, except that the conclusionary paragraph, paragraph 37, pleaded that "Respondent has been failing and refusing to bargain in good faith with the exclusive collective-bargaining representative of its employees within the meaning of Section 8(d) of the Act in violation of Section 8(a)(1) and (5) of the Act." Respondent's Brief seizes on the pleading's reference to Section 8(d) in support of its claim that this is a contract modification case.

Section 8(d) of the Act contains the proviso that explicitly proscribes unilateral contract modifications. Nevertheless, that proviso is not the reason for the Section 8(d) reference in paragraph 37 of the complaint. Section 8(d) also defines the duty and obligation to bargain in good faith more generally, stating that: "to bargain collectively is 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.” Here, the complaint’s reference is to this more general definition. The same paragraph that contains a reference to Section 8(d), paragraph 37, also serves as the conclusionary paragraph for the refusal to provide information allegations. This context additionally clarifies that the reference to “within the meaning of Section 8(d) of the Act” pertains to that Section’s generally defining the duty to bargain in good faith, rather than the aspect of Section 8(d) relating more specifically to prohibiting contract modifications.

Accordingly, the administrative law judge did not err in treating this case as a unilateral change case governed by the “clear and unmistakable” waiver standard applied to 8(a)(5) cases, not the “contract coverage” or “sound arguable basis” theories. *Provena Hospitals*, 350 NLRB at 811 (rejecting theories other than the “clear and unmistakable waiver” standard); *Public Service Co.*, 337 NLRB 193, 198 (2001) (expressly rejecting the “contract coverage” theory and applying the “clear and unmistakable waiver” standard); *CBS Corp.*, 326 NLRB 861, 861 (1998) (same).

C. The Administrative Law Judge Properly Corrected the Transcript

The Respondent takes exception to the administrative law judge modification of the transcript at page 1386. As noted by the Respondent, a judge should not unilaterally correct the transcript except for obvious typographical errors. The Respondent also notes that the proper procedure is an order to show cause. That procedure is exactly what the administrative law judge followed. Seemingly, the Respondent would have the Board conclude that other than obvious typographical

errors, a judge should not correct a transcript whether by means of a show cause procedure or otherwise.

The change that the judge made to the transcript was consistent with Perry's earlier response to a question substantially the same, as well as with the testimony of other witnesses. When asked whether the Respondent had bargained with the Union about the shortened workweeks, Perry stated it had not (Tr. 335-41). Perry testified that while the Respondent informed him about its decision to shorten the workweek, instituting layoffs, (Tr. 335-41), Respondent did not bargain to impasse with Perry or any other union representative over this term of employment, *id.*, as is required under Section 8(a)(1) and (5). *Uniserv*, 351 NLRB 1361 (2007); *New Seasons, Inc.*, 346 NLRB 610 (2006). The judge credited the testimony of Perry and Stacy Sinele that no such bargaining had occurred, (Tr. 335-41, 1346-47), and he discredited the testimony of Gary Franks that it had. (Tr. 329-30). Even if the judge had not formally corrected the transcript, the judge's credibility resolutions would have warranted a conclusion that the Respondent had not bargained about the shortened workweeks.

In crediting the testimony of some witnesses over others, the judge made a credibility determination. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces the Board that they are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). Since the testimony of other witnesses corroborates the change that the judge made to the transcript, and since the judge made a credibility resolution in favor of Perry and Sinele over Franks, the Board should accord deference to the judge's resolution.

Therefore, the judge acted according to Board practice and precedent when he changed part of the transcript and when he credited the testimony of some witnesses over others.

D. The Administrative Law Judge Correctly Concluded that Respondent unilaterally changed the work schedules of employees in violation of Section 8(a)(1) and (5).

Because hours of work are mandatory subject of bargaining, the Respondent could not unilaterally change it without first bargaining collectively with the Union, unless the bargaining parties first reached impasse or the union clearly and unmistakably waived its rights. *Uniserv*, 351 NLRB 1361 (2007); *New Seasons, Inc.*, 346 NLRB 610 (2006). Here, the credited evidence strongly supports the administrative law judge's conclusions that the Respondent did not bargain with the Union regarding the change and that the Union did not clearly and unmistakably waive bargaining in the matter. Therefore, the Respondent violated Section 8(a)(1) and (5) of the Act when it unilaterally changed the workweek beginning in March 2009.

III. The Administrative Law Judge Correctly Determined that Respondent Violated Section 8(a)(1) of the Act by Engaging in Surveillance of Employee Union Officers and by Promulgating Rule Restricting their Access

A. The Respondent unlawfully denied, impeded and restricted the access of its Employee Union representatives.

The Respondent has taken exceptions to the administrative law judge's conclusion that it violated the Act by restricting employee Union officers' access to its facility and employees. Any rule which denies the employee representatives "entry to parking lots, gates, and other outside nonworking areas will be found invalid" unless "justified by business reasons." *Tri-County Med.Ctr.*, 222 NLRB 1089 (1976). A rule which otherwise restrict access are presumptively valid only if (1) it limits access with

respect to the interior of the plant and other working areas, (2) it is clearly disseminated to all employees, and (3) it applies to off-duty employees seeking access to the plant for any purpose and not just to those employees engaged in union activity. *Id.* Despite initially allowing access to nonworking areas immediately after the strike ended (e.g. the Union office, break room, and the front office restroom), the Respondent subsequently restricted the reinstated employees' access through Human Resource Manager Franks and Assistant Plant Manager Shotts' oral promulgations. These additional actions contravened each one of the *Tri-County* criteria.

First, the break room/cafeteria that Perry was barred from is, by its definition, a nonworking area. Second, since the new rules were only told to the employees individually, the Respondent failed to disseminate the rules to all employees. Similarly, because the employee Union representatives were singled out, the new rule obviously did not apply to all off-duty employees. Perry's credited testimony that visitors were seen in the break room shows that the reinstated employees were not even treated as visitors. The reinstated striker Union representatives are employees within the meaning of Section 2(3) of the Act. No contract language contemplates treating them differently than other employee Union representatives. Despite the assertions of Respondent Human Resources Manager Franks, Article III, Section 9 of the Collective Bargaining Agreement does not apply to employee Union representatives. Finding that Article III, Section 9 does apply would clearly fly in the face of the CBA's plain language. As the heading for Section 9 implies, the section is only meant for the Union's "International Representatives." The terms of the section go even further and explicitly state it will apply to "[a]uthorized representatives of the Union not in the employ of the

Respondent.” Since the unreinstated strikers are still legally “employees,” they are by definition “in the employ of the Respondent” and therefore outside the restrictive conditions of Article III, Section 9. If the Respondent wished to treat the unreinstated strikers as a new class, they should have bargained such changes with the Union.

As the administrative law judge correctly held, the unreinstated strikers are akin to off-duty employees. After all, the unreinstated strikers are still “employees,” they simply are not current performing any work for the Respondent. Also, as with off-duty employees, the unreinstated strikers “have common interests [with the on-duty workers] and concerns related to wages, benefits, and other workplace issues that may be addressed by concerted action.” *Hillhaven Highland House*, 336 NLRB 646, 649 (2001). The unreinstated strikers are not neutral third-parties or even sympathetic outsiders; they are legal employees with a pronounced tangible interest in the conditions and management relationships of all employees.

Respondent contends that a primary reason for the Board not to consider the unreinstated strikers as employees is that they do not have the ability to discipline or discharge unreinstated strikers as they would active employees. Despite Respondent’s contentions, this assertion is simply not true. Unreinstated strikers are subject to discipline and discharge for misconduct just as active employees are. The Board has consistently held that striking employees may be discharged, just like active employees if the discharge is motivated by misconduct by the employee. *E.g. Hedstrom*, 235 NLRB 1198 (1978) (employees on strike making serious threats of violence are not protected by the Act); *Routh Packing Co.*, 247 NLRB 274, 281 (1980) (a striking employee’s “participation in an armed threat against a non-striker precludes the

issuance of an order [to reinstate] him”); *Newport News Shipbuilding*, 265 NLRB 716 (1982) (Respondent’s discharge of employees for littering road in front of Respondent’s facilities with tacks during a strike was appropriate); *Clear Pines Mouldings*, 268 NLRB 1044 (the Board refused reinstatement to individuals who engaged in threatening and violent behavior during a strike).

B. The Respondent Unlawfully Engaged in Surveillance and Monitoring of its Employee Union Representatives.

It is well-established that, under Section 8(a)(1) of the Act, it is unlawful for employers to monitor or exercise surveillance over union representatives or employees engaged in protected union activities, or to even give such an impression. *Crown Cork & Seal Co.*, 254 NLRB 1340 (1981). According to the testimony credited by the administrative law judge, supervisors Shotts and Franks engaged in clear and overt surveillance of Union representative Perry on November 19, November 24, December 1, and December 10, 2008. Since Perry remains a legal employee, these acts of surveillance are obvious violations of Section 8(a)(1). Franks surveillance of Perry in the employee smoking area on December 1, is especially obvious given its similarities to *P.S.K. Supermarket, Inc.*, 349 NLRB 34 (2007). As the Board held, it is unlawful for a supervisor to monitor its employees engaged in union activities in a general smoking area. *Id.* at 38. Furthermore, as Perry’s credited testimony establishes, supervisor Franks did not smoke and offered no reasoning for being there.

C. The Respondent changes to the terms and conditions of employment restricted Union access and were unlawfully made unilaterally.

As the complaint alleged, and the administrative law judge concluded, the Respondent made multiple unilateral changes to its terms and conditions of

employment, each violations of Section 8(a)(1) and (5) of the Act. Each of the changes pertained to mandatory subjects of bargaining, which made the right to bargain a right protected by the Act. *E.g. Schraffts Candy Co.*, 244 NLRB 581 (1979) (plant rules are mandatory subjects of bargaining); *American Ship Building Co.*, 226 NLRB 788 (1976) (unilateral changes to a union's office building may not be made unless certain conditions are met). Therefore, changes can only be validated if the Respondent proves the Union made a "clear and unmistakable" waiver of its right to bargain. *Metro Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983).

The Respondent argues that the administrative law judge should have applied the "sound arguable basis" analysis for contract modification cases herein. Argument Section II.C provides a detailed explanation of the difference between contract modification cases and unilateral change cases. For the reasons explained there in connection with the same paragraphs of the complaint, this is a unilateral change case, not a contract modification case, and the administrative law judge was correct to apply the "clear and unmistakable waiver" standard.

While the Collective Bargaining Agreement might briefly mention subject matter that is similar or connected to the unilateral changes in this case, the Board has held this is largely irrelevant:

[T]he *Metropolitan Edison* standard is not limited to matters on which a collective-bargaining agreement is silent. In order to establish waiver of the statutory right to bargain over mandatory subjects of bargaining, such as those raised here, there must be clear and unmistakable relinquishment of that right. *Exxon Research & Engineering Co.*, 317 NLRB 675 (1995). To meet the "clear and unmistakable" standard, the contract language must be specific, or it must be shown that the matter sought to be waived was fully discussed and consciously explored and that the waiving party thereupon consciously yielded its interest in the matter. *Angelus Block Co.*, 250 NLRB 868, 877 (1980).

Trojan Yacht, 319 NLRB 741, 742 (1995). The Respondent has not offered proof that the Union “consciously yielded its interest,” but has, instead, simply pointed to vague language and attempted to confuse the issue. Id.

The relocation of the Union office on November 12 was clearly a unilateral change to the terms and conditions of employment and, as a result, a violation of Section 8(a)(1) and (5) of the Act. The Union office location was the bargained settlement of a previous grievance with the Respondent, yet no similar bargaining existed here. Also, the Board has determined that a Respondent may only relocate a union’s office space without mutual bargaining if the Respondent (i) gives notice to the union of its intention to move the union office, (ii) explains its reasons for doing so, (iii) discusses alternate sites for the office with the union, and (iv) gives adequate time for the union to vacate the office. *American Ship Building Co.*, 226 NLRB 788 (1976). The actions of the Respondent failed every one of these criteria. Perry’s credited testimony proves the Respondent never even gave notice to the Union of the November 13 relocation until November 12, effectively failing criteria (i) and (iv) under *American Ship Building Co.* The last minute notice on November 12 failed to even state a reason for the move, failing criteria (ii). Lastly, despite the Union’s quick suggestion of an alternate location, the fact that the Respondent immediately dismissed the emailed suggestion and proceeded with the relocation a day later proves that no meaningful bargaining ever occurred, criteria (iii).

The actions of the Respondent on November 4, November 17, November 24, and December 1, 2009 also violate Section 8(a)(1) and (5) of the Act since, in each instance, the Respondent unilaterally changed its plant rules. The Board has

determined that plant rules are mandatory subjects of bargaining; therefore it is unlawful for employers to unilaterally implement or change such rules. *Schraffts Candy Co.*, 244 NLRB 581 (1979). Similarly, the Board has prohibited employers from unilaterally changing the terms and conditions of employment without bargaining collectively with a union unless the parties reach impasse or there is an express waiver. *Uniserv*, 351 NLRB (2007) and *New Seasons, Inc.*, 346 NLRB 610 (2006). As Caudle and Perry's credited testimony demonstrates, the long-standing Respondent practice was for employees to use the break rooms and bathrooms throughout the facility without restrictions on which they could use. By promulgating a new bulletin board rule to Caudle and Perry on November 4 and by restricting Perry's access to these non-work areas on November 17, November 24, and December 1, the Respondent unilaterally altered its plant policies in violation of the Act. Similarly, if the Respondent was treating these employees as a new class since they were reinstated strikers and not "active employees," that is a change in policy that should have been bargained for, not unilaterally altered by the Respondent.

On or about Friday, November 28, Respondent, again, violated Section 8(a)(1) and (5) of the Act by prohibiting Union representatives from accessing the facility. Although Respondent had agreed that the Union could staff the new Union office on Monday, Wednesday, and Friday from 2 p.m. to 4 p.m. starting November 17, Perry's credited testimony shows that he was denied access November 28, 2009. The parties had not negotiated any change to the days and hours that the Union representatives would staff the Union office. Furthermore, Article III, Section 9 of the Collective Bargaining Agreement clearly does not apply since its terms are limited to

“international representatives” and employees of the Union who are not also employees of the Respondent.

IV. The Administrative Law Judge Correctly Determined that Respondent Violated Section 8(a)(5) of the Act by Refusing to Provide the Union with the Addresses of Current Employees

Although the administrative law judge concluded that the Respondent was justified in withholding the names and addresses of replacement employees from the Union during the strike in view of a number of incidents involving property damage and visits to employees homes, the judge concluded that the Respondent’s continued refusal to furnish the information, even a year after the strike had concluded, violated Section 8(a)(5). The Respondent has taken exceptions to this conclusion.

Bargaining unit employees’ names and addresses are presumptively relevant for purposes of collective bargaining and must be furnished upon request. *Beverly Health and Rehabilitation Services*, 346 NLRB 1319, 1326 (2006). Although misconduct occurred during the strike the Respondent acknowledged that the Union was not responsible for it and thus has no reason to believe that providing Union agents with names and addresses after the conclusion of the strike would have endangered the replacements. Any basis for concern dissipated when the strike ended in July 2008. Thus, the Respondent terminated its relationship with SRC and resumed normal operations. The testimony was uniform that there have been no incidents related to hostilities between former strikers and permanent replacement or other employees since the strike ended. Nevertheless, at hearing on the matter, Human Resources Director Stacy Sinele stated Respondent’s continuing refusal to supply the Union with the addresses of scores of employees the Act obligates the Union to represent.

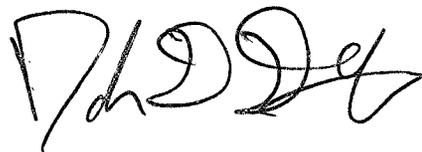
Since the strike's conclusion, the Respondent has implemented a series of unilateral changes that impede employees' access to Union officers, with the result being that many employees do not even know that the Union represents them, that there is a collective bargaining agreement in effect, or how to redress violations of the agreement. Several employees plainly stated at hearing that they do not object to the Union International Representative having their addresses, yet the Respondent persists in suppressing such information from the Union.

CONCLUSION

In view of the foregoing, the Board should overrule the Respondent's exceptions and adopt the administrative law judge's Decision and recommended Order.

Dated at Birmingham, Alabama, this 25th day of August, 2010.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "John D. Doyle, Jr.", written in a cursive style.

John D. Doyle, Jr.
Counsel for the General Counsel

CERTIFICATE OF SERVICE

NTN Bower Corporation
Cases 10-CA-37271, et. al.

I, John D. Doyle, Jr., Counsel for the General Counsel, hereby certify that on this date, I served copies of the foregoing Answering Brief the following parties by the methods indicated below:

by e-mail to rgdavis@dcamplaw.com and rarusso@dcamplaw.com and
regular mail to:

Roy G. Davis, Esq.
Richard A. Russo, Esq.
Davis and Campbell L.L.C.
401 Main Street, Suite 1600
Peoria, Illinois 61602

by e-mail to gdavies@nqwlaw.com and **regular mail to:**

George N. Davies, Esq.
Nakamura, Quinn, Walls, Weaver & Davies LLP
2700 Highway 280, Suite 380
Birmingham, Alabama 35223

By regular mail to:

NTN Bower Corporation
707 North Bower Road
Macomb, Illinois 61455

International Union – UAW
P.O. Box 771
Hamilton, Alabama 35570

NTN Bower Corporation
2086 Military Street
Hamilton, Alabama 35570

International Union – UAW
8000 East Jefferson Avenue
Detroit, Michigan 48214-2699



John D. Doyle, Jr.
Counsel for the General Counsel
National Labor Relations Board
Region 10
1130 22nd Street South, Suite 3400
Birmingham, Alabama 35205