

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
WASHINGTON, D.C.

ALDEN LEEDS, INC.,

Respondent Employer,

and

UNITED FOOD AND COMMERCIAL
WORKERS UNION LOCAL 1245,

Charging Party.

Case: 22-CA-29188

RESPONDENT'S BRIEF IN SUPPORT OF EXCEPTIONS
TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

SOKOL, BEHOT & FIORENZO
433 Hackensack Avenue
Hackensack, NJ 07601
(201) 488-1300
Attorneys for Respondent
Alden Leeds, Inc.

JOSEPH B. FIORENZO, ESQ.
Of Counsel and On the Brief

STEVEN SIEGEL, ESQ.
On the Brief

TABLE OF CONTENTS

TABLE OF AUTHORITIES..... v

STATEMENT OF THE CASE 1

FACTS 2

A. The parties and pre-negotiation communication 2

B. The September 30 Meeting 3

C. The October 5 Meeting 4

D. The October 8 Meeting 6

E. The October 21 and 22 emails 7

**F. Epstein’s phone call with Troccoli and Cunningham prior to
 October 30 8**

G. Friday, October 30 10

H. Monday, November 2 13

I. The Lockout and the November 3 Meeting 15

LEGAL ARGUMENT 15

POINT I 15

**EXCEPTION IS TAKEN TO THE ALJ’S LEGAL DETERMINATION TO APPLY A
 STRICT NOTICE REQUIREMENT TO RESPONDENT’S LOCKOUT IN THE ABSENCE
 OF SETTLED LAW THAT HOLDS THAT A LOCKOUT REQUIRES NOTICE TO THE
 UNION WHEN THE LOCKOUT, AS HERE, IS CARRIED OUT BY AN EMPLOYER IN
 GOOD FAITH AND IN THE ABSENCE OF A STRIKE AND A SUBSEQUENT RETURN
 TO WORK BY STRIKING EMPLOYEES. (ALJD 16:22 TO 17:51). THIS EXCEPTION IS
 TAKEN IN LIGHT OF THE FACT THAT: (1) THERE IS NO PUBLISHED DECISION
 THAT HOLDS THAT A STRICT NOTICE REQUIREMENT IS APPLICABLE TO
 LOCKOUTS THAT ARE CARRIED OUT BY AN EMPLOYER IN GOOD FAITH AND IN
 THE ABSENCE OF A STRIKE AND A SUBSEQUENT RETURN TO WORK BY
 STRIKING EMPLOYEES; AND (2) TO THE EXTENT THAT THE NLRB WERE TO
 ESTABLISH NEW LAW WITH RESPECT TO A NOTICE REQUIREMENT UNDER
 THESE CIRCUMSTANCES, SUCH NEW LAW, BY OPERATION OF PRINCIPLES OF
 FAIRNESS AND EQUITY, SHOULD BE PROSPECTIVE ONLY (EXCEPTIONS 1 AND 2)**

**A. Existing case law pertaining to notice requirements applicable to employer
 lockouts 16**

1. Eads Transfer 16

2. Dayton Newspapers..... 17

3. Dietrich Industries 19

4. Boehringer Ingelheim 20

B. Because no case has ever held that a notice requirement attaches to a lockout in the circumstances here presented (i.e., a lockout in the absence of a strike), then -- to the extent that this panel were inclined to establish new law as to this issue -- such new law, by operation of principles of fairness and equity, should be prospective only..... 24

POINT II 25

IN THE ALTERNATIVE, EXCEPTION IS TAKEN TO THE ALJ'S VARIOUS FINDINGS TO THE EFFECT THAT RESPONDENT FAILED TO PROVIDE CLEAR AND SUFFICIENT NOTICE TO THE UNION OF THE "CONDITIONS THAT THE EMPLOYEES MUST ACCEPT TO AVERT THE LOCKOUT AND THE TIME TO INTELLIGENTLY EVALUATE THESE CONDITIONS." THIS EXCEPTION IS TAKEN IN LIGHT OF THE CHARGING PARTY'S REPEATED ADMISSIONS -- BY WAY OF DOCUMENTARY EVIDENCE AND TESTIMONY AT THE HEARING BY THE UNION REPRESENTATIVES -- THAT IT KNEW AND UNDERSTOOD THAT RESPONDENT WAS OFFERING A ONE-YEAR FREEZE ON ALL TERMS OF THE AGREEMENT (INCLUDING THE COST OF EMPLOYEE HEALTH BENEFITS), AND THAT RESPONDENT'S NEGOTIATING POSITION REMAINED UNCHANGED THROUGHOUT THE ENTIRE PERIOD OF NEGOTIATIONS LEADING UP TO, AND INCLUDING, THE LOCKOUT OF NOVEMBER 3, 2009 (EXCEPTIONS 3 THROUGH 10)

A. Overview of the standard applicable to the Board's review of factual findings of the Administrative Law Judge..... 26

B. Although the ALJ concluded that Respondent failed to provide clear and sufficient notice to the union of the "conditions that the employees must accept to avert the lockout and the time to intelligently evaluate these conditions," the ALJ also made numerous findings that are inconsistent with -- and directly undercut -- the foregoing conclusion, and that instead support the contrary conclusion that the Union knew and understood that Respondent was offering a one-year freeze on all terms of the Agreement (including the cost of employee health benefits), and that Respondent's negotiating position remained unchanged throughout the entire period of negotiations leading up to, and including, the lockout of November 3, 2009 27

C. In addition to the ALJ's own findings summarized in Point IIB, the record is replete with evidence (including admissions by the Union's representatives at the hearing before the ALJ) that the Union knew and understood that Respondent was offering a one-year freeze on all terms of the Agreement (including the cost of employee health benefits), and that Respondent's

negotiating position remained unchanged throughout the entire period of negotiations leading up to, and including, the lockout of November 3, 2009..... 31

D. The ALJ’s erroneous conclusion (*i.e.*, that Respondent failed to provide clear and sufficient notice to the Union of the “conditions that the employees must accept to avert the lockout and the time to intelligently evaluate these conditions”) is based entirely on the ALJ’s misinterpretation and misapprehension of the significance of parties’ discussions concerning health care costs. In particular, the ALJ determined that these discussions concerning health care costs amounted to a shifting position by Respondent with respect to Respondent’s willingness to bear a greater or lesser amount of employee health care costs. However, the record instead conclusively establishes that: (1) Respondent’s consistent and unchanging position in the entire period leading up to the lockout is that Respondent’s responsibility for health care costs would be “frozen” at the present level; (2) although Respondent did offer assistance to the Union in finding health insurance providers other than the Union’s health insurance provider and in finding more affordable health insurance plans than the Union’s present plan, Respondent’s offer of “assistance” to the Union in no way represented a change in Respondent’s fundamental position throughout the course of the negotiations of the collective bargaining agreement that the amount of Respondent’s contribution to employee health care costs, would remain frozen at the present level; and (3) Respondent’s efforts amounted to nothing more than an attempt to assist the Union in maximizing coverage for its members by showing there existed alternate health care plans that the Union could switch to given the Respondent’s unwavering position that its contribution to health care costs would be frozen..... 36

E. The Union’s negotiating team -- all admitted to be experienced negotiators -- should be held to a standard of knowledge and understanding with respect to Respondent’s offer that is consistent with the exacting standard set out by the Board in Boehringer Ingelheim, 350 NLRB 678 (2007) 40

F. Under Boehringer Ingellheim, legally sufficient and timely notice of an employer’s intention to impose a lawful lockout occurred within hours of the lockout’s commencement. Here, substantial evidence in the record supports the conclusion that Respondent’s notice to the Union of a lockout occurred seven days (*i.e.*, October 27) before the commencement of the November 3 lockout and it is undisputed (and the ALJ found) that notice of the lockout occurred at least as early as four days (*i.e.*, October 30) before the commencement of the November 3 lockout. By any reckoning, notice of the lockout was timely, especially in light of the fact Respondent’s last best offer remained unchanged for the weeks leading to the lockout..... 42

G. Summary 43

POINT III 44

ALTHOUGH NOT NECESSARY TO THE REVERSAL OF THE ALJ’S RECOMMENDATION (AS TO THE PRE-LOCKOUT NOTICE ISSUE) THAT IS MANDATED BY THE ARGUMENTS SET FORTH IN POINTS I AND II, SUPRA, IT IS NEVERTHELESS RELEVANT TO THE BOARD’S CONSIDERATION OF THIS ISSUE THAT THE ALJ’S RECOMMENDATION IS PREMISED IN PART ON THE ALJ’S FINDING THAT THE UNION NEGOTIATED IN GOOD FAITH THROUGHOUT THE WEEKS LEADING UP TO THE LOCKOUT. HOWEVER, A REVIEW OF THE RECORD INSTEAD DISCLOSES ABUNDANT EVIDENCE OF THE UNION’S BAD-FAITH CONDUCT, INCLUDING: (1) THE FACT THAT RESPONDENT AGREED TO A 30-DAY EXTENSION OF THE AGREEMENT AND REPEATEDLY INDICATED ITS WILLINGNESS TO ENGAGE IN FACE-TO-FACE NEGOTIATIONS FOR A NEW AGREEMENT BUT THE UNION FAILED AND REFUSED TO ENGAGE IN FACE-TO-FACE NEGOTIATIONS AT ANY TIME DURING THE PERIOD FROM OCTOBER 8 WHEN THE EXTENSION AGREEMENT WAS EXECUTED TO NOVEMBER 3 WHEN IT EXPIRED; AND (2) RESPONDENT SENT NUMEROUS COMMUNICATIONS TO THE UNION DURING THIS CRITICAL PERIOD TO WHICH THE UNION DID NOT EVEN BOTHER TO RESPOND. (EXCEPTION 11)

POINT IV 46

ALTHOUGH NOT NECESSARY TO THE REVERSAL OF THE ALJ’S RECOMMENDATION (AS TO THE PRE-LOCKOUT NOTICE ISSUE) THAT IS MANDATED BY THE ARGUMENTS SET FORTH IN POINTS I AND II, SUPRA, IT IS NEVERTHELESS RELEVANT TO THE BOARD’S CONSIDERATION OF THIS ISSUE THAT THE CREDIBILITY OF UNION REPRESENTATIVES TROCCOLI CUNNINGHAM AND DEVITO ARE SEVERELY UNDERCUT ON THIS RECORD (EXCEPTIONS 12 AND 13).

A. The ALJ’s recommendation of dismissal of the Union’s “inability to pay” claim based on the ALJ’s rejection of the credibility of the testimony of Troccoli and Cunningham 47

B. The ALJ’s recommendation of dismissal of the Union’s “relocation threat” claim based on the ALJ’s rejection of the credibility of the testimony of Union Shop Steward Simon Hemby, as well as the testimony of Troccoli and Cunningham 48

CONCLUSION 51

TABLE OF AUTHORITIES

<u>American Ship Building Co. v. NLRB</u> , 380 U.S. 300 (1965).....	23
<u>Boehringer Ingelheim</u> , 350 N.L.R.B. 678 (2007)	16, 20, 21, 40, 41, 42
<u>Cipriano v. City of Houma</u> , 395 U.S. 701 (1969).....	24
<u>Dayton Newspapers</u> , 339 N.L.R.B. 650 (2003)	16, 17, 18, 19, 24,
enfd. in relevant part, 402 F. 3d 651 (6th Cir. 2005)	
<u>Dietrich Industries</u> , 353 N.L.R.B. 57 (2008)	16, 30
<u>Eads Transfer</u> , 304 N.L.R.B. 711 (1991)	16, 17, 18, 19
enfd., 989 F.2d 373 (9 th Cir, 1993)	
<u>Harter Equipment (Harter I)</u> , 280 N.L.R.B. 597 (1986)	19, 23
<u>Laidlaw Corp.</u> , 171 N.L.R.B. 1366 (1968)	18, 19
<u>NLRB v. Fleetwood Trailer Co., supra</u> , 389 U.S. 375 (1967).....	18
<u>NLRB v. Oregon Worsted Co.</u> , 94 F.2d 671 (9th Cir. 1938)	26
<u>Pirelli Cable Corp. v. NLRB</u> , 141 F.3d 503 (4th Cir. 1998)	26
<u>Tyler v. Cain</u> , 533 U.S. 656 (2001).....	25
<u>Universal Camera Corp. v. NLRB</u> , 340 U.S. 474 (1951).....	26, 27, 35

STATEMENT OF THE CASE

Following a two-day hearing on unfair labor practice charges by United Food and Commercial Worker's Union Local 1245 (the "Union" or "Local 1245") the ALJ rejected all of the charges filed by the Union with one exception: the ALJ recommended that the Board sustain the Union's claim that it was not provided adequate notice of the lockout.¹

As shall be set forth herein, Respondent takes exception to the ALJ's recommended disposition of the "pre-lockout notice" claim. ALJD 20:16-20:18. Respondent will show that the hearing record provides clear and convincing evidence that the Union had clear notice of the "conditions that the employees must accept to avert the lockout and the time to intelligently evaluate these conditions." Indeed, the record plainly shows, through repeated admissions by Union witnesses and the documentary evidence, that the Union understood that Respondent was offering a one-year freeze on all terms of the Agreement (including the cost of employee health benefits) and that Respondent's negotiating position remained unchanged throughout the entire period of negotiations up to, and including, the lockout date of November 3, 2009. The record further shows that, despite receiving assurances from the Union that it would have its members vote on the one-year freeze, that the Union took no action, which ultimately resulted in the lockout of November 3, 2009.

For the reasons fully set forth herein, the ALJ erred in finding that the Respondent violated the act by failing to provide adequate and sufficient notice to the Union of the lockout that would commence on November 3, 2009 in the absence of Union acceptance of the clear and unambiguous "freeze" offer. Consequently, the Board should reject the ALJ's finding of violation and the Complaint should be dismissed in its entirety.

¹ On November 6, 2009, when the Union filed its unfair labor practice charge, it did not allege the lockout was unlawful because of the failure to advise the Union or its employees of the terms that would avert a lockout. (See GCX #1). On December 8th, the Union filed an amended charge but, like the original charge, did not claim Respondent violated the Act by failing to advise it of the terms it would take to avert a lockout. (GCX #1). It was only on January 12, 2010, that the Union belatedly alleged that Respondent "illegally locked out bargaining unit employees. . .without providing proper notice to employees." (GCX #1).

FACTS

A. The parties and pre-negotiation communication.

Alden Leeds (hereafter “Alden” or “Respondent”) manufactures and packages swimming pool chemicals at two locations in Kearny, New Jersey: 100 Hackensack Avenue and 55 Jacobus Avenue. (Tr. 271).² Alden has been operating out of these locations for over forty years. (Tr. 273).

Alden’s production and delivery employees have been represented by the United Food and Commercial Workers Local 1245 since 2001 (hereafter “Local 1245” or “the Union”). (Tr. 58) Alden and Local 1245 negotiated two collective bargaining agreements in 2002 and 2005. (Tr. 59; GCX #4(b) and (c)). The 2002 contract followed a one-week lockout. (Tr. 104; GCX #4(b)).³ Tom Cunningham, who is the Union’s business agent has been with the Union for nine years and negotiates several contracts a year. Cunningham served as Local 1245’s chief spokesperson for the 2009 negotiations. John Troccoli, the Union’s Secretary-Treasurer, also played a key role in the negotiations beginning with a meeting between the parties on October 8. Union President Vincent DeVito also assumed a personal but indirect role in the negotiations but assumed that role only beginning a few days before the November 3 lockout.⁴

Mark Epstein, Alden’s President, served as chief spokesperson for Alden. (Tr. 24, 58, 59, 273; GCX #4(a) - (c)). Epstein has served in that role for over thirty years negotiating between eight and ten contracts with Local 174 and 1245. (Tr. 273, 351). Although Epstein negotiated these contracts, he always consulted with legal counsel. (Tr. 294, 295). The then-

² Citations to the record are as follows: (Tr. __); General Counsel Exhibits (GCX# __); and Respondent Exhibits (RX# __).

³ DeVito testified that he never experienced a lockout in the 35 years he has been with Local 1245. (Tr. 49)

⁴ At the hearing, Troccoli testified that he is a “*talented negotiator*,” and served as the lead negotiator for the Union in a major collective bargaining involving 2,100 employees at the Kings supermarket chain. (Tr. 209). Troccoli further testified that he has an excellent understanding of health insurance plans – the critical negotiating issue that is at the heart of this case. (Tr. 209-210). Union President DeVito is also an experienced negotiator, having negotiated “hundreds” of contracts. (Tr. 40).

current collective bargaining agreement (“Agreement”) expired, by its terms, on October 3.

By letter dated July 17, 2009,⁵ Local 1245 advised Alden that Cunningham would be in contact with Epstein to arrange meeting dates. (Tr. 24, 58, 59; GCX #2). Yet it was not until two months later on September 16, 2009 that Cunningham first contacted Epstein requesting dates to negotiate a successor agreement. (Tr. 60, 61). Cunningham left a voicemail message that was followed by an email from Carol Orefice (“Orefice”), Cunningham’s assistant, indicating that the email was being sent by Cunningham. (Tr. 61, 63; GCX #5). The following day Epstein responded by email to Cunningham advising that he would be available most of the following week and would call when he returned to the office on September 18. (Tr. 62; GCX #6).

On or before September 22, Epstein and Cunningham spoke by telephone and agreed to meet on September 30. (Tr. 64). Epstein requested that Cunningham send him the Union’s **complete** contract proposal prior to the September 30 negotiation session. (Tr. 64, 65). By email dated September 22, Cunningham forwarded the Union’s **incomplete** initial proposal for a new contract. (Tr. 64). The proposal did not include healthcare contribution rates. (GCX #8). In response, Epstein notified Cunningham by email to send the health contribution rates in advance of the September 30 meeting. (Tr. 66). Cunningham failed to do so. (Tr. 66). According to Cunningham, the contribution rates were not sent because he never saw Epstein’s email prior to that meeting. (Tr. 66). Yet he never complained to Epstein that emails were not being received or that he was not receiving the emails on a timely basis and never told Epstein to stop sending emails and communicate by other means. (Tr. 109, 110). Indeed, Cunningham testified that emails sent by Epstein to Orefice were always given to him. (Tr. 86, 109, 186; GCX #3, #13 through #16).

B. The September 30 Meeting.

Cunningham and Epstein met for the first time in Epstein’s office on September 30 (the “First Meeting”). (Tr. 67, 273). The First Meeting only lasted for fifteen or twenty minutes. (Tr.

⁵ Unless otherwise noted, all dates hereinafter are in 2009.

67, 273, 274). Cunningham gave Epstein a revised copy of the Union's initial proposal previously emailed on September 22 with the health contribution rates. (RX #5).

Cunningham went through the proposals, one-by-one, to simply advise Epstein of what the Union was proposing. (Tr. 74, 145). There was no discussion of the Union's proposals until Cunningham reached the healthcare contribution rates. (Tr. 74, 147, 276). Epstein then calculated the cost of the newly proposed health contribution rates and told Cunningham that the rates were expensive and that he was unwilling to agree to the proposed rates. (Tr. 276,334). Cunningham asked Epstein to explain his bargaining position. Epstein responded that there were several economic factors affecting Alden's business, including the fact that there had been a cold and wet season, record rainfall in May, extreme cold in June, competitors had reduced their prices, customers were not selling many swimming pools, pool construction was down 50%, and Alden had an issue with the government regarding a late refund of anti-dumping duties. (Tr. 276, 336). As a result of these several factors, Alden knew it would be selling less product so it adjusted its inventories downward. (Tr. 305, 333).

The September 30 meeting ended with Epstein telling Cunningham that he would contact his health insurance broker to investigate alternative health plans. (Tr. 75, 278, 334). The purpose of this effort was to help the Union secure a less expensive health insurance plan for its members consistent with Alden's proposed freeze on all economic issues, including health care costs. (Tr. 80, 154). At the conclusion of the meeting, Epstein and Cunningham agreed to meet again on October 5. (Tr. 278).

C. The October 5 Meeting and the Respondent's Clear Offer to Freeze its Economic Costs.

On October 5, Epstein and Cunningham again met alone in Epstein's office (the "Second Meeting"). (Tr. 279). Like the First Meeting, it did not last more than twenty minutes. (Tr. 80, 279). Cunningham testified that his main focus for this meeting was to get an extension agreement signed since the Agreement had already expired. (Tr. 78). Epstein refused to sign an

extension agreement. (Tr. 280). Epstein did present Cunningham with information concerning alternative health insurance plans by giving him two alternative plans.⁶ (Tr. 78, 279, 341; GCX #33(a) and (b)). Epstein told Cunningham that he would continue to look for other plans in order to assist the Union in securing a less expensive health insurance plan consistent with Alden's proposed freeze on all economic issues, including health care costs.. (Tr. 79. 153, 156).

Epstein was emphatic as to this point. He told Cunningham: “[A]ll I’m looking for is a freeze for one year.” (Tr. 80, 154) (emphasis added). Cunningham, for his part, testified that he clearly understood that to mean that Alden wanted a one-year contract with no changes to the Agreement. (Tr. 120, 154-155.). Indeed, Cunningham’s contemporaneous notes state “keep a freeze for a one year contract”. (Tr. 80, 120 154-155; RX. #4) (emphasis added). Cunningham further testified that he told Epstein there that the Union would likely find a freeze on Alden’s health care contributions to be unacceptable, because the contributions Alden was currently paying would not maintain the current level of coverage for the year. (Tr. 80, 155). Nonetheless, Cunningham told Epstein that he would bring Alden’s offer of a health-care contribution freeze (as part of the overall freeze of compensation) back to the Union. Epstein confirmed the discussions at the October 5 meeting in an email to his brothers sent immediately after the meeting ended: “[Cunningham] will bring the offer of one year status quo but doesn’t think it will be acceptable.” (Tr. 280; RX #7). At the conclusion of the meeting, Epstein and Cunningham agreed to meet on October 8. (Tr. 280).

Thus, the record is clear and undisputed that as of the Second Meeting on October 5, Alden had made clear, and the Union plainly understood, that it wanted a one-year extension of the Contract with all of Alden’s costs, including those for health care, frozen at the current

⁶ The expiring Agreement provided for Alden to make a contribution to the Union controlled health insurance plan. Alden’s position consistently was that it would freeze the amount of its contribution for health insurance. The discussion about alternate health insurance plans was to show the Union that, even with Alden freezing its health care contributions, there were ways that those dollars could go further in certain health plans, not controlled by the Union, which might provide more benefits for the same “frozen” dollar payment than under the Union plan. See Point IVD, infra.

levels, following which the parties would then negotiate a new Agreement.

D. The October 8 Meeting.

The parties met again on October 8 in Epstein's office (the "Third Meeting"). (Tr. 82, 171, 281). This was the last face-to-face meeting between the parties up to the November 3 lockout. Cunningham and Troccoli attended for the Union. (Tr. 82, 170,281). Troccoli testified that his *sole purpose* in attending this meeting was to secure an extension agreement from Epstein. (Tr. 171,210, 281, 341). He opened the meeting by telling Epstein that he believed it was very important to sign a thirty-day extension agreement. (Tr. 281). Initially, Epstein refused to sign the extension agreement. (Tr. 82). Epstein then repeated on several occasions the same offer he made three days earlier to Cunningham of a 1 year freeze on payment of economic benefits. (Tr. 281). Cunningham confirmed Epstein's offer in his contemporaneous bargaining notes: "Company wants a one-year **freeze.**" (RX #3) (emphasis added). Indeed, Troccoli admitted that Epstein reiterated that exact same offer at least three times during the meeting:

"[Y]ou don't understand, . . . I need to keep the contract intact; I just want to continue the contract for a year" "Well, you just don't understand. I just want to continue this for a year." "You just don't understand I want to keep everything the same. I don't want to give anything more." "I just want to extend this thing for a year." (Tr. 214) (emphasis added).

Troccoli testified repeatedly that he knew exactly what Epstein was proposing. (Tr. 174, 175, 214, 234).

The meeting ended with Troccoli again requesting that Epstein sign an extension agreement. (Tr. 176). **Epstein agreed to do so conditioned upon there being no retroactivity because he was not offering anything more than the current Agreement.** (Tr. 283). **Troccoli understood the offer and agreed to eliminate the retroactivity language in the extension agreement.** The parties signed a thirty-day extension. (Tr. 178, 284; GCX #12). Epstein then said he would continue to assist the Union by looking for additional health plans and that he would forward to the Union any additional information. (Tr. 84, 216, 228, 283). Troccoli and Cunningham did not request to meet again. (Tr. 94, 159, 284, 313).

Following the meeting, neither Cunningham nor Troccoli notified Epstein that they did not understand his proposal for a new Agreement. (Tr. 121, 122, 215; RX #3). Quite to the contrary, as admitted at the Hearing, Epstein could not have been clearer, reiterating at the Second Meeting, as he had at the First, that there would be a 1 year freeze of Alden's costs for wages and benefits.

E. The October 21 and 22 emails forwarding the health plans and explanations of those plans.

Early in the morning on October 21, Epstein emailed Orefice to advise Cunningham that he had been promised information regarding an alternative healthcare plan and that it would be forwarded to Cunningham. (Tr. 284; RX #13). Later that afternoon, Epstein emailed the health plan to Cunningham with a message: "Please review the attached regarding medical coverage. I'd hoped to have something even better but time is passing and I'm not certain of getting anything else. Will advise if anything else comes through. Epstein also made an overture to Local 1245 to have another meeting: *Lets meet to discuss this early next week.*" (GCX #14) (emphasis added). The Union received both emails, but, incredibly, never responded and at no time after the extension agreement was signed did it either (a) agree to Epstein's request for another meeting, or (b) conduct a face-to-face meeting with Epstein. (Tr. 86, 87, 228, 284, 340).

The following morning, October 22, Epstein emailed a detailed analysis of the health plans emailed the previous day. (Tr. 90, 284-85; GCX #15). The purpose of this analysis was simply to provide assistance to the Union in securing a health benefits plan that maximized benefits to its members consistent with Alden's proposal of a "freeze" on its current employee health care benefit contributions of \$20,000 per month. In the health care benefit analysis, Epstein advised Cunningham that the alternative health care benefit plan would cost about halfway between the existing expiring Union healthcare plan and the newly proposed contribution rates. (Tr. 284-85). Epstein noted that the existing expiring Union plan was costing Alden \$20,000 per month and that the newly proposed Union healthcare contribution rates

would cost Alden \$35,000 per month -- an increase of \$15,000 per month. (GCX #15). Epstein also stated that the deductibles in the Plan were \$1,150 for single and \$2,300 for family and that if single coverage only was provided, the Plan would cost Alden \$18,500 per month, or less than the existing expiring Union plan. (GCX #15). To bring that cost to \$20,000 per month -- the same Alden was currently paying (and consistent with Alden's position of a "freeze" on its contributions to employee health benefits) -- Alden could provide the first \$400 deductible to each member. (GCX #15). Epstein advised that members with families would have to pay for the difference between single and family coverage. (GCX #15). He closed the email by saying that he hoped to have something better today and, if so, would forward it, but he wanted to provide Cunningham with this analysis. (GCX #15). Cunningham never responded to the email. (Tr. 124).

Later that day, Epstein emailed Cunningham another alternative health plan explaining that this Plan had a slightly higher cost to each member. This Plan did not require medical questions to be asked upon enrollment, whereas the plan sent the day before did. (Tr. 92, 285; GCX # 16). Cunningham and Troccoli both testified that they did not respond to this information either.⁷ (Tr. 87, 92, 124, 232, 233, 284, 285, 340, 341).

F. Epstein's phone call with Troccoli and Cunningham prior to October 30.

On or about October 26, Epstein had a telephone conversation with Cunningham and Troccoli. (Tr. 285, 286). Epstein testified that he was sure it was prior to October 30 because Cunningham told him that he was going to have a meeting with the employees by October 30 to vote on Alden's offer. (Tr. 343). During this telephone conversation, Epstein repeated the offer that was given to Troccoli and Cunningham on October 5 and 8. (Tr. 286). The three of them also discussed healthcare. (Tr. 286, 287). Troccoli told Epstein that he was unaware of the

⁷ The reason the Union representatives failed to respond to these alternate health care plans is simple. They had absolutely no interest in changing plans but, instead, wanted to keep the Union-sponsored plan, even if it meant a higher cost and a reduction in benefits for its members. The reason for this has never been explained

health benefit plans that Epstein emailed on October 21 and 22. (Tr. 286). He thanked Epstein for his efforts to find alternatives. However, Troccoli made it crystal clear to Epstein that the Union rejected the Plans because deductibles were too high and employees' cost would substantially increase. (Tr. 183). Troccoli then told Epstein that the Union insisted that employees remain in its own healthcare plan and would freeze the Alden's cost, but benefits might have to be cut. (Tr. 183, 286, 344).

Epstein accepted Troccoli's offer on the healthcare cost. (Tr. 344; GCX# 3). Epstein reminded Troccoli and Cunningham that he still wanted a freeze for one year, but if the Union wanted two years that would also be acceptable. The bottom-line offer of Epstein remained a one-year freeze on all employer costs, including health care costs. Tr. 345). Epstein testified that Troccoli and Cunningham did not seem to be interested in a two-year freeze. (Tr. 345) (emphasis added). **Cunningham agreed to take the offer to a vote by Friday, October 30.** (Tr. 345).

Troccoli and Cunningham further testified that Epstein had made it clear that he rejected, and was not interested in agreeing to any of the Union's demands contained in the September 30 proposal. (CRX #5)(Tr. 183-184, 286, 344). Indeed, Troccoli candidly admitted that when he attempted to discuss the Union's other demands during October 8 meeting, Epstein always cut him off and told him that **he did not want any changes to the existing terms of the Agreement.** (Tr. 183-84,286,344).

Thus, as of October 26, the record, including Hearing admissions of the Union, confirmed that: (1) the Union was uninterested in having its employees do anything other than remain in its own health care plan; (2) that the Union employees would remain in their own health care plan and Alden's costs would be frozen, which would mean some of the Union benefits would have to be cut under the Union plan; (3) Alden accepted the Union's agreement that the health care costs of Alden would remain fixed, which was consistent with its unwavering position to freeze all costs; and (4) the Union, through Cunningham, agreed to take Alden's

“freeze” proposal, which had been on the table since October 5, to the Union for a vote.

G. **Friday, October 30.**

DeVito and Troccoli testified they attended a staff meeting in their office that began at 1:30 PM. (Tr. 28, 217). DeVito testified that Troccoli came to him early in the morning to advise him that Epstein had called looking for Cunningham. (Tr. 44, 45). According to DeVito, Troccoli told him that he returned the call but all that he and Epstein discussed was that Cunningham was taking a personal day. (Tr. 50-51). Troccoli contradicted DeVito’s testimony admitting that he and DeVito, prior to the staff meeting, had a detailed discussion about Alden regarding health insurance. (Tr. 50-51). Troccoli further admitted that DeVito told him, consistent with the commitment already made on October 26 by Troccoli to Epstein, that Alden could have the same medical plan at the same contribution rate with a cut in the benefits. (Tr. 181, 182). Troccoli testified that he recalled such a discussion because he would be calling Epstein later that day. (Tr. 182). DeVito denied those conversations which his subordinate said took place. (Tr. 51-55). Indeed, incredibly, DeVito testified that he only spoke to Troccoli about healthcare at 7:00 PM, despite the clear testimony of his subordinate, Troccoli, to the contrary.

Troccoli testified that after his conversation with DeVito, he telephoned and spoke to Epstein. (Tr. 183). He could not remember the time that he spoke to Epstein but was able to recall the time the staff meeting began and ended and when he spoke to DeVito. (Tr. 181, 217). Troccoli further testified that he told Epstein he was unaware of the health plans proposed on October 21 and 22. (Tr. 184, 238). **Epstein responded by repeating his offer, confirmed repeatedly over 3 weeks, that he wanted everything to stay the same for a year and that Epstein was not interested in any of the Union’s proposals.** (Tr. 183, 184, 286, 344) Troccoli confirmed Epstein’s testimony that the Union had not interest in switching to any of the alternative non-union plans forwarded to Troccoli and, instead, offered that they would stay with the Union’s health plan at the same cost to the Company with a cut in benefits. (Tr. 183, 237). Thus, the Union plainly understood, as admitted by Troccoli, the Alden proposal. No increase in

costs for a year; everything stays the same for 1 year; and the Union would stay with their current health plan through the Union.

Just as critical, Troccoli did not dispute that Epstein told him that Cunningham previously stated that a vote on the Company's offer by the employees would take place by October 30. (Tr. 286, 344). Troccoli testified: "*All I know is, he (Epstein) said he wanted to extend it for one year.*" (Tr. 231) (emphasis added). Troccoli testified that Epstein said an offer would be received by the end of the day and also told Troccoli that employees would be locked out if the employees did not accept the offer. (Tr. 239)⁸

Despite allegedly being told by Epstein that Troccoli would get something by the end of the day and that a lockout was a real possibility, Troccoli never thought to tell Orefice to be on the lookout for something from Alden, or to interrupt the staff meeting if something came in from Epstein. (Tr. 218, 239). According to Troccoli, he did not think Epstein would send something by the end of the day even though according to Troccoli, Epstein said an offer would definitely be sent. (Tr. 218).

As of October 30, 2009, this was the current state of events: (1) the contract which Alden agreed to extend was set to expire in just 3 days, on November 3; (2) the Union had undertaken no efforts to have a face-to-face negotiating session since October 8 – – 22 days earlier, despite Epstein's request to do so; and (3) Epstein had been repeatedly promised that the wage and benefit proposal for 1 year would voted upon.

On October 30, Epstein sent an email to Cunningham and Troccoli. As he testified at the Hearing, he did so, not in response to any request, but due to Cunningham's failure to obtain a Union vote on the company's long-standing offer for a 1 year freeze, as had been previously promised. (TR. 287, 345). Indeed, the content of the email, (GCX #3), makes no

⁸ Troccoli testified that he did not ask for another extension agreement because he did not believe the parties were at "*odds ends*" even though he was just told that there was danger of a lockout-- the exact reason why he would ask for an extension. (Tr. 242).

reference to being sent in response to any conversation with Troccoli, or due to a request by anyone from the Union.

The October 30 email was sent at 3:32 p.m. to Cunningham and Troccoli with the message: IMPORTANCE HIGH. The email corroborated conversations Epstein had with Troccoli earlier in the week:

- It confirms the Union's offer and Alden's acceptance to maintain the Union-sponsored health plan and to freeze Alden's costs.
- It confirms that Alden had been promised that the Union would have a meeting with its members by October 30 to vote on whether they would accept a 1 or 2 year freeze.
- It confirmed that "if we have no agreement between the parties by the close of business on Monday, then the company will lock out the Union members on Tuesday morning, November 3, 2009.

Consistent with the Union's lack of responsiveness over the period of 22 days, Epstein got not response to his email (Tr. 288-289).

Within one hour after sending the email, Epstein spoke to Shop Steward Simon Hemby in his office to advise him that Alden had made its offer to the Union and if there was no contract in place by the close of business on November 2 the employees would be locked out the following day. (Tr. 288). Epstein told Hemby to inform employees at both Kearny locations. (Tr. 288). Hemby agreed to do so. (Tr. 288).

DeVito and Troccoli testified that they did not see Epstein's email until after the staff meeting ended at 6:30 p.m. or 7:00 p.m. (Tr. 28, 44, 186). Incredibly, DeVito testified that *there was no discussion regarding the email at that time despite being told that employees may be locked out just a few days later.* (Tr. 51). According to DeVito, he only instructed Troccoli to have Cunningham at the office on Monday so the three of them could discuss the email. (Tr. 29)⁹ Cunningham testified that he called into the office later on Friday, October 30 and spoke to Troccoli who told him about the email, even though Cunningham called prior to Troccoli

⁹ Troccoli testified that he did not even come into the office on Monday. (Tr. 191).

allegedly seeing the email, and that he should come to the office on Monday to discuss it because it threatened some type of lockout. (Tr. 94, 95, 125). Troccoli testified that he never spoke to Cunningham on October 30. (Tr. 222, 228).

Despite never before expressing any doubt as to Alden's offer for a "freeze" DeVito and Troccoli testified that they did not respond to Epstein's October 30 email because (1) they did not understand Alden's offer and (2) Local 1245 had never experienced a lockout. (Tr. 55, 228). DeVito testified that he wanted to consult with legal counsel before responding. (Tr. 29,49. 55, 224. 229). Troccoli's affidavit stated: "[t]hat same day (October 30), the Union received an email from Epstein saying that the workers would be locked out November 3rd, 2009, if the Union would not agree to the employer's proposals." (Tr. 225). Troccoli admitted that there was nothing in his affidavit corroborating his testimony that he did not understand the Company's proposal or that he was confused in any way. (Tr. 225). Cunningham also clearly understood the Company's offer. His affidavit stated: "[o]n October 30, 2009, the Union received an email from Epstein indicating that if the Union did not agree to his demands, the members would be locked out November 3." (Tr. 129). Like Troccoli, Cunningham admitted that he was not confused by, or did not understand the Alden's offer. (Tr.129). Moreover, contrary to DeVito's testimony, Local 1245 has experienced at least one lockout in its history. (Tr. 104, 234; GCX #4(b)). In fact, Alden had a lockout only eight years earlier and Troccoli and Cunningham were both directly involved in the negotiations that led to and ended the previous lockout. (Tr. 104, 234). DeVito also testified that he made absolutely no effort to contact legal counsel on Friday, October 30. (Tr. 42).

Thus, both of the Union's two primary negotiators, Cunningham and Troccoli, clearly understood that a lockout would occur if the Union did not agree to the employer's offer, reiterated on multiple occasions over a 3 week period of time, for a freeze in compensation and benefits.

H. Monday, November 2.

DeVito testified that he did not remember whether he spoke to legal counsel at all and, if so, was not sure if and when the conversation occurred. (Tr. 42). In any event, Local 1245 did not respond to the October 30 email on November 2. (Tr. 41, 223). Troccoli testified that he was sure DeVito spoke to legal counsel on November 2. (Tr. 234)¹⁰ DeVito spoke with Cunningham on November 2 regarding a summary of the negotiations. Based on the Hearing evidence, the ALJ concluded that Cunningham and DeVito were both well aware of Alden's outstanding offer of a freeze. The ALJ found the following:

Similarly, when DeVito asked Cunningham on November 2 for a summary of developments at negotiations, Cunningham informed him that the **Respondent has proposed a freeze**, but that the health care contributions were the big problem and they could not get past that issue. (ALJ Dec. at p. 6).

Not only do the statements of Cunningham and Troccoli make plain that there was absolutely no ambiguity as to the "freeze" offer, their actions confirm their clear understanding. As found by the ALJ, the Union never asked Alden to "clarify" any issue and never expressed to Alden, or anyone else, any ambiguity with regard to the proposal. This conduct, consistent with the "summary" given by Cunningham to DeVito, speaks louder than words ever could as to Alden's consistently clear position that it would accept nothing more than a freeze on economic benefits to the Union.

Cunningham testified that he arrived at the office on November 2 at around 11:00 AM and learned that Hemby had already called the office to advise that employees had already been told that there was going to be a lockout on November 3. (Tr. 95-96). However, Hemby -- contrary to Cunningham's testimony -- testified that he was only advised by Epstein of a November 3 lockout on Monday November 2 (Tr. 269) and did not call the Union office *until the afternoon of that day* (Tr. 254, 269). Cunningham's testimony on the above point is fully

¹⁰ Legal Counsel was present at the trial and never testified to clear the confusion between DeVito and Troccoli as to whether any phone call even took place and what day it may have occurred. (Tr. 5).

consistent with Respondent's position and Epstein's testimony -- *i.e.*, that Epstein spoke to Hemby in his office on Friday October 30 (not Monday November 2, as Hemby testified) to advise him that Alden had made its offer to the Union and if there was no contract in place by the close of business on November 2 the employees would be locked out the following day. (Tr. 288).

Hemby further testified that Cunningham said he would get back to him after speaking to DeVito. (Tr. 254). Hemby also testified that he spoke to DeVito on November 2. (Tr. 254). Neither DeVito nor Cunningham testified that they spoke to Hemby on November 2.

I. The Lockout and the November 3 Meeting

On November 3, DeVito, Troccoli and Cunningham arrived at Alden around 7:45 or 8:00 AM. (Tr. 30, 99, 192). Sometime thereafter, a very short meeting took place between Epstein, DeVito, Cunningham and Hemby in Epstein's office. (Tr. 34-35, 103,290). DeVito asked Epstein what was going on and why he locked out the employees. (Tr. 35, 290). Epstein responded that the Union received Alden's terms on Friday (October 30). (Tr. 290). DeVito then asked Epstein what it would take to put the people back to work and Epstein replied: "if you sign an agreement, the people can come right back to work," (Tr. 290). Hemby testified that DeVito asked if Alden was having a bad year, then show us your books, but Epstein denied that DeVito ever requested to see financial records during this brief five-minute meeting and DeVito corroborated Epstein's testimony. (Tr. 259, 290-91). The parties did agree to have a meeting the next day. (Tr. 290).

LEGAL ARGUMENT

POINT I

EXCEPTION IS TAKEN TO THE ALJ'S LEGAL DETERMINATION TO APPLY A STRICT NOTICE REQUIREMENT TO RESPONDENT'S LOCKOUT IN THE ABSENCE OF SETTLED LAW THAT HOLDS THAT A LOCKOUT REQUIRES NOTICE TO THE UNION WHEN THE LOCKOUT, AS HERE, IS CARRIED OUT BY AN EMPLOYER IN GOOD FAITH AND IN THE ABSENCE OF A STRIKE AND A SUBSEQUENT RETURN TO WORK BY STRIKING EMPLOYEES. (ALJD 16:22 TO 17:51) THIS EXCEPTION IS TAKEN IN LIGHT OF THE

FACT THAT: (1) THERE IS NO PUBLISHED DECISION THAT HOLDS THAT A STRICT NOTICE REQUIREMENT IS APPLICABLE TO LOCKOUTS THAT ARE CARRIED OUT BY AN EMPLOYER IN GOOD FAITH AND IN THE ABSENCE OF A STRIKE AND A SUBSEQUENT RETURN TO WORK BY STRIKING EMPLOYEES; AND (2) TO THE EXTENT THAT THE NLRB WERE TO ESTABLISH NEW LAW WITH RESPECT TO A NOTICE REQUIREMENT UNDER THESE CIRCUMSTANCES, SUCH NEW LAW, BY OPERATION OF PRINCIPLES OF FAIRNESS AND EQUITY, SHOULD BE PROSPECTIVE ONLY (EXCEPTIONS 1 AND 2)

The ALJ determined, as a matter of law, to apply a strict notice requirement to Respondent's lockout. (ALJD 16:22 to 17:51). However, a review of relevant case law discloses that there is no published decision that holds that an employer lockout requires notice to the union when the lockout, as here, is carried out by an employer in good faith and in the absence of a strike and a subsequent return to work by the striking employees.

As set forth below, because no case has ever held that a notice requirement attaches to a lockout in the circumstances here presented (i.e., a lockout in the absence of a strike), then -- to the extent that this panel were inclined to establish new law as to this issue -- such new law, by operation of principles of fairness and equity, should be prospective only.

A. Existing case law pertaining to notice requirements applicable to employer lockouts

In determining that a notice requirement applied to this record, the ALJ relied on decisions in Eads Transfer, 304 NLRB 711, 712-713 (1991), enfd., 989 F.2d 373 (9th Cir, 1993); Dayton Newspapers, 339 NLRB 650, 656 (2003), enfd. in relevant part, 402 F. 3d 651 (6th Cir. 2005); Dietrich Industries, 353 NLRB 57, 60-61 (2008); Boehringer Ingelheim, 350 NLRB 678 (2007). However, as set forth below, *none of these decisions holds that a strict notice requirement is applicable to lockouts that are carried out by an employer in good faith and in the absence of a strike or a strike authorization*. Instead, all of these decisions hold that a strict notice requirement attaches when an employer exercises the lockout option following a strike or strike authorization. Each of these decisions is discussed in turn.

1. Eads Transfer

In Eads Transfer, 304 NLRB 711, the NLRB comprehensively "address[ed] [the]

competing rights of economic strikers to reinstatement on their unconditional offer to return to work and of employers to lockout and temporarily replace employees for legitimate economic or business reasons.” Id. at 712. The Board’s holding expressly was grounded in this factual context. More particularly, the Board held:

In balancing these competing interests [of the employer and the union in a circumstance in which employees seek reinstatement following a strike], we conclude that an employer can only justify its failure to reinstate economic strikers “for legitimate and substantial business reasons” based on a “lockout” **by its timely announcement to the strikers that it is locking them out in support of its bargaining position. For only after the employer has informed the strikers of the lockout can the strikers knowingly reevaluate their position and decide whether to accept the employer’s terms and end the strike or to take other appropriate action.** In the absence of notification, we conclude that an employer’s failure to reinstate economic strikers based on a claimed lockout on their unconditional offer to return to work is inherently destructive of employee rights under Laidlaw and is a violation of Section 8(a)(3) and (1) of the Act. Thus, we find that the judge’s decision finding lawful the Respondent’s failure to reinstate economic strikers in the context of an unannounced lockout represents not simply an application of Harter, but a considerable and unwarranted extension of that decision **that substantially impairs economic strikers’ Laidlaw rights.**

[Eads Transfer, supra, 304 NLRB at 712-13 (emphasis added)]

Thus, Eads Transfer held only that -- in the specific context of a strike wherein strikers seek reinstatement -- an employer has an obligation to “inform[] the strikers of the lockout [so that] the strikers knowingly reevaluate their position and decide whether to accept the employer’s terms and end the strike or to take other appropriate action.” Id.

2. Dayton Newspapers

Dayton Newspapers, like Eads Transfer, arose in the specific context of a strike wherein the employees sought reinstatement and the employer thereafter interposed a lockout. Dayton Newspapers, 339 NLRB 650 (2003), enfd. in relevant part, 402 F. 3d 651 (6th Cir. 2005). Here again, the NLRB undertook a careful balancing of employer and union interests in the specific context of a lockout imposed by an employer as a legitimate economic response to a strike. Placing crucial reliance on Eads Transfer, the Board held:

The burden is on an employer to prove a legitimate and substantial business

justification **for failing to reinstate economic strikers.** NLRB v. Fleetwood Trailer Co., *supra*, 389 U.S. at 378; Laidlaw, *supra*, 171 NLRB at 1368. In the present case, the Respondent's asserted business justification is that it lawfully locked out the striking drivers. The Respondent claims that it was entitled to condition reinstatement on the Union's fulfillment of two requirements: some type of assurance against further work stoppages, and agreement to accept "operational changes" made after the strike. The Respondent argues that it lawfully continued the lockout and denied reinstatement even after the Union's December 23 offer, because the Union did not agree to the operational changes.

As the judge noted, however, a fundamental principle underlying a lawful lockout is that the Union must be informed of the employer's demands, so that the Union can evaluate whether to accept them and obtain reinstatement. **The judge cited Eads Transfer, 304 NLRB 711 (1991), *enfd*, 989 F.2d 373 (9th Cir. 1993).** In Eads, the employer refused to reinstate economic strikers after their unconditional offer to return. Several months later, the employer announced for the first time that reinstatement would be conditioned on a signed contract. Because the employer had not timely informed the strikers that it was locking them out until a contract was reached, the Board found the failure to reinstate unlawful.

The judge concluded that the Respondent violated Section 8(a)(3) and (1) by failing to reinstate the [striking] locked-out drivers. In doing so, he found, in part, that the Respondent did not clearly state the conditions the Union must meet to end the lockout, as required by Eads.

We agree with the judge that the Respondent's failure to reinstate the [striking] drivers was unlawful under this principle. In the present case, the Respondent denied the Union's December 23 offer to return to work, claiming that the Union had not accepted the Respondent's conditions. However, we find that the Respondent had not clearly and fully set forth those conditions. Instead, as explained below, the Respondent presented the Union with unclear and changing conditions that, in our view, became a "moving target." **Under these circumstances, the Union could not intelligently evaluate its position and obtain reinstatement [of its striking members]. The Respondent therefore violated Section 8(a)(3) and (1) by refusing to reinstate the drivers after the Union's December 23 offer to return to work.**

[Dayton Newspapers, *supra*, 339 NLRB at 656 (emphasis added)]

The clear import of the foregoing holding of Dayton Newspapers is a restatement of the Eads Transfer principle that: (1) "an employer can only justify its failure to **reinstate economic strikers** for legitimate and substantial business reasons based on a lockout by its timely announcement to the strikers that it is locking them out in support of its bargaining position"; and

(2) “only after the employer **has informed the strikers of the lockout can the strikers knowingly reevaluate their position** and decide whether to accept the employer’s terms and end the strike or to take other appropriate action.” Ibid.

3. Dietrich Industries

Dietrich Industries -- as with Dayton Newspapers and Eads Transfer -- arose in the specific context of a strike wherein the employees sought reinstatement and the employer thereafter imposed a lockout as a means to exert economic pressure on the union. In this 2008 decision, the ALJ (as summarily affirmed by the Board) restated the “three principles” that had developed through decades of case law that govern the rights and obligations of the parties in circumstances wherein a strike is followed by a lockout:

The complaint alleges that the Respondent locked out the striking employees on September 11, at a time when the Respondent had made no complete contract offer and failed and refused to reinstate the striking employees to their former positions of employment upon their unconditional offer to return to work.

Three principles are applicable in addressing the foregoing complaint allegations.

The first principle, established in Laidlaw Corp., 171 NLRB 1366 (1968), is that an employer’s failure to reinstate striking employees to available positions upon their unconditional offer to return to work is inherently destructive of rights under that Act and, standing alone, violates Section 8(a)(3) and (1) of the Act.

The second principle, discussed in Harter Equipment (Harter I), 280 NLRB 597 (1986), is that an employer is privileged to lock out employees in support of its bargaining position.

The third principle, **and the principle critical to the decision in this case, is that, although an employer may lock out striking employees in support of its bargaining position and refuse to reinstate them immediately in response to an unconditional offer to return to work, it must make a “timely announcement to the strikers that it is locking men out in support of its bargaining position” and “clearly and fully ... [inform them] of the conditions they must meet to be reinstated.”** Eads Transfer, 304 NLRB 711, 712 (1991); Dayton Newspapers, 339 NLRB 650, 656 (2003). ember 27. [Id. at 658.]

Thus, although an employer may lock out its employees in support of its bargaining position, it is privileged to do so only if it gives notice that it is doing so and makes the union aware of the employer's bargaining position **so that the union and strikers, as held in Dayton Newspapers, are “clearly and fully informed of the conditions they must meet to be reinstated.”** This is necessary because, as held in Ancor Concepts, the Union and strikers must be able to “knowingly reevaluate their position and decide whether to accept the employer's terms.”

[Dietrich Industries, *supra*, 353 NLRB at 7 (emphasis added)]

Applying the above-referenced “third principle,” the ALJ concluded that “[b]y failing to reinstate its striking employees following their unconditional offer to return to work on September 8, 2006, and by locking them out on September 11, 2006, without presenting the Union with a contract offer capable of acceptance or giving the Union clear conditions for reinstatement, the Respondent has engaged in unfair labor practices...” *Id.* at 13. That conclusion is squarely grounded in the specific context of a strike wherein the employees sought reinstatement and the employer thereafter interposed a lockout.

4. Boehringer Ingelheim

The NLRB’s decision in Boehringer Ingelheim arose from the following “undisputed” facts. *See* Boehringer Ingelheim, *supra*, 350 NLRB at 678. The parties’ collective bargaining agreement was scheduled to expire at midnight on November 12, 2004. “Shortly before the agreement’s expiration, unit employees rejected [the employer’s] last best offer and voted to authorize a strike.” *Ibid.* The union’s negotiator promptly called the company’s negotiator and informed him of the vote authorizing the strike. At that point, the company negotiator “sought assurances that that the union would not engage in a work stoppage for a certain period of time [but] [t]he union declined to provide such assurances.” *Ibid.* In response to the union’s strike authorization and to the union’s unwillingness to head off a strike of uncertain duration, the company imposed a lockout. *Ibid.*

On this record, the ALJ found: (1) that the strike had not actually commenced by the time of the lockout, but that a strike authorization was conveyed by the union to the company in the period immediately leading up to the expiration of the contract and the commencement of the lockout; (2) the lockout was lawful at its inception but became unlawful because of the subsequent conduct of the employer (by reason of a finding that the company engaged in unlawful direct dealing with union members after the commencement of the lockout); and (3) “the lockout did not become unlawful due to the failure by [the employer] to inform the union of the reasons for the lockout and of what the union could do to end it.” Id. at 679-80. On appeal, the Board affirmed the ALJ’s first conclusion but reversed the ALJ’s second conclusion. In particular, the Board found the lockout was lawful at its inception (ALJ Conclusion #1), but that - - contrary to the ALJ’s second conclusion -- the lockout remained lawful. Id. at 681. The Board did not render an opinion as to the third conclusion -- i.e., the very conclusion that is germane here.

For three separate and distinct reasons, the Board’s decision in Boehringer Ingelheim has no precedential value with respect to the precise question of law here presented: *i.e.*, whether a notice requirement attaches to a lockout in the absence of a strike.

First, the actual holding in Boehringer Ingelheim is unrelated to the pre-lockout notice issue, because “there [was] no dispute [by the parties] that the lockout was lawful at its outset.” Id. at 680. There being no dispute as to this issue, the holding in the Boehringer Ingelheim decision is confined to the post-lockout conduct of the company -- *i.e.*, conduct unrelated to the pre-lockout notice issue that is at issue in this case.

Second, the Board -- in partly affirming and partly reversing the ALJ on other grounds -- did not render an opinion on the pre-lockout notice issue that was referenced by the ALJ. This fact -- together with the fact that the pre-lockout notice issue was not in contention before the ALJ -- means that the Boehringer Ingelheim decision has no application whatsoever to the distinct question of law here presented.

Third, in the alternative, the record in Boehringer Ingelheim discloses that a strike authorization immediately preceded the company's lockout. Thus, in Boehringer, the ALJ's reference to the applicability of a notice requirement to the lockout there at issue is properly understood as premised on a record that included the union's strike authorization and its communication of this fact to the company just prior to the expiration of the collective bargaining agreement. Here, in stark contrast, the record discloses that there was no strike authorization by the union or other threat by the union to engage in a work stoppage prior to Respondent's lockout. Thus, even assuming *arguendo* that Boehringer Ingelheim could be construed as a decision on the merits of the pre-lockout notice issue (which it cannot), then, even in that event, the decision is properly understood as applying to a pre-lockout circumstances which included the union's strike authorization and its communication of this fact to the company just prior to the expiration of the collective bargaining agreement. As noted, those circumstances are not present in our case.

In short, the decisions relied on by the ALJ in our case -- Eads Transfer, Dayton Newspapers, Dietrich Industries and Boehringer Ingelheim -- do **not** hold that a strict notice requirement is applicable to lockouts that are carried out by an employer in good faith and in the absence of a strike. Notwithstanding the foregoing, the ALJ below determined that the above-referenced decisions do, in fact, hold that a strict notice requirement is applicable to lockouts that are carried out by an employer in good faith and in the absence of a strike. ALJD16-17. This was an error of law.

Although the ALJ pointed to a few isolated passages in Eads Transfer, Dayton Newspapers, Dietrich Industries and Boehringer Ingelheim that suggest a potentially broader application of the pre-lockout notice rule to other than post-strike lockouts, see ALJD16-17,

those isolated passages amount to mere dicta.¹¹ It is fundamental to our system of adjudication that dicta is not binding, because “a case is not authority for any point [that is] not necessary to be passed on to decide the case or not specifically raised as an issue addressed by the court.” Am. Jur. Courts § 134. The isolated passages cited by the ALJ were “not necessary to be passed on to decide the case” (in the cases of Eads Transfer, Dayton Newspapers and Dietrich Industries) and “[not] specifically raised as an issue addressed by the court” (in the case of Boehringer Ingelheim).

¹¹ In determining that Eads Transfer, Dayton Newspapers, Dietrich Industries and Boehringer Ingelheim require a broader application of the pre-lockout notice rule to other than post-strike lockouts, see ALJD16-17, the ALJ also relied on the general statement in Harter Equipment, 280 NLRB 597, 600 (1986), that, “in light of [the Supreme Court’s decision in] American Shipbuilding, there is no longer any meaningful distinction *concerning effects* between “offensive” and “defensive” lawful economic weaponry.” Id. at 600 (emphasis added). However, contrary to the ALJ’s determination, the above-referenced statement in Harter does not mean that every requirement that is applicable to one form of lockout (i.e., defensive lockouts) is necessarily applicable to the other form of lockout (i.e., offensive lockouts). By its terms, Harter referred only to the “effects” of the two forms of lockouts, not to the requirements applicable to the respective forms of lockouts.

We consider American Ship Building and Harter in turn. The Supreme Court’s decision in American Ship Building merely held that offensive lockouts -- lockouts commenced by an employer in the absence of a strike -- are not per se unlawful under the Act. American Ship Building Co. v. NLRB, 380 U.S. 300, 310-313 (1965). Nothing in American Shipbuilding suggests that the conditions and requirements pertaining to the two forms of lockouts are identical in all respects.

The NLRB’s decision in Harter was concerned with *the effect* of hiring temporary replacement workers in connection with a lockout. The NLRB held that, in light of the fact that hiring temporary replacement workers in connection with a defensive lockout (*i.e.*, a lockout following a strike) was not per se illegal, the of temporary replacement workers in connection with an offensive lockout (*i.e.*, a lockout not following a strike) also was not per se illegal. See id. In particular, *the effect* of the hiring of such workers in the context of an offensive lockout was not “inherently destructive of employee rights and per se violative of the Act without inquiry into the employer’s motivation.” Id. at 599-600.

Neither American Ship Building nor Harter mandates a holding that *the notice requirements* -- what is at issue here -- are identical with respect to offensive and defensive lockouts. Unlike in Harter which concerned the hiring of temporary replacement workers, the notice requirements as to a lockout -- whether a defensive or offensive lockout -- do not turn on *the effect* of such lockouts on employee rights. Rather, the imposition of a notice requirement properly turns on the nature of the lockout and the information that employees engaged in negotiations need from the employer in order to avoid the lockout -- in offensive versus defensive situations. That is a “notice” issue, not an “effects” issue.

Moreover, even a cursory review of Eads Transfer, Dayton Newspapers, Dietrich Industries and Boehringer Ingelheim discloses that these cases involve a careful balancing of employer and union interests *in the specific context of a lockout imposed by an employer as a legitimate economic response to a strike (i.e., a defensive lockout)*. This careful balancing of interests is contextual -- and thus cannot and should not be construed as applying to the distinct interests at issue when an employer engages in a lockout in good faith and in the absence of a strike and employees seeking reinstatement following the strike.

Stated differently, a review of the *entirety* of the above-referenced decisions (not just the isolated passages relied on by the ALJ) -- including the extended passages in the opinions of the four cases that are quoted in this brief -- discloses that the cited cases involve a careful balancing of employer and union interests in the specific context of a lockout imposed by an employer as a legitimate economic response to a strike. Thus, the leading case, Dayton Newspapers, expressly held only that: (1) “an employer can only justify its failure to **reinstate economic strikers** for legitimate and substantial business reasons based on a lockout by its timely announcement to the strikers that it is locking them out in support of its bargaining position”; and (2) “only after the employer **has informed the strikers of the lockout can the strikers knowingly reevaluate their position** and decide whether to accept the employer’s terms and end the strike or to take other appropriate action.” Dayton Newspapers, *supra*, 339 NLRB at 656 (emphasis added).

The cases’ careful balancing of employer and union interests in the specific context of a post-strike lockout compel the conclusion that these cases cannot be construed beyond their specific factual predicate. Because the ALJ construed the cases as going far beyond the precise question presented and decided in those cases, the ALJ recognized a new rule of law that had not heretofore existed.

B. Because no case has ever held that a notice requirement attaches to a lockout in the circumstances here presented (i.e., a lockout in the absence of a strike), then -- to the extent that this panel were inclined to establish new law as to this issue -- such new law, by operation of principles of fairness and equity, should be prospective only.

Because no case has ever held that a notice requirement attaches to a lockout in the circumstances here presented (*i.e.*, a lockout in the absence of a strike), then -- to the extent that this panel were inclined to establish new law as to this issue -- such new law, by operation of principles of fairness and equity, should be prospective only. See Cipriano v. City of Houma, 395 U.S. 701, 706 (1969) (holding that when a court establishes a new rule of law, the rule is properly made prospective only in application if retroactive application “produce[s] substantial

inequitable results”).

Here, prior to the ALJ’s decision in this case, the legal question here presented had never before been decided, and, at most, was the subject of passing dicta. However, as the Supreme Court has indicated, courts “do[] not make a rule retroactive through dictum, which is not binding.” Tyler v. Cain, 533 U.S. 656, 663 (2001), n. 4.

Moreover, there is no issue in this case as to the good faith of Respondent at each and every step of the negotiations leading to the lockout. The only issue is whether Respondent gave the Union adequate notice of the conditions upon which the Union could end the lockout. Respondent’s principal position in this proceeding is that it did, in fact, give the Union adequate notice of these conditions (contrary to the finding of the ALJ). However, even if this panel were to find to the contrary, principles of fairness and equity should require that -- based on the entire record -- the ALJ’s recognition of a new principle of law properly should be applied on a prospective basis only.

That being so, the decision of the ALJ below -- applying the notice requirement to Respondent’s lockout and holding that the lockout violated the notice requirement -- should be reversed for this reason alone.

POINT II

IN THE ALTERNATIVE, EXCEPTION IS TAKEN TO THE ALJ’S VARIOUS FINDINGS TO THE EFFECT THAT RESPONDENT FAILED TO PROVIDE CLEAR AND SUFFICIENT NOTICE TO THE UNION OF THE “CONDITIONS THAT THE EMPLOYEES MUST ACCEPT TO AVERT THE LOCKOUT AND THE TIME TO INTELLIGENTLY EVALUATE THESE CONDITIONS.” THIS EXCEPTION IS TAKEN IN LIGHT OF THE CHARGING PARTY’S REPEATED ADMISSIONS – BY WAY OF DOCUMENTARY EVIDENCE AND TESTIMONY AT THE HEARING BY THE UNION REPRESENTATIVES – THAT IT KNEW AND UNDERSTOOD THAT RESPONDENT WAS OFFERING A ONE-YEAR FREEZE ON ALL TERMS OF THE AGREEMENT (INCLUDING THE COST OF EMPLOYEE HEALTH BENEFITS), AND THAT RESPONDENT’S NEGOTIATING POSITION REMAINED UNCHANGED THROUGHOUT THE ENTIRE PERIOD OF NEGOTIATIONS LEADING UP TO, AND INCLUDING, THE LOCKOUT OF NOVEMBER 3, 2009 (EXCEPTIONS 3 THROUGH 10)

Assuming the Board elects to hold that the notice rule applies to lockouts other than

post-strike lockouts, and assuming further that the Board elects to apply this new rule retroactively to the present case, then, in that event, the Board properly should conclude that -- contrary to the ALJ's determination -- that Respondent properly complied with the pre-lockout notice rule. In particular, the evidence in the record is overwhelming that Respondent properly provided clear and sufficient notice to the Union of the "conditions that the employees must accept to avert the lockout and the time to intelligently evaluate these conditions."

As fully set forth herein, the record is replete with admissions by the Union -- by way of documentary evidence, testimony at the hearing by the union representatives and the conduct of Union representatives -- that it knew and understood that Respondent was offering a one-year freeze on all terms of the Agreement (including the cost of employee health benefits), and that Respondent's negotiating position remained unchanged throughout the entire period of negotiations leading up to, and including, the lockout of November 3, 2009. By any reckoning, the pre-lockout notice requirement is satisfied on this record. That being so, the decision of the ALJ that held to the contrary should be reversed.

A. Overview of the standard applicable to the Board's review of factual findings of the Administrative Law Judge

The NLRB is free to accept or reject an Administrative Law Judge's recommendations, and it may add to the accepted recommendations any other orders it deems warranted by the evidence and the Board's own findings. NLRB v. Oregon Worsted Co., 94 F2d 671, 672 (9th Cir. 1938). Furthermore, the Board is free to draw different inferences from the facts and may reach different legal conclusions. Pirelli Cable Corp. v. NLRB, 141 F3d 503, 514 (4th Cir. 1998). Finally, although the NLRB ordinarily should give weight to the factual findings and credibility assessments of an Administrative Law Judge who had an opportunity to observe the witnesses, the NLRB's power to reverse a judge's findings of facts is not limited to findings that are "clearly erroneous." Universal Camera Corp. v. NLRB, 340 U.S. 474, 492 (1951).

Thus, the NLRB need not defer to the ALJ's recommendations, and is fully empowered to review the entire record, and draw different inferences from the facts and may different legal conclusions than those reached by the ALJ. See id.

B. Although the ALJ concluded that Respondent failed to provide clear and sufficient notice to the union of the “conditions that the employees must accept to avert the lockout and the time to intelligently evaluate these conditions,” the ALJ also made numerous findings that are inconsistent with -- and directly undercut -- the foregoing conclusion, and that instead support the contrary conclusion that the Union knew and understood that Respondent was offering a one-year freeze on all terms of the Agreement (including the cost of employee health benefits), and that Respondent's negotiating position remained unchanged throughout the entire period of negotiations leading up to, and including, the lockout of November 3, 2009

The ALJ found that Respondent failed to provide clear and sufficient notice to the Union of the “conditions that the employees must accept to avert the lockout and the time to intelligently evaluate these conditions.” ALJD 20:17 to 20:19. In turn, this finding was premised on the following subsidiary findings:

(1) “Respondent's October 30 email purporting to detail the terms of Respondent's offer was confusing, incomplete and internally inconsistent, and fails to provide the Union and Respondent's employees with the timely and complete notification of the terms that the employees must accept to avert the lockout.” ALJD 18:2 to 18:5.

(2) “Respondent's position on health care cannot be readily determined.” ALJD 40:1.

(3) “[Respondent's October 30] proposal is on its face ... clearly different from the one-year freeze offered in prior sessions.” ALJD18:44 to 18:45.

(4) “[I]t is ... uncertain if Respondent was still proposing any of its alternative plans, particularly the plan for single coverage, which could result in reduced costs for Respondent, thereby less than a total “freeze” previously offered, or if it was accepting the Union's proposal to freeze contributions for one year with a possible reduction in benefits.” ALJD 19:3 to 19:7

(5) “[T]here was no agreement on the Union's health care proposal during and Epstein's email gives the impression that Respondent was still proposing various alternative plans.” ALJD 19:47 to 19:49.

(6) “Respondent's decision to provide the Union with only one working day's notice, in which to evaluate and understand Respondent's uncertain, ambiguous and confusing offer, vote on it and accept it, is clearly insufficient and not the ‘timely’ notice required by Board precedent.” ALJD 20:7 to 20:10.

(7) “Respondent’s October 30 email presented the Union and its employees with a ‘moving target,’ ... that does not satisfy Respondent’s burden to afford the Union with a clear statement of the conditions that the employees must accept to avert the lockout and the time to intelligently evaluate these conditions.” ALJD 20:14 to 20:18.

(8) “[T]he first complete proposal submitted by Respondent to the Union was at the November 9 meeting and was after the employees had been locked out for nearly a week. This offer cannot cure the Respondent’s failure to provide such an offer prior to the lockout.” ALJD 20:21 to 20:24.

Although the ALJ concluded that Respondent failed to provide clear and sufficient notice to the Union of the “conditions that the employees must accept to avert the lockout and the time to intelligently evaluate these conditions,” *the ALJ also made numerous findings that undercut the foregoing conclusion*, and that support the contrary conclusion that the Union knew and understood that Respondent was offering a one-year freeze on all terms of the Agreement (including the cost of employee health benefits), and that Respondent’s negotiating position remained unchanged throughout the entire period of negotiations leading up to, and including, the lockout of November 3, 2009.

The ALJ’s findings that compel the latter conclusion include the following:

The next meeting took place on October 5, once again attended by Epstein and Cunningham... Cunningham then attempted to discuss the Union’s other proposals. Epstein interjected that he “couldn’t do anything” with the other proposals, **and that Respondent wanted to keep everything the same for one year and all he was looking for was “a freeze for one year.”** Cunningham responded that the Union could not do that because contributions that Respondent was currently paying would not sustain medical coverage for that year...

Cunningham added that although he did not think that an offer of a one-year freeze would be acceptable, he would take it back to the membership for a vote.

[ALJD 3:42 to 3:43; 3:51 to 4:7 (emphasis added)]

Immediately after the October 5 meeting, Epstein sent an email to this his three brothers, who are also involved in operating the business. **The email noted that he had just met with Cunningham and told Cunningham that Respondent offered a “status quo” contract and that Cunningham had**

stated that he will “bring back the offer of one-year status quo but he doesn’t think it will be acceptable.”

[ALJD 4:22 to 4:26 (emphasis added)]

On October 8, the parties met once again in Epstein’s office. Troccoli was present in addition to Cunningham on behalf of the Union...

Epstein repeated the offer that he had made at the previous meeting that Respondent wanted to extend the contract for one year and that it wanted a one-year “freeze.” Troccoli responded that with all these problems that Epstein was telling the Union that Respondent has, there is even more reason to sign an extension agreement.

Troccoli continued to push for Epstein to sign an extension agreement. He handed Epstein a copy of an agreement, which the Union had prepared, and asked Epstein to look it over. **Epstein did and informed the Union that he would not agree to retroactivity since he was not offering anything more than the current agreement.**

[ALJD 4:28 to 4:29; 5:4 to 5:12 (emphasis added)]

[W]hen DeVito asked Cunningham on November 2 for a summary of developments at the negotiations, Cunningham informed him that he proposed a freeze, but that the health care contributions were the big problem and they could not get past that issue.

[ALJD 6:5 to 6:7]

[On October 30], Troccoli telephoned Epstein.... Troccoli requested that the parties go forward and discuss the other issues. Epstein replied, **“You don’t understand. I just want to keep everything the same. I don’t want to pay anything more... I want to keep everything the same for one year.”** Troccoli answered that the Union did that with health care and asked to discuss some other issues. Epstein repeated that he wanted to keep everything the same for one year.

[ALJD 8:1; 8:46 to 8:50 (emphasis added)]

The only proposal discussed from Respondent was its demand for a one-year freeze, which was repeated at negotiation meetings.

[ALJD 18:13 to 18:14]

Thus, the ALJ’s *own* findings of fact -- based on the entirety of the record -- establish

that: (1) on October 5, Respondent, through its president Mark Epstein, communicated to the Union that Respondent “wanted to keep everything the same for one year and all he was looking for was “a freeze for one year;” ALJD 4:1 to 4:2; (2) on October 5, Tom Cunningham, the Union’s business agent, acknowledged Respondent’s position, and communicated to Epstein that “although he did not think that an offer of a one-year freeze would be acceptable, he would take it back to the membership for a vote,” ALJD 4:6 to 4:7; (3) on October 8, Epstein “repeated the offer that he had made at the previous meeting that Respondent wanted to extend the contract for one year and that it wanted a one-year freeze,” and, further, that “he was not offering anything more than the current agreement,” ALJD 5:4 to 5:5; 5:11 to 5:12; (4) on October 30, Epstein reiterated to Troccoli, the Union’s secretary-treasurer, that, “I don’t want to pay anything more” and “I want to keep everything the same for one year,” ALJD 8:48 to 8:50; and (5) on November 2, when “[Union President] DeVito asked Cunningham ... for a summary of developments at the negotiations, Cunningham informed him that [Respondent] proposed a freeze,” ALJD 6:5 to 6:7; and (5) throughout the entire period of negotiations leading to the November 3 lockout, Respondent’s “only proposal” was “its demand for a one-year freeze, which was repeated at negotiation meetings,” ALJD 18:13 to 18:14.

These finding of facts of the ALJ correspond precisely with Respondent’s consistent position in the course of the negotiations and throughout this proceeding and confirm that there was no confusion by the Union whatsoever as to the Respondent’s offer. Rather, as Cunningham told DeVito, they just “could not get past” the issue of a freeze in the employer contributions of health care.

Notwithstanding the foregoing, the ALJ concluded that Respondent failed to provide clear and sufficient notice to the Union of the “conditions that the employees must accept to avert the lockout and the time to intelligently evaluate these conditions, ” ALJD 20:16 to 20:18, and thereby violated the Act. This conclusion of the ALJ is clearly erroneous for many reasons (to be fully set forth below). For present purposes, suffice it to say that one of the reasons that

the ALJ's conclusion is clearly erroneous is, paradoxically, the above-referenced findings of the ALJ himself.

C. In addition to the ALJ's own findings summarized in Point IIB, the record is replete with evidence (including admissions by the Union's representatives at the hearing before the ALJ) that the Union knew and understood that Respondent was offering a one-year freeze on all terms of the Agreement (including the cost of employee health benefits), and that Respondent's negotiating position remained unchanged throughout the entire period of negotiations leading up to, and including, the lockout of November 3, 2009

The Statement of Facts, supra, contains a detailed recitation of the evidence in the record (including admissions by the Union's representatives at the hearing) that the Union knew and understood that Respondent was offering a one-year freeze on all terms of the Agreement (including the cost of employee health benefits), and that Respondent's negotiating position remained unchanged throughout the entire period of negotiations leading up to, and including, the lockout of November 3, 2009. The full Statement of Facts is incorporated herein by reference.

By way of brief summary, the following evidence in the record compels the conclusion that the Union knew and understood that Respondent was offering a one-year freeze on all terms of the Agreement (including the cost of employee health benefits), and that Respondent's negotiating position remained unchanged throughout the entire period of negotiations leading up to, and including, the lockout of November 3, 2009:

- Epstein testified that, at the October 5 meeting between the parties, he told Cunningham: “[A]ll I’m looking for is a **freeze** for one year.” (Tr. 80, 154) (emphasis added).
- Cunningham, for his part, testified **that he clearly understood that to mean that Alden wanted a one-year contract with no changes to the Agreement.** (Tr. 120, 154-155.).
- Cunningham’s contemporaneous notes state “keep a **freeze for a one year contract**”. (Tr. 80, 120 154-155; RX. #4) (emphasis added).
- Epstein made clear that the “one year freeze” included a freeze on Alden’s contributions to employee health care benefits. Cunningham testified that he told Epstein there that the Union would likely find a freeze on Alden’s health care contributions to be unacceptable, because the contributions Alden was currently paying would not maintain the coverage for the year. (Tr. 80,

155).

- Epstein's recollection of what transpired at the October 5 meeting was corroborated in his email to his brothers sent immediately after the meeting ended: "[Cunningham] will bring the offer of one year status quo but doesn't think it will be acceptable." (Tr. 280; RX #7).

- The parties met again on October 8 in Epstein's office. (Tr. 82, 171, 281). Troccoli testified that his sole purpose in attending this meeting was to secure an extension agreement from Epstein. (Tr. 171,210, 281, 341). He opened the meeting by telling Epstein that he believed it was very important to sign a thirty-day extension agreement. (Tr. 281). Initially, Epstein refused to sign the extension agreement. (Tr. 82). Epstein then repeated the same offer he made three (days earlier to Cunningham. (Tr. 281). Cunningham confirmed Epstein's offer in his contemporaneous bargaining notes: "**Company wants a one-year freeze.**" (RX #3) (emphasis added). In fact, Troccoli testified that Epstein reiterated that exact same offer at least three times during the meeting:

"[Y]ou don't understand, . . . I need to keep the contract intact; I just want to continue the contract for a year" "Well, you just don't understand. I just want to continue this for a year." "You just don't understand I want to keep everything the same. I don't want to give anything more." "I just want to extend this thing for a year." (Tr. 214) (emphasis added).

- Troccoli testified that he knew exactly what Epstein was proposing. (Tr. 174, 175, 214,234).

- The meeting ended with Troccoli again requesting that Epstein sign an extension agreement. (Tr. 176). Epstein agreed to do so conditioned upon there being no retroactivity because **he was not offering anything more than the current Agreement.** (Tr. 283). Troccoli understood the offer and agreed to eliminate the retroactivity language in the extension agreement. The parties signed a thirty-day extension. (Tr. 178, 284; GCX #12).

- Epstein then said he would continue to assist the Union by looking for additional health plans and that he would forward to the Union any additional information. (Tr. 84, 216, 228, 283). Epstein's assistance to the Union was to enable the Union members to secure a less expensive health insurance plan consistent with Alden's proposed freeze on all economic issues, including health care costs. (Tr. 79, 153, 156).

- On October 21, Epstein emailed an alternative health plan to Cunningham with a message: "Please review the attached regarding medical coverage. I'd hoped to have something even better but time is passing and I'm not certain of getting anything else. Will advise if anything else comes through. Epstein also made an overture to Local 1245 to have another meeting: "Let's meet to discuss this early next week." (GCX #14). The Union received both emails, but never responded and at no time after the extension agreement was signed did Local 1245 agree to Epstein's request for another meeting.

(Tr. 86, 87, 228, 284, 340).

- The following morning, Epstein emailed a detailed analysis of the health plans entailed the previous day. (Tr. 90, 284-85; GCX #15). The purpose of this analysis was to provide assistance to the Union in securing a health benefits plan that would be feasible consistent with Alden's proposal of a "freeze" on its current employee health care benefit contributions of \$20,000 per month.

- On or about October 26, Epstein had a telephone conversation with Cunningham and Troccoli. (Tr. 285, 286). Epstein testified that he was sure it was prior to October 30 because Cunningham told him that he was going to have a meeting with the employees by October 30 to vote on Alden's offer. (Tr. 343). During this telephone conversation, Epstein repeated the offer that was given to Troccoli and Cunningham on October 5 and 8. (Tr. 286). The three of them also discussed healthcare. (Tr. 286, 287). Troccoli told Epstein that he was unaware of the health benefit plans that Epstein entailed on October 21 and 22. (Tr. 286). He thanked Epstein for his efforts to find alternatives. However, Troccoli made it crystal clear to Epstein that the Union rejected the Plans because deductibles were too high and employees' cost would substantially increase. (Tr. 183). Troccoli then told Epstein that the Union insisted that employees remain in its own healthcare plan **and would freeze the Alden's cost, but benefits might have to be cut.** (Tr. 183, 286, 344).

- Epstein accepted Troccoli's offer on the healthcare cost. (Tr. 344; GCX# 3). **Epstein reminded Troccoli and Cunningham that he still wanted a freeze for one year, but if the Union wanted two years that would also be acceptable. The bottom-line offer of Epstein remained a one-year freeze on all employer costs, including health care costs.** Tr. 345). Epstein testified that Troccoli and Cunningham did not seem to be interested in a two-year freeze. (Tr. 345) (emphasis added). Cunningham agreed to take the offer to a vote by Friday, October 30. (Tr. 345).

- Troccoli and Cunningham further testified that Epstein had made it clear that he was not interested in agreeing to any of the Union's demands contained in the September 30 proposal. (Tr. 183-184, 286, 344). Indeed, Troccoli testified that when he attempted to discuss the other demands during October 8 meeting, Epstein always cut him off and told him that he did not want any changes to the existing terms of the Agreement. (Tr. 183-84, 286, 344).

- Troccoli testified that on Friday October 30 he telephoned and spoke to Epstein. (Tr. 183). He could not remember the time that he spoke to Epstein but was able to recall the time the staff meeting began and ended and when he spoke to DeVito. (Tr. 181, 217). Troccoli further testified that he told Epstein he was unaware of the health plans proposed on October 21 and 22. (Tr. 184, 238). **Epstein responded by repeating his offer that he wanted everything to stay the same for a year and that Epstein was not interested in any of the Union's proposals.** (Tr. 183, 184, 286, 344) Troccoli corroborated Epstein's testimony that Local 1245 rejected Alden's

alternative health plans and only offered the Union's current health plan at the same cost to the Company with a cut in benefits. (Tr. 183, 237).

- Troccoli did not dispute that Epstein told him that Cunningham previously stated that a vote on the Company's offer by the employees would take place by October 30. (Tr. 286, 344). Troccoli testified: "**[a]ll I know is, he (Epstein) said he wanted to extend it for one year.**" (Tr. 231) (emphasis added). Troccoli testified that Epstein said an offer would be received by the end of the day and also told Troccoli that employees would be locked out if the employees did not accept the offer. (Tr. 239)

- On Friday October 30, Epstein sent an email to Cunningham and Troccoli. The email corroborated the conversation that Epstein had with Troccoli and Cunningham earlier in the week by confirming the Union's offer and Alden's acceptance to maintain the Union's-health plan and freeze Alden's cost. (GCX #3). Epstein further confirmed that Cunningham previously stated he would meet with the employees by October 30, and that such a meeting had not taken place. (GCX #3). Moreover, **the email verified that Epstein had previously told the Union that he wanted the length of the new Agreement to be one (1) or two (2) years, but that he believed the Union was not interested in two (2) years by stating "[i]f two years is out of the question then a one year Agreement is the only other option."** (GCX #3). The email also stated that Alden wanted a freeze on wages. (GCX #3). The email closed by stating "[i]f we have no Agreement between the parties by close of business on Monday then the Company will lock out the Union members on Tuesday morning Nov 3 2009 (GCX#3) Epstein did not get any response to his email. (Tr. 288-289).

- In an Affidavit signed by Troccoli, he stated: "[t]hat same day (October 30), the Union received an email from Epstein saying that the workers would be locked out November 3rd, 2009, if the Union would not agree to the employer's proposals." (Tr. 225). Troccoli admitted that there was nothing in his affidavit suggesting that he did not understand the Company's proposal or that he was confused in any way. (Tr. 225). Cunningham also clearly understood the Company's offer. As confirmed by his affidavit stated: "[o]n October 30, 2009, the Union received an email from Epstein indicating that if the Union did not agree to his demands, the members would be locked out November 3. (Tr. 129). Like Troccoli, Cunningham admitted that he was not confused by, or did not understand the Alden's offer. (Tr.129).

- On November 3, DeVito, Troccoli and Cunningham arrived at Alden around 7:45 or 8:00 AM. (Tr. 30, 99, 192). Sometime thereafter, a very short meeting took place between Epstein, DeVito, Cunningham and Hemby in Epstein's office. (Tr. 34-35, 103,290) DeVito asked Epstein what was going on and why he locked out the employees. (Tr. 35, 290). **Epstein responded that the Union received Alden's terms on Friday (October 30).** (Tr. 290). DeVito then asked Epstein what it would take to put the people back to work and Epstein replied: "if you sign an agreement, the people can come right back to work," (Tr. 290).

In short, the record is replete with evidence (including admissions by the Union's

representatives at the hearing before the ALJ) that the Union knew and understood that Respondent was offering a one-year freeze on all terms of the Agreement (including the cost of employee health benefits), and that Respondent's negotiating position remained unchanged throughout the entire period of negotiations leading up to, and including, the lockout of November 3, 2009. Stated differently, the evidence in the record is overwhelming that Respondent properly provided clear and sufficient notice to the Union of the "conditions that the employees must accept to avert the lockout and the time to intelligently evaluate these conditions," ALJD 20:17 to 20:18, and thereby satisfied the pre-lockout notice requirements that the ALJ held to be applicable to this record.¹²

The ALJ's determination to the contrary is clearly erroneous, and is properly reversed by the Board. See Universal Camera Corp. v. NLRB, 340 U.S. 474, 492 (1951) (holding that the Board's power to reverse an ALJ's findings extends to circumstances when the ALJ's findings are "clearly erroneous," and includes, as well, circumstances in which the ALJ's erroneous findings do not even rise to the standard of "clearly erroneous")

In the following brief point, we discuss at greater length the ALJ's erroneous findings underlying his conclusion that Respondent failed to satisfy the pre-lockout notice rule.

D. The ALJ's erroneous conclusion (*i.e.*, that Respondent failed to provide clear and sufficient notice to the Union of the "conditions that the employees must accept to avert the lockout and the time to intelligently evaluate these conditions") is based entirely on the ALJ's misinterpretation and misapprehension of the significance of parties' discussions concerning health care costs. In particular, the ALJ determined that these discussions concerning health care costs amounted to a shifting position by Respondent with respect to Respondent's willingness to bear a greater or lesser amount of employee health care costs. However, the record instead conclusively establishes that: (1) Respondent's consistent and unchanging position in the entire period leading up to the lockout is that Respondent's responsibility for health care costs would be "frozen" at the present level; (2) although Respondent did offer assistance to the Union in finding health insurance providers other than the Union's health insurance provider and in finding more affordable health insurance plans than the Union's present plan, Respondent's offer of "assistance" to the Union in no way represented a change in Respondent's fundamental position as to the amount of Respondent's contribution to employee health care costs, which always was that its health care benefit contribution

¹² As to the error underlying this legal determination by the ALJ, see Point I, supra.

would remain frozen at the present level; and (3) Respondent's efforts amounted to nothing more than an attempt to assist the Union in maximizing coverage for its members by showing there existed alternate health care plans that the Union could switch to given the Respondent's unwavering position that its contribution to health care costs would be frozen.

The ALJ's erroneous conclusion (*i.e.*, that Respondent failed to provide clear and sufficient notice to the Union of the "conditions that the employees must accept to avert the lockout and the time to intelligently evaluate these conditions," ALJD 20:17 to 20:18) is based entirely on the ALJ's misinterpretation and misapprehension of the significance of parties' discussions concerning health care costs. In particular, the ALJ determined that these discussions concerning health care costs amounted to a shifting position by Respondent with respect to Respondent's willingness to bear a greater or lesser amount of employee health care costs. ALD18:31 to 18:46. Nothing could be further from the truth.

However, the record instead conclusively establishes that: (1) Respondent's consistent and unchanging position in the entire period leading up to the lockout is that Respondent's responsibility for health care costs would be "frozen" at the present level; (2) the Union understood and accepted this position; and (3) although Respondent forwarded to Union negotiators some proposals for alternate health coverage other than the Union's health insurance provider, this was done simply to show the Union that there were other plans that might provide greater coverage to its members than the Union sponsored plan premised upon the same level of contribution by Respondent. Respondent's offer of "assistance" to the Union in connection with the Union's health care plan in no way represented a change in its clear unambiguous position throughout negotiations that the amount of its contribution to employee health care costs would be "frozen" or "*status quo*." Rather, Respondent's efforts were nothing more than an attempt to assist the Union to maximize the employer health benefit contribution -- **that would be frozen at last-year's levels** -- by showing the Union that if they moved to an alternate health care plan the reduction in benefits that the Union was complaining about could be ameliorated. In the end, these efforts went for naught, as the Union was intractable in its

position that it would not change from the Union sponsored health plan. More particularly, the record reflects the following facts with respect to this critical issue:

- In the September meeting between Epstein and Cunningham, **Epstein told Cunningham that he would contact his health insurance broker to investigate alternative health plans.** (Tr. 75, 278, 334). The purpose of this effort was to help the Union secure a less expensive health insurance plan for its members consistent with Alden's proposed freeze on all economic issues, including health care costs. (Tr. 80, 154). At the conclusion of the meeting, Epstein and Cunningham agreed to meet again on October 5. (Tr. 278).

- On October 5, Epstein and Cunningham again met in Epstein's office. (Tr. 279). **In the course of that meeting, Epstein presented Cunningham with information concerning alternative health insurance plans by giving him two alternative plans.** (Tr. 78, 279, 341; GCX #33(a) and (b)). Epstein told Cunningham that he would continue to look for other plans in order to assist the Union in securing a less expensive health insurance plan consistent with Alden's proposed freeze on all economic issues, including health care costs. (Tr. 79, 153, 156), and the Union's goal of minimizing reduction in benefits.

- In the course of the October 5 meeting, Epstein told Cunningham: "[A]ll I'm looking for is a **freeze** for one year." (Tr. 80, 154) (emphasis added). Cunningham, for his part, testified that he clearly understood that to mean that Alden wanted a one-year contract with no changes to the Agreement. (Tr. 120, 154-155.). Indeed, Cunningham's contemporaneous notes state "keep a *freeze* for a one year contract". (Tr. 80, 120 154-155; RX. #4) (emphasis added).

- **Cunningham further testified that he told Epstein that the Union would likely find a freeze on Alden's health care contributions to be unacceptable, because the contributions Alden was currently paying would not maintain the coverage for the year.** (Tr. 80, 155).

- **Epstein testified that Cunningham told him that Cunningham would bring Alden's offer of a health-care contribution back to the Union.** Epstein's recollection of what transpired at the October 5 meeting was corroborated in his email to his brothers sent immediately after the meeting ended: "[Cunningham] will bring the offer of one year status quo but doesn't think it will be acceptable." (Tr. 280; RX #7). At the conclusion of the meeting, Epstein and Cunningham agreed to meet on October 8. (Tr. 280).

- The parties met again on October 8 in Epstein's office. **Cunningham's notes confirm Epstein's offer: "Company wants a one-year freeze."** (RX #3) (emphasis added). In fact, Troccoli testified that Epstein reiterated that exact same offer at least three times during the meeting:

"[Y]ou don't understand, . . . I need to keep the contract intact; I just want to continue the contract for a year" "Well, you just don't understand. I just want to continue this for a year." "You just don't

understand I want to keep everything the same. I don't want to give anything more." "I just want to extend this thing for a year."
(Tr. 214) (emphasis added).

Troccoli testified that he knew exactly what Epstein was proposing. (Tr. 174, 175, 214,234).

- At the October 8 meeting **Epstein said he would continue to assist the Union by looking for additional health plans and that he would forward to the Union any additional information.** (Tr. 84, 216, 228, 283). Those alternate health plans would help show that the impact of the freeze on health care would not be as great as the Union suggested if they were willing to move away from the Union backed health plan that currently existed.

- Early in the morning on October 21, Epstein emailed Orefice to advise Cunningham that he had been promised information regarding an alternative healthcare plan and that it would be forwarded to Cunningham. (Tr. 284; RX #13). Later that afternoon, Epstein emailed the health plan to Cunningham with a message: **"Please review the attached regarding medical coverage. I'd hoped to have something even better but time is passing and I'm not certain of getting anything else. Will advise if anything else comes through.** Epstein also made an overture to Local 1245 to have another meeting: Lets meet to discuss this early next week." (GCX #14). The Union received both emails, but never responded and at no time after the extension agreement was signed did Local 1245 agree to Epstein's request for another meeting. (Tr. 86, 87, 228, 284, 340).

- The following morning, Epstein emailed a detailed analysis of the health plans he had received the previous day. (Tr. 90, 284-85; GCX #15). **The purpose of this analysis was to show the Union that securing a health benefits plan that would be feasible consistent with Alden's proposal of a "freeze" on its current employee health care benefit contributions of \$20,000 per month. In the health care benefit analysis, Epstein advised Cunningham that the alternative health care benefit plan would cost about halfway between the existing expiring Union healthcare plan and the newly proposed contribution rates. (Tr. 284-85). Epstein noted that the existing expiring Union plan was costing Alden \$20,000 per month and that the newly proposed Union healthcare contribution rates would cost Alden \$35,000 per month -- an increase of \$15,000 per month. (GCX #15). Epstein also stated that the deductibles in the Plan were \$1,150 for single and \$2,300 for family and that if single coverage only was provided, the Plan would cost Alden \$18,500 per month, or less than the existing expiring Union plan. (GCX #15). To bring that cost to \$20,000 per month -- the same Alden was currently paying (and consistent with Alden's position of a "freeze" on its contributions to employee health benefits) -- Alden could provide the first \$400 deductible to each member. (GCX #15). Epstein advised that members with families would have to pay for the difference between single and family coverage. (GCX #15). He closed the entail by saying that he hoped to have something better today and, if so, would forward it, but he wanted to provide Cunningham with this analysis. (GCX #15). Cunningham never responded to the email. (Tr.**

124).

- Later that day, Epstein emailed Cunningham another alternative health plan explaining that this Plan had a slightly higher cost to each member. This Plan did not require medical questions to be asked upon enrollment, whereas the plan sent the day before did. (Tr. 92, 285; GCX # 16). Cunningham and Troccoli both testified that they did not respond. (Tr. 87, 92, 124, 232, 233, 284, 285, 340, 341).

- On or about October 26, Epstein had a telephone conversation with Cunningham and Troccoli. (Tr. 285, 286). Epstein testified that he was sure it was prior to October 30 because Cunningham told him that he was going to have a meeting with the employees by October 30 to vote on Alden's offer. (Tr. 343). During this telephone conversation, Epstein repeated the offer that was given to Troccoli and Cunningham on October 5 and 8. (Tr. 286). This included discussions about healthcare. (Tr. 286, 287). **He thanked Epstein for his efforts to find alternatives. However, Troccoli made it crystal clear to Epstein that the Union rejected the Plans because deductibles were too high and employees' cost would substantially increase. (Tr. 183). Troccoli then told Epstein that the Union insisted that employees remain in its own healthcare plan and would freeze the Alden's cost, but benefits might have to be cut. (Tr. 183, 286, 344).**

- **Epstein accepted Troccoli's offer to freeze the healthcare cost. (Tr. 344; GCX# 3).** Epstein reminded Troccoli and Cunningham that he still wanted a freeze for one year, but if the Union wanted two years that would also be acceptable. **The bottom-line offer of Epstein remained a one-year freeze on all employer costs, including health care costs. Tr. 345).** Epstein testified that Troccoli and Cunningham did not seem to be interested in a two-year freeze. (Tr. 345) (emphasis added). Cunningham agreed to take the offer to a vote by Friday, October 30. (Tr. 345).

The record thus conclusively establishes that, contrary to the ALJ's determination, Respondent's efforts were nothing more than an attempt to assist the Union to maximize the employer health benefit contribution -- that would be frozen at last-year's levels -- by helping the Union secure an alternate health care plan that was most economical to its members. Respondent provided alternatives -- based upon the agreed upon "freeze" of Alden contributions -- to show that the benefit reduction could be mitigated if the Union moved to another plan. Respondent's offer of assistance to the Union in connection with the Union's health care plan in no way represented a change in Respondent's clear position that all of its costs for wages and benefits, including health care, would be "frozen" or "*status quo*" for a year. Respondent's position as to the amount of its health care benefit contribution never changed in

the entire course of negotiations leading up to the lockout of November 3.¹³

E. The Union’s negotiating team -- all admitted to be experienced negotiators -- should be held to a standard of knowledge and understanding with respect to Respondent’s offer that is consistent with the exacting standard set out by the Board in Boehringer Ingelheim, 350 NLRB 678 (2007)

The NLRB’s decision in Boehringer Ingelheim, 350 NLRB 678 (2007), held that when Union negotiators are experienced, then the Union negotiators should be held to a high standard with respect to their knowledge and understanding of collective bargaining negotiations in general and, in particular, the employer’s conditions with respect to a lockout. That standard is properly applied here, and compels the conclusion that Respondent satisfied the notice requirements incident to a lockout.

It is instructive to quote at length from the ALJ’s decision in Boehringer Ingelheim (as affirmed by the Board) with respect to the high standard of knowledge and understanding expected of experienced Union negotiators in the specific context of negotiations in an advance of an employer’s lockout. In this portion of the decision, the ALJ recounts in some detail the events leading up to the lockout and to the Union representative’s understanding of those events, including the employer’s conditions:

As of the time of the initial telephone conversation between Lewis and Nowak following the strike authorization vote, **it does not appear that Nowak specifically told Lewis that a lockout could be avoided with a commitment from the Union not to strike for a certain period of time. However, I have no doubt that Lewis, as an experienced negotiator, understood this to be the case.** He had previously discussed these matters with the Respondent’s negotiators and knew that the issue of when “the

¹³ In light of the foregoing, the ALJ’s conclusion with respect to the untimeliness of Respondent’s offer is plainly erroneous. In particular, the ALJ found that “Respondent’s decision to provide the Union with only one working day’s notice, in which to evaluate and understand Respondent’s uncertain, ambiguous and confusing offer, vote on it and accept it, is clearly insufficient and not the ‘timely’ notice required by Board precedent.” (ALJD 20:7 to 20:10). The foregoing is the subject of Respondent’s Exception # 8.

As fully set forth in the text above, Exception # 8 is taken in light of the Union’s repeated admissions – by way of documentary evidence and testimony at the hearing by the Union representatives – that it knew and understood that Respondent was offering a one-year freeze on all terms of the Agreement (including the cost of employee health benefits), and that Respondent’s negotiating position remained unchanged throughout the entire period of negotiations leading up to, and including, the lockout of November 3, 2009.

trigger” could be pulled and a strike actually commence was of great concern to the Respondent. Further, as early as the next day, November 13, in conversations with both Lewis and Price, Nowalk explained that there were two options for returning the employees to work. He advised that either the Union must provide a written no-strike assurance or, alternately, individual employees could provide their individual agreement not to strike during a period of continued contract negotiations.

Lewis and Price [i.e., Tom Price, the Union local president] were experienced union negotiators. There was no mystery here. Both men understood that what most concerned the Employer's negotiators was not knowing whether and when a strike would commence. The lockout was intended to bring some certainty to the Respondent's production facilities, It would be naive to assume that the union negotiators did not know how to end the lockout. It was implicit in the Respondent's call for the lockout that it could be ended with an understanding that there would be no strike for a certain period of time. However, the Union was unwilling to give such an assurance except in the context of extending the expired contract, which the Respondent refused to do. Further, as of the time of their conversations on November 13, Nowalk made it explicitly clear to Price and Lewis what it would take to end the lockout. **Therefore, I conclude that the Respondent's demands in connection with the lockout were sufficiently understood by the union representatives for them to make an intelligent determination as to whether to accede to those demands so that the employees might return to work.** Dayton Newspapers, supra; Eads Transfer, supra.

[I therefore] conclude[] that the Respondent's lockout was not unlawful from inception and did not become unlawful by reason of any uncertainty about what demands the Respondent was making...

[Boehringer Ingelheim, supra, 350 NLRB 678 (2007), 2007 WL 2330905, * 21-22 (emphasis added)]

Thus, under Boehringer Ingelheim, when Union negotiators are experienced, then the Union negotiators should be held to a high standard with respect to their knowledge and understanding of collective bargaining negotiations in general and, in particular, the employer's conditions with respect to a lockout.

Here, the record is clear: the Union knew and understood that Respondent was offering a one-year freeze on all terms of the Agreement (including the cost of employee health benefits), and that Respondent's negotiating position remained unchanged throughout the entire period of negotiations leading up to, and including, the lockout of November 3, 2009. See Points IIB – IID, infra.

Furthermore, the record is equally clear that the Union's representatives involved in the negotiations were knowledgeable and experienced negotiators. Troccoli testified that he is a "talented negotiator." (Tr.209). Troccoli served as the lead negotiator for the Union in a major collective bargaining involving 2,100 employees at the Kings supermarket chain. (Tr. 209). Troccoli further testified that he has an excellent understanding of health insurance plans – the critical negotiating issue that is at the heart of this case. (Tr. 209-210). Cunningham, who is the Union's business agent, has been with the Union for nine years and negotiates several contracts a year. Union President Vincent DeVito is also an experienced negotiator, having negotiated "hundreds" of contracts. (Tr. 40).

Thus, the Union's negotiating team -- all admitted to be experienced negotiators -- should be held to a standard of knowledge and understanding with respect to Respondent's offer that is consistent with the exacting standard set out by the Board in Boehringer Ingelheim, 350 NLRB 678 (2007). The Boehringer Ingelheim standard further buttresses the conclusion that Respondent satisfied the notice requirements incident to a lockout.

F. Under Boeringer Ingellheim, legally sufficient and timely notice of an employer's intention to impose a lawful lockout occurred within hours of the lockout's commencement. Here, substantial evidence in the record supports the conclusion that Respondent's notice to the Union of a lockout occurred seven days (i.e., October 27) before the commencement of the November 3 lockout and it is undisputed (and the ALJ found) that notice of the lockout occurred at least as early as four days (i.e., October 30) before the commencement of the November 3 lockout. By any reckoning, notice of the lockout was timely, especially in light of the fact Respondent's last best offer remained unchanged for the weeks leading to the lockout.

In Boeringer Ingellheim, the facts disclose that the contract between the parties was set to expire on midnight of November 12, 2004. Just hours before the expiration of the contract, representatives of the parties engaged in intensive telephone negotiations wherein the employer gave notice of a lockout to commence at 12 midnight. Id. at *13. On this record, the ALJ held (and the NLRB affirmed) that legally sufficient and timely notice of the employer's intention to impose a lawful lockout occurred within hours of the lockout's commencement. Id. at 19-20.

Here, substantial evidence in the record supports the conclusion that Respondent's

notice to the Union of a lockout occurred *seven days* (i.e., October 27) before the commencement of the November 3, 2009 lockout. (tr. 218, 286) (testimony of Mark Epstein that notice was given by telephone no later than Tuesday October 27). In any event, it is undisputed (and the ALJ found) that notice of the lockout occurred at least as early as four days (i.e., October 30) before the commencement of the lockout on November 3. See ALJD 19:4 to 9:5 (setting forth October 30 telephone conversation between the parties wherein Epstein stated that “if the employees did not vote and agree on the offer, the employees would be locked out.”); 18:25 to 18:26; GCX #3 (October 30 e-mail from Respondent).

It is well to recall that the facts in Boeringer Ingellheim disclose that not only was the employer’s notice to the Union of its last best offer made just hours before the commencement of the lockout, but the employer’s notice of the lockout itself was made just hours before the commencement of the lockout. By any reckoning, the notice of the lockout in our case was timely, especially in light of the facts that: (1) Respondent’s last best offer remained unchanged in the weeks leading to the lockout, see Points IIB-IIE, supra; and (2) Respondent’s notice of the lockout itself was at least four days (and as many as seven days) before the commencement of the lockout.

G. Summary

To sum up: exception is taken to the ALJ’s various findings to the effect that Respondent failed to provide clear and sufficient notice to the Union of the “conditions that the employees must accept to avert the lockout and the time to intelligently evaluate these conditions.” This exception is taken in light of the Union’s repeated admissions – by way of documentary evidence and testimony at the hearing by the union representatives – that it knew and understood that Respondent was offering a one-year freeze on all terms of the agreement (including the cost of employee health benefits), and that Respondent’s negotiating position remained unchanged throughout the entire period of negotiations leading up to, and including, the lockout of November 3, 2009. These erroneous findings led the ALJ to conclude that

Respondent failed to provide clear and sufficient notice to the Union of the “conditions that the employees must accept to avert the lockout and the time to intelligently evaluate these conditions,” ALJD 20:16 to 20:18, and thereby violated the Act. This conclusion of the ALJ is clearly erroneous, and should be reversed.

POINT III

ALTHOUGH NOT NECESSARY TO THE REVERSAL OF THE ALJ’S RECOMMENDATION (AS TO THE PRE-LOCKOUT NOTICE ISSUE) THAT IS MANDATED BY THE ARGUMENTS SET FORTH IN POINT I AND II, SUPRA, IT IS NEVERTHELESS RELEVANT TO THE BOARD’S CONSIDERATION OF THIS ISSUE THAT THE ALJ’S RECOMMENDATION IS PREMISED IN PART ON THE ALJ’S FINDING THAT THE UNION NEGOTIATED IN GOOD FAITH THROUGHOUT THE WEEKS LEADING UP TO THE LOCKOUT. HOWEVER, A REVIEW OF THE RECORD INSTEAD DISCLOSES ABUNDANT EVIDENCE OF THE UNION’S BAD-FAITH CONDUCT, INCLUDING: (1) THE FACT THAT RESPONDENT AGREED TO A 30-DAY EXTENSION OF THE AGREEMENT AND REPEATEDLY INDICATED ITS WILLINGNESS TO ENGAGE IN FACE-TO-FACE NEGOTIATIONS FOR A NEW AGREEMENT BUT THE UNION FAILED AND REFUSED TO ENGAGE IN FACE-TO-FACE NEGOTIATIONS AT ANY TIME DURING THE PERIOD FROM OCTOBER 8 WHEN THE EXTENSION AGREEMENT WAS EXECUTED TO NOVEMBER 3 WHEN IT EXPIRED; AND (2) RESPONDENT SENT NUMEROUS COMMUNICATIONS TO THE UNION DURING THIS CRITICAL PERIOD TO WHICH THE UNION DID NOT EVEN BOTHER TO RESPOND. (EXCEPTION 11)

Implicit in the ALJ’s opinion is that, in the critical weeks leading to the November 3 expiration of the Agreement, the Union was, at all times, negotiating in good faith. However, the record -- to the contrary -- discloses abundant evidence of the Union’s bad-faith conduct. Numerous examples of the Union’s bad faith conduct are addressed at length in Points IV and V, infra, wherein we set forth testimony of the Union representatives that are belied by undisputed facts or that the ALJ himself found to lack credibility.

For purposes of this brief point, we focus instead on an important overarching issue that further establishes the bad faith of the Union in the collective bargaining process: *i.e.*, undisputed evidence in the record that (1) Respondent agreed to a 30-day extension of the Agreement and repeatedly indicated its willingness to engage in face-to-face negotiations for a new Agreement, but the Union failed and refused to engage in face-to-face negotiations at any time in the period subsequent to the execution of the extension agreement on October 8 and the

expiration of that agreement on November 3; and (2) Respondent sent numerous communications to the Union during this critical period to which the Union did not even bother to respond.

As to this critical issue, the record discloses the following:

- On October 5, Epstein and Cunningham met at Epstein's office in the Second negotiating session which lasted only 20 minutes. The parties agreed to meet again on October 8. (Tr. 279-280).

- Even though Epstein had provided to Cunningham on October 5 two alternative health plans to show how the Unions might maximize their health care coverage with other plans, Cunningham never responded to those alternatives.

- On October 8 Epstein met for a third time at his office, this time with Cunningham and Troccoli. Epstein provided Cunningham and Troccoli with more information on health care for them to consider, given the clear position that Alden was unwilling to pay anything more than its existing health care premium. Troccoli and Cunningham did not request to meet again (Tr. 94, 284, 313).

- On October 21, Epstein, via email, provided further alternative health care plans and again asked for another meeting with the Union (GCX #14). The Union never responded to Epstein's request for another meeting (Tr. 86, 87, 228, 284, 340).

- The undisputed record reflects that from October 8 onward, despite Epstein's repeated efforts to try to meet again with the Union, the Union never responded to these requests and never asked to meet again. Instead, they told Epstein that they would present his "freeze" proposal to the membership for a vote. When that did not occur as promised, the lockout date of November 3 was set.

In short, the record discloses that Respondent agreed to a 30-day extension of the Agreement and repeatedly indicated its willingness to engage in face-to-face negotiations for a new Agreement. The record further discloses that (1) the Union failed and refused to engage in face-to-face negotiations at any time in the period subsequent to the execution of the extension agreement on October 8 and the expiration of that agreement on November 3; and (2) Respondent sent numerous communications to the Union during this critical period to which the Union did not even bother to respond. All of the foregoing evidence in the record buttresses the conclusion that the Union was negotiating in bad faith in the critical weeks leading up to the

November 3 expiration of the Agreement.

Although the foregoing conclusion is by no means *necessary* to the reversal of the ALJ's recommendation as to the pre-lockout notice issue (that is mandated by the arguments set forth in Points I and II, supra), it is nevertheless *relevant* and *probative* with respect to the Board's consideration of this issue. Moreover, as previously noted, the foregoing conclusion is made even more compelling by the numerous examples in the record of the testimony of the Union representatives that are belied by undisputed facts or that the ALJ himself found to lack credibility.

POINT IV

ALTHOUGH NOT NECESSARY TO THE REVERSAL OF THE ALJ'S RECOMMENDATION (AS TO THE PRE-LOCKOUT NOTICE ISSUE) THAT IS MANDATED BY THE ARGUMENTS SET FORTH IN POINTS I AND II, SUPRA, IT IS NEVERTHELESS RELEVANT TO THE BOARD'S CONSIDERATION OF THIS ISSUE THAT THE CREDIBILITY OF UNION REPRESENTATIVES TROCCOLI CUNNINGHAM AND DEVITO ARE SEVERELY UNDERCUT ON THIS RECORD (EXCEPTIONS 12 AND 13).

The Amended Complaint consists of three claims. *First*, that Respondent violated the Act by failing to give sufficient pre-lockout notice to the Union. *Second*, that Respondent made a claim of "inability to pay," thereby triggering the obligation on the part of Respondent to disclose its financial records to the Union (and that Respondent violated the Act by failing to do so). *Third*, that Respondent violated the Act by threatening to move its operations to Oklahoma if the Union did not submit to its bargaining demands. The ALJ, after a hearing, recommended that the Board sustain the first claim but reject the second and third claims. ALJD 15:15 to 22:4.

Significantly, the second and third claims (that were rejected by the ALJ) are largely based on statements and testimony put forth by Union representatives Troccoli and Cunningham. The ALJ -- in recommending the rejection of the second and third claims -- crucially determined that the credibility of Troccoli and Cunningham was lacking. *This point is highly significant for present purposes, because the pre-lockout notice claim -- the claim here at*

issue -- is also largely based on statements and testimony put forth by Troccoli and Cunningham.

A. The ALJ's recommendation of dismissal of the Union's "inability to pay" claim based on the ALJ's rejection of the credibility of the testimony of Troccoli and Cunningham

The ALJ's opinion includes the following assessments of the credibility of Troccoli and Cunningham in connection with the above-referenced second claim concerning the Union's claim that Respondent asserted an "inability to pay":

While much of the facts are not in dispute, there are some significant credibility issues, particularly the testimony of Cunningham, supported in part by Troccoli, that at the September 30 and October 8 bargaining sessions, Epstein stated that Respondent "could not afford" the Union's proposals, that the Union requested that Respondent make its financial records available to the Union's auditors and that Epstein refused to agree to do so.

As noted in my summary of the facts detailed above, I did not include these assertions by Cunningham and Troccoli because I credit Epstein's testimony that these alleged statements were not made at either meeting. I make these findings for a number of reasons. Initially, I note that Cunningham failed to include in his bargaining notes of either of these meetings that Epstein told the Union that Respondent could not afford the Union's demands or increases or that the Union representatives requested that he submit financial records to the Union's auditors. Cunningham did include statements made by Epstein about financial difficulties Respondent was having, such as problems with the government concerning dumping fees and the cold and wet season. I find it highly improbable that Cunningham would omit writing down such an important statement such as a claim that Respondent can't afford the Union's increases and that the Union consequently requested to inspect Respondent's records, if such comments had been made.

Similarly, Cunningham's affidavit did not include an assertion that Epstein stated that Respondent could not afford the Union's increases at the October 8th meeting.

I also rely on a number of subsequent conversations and events, which shed light on this issue. Thus, on October 30, Union President Vincent DeVito discussed the status of negotiations with Troccoli. Troccoli informed DeVito that the extension agreement that had been signed was close to expiring and that he (Troccoli) was going to call Epstein later that day. Troccoli informed DeVito that the key issue during negotiations was the cost of the health care plan and that Respondent was looking for alternative plans. Troccoli asked DeVito what he could offer Respondent to keep things moving. DeVito authorized Troccoli to offer Respondent the option to continuing the same contributions for one year but with the possibility that benefits might be

reduced. **Nowhere in this conversation did Troccoli inform DeVito that twice during the prior negotiations, Epstein had stated that Respondent “couldn’t afford” to pay the increases or that the Union had asked to see Respondent’s financial records.** Similarly, when DeVito asked Cunningham on November 2 for a summary of developments at negotiations, Cunningham informed him that Respondent has proposed a freeze, but that the health care contributions were the big problem and they could not get past that issue. **Again, nowhere in that conversation did Cunningham inform DeVito that the Union had requested to inspect Respondent’s financial records or that Respondent has said that it couldn’t afford the-increases requested by the Union.**

I find it highly likely that had these statements been made at either the September 30 or October 8 meetings that Troccoli and Cunningham would have informed DeVito of such developments. Their failure to do so suggests to me that they did not happen.

Further, and in a similar vein, on November 4 at the first meeting that the parties had after the lockout of November 3, DeVito, who had become chief negotiator for the Union, asked to see Respondent’s financial records. Both Epstein and Steven Glassman, Respondent’s attorney, responded that Respondent had not claimed an inability to pay, and therefore, Respondent had no obligation to show to the Union its financial records. **Significantly, neither DeVito, nor Troccoli (who was also present), mentioned anything at the meetings about the alleged facts that Epstein had stated at the September 30 and October 8 meetings that Respondent could not afford the Union’s proposed increases or that the Union had asked to have its auditors inspect Respondent’s records.**

[ALJD 5:24 to 6:25 (emphasis added)]

The ALJ recommended the dismissal of the Union’s “inability to pay” claim. ALJD 15:20 to 16:11. The ALJ’s recommendation of dismissal was based largely on his above-quoted assessment of key Union witnesses Troccoli and Cunningham, and the ALJ’s determination that the credibility of Troccoli and Cunningham was lacking. See id.

B. The ALJ’s recommendation of dismissal of the Union’s “relocation threat” claim based on the ALJ’s rejection of the credibility of the testimony of Union Shop Steward Simon Hemby, as well as the testimony of Troccoli and Cunningham.

As previously noted, the ALJ also rejected Union’s “relocation threat” claim. ALJD 21:25 to 21:26. The recommended rejection was based in part on the ALJ’s rejection of the credibility of the testimony of Union Shop Steward Simon Hemby. ALJD 20:35 to 21:9. The ALJ found:

The Complaint alleges that Respondent through its supervisor, Belvin, “threatened its employees that if the Union did not submit to Respondent’s

bargaining demands, it would move unit work to another plant in Oklahoma.”

I agree with Respondent that the evidence did not disclose that Belvin made any such threat during his December 24 conversation with [Union Shop Steward Simon] Hemby.

[ALJD 20:35 to 21:2]

Furthermore, Cunningham and Troccoli testified in support of the Union’s “relocation threat” claim, and the ALJ -- in recommending the dismissal of this claim -- implicitly rejected the testimony of Cunningham and Troccoli as to this claim.

In particular, the October 8 meeting between the parties included a discussion in which Epstein told Troccoli and Cunningham that he would be in Oklahoma the following week on business. (Tr. 283). At the hearing, the record reflects that Epstein testified that, at the October 8 meeting, he never told Troccoli and Cunningham that he was going to move the Kearny facilities to Oklahoma. (Tr. 282). Cunningham, for his part, testified that Alden was considering moving to Oklahoma because Alden was being harassed by the Town of Kearny, which was costing Alden a substantial sum of money, and that the Union’s proposals were doing the same. (Tr. 83). However, there was nothing in Cunningham’s contemporaneous bargaining notes which make any reference to such a statement being made by Epstein. (RX #4). Similarly, Cunningham’s November 18 affidavit was completely silent about moving work to Oklahoma or harassment by Kearny. (Tr. 106, 166) Troccoli, for his part, testified that Epstein said he was thinking about moving the work to Oklahoma because it was becoming more difficult to deal with the Union, (Tr. 174).

However, as noted above, the ALJ credited Epstein’s testimony at the hearing, rejected the testimony of the Union representatives, and recommended dismissal of this claim. ALJD20-21.

The import of the foregoing is as follows. As previously noted, the second and third claims (that were rejected by the ALJ) are based on statements and testimony put forth by

Union representatives Troccoli and Cunningham. The ALJ -- in recommending the rejection of the second and third claims -- crucially determined that the credibility of Troccoli and Cunningham was lacking. *This point is highly significant for present purposes, because the pre-lockout notice claim -- the claim here at issue -- is also largely based on statements and testimony put forth by Troccoli and Cunningham.*

Although not necessary to the reversal of the ALJ's recommendation (as to the pre-lockout notice issue) that is mandated by the arguments set forth in Points I and II, supra, it is nevertheless relevant and probative to the Board's consideration of this issue that the credibility of Union Representatives Troccoli and Cunningham is severely undercut on this record.¹⁴

¹⁴ Although Union President Vincent DeVito had no direct role in the negotiations (and played a marginal role in the few days leading up to the November 3 lockout), his testimony -- and its lack of credibility -- is also relevant and probative to the Board's consideration of the pre-lockout notice.

More particularly, DeVito testified as to the reasons why the Union did not respond to Epstein October 30 email that reiterated Respondent's offer to the Union and set forth the conditions necessary to avoid a lockout. DeVito's testimony is highly probative as to the pre-lockout notice issue -- which is the only issue before this Board. DeVito's testimony is highly probative, because his testimony pertains directly to the question of why -- if the notice afforded by the October 20 email was allegedly "not clear" to the Union -- the Union did not contact Respondent to seek clarification just days before the expiration of the Agreement

DeVito testified that he did not respond to Epstein's October 30 email because: (1) Local 1245 (and DeVito personally) had never previously experienced a lockout (Tr. 29, 49, 55); and (2) he wanted to consult with legal counsel before responding to the October 30 email. (Tr. 29,49. 55, 224. 229). We address each of these asserted "reasons" in turn.

As to DeVito's first reason for not responding to the October 30 e-mail, the record discloses that Local 1245 had experienced at least one prior lockout, *and that lockout involved Alden*. (Tr. 104, 234; GCX #4(b)). DeVito was the president of the Union local at that time. (Tr. 23). Indeed, in that lockout of eight years earlier, DeVito's subordinates, Troccoli and Cunningham, were both directly involved in the negotiations that led to and ended the lockout. (Tr. 104, 234). Thus, DeVito's unqualified statements under oath (testified to three times, Tr. 29, 49, 55) that Local 1245 (or DeVito himself) had never been involved in a lockout is belied by undisputed facts in the record.

As to DeVito's second reason for not responding to the October 30 e-mail (*i.e.*, his asserted need to consult with counsel), DeVito testified that: (1) he made absolutely no effort to contact legal counsel on Friday, October 30. (Tr. 42); (2) as for Monday November 2, DeVito testified that he did not remember whether he spoke to legal counsel at all and, if so, was not sure if and when the conversation occurred. (Tr. 42). However, DeVito's direct subordinate, Troccoli, testified that he was certain DeVito spoke to legal counsel on November 2. (Tr. 234). The sworn testimony of DeVito's direct subordinate severely damages DeVito's credibility as to a critical issue bearing on the sufficiency of Respondent's pre-lockout notice.

CONCLUSION

For the reasons set forth above, the Administrative Law Judge erred in holding that Respondent violated the Act by failing to provide adequate and sufficient notice to the Union of Respondent's Lockout that commenced on November 3, 2009. The Administrative Law Judge's recommended finding of a violation should be reversed, and the Complaint dismissed in its entirety.

Respectfully Submitted,
Sokol Behot and Fiorenzo
Attorneys for Respondent Alden Leeds, Inc.

By: /s/ Joseph B. Fiorenzo
Joseph B. Fiorenzo

Dated: October 11, 2010