Spurlino Materials, LLC *and* Coal, Ice, Building Material, Supply Drivers, Riggers, Heavy Haulers, Warehousemen and Helpers, and Local Union No. 716, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America. Cases 25–CA–30053, 25–CA–30054, 25–CA–30080, 25–CA–30104, 25–CA–30156, 25–CA–30179, and 25–CA–30362

March 31, 2009

DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBER SCHAUMBER

On December 17, 2007, Administrative Law Judge Ira Sandron issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel and the Charging Party each filed cross-exceptions, a supporting brief, and an answering brief to the Respondent's exceptions. The Respondent filed an answering brief to the General Counsel's and the Charging Party's cross-exceptions, and a reply brief to the General Counsel's and the Charging Party's answering briefs. The Charging Party filed a reply brief to the Respondent's answering brief.

The National Labor Relations Board[1] has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions, as modified herein, and to adopt his recommended Order as modified and set forth in full below.

The Union represents a bargaining unit of concrete truckdrivers at the Respondent's three facilities in the Indianapolis, Indiana area. The consolidated complaint, as amended, alleges that the Respondent committed violations of Section 8(a)(5), (3), and (1) of the Act. Most of the allegations relate to work performed at two jobsites: (1) the Lucas Oil Stadium and Convention Center expansion project (Stadium project) between late 2005 and early 2007, and (2) the Air West Distribution Warehouse (Warehouse project) in 2007.

We adopt the judge's conclusions, for the reasons stated by him, that the Respondent violated Section 8(a)(5) and (1) by unilaterally assigning unit work at the Warehouse project to nonunit employees,[3] by unilaterally creating the positions of "portable plant driver" and "alternate/backup portable plant driver" at the Stadium project, and by instituting a new evaluation system and aptitude testing (driving tests) to select the portable plant drivers from among unit employees.[4] We further adopt the judge's conclusions, again for the reasons stated by him, that the Respondent violated Section 8(a)(3) and (1) by failing to select prominent union supporters Matt Bales, Ron Eversole, and Gary Stevenson as portable batch plant drivers, and by suspending and later discharging Stevenson,[5] and that the Respondent also violated Section 8(a)(1) by failing to accord Stevenson his union representation rights during an investigatory meeting preceding his suspension.[6]

[1] Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Liebman and Member Schaumber constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] In adopting the judge's conclusion, Member Schaumber notes that the Respondent did not present an "economic exigency" argument to the judge. See generally *RBE Electronics of S.D.*, 320 NLRB 80, 81 (1995). Accordingly, he deems such argument in the Respondent's exceptions to be untimely raised and thus waived. *Smoke House Restaurant*, 347 NLRB 192, 195 (2006), citing *Yorkaire, Inc.,* 297 NLRB 401 (1989), enfd. mem. 922 F.2d 832 (3d Cir. 1990).

There are no exceptions to the judge's recommendation to dismiss the allegation that the Respondent violated Sec. 8(a)(5) by soliciting volunteers for night pours on the Warehouse project.

[4] The Respondent contends that the General Counsel coined the terms "portable plant driver" and "alternate portable plant driver" and that the challenged actions more closely resemble a transfer of work rather than the creation of new unit job classifications. The judge addressed this alternative view. We agree with the judge that, regardless of how the issue is framed, the Respondent had an obligation to bargain with the Union before departing from established dispatch and seniority practices when using unit employees to staff the driver positions at the portable plant. We find no need to pass on the General Counsel's contention that the Respondent's actions also violated Sec. 8(a)(3) inasmuch as the finding of an additional violation would not materially affect the remedy. See, e.g., *Industrial Hard Chrome Ltd.*, 352 NLRB 298 fn. 2 (2008), and *Raymond F. Kravis Center for Performing Arts*, 351 NLRB 143, 145 (2007), enfd. 550 F.3d 1183 (D.C. Cir. 2008).

There are no exceptions to the judge's recommended dismissal of the allegation that the Respondent violated Sec. 8(a)(5) when offering certain drivers the alternate portable plant positions.

[5] In adopting the judge's conclusion on Stevenson's suspension and discharge, Member Schaumber relies primarily on the judge's credibility-based analysis of the pretextual nature of the Respondent's shifting explanations. He notes that while, under appropriate circumstances, the disproportionate nature of discipline may be a relevant factor in assessing pretext, it is not the Board's place to "function as a ubiquitous 'personnel manager,' supplanting its judgment on how to respond to unprotected" behavior of employees. *Detroit Newspaper Agency v. NLRB*, 435 F.3d 302, 310–311 (D.C. Cir. 2006) (citations omitted).

[6] See *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975).

For the reasons explained below, we reverse the judge and find that the Respondent violated Section 8(a)(3) and (1) by discriminatorily failing to dispatch Bales, Eversole, and Stevenson according to the established seniority system for the deliveries to the Stadium project prior to the staffing of the portable plant operation at that project. We also reverse the judge and dismiss the allegation that the Respondent violated Section 8(a)(5) by failing to timely answer the Union's information request. Finally, we disagree with the judge's recommendation to extend the Union's certification year, and we shall delete provisions for that remedy from the Order and notice.

A. Alleged Discriminatory Failure to Dispatch by Seniority

The Union was certified to represent the Respondent's concrete delivery drivers on January 23, 2006.[7] At that time, the Respondent's established procedure for initial daily deliveries, with limited exceptions, was to dispatch unit drivers out of each plant according to call-in lists ordered by seniority. In February, the Respondent began deliveries to the Stadium project using drivers dispatched from its Kentucky Avenue facility, where Bales, Eversole, and Stevenson worked. These three drivers had only recently served as members of the Union's preelection organizing committee, as its observers during the Board election, and as the employee representatives on the Union's bargaining committee.

By the terms of a project labor agreement (PLA), unit employees dispatched to the Stadium project received significantly higher hourly wages than for other delivery assignments. The Respondent's witnesses testified that drivers were dispatched to the Stadium project in accord with the usual seniority-based system. The judge credited the contrary testimony of General Counsel's witnesses, as corroborated by documentary evidence, and found that dispatches were not made in the normal sequence, with the result that Eversole, Bales, and Stevenson made fewer Stadium project runs from February through June than they should have made based on their seniority. Applying *Wright Line,*[8] the judge further found, and we agree, that the General Counsel met the initial burden of demonstrating that the Respondent unlawfully discriminated against these known prounion employees in making Stadium project dispatches from Kentucky Avenue.[9]

However, the judge attributed the Respondent's deviations from the established seniority-based dispatch procedure to a desire to display new trucks driven by three other unit employees, and thereby to "make a good impression at a high-profile job." The judge concluded that the Respondent therefore met its *Wright Line* rebuttal burden of proving that it would have made the disputed dispatches based on this factor even in the absence of union activity by the alleged discriminatees.

In cross-exceptions, the General Counsel and the Union argue, among other things, that the Respondent never advanced a "new truck" defense. Based on testimony discredited by the judge, the Respondent simply denied deviating from the established dispatch pattern. We find merit in the cross-exceptions. The Board has held that in cases turning on employer motivation the judge may not provide reasons not offered by the employer to defend its decisions. See *Allied Mechanical Services,* 346 NLRB 326, 328 fn. 14 (2006), citing *White Oak Coal Co.,* 295 NLRB 567, 569–570 (1989). The judge erred by doing so here. We therefore conclude that the Respondent failed to meet its *Wright Line* rebuttal burden and that it violated Section 8(a)(3) as alleged.

B. Alleged Delay in Responding to an Information Request

By letter dated August 24, the Union's attorney, Neil Gath, requested that the Respondent provide, by September 6, payroll records showing union dues deductions and the dates that dues were actually remitted to the Union for unit drivers working on the Stadium project.[10] Because the Respondent contracts its payroll services, Respondent's agent, Mary Rita Weissman, forwarded the request to the Respondent's administrative offices.

Weissman received the payroll information on September 5. On September 6, she left Gath a voice mail, saying that she would send the information as soon as she had reviewed it (she was travelling on business during most of September through mid-October). On September 14, the Union filed unfair labor practice charges.

[7] All dates are in 2006, unless otherwise indicated.

[8] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

[9] As previously mentioned, we affirm the judge's finding that the Respondent subsequently discriminated against Bales, Eversole, and Stevenson when staffing the portable batch plant for the Stadium project and that it discriminatorily suspended and discharged Stevenson. The judge also found that the Respondent discriminated against these employees by failing to select them as alternate portable plant drivers. We find no need to pass on this issue, inasmuch as any remedy for such an additional violation would be subsumed by the remedies for the other violations found. We also find no need to pass on the General Counsel's exceptions to the judge's failure to find that the Respondent's portable plant driver selections violated Sec. 8(a)(5). The finding of an additional violation would be cumulative and would not materially affect the remedy for the Respondent's unlawful conduct.

[10] The Stadium project PLA contained a dues-checkoff provision, and the Union had presented the Respondent with dues-checkoff cards from employees working at the Stadium. Although the Union had requested, at a March or April bargaining session, that dues be deducted monthly, it did not receive any dues until late July. This delay prompted the information request.

On September 22, Weissman faxed documents responsive to the information request.

There is no dispute that the Respondent provided the requested information. The issue is whether the Respondent did so in a timely fashion, consistent with its statutory obligation to bargain in good faith. The judge concluded that it did not, finding it "noteworthy" that: (1) the Respondent did not supply the information until after a charge had been filed; (2) the parties were still negotiating an initial agreement; and (3) the request was relatively simple. The Respondent excepts, arguing that the Union's self-proclaimed 14-day deadline was per se unreasonable, that all requested information was provided, and that there is no claim of prejudice to the Union's bargaining position because it did not receive that information sooner.

When a union makes a request for relevant information, an employer has a duty to supply the information in a timely fashion or to adequately explain why the information will not be furnished. *Regency Service Carts,* 345 NLRB 671, 673 (2005). In determining whether an employer has unlawfully delayed in responding to an information request, the Board considers the totality of the circumstances, including the "complexity and extent of information sought, its availability and the difficulty in retrieving the information," *Samaritan Medical Center,* 319 NLRB 392, 398 (1995), quoted with approval in *West Penn Power Co.*, 339 NLRB 585, 587 (2003), enfd. in part 394 F.3d 233 (4th Cir. 2005).

Here, the Respondent took immediate action to get the requested information from a third party; Weissman left Gath word about the status of the request before the Union's "due date"; Weissman requested more information so that she could match the payroll information she had received to the question of when dues had been remitted; and Weissman provided information to the Union less than a month after it was requested. In this context, and particularly in the absence of any evidence that the parties' contract negotiations were adversely affected by waiting for the Respondent to provide the information,[11] we conclude that the Respondent made a good-faith effort to respond to the request as promptly as circumstances allowed. Accordingly, we reverse the judge's finding to the contrary.

[11] The cases cited by the judge to support his conclusion, that even relatively short delays can be unlawful, are factually distinguishable. In *Woodland Clinic*, 331 NLRB 735 (2000), the Board found that a 7-week delay in providing employees' home phone numbers was neither "minimal" nor legitimized by the employer's asserted interest in protecting employees' privacy. In *Pennco, Inc.*, 212 NLRB 677 (1974), the employer took *no* action to supply information for over 1 month, acted only after the union filed a charge, and then furnished *incomplete* information. In *Samaritan Medical Center*, supra, the Board found a 2–3-month delay violative because it impeded the union's preparations for upcoming negotiations.

In exceptions, the Respondent suggests for the first time that the information was not "presumptively relevant," as the judge found, because the requested information pertained to the PLA, not to issues relevant to the Indianapolis unit. We deem this belated argument waived, but even if timely raised, there would be no need to address its merits in light of our dismissal of the 8(a)(5) allegation on other grounds.

AMENDED REMEDY

We shall order the Respondent to make Ron Eversole, Matthew Bales, and Gary Stevenson whole for losses suffered as a result of the Respondent's discriminatory failure to dispatch them in accord with the established seniority system prior to the establishment of the portable batch plant.[12] In addition, we agree with the judge that the Respondent should be ordered to make Eversole, Bales, and Stevenson whole for its discriminatory failure to select them to fill the regular portable batch plant positions. Finally, we agree with the judge that the Respondent should be ordered to make whole all unit employees who suffered losses as a result of the Respondent's unlawful unilateral creation of portable batch plant driver positions and the failure to utilize the preexisting dispatch procedure from the Kentucky Avenue facility that would have otherwise governed Stadium project deliveries. This remedy will include backpay for those employees who worked as portable batch plant drivers to the extent they suffered any losses as a result of the unilateral change, as well as Eversole, Bales, and Stevenson, to the extent they suffered any additional losses from the unilateral change after being compensated for the failure to select them to work at the portable plant.[13] Backpay for the aforementioned violations should be computed in accordance with *Ogle Protection Service,* 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), plus interest as computed in accordance with *New Horizons for the Retarded,* 283 NLRB 1173 (1987).[14]

Contrary to the judge's recommendation, we find that an 8-month extension of the Union's certification under

[12] We have modified the recommended Order and substituted a new notice with language conforming to the violations found herein and to correct an error in the records removal provisions with respect to the year of Stevenson's discharge. We shall also change the conditional notice-mailing provision in our Order to reflect February 10, 2006, as the approximate date of the Respondent's first unfair labor practice. The judge found that the Respondent dispatched drivers to the Stadium project beginning on this date and bypassed the three prounion employees for these assignments thereafter.

[13] We leave resolution of any issues with respect to backpay entitlement to the compliance stage of this proceeding.

[14] As stated by the judge, the backpay remedy for Stevenson's unlawful suspension and discharge shall be computed in accordance with *F. W. Woolworth Co.,* 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded,* supra.

Mar-Jac Poultry Co., 136 NLRB 785 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), is unwarranted in the circumstances of this case. The Board exercises remedial discretion in determining whether to extend the certification year, with the resultant bar against challenges to the incumbent union's status as the employees' exclusive bargaining representative. *United Electrical Contractors Assn.,* 347 NLRB 1, 3 (2006). The Board has often granted *Mar-Jac* extensions in cases involving a complete refusal to bargain, overall bad-faith bargaining, or a breakdown in negotiations caused by unfair labor practices. In this case, there is no allegation that the Respondent engaged in a complete refusal to bargain or overall bad-faith bargaining. Furthermore, there is no showing that its unilateral changes and other unfair labor practices had any impact on the parties' ongoing contract negotiations. In this respect, this case is similar to *Southern Mail, Inc.,* 345 NLRB 644, 644 fn. 2 (2005), where the Board rejected the judge's recommendation for a *Mar-Jac* extension. The respondent in *Southern Mail* made unlawful unilateral changes and refused to furnish requested relevant information, but the General Counsel did not contend either that the respondent had refused to recognize and negotiate in good faith with the union for a contract following its certification or that the respondent's 8(a)(5) violations had tainted those negotiations. Accordingly, as in *Southern Mail,* we shall delete the provision for a certification year extension from the recommended Order. [15]

ORDER

The Respondent, Spurlino Materials, LLC, Indianapolis, Indiana, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Creating new positions or implementing new employee evaluation or testing procedures for the selection of employees to fill those positions, without first affording Coal, Ice, Building Material, Supply Drivers, Riggers, Heavy Haulers, Warehousemen and Helpers, and Local Union No. 716, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America (the Union) notice and an opportunity to bargain.

(b) Subcontracting out unit work or using Spurlino Ohio employees to perform such work, without first affording the Union notice and an opportunity to bargain.

(c) Discriminatorily bypassing employees out of the normal dispatch sequence because they have engaged in activities on behalf of the Union.

(d) Failing to select employees for new positions, or suspending, terminating, or otherwise disciplining them, because they have engaged in activities on behalf of the Union.

(e) Denying an employee's requests for the presence of a union representative and continuing to question him during an investigatory meeting which the employee could reasonably fear would result in disciplinary action.

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

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

(a) Before implementing any changes in wages, hours, or other terms and conditions of employment, notify and, on request, bargain in good faith with the Union as the exclusive collective-bargaining representative of employees in the following appropriate unit:

> All full-time and regular part-time drivers and plant operators/batch men employed by the Employer at the following facilities: Indianapolis (Kentucky Ave.), Indiana; Linden, Indiana; and Noblesville, Indiana; BUT EXCLUDING all garage employees, mechanics, helpers, laborers, dispatchers, and guards and supervisors, as defined in the Act.

(b) Make unit employees whole, with interest for any loss of earnings and other benefits suffered as a result of the Respondent's unilateral implementation of new selection criteria and staffing procedures for the portable batch plant at the Lucas Oil Stadium project from June 8, 2006, until March 2007, in the manner set forth in the amended remedy section of this decision.

(c) Make employees Ron Eversole, Matthew Bales, and Gary Stevenson whole, with interest, for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the amended remedy section of this decision.

(d) Within 14 days from the date of this Order, offer Gary Stevenson full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(e) Within 14 days from the date of this Order, remove from its files any references to the August 26, 2006 indefinite suspension, and the February 22, 2007 termination, issued to Gary Stevenson, and the failure to select Ron Eversole, Matthew Bales, and Gary Stevenson for positions at the portable batch plant and to properly dis-

[15] See also *Visiting Nurse Services of Western Massachusetts,* 325 NLRB 1125, 1132 (1998), enfd. 177 F.3d 52 (1st Cir. 1999), cert. denied 528 U.S. 1074 (2000), and *Cortland Transit, Inc.*, 324 NLRB 372 (1997).

patch them, and within 3 days thereafter, notify them in writing that this has been done and that the unlawful actions will not be used against them in any way.

(f) Within 14 days from the date of this Order, remove from its files employee evaluations written pursuant to the Respondent's new evaluation system, which was unilaterally implemented without affording the Union notice and an opportunity to bargain.

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

(h) Within 14 days after service by the Region, post at its facilities in Indianapolis (Kentucky Avenue), Linden, and Noblesville, Indiana, copies of the attached notice marked "Appendix."[16] Copies of the notice, on forms provided by the Regional Director for Region 25 after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 10, 2006.

(i) Within 21 days after service by the Region, file with the Regional Director for Region 25 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

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

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT create new positions or implement new evaluation or testing procedures for employees without first affording the Union, Coal, Ice, Building Material, Supply Drivers, Riggers, Heavy Haulers, Warehousemen and Helpers, and Local Union No. 716, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, prior notice and an opportunity to bargain.

WE WILL NOT subcontract out unit work or use Spurlino Ohio employees to perform unit work without first affording the Union prior notice and an opportunity to bargain.

WE WILL NOT discriminate against you by not dispatching you pursuant to our normal dispatching procedure, by not selecting you to fill newly created positions, or by suspending, terminating, or otherwise disciplining you because you have engaged in activities on behalf of the Union.

WE WILL NOT deny your requests for the presence of a union representative and continue to question you during meetings in which you reasonably fear that discipline may result.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of your rights under Section 7 of the Act, as set forth at the top of this notice.

WE WILL, before implementing any changes in wages, hours, or other terms and conditions of employment, notify and, on request, bargain in good faith with the Union as your exclusive collective-bargaining representative in the appropriate bargaining unit:

All full-time and regular part-time drivers and plant operators/batch men employed by us at our following facilities: Indianapolis (Kentucky Ave.), Indiana; Linden, Indiana; and Noblesville, Indiana; BUT EXCLUDING all garage employees, mechanics, helpers, laborers, dispatchers, and guards and supervisors, as defined in the Act.

WE WILL make employees Ron Eversole, Matthew Bales, and Gary Stevenson whole for any loss of earnings and other benefits suffered as a result of our discriminatorily bypassing them (assigning them out of the normal dispatch sequence) for Stadium assignments between February 10 and June 8, 2006, and for not selecting them thereafter for portable plant assignments, because they engaged in activities on behalf of the Union.

WE WILL make employee Gary Stevenson whole for any loss of earnings and other benefits suffered as a result of his discriminatory suspension and discharge, with interest.

WE WILL make employees whole, from when the Respondent first assigned drivers to the portable plant on June 8, 2006, to when it closed the portable plant, for any loss of earnings and other benefits suffered as a result of the Respondent's failure to utilize the preexisting dispatch procedure that would have otherwise governed, had Respondent not made unlawful unilateral changes which resulted in certain drivers being dedicated to Stadium dispatches.

WE WILL, within 14 days of the Board's Order, offer Gary Stevenson full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL, within 14 days of the Board's Order, remove from our files any references to the August 26, 2006 indefinite suspension, and the February 22, 2007 termination, issued to Gary Stevenson, and the failure to select Ron Eversole, Matthew Bales, and Gary Stevenson for positions at the portable batch plant and to properly dispatch them, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the unlawful actions will not be used against them in any way.

WE WILL, within 14 days of the Board's Order, remove from our files the employee evaluations that we prepared without first affording the Union notice and an opportunity to bargain.

SPURLINO MATERIALS, LLC

Joanne C. Mages and *Rebekah Ramirez, Esqs.,* for the General Counsel.

Robert J. Brown, Esq. (Thompson Hine LLP) and *Mary Rita Weissman (The Weissman Group),* for the Respondent.

Geoffrey S. Lohman (Fillenwarth, Dennerline, Groth & Towe), for the Charging Party.

DECISION

STATEMENT OF THE CASE

IRA SANDRON, Administrative Law Judge. The amended consolidated complaint dated March 21, 2007, and the complaint dated July 18, 2007, stem from unfair labor practice (ULP) charges that Coal, Ice Building Material, Supply Drivers, Riggers, Heavy Haulers, Warehousemen and Helpers, and Local Union No. 716, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America (the Union) filed against Spurlino Materials, LLC (Respondent or the Company). The alleged violations of Section 8(a)(3), (5), and (1) of the National Labor Relations Act (the Act) relate to drivers that the Union represents at Respondent's three Indianapolis, Indiana area facilities. Most pertain to work performed at two major jobsites: the Lucas Oil Stadium (Stadium) in 2006, and the AirWest Distribution warehouse (Warehouse Project) in 2007.

Pursuant to notice, I conducted a trial in Indianapolis, Indiana, on April 24–27, May 30–31, and October 18, 2007, at which the parties had full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence.[1] All parties filed helpful posthearing briefs that I have duly considered.

At the General Counsel's unopposed request, I take official notice that on November 8, 2007, Judge David F. Hamilton of the United States District Court for the Southern District of Indiana, Indianapolis Division, issued an injunction against Respondent pursuant to the Regional Director's petition for such under Section 10(j) of the Act. As Judge Hamilton articulately explained, the standard he applied in determining injunctive relief appropriate was not that of passing on the merits of the underlying ULP charges, a role vested at the first adjudicatory level with me.

I also grant the General Counsel's unopposed motion to correct transcript.

Issues

Did Respondent violate Section 8(a)(5) and (1) by the following conduct:

1. In May 2006, created the position of portable batch plant driver (portable plant driver) at the Stadium, without first affording the Union notice and an opportunity to bargain over the conduct and its effects?

[1] I left the record open on May 31 to afford the General Counsel the opportunity to investigate pending charges that the Union had filed against Respondent on May 24, in Case 25–CA–30345. Subsequently, the General Counsel found merit to certain charges in Case 25–CA–30362, filed on June 12, and issued a complaint on July 18. By order dated July 30, I granted its unopposed motion to consolidate such complaint with the outstanding amended consolidated complaint.

2. In May 2006, implemented a new evaluation and testing procedure, upon which to select employees to work as portable plant drivers, without first affording the Union notice and an opportunity to bargain?

3. In about late July 2006, created the position of alternate/backup portable plant driver (alternate driver) at the Stadium, without first affording the Union notice and an opportunity to bargain?

4. In about late July 2006, by Jeff Davidson, operations manager, bypassed the Union and dealt directly with unit employees by offering them alternate driver positions?

5. Unreasonably delayed furnishing the Union with information it requested on August 24, 2006, concerning Respondent's records of union dues deductions made from unit employees' paychecks and their remittance?

6. From June 11–28, 2007, assigned unit work to nonunit employees; more specifically, utilized subcontracted trucks and drivers, employees from Spurlino's Ohio operations (Spurlino Ohio), and nondriver employees, for concrete slab pours at the Warehouse Project, rather than using unit employees?

7. On about June 11, 2007, altered the manner in which it assigned unit employees to perform unit work; more specifically, solicited unit employees to volunteer for slab pours at the Warehouse Project, rather than simply using the regular call-in referral system?

Did Respondent violate Section 8(a)(3) and (1) by the following conduct against the named employees because they engaged in union activity:

1. From about February 10 until about June 7, 2006, failed to assign employees Matt Bales, Ron Eversole, and Gary Stevenson to the Stadium?

2. In about early June 2006, failed to select them as portable plant drivers?

3. In about late July 2006, failed to select them as alternate drivers?

4. On August 26, 2006, indefinitely suspended Stevenson, and on about February 25, 2007, discharged him?

Finally, did Respondent commit an independent violation of Section 8(a)(1) on August 25, 2006, when Davidson continued to interview Stevenson after denying his request for union representation at an interview at which Stevenson had reasonable cause to believe that disciplinary action might result?

Witnesses and Credibility

The General Counsel's witnesses included Bales, Eversole, and Stevenson; Union Attorney Neil Gath, Union President Gary Green, Union Vice President Steve Jones; drivers Kenneth Cox, Eric Kiefer, and Terry Mooney; and Matt Ahlquist, area lead for Lithko, the contractor under which Respondent performed work at the Warehouse Project.

Respondent called its admitted agents Davidson, Majority Owner Jim Spurlino (Spurlino), Consultant Mary Rita Weissman (Weissman) of The Weissman Group (TWG), General Manager Gary Matney, and dispatchers Wilma Leary and Donald Rollins.

On some matters, the testimony of various witnesses from both sides was completely consistent; on others, testimony was contradictory, not only between witnesses from opposing parties but also between a party's witnesses themselves. I have taken into account the natural diminution of recall when events occurred over a period of time rather than on one or two specific occasions.

Ahlquist is employed by a neutral third party with no stake in the proceedings. He appeared candid and answered questions posed by Respondent's counsel on cross-examination as readily as he did those asked by the General Counsel on direct. His testimony was also consistent with the documentary evidence of record. Accordingly, I credit what he stated.

Cox, Kiefer, and Mooney are not alleged discriminatees and were not active union proponents. Thus, Cox served as an election observer for the Company; Kiefer was neutral during the campaign; and Mooney's sole union activity was signing an authorization card. These drivers would have no apparent vested interest in slanting their testimony either for or against Respondent, and they did not seem to do so during their testimony. They appeared candid, and I credit them.

Eversole and Bales struck me as generally credible, and I credit their testimony for the most part. Stevenson, who apparently has limited education and seemed somewhat intimidated by the trial setting, did not always testify smoothly, and at different times related events differently, particularly as to what was said at his August 25, 2006 interview with Davidson. I do not believe he was deliberately untruthful but nevertheless find portions of his testimony unreliable.

Turning to Respondent's witnesses, I find that Weissman and Rollins were the most reliable, with an exception in each case. Although Weissman occasionally tried to slip in statements in support of Respondent's legal positions, she generally answered questions, including those I posed, readily and without an apparent effort to formulate the "right" answers. She was Respondent's chief negotiator at bargaining sessions, and I believe she would have had a more solid recall than Green or employees on the Union's bargaining committee who testified on what was said during negotiations. Only when it came to her testimony on Spurlino's role in decisionmaking did Weissman equivocate and lose her otherwise self-assured demeanor.

Rollins seemed candid, and he has a great deal of experience both in driving and dispatching. As opposed to Rollins, O'Leary has never personally been inside the trucks, and her testimony struck me as more calculated to help Respondent's case. Accordingly, I credit his testimony over hers where they diverged. On one matter—whether the call-in list was strictly followed in dispatches to the Stadium—Rollins' testimony (and that of other management witnesses) was contradicted not only by the testimony of General Counsel's witnesses but, more significantly, by Respondent's own documents. Therefore, I do not credit his testimony thereon.

Respondent's remaining witnesses were often not credible. Spurlino claimed lack of knowledge on a wide range of subjects and was frequently vague or nonresponsive, even though the testimony of other management witnesses and Spurlino himself show his active role in managing the Indiana facilities. His testimony regarding Stevenson's suspension was notably suspect. Thus, he more than once first testified that the final decision to suspend Stevenson was a consensus between him, Weissman, Matney, and Davidson, but Matney and Davidson

directly contradicted this testimony, and Spurlino himself later retracted it.

Ironically, both Matney and Davidson seemed noticeably more at ease in testifying as adverse witnesses under Section 611(c) than they did in testifying as witnesses in Respondent's case-in-chief. During the latter, both exhibited considerably greater defensiveness and more stress. Matney, in fact, became argumentative at times. This causes me to believe that they were not comfortable in testifying in support of Respondent on certain subjects and to have doubts about the reliability of their testimony thereon.

Other factors undermine the reliability of their testimony in general. Matney, particularly as Respondent's witness, frequently hesitated in giving answers and often professed not to recall specific details. The latter was most noticeable regarding conversations he had with employees prior to the election on January 13, 2006. Further, certain aspects of his testimony were not believable. For example, he testified that both Eversole and Stevenson told him more than once prior to the election that they did not support the Union and never told him they changed this position. Yet, he also testified that he was not surprised to learn they were later appointed to the Union's negotiating committee. Similarly, his testimony that he did not know on the day of the election who the Union's observers were flies in the face of his presence at Kentucky Avenue that day, and the uncontroverted fact that Respondent engaged in a vigorous preelection campaign to discourage employees from voting for the Union and evinced a strong interest in the outcome.

Matney's credibility was further weakened when he professed not to have understood a simple question that had been posed by Respondent's counsel (concerning his preelection statements to drivers about collective bargaining), after having first given an ambiguous and evasive answer. I do not find this plausible from a high-level manager who had no problems understanding questions from the General Counsel and the Union's attorney when he testified as a 611(c) witness. Finally, I do not believe that all of the five drivers who testified that Matney made a variety of antiunion statements before or shortly after the election fabricated their testimony, and I therefore do not credit Matney's denials thereof.

Davidson's testimony about the evaluation process used to select drivers to staff the portable plant was frequently ambiguous, shifting, and even directly contradictory, particularly on how employees were evaluated and how various factors were weighed. For example, on the question of whether grades of "A" or "B" were required on certain criteria, he first testified that there were two such criteria, then added several others, and finally stated that there were none. He also failed to give any specific supporting information behind his purported reasons for not selecting Bales, Eversole, and Stevenson, and some of his statements about them were conflicting. I note that their personnel files, subpoenaed by the General Counsel, contain no documentation of their alleged deficiencies. Moreover, several driver-witnesses contradicted his testimony about the role driving tests played in selecting portable plant drivers.

Finally, as to credibility, I note the well-established precept that witnesses may be found partially credible, because the mere fact that a witness is discredited on one point does not automatically mean that he or she must be discredited in all respects. *Golden Hours Convalescent Hospitals*, 182 NLRB 796, 799 (1970). Rather, it is appropriate to weigh the witness' testimony with the evidence as a whole and to evaluate its plausibility. Id. at 798–799; see also *MEMC Electronic Materials,* 342 NLRB 1172, 1200 fn. 13 (2004), quoting *Americare Pine Lodge Nursing*, 325 NLRB 98 fn. 1 (1997) (when examining testimony, a trier of fact is not required "to accept the entirety of a witness' testimony, but may believe some and not all of what a witness says"); *Excel Container, Inc.,* 325 NLRB 17 fn. 1 (1997) (it is quite common in all kinds of judicial decisions to believe some, but not all, of a witness' testimony).

Facts

Based on the entire record, including witness testimony, documents, and the parties'stipulations, I find the following facts.

Spurlino, Respondent's majority owner, owns and operates a number of plants in various states, all engaged in supplying and delivering ready-mix concrete in the construction industry. His business enterprises are headquartered in Ohio. In about November 2005, he purchased the assets of American Concrete as a limited liability company and took over its three facilities in the Indianapolis, Indiana area: Kentucky Avenue (or South Plant) in Indianapolis, Linden, and Noblesville (or North Plant). Jurisdiction has been admitted, and so I find.

Spurlino visits the facilities on an average of twice monthly for 2 days each, mostly going to Kentucky Avenue, where management offices are located. Matney, as general manager, oversees the entire operation on a day-to-day basis. Davidson, as operations manager, has direct responsibility over quality control, plant and truck maintenance, and dispatchers, drivers, and batch men. He reports to both Matney and Spurlino, with whom he typically talks several times a week. George Gaskin, also classified as an operations manager, assists him. Angie Johnson handles payroll, employee benefits, and recordkeeping functions. At all times relevant, Respondent employed three dispatchers, all located at Kentucky Avenue.

For the Indiana facilities, Respondent has at all times outsourced resources and labor relations, including union matters, to TWG. Respondent's management in Indiana is in contact with TWG on a regular basis, at least three or four times weekly. Weissman has been TWG's primary contact person.

At the time of trial, Respondent employed approximately 15 drivers and one batch man (or plant operator) at Kentucky Avenue; about eight drivers and one batch man at Noblesville; and about four or five drivers and one batch man at Linden.

I. UNION ACTIVITY AND ELECTION

In late 2005, drivers, including Bales, Eversole, and Stevenson contacted the Union, which, on December 6, 2005, filed a petition for an election. The Union considered the three, along with Kentucky Avenue batch man, Scotty Sullivan, to be members of its bargaining committee during the preelection campaign period. They talked in favor of the Union and solicited employees to sign authorization cards.

A number of employees testified about one-on-one meetings with Matney following the filing of the petition, and it is undisputed that Respondent engaged in a preelection campaign to dissuade employees from voting for the Union. Respondent's preelection conduct was the subject of a prior complaint and is not before me for adjudication. Nevertheless, I can appropriately consider such conduct as background evidence in this proceeding.

Matney testified that "John" from TWG provided management with a series of about six bullet-point letters on various topics to discuss with drivers.[2] Matney and Gaskin divided up the Kentucky Avenue drivers for such meetings, with Matney having six or seven on his list.

According to Matney, he met on a one-to-one basis with drivers he had been assigned, usually in his office for 5–15 minutes. Initially, he testified that he followed the contents of the letters "generally fairly closely."[3] However, on cross-examination, he testified that what he read to them "varied, really," depending on whether he or the driver was pressed for time.[4] He also testified that he did not go over all of the letters with all of his assigned drivers because some drivers were easier to "get a hold of" than others."[5] In light of his status as Respondent's highest-level manager in Indiana, I find incredible his professed inability to secure the presence of employees, especially when Respondent's labor relations consultant had directed that he speak to them.

Matney's testified inconsistently concerning which drivers he spoke to. He first stated that he spoke to four or five, including Bales, Eversole, Stevenson, Randy Poindexter, and there "may have been a few more."[6] He also testified that he "believed" he also talked to Cox, who he "believed" was on his list, but could not recall how many times. He did not raise Kiefer's name until the General Counsel's redirect-examination—and then in response to the question of the driver with whom he had the most conversations on the letters.[7] This is another indication of Matney's lack of reliability as a witness.

Matney was vague about what he discussed with drivers. He could recall only "some discussion about bargaining . . . how bargaining took place. There were discussions about the length of time that first contracts generally take."[8] He gave no other description about what was said. When Respondent's counsel specifically asked whether he had any conversations about collective bargaining outside the scope of the letters, Matney was ambiguous and evasive. He first answered that several employees had questions for him about the Company but could recall no specifics. He then said the questions were related to operations, such as the types of trucks. Next, he stated, circularly, "[T]hese were just conversations that we were having during the course when we were talking about the collective bargaining, questions that they asked."[9] Finally, he claimed that he "didn't understand" the question and could recall no such conversations.[10]

Matney's testimony about his conversations with Eversole and Stevenson was as follows. They approached him and volunteered that they were both on the Company's side and willing to work with him by circulating a petition against proceeding with the election. Eversole asked if Matney could provide such a petition and was told "no." In later conversations, Eversole stated that his sister had prepared one, which would be circulated to drivers for their signatures, and that he would help to get it signed. Stevenson also told Matney a couple of times after the three of them met that he was behind the Company and would assist management.

Oddly, although Matney testified that Eversole and Stevenson had evinced antiunion sentiments to him, he also testified that he was not surprised when he learned after the election that they had been elected to the Union's bargaining committee. His explanation, that he "fully anticipated that somebody from the group would be there and they were the ones who were elected,"[11] was a nonsequitur that further undermines Matney's credibility, as does the implausibility of his testimony that Eversole and Stevenson sua sponte offered to get drivers to sign antiunion petitions, when they were among the employees who approached the Union and sought drivers to sign authorization cards.

For the myriad of reasons above, Matney's testimony about what he said to drivers during the one-on-one meetings was unreliable.

The following employees, in the order they testified, recounted conversations with Matney prior to, or shortly after, the election: Eversole, Stevenson, Bales, Kiefer, Mooney, and Cox. Their testimony on these was generally credible, plausible, and not inconsistent, and I credit it over Matney's denials. The one exception is Stevenson, whom I credit only partially for reasons to be stated.

Eversole's first such conversation with Matney was in December 2005, when the latter called him in to the mechanics' shop. Matney laid a piece of paper on the desk (presumably, the NLRB notice that the petition had been filed), and said, "I cannot believe you guys acted in such a fast manner to run to the Union to try to get the Union in this company instead of giving Jim Spurlino a chance . . . [Y]ou guys are messing up a good thing that could happen here, and now you've blown it for yourselves. . . . I cannot believe you're doing this to us."[12] Eversole replied that he and the other employees felt it was best for their families.

Matney initiated about 20 subsequent conversations with Eversole. Generally, similar in content, they took place in various locations, including the mechanics' shop, drivers' room, and the management office. Matney stated it was their (the drivers') decision but that he did not want the Union, and the Company would not stand for a union. He further stated that

[2] Respondent furnished three of them, all signed by Matney, dated December 29, 2005, and January 3 and 5, 2006. R. Exh. 1.
[3] Tr. 788.
[4] Tr. 815.
[5] Tr. 791; semble, Tr. 813.
[6] Tr. 779–780.
[7] Tr. 814.
[8] Tr. 788.
[9] Tr. 797.
[10] Tr. 797–798.
[11] Tr. 824–825.
[12] Tr. 409.

Spurlino had gone through union organizing several times, and "only once did it even get to a bargaining session. And he [Spurlino] held it out for so long that the Union walked away from the table."[13]

At one meeting, Matney asked Eversole to circulate an anti-union petition, and he replied that he was not interested. Matney pressed him, and he then asked what he needed to do. Matney replied it was a petition that needed to be signed by at least 51 percent of the employees to stop the election. In later conversations, Matney asked him if he had gotten the petition signed. During their last conversation, 2 days before the election, Eversole stated that the drivers did not want to sign because they were fearful of repercussions. Matney replied there would be no repercussions, and he accused Eversole of not being a man of his word.

Stevenson also had numerous conversations with Matney, either in the mechanics' shop or the break room. His testimony about them was often not easy to follow, some of it was confusing, and some was implausible. Accordingly, I credit his testimony on this subject only in part and where consistent with Eversole and the credited testimony of other drivers.

I find that on December 10 or 11, soon after the petition was filed, Stevenson had a conversation with Matney in the mechanic's shop.[14] Matney asked why the drivers wanted a union and to give management a chance. Stevenson, for whatever reason, led Matney to believe he would assist in getting rid of the Union. The next morning, in the same location, Matney asked Stevenson if he (Stevenson) thought he could get rid of the Union. Stevenson asked how, and Matney replied, to take a petition around and have people sign.

I further find that Gaskin gave Stevenson such a petition either later that day or the next morning. A day or so thereafter, Stevenson was in the break room when Matney asked how the petition was coming and if Stevenson had encountered any problems getting signatures. Stevenson replied that it was going slowly but that he was still trying. Matney asked if there were any people to whom he needed to talk, to persuade them to sign the petition. Stevenson replied, "[N]o." A day or 2 later, Matney called him to the mechanics' cage and again asked how the petition was coming. Stevenson replied that he was still having problems.

On the other hand, I do not credit Stevenson's testimony that in the last conversation above, Matney then asked who had started "this union shit" and became irate when Stevenson responded that he had. Such question would have been highly out of context and is one that I would expect Matney would have asked much earlier. In that event, I doubt if Matney would have continued to press Stevenson to spearhead an anti-union effort. I also do not credit Stevenson's incredible testimony that 2 or 3 days later—after Matney's purported angry reaction at Stevenson's union activity—Matney again called him to his office and asked how the petition was going, and was he (Stevenson) still trying to get rid of the Union.

Matney called Bales to the management office a week before Christmas 2005. He stated that Spurlino had been through this (union organizing activity) six times and "had prolonged it 16 to 18 months, long enough that the union walked away from the table."[15] In subsequent conversations, Matney asked Bales if he understood "that stuff." In at least one conversation, Matney stated that he knew that Bales had already made up his mind how he was going to vote. Bales replied that he and Eversole were best friends but did not always agree. On at least two occasions, Matney asked Bales if he understood that the Company could not retaliate.

Kiefer characterized himself as "neutral" during the preelection period, during which Matney initiated about three "casual" meetings with him. Therein, Matney explained what the Union could not do for him and stated that the Company wanted a "no" vote.

Mooney's sole union activity consisted of signing a union authorization card. Matney had three meetings with him prior to the election, all in the management office. The first was on December 20, 2005. Matney advised Mooney that he did not have to talk to him if he did not wish. He asked Mooney to give the Company a chance and said that Spurlino would take care of the drivers if they did so; however, if they voted for the Union, it would probably take about 18 months to get to negotiations. In the second conversation, a week later, Matney started the conversation in the same way. He then said he wanted Mooney to convince the other drivers that if they dropped the Union, they would suffer no repercussions, and nobody would get fired. He added that the drivers did not need a third party to intervene. In their third conversation, on January 4, 2006, Matney stated that "[I]t would take 18 months if we did vote the union in, for negotiations, to start negotiating and that Jim Spurlino would drag it out and that he would pay any fines."[16] He also said that just because the drivers were union did not mean they would get all the union jobs, and he repeated that the drivers did not need a third-party intervenor.

An election was held on January 13, 2006. The Union's observers were Eversole at Kentucky Avenue, Stevenson at Linden, and Bales at Noblesville. Cox was the Company's observer at Kentucky Avenue. For reasons stated, I discredit Matney's testimony that he was not aware of the identity of the Union's observers that day and conclude that management had such knowledge. I note that he was present at Kentucky Avenue on the day of the election and find disingenuous his testimony on this point. After the election results were announced, John Coit, one of the Company's representatives at the preelection conference (and perhaps the same individual with TWG who prepared the letters for Matney to read to drivers) stated, "They all lied. All those mother-fuckers voted yes."[17]

Following the announcement of the election results in favor of the Union, Cox and Gaskin had a conversation outside the break room, in which the latter stated that he wished the vote had gone differently, and "Stuff around the plant was going to

[13] Tr. 411–412.

[14] Stevenson testified that it was in the presence of Bales, Cox, and Eversole, but his subsequent testimony suggests he was alone with Matney. None of the named drivers testified about such a conversation.

[15] Tr. 667.

[16] Tr. 600.

[17] Eversole at Tr. 420; semble, Bales at Tr. 672. See GC Exh. 20, preelection conference attendance sheet.

be a whole lot different and things were going to get uglier than what they were."[18]

A couple of days later, Matney, as he was going upstairs, told Stevenson that "[i]t is just going to get worse now, union [sic] makes me do mean things."[19] In a similar vein, in a conversation with Cox the following week in or around the break room area, Matney stated that he wished things had gone better as far as the election and that drivers were going to "lose a lot of stuff that we could have had that [Spurlino] was going to offer regarding not having a union, that we were going to lose all of that as far as bonuses and more money and vacations and stuff like that . . . Now it was all going to be gone . . . [T]hings at the plant were going to get a whole more [sic] uglier."[20] Cox responded that drivers had not known that the Company was going to give them those benefits. Matney stated that he felt Eversole was "the ringleader in all this that got everybody involved" and called him a "nigger."[21]

On January 23, 2006, the Union was certified as the representative of all full-time and regular part-time drivers and plant operators/batch men at the three facilities.[22]

II. DISPATCH SYSTEM

When Respondent purchased the facilities from American Concrete in November 2005, it kept in place the latter's dispatch system, to which it claims to have adhered consistently since.

Although the policy has never been reduced to writing, its basics are not at issue. At each location, a separate call-in list is maintained daily, listing drivers in order of their seniority or dates of hire, with the most senior at the top (GC Exh. 2, for January 2, 2006, is representative). New hires are added to the bottom. In making assignments for the following day, dispatchers start at the top of the list and go down, skipping drivers off on scheduled leave or otherwise not available. Drivers call in after 7 p.m. for a recorded dispatch message telling them, by facility, what time each should report the following day. Reporting times vary, depending on customer orders and the intervals between deliveries.

Drivers who return to the facility after completing their initial assignments of the day are ordinarily sent out again on further assignments in the order of their return. The first drivers in, either in the morning or during the day, are the first to be loaded out. The only exceptions, occurring less often than once a month, are when a special type of truck is required or because a customer does not want a certain driver.[23] All of the trucks have GPS, and dispatchers can track their movements at all times and thereby know when they are back at the facility and ready for another load. This does not hold true if the tracking mechanism in the truck's box is not working, an uncommon event.[24]

Respondent owns the trucks its drivers use. Each driver is assigned and normally drives a particular truck, although, for a number of reasons, including vehicle repair, such is not always the case. New drivers are normally sent out with more experienced drivers for about 2 weeks, as training, before driving on their own. They take no driving test as such.

III. THE LUCAS OIL STADIUM PROJECT

When Respondent contracted with Baker Concrete (Baker) to provide ready-mix concrete at the Stadium, it was required to sign a letter of assent to the Project Labor Agreement for Work Stabilization for Stadium and Convention Center Expansion Construction (PLA), entered into on August 9, 2005, between the Indiana Stadium and Convention Building Authority, Hunt Construction Group, Inc., as the current construction manager for the project, employers who are or may become signatory to the agreement; and the Central Indiana Building and Construction Trades Council and its affiliated unions.[25] The Union is among the signatory unions. Following are relevant PLA provisions:

> Art. 2.1—The PLA applies to employers who perform construction work on the project at the project site.
>
> Art. 2.3—". . . . This Agreement (including the applicable collective bargaining agreements listed in Attachment C . . . represents the complete understanding of the Parties . . . . The provisions of this agreement shall control construction of this project and take precedence over and supersede provisions of all the Unions' collective bargaining agreements . . . which conflict with the terms of this Agreement. . . ."
>
> Art. 2.4—"[E]ach Employer, before performing any Construction Work on the Project, shall become signatory and bound by the terms and conditions of this Agreement. . . ."
>
> Art. 2.11—The delivery of concrete, sand, gravel, asphalt, ready mix, and/or aggregate is included within the scope of this agreement.
>
> Art. 3.1—"[E]ach Employer agrees to recognize the appropriate Union(s) signatory to this Agreement, as the sole and exclusive bargaining agent of all craft employees performing construction work on the Project within the scope of this Agreement."

Attachment C referenced numerous labor agreements by trade, including the Uniform Building Construction Agreement between the Associated General Contractors of Indiana, Inc. and the Union, effective June 1, 2005, through May 31, 2008.[26] Article 1 of this agreement provides that the employer recognize the Union as the exclusive representative and bargaining agency for several categories, including truckdrivers, covered

[18] Tr. 513. Stevenson recalled similar statements that day but attributed them to Matney.
[19] Tr. 577.
[20] Tr. 516.
[21] Tr. 517–518.
[22] Jt. Exh. 2.
[23] Testimony of Rollins at 896–897. Semble, Matney's testimony at Tr. 77 (exceptions are "seldom.")
[24] See Rollins' testimony at Tr. 893, 913.
[25] Jt. Exh. 4.
[26] Jt. Exh. 5.

by the agreement. Article 32 sets out hourly wage rates by classification.[27]

IV. DISPATCH OF DRIVERS TO THE PROJECT, FEBRUARY 10–JUNE 7, 2006

On about February 10, 2006, Respondent first sent out drivers to work on the Stadium. Consistent with Respondent's practice of normally using the plant nearest to a delivery site, almost all of the loads sent to the Stadium were from Kentucky Avenue, the geographically closest. On occasion, if the need were great enough, drivers from the other two facilities were also used. New drivers, after about 2 weeks of training, were dispatched to the Stadium in the normal order of dispatch. At all times, drivers used their regular timecards for non-Stadium deliveries but separate time cards for Stadium deliveries, for which they were paid more pursuant to the PLA.

The General Counsel contends that prior to the operation of the portable plant on June 8, 2006, Respondent bypassed union supporters Bales, Eversole, and Stevenson by loading other drivers either before or after them, instead of following the normal dispatch procedure. At the time, Eversole was first on the call-in list, followed by Mooney, Cox, Stevenson, Bales, approximately two other drivers, and then Kiefer. Respondent's witnesses uniformly testified that the normal dispatch procedure was used as on any other job. However, their testimony was not borne out by records that Respondent furnished pursuant to subpoena.

Thus, General Counsel's Exhibit 19, dispatch tickets from February 16–March 24, 2006, shows that Mooney, Kiefer, and Cox were dispatched most often to the Stadium during that period. According to the General Counsel's calculations, Mooney received 50 trips, Kiefer 44, and Cox 41, or approximately 45 percent of all such dispatches.[28] Bales was fourth with 31, followed by Sam Southerland, a newer employee (he was not employed as of January 2006) with 15, Stevenson 13, and Eversole 11. The remaining eight drivers had between two and seven. Respondent's analysis of General Counsel's Exhibit 4, which shows hours worked at the Stadium by driver from February 13, 2006, through April 10, 2007, reflects that for the period from May 1–June 9, 2006, Mooney worked 62 Stadium hours, Eversole—61; Kiefer—57; Bales—54; Stevenson—48; Steve Miller—48,Cox—47; and Mark Sims—43.[29] Therefore, Mooney was the only driver who received more Stadium hours than Eversole during that timeframe, and Mooney and Kiefer the only ones who had more such hours than Bales and Stevenson, out of normal dispatch order.

These records substantially corroborate the basically consistent testimony of Bales, Cox, Eversole, Kiefer, and Mooney that for early dispatches to the Stadium, Cox, Kiefer, and Mooney, and later Bales, were sent out of their normal call-in list dispatch order.

Respondent had given Cox, Kiefer, and Mooney new trucks in late January or early February 2006. Gaskin told Cox that he and the other two drivers were selected to receive them based on a 15-point system, including work performance, time on the job, and other factors.[30] Davidson later told Cox that the reason he, Kiefer, and Mooney had been given loads to the Stadium was that Respondent "wanted the new trucks shown on the job."[31] Cox heard him say this more than once. Those were the trucks that were initially sent to the Stadium, with other trucks being dispatched there only if big pours required them.[32]

Based on the preceding, I find that the favored treatment Cox, Kiefer, and Mooney received for Stadium assignments was due to their driving new trucks that Respondent reasonably wished to display when it started performing work at the Stadium.

V. THE PORTABLE PLANT

At Baker's initiation, Respondent set up a portable batch plant at the Stadium in approximately May 2006, with the anticipation that it would operate for about a year (Matney and Davidson) or through the end of 2006 (Spurlino). It remained in operation until approximately March 2007, when it was dismantled due to a decrease in the volume of work. Davidson was in direct charge of its day-to-day operations, with Matney and Gaskin occasionally also having a role. At Respondent's three plants, the drivers used front-discharge trucks. However, Baker suggested that Respondent use rear-discharge trucks at the portable plant because they loaded faster and mixed more thoroughly. Respondent first assigned drivers to the portable plant on June 8, 2006.

The General Counsel does not contend that the establishment of the portable plant or the use of rear-discharge trucks there per se violated the Act.

A. Portable Plant Drivers and the Call-In List

General Counsel's Exhibit 14 is a memo dated June 7, 2006, signed by Davidson. It stated that on days when the portable plant was not in operation, the portable plant drivers would be at the bottom of the call-in list at their home plants. Further, once the project was completed, those drivers would return to their home plant and be restored to their original places on the call-in list. Davidson was uncertain whether this was shown to employees before or after the selections were made for the portable plant, and he was very vague about whether it was posted or not. When asked the simple question whether he instructed anyone to distribute it, he replied, "It was—yes, I'm sure I did or—or maybe I did. It's been over a—you know, a year ago and I just don't recall."[33] I credit the testimony of Cox, Eversole, Kiefer, and Stevenson, that they never saw the memo. No driver testified that they did. Accordingly, I find that the memo was not disseminated to employees. Eversole, in fact, did not learn until after July 2006 that portable plant drivers would revert to their former call-in list positions at their home plants once the portable plant closed.

Davidson professed not to recall who decided that the portable plant drivers would be at the bottom of their home plant call-in list on days that the portable plant was not operating. In

[27] As of June 1, 2005, drivers $20.95–$21.10; as of June 1, 2006, $21.83–$21.98. Respondent's wage rate was $17.50 an hour.

[28] GC Br. at attachment A.

[29] R. Br. at 20 (hours are rounded off).

[30] Unrebutted testimony of Cox at Tr. 524–525.

[31] Unrebutted testimony of Cox at Tr. 523.

[32] Testimony of Mooney at Tr. 617; Bales at Tr. 679.

[33] Tr. 302.

light of Davidson's integral involvement in the portable plant's preparations and operations, I find this answer difficult to accept, especially when I credit Matney's testimony that he had nothing to do with the decision. In any event, Weissman conceded that nothing was said during bargaining sessions about how portable plant drivers would be treated when they worked out of Kentucky Avenue.

B. Selection of Drivers for the Portable Plant

As with most personnel matters concerning the drivers, the Company has no written policies regarding transfers from one facility to another. Since Davidson has worked for Respondent in Indiana (he previously worked at Spurlino Ohio), there has been only one temporary transfer and no permanent transfers.

Spurlino, as was so frequently the case during his testimony, was evasive when asked if he was involved in creating the portable plant driver position. Instead of giving a responsive answer, he replied, "[W]e did not think of it as creating a new position."[34]

According to Davidson, Respondent determined not to use the normal call-in list for the portable plant because Respondent was a new concrete company in the area and wanted to put its "best foot forward" by selecting reliable individuals who would not have attendance problems.[35] This resulted in the first and only time that drivers at the Respondent's Indiana operations have been subject to performance reviews or formal driving tests.

On about May 12, 2006, Respondent posted in the drivers' break room at Kentucky Avenue a notice with that date from Matney,[36] stating:

> In the near future we anticipate erecting a portable plant adjacent to the Stadium project. Any employee interested in working out of the plant for the duration of the project should notify the Company in writing of this interest by May 17, 2006. The notification of interest should include your name and experience with rear-discharge trucks.
>
> Wages and benefits for this project are set by the project agreement with the Teamsters.

Stevenson asked Davidson that day how seniority would work and how they would pick the drivers. Davidson responded that selection would be based on the driving test and also that portable plant drivers would lose seniority at Kentucky Avenue and go to the bottom of the call-in list.

Subsequently, 13 drivers, including Bales, Eversole, and Stevenson signed the notice. Wayne Thomerson added a comment, "None Will Learn." One driver from another facility also expressed an interest. Of the 13, only Bales and Eversole submitted to Davidson written notifications of interest as per the announced requirement.[37] Both stated that they had no rear-discharge truck experience.

Davidson ultimately selected Kiefer, Mooney, Thomerson, and John Pinatello. His testimony regarding the selection process was hazy, often internally inconsistent, and contradicted by driver-applicants.

He testified that performance was the criteria—attendance, customer service, truck cleanliness, plus experience, including driving rear-discharge trucks. He conducted no personal interviews of applicants but rather, he testified, had knowledge of the experience of the four who were selected through their job applications or casual conversations. However, he could not recall the names of any of those to whom he talked casually. He was also uncertain whether he discussed with the dispatchers any of those selected. He averred that the only documents he reviewed were job applications and attendance records and conceded that he did not check employees' personnel files or look at any safety records.

I note that, although Davidson indicated at certain points in his testimony that experience, including driving rear-discharge trucks was a consideration, Kiefer and Mooney testified they had no rear-discharge truck driving experience. Thomerson (who had indicated the same in writing) and Pinatello were both recent hires, their names not even appearing on the January 2, 2006 call-in list.[38] Moreover, Davidson also testified that he did not take into consideration the years employees had worked for Respondent or American Concrete.

The sole documents to reflect the evaluation process are contained in General Counsel's Exhibit 13, the "performance review cards" that Davidson and Gaskin prepared for each driver-applicant on about May 25, 2006. Davidson graded drivers "A" to "F" in 13 categories relating to performance, and he wrote in the comments appearing at the bottoms of some of the evaluations. Experience and experience with a rear-discharge truck were not among the listed categories and were not otherwise mentioned in any of the evaluations.

A review of the evaluations makes somewhat puzzling Davidson's testimony that the Company chose drivers who would put its "best foot forward." Thus, he commented about Mooney: "Attitude sometimes below standards. Also with customers" and about Kiefer, "Eric could be much better if he applied himself."[39]

In later testimony, Davidson averred rather curiously that neither Bales' nor Eversole's evaluations contained any "stalls" but that they were "not as qualified" as some of the others.[40] He then went on to testify, for the first time, that he basically categorized drivers into three groups—best qualified, qualified, and not qualified, and that Bales and Eversole were in the second category. He also testified that Stevenson had a "horrible truck cleanliness" problem and *believed* that Stevenson had attendance problems, and therefore was assigned to the third category.[41] Respondent submitted no records showing anything in Stevenson's' personnel files regarding attendance or truck cleanliness. Davidson later conceded that there was no actual policy in place on truck cleanliness and that in several conversations, he merely asked Stevenson to improve on this. When

[34] Tr. 177.
[35] Tr. 271.
[36] GC Exh. 5.
[37] GC Exhs. 11–12.
[38] GC Exh. 2.
[39] GC Exh. 13 at 1, 4.
[40] Tr. 726.
[41] Tr. 729, 731.

asked about Stevenson's attitude (for which he was rated "F"[42]), Davidson could recall nothing specific.

Similarly, although Davidson testified that Bales had had accidents, which tied in with safety, and an attitude problem, Respondent submitted nothing from Bales' personnel files regarding either alleged deficiency.

Finally, on the subject of the criteria Davidson used for selection, he testified at one point that an "A" or "B" for attendance and safety were required; however, soon thereafter, he testified that such grade was required for attendance, safety, on-time delivery, personal productivity, and customer service. Shortly thereafter, Davidson directly contradicted this earlier testimony by stating flat out that there were no areas in which an "A" or "B" were absolute requirements.[43]

Davidson testified that he made the decision that applicants for the portable plant driver position would have to take driving tests in rear-discharge vehicles. Brett, DeLong, an employee of Spurlino Ohio, administered them.

The role, if any, that these driving tests actually played in the selection process remains an enigma. Davidson was vague on what the "test" consisted of and how DeLong rated the applicants (no one failed). Davidson stated that DeLong made notes and showed them to him but that no records of the driving tests were kept. He could not recall if the driving tests were given before or after the performance reviews were done.

Davidson testified that he selected Kiefer, Mooney, Pinatello, and Thomerson in part as a result of the driving tests, to the extent that they would not have been selected if they had been unable to drive a rear-discharge truck. However, Mooney refused to take the test at all, and Kiefer described it as "unpleasant," because he encountered problems. Mooney was present when Kiefer took the test and observed his having difficulties. On the other hand, DeLong told Stevenson that he was "one of the better ones,"[44] and neither Bales nor Eversole were ever offered the test.

Interestingly, the next occasion when Kiefer drove a rear-discharge truck after his test was on the first day he reported to the portable batch plant, June 8, 2006. An individual from Respondent's Ohio operations went through the truck controls with the four drivers, giving them a "crash course" on site. That was the extent of their training in operating a rear-discharge truck. By the end of the first day of work, they all were able to drive.

In sum, Davidson's testimony on the evaluation, testing, and selection process for portable plant drivers was a hopeless muddle, much of which driver-witnesses contradicted. I therefore find it wholly unreliable.

During negotiations, Respondent never stated that drivers would be formally evaluated or given driving tests, although Weissman said at a meeting in late April 2006 that work performance and "driving skills" would be criteria for selecting portable plant drivers.

When Pinatello left the portable plant in approximately July, Davidson testified, he first offered the vacant position to some of those who had already applied, in order of their performance, with attendance and safety being the most heavily-weighted factors. He then went on to ask newer employees.

Davidson did offer the position to Bales and Eversole, who both turned it down because they did not want to be at the bottom of both call-in lists (Kentucky Avenue and portable plant). He did not offer it to Stevenson. He ultimately selected Andrew Alexander. Since Respondent did not employ Alexander at the time of the performance reviews, none exists for him.

Mooney and Kiefer, the two portable plant drivers who testified, both benefited financially from being assigned to the portable plant, even though they were assigned from the bottom of the list from Kentucky Avenue. During the time they were portable plant drivers, both also performed non-Stadium work out of Kentucky Avenue. Mooney worked a total of 69 days at the portable plant, and Kiefer during the period the portable plant was in operation spent about 60 percent of his time at the portable plant and the remainder on regular Kentucky Avenue dispatches.

C. Alternate Portable Plant Driver Position

Shortly after Alexander became a portable plant driver, Davidson, most likely in conjunction with Spurlino, apparently made the decision to create the position of alternate or backup portable plant drivers (alternate drivers) when regular portable plant drivers were unavailable or an additional driver was needed to deliver at the portable plant.[45] Respondent had purchased a total of six rear-discharge trucks, and about 10 percent of the time, more than four trucks were needed at portable plant. Nothing about this position was posted, nor was the Union ever notified that it would be created, either during negotiations or otherwise.

In about late July, Davidson approached certain employees and asked them verbally if they were interested. He did not go through the applicants who had turned down the portable plant position that became available when Pinatello left (including Bales and Eversole), because he assumed they would not have changed their minds. However, he did not tell them that there was a key difference in the treatment of the alternate driver's position on his home plant's call-in-list vis-à-vis regular portable plant drivers. That is, Davidson considered the alternative driver position to be a "temporary fill-in" position rather than a "reassignment," and he therefore determined that such drivers would keep their normal call-in list order at their home plant when they were not dispatched to the portable plant, rather than go to the bottom. He did not offer the position to Stevenson.

Carlos Quesada, a driver hired April 24, 2006, was given the position at Kentucky Avenue. One driver from each of the other two facilities was also selected.

D. Statements Made During Negotiations

From February 12, 2006, to January 10, 2007, Respondent and the Union had about 13 bargaining sessions. Weissman was Respondent's chief negotiator throughout. Green was the Union's chief negotiator at the first or so session, after which attorney Gath assumed the role. Also on behalf of the Union,

[42] GC Exh. 13 at 10.
[43] Tr. 771–773.
[44] Tr. 588.
[45] Matney testified that he had no role in the creation of this position and was "not sure" who did. Tr. 137–138.

Jones was at all or most meetings, and employees Bales, Eversole, and Stevenson (prior to his discharge) attended as members of the Union's negotiating team from the start of negotiations. Matney and Gaskin also attended for management.

It is undisputed that the Union raised the issue of Stadium work at the first meeting. Green stated that employees sent there were entitled to a higher wage rate under the PLA, and Weissman said she would check it out. This issue was later resolved when Respondent paid those higher wage rates to unit employees dispatched to the Stadium.

At the April 25 or 26, 2006 session, Gath raised the matter of how employees were being dispatched to the Stadium. Weissman responded that she understood they were being sent the same way they were sent to any other customers. Gaskin confirmed this. Gath asked if Respondent was going to put up a portable plant. Matney answered that it was likely and that employees would be assigned there based on performance. Gath responded that they should be assigned by seniority, as per the AGC. Weismann replied that the terms of the AGC did not apply until employees were actually on site. After a caucus, Weissman told Gath that management's representatives had looked at both the AGC and PLA, and it was clear that they applied when employees were at the Stadium site. However, she said, the PLA clearly stated that if a conflict existed between it and individual contracts between unions and companies at the project, the PLA governed and, according to the PLA, no seniority was to be considered on the project. She told Gath that she would let him know as soon as Respondent knew when the portable plant would open.

By letter to Gath dated May 1, Weissman stated that a portable plant would be set up at the Stadium in the "not too distant future" and that Respondent would post a solicitation for drivers who wished to work there.[46]

At the May 11 meeting, Gath asked if the Company believed that the Union represented employees at the portable plant. Weissman replied, "yes," because Respondent had signed the PLA, which recognized that drivers belonged to the bargaining unit represented by the Teamsters. She further said that the Union did not represent drivers at the portable plant with regard to the contract proposals that were being discussed at negotiations and that the Engineers represented batch men working at the portable plant (as opposed to those working at Respondent's three facilities). Gath asked how Respondent was going to send people to the portable plant. She replied that Respondent was going to post a solicitation for employees to express an interest in being assigned there but did not know when. Matney stated that it might be in a couple of weeks, and Weissman said she would send a copy to the Union. Gath stated that assignments should be in order of seniority, to which she responded that Respondent had no an obligation to even assign any drivers from the bargaining unit to work there.

Respondent has refused to arbitrate a grievance the Union filed under the PLA regarding how the Company assigned drivers to work at the Stadium, on the ground that the PLA does not apply to the hiring of such drivers.

[46] GC Exh. 15.

By letter dated May 12 to Gath, Weissman forwarded a copy of the notice put up that morning, soliciting volunteers "who might wish to move from their existing plant to the batch plant."[47]

Gath responded by letter dated May 15,[48] in which he posed several questions, including: (1) identifying the criteria on which Respondent planned to rely in deciding who would be sent to the Stadium; (2) whether an employee assigned to the portable plant would also be making pickups and/or deliveries from other company locations; and (3) a description of how Respondent intended to pay unit employees transferred to the portable plant. He stated that the Union reserved the right to bargain over the transfers and work assignments of unit employees to the Stadium, to the extent that such issues were not covered by the PLA.

By letter dated May 22, Weissman replied,[49] saying that Respondent would make the decision based on "skills, qualifications and past performance. Where all other factors are equal, seniority shall govern." Further, drivers transferred to the portable plant would be paid the rate defined in the agreement covering the Stadium for all hours they worked at the portable plant. Drivers dispatched from Kentucky Avenue to the Stadium would continue to be paid such rates. Non-Stadium work would be paid at the regular $17.50 an hour.

Other than the above, Respondent and the Union had no other communications regarding how Respondent would staff the portable plant or the treatment of drivers selected to work there.

1. The Union's information request

The PLA contained a dues-checkoff clause, and the Union presented Respondent with dues-checkoff cards from employees who were performing work at the Stadium. At a bargaining session in March or April 2006, Gath told Weissman that such dues needed to be taken out of employees' paychecks once a month, for work they performed at the Stadium. The Union received moneys for the first time at the end of July.

By letter to Weissman dated August 24,[50] Gath expressed concern that Respondent was not honoring the written dues checkoffs and the PLA. He requested, by September 6, monthly payroll records for the period of May 2006 to present, reflecting an itemization of all deductions from bargaining unit employees' wages including, inter alia, union dues and when they were remitted to the Union.

Weissman forwarded the request to Respondent's administrative offices, since Respondent uses a contracted payroll service. On September 5, she received the information, and the following day left a voice mail for Gath, stating that as soon as she had an opportunity to analyze the information she had collected, she would send it. On September 8, the Union filed ULP charges on the matter. On or about September 22, she faxed to the Union documents showing, by employee, amounts of union dues withheld and check numbers, along with a re-

[47] GC Exh. 16.
[48] GC Exh. 17.
[49] GC Exh. 18.
[50] Jt. Exh. 7.

cap.[51] All the documents have the notation "Run Date: 9/05/2006" and a time.

The General Counsel does not contend that the response was defective in content; only that it was untimely.

2. Stevenson's suspension and termination

For bargaining unit employees, Respondent has no formal written disciplinary procedure in place, no progressive discipline system, and no specific policies for written warnings or suspensions. Respondent has terminated three other drivers: Berlin Everson for misappropriating concrete and giving it to friends or relatives instead of to customers; Steve Miller, for attendance problems; and Mark Sims, for making threats to drive his truck through the Company's building.

The sole basis for Stevenson's suspension on August 26, 2006, and discharge on February 22, 2007, was his conduct on August 25, 2006. He had no prior warnings.

On about August 25, 2006, Respondent distributed with some employee paychecks, including Stevenson's, a packet of documents, with a cover letter from Matney, relating to how Respondent was handling the deduction of union dues from their paychecks under the PLA.[52] Included were copies of authorization cards employees had signed. Respondent erroneously neglected to remove the SSNs from them. When this was brought to Respondent's attention, it attempted to retrieve copies of such documents.

Stevenson admittedly became agitated when he saw the SSNs, and he placed the envelope in his truck. Shortly before he was to leave for another delivery, batch man Larry Davis told him that he needed back the papers enclosed with the paycheck. Stevenson replied that he had gotten rid of them in the dumpster (they were actually in his truck). Davis told him not to lie and to return the papers. Stevenson repeated that he did not have them, and, "I ain't [sic] giving nothing back."[53] He proceeded to his next job.

When Stevenson returned at about noon, Davis informed him by radio that Davidson wanted to see him in the management office. Davis and Davidson were present when Stevenson arrived, and Angie Johnson joined them.

In relating the subsequent conversation, Stevenson was not always chronological, his statements about what was he said about union representation varied in specifics, and his versions on direct-examination and cross-examination were not entirely consistent. Nevertheless, on major points, his testimony did not differ significantly from Davidson's account. Where there were differences, I accept Davidson's version, which substantially mirrored the later written statements that Weissman had Davidson, Davis, and Johnson prepare.[54]

I find the following. Davidson asked for the papers and said that the Company really needed them back because they contained SSNs. Stevenson replied that he had thrown them in a customer's dumpster because he was very upset. Davidson stated that if the documents could not be located "[W]e may have to take further action."[55] Stevenson then said he needed to call his union representative, to find out if he had to give the papers back.[56] Davidson continued to question him about their whereabouts. Stevenson finally took them from his pocket and placed them on the table. At some point during the conversation, Davidson asked if Stevenson was lying to him.

The following day, Gaskin left Stevenson the phone message that he was suspended while the matter was under investigation.

Respondent's witnesses gave marked conflicting accounts of the decision-making process relating to Stevenson's suspension.

Spurlino testified that on August 25, he had a number of conversations with management representatives concerning the incident, although he could not recall with whom he had the first. Throughout his testimony, he was quite vague about the specifics of the conversations he had with other management on the subject. He initially testified that he was not the sole decision-maker on Stevenson's suspension and that it was collective decision between him, Matney, Davidson, and Gaskin.[57] Later, however, he averred that those involved in the "consensus" decision were him, Weissman, Matney, and Davidson.[58] Still later, after once more testifying that the suspension was a collective decision, went on to say, "It is correct as to the termination. I don't recall the suspension."[59]

Weissman testified that after Davidson reported to her on August 25 that Stevenson had refused to return the documents, she had "a lot" of conversations with Spurlino, Matney, and Davidson about what should be done and that she recommended he be suspended pending further investigation. I note that Weissman, who generally testified quite smoothly and without hesitation, equivocated to the point of evasiveness when I asked her who made the decision to suspend Stevenson: "I do not know with certainty. My—my best understanding is that it was a decision between Mr. Matney and Mr. Spurlino. Obviously, it was my recommendation, so I would say, the three of us, I guess."[60]

Matney and Davidson contradicted Spurlino's and Weissman's account that the suspension resulted from a "joint" decision. Thus, Matney testified that he was not involved in the decision to indefinitely suspend Stevenson and did not for certain who was. Davidson testified that his only role in Stevenson's suspension was conducting the interview with him, that he furnished information on the interview but did not make a recommendation, and that Spurlino made the final decision.

I credit Matney and Davidson and find that they did not play any part in the decision to suspend Stevenson. I further credit Davidson's testimony, and find that Spurlino made the final decision, believing that to be the most logical conclusion in light of Spurlino's ownership of the Company, regular contact with Kentucky Avenue management, and active participation in

[51] Jt. Exh. 8.

[52] See GC Exh. 22, identical to what was distributed, with the exception that social security numbers (SSN's) have been redacted.

[53] Tr. 630.

[54] GC Exhs. 7–9.

[55] Davidson at Tr. 741.

[56] Ibid; Stevenson at Tr. 658.

[57] Tr. 178–179.

[58] Tr. 188–189.

[59] Tr. 205.

[60] Tr. 954–955.

discussions on August 25. For whatever reasons, Spurlino and Weissman attempted to minimize his role, and their lack of candor raises suspicions about the real reasons for the suspension.

Weissman called Stevenson on September 5 and said that she wanted to interview him about the incident, with a union representative present. He replied in the affirmative. Weissman and Green subsequently arranged that she would have a telephonic interview with Stevenson at Gath's law offices on September 15, with Attorney Lohman in attendance.

Weissman's notes of the interview are contained in Respondent's Exhibit 4. I have no reason to doubt their accuracy and, crediting her testimony, find that they constitute a complete record of what was said. She engaged in no further investigation. All of her subsequent communications with the Union on the matter related to attempts to settle the grievance that the Union filed over the suspension.

Stevenson was not terminated until February 22, 2007, over 5 months later. Weissman testified that this long hiatus between indefinite suspension and termination resulted from efforts she made to settle the above grievance. After Gath in early 2007 notified her that the Union was not interested in Respondent's (final) settlement offer, the decision was made to terminate Stevenson. I note that Stevenson indirectly corroborated her by testifying that in about December 2006 or January 2007, Gath related to him a settlement offer from Respondent. I credit Weissman's testimony that grievance settlement efforts were the reason for the delay. Conversely, I do not accept Spurlino's contrary explanation, that "[w]e had difficulty completing the investigation and Ms. Weissman was . . . making attempts to complete that investigation and had extraordinary difficulty in doing that."[61] This is yet another example of why I have found him a generally unreliable witness.

Although Weissman testified that Spurlino made the decision to terminate Stevenson "in consultation" with her and Matney, she conceded that she did not directly recommend that Stevenson be discharged. In fact, she also testified that other management informed her that Stevenson was going to be discharged—inconsistent with her having participated in making the decision. It is clear, contrary to Spurlino's claim of joint or consensus decisionmaking, that, as with the suspension, he had the final word on the termination.

Weissman prepared Stevenson's termination letter, dated February 22, 2007, and signed by Matney.[62] Consistent with the Company's normal practice, it listed no reasons. Weissman testified that this is done for the benefit of discharged employees.

According to Spurlino, Stevenson was terminated for the following reasons: dishonesty, attempted theft of personal confidential information, and intentionally misleading other employees and management. No nonbargaining unit employee has been disciplined for these reasons.

[61] Tr. 193.

[62] GC Exh. 23.

3. Warehouse project slab pours

Past Practices

Davidson testified that Respondent prior to June 11, 2007, used nonunit employees based in Indianapolis, drivers from the Spurlino Ohio, and leased drivers, to perform unit work, when needed.

In this regard, both the General Counsel and the Union specifically subpoenaed records from Respondent that would document any use of leased trucks or truckdrivers since November 2005, when Respondent began its operations in Indiana.[63] Respondent did provide documentation showing the leases in which it entered in June 2007. However, Respondent provided nothing showing that it ever before entered into contracts for the leasing of trucks and drivers. Nor did Respondent make a motion to revoke any portion of either subpoena.

As the Board stated in *Smithfield Packing Co.,* 344 NLRB 1, 8 (2004), "It is well established that a respondent that has refused to produce subpoenaed materials that are the best evidence of a fact may not introduce secondary evidence of matters provable by those materials," citing *Bannon Mills, Inc.,* 146 NLRB 611 (1964), and *Avondale Industries*, 329 NLRB 1064, 1244–1245 (1999).

Respondent's counsel represented that Respondent contends that no such documents are in existence. This averment cannot be automatically accepted at face value without further evaluation. To do so would be to allow a party to avoid subpoena compliance by merely stating that it has no documents that are responsive to the request and thereby defeat the whole purpose of the subpoena process.

I find totally incredible that, in this day and age of extensive recordkeeping requirements, particularly in the transportation industry, that had Respondent engaged in leasing arrangements with other companies prior to June 2007, *nothing* in its files would contain any kind of documentation thereof. What makes this more suspect is that Spurlino maintains operations in a number of states and is not new to the business.

Distinguishable are situations in which the subpoenaed documents are not in the nature of formal business records, and the representation that they have been inadvertently lost or destroyed may be plausible. See, e.g., *BP Amoco Chemical-Chocolate Bayou*, 351 NLRB 614 (2007) (employer claimed that it had shredded worksheets from various committee meetings); *CPS Chemical Co.*, 324 NLRB 1018, 1019 (1997) (union claimed that it could not locate a list of employees who had attended a union meeting); *Champ Corp.*, 291 NLRB 803, 803–804 (1988), enfd. 932 F.2d 688 (9th Cir. 1990) (union claimed it could not locate bargaining notes taken during negotiations).

Respondent has either failed to maintain normal and customary business records, for whatever reason, or has chosen not to provide them. Either way, I will not reward Respondent for their nonproduction. I, thus, conclude that either Davidson's testimony was inaccurate, and no such subcontracting took place, or his testimony constituted secondary evidence that should be excluded because the documents that were subpoe-

[63] See GC Exh. 29, attachment at par. 13; CP Exh. 1, attachment A at par. 1.

naed would have been the best evidence of any such subcontracting. Therefore, I do not find as a fact that Respondent engaged in leasing trucks or drivers prior to June 2007.

Davidson also testified that Spurlino Ohio employees have occasionally been sent to the Indiana facilities and made concrete deliveries when needed. This was mostly shortly after Respondent took over the operation in late 2005, and they primarily performed plant maintenance. In any event, Respondent provided no documentation of such, and I would expect Respondent to have maintained payroll or other internal records of some kind showing that drivers from one State were assigned to do work in another. Indeed, Weissman testified that she believed that Respondent was billed by Spurlino Ohio when the latter's employees were sent to perform work at the Indiana facilities. I therefore draw an adverse inference against Respondent for failing to provide any documentation and do not find as a fact that Spurlino Ohio drivers previously were assigned to drive out of the Indiana facilities, at least at any time following the Union's certification in January 2006.

On the contrary, I credit Gath's unrebutted testimony, and find, that in one of his conversations with Weissman between June 8 and 11, Gath asked whether Respondent had any practice of using leased drivers, and she replied, "[N]o."[64] As an admission against interest, her statement comes under the exception to the hearsay rule. See Federal Rule 804(b)(3), 28 U.S.C. 804(b)(3).

Finally, Davidson testified without controversion that, prior to June 2007, Respondent occasionally used mechanics and maintenance employees at its Indiana facilities to deliver concrete when unit employees were not readily available. Regardless of the scope of the General Counsel's and Union's subpoenas, this is not the type of situation where I would necessarily expect Respondent to have had documentation. Accordingly, I do not draw an adverse inference from Respondent's not providing such, and I credit Davidson's unrebutted testimony thereon.

4. The Air West distribution warehouse project

In September 2006, Lithko Contracting (Lithko) solicited from Respondent a bid to provide all of the ready-mix cement for the approximately 725,000-square-foot Warehouse Project, Plainfield, Indiana (the Warehouse Project), for Arco Construction. This bid entailed supplying concrete for the entire building, including footers, foundations, interior slabs, and exterior paving, as well as surrounding site work. Of the approximately 16,000-cubic yards of concrete total, about 11,000-cubic yards were for the interior slabs, to be installed continuously over a 3-week or so period. Respondent's contact person was Scott Noel, then Respondent's sales manager. He was not called as a witness.

Respondent bid on the project on September 25, 2006, and was verbally awarded the job on about October 9, 2006. At that time, the anticipated start date was around the end of October. Primarily because of the condition of the soil on the site, Lithko repeatedly postponed Respondent's start date. The site owner eventually decided that it would be better to wait until the spring and weather improved. In the concrete construction industry, winter is a slow time of year, whereas the spring is busier.

After September 25, Respondent and Lithko negotiated modifications to their contract in late October 2006 and in mid-January and early April 2007.[65]

In approximately February 2007, Respondent held a "job fair" at an Indianapolis hotel, at which it took applications for drivers and other positions. Green testified without controversion, and I find, that he went to the job fair, filled out a driver application, and was told, inter alia, by Matney that Respondent was "going to be getting a lot of business and he was going to hire drivers in town."[66]

Respondent first did work at the site on April 5, 2007.[67] These were small pours. However, it did not commence major work until June 11, when it started making deliveries for the interior slabs. Respondent's alleged ULP's at the Warehouse project relate solely to the slab work it performed there, from June 11–28.

Sometime in March, Davidson and Noel participated in a meeting with representatives of Lithko and Arco, concerning general plans.

On May 11, Ahlquist, along with other Lithko representatives, attended a meeting with Davidson and Noel at Lithko's offices. I credit Ahlquist's account of what was said there, as follows. Lithko and Respondent discussed slab pour logistics, including locations, production rates, and anticipated pour dates. Lithko stated that it anticipated starting the slab pours within 2 weeks but did not have a date certain. Lithko requested 150-cubic yards per hour. Respondent replied that they could do it. The parties agreed to a start time (time of delivery to the Warehouse Project site) of 1 a.m., with 7 or 8 hours of continuous truck delivery.[68]

Davidson testified that he and Noel attended a meeting in approximately the third week of May, in a restaurant a few blocks from Lithko's offices. This was the final meeting prior to June 11. According to Davidson, he told Lithko that unless Lithko agreed to certain revisions that Respondent proposed in the pour schedule, including weekend deliveries, Respondent could not do the slab work. Further, according to Davidson, Lithko wanted a start time of between 2 and 4 a.m., and Respondent proposed starting earlier. Davidson also testified that he and Noel left the meeting with the understanding that Lithko would get back to them, to let them know if Lithko would agree to make the changes that Respondent requested. I do not credit this testimony to the extent that it was contrary to Ahlquist's testimony reflecting lack of disagreement between the parties at the May 11 meeting.

On June 6, Lithko notified Respondent that the slab pouring would begin on June 11.[69]

[64] Tr. 1166.

[65] See GC Exh. 30.

[66] Tr. 1201.

[67] See GC Exh. 37, Lithko's concrete log.

[68] Such a start time is common. The general contractor may request it to avoid interference with other trade traffic on the jobsite or because it fits in with other scheduling needs.

[69] See GC Exh. 35, pour schedule that Lithko provided to Respondent dated, June 5, 2007.

5. Soliciting unit employees to volunteer

I credit Davidson's unrebutted testimony that prior to the Warehouse Project, Respondent sometimes asked for volunteers for Saturday or early morning deliveries, including most of the early morning pours at the Stadium Project (before, during, and after the operation of the portable plant). It is only logical to assume that some employees would either be unavailable or uninterested in working hours outside the normal schedule.

Davidson testified that dispatchers spoke directly to the drivers concerning volunteering for the Warehouse Project. However, since no dispatchers or drivers testified on the subject, there were no first-hand witnesses. Nonetheless, it is undisputed that Respondent did engage in such conduct; indeed, the substance of the General Counsel's allegation of unilateral change in dispatch procedures is that Respondent did not follow the normal call-in system but rather asked drivers to volunteer in advance for the work. In these circumstances, and in the absence of objection from any counsel, I will accept secondary evidence on the subject.

I credit Davidson's unrebutted testimony that the dispatchers asked unit drivers at all three facilities to volunteer, both for the first day of the pour (June 11) and for the remainder of that week. Some drivers said they were available to report at 11 p.m. on June 10 and for the rest of the days that week; others were available only on some days; and still others did not wish to be scheduled at all. General Counsel's Exhibit 31, prepared by the dispatch office, is a list of volunteers during the period from June 18–July 7. Many of its notations are unclear, since the preparer(s) did not testify, but the document does reflect Respondent's use of a volunteer system. Nothing documentary was furnished for the week of June 11, but I will assume that a similar record of driver responses was used at the time.

Drivers who volunteered were called in order of the call-in sheet, with Kentucky Avenue first, Noblesville second, and Linden third. After all of them were called, Respondent used the subcontractors when needed.

6. Respondent's use of nonunit employees

After Davidson and Matney were notified on June 6 that the slab work was to start the following Monday, the former called the dispatcher at Spurlino Ohio but was told they were to busy and unable to assist. Respondent then made the decision to use subcontracted trucks and drivers from McIntire and Buster's Cement Products (Buster's). Davidson called them on June 7 and asked if they had trucks available on Monday. He mentioned the possibility that Respondent might need trucks on and off for the next several weeks.

The following day, both companies notified Davidson that they could provide trucks on Monday. Davidson made identical arrangements with them: they would be paid $100/hour for their drivers to load Respondent's cement and deliver it to the Warehouse Project.

Davidson decided how many trucks would be needed from the subs during the course of the slab deliveries. McIntire furnished four trucks on June 10, two on June 12, and two on June 14; Buster's furnished six on June 10, two on June 12, and two on June 20.[70] They were dispatched solely to the Warehouse Project.

The night pours took about 6 or 7 hours. Leased drivers and unit employees were reloaded to return to the Warehouse Project in the normal order of first-back, first-out again, unless Respondent had orders from other customers, to which only unit employees were dispatched. Leased drivers were sent home if no Warehouse Project work was available.

Davidson also intermittently utilized drivers from Spurlino Ohio, as well as two or three nonunit employees at the Indiana facilities, to make such deliveries. They were used in lieu of leased drivers, again, after unit drivers who had volunteered were first assigned.

7. Respondent's contacts with the Union

The first notice the Union had of Respondent's intention to use subcontracted trucks was on June 7, when Jones returned Weissman's phone message from the previous day. The following facts are based on Weissman's unrebutted testimony, which I credit. She explained that Respondent was getting ready to pour concrete at the Warehouse Project, starting on Monday, June 11 at 12:01 a.m. She stated that this job was one that had been bid on and awarded in October or November, but the scheduled start date had been repeatedly postponed. Because of the time of year and number of (unit) drivers that Respondent had, Respondent needed additional drivers but did not have adequate time to hire any. Therefore, Respondent was going to contract with someone (Buster's) from whom it had previously leased trucks and drivers.

Jones asked a number of questions, including whether all unit drivers would work that day and whether the call-in procedure would be changed. Weissman replied that the drivers would have the option of going out on the job but would not be required to work so early. She also stated that the work would start at 12:01 a.m. and go until 6 or 7 a.m, and then Respondent's drivers would have to service regular customers, normally starting at between 5 and 7 a.m. Thus, the drivers who volunteered for the slab pour would also work the day shift. Moreover, the first drivers to stop working would be the leased drivers.

Jones asked about drivers at Respondent's plants other than Kentucky Avenue. She replied that Respondent would post for volunteers at all three facilities. He said that would be good. He told her that the Union dealt with this type of situation all the time, and he would think about it. She suggested that she document Respondent's proposals, incorporating some of his suggestions, and he replied that would be helpful. She did so.[71] During their conversation, Jones did not agree to anything.

Gath responded to Weissman by a letter dated and faxed June 8.[72] In sum, he stated that Jones had not agreed to the proposed assignment of work to lease drivers or the scheduling arrangements for unit employees, that the Union objected to the use of nonbargaining unit employees, and that unit employees

[70] See GC Exhs. 32–33, invoices. The drivers reported to Kentucky Avenue prior to midnight, in order to make the delivery at the Warehouse Project at 1 a.m. the following day.

[71] GC Exh. 25, memorandum from Weissman to Jones dated June 7.

[72] GC Exh. 26.

should be referred to the job in accordance with Respondent's normal dispatch procedures.

Weissman called Gath that afternoon. Their testimony about the conversation was substantially similar. Gath again objected to Respondent's proposed use of leased drivers and system for "referral" of drivers to the job, as unilateral changes in the status quo. Weissman replied that Respondent did not believe it had an obligation to bargain but was simply notifying the Union and was willing to listen to their ideas. Further, Respondent would proceed with its proposals on Monday, because otherwise all of the unit drivers would not be able to work. She suggested a meeting, and the conversation ended with the an agreement to try to arrange a time and place for such, over the weekend or on Monday morning, depending on when union representatives could be present.

Over the weekend, Weissman and Gath had e-mail correspondence concerning the logistics of the meeting.[73] Through a telephone call on June 10 at about 4 p.m., they ultimately agreed that such a meeting would be held at Kentucky Avenue on Monday, June 11 at 9 a.m. Gath told Weissman that he would attend. Weissman at no time expressly stated that she would be present, although certain statements she made by phone and e-mail implied that she would personally attend. Regardless, I do not draw any negative inferences against Respondent by virtue of the fact that she did not. Gath made it clear in his communications with her that the scheduled meeting was only for the purpose of conferring, not bargaining per se.

Gath testified without controversion, and I find, that in one of his telephone conversations with Weissman, he asked if Respondent was claiming some kind of "dire financial emergency" for having to use leased drivers, and she replied, "No."[74] See also paragraph 4 of Gath's e-mail to Weissman of June 9 at 2:34 p.m., in which he stated, "Spurlino has never asserted that [sic] existence of such a financial emergency in any telephone conversation or written communication with the Union." Respondent has provided no evidence that it ever raised such a justification.

Davidson was the only management representative to meet with Gath, Green, and Jones on June 11 at 9 a.m., after McIntire and Buster's drivers had already started delivering Respondent's cement to the Warehouse Project. Eversole later joined the meeting. Davidson's, Gath's, and Green's versions of what was said were similar, and I find the following.

Consistent with what he had told Weissman, Gath made it clear that the purpose of the meeting was "informational" and that the Union was there only to hear Davidson out, not to engage in any bargaining. No proposals were exchanged. Davidson set out Respondent's contentions for why it needed to use leased drivers and stated that without them, Respondent would have been unable to do the job. Gath voiced objections to the way the Union had been notified of the subcontracting and contended it violated the law. Davidson was asked about Respondent's plans for slab deliveries and how dispatching was to be handled. Green asked how the work was being assigned to unit employees, to which Davidson replied there was a volunteers' list. Davidson could not recall whether Gath asked for a copy of the list, and I credit Gath's and Green's testimony that he did so but was not provided it. The meeting ended with Green telling Davidson he would get back to him about whether the Union would agree to the changes. Green later called Davidson and said no.

[73] See GC Exh. 27. In one of the e-mails, Gath made a request for certain information regarding the slab pour job, which Weissman answered in e-mail form (GC Exh. 28). The General Counsel has not alleged that the Company's response violated the Act, and I need not go into further details thereon.

[74] Tr. 1180.

Analysis and Conclusions

A. Alleged Violations of Section 8(a)(5)

1. Unilateral changes

An employer violates Section 8(a)(5) and (1) of the Act when it unilaterally makes substantial changes on subjects of mandatory bargaining; to wit, employees' wages, hours, or other terms and conditions of employment, without first affording notice and a meaningful opportunity to bargain to the union representing the employees. *NLRB v. Katz*, 369 U.S. 736 (1962); *United Cerebral Palsy of New York City*, 347 NLRB 603, 608 (2006).

2. The stadium project

Creation of Portable Plant Driver and Alternate Driver Positions

Prior to the Stadium Project, Respondent did not have the positions of portable plant driver or alternate driver. It is undisputed that Respondent never gave the Union notice the latter position would be created or the opportunity to bargain over either of them.

Respondent's defense is that the portable plant drivers were governed exclusively by the terms of the PLA, which gave Respondent the unfettered discretion to hire whomever it chose to be such drivers, to decide how they should be selected, and to treat them however it saw fit. Respondent, however, has refused to arbitrate a grievance the Union filed under the PLA regarding the way it assigned drivers to the Stadium, thus, foreclosing a neutral third party from analyzing the validity of its interpretation of the PLA.

In any event, Respondent's argument ignores the critical fact that unit employees who performed work at the portable plant never lost their status as unit employees and were never assigned exclusively to work at the Stadium. Indeed, there were days that the portable plant was not in operation, and the portable plant drivers were assigned to other jobs from the regular call-in list at Kentucky Avenue, albeit they were at the bottom of the list instead of in their normal order. On other days, nonportable plant drivers were dispatched to the batch plant to fill in for regular portable plant drivers or because of the volume of work. The alternate drivers were dispatched to the batch plant only as needed and lost even less of their status as unit employees working at one of three regular plants.

I note also that the portable plant and alternate drivers remained under the same dispatchers and supervisors, and that their performance at the Stadium clearly had the potential to

impact on their overall employment. Further, the Stadium portable plant was never contemplated as being permanent, and it was always management's expectation that the four portable plant drivers and three alternate drivers would return to their regular assignments. Finally, that unit employees were assigned to the Stadium on a regular basis also had an impact on the remaining unit employees.

The portable plant assignments clearly were new positions rather than merely transfers to another facility since they entailed different rates of pay and different benefits. Even accepting Respondent's characterization of the portable plant driver as a "transfer," rather than a new position, Respondent still had the obligation to notify the Union and afford it the opportunity to bargain, because the transfer of a unit employee is a mandatory subject of bargaining. *United Cerebral Palsy of New York City*, above (elimination of seniority as a consideration when selecting employees for involuntary transfers); *Industrial Lechera de Puerto Rico (Indulac, Inc.),* 344 NLRB 1075 (2005) (transfer from one shift to another).

Based on the above, I conclude that the creations of the positions of portable plant and alternate drivers, which overlapped the drivers' functions at their home plants, did impact on the drivers' wages, hours, or other terms and conditions of employment as unit employees and ergo constituted mandatory subjects of bargaining.

Therefore, I conclude that Respondent violated Section 8(a)(5) and (1) by creating the positions of portable plant driver and alternate driver without affording the Union notice of the latter or an opportunity to bargain over either.

3. Implementation of a new evaluation system

It is undisputed that Respondent did not utilize any kind of formal evaluation system or testing procedure prior to the Stadium Project.

Since management's use of these rating devices obviously had the potential for affecting unit employees at their permanent home plants and apart from the matter of temporary assignment to the Stadium, I conclude that they were mandatory subjects of bargaining.[75] I note that the ratings were retained in the Company's records after the portable plant was shut down. Respondent thus had an obligation to provide the Union notice and an opportunity to bargain before it implemented a new evaluation system, which included driving tests. See *Bridon Cordage, Inc.*, 329 NLRB 258 (1999); *Safeway Stores*, 270 NLRB 193 (1984).

Weissman's statement at negotiations that "driving criteria" would be used in selection did not amount to notice that driving tests would be given, and her stating that selection would be based on performance did not equate to notice that formal evaluations would be prepared on applicants.

Thus, I conclude that Respondent violated Section 8(a)(5) and (1) by implementing a new evaluation system, including implementation of a driving test, without affording the Union notice and an opportunity to bargain.

4. Bypassing the Union

The General Counsel further alleges that Davidson bypassed the Union and engaged in direct dealing with employees when he offered drivers alternative portable plant driver positions in July 2007.

The obligation to bargain collectively requires than an employer deal exclusively with the collective-bargaining representative and not directly with the employees it represents. *Medo Photo Supply Co. v. NLRB*, 321 U.S 678, 683 (1944); *Georgia Power Co.*, 342 NRB 192, 192 (2004).

Here, Davidson did not solicit drivers' input on the terms and conditions of employment of alternative portable plant drivers, or otherwise engage in any kind of "bargaining" with them. Instead, he conveyed to them as a fait accompli a predetermined company decision that there would be such a position and what it would entail. This did not amount to unlawful "bypassing" of the Union and direct dealing with employees. See *Friendly Ford*, 343 NLRB 1058 (2004); *Huttig Sash & Door*, 154 NLRB 811, 817 (1965); contrast, *United Cerebral Palsy of New York City*, supra, in which the employer required represented employees to affirmatively agree to future unilateral changes. I therefore recommend that this allegation be dismissed.

B. The Warehouse Project

1. Subcontracting work

Subcontracting of bargaining unit work that does not constitute a change in the scope, nature, or direction of the enterprise but only substitution of one group of workers for another to perform the same work is clearly a mandatory subject of bargaining. *Hospital Espanol Auixilio Mutuo de Puerto Rico*, 342 NLRB 458, 459 (2004); *Overnite Transportation Co.*, 330 NLRB 1275, 1276 (2000); *Torrington Industries,* 307 NLRB 809 (1997). Unless an employer can demonstrate "compelling economic reasons," it violates Section 8(a)(5) by subcontracting unit work that constitutes a mandatory subject of bargaining. *Hospital Espanol*, supra at 458.

Since Respondent did not establish the existence of any kind of past practice of using subcontractors or Spurlino Ohio employees to perform unit work, I conclude that its doing so for the Warehouse Project slab pours constituted a change in its operations.

Respondent has never contended the existence of financial emergency or shown that the use of subcontractors or Spurlino Ohio employees was based on compelling economic reasons. In any event, Respondent would be hard pressed to make such an argument when it knew for months (as far back as October 2006) that it would at some point perform major concrete slab work at the Warehouse Project yet waited until only a few days before the work started to even notify the Union.

It is undisputed that Respondent never offered to bargain over the use of subcontractors; rather, Weissman and Davidson merely answered questions about the subcontracting and how unit employees would be dispatched vis-à-vis leased drivers. The June 11 meeting between Davidson and union representa-

[75] Inasmuch as the evaluations and tests were imposed on existing employees who had applied for new positions, rather than applicants for hire, Respondent cannot rely on cases holding that administering drug and alcohol tests for applicants is not a mandatory subject of bargaining. See, e.g., *Finch, Pruyr & Co.*, 349 NLRB 270 (2007); *Star Tribune*, 295 NLRB 543 (1989).

tives was seen as "informational" in nature by both parties and, in any event, took place *after* the subcontracting had already started.

Respondent has emphasized that the subcontracted drivers only supplemented unit employees, that all unit employees who volunteered for the slab pour work received it with priority over nonunit drivers, and that no unit employees suffered lost work as a result.

Respondent's arguments ignore the fact that both existing and potential unit employees might have been adversely affected by the subcontracting of unit work. First, unit employees might otherwise have been given overtime pay to perform the work that was subcontracted. Second, in the absence of subcontracting, Respondent might have hired additional unit employees, resulting in jobs for them and benefits for the Union and current unit employees in having an expanded unit. A Board majority in *Overnite Transportation Co.*, supra at 1776, clearly recognized the possible harm of subcontracting even when no unit employees have lost regular work:

> At issue here is the decision to deal with an increase in what was indisputably bargaining unit work by contracting work to outside subcontractors rather than assigning it to unit employees. We think it plain that the bargaining unit is adversely affected whenever bargaining unit work is given away to nonunit employees, regardless of whether the work would otherwise have been performed by employees already in the unit or by new employees who would have been hired into the unit. In any event, it is not clear in this case that respondent's unit employees did not, themselves, lose work opportunities.

The Board went on to discuss *Acme Die Casting*, 315 NLRB 202, 207 (1994), Therein, the Board rejected an employer's argument that no violation should be found because unit employees had not lost any hours, instead concluding that such employees might have lost the opportunity to be paid overtime for performing the additional work.

Therefore, I conclude that Respondent violated Section 8(a)(5) and (1) by failing to afford the Union notice and an opportunity to bargain over the use of subcontractors and Spurlino Ohio employees for the Warehouse Project slab pours, bargaining unit work.

2. Requesting volunteers

Respondent, prior to June 2007, did ask drivers to volunteer for Saturday and early morning work; accordingly, its seeking of volunteers for the Warehouse Project slab pours that were to be delivered at 1 a.m. each morning was not a departure from past practice. It follows that such conduct did not constitute a change in working conditions that triggered an obligation to provide the Union with notice and an opportunity to bargain.

As an aside, I cannot see how Respondent's checking with drivers to see if they wanted to work early morning hours—which some might have found onerous and undesirable—amounted to any kind of failure to honor the usual call-in list procedures that were in place. Drivers who volunteered were sent out in the normal call-in list order to the Warehouse Project, and those who did not volunteer were sent out on other jobs as per regular dispatch order. Additionally, drivers are not required to be available for dispatch at all times but have the option to remove themselves from consideration for reasons such as taking sick leave or vacation. Determining ahead of time which drivers wanted the assignments was both reasonable and efficient from the standpoint of good business and common sense.

Accordingly, I recommend that this allegation be dismissed.

3. Response to information request

An employer must supply information requested by a collective-bargaining representative that is relevant and necessary to the latter's performance of its responsibilities to the employees it represents. *NLRB v. Acme Industrial Co.,* 385 U.S. 432 (1967); *NLRB v. Truitt Mfg. Co.,* 351 U.S. 149 (1956).

The law is well settled that an employer's remittance of union dues deducted from employee paychecks is a mandatory subject of bargaining. See, e.g., *Do Group Systems, Inc.*, 347 NLRB No. 44 (2007) (not reported in Board volumes); *Victor Specialty Packaging, Inc.*, 331 NLRB 935 (2000); *Metro Enterprises*, 331 NLRB No. 112 (2000) (not reported in bound volume). I conclude, therefore, that the information requested by the Union pertaining to such was presumptively relevant. Respondent has never claimed otherwise. Indeed, after receiving the request, Weissman responded that she would supply it to the Union as soon as she had the opportunity to review and compile the relevant records.

The General Counsel alleges that Respondent did not furnish the information in a timely fashion and therefore violated Section 8(a)(5) and (1). See *Beverly California Corp.*, 326 NLRB 153, 157 (1991). *Interstate Food Processing*, 283 NLRB 303, 306 (1987).

The fact that Respondent furnished the information in slightly under a month does not rule out a conclusion that its conduct was untimely, since a union is entitled to relevant information at the time of its request. *Woodland Clinic*, 331 NLRB 735, 737 (2000) (7-week delay unlawful); *Pennco, Inc.*, 212 NLRB 677, 679 (1974) (6-week delay a violation). The standard is not the length of time alone. Rather, in evaluating whether a response was untimely, the Board looks at the totality of circumstances, including the complexity and extent of the information sought, its availability, and the difficulty in retrieving it. *West Penn Power Co.,* 339 NLRB 585, 587 (2003); *Samaritan Medical Center,* 319 NLRB 392, 398 (1995). The ultimate determination is whether the employer made a good-faith effort to respond to the request "as promptly as circumstances allow." *West Penn Power,* id.; *Good Life Beverage Co.,* 312 NLRB 1060, 1062 fn. 9 (1993).

I conclude that Respondent here did not satisfy this obligation. The documents provided to the Union on September 22, 2006, nearly 1 month after the Union's request of August 24, were on their face generated on September 5 and simply showed union dues that Respondent had withheld per unit employee. Even assuming Respondent required almost 2 weeks to compile the data, I fail to see why Weissman would have needed another 2-1/2 weeks for "review" before transmitting the information. I deem noteworthy the fact that Respondent did not furnish the information until after the Union had filed ULP charges on the matter. See *Pennco, Inc.,* supra at 678, in

which the Board mentioned this as a consideration in finding information was untimely furnished. I also note that during the period in question, the parties were still in the process of negotiating an initial collective-bargaining agreement.

Accordingly, I conclude that Respondent violated Section 8(a)(5) and (1) by not timely furnishing the Union with information that was relevant and necessary to the Union's performance of its collective-bargaining duties.

4. Discrimination against Bales, Eversole, and Stevenson

The framework for analyzing alleged violations of Section 8(a)(3) is *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Under *Wright Line*, the General Counsel must make a prima facie showing sufficient to support an inference that the employee's protected conduct motivated an employer's adverse action. The General Counsel must show, either by direct or circumstantial evidence, that the employee engaged in protected conduct, the employer knew or suspected the employee engaged in such conduct, the employer harbored animus, and the employer took action because of this animus.

Under *Wright Line*, if the General Counsel establishes a prima facie case of discriminatory conduct, it meets its initial burden to persuade, by a preponderance of the evidence, that protected activity was a motivating factor in the employer's action. The burden of persuasion then shifts to the employer to show that it would have taken the same adverse action even in absence of such activity. *NLRB v. Transportation Corp.,* 462 U.S. 393, 399−403 (1983) *Kamtech, Inc. v. NLRB,* 314 F.3d 800, 811 (6th Cir. 2002); *Serrano Painting,* 332 NLRB 1363, 1366 (2000); *Best Plumbing Supply,* 310 NLRB 143 (1993). To meet this burden, "an employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct." *Serrano Painting,* supra at 1366, citing *Roure Bertrand Dupont, Inc.,* 271 NLRB 443 (1984).

At the time the first alleged discrimination occurred (in February 2006), Respondent had knowledge that Bales, Eversole, and Stevenson had engaged in union activity, because they were the Union's observers at the election on January 13 and present on the Union's behalf at the first negotiations session on about February 12. The first two elements of *Wright Line* are therefore established.

Animus is demonstrated by Matney's numerous statements to various employees between the time the petition was filed and the time of the election, and what he stated to Cox and Stevenson after the election.

I now turn to the element of action. First is the allegation that Respondent loaded around Bales, Eversole, and Stevenson in Stadium assignments, in the months prior to the operation of the portable batch plant. General Counsel's Exhibit 19 reflects that for the period from February 16–March 24, 2006, Mooney, Kiefer, and Cox were given the most assignments to the Stadium. Bales, one of the alleged discriminatees was number four in assignments. General Counsel's Exhibit 4 shows that from May 1 through June 9, Mooney worked the most hours at the Stadium, followed by Eversole, Kiefer, Bales, and Stevenson. On the call-in list, Eversole was first, with Stevenson and Bales fourth and fifth, respectively (and ahead of Kiefer).

Respondent did not select Bales, Eversole, and Stevenson to be portable batch plant drivers or alternate drivers. Similarly, Respondent indefinitely suspended Stevenson on August 26, 2006, and terminated him on about February 22, 2007.

Accordingly, I conclude that the General Counsel has established a prima facie case of unlawful discrimination with regard to bypassing Bales, Eversole, and Stevenson for assignments to the Stadium prior to the portable batch plant, not selecting them for portable batch plant, and also in suspending and terminating Stevenson.

5. Bypassing Bales, Eversole, and Stevenson

Respondent gave priority in Stadium dispatches to Mooney, Kiefer, and Cox because they were driving new trucks and Respondent wanted to make a good impression at a high-profile job. Both Bales and Eversole testified that only Mooney, Cox, and Kiefer were initially dispatched to the Stadium around them. I note Eversole's testimony that after the initial period of Stadium dispatches, Bales was the fourth driver to be loaded around him. Since Bales was also a known union adherent and is also an alleged discriminatee, any such bypassing of Eversole in Bales' favor cannot be attributed to union animus. The documents of record do not establish a clear pattern of using drivers other than Mooney, Kiefer, and Cox ahead of the alleged discriminatees.

I therefore conclude that Respondent has rebutted the presumption that Bales, Eversole, and Stevenson were bypassed for assignments to the Stadium in the period before the portable plant began operations because of their union activities, and recommend dismissal of this allegation.

6. Nonselection of Bales, Eversole, and Stevenson for portable plant/alternate driver positions

Respondent's problem in rebutting the General Counsel's prima facie case is that Davidson's testimony about why they were not selected was laced with inconsistencies, contradicted by driver testimony, and unsupported by any underlying documents or even specifics. Thus, Davidson did not offer a well-based, logical explanation of why Eversole (number one on the call-in list), Stevenson (number four), and Bales (number five) were bypassed in favor of new drivers Pinatello and Thomerson. Indeed, he did not present a cohesive account of how he rated any drivers or the system he used to grade them. I will not reiterate here all of the numerous defects in his testimony but will only highlight the most glaring.

First, Davidson recited no specific reasons for not selecting Eversole and furnished no details or supporting documentation to back up his testimony that Stevenson had a "horrible" record keeping up his truck and attendance problems and that Bales had had accidents that allegedly impacted on how he was rated on safety. Interestingly enough, at one point, Davidson at one point did concede that he considered Eversole and Bales "qualified" but not as the "best qualified."

Second, he never offered an explanation of how he determined that new drivers Pinatello and Thomerson were the "best qualified" and had the experience he claimed was important.

Third, he gave conflicting accounts of how he graded applicants and what criteria were the most important.

Fourth, his testimony that the results of the driving test played a role in the selection of the four successful applicants was contradicted by two of them. Mooney refused to take the test, and Kiefer, by his own testimony, did poorly. Moreover, Bales and Eversole were not even offered the test, and Stevenson performed well.

Finally, Davidson testified that the only documents he could recall reviewing were job applications and attendance records (none of which were offered as evidence). He did not interview the applicants themselves, claimed he spoke "casually" to the applicants who were selected yet could not recall any by name, and could not recall if he talked to any dispatchers.

That Davidson's whole system of ratings may have been subjective and unquantifiable cannot serve to obviate the conclusion that Respondent has failed to rebut the General Counsel's prima facie case that Bales, Eversole, and Stevenson were discriminated against in selection.

Accordingly, I conclude that Respondent violated Section 8(a)(3) and (1) by not selecting Bales, Eversole, and Stevenson for the position of portable batch plant driver. When Davidson later offered Bales and Eversole the position, and they declined, Respondent's liability to them ceased.

I now turn to the alternate portable batch plant driver position that Davidson did not offer to any of the three alleged discriminatees. His reason for not offering it to Bales and Eversole, was that they had declined the portable plant driver position, and he assumed they would be uninterested in the alternate position. This ignores a critical fact. Both Bales and Eversole had turned down the portable batch plant driver position because they would have been placed at the bottom of the seniority list at both Kentucky Avenue and the batch plant. However, Davidson made the decision that the alternate drivers would keep their call-in list positions at their home plants, thus eliminating a primary reason that Bales and Eversole had declined the portable plant driver position. This important difference was not communicated to either of them at the time that Davidson created the alternate driver position and offered it to other employees. As to Stevenson, since Davidson failed to demonstrate valid grounds for not offering him the portable plant position, it follows that Respondent has also failed to establish such for not offering him the alternate position.

Therefore, I conclude that Respondent violated Section 8(a)(3) and (1) by not offering Bales, Eversole, and Stevenson the alternate portable plant driver position.

7. Stevenson's suspension and discharge

Stevenson's suspension and discharge resulted solely from the incidents occurring on August 25, 2006.

Stevenson's conduct on that date was no doubt unwise and constituted a ground for some kind of disciplinary action: he admittedly lied about having the documents with the SSNs in his possession. The real issue is whether, but for Stevenson's union activities, Respondent have indefinitely suspended him on August 26, 2006, and ultimately terminated him on February 22, 2007.

Respondent has no formal progressive disciplinary system, and there is no evidence that it has ever issued oral or written warnings to bargaining-unit employees, or that any bargaining-unit employees besides Stevenson have been suspended. Respondent has discharged three others—for attendance, blatant theft of concrete, and threats to drive a truck into the building.

Here, Stevenson first told the batch man that he did not have the documents. He repeated this initially to Davidson but got caught in inconsistencies and then handed them over. Respondent thus received the documents in question the same day that Stevenson was asked to surrender them in exchange for redacted versions. In contrast to the detrimental impact that attendance problems, theft, and driving a truck into the building could create for Respondent, I fail to see how Respondent was prejudiced in any way by Stevenson's conduct. Moreover, although Stevenson behaved imprudently, perhaps childishly, as a result of being upset over the inclusion of the SSNs, his concern was certainly understandable. Indeed, Respondent determined that it had committed a serious error in breaching drivers' privacy rights when it failed to redact the SSNs.

In these circumstances, I must conclude that the discipline imposed on Stevenson was out of proportion to the gravity of the offense, which was relatively minor—one act of lapse of judgment that resulted in no harm to Respondent. The insubstantial nature of the misconduct is appropriately considered in determining whether the discipline was legitimate or pretextual. *Detroit Paneling Systems,* 330 NLRB 1170 (2000); *Neptune Water Meter Co. v. NLRB*, 551 F.2d 568, 570 (4th Cir. 1977).

In concluding that Respondent would not have taken the same action against Stevenson but for his union activity, I also take into account Spurlino's (and Weissman's) evasiveness in answering the simple question of who decided to suspend and then terminate him. I again note Spurlino's shifting testimony on this point and that he was contradicted by both Matney and Davidson. This further leads me to believe that the discipline was pretextual and not bona fide.[76]

Accordingly, I conclude that Respondent violated Section 8(a)(3) and (1) by indefinitely suspending and later terminating Stevenson.

8. Stevenson's August 25, 2006 interview with Davidson

An employer violates Section 8(a)(1) when it denies an employee's request to have a union representative present at an investigatory interview that the employee reasonably believes might result in disciplinary action. *NLRB v. J. Weingarten,* 420 U.S. 251 (1971). What is a "reasonable" ground for such belief is measured by objective standards under all of the circumstances present. *Quality Mfg. Co.,* 195 NLRB 197, 198 fn. 3 (1972); see also *Consolidated Edison Co. of New York,* 323 NLRB 910, 910 (1997). Once such a request is made, the employer must grant the request, discontinue the interview, or offer the employee the option of continuing the interview without the representative of discontinuing it. *Montgomery Ward &*

[76] On the other hand, Weissman offered a reasonable explanation for the delay between the time of her telephone interview with Stevenson and his actual termination—settlement efforts that proved unsuccessful by early 2007. I therefore do not draw any negative inferences against Respondent on the basis of the delay.

Co., 254 NLRB 826, 831 (1981), enfd. in relevant part 664 F.2d 1095 (8th Cir. 1981).

Stevenson's interview was clearly investigatory—Davidson questioned him about what he done with the documents containing the SSNs. Since Davidson expressly threatened him with "further action" if the documents were not produced, there is no question but that Stevenson had an objectively reasonable belief that disciplinary action might result.

The only remaining issue is whether Stevenson made a request under *Weingarten* to have a union representative "present" at the interview, since he stated that he wanted to contact his representative to see if he should give the documents back. I conclude in the affirmative. The employee should not bear the burden of articulating a *Weingarten* request with legal precision, and Stevenson's words were reasonably construed as a request to have a representative present to assist him. This comports with Board decisions holding that an employee need not recite the exact language that he or she wants a union representative present to trigger the employee's *Weingarten* rights; rather, the employee's request may be more general, so long as it places the employer on notice of the desire for such representation. See *Bodolay Packaging Equipment,* 263 NLRB 320, 325–326 (1982) (employee asked whether he needed "a witness"); *Southwest Bell Telephone Co.,* 227 NLRB 1223, 1223, 1227 (1977) (employee stated he wanted "someone" present). In any event, Davidson did not give Stevenson an opportunity to even call and consult with the Union but instead proceeded with the interview.

Therefore, I conclude that Respondent, through Davidson, violated Section 8(a)(1) by violating Stevenson's *Weingarten* rights.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By the following conduct, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act and violated Section 8(a)(5) and (1) of the Act:

(a) Created the position of portable dispatch plant driver without first affording the Union an opportunity to bargain, and created the position of alternate dispatch plant driver without first affording the Union notice and an opportunity to bargain.

(b) Implemented a formal evaluation system, including a driving test, to select employees for the position of dispatch plant driver, without first affording the Union notice and an opportunity to bargain.

(c) Subcontracted unit work and used employees from a related company to perform unit work, without first affording the Union notice and an opportunity to bargain.

(d) Failed to timely furnish the Union information that was relevant and necessary to the Union's role as exclusive bargaining representative of unit employees.

4. By the following conduct, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act and violated Section 8(a)(3) and (1) of the Act:

(a) Failed to select Matthew Bales, Ron Eversole, and Gary Stevenson for the position of portable batch plant driver.

(b) Failed to select these employees for the position of alternate batch plant driver.

(c) Indefinitely suspended and then terminated Gary Stevenson.

5. By the following conduct, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act and violated (1) of the Act:

(a) Denied Gary Stevenson's request to have a union representative present and continued to question him at a meeting in which he had a reasonable fear that discipline could result.

REMEDY

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

The General Counsel seeks rescission of Respondent's unilateral changes as part of the remedy. However, the portable batch plant at the Stadium has ceased operations, and the slab pours for the Warehouse Project have been completed, with no indication that either work will at any point be resumed in the future. Respondent maintained no records of the driving "tests" it implemented. Accordingly, rescission would serve no purpose with respect to these violations.

In contrast, Respondent has retained the employee "evaluations." Even though nothing in the record indicates that they have ever been used for any reason other than selection for the portable plant, they could potentially adversely affect unit employees in the future. In these circumstances, I will order that they be rescinded.

Since Respondent unilaterally implemented a new evaluation system, including a driving test, for selecting employees as portable batch plant drivers, and it then unilaterally created the position of alternate batch plant driver, Respondent shall be ordered to make any employees, including Matthew Bales, Ron Eversole, and Gary Stevenson, whole for any loss of pay they may have suffered as a result of Respondent's failure to comply with the preexisting procedure that governed how drivers were dispatched. This shall be done in the manner prescribed in *Ogle Protective Service,* 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), plus interest as prescribed in *New Horizons for the Retarded,* 283 NLRB 1173 (1987).

Since Respondent failed to select employees Matthew Bales, Ron Eversole, and Gary Stevenson for the positions of portable batch plant driver and alternate driver, in violation of Section 8(a)(3), it must make them whole on this basis as well, in the manner described above. Since these positions no longer exist, reinstatement is not applicable.

Since Respondent suspended and then terminated Gary Stevenson, in violation of Section 8(a)(3), it must offer him reinstatement and make him whole for any loss of earnings and other benefits, in accordance with *F. W. Woolworth Co.,* above, with interest computed as provided in *New Horizons for the Retarded,* above.

In the absence of any evidence that Respondent had a practice of having unit employees perform overtime work, I do not deem a make-whole remedy appropriate for Respondent's failure to provide the Union with notice and an opportunity to bargain over the use of subcontractors and Sprurlino Ohio employees for Warehouse Project slab pours. Contrast, *Clear Channel Outdoor, Inc.,* 344 NLRB No. 66 (2006) (not reported in bound volumes).

The General Counsel seeks a special remedy under *Mar-Jac Poultry Co.,* 136 NLRB 785 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 329 U.S. 817 (1964), more specifically that Respondent be ordered to bargain in good with the Union, on request, for an 8-month period. Under the *Mar-Jac* doctrine, the Board may extend the 1-year certification period to compensate for the failure of an employer to bargain in good faith during that year. The union's majority status cannot be questioned during the period of extension. In essence, the employer is not permitted to benefit from its own unlawful conduct.

The record must support the need for an extension and its appropriate length. *American Medical Response,* 346 NLRB 1004, 1005 (2006). In determining such, the Board considers the nature of the violations; the number, extent, and dates of the collective-bargaining sessions; the impact of the ULP's on the bargaining process; and the conduct of the Union during negotiations. Ibid; *Northwest Graphics, Inc.,* 342 NLRB 1288, 1289 (2004).

I conclude that an 8-month *Mar-Jac* extension is indeed appropriate in all the circumstances present. Most significantly (1) Respondent committed a number of violations of Section 8(a)(5) and (3) that extended from May 2006, 4 months after the Union was certified, until June 2007, over 1 year later; (2) the entire bargaining unit was affected by Respondent's unilateral changes in May 2006 and again in June 2007; (3) the unilateral changes in June 2007 occurred after the hearing on the original charges contained in the amended consolidated complaint. Such conduct must be considered to reflect Spurlino's disregard for his obligations under the law to bargain with the Union, and it would have had the natural effect of diminishing unit employees' faith that the Union could protect their interests.

I also note Matney's statements to three employees (Bales, Eversole, and Mooney) prior to the election that Spurlino had gone through union organizing before and deliberately prolonged bargaining in an effort to get the union to give up trying to negotiate a contract. This suggests that Respondent went through the motions of engaging in good-faith negotiations with the Union but had no intention of reaching an agreement.

[Recommended Order omitted from publication.]