Oak Harbor Freight Lines, Inc. *and* Teamsters Locals 81, 174, 231, 252, 324, 483, 589, 690, 760, 763, 839, and 962 *and* Teamsters Local 174. Cases 19–CA–031797, 19–CA–031827, 19–CA–031865, 19–CA–032030, 19–CA–032031, 19–CA–031526, 19–CA–031536, 19–CA–031538, and 19–CA–031886

May 16, 2012

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS HAYES AND GRIFFIN

On January 5, 2011, Administrative Law Judge John J. McCarrick issued the attached decision. The Acting General Counsel filed limited exceptions and a supporting brief, and the Respondent filed an answering brief. The Charging Party filed exceptions and a supporting brief, the Respondent filed an answering brief, and the Charging Party filed a reply brief. The Respondent filed cross-exceptions and a supporting brief, the Acting General Counsel and the Charging Party each filed answering briefs, and the Respondent filed reply briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions[1] and briefs and has decided to affirm the judge's rulings,[2] findings, and conclusions as modified, and to adopt the recommended Order as modified and set forth in full below.[3]

We agree with the judge, for the reasons he states, that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally implementing its company health care plan for unit employees at the conclusion of the strike[4] and, thereafter, refusing to bargain in good faith with regard to health benefits. We also agree with the judge that the Respondent did not violate Section 8(a)(5) and (1) by unilaterally ceasing its payments into the Washington Teamsters Welfare Trust, the Western Conference of Teamsters Pension Trust Fund, and the Retirees Welfare Trust. Consistent with the judge's findings, we find that the signed cancellation language in the Subscription Agreements (SAs) for the Washington Teamsters Welfare Trust and the Retirees Welfare Trust, and in the employer union pension certifications (EUs) for the Western Conference of Teamsters Pension Trust Fund, constituted a waiver. Specifically, we find that the Unions waived their right to bargain with the Respondent concerning its cancellation of contributions into the funds upon the expiration of the parties' collective-bargaining agreement.

The judge additionally found that the Unions had waived their right to receive trust payments for the Oregon Warehouseman Trust (Oregon Trust). In reaching that conclusion, the judge found that the Oregon Trust required that the parties execute SAs or EUs and that Local Unions 81, 324, and 962 had signed the requisite SA and EU agreements for the Oregon Trust in November 2005. We disagree with these findings and accordingly find that the Respondent violated Section 8(a)(5) and (1) by unilaterally ceasing its payments into the Oregon Trust.

[1] No exceptions were filed to the judge's finding that the Respondent violated Sec. 8(a)(3) and (1) of the Act by refusing to reinstate employee Jeff Gibson to his former position. After the issuance of the judge's decision, the parties entered into a non-Board settlement agreement with respect to the Gibson allegations. By Order dated April 18, 2011, the Board severed and remanded Case 19–CA–32001 to the Regional Director for further processing pursuant to that settlement. Accordingly, Case 19–CA–32001 is no longer before the Board.

[2] At the hearing, the Unions sought to introduce rebuttal evidence in order to establish that the Respondent's Director of Labor Relations and Human Resources Robert Braun had never negotiated changes to trust fund subscription agreements (SAs) or employer union pension certifications (EUs) covering the Respondent. The parties stipulated that the proffered exhibits were authentic, but the judge rejected them, finding that they were not "appropriate rebuttal at this point in time." Tr. 1583. The Unions except to the judge's refusal to admit the proffered evidence, asserting that it is relevant to establishing that the Respondent's SAs and EUs do not reflect a bargained-for waiver of the Unions' bargaining rights. They request that the exhibits be included in the record and that, in the event of a remand, they be allowed to present testimony concerning those exhibits.

We find, without regard to whether the judge erred in not admitting the proffered evidence, that the result in this case would not change even if the evidence had been admitted. The cancellation language in the documents clearly and unambiguously privileges the employer to discontinue trust contributions after expiration of the collective-bargaining agreement and after written notice of its intent to cancel the contribution obligation, and the documents were agreed to and signed by the parties. Therefore, even assuming that the cancellation language had been dictated by the Funds and was not specifically bargained over by the parties, the signed documents establish that the Unions waived their right to bargain over the Respondent's cessation of fund payments upon notice after the expiration of the parties' contract. See *Cauthorne Trucking,* 256 NLRB 721 (1981), remanded on other grounds 691 F.2d 1023 (D.C. Cir. 1982).

[3] We shall modify the judge's conclusions of law, remedy, Order, and notice to delete references to severed Case 19–CA–32001 pertaining to the failure to reinstate Jeff Gibson, and to conform to the violations found. For the reasons stated in his dissenting opinion in *J. Picini Flooring*, 356 NLRB No. 9 (2010), Member Hayes would not require electronic distribution of the notice.

[4] The Respondent excepts to the judge's finding that the unlawful implementation of the Respondent's company health plan occurred on February 17, 2009, rather than February 26, 2009, when the strikers returned to work. We agree with the Respondent and shall correct the implementation date.

Unlike the other three funds at issue in this case, the Oregon Trust did not require an SA or EU agreement. Mark Coles, co-account executive for the Oregon Trust, testified that "the Oregon Trust does not require a subscription agreement."[5] Further, the Respondent has not produced any documentary evidence that the Unions executed one for that fund. Because no cancellation language, as set forth in the SAs and EUs, applied to the Oregon Trust, the Unions did not waive their right to bargain about the Respondent's unilateral stoppage of payments into the Trust. Accordingly, the Respondent violated Section 8(a)(5) and (1) by taking that action without providing the Unions with notice and the opportunity to bargain over its decision to stop its payments.

The Respondent asserts that, even if no such cancellation language applied to the Oregon Trust, the Unions should be equitably estopped from challenging its stoppage of payments into the Trust based on its prior acquiescence in the Respondent's actions. Specifically, the Respondent relies on the fact that, during the events at issue, the Oregon Trust or the Unions never denied the existence of an SA for that fund, despite Respondent's requests for clarification about whether such an SA had been signed.

It is clear that, at the time of the events in this case, none of the parties appear to have understood whether the parties had signed an SA or EU for the Oregon Warehouseman Trust. Respondent's attorney John Payne testified that when he attempted to confirm with the Oregon Trust in September 2008, that an SA for that fund had been executed, he was told by the trust administrators that they "were almost sure" that a signed SA existed.[6] Further, Oregon fund administrator, Coles, admitted that neither he nor administrator, Linda Philbrick, ever notified the Respondent that no Oregon-based SA existed.[7] Even in response to Payne's September 23, 2008 conditional Notice of Intent to Cancel, and Payne's follow-up letter of September 24 asking whether the fund would accept contributions in light of the conditional Notice of Intent to Cancel, the fund did not notify the Respondent that no SA—and therefore no relevant cancellation language—existed. Instead, the fund attorney, Jerome Buckley, rejected contributions for crossovers without providing any explanation.

Despite the existence of confusion concerning whether a SA existed for the Oregon Trust, we reject the Respondent's equitable estoppel argument. When the Respondent ceased its contributions to the Oregon fund pursuant to its conditional cancellation notice, it acted without having clear knowledge of its contractual authority to do so. Although neither the Unions nor the Oregon Trust administrators informed the Respondent of its error, the Respondent nevertheless acted at its peril in discontinuing fund payments based on cancellation language that it was not certain even existed. Because no such termination or cancellation language existed, we agree with the Acting General Counsel and the Unions that the judge erred in finding clear and unmistakable waiver as to the Oregon Trust. We therefore find, contrary to the judge, that the Respondent was not entitled to unilaterally discontinue contributions to the Oregon Trust and that it violated Section 8(a)(5) and (1) by unilaterally ceasing its payments into that fund.

AMENDED CONCLUSIONS OF LAW

1. The Respondent, Oak Harbor Freight Lines, Inc., is an employer within the meaning of Section 2(2), (6), and (7) of the Act.
2. Teamsters Locals 81, 174, 231, 252, 324, 483, 589, 690, 760, 763, 839, and 962 are labor organizations within the meaning of Section 2(5) of the Act.
3. The Respondent has violated Section 8(a)(5) and (1) of the Act by unilaterally discontinuing required contributions to the Oregon Warehouseman Trust.
4. The Respondent has violated Section 8(a)(5) and (1) of the Act on and after February 26, 2009, by unilaterally implementing its company health care plan for bargaining unit employees, and thereafter failing and refusing to bargain in good faith with regard to health care benefits.
5. The unfair labor practices committed by the Respondent are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.
6. The Respondent has not otherwise violated the Act.

AMENDED REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent unlawfully discontinued contributions to the Oregon Warehouseman Trust, we shall order the Respondent to make whole its unit employees covered by the Oregon Trust by making all delinquent Oregon Trust fund contributions on behalf of those employees, including any additional amounts due the fund in accordance with *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979).[8] Further, the Re-

[5] Tr. 903.
[6] Tr. 986.
[7] Tr. 921–923.

[8] Because the provisions of employee benefit fund agreements are variable and complex, we leave to the compliance stage the question of whether the Respondent must pay any additional amounts into the

spondent shall be required to reimburse its unit employees for any expenses ensuing from its failure to make the required contributions to the Oregon Trust, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981), including all medical expenses that were not covered by the Respondent's medical plan but would have been covered by the Oregon Trust. Such amounts should be computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 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), enf. denied on other grounds sub nom. *Jackson Hospital Corp. v. NLRB,* 647 F.3d 1137 (D.C. Cir. 2011).[9]

Having unilaterally implemented its company health care plan for unit employees, the Respondent shall be ordered to restore the status quo ante by ceasing to give effect to its unilaterally implemented company health care plan for unit employees and by bargaining in good faith with the Unions over health care benefits. Further, we shall order the Respondent to restore the status quo ante in the expired collective-bargaining agreement with respect to the Oregon Trust and to continue to make contributions to that fund pursuant to the expired collective-bargaining agreement until the Respondent negotiates in good faith to a new agreement or to a lawful impasse.[10]

ORDER

The Respondent, Oak Harbor Freight Lines, Inc., California, Oregon, Washington, and Idaho, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unilaterally discontinuing required contributions into the Oregon Warehouseman Trust.

(b) Unilaterally implementing terms and conditions of employment, including its company health care plan, without having reached a genuine impasse with the Unions, and refusing to bargain in good faith with the Unions with respect to health care benefits for employees in the following appropriate bargaining unit:

> All truck drivers, helpers, dockmen, warehousemen, checkers, power-lift operators, hostlers, and other such employees as may be presently or hereafter represented by each Local Union as referenced in Appendices A, B, C, and D, engaged in local pick-up, delivery and assembling of freight, within the jurisdiction of the Local Union and office-clerical and shop employees employed by the Respondent excluding however, the classifications set forth immediately below in section 1.04.
>
> 1.04 The following classifications of employees are specifically excluded from the coverage of this Agreement:
>
> (a) confidential employees, supervisory and professional employees within the meaning of the Labor Management Relations Act of 1947, as amended;
>
> (b) employees already covered by an existing union contract not included in this agreement;
>
> (c) office supervisors exercising independent judgment with respect to the responsibility for directing the work or recommending hiring and firing; and
>
> (d) nonbargaining unit employees.

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

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

(a) Restore the status quo ante as it existed prior to February 26, 2009, by ceasing to give effect to the Respondent's health care plan for bargaining unit employees, and bargain in good faith with the Unions over health care benefits.

(b) Make unit employees covered by the Oregon Warehouseman Trust whole by paying all delinquent contributions to the Oregon Warehouseman Trust, as well as any additional amounts due to the fund, restore the status quo ante in the expired collective-bargaining agreement with respect to that fund, and continue to make contributions to that fund until the Respondent negotiates in good faith to a new agreement or to a lawful impasse.

(c) Reimburse unit employees covered by the Oregon Warehouseman Trust, with interest as provided in the amended remedy section of this decision, for any expenses resulting from its failure to make the required payments to the Oregon Warehouseman Trust.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and

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benefit fund in order to satisfy our "make whole" remedy. *Merryweather Optical Co.*, supra.

[9] To the extent that an employee has made personal contributions to a fund that are accepted by the fund in lieu of the employer's delinquent contributions during the period of the delinquency, the Respondent will reimburse the employee, but the amount of such reimbursement will constitute a setoff to the amount that the Respondent otherwise owes the fund.

[10] In light of our finding that the Respondent's obligations to the Washington Teamsters Welfare Trust were lawfully cancelled in September 2008, we shall not order a return to the terms of the expired collective-bargaining agreement with respect to that trust or a monetary remedy for the failure to make contributions to that trust after its cancellation.

copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amounts due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facilities in the States of California, Oregon, Washington, and Idaho, and mail a copy thereof to each laid-off bargaining unit employee, copies of the attached notice marked "Appendix."[11] Copies of the notice, on forms provided by the Regional Director for Region 19, 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 physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/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, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 26, 2009.

(f) 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. May 16, 2012

Mark Gaston Pearce, Chairman

Brian E. Hayes, Member

Richard F. Griffin, Jr., 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 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.

After a trial at which we appeared, argued and presented evidence, the National Labor Relations Board has found that we violated the National Labor Relations Act and has directed us to post this notice to employees in both English and Spanish and to abide by its terms.

Accordingly, we give our employees the following assurances:

WE WILL NOT do anything that interferes with these rights.

WE WILL NOT unilaterally implement terms and conditions of employment, including our own health care plan, without having reached a genuine impasse with the Unions and WE WILL NOT refuse to bargain in good faith with the Unions with respect to health care benefits for our employees in the bargaining unit:

> All truck drivers, helpers, dockmen, warehousemen, checkers, power-lift operators, hostlers, and other such employees as may be presently or hereafter represented by each Local Union as referenced in Appendices A, B, C, and D, engaged in local pick-up, delivery and assembling of freight, within the jurisdiction of the Local Union and office-clerical and shop employees employed by us excluding however, the classifications set forth immediately below in section 1.04.
>
> 1.04 The following classifications of employees are specifically excluded from the coverage of this Agreement:

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

(a) confidential employees, supervisory and professional employees within the meaning of the Labor Management Relations Act of 1947, as amended;

(b) employees already covered by an existing union contract not included in this agreement;

(c) office supervisors exercising independent judgment with respect to the responsibility for directing the work or recommending hiring and firing; and

(d) nonbargaining unit employees.

WE WILL NOT unilaterally discontinue required contributions to the Oregon Warehouseman Trust.

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

WE WILL restore the status quo ante as it existed prior to February 26, 2009, by ceasing to give effect to our company health care plan for our employees in the above-described bargaining unit and WE WILL bargain in good faith with the Unions over health care benefits.

WE WILL make unit employees covered by the Oregon Warehouseman Trust whole by paying all delinquent contributions to the Oregon Warehouseman Trust, as well as any additional amounts due to the fund, and WE WILL restore the status quo ante in the expired collective-bargaining agreement with respect to that fund and continue to make contributions to that fund until we negotiate in good faith to a new agreement or to a lawful impasse.

WE WILL reimburse unit employees covered by the Oregon Warehouseman Trust, with interest, for any expenses resulting from our failure to make the required payments to the Oregon Warehouseman Trust.

OAK HARBOR FREIGHT LINES, INC.

Irene Hartzell Botero, Esq. and *Daniel Apoloni, Esq.* and *Helena A. Fiorianti, Esq.* for the General Counsel.

Michael R. McCarthy, Esq. and *David Ballew, Esq. (Reid, Pedersen, McCarthy & Ballew, LLP),* of Seattle, Washington.

John M. Payne, Esq., Christopher L. Hilgenfeld, Esq., and *Selena C. Smith, Esq. (Davis Grimm Payne & Marra),* of Seattle, Washington.

Nelson Atkin, Esq. (Barran Liebman LLP), of Portland, Oregon, for the Respondent.

DECISION

STATEMENT OF THE CASE

JOHN J. MCCARRICK, Administrative Law Judge. This case was tried in Seattle, Washington, from July 6 to 16, and 20, 2010, upon the fourth order consolidating cases, fourth amended consolidated complaint (complaint), as amended,[1] and notice of hearing issued on May 24, 2010, by the Regional Director for Region 19.

The complaint, as amended, alleges that Respondent violated Section 8(a)(1) and (3) of the Act by suspending and discharging striking employee Jeff Gibson from his former or substantially equivalent position of employment because he assisted the Union and engaged in protected concerted activities.

The complaint, as amended, further alleges that Respondent violated Section 8(a)(1) and (5) of the Act by failing to apply the terms of the expired collective-bargaining agreement to the Employee Benefit Trust Funds and the Pension Trust and by applying its own health care plan to striking employees after the Unions' unconditional offer for the strikers to return to work.

Respondent filed a timely answer to the complaint stating it had committed no wrongdoing and raised several affirmative defenses including:

. . . .

7. Without conceding that Respondent is obligated to adhere to the terminated and expired collective bargaining agreement in all sections, Respondent has followed and acted in compliance with the enforceable provisions of the expired collective bargaining agreement and the Act.

8. Any change in business operations which Respondent implemented were done for substantial legitimate business justifications and were in compliance with the provisions of the expired collective bargaining agreement and the Act.

9. Any alleged unilateral changes made by Respondent were lawfully accomplished in accordance with the

[1] At the beginning of the hearing, GC Exh. 1(xx) replaced the fourth paragraph of complaint paragraph 17 which sets forth the remedy for Respondent's alleged violation of Section 8(a)(5) of the Act for failure to apply the expired collective-bargaining agreement's health and welfare and pension benefits to returning strikers. At the hearing, counsel for the General Counsel moved to delete complaint pars. 1(i) and (o), 11(b) and (e) as to alleged discriminatee Tuttle, (f) and (h). The complaint was further amended by the written stipulation of the parties (Jt. Exh. 3) to reflect the non-Board settlements reached during the hearing of several charges and complaint allegations. The parties jointly moved to sever complaint pars. 1(k), (l), (m), (n), 11(g) and (i) and the portions of paragraph 15 related to employees Gentry and Dyche and that Case 19–CA–32030 be remanded to the Regional Director to process the settlement. In addition the parties moved to sever complaint allegations 1(e), (f), and (g), 12, 13(b) and the portion of 13(c) referring to 13(b) the portion of 13(d) referring to 13(b), the portion of 15 referring to 12 and the portion of 16(b) referring to 13(b) and that Case 19–CA–31827 be remanded to the Regional Director to process the settlement. The parties further moved to sever complaint allegations 1(h), 11(d) and the portions of 11(e) and (f) and 15 related to employee Neubauer and that Case 19–CA–31865 be remanded to the Regional Director to process the settlement. The motion was granted. After the hearing the parties filed a joint motion to sever complaint paragraphs 6, 7, 14, 16, and those portions of 17 making reference to pars. 6, 7, 14, and 16. The motion was granted.

Act, including prior good faith notice to the Unions and an opportunity to bargain.[2]

ISSUES

As noted in footnote 1 most of the issues herein were resolved during the course of the hearing by settlement. The remaining issues for resolution are:

1. Did Respondent violate Section 8(a)(1) and (5) of the Act by unilaterally ceasing to make payments into the trust funds?
2. Did Respondent violate Section 8(a)(1) and (5) of the Act by unilaterally implementing its health care plan for returning strikers?
3. Did Respondent violate Section 8(a)(1) and (3) of the Act by suspending, terminating and failing to reinstate striker Jeff Gibson?

FINDINGS OF FACT

Upon the entire record[3] herein, including the briefs from the counsel for the General Counsel, Charging Party, and Respondent, I make the following findings of fact.

I. JURISDICTION

Respondent admitted it is a State of Washington corporation with offices and places of business located throughout the States of California, Idaho, Oregon and Washington where it is engaged in the business of transporting freight. Annually, Respondent in the course of its business operations derived gross revenues in excess of $500,000 for the transportation of freight from the States of California, Idaho, Oregon and Washington directly to points outside the States of California, Idaho, Oregon, and Washington.

Annually, Respondent in the course of its business operations purchased and received goods valued in excess of $50,000 at its facilities in the States of California, Idaho, Oregon, and Washington directly from points located outside the States of California, Idaho, Oregon, and Washington.

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

II. LABOR ORGANIZATION

Respondent admitted and I find that Teamsters Locals 81, 174, 231, 252, 324, 483, 589, 690, 760, 763, 839 and 962 are labor organizations within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Facts

1. The Respondent's business and bargaining history

Respondent is engaged in the business of transporting freight from over 30 terminals located in California, Idaho, Oregon, and Washington. Respondent's director of labor relations and human resources is Robert Braun (Braun). Respondent's Mount Vernon, Washington terminal manager is Michael Apodaca (Apodaca). In its answer to the complaint Respondent admitted that the above-named individuals are supervisors or agents within the meaning of the Act.

Respondent has had a long term collective-bargaining relationship with the above captioned Teamsters Local Unions, collectively the Unions, whose jurisdictions include Respondent's terminals in Washington, Oregon, and Idaho , and has memorialized that collective-bargaining relationship in a series of collective-bargaining agreements (CBA), the latest of which was effective from November 1, 2004 to October 31, 2007.[4] Over the years the 12 local Unions have engaged in joint bargaining with Respondent, resulting in one collective-bargaining agreement signed by each local.

Paragraph 1.03 of the expired CBA provides for the bargaining unit of the Respondent's employees covered by the contract:

> Scope of Agreement:
>
> 1.03 The execution of this Agreement on the part of the Employer shall cover all line haul and pickup and delivery operations of the Employer that are covered by this Agreement, and shall only have application to the work performed by the following designated unit of employees:
>
> All truck drivers, helpers, dockmen, warehousemen, checkers, power-lift operators, hostlers, and other such employees as may be presently or hereafter represented by each Local Union as referenced in Appendices A, B, C, and D, engaged in local pick-up, delivery and assembling of freight, within the jurisdiction of the Local Union and office-clerical and shop employees employed by the Employer excluding however, the classifications set forth immediately below in section 1.04.
>
> 1.04 The following classifications of employees are specifically excluded from the coverage of this Agreement:
>
> (a) confidential employees, supervisory and professional employees within the meaning of the Labor Management Relations Act of 1947, as amended;
>
> (b) employees already covered by an existing union contract not included in this agreement;
>
> (c) office supervisors exercising independent judgment with respect to the responsibility for directing the work or recommending hiring and firing; and
>
> (d) nonbargaining unit employees.

The most recent CBA at paragraphs 17 and 18 provide that

[2] At the end of its case in chief, Respondent moved to amend its answer to allege an additional affirmative defense that the parties had reached impasse on the issue of benefits for returning strikers. Since the case had been fully litigated at the time Respondent offered its motion, the motion was denied.

[3] Counsel for the Acting General Counsel filed a Motion to Correct Record on September 30, 2010. On October 4, 2010, Respondent filed a letter indicating it had no opposition to the Motion to Correct Record. In its brief Charging Party essentially agreed with counsel for the Acting General Counsel's Motion. The Motion to Correct Record is granted.

[4] GC Exh. 2.

Respondent is obligated to make contributions for bargaining unit employees to the Washington Teamsters Welfare Trust, the Oregon Warehouseman Trust, the Western Conference of Teamsters Pension Trust Fund and the Retirees Welfare Trust.

In order to implement the CBA trusts described above, the parties must execute subscription agreements (SA) or employer union pension certifications (EU). These form agreements provide, inter alia:

> COLLECTIVE BARGAINING AGREEMENT
>
> . . . Upon expiration of the current or any subsequent bargaining agreement requiring contributions, the employer agrees to continue to contribute to the trust in the same manner and amount as required in the most recent expired bargaining agreement until such time as the undersigned either notifies the other party in writing (with a copy to the trust fund) of its intent to cancel such obligation five days after receipt of notice or enter into a successor bargaining agreement which conforms to the trust policy on acceptance of employer contributions, whichever occurs first. . . .
>
> ACCEPTANCE OF TRUST AGREEMENT
>
> The undersigned further acknowledge that with each successive collective bargaining agreement to the one identified above that provides for contributions to continue to be made to (appropriate trust listed), the parties agree to continue to be bound by the terms of the trust agreement and any subsequent amendments thereto. This subscription agreement will automatically continue until such time as contributions are no longer required to be made to the trust under a collective bargaining agreement between the parties; . . . .[5]

Respondent and the various local Unions signed the requisite SA and EU agreements in November 2005.

2. 2007–2008 Prestrike bargaining for a new contract

The parties commenced bargaining for a new collective-bargaining agreement in 2007. Respondent was represented during the course of negotiations by its attorney John Payne (Payne) and it's Director of Labor Relations and Human Resources Robert Braun. The local Unions were represented by a representative of each local and were led by a variety of union officials including John Hobart (Hobart). Hobart was president of Teamsters Joint Council 28 and was the Unions' chief spokesman from August 2008.

3. The strike and cancellation of the trust EU and SA agreements

On September 22, 2008, Respondent's employees in the unit represented by the various Teamsters Locals commenced a work stoppage. Respondent hired strike replacements and a number of current unit employees chose to continue working and crossed the picket line. Between September 23 and 26, 2008, Payne advised the Unions and the Trusts that Respondent intended to cancel its subscription agreements and employer union pension certifications.[6]

The letters provided:

> Please be advised that this constitutes Notice of Intent to Cancel Obligations to the (appropriate trust stated), five (5) days after receipt of this notice.
>
> This notice is being provided pursuant to the (appropriate trust named) Subscription Agreement (or Employer-Union Pension Certification), regarding Oak Harbor Freight Lines.

In addition on September 24, 2008, Payne sent letters[7] to the Trusts advising that Respondent was obligated under the Act to continue making trust fund contributions for employees who chose not to strike but crossed the picket lined and continued to work. The letters provide:

> Under the NLRA, Oak Harbor Freight Lines is required to continue to make (the appropriate trust named) and other benefit contributions on behalf of current bargaining unit employees who choose not to strike and instead decide to cross the picket line at Oak Harbor Freight Lines. Oak Harbor Freight Lines will continue to make such contributions under medical plans that were in place under the expired agreement for these current employees who cross the picket line. These are current Oak Harbor employees who did not join the strike, but chose instead, to cross the picket line and continue working ("crossovers").
>
> By contrast, Oak Harbor Freight Lines does not intend to make benefit contributions to the (appropriate trust named) on behalf of strike replacements. This is what caused Oak Harbor Freight Lines to send the Notice of Intent to Cancel which is dated September 23, 2008.
>
> Please let me know whether the Trust fund will accept such contributions and process the claim of the crossovers. Additionally, Oak Harbor will make the October 10, 2008 contribution for September hours.

The trusts each replied that they would not accept contributions from Respondent.[8] Payne admitted that at the time he sent his September 24 letter he was aware that the Western Conference of Teamsters Pension Trust required contributions on behalf of all bargaining unit employees, including strike replacements and crossovers. Payne likewise admitted that the purpose of the cancellation of the SA and EU agreements was so that he could provide different benefits to strike replacements.

As a result of the Trusts' response, on October 3, 2008 Payne wrote[9] the Union advising that Respondent proposed for crossover employees:

> 1. Pension. We propose that contributions would be placed in an Oak Harbor escrow account on behalf of crossovers. We will hold these contributions in abeyance, depending upon the outcome of the strike.
>
> 2. Health & Welfare. The WTWT and Oregon teamsters Local 206/Employers Trust won't pay claims after October 31. Therefore, the Employer proposes to tempo-

[5] GC Exhs. 36–41.
[6] GC Exhs. 42–45(a).
[7] GC Exhs. 46–49.
[8] GC Exhs. 50–53.
[9] GC Exh. 54.

rarily cover its crossovers (after October 31) under its Company medical plan (during the strike), so that they do not go without coverage. This would be an interim measure pending the outcome of bargaining and of the strike.

3. Retirees Welfare. The Washington Retirees Trust will not accept contributions for crossovers after September hours, October contributions. Oak Harbor proposes to place post-October contributions in an escrow account pending the outcome of negotiations and the strike.

4. Bargaining during the strike

On October 9, 2008, the parties met to bargain over a successor collective-bargaining agreement. Prior to this meeting on September 22, 2008, Respondent had given the Union its last, best, and final offer.[10] The Union brought its counterproposal to Respondent's last, best and final offer to the October 9, 2008 meeting.[11] At this meeting Respondent's attorney Payne asked Union spokesman Hobart if he had a response to his letter of October 3 dealing with trust payments for crossovers. Hobart agreed to escrow pension and retirees contributions for crossovers and noted that crossovers were covered by Respondent's medical plan. No agreement was reached concerning poststrike coverage for strikers under Respondent's medical plan or for poststrike continued escrow of returning strikers' pension and retiree trust funds.

During the October 9, 2008 meeting Payne asked Hobart what it would take to end the strike and Hobart reviewed the terms of the Union's counterproposal noting particularly the importance of maintaining health and welfare and pension benefits. Later, Payne indicated Respondent was withdrawing its 5-year duration of contract proposal and noted that Respondent would review the Union's latest proposal.[12]

The next bargaining session took place on November 7, 2008 after the parties exchanged correspondence discussing bargaining issues. At this meeting the Union made a presentation on a different health and welfare plan the Union considered a compromise between its proposal for health and welfare and Respondent's proposal for its own medical plan.

At about the same time an issue arose concerning vacation pay and concomitant trust contributions for strikers. In a letter to Hobart dated October 24, 2008, Payne stated that it was Respondent's practice to pay its employees vacation pay in January. However, trust contributions were not made until the vacation time was requested.[13] Payne noted that at least one striker was requesting vacation time in the near future and that the trust funds were not accepting contributions. Payne suggested that since the trusts were not accepting Respondent's contributions that on an interim basis Respondent make the trust contributions directly to the striking employee and that pension contributions be held in escrow. In response by letter[14] dated October 29, 2008, Hobart agreed that the vacation benefits accrued in January 2008 were due to the trusts but that Pension Trust contributions could be hold in escrow.

The issue of vacation pay for strikers was again raised by Payne in his November 7, 2008 letter.[15] Payne stated that Respondent had striking employees who were not paid vacation pay before September 30, 2008, now requesting vacation time off. Payne suggested the Respondent pay Trust contributions directly to the employees and to escrow their pension contributions on an interim basis. By letter[16] dated November 17, 2008, Hobart agreed to this proposal.

5. Return to work and poststrike bargaining

On February 12, 2009, the Union made an unconditional offer[17] to return to work. On February 17, 2008, the parties met to discuss the terms of striking employees' return to work. At the meeting Payne presented the Union with a letter[18] that stated all striking employees would be returned to work on February 18, 2009, that some employees would be suspended pending investigation of strike misconduct, and that some employees would be laid off due to lack of work. During this meeting Payne gave the Union another letter[19] stating Respondent's understanding of the "status quo" for returning strikers' wages and benefits:

> Oak Harbor proposes to continue the status quo regarding wages and benefits. The benefits proposal is based on the fact that the Trust funds (i.e., Pension, Health & welfare, and Washington Retirees H&W) have consistently refused to accept contributions for returning strikers.
>
> Thus, the status quo is the wage rate in the terminated CA. It also includes the agreement reached with the Union in early October 2008 regarding Pension, Washington Retirees Health & Welfare, and Teamsters Health & Welfare for returning strikers. Oak Harbor would continue to follow the agreed upon status quo for returning strikers, which is as follows:
>
> *Health & Welfare: Oak Harbor will cover the returning strikers under its Company Plans pending a different agreement with the Union on Health & Welfare. (This will allow these employees to have coverage.)
>
> *Pension: Oak Harbor will place the monthly contributions into an escrow account pending some other agreement on the subject.
>
> *Washington Retirees Health & Welfare: Oak Harbor will put the monthly contributions into an escrow account pending a different agreement on this subject.

Hobart expressed his disagreement with Payne's understanding of the status quo as to wages and benefits for returning strikers as expressed in Paynes' letter. Payne asked Hobart if the Union was placing conditions on the strikers return to work and Hobart replied that the strikers return to work was in neutral.

On February 18, 2009, Hobart sent a letter[20] to Payne which reiterated that the strikers had made an unconditional offer to

[10] GC Exh. 55.
[11] GC Exh. 56.
[12] GC Exh. 57.
[13] GC Exh. 60(b).
[14] GC Exh. 61.
[15] GC Exh. 65.
[16] GC Exh. 66.
[17] GC Exh. 74.
[18] GC Exh. 24.
[19] GC Exh. 25.
[20] GC Exh. 75.

return to work. Hobart stated further that the health and welfare and pension trusts would accept trust contributions if the parties signed an "interim agreement" stating, "that the parties agree to continue their participation in the funds during the period in which they are negotiating a collective bargaining agreement to replace the expired contract." Hobart attached the emails[21] from the trusts to his February 18 letter. The email from the Washington Teamsters Welfare Trust and Retirees Welfare Trust stated:

> The Washington Teamsters Welfare Trust and Retirees Welfare Trust will accept a written interim agreement between the parties to participate in the Trusts provided that the agreement complies with each Trust's operating rules and the parties also execute a new Subscription Agreement for each trust.

The email from Western Conference of Teamsters Pension Trust stated:

> Al, you have asked whether or not participation under the Western Conference of Teamsters Pension Trust could be acceptable on the basis of an interim collective bargaining agreement. The short answer is yes, provided that the agreement provides for the continuation of Pension Contributions at the same rate as previously contained in the last acceptable pension agreement. Further, the Trust would require an executed Employer-Union Pension Certification form to be submitted along with the new collective bargaining agreement.
>
> It should be noted that the interim agreement must conform to the Trust's policies for the Acceptance of Employer Contributions found in the agreement and Declaration of Trust. Finally, it is critical that the effective date for the commencement date of contributions be clear. The Trust does not permit a "gap" in the payment of Pension Contributions except for periods of strike where the bargaining parties agree that no contributions are due. As a result, contributions to the Trust would have to resume effective with the bargaining unit's return to work.

Between February 19 and 25, 2009, phone conversations took place between Payne and Union attorney David Ballew (Ballew) concerning Respondent's position on the status quo as to wages and benefits for returning strikers. During a conversation on February 20, 2009, Payne contended that Respondent's position (apparently as expressed in his February 17, 2009 letter) regarding the trusts was to maintain the status quo and Ballew contended that the status quo was the terms of the expired collective-bargaining agreement.

During the course of these conversations Payne offered a middle ground as an alternative to his February 17 status quo letter that Respondent would agree to the Union's Pension Trust. Ballew said the Union could not accept this proposal.

In a February 25, 2009 conversation Payne told Ballew that he was no longer authorized by Respondent to discuss bargaining with Ballew. Payne also said that Respondent and the Union were making progress toward a collective-bargaining agreement.

The striking employees returned to work on February 26, 2009, under the terms outlined in Payne's February 17, 2009 letter.

6. The Trusts' position on receiving contributions

At the hearing Mark Coles, an account executive with Northwest Administrators, who manages the Retirees Trust testified that an interim labor agreement was not necessary to support trust contributions as the expired CBA would be sufficient together with a new SA. Likewise Michael Sander (Sander), vice president of Northwest Administrators and the administrative manager of the Western Conference of Teamsters Pension Trust, explained that the trust could not accept pension contributions from Respondent for crossovers if Respondent did not make contributions for strike replacements as this would violate selectivity rules. Sander also explained that the trust would accept contributions in the absence of an EU or SA and with an expired CBA. In additional Sander testified that the pension trust would accept trust contributions based solely on the expired CBA and an order from the administrative law judge herein. This position was confirmed by Rick Dodge, chairman of the Pension Trust.[22]

7. Strike misconduct—Jeff Gibson

Jeff Gibson (Gibson) worked for Respondent as a delivery driver at its Mt. Vernon, Washington terminal. Gibson was one of the striking employees who was suspended pending investigation into strike misconduct. Gibson went on strike with fellow employees in September 2008 and engaged in picketing at the Mt. Vernon terminal. Gibson also engaged in ambulatory picketing in which he followed Respondent's trucks and picketed at customers' sites.

When the strike ended, Gibson reported for work at Respondent's Mt. Vernon terminal where he was told that he had been suspended.

A few weeks later an investigatory interview into Gibson's alleged strike misconduct was conducted by Respondent. There were 11 incidents of strike misconduct attributed to Gibson by Respondent. During the investigatory interview Gibson was given an opportunity to respond to each of the 11 allegations. On March 16, 2009, Gibson was discharged for strike misconduct.[23]

While Braun had a list of 13 employees from Respondent's terminal managers who had engaged in strike misconduct, other than the allegations leveled against Gibson, no other evidence of strike misconduct was offered at trial. Braun was the ultimate decisionmaker concerning discipline for those accused of strike misconduct. In making his decision concerning Gibson, Braun relied solely upon a package of information that was supplied to him by the law firm hired by Respondent to investigate the alleged misconduct.[24] That evidence is set forth below together with Gibson's testimony at the hearing.

8. The strike misconduct incidents involving Gibson

a. Mike Apodaca

Toward the end of the strike when Gibson was on the picket

[21] GC Exhs. 75(c) and (d).

[22] GC Exh. 91.

[23] GC Exh. 35.

[24] R. Exh. 36.

line, Mt Vernon terminal manager, Mike Apodaca (Apodaca), got out of his car about 20 feet from Gibson on the terminal property. Gibson admitted that he asked Apodaca about Respondent's owner, Ed Vander Pol cheating on his wife and that he then called Apocaca a "real piece of shit." Braun did not consider this incident alone sufficient to terminate Gibson.

b. Bruce Miller

Bruce Miller (Miller) was Gibson's coworker at the Mt. Vernon terminal. Gibson and Miller were friends. On the first day of the strike Miller had a phone conversation with Gibson in which Gibson said that if Miller crossed the picket line he would not live to see retirement. Miller advised Apodaca of Gibson's threat and on February 20, 2009 gave an affidavit concerning the Gibson threat. Gibson denied threatening Miller but admitted saying if Miller crossed the picket line, their friendship was over. I found Gibson to be an evasive witness whose recollection lacked specificity. I will credit Miller. Braun did not consider this incident alone sufficient to terminate Gibson.

c. Joe Velasco—delivery at a customer

Joe Velasco (Velasco) was Gibson's coworker at Respondent's Mt. Vernon terminal. While Velasco was making a delivery in November 2008 at a customer's facility in Bellingham, Washington, he saw Gibson getting out of a small pickup truck. Velasco did not notice any sign indicating the Union was on strike. Gibson approached Velasco and called him a scab and said Velasco would lose his job. A short time later, Gibson told Doug Jensen, the customer's employee, not to take the delivery from Velasco. Jensen told Gibson to leave the property and Gibson left. Velasco reported this incident to Respondent and later filled out a declaration. According to Gibson, he entered the customer's property to engage in ambulatory picketing for informational purposes and so advised the customer who asked Gibson to leave the property. Velasco admitted in his declaration and testimony at trial that he advised the customer that Gibson was there because of a labor dispute with Oak Harbor. There was no evidence in the report Braun reviewed, including Velasco's declaration, to reflect that Gibson yelled or acted rudely toward the customer. Indeed Velasco testified that Gibson, "had some respect for the customer, even though he did get in his face."[25] Braun considered this conduct serious enough to warrant a suspension. In its brief Respondent concedes that this incident did not constitute serious misconduct.

d. Joe Velasco—driving on Guide Meridian Road

In January 2009, Velasco was driving Respondent's truck on Guide Meridian Road in Bellingham, Washington. In the area he was driving the road was one lane in each direction due to road construction. Velasco saw a small pickup truck coming in the opposite direction toward him. The pickup swerved into Velasco's lane and then swerved back out. Velasco estimated that the closing speed of both drivers as they approached each other from opposite directions was 90 to 100 mph. Velasco identified the driver as Gibson. Gibson denied this allegation. Contrary to Respondent's assertion in its brief, Gibson denied he had or drove a small pickup truck. The only pickup truck Gibson admitted he owned was a 1973 full size 3/4 ton red Chevrolet. Gibson stated the truck was not insured and was not driven. The only evidence Braun had concerning this incident was Velasco's declaration which stated:

> 13. Sometime in November, 2008, I was driving northbound in the Bellingham area through a construction zone, a small, pick-up truck suddenly pulled in front of me. I noticed it was Jeff Gibson in front of me. He smirked at me and then moved back into the lane to my right. I believe he was trying to get me to brake suddenly and lose control of my truck.[26]

Apparently, Velasco did not consider this incident serious enough to file a report to the police or to Respondent.

In view of Gibson's denial that he owned or drove a small pickup truck and the difficulty Velasco would have identifying anyone coming head on at 100 mph, I do not credit Velasco's testimony that it was Gibson who swerved into Velasco's lane. Moreover, Velasco's declaration does not state that Gibson swerved into Velasco's lane of traffic as Respondent contends. Rather it appears Gibson was passing not coming head on at Velaco. If Gibson was coming head on he would have pulled back into the lane to Velasco's left to avoid hitting Velasco. Braun said that he considered this incident serious enough alone to warrant Gibson's termination.

e. Videos

During the course of the strike Gibson videoed various incidents that he considered to be safety violations by Respondent's drivers as well as security guards videoing strikers. Eight of these videos were posted on YouTube.com. Braun gave this little weight in his decision to terminate Gibson.

f. Shane Brantner—driving on Guide Meridian Road

Toward the end of the strike, on about November 26, 2008, Gibson was driving on Guide Meridian Road in Bellingham, Washington, when he saw one of Respondent's trucks ahead of him which was driven by Respondent's replacement driver Shane Brantner (Brantner). According to Brantner's testimony, he slowed to let the car pass because the car was only one to two feet behind his truck for a few seconds. The car passed Brantner and as it did the driver gave Brantner the finger. The car then pulled in front of Brantner and the driver continued to give Brantner the finger while repeatedly putting on its brakes while not coming to a full stop. Brantner was forced to apply his brakes in response to the car in front of him but was able to control his truck despite Gibson's driving. The evidence Braun used to decide Gibson's fate consisted of Brantner's declaration which did not indicate Gibson was tailgating nor that Gibson pulled six to seven feet back in front of Brantner, as Brantner testified. When the car and Brantner's truck reached the next stop light, Gibson got out of his car jumped on Brantner's running board and asked Brantner if he was the guy who wanted to beat him up. Brantner said no and Gibson said that the drivers at Oak Harbor had to watch out for him. Brantner reported this incident to Respondent and later gave a declaration. Braun

[25] Tr. at 1411, LL. 4–7.

[26] R. Exh. 36, at 18.

only considered the erratic driving incident to be serious. Gibson denied tailgating Brantner or driving in an erratic fashion but admitted asking if Brantner was the person who threatened him and told Brantner to tell the drivers to watch what they say because word gets around. I found Gibson to have a hostile attitude during the course of his testimony. His recollection was lacking in specifics and there was inconsistency in his testimony concerning prior discipline. On the other hand Brantner at the time of his testimony had not been working for Respondent for at least a year and thus had no motivation to distort his testimony. Brantner's testimony was given without hostility and was detailed and consistent. I will credit Brantner over Gibson.

g. Donald Timm—NAPA delivery

Near the end of the strike in a NAPA auto parts parking lot, Respondent's replacement driver Donald Timm (Timm) was parked in one of Respondent's trucks. Gibson saw Respondent's truck and parked his car next to the truck. According to Timm, Gibson said, "How would you like it if somebody came to your house and fucked your wife." Timm replied he would not like that. Gibson told Timm that was what he was doing by taking strikers' jobs. About 10 days later at Respondent's Mt. Vernon terminal Gibson repeatedly said to Timm, "Hey, where's your wife because I'm going to come over [sic] fuck her like you're fucking me." Timm reported this incident to Respondent and gave a declaration. According to Gibson he asked Timm if he would like it if someone was doing his wife while he was at work. I found Timm to be a credible witness whose recollection was detailed and consistent. I found Gibson to be an angry witness with less than a good memory. I will credit Timm's testimony.

There is no evidence that anyone tried to follow Timm or any other employee to their houses or attempted to locate Timm's or any other employees' house. Braun said he considered this a serious incident warranting termination.

h. Jim McDonald incident leaving the Mt. Vernon terminal

Jim McDonald (McDonald), Respondent's driver, said that during the strike he was leaving the Mt. Vernon terminal in Respondent's tractor-trailer when he observed Gibson standing about six to eight feet from the trailer. When McDonald started to turn left to enter the road, he lost sight of Gibson, causing him to slam on his brakes because he could not tell where Gibson was. When he left the truck cab, McDonald saw Gibson standing a foot away from his rear tires. There is no evidence that Gibson lunged at McDonald's truck. All McDonald was able to say is that he lost sight of Gibson while he was making a left turn, that he stopped his truck and that when McDonald got down from his cab, he observed Gibson a few feet away from the left end of the trailer.

Braun said this was a serious incident that alone warranted suspension and when considered with the other strike misconduct warranted Gibson's termination. Gibson denied jumping in front of or touching Respondent's trucks when entering or leaving Respondent's facilities.

i. Threats of union lawsuits

Gibson admitted twice telling crossover employees that the Union would sue them and recover the money they were making during the strike. While Braun considered this a serious incident, it alone was not enough to warrant Gibson's termination.

j. Remarks to security guards

During the strike, at the Mt. Vernon terminal while he was picketing, Gibson admitted making crude remarks to Respondent's security guards. Braun said that these incidents were given no weight in his decision to terminate Gibson.

In making his decision considering Gibson's discipline, Braun considered the totality of the alleged strike misconduct as set forth in Respondent's Exhibit 36, which included a summary of Gibson's interview into the strike misconduct allegations.

k. The postdischarge conduct of Gibson

Lavance Ross, an African-American, was hired by Respondent in September 2008 as a strike replacement. After Gibson's termination in March 2009, in October 2009, Ross was making a delivery at Respondent's customer, Wallace Farm. While at the Wallace Farm loading dock, Gibson from about 30 feet away said to Ross, "Hey, scab master funk." After some additional conversation and after Gibson had gotten closer to Ross, Gibson said "You scabs caused me to lose my job and I lost everything. I worked for Oak Harbor for 16 years and I was going to retire in 8 years." Gibson appeared angry and had his finger about 6–8 inches from Ross's face. Ross is a large man, significantly bigger than Gibson.

Braun recalled two incidents where Respondent had disciplined employees in the past 3 years for racial comments. In one case a Caucasian mechanic called an African American driver "nigger" twice in one week. The employee was suspended for 1 week. On another occasion a Caucasian employee referred to an African American employee as "boy." The offending employee was suspended for 1 week. Braun, who is Caucasian, believes the term "scab master funk" was a pejorative term that violated Respondent's antidiscrimination policy because the term refers to odors emanating from African Americans.

B. The Analysis

1. The Trust Fund payments

Complaint Paragraph 10(c) alleges that Respondent and the Locals entered into an agreement on or about October 9, 2008, in which Respondent promised to:

> (ii) Provide coverage under its medical plan to its eligible crossover employees represented by the Locals, for claims made after October 31, 2008.

The complaint describes the terms agreed to in paragraph 10(c) as "Temporary Benefit Changes."

Complaint Paragraph 13(a) alleges that on or about February 26, 2009, after the Locals' unconditional offer for the strikers and/or sympathy strikers to return to work, Respondent failed to apply the terms of the expired CBA as it related to the Employee Benefit Trust Funds and the Pension Trust, and, instead, applied the Temporary Benefits Changes to the single unit

and/or units of employees, including returning strikers and/or sympathy strikers.

Counsel for the General Counsel contends that Respondent was obligated under the terms of the expired 2003–2007 CBA to continue making trust fund payments on behalf of its employees and its failure to make contributions to the various trusts and its unilateral implementation of its own health care plan and its escrow of funds to the various trusts violated Section 8(a)(5) of the Act. As a remedy counsel for the General Counsel seeks an order requiring Respondent to pay all trust fund payments due the various trusts since February 12, 2009, and reimbursement for medical bills not covered by Respondent's medical plan.

We start with the proposition that after a collective-bargaining agreement expires, an employer must maintain the status quo on all mandatory subjects of bargaining until the parties either agree on a new contract or reach a good-faith impasse in negotiations. *Triple A Fire Protection, Inc., 315* NLRB 409, 414 (1994); *Kingsbridge Heights Rehabilitation & Care Center,* 353 NLRB 631 (2008). This status quo obligation includes making contributions to fringe benefit funds "specified in the expired collective bargaining agreement." *N. D. Peters & Co.,* 321 NLRB 927, 928 (1996). An employer may not implement its own terms and conditions of employment absent impasse or waiver by the Union. In case of impasse, the employer must implement the exact terms of its final offer. In case of waiver by the union, it must be clear and unequivocal. *Tampa Sheet Metal Comp.,* 288 NLRB 322, 326 (1988). *Carpenter Sprinkler Corp.,* 238 NLRB 974 (1978). *Provena* St. *Joseph Medical Ctr.,* 350 NLRB 808, 811 (2007).

Whether a bargaining impasse exists is a matter of judgment which relies on factors like bargaining history, the good faith of the parties, the length of the negotiations, the importance of the issue(s) as to which there is disagreement, and the contemporaneous understanding of the parties as to the state of negotiations. *Taft Broadcasting Co.,* 163 NLRB 475 (1969).

During overall negotiations for a new CBA, an employer may not justify the unilateral implementation of a proposal on a particular subject, on the ground that it gave the union notice and an opportunity to bargain. *Bottom Line Enterprises, 302* NLRB 373, 374 (1991).

2. The parties did not reach impasse on February 17, 2009

In this case there was no impasse in overall negotiations for a collective-bargaining agreement. The parties began bargaining for a new collective-bargaining agreement in 2007. Bargaining continued up to the strike in September 2008, throughout the strike, and after the strike ended.

On about September 22, 2008, Respondent provided its best, last, and final offer to which the Union responded with its counterproposals on October 9, 2008. During the October 9, 2008 meeting Payne asked Hobart what it would take to end the strike and Hobart reviewed the terms of the Union's counterproposal noting particularly the importance of maintaining health and welfare and pension benefits. Later, Payne indicated Respondent was withdrawing its 5-year duration of contract proposal and noted that Respondent would review the Union's latest proposal.

The next bargaining session took place on November 7, 2008, after the parties exchanged correspondence discussing bargaining issues. At this meeting the Union made a presentation on a different health and welfare plan the Union considered a compromise between its proposal for health and welfare and Respondent's proposal for its own medical plan.

On February 12, 2009, the Union made an unconditional offer to return to work. On February 17, 2009, the parties met to discuss the terms of striking employees' return to work. At the meeting Payne presented the Union with a letter that stated all striking employees would be returned to work on February 18, 2009, that some employees would be suspended pending investigation of strike misconduct, and that some employees would be laid off due to lack of work. During this meeting, Payne gave the Union another letter which stated that Respondent would place returning strikers under its own health care plan and place contributions to the various trust funds into an escrow account. Hobart expressed his disagreement with Payne's understanding of the status quo as to wages and benefits for returning strikers as expressed in Paynes' letter.

Between February 19 and 25, 2009, phone conversations took place between Payne and Union attorney David Ballew (Ballew) concerning Respondent's position on the status quo as to wages and benefits for returning strikers. During the course of these conversations Payne offered a middle ground as an alternative to his February 17 status quo letter that Respondent would agree to the Union's Pension Trust. Ballew said the Union could not accept this proposal.

In a February 25, 2009 conversation Payne told Ballew that he was no longer authorized by Respondent to discuss bargaining with Ballew. Payne also said that Respondent and the Union were making progress toward a collective-bargaining agreement.

Clearly as of February 17, 2009, the date Respondent unilaterally implemented its health care plan and escrowed trust fund payments, there was no impasse. Even though Respondent had submitted what it termed its last, best, and final offer on September 22, 2008, on and after February 17, 2009, the parties were still exchanging proposals and there was movement on various terms and conditions of employment. Payne admitted on February 25, 2009 that the parties were still making progress toward a contract.

Thus, I find that as of February 17, 2009 no impasse existed between the parties.

3. Waiver

While otherwise unlawful unilateral acts may be justified in certain circumstances, including waiver or acquiescence by the Union, such waiver of bargaining rights by a union is not to be lightly inferred and must be clearly and unequivocally conveyed. *Provena* St. *Joseph Medical Ctr.,* 350 NLRB 808, 811 (2007).

At no time, during collective bargaining for a new contract, did the Union agree that terms and conditions of work for returning strikers included Respondent's health plan and an escrow of trust fund payments. It is clear that the Union agreed only to such terms and conditions of employment for crossover employees during the term of the strike. From the terms of

Payne's October 3, 2008 proposal it is clear that Respondent's health plan and escrowed funds applied only to crossover employees during the pendency of the strike. This was not intended as an overall provision of the new collective-bargaining agreement. Such an interim agreement cannot be considered a waiver of the Union's right to bargain over health and welfare and trust payments for an overall CBA.

However, Respondent argues that the Union has waived its right to receive trust fund contributions as a result of the contract language contained in the SA and EU agreements. Respondent contends that the SA and EU agreements give it the unilateral right to discontinue benefit payments upon expiration of the CBA upon 5-days written notice to the Union and the Trust. The relevant EU and SA agreement contain the following language:

> COLLECTIVE BARGAINING AGREEMENT
>
> . . . Upon expiration of the current or any subsequent bargaining agreement requiring contributions, the employer agrees to continue to contribute to the trust in the same manner and amount as required in the most recent expired bargaining agreement *until such time as the undersigned either notifies the other party in writing (with a copy to the trust fund) of its intent to cancel such obligation five days after receipt of notice or enter into a successor bargaining agreement* (emphasis added) which conforms to the trust policy on acceptance of employer contributions, whichever occurs first. . . .

The Board has found a waiver of the union's right to receive trust contributions from the contractual language in a pension agreement in *Cauthorne Trucking,* 256 NLRB 721 (1981). The parties' pension agreement provided:

> IT IS UNDERSTOOD AND AGREED that at the expiration of any particular collective bargaining agreement by and between the Union and any Company's obligation under this Pension Trust Agreement shall terminate, unless, in a new collective bargaining agreement, such obligation shall be continued. Id. at 722.

The Board held that this provision constituted a waiver. The Board concluded that this language, explicitly stating that all company obligations under the pension agreement shall "terminate" upon expiration of the contract, expressed a clear intent to relieve the employer of any obligation to make payments after contract expiration. The Board premised its finding of a waiver on the fact that the contract language explicitly addressed the obligation to provide the benefits and the statement in the contract that the obligation would terminate.

Subsequent cases distinguishing *Cauthorne* confirm that the Board will only find a clear and unmistakable waiver of the obligation to continue providing trust payments where there is explicit contract language authorizing an employer to terminate its obligations.

In *Allied Signal Aerospace*, 330 NLRB 1216, 1228 (2000), the Board and administrative law judge found the following contract language failed to clearly and unequivocally waive the union's right to receive trust payments:

> This Effects Bargaining Agreement shall be effective as of May 30, 1994, and shall remain in effect until midnight on June 6, 1997, but not thereafter unless renewed or extended in writing by the parties. It is understood that expiration of this Agreement shall not foreclose the post-expiration payment to employees of bonuses or other benefits which accrued to them because of layoff during the term of this Agreement, or the post-expiration presentation in a timely fashion of claims regarding matters arising out of the application of its terms prior to the expiration date.

The administrative law judge concluded that this language dealt solely with the question of whether the effects bargaining agreement remained in effect as a contract after June 6, 1997 and made no provision about the termination of any duties or obligations on the part of Respondent to continue providing fringe benefits.

In *Natico, Inc.,* 302 NLRB 668, 685 (1991), the respondent argued that the following language relieved it of its obligation to make pension contributions:

> [Section] 5.16 It is agreed that the pension program effective April 1, 1976 will remain in effect for the term of this agreement with the following changes.
> Effective 12/16/83 Add 5/Hr. = 20 cent Total
> Effective 12/16/84 Add 5/Hr. = 25 cent Total

The administrative law judge concluded that in section 5.16, the parties agreed not to disturb the pension program effective 1976 except for two 5-cent-per-hour increases. However, the contractual language did not provide that the pension program would terminate on the expiration of the contract. The administrative law judge, with Board approval, found that language to that effect is required either in the collective-bargaining agreement or in the underlying pension agreement to satisfy a waiver condition.

In *Schmidt-Tiago Construction Co*., 286 NLRB 342 (1987), the Respondent argued that the Union had waived its right to bargain regarding the Respondent's cessation of payments into the pension trust fund, after expiration of the current collective-bargaining agreement by the following language of the pension certification and declaration of trust:

> [Respondent] and [Union] hereby certify that *a written* labor agreement is in effect between the parties providing for contributions to the Western Conference of Teamsters Pension Trust Fund [Trust Fund] and that such agreement conforms to the trustee policy on acceptance on Employer contributions and is not otherwise detrimental to the plan, and further provides that, the [Union] and [Respondent] agree to be bound by the Western Conference of Teamsters Agreement and Declaration of Trust and Pension Plan as now constituted or as hereinafter amended.

The pension certification and the declaration of trust each contained the following provision:

> It is the policy of the Trustees of the Western Conference of Teamsters Pension Trust Fund to accept as Employer Contributions only payment made in accordance with a Pension Agreement that is not detrimental to the Plan. The determination of whether or not a Pension Agreement is detrimental to

> the Plan shall be made by the Trustees in their sole discretion. However, the list of provisions that follows is furnished as an illustration of those whose inclusion in a Pension Agreement may result in a determination by the Trustees that the Pension Agreement is detrimental to the Plan.

Section 9, article I of the trust declaration, entitled "Definitions," defines "Employer Contributions" as follows:

> The term Employer Contributions as used herein shall mean payments to the Trust Fund by an employer in accordance with a Pension Agreement. Any contribution to the Trust Fund which are discovered not to have been made pursuant to a valid pension agreement, or which are subsequently discovered to be unacceptable for any other reason**,** shall be withdrawn from the Trust Fund and credited to a Segregated Account pending the determination of the person or persons entitled thereto.

Section 10, article I of the trust declaration, entitled "Definitions," defines "Pension Agreement," as follows:

> The term Pension Agreement as used herein shall mean a written agreement between any Union and any Employer which, among other thing[s], requires payments to the Trust Fund on behalf of employees of such Employer who are represented by such Union. Such agreement may not provide for payments to the Trust Fund with respect to employees not so represented. The term Pension Agreement shall include any extension, renewal or replacement thereof. A Pension Agreement shall be considered as being in effect on any date if it provides for Employer Contributions to be made to the Trust Fund with respect to employment on such date.

The administrative law judge, as affirmed by the Board, found that there was an inadequate basis for implying the existence of a waiver in the above-described language of the pension certification and declaration of trust. The judge found that this language does not on its face, as in *Cauthorne Trucking,* specifically state that Respondent's obligation to contribute to the pension trust fund ends with the expiration of the current collective-bargaining contract.

In another case involving waiver of trust payments, *KBMS, Inc*., 278 NLRB 826 (1986), the Respondent contended that article III, section 2 of the agreement and declaration of trust prohibited contributions after the expiration of the bargaining agreement. This section provides:

> ARTICLE III. Contributions to the Funds
>
> SECTION 2. *Effective Date of Contributions.*
>
> All contributions shall be made effective as of the date specified in the collective bargaining agreements between AFTRA and the Producers, and *said contributions shall continue to be paid as long as a Producer is so obligated pursuant to said collective bargaining agreements.* [Emphasis added.]

The administrative law judge found that the declaration of trust language did not constitute a clear and unmistakable waiver since that section did not purport to deal with the termination of the employer's obligation to contribute to the funds particularly in view of Section 1 of that same article which provided "Nothing in this Trust Agreement shall be deemed to change, alter or amend any of said collective bargaining agreements."

Finally, in *American Distributing Co.,* 264 NLRB 1413, 1415 (1982), the administrative law judge concluded that the pension certification did not constitute a waiver.

Pertinent language from the pension certification provides:

> The undersigned employer and Union hereby certify that a *written* pension agreement (in most cases a Teamsters collective bargaining agreement) is in effect between the parties providing for contributions to the Western Conference of Teamsters pension trust fund and that such pension agreement conforms to the trustee policy on acceptance of employer contributions (as reproduced on the reverse of this form) and is not otherwise detrimental to the plan. A complete copy of the pension agreement (labor contract) is attached or, if not yet available, will be furnished to the area administrative office as soon as available. The undersigned further certify that the following information is true and correct and accurately reflects the provisions of the pension agreement. . . .

The judge held that this language did not make reference to a contract termination date and was not a clear or unequivocal waiver of Respondent's obligation to make trust fund payments.

It appears that the pertinent language in the EU and SA agreements herein," . . . the employer agrees to continue to contribute to the trust in the same manner and amount as required in the most recent expired bargaining agreement until such time as the undersigned either notifies the other party in writing (with a copy to the trust fund) of its intent to cancel such obligation five days after receipt of notice. . . ." is similar to the pension agreement language in *Cauthorne Trucking,*

> IT IS UNDERSTOOD AND AGREED that at the expiration of any particular collective bargaining agreement by and between the Union and any Company's obligation under this Pension Trust Agreement shall terminate, unless, in a new collective bargaining agreement, such obligation shall be continued.

Like the pension agreement in *Cauthorne Trucking*, the EU and SA agreements in this case explicitly state that Respondent's obligations under the trust agreements pursuant to the expired bargaining agreement will continue until one party notifies the other of its intent to cancel such obligation. This contract language expresses a clear intent to relieve Respondent of its obligation to make payments after contract expiration and notice to cancel trust payments. The language of the EU and SA agreements is explicit in stating when Respondent's trust payment obligation ceases unlike the language in *Allied Signal Aerospace*, *Natico, Inc., Schmidt-Tiago Construction Co*., *KBMS, Inc*., or *American Distributing Co.,* supra. I find that the EU and SA language operate as a waiver of the union's right to receive trust contributions. Respondent exercised the right to cease making trust contributions by its notices of September 23–26, 2008.

4. The unilateral implementation of Respondent's health care plan

However, the question remains, given the Union's waiver of the right to receive trust contributions at the expiration of the most recent CBA, whether this waiver permitted Respondent to unilaterally apply its health care plan to returning strikers.

The waiver in the SA and EU agreements is limited to permitting Respondent to terminate its trust payments. Nothing in the SA or EU language explicitly permits Respondent to unilaterally implement its own health care plans. As noted above, an employer must maintain the status quo on all mandatory subjects of bargaining until the parties either agree on a new contract or reach a good-faith impasse in negotiations. *Triple A Fire Protection, Inc.; Kingsbridge Heights Rehabilitation & Care Center*, supra.

Respondent appears to contend that it reached impasse on the trust fund contributions and health care benefits during the strike or during the Payne-Ballew negotiations at the end of the strike and that it accordingly made no unilateral changes. Thus when the strike ended, the employer was legally permitted to place the strikers in its company plans. Respondent's argument is misplaced since the agreement between Respondent and the Union for benefit contributions for crossovers was only a temporary agreement for the duration of the strike and did not apply to modify the extant CBA. Moreover, even assuming arguendo that there was an impasse in discussions between Payne and Ballew concerning the definition of the status quo for benefits for returning strikers, any impasse reached on a single issue such as benefits payments for returning strikers does not justify implementation of Respondent's proposal in the absence of overall impasse in negotiations for an overall CBA. *Bottom Line Enterprises,* supra. Respondent's cites *St. Gobain Abrasives,* 343 NLRB 542 (2004); *Nabors Alaska Drilling, Inc.*, 341 NLRB 610 (2004); and *Brannon Sand & Gravel Co.,* 314 NLRB 282 (1994), for the proposition that an employer may implement individual proposed changes before an impasse was reached in bargaining for a collective-bargaining agreement as a whole. These cases are distinguishable. Each case cited by Respondent involved an employer who had a preexisting annual process of reviewing and adjusting its benefits programs. Accordingly, the employers were not obligated to refrain from implementing their proposed changes regarding benefits until an impasse was reached in bargaining for a collective-bargaining agreement as a whole. Here implementation of Respondent's health care plan for all bargaining unit employees was introduced for the first time after the strike. The interim agreement reached during the strike for health care coverage clearly applied only to crossover employees for the duration of the strike. Respondent had no preexisting program of adjusting the benefits programs of its employees. Health care benefits were paid to Respondent's employees through the Trusts as a result of Respondent's contributions established in the parties' CBA. Likewise *Dixon Distributing Co.,* 211 NLRB 241, 244 (1974), is not apposite as the alleged unilateral changes did not occur in the context of bargaining for an overall collective-bargaining agreement.

Having found the parties were not at impasse as of February 17, 2009, by unilaterally implementing its own health care plan on that date, Respondent has violated Section 8(a)(1) and (5) of the Act.

5. The Jeff Gibson termination

Complaint paragraph 11(c) alleges that on or about February 26, 2009, Respondent suspended and, since that time, has failed and refused to reinstate striking and/or sympathy striking employee Jeff Gibson, employed within the jurisdiction of Local 231, to his former or substantially equivalent position of employment.

The General Counsel contends that even if Gibson's accusers testimony is credited, his conduct is not serious misconduct that would disqualify him as a striker from reinstatement, or permit his discharge, under the test set forth by the Board in *Clear Pine Mouldings, 268* NLRB 1044, 1046 (1984), enfd. 765 F.2d 148 (9th Cir. 1985), cert. denied 474 U.S. 1105 (1986).

In Clear Pine Mouldings, the Board held:

> Section 7 of the Act gives employees the right to peacefully strike, picket, and engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. Section 7 also grants employees the equivalent right to "refrain from" these activities. Id. at 1045.

The Board also noted that certain conduct engaged in strikers during the course of a strike may deprive an employee of the protection of the Act if they engage in:

> [S]erious acts of misconduct which occur in the course of a strike may disqualify a striker from the protection of the Act. Id. at 1045.

Respondent argues that under the *Universal Truss*, *Inc.,* 348 NLRB 733, 735–736 (2006), test it properly discharged Gibson because it had an honest belief that Gibson engaged in serious misconduct that would reasonably tend to coerce or intimidate employees. Respondent also contends that Gibson's poststrike conduct involving Lavance Ross warrants Respondent not reinstating Gibson because his conduct violates Respondent's anti-discrimination policy.

In *Universal Truss*, the Board set forth a test to determine if an employer lawfully discharged an employee for strike misconduct. The employer must first prove that it had an honest belief that the discharged employee engaged in strike misconduct of a serious nature. The Board then defined serious strike misconduct as:

> [T]hat which under the circumstances existing . . . may reasonably tend to coerce or intimidate employees in the exercise of rights protected under the Act. Id. at 734.

The Respondent's honest belief may be based on hearsay sources, such as the reports of nonstriking employees, supervisors, and security guards.

When the Respondent has proven that it has an honest belief that the striker engaged in serious strike misconduct, the burden shifts to the General Counsel to show either that the striker did not, in fact, engage in the alleged misconduct or that the conduct was not serious enough for the employee to forfeit the protection of the Act. Id. at 735.

In determining whether specific misconduct is serious enough to warrant discharge, it is appropriate to consider all of

the circumstances in which the alleged misconduct occurs, including, other instances of vandalism, threats, and violence occurring during the course of the strike. Id. at 735.

The Board stated that where violence, property damage, and other egregious misconduct directed at nonstriking employees have occurred earlier in a strike, threats to inflict similar harm in the future are likely to have a greater coercive impact. Id. at 735.

In *Hotel Roanoke,* 293 NLRB 182, 207 (1989), the Board, citing the Supreme Court decision in *Milk Wagon Drivers Union v. Meadowmoor Dairies,* 312 U.S. 287, 293 (1941), noted that during strikes, employees sometimes engage in "moments of animal exuberance." Thus, name calling, minor threats, mass picketing, and the like are generally not deemed sufficient to deny employees their statutory protection. However, when the striker has stepped over the line and engaged in serious threats of physical violence, actual physical violence or property damage, such has a coercive effect on the rights of other employees. Id.

In *Service Employees Local* 87 *(Pacific Telephone),* 279 NLRB 168, 178 (1986), the Board adopted an administrative law judge's finding that strikers' remarks such as "we know where you live," "we're going to get you," "I'm waiting for you," 'We're going to kill the scabs," "Kill the scabs," "getting even," "we'll fix you," and "I'll whip your ass," reflected "animal exuberance," rather than threats meant to be taken seriously. However, where one such statement was made by a large man, capable of carrying out the threat, the Board found the threat to be violation of Section 8(b)(1)(A) of the Act.

Let us now turn to the specific instances of conduct Respondent relied upon to form its honest belief that Gibson engaged in serious strike misconduct. Initially it should be noted that there is no evidence that Gibson engaged in actual physical violence or property damage. Moreover, Braun admitted that he did not consider the statements to Apodaca, Miller, and the security guards, the videos and threat of lawsuits, standing alone, serious misconduct warranting discipline. Respondent conceded in its brief that Gibson's conduct with Velasco and the customer was not serious misconduct. That leaves the two incidents of alleged dangerous driving involving Brantner and Velasco, the statements to Timm involving his wife and the incident involving getting too close to McDonald's truck.

a. Dangerous driving incidents

(1) The Velasco incident

As noted above, I have not credited the testimony of Velasco that Gibson dangerously swerved head on into Velasco's lane and only at the last minute swerved back into his own lane. The only evidence Braun had of this alleged incident of serious misconduct was Velasco's declaration that is ambiguous at best and suggests that Gibson passed Velasco then "moved back into the lane to my right." This describes the act of passing not coming head on at Velaco. If Gibson was coming head on he would have pulled back into the lane to Velasco's left to avoid hitting Velasco.

This evidence Braun relied upon in firing Gibson is insufficient in itself to support a good faith belief that Gibson was engaged in serious strike misconduct because the only evidence Braun acted on suggests Gibson passed Velasco rather than trying to cause an accident.

(2) The Brantner incident

In *Altorfer Machinery Co.,* 332 NLRB 130, 143 (2000), the Board agreed with the administrative law judge that a striker had not engaged in tailgating misconduct, because the testimony was limited to general assertions that "the green truck stayed behind me most of the time" but without specific testimony labeling the conduct as tailgating. In *Otsego Ski Club–Hidden Valley,* 217 NLRB 408 (1975), the Board affirmed the administrative law judge who found that strikers who harassed and tailgated a supervisor employee on between 2 and 5 consecutive days did not engage in serious misconduct where the driving may have been annoying but did place passengers in danger.

Respondent cites both *Universal Truss*, *Inc.,* 348 NLRB 733, 735–736 (2006), and *Aztec Bus Lines*, 289 NLRB 1021, 1029, 1073 (1988), for the proposition that Gibson's driving in the Brantner incident was serious strike misconduct justifying his discharge. In both *Universal Truss* and *Aztec* there was pervasive evidence of egregious conduct by strikers including widespread property damage, severe assaults on nonstrikers, managers and security guards, and following of nonstrikers home. These incidents were accompanied by threats to other nonstrikers and managers, including threats to rape or kill female employees and the wives of male workers, threats to beat nonstrikers and following nonstrikers home.

The incident involving Brantner was isolated and at best suggests Gibson may have tailgated Brantner's truck for a few seconds. Gibson passed Brantner and repeatedly put on his brakes causing Brantner to put on his brakes. There is no evidence that Brantner was unable to control his vehicle or was in danger of hitting Gibson. The incident here is distinguishable from the facts in *Universal Truss* or *Aztec*. Unlike *Universal Truss* or *Azte*c, there was no car chase at high speeds that endangered the drivers or passengers of the vehicles. Like the facts in *Altorfer,* Gibson's driving may have been annoying but did not rise to a level where life or property was in danger. Respondent did not have evidence sufficient to form a good faith belief that this incident involved serious misconduct.

b. Standing near the truck

Further, in *Limestone Apparel Corp.,* 255 NLRB 722, 739 (1981), the Board affirmed an administrative law judge's finding that employees who ran alongside a company truck going into the employer's plant, and then stood in front of it did not engage in strike misconduct outside the protection of the Act. The judge found that the strikers' activity in lying down in front of a truck was certainly an unintelligent action, and was a form of misconduct. However, the judge found that there was no actual or implied threat of harm to the truckdriver or to the truck. The judge concluded that this conduct was not of such a serious nature as to disqualify them from their right of reemployment.

In this case there is no evidence that Gibson lunged at the truck or even put himself in a position where he could be harmed. The only evidence Braun had before him was that McDonald lost sight of where Gibson was located and that after

McDonald got down from the truck cab, Gibson was near the rear of the truck. There is simply no evidence that Gibson attempted to harm the truck, McDonald, or himself. I find that this evidence does not support a good-faith belief that Gibson engaged in serious misconduct sufficient to disqualify him from the right of reemployment.

c. The Timm incident

In *Universal Truss,* the Board found that threats to "fuck [somebody's] mother" conveyed a reasonable discernible threat of rape and sexual violence. *Universal Truss*, 348 NLRB at 739–740. In addition the Board concluded that striker's threats to rape a nonstriker's wife and threats to rape or kill an employee's daughter were serious strike misconduct that justified failure to reinstate and termination. However, it must be noted that in *Universal Truss,* the Board found these threats to rape were credible and serious because they occurred in the context of pervasive violence, including the severe beating of a nonstriker, multiple incidents of property damage, multiple threats of bodily harm to nonstrikers and following nonstrikers by striking employees.

In the instant case no evidence of pervasive property damage was shown. No evidence of assaults to nonstrikers by striking employees was established. No evidence was presented suggesting strikers followed nonstriking employees home.

According to Timm, Gibson said, "How would you like it if somebody came to your house and fucked your wife." Gibson told Timm that was what he was doing by taking strikers' jobs. Gibson later told Timm, "Hey, where's your wife because I'm going to come over [sic] fuck her like you're fucking me." I do not find that these were credible threats by Gibson. They occurred in the context of Gibson comparing what strike replacements were doing to him and were hyperbole in very bad taste. However, absent evidence that strikers or Gibson in particular engaged in violence toward nonstrikers or nonstrikers family members, I do not find that Gibson's conduct was serious strike misconduct justifying his termination.

d. The other incidents

Braun found that the Miller threat, the threat of lawsuits and the statements to Apocaca were not alone enough to warrant Gibson's termination. I find that even in the aggregate these incidents are insufficient to justify Gibson's termination.

I find that the Gibson's name calling comments to Apodaca were what the Board and Supreme Court termed "moments of animal exuberance" that would not support termination for strike misconduct. *Milk Wagon Drivers Union v. Meadowmoor Dairies,* 312 U.S. 287, 293 (1941); *Hotel Roanoke,* 293 NLRB 182, 207 (1989). Moreover, the statement to Miller that if he crossed the picket line he would not live to see retirement, was not a credible threat given their past friendship and the absence of violence directed by strikers to nonstrikers. This threat would not support termination for strike misconduct. Finally, Gibson's threats that the Union would sue nonstrikers and recover the money they were making during the strike is yet another example of "animal exuberance" that does not support Gibson's termination.

e. The post termination incident with Ross

It was Braun's subjective opinion that the term "scab master funk" had some pejorative racial connotation. Ross also opined that the term was related to his race. However, these subjective opinions were unsupported with any objective evidence as to the meaning of the term. The dictionary definition of the noun "funk" is defined in the Encarta Dictionary as (noun) 1. musical style; 2. earthy musical quality; 3. lack of worldliness; 4. melancholy; 5. bad smell. There is no reference to any racial connotation. Other than Braun and Ross's subjective belief, the term does not appear to be a racial epithet.

Moreover, Respondent's 1 week suspension of other Caucasian employees who called African American employees "nigger" and "boy" suggests Respondent's disparate treatment of Gibson is a belated attempt to concoct a defense to justify its action terminating Gibson because of his protected activity.

I conclude that Respondent was not justified in terminating and failing to rehire Gibson and that he was terminated for his Section 7 activity in violation of Section 8(a)(1) and (3) of the Act.

CONCLUSIONS OF LAW

1. The Respondent, Oak Harbor Freight Lines, Inc., is an employer within the meaning of Section 2(2), (6), and (7) of the Act.
2. Teamsters Locals 81, 174, 231, 252, 324, 483, 589, 690, 760, 763, 839, and 962 are labor organizations within the meaning of Section 2(5) of the Act.
3. Respondent has violated Section 8(a)(1) and (5) of the Act subsequent to February 17, 2009, by unilaterally implementing its company health care benefits to returning strikers who are bargaining unit members of the Union and thereafter failing and refusing to bargain in good faith with regard to such benefits.
4. Respondent has violated Section 8(a)(1) and (3) of the Act by refusing to reinstate Jeff Gibson to his former or substantially equivalent position of employment.
5. The unfair labor practices committed by Respondent are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.
6. Respondent has not otherwise violated the Act.

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.

The Respondent will be ordered to offer reinstatement to Jeff Gibson who it unlawfully denied reinstatement following the close of the strike, and make him whole for any wages or other rights and benefits he may have suffered as a result of the discrimination against him in accordance with the formula set forth in *F. W. Woolworth* Co, 90 NLRB 289 (1950), with interest as provided for in *New Horizons for the Retarded,* 283 NLRB 1173 (1987), and *Kentucky River Medical Center,* 356 NLRB No. 8 (2010).

Having unilaterally implemented its company health care plan Respondent shall be ordered to bargain in good faith with the Unions over such benefits and cease giving effect to its

unilaterally implemented health care plans.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[27]

ORDER

The Respondent, Oak Harbor Freight Lines, Inc., California, Oregon, Washington, and Idaho, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with the Unions as the duly designated representative of a majority of its employees in the bargaining unit appropriate for purposes of collective bargaining, within the meaning of Section 9(b) of the Act:

> All truck drivers, helpers, dockmen, warehousemen, checkers, power-lift operators, hostlers, and other such employees as may be presently or hereafter represented by each Local Union as referenced in Appendices A, B, C, and D, engaged in local pick-up, delivery and assembling of freight, within the jurisdiction of the Local Union and office-clerical and shop employees employed by the Employer excluding however, the classifications set forth immediately below in section 1.04.
>
> 1.04 The following classifications of employees are specifically excluded from the coverage of this Agreement:
>
> (a) confidential employees, supervisory and professional employees within the meaning of the Labor Management Relations Act of 1947, as amended;
>
> (b) employees already covered by an existing union contract not included in this agreement;
>
> (c) office supervisors exercising independent judgment with respect to the responsibility for directing the work or recommending hiring and firing; and
>
> (d) nonbargaining unit employees.

[27] 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.

(b) Unilaterally implementing terms and conditions of employment during the course of collective bargaining without the parties having reached a genuine impasse.

(c) Refusing to reinstate employees because they engage in concerted protected activity.

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

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

(a) Offer immediate and full reinstatement to Jeff Gibson to his former job or, if that job no longer exists, to a substantially equivalent position, without loss of seniority or other privileges and make him whole with interest as provided in the Remedy section of this decision.

(b) Remove from its files any reference to the unlawful suspension and termination of Jeff Gibson and notify him, in writing, that this has been done and that the suspension and termination will not be used against him in any way.

(c) Restore the status quo ante as it existed prior to February 17, 2009, by ceasing to give effect to Respondent's health care plan for bargaining unit members and bargain in good faith with the Unions over such benefits.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facilities in the States of California, Oregon, Washington, and Idaho, and mail a copy thereof to each bargaining unit member laid off subsequent to February 17, 2009, copies of the attached notice marked "Appendix."[28] Copies of the notice, on forms provided by the Regional Director for Region 19, 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. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/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, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 17, 2009.

(f) 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. January 5, 2011

APPENDIX

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

After a trial at which we appeared, argued and presented evidence, the National Labor Relations Board has found that we violated the National Labor Relations Act and has directed us to post this notice to employees in both English and Spanish and to abide by its terms.

Accordingly, we give our employees the following assurances:

WE WILL NOT do anything that interferes with these rights.

WE WILL NOT unilaterally implement our own health care plan without having reached a genuine impasse with the Unions and WE WILL NOT refuse to bargain in good faith with the Unions with respect to those benefits for our employees in the bargaining unit:

All truck drivers, helpers, dockmen, warehousemen, checkers, power-lift operators, hostlers, and other such employees as may be presently or hereafter represented by each Local Union as referenced in Appendices A, B, C, and D, engaged in local pick-up, delivery and assembling of freight, within the jurisdiction of the Local Union and office-clerical and shop employees employed by the Employer excluding however, the classifications set forth immediately below in section 1.04.

1.04 The following classifications of employees are specifically excluded from the coverage of this Agreement:

(a) confidential employees, supervisory and professional employees within the meaning of the Labor Management Relations Act of 1947, as amended;

(b) employees already covered by an existing union contract not included in this agreement;

(c) office supervisors exercising independent judgment with respect to the responsibility for directing the work or recommending hiring and firing; and

(d) nonbargaining unit employees.

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

WE WILL NOT suspend, terminate, or refuse to reinstate employees for engaging in activities protected by Section 7 of the Act.

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

WE WILL restore the status quo ante as it existed prior to February 17, 2009 by ceasing to give effect to our own health care plan for our employees in the above-described bargaining unit.

WE WILL offer striking employee Jeff Gibson reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position of employment without any loss of rights and benefits, and WE WILL make him whole for any loss of wages or other benefits he may have suffered as the result of the discrimination against.

WE WILL notify Jeff Gibson that we have removed from our files any reference to his suspension and termination and that the suspension and termination will not be used against him in any way.

OAK HARBOR FREIGHT LINES, INC.