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Ardley Bus Corporation, Inc., a/k/a Gene's Bus Company and Transport Workers Union of Greater New York, Local 100, AFL-CIO. Cases 2-CA-38713, 2-CA-39049, 2-CA-39376, and 2-CA-39467

August 31, 2011

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS BECKER
AND HAYES

On March 2, 2010, Administrative Law Judge Raymond P. Green issued the attached decision, and he then issued an Errata on March 15, 2010. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief. The General Counsel additionally filed cross-exceptions and a supporting brief to which the Respondent filed an answering brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions,¹ cross-exceptions, and briefs and has decided to affirm the judge's rulings, findings,² and conclusions only to the extent consistent with this Decision and Order.³

¹ The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

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

In addition, the Respondent asserts that the judge's rulings, findings, and conclusions demonstrate bias and prejudice. On careful examination of the entire record, we are satisfied that the Respondent's contentions are without merit.

³ We shall modify the judge's conclusions of law and recommended Order to conform to our findings and to the Board's standard remedial language, and we shall substitute a new notice to conform to the Order as modified and set forth in full below.

In accordance with our decision in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010), we modify the judge's recommended remedy by requiring that backpay and other monetary awards shall be paid with interest compounded on a daily basis.

We shall modify the judge's recommended Order to provide for the posting of the notice in accord with *J. Picini Flooring*, 356 NLRB No. 9 (2010), and to conform more closely to the findings herein. For the reasons stated in his dissenting opinion in *J. Picini Flooring*, Member Hayes would not require electronic distribution of the notice.

There are no exceptions to the judge's imposition of a broad cease-and-desist Order. See *Valerie Manor, Inc.*, 351 NLRB 1306, 1306 fn. 7 (2007).

Background

The Respondent operates a schoolbus service. It contracts with several school districts in and around Westchester County, New York (1) to transport children to schools during the year and to camps in the summer, and (2) to provide various charter-bus services throughout the school year. The Respondent and the Union had a collective-bargaining relationship from at least 2000 through June 30, 2009, when the Respondent withdrew recognition from the Union. The judge found that the Respondent committed numerous unfair labor practices in 2008-2009; that those unfair labor practices tainted its later withdrawal of recognition; and that, subsequent to the withdrawal of recognition, it made a number of unlawful unilateral changes in terms and conditions of employment. We adopt the judge's findings of violations (some with further comment, as explained below); we adopt certain of his complaint dismissals;⁴ we reverse others of his dismissals, as explained below; and we find that the Respondent's withdrawal of recognition was unlawful for the reasons explained below.

The Respondent asserts that the Board should not assert jurisdiction in this case. For the reasons stated by the judge, we find the Respondent's contention without merit.

⁴ We adopt the judge's dismissal of allegations that the Respondent unlawfully threatened the Union's shop representative, Cesar Uchofen, with violence; unlawfully threatened employees by telling them that people who complain to the Union do not get summer work; and unlawfully interrogated employees by asking them whether they had signed the decertification petition. Chairman Pearce and Member Becker agree with the dismissal of the loss of summer work threat and interrogation allegations, but in doing so, they do not rely on the judge's finding that Rosa Villela and Elisa Arias, who allegedly perpetrated the misconduct, were not supervisors or agents of the Respondent, or the judge's finding that the interrogation was not coercive under *Rossmore House*, 269 NLRB 1176 (1984), affd. sub nom. *UNITE HERE Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). Instead, they rely solely on the judge's failure to explicitly credit the witnesses' testimony that the unlawful conduct occurred.

We also adopt the judge's dismissal of the allegation that the Respondent unlawfully discharged Uchofen. Uchofen's conduct was not protected when he disrupted State-mandated medical and eye exams to distribute and discuss a union survey and persistently refused requests to stop. Even assuming *arguendo* that Uchofen's activity was initially protected, he lost that protection under *Atlantic Steel Co.*, 245 NLRB 814 (1979) (setting out four factors to determine whether employee conduct arising from protected activity is so egregious as to lose the Act's protection). Member Becker finds that, because Uchofen was engaged in activity that the Act generally protects, analysis under *Atlantic Steel* is appropriate. Applying that analysis, he agrees that Uchofen's distribution of the questionnaire lost its protection because of the disruptive manner in which it was carried out.

The 8(a)(1) Allegations⁵

1. We agree with the judge, for the following reasons, that the Respondent unlawfully suspended the Union's shop representative, Uchofen, on or about March 24, 2008,⁶ because Uchofen sought union representation at an interview that he reasonably believed could have led to disciplinary action.

On March 17, the Respondent learned that Uchofen had violated work rules by using a company van for personal business without permission. Uchofen also received a parking ticket that went unpaid, resulting in a summons to the Respondent. According to General Manager Gillison's affidavit, he told Uchofen to come to his office after Uchofen completed his morning run on March 20. Uchofen did not come, but came later in the day with Union Representative John Simino. Gillison stated that he did not have time to meet and that he wanted to meet with Uchofen alone. When the two refused to leave, he threatened to call the police. He told them to return on March 24. When Uchofen then returned with Simino, Gillison again stated that he would only meet with Uchofen. The two refused to leave and Gillison called police. Later on March 24, Gillison notified Uchofen that he was suspended for 5 days (later reduced to 2-1/2 days). Gillison stated in his affidavit that, initially, he only intended to read Uchofen the "riot act," but decided to suspend him after Simino insisted on being present at their meeting. Gillison stated: "Once [Simino] had forced the issue of the meeting on [March] 20th and decided he was going to run it his own way by demanding a meeting to discuss Cesar's discipline, I decided on that day it would be a suspension."⁷

An employee has the right to request that a union representative be present at an investigatory interview that the employee reasonably believes might result in disciplinary action. *NLRB v. J. Weingarten*, 420 U.S. 251, 262 (1975). Upon such a request, the employer is permitted one of three options: (1) grant the request; (2) discontinue the interview; or (3) offer the employee the choice between continuing the interview unaccompanied by a union representative or having no interview at all. *Montgomery Ward & Co.*, 254 NLRB 826, 831 (1981), *enfd.* in relevant part 664 F.2d 1095 (8th Cir. 1981). Here, Gillison twice summoned Uchofen to an investigatory meeting. On both occasions, Simino and Uchofen requested Simino's presence. Gillison refused to grant

⁵ We adopt the judge's finding that the Respondent violated Sec. 8(a)(1) when its general manager, Thomas Gillison, physically assaulted Union Shop Representative Uchofen on November 25, 2008.

⁶ All dates are in 2008, unless noted otherwise.

⁷ The judge based his credibility determinations on Uchofen's and Simino's testimony and admissions in Gillison's affidavit.

the request and failed to offer Uchofen the above options, insisting that he wanted to meet with Uchofen alone. He then suspended Uchofen in retaliation for Simino's effort to represent him and for Uchofen's assertion of his Section 7 right to a representative, thus violating Section 8(a)(1) of the Act. *Salt River Valley Water Users' Assn.*, 262 NLRB 970 (1982).⁸

2. We adopt the judge's finding that the Respondent unlawfully interrogated employee Reynaldo Gomez, on May 8, 2009, without providing him the required assurances under *Johnnie's Poultry Co.*, 146 NLRB 770 (1964), *enf. denied* on other grounds 344 F.2d 617 (8th Cir. 1965). An employer who interrogates an employee witness in preparation for a Board hearing must give the employee explicit assurance against reprisal for refusing to answer or for the substance of any answer given. *Freeman Decorating Co.*, 336 NLRB 1, 14 (2001), *enf. denied* on other grounds sub nom. *Stage Employees IAT-SE v. NLRB*, 334 F.3d 27 (D.C. Cir. 2003). Here, the Region sent an investigatory subpoena to Gomez and another employee. When the two went to the Respondent with concerns about the subpoena, they were referred to the Respondent's attorney. The attorney, *inter alia*, asked Gomez whether he had picked his bus route in August 2008. This information was relevant to an unfair labor practice investigation and Gomez' answer would have indicated whether the information he would provide was adverse to the Respondent. In addition, the question signaled to Gomez the Respondent's interest in his statement to the Board. Employees' compliance with a Board subpoena is statutorily protected activity and, in the context of such a subpoena, the Respondent's counsel's questions here would reasonably have been understood by the employees to be asking them what they would tell the Board. Thus, we find that *Safelite Glass*, 283 NLRB 929 (1987), relied on by our colleague, is not on point. We find, in agreement with the judge, that in these circumstances, the attorney's failure to provide the *Johnnie's Poultry* assurances to Gomez and to assure Gomez that he need not answer and that he would not face reprisal for speaking to the Board agent or for the content of his statement violated Section 8(a)(1).⁹

⁸ We find it unnecessary to pass on the judge's finding that this conduct also violated Sec. 8(a)(3), as it would not affect the remedy.

Uchofen was made whole for money losses from the suspension pursuant to a settlement agreement that the Regional Director approved on August 12. That agreement was revoked on September 11, 2009, due to the Respondent's noncompliance with its terms. While the General Counsel does not seek backpay, the judge determined that the notice in this case should include a cease-and-desist order referencing the suspension, and we agree.

⁹ Member Hayes does not find this violation. The *Johnnie's Poultry* requirements are triggered when an employer seeks information "on

3. We reverse the judge and find that the Respondent unlawfully threatened Union Shop Representative Uchofen that it was futile to bring grievances to the Respondent, and threatened unspecified reprisals if he did so. About September 8, Uchofen learned he would not have a monitor to help with children on the bus that he drove. He testified that he had one the previous year. He went to General Manager Gillison's office and asked Gillison if he could have his monitor back. Gillison responded that:

[The] Union's fault [sic] now you need to fix it. You are a Union person. You need to fix it. Now, you learn . . . that I have the power here. I am your boss. I [have] the right to pay you your salary. Now, I do whatever I want

Gillison did not assign a monitor to Uchofen's bus.

In dismissing the allegation, the judge found that Uchofen's testimony about the incident "[a]t most, . . . shows that Gillison was annoyed by the Union and that he was merely asserting his status as Uchofen's boss." We disagree. By responding to a complaint about a change in working conditions with the statement "[y]ou are a Union person" followed by the assertions that "[n]ow, you learn . . . that I have the power here" and "I do whatever I want," Gillison clearly threatened Uchofen that he would not cooperate in resolving the complaint based on Uchofen's position with the Union. Contrary to our colleague, we do not find Gillison's statements to be too ambiguous to establish a violation of the Act. Rather, Uchofen would reasonably interpret Gillison's assertion of power over him as a threat to exercise that power in reprisal against his union role, particularly in light of the Respondent's prior unlawful conduct toward him. Accordingly, contrary to the judge and our colleague, we find that Gillison's statements violated Section 8(a)(1) of the Act.¹⁰

matters involving [employees'] Section 7 rights" in preparation for a Board proceeding. *Johnnie's Poultry*, supra at 774-775. Here, the Respondent's attorney merely asked Gomez whether he picked his bus route in August. He did not ask about Gomez' or other employees' Sec. 7 activities, nor did he ask Gomez what he intended to say in his upcoming statement to the Board agent. Because this question did not involve any Sec. 7 activity, the *Johnnie's Poultry* standards do not apply. *Safelite Glass*, supra (no violation where employees were asked to inform respondent's attorney of allegedly unlawful statements that the respondent made at meetings that the employees attended because the questions did not seek information about employees' Sec. 7 activity).

¹⁰ See the discussion of Uchofen's suspension above.

Member Hayes finds Gillison's statements too ambiguous to establish a violation of the Act and would adopt the judge's dismissal of these allegations. See *Phoenix Glove Co.*, 268 NLRB 680 (1984) (no

The 8(a)(5) Allegations

1. We adopt the judge's findings that the Respondent violated Section 8(a)(5) and (1) of the Act in several respects: by failing, on multiple occasions, to furnish information that the Union requested that was relevant to the seniority bidding process for 2008 summer camp routes, to potential and actual grievances, and to bargaining for a new contract; by refusing to allow employees to bid by seniority for the 2008 summer camp routes as required by the parties' contract;¹¹ by excluding certain regular 2008-2009 school year bus routes from the bidding process; by refusing to meet with the Union for contractually required, second-level grievance meetings involving pay disputes;¹² by engaging in direct dealing with unit employees;¹³ and by failing to bargain in good

violation where statements were too vague and ambiguous to be found unlawful).

¹¹ This refusal was not alleged as unlawful in the complaint, but the Respondent has not excepted to the unfair labor practice finding on this basis. Moreover, the issue is closely connected to the subject matter of the complaint and was fully and fairly litigated. See *Pergament United Sales*, 296 NLRB 333, 334 (1989), enf'd. 920 F.2d 130 (2d Cir. 1990) (unpleaded matter may support unfair labor practice finding if "closely connected to the subject matter of the complaint and [it] has been fully litigated [footnote omitted]").

¹² We reject the Respondent's contention that the judge did not specify which meetings were the bases of this finding. The judge specifically referenced meetings that the Union had requested by letter dated October 31. Further, the Respondent erroneously contends in its answering brief that the collective-bargaining agreement states only that second-level meetings "should" be held on request. The agreement in fact states that they "shall" be held, but that this "should" take place within 10 days of a request.

We further find that the Respondent's failure to meet over grievances also violated Sec. 8(d) of the Act, as alleged in the complaint. Absent circumstances not present here, a party to a collective-bargaining agreement contravenes Sec. 8(d), and violates Sec. 8(a)(5), when, during the term of the agreement, it unilaterally modifies or terminates contract provisions which are mandatory bargaining subjects. *C & S Industries*, 158 NLRB 454, 457 (1966). The Respondent's failure to meet amounted to such action. We modify the judge's finding accordingly in the amended conclusions of law.

¹³ The Respondent and the Union were involved in ongoing disputes as to whether the Respondent followed the contractual seniority/bidding procedures and whether the mechanics were paid tool allowances pursuant to a prior grievance settlement. In December, after the Union filed a grievance over the assignment of summer-camp routes, Gillison summoned employees and asked them to sign letters he had prepared stating that they had chosen their summer-camp routes and had always picked or accepted routes "of my own free will." In January 2009, Gillison asked the five mechanics to sign statements that they had in fact received their tool allowances. The judge found, and we agree, that in these circumstances, asking the employees to sign prepared statements in the absence of union representation went beyond factual investigation and constituted an effort to induce employees to waive claims they may have had under pending contractual grievances. The judge further found that, in light of these ongoing disputes, this conduct constituted unlawful bypassing of the employees' union representative and dealing directly with employees to resolve contractual grievances over terms and conditions of employment. We find, contrary to our

faith by refusing to meet with the Union so long as Uchofen was on the Union's bargaining team.

2. We also find that the Respondent violated Section 8(a)(5) and (1) by conditioning further bargaining on obtaining the Union's demands in writing.¹⁴ An employer violates Section 8(a)(5) and (1) of the Act by demanding written position statements from a union before agreeing to bargain. *Twin City Concrete, Inc.*, 317 NLRB 1313, 1314 fn. 5 (1995). Here, on June 18, 2009, the parties met for their only bargaining session to negotiate a successor agreement. A union representative began by reading the Union's demands. The Respondent asked for the demands in writing, but the Union said they were not finalized. The Respondent's counsel then told the union representatives that the Respondent would not provide the Union with its own demands or schedule further bargaining until it received the Union's demands in writing, and the Respondent's bargaining team left the session. Consistent with precedent, we find that the Respondent's actions violated the Act.¹⁵

3. We agree with the judge, as we further explain, that the Respondent could not lawfully rely on the employees' June 2009 decertification petition to withdraw recognition from the Union, and that, in so doing, the Respondent violated Section 8(a)(5) and (1) of the Act. The judge referenced the four-part test set forth in *Master Slack Corp.*, 271 NLRB 78 (1984), to find that the Respondent's unfair labor practices tended to undermine the Union in the eyes of the bargaining unit employees and

colleague, that in these circumstances, the Respondent's conduct effectively undercut the Union's role in grievance adjustment and derogated the Union's representational role. Accordingly, we agree with the judge that the Respondent's conduct constituted direct dealing in violation of Sec. 8(a)(5) and (1) of the Act. See *Circuit-Wise, Inc.*, 306 NLRB 766, 767 (1992).

Member Hayes finds that the Respondent's conduct did not constitute direct dealing. Rather, the Respondent sought factual information from employees concerning their own existing working conditions to defend against a grievance and an allegation that it had not complied with a settlement agreement. It did not "seek the input of employees on a proposed change in working conditions," *Allied-Signal, Inc.*, 307 NLRB 752, 754 (1992), or attempt to settle grievances directly with employees, as in *Circuit-Wise*, above. Moreover, contrary to the majority, the proffered statements, on their face, contain no language waiving any claims the employees or the Union may have had. In finding this violation, my colleagues effectively prohibit an employer from seeking from employees any factual information that may be relevant to a pending grievance. Neither the Act nor our precedent reaches so far.

¹⁴ The judge did not address this complaint allegation, but the issue was litigated and the facts are not in dispute.

¹⁵ We reject the General Counsel's additional argument, raised in its brief to the Board, that we should also find that the Respondent bargained in bad faith by demanding copies of the Union's contracts with other employers before it would consider the Union's demands. This separate allegation was not pleaded or litigated, and the General Counsel makes no argument that we should find the additional violation under *Pergament United Sales*, above.

tainted the decertification petition that employees presented to the Respondent in mid-June 2009. We clarify that *Master Slack* analysis here.

Upon expiration of a collective-bargaining agreement, an incumbent union is presumed to have majority support among the employees it represents. An employer may withdraw recognition from the union only if the union has actually lost majority support. *Levitz Furniture Co. of the Pacific*, 333 NLRB 717, 725 (2001). An employer may not, however, lawfully withdraw recognition from a union where it has committed unfair labor practices that have a tendency to cause the loss of union support. *Bunting Bearings Corp.*, 349 NLRB 1070, 1071-1072 (2007); *Lee Lumber & Building Material Corp.*, 322 NLRB 175, 177 (1996) (*Lee Lumber II*), enf. in relevant part and remanded in part 117 F.3d 1454 (D.C. Cir. 1997). Where the unfair labor practices do not involve a general refusal to recognize and bargain with the union, there must be a causal relationship between the unfair labor practices and the loss of support in order for the withdrawal of recognition to be unlawful. *Lee Lumber II*, 322 NLRB at 177. To determine whether there is a causal connection between an employer's unfair labor practices and employees' disaffection, the Board considers the following factors:

- (1) The length of time between the unfair labor practices and the withdrawal of recognition;
- (2) the nature of the illegal acts, including the possibility of their detrimental or lasting effect on employees;
- (3) any possible tendency to cause employee disaffection from the union; and
- (4) the effect of the unlawful conduct on employee morale, organizational activities, and membership in the union.

Master Slack, supra at 84.

As to timing, the Respondent here engaged in a series of unfair labor practices over the course of more than 1 year prior to the circulation of the decertification petition. The Respondent's failure to provide relevant information that the Union requested persisted throughout the year preceding the petition. Further, the approximately 7 months that passed between Manager Gillison's public derogation of and physical assault on the shop steward, and the 5-6 months that passed between the direct-dealing incidents¹⁶ and the circulation of the decertification petition would not dissipate the effects of the unfair labor practice on unit employees. See *AT Systems West*,

¹⁶ Member Hayes does not find that the Respondent unlawfully dealt directly with unit employees or threatened Uchofen that seeking assistance from the Union would be futile, and thus he does not rely on those incidents in finding the Respondent's withdrawal of recognition unlawful.

341 NLRB 57, 60 (2004) (9 months between unlawful direct dealing and circulation of decertification petition would not dissipate effects of employer's conduct, which precluded the employer from withdrawing recognition based on employee disaffection).

The nature of the violations would tend to undermine the Union in the eyes of unit employees. The failure to post the summer-camp routes and certain of the 2008–2009 school year picks for bidding; the direct dealing with mechanics and drivers; the repeated failures to provide the Union with presumptively relevant information necessary for its representational and bargaining obligations; the refusal to meet for contractually required grievance meetings; the suspension of Uchofen for seeking a *Weingarten* representative; Gillison's threats to Uchofen; and the Respondent's physical assault on Uchofen show a pattern of failing to accord the Union its lawful role as the employees' representative. As to Uchofen's suspension, the suspension of union adherents for protected activity is a hallmark violation that is "highly coercive and likely to remain in the memories of employees for a long time." *Goya Foods of Florida*, 347 NLRB 1118, 1121 (2006) (unlawful discharge of union supporters for attending a rally and suspension of another for reporting health and safety problems), enf. 525 F.3d 1117 (11th Cir. 2008) (citations omitted). Here, the Respondent's suspension of the shop representative for seeking assistance from the Union illustrated the perils of seeking such assistance and the inability of the Union effectively to defend unit employees. Further, many employees (the exact number is not in the record) were present when Gillison assaulted Uchofen while mocking his role as shop representative.¹⁷ See *NLRB v. Jamaica Towing, Inc.*, 632 F.2d 208, 213 (2d Cir. 1980) (stating, in a bargaining order case, that an employer's use of physical force is among the unfair labor practices that "may reasonably be calculated to have a coercive effect on employees and remain in their memories for a long period"). As to the Respondent's direct dealing with mechanics and drivers, the Board has found that an employer's going over the head of a union to deal individually with employees tends "inevitably to weaken the authority of the [Union] and its ability to represent the employees in dealing with the Company." *AT Systems West*, supra at 60, (quoting *RTP Co.*, 334 NLRB 466, 468 (2001), enf.

¹⁷ The assault occurred November 25, the day after the Union had filed an unfair labor practice charge with the Board. While Uchofen was signing in to work in the morning, Gillison sarcastically told employees that Uchofen was the new boss and was going to run the Company now. He then kicked Uchofen in the back and took him off his assigned run.

315 F.3d 951 (8th Cir. 2003), cert. denied 540 U.S. 811 (2003)).

As to the final two elements of the *Master Slack* analysis, the Board has held that direct dealing "reasonably tends to have a negative effect on union membership," *RTP*, supra at 469. As the Board stated in *RTP*, "direct dealing, by its very nature, would tend to undermine employee confidence in the effectiveness of their collective-bargaining representative." Here, the Respondent's conduct of asking employees, without the Union's knowledge or consent, to sign letters that potentially waived contractual claims (supra at fn. 13) undercut the Union's representational role concerning employee grievances. Such conduct would reasonably tend to have a negative effect on employees' perception of the Union as an effective grievance representative. Further, suspending an employee for seeking *Weingarten* representation from a union representative, as the Respondent did here, would surely demonstrate to employees the potential dangers and futility of union representation, and would undermine the employees' confidence in the effectiveness of the Union. As the Board stated in *Fruehauf Trailer Services*, 335 NLRB 393, 394 (2001), the unlawful refusal to allow an employee *Weingarten* representation "would also likely contribute to employee disaffection," as "[s]uch actions negate the very essence of the Union's representative role" and "undercut the Union's standing among employees." Finally, physically assaulting a union steward after mocking his role with the Union surely contributed to employees' disaffection.

In sum, we find a causal relationship between the Respondent's unfair labor practices and the petition the Respondent relied on to withdraw recognition. Accordingly, the Respondent's withdrawal of recognition violated Section 8(a)(5) and (1) of the Act.¹⁸

4. We reverse the judge and find that, since approximately August 25, the Respondent has failed to assign new regular, charter, and extra routes as required by the parties' collective-bargaining agreement in violation of Section 8(a)(5), (1), and (d) of the Act.

¹⁸ We do not rely on the judge's further statement that the Respondent did not show an actual loss of majority status, as the General Counsel does not contest the authenticity of the petition signatures.

There are no exceptions to the judge's grant of an affirmative bargaining order to remedy the Respondent's unlawful withdrawal of recognition. Therefore, we find it unnecessary to provide a specific justification for that remedy. See *SKC Electric, Inc.*, 350 NLRB 857, 862 fn. 15 (2007). See also *Scepter v. NLRB*, 280 F.3d 1053, 1057 (D.C. Cir. 2002).

The judge also correctly found that the Respondent's subsequent unilateral changes to terms and conditions of employment violated Sec. 8(a)(5) and (1). The Respondent does not except to this finding beyond its contention that such changes were lawful upon the Union's loss of majority status.

The parties' agreement states in pertinent part:

Seniority lists shall be posted monthly. All runs open for bid must be posted and picked by seniority. The picks shall include Bus Operators, Van Operators and Monitors. Schedules shall include hours of assignment. All extra work including Charters, Summer Camp and Extra Runs must be posted and picked by seniority and assigned by Union and Management representatives.

As the judge found, the contract requires that the seniority/bidding process cover not only the normal school year routes, but also "other routes that the Company obtained from its customers during the course of the year." These other routes include charter transportation for various events such as field trips and the transportation of athletic teams to and from athletic events, and new regular routes that the school districts may add during the year. During the 2008–2009 school year, none of these new, extra, or charter routes were posted for bidding.

By letter dated June 9, 2009, Gillison informed the Union that "there are many [drivers and monitors] that are assigned when the school districts request . . . additional routes. These drivers and monitors come via of [sic] new hires not seniority." Gillison testified that extra runs may come in from the school districts on a day's notice or less. In such situations, the dispatcher calls drivers in order of seniority to offer the runs. As to charters, Gillison testified that the districts have regular athletic seasons that the Respondent knows about, "but it can change at any minute."

The judge found that, because many routes come in or change on an ad hoc basis, it may be impossible for the Respondent to adhere to a literal reading of the contract by posting all such runs for bidding. He referred to an August 18 opinion by Arbitrator Andrew Sayegh, discussed below, ruling in favor of the Union on various grievances. That award directs the Respondent to post all extra work for seniority bidding "when possible." The judge viewed this as support for the proposition that, in some situations, the Respondent would be unable to post extra routes that came in on short notice for seniority bidding. He found that this involved an issue of contract interpretation that the arbitrator should have, and did, resolve.¹⁹

We disagree. The parties' agreement requires that "[a]ll runs . . . including Charters, Summer Camp and Extra Runs" be posted and awarded based on seniority, and that assignments be made by both union and Respondent representatives. Contrary to the agreement, the

¹⁹ The judge otherwise declined to defer to the arbitration award, as we discuss below.

Respondent held bidding only for the regular school year routes as described above. Although the judge found that the Respondent obtained some runs with insufficient notice to permit posting and bidding, there is no evidence that this is true for all or most such runs.²⁰ In any event, the contract does not require specific posting and bidding procedures or prevent the parties from establishing a process for bidding on and assigning such work in advance, such as by establishing a seniority-based registry of employees interested in certain charter and extra work as it becomes available. Indeed, Union Representative Simino testified about just such a process at another bus company where employees register their interest in such work in advance.²¹ It does not appear that the Respondent even attempted to discuss a workable bidding process for charter and extra runs with the Union. Rather, the Respondent decided unilaterally that it would simply not comply with the contract terms.²²

5. Finally, we reject the Respondent's "affirmative defense" that, because the parties arbitrated three disputes related to the allegations before us involving a 2008 information request and the Respondent's failure to post summer-camp and certain school year routes for bidding, the Union is "estopped" from relitigating them here.²³ The Union and the Respondent arbitrated these issues in July and August 2009, and Arbitrator Sayegh issued awards in favor of the Union on July 17 and August 18, 2009.

A criterion for deferral to an arbitration award is that the parties agree to be bound. *Spielberg Mfg. Co.*, 112 NLRB 1080, 1082 (1955) (deferral appropriate where arbitration proceedings "appear to have been fair and regular, all parties had agreed to be bound, and the decision of the arbitration panel is not clearly repugnant" to

²⁰ Contrary to the judge, we do not find that the Respondent's failures to post charter and extra runs involve an issue of contract interpretation. The contractual language is clear that such work is subject to seniority bidding. No party has directed us to any other provision of the contract that would cast doubt on its meaning, or argued an alternate interpretation.

²¹ Thus, contrary to the judge, we do not construe Arbitrator Sayegh's award as a determination that compliance with the contractual bidding procedure was impossible. In any event, deferral to that award is not warranted for the reasons stated below.

²² Member Hayes agrees with the judge's dismissal. Thus, the Respondent's practice of calling and offering charter and extra runs in order of seniority preserves seniority rights and substantively complies with the contractual requirement that the runs be bid by seniority. At the very least, it raises an issue of contract interpretation that the parties should resolve on their own, or through arbitration if necessary.

²³ The Respondent asserted this defense in its answer to the complaint and in its exceptions. Although the Respondent's exceptions and brief are not clear, and it advances no specific argument for deferral, we infer that it is excepting to the judge's failure to defer to the arbitral award, and is thus requesting that we defer.

the Act), citing *Wertheimer Stores Corp.*, 107 NLRB 1434 (1954). Further, the Board's policy in information request cases is not to defer to arbitration. See *Rochester Gas & Electric Corp.*, 355 NLRB No. 86, slip op. at 13 (2010); *Shaw's Supermarkets*, 339 NLRB 871 (2003). This applies in both prearbitral and postarbitral deferral cases. *Id.* The Board has also stated a preference for resolving an entire dispute in a single proceeding and does not favor the "piece-meal" deferral of complaint allegations. *Rochester Gas & Electric*, supra (citations omitted).

Applying these principles, we find that deferral is not appropriate. Plainly, the Respondent has not agreed to be bound by Arbitrator Sayegh's award. To the contrary, the Respondent failed to comply with the arbitrator's interim ruling on July 17, 2009, ordering the Respondent to provide information that the Union requested to help prepare for grievance and arbitration proceedings.²⁴ On July 22, 2009, the Respondent walked out of the arbitration proceeding then in progress after accusing the arbitrator of bias, and refused to further participate. The Respondent then unilaterally "terminated" the arbitrator and asserted by letter that he had no authority to issue an award.²⁵ And the Respondent has refused to comply with the arbitrator's August 18, 2009 final ruling in favor of the Union regarding summer and school year route selection. Indeed, the Respondent had withdrawn recognition from the Union by this time. Hence, to the extent that the Respondent is excepting to the judge's failure to defer to arbitration, it is asking us to defer to an award with which it has no intention of complying. And, had the Respondent not repudiated the arbitration process and withdrawn recognition, we would still decline to defer, consistent with our above-cited policies of not deferring in information request cases or where deferral would lead to the "piece-meal" litigation of related issues in different forums.²⁶

²⁴ The Union requested information on October 23 and again on December 8 to investigate a grievance about routes given "out of seniority." The judge found that the Respondent unlawfully failed to provide the requested information since about October 24. The Respondent does not except on the merits, but only argues, implicitly, that we should defer to arbitration. For the reasons discussed here, we decline to do so, and we adopt pro forma the judge's findings on the merits.

²⁵ Although the judge did not address this, the arbitral award and the parties' correspondence regarding the arbitration are in the record.

²⁶ In Member Hayes' view, 8(a)(5) allegations of a failure to provide requested information should be deferrable in appropriate circumstances to the parties' voluntary grievance/arbitration procedures, but he finds deferral inappropriate in this case because of the Respondent's repudiation of the arbitration process, described herein.

AMENDED CONCLUSIONS OF LAW

1. By the following acts and conduct the Respondent violated Section 8(a)(1) of the Act:

(a) Physically assaulting the Union's shop representative.

(b) Suspending Cesar Uchofen because he sought union representation at an interview that he reasonably believed could have led to disciplinary action.

(c) Coercively interrogating Reynaldo Gomez.

(d) Threatening Cesar Uchofen that it would be futile for the Union to bring employee grievances to the Respondent and threatening unspecified reprisals for assisting the Union.

2. By the following acts and conduct, the Respondent violated Section 8(a)(5) and (1) of the Act:

(a) Failing to furnish relevant requested information so that the Union could carry out its contract-administration and representational functions in relation to seniority bidding for routes, the processing of grievances, and bargaining for a successor collective-bargaining agreement.

(b) Bypassing the Union and dealing directly with unit employees regarding the resolution of grievances.

(c) Refusing to bargain in good faith with representatives chosen by the Union.

(d) Refusing to consider the Union's proposals, to submit its own proposals, and to schedule an additional bargaining session unless and until it received the Union's proposals in writing.

(e) Withdrawing recognition from the Union in the absence of a demonstrated showing that the Union has lost its majority status.

(f) Unilaterally and without bargaining with the Union, making changes in the terms and conditions of employment after its collective-bargaining agreement expired.

3. By the following conduct, the Respondent has violated Section 8(a)(5), (1), and (d) of the Act:

(a) Excluding summer-camp routes, certain regular 2008–2009 schoolbus routes, and new regular, charter, and extra routes from the contractual seniority-bidding process.

(b) Refusing to meet with the Union regarding pending grievances.

AMENDED REMEDY

We amend the judge's remedy to provide that the make-whole remedy shall be computed in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), enf. 444 F.2d 502 (6th Cir. 1971), with interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010).

ORDER

The National Labor Relations Board orders that the Respondent, Ardsley Bus Corporation, Inc., a/k/a Gene's Bus Company, Ardsley, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Physically assaulting the Union's shop representative.

(b) Suspending or otherwise disciplining employees because they seek union representation at interviews that they reasonably believe could lead to disciplinary action or engage in other protected concerted activities.

(c) Coercively interrogating employees about their own or other employees' protected concerted activities or about the Board's investigation of alleged unfair labor practices.

(d) Threatening employees that it would be futile to seek assistance from the Union.

(e) Threatening employees with unspecified reprisals for engaging in union or protected concerted activities.

(f) Refusing to bargain collectively with the Union by failing and refusing to furnish it with requested information that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of the Respondent's unit employees.

(g) Bypassing the Union and dealing directly with unit employees regarding the resolution of grievances.

(h) Refusing to bargain in good faith with representatives chosen by the Union.

(i) Refusing to consider the Union's proposals, to submit its own proposals, and to schedule an additional bargaining session unless and until it received the Union's proposals in writing.

(j) Withdrawing recognition from the Union and failing and refusing to bargain with the Union as the exclusive collective-bargaining representative of unit employees.

(k) Unilaterally changing the terms and conditions of employment of its unit employees.

(l) Excluding summer-camp routes, regular schoolbus routes, and new regular, charter, and extra routes from the seniority-bidding process.

(m) Refusing to meet with the Union's representatives regarding pending grievances.

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

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

(a) Within 14 days of this Order, remove from its files any reference to the unlawful suspension of Cesar Uchofen in March 2008, and within 3 days thereafter, notify him in writing that this has been done and that the suspension will not be used against him in any way.

(b) Except as explicitly excluded in the judge's decision, furnish to Transport Workers Union of Greater New York, Local 100, AFL-CIO the information sought in the Union's letters dated October 23 and December 8, 2008, and May 21 and June 1, 2009.

(c) Recognize and, upon request, bargain collectively with the Union as the exclusive representative of its employees with respect to wages, hours, and other terms and conditions of employment, and if an agreement is reached, embody such agreement in a signed document. The appropriate bargaining unit is:

All regular full and regular part-time school bus and van drivers, monitors, mechanics, cleaners and fuelers employed by the Respondent but excluding office clericals and guards and professional, confidential and supervisory employees as defined by the Act.

(d) Rescind all changes unilaterally made to the terms and conditions of employment after June 30, 2009, and any changes or modifications made to the seniority/bidding provisions of the collective-bargaining agreement.

(e) Make employees whole for the loss of any earnings or benefits resulting from the failure to comply with the terms of the seniority/bidding provisions described above, and as a result of any changes in the terms and conditions of employment made on or after June 30, 2009, in the manner set forth in the remedy section of the judge's decision as amended in this decision.

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

(g) Within 14 days after service by the Region, post at its facilities in Ardsley, New York, copies of the attached notice marked "Appendix."²⁷ Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to the physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, or sold the business or the facilities involved herein, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 20, 2008.

²⁷ If this Order is enforced by a judgment of the United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

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

Dated, Washington, D.C. August 31, 2011

Mark Gaston Pearce, Chairman

Craig Becker, Member

Brian E. Hayes, Member

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT physically assault the Union's shop representative.

WE WILL NOT suspend or otherwise discipline you because you seek union representation at interviews that you reasonably believe could lead to disciplinary action or engage in other protected concerted activities.

WE WILL NOT coercively interrogate you about your or other employees' protected concerted activities or about the Board's investigation of alleged unfair labor practices.

WE WILL NOT threaten you that it would be futile to seek assistance from the Union.

WE WILL NOT threaten you with unspecified reprisals for engaging in union or protected concerted activities.

WE WILL NOT refuse to bargain collectively with the Union by failing and refusing to furnish it with requested information that is relevant and necessary to the Union's performance of its functions as your collective-bargaining representative.

WE WILL NOT bypass the Union and deal directly with you regarding the resolution of grievances.

WE WILL NOT refuse to bargain in good faith with representatives chosen by the Union.

WE WILL NOT refuse to consider the Union's proposals, to submit our own proposals, and to schedule an additional bargaining session unless and until we receive the Union's proposals in writing.

WE WILL NOT withdraw recognition from the Union and fail and refuse to bargain with the Union as exclusive collective-bargaining representative of unit employees.

WE WILL NOT unilaterally change the terms and conditions of employment of unit employees.

WE WILL NOT exclude summer-camp routes; certain regular schoolbus routes; or new regular, charter, and extra routes from the seniority/bidding process.

WE WILL NOT refuse to meet with union representatives regarding pending grievances.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days of the date of this Order, remove from our files any reference to the unlawful suspension of Cesar Uchofen in March 2008 and within 3 days thereafter, WE WILL notify him in writing that this has been done and that the suspension will not be used against him in any way.

WE WILL, except as explicitly excluded in the judge's decision, furnish to the Union the information sought in the Union's letters dated October 23 and December 8, 2008, and May 21 and June 1, 2009.

WE WILL recognize and, upon request, bargain collectively with the Union as the exclusive representative of our employees with respect to wages, hours, and other terms and conditions of employment, and if an agreement is reached, embody such agreement in a signed document. The appropriate bargaining unit is:

All regular full and regular part-time school bus and van drivers, monitors, mechanics, cleaners and fuelers employed by us but excluding office clericals and guards and professional, confidential and supervisory employees as defined by the Act.

WE WILL rescind all changes we unilaterally made to the terms and conditions of employment after June 30, 2009, and any changes or modifications made to the seniority/bidding provisions of the collective-bargaining agreement.

WE WILL make employees whole, with interest, for the loss of any earnings or benefits resulting from our failure to comply with the terms of the seniority/bidding provisions described above or as a result of any changes in the terms and conditions of employment made after June 30, 2009.

ARDSLEY BUS CORPORATION, INC., A/K/A
GENE'S BUS COMPANY

Alan M. Rose, Esq. and *Colleen Breslin, Esq.*, for the General Counsel.

Anthony J. Pirrotti, Esq., for the Respondent.

Ursula Levelt, Esq., for the Charging Party.

DECISION*

STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge. I heard this case in New York City on October 14, 15, 16, 19, 26, 27, and 28 and November 30, 2009.

The charge and the amended charge in Case 2-CA-38713 were filed on March 27 and June 27, 2008. The charge and the amended charges in Case 2-CA-39049 were filed on November 24, 2008, and January 15 and 23, March 26, April 30, and May 29, 2009.

On June 30, 2009, the Regional Director issued a consolidated complaint in Cases 2-CA-38713 and 2-CA-39049. This complaint made a number of allegations including allegations that (a) the Respondent threatened employees with violence; (b) called the police because union representatives engaged in union activities; (c) suspended union chairperson, Cesar Uchofen, because of his union activities; (d) revoked his privilege of taking a van home; and (e) refused to furnish the Union with information regarding bus routes.

As to this complaint, the Regional Director approved an informal settlement agreement, executed by all parties, on August 12, 2008.¹ This settlement required inter alia, that the Respondent (a) revoke the suspension issued to Uchofen and make him whole for any losses he suffered; (b) restore Uchofen's privilege of taking a van home between his shifts; (c) furnish the Union with certain information relating to seniority; (d) post a notice to its employees; and (e) refrain from engaging in any like or related conduct that would interfere with, restrain, or coerce employees in their Section 7 rights.

The charge and the amended charge in Case 2-CA-39376 were filed on July 9 and August 20, 2009.

* Corrections have been made according to an errata issued on March 15, 2010.

¹ At the hearing, Respondent's counsel contended that the agreement, which is GC Exh. 5, was not signed by the Union. This is not correct.

A consolidated complaint based on all three of the above-named charges was issued on September 11, 2009. Also, the Regional Director ordered that the settlement described above be revoked based on her belief that the Respondent was not in compliance with its terms.

Thereafter, a new complaint was issued on October 13, 2009, based on a charge in Case 2-CA-39467 that was filed on August 31, 2009.²

The totality of the substantive allegations of all the complaints can be summarized as follows:

1. That on or about March 19, 2008, the Respondent, by Thomas Gillison, its general manager, threatened an employee with physical harm.

2. That on or about March 20 and 24, 2008, the Respondent, by Thomas Gillison, threatened to call and did call the police to remove union representatives who were engaged in representation duties.

3. That on or about March 20, 2008, the Respondent, for illegal reasons, suspended Cesar Uchofen and revoked his privilege of taking home a company van between his morning and afternoon shifts.

4. That since on or about May 23, 2008, the Respondent has refused to furnish the Union with a listing of routes open for bid for the summer of 2008 and information about the dates, hours, and pay routes for each summer route.

5. That on or about June 16, 2008, the Respondent, by Thomas Gillison, threatened an employee (Cesar Uchofen), with physical harm.

6. That between August 25 and 28, 2008, the Respondent, for discriminatory reasons, unilaterally and without affording the Union an opportunity to bargain and without the Union's consent, breached, in midterm, the existing collective-bargaining agreement by refusing to post all available routes for employee bidding.

7. That since August 25, 2008, and continuing to date, the Respondent, for discriminatory reasons, unilaterally and without affording the Union an opportunity to bargain and without the Union's consent, breached, in midterm, the terms of the existing collective-bargaining agreement by refusing to assign regular, charter, and extra routes in accordance with seniority.

8. That on or about September 3, 2008, the Respondent (a) told an employee that it was futile for the Union to bring grievances to it and (b) threatened an employee with unspecified reprisals if he/she assisted the Union.

9. That in October 2008, the Respondent, by Tomas Gillison, threatened an employee that it was withholding hours because of the Union.

10. That since about October 24, 2008, the Respondent refused to furnish the following information requested by the Union that was relevant to various grievances.

11. That since October 31, 2008, the Respondent, for discriminatory reasons, unilaterally and without affording the Union an opportunity to bargain and without the Union's consent, breached in midterm, the collective-bargaining agreement by refusing to hold a step 2 grievance meetings relating to unpaid wages.

12. That on or about November 25, 2008, the Respondent, by Gillison, ridiculed and threatened an employee with violence and kicked an employee.

13. That in December 2008, the Respondent, by Gillison, threatened to withhold benefits from employees unless they renounced the Union.

14. That in December 2008, the Respondent, by Elisa Arias, its supervisor, threatened that the Respondent would reduce hours and other benefits to employees known to associate with the Union.

15. That in December 2008, the Respondent, by Gillison and other agents, bypassed the Union and dealt directly with employees by (a) requiring employees to renounce the terms of a grievance settlement negotiated pursuant to the collective-bargaining agreement and (b) requiring employees to sign an agreement affirming that they did not object to the Respondent's distribution of summer routes.

16. That on or about January 9, 2009, the Respondent, by Gillison, threatened an employee with unspecified reprisals.

17. That on or about January 21, 2009, the Respondent, for discriminatory reasons, discharged Cesar Uchofen.

18. That on or about May 8, 2009, the Respondent, by its attorney, interrogated employees.

19. That since on or about May 21, 2009, the Respondent has failed to furnish to the Union requested information that is relevant to collective bargaining.

20. That in late May and in June 2009, the Respondent by Alisa Arias and Rosa Villela, interrogated employees regarding whether or not they signed a petition to decertify the Union.

21. That in relation to negotiations for a new contract starting in May 2009, the Respondent refused to bargain in good faith by (a) conditioning its participation in negotiations on the exclusion of Cesar Uchofen as a union representative and (b) refused to consider the Union's proposals or submit its own proposals or schedule meetings unless and until it received the Union's proposals in writing.

22. That on June 22, 2009, the Respondent withdrew recognition from the Union.

23. That between August 24 and 27, 2009, the Respondent unilaterally changed the terms and conditions set forth in the collective-bargaining agreement by refusing to allow union representatives to participate in the bidding of routes by employees for regular schoolbus routes.

24. That on or about September 1, 2009, the Respondent unilaterally, and without notification to or bargaining with the Union, changed certain of the existing terms and conditions of its employees' employment.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent asserts that the Board does not have jurisdiction because its operations are wholly local in nature and therefore do not affect interstate commerce.

² This case was consolidated at the hearing.

The Respondent is a New York corporation that operates a schoolbus business. It is located in Ardsley, New York, and for the most part, it performs services for various New York State school districts, plus public and private schools in Westchester, New York. It admittedly has annual gross revenues in excess of \$10 million. It also has admitted that it has derived revenue in excess of \$4000 for services provided outside the State of New York. I also note that in a second commerce questionnaire submitted to the Regional Office by Respondent's owner, he indicated that the Company's purchases of goods and materials delivered directly from outside the State of New York, exceeded \$50,000.

Based on the above, it is concluded that the Respondent is an employer engaged in commerce and that its operations affect interstate commerce within the meaning of Section 2(2), (6), and (7) of National Labor Relations Act (the Act).³

I also find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

The allegations in these cases fall into three broad categories.

First are allegations involving Cesar Uchofen, a driver who was named by the Union as an employee union representative.

Second are allegations concerning seniority clauses and practices. As described below, the Company and the Union entered into a complete collective-bargaining agreement in 2000 and have executed subsequent supplemental memoranda of agreements, the last having an expiration date of June 30, 2009. There is no question but that these agreements, taken together, contain provisions governing seniority, not only for layoffs and recalls, but also in relation to the choosing and selection of routes. It is alleged (a) that the Respondent breached or abrogated the relevant seniority provisions, thereby unilaterally modifying the collective-bargaining agreement and (b) that on several occasions, the Respondent failed and refused to furnish to the Union requested information regarding its practices of assigning routes.

Thirdly, there are allegations concerning the negotiations in June 2009 for a new contract. It is alleged that the Respondent (a) refused to furnish information that was relevant for bargaining; (b) that the Respondent refused to meet and bargain with the Union's designated representatives; (c) that the Respondent agreed to meet for only one bargaining session and thereafter refused to meet at all; (d) that the Respondent unlawfully withdrew recognition; and (e) that the Respondent unlawfully made unilateral changes in terms and conditions of employment after the last agreement's expiration date.

In addition to the above-major themes, there are a number of other allegations of independent 8(a)(1) statements or conduct that are alleged to have occurred from autumn of 2008 through the spring of 2009.

Among other arguments, the Respondent contends that in or around May or June 2009, a majority of the employees within the bargaining unit indicated their desire to get rid of the Union

and that it therefore could lawfully withdraw recognition and refuse to bargain at that time. It also contends that any changes made after the last contract's expiration date were lawful because the Union no longer represented a majority of the employees and that having expired, the last effective agreement's terms, no longer were binding.

Because the allegations fall within these three categories, this decision will discuss each category separately and the reader is advised that I will not be following a strict chronological order. Hopefully, this will allow the issues to be more clearly explained.

I note here, that on November 11, 2009, I issued an order, granting in part and denying in part, the General Counsel's end of hearing motion to amend the complaint. To the extent that I have denied the General Counsel's motion to amend, I will not discuss those allegations in this decision. However, my reasons for denying or granting those amendments are attached as Appendix A.

A. *The Company's Operations*

The Respondent operates a schoolbus business which is located in Ardsley, New York. The owner of the Company is Gideon Tiktin. The general manager is Thomas Gillison.

The Company's business involves essentially three types of activities all involving the transportation of children. During the regular school year (September through May), the Company picks up and delivers children to their schools in the morning and returns them to their homes in the afternoon. The routes for this type of work are the result of contracts with school districts and private schools and the routes are pretty stable once they have been established by the respective customer and the drivers and monitors have been assigned to each route. The drivers and monitors are assigned to specific routes before the start of the school year and typically do that route for the rest of the year. How drivers and monitors are or should be selected to do their routes is an issue in this case and will be discussed later.

Also during the school year, the Company receives charter work. This typically is work that would involve transporting children to afterschool events such as school trips or athletic events. Charters are usually received by the Company from a school during the week that the charter routes have to be done. Therefore, this may involve some degree of scrambling to get a driver and/or a monitor to do a particular job.

Then there is summer work. The Company receives contracts from organizations such as summer camps. As with regular school year routes, these are stable and drivers are assigned to do specific summer routes. The assignment of these routes typically would take place soon after the end of the regular school year.

The Company's physical operations consist of three trailers that are used as offices and a training facility. It also has a garage and a yard where buses and vans are kept. The Company employs a group of drivers and a somewhat smaller group of schoolbus monitors. Typically, there would be somewhat in excess of 200 individuals who are employed as drivers and monitors. Also in the bargaining unit is a small group of mechanics. In addition and excluded from the bargaining unit, the

³ I note that the Respondent had made a motion to the Board to dismiss the complaint based on its assertion that the Board did not have jurisdiction over its operations. This motion was denied by Order dated September 22, 2009.

Company employs a small group of office employees and another group of about two or three dispatchers.

The dispatchers are people who are responsible for making sure that the routes are covered and they are in constant touch with drivers via two-way radios. For example, although regular school year routes are established before the beginning of each school year, with the drivers and monitors assigned to specific routes, there are occasions when substitutions and changes have to be made at the last minute. A driver or monitor may be sick and a substitute will have to be assigned to a route by a dispatcher. Or a school might cancel a route and this might engender another change. Or a charter run may come into the office and a dispatcher, on short notice, will have to find and assign a driver and/or monitor to do this work.

Other than dealing with the day-to-day shifting of people around when needed to fulfill the needs of the routes, there is no evidence that dispatchers can hire or fire, direct the work of employees, adjust grievances, or engage in or recommend any of the other powers set forth in Section 2(11) of the Act. The dispatchers are, however, responsible for transmitting instructions to the drivers from Gillison, who is the general manager. To a limited extent, they may, in certain limited circumstances, be construed as agents within the meaning of Section 2(13) of the Act.

B. The Collective-Bargaining Relationship and Seniority Issues

The Company and the Union have had a collective-bargaining relationship since at least 2000. I received into evidence a collective-bargaining agreement that ran from September 1, 2000, to June 30, 2002. This was a complete collective-bargaining agreement and the unit consists of all full-time and regular part-time schoolbus and van drivers, monitors, mechanics, cleaners, and fuelers employed by the employer, but excluding all other employees including office clericals and guards, professional employees, and supervisors as defined in the National Labor Relations Act. This contract contains a grievance/arbitration procedure and provisions relating to seniority.

Because a number of significant allegations relate to whether or not the Respondent unilaterally revoked an agreement regarding seniority practices and/or refused to furnish relevant information regarding its seniority practices, the history of the contract provisions relating to this subject is set forth below.

The initial contract, at article 15, had a group of provisions relating to seniority. This provides that the Company shall recognize terminal seniority rights from the employees first day of work or date of transfer into the bargaining unit and that layoffs and recalls will be determined by classification seniority. Article 15 also stated:

d. The Employer will post a seniority list on the driver bulletin board.

e. All runs, holidays, vacations and extra work shall be picked by seniority. Routes becoming vacant during the school year shall be subject to bid by seniority and qualification.

In September 2002, the parties executed a two-page Memorandum of Agreement. This essentially was a 4-year extension that ran from July 1, 2002, through June 30, 2006. It was signed on September 11, 2002, by Gideon Tiktin for the Company and Roger Toussaaint for the Union. This document sets out various wage rates and wage increases for the term of the contract. It also, at paragraph 5, made some changes in the seniority provisions that had been in underlying contract that was executed in 2000. This reads as follows:

Seniority lists shall be posted monthly. All runs open for bid must be posted and picked by seniority. The picks shall include Bus Operators, Van Operators and Monitors. Schedules shall include hours of assignment. All extra work including Charters, Summer Camp and Extra Runs must be posted and picked by seniority and assigned by Union and Management representatives.

On October 6, 2003, the Union's counsel sent to the Company a proposed full contract covering the period from July 1, 2002, through June 30, 2006. This contained a new seniority provision at article 16 that incorporated certain seniority provisions contained in the original contract plus the seniority modifications that were contained in the 2002 Memorandum of Agreement. In relation to the selection of routes, this reads as follows:

(d) Seniority lists shall be posted monthly. All runs open for bid must be posted and picked by seniority. The picks shall include Bus Operators, Van Operators and Monitors. Schedules shall include hours of assignment. All extra work including Charters, Summer Camp and Extra Runs must be posted and picked by seniority and assigned by Union and Management representatives.

(e) All runs, holidays, vacations and extra work shall be picked by seniority. Routes becoming vacant during the school year shall be subject to bid by seniority.⁴

Sometime later, Tiktin sent a copy of a full collective-bargaining agreement to the Union that contained a number of handwritten modifications. These changes did not, however, affect the proposed article 16 and I, therefore, assume that Tiktin did not, at that time, have any disagreement with the way the Union wrote article 16. In any event, neither party signed each other's proposed contract, although they lived with and under the terms that were agreed to in the 2002-2006 Memorandum of Agreement.

On January 5, 2006, in preparation for negotiations for a new contract, a union lawyer sent a letter containing a full collective-bargaining agreement for the period from the 2002 to 2006. She stated:

Enclosed are two copies of the integrated collective bargaining agreement incorporating the changes made in the last contract negotiations. Please sign the agreements and return them to me. We will return a fully executed original to you when it is signed by the union. Although we have repeatedly re-

⁴ The proposed art. 16(d) replaced the 2000 contract provision at art. 15 and the proposed 16(e) retains the same language as 15(e) the 2000 contract.

requested that you sign this agreement, you have not done so. If you do not sign the agreement within ten days, we will be forced to file an unfair labor practice charge against your company for failure to bargain in good faith.

By letter dated January 17, 2006, Tiktin indicated that he was willing to execute a full collective-bargaining agreement so long as it contained the corrections that he had proposed in 2003. Although reiterating his previous understanding of what had or had not been agreed to, Tiktin did not make any objection to the way that article 16 was written in the Union's proposed contract.

The testimony showed that there were five or six bargaining sessions from July through October 2006 and that this ultimately resulted in another signed Memorandum of Agreement. This new memorandum set forth new terms that would be effective from July 1, 2006, through June 30, 2009. This document does not have anything in it relating to seniority although I think that it is safe to conclude that the parties did not have any intention of completely abrogating the other unmentioned terms of the underlying collective-bargaining agreement, including the grievance/arbitration provisions or the seniority provisions that had preceded the execution of this new Memorandum of Agreement. Thus, on October 27, 2006, Tiktin sent a memo to a union attorney that stated:

Enclosed is a signed copy of the Memorandum of Agreement. Are you going to send us a new contract or just attach the Memorandum to the old contract? Please advise.

Needless to say, the parties never got around to agreeing on the precise terms or language for a new complete collective-bargaining contract. So, like the situation from 2002–2006, the parties operated from 2006 to 2009 under what they understood to be the terms of the new Memorandum of Agreement.

As we shall see, matters started to deteriorate around 2007 and the situation went from bad to worse. As of the time of this hearing, the Union and the Company had met on one day in June 2009 to “negotiate” for a new contract. There have been no further negotiations because the Company has withdrawn recognition. In this regard, the Company asserts that the Union has lost its majority status and that this is demonstrated by a petition signed by a majority of its unit employees indicating their desire to be rid of the Union. But this gets ahead of ourselves.

Everyone seems to agree that up until around 2007, there was a cooperative relationship between the Union and the Company. However, the Union apparently feels that its previous administration had a too cozy relationship with the employer. The Employer, for its part, seems to feel that their relationship was good and that when disputes arose they could reasonably be resolved through negotiation.

In any event, it is clear that the relationship between the Union and the Company became much more confrontational starting around the fall of 2007. Thus, in a written statement given by Gillison to the Regional Office, he stated *inter alia*:

Starting in September 2007, John Simino and several other union representatives from outside the bus company

have harassed management personnel, employees and others. Some examples are:

They told drivers that our buses are unsafe to drive, including ones that just at that same time passed New York State Department of Transportation inspections!

The union passed out misleading information to drivers, called school districts with false reports and sent out untruthful fliers to parents.

On Christmas Eve, they came to the company and with a gas generator blew up a balloon of a pig or rat.... and tied the owner's name around its neck. This was disrespectful racial gesture.⁵

For seven years there were no problems between the company, the union and the employees. Starting in September of 2007, these union personnel mentioned here have made disrespectful accusations and created unrest. If the union is trying to build a better relationship between employees, management and themselves, the methods and tactics they are using don't facilitate it.

In a pretrial affidavit, Gillison had the following to say about the Company's relationship to the Union:

Joe Ramos has been the Chairperson for all the years that the union has been here and Ardsley has just had no problems with the Union. In September 2007, the union just came in and walked over Ramos. They put in another chairperson in or about September 2007, she was a monitor, and since then, we've had problems with the Union. There was an issue with that monitor and back in September, she accused me of swearing and yelling at her and during a meeting John and I, the monitor lied and told John and I that I had sworn at her and abused her. That wasn't true... I told John at that point that since that employee had been there for less than 2 months, I could fire her for the color of her hair. I told John, I liked the color of her hair but that the employee was fired there. I fired her right then and there for lying about me. Since then, the union has been obstinate and difficult and they've been accusing me of talking to the union representatives abusively. I think the Union wants me out because there are a lot of employees here who don't want the Union and John has told me that I need to force them to be part of the union. That's not my job—I just want to make sure we are getting the job done. I don't care about the Union one way or another. Then around last December, the Union created a mess around some wages we owed people, it ended up being about \$25,000. They sent letters to parents and to officials from Westchester County about some wages we owed—the Union just made a big scene, they brought out a blown-up pig.

C. Allegations Involving Cesar Uchofen

1. The events in March 2008

Uchofen had been employed as a vandriner since January 5, 2007. Since early 2007, pursuant to company policy, he was allowed to return to his home with the van between his morning

⁵ For whatever it is worth, I note that Tiktin is Jewish and that the portrayal of Jews as rats was a stereotype utilized by the Nazi regime in Germany.

and afternoon runs. However, the Company's policy has always been that drivers were not permitted, without express approval, to use the company vehicles for personal use. Doing so would be grounds for discharge.

After Ramos was removed by the Union as the shop chairman, the Respondent was notified by letter that Julie Rivera had been appointed as the new chair, that Cesar Uchofen had been appointed as the vice chairman, and that Yolanda Vergara was appointed as the recording secretary. In April 2008, the Union appointed Cesar Uchofen as the shop chairman.

The evidence shows that in early March 2008, the Company's manager, Tom Gillison, received reports that Uchofen was using his van for his own personal use. Around March 17, the Company received a summons relating to a parking ticket that been issued to the van driven by Uchofen and this indicated that the address of the violation was neither near his home nor on the route to which he had been assigned. Instead, it was at or near the Union's offices in Yonkers. Consequently, on March 17, Gillison requested that Uchofen come to his office but Uchofen did not do so.

On Tuesday, March 18, Uchofen was told by Rose Villela that she had been instructed by Gillison that Uchofen was no longer allowed to take the van home between shifts.

The General Counsel claims that on Wednesday, March 19, Gillison threatened Uchofen with violence. However, the evidence does not support that assertion. Uchofen testified that after finishing his afternoon route, he spoke to Gillison and was directly told that he no longer could bring his van home. According to Uchofen's testimony, Gillison stated:

[B]ecause I am the . . . union person, you think you are smarter than me. You don't know who are you dealing. I am going to take all the shit from you. I say you're not supposed to talk like that to me. I come nice to talk to you. But, [Gillison] try to say I am—I have the power here. I do whatever I want here.⁶

In any event, on Thursday, March 20, Uchofen was suspended for that afternoon. The evidence shows that Union Representative Simino agreed to accompany him to Gillison's office later in the day. In this regard, when Simino stated that he was there to represent Uchofen, Gillison responded that he didn't have time for them at that moment and that he wanted to meet with Uchofen alone. When Uchofen and Simino refused to leave the office, Gillison said that he would call the police. Before leaving, Simino said that he wanted to meet with Gillison to talk about the suspension and Gillison said that he could return on Monday.

On Monday, March 24, Simino and Uchofen returned to Gillison's office and Simino stated that he wanted to have a "hearing" on the suspension. Gillison, for his part, insisted that he wanted to talk to Uchofen alone and essentially refused to

discuss the matter so long as Simino was present. At an impasse, Gillison told them to leave and when they refused, he called the police. Uchofen and Simino then stepped out of the office and when the police arrived they explained that they were trying to have discussion with Gillison about a labor management issue. After some more conversation Gillison told Uchofen that he was "out of service." Before leaving the yard, Simino left a copy of a grievance with Company Owner Titkin.

By letter dated March 24, 2008, Gillison advised Uchofen that he was being given a 5-day suspension.

With respect to his decision to suspend Uchofen, the Company asserts that this was justified by its well-founded belief that Uchofen had violated company policy prohibiting drivers from using company vehicles for personal use.

In reviewing this record, Gillison may have had a legitimate beef with Uchofen in relation to his belief that Uchofen had violated a clearly defined company policy. But I also conclude that Gillison's decision to suspend Uchofen was actually motivated by Uchofen's decision to seek representation from Union Business Agent Simino. This is, in fact, pretty much admitted by Gillison, who gave an affidavit to a Board agent during the investigation of this charge. This stated in pertinent part:

13. At around 1:15 on March 20, Cesar and the Union representative John Simino came into my office. I was in the middle of reviewing the backpay figures that the Union had told us we owed the employees when they arrived. [Apparently relating to another grievance]. John asked for a meeting right then and there, no prior phone calls or anything. I told John that I would not stop what I was doing and that they could see me the next day to discuss. Cesar was not suspended at that time. I had said that I had summoned Cesar to my office that morning to discuss it but he didn't show. At that point, I had just intended on reading him the riot act and let it go but he never showed up. I did not tell them that I would meet with Cesar but not John. I just did not have the afternoon of the 20th to meet them. I did ask John to leave my office on that day because I had work to do and John was belligerent and refused to leave. I told him I needed to call the police on him, and he still refused to leave. So I needed to call the police and John stayed there until I did.

14. Once John had forced the issue of the meeting on the 20th and decided he was going to run it his own way by demanding a meeting to discuss Cesar's discipline, I decided on that day that it would be a suspension. I didn't tell Cesar it would be suspension on that day, I just told them to come back the next day to discuss it. Again, I had asked Cesar to meet with me on the morning of the 20th to discuss the ticket and he didn't show up—I wasn't going to suspend him, just going to read him the riot act and send him out again. It was when they demanded this meeting that I decided to suspend him.

16. The following morning, on March 21st, John and Cesar came in to have a meeting about the discipline. I had not informed Cesar of a suspension at this point. . . . By that point, I had an Employee Disciplinary Notice (exhibit 2) and Report (attached at Exhibit 3), both of which I

⁶ The General Counsel points to an assertion in Uchofen's affidavit to the affect that during this conversation, Gillison stated: "I'm going to squeeze the shit out of you." I am not going to rely on this to find that the Gillison threatened Uchofen with violence. For one thing, this out of court statement is hearsay if offered by the General Counsel for the truth of the matter asserted. Secondly, it is contrary to the record testimony of Uchofen at the hearing.

wrote on the 21st before Cesar and John came in and in those documents I informed Cesar of the suspension. Basically what happened is that I decided on the suspension after John made it clear he was going to do it his way. We all had a meeting with Gideon Titkin to discuss the issue and I handed Cesar the Notice and Report. During this meeting, John wanted to meet privately with Gideon and so everyone left the room. Then Gideon called me to a meeting and he told me that John wanted me to reduce the suspension from 5 to 2.5 days. I told Gideon I would give him 3 days and then John and I had a private meeting. I told John that it would be three days and John told me that he knew Cesar had gotten the ticket and he need to do something for his men, so he asked if we could reduce it to 2.5 days. I told John I could not do that, I needed to keep it at three. John said then, when Gideon was back in the meeting that he would bring it to the Labor board and Gideon said he needed to do what he needed to do.

17. On or about March 24, 2008, I wrote Cesar the letter attached at Exhibit 4. In that letter, I was just reiterating my position that the suspension would last 5 days. I wanted to be clear that if John was going to hold his ground that it should only be a 2.5 days suspension, Cesar was going to get the whole five days. . . . At some point, John and Gideon did reach some deal that ended in Cesar being suspended for only 2.5 days and I did go along with that. There's no reason to be in a long battle. I'm not crazy about suspending people because I need the drivers. Cesar only ended up being suspended for 2.5 days.

There is little doubt that Gillison's decision to suspend Uchofen, instead of dressing him down, was actually motivated by the fact that Uchofen sought to be represented by a union representative. Moreover, instead of allowing Uchofen to have a union representative present in circumstances where Uchofen had reason to believe that he would be subject to disciplinary action, Gillison insisted that he would only speak to Uchofen alone. In these circumstances, it is my conclusion that the Respondent interfered with Uchofen's right to have union representation and that the ensuing suspension constituted a violation of Section 8(a)(1) and (3) of the Act.

I note that the Respondent called Uchofen back to work before the 5-day suspension was over. And as a result of negotiations between the Union and the Company, Uchofen was made whole for all monetary losses he suffered as a result of the suspension. Nevertheless, as this suspension was at the start of a prolonged series of later unfair labor practices that are described below, it is my opinion that any notice required in this case should reflect this particular violation as well. Thus, although the General Counsel does not seek any monetary relief for this suspension, I shall take this violation into account as part of the appropriate remedy.

The General Counsel also asserts that the Respondent violated Section 8(a)(1) of the Act, when Gillison threatened to call the police on March 20 and called the police on March 24. The theory is that the Respondent violated the Act because the Company had no general policy prohibiting off duty employees from remaining on its property. But it is one thing to ask or

demand that an employee leave the property and another thing to ask or demand that an employee leave one's personal office. Although I have concluded that on both occasions, Gillison was interfering with Uchofen's right to have union representation, this does not mean that the Company's representative doesn't have the right to terminate the interview and insist that the others leave his office. In this particular case, it is my opinion that Gillison was within his rights to call the police when Uchofen and Simino insisted on remaining in his office after being asked to leave.

2. Alleged threat of assault on June 16, 2008

The General Counsel alleges that Gillison threatened Uchofen with violence on June 16, 2008. According to Uchofen, he asked to talk about what the pay rate was going to be for one of the summer camp runs and that in response Gillison said that this was not union business and to "please get out." Uchofen states that he politely pressed Gillison to talk about the issue but that Gillison stood up and then came toward him in an aggressive manner. According to Uchofen, John Stewart put himself between the two men and said that it would be better if Uchofen left. Neither Gillison nor Stewart testified about this transaction.

In my opinion, even if I completely accepted Uchofen's version, the actions of Gillison did not rise to the level of a legally prohibited threat. At most, it shows an irritated and angry Gillison responding to a request for information by the Union's shop chairman. But it does not show much more than that. I therefore shall dismiss this allegation.

3. Alleged assault in November 2008

Uchofen testified that on or about November 25, 2008, as he was signing in to work, Gillison came into the trailer and starting ranting in front of other employees that Uchofen was the new boss here and that "he's going to run the company now." He states that after trying to avoid an argument, Gillison still kept on making sarcastic comments to the effect that Uchofen was the new boss. According to Uchofen as he was leaving the trailer, Gillison kicked him in the back and told dispatcher John Stewart to take him of his run. Employee Rosie Clayton essentially corroborated Uchofen's account. I, therefore, conclude that the Respondent, by Gillison's actual assault on Uchofen, violated Section 8(a)(1) of the Act.

4. The discharge of Uchofen on January 21, 2009

The General Counsel alleges that Uchofen was discharged in relation to an event that took place on January 21, 2009, because of his actions on that date as a union representative. There is no significant dispute about the facts.

On the morning of January 21, 2009, the Company was conducting a State mandated health examination for its drivers and monitors. To do this, batches of about 20 employees were directed into the training trailer where they were given forms to fill out regarding their medical histories. One by one, the employees were then examined by a physician in an adjoining room. Prior to the actual examinations, Gillison was with the employees and was giving them instructions regarding the forms. Also, as employees were sent in to see the doctor, other employees were being given eye tests.

At about 10:30 a.m., Uchofen entered the trailer and during the time that Gillison was giving instructions to the waiting employees, started handing out and asking employees to fill out a questionnaire which sought input as to what issues employees wanted the Union to address during negotiations. Gillison told Uchofen that he could not do this while employees were waiting for their medical exams and that he would have to leave the trailer. Nevertheless, Uchofen refused at least two requests to leave and phoned Union Business Agent Simino. He also told the employees that this was a free country and that Gillison was no Fidel Castro. While still standing inside the trailer, the owner arrived and asked Uchofen to come to his office. Uchofen refused. At this point, Gillison called the police.

Upon the arrival of the police, who came at about the same time as Simino, Uchofen was asked by the police to leave the trailer and he did. He then proceeded to hand out the questionnaires to the employees outside the trailer as he had done on previous occasions before this date.

In describing this event, Rosie Clayton, who was called by the General Counsel, credibly testified as follows:

Q. Okay, why don't you explain to me what happened while you were in the trailer before your medical examination.

A. We were taking an eye examination from Tom.

JUDGE GREEN: What else, if anything?

THE WITNESS: Cesar started talking about the Union. So he kind of took our attention a little bit from Tom when we were supposed to have been looking up at the chart for our examination

. . . .

Q. While everybody was waiting to have their medical examination—or their eye examination what was everybody doing?

A. Well Tom was still giving us some of what we were supposed to be doing as far as the examination. We were really supposed to be listening to him.

. . . .

Q. You said that Cesar was sitting at a table. Is that right?

A. Yes.

Q. And what was he doing?

A. He kept talking about the Union. He was trying to give out the paper that he had so we could see what was on the paper.

Q. And who was he giving the paper to?

A. To all of us; the ones that work with me.

Q. Was everybody right around Cesar?

A few of them was. It was just like just turned from the examination to what he was doing.

Q. And what did Tom say?

A. He told him that we're conducting an examination right now, and you have to do that on your own time.

Q. Did Cesar get up from the table?

A. No. He kept sitting there talking like he didn't hear.

JUDGE GREEN: I would like to know in the witness' own words what happened.

THE WITNESS: He kept talking. He just kept talking and was telling us about what was going on in the Union. And being honest, I had turned around myself. I turned around to listen to what he was saying.

JUDGE GREEN: Then what?

THE WITNESS: Then [Tom] told him "I'm sorry, but you cannot do that. You cannot do that in here." He said "I called this meeting for the examinations so we can be back in time for our run." He said, "You have to call your own meetings." And that's what he was saying to him, but he didn't listen.

JUDGE GREEN: And what happened then?

THE WITNESS: Then Tom said he wanted him out of there.

JUDGE GREEN: And what did Cesar do, if anything?

THE WITNESS: He kept saying, "I'm not doing anything. You keep on doing what you was doing. But he couldn't do what he was doing because he needed them to sit down so that they could see the chart for our eyes. We couldn't see it.

. . . .

JUDGE GREEN: So how many times did Mr. Gillison ask Cesar to leave? If you can remember.

THE WITNESS: About three or four times.

JUDGE GREEN: And did Cesar—

THE WITNESS: He told him he didn't have to go anywhere because he wasn't bothering anybody.

JUDGE GREEN: Did any of the employees have anything to say or were they just watching?

THE WITNESS: We just sat back and watched.

The General Counsel argues that Uchofen's discharge was unlawful because he was engaged in protected concerted union activity on January 21, 2009. I do not agree.

There are cases where an employee's otherwise concerted or union activity loses its protection because of the way it is carried out. In *Atlantic Steel Co.*, 245 NLRB 814, 816 (1979), the Board established a balancing test for these types of situations. In determining if the employee's conduct lost the protection of the Act, the Board will take into account and balance the following factors: (a) the place of the discussion; (b) the subject matter of the discussion; (c) the nature of the employee's outburst; and (d) whether the outburst was provoked by the employer's unfair labor practices.

We are really not dealing with an employee's verbal outburst. Rather, what we have here is his refusal to leave a particular working location where employees are being addressed by their manager and being given physical examinations that are necessary for them to do their jobs. As shown by the testimony of Rosie Clayton, the conduct by Uchofen interfered with the operations of the employer on that day and that he refused to leave the trailer after being politely asked to leave. There was no good reason for Uchofen to be in the trailer handing out his papers or talking to the employees while the Company was conducting the exams. He could have easily waited just outside the trailer which was still on the Respondent's property and handed out his questionnaires. Indeed, the evidence is that

before this particular date, he did so without any interference on the part of the Company.

Despite the fact that the Company demonstrably held Uchofen in enmity, this did not give him, even though a union representative, the right to do whatever he liked. As I conclude that his actions on January 21, 2009, were not protected by the Act, I shall recommend that this allegation be dismissed.

D. Issues Relating to Seniority

The Company and the Union have had a collective-bargaining relationship since at least 2000. The evidence shows that a complete contract document was executed in 2000 and ran from September 1, 2000, to June 30, 2002. Thereafter, the parties executed a number of memoranda that updated the initial contract. Whatever confusion may exist because of the failure of the parties to execute a newer fully detailed contract, there is no doubt that the parties' agreements, as manifested by the various documents, required that seniority be utilized before routes were assigned to drivers and monitors and that the routes be posted in advance so that employees, in order of seniority, could bid for their selections.

It is also clear to me that the choosing of routes via a posting and a seniority/ bidding process was intended to cover not only the normal school year routes, but also other routes that the Company obtained from its customers during the course of the year.

In this regard, there are two basic types of seasonal routes.

(a) The Company contracts with schools and school districts to drive children to and from schools during the school year. These would be during the period from September to June. (b) The Company also contracts to provide bus services to summer camps or other organizations having summer activities. These would take place after the regular school year ends and run until sometime in August before school resumes. In addition, there are also a few prekindergarten routes for Westchester County that also are steady and recurring.

As to the above-described basic seasonal routes, it does not take all that much imagination to figure out how to set up a system so that employees, in order of seniority, can bid for their selections. Since these routes (school year routes, prekindergarten routes, and summer camp routes), tend to be recurring and contracted for well in advance, the Company can post the routes in a public place and the employees, after reviewing them, can be given the opportunity, in order of seniority, to make their individual bids.

But there are also nonrecurring routes and/or changes in regular routes that come about on a more an ad hoc basis. These would include charter routes which normally involve after school events such as sporting events. Also, changes in scheduled routes may occur, for example, because a new student is enrolled in a school and an existing route needs to be modified to pick him or her up. The provisions of the "contract" would seem to encompass these types of routes as well as the basic seasonal routes. However, I must say that the establishment of a new bidding process every time a route is

changed or a charter route is obtained, strikes me as being impractical at best.⁷

1. The 2008 summer camp routes

According to John Simino, in late May 2008 he told Gillison that he wanted to speak about the summer picks. He states that Gillison refused to discuss the issue and said that the Union had no say in the summer picks. Simino testified that he thereupon requested information regarding the value of the summer routes, meaning the number of hours for each route so that employees could choose how many hours they wanted to work and how much money they wanted to earn.

According to Simino, he attempted in early June to arrange for two meetings to discuss the summer routes but that Tiktin cancelled both meetings.

On June 20, 2008, Union Representative Simino sent a letter to the Company which stated the following:

Over the past three weeks we have agreed on two scheduled meetings to discuss a summer pick. You cancelled the first one the day before and the second meeting you cancelled twenty minutes before we were to start. Both times you informed me that the rest of the week you had auditors so you could not see me.

Simino testified that he eventually obtained a meeting with the Company in late June 2008 and was given some information. But he also testified, without contradiction, that the information given to him did not have the hours of work for the routes.

In the meantime, the Company, in mid-June 2008, had already invited representatives from the summer camps to visit the facility. Basically, what happened was that by this time, and before any information had been turned over to the Union, the Respondent had already assigned employees to the summer routes and had arranged for the drivers to meet with the representatives from the camps to which they had been assigned. The Union was not notified of these transactions and the evidence shows that the employees were not given any opportunity to bid for these routes.

I have already noted that the parties had executed contract documents pursuant to which routes, including summer camp routes, would be posted for bid on the basis of employee seniority. Therefore, information relating to the upcoming routes, including the types of route and the hours that the routes would take to run, was information which not only is presumptively relevant, but is also relevant to enable the Union to administer

⁷ For example, a school may cancel an existing route or add a new route. If a route is canceled, the driver and/or monitor who had the canceled route would have to be reassigned. And if a new route is created and received by the Respondent, that route would have to be covered by a driver and/or monitor. In either case, how would you set up a practical bidding process to meet these contingencies? If a driver lost his route, would he be allowed to bid and bump a less senior driver on some other route? And if that happened, would the bumped driver be then permitted to bid to bump yet another driver? Would this create a cycle of bids? Where would it end? If these contingencies cannot be addressed in the real world, then one wonders if the contract seniority bid provisions insofar as they involve ad hoc routes, would be impossible of performance.

the seniority provisions of the contract. Moreover, since the routes were to commence in early July, they needed to be selected before that date and the information, in order to be meaningful, had to be made available to the Union and the employees before the start of the selection process.

As the evidence shows that the Company did not provide in a timely manner, information relevant to the Union for the administration of its collective-bargaining agreement, I conclude that the Respondent violated Section 8(a)(1) and (5) of the Act. *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 437 (1967); *Knappton Maritime Corp.*, 292 NLRB 236 (1988); *Frito-Lay Inc.*, 333 NLRB 1296 (2001); *ATC of Nevada*; 348 NLRB 796 (2006).

2. The picks for the regular schoolbus routes

The allegations involving the 2008–2009 schoolbus routes fall into three categories.

First, is the allegation that the Company unilaterally and without the consent of the Union, modified the existing collective-bargaining agreement by failing to carry out terms requiring the Company to post routes and allow employees to bid for those routes based on their seniority. The General Counsel therefore contends that the Respondent's actions violated Section 8(d) and 8(a)(1) and (5) of the Act. In this respect, Section 8(d) of the Act essentially states that when there is a collective-bargaining agreement in existence, "the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract." On the other hand, this same provision of the Act states that the obligation to maintain, absent consent by the other party, the terms of an existing labor agreement during its term will cease in the event that the labor organization "has been superseded as or ceased to be the representative of the employees subject to the provisions of section 9(a)."

The second 8(a)(1) and (5) allegation is that in relation to grievances filed by the Union concerning the alleged breach of the seniority/bidding provisions of the agreement, the Company refused to furnish certain information that would have been relevant to the investigation and/or prosecution of these grievances.

The third allegation is that the Company refused to meet with the Union as to certain other grievances. In this regard, the provisions of the grievance/arbitration clause require the Company to meet with the Union at a step two meeting. The evidence is that the Respondent refused to respond to at least two requests by the Union to have step two meetings. Irrespective of the provisions of the contract, I construe this as basically an allegation that the Employer refused to meet at reasonable times regarding terms and conditions of employment.⁸ As the

⁸ Sec. 8(d) states in part: "For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement or any question arising there under. . . ."

evidence shows that the Company refused to meet with the Union on these grievances, I conclude that it violated Section 8(a)(1) and (5) of the Act in this respect.

I note here, that certain of these grievances including the grievances involving the seniority/bidding issues were presented to an arbitrator who ultimately issued an Opinion and Award in favor of the Union. (As of this time, the Union had filed a lawsuit seeking enforcement of the Award and this is pending in the Federal District Court.) Thus, while this unfair labor practice complaint alleges that the Respondent, in violation of Section 8(d) and 8(a)(5), modified the existing labor agreement, the same basic claims were made to the arbitrator. I also note that in relation to the refusal to furnish information allegations of this complaint that this matter was also presented to the arbitrator who concluded that the Company's failure to furnish the same information was grounds for drawing an adverse inference against the Company as to the underlying grievances.

As many of the alleged violations that are described in this section have already been arbitrated and are pending possible enforcement by a Federal District Court, there is a question as to whether the Board should defer these allegations to the arbitration process.

Moving on to late August 2008.

Because the regular school year routes commence in September, the drivers and monitors need to be assigned in advance. This process usually takes place in late August.

For the 2008–2009 school year, the parties arranged for a process whereby drivers and monitors would make their picks, (based on seniority), over a several day period starting on August 25, 2008.

However, prefatory to the route pick, Gillison, at a meeting with union representatives on August 20, 2008, presented a document describing how the Company intended to conduct the route pick. This stated:

1. Route picks will be in effect from Monday, August 25, Tuesday, August 26 and Wednesday August 27.

2. An employee may pick and sign for a route but if a senior employee chooses to pick that same route at a later date before the route pick close date, the senior employee will have the right to the route.

3. It will be up to all employees to check the route pick board daily to know if the route they have picked is still in effect. Employees may also call in and speak to Joe Ramos, the Company's safety director or John Simino ... to find out the status of their route signing.

4. Many routes may change in the way of adding to, subtracting from, combining with another route, or deleting all together because of school district changes or changes from the company.

5. Employees will have the right to change their route pick according to seniority if there are changes made for less hours in for of a different route until Wednesday, August 27, 2008.

6. No employee who has been with the company under sixty days will be allowed to pick a route. The company will assign the routes.

7. There will be only one route pick during the 2008 - 2009 school year.

8. During the school year, if a route changes by increasing or decreasing hours, the employee will not be allowed to bump the employee with the changed hours. This would cause a domino effect in the company'

Contrary to Gillison's assertion that the Union had previously agreed to these procedures, Simino credibly testified that there was no such agreement about certain terms. One of Simino's objection was that the Company's proposal did not permit any further bidding process to take place after the initial selection of routes had been made. That is, in the event that a school changes an assigned route (either by being shortened or lengthened), neither the employee assigned to that route or any other employee would have a right to bid for the now changed route or for some other route. Another objection was that under the Company's proposed procedures, probationary employees would not be allowed to bid for routes and there is nothing in the labor agreement that allows the Company to carve out such an exception.⁹

It is the Union's position that by putting into effect the procedures tendered on August 20, 2008, the Respondent altered the terms of the seniority provisions of the labor agreement which, by its terms, seems to call for a bidding procedure by seniority for *any and all* routes. But I have already noted that it may be that a literal application of those provisions in the case of intermittent routes (like charters), or in situations where routes may unexpectedly be changed by the Respondent's customers, cannot be practically accomplished. Indeed, a continual bidding process that would take place over the course of a year may simply be impossible of performance for the assignment of routes that are obtained or changed on an ad hoc basis through no fault of the Respondent.

In any event, the fact is that starting on August 25, 2008, a bidding system was set up whereby the routes were posted in a trailer and the employees, in order of seniority, were assigned a specific time to make their route picks. When an employee made a pick, he or she notified the union and company representatives who were present. The employee then signed a "route pick form." The picks were finished by August 29. Thereafter, the Company did not conduct any bidding procedure for the remainder of the year.

Notwithstanding the procedure set up for August 25 to 29, the evidence shows that the Company did not, in fact, post all of the routes. Instead, there were certain routes that were not put up for bid and were assigned unilaterally by the Respondent. Thus, in a letter dated August 28, 2008, Gillison essentially admitted that the Irvington, Dobbs Ferry, and Westchester County routes, along with one route for the Ursuline School, were assigned by means other than the bidding/seniority process. He stated, in effect, that the drivers and monitors that had

done these routes in previous years were either assigned to or given preference over anyone else, irrespective of seniority. Gillison referred to the "contract" between the Respondent and Westchester County as the justification for withholding these routes from the August bidding process.

By letter dated August 28, 2008, Simino notified the Company that the Union was grieving the integrity of the bidding process that had just taken place. He stated:

We are objecting to the posted pick. As it turns out an extensive amount of routes were closed off from picking as the schools allegedly picked drivers instead of the other way around. All the Irvington, Dobbs Ferry and Westchester County routes were closed off the pick. We began questioning this practice at an August 22 discussion of the pick. It seems this practice is far more extensive than portrayed at that discussion. Any pick that eliminates that many jobs is a violation of the pick's integrity and amounts to a gross violation of our members' seniority. Consider this our notification of grievance on this issue.

By letter dated October 23, 2008, Uchofen wrote to the Company and requested certain information as follows:

The Union . . . is investigating a grievance regarding bus routes giving out of seniority. Please provide the following:

1. All routes info.
2. A list of the drivers and monitors who have assigned to the routes.
3. List of drivers and monitors who are not assigned to any routes.
4. Any temporary or short term routes
5. List of routes that have been canceled.
6. List of new routes after September 2008.
7. The new routes that you posted to pick by seniority since September until now.
8. The charter routes that you posted to pick by seniority since September until now.

Tiktin's response was as follows:

Your requested route information for your investigation of grievances as to seniority: are as follows:

1. Unless you have a specific grievance of a specific route and employee for us to answer, we are not obligated to reveal company documents with you.
2. As for the monitors and drivers who are assigned to routes they picked their own routes or if they were not present for the route picks they were assigned routes by TWU -Local 100 with Harold Williams as union overseer. You should be able to obtain a copy of the route picks from Harold Williams.
3. As far as a list of employees not assigned to routes those employees are considered spares and can be assigned to whatever routes that are needed.
4. We have no temporary or short term routes. All routes are permanent are added or deleted as the districts decides to do so.
5. Please tell us why we should be obligated to give you company route information as to which routed added or deleted? This is company information for company re-

⁹ As I understand the situation, it is the schools that determine the routes and not the Respondent. Thus, any route changes that may occur during the year will originate at the school involved and that change will be transmitted to the Respondent. Thus, the Respondent, as far as I am aware, does not design or set the routes. It simply assigns the personnel to do the already established routes.

view only. Unless that information is needed to prove points via arbitration or the NLRB we see no reason why it should be given to you.

6. There have not been any other routes posted for pick since the start of schools or in September 2008.

7. Our charters come to us daily and they are assigned by seniority.

On October 29, 2008, Uchofen, on behalf of the Union, filed the following grievance:

Management is required to post all runs, including charters by seniority. Route becoming vacant during school year shall be subject to bid and by seniority and qualifications. Ardsley bus has not posted all runs for the bidding process and this resulted in less senior drivers & monitors driving routes with more hours than more senior drivers & monitors. Additionally, the withholding of the routes was intentional. Any and all work should be posted by seniority. Remedy Sought: Re-bid of all work by seniority and back payment to any and all drivers and monitors who lost pay.

The Respondent responded by sending a letter dated October 31, 2008. This read as follows:

Re: Grievance 10/29/08 vacant routes and posting new routes.

1. There is no such thing as a vacant route. All of our routes are routes of operation.

2. There are no routes that come up for bid during the year. The company only bids for contracts. If there is a route or routes that come up for bid that you know of, please specify the route and if there is a grievance about such a route, you have the right to submit it to us. Otherwise just writing nonsense grievances should be stopped. I have received several grievances from you of the same nature seeking information without a valid grievance from a named employee. You just send me letters of what you think the company should be doing. I will remind you that it is not your job to instruct this company on what we should do or not do.

3. The contract requires only one route pick at the start of schools and "no other."

4. As for charters, I have made clear to the union and to you in the past and again I will explain why our charters are not posted daily the way you think they should. 95% of the charters are athletic trips that come in the day before the trip is scheduled to run. Many of the trips change sites, times or postponed for another day, sometimes out right cancelled at the last minute or on site. (Therefore what I am saying is that our charter work is subject to change in a moment's notice). Many charters are assigned to drivers at the completion of their school routes. When there are changes in the schedules many drivers could lose out on doing charters at all. (Money lost to the driver).

5. Your statement accusing me of intentionally withholding routes with more hours from the senior employees is absolutely false without proof.

6. Cesar you continue to tell me that you are always trying to work with me on a good faith basis and that we must develop a good working relationship for the benefit

of all. If this is how you plan to build a good working relationship please leave me out.

On October 31 2008, Simino sent another letter to Titkin asking for step 2 hearings on a number of other grievances. The letter goes on to state that unless the Company scheduled these grievances for a step 2 meeting, the Union would have them scheduled for arbitration. Simino testified that he received no response.

On November 19, 2008, Union Attorney Levelt, sent a letter to the contractually named arbitrator (Andrew W. Sayegh), requesting that a number of grievances be arbitrated.¹⁰ These included the assertion that the Company (a) had not allowed employees to bid by seniority for the summer camp routes and (b) that the Company "had violated the integrity of the August pick."

On December 8, 2008, the Union's attorney sent the following letter to the Respondent:

In order to prepare the above referenced grievance for arbitration, we request the following information.

1. Any evidence of work posted available for bid after the August 2008 pick;

2. Copies of route descriptions of all work performed by drivers and monitors, (including charters, extra work/runs, vacations, holidays) from August 1, 2008 to the present with an indication of the time period the route or other work was being performed and who performed the work on which day;

3. Payroll records for all drivers and monitors from September 1, 2008 to the present;

4. Seniority list of drivers and monitors effective on or about July 1, 2008; and

5. Copies of all contracts with the Board of Education of the different municipalities underlying the work described under no. 2 above.

We appreciate a response to this request by December 22, 2008 so we can review the evidence before the date of the arbitration hearing. At the time of the hearing we expect an update of the information requested to the date of the hearing.

In a letter dated December 23, 2008, Respondent's counsel advised the arbitrator that the Company objected to him hearing the arbitration cases. The letter asserted a claim of bias on the part of the arbitrator.

Without describing all of the procedural aspects, suffice it to say that an arbitration hearing commenced on May 4, 2009. During that proceeding, the arbitrator issued an interim order requiring the Employer to produce the information requested by Attorney Levelt. When that information was not turned over, the arbitrator utilized that failure as a reason to draw an adverse inference in his August 18 opinion. The opinion, which sums up the facts relating to the seniority issues, stated:

¹⁰ Par. 15(d) of the contract states; "arbitral matters shall be submitted to Andrew Sayegh or a representative for the American Arbitration Association."

In the last week of August 2008, the Company ostensibly held a Pick for the ensuing school year by posting available work and permitting employees to choose from among the posted work by order of seniority. The Union complains that in the weeks after the Pick was conducted it came to their attention that there was more and different work available than the work that was actually posted for the Pick. And the Union further complains that this work was assigned by the Company in violation of the Collective Bargaining Agreement, Sections 10(d) and (e); much of the work picked by the employees was cancelled, modified and reassigned by the Company. The Union requested certain disclosure of information that is in the sole custody and control of the Company, information the Union feels is necessary to aid it not only in monitoring and enforcing its members' seniority rights but also to aid it in framing and presenting its grievance. The Union feels the requested material is of "utmost importance" as to enable it to specifically present its grievance. It feels it has the right to know what work is available and how the work is being assigned by the Company.

The Company's position relative to this issue is simply that there was no seniority violation of any kind; the Union's grievance is a general complaint lacking any specificity and therefore the Company is placed in a position to disprove a negative, which is, in essence, impossible. The Company, however, did agree to provide the requested information if the Union can demonstrate a "good faith basis" for its complaint, a position I find to be reasonable.

In an Opinion and Award dated July 17, 2009, I found that the Union did in fact demonstrate a good faith basis for its complaint of seniority violations and I ordered the Company to furnish to the Union some of the items that the Union has demanded.

In the continuation hearing on this issue that was held on July 22, 2009, I was pleased to learn from the company that it intends to comply with my July 17th Award. However, as of the last day of hearings, August 4, 2009, I learned that the Company has not complied with this Award. The Company was given due notice that I will draw a negative inference if the company fails to comply with my July 17th Award, and I therefore draw a negative inference by this noncompliance.

I find that the Company has violated Section 15 (e) and Section "5" of the 2002-2006 Memorandum of Understanding. All runs open for bid must be posted and picked by seniority and all extra work including charters, summer camps and extra runs must be posted, when possible and picked when possible or assigned by seniority.

In light of my finding of seniority violations I therefore order the following:

1. The Company must hold a Pick as soon as reasonably possible posting all work available for the bargaining unit and permit employees to pick by seniority and qualification; and

2. The Company must post all holidays, vacations and extra work (when possible) and permit employees to pick by seniority and qualification; and
3. The Company must post all routes becoming vacant during the school year and permit employees to bid for such work by seniority and qualification.

With respect to the Union's demand to make whole all drivers and monitors injured because of violation of their seniority, this issue shall be determined at a further hearing.

The General Counsel contends that the Respondent violated Section 8(a)(5) of the Act by unilaterally changing the bidding procedure to be utilized for the picking of the regular schoolbus routes. The General Counsel also alleges that the Respondent violated Section 8(a)(5) and 8(d) by modifying, without the consent of the Union, the existing labor agreement by failing to allow employees to bid by seniority for *all* available routes. These are two separate allegations and are based on two separate theories.

As to allegation that basically goes to the bidding process that occurred in late August 2008, there was no evidence presented to me as to how that process was conducted in 2007 or in any previous years. It is safe to say that the Union objected to the fact that the Respondent, on August 20, 2008, presented the Union with a document that described how it intended to conduct the bidding for assignments. Maybe this was a change, but I cannot say specifically how this changed the procedure that occurred in previous years. (From hints in the testimony, it seems that the Union was not too happy with the way the bidding process was conducted in 2007.) Therefore, in the absence of evidence as to how this bidding process was conducted in previous years, I find no merit in a theory that is predicated on the assumption that the Respondent unilaterally changed the bidding practices without bargaining with the Union.

But that does not end the inquiry.

I have already set forth the relevant language of Section 8(d) of the Act. And in *Milwaukee Spring Division*, 268 NLRB 601, 602 (1984), the Board stated:

Section 8(a)(5) and 8(d) establish an employer's obligation to bargain in good faith with respect to "wages, hours, and other terms and conditions of employment." Generally an employer may not unilaterally institute changes regarding these mandatory subjects before reaching a good faith impasse in bargaining. . . . Section 8(d) imposes an additional requirement when a collective bargaining agreement is in effect and an employer seeks to modify... the terms and conditions contained in the contract. The employer must obtain the union's consent before implementing the change.

In the absence of a contract, or in the absence of a controlling contract provision, or after a contract expires, an employer that has a legal obligation to bargain with a union can only, without a sufficient waiver, change the existing terms and conditions of employment after giving notice to the Union and bargaining to an impasse over the proposed change. If no agreement is reached, an employer can then make the proposed

change. But when there is an existing contract, it is not enough to bargain. Neither the union nor the employer can, in mid-term, modify that contract without the consent of the other. Absent consent, no amount of bargaining will permit a change during the lifetime of an existing contract.

At the same time the Board has made a distinction between "mere breaches" of contract and situations that constitute contract modifications prohibited by Section 8(d) and 8(a)(5). A Board majority in *NCR Corp.*, 271 NLRB 1212 (1984), distinguished the two situations by holding that there would be no violation if the company had "a sound arguable basis" for its interpretation of the agreement. See also *Allied Signal Inc.*, 330 NLRB 1201, 1203 (2000), where the Board found a violation and held that the employer had no sound arguable basis for its position.

The labor agreement that was effective in 2008 and 2009 contained provisions that literally required the Company to post *all* routes so that employees could bid for them on the basis of seniority. The evidence shows that insofar as the summer camp routes, the Company did not post those routes; instead assigning them, for the most part, to employees who had done them in the past. Additionally, there is simply no dispute that in late August 2008, the Company omitted from the bidding process a substantial group of routes for the regular school season. The reason for eliminating those routes is not relevant as there is no question but that the routes, under the terms of the contract, were required to be posted for bid by seniority. In both of these situations, the violations of the terms of the labor agreement were clear and unequivocal and I conclude that the Respondent had no sound arguable basis for its failure to follow its terms. As such, I conclude that the Respondent violated Section 8(a)(1) and (5) and 8(d) of the Act.

There is also evidence that after the August 2008 picks, the Company, from time to time, changed the assigned routes and did so without putting them up for re-bid. The same can be said for charter routes that typically come into the Company from its customers during the same week that they must be assigned.

A literal reading of the contract would seem to require that all of these routes be subject to a bidding procedure at any time that the situation presents itself. I have already indicated my misgivings about the practicality of having an ongoing bidding process throughout the year to deal with changes that are the result of route changes that are *solely* made by the Respondent's customers or to charter routes which come in on an ad hoc, daily, or weekly basis. Put another way, an argument can be made that such a literal application of the contract would be impossible of performance. And in fact, the arbitrator seems to have recognized this problem when he stated that all extra work must be posted and bid by seniority *when possible*. As there is at least an arguable position that the Respondent could take with respect to the assignment of these limited types of routes, it seems to me that this involves an issue of contract interpretation that should (and was), resolved by the arbitration process.

The General Counsel alleges that the Respondent refused to furnish relevant information to the Union regarding the assignment of the summer camp routes and the assignment of the regular school year routes. I have already dealt with this issue

in relation to the summer camp routes. This leaves the information requests regarding the regular school year routes where the evidence shows that the Respondent failed to furnish certain information regarding this subject after numerous requests.

Pursuant to Section 8(a)(5), each party to a bargaining relationship is required to bargain in good faith. And part of that obligation is that both sides are required to furnish relevant information upon request. *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967). Requests for information may come in essentially two contexts: (a) bargaining for a collective-bargaining agreement or (b) processing a grievance. In relation to information sought during the term of an existing contract, a union's responsibilities include: (a) monitoring compliance and effectively policing the collective-bargaining agreement; (b) enforcing provisions of a collective-bargaining agreement; and (c) processing grievances. *American Signature, Inc.*, 334 NRB 880, 885 (2001). This means, among other things, that an employer is required to provide information even in the absence of a filed grievance. This is because a union is entitled to information that would be relevant to evaluate whether or not it wishes to file a grievance in the first place. To the extent that furnished information may deter a union from filing a grievance, this is useful to its role of enforcing a contract because it can then more effectively allocate its resources and not waste time and money on issues where it would not likely prevail. *J. I. Case Co. v. NLRB*, 253 F.2d 149 (7th Cir. 1958); *Universal Atlas Cement Division of United States Steel Corp.*, 178 NLRB 444 (1969).

Where there is a request for information in either context, the Board makes a distinction between information which is presumptively relevant and all other information. Where the information requested is presumptively relevant (such as the names of employees, their job titles, rates of pay, hours of work, etc.), the party seeking the information is not required to show relevance. *Ohio Power Co.*, 216 NLRB 987, 991 (1975), *enfd.* 531 F.2d 1381 (6th Cir. 1976); *Dyncorp/Dynair Services*, 322 NLRB 602 (1996), *enfd. mem.* 121 F.3d 698 (4th Cir. 1997); *International Protective Services*, 339 NLRB 541 (2003); *Deadline Express*, 313 NLRB 1244 (1994). As to presumptively relevant requests, it is the employer that has the burden of proving the lack of relevance, and a union does not need to make a specific showing of relevance unless the presumption is rebutted. *Contract Carriers Corp.*, 339 NLRB 851, 858 (2003).

If the information sought relates to the processing of a grievance (or potential grievance), the legal test is whether the information is relevant to the grievance and the determination of relevancy is made based on a liberal, discovery type of standard. *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 437 (1967); *Knappton Maritime Corp.*, 292 NLRB 236 (1988).

In my opinion, the Respondent's failure to furnish adequate information in a timely manner regarding the regular school year routes relate to the hours, rates of pay, and terms and conditions of employment for the bargaining unit employees. That is, the information requested (and summed up by the union attorney's letter dated December 8, 2008) was, in my opinion, relevant to the Union's right and obligation to administer the terms of the collective-bargaining agreement's senior-

ity/bidding provisions. Further, although contracts between a company and its customers are not presumed to be relevant,¹¹ it is my opinion that because the Respondent claimed that its contracts with certain customers precluded it from assigning those routes by the seniority/bidding process, those contracts would be relevant to the Union's investigation of, and, if deemed appropriate, to its prosecution of an arbitration case.

In this case, the Union proceeded to arbitration on these same issues and requested the same information in the arbitration proceeding. As noted above, the Respondent failed to furnish all of the information requested despite the arbitrator's order requiring it to do so. And the ultimate outcome was that the arbitrator, much like an administrative law judge of the NLRB, decided to draw an adverse inference and decided that the company breached the terms of the collective-bargaining agreement by failing to put *all* routes (summer camp routes, regular school year routes, charter routes, etc.) up for bid by seniority.

So, having obtained a completely victory and potentially complete remedy before the arbitrator on the seniority/bidding issues, why is the Union and the General Counsel relitigating those same issues before me?

The General Counsel argues that the award does not warrant deferral because the arbitrator did not order backpay. This contention is not really accurate because it is clear from the opinion, that the arbitrator contemplated a subsequent proceeding to determine what if any backpay was due to employees who may have been adversely affected by the Company's failure to comply with the seniority/bidding procedure. He stated:

With respect to the Union's demand to make whole all drivers and monitors injured because of violation of their seniority, this issue shall be determined at a further hearing.

This is analogous to the way that the Board processes its own cases; first with a determination as to liability and then, if necessary, with a backpay hearing to determine the amount of loss to employees.

In *Electronic Reproduction Service Corp.*, 213 NLRB 758 (1974), a Board majority decided to defer to arbitration, awards involving discharge or discipline cases where the union had failed to present to the arbitrator, the same evidence it was relying on in filing an unfair labor practice charge. The Board stated inter alia:

[I]n deciding *Spielberg* and *Collier*, the Board sought to discourage dual litigation and forum shopping by encouraging the parties to employ initially the contractual procedures for dispute settlement which they have created, (*Collyer*), and to permit the dispute resolution achieved through those procedures to stand in the absence of procedural irregularity or statutory repugnancy (*Spielberg*). Thus the purpose of both *Collyer* and *Spielberg* is to encourage, require, and generally to honor the utilization of contractual procedures where "a set of facts . . . presents not only an alleged violation of the Act but also an alleged breach of the collective-bargaining agreement."

....

¹¹ *F. A. Bartlett Tree Expert Co.*, 316 NLRB 1312 (1995).

[W]e believe the better application of the underlying principles of *Collyer* and *Spielberg* to be that we should give full effect to arbitration awards dealing with discipline or discharge cases, under *Spielberg*, except when unusual circumstances are shown which demonstrate that there were bona fide reasons, other than a mere desire on the part of one party to try the same set of facts before two forums, which cause the failure to introduce such evidence at the arbitration proceeding.

In *Malrite of Wisconsin, Inc.*, 198 NLRB 241, 242 (1972), the Board was asked to defer its decision (in an 8(a)(5) case), where an arbitrator had already ruled in favor of the charging party. The Board stated:

In our opinion, the dissent misconstrues *Spielberg* by distinguishing between those arbitration awards ruling in the grievant's favor by finding a contract breach and those rulings against the grievant. Although we may not have previously deferred to an award favoring the grievant, this is because, so far as we can determine, such a case had not heretofore been presented to us. Indeed, the absence of such cases demonstrates the remedial effectiveness of arbitration awards, since a person who has had his grievance remedied is not likely to file an unfair labor practice charge concerning that grievance. Such would have been the case here if the Employer had readily complied with the arbitration award.

In addition, we fail to understand our dissenting colleagues' claim that there is no adequate remedy at law. . . . Judicial enforcement would result in an order, backed by the full powers of the Federal judiciary, that the Employer comply with the award, and the only way the Employer can comply is to refrain from employing combo operators, except as permitted by the arbitration decision. Thus, enforcement would provide the Union with full remedial relief. Nor is there any apparent barrier to court enforcement, since, so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his." *Steelworkers v. Enterprise Wheel and Car Corp.*, 363 U.S. 593, 599.

Citing footnote 11 in *15th Avenue Iron Works*, 301 NLRB 878 (1991), the General Counsel argues that the Board will not defer issues that are closely related to nondeferable issues or situations where the employer has essentially repudiated the collective-bargaining relationship. The Board stated:

We further find no merit in the General Counsel's reliance on the failure of the Respondent to comply with the existing arbitration awards. Under *Malrite of Wisconsin*, 198 NLRB 241 (1972), enfd. in relevant part 494 F.2d 1136 (D.C. Cir. 1974), noncompliance with an arbitral award is not "a matter for the Board's concern." The General Counsel attempts to distinguish this case from *Malrite* on the ground that the Respondent's failure to comply with several arbitration awards constituted a repudiation of the contract, citing *Electronic Reproduction Service Corp.*, 213 NLRB 758 (1974), as authority supporting that distinction. In that case, however, the refusal to execute a

contract pursuant to an arbitrator's award struck at the very essence of the collective bargaining relationship. Id. at 759, fn. 2. By not signing the contract, the Respondent in effect repudiated that relationship. Hence, the bargaining process itself was at stake and deferral to the award would not protect or enhance it. We are not faced with that situation here. The Respondent does not deny its obligations under the contract but claims a lack of funds to meet them. Further, the Respondent's noncompliance relates to arbitral awards all stemming from the breach (albeit repeated) of the same contractual provisions. In that respect, it is not dissimilar from *Malrite*, which involved the breach of a single contractual provision in the form of a unilateral change in a term and condition of employment that the respondent continued uninterrupted in the face of an adverse arbitration decision and award.

In the present case, I do not think that the fact that the Company breached the seniority/bidding provisions of the contract in the summer and fall of 2008, demonstrates that the Respondent, at that time, had a "plan" to repudiate the collective-bargaining relationship.

However, I am not going to defer these 8(a)(5) and 8(d) allegations. There is no question but that the Employer failed to comply with the seniority/bidding provisions of the collective-bargaining agreement, at least insofar as the summer camp routes and the regular schoolbus routes are concerned. There also is no doubt that the Respondent failed to furnish information that was relevant so that the Union could investigate and grieve these contract breaches. Moreover, the information in question will continue to be relevant so that the Union can investigate and determine, perhaps through further arbitration proceedings, what if any losses employees may have suffered because of the contract breaches. The Respondent's conduct not only constitutes substantial contract avoidance but is the kind of conduct that would tend to undermine the Union in the eyes of the bargaining unit employees. Therefore, this type of conduct is, in my opinion, inextricably entwined with the question as to why the Union may have lost its majority status. Accordingly, this conduct is related to the contention that the Union's purported loss of majority status was tainted by the Respondent's avoidance of its contract obligations. In the end, these substantial contract breaches and the related refusals to meet at step 2 for grievances, plus the refusals furnish information are, in my opinion, proximately related to the Respondent's ultimate repudiation of the collective-bargaining relationship.

E. Miscellaneous 8(a)(1) Allegations During 2008 and 2009

The General Counsel asserts that in September 2008, the Respondent threatened Uchofen with unspecified reprisals, told him that he was being denied work because of his union affiliation, and made statements indicating the futility of union representation.

To support this allegation, the General Counsel relies on the testimony of Uchofen at pages 896–898 and 960 to 962 regarding a conversation that Uchofen had with Gillison in early September. In my opinion, nothing in this conversation supports the allegations that Gillison made statements of futility or that

he threatened Uchofen with unspecified reprisals. At most, this testimony shows that Gillison was annoyed by the Union and that he was merely asserting his status as Uchofen's boss.

Insofar as Elisa Arias' alleged statement that Uchofen was not given certain routes because he was a "union person," that allegation was never part of the original or amended complaints and the General Counsel only sought to amend the consolidated complaint at the close of the hearing. I denied this motion for the reasons set forth in Appendix A.

It is claimed that on some undetermined date, Gillison threatened that it would withhold certain benefits from the mechanics that supported the Union.

On December 5, 2007, the Union and the Company entered into a settlement that resolved a grievance relating to the payment of tool allowances to the mechanics. At some later point, the Union apparently claimed that the Company was not complying with the settlement. It also seems that Gillison, who asserts that the Company did in fact make the payments, met with the mechanics and asked them to confirm this in writing. Juventino Lopez, a mechanic's helper, testified about this meeting and in my opinion, his testimony was very confusing. As best as I can determine, he testified that Gillison asked the mechanics whether they wanted the money and also asked them if they worked for the Company or the Union. According to Lopez, he piped up and said that if money was being given out, he would like to have some too.

In January 2009, the Company asked the mechanics to sign a letter regarding the tool allowance issue. This stated:

To whom it may concern:

Please be advised that I, [employee name], am a school bus mechanic at Respondent bus Corporation and I received my tool allowance of \$250.00 for 2007 and 2008.

With respect to the tool allowance issue, I think that the testimony of Lopez is insufficient to establish that Gillison threatened employees with the loss of benefits if they supported the Union.

Nevertheless, I think that the evidence establishes that the Company, by asking employees to sign the above-described letters was engaged in "direct dealing." From what I can see, there was a dispute as to whether or not the mechanics were paid the tool allowances in accordance with a previous grievance settlement. In my opinion, by asking employees to sign these letters, the Company was, in effect, seeking to induce employees, in the absence of union representation, to waive any claims that they might have pursuant to the settlement. As such, I conclude that the Respondent has violated Section 8(a)(1) and (5) by its actions in bypassing the employees' union representative and attempting to deal directly with employees to resolve (to the benefit of the Company), a contract grievance. See *Permanente Medical Group*, 332 NLRB 1143, 1144 (2000); *Bozeman Deaconess Foundation*, 322 NLRB 1107, 1119 (1997); *Circuit-Wise, Inc.*, 306 NLRB 766, 767 (1992).

The General Counsel claims that in December 2008, Elisa Arias, a dispatcher, told a group of about 15 to 20 employees that the people who were complaining to the Union "don't get any summer work." This alleged statement, testified to by Uchofen, was not corroborated by any other person. Moreover,

the evidence does not suggest that Arias was a supervisor within the meaning of the Act. Although the dispatchers do communicate between Gillison and the employees on the road, the evidence does not suggest that Arias or any other dispatcher is authorized, on their own account, to speak about company policy. I, therefore, shall recommend that this allegation be dismissed.

In mid-December 2008, the Company asked its drivers and monitors to sign the following letter:

To Whom It May Concern:

I, _____ did choose the summer camp route that I drove for 2008. In no way was I ever coerced or forced to do my summer camp route. Nor was I ever coerced or forced to do any summer camp route or school route for Respondent bus company. I have always chosen, picked or accepted the assigned routes of my own free will.

By December 2008, the Union had filed grievances regarding the Company's alleged failure to follow the seniority/bidding procedures in the contract. The reader may recall that by this time, the Union had submitted these grievances to arbitration and its attorney had requested information in preparation for an arbitration hearing. Therefore, there was, at this point, an active dispute regarding the Union's claims that the Company had failed to allow employees to bid for the summer camp routes and that it had exempted certain routes from the bids for the regular school routes. There was therefore the possibility that the Company could be liable for damages if the Union could show that some employees suffered monetary losses by being denied the opportunity to bid for the routes of their choice.

Given the situation as it existed as of mid-December 2008 and for the same reasons as described above with respect to the tool allowance letters, the Company's attempt to have employees sign statements that amount to "waivers," constitutes "direct dealing" in violation of Section 8(a)(1) and (5) of the Act.

F. Alleged Interrogation by Respondent's Attorney

The Respondent's counsel, Anthony Pirrotti, is not a specialist in labor law or in the procedures of the National Labor Relations Board. As such, it would not surprise me if he inadvertently ran afoul of the procedures set forth in *Johnnie's Poultry Co.*, 146 NLRB 770, 775 (1964), where the Board stated:

[T]he employer must communicate to the employee the purpose of the questioning, assure him that no reprisal will take place and obtain his participation on a voluntary basis; the questioning must occur in a context free from employer hostility to union organization and must not be itself coercive in nature; and the questions must not exceed the necessities of the legitimate purpose by prying into other union matters, eliciting information concerning an employee's subjective state of mind or otherwise interfering with the rights of employees.

In support of this allegation, the General Counsel called employee Reynaldo Gomez. Gomez and employee Luis Maciera received investigatory subpoenas to appear and testify at the Board's Regional Office. When they asked Gillison what the

papers were about, they were told that they could go to Pirrotti's office and ask him. They did so on May 8, 2009. When Gomez was asked by the General Counsel what happened at the lawyer's office, he testified that Pirrotti did *not* ask him any questions.

For his own reasons, the Respondent's counsel offered into evidence an affidavit given to the Board by Gomez on May 13, 2009. And although, the General Counsel could have objected on the grounds that this out-of-court statement was hearsay, he did not do so. Instead, the General Counsel agreed that the affidavit should be admitted into evidence and in the absence of objection, statements that otherwise would be precluded as hearsay, are admissible for the truth of the matters asserted. The affidavit states:

When we got to the lawyer's office, he asked me how long I had been with the company, if it paid the Union and if I picked my route in August. The lawyer did not offer to accompany me to the appointment, did not take any notes and it was a brief meeting. He did not ask me to report to him what happens at the appointment. The lawyer did not tell me that the company would not take negative actions or reprisals against me because of the appointment with the Labor Department or my testimony.

I admitted the affidavit into evidence because there was no hearsay objection by any party. The affidavit was executed 5 days after the meeting and its description of what took place was not challenged by Pirrotti. In my opinion, the contents of the affidavit are more reliable than the almost largely forgetful testimony that Gomez gave at the trial. As such, it is my opinion, that the Respondent violated Section 8(a)(1) of the Act by interrogating Gomez about the route picks in August (which was a subject of dispute in the unfair labor practice investigation), and by failing to give him the assurances required by *Johnnie's Poultry*, supra.

G. Negotiations for a New Contract; Withdrawal of Recognition; and Unilateral Changes made after the Contract Expired

The existing lab or agreement expired on June 30, 2009, and in anticipation of bargaining for a new contract, Simino sent a letter to Tiktin on May 21, 2009 stating:

The collective bargaining agreement . . . will be expiring June 30, 2009. We are available to start bargaining and propose that we schedule weekly meetings on Mondays at noon, starting June 1, 2009. . . .

The Union's bargaining team will consist of Gil Hodge, Miguel Gonzalez, Joyce Green, Victor Santos, Donna Turner, Yolanda Vergara, Cesar Uchofen and myself.

Also on May 21, the Union sent another letter requesting information in relation to bargaining. This letter stated:

In preparation for collective bargaining, TWU Local 100 is making the following information request.

Current enrollment in any health insurance program(s) offered to employees in the bargaining unit by type of coverage (individual, individual plus spouse, family, etc)

and the amount of the premium paid by the employee and the company for each type of insurance in dollar amounts;

The most recent plan documents for such insurance program(s) including the type of benefits covered, the cost of co-pays and other out of pocket expenses;

The most recent plan documents for any health insurance programs offered to management employees including the type of benefits covered, the cost of co-pays and other out of pocket expenses;

Number of current employees in each job title, with a breakdown within each title of the number of employees at top pay and successive six month steps;

A list of all runs serving children with special needs and all monitors assigned to these runs;

Any and all information on training and instruction provided to monitors serving children with special needs in the last three years;

Invoices from Ardsley Bus Corporation to School Districts for all charters or other separately invoiced activities performed by members of the bargaining unit for the months of October 2008, November 2008, March 2009, April 2009 and May 2009;

All current contracts between Ardsley Bus Corporation and school districts with invoices showing the monetary value of the current contracts.

All documentary information in possession of Ardsley Bus Corporation from school districts regarding any extensions of contracts or the bidding process for new contracts.

On June 1, 2009, Union Attorney Levelt wrote to the Company's attorney, Pirrotti, and stated:

I will be representing Local 100 at the upcoming negotiations to modify the collective bargaining agreement. We are available to start bargaining and propose that we schedule weekly meetings on Mondays, starting June 8, 2009. We propose to alternate between the Union's Yonkers office ... and Ardsley's offices.

On June 5, 2009, the Union by its attorney sent a followup letter to Pirrotti. In substance this stated:

In order to begin negotiations for a new contract, the Union has been trying to schedule a negotiation session. By letter of May 21, the Union offered June 1 as the first date. When we did not hear back from Ardsley, I called you office on May 28 about the June 1 date. Your secretary informed that you would not be available.

By letter of June 1, the Union proposed to meet on June 8. When again, we did not receive a response, I called your office yesterday to confirm the June 8 date. Your secretary informed that you would get back to me. You still have not contacted us. This leaves us no option but to assume that we will not be meeting on June 8th.

The Union is now offering June 15 for a first negotiation, but we are also willing to entertain dates that you want to propose. . . .

By letter dated June 5, 2009, the Company by Pirrotti responded to Levelt's letter and stated as follows:

As you are aware, my client is in Israel and we adjourned the Arbitration Hearing based upon his vacation schedule. He will be returning on June 14, 2009 and as soon as he returns, I shall call you.

However, in regard to your proposed negotiating committee, you of course understand from the Arbitration . . . that we cannot permit Mr. Uchofen to be part of any negotiating team because of his bias and because of the fact that my client has had to call the police on no less than two occasions to remove him from the business grounds.

Please advise immediately that you agree that Mr. Uchofen will be removed and advise of the name of a substitute member of your negotiating team.

Contemporaneous with the above, there is evidence that some unnamed drivers, sometime in late May or early June 2009, began to solicit employees to sign a petition to get rid of the Union. It is not clear who did this or exactly when this activity began. But as it was conducted in the yard on the Respondent's property, it is unlikely that Gillison and Tiktin were not aware of it. I do note, however, that there is little or no credible evidence that management played any direct or indirect role in the solicitation of the petition.¹²

So by early June 2009, the Company had not responded to the Union's request for bargaining information and had not responded to the Union's requests for bargaining dates. By letter dated June 5, Pirrotti informed the Union that the owner would be out of the country until June 14 and further stated that it objected to the Union picking Uchofen to be on its negotiating committee. To me, this is beginning to look like the Company is trying to run out the clock until the contract's expiration date.

In a letter that is dated June 11, 2009, the Union, by Levelt, wrote to Pirrotti and stated inter alia:

We decline your request to remove Mr. Uchofen from the negotiation team. . . . If your request was inspired by a concern about maintaining civility during the course of these negotiations, we share your concern and we hereby commit to engage in these negotiations in a professional manner. We expect the same commitment from your client.

Given the fact that your client will not be returning to the United States until June 14, I will assume that we will not be able to have a negotiation session on June 15. As the arbitration hearing scheduled for June 18 had been rescheduled, I propose that we have our first session on Thursday June 18 at noon. . . .

¹² The General Counsel produced a single witness (out of more than 200 employees), who gave uncorroborated testimony to the effect that Rosa Villela and Elisa Arias asked several employees on one occasion if they had signed the petition. As the evidence does not establish that either is a supervisor within the meaning of Sec. 2(11) of the Act or that such a question was within their authority as employees of the Respondent, I do not conclude that this single transaction violated the Act. Nor would I view this one time question as being coercive under *Rossmore House*, 269 NLRB 1176 (1984).

On some unspecified date, probably in mid-June 2009, a group of about seven employees visited the Board's Regional Office and spoke to Attorney Colleen Breslin. It seems that they sought to file a decertification petition and presented a petition signed by about 190 employees that stated they did not want to be represented by the Union.¹³ They apparently were told that because the contract's expiration date was June 30, they could not file a decertification petition at that time because under the Board's contract bar rules, this was the "insulated period" and that the proper time to file a decertification petition would be after the contract expires.¹⁴

On or about June 16, 2009, these employees wrote a letter to the Company describing their attempt to file a decertification petition. And although no one actually testified about the visit to the Regional Office, the description in the letter (albeit hearsay), sounds basically consistent with Board law and procedure. Assuming that the Company had nothing to do with the solicitation of signatures, it would seem that this was the first time that the Company was made aware that many or most of its employees had, in fact, signed a petition to oust the Union.

At this point, I wish to point out that notwithstanding the fact that I received the signed petition into evidence no one was called to testify about who, when, or how the signatures were obtained. Nor was I presented with a group of authenticated exemplar signatures with which to make a signature comparison. I simply have no evidence to authenticate that the signatures on the petition are genuine. Maybe there are. But there is no evidence to demonstrate that they are.

The parties met for the first and last time on June 18, 2009. At this rather brief meeting, the Union orally presented a long list of demands. When Pirrotti asked for a written list, the Union's representative said that they would send a copy when they had been finalized. After repeating his request for a written list of the union demands, the Company left the meeting. In a letter dated June 18, Pirrotti stated:

Mr. Hodge acted as Chairman and proceeded to read from a list that he had in his possession, as well as a copy of which you had and Mr. Uchofen had, purporting to be a list of demands. I asked you for a copy of the list and you refused to provide same, saying they had yet to be finalized. After listening to Mr. Hodge's oral demands I asked again for a copy of the demands and you repeated to me that the list had yet to be finalized.

¹³ At the top of each page of the petition there is the following language in English and Spanish:

We the undersigned wish to have the present union, T.W.U. Local 100 removed from Ardsley Bus Company. The reason for this request is that this union is only taking out money weekly and causes huge problems between the company and the employees. The union has raised the weekly dues twice within one year. We understood that the dues were to remain the same as the length of the contract, which is three years.

¹⁴ Under the Board's contract-bar rules, a petition cannot be timely filed unless it is filed within 90 to 60 days before the expiration date of a contract having a duration of 3 years or less, *or* until after the contract expires if no new contract has been signed. See chapter 9 of the Board's Outline of Law and Procedure in Representation cases.

At 11:00 a.m. Mr. Hodge completed his litany of demands and I again invited you to send a list of your demands in writing and including which of the demands were exploratory so that I would be able to consult with my client.

Before addressing the demands, please furnish me with the copies of contracts which you have entered into with other bus companies so that we can determine whether the demands that you are making are reasonable.

On June 18, 2009, Union Counsel Levelt sent a letter to Pirrotti reiterating her previous request for information and forwarding a written set of union demands. This stated:

Pursuant to our first negotiation session, I am herewith submitting our demands in writing. As you will see, we already have specific language prepared for demands numbers 8, 22 and 41.

On May 21, 2009, the Union sent you an information request in order to prepare for collective bargaining. Today Mr. Gillison informed us that Ardsley does not offer health benefits to members of the bargaining unit. Otherwise, we have not yet received a response to the information request. We hereby reiterate and supplement the information request as follows: [Essentially repeating the request of May 21, 2009 and including a request for any insurance programs offered to management employees.]¹⁵

Thereafter, by letter dated June 21, 2009, the Union's attorney sent another letter to Pirrotti as follows:

This is to confirm the conversation we had yesterday. I asked you for a date to continue contract negotiations. You responded that you did not want to set a date. I asked whether you were refusing to negotiate. You said that you had seen a decertification petition signed by 193 or 196 employees out of 219 employees . . . and that you therefore needed to confer with your client because you were afraid that it would be an unfair labor practice charge to negotiate with the Union when there was a decertification petition pending.

We are hereby renewing our offer to conduct a negotiation session on Thursday, June 25 any time of the day. We are enclosing an agreement to extend the collective bargaining agreement for signature. . . .

The Union's letter dated June 21, 2009, generated no response from the Company and the Respondent did not thereafter offer to resume negotiations. Instead, soon after the contract expired, the Company made a number of changes in its practices, many of which were contrary to the terms and conditions of employment as set forth in the last labor contract. There is, therefore, no question but that after June 30, 2009, the Respondent de facto withdrew recognition from the Union and determined that it was free to establish, change and/or modify, any and all terms and conditions of employment, without bargaining with the Union.

Among the changes made after June 30 were the following.

¹⁵ Attached to this letter is a list of bargaining demands that consists of about 41 items.

1. The Respondent did not allow union representatives to attend the seniority/bidding procedure that took place in August for the 2009/2010 regular school bus routes.
2. The Respondent froze the anniversary wage increases for employees.
3. The Respondent excluded wage increases for casual employees.
4. The Respondent imposed new seniority rules for charter routes.
5. The Respondent changed a minimum guaranteed annual work week with paid holidays.
6. The Respondent imposed new termination rules on employees for absences.
7. The Respondent changed the method by which it calculated route hours and daily work hour guarantees.

The facts described above lead to a number of interrelated legal questions. Did the Company refuse to furnish information relevant to the bargaining process? Did the Respondent violate the Act by refusing to meet with representatives chosen by the Union? Did the Respondent bargain in good faith? Did the Respondent lawfully withdraw recognition from the Union or was it legally entitled to do so because the Union lost its majority status? Did the Respondent violate the Act by unilaterally changing the conditions of employment after the contract expired, or was it legally entitled to do so because of the Union's alleged loss of majority status?

I have already described the law dealing with cases involving information requests. As stated, the general rule is that parties to a collective-bargaining relationship are required to furnish, upon request, information that is relevant for bargaining. In the context of contract bargaining, information that describes the employees, wages, hours, and other terms and conditions of employment is presumptively relevant and must be provided. There are, however, two exceptions that are relevant in this case. First, unless a company asserts an inability to pay, financial information is precluded from disclosure. *NLRB v. Truit Mfg. Co.*, 351 U.S. 149 (1956). Second, unless shown to be relevant, information regarding persons outside the bargaining unit is not deemed to be relevant. *Sheraton Hartford Hotel*, 289 NLRB 463 (1988). Cf. *New York Presbyterian Hospital*, 354 NLRB No. 5 (2009).

In my opinion, the Respondent therefore violated Section 8(a)(5) of the Act by refusing to furnish the information requested in the Union's May 21, 2009 letter except for invoices showing the monetary value of the Respondent's current contracts. As to the Union's June 21 letter, the Respondent is not required to turn over documents or information relating to insurance programs offered to its management employees.

The Act requires each side to a collective-bargaining agent to bargain with the other side's chosen representatives. Accordingly, one party cannot legally refuse to bargain because it doesn't like who the other party has chosen as its bargaining representatives. The only exception is if it is demonstrated that the selection of a particular individual or individuals would bring such ill will to the bargaining table so as to make good-

faith bargaining impossible. *Pan American Grain Co.*, 343 NLRB 205, 206 (2004), citing *KDEN Broadcasting Co.*, 225 NLRB 25, 35 (1976).

In the present case, the Respondent, in its June 5 letter, objected to Uchofen being placed on the Union's bargaining committee and stated that he had to be replaced. The Respondent cited Uchofen's alleged misconduct for its position. Notwithstanding my earlier conclusion that Uchofen's discharge on January 21, 2009, was not unlawful because he was not engaged in protected activity, his conduct on that or any other occasion was not so egregious as to warrant the Respondent's refusal to accede to the Union's choice of having him as one of the people on its bargaining committee. Accordingly, I conclude that in this respect, the Respondent violated Section 8(a)(1) and (5) of the Act.

The Respondent contends that based on the petition described above, it had the legal right to withdraw recognition from the Union. It therefore argues that it could legally suspend bargaining after June 18, 2009. It also contends that after the contract expired, it could unilaterally make any changes to the terms and conditions of employment that it liked.

When there is an existing bargaining relationship between a union and an employer, whether by Board conducted election or by voluntary recognition, the Union is presumed to have majority support. *Brooks v NLRB*, 348 U.S. 96 (1954); *Royal Coach Lines*, 282 NLRB 1037, 1038 (1987).

Having obtained recognition, an incumbent union, if it enters into a collective-bargaining agreement with an employer, is entitled to an irrefutable presumption of majority status during the life of the contract. *Hajoca Corp.*, 291 NLRB 104 (1988); *Royal Coach Lines*, supra. After the contract expires, an incumbent union is entitled to a presumption of continued majority support. *Laidlaw Waste Systems*, 307 NLRB 1211 (1992). This means not only that the employer may not, without violating Section 8(a)(5) of the Act, withdraw recognition during the life of the contract, but it also means that no rival union may file a petition for an election with the Board during most of the life of the contract. (To the extent that the contract does not exceed more than 3 years in duration.) To balance the interest between labor relations stability and employee free choice, the Board established certain "contract-bar" rules in *Delux Metal Furniture Co.*, 121 NLRB 995 (1958). Without describing all the rules, suffice it to say that where there exists a valid contract between a company and union A, another union will be precluded from filing an election petition for the same group of employees except 90 to 60 days before the expiration of the contract (or if the contract is more than 3 years, 90 to 60 days before the 3-year period), or after the contract expires if no new contract is reached by the Employer and the incumbent union. Similarly, an employer petition (RM) or employee petition (RD) to oust an incumbent union can only be filed within the time frame described above.

During the hearing, the Respondent vehemently argued that the Regional Office engaged in misconduct by not allowing employees to file a decertification petition in June 2009. But in light of the legal standards described above, any such petition would have been untimely filed as the contract was set to expire on June 30, 2009, and the employees visited the Regional Of-

office within the insulated period which starts 60 days before the expiration date and runs through to the expiration date of the contract. (It is my understanding that a decertification petition was subsequently filed after the contract expired and that it is being held in abeyance pending the outcome of this case.)

In *Levitz Furniture Co. of Pacific*, 333 NLRB 717 (2001), the Board held that where there was an established bargaining relationship, a union enjoys a presumption of majority status and this may only be overcome if the employer can demonstrate by objective evidence, that there was an “actual loss of support” by the incumbent union. The Board also held that an employer acts at its peril if it is wrong. In *Levitz*, the Board changed a standard which had previously allowed an employer to withdraw recognition from an incumbent union, in the absence of a contract or after a contract expires, based on a “good faith belief” that the Union had lost its majority status. See also *Raymond F. Kravis Center for the Performing Arts*, 351 NLRB 143 (2007).

In addition, the fact that a majority of the bargaining unit may have indicated their preference for nonrepresentation is not necessarily controlling if the evidence shows that there is a probable causal relationship between an employer’s previous unfair labor practices and a union’s loss of support. *Atlas Refinery, Inc.*; 354 NLRB No. 120 (2010); *Penn Tank Lines*, 336 NLRB 1066, 1067–1068 (2001); *Lee Lumber & Building Material Corp.*, 322 NLRB 175, 177 (1996). In *Master Slack Corp.*, 271 NLRB 78, 84 (1984), the Board stated that the factors to determine whether a causal relationship exists between unfair labor practices and employee disaffection are:

- (1) the length of time between the unfair labor practice and the withdrawal of recognition; (2) the nature of illegal acts, including the possibility of their detrimental or lasting effect on employees; (3) any possible tendency to cause employee disaffection from the union; (4) the effect of unlawful conduct on employee morale, organizational activities and membership in the union.

In my opinion the evidence in this case demonstrates that the Respondent’s unfair labor practices from 2008 through June 2009 tended to have the probable effect of undermining the Union in the eyes of the bargaining unit employees. I would therefore view these unfair labor practices as a proximate cause for any disaffection that employees may have had with the Union. In this respect, I have concluded, *inter alia*; (a) that in March 2008, the Respondent suspended Cesar Uchofen because he sought union representation in relation to an interview that he reasonably believed could have led to disciplinary action; (b) that in the spring and summer of 2008, the Respondent failed to furnish relevant information so that the Union could carry out its contract administration functions; (c) that in the summer of 2008, the Respondent, contrary to the explicit terms of its contract, did not allow its employees to bid by seniority for summer camp routes; (d) that in August 2008, the Respondent excluded certain regular schoolbus routes from the bidding process; (e) that the Respondent, on multiple occasions in 2008 and 2009, had failed and refused to furnish information relevant to potential and actual grievances; (f) that in late October 2008, the Respondent refused to meet with the Union regarding pend-

ing grievances; (g) that in November 2008, the Respondent by its manager, physically assaulted the Union’s shop steward; (h) that since May 2009, the Respondent has failed to provide information relevant to bargaining for a new contract; (i) that in December 2008 and January 2009, the Respondent bypassed the Union and attempted to bargain directly with employees regarding grievances; and (j) that in June 2009, the Respondent refused to bargain with representatives chosen by the Union.

Given this set of unfair labor practices, I conclude that the alleged loss of majority status was likely caused by the Respondent’s course of illegal conduct. I therefore conclude that the Respondent cannot withdraw recognition and that by doing so it violated Section 8(a)(1) and (5) of the Act.

Moreover, it is my opinion that the Respondent has not met its burden of proving that the Union actually lost its majority status. Although it is true that the petition relied upon by the Respondent has about 190 signatures, there was no proof that the people whose signatures are contained on it actually signed the petition. Witnesses were not called to testify that they signed the petition. No witnesses were called to testify that they saw people sign the petition or that they handed out the petition and received it back from individuals who signed the document. No documents containing authenticated signatures were offered as a means by which I could make a signature comparison.

In cases tried under *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), where the General Counsel is seeking to impose, without an election, a bargaining order in favor of a nonincumbent union based on an allegation that the employer’s conduct has made a fair election improbable, the General Counsel is required to show that at some relevant period of time, the union had obtained majority status. This necessary element is shown by evidence that a majority of the employees in an appropriate bargaining unit have signed either cards or petitions authorizing the union to represent them for purposes of collective bargaining. It is axiomatic that as part of this proof, the General Counsel must establish the authenticity of the signatures. And this can be done by the testimony of the signer, the testimony of the solicitor, the testimony of a person who witnessed the signature, the testimony of a person who handed a card to an individual and received it back with a signature, or by a comparison of signatures to an authenticated exemplar.

If majority status requires proof as to the authenticity of authorization cards or petitions in a case where the General Counsel seeks to impose a bargaining order on behalf of a nonincumbent union in the absence of an election, it is logical that the same element of proof would be required in a case where an employer is seeking to withdraw recognition from an incumbent union in the absence of an election. This is simply the other side of the same coin. That is, if an employer asserts that it is legally entitled to withdraw recognition from an incumbent union, it must be required to prove by objective evidence that the Union has lost its majority status. And what is required to prove majority loss should be the same as in cases where the General Counsel must prove that a nonincumbent union has gained majority status. Since proof of majority status in the later case requires evidence as to the authentication of signa-

tures on cards or petitions, it seems to me that proof of majority loss should require the same standard of proof.

Having concluded that the Respondent violated the Act by withdrawing recognition from the Union in August 2009, it follows that the Respondent was not free to alter, change or modify the existing terms and conditions of employment, without first bargaining with the Union to a legitimate impasse. See for example, *Hinson v. NLRB*, 428 F.2d 133 (8th Cir. 1970); *Central Management Co.*, 314 NLRB 763, 768, 781 (1994), and *Raymond F. Kravis Center for the Performing Arts*, 351 NLRB 143 (2007).

The Respondent argues that inasmuch as the labor contract expired, it could do what it liked. That, however, is not the law. In *Allied Signal Inc.*, 330 NLRB 1216, 1227 (2000), the administrative law judge quoting from *Litton Business Systems*, 501 U.S. 190 (1991), stated:

This distinction between the legal status of a contract and the duty to maintain terms and conditions of employment is discussed at length by the Supreme Court in *Litton*:

Although after expiration most terms and conditions of employment are not subject to unilateral change, in order to protect the statutory right to bargain, those terms and conditions no longer have force by virtue of the contract. See *Office and Professional Employees Ins. Trust Fund v. Laborers Funds Administrative Office of Northern California, Inc.*, 783 F.2d 919, 922 (CA9 1986) ("An expired [collective bargaining agreement] . . . is no longer a 'legally enforceable document.'" (citation omitted)); cf. *Derrico v. Sheehan Emergency Hosp.*, 844 F.2d 22, 25–27 [127 LRRM 3201] (CA2 1988) (Section 301 of the LMRA 29 U.S.C. § 185, does not provide a federal court jurisdiction where a bargaining agreement has expired, although rights and duties under the expired agreement "retain legal significance because they define the status quo" for purposes of the prohibition on unilateral changes).

The difference is as elemental as that between *Nolde Bros.* and *Katz*. Under *Katz*, terms and conditions continue in effect by operation of the NLRA. They are no longer agreed-upon terms; they are terms imposed by law, at least so far as there is no unilateral right to change them. As the Union acknowledges, the obligation not to make unilateral changes is 'rooted not in the contract but in preservation of existing terms and conditions of employment and applies before any contract has been negotiated.' Brief for Respondents 34, n. 21. *Katz* illustrates this point with utter clarity, for in *Katz* the employer was barred from imposing unilateral changes even though the parties had yet to execute their first collective-bargaining agreement.

Our decision in *Laborers Health and Welfare Trust Fund v. Advances Lightweight Concrete Co., Inc.*, 484 U.S. 539 (1988), further demonstrates the distinction between contractual obligation and post expiration terms imposed by the NLRA. There, a bargaining agreement required employer contributions to a pension fund. We assumed that under *Katz* the employer's failure to continue contributions after expiration of the agreement could con-

stitute an unfair labor practice, and if so the Board could enforce the obligation. We rejected, however, the contention that such a failure amounted to a violation of the ERISA obligation to make contributions 'under the terms of a collectively bargained agreement . . . in accordance with the terms and conditions of . . . such agreement.' 29 U.S.C. § 1145. Any post-expiration obligation to contribute was imposed by the NLRA, not by the bargaining agreement, and so the District Court lacked jurisdiction under §502(g)(2) of ERISA, 29 U.S.C. § 1132(g)(2), to enforce the obligation. [501 U.S. at 206–207.]

There is no dispute that after the labor contract expired on June 30, 2009, the Respondent, without notice to or offering to bargain with the Union, made the unilateral changes in the terms and conditions of employment that are described above. I therefore conclude that in this respect, the Respondent violated Section 8(a)(1) and (5) of the Act.

CONCLUSIONS OF LAW

1. By suspending Cesar Uchofen because he sought union representation in relation to an interview that he reasonably believed could have led to disciplinary action, the Respondent violated Section 8(a)(1) and (3) of the Act.

2. By failing to furnish relevant information so that the Union could carry out its contract administration functions in relation to the seniority bidding process for routes, the Respondent has violated Section 8(a)(1) and (5) of the Act.

3. By not allowing employees to bid for the summer school routes in 2008, the Respondent has violated Section 8(d) and 8(a)(1) and (5) of the Act.

4. By excluding certain regular schoolbus routes from the bidding process in 2008, the Respondent has violated Section 8(d) and 8(a)(1) and (5) of the Act.

5. By failing and refusing to furnish to the Union, information relevant to potential and actual grievances, the Respondent has violated Section 8(a)(1) and (5) of the Act.

6. By refusing to meet with the Union regarding pending grievances, the Respondent has violated Section 8(a)(1) and (5) of the Act.

7. By physically assaulting the Union's shop representative, the Respondent has violated Section 8(a)(1) of the Act.

8. By failing to provide information relevant to bargaining for a new contract, the Respondent has violated Section 8(a)(1) and (5) of the Act.

9. By refusing to bargain in good faith with representatives chosen by the Union, the Respondent has violated Section 8(a)(1) and (5) of the Act.

10. By withdrawing recognition from the Union in the absence of a demonstrated showing that the Union has lost its majority status, the Respondent has violated Section 8(a)(1) and (5) of the Act.

11. By unilaterally and without bargaining with the Union, making changes in the terms and conditions of employment after its collective-bargaining agreement expired, the Respondent has violated Section 8(a)(1) and (5) of the Act.

12. By attempting to bargain directly with employees about grievances and bypassing the Union as their collective-

bargaining representative, the Respondent has violated Section 8(a)(1) and (5) of the Act.

The general counsel asserts that although it would not affect the remedy, there should also be a finding that certain of the actions which violated Section 8(a)(5) should also be found to have violated Section 8(a)(3) of the Act. The General Counsel asserts that these actions, in addition to being unlawful refusals to bargain were also motivated by antiunion considerations.

I agree with the General Counsel that a conclusion that these 8(a)(5) violations would also be 8(a)(3) violations would not be necessary for a remedy. Moreover, I cannot say that the General Counsel has proven that these actions, including the failures to comply with the contract, were motivated by antiunion considerations as such. The contract changes that the Respondent made were illegal because they violated the bargaining obligation provisions of the statute as defined in Section 8(d); not because the decisions, of themselves, made no economic sense. What company would not wish to be free from constraints on its ability to assign work without having to consider seniority or construct a complicated bidding procedure to accomplish that result? That goal may make eminent economic sense from the company's point of view.

Nor am I inclined to view the direct dealing allegations as being motivated by antiunion animus per se. In those cases, the company, faced with the prospect of being held liable for breaches of the contract, sought to go around the union and attempt to mitigate or avoid contract liability by gaining "waivers" from the employees affected. I have concluded that this conduct was illegal under Section 8(a)(1) and (5) and I see no purpose served by finding that the same conduct violated Section 8(a)(3).¹⁶

REMEDY

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

With respect to Cesar Uchofen, I have concluded that his first suspension in March 2008 was violative of Section 8(a)(1) and (3) of the Act. Nevertheless, I have concluded that his later discharge on January 21, 2009, did not violate the Act. Since the Respondent had rescinded the original suspension and made Uchofen whole for that action, there is no backpay owing to him. Moreover, while the Respondent can be ordered to rescind the original suspension from its personnel files, I can't order it do so with respect to the January 2009 discharge because in that respect, it acted legally.

Having determined that the Respondent violated the Act by making unilateral changes in the terms and conditions of employment as they existed as of June 30, 2009, I shall recommend that the employees within the bargaining unit, be made whole, with interest, for any difference in earnings or benefits resulting from those changes. Interest should be computed in

¹⁶ The finding that the Respondent failed to meet with the Union as to two grievances at step 2 of the grievance procedure is relatively trivial in the context of this entire case. I see no point in making a finding that these transactions violated Sec. 8(a)(3) in addition to being a violation of Sec. 8(a)(1) and (5).

the manner set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).¹⁷

I have also concluded that the Respondent violated the Act by modifying its collective-bargaining agreement with respect to the seniority/bidding provisions as they related to the summer camp routes and the 2008–2009 regular school bus routes.

I suspect that a backpay determination for these seniority violations will not be simple. From what I understand to be the case, it will be necessary to ascertain which, if any employees, would have decided to make a bid and thereafter would have been successful in their bid for certain routes based on their seniority vis a vis the persons who actually were assigned to do the particular routes. Assuming that one could determine which employees would be eligible for backpay awards, it perhaps would be possible to find out how much money that individual would have earned if he or she had successfully been able to bid for a different route than the one that was obtained. (Obviously, if the potential successful bidder received no route at all, then a backpay determination for that individual, assuming that he or she would have bid in the first place, would be relatively simple.)

Moreover, the whole question of calculating backpay for these situations is presently before the contract arbitrator, who given his assumed experience in this industry, might have greater expertise in doing this job.

Nevertheless, it seems to me that by not complying with the contract terms in relation to the seniority/bidding process for the summer camp and regular schoolbus routes, there is potentially an amount of money due to some employees. I shall leave that to any compliance proceedings and any money owed should be computed with interest as described above.

The Respondent having unlawfully withdrawn recognition must be ordered to bargain affirmatively with the Union and should, upon request, resume negotiations for a new contract to supersede the agreement that expired on June 30, 2009.

In addition, the Respondent should be compelled to furnish to the Union all of the information requested, (except for information explicitly excluded by me). This information is deemed not only necessary for the process of bargaining for a new contract but also for determining any remedial action that might be sought in the ongoing arbitration proceedings and for any future investigation of or prosecution of contract grievances.

Finally, because the Respondent is a repeat offender, having failed to comply with the terms of a previously executed settlement agreement, I shall recommend the issuance of a broad Order.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹⁸

¹⁷ The General Counsel argues that all interest should be compounded on a quarterly basis. This is not current law and this request is denied.

¹⁸ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The Respondent, Ardsley Bus Corporation Inc., a/k/a Gene's Bus Company, Ardsley, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from
 - (a) Suspending or otherwise disciplining employees because they seek union representation in relation to interviews that they reasonably believe could lead to disciplinary action.
 - (b) Refusing to furnish to the Union information relating to the investigation or processing of grievances.
 - (c) Refusing to meet with union representatives regarding pending grievances.
 - (d) Refusing to allow employees to bid for the summer routes in 2008.
 - (e) Excluding certain regular schoolbus routes from the seniority/bidding process in the summer of 2008.
 - (f) Physically assaulting the Union's shop representative.
 - (g) Coercively interrogating employees about their union adherence or activities or about the Board's investigation of unfair labor practices.
 - (h) Failing to provide information relevant to bargaining for a new contract.
 - (i) Refusing to bargain in good faith with representatives chosen by the Union.
 - (j) Withdrawing recognition from the Union in the absence of a demonstrated showing that the Union has lost its majority status.
 - (k) Unilaterally and without bargaining with the Union, making changes in the terms and conditions of employment after its collective-bargaining agreement expired on June 30, 2009.
 - (l) Attempting to bargain directly with employees about grievances and bypassing the Union as their collective-bargaining representative.
 - (m) In any other manner interfering with, restraining, or coercing employees in the rights guaranteed to them by Section 7 of the Act.
2. Take the following affirmative action necessary to effectuate the policies of the Act.
 - (a) Within 14 days of this Order, remove from our files any reference to the unlawful suspension of Cesar Uchofen in March 2008 and within 3 days thereafter, notify him in writing, that this has been done and that the suspension will not be used against him in any way.
 - (b) Except as explicitly excluded in my decision, furnish to Transport Workers Union of Greater New York, Local 100, AFL-CIO, upon its request, the information sought in the Union's letters dated October 21 and December 8, 2008, and May 21 and June 18, 2009.
 - (c) Upon request, recognize and bargain collectively with the Union as the exclusive representative of its employees with respect to wages, hours, and other terms and conditions of employment, and if an agreement is reached, embody such agreement in a signed document. The appropriate bargaining unit consists of

All regular full and regular part-time school bus and van drivers, monitors, mechanics, cleaners and fuelers employed by the Respondent but excluding office clericals and guards and

professional, confidential and supervisory employees as defined by the Act.

(d) Rescind all changes made to the terms and conditions of employment made after June 30, 2009, including any changes or modifications made to the seniority/bidding provisions of the labor contract insofar as summer camp routes and regular schoolbus routes.

(e) Make employees whole, with interest for the loss of any earnings or benefits resulting from the failure to comply with the terms of the seniority/bidding provisions described above or as a result of any changes in the terms and conditions of employment made after June 30, 2009.

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

(g) Within 14 days after service by the Region, post at its facilities in Ardsley, New York, copies of the attached notice marked "Appendix B."¹⁹ Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, or sold the business or the facilities involved herein, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondents at any time since March 20, 2008.

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

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

Dated, Washington, D.C. March 2, 2010

APPENDIX A

ORDER REGARDING PROPOSED AMENDMENTS
TO COMPLAINT

Immediately prior to the close of the hearing, and *after* the General Counsel, the Charging Party and the Respondent had

¹⁹ If this Order is enforced by a judgment of the United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

rested,¹ Mr. Rose on behalf of the General Counsel, stated that he wanted to move to amend the Complaints to have the pleadings conform to the proof. I told him that I was not going to approve such an open ended amendment and that if he wished to make amendments, they needed to be specific. When Counsel started to recite the proposed amendments, (none of which were simply amendments to names, dates or places), it became apparent that these were substantial and new allegations that were not plead in the original complaints. It was also clear to me that except for one of the proposed amendments, these new allegations were not fully litigated and would likely require a postponement of the trial so that additional evidence could be presented. I therefore required the General Counsel to submit to me, in writing, these proposed amendments and to serve them simultaneously on the Respondent. At the hearing, the Respondent objected to the proposed amendments contending *inter alia*, that they were too late and would be burdensome.²

By letter dated October 29, 2009, Mr. Rose submitted a corrected Motion to Amend the Complaints. Thereafter, on November 9, 2009, the Respondent submitted a Memorandum of Law in Opposition to the Proposed Amendments. The proposed amendments are as follows:

1. That in or about October 2008, the Respondent, by Elisa Arias, in its dispatch office, threatened an employee that the Respondent was withholding work from him because of his Union activities.

The General Counsel states that this proposed amendment is based on the testimony of Cesar Uchofen at pages 960 to 962 to the effect that Elisa Arias, an alleged agent, told him that he was not getting charter or other extra work "because he is a union person."

2. That on or about October 8, 2008, the Respondent violated Section 8(a)(1), (3) and (5) when Thomas Gillison bypassed the Union and dealt directly with employees in the unit, by requiring employees to meet with him outside the presence of their union representative about grievances that they submitted to their union representative.

The General Counsel states that this proposed amendment is based on the testimony of Cesar Uchofen at pages 904 to 908 to the effect that Mr. Gillison met with employees on October 8, 2008 to discuss grievances which Uchofen and Gillison had earlier agreed to discuss together with employees on October 9, 2009.

3. That in or about March 2009, the Respondent by Rosa Villeda, an alleged agent, solicited an employee to sign a document to decertify the Union.

The General Counsel states that this proposed amendment is based on the testimony of Juventino Lopez to the effect that Rosa Villeda approached him in the garage and asked him to sign a document to decertify the Union.

¹ Neither the Charging Party nor the Respondent chose to call any witnesses.

² The Respondent is a relatively small enterprise and in my opinion, an extended hearing in these cases imposes a substantial burden on its operations; not only as to the cost of litigation, but also in terms of the time spent by management at the hearing and away from their normal business.

4. That on or about September 1, 2009 made various unilateral changes to the terms and conditions of employment of its employees including:

(a) Implementing a freeze on employee anniversary date wage increases;

(b) Excluding casual employees from wage increases;

(c) Implementing rules covering employee performance of charter work;

(d) Implementing a structure of paid holidays and vacations in place of annual minimum numbers of employee work weeks;

(e) Changing the criteria for discharges for absences; and

(f) Imposing a method of calculating employee route hours and daily work hour guarantees.

The General Counsel bases this proposed amendment on the testimony of Thomas Gillison to the effect that General Counsel Exhibit 19 represents company policies put into effect for all employees on September 1, 2009 and that the provisions cited above constitute unilateral changes in the terms and conditions of employment that the employees enjoyed up until that date. In this regard, the General Counsel cites to various provisions of the collective bargaining agreement that expired on June 30, 2009.

Section 102.17 of the Board's Rules and Regulations deals with amendments to Complaints and states *inter alia*;

Any such complaint may be amended upon such terms as may be deemed just, prior to the hearing, by the Regional Director issuing the complaint; at the hearing and until the case has been transferred to the Board pursuant to section 102.45, upon motion, by the administrative law judge designated to conduct the hearing; and after the case has been transferred to the Board pursuant to section 102.45, at any time prior to the issuance of an order based thereon, upon motion, by the Board.³

The proposed amendments numbered 1 and 2 both involve conduct that allegedly occurred in October 2008 and both are based on the testimony of Cesar Uchofen, who at the time was an employee of the Company and the Shop Chairman for the Union.

I note that the investigation of these cases commenced in March 2008 and involved many charges and amended charges. In relation to events occurring in October 2008, I note that charges and/or amended charges were filed on November 24, 2008, January 15 and 23, March 26, April 30, May 29, July 9 and August 20, 2009. Moreover, the Regional Office, during the investigation of the charges, interviewed and took five affidavits from Mr. Uchofen. It is thereby somewhat remarkable that the allegations in these two proposed amendments were first "discovered" only after the trial in this case commenced.

The General Counsel proposes to amend the Complaint to allege that in October 2008, Elisa Arias told Cesar Uchofen that he was not getting charter or other extra work "because he is a union person." Apart from the possibility that his testimony on

³ See *Sheet Metal Workers Local Union No. 91 (The Schebler Company)*, 294 NLRB 766, 774-775 for a discussion of what constitutes "just" in the context of allowing an amendment to a Complaint. See also *Henry Bierce Co. v. NLRB*, (6th Cir. 1994), 146 LRRM 2419.

this point might be a recent fabrication,⁴ this allegation has not been fully litigated and the Respondent would have the right to further cross examine Mr. Uchofen about this issue and to present Elisa Arias or other persons to testify about the alleged transaction.

Given the fact that the General Counsels have rested their case, the amount of time that has already gone into the processing of these cases, the fact that this allegation could or should have been discovered before the trial started and the burden that would be imposed upon the Respondent to litigate this new allegation, I am going to deny the General Counsels' Motion in this regard.

The General Counsel proposes to amend the Complaint to allege that on October 8, 2008, Thomas Gillison bypassed the Union and dealt directly with employees, by requiring employees to meet with him outside the presence of their union representative about grievances that they submitted to their union representative.

The evidence relied on by the General Counsel, (some of which is hearsay), essentially shows that one day prior to a meeting planned to take place on October 9, 2009 to discuss a grievance, Gillison *may* have talked to some employees to discuss a pending grievance. But there was no evidence to establish that any employees were "required" to discuss such a grievance with Gillison. If I permitted the General Counsel to amend the Complaint in this regard, I would have to allow the Respondent to put on witnesses regarding this alleged incident which appears nowhere in any of the Complaints and which has not been fully litigated.

For the same reasons set forth above, I am going to deny the General Counsel's Motion in this respect.

The General Counsel proposes to amend the Complaint to allege that in March 2009, the Respondent by Rosa Villela, solicited an employee to sign a document to decertify the Union. As noted above, this proposed amendment is based on the testimony of Juventino Lopez to the effect that Rosa Villela approached him in the garage and asked him to sign a document to decertify the Union.

The testimony of Juventino Lopez was fairly confused. He testified that in March he was first approached by another employee of the Company who asked him to sign a petition for the purpose of getting rid of the Union and that he refused. Lopez testified that about two weeks later, Rosa Villela, who he understood was someone who worked in the office, approached him and asked him to sign a paper that had some other names on it. He testified that he asked her if this was the same paper to get rid of the Union and she said that it was not. According to Lopez, he could not say if the paper that was presented to

him by Villela had any printed words at the top. (The petition that was put into evidence as Respondent Exhibit 6(b) has a paragraph at the top of each page, printed in Spanish and English, which states that the signatories do not wish to be represented by the Union).

I am going to deny the General Counsel's Motion to Amend the Complaint in this regard. This new allegation that a company supervisor and/or agent solicited employees to sign a petition to decertify the Union was not corroborated by any other person and was not supported by any other probative evidence. And the testimony of Lopez would not, in my opinion, support such an allegation. Lopez could not state that the document he signed was the same type of document that appears in Respondent Exhibit 6(b) and he admittedly states that Villela denied that the purpose of the document was to get rid of the Union.

The General Counsel proposes to amend the Complaint in Case No. 2-CA-39376 that was issued on October 13, 2009 to allege that the Respondent on or about September 1, 2009, made various unilateral changes to the terms and conditions of employment of its employees.

The theory of this amendment rests on the proposition that even though the 2006 to 2009 contract expired on June 30, 2009, the terms of that agreement continue in effect until the parties bargain to a valid impasse; a new contract is reached; or the Respondent is legally entitled to withdraw recognition. Under this theory, the Respondent cannot unilaterally change the existing terms and conditions of employment without first bargaining with the employees' bargaining representative. And the existing terms and conditions are defined, with one or two exceptions not present here, by the terms of the expired contract. *Hen House Market No. 3*, 175 NLRB 596 (1969), *enfd.* 428 F.2d 133 (8th Cir. 1970); *Made 4 Film, Inc.*, 337 NLRB 1152 (2002). See also *Butera Finer Foods*, 343 NLRB [197] No. 30, slip op. at 1 (2004), where the Board found that, after contract expiration, the employer was only required to pay into the pension fund until it obtained actual evidence that a majority of its employees no longer supported the union.

The facts relating to this proposed amendment are not in dispute and are set forth in documents that are already exhibits in this case. The terms and conditions of employment as they existed immediately before September 11, 2009, are contained in the collective bargaining agreement that expired on June 30, 2009. The unilaterally made changes are set forth in a company policy document that was distributed to and signed by employees on or about September 1, 2009. (General Counsel Exhibit 19).

The Respondent's defense to this allegation has also been set forth during the trial and basically consists of its assertion that a majority of the bargaining unit employees had signed a petition to get rid of Local 100. If the Respondent prevails on its assertion that it had the right to withdraw recognition from the Union because it has demonstrated, by probative evidence, that a majority of employees had objectively manifested their intention not to be represented by the Union, then the Respondent would thereafter be free to make any and all changes in the terms and conditions of employment without having to bargain with the Union.

⁴ The Consolidated Complaint in Case Nos. 2-CA-38713 et al, alleges that Mr. Uchofen was discriminatorily discharged in January 2009. One would imagine that this alleged conversation, being not only an independent violation of Section 8(1)(1) but also an important element for establishing anti-union animus, would have been mentioned by Uchofen in at least one of his many affidavits and would have found its way into one of the Consolidated Complaint issued on June 30 and September 11, 2009. Nor does such an allegation appear in when on October 13, 2009, the General Counsel served a Notice of Intention to Amend the Complaint.

As this proposed amendment relates to the most recent Complaint that was issued on the day before this trial opened, (October 13, 2009), and as the General Counsel's theory of violation and the Respondent's theory of defense are based on documentary evidence already in the record, it is my opinion that the matter has been fully litigated. Accordingly, it is my opinion that this proposed amendment to the Complaint would be fair and just and it hereby is granted.

On another matter, I hereby receive into evidence, by way of official notice, General Counsel Exhibits 109 to 113. These are documents that were created and filed by the Union and the Employer in a civil case being conducted in the United States District Court, for the Southern District of New York. The case number is 09 Civ. 701 and I would like to be updated on this related case.

Finally, the hearing in this matter is presently scheduled to resume on November 30, 2009. I need to know from all parties whether or not they intend to call any additional witnesses or offer any further evidence. Please advise me of your intentions by November 23, 2009. On the other hand, if none of the parties intend to offer any new evidence, please advise me so that I can close the hearing and set time for filing Briefs.

Dated: March 2, 2010.

/s/ Raymond P. Green

Raymond P. Green
Administrative Law Judge

APPENDIX B

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

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

[NOTE: THE ABOVE SHOULD BE UPDATED TO THE CURRENT LANGUAGE, SEE BELOW:

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

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT suspend or discipline employees because they seek union representation in relation to interviews that they reasonably believe could lead to disciplinary action.

WE WILL NOT refuse to furnish to Transport Workers Union of Greater New York, Local 100, AFL-CIO information relating to the investigation or processing of grievances.

WE WILL NOT refuse to meet with union representatives regarding pending grievances.

WE WILL NOT refuse to allow employees to bid for summer camp routes.

WE WILL NOT exclude certain regular schoolbus routes from the seniority/bidding process.

WE WILL NOT physically assault employees who are selected to be union representatives.

WE WILL NOT coercively interrogate employees concerning their union adherence or activities or about the Board's investigation of unfair labor practices.

WE WILL NOT fail to provide information relevant to bargaining for a new contract.

WE WILL NOT modify, alter or change the terms of a collective bargaining during midterm, without the consent of the Union.

WE WILL NOT refuse to bargain in good faith with representatives chosen by the Union.

WE WILL NOT withdraw recognition from the Union in the absence of a demonstrated showing that the Union has lost its majority status.

WE WILL NOT unilaterally and without bargaining with the Union, make changes in the terms and conditions of employment after the expiration of the collective-bargaining agreement on June 30, 2009.

WE WILL NOT attempt to bargain directly with employees about grievances and bypass the Union as their collective-bargaining representative.

WE WILL NOT in any other manner interfering with, restraining, or coercing employees in the rights guaranteed to them by Section 7 of the Act.

WE WILL within 14 days of this Order, remove from our files any reference to the unlawful suspension of Cesar Uchofen in March 2008 and within 3 days thereafter, notify him in writing, that this has been done and that the suspension will not be used against him in any way.

WE WILL except as explicitly excluded in this decision, furnish to the Union, upon its request, the information sought in the Union's letters dated October 21 and December 8, 2008, and May 21 and June 18, 2009.

WE WILL upon request, recognize and bargain collectively with the Union as the exclusive representative of its employees with respect to wages, hours, and other terms and conditions of employment, and if an agreement is reached, embody such agreement in a signed document. The appropriate bargaining unit consists of

All regular full and regular part-time school bus and van drivers, monitors, mechanics, cleaners and fuelers employed by us

but excluding office clericals and guards and professional, confidential and supervisory employees as defined by the Act.

WE WILL rescind all changes made to the terms and conditions of employment made before and after June 30, 2009, including any changes or modifications made to the seniority/bidding provisions of the labor contract insofar as summer camp routes and regular schoolbus routes.

WE WILL make employees whole, with interest, for the loss of any earnings or benefits resulting from the failure to comply with the terms of the seniority/bidding provisions described above or as a result of any changes in the terms and conditions of employment made after June 30, 2009.

ARDSLEY BUS CORPORATION INC., A/K/A GENE'S BUS COMPANY