UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

DAYCON PRODUCTS COMPANY, INC.

and

DRIVERS, CHAUFFEUERS, AND HELPERS LOCAL UNION NO. 639 A/W INTERNATIONAL BROTHERHOOD OF TEAMSTERS

Cases 5-CA-35687
5-CA-35738
5-CA-35965
5-CA-35994

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I) OVERVIEW[1]

For all the evidence and argument that has been produced in this case, the most significant question is exceedingly simple: were both of the parties involved in this case at the end of their respective bargaining ropes when the employer involved decided to stop negotiating with the union involved and instead unilaterally changes its employees' terms and conditions of employment? The administrative law judge who presided over the trial did not think so, and neither should the Board.

Daycon Products Company, Inc. ("Respondent") is a District of Columbia corporation engaged in the business of manufacturing and distributing janitorial, maintenance and hardware supplies.[2] Respondent maintains an office and place of business in Upper Marlboro, Maryland. Respondent's President is John Poole. Certain employees employed by Respondent in its Upper Marlboro, Maryland facility are represented by the labor organization Drivers, Chauffeurs and Helpers Local Union No. 639 ("the Union").[3] On four separate occasions over the spring and summer of 2010, the Union filed an unfair labor practice charge, alleging that Respondent violated Section 8(a)(1), (3), and (5) of the Act. (GC 1-A, 1-C, 1-E, 1-G). On November 17-22, the parties appeared before Administrative Law Judge Joel P. Biblowitz and had a full and fair opportunity to present evidence. On February 16, 2011, Judge Biblowitz issued his decision, finding that Respondent violated Sections 8(a)(1), (3), and (5) of the Act.

The allegations arise from bargaining that took place between the Union and Respondent for a successor collective-bargaining agreement, beginning in the fall of 2009. Since 1973, the Union has represented a unit of employees at Respondent's Upper Marlboro facility. The parties began

[1] Counsel for the Acting General Counsel respectfully requests that the Board expedite its analysis of Respondent's exceptions, since the parties currently have an outstanding petition for injunctive relief. On December 2, 2010, the Board authorized the Counsel for the Acting General Counsel to seek a preliminary injunction under Section 10(j) of the Act. On December 17, 2010, Counsel for the Acting General Counsel filed a petition with the United States District Court of Maryland, Southern Division, seeking such injunctive relief. On January 20, 2011, Counsel for the Acting General Counsel and counsel for Respondent appeared before Judge Deborah K. Chasonow for a motions hearing regarding the petition; on February 10, the parties appeared before Judge Chasonow again, for an evidentiary hearing. As of the date of this filing, the parties have not received a ruling from Judge Chasonow on the petition.

[2] Citations to the transcript will appear as "Tr. [page numbers]" and/or the exhibit number (e.g., "GC [exhibit number]" or "R [exhibit number]").

[3] Drivers, Chauffeurs and Helpers Local Union No. 639 is affiliated with the International Brotherhood of Teamsters.

bargaining for a successor agreement in November 2009. On April 22, 2010,[4] Respondent unilaterally declared that the parties were at an impasse in their negotiations, and Respondent unilaterally changed its employees' terms and conditions of employment the following day, Friday, April 23. The next workday, Monday, April 26, Respondent's employees initiated a strike against Respondent, protesting Respondent's unfair labor practice of unilaterally changing their terms and conditions of employment without first reaching a good-faith impasse with the Union. On July 2, the Union notified Respondent that its employees were unconditionally offering to return to work on the following workday, July 6. However, on that date, Respondent did not allow its employees to return to work. On July 23, the Union demanded Respondent rescind its unilateral changes, which, to date, Respondent has failed to do. Also, during the course of negotiations, Respondent subcontracted bargaining unit work (repairing snowthrowers) from December 2009 through the spring of 2010 without notifying the Union and affording it an opportunity to bargain.[5]

Respondent was tasked with the burden of establishing it was privileged to engage in all of the unlawful conduct alleged in the Consolidated Complaint. Respondent failed to meet its burdens in each circumstance. Respondent failed to establish the existence of a good-faith impasse; thus, its changes of April 23 violated Section 8(a)(5) and (1) of the Act. Respondent similarly violated Section 8(a)(5) and (1) of the Act by failing to rescind those unilateral changes. The strike initiated on April 26 was caused by Respondent's unfair labor practice of unilaterally changing employees' terms and conditions of employment without reaching a lawful impasse. Respondent unlawfully refused to reinstate the employees who made an unconditional offer to return to work in violation of Section 8(a)(3) and (1) of the Act. Finally, Respondent did not establish it was permitted to unilaterally subcontract bargaining unit work, again violating Section 8(a)(5) and (1) of the Act.

[4] Unless otherwise noted, all dates are in 2010.
[5] Snowthrowers are synonymous with snowblowers. (Tr. 800-801)

Having lost on all accounts before Judge Biblowitz, Respondent now repeats the bulk of its arguments in its exceptions to the Board. However, just as Judge Biblowitz determined, all of Respondent's arguments are meritless. The Board should not hesitate in rejecting Respondent's arguments. Respondent's principal argument on the lynchpin issue of whether the parties were at impasse is very much a credibility argument. Simply put, Respondent contends Judge Biblowitz erred in a key credibility resolution, yet Respondent offers the Board no viable grounds on which to reverse Judge Biblowitz's credibility resolution. Respondent's other arguments on the issue of impasse rely on its mischaracterizing of the record evidence and its ignoring of undisputed facts that damn its case—Respondent unquestionably gave the Union the impression it was going to evaluate a Union proposal and continue bargaining, but Respondent unexpectedly snuck away from the bargaining session and declared impasse by letter that same day. The remaining legal issues very much fall like dominoes after the impasse question is decided against Respondent.

II) ISSUES PRESENTED

A) Did the ALJ correctly conclude that Respondent violated Section 8(a)(5) and (1) on or about April 23 by implementing its last bargaining offer without first bargaining to a good-faith impasse?

B) Did the ALJ correctly conclude that Respondent violated Section 8(a)(5) and (1) by refusing to rescind the unilateral change of implementing its last bargaining offer?

C) Did the ALJ correctly conclude that the strike which began on April 26 was caused by Respondent's unfair labor practices?

D) Did the ALJ correctly conclude that Respondent has violated Section 8(a)(3) and (1) since on or about July 6 by refusing to reinstate employees after the Union made an unconditional offer for those employees to return to their former positions of employment?

E) Did the ALJ correctly conclude that Respondent violated Section 8(a)(5) and (1) since in or around December 2009 by subcontracting snowthrower repair work?

III) STATEMENT OF FACTS[6]

A) **Negotiations**

For many years, the Union has served as the collective-bargaining representative for a unit of Respondent's employees working at Respondent's Upper Marlboro facility.[7] As part and parcel of this collective-bargaining relationship, Respondent and the Union have agreed on collective-bargaining agreements in the past, memorializing the terms and conditions of employment for Respondent's employees. The parties' most recent collective-bargaining agreement was in effect from March 3, 2007 through January 31, 2010. (GC 2).

With that agreement approaching its expiration date, the parties began negotiating a successor collective-bargaining agreement on November 4, 2009. (Tr. 50). The Union's bargaining committee was led by Doug Webber, a business agent for the Union, and also included three employees of Respondent. On the other side, Respondent's bargaining committee was led by outside counsel Jay Krupin, and another outside counsel, Paul Rosenberg; also included in Respondent's committee were John Poole (Respondent's President), Jodie Kendall (Respondent's Human Resources Director), Joe Giusto (Respondent's Vice President of Manufacturing), and Howard Cohen (Respondent's Owner). (Tr. 49-50).

At the November 4, 2009 session,[8] Respondent discussed the parties' difficult history of bargaining, encouraged a new approach to negotiations, and raised the prospect of a performance-

[6] Respondent's brief refers to a prior case involving the same parties, commonly known as the "Daycon 8" case. That case is currently with the Board on exceptions. Contrary to Respondent's aspersions, that matter is a separate case. Judge Biblowitz considered it as such (Tr. 243), as should the Board.

[7] The unit is composed of all drivers, warehousemen, chemical compounders, utility employees, and repairmen of the Company employed at its 16001 Trade Zone Avenue, Upper Marlboro, MD 20774 location; but excluding office clerical employees, salesmen, professional employees, guards, supervisors, and all other employees. (GC 2 p.3, and GC 63 p.3).

[8] Prior to this first session, Webber requested information from Respondent, including a seniority list reflecting classifications and rates of pay for each individual working for Respondent. (GC 3, Tr. 50-51). Respondent provided such a list to Webber before negotiations began, upon which the Union based its economic proposals. (GC 4, Tr. 51-52, 74). A comparison of GC 4 and GC 10, p. 3 show the Union based its December 9, 2009 wage proposal on the top rates reflected on Respondent's spreadsheet, GC 4. The Union's December 9, 2009 proposal included a top rate which was calculated as a $.75 increase from the top rates Respondent represented were in existence at the time bargaining began. Despite Respondent's contentions, the Union demonstrated their good faith by relying on Respondent's wage rates and avoiding issues relating to the "Daycon 8" case, which is still pending on exceptions to the NLRB.

based wage system. (R 20, Tr. 56-57). However, Respondent did not specifically explain the mechanics of a performance-based system during this meeting. (Tr. 57-58, 672-673). Webber immediately opposed this proposed departure from the hourly wage structure the parties historically used.[9] (Tr. 57, 599). Krupin indicated that Respondent could not commit to a contract that looked like the prior contract. (Id.). That contract, which was scheduled to expire on January 31, contained two different types of pay increases: (a) an annual wage increase; and (b) a "catch-up" wage increase in which employees who were below the top rate of pay for their respective job classification received an additional increase on their anniversary of date-of-hire, until such time as they reached the top rate for their job classification. (GC 2 pp.13-15). Respondent did not present any proposals at this meeting. (Tr. 58). However, Webber presented the Union's written non-economic proposals, and the parties agreed to some stylistic and language changes. (Tr. 60-63, GC 5-6). Towards the end of the meeting, Krupin asked that the Union make its economic proposals. (GC 5 p. 2).[10]

On November 16, 2009, Rosenberg followed up with a letter to Webber, requesting that the Union make its economic proposals by December 1, 2009 so Respondent had time to assess the financial impact of the Union's bargaining stance. (Tr. 64-65, GC 7). That same day, Webber replied that the Union would be prepared to continue discussing the open non-economic issues at the parties' next bargaining session (scheduled for December 9, 2009), and that Webber anticipated that the Union would make its economic proposals at that time. (Tr. 65, GC 8).

On December 9, 2009, the parties met, and Webber presented the Union's economic proposal. (GC 10). Webber made clear to Respondent that the Union's presentation of its economic proposal did not mean that the non-economic portions had been resolved, stating that those proposals remained open. (Tr. 67). The Union's proposal included an annual wage increase of $.75/hr for all

[9] At the hearing, Webber explained the basis for the Union's opposition to Respondent's proposed move to a performance-based wage system, noting that the high traffic congestion in the metropolitan Washington, D.C. area makes use of a performance-based system of compensation inconsistent. (Tr. 59).
[10] The parties' prior negotiations followed a pattern of addressing non-economic issues first, and then addressing economic issues. (Tr. 220).

employees. (GC 10 p. 3, Tr. 74-75). The Union also proposed an expansion of the "catch up" increase from the then-existing collective-bargaining agreement.[11] (Id., Tr. 70-75). Under this proposed expansion of the "catch up" increase, all employees who were hired before February 1, 2008 were to immediately be elevated to the top rate of pay in their respective classification. (GC 10 p. 3, Tr. 72-73, 245-246).[12] As for existing employees hired after February 1, 2008, as well as any new employees hired during the life of the collective-bargaining agreement, their wages would be slotted along the following progression:

Hire date	-	Employee is paid 85% of top rate
1 year anniversary of hire date	-	Employee is paid 90% of top rate
2 year anniversary of hire date	-	Employee is paid 95% of top rate
3 year anniversary of hire date	-	Employee is paid 100% of top rate

(Id., Tr. 73-74, 247-248).

After Webber presented the Union's initial economic proposal, Krupin ended the meeting by stating that Respondent would have to cost out the Union's economic proposal. (Tr. 76, 661, GC 9). Respondent did not present any proposals at this meeting. (Tr. 76).

On December 15, 2009, the parties held a third bargaining session. (Tr. 76). At the beginning of the meeting, Rosenberg said the Union's economic proposal was not in line with today's economic climate and would cost Respondent nearly $3 million. (Tr. 78-79, GC 11 p. 1). Rosenberg reiterated that Respondent wanted to change the wage structure to one where employees' wages were performance-based, while at the same time declining to offer any specifics about this proposed alteration of the traditional wage structure. (GC 12, Tr. 78-79, 676-677). Webber again

[11] Webber testified that this concept, referred to by the parties as "catch up" or "progression," was the most important issue for the Union in the negotiations. (Tr. 222). Also, Webber's proposal mistakenly referenced 2008; he intended to refer to 2007, and he later corrected this error in a subsequent proposal.

[12] The parties previously utilized a similar wage progression, under which an employee would receive "catch-up" raises on the anniversary of their date of hire (as well as an annual increase), until they reached the top wage rate for their respective classification; it was a three-year progression to the top rate. (Tr. 595-96, 658, GC 63 pp. 13, 35). Thus, Respondent is flatly wrong in its assertion that the parties have agreed to maintain a two-tier wage structure over the past decade—as recently as December 31, 2003, Respondent's employees had a contractual right to progress to the top wage rate for their respective classification. At some point in 2004, the parties agreed to not include "catch up" raises in their collective-bargaining agreement, but the concept of "catch up" raises returned in the parties' 2007-2010 collective-bargaining agreement. (Tr. 596, GC 2 pp. 13-15).

rejected an approach to wages which included a performance-based component. (Tr. 675-676). Rosenberg presented a proposed collective-bargaining agreement on behalf of Respondent, but the proposal left open the issue of employees' wages. (GC 12 pp. 13-14, Tr. 81-82). Rather, Rosenberg said that it was not prudent for Respondent to make a counteroffer. (Tr. 79, GC 11 p. 1).

On January 5, the parties met for their fourth bargaining session. (Tr. 82, 84). At this session, Krupin handed out an agenda for the meeting, seeking to narrow the scope of the negotiations. (Tr. 85-86, GC 13-14). Krupin suggested that the Union do the same and limit the scope of negotiations to only a few issues. (Tr. 88, GC 13). Webber responded that the Union was not willing to do that. (Id., Tr. 708-709). Without any discussion and without providing specifics of the proposal, Respondent introduced an "economic distress" clause in its proposal, which the Union rejected. (Tr. 87, GC 14). Respondent still had not provided the Union with a written counterproposal addressing employees' wages.

On January 19, the parties met for a fifth bargaining session. (Tr. 89). The meeting began with Krupin claiming that the Union's proposal would cost around $2.7 million, and that he would take the first "shot" at a new proposal. (Tr. 91, GC 15 p. 1). Respondent's President, John Poole, added that he wanted some type of incentive-based compensation for employees. (Id.). Krupin presented Respondent's first written economic proposal,[13] under which each individual employee would receive a 1% increase in wages in each year of a three-year contract, and be eligible for up to a 3% increase if the individual employee met conceptual performance and productivity criteria which had not been fully formed.[14] (Tr. 90-91, 679-681, GC 16).[15] Webber replied that the Union was not interested in changing from the established hourly wage rate, nor was the Union interested in changing to percentage-based wage increases. (Tr. 91-92, 251, 602-03). Rather, Webber said

[13] In its proposal, Respondent indicated that, for issues not addressed by its proposal, it was willing at the time to retain the language from the parties' existing collective-bargaining agreement. (GC 16 p. 3).
[14] Respondent never proposed concrete metrics upon which employees' performance would be measured.
[15] John Poole testified that Respondent's proposal was an effort to try to get employees a $1/hour, or 5%, wage increase. (Tr. 602, 673).

that the Union wanted "cents on the dollar" wage increases, or defined monetary wage increases. (Id., GC 15). Krupin responded that Respondent did not want "cents on the dollar" increases without there being some tie to employees' performance. (Id.). Additionally, Krupin discussed the proposed economic distress clause, under which employees' wages would be frozen any time Respondent's gross revenue dropped 5% or more.[16] (Tr. 93-94, GC 16 p. 2). Webber rejected Krupin's proposed economic distress clause.[17] (Tr. 94-96).

On January 29, the parties held their sixth bargaining session. (Tr. 97). At the beginning of this meeting, Krupin proposed the same non-specific performance-based wage system that he had proposed, and Webber had rejected, at the parties' prior meeting. (Tr. 100, GC 18). Later in the meeting, Krupin submitted a revised proposal on employees' wages, withdrawing the suggested bonus program.[18] (GC 19). Krupin's proposal (which included the economic distress clause) reflected a two-tiered approach to wages, one for employees who were at the top rate for their classification, and a second tier for employees who were not at the top rate:

Increases for Employees at "Top Rate"

Date of Ratification (DOR)	2% (or $0.34/hour)
1 year from DOR	1% (or $0.17/hour)
2 years from DOR	1% (or $0.17/hour)

Increases for Employees below "Top Rate"

Date of Ratification (DOR)	3% (or $0.50/hour)
1 year from DOR	1.5% (or $0.25/hour)
2 years from DOR	1.5% (or $0.25/hour)

(GC 19, Tr. 106-107).

[16] Respondent never experienced a 5% decrease in revenue in 30 years. (Tr. 607-608).
[17] The Union rejected economic distress in part because of Respondent's control of financial information and the proposed unilateral ability of Respondent to halt all raises in the contract. (Tr. 94-94).
[18] According to Poole, Krupin initially presented the Union with a revised proposal, under which employees at the top rate would receive 1% increases in each of the three years of the contract, while employees not at the top rate would receive 1.5% increases. (Tr. 603-605, R 3). Poole testified that Webber rejected this proposal. Webber was not certain whether Krupin made this proposal. (Tr. 312-313). Judge Biblowitz appears to not have credited Poole's testimony, as the ALJD does not mention this offer.

Krupin's proposal initially involved only percentage increases. When Webber reiterated that the Union was not interested in percentage increases, Poole proposed the "cents on the dollar" increases. (Tr. 106). The Union maintained that all employees should be at, or in progression to, the top rate of pay in their respective classifications. (Tr. 108). Subsequently, Webber revised the Union's economic proposal, withdrawing several economic proposals but adhering to its December 9 proposals regarding employees' annual wage increase and progression. (GC 21, Tr. 108-110).

On February 18, the parties met for their seventh bargaining session. (Tr. 112).[19] After Webber briefly raised some pending grievances, Krupin presented Webber with two documents. (Tr. 113-115, GC 24-25). In one, Krupin re-proposed the same wage proposal that he had made at the parties' prior meeting; in the other, Krupin set forth what he considered were the issues that the parties had tentatively agreed upon. (Id.). Krupin added that he felt Respondent had made substantial movement in its proposals, while the Union had not. (Tr. 116, 692). Subsequently, Krupin revised Respondent's proposal on employees' wages and the proposed economic distress clause. (Tr. 116, GC 23 p. 1, GC 26). Regarding wages, Krupin proposed the following:

Increases for Employees at "Top Rate"

Date of Ratification (DOR)	$0.40/hour
1 year from DOR	$0.20/hour
2 years from DOR	$0.20/hour

Increases for Employees below "Top Rate"

Date of Ratification (DOR)	$0.60/hour
1 year from DOR	$0.30/hour
2 years from DOR	$0.30/hour

(GC 26)

As for the economic distress clause, Krupin proposed increasing the revenue decrease trigger to 6%. (Id.). Webber rejected Krupin's proposals, while modifying the Union's proposals in response. (Tr. 117-119, GC 23, GC 28). Regarding employees' wages, Webber reduced the proposed annual increase by $.10/hour in each of the three years of the proposed contract, to

[19] The day before this bargaining session, Krupin wrote a letter to Webber regarding negotiations. (GC 22).

$.65/hour. (Tr. 122, GC 23 p. 2). Additionally, Webber withdrew several of the Union's economic proposals, including those addressing the employees' work week, funeral leave, and vacations. (Id., GC 28 pp. 2-4). On the wage progression, Webber corrected an earlier mistake (his prior proposals mistakenly referenced 2008) and clarified that the Union's proposal was that employees hired before February 1, 2007 would receive the top rate in their respective classifications.[20] (Tr. 120, GC 28 p. 3, GC 23 p. 2). Finally, regarding the economic distress clause, Webber rejected Krupin's proposal, but acknowledged that the Union would be willing to discuss economic distress should Respondent ever experience such a decrease in revenue. (Tr. 693-694).

After meeting privately, Krupin modified Respondent's proposal on employees' wages, indicating to the Union that it was its "best" offer. (Tr. 122-125, 612, GC 27). Respondent proposed the following:

Increases for Employees at "Top Rate"

Date of Ratification (DOR)	$0.40/hour
1 year from DOR	$0.40/hour
2 years from DOR	$0.40/hour

Increases for Employees below "Top Rate"

Date of Ratification (DOR)	$0.60/hour
1 year from DOR	$0.60/hour
2 years from DOR	$0.60/hour

(GC 27).[21]

Webber rejected the proposal. (Tr.123). Webber also stated he would contact the Federal Mediation and Conciliation Service (FMCS).[22] (Tr. 616).

[20] Webber testified that Krupin asked if the Union needed the progression in the collective-bargaining agreement, to which Webber said yes. (Tr. 260, GC 23 p. 2).

[21] Poole testified that, prior to negotiations, he had targeted a range of 3% - 4% increase as an appropriate economic figure, and Respondent's final proposal from February 18 was "approaching 3%." (Tr. 709-710). Poole also indicated that Respondent would accept a 5% increase when it was proposing a bonus plan for employees. (Tr. 709-712). In its brief, Respondent acknowledges that its offer on February 18 was "nearly" 3%. Yet, in direct contravention of the testimony of its chief witness, Respondent then claims that this nearly-but-not-quite-3% figure was what Respondent had budgeted for the negotiations.

[22] After the parties' February 18 bargaining session, the Union held a meeting with its membership on February 27. (Tr. 125-128, GC 29). A notice for the meeting, titled "Contract Update and a Strike Vote Will Be Taken" and prepared by Webber, was posted on a bulleting board at Respondent's facility. (GC 29). At this meeting, Webber informed the employees about the state of negotiations with Respondent. (Tr. 127-128, 271-272). Webber commented that the Union

On March 17, the parties met for their eighth bargaining session. (Tr. 131-132). The Union's President, Thomas Ratliff, attended this session, as did a mediator from the Federal Mediation and Conciliation Service (FMCS), Gary Eder. (Tr. 131-133). At this session, Webber presented Respondent with a written rejection of Krupin's proposal from the parties' February 18 meeting, and the Union's proposals on all non-economic and economic issues which Webber believed remained open. (Tr. 133-137, GC 32-34).[23] Respondent caucused with the mediator, and decided to discuss the issue of progression with the Union. (Tr. 617). The Union received a phone call from the mediator, and came back to the bargaining table. (Tr. 140). However, when the Union returned to the table, Respondent did not make any counterproposals. (Id.). The Union decided to end the session, informing Respondent of this decision. (Tr. 139-141, 424).[24] Before leaving, Ratliff opined that the parties were very far apart, told Poole to "get serious," and said that he thought Respondent's treatment of its employees was an insult. (Tr. 277-278, 471, GC 31).

On March 26, Ratliff received a phone call from Krupin. (Tr. 425-426, GC 56). Krupin asked if Ratliff would have an "off the record" meeting with him and Respondent's representatives to try to reach agreement on a contract. (Tr. 426). Shortly thereafter, Ratliff met with Webber and John Gibson (the Union's Secretary-Treasurer), informed them of the call, and instructed them to clear their schedules to be available for a meeting. (Tr. 426-427, 520).

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believed that Respondent was not bargaining in good faith. (Tr. 391, R 1). Webber informed the employees at this meeting that the strike vote was "first step preparation" if a strike was necessary, but that it was a tool used in bargaining. (Tr.128). A majority of employees voted in favor of a strike. (Tr. 391, 562, 776).

[23] In addition, Webber also sought some clarification from Krupin regarding employees' health and welfare contributions, and Webber proposed a new contract clause setting a time limit for which employees could receive discipline. (Tr. 138-139, GC 35).

[24] In its brief, Respondent quotes from a portion of Poole's testimony in which he referred to "his charts" that he had at this March 17 meeting. However, no evidence of such charts or economic analysis was admitted into the record. At the hearing, Respondent attempted to introduce evidence purportedly prepared prior to the parties' March 17 bargaining session, addressing the economic impact of the Union's proposals. (Tr. 618-626). Judge Biblowitz sustained an objection to the introduction of this evidence and struck it, and the accompanying testimony, from the record. (Id.). Respondent did not produce certain documents, which Judge Biblowitz determined were clearly covered by a subpoena issued by the Counsel for the Acting General Counsel. (Id.). A "penalty" for the failure of a subpoenaed party to turn over responsive documents to a subpoena request is that the non-complying party is prohibited from introducing such evidence into the administrative record. See, e.g., McCallister Towing & Transportation Co., 341 NLRB 394, 396 (2004) (indicating variety of sanctions to deal with subpoena noncompliance), *enfd.* 156 Fed. Appx. 386 (2d Cir. 2005)(unpublished).

On April 1, the parties met for the ninth time. (Tr. 143). Unlike prior meetings, this meeting did not include the full bargaining committee for each side. (Id.). Webber, Ratliff, and Gibson attended on behalf of the Union. (Id.). Krupin, Rosenberg, and Poole attended on behalf of Respondent. (Id.). At this meeting, held in a private room of a Washington, D.C. restaurant, Webber suggested a four-year collective-bargaining agreement, with the top rate progression extended over four years (rather than threw), despite the Union's preference for shorter contracts. (Tr. 146-147, 285, 430-431, 523-524, 630). After Respondent's contingent met privately, Krupin suggested an idea: employees currently making the top rate would receive annual increases, while employees not at the top rate would progress to a mutually agreeable, substandard "contract rate" during the life of the contract. (Tr. 147-48, 292-293, 431, 524, 631-632, 664-666). The Union did not reject this proposal; instead it decided to make a counter-offer. (Tr. 147-148, 293, 452, 524-525). The Union met privately, and Webber responded to Krupin by suggesting a five-year collective-bargaining agreement with the top rate progression extended over five years, indicating that this was a major concession by the Union. (Tr. 148-149, 293, 432, 525, 632, 667). Krupin said Respondent was going to have to "crunch the numbers," and that he would respond to the Union on the following Tuesday, April 6. (Tr. 149, 204-205, 432, 525-526, 634).[25]

However, Krupin did not contact the Union, nor did anyone else from Respondent. (Tr. 153-54, 206, 433). Rather, on April 5, the FMCS mediator contacted both parties to arrange for another meeting. (R 36 p. 2). The earliest date when all parties were available was April 22. (Tr. 635). On that date, the parties met for their tenth bargaining session. (Tr. 154). As at the parties' March 17 session, Ratliff attended with the Union committee, and FMCS mediator Gary Eder was present. (Id.). The Union's committee first met privately with the mediator. (Tr. 434-435). The mediator indicated that he had just met with Respondent's bargaining committee, and that Respondent was not

[25] Webber, Ratliff, and Gibson testified that they felt positively about the direction of negotiations at the conclusion of the parties' April 1 meeting. (Tr. 151, 433, 525-526).

altering its position. (Id.). The Union's committee updated the mediator on what had occurred on April 1. (Id.). At this point, the mediator brought the parties together. (Id.). Ratliff questioned Krupin, indicating that the Union had been expecting to hear back from Krupin earlier. (Id., Tr. 155). In response, Krupin said that Respondent was only interested in a three-year collective-bargaining agreement. (Tr. 155, GC 49). Webber, after acknowledging the parties' discussion of April 1 and other open contractual issues, formally proposed a five-year collective-bargaining agreement, with the top rate progression extended over five years. (Tr. 155, 435-436, 565, 777).[26] Krupin asked Webber if the Union was "wedded" to progression. (Tr. 155, 636). Webber said yes. (Id.). Krupin stated that the Respondent's committee was going down the hall to "crunch numbers," and Respondent's committee left the table. (Tr. 155-156, 435, 565).[27]

While the Union's bargaining committee sat in the conference room, under the impression that Respondent's bargaining committee was in a room down the hall analyzing the Union's

[26] Poole testified that Webber did not propose a five-year collective-bargaining agreement with a five-year progression at this session. However, Judge Biblowitz implicitly discredited Poole's testimony on this point, clearly crediting the testimony that Webber in fact proposed a five-year contract with five-year progression. Poole acknowledged that Webber mentioned a five-year collective-bargaining agreement with a corresponding progression at this meeting, but recalled that Webber said that no one was interested in it. (Tr. 635-636, 670-671). Respondent's Human Resources Director, Jodie Kendall, testified, that Webber raised the issue of a five-year collective-bargaining agreement, but that it was "just exploratory" and "nobody was interested in it." (Tr. 732-733). Webber explained that, while he was not a proponent of a collective-bargaining agreement with a longer duration, he was willing to propose it in order to make progress towards reaching agreement, and he, in fact, did so. (Tr. 777-779). Kendall's notes indicate that Krupin responded to Webber's proposal of a five-year collective-bargaining agreement by saying that it was difficult for Respondent to plan for 2015, but that the parties continued to discuss Webber's proposal until Respondent left the conference room. (Tr. 779-780, R 26 p. 2).

[27] Poole testified that Respondent's side requested a caucus before leaving the conference room, but disagreed that Respondent said it needed to "crunch the numbers." (Tr. 698, 719). During the hearing, Respondent did not call Krupin as a witness, though Respondent was represented at the trial by two attorneys from the law firm of Epstein, Becker & Green, P.C., where Krupin is a partner. In its brief to Judge Biblowitz, Counsel for the Acting General Counsel requested that an adverse inference be applied against Respondent for the failure to call Krupin as a witness. See, e.g., Desert Pines Club, 334 NLRB 265, 268 (2005)(discussing adverse inferences). In that case, the Board stated, "The Board has made it clear that in Board hearings the proper inquiry in determining whether an adverse inference may be drawn from a party's failure to call a potential witness is whether the witness may reasonably be assumed to be favorably disposed to that party. Electrical Workers Local 3 (Teknion, Inc.) 329 NLRB 337 (1999). An adverse inference may be drawn regarding any factual question on which the witness is likely to have knowledge and it may be inferred that the witness, if called, would have testified adversely to the party on that issue. The Board has rejected the rationale that if a witness is equally available to both the parties no adverse inference can be drawn if neither party calls him. International Automatic Machines, 285 NLRB 1122 (1987), enfd. 861 F.2d 720 (6th Cir. 1988); Avondale Industries, 329 NLRB 1064 (1999). Here, Respondent should have called Krupin, its lead negotiator and chief speaker in all but one negotiation session, as a witness in this case. The fact that Respondent chose not to do so allows for the inference that Krupin would have testified against the interests of Respondent in this case. Judge Biblowitz did not indicate one way or another whether he applied an adverse inference.

proposal (Tr. 207, 566), Poole decided to end the parties' bargaining session and leave the building, without a word to the federal mediator or the Union's bargaining committee. (Tr. 637, 699-700).[28] At that time, Poole decided to declare an impasse in negotiations. (Tr. 637). During this time, the Union's committee remained in the conference room, discussing proposals that could be modified or withdrawn, including an expensive pension proposal, and waiting for Respondent's side to return to the table. (Tr. 156, 209-211, 217, 219, 436). Eventually, the mediator suggested to the Union's committee that they go eat lunch because "this was going to take a while." (Tr. 156, 436). The Union's committee left for lunch, only to discover that none of Respondent's committee members' cars were in the parking lot. (Tr. 157, 436-437, 567). Ratliff confirmed with the mediator that Respondent's committee had left. (Tr. 436-437, 567). The Union's committee then left. (Id.). After Respondent's team left the FMCS conference room on April 22, Respondent's committee never returned to the room, never informed the Union or the mediator about their plans to leave the session, and did not speak to nor call the Union at any time that day. (Tr. 699).

That afternoon, Krupin sent a letter to Webber, declaring the parties were at impasse and indicating that it would proceed accordingly. (GC 58, Tr. 158-159). Webber responded to Krupin by letter on the same afternoon. (GC 39, Tr. 159-160). In his letter, Webber denied the parties were at impasse, referring to his proposal from earlier in the day and indicating that there were "numerous issues that would have allowed for movement by the Union." (GC 39). Webber added that, at the parties' meeting earlier that day, Respondent indicated that it needed to "'crunch numbers'" to respond to the Union's most recent proposal; Webber stated that he was still waiting for a response from Respondent.[29] (Id.).

The following morning, Friday, April 23, Respondent announced to its employees that it was implementing the terms of its "best" offer. (Tr. 568-569, 639-640, R 22 paragraph 4).

[28] Respondent fails to mention in its brief that Poole made this decision without informing the mediator or the Union.
[29] Krupin and Webber exchanged additional correspondence on April 26 and April 29. (GC 40-41, Tr. 167-170, 213-215).

Consequently, employees reported Respondent's announcement to Webber. (Tr. 161, 570-571). Webber then met with Ratliff and Gibson and informed them of the unilateral action. (Tr. 162, 439, 527). Ratliff decided that Respondent left the Union with no alternative other than initiating a strike to protest Respondent's conduct; Ratliff testified he made the decision because Respondent had violated the law and improperly declared impasse.[30] (Tr. 162-163, 440, 453-455). Ratliff instructed Webber to prepare for, and initiate, a strike. (Tr. 439-440). Shortly thereafter, Webber began preparing for a strike, making picket signs the next morning.[31] (Tr. 164).

On the next workday, Monday, April 26, the Union initiated the strike at Respondent's facility. (Tr. 165). Webber arrived at the facility at 5:30 a.m. with the picket signs, and he told arriving employees of the Union's position—that they were on strike to protest the unfair labor practice committed by Respondent in declaring impasse and implementing the changes on April 23. (Tr. 165-166, 350, 395, 572). Ratliff and Gibson also spoke to the employees, telling them that they were on strike because the Union believed Respondent violated federal labor laws on April 22 and 23.[32] (Tr. 166-167, 440-441). Employees started a picket line in front of Respondent's facility, wearing picket signs that read:

ON STRIKE
DAYCON
UNFAIR – VIOLATES
FEDERAL LABOR LAW
TEAMSTERS
UNION
LOCAL 639
INTERNATIONAL BROTHERHOOD OF TEAMSTERS

(GC 37).

After the Union initiated the strike, Respondent sent letters to its employees, informing them that they had been permanently replaced. (GC 53, GC 66, Tr. 738-739). After the strike began,

[30] The Union, through counsel, filed its unfair labor practice charge specifically addressing Respondent's unilateral changes on April 27. (GC 1-C).
[31] Webber worked through the weekend to prepare for the strike, (Tr. 164), demonstrating that the Union did not make preparations for the strike until after Respondent unilaterally implemented its "best" offer.
[32] Ratliff and Krupin exchanged written correspondence on April 26. (GC 57-58, Tr. 441-443).

Respondent started hiring workers to replace the striking employees. According to Respondent's Human Resources Director, Jodie Kendall, replacement workers were given the same employee information form to complete that any employee completes when hired. [33] (Tr. 739-740, R 29, R 39). Replacement workers were not specifically told to indicate that they were regular full-time employees, but each replacement worker did so. (Id.). Kendall testified that Respondent has treated replacement workers the same as pre-strike employees. (Tr. 740, 745). Finally, Kendall testified that replacement workers were offered health benefits, which, under the expired collective-bargaining agreement, are not offered to temporary employees. (Tr. 745-746, GC 2 p. 34).

Upon their hire, twenty-six replacement workers signed a form acknowledging that they had received Respondent's employee handbook. (GC 65(a)-(y)). This form states as follows:

> I also acknowledge that I am employed as an at-will employee. Accordingly, I recognize and agree that nothing shall restrict my right to terminate my employment at any time and for any reason and nothing shall restrict the right of [Respondent] to terminate my employment at any time or for any reason. I also recognize that any promises of employment for a specified period of time or any exceptions to this policy of at-will employment are not binding upon [Respondent], unless reduced to writing and signed by an officer of [Respondent].
>
> (Id.).

At some point, Respondent voided each of these twenty-six forms. [34] (Id.). Each replacement worker completed a new form that did not include the above-quoted paragraph, but instead included the following:

> If the terms and conditions as outlined in this manual conflict with the terms and conditions as described in the collective-bargaining agreement (CBA) with [the Union], then the CBA controls only for those particular unionized employees.
>
> (Id.).

All but one of these forms were signed October 14 or later.[35]

The Union maintained its strike of Respondent through July 2. (Tr. 170). On that date, Webber sent Krupin an e-mail in which Webber, on behalf of the striking employees, unconditionally offered for all striking employees to return to work on the next business day, July 6.

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[33] Kendall also testified, and Respondent introduced documentary evidence, regarding employment offer letters Respondent has issued; these exhibits indicate Respondent used the same form letter for its job offers, pre-strike and post-strike. (Tr. 784-790, R 37-38).

[34] Kendall testified that the replacement workers were "accidentally" given the "non-union form" characterized by the above-quoted paragraph identifying the individual as an at-will employee. (Tr. 749).

[35] These dates are well after the Consolidated Complaint issued, after Respondent filed its Answer to that complaint and about one month before the hearing in this matter.

(GC 42, Tr. 171). In this same July 2 e-mail, Webber also requested that the parties meet again to continue bargaining. (GC 42). On that same day, Webber went to the picket line and read his e-mail aloud to the approximately 30 striking employees at Respondent's facility. (Tr. 172-173, 397-398). On July 3, Krupin replied to Webber by e-mail, acknowledging receipt of Webber's July 2 e-mail, including "[Webber's] unconditional offer." (GC 43).[36]

On Monday, July 6, employees arrived at Respondent's Upper Marlboro facility, prepared to work. (Tr. 398-399). Respondent did not allow the employees to return to their jobs on that date. (Id.). Respondent did, however, hire two replacement workers on that date. (GC 48 p. 3 [Howard Brown and Arquie Sanford]). On the following day, July 7, Respondent sent letters to four individual employees, acknowledging the Union's unconditional offer for employees to return to work and informing those employees that they had until July 9 to return to work, or Respondent would fill the position with another qualified employee. (GC 67 pp. 1, 5, 7, 10). Respondent subsequently issued similar letters to seven other employees.[37] (Tr. 399-400, GC 67 pp. 2-4, 6, 8-9, 11). Respondent hired another replacement, Reginald Malloy, no earlier than July 12. (GC 48 p.3, GC 69).

On July 13, the parties met at FMCS' office in Washington, D.C. with mediator Eder. (Tr. 176-80, 445-448, 528-531). Krupin indicated that Respondent's position was that the Union had engaged in an economic strike, and it was happy to adjudicate the issue for years. After caucusing, Webber proposed several modifications to his proposal from the parties' April 22 meeting. Webber proposed: (a) a five-year contract with a five-year progression mechanism; (b) a $.10/hour reduction in the employees' annual wage increase (to $.55/hour); and (c) that Respondent begin participating in the Union's pension fund in the fourth year of the contract, rather than the first year. (Id., GC 45).

[36] Subsequently, Webber and Krupin exchanged additional e-mails on July 7-8. (GC 44). Contrary to Webber's contention that the strike was an unfair labor practice strike, Krupin maintained that the strike was an economic strike. In his e-mail, Krupin again acknowledged Webber's unconditional offer of July 2, and represented that, upon receipt of Webber's offer, Respondent notified all employees who had not been permanently replaced that they were welcome to return to work, and that replaced employees would be subject to recall as openings became available. (GC 44).

[37] The parties stipulated at the hearing that employee Robert Redmond received a letter recalling him to work on September 25. (Tr. 401). The letter, dated September 24, states that Redmond had five days from September 24 to return to work, or his job would be offered to another qualified employee. (GC 54).

Krupin rejected Webber's offer and did not modify Respondent's proposal from the parties' February 18 session. (Id.). Respondent also indicated that it would not allow all the employees to return to their jobs. (Id.).

On July 23, Ratliff, in a letter to Krupin, demanded that Respondent rescind its unilateral changes. (GC 59). Since that time, Respondent has maintained its unilateral changes and has refused to rescind them. (GC 48, Tr. 183, 448-449).

B) **Subcontracting**

At various times beginning in December 2009, during the parties' negotiations,[38] Respondent subcontracted certain work on snowthrower machines to Marlboro Mower, Inc. ("Marlboro Mower"). (GC 61-63, GC 70). Marlboro Mower is a company engaged in the business of selling and servicing outdoor equipment, focusing on service work and parts replacement. (Tr. 796). Respondent's relationship with Marlboro Mower typically involves Marlboro Mower selling parts and materials to Respondent for Respondent's repair technicians to make repairs. (Id., Tr. 367).

Bargaining unit repair technicians perform a wide variety of repairs on snowthrowers as part of their assigned work. (Tr. 129, 362-367). The work subcontracted to Marlboro Mower during this period was historically completed by bargaining unit repair technicians. (Id., Tr. 704, GC 60-62, 70). However, Respondent's repair technicians do not perform certain types of work. Repair technicians do not work on pressure washers because of parts issues and the unavailability of manuals to perform the correct repairs. (Tr. 370, 371). Bargaining unit repair technicians do not perform work on propane powered equipment because of liability issues and because of concerns pertaining to carbon monoxide output requiring specific equipment Respondent does not own. (Tr. 370-371). Further, such work requires additional certification. (Id.) Bargaining unit repair

[38] At the time Respondent subcontracted out this bargaining-unit work, the parties were bargaining. Furthermore, in this timeframe, Respondent had proposed what they termed their "best" offer, and the Union had already taken a strike vote, about which Respondent was aware.

technicians do not service equipment under warranty because that work must be completed by the manufacturer, or the warranty is void. (Tr. 654).

Respondent claimed the relevant work was subcontracted because Marlboro Mower refused to sell parts necessary for the snowthrower repairs and because Marlboro Mower allegedly wanted to perform the repairs on the machines. (Tr. 653, 705). However, Christopher Moore, the parts manager for Marlboro Mower, credibly testified that Marlboro Mower did not refuse to sell the parts to Respondent, but rather was willing to sell the parts to Respondent and preferred to do so, rather than being subcontracted the repair work. (ALJD 14, lns. 26-36).

Respondent never informed the Union that this work was subcontracted, nor did Respondent bargain with the Union about subcontracting the snowthrower work typically performed by the bargaining unit repair technicians. (Tr. 129-130, 354-355). Prior to the period during which Respondent subcontracted this work, it had never before done so for the same type of work on snowthrowers. (Id., Tr. 373). There is no record evidence showing Respondent ever had a past practice of subcontracting out this type of work on snowthrowers. During this period, repair shop technicians were only occasionally working overtime hours. (Tr. 379, GC 68).

The parties' most recent collective-bargaining agreement allowed Respondent to subcontract work "where all regular full time employees are working and during period of peak demand and/or in accordance with the employer's past practice, provided that the subcontracting shall not be used as a subterfuge to violate the other provisions of this agreement." (GC 2, p. 3). Among these other provisions was the following provision regarding employees' work week:

> Shop – whenever there is an emergency, road service over 48 hours old, or if the que (total unrepaired equipment in house) goes over seventy five (75), then overtime shall be required and the employer shall assign overtime as necessary to reduce the que below seventy five (75) and/or to complete the repairs as necessary. (GC 2, p. 10).

Despite the supposed demand for snowthrowers during the snowstorms of 2010, much of the work performed on those machines by Marlboro Mower was not completed until months following the storms. (GC 60-62, GC 70).

IV) ARGUMENT

In this case, Respondent unlawfully changed its employees' terms and conditions of employment without first bargaining to a lawful impasse with its employees' chosen collective-bargaining representative. To date, Respondent has refused to rescind these unlawful unilateral changes. After Respondent engaged in this unlawful conduct, its employees exercised their rights under Section 7 of the Act and struck Respondent in protest of its unlawful activity. When the Union chose to end the strike and offered for the employees to unconditionally return to work, Respondent refused to allow all of the employees to return to their jobs.

Respondent was tasked with the burden of establishing not only that it had bargained in good faith with the Union to a point where further bargaining would have been fruitless, but also that it lawfully replaced all of its employees who chose to go on strike. As Judge Biblowitz correctly determined, Respondent failed to meet its initial burden, and thus committed significant unfair labor practices. Similarly, Respondent had the burden of showing that it lawfully subcontracted snowthrower repair work. As Judge Biblowitz correctly found, Respondent failed to meet this burden as well. The Board should reach the same conclusions.

A) **Respondent violated Section 8(a)(5) and (1) of the Act on or about April 23 by implementing its last bargaining offer without first bargaining to a good-faith impasse.**

1) *JUDGE BIBLOWITZ CORRECTLY HELD THAT RESPONDENT DID NOT MEET ITS BURDEN OF ESTABLISHING THAT THE PARTIES WERE AT IMPASSE ON APRIL 22-23.*

An employer with employees represented by a union may not unilaterally change its employees' terms and conditions of employment. When an employer and a union have a collective-bargaining agreement that has expired, the employer generally must maintain the terms of that

agreement until the parties reach a new agreement, or the parties, after bargaining in good faith, reach an impasse in their negotiations. See, e.g., Newcor Bay City Division of Newcor, 345 NLRB 1229, 1237-38 (2005). Such an impasse occurs whenever negotiations reach that point at which the parties have exhausted the prospects of concluding an agreement and further discussions would be fruitless. Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co., 484 U.S. 539, 543 (1988)("A genuine impasse in negotiations is synonymous with a deadlock; the parties have discussed a subject or subjects in good faith, and, despite their best efforts to achieve agreement with respect to such, neither party is willing to move from its respective position."). The party asserting impasse has the burden of proof. North Star Steel Co., 305 NLRB 45 (1991), *enfd* 974 F.2d 68 (8th Cir. 1992). In this case, Respondent has not carried its burden.

In PRC Recording Co., 280 NLRB 615 (1986) *enfd*. 836 F.2d 289 (7th Cir. 1987), the Board adopted the administrative law judge's decision, in which he explained:

> The use of words like 'impasse' or 'deadlock' by the parties, even relating to overall issues, does not necessarily imply that future bargaining would be futile. Builders Institute of Westchester County, 142 NLRB 126, 127 fn. 2 (1963). The determination of whether impasse has been reached, a determination of the mental state of the parties and thus a highly subjective inquiry, Huck Mfg. v. NLRB, 639 F.2d 1176 (5th Cir. 1982), is a strictly factual judgment, Baytown Sun, 255 NLRB 154 (1981)., and bargaining devices or scare words such as 'impasse' or 'deadlock' used by the parties are legal conclusions not binding on the Board. Impasse should not be mechanically inferred because the parties have failed to reach complete agreement after some specified number of bargaining sessions or whenever one party announces that his position is henceforth fixed and no further concessions can be expected, Builders Institute of Westchester County, 142 NLRB 126 (1963) at 127. Moreover, a good-faith impasse may be waived by a change of position, Langlade Veneer Products Corp., 118 NLRB 985, 988 (1957); Pillowtex Corp., 241 NLRB 40 (1979); or by continuous or further bargaining, Good GMC, Inc., 267 NLRB 583 (1983); Pillowtex Corp., ibid. As the court notes in Gulf States Mfg. v. NLRB, 704 F.2d 1390, 1399 (5th Cir. 1983): 'Anything that creates a new possibility of fruitful discussion (even if it does not create a likelihood of agreement) breaks an impasse ... [including] bargaining consessions [sic], implied or explicit.'"
>
> PRC Recording, 280 NLRB at 635-636.

In Grinnell Fire Systems, Inc., 328 NLRB 585 (1999), similar to the facts of the instant case, the Board found no impasse existed. In that case, the party asserting impasse was also the party which foreclosed the possibility of further bargaining. In reaching its conclusion, the Board stated, "we find support for our position in the analytical approach taken by the Board and upheld by courts

in past decisions that have found no impasse despite the fact that one party had asserted that it had reached its final position and the other had not yet offered specific concessions. See, e.g., PRC Recording Co., 280 NLRB at 640 (for impasse to occur, both parties must be unwilling to compromise); Powell Electrical Mfg. Co., 287 NLRB 969, 973, 974, *enfd. as modified*, 906 F.2d 1007 (5th Cir. 1990)(futility, not some lesser level of frustration, discouragement, or apparent gamesmanship, is necessary to establish impasse); D.C. Liquor Wholesalers, 292 NLRB 1234, 1235 (1989), *enfd.* 924 F.2d 1078 (D.C. Cir. 1991)(exhaustion of the collective-bargaining process is required for impasse to exist); Grinnell Fire Systems, Inc., 328 NLRB at 585.

A careful look at the whole of the parties' negotiations makes clear that further bargaining would not have been futile past April 22. At the outset of the parties' first meeting in November, Respondent threw out the vague, generalized concept of some sort of productivity-based compensation but provided no concrete proposal as to how such a system would function. The Union rejected this concept outright. During their next meeting, the Union made an economic proposal consistent with the parties' past wage schemes, both in the 2001-2003[39] and the expiring 2007-2010 collective-bargaining agreements. At the next meeting on December 15, Respondent failed to make an economic counteroffer, instead repeating the idea of a productivity-based system while still neglecting to define such a model in any substantive way which would allow legitimate consideration. It was not until the January 19 meeting that Respondent gave the Union an economic proposal. Yet even that proposal omitted a clear description of the metrics upon which performance would be measured, instead merely outlining vague, general benchmarks which allowed an employee to "be eligible to receive an annualized bonus payment of up to 3% of their base hourly earnings." (GC 16). Poole admitted that, as of this session, Respondent's proposal still did not include a definition of the concepts at the core of this dramatically new system it was proposing and

[39] The collective-bargaining agreement covering this period had a three-year progression similar to that proposed by the Union during the 2009-2010 negotiations. (Tr. 595-96, 658, GC 63 pp.13, 35). The Union's initial economic proposal was reasonable and consistent with the parties' history of bargaining, indeed far more consistent than the dramatic departure to productivity-based wages suggested by Respondent.

that Krupin made clear that the criteria used in this proposed performance-based system was still not concrete.[40] The Union continued to reject Respondent's murky approach to wages, maintaining its interest in traditional means of compensation used by the parties.

The sixth meeting, on January 29, began with Respondent proposing the same ill-defined performance-based system from earlier meetings. The Union again rejected the proposal, causing Respondent to withdraw it. In its stead, Respondent, for the first time since bargaining began, offered an economic proposal with concrete details which allowed for actual wage calculations. This proposal, designed to close the gap between employees in progression and those at top rate, is conceptually similar to the approach to wages advocated by the Union. This shows there was no ideological divide between the parties. Once this conceptual "Rubicon" was crossed, the only remaining difference between the parties was the amount of money paid to employees. Respondent was finally offering substantive economic proposals, and those proposals were moving closer to the Union's economic proposal. Noticing its strategy was effective, the Union rejected Respondent's proposals, adhering to its December 9 proposal. The Union's commitment to the traditional wage system used by the parties resulted in considerable movement by Respondent, without the Union needing to adjust its position on issues most important to it in negotiations. (Tr. 691).

During the next meeting, February 18, the parties made more progress towards agreement. Respondent revised its economic proposal, and, in response, the Union modified its proposal and withdrew a number of significant economic proposals, illustrating its flexibility. Later during this session, Respondent further modified its wage proposal, this time characterizing it as Respondent's

[40] While Respondent highlighted general criteria for rewarding certain employee performance aspects, it still neglected to define critically important measurement concepts incorporated in the proposal, such as "employees shall be eligible to receive an annualized *bonus* of up to 3%" of base hourly earnings" and "accepted industry standards." (GC 16, italics supplied, underlining added). What the proposed standards were for how an employee could reach 3% or what "up to" means in the context of the proposal was never defined nor explained during bargaining. Poole admitted that the proposed bonus would be somewhere on a "continuum" from zero to three percent, but that continuum was never defined during bargaining or in Respondent's proposals. (Tr. 678-681). Additionally, Poole testified during GC's cross examination that Respondent was "just simply broad brushing [the performance-based proposal]" and that the proposal did not set forth what "accepted industry standards" would include. (Tr. 680-681). Poole further testified that, during the January 19 meeting, Krupin said Respondent had not "flushed out" the performance-based metrics involved in Respondent's economic proposal. (Id.).

"best" offer.[41] Such a characterization was highly premature—Respondent made its "best" offer at the session immediately following the session in which Respondent had made its "first" concrete economic proposal.

At the critical off-the-record April 1 meeting, both parties made significant movement toward reaching an agreement.[42] The Union made the first move, offering a four-year contract with a four-year progression, thus spreading the cost of the proposal out over additional years to make the proposed increases more palatable for Respondent. Respondent countered that concept with the "contract rate" concept. This concept continued to bring the parties closer together. Respondent's earlier proposals acknowledged the need to offer some variety of catch-up for employees in progression, but this idea was even closer to the Union's vision for the wage structure. The "contract rate" concept embraces the notion that those in progression ultimately need to reach the top rate during a finite period, thereby eliminating the gap existing between the two classes of employees. Again, with Respondent adopting this approach, there was no ideological divide between the parties, only a financial one.[43] Once the remaining issue was merely financial, and recognizing Respondent's "best" proposal was targeted at an amount less than Respondent's own internal financial targets, it cannot be concluded that Respondent was at the "end of its rope." Seeing the potential for agreement, the Union did not reject Respondent's proposal; instead, it suggested a five-year contract with a five-year progression, even further dispersing the cost of the increases over time. Respondent did not reject the Union's suggestion, but instead said it would "crunch the

[41] Interestingly, Respondent never called their February 18 proposal its "last, best and final offer," the term used to describe a parties' offer from which no further movement is possible. Respondent instead called this proposal its "best" offer. Poole admitted that Respondent's best offer was only "approaching" the 3% mark on this contract. Poole testified that Respondent would consider a 4% increase for this contract or even a 5% increase if performance-based compensation was used. Respondent's own testimony illustrates its "best" offer was below its own economic target.
[42] While this meeting was "off-the-record," the parties engaged in real bargaining, exchanging clear ideas of how the parties could reach an agreement.
[43] As will be discussed *infra*, Respondent's "contract rate" suggestion, as well as its prior two-tiered wage proposals, doom its argument that the parties had a "philosophical" disagreement on a conceptual approach to wages. Rather, the parties merely disagreed about how much employees would get paid—their disagreement was financial, not conceptual.

numbers" and get back to the Union. In light of the significant progress towards reaching agreement on wages, the Union left feeling positively about the prospects of finalizing the contract.

During the April 22 meeting, the parties revisited their discussions from the April 1 meeting. Webber, recognizing the April 1 meeting was technically off-the-record, formally proposed the five-year contract with a five-year progression. Krupin responded to the Union's five-year proposal, saying Respondent's team was going down the hall to "crunch the numbers."[44] Respondent represented to the Union it was going to analyze the Union's proposal, leaving the Union with the impression that there would be additional opportunities to bargain. While the Union's contingent was in the conference room, they discussed other proposals they were willing to withdraw or modify. (Tr. 209, 435-436). The Union was prepared, and expected, to bargain all day on April 22. Thanks to Respondent's rashness, it never got that opportunity.

Rather than walking down the hall to the bargaining table, Respondent snuck away and fired off a terse letter unilaterally declaring impasse. (GC 38). Webber responded, denying the parties were at impasse.[45] In doing so, Webber referenced his proposal from earlier that day and indicated the Union was flexible, noting that there were "numerous issues that allowed for movement by the Union." (GC 39). Respondent has attempted to contort Webber's letter, seeking to recast it as saying something other than it does. Yet Webber made clear in his letter that the parties were not at impasse, and that the Union made reasonable proposals during the April 22 meeting that Respondent

[44] At numerous times during bargaining, Respondent represented it needed to "crunch the numbers" or "cost out" a proposal made by the Union. Each time Respondent did this, Respondent returned to the bargaining table to discuss the proposal being considered. At the conclusion of the November 4, 2009 meeting, Krupin requested the Union's economic proposals, which was followed by Rosenberg's November 16, 2009 letter requesting the same so Respondent could assess the financial impact of the proposals. (Tr. 659-660, GC 5 p. 2, GC 7). During the December 9, 2009 meeting, Krupin told Webber that Respondent needed to "cost out" the Union's economic proposal. (Tr. 76, 661, GC 9). At the parties' December 15, 2009 session, Rosenberg responded to the Union, explaining that Respondent had analyzed the Union's proposal. (TR. 78-79, GC 11 p. 1). At the end of the parties' April 1 meeting, Krupin told the Union Respondent would "crunch the numbers" on the Union's proposals, after which the parties again met on April 22. (Tr. 149, 204-205, 432, 525-526, 634). Thus, when Krupin said on April 22 that Respondent would "crunch the numbers" on the Union's five-year proposal, the Union justifiably expected that Respondent would return to bargain, as it had every other time it made these types of statements.

[45] Webber is not an attorney and, as noted above, "the use of words like 'impasse' or 'deadlock' by the parties, even relating to overall issues, does not necessarily imply that future bargaining would be futile." Builders Institute of Westchester County, 142 NLRB 126, 127 fn. 2 (1963).

said it would analyze, thus giving the Union the impression it had further opportunities to bargain. Contrary to Respondent's argument, Webber's letter does *not* indicate the Union's inflexibility, but rather highlights that it was the Union which modified its position on that date, and Respondent which aborted the parties' negotiations. The Union obviously did not believe the parties were at impasse; they believed Respondent would respond in bargaining to the Union's April 22 proposal.

In sum, when the parties met on April 22, Respondent gave the Union the impression that it would be evaluating the Union's proposal of a five-year collective-bargaining agreement with a five-year progression. The Union's proposal alone indicates that the parties were still engaged in legitimate negotiations, and not deadlocked. This proposal demonstrated the Union's flexibility and willingness to compromise. Furthermore, the Union was prepared to modify its proposals (such as its pension proposal), if given the opportunity to continue the parties' negotiations. But rather than return to the bargaining table and continue bargaining with the Union, Respondent abruptly terminated the bargaining process and unilaterally changed employees' terms and conditions of employment the following day. As Judge Biblowitz correctly concluded, Respondent did not meet its burden of proving that both Respondent and the Union were at the ends of their respective bargaining "ropes," and that the parties were at impasse.

In Taft Broadcasting Co., 163 NLRB 475 (1967), the Board analyzed the existence of impasse using five factors: the bargaining history of the parties, the length of the negotiations, the importance of the issues to which there is disagreement, the good faith of the parties, and the contemporaneous understanding of the parties. Examining each of these factors in turn, the record evidence weighs, as Judge Biblowitz correctly found, *against* a finding of impasse.

First, the parties' history reveals that past negotiations were frequently challenging. According to Poole, the parties had a history of negotiating "until we past the contact expiration date and sooner or later after much posturing we come up with a deal." (R 20). This factor weighs against a finding of impasse. Second, the length of negotiations also shows the parties were not at

impasse. Although negotiations lasted from November 2009 through April, the period is, in reality, even shorter. Respondent did not even begin making concrete economic proposals until January 29. Then, at the very next meeting on February 18, Respondent claimed their economic proposal was their "best" offer. On April 1, the parties made extensive progress toward reaching an agreement, both moving substantially from their earlier proposals. On April 22, Respondent prematurely abandoned negotiations, a mere four meetings from making its first sincere economic proposal.

Regarding the third factor, the wage issue was undisputedly among the most important issues, if not the most important, in these negotiations. However, at the April 1 meeting, the parties had a breakthrough, both using wage concepts which addressed the need to "catch up" employees to a top rate in a finite period. The parties were headed in the same direction, as illustrated by the Union's optimism following that meeting. In addition to the positive movement established in the April 1 meeting, there were many other significant issues still on the table including, *inter alia*, the Union's non-economic issues, the economic distress clause, and the Union's pension proposal.

Examining the fourth factor of the parties' good-faith in negotiations, although there were no complaint allegations that either side bargained in bad faith, the record evidence indicates that this factor leans against finding impasse. Respondent, by making half-hearted economic proposals for the majority of the period it bargained, slowed the pace of the parties' negotiations. Respondent "postured" for the first five meetings by asserting a wholly unprecedented approach to wages while refusing to make specific proposals about what that system would include. When Respondent finally made an actual economic proposal, it almost immediately termed it their "best" offer, declaring impasse soon after that. This factor weighs against the existence of impasse.

Finally, the contemporaneous understanding of the parties is where Respondent's claim of impasse ultimately breaks down. As noted above, the Union clearly did not believe the parties were at impasse. The Union was in the process of making proposals and had additional modifications it was waiting to offer Respondent upon their return to bargaining. Undisputedly, Respondent snuck

out of the bargaining session and declared impasse, thus aborting the negotiations and preventing further movement. The Union was shocked by Respondent's declaration of impasse and, immediately upon receiving Krupin's April 22 letter, Webber notified Respondent that the Union did not believe the parties were at impasse. While Respondent might have felt the parties were at impasse, the Union clearly did not; thus, this final factor weighs against a finding of impasse.

In light of the high bar required by Board law to establish impasse, and the need for the parties to both be "at their end of their ropes," Judge Biblowitz correctly found that Respondent failed to meet its burden of establishing impasse. The Union demonstrated its flexibility and willingness to compromise at various times during negotiations, especially on April 1 and April 22. The Union was awaiting word back from Respondent about its evaluation of the Union's April 22 proposal and was prepared to further demonstrate its willingness to compromise upon Respondent's return to bargaining. Throughout bargaining prior to April 22, Respondent frequently indicated it needed to "analyze," "cost out," or "crunch the numbers" on a Union proposal, each time returning to the table allowing the Union an opportunity to respond. The Union had every reason to expect that would be the case on April 22. On that day, the Union held its modified proposals in hand, ready to discuss them when Respondent returned. The Union never got this chance. Respondent, by sneaking out of negotiations on April 22 and prematurely terminating the bargaining process after ***they*** created the impression the Union would have additional opportunities to bargain, robbed the Union of the opportunity to modify its proposals, which it stood ready to do. The Union clearly was not at the end of its rope; it had numerous proposals left to discuss with Respondent, as evidenced during the Union's caucus in the April 22 meeting and its proposals during the July 13 meeting. On April 22, the Union did not believe the parties were at impasse, and the Union denied the existence of an impasse in Webber's April 22 letter to Krupin. Even Respondent failed to show they were at the end of their rope; to the contrary, it acknowledged that its "best" offer was only "approaching 3%," thus that there was significant room for movement towards the 4% or 5% increase Respondent

had targeted prior to the negotiations. Thus, Judge Biblowitz correctly held that Respondent violated the Act by prematurely declaring impasse and implementing its terms without first bargaining to a good-faith impasse.

2) *RESPONDENT'S ARGUMENTS ON EXCEPTIONS ARE MERITLESS.*

Predictably, Respondent spends the bulk of its argument attempting to overcome Judge Biblowitz's well-supported finding that Respondent did not meet its burden of proving that the parties were at impasse on April 22-23. However, Respondent's argument does not hold weight. Respondent's argument is, essentially, a credibility-based argument—that Judge Biblowitz erred by crediting the ample evidence that Webber proposed a five-year contract, with progression spread over five years, on April 22. Beyond its weak credibility-based argument, Respondent is left to mischaracterizing record evidence while ignoring the undisputed facts that is so damning to its case—it gave the Union the impression that it was considering the Union's proposal, then it foreclosed further bargaining by sneaking out of the bargaining session and announcing impasse by letter. Thus, the Board should reject Respondent's arguments and reach the same conclusion as Judge Biblowitz—that Respondent failed to establish that a lawful bargaining impasse privileged it to unilaterally change its employees' terms and conditions of employment.

Respondent's principal argument as to why the parties were at impasse is that Judge Biblowitz erred in a key credibility resolution. However, Respondent falls far short of meeting the Board's test for reversing a credibility determination. The Board's established policy is *not* to overrule an administrative law judge's credibility determinations unless a clear preponderance of the relevant evidence indicates that the administrative law judge's determination was incorrect. Standard Dry Wall Products, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). The record indicates that a preponderance of evidence supports Judge Biblowitz's determination.

Webber, Ratliff and employee Eugene Brown all testified that Webber proposed a five-year contract and five-year progression during this meeting. (Tr. 155, 453, 565, 777). Krupin,

Respondent's lead negotiator, did not appear to testify at the hearing.[46] Furthermore, Poole and Kendall both acknowledged that Webber discussed the five-year contract proposal during this meeting. Kendall's notes of the meeting corroborate this point, as they indicate the parties clearly discussed Webber's five-year proposal. (R 26). Though Poole and Kendall claimed that Webber did not actually offer the five-year concept as a formal proposal, they testified that Webber mentioned that no one wanted such a contract. Hardly an indication that Webber did not propose a five-year contract on April 22, the testimony Respondent relies on supports the position that the Union was going against its preferences in order to reach an agreement. Regarding that portion of the meeting, Webber testified that he reiterated, at the parties' April 22 meeting, the position he had on April 1—that while he did not want to propose a contract with a longer duration, he was willing to do so to try to reach an agreement. (Tr. 777-778). Judge Biblowitz clearly credited the evidence that Webber, in fact, suggested a five-year collective-bargaining agreement and five-year progression, as he referred to the flexibility the Union demonstrated at the parties' April 22 meeting. Respondent, through its close readings of Webber's subsequent letters (which Webber explained) and inferences from the post-implementation bargaining session, has not come close to demonstrating to the Board that a preponderance of record evidence indicates Judge Biblowitz was incorrect. Thus, for all Respondent's mischaracterization and bluster that the Union never wavered in its proposals, the credited record evidence indicates precisely the opposite: the Union materially modified its proposal during the parties' April 22 meeting, and was willing to further change its proposals had Respondent not snuck out and declared impasse by letter.

Assuming Webber's five-year proposal of April 22 occurred, Respondent additionally mounts the same argument that failed to pass muster with Judge Biblowitz: that the parties had an irreconcilable "philosophical" difference regarding the concept of employees' wages. The Board

[46] As noted above, the Counsel for the Acting General Counsel requested that Judge Biblowitz draw an adverse inference against Respondent for Krupin's failure to testify.

should summarily reject this argument, which is not even consistent with Respondent's own proposals. Respondent's "contract rate" suggestion and its prior two-tiered wage proposals demonstrate that the parties had no such "philosophical" disagreement on a conceptual approach to wages. Rather, the parties merely disagreed about how much employees would get paid—their disagreement was financial, not conceptual. Additionally, the parties maintained wage progression to the top wage rate in three years in their collective-bargaining agreement which expired on December 31, 2003. Although wage progression went away for a three-year stretch between 2004 and 2007, the parties agreed to "catch up" raises in their 2007-2010 collective-bargaining agreement, clearly as a means of having employees who were not at the top rate "progress" towards their better-paid peers. Furthermore, Respondent, through its "two-tiered" wage proposals, was more than happy to continue a process by which lesser-paid employees got larger raises to progress towards the top rate, contrary to its disingenuous argument that it had a "philosophical" desire to reward its most-senior employees. Ultimately, Respondent's suggestion of a "contract rate" that employees could progress to within three years illustrates the weakness of Respondent's "conceptual" argument. The parties simply disagreed about how much employees would get paid.

Respondent is equally unsuccessful in its specious argument that the parties were at impasse because the Union never actually conveyed to Respondent the additional areas where the Union was willing to move. There is an easy explanation: the Union never got that chance because Respondent snuck away from the meeting and aborted the bargaining process by declaring impasse.[47] Notably, Respondent chooses to avoid this undisputed fact in its brief to the Board, although it is a key component of Judge Biblowitz's holding that there was no lawful impasse. Rather, Respondent

[47] Respondent's further arguments—that the Union's willingness to move is speculative and unsupported by evidence—are nothing but inflammatory. First, there is evidence to support the Union's willingness to move, namely, the testimony regarding what took place during the Union's caucus of April 22. Second, Respondent's counsel was free to make any objection he wished regarding this testimony, but he failed to do so. Finally, as mentioned above, Respondent prevented the Union from actually presenting the modifications the Union was prepared to make by sneaking out of the bargaining session. While Respondent characterizes the meeting as unproductive, it fails to mention its responsibility for that unproductiveness—there was no further progress because Respondent left and declared impasse.

chooses to insult the reasoning of an administrative law judge. Rather than a "silly claim" that "has the intellectual weight of a feather," Judge Biblowitz's decision focuses on one particular factor in the analysis of whether parties are at a lawful impasse: the contemporaneous understanding of the parties. While Respondent may have felt that it was at the end of its bargaining rope (though Poole admitted that Respondent had not yet reached its own budgeted economic figure),[48] the Union clearly did not understand that the parties were at impasse on April 22, and made its feelings known to Respondent. Respondent acted at its own peril the following day when it *chose* to unilaterally change its employees' terms and conditions of employment, over the Union's protestations that the parties were not at impasse.

Respondent's citations to prior Board cases hardly demand that the Board reverse Judge Biblowitz's finding that the parties were not at impasse. CalMat Co., 331 NLRB 1084 (2000), is clearly distinguishable on its facts. In that case, the parties had engaged in much more substantive discussions about the issue separating them (a fixed contribution rate for employees' pensions), and agreed at the bargaining table that they were "hung up" on the issue. Id. at 1093. Furthermore, neither side presented any change to its proposal on that issue at their last bargaining session prior to the employer's unilateral implementation, and each side represented to the other that it was not modifying its proposal. Id.[49] Of course, no such discussions took place between the parties to the instant case on April 22; furthermore, the Union modified its position and disputed that the parties were at impasse. Times Herald Printing Co., 223 NLRB 505 (1976), similarly dealt with heftier body of negotiations between the employer and the union than is involved in the present case, with a clear entrenchment of the parties' positions on the issue separating them (a manning requirement);

[48] The fact that Respondent's February 18 offer was less than the figure Respondent had budgeted for employees' raises prior to the negotiations makes plain that Respondent's "best" offer was anything but. Furthermore, Respondent's "contract rate" suggestion of April 1, while not a formal proposal, suggests that Respondent's February 18 offer was anything but a "last, best, and final" offer.

[49] The parties in United States Sugar Corp., 169 NLRB 11 (1968) similarly indicated to each other that it was not willing to move; in contrast, the present case involves no such facts. Rather, the Union modified its position, and was ready, willing, and able to continue modifying its position on April 22.

also, when presented with the employer's final offer, the union did not make any movement, in direct contrast to the Union's modified proposal of April 22. Finally, Respondent's reliance on Bell Transit, 271 NLRB 1272 (1984), *reversed and remanded,* 788 F.2d 27 (D.C. Cir. 1986) is disturbing. On its facts alone, Bell Transit is distinguishable—it dealt with an employer who was pressured by its sole customer to cut employees' wages, a fact which the employer repeatedly cautioned the union about in bargaining, given that it went to the employer's very existence. Yet shockingly, Respondent fails to mention that the Board's Bell Transit decision was reversed and remanded; the D.C. Circuit found the Board's conclusion of impasse "completely unsupportable." 788 F.2d at 28.

In sum, Respondent has advanced no viable argument, either factual or legal, for the Board to reverse Judge Biblowitz's finding that Respondent did not establish that the parties were at impasse on April 22-23, and that Respondent's unilateral changes of April 23 violated Sections 8(a)(5) and (1). After this initial legal issue is concluded, Respondent's other violations of the Act fall like dominoes.

B) **Respondent violated Section 8(a)(5) and (1) of the Act on by refusing to rescind the unilateral change of implementing its last bargaining offer.**

Falling first after the Section 8(a)(5) violation for Respondent's unilateral change is its refusal to rescind those changes. Judge Biblowitz found the violation, and Respondent advances no reason for Judge Biblowitz's finding to be reversed, short of its arguments on its unilateral implementation. The record is clear, and there is no dispute, that Respondent is still operating under the terms it unlawfully implemented on April 23. Respondent admitted this in their Answer. (GC 1-R). Having established the parties were not at impasse, Respondent's implementation was unlawful, as is its refusal to rescind that change. The Board should adopt Judge Biblowitz's finding that Respondent thus violated Section 8(a)(5) and (1) of the Act.

C) **The strike which began on April 26 was caused by Respondent's unfair labor practices and was prolonged by the unfair labor practices of Respondent.**

With ample factual and legal grounds supporting Judge Biblowitz's finding that the Respondent committed an unfair labor practice on April 23 by unilaterally changing its employees' terms and conditions of employment without first bargaining to a good faith impasse, there was "little doubt" in his mind that the strike which began on the next working day was an unfair labor practice strike, caused or prolonged by Respondent's unfair labor practice of April 23. To determine whether a strike is an unfair labor practice strike, the Board looks to whether the strike has been caused in whole or in part by an unfair labor practice committed by the employer. Child Development Council of Northeast Pennsylvania, 316 NLRB 1145, 1145-46 (1995), *enfd.* 77 F.3d 461 (3rd Cir. 1996); Citizens National Bank of Willmar, 245 NLRB 389, 391 (1979) *enfd. mem.,* 644 F.2d 39 (D.C. Cir. 1981). As long as an unfair labor practice has "anything to do with" causing a strike, it will be considered an unfair labor practice strike. NLRB v. Cast Optics Corp., 458 F. 2d 398, 407 (3rd Cir. 1972), *cert. denied,* 419 U.S. 850 (1972). That a strike may also have economic objectives does not change its status from an unfair labor practice strike to an economic strike. NLRB v. Fitzgerald Mills Corp., 313 F.2d 260, 269 (2d Cir. 1963), *cert. denied* 375 U.S. 834 (1963). The employer's unfair labor practice does not have to be the sole cause or even the major cause or aggravating cause for the strike; it is sufficient if the unfair labor practice is a contributing factor. Teamsters Local 515 v. NLRB, 906 F.2d 719, 723 (D.C. Cir. 1990), *cert. denied* 498 U.S. 1053 (1991); RCG (USA) Mineral Sands, Inc., 332 NLRB 1633, 1633 (2001), *enfd.* 281 F.3d 442 (4th Cir. 2002).

In this case, the record shows that the employees' strike was triggered by Respondent's unlawful changes to the employees' terms and conditions of employment on April 23, thus clearly establishing that the employees were engaged in an unfair labor practice strike. The Union decided to implement the strike the next business day after Respondent committed the unfair labor practice

of unilaterally changing employees' terms and conditions of employment on April 23. Although employees voted in February to authorize a potential strike, the Union did not act on that authorization at that time, but instead continued to bargain for a new agreement. Throughout this time, the employees continued to work under the terms and conditions of employment from the expired collective-bargaining agreement, and the Union did not initiate a strike. Not until Respondent prematurely terminated the parties' bargaining and unilaterally changed employees' terms and conditions of employment did the employees respond with a strike.[50] Thus, there is a clear temporal nexus between the unfair labor practice and the strike protesting the unlawful conduct. Further, since the strike began on April 26, the Union consistently stated that it is an unfair labor practice strike. The Union orally communicated as much to the employees on April 26, and the picket signs state that the strike is to protest Respondent's unfair labor practice. Thus, the record supports a conclusion that this was an unfair labor practice strike.

Respondent's arguments to the contrary are meritless. First, Respondent attempts to argue that the temporal nexus is insufficient to establish that the strike was an unfair labor practice strike. However, the temporal nexus is only one element establishing the causal connection between Respondent's April 23 unfair labor practice and the unfair labor practice strike that began on the next working day. Not only has the Union consistently stated that the strike is an unfair labor practice strike, Ratliff testified directly that he called for the strike because of Respondent's unfair labor practice, and Webber, Ratliff, and Gibson all testified about speaking to employees about the strike as the employees arrived to work on April 26. Undisputedly, a significant number of these employees exercised their Section 7 rights and went on strike to protest Respondent's unfair labor practices, wearing signs that clearly indicated the nature of the strike. There could be no more direct evidence that the strike was caused by Respondent's unfair labor practices. The Board should thus

[50] Webber worked over the weekend before the strike in order to prepare for the action, illustrating the Union did not expect the need to strike was imminent and that it was only after the Union learned of Respondent's unlawful implementation that the Union began preparing for the strike.

reach the same conclusion as Judge Biblowitz—there is no doubt that the strike was an unfair labor practice strike.

D) **Respondent violated Section 8(a)(3) and (1) of the Act since on or about July 6 by refusing to reinstate employees after the Union made an unconditional offer for those employees to return to their former positions of employment.**

Once the domino of the unfair labor practice strike falls, the domino of Respondent's further violation of refusing to reinstate the unfair labor practice strikers falls as a matter of course. Unfair labor practice strikers are entitled to prompt reinstatement upon their unconditional offer to return to work, even if the employer must discharge replacement workers in order to reinstate them. Mastro Plastics Corp., v. NLRB, 350 U.S. 270, 278 (1956). On July 2, the Union made a written, unconditional offer to Respondent for the striking employees to return to their jobs on the next business day, July 6. On that day, employees attempted to return to work, but Respondent did not allow the employees to return to their jobs. With the strike established as an unfair labor practice strike, the striking employees were entitled to reinstatement as of July 6, and Respondent's failure to immediately reinstate them on that date violates Sections 8(a)(3) and (1).[51]

Respondent's lone argument on this issue is that Webber's July 2 offer was not unconditional. Just as Judge Biblowitz evaluated this argument, the Board should similarly find it to be "easily disposed of." Webber's July 2 e-mail plainly includes an unconditional offer for

[51] Having correctly determined that the employees were engaged in an unfair labor practice strike and unlawfully prohibited from returning to work following Webber's July 2 unconditional offer for the employees to return to work, Judge Biblowitz did not pass on the Counsel for the Acting General Counsel's contention that Respondent failed to establish the affirmative defense that it had permanently replaced the striking employees. The extent of Respondent's evidence that it had hired permanent replacement workers consists of: (1) indicating to the striking employees that they had been permanently replaced; (2) using the same forms (employee information forms and employment offer letters) as it had used prior to the strike; (3) treating the replacement workers as it had treated employees prior to the strike; and (4) having replacement workers initially fill out the "non-union" at-will employee form, and then correcting those forms to the "union" form well after the Consolidated Complaint issued. In particular, Respondent's sleight of hand with regard to the forms describing the replacements' employment relationship with Respondent reveals the temporary nature of this arrangement. Respondent's late effort to cure its offering the replacements the "wrong" at-will form (which conferred temporary status on the replacements), illustrates their treatment as non-permanent replacements. Further, Kendall testified that these replacement workers had not been told that they were regular full-time employees, failing to show a mutual understanding between Respondent and the replacements. Inexplicably, Respondent hired three "replacement" workers on or after Webber's July 2 offer (GC 48, p. 3; GC 69), and four of Respondent's employees were given a legally insufficient period of time to respond to Respondent's letter recalling them to work. (GC 67 pp. 1, 5, 7, 10). See Murray Products, Inc., 228 NLRB 268 (1977)(indicating a discriminate has a fundamental right to a reasonable time to consider an offer to return to work).

employees to return to work, and a wholly separate request for bargaining. (GC 43). Furthermore, Respondent has, on numerous occasions, acknowledged Webber's unconditional offer. Its experienced counsel, Jay Krupin, certainly did so in his subsequent correspondence with Webber, as has its own human resources personnel in recalling individual employees to work. (GC 44; 67). Thus, the Board should view this argument from Respondent with extreme prejudice, and adopt Judge Biblowitz's finding that Respondent's failure to reinstate unfair labor practice strikers on July 6 violated Sections 8(a)(3) and (1).[52]

E) **Respondent violated Section 8(a)(5) and (1) of the Act since in or around December 2009 by subcontracting snowthrower repair work.**

Finally, the Board should reject Respondent's argument that Judge Biblowitz erred in finding that it violated Sections 8(a)(5) and (1) by unilaterally subcontracting unit work. It is well-settled that an employer violates Section 8(a)(5) and (1) by unilaterally transferring work to non-unit employees that is of the type which the bargaining unit would have expected to perform. S-1 Fire Protection, 273 NLRB 964, 965 (1984), *aff'd* Road Sprinkler Fitters Local No. 669 v. NLRB, 789 F.2d 1363 (D.C. Cir. 1986). As this issue involves reassignment of unit work, it is a mandatory subject of bargaining Geiger Ready-Mix, 315 NLRB. 1021, 1023 (1995); Mid-State Ready Mix (Torrington Industries), 307 NLRB 809 (1992); accord, Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203 (1964). As a result, an employer's unilateral change regarding the diversion of bargaining unit work to non-unit workers is clearly a violation of Section 8(a)(1) and (5) of the Act. *See* Bath Iron Works, 345 NLRB 499, 500 (2005) (any unilateral change affecting a mandatory subject of bargaining constitutes an attempt to modify the agreement, in violation of Section 8(a)(5)).

Respondent does not dispute that it subcontracted the snowthrower repair work, or that the repair work was of the type that was traditionally performed by bargaining unit employees.

[52] The Board should reject Respondent's argument that Judge Biblowitz erred by excluding some of its exhibits on relevancy grounds. It is plainly within the duties of Judge Biblowitz to regulate the course of trials, including curtailing lines of inquiry. National Labor Relations Board: Bench Book, Sec. 2-300. Judge Biblowitz was correct in excluding Respondent's irrelevant exhibits. Moreover, even assuming *arguendo* the evidence was relevant, Judge Biblowitz had the discretion to exclude evidence that had scant probative value. Id. at Sec. 13-102.

Furthermore, the record evidence clearly shows this work was performed by the bargaining unit, and that there is no past practice of subcontracting such work on snowthrowers.[53] There is no dispute that Respondent did not, at any time, notify or bargain with the Union about subcontracting this work. In light of these facts, Respondent bears the burden of establishing its actions were lawful. Respondent fails to meet that burden.

Critically important is Respondent's untruthful claim regarding its decision to subcontract the snowthrower repair work. Poole testified that Respondent subcontracted this work because Marlboro Mower supposedly refused to sell parts to Respondent and that Marlboro Mower demanded to perform the repair work themselves. (Tr.653) Moore, Marlboro Mower's parts manager,[54] testified in direct contradiction to Poole, explaining that ***Respondent*** asked Marlboro Mower to perform the work, that Marlboro Mower did not refuse to sell parts to Respondent, that Marlboro Mower did not insist on doing this repair work, and that Marlboro Mower prefers not to perform such work for Respondent. (Tr. 797-798). Moore also testified that Marlboro Mower has not performed any other repair work for Respondent since completing the work on the snowthrowers. Judge Biblowitz credited Moore over Poole, and Respondent has advanced no basis on which to reverse this credibility determination.

Respondent's exceptions key on the initial subcontracting clause from the parties' collective-bargaining agreement, in that Respondent claims it had a past practice which permitted it to unilaterally subcontract the snowthrower repair work. However, Respondent failed to establish it had *ever* subcontracted this type of work, let alone that it had a past practice of doing so. More significantly, Respondent fails to acknowledge the import of the whole subcontracting clause—namely, that it not be used as a subterfuge to violate other provisions in the contract, such as the clause requiring mandatory overtime. While Respondent claims the repair shop employees were

[53] Respondent argues that there were some instances where other types of work were subcontracted. There is no record evidence that the type of work at issue here has ever been subcontracted by Respondent.
[54] As parts manager, Moore maintains the parts department, waits on customers, supplies parts to customers and supplies the service department with parts. (Tr. 795).

working mandatory overtime and lost no overtime by its subcontracting, the record evidence indicates the repair shop employees were *not* working mandatory overtime in the relevant timeframe in accordance with the terms of the expired agreement. (GC 68). While Respondent also appears to argue on exceptions that it was privileged to subcontract the unit work because it was in a period of peak demand, the record evidence indicates just the opposite: that many of the snowthrowers were brought to Respondent in December 2009, but that Respondent did not bring those machines to Marlboro Mower until March and did not even pick up those machines from Marlboro Mower until May and June. (GC 60-62, 70). Any argument that this was a period of peak demand is betrayed by Respondent's complete lack of urgency and failure to use its available workforce to complete the repairs. Thus, the Board should reject Respondent's exceptions on this point, and adopt Judge Biblowitz's finding that Respondent violated Sections 8(a)(5) and (1) by unilaterally subcontracting bargaining unit work.

V) REQUEST FOR EXPEDITED DECISION

In light of the Board's authorization of Section 10(j) proceedings in this case and the pendency of those proceedings in the United States District Court for the District of Maryland, Southern Division, the Counsel for the Acting General Counsel respectfully requests an expedited decision in this case.

VI) CONCLUSION

For the foregoing reasons, the Counsel for the Acting General requests that the Board adopt the findings and conclusions of Judge Biblowitz that Respondent violated the National Labor Relations Board in the various ways noted above.

Dated at Baltimore, Maryland, this 29th day of March 2011.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed this Counsel for the Acting General Counsel's Reply Brief to Respondent's Brief in Support of Exceptions on March 29, 2011, and, on that same day, copies were electronically served on the following individuals by electronic mail:

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