

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

PIGGLY WIGGLY MIDWEST, LLC

and

Cases 30-CA-67117
30-CA-73311

UNITED FOOD & COMMERCIAL WORKERS
UNION, LOCAL 1473

Andrew S. Gollin, Esq., and Renee M. Medved, Esq.,
for the Acting General Counsel.

Mark A. Sweet, Esq., of Milwaukee, Wisconsin
for the Charging Party.

Gregory H. Andrews, Esq., of Chicago, Illinois, and
Andrew T. Frost, Esq., of Waukesha, Wisconsin
for the Respondent.

DECISION

Statement of the Case

Eric M. Fine, Administrative Law Judge. This case was tried in Milwaukee, Wisconsin on February 22 and 23, 2012. The charge in Case 30-CA-67117 was filed on October 19, 2011, with the first and second amended charges filed on November 7, 2011, and November 18, 2011, respectively.¹ The charge in Case 30-CA-73311 was filed on January 27, 2012. All the charges and amended charges were filed by United Food & Commercial Workers Union, Local 1473 (the Union or Local 1473) against Piggly Wiggly Midwest, LLC (Respondent). The complaint in Case 30-CA-67117 issued on December 28. The complaint in Case 30-CA-73311 issued on February 3, 2012. The two complaints were consolidated for hearing by order dated February 6, 2012. The consolidated complaints allege that on or about September 18, Respondent reduced 19 full-time employees to part-time status causing them to lose their full-time benefits, including health insurance, without prior notice to the Union, and affording the Union an opportunity to bargain in violation of Section 8(a)(1),(3) and (5) of the Act, and that by engaging in such conduct Respondent constructively discharged employees Jeffrey Gross, Lauriel Hansen, Laura Hoffmann and Tina Meinhardt in violation of Section 8(a)(1) and (3) of the Act. The consolidated complaints allege Respondent violated Section 8(a)(1) and (5) of the Act by failing to honor information requests made by the Union on September 16, 19, 27, October 5, and November 8. The consolidated complaints allege Respondent engaged in a course of conduct designed to undermine the Union by posting letters on September 15 and on September 22 on Respondent's bulletin board denigrating the Union, and by a statement made to employees by one of Respondent's officials on September 21 in violation of Section 8(a)(1) of the Act. The consolidated complaints allege Respondent violated Section 8(a)(1) of the Act by: on September 23 threatening to contest an employee's claim for unemployment because the

¹ All dates are in 2011 unless otherwise indicated.

Union filed a grievance regarding the employee's reduction to part-time status; and on October 3 by threatening to force an employee to bump her sister if the Union pursued a grievance on the employee's behalf regarding her reduction to part-time status. The consolidated complaints allege Respondent since on or about September 21, implemented a new interpretation of its call in policy by issuing written warnings and two day suspensions without prior notice to and bargaining with the Union in violation of Section 8(a)(1) and (5) of the Act. The consolidated complaints allege that on January 13, 2012, Respondent bypassed the Union and dealt directly with an employee regarding wages, hours, and other terms and conditions of employment by offering to rehire the constructively discharged employee with wages, hours and other terms and conditions of employment that differed from those contained in the specified collective-bargaining agreement; and that differed from those that existed at the time of the employee's alleged constructive discharge in violation of Section 8(a)(1) and (5) of the Act.

On the entire record, including my observation of the witnesses' demeanor, and after considering the briefs filed by the Acting General Counsel and Respondent, I make the following:²

Findings of Fact

I. Jurisdiction

Respondent, a Wisconsin limited liability company, with a place of business located at 3128 S. Business Drive, Sheboygan, Wisconsin (Store 15) and a place of business located at 2215 Union Avenue, Sheboygan, Wisconsin (Respondent's corporate headquarters), has been a wholesaler of grocery, meat and produce to franchise stores and an operator of corporate retail grocery stores. During the past calendar year, Respondent in conducting its described business operations derived gross revenues in excess of \$500,000, and purchased and received at its corporate headquarters products, goods, and materials valued in excess of \$5,000 directly from points outside of Wisconsin. Respondent admits and I find it is an employer engaged in commerce under Section 2(2), (6), and (7) of the Act and the Union is a labor organization under Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

Respondent admits the following individuals maintain the titles next to their names and are supervisors and agents of Respondent under Section 2(11) and 2(13) of the Act: Paul Butera, owner; Mary Zenisek, manager of retail service operations; John Braunreiter, Jr., district manager; and Daniel Holtz, store manager. Respondent became the owner of Store 15 in 2007 at which time Respondent recognized the Union as representative of its employees in two collective-bargaining units, the clerks unit and the meat department unit. The recognition was embodied in two separate collective-bargaining agreements, the most recent of which at the time of the hearing had effective dates of May 7, 2009 to September 7.

² In making the findings, I have considered the witnesses' demeanor, the content of their testimony, and the inherent probabilities of the record as a whole. In certain instances, I have credited some but not all of what a witness said. See *NLRB v. Universal Camera Corporation*, 179 F. 2d 749, 754 (C.A. 2), reversed on other grounds 340 U.S. 474 (1951). All testimony and evidence has been considered. If certain testimony or evidence is not mentioned it is because it is cumulative of the credited evidence, not credited, or not essential to the findings herein. Further discussion of specific credibility determinations is set forth below.

Holtz began working for Respondent in October 2010 as store manager at Store 15, which is a corporate store. At the time of the hearing there were 118 employees on Store 15's roster, divided by full-time and part-time employees. Holtz reports to District Manager Braunreiter. Holtz testified he is the only individual employed at Store 15 who is not a member of the Union and he is the only supervisor at the store. He testified all the other individuals are covered by one of the two collective-bargaining agreements. Holtz testified that under the collective-bargaining agreements full-time employees receive certain benefits not available to part-time employees, including: paid vacation, paid personal days, time and a half premium pay for work performed on Sunday, and health insurance for themselves and their families.

Grant Withers is employed by the Union as secretary/treasurer, a position he has held since 2006. Withers reports to John Eiden, the local union president. The Union represents employees working at six of Respondent's corporate stores located in: Menasha, Sheboygan, with two each in Racine and Kenosha. The Union represents the retail clerks and meat department employees of each store. Withers testified in the last five years the number of stores for which the Union has represented employees has decreased by five. The following stores are no longer represented by the Union: Appleton No. 23; Sheboygan No. 31; Racine Nos. 43 and 44; and Oshkosh, No. 25. Withers testified he thought Respondent has 10 or 11 former Dick's stores, which are corporately owned and are non-union. Withers testified he thought there were 16 corporate stores in all. Withers testified Respondent also has franchise stores, but he did not know the number.

Withers was involved in the negotiation of the expired May 7, 2009 to September 7 collective bargaining agreements for Store 15. For the Union, Withers, Eiden, Dale Seianas, now retired, Jim Ridderbush, and bargaining unit employees participated in the negotiation of the agreements. Eiden and Withers split the duties of lead spokesperson. For the Respondent, Attorney Robert Simandl, Dave Koenig, Nadine Becker, Steve Marchewka, Paul Butera, and Judy Butera were involved in the negotiations. There were separate agreements for the clerks and meat cutters negotiated and at the time the agreements were executed they applied to Stores 15 and 31, each located in Sheboygan.

In the Clerks Agreement under article I entitled "RECOGNITION AND MANAGEMENT CLAUSE" there is the follow provision:

1.11. Subject to the provisions of this Agreement, the management of the business, including the right to plan, determine, direct and control store operations and hours; the right to study and introduce new methods, facilities and products; to determine who will perform available work, including the right to direct and control the workforce, determine the size and composition of the workforce; the scheduling of hours (including unscheduled overtime and additional hours and work assignment) for departments and shifts and the assignment of work amongst employees; the right to hire, assign, demote, promote and transfer (including to a different store within the scope of this Agreement), to layoff or reduce the hours of work because of lack of work; to discipline, suspend or discharge employees for just cause; to establish and maintain reasonable rules and regulations covering the operation of the stores (including establishing reasonable quality and quantity of work standards); the determination and enforcement of safety, health and protection measures, regulations and practices.

Under Article III-"Seniority" are the following provisions:

3.3. The Employer will schedule hours of work on a seniority basis. The Employer will

schedule employees who are full-time within the meaning of this Agreement for hours not below the full-time classification threshold unless:

- (i) the employee requests a temporary reduction in hours for two more weeks and/or
- (ii) the Employer makes a permanent reduction in the full-time positions in a classification based on business needs.

The Meat Department collective-bargaining agreement contains the same provision listed above as article 1.11, under the article number 1.10. The Meat Department agreement does not contain the language listed above in article 3.3.

Withers testified that during the negotiation for the most recent contracts for Store 15, Paul Butera invited the Union officials to meet with Respondent's chief financial officer who turned over the profit and loss statements to Eiden and Withers for review. Then the Union had their accountant perform a full review of the documents. Withers testified the accountant was required to sign a confidentiality agreement, but the Union officials were not. Withers testified there was a term "business needs" incorporated in article 3.3 of the most recent collective bargaining agreement. He testified the term business needs was an employer proposal. The example given at the time was that if a Festival Foods (Festival) opened up across the street there had to be a component to address the Union's concerns as far as the Employer's unilateral right to reduce full-time employees and to address the Employer's concerns about reduced business. He testified they agreed to the "business needs" language because it was something tangible they could both review. Withers testified present for the meeting when this was discussed were: the federal mediator, Simandl, Judy Butera, Keonig, Eiden and Withers. Withers testified the issue of Festival Foods was raised by Respondent through the mediator. Withers testified it was stated that if a Festival store opened up across the street and by example if there was a 40% reduction in Respondent's sales that would trigger a reduction in staffing if the Respondent was able to demonstrate the reductions were necessary relating to the business needs language. Withers testified this addressed the Union's concerns because they would be able to review the evidence. Withers his testified there was no percentage in the contract that had to be triggered before business needs definition was met. He testified 40% was the actual number they discussed but it was just used as example as the trigger number. Withers testified there was no minimum level of business needs in which Respondent would not have to provide the Union the evidence. Rather, he testified if they claimed business needs they would have to demonstrate it to the Union.

Withers testified to the following: Respondent sold Sheboygan Store 31 in December 2009. Respondent and the Union met to discuss what would happen to the bargaining unit employees at Store 31. Withers, Attorney Mark Sweet, and Seianas represented the Union and for the Respondent Simandl and Koenig participated. These discussions took place in November and December 2009, prior to the actual sale date. After the sale some of the bargaining unit employees from Store 31 bumped into Store 15. For employees bumping from Store 31 to Store 15, Respondent agreed to recognize the employees initial hire date. Some of the existing employees at Store 15 were impacted when the employees bumped into Store 15 from Store 31.

Zenisek has worked for Respondent 17 years, and she began working with Respondent's union stores in June 2010. Zenisek testified she attended a mediation meeting relating to three grievances on January 6 pertaining to Store 15. Present were Don Maki, the federal mediator, Simandl, Zenisek, Union officials Prickett and Ridderbush, along with two of the three employees. Zenisek testified the subject of the mediation was the reduction from full-time to part-time status in May 2010 for the three employees. The mediation was held pursuant

to the collective-bargaining agreement in effect at the time. Zenisek testified there was no decision made during the January 6 meeting. She testified the grievances related to three deli department employees at Store 15 who reduced from full-time to part-time. Zenisek testified that, after the January 6 mediation, the Union did not pursue the grievances further. Zenisek testified employees moving to Store 15 from Store 31 had nothing to do with the reduction to part-time status in Store 15. However, she testified the reductions took place after the employees moved from Store 31 to Store 15.

There was a meeting at Respondent's corporate offices on January 7. Zenisek testified present were Respondent representatives Paul Butera, Judy Butera, Suokko, Barbara Pike, Simandl, Attorney Andrew Frost, and Union officials Eiden and Withers. Withers testified Paul Butera called the Union to the corporate office, stating he was going to have his attorneys there, and demanded the Union officials attend. Withers testified that, during the meeting, Respondent's officials told him competition was coming to the Sheboygan store in that Festival was trying to get into Sheboygan. Withers testified, in reference to Store 15, Paul Butera gave them customer complaints that had been e-mailed in and asked the Union officials for their assistance in getting the employees to take better care of the customers. Withers testified that he did not recall Paul Butera say when the Festival store was coming in. Withers testified this was the only time that anyone from Respondent mentioned a Festival store coming to Sheboygan.³ Withers testified there was a discussion about full-time to part-time employees during the January 7 meeting in the context of Paul Butera complaining about attorneys fees with Simandl and the fact that the Union was causing problems as they had just been through an unfair labor practice trial in November. Withers testified Withers stated if you would just have turned over the information the Union requested there would not have been all the litigation. Withers stated some of the grievances could have been avoided if the Union had been provided information.

On June 27, Eiden sent Paul Butera two contract reopener letters, one for the clerks and one for the meat cutters pertaining to the Store 15 collective-bargaining units. The letters asked Butera to contact Eiden as soon as possible with the earliest dates Respondent had available to begin negotiations. On July 25, Simandl sent Sweet a letter stating the Sheboygan contracts were set to expire on September 7, and Simandl requested dates when the Union was available to bargain. Simandl asked Sweet to contact him as soon as possible. Withers testified he did not know if Simandl's July 25 letter was responded to stating that Sweet, Hilbert, and Simandl were scheduling negotiations.

Holtz testified he first learned that Festival was going to be opening a store in Sheboygan in February. Concerning the mid-September reductions from full-time to part-time at Store 15, Holtz testified the initial contact as to schedule changes at Store 15 took place around the end of July. He testified a note came from Brian Bucaro, Respondent's vice-president of

³ Zenisek identified two articles from the Sheboygan Press which she testified were given to Eiden and Withers by Respondent's officials during the January 7 meeting. One of the articles is dated January 5, and contains the title "Festival Foods store coming to Sheboygan." The article stated there was a planned opening in the fall of 2011. However, I have credited Withers testimony that he did not see the articles at the January 7 meeting. Zenisek's recall of the meeting was vague. As to the articles, she merely stated she pushed them across the table to the Union officials. Thus, I have credited Withers testimony that the Union officials were informed that a Festival Store was coming to Sheboygan on January 7, but they were given no time table as to when this was to take place.

retail operations, talking about a plan for the competitor coming to town.⁴ Based on concerns of the Festival store planned opening, on August 26 Holtz sent Braunreiter an e-mail containing an attachment labeled "Weekly Budget by Period-2011.xls" with the description "Period 9 & 10 tabs." The attached chart contained predictions of increased sales for the weeks ending August 27, September 3, and September 10 over the prior year. It contained predictions of a 5% drop in sales per day for the week ending September 17; a 15% per day drop for the weeks ending September 24 and October 1; a 13% per drop per day for the week ending October 8; and a 10% drop per day for the week ending October 15 in sales from the prior year. Holtz later sent Braunreiter another e-mail on August 26 with an attachment labeled "Labor adjustments.xls" showing a drop in projected labor hours with predictions in drops in labor hours per week corresponding to the percentages he had predicted of sales drops in his prior e-mail of that date. Holtz stated to Braunreiter "let's meet to discuss the game plan." Holtz testified he broke the hours down by department based on his expected decrease in sales for each. On August 29, Braunreiter sent Holtz an e-mail stating, "I think Period 9 looks about right. I would prepare for a larger hit in Period 10." Braunreiter stated that if we "take the above hits we'll be in the 16% to 26% range for (Festival's) grand opening. I would rather play things on the conservative side." Holtz testified Period 9 started with the week ending August 27 and goes through the week ending September 17. Holtz testified that he and Braunreiter were involved in the decision to reduce employees at Store 15 from full-time to part-time status. He testified they each came up with a plan pertaining to the expected sales percentage decrease. Holtz testified they went with the plan they agreed on. Holtz testified in making the reductions they did not consider an employee's union membership or the cost of their benefits. He testified the decision was based on the fact that they knew their sales were going to decrease, which means there would be less work to perform. Holtz provided a pre-hearing affidavit on November 25, in which he stated he had a conversation with Braunreiter "about the new competition in early September. We waited until early September because we didn't feel the need to plan that far out." Holtz stated, "We decided to separately put our thoughts together about what we thought would happen with the store, based on the new competition. We then met about four days later. When we met, we made a decision. We agreed we were going to face a substantial decrease in sales, and estimated an anticipated amount of the decrease based on our experience in the business. We started reviewing business processes to make some adjustments based on an anticipated 30% sales decrease from the current sales trend compared to sales we did in the same week last year."

On September 1, Simandl sent Sweet a letter stating the Union's contracts in Sheboygan expire on September 7, and as a result Respondent would not be legally authorized to deduct dues from employees beginning on the first full pay-period after September 7. Simandl stated Respondent also will not process arbitrations on matters which arise after the expiration of the collective-bargaining agreements.⁵

On September 2, Bucaro, sent an e-mail to Holtz and Braunreiter, copied to Zenisek. The e-mail encapsulated Bucaro's "thoughts regarding the opening of Festival in two weeks." Bucaro stated they "should anticipate a 15% drop from last year sales (we have been up recently so this may be a 20% drop from recent sales trend." Bucaro instructed that, "We Must make adjustments to scheduling from Day 1. We can no longer spend \$37 to \$40K on labor.

⁴ Holtz testified he thought Brian Bucaro is a part owner of Respondent.

⁵ Withers testified the parties did not meet to bargain over successor agreements for the Sheboygan employees prior to the agreements' September 7 expiration date. He testified the parties never agreed that any provision of the agreements would survive the September 7 expiration date.

Initially you should plan on spending \$32 to \$35K a week and MUST stay below 9.00 payroll %. You should review your current schedules and compare to your load schedule as well as your department sales by hour to ensure you are scheduling strictly to the needs of the business." Bucaro stated there was to be a hiring freeze at Store 15, and that next week after the holiday six named probationary employees were to be terminated. Bucaro stated, "You will be able to schedule all part-time employees to the minimum 12 hours and if necessary and if deeper cuts are needed, which is likely, then we will address layoff and status reductions. Mary Zenisek will be in to visit during the week of 9/11 to review schedules and address issues. In using less Part-Time hours and more Full-Time hours, your average hourly rate will rise."

On September 14, Allison Haller, a human resource specialist at Respondent's corporate office, sent Holtz an e-mail with an attachment. The e-mail was copied to Braunreiter, Zenisek, and Judy Butera. The e-mail came under the heading, "Full Time to Part Time Frequently Asked Questions." Holtz identified a document dated September 16, entitled, "Presentation Outline to Employees on Schedule Change - Sheboygan Store." Holtz testified the outline was prepared by Respondent's corporate office and given to Holtz. The outline stated that Festival Foods, a "large non-Union grocery store, is opening across the street from us this next week." The outline forecast a reduction in sales at Respondent's store in the amount of 30 to 40% over the first couple of weeks after the opening. The outline states, "For some employees, this has meant that they will be laid off, for others it means that they will have reduced hours. However, the Company has stayed within its rights and obligations to our employees under the collective bargaining agreement." The outline states at item 4 that, "We have told the Union about this upcoming opening for months and how it will affect sales and our employees, but it appears that they have not communicated these issues to you. You should discuss your contract questions with your Union representative."

Holtz testified that on around September 13, 14, and 15, he notified 17 Store 15 employees that they were being reduced from full-time to part-time status. In fact, during this period, Respondent reduced 19 employees from full-time to part-time status.⁶ Holtz testified he and Braunreiter met with 17 of the 19 employees in Holtz' office one at a time to notify them. Holtz testified the other two employees were on leave at the time. Holtz testified no union representative was present when he notified the employees of their change of status, and Holtz did not inform anyone from the Union that he was going to be speaking with the employees. Holtz testified he posted the work schedule to employees on September 15 containing the 19 employee reductions to part-time. The work schedule went into effect on September 18. At the time he posted the schedule on September 15, Holtz knew the Festival store was going to open on September 16. Holtz attended the Festival store opening on that date.

Holtz testified Store 15 suffered loss of sales the first week Festival was open. Holtz testified he thought it was a 5% decrease for the first week as Festival was only open to Thursday, Friday and Saturday that week. Holtz testified he anticipated a 15% sales decrease. He testified he knew they came a little higher the first couple of weeks and a little lower the next few and averaged a 13% decrease the first six weeks Festival was open. In fact, Respondent submitted a chart comparing on a weekly basis sales between 2010 and 2011. The chart showed the following for 2011: for the week ending September 17 a plus 1.37%; week ending September 24 a minus 16.17%; for the week ending October 1 a minus 16.37%; for the week ending October 8 a minus 2.30%; for the week ending October 15, a minus 11.19%; for the

⁶ On September 17, Holtz signed off on 19 "employee status notifications," with the comment, "Work Force Adjustments because of changes in the Market," which converted the 19 named employees from full-time to part-time status.

week ending October 22 a minus 9.96%; and for the week ending October 29 a minus 8.41%.

Thus, the average loss from the prior year for the first six full weeks that the Festival store was open was 10.73 percent of sales per week.

5 Withers testified the Respondent gave the Union no notice or opportunity to bargain concerning the reduction of the 19 employees from full-time to part-time.⁷ Withers testified he first learned Respondent had reduced employees from full-time to part-time on Wednesday, September 14 when he received a phone call from employee Pat Gruenke, a cashier, at around 4:30 to 5 p.m. Gruenke stated she had been notified she was going to be reduced from full-time to part-time. Withers told Gruenke the schedule comes out tomorrow and there is a contractual provision that the Union has 24 hours to file a grievance over the schedule after it issues. 10 Withers told Gruenke to call Withers on September 15 after she saw the schedule. Withers spoke to Gruenke again on Thursday morning, September 15. Withers did not recall if Gruenke had seen a draft of the schedule but she now informed him there were 10 or 15 employees 15 being reduced from full-time to part-time. Withers testified he was at Respondent's Menasha store on September 15. Withers told Gruenke that either Withers or someone from the Union would be at the Sheboygan store on September 16.⁸

20 On September 15, Zenisek sent a letter by e-mail and regular mail to Eiden. Holtz testified that, at the direction of Zenisek, on September 15, Holtz posted a copy of the letter on a bulletin board in the employee break room at Store 15.⁹ The letter states:

7 Zenisek testified it was not her decision to make the September reductions. Zenisek testified that on Thursday, September 15 she was informed of the schedule changes that were 25 being put into place at Store 15. Zenisek testified the schedule posted on September 15, was for the period Sunday, September 18 to Saturday, September 24. Zenisek testified she did not inform the Union the schedule changes were going to be made before they were made. She testified she did not know whether anyone else from Respondent told the Union. Zenisek testified she stated in her pre-hearing affidavit concerning the reductions that, "The Company is 30 allowed to make changes to the schedule because of the management rights clause, which is in Section 1.1 in the Clerk's Agreement. The management rights clause is in Section 1.10 of the Meat Agreement." Zenisek testified she also stated in the affidavit that "because the contract allows us to make changes, I did not think I was required to announce changes to the Union." 35 Zenisek stated in the affidavit that, because the right is reserved to Respondent under the contract to make the changes, they did not need to notify the Union and bargain. Zenisek testified she did not mention any other contractual provisions in her affidavit for the reasons that Respondent had the right to make the reduction in status changes.

8 Withers testified that Sheboygan is an hour or more away from Menasha. Withers testified he was at the Menasha store because on September 12 Respondent had distributed their last 40 best offer to the bargaining unit and simultaneously served it on the Union and the employees there were very irritated. Withers testified he went to Menasha to talk to the members. Withers testified he was at the Menasha store on September 15 from 8:30 a.m. until around 1:30 or 2:00 p.m. Withers testified he was negotiating contracts at Racine/Kenosha and the Menasha stores at the time. Withers testified that all of the contracts with Respondent expired in 2011. Withers 45 testified that bargaining began for the stores on around January 10 beginning in Menasha and continued through the last bargaining session which was Sheboygan on November 15, 2011.

9 Zenisek testified she wrote the September 15 letter due to her frustrations. She testified negotiations were scheduled for September 12, but the Union did not show up. Zenisek testified she knew from the past months there was a lot of back and forth, they were not meeting, and 50 they needed to meet. Zenisek testified she was concerned about the employees jobs and she

Continued

As you may or may not know, the Company was forced to reduce the hours of some employees at Store #15 in Sheboygan today in anticipation of the opening of a nearby Festival Foods Store. The reduction in hours is required because it is anticipated that the Festival Foods Store will absorb a sizable portion of Piggly Wiggly's sales in that region.

Understandably, the affected employees were concerned about their reduction in hours and reached out to the Union to voice their questions and concerns. Unfortunately, Grant Withers informed the employees that he did not have the time to address their concerns. Needless to say, employees were incredibly upset to hear that the Union was too busy to help them.

Frankly, the Company is concerned with the Union's lack of support for our employees. Rather than leaving the employees hung out to dry, the Company will be holding an informational meeting for employees to address their questions and concerns.

If you have any further questions, please do not hesitate to call me directly.¹⁰

On Thursday, September 15, Holtz posted the schedule at Store 15 for the following week. The schedule was the first schedule where the 19 employees were reduced to part time status. Holtz testified schedules for the meat department are posted no later than noon on Thursdays and schedules for the balance of the store are posted no later than 4:00 p.m. on Thursdays.

On September 16, at 8:23 a.m., Holtz sent an e-mail to Haller. The subject of the e-mail was, "Effectuated people". The e-mail named Tina Meinhardt, Dave Meinhardt, Laura Hoffman, Shantel Edler, Kim Fisher, Laurie Hoppert, Tammy Edler, Pat Grunke, Tanya Weisfeld, Robin Schubert, Lauriel Hanson, Sue Fliss, Brenda Thede, and Andy Sommersberger as being converted from full-time to part-time, and who had been talked to about the conversion. It stated that Jeff Gross, Kelly Haak, and Debbie Gerdes were also converted from full-time to part-time status, but they were not talked to about the conversion as they were on vacation. Of those listed, Thede and Sommersberger were listed in the Meat/Fish department on the schedule for the week ending September 24, and I have concluded that unlike the other employees who were covered by the clerks collective-bargaining agreement, Thede and Sommersberger were covered by the meat department agreement.

Withers went to Store 15 on September 16. During his time at the store, Withers went to the break room where he saw Zenisek's September 15 letter to Eiden posted on both the Employer and Union bulletin boards. Withers testified the Employer's bulletin board is locked with glass. Withers testified that on September 16, he was in the break room for a while before he went up and spoke to Holtz at around 10 a.m. Withers testified he went to the front of the store where Holtz' office is located. Present were Withers, Braunreiter, Holtz, and Haller. Withers testified that, during the meeting, he requested from Holtz the list of employees who

knew the competition was going to hurt Respondent. Zenisek testified she knew Withers was in Menasha on September 15, and she learned from Holtz that Withers was not going to Store 15 on September 15. Zenisek testified she felt the Union needed to be there for the employees. Yet, Zenisek testified Withers was never given any notice of when Festival was going to open by Respondent, or any advance notice as to why he should be at Store 15 on September 15 by Respondent.

¹⁰ Withers testified he first saw Zenisek's September 15 letter around 6 p.m. on September 15. Withers testified the letter was the first information he received from Respondent concerning the reductions.

had been reduced from full-time to part-time. He testified no one responded to his request. Withers testified he then went to the break room. Withers testified Holtz came to the break room around 30 to 45 minutes later and stated Zenisek said Withers should put his information request in writing. Holtz confirmed that Withers asked Holtz for the names of the employees affected by the reductions and that Holtz told Withers that he needed to put his request in writing. Holtz testified it is Respondent's policy to require the Union to make all information requests in writing.

On September 16, Withers filed with Holtz typed grievances on behalf employees Hansen, Fischer, Shantel Edler, Tammy Edler, Dave Meinhardt, Tina Meinhardt, Gross, Gerdes, Weisfeld, Haack, Schubert, Rowden, Hoffman, Fliss, Hoppert, Gruenke, Sommersberger, and Thede. Each grievance cited the named employee and referenced "other similarly affected employees." The grievances for all named employees except Sommersberger and Thede alleged that the "Employer has violated Article II Seniority, Sections 3.1, 3.12, 3.3, 3.4.3, 3.5, 3.5.1, 3.5.2, 3.5.3, 4.5 and other articles of the Agreement. Concerning Sommersberger and Thede the grievances alleged that the "Employer has violated Article VII Seniority, Sections 7.1, 7.8 and other Articles of the Agreement." Zenisek responded to the grievances by letters to Withers sent on September 18 by e-mail and mail asserting for each that there was no contract violation, and Holtz would be contacting Withers on September 19 to discuss a meeting concerning the grievances.

On September 19, Eiden sent Zenisek a letter referencing the grievances filed on behalf of the 18 named employees. In the letter, Eiden requested information from Respondent for preparation for the grievance meetings, including item 3, which read, "3. Predicted store sales total and by department for the previous twenty four (24) month period broken down on a weekly basis."¹¹ Eiden went on to state:

In your letter to me dated September 15, 2011, which the Company posted on the Union bulletin board and the Company bulletin board on the same date, amid your baseless and false claims, you mentioned that you will have a meeting with the employees. Grant Withers spoke with Piggly Wiggly employees on September 14. All of our phone conversations with our members are confidential, so I am not going to elaborate on the content of those calls except to say that our members are deeply disturbed by Piggly Wiggly's actions that reduce their hours and take-home pay. Piggly Wiggly is solely responsible for the reduction in hours, the pay of its employees, their health insurance, and pension benefits. Your assertion of concern for your employees in your letter of September 15 is laughable. Your accusation that the Union does not support our members is simply untrue. Paul Butera is destroying the lives of the people who work for him. The Union will continue to fight Mr. Butera's attempts to drive his workers into poverty.

The Union requests to be present at any meeting the Employer schedules with the

¹¹ Withers testified he drafted the information request items in Eiden's September 19 letter. Withers testified the Union requested the information because in Zenisek's September 15 letter, she stated they made the decision to reduce some of the employees' hours based on an anticipated reductions in sales from the opening of the Festival store. Withers testified the Union made this request based on that statement. He testified he was hoping to determine the anticipated impact on Store 15. The information was requested in preparation for the grievance meetings. Pertaining to the Union's request for projected sales information, Holtz testified Respondent only had made 4 weeks of sales projections for the weeks ending September 17, 24, and October 1, and 8.

employees to prevent the Employer from committing any further violations of the National Labor Relations Act. The Union requests that you provide the information requested above as soon as possible, but not later than Friday, September 23, 2011.

Also, the Union requested verbally on September 16, 2011, a complete list of all employees that were reduced in hours from full-time status. While the Union is not required to meet your demand to put this request in writing, here it is. Please provide this list within twenty four (24) hours as well as telephone contact information for each employee.

Withers testified that the parties met on September 21 at Store 15 to discuss the grievances over the reductions from full-time to part-time. Present for the Union were Withers and Ridderbush; and for Respondent were Zenisek, Braunreiter, and Holtz. The employees attended their individual meetings. Withers testified that as they went through the day they dealt with each grievant. The meetings began at 9 a.m. and ended at around 6 p.m. Withers testified Gruenke's was the first grievance discussed and she was present for the meeting. Withers testified he started out by asking Respondent how they came to the decision to reduce full-time employees to part-time. He testified Braunreiter did most of the talking for Respondent. Withers testified it was stated that Braunreiter and Holtz used sales forecasts and comparisons with the Howard store in the Green Bay area where a Festival store had come into competition with one of their stores. Withers testified they used the sales impact of that store to draw a correlation to the Sheboygan store. It was stated that they were stores of like volume and they had a forecast of the sales decline of 30%.¹² Braunreiter and Holtz said they got together and drafted schedules. They stated these were the optimum schedules to address the customers' needs and needs of Store 15. Withers asked Zenisek when the last time was that Respondent had made an adjustment. Zenisek said they had adjusted the business needs in May 2010. Withers testified this was after Store 31 merged with Store 15 in January or February 2010. Withers testified Respondent's officials gave the union representatives the components that went into their forecasting. Withers asked them how they were doing in terms of sales at one point in the meeting and Braunreiter said they were down 32% from what their normal week's sales were. Withers testified Respondent tracked sales on a daily basis. Withers testified they met on a Wednesday so from Sunday through Wednesday, for that four day period, he was told Respondent was down 32% from what they would normally do in a week. Withers testified he thought Festival opened on September 16 or 17. The employees were reduced to part-time on the schedule posted on September 15, for the week running September 18 to September 24. Withers testified that, during the September 21 meetings, he asked Respondent's officials what contractual provision they relied on in making their decision to reduce employees to part-time status, and Zenisek said article 1.11, which is management rights. Withers asked if there was any other provision and Zenisek said no.

On September 22, Withers filed a grievance on behalf of employee Abraham Gerharz over his reduction from full-time to part-time status. He testified Gerharz was not discussed during the September 21 grievance meetings because the Union did not know about his reduction at the time. Withers testified he did not get Gerharz' name until he received the answer to the Union's information request on September 22. On September 22, Zenisek sent a letter to Withers denying the Gerharz grievance. Withers testified there was a separate first step meeting concerning Gerharz' grievance.

¹² Similarly, Zenisek testified in her pre-hearing affidavit that Braunreiter stated, during the meeting, he was expecting to see a 30% sales decline at Store 15 as a result of Festival's opening. (G.C. Exh. 32(d), p. 6).

On September 22, Zenisek sent a letter to Eiden by e-mail and regular mail. The subject line of the letter was in bold stating: "Sheboygan Stores-Need for UFCW Support". In the letter Zenisek stated:

5 I am in receipt of your September 19, 2011 letter. In your letter, you state that "Piggly Wiggly is solely responsible for the reduction in hours...." Shame on you! It is true that the Company has the right under the contract to reduce hours, but the Union is in part to blame for causing the Company's *need* to reduce hours. Since January, the Company has warned the Union time and again that nonunion Festival Foods stores were going to compete for Piggly Wiggly business, especially in Sheboygan.¹³ We have asked the
10 Union why it is not organizing the non-union stores to create a level playing field. Also, why is the Union not picketing or hand billing the non-union stores telling the potential customers to not favor the nonunion store and to shop at the Union represented Piggly Wiggly store? I do not understand why the Union is not doing something to support the Store and our Union employees' jobs.

15 Even when faced with a reduction of Union employees' hours because of non-union grocery business, the Union continues to insult Piggly Wiggly by saying "Paul Butera is destroying the lives of the people who work for him" and "the Union will continue to fight Mr. Butera's attempts to drive his workers into poverty." Again, shame on you! To truly support our employees like you claim, the Union should work with Piggly Wiggly and take action against our non-union competition rather than blaming and insulting us. The
20 time is now for the Union to do its job by fighting the non-union Festival Foods and supporting unionized Piggly Wiggly stores!

If you have any further questions or would like to discuss how to begin supporting Piggly Wiggly and its Union employees, please do not hesitate to call me directly.

25 Holtz testified he posted Zenisek's September 22 letter at Store 15 in the employee break room on the same bulletin board where he posted the September 15 letter. Holtz testified there are three bulletin boards. He testified one is a locking bulletin board where the Company posts things, and Holtz thought that was where he posted the letters, stating, "I don't specifically
30 remember." Hoppert, at the time of her testimony, was working for Respondent in the office. Hoppert testified she saw both Zenisek's September 15 and 22 letters posted on the bulletin board at Store 15, behind the locked glass where employees schedules are posted. Hoppert credibly testified, "I believe they are still up at this time," stating she saw them posted the day before her testimony which took place on February 22, 2012. Similarly, David Meinhardt
35 testified the last time he saw the letters posted was on February 21, 2012. Tina Meinhardt testified she first saw Zenisek's September 15 letter to Eiden on September 15 in the break room posted on the unlocked bulletin board. Tina Meinhardt testified she thought she saw the September 22 letter still posted in November at the time she left Respondent's employ.¹⁴

40 Zenisek sent Eiden a letter on September 22 by e-mail and regular mail responding to

¹³ Withers testified that while the Union officials were told by Respondent on January 7, that a Festival store was planning to come to Sheboygan, they were only told this once, not "time and again" as depicted in Zenisek's letter.

45 ¹⁴ Holtz testified the letters were not still posted on the day of his testimony which was February 22, 2012, but he could not recall when they were taken down. Holtz testified, "I would say they were up no longer than a week a piece." I find Holtz testimony on the length of time the letters were posted to be purposely vague. I have credited the testimony of the employees that the letters posted on their issuance date and remained posted as of the unfair labor practice
50 trial in this case.

Eiden's written information request dated September 19. Zenisek stated in the letter that Respondent does not have information pertaining to the Union's request for "Projected store sales total and by department for the previous twenty four (24) month period broken down on a weekly basis." As to the Union's requested for a complete list of employees reduced from full-time to part-time, and their phone numbers, Zenisek sent the Union a list of 19 names, without their phone numbers. Zenisek stated the Union was already in possession of their phone numbers because all employees were required to complete a union membership application which contained their phone numbers. She also stated Respondent also provides a monthly list of new employees with their phone numbers. Withers testified he did not believe Zenisek's response that Respondent did not maintain the requested information on projected store sales because Holtz and Braunreiter stated during the September 21 grievance meetings that they had used the forecast to determine the effect that Festival was going to have on Store 15 in determining to reduce the employees to part-time status. As to the Union's request for the phone numbers of the 19 employees, Withers testified employees fill at their union membership applications when they are hired. Withers testified the reduced employees had a range of 7 to 32 years of service and it was likely the Union did not have their current phone numbers.

On September 27, Withers sent Zenisek a five item information request marked hand delivered pertaining to the reduction in status grievances. Withers' information request read, in pertinent part, as follows:

During the course of our grievance meetings on Wednesday, September 21, 2011 the Company maintained that the projected sales forecast and subsequent reduction in full-time positions for Store #15 were formulated through review of other stores with similar sales and/or competition from Festival Foods entering the market place.

As such, the Union requests the following information:

1. Total store sales for each Piggly Wiggly store for a period of twelve (12) months preceding the opening of a Festival Foods store and the twelve (12) months proceeding the opening of a Festival Foods store, within a 3.5 mile radius (the distance between Store #15 and the new Festival Foods Store in Sheboygan) of the Piggly Wiggly stores; broken down on a weekly basis.

* * *

3. The work schedules for each department of each store identified in #1 above for the twelve (12) months preceding and proceeding the opening of a Festival Foods store.

4. The number of full-time positions reduced or eliminated when Walmart Supercenters opened on Sheboygan's south side.

* * *

The Union requests this information be provided on or before October 5, 2011. Please contact the undersigned if you have any questions.¹⁵

On October 5, Zenisek responded by e-mail to Withers September 27 information request as follows in relation to request 3 and 4:

¹⁵ Withers testified he made this request because of the issues raised in grievance meetings on September 21 by Respondent's officials. Withers testified that, at that time, Respondent's officials made a comparison with Store 15, and the prior opening of a Festival store in close proximity to Respondent's Howard store as the reason they were projecting a 30% decline in sales at Store 15. As to item 4, Withers testified that during Haack's grievance meeting on September 21, Respondent said they had a history in reference to Walmart's opening of how it affected their store and that was one of the considerations they used to judge the impact of Festival's opening.

3. Your request does not make sense. Please explain what you mean by "proceeding." After you have clarified what you are looking for, we will make available to you a portal to obtain the schedules for Sheboygan, for each Department, for the past twelve months. Information on establishing the portal will be forwarded to you separately.
- 5 4. We have no information responsive to your request.

Withers testified he never clarified to Zenisek what the word "proceeding" meant in his request for information. Withers testified "I think if you don't know the meaning of it you can look in any dictionary and figure that out." As to Item 4, Withers testified he was not satisfied with Respondent's response. He testified they stated in the Haack grievance meeting that they had their history from Walmart Supercenter coming to town, so if they had that history on September 21, Withers did not understand how they lost it by October 5.

There was a meeting on November 8 at Store 15 with a federal mediator concerning the reduction in status grievances. Withers testified when he arrived at Store 15 for the meeting, he saw signs on the store's front doors stating they were accepting applications for part-time employees. Withers testified that, upon entering the store on November 8, Withers saw people from outside cashier classifications working up front, that stockers were bagging, and doing utility clerk work. Withers testified they were working outside their classifications. Withers saw the same thing when he came to the store for the September 21 grievance meetings.

Present for the November 8 mediation session were mediator Don Maki, Withers, Prickett, Zenisek, Braunreiter, Holtz, with the grievants attending when their grievance was discussed. The meeting lasted until around 6 p.m. Withers' notes show the first discussion involved grievant Gerharz. Withers, upon review of his notes, testified that during this particular discussion, Zenisek explained to the mediator that Respondent was exercising their rights under 1.10 of the of the management rights provision of the meat unit contract; and 1.11 under the clerk's agreement when Respondent reduced the employees to part-time status. Withers testified when grievant Thede, a meat wrapper, came in she brought in a note to Withers indicating meat cutters had worked outside their classification, in fact in her classification. Withers testified that during Thedes' meeting, Withers requested copies of Respondent's surveillance videos for all departments back to September 17. Withers testified he requested this because it was obvious to him employees were working outside their classifications all over the store because Respondent was short staffed. Withers testified Zenisek responded to Withers' information request by stating he would have to put it in writing and sign a confidentiality agreement. Withers told Zenisek he was not putting it in writing that she had his information request. Withers told Zenisek that he would not sign a confidentiality agreement. Withers testified Zenisek did not say why Respondent needed a confidentiality agreement, and Withers did not ask for Respondent's reasoning.

On November 11, Zenisek sent Withers a letter by e-mail, which read:

During our mediation meeting on November 8, 2011, you requested store number 15's video footage for a period of time. Also, you stated you would not put this request in writing and you insisted I make these recordings available to you. Despite your refusal, we will make the video footage watched at the store after we receive a signed Confidentiality Agreement. Furthermore, our camera system has a limited amount of recording days so the full extent of the requested information may not be available if you do not respond in a timely manner.

As to your request for information, we request that the Union provide a statement as to the reason the requested information is necessary in the administration of

employee/Union rights under the Collective Bargaining Agreement along with a signed Confidentiality Agreement. If you have any questions, please do not hesitate to contact me directly.

I have attached a draft of a Confidentiality Agreement. If you have another format for a Confidentiality Agreement which you prefer but which meets our needs and concerns,
5 please forward it to me for consideration.

Withers responded to Zenisek by letter dated November 11, stating as follows:

10 I have received your letter of November 11 regarding the Union's request for the video tapes of employee activities for the period 9/17/2011 forward. You stated that Piggly Wiggly required the Union to put its request in writing and to agree to the confidentiality agreement you sent me.

The Union will now clarify its request for information.

15 The Union demands the video tapes of Store 15 of employee activities for the period 9/17/2011 forward in order to represent members of the bargaining unit for purposes of collective bargaining regarding wages, hours, and terms and conditions of employment. The Union needs the information to evaluate whether unit employees were being rotated to different jobs in order to cover up Piggly Wiggly's unilateral reductions of approximately 20 full time employees to part-time status.

20 Piggly Wiggly has provided no reason for the confidentiality agreement. The Union therefore will sign no such agreement. The Union notes that the exact same information has been provided multiple times in the past without any need for discussion regarding a confidentiality agreement.

25 Because Piggly Wiggly refused to provide this information, the Union will file an unfair labor practice charge with the National Labor Relations Board seeking an order of the Board directing that Piggly Wiggly provide the video tapes to the Union.

30 Because the Union will file an unfair labor practice charge with the NLRB regarding the refusal to provide the information, the Union demands that Piggly Wiggly immediately place a "litigation hold" on the information; that is, the Union demands that Piggly Wiggly preserve from destruction all tape, electronic, or other surveillance recordings made at Store 15 for the period September 17, 2011, to date.

35 Zenisek testified that on November 15 she attended a bargaining session in Sheboygan the subject of which was to negotiate a new contract for Store 15. Zenisek testified the meeting was attended by Eiden, Withers, Sweet, Prickett, the mediator, Simandl, Frost and Zenisek. Zenisek testified Sweet started off the session by making comments regarding the status quo that is full-time to part-time. She testified the meeting only lasted a couple of hours because the Union had no employee negotiating committee. Zenisek testified there has not been any more bargaining sessions regarding Store 15. Zenisek testified the Union was unwilling to meet with Respondent regarding Sheboygan. Zenisek testified she did not know if the reason the Union was refusing to meet was because of the unfair labor practice charges. However, Zenisek admitted seeing a January 30, 2012 letter from Withers to Braunreiter in which Withers stated, "As you know, the Union has continued to demand a return of the status quo ante, that is, the condition that existed before the slashing of 19 bargaining unit employees' status from full to part-time in September 2011. Such a return is being sought by the General Counsel of the NLRB in a trial scheduled to commence on February 22, 2012. Until Piggly Wiggly restores the status quo ante that existed in September 2011, good faith bargaining for a successor collective bargaining agreement is not possible."

50 On December 22, Respondent Attorney Simandl wrote Union attorney Sweet as follows:

After further review of the requested video footage for store number 15 with the National Labor Relations Board, we will no longer require a signed confidentiality agreement in order for the Union to view the requested information. As the file size of the information requested is far too large to send (i.e., multiple terabytes of information) and would also require days to convert to a file format viewable from an outside computer, the Company is willing to allow the Union to view all of the requested security footage at the corporate office at a mutually convenient time.

Please contact me to set up a convenient time to view the requested information.

Withers testified some video footage has been provided to the Union and Prickett has been over to Respondent to view it. Withers testified the footage provided covered the period 2 weeks prior to November 8 through November 8. Withers testified the Union requested video footage back dating back to September 17, and through the date of his letter. In this regard, he testified, "I think the letter said through this date." Withers stated it is his understanding that Respondent never said the video dating back to September 17 did not exist. Upon reviewing, his November 11 letter, Withers then testified to the extent he demanded videotapes forward of November 11 that he thought he expanded his request. He testified the request changed over time. Withers testified in his initial verbal request during the November 8 meeting, he requested videos back to September 17, and in his November 11 written request he requested videos going forward past November 11. He testified that the written request was to review all tapes from September 17 to today referring to the day he was testifying.

Zenisek testified there are 32 cameras at Store 15. The cameras are motion sensitive in terms of their recording. There is a separate film from each camera. Zenisek testified that following the reduction of people from full-time to part time, Zenisek contacted the director of loss prevention and asked him to start saving the film onto a hard drive pertaining to the Union's information request. Zenisek testified the store system only retains 19 days of video so if they go to the next day, one day drops off. Zenisek testified it was astronomical in terms of gigabytes to make copies of the recordings for the Union on a disk. The director of loss prevention person said it would be best to do it on a hard drive.

A. The testimony and evidence pertaining to individual employees who were reduced from full-time to part-time status effective September 18

1. Laura Hoffman

Hoffman was working for Festival as a shift manager at the time of her testimony. She had been working there since October 2011. Hoffman had previously worked for Respondent from November 1989 until October 2011. Hoffman worked for Respondent at Store 15 for about six years. As of September 1, Hoffman's position at Store 15 was liquor manager and manager on duty (MOD). Hoffman worked as a full-time employee for 40 hours a week until she was reduced to a part-time employee on the September 15 schedule for work beginning on September 18.

Hoffman testified she learned she was being reduced to part-time on or around September 15 when she was called into Holtz' office with Holtz and Braunreiter in attendance. Holtz stated because of the competition with Festival coming to town they expected a decrease in sales and they were cutting labor. Holtz said Hoffman was one of the people being cut. Holtz said Hoffman would have insurance until the end of November and her part-time status would start on Sunday. Prior to her reduction from full-time, Hoffman was earning \$15.45 an hour. She received health insurance, vacation, holidays, retirement, and personal days. Hoffman testified she received a time and a half shift differential as full-time when she worked on

Sundays and she was scheduled to work every Sunday. Hoffman testified she lost the shift differential when she was reduced to part-time.¹⁶

Hoffman attended a grievance meeting pertaining to her reduction to part-time status on September 21. Present along with Hoffman were Withers, Ridderbush, Zenisek, Braunreiter, and Holtz. Hoffman testified they discussed seniority with the possibility of her bumping into another 40 hour full time position. She was asked if she wanted to work 40 hours and said she did. Hoffman testified that during the grievance meeting there was a discussion about her bumping Tammy Edler and Terri Hansen. Hoffman credibly testified she did not refuse to bump anyone. Hoffman testified nothing was resolved at the grievance meeting because there were other people Respondent needed to meet with that had more seniority than Hoffman. Hoffman denied refusing a full-time position during the meeting. Hoffman testified by the end of the meeting she had not been put back to a 40 hour position.¹⁷

Hoffman's credited testimony reveals that, prior to her September reduction to part-time status at Respondent, Hoffman had applied for a job with Festival in June 2011 when she heard they were coming to the area. Hoffman had a job interview at that time and met with Mike Weiss, the eventual store director at Festival's Sheboygan store. Hoffman received an offer of employment from Festival in July 2011. Hoffman did not accept the offer. The store had not opened at the time Hoffman received the offer. Hoffman testified she turned down the Festival offer at the time because of the years she had with Respondent and her benefits there. Hoffman's testimony reveals that on September 23, Hoffman went to Festival and spoke to Weiss. Hoffman asked Weiss if he heard what happened at Respondent. Weiss said he had heard and Hoffman should keep Festival in mind because there was still a position for her. Hoffman returned to see Weiss on September 27, and accepted a job offer from Festival.

Hoffman's work schedules reveal she was scheduled to work 40 hours during the week ending September 17, dividing her time between the grocery and liquor departments, and she was listed on the schedule as a full-time employee. For the week ending September 24, Hoffman was listed as part-time and scheduled to work 25 hours all in the grocery department. Hoffman's payroll records show her pay was reduced from \$15.45 an hour to \$14.95 an hour during this pay period. Hoffman testified she was not scheduled to work at Respondent during the week of September 26 because she was on vacation.¹⁸ Hoffman credibly testified she went

¹⁶ The parties stipulated that according to the contract, full-time employees receive: health insurance for themselves and their families, paid vacation, paid personal days, pay for jury duty, retirement contributions, and shift differentials for working on Sundays. They also received overtime by working a sixth day, and those benefits were either reduced or eliminated when they were reduced to part-time status. Their health insurance ended eight weeks after they started to work part-time. The other reductions or limitations in benefits took place immediately when they started working the part-time schedule.

¹⁷ I found Hoffman to be a credible witness with good recall. Zenisek, contrary to Hoffman, testified Hoffman was offered a full-time position during the September 21 grievance meeting. In this regard Zenisek testified in response to a somewhat leading question in reference to Hoffman, "Yes, she was, and before she left she accepted." Zenisek testified that Hoffman was offered a full-time position of CSM backup. I have credited Hoffman over Zenisek that on September 21 the possibility of a full-time position was discussed but not offered to Hoffman. Hoffman's testified about her situation with clear detail, while Zenisek's provided little detail and I do not find her claim worthy of belief.

¹⁸ Hoffman's testimony is verified by her payroll records which show she was on vacation for the week ending October 1, for 40 hours, and she was only compensated for that week at the

Continued

to Store 15 on September 29 to shop. When she entered the store, a checker told Hoffman that she had made the cut and was on the office schedule now. Hoffman looked at the posted schedule and saw she was in training in the office as a full-time position. Hoffman had previously worked in the office as a desk person, but this was a customer service manager assistant which was a different position. Hoffman testified that no one from Respondent contacted her to inform her that she had moved back to full-time. Hoffman testified learned she had been returned to full-time at Respondent after she accepted the position at Festival. Hoffman testified she notified Holtz and Braunreiter in person on October 1 that she had accepted another position. Hoffman told them she was giving her three weeks notice. She told them she was on the schedule for 40 hours, that she would work 40 hours, and then she had two weeks vacation. Hoffman testified they asked for something in writing. Hoffman's payroll records for the pay period ending October 8 show she worked 40 hours that week at the hourly rate of \$14.95 an hour. Hoffman's payroll records show she earned 40 hours vacation pay for the week ending October 15, and 7 hours vacation pay for the week ending October 22, all at the rate of \$14.95 an hour. Hoffman began working for Festival in October 2011.

Hoffman testified she left Respondent because she was reduced in hours and benefits, and she needed full-time work. She testified she was not scheduled to work full-time at Respondent until after she accepted the job at Festival. While at Respondent when she was reduced to part time, Hoffman was told her health insurance would remain in effect until the beginning of December. She testified that she did not lose her health insurance while working for Respondent. Hoffman testified she did work part-time at Respondent for one week after she was reduced to part time and then she went on vacation.

Hoffman testified that on the evening of January 5, 2012, she received a phone call from Brian, who she thought was the son or son in law of Paul Butera, Respondent's owner. Brian said Paul Butera would like to talk to Hoffman. Brian gave Hoffman a phone number for Paul Butera and asked Hoffman to call him the next day. Hoffman called Paul Butera, left a message, and he returned her call. Paul Butera said he would like to talk to Hoffman and she was to call Gary Suokko on Monday, January 9, 2012, to set up an appointment. Hoffman called Suokko and set up the appointment to meet with Paul Butera.

Hoffman met with Respondent's officials Paul Butera, Judy Butera, and Suokko on January 13, 2012 at Respondent's corporate office in Sheboygan. During the conversation, Paul Butera stated the liquor department was not doing so well at Store 15, that he was not worried about the store that it was down 3%, but the liquor department took a little bigger hit, and Paul Butera wanted to offer Hoffman a job. He told her she would be doing a lot of what she had been doing that she would be in charge of ordering, the displays, the pricing, and the scheduling of the liquor department. Paul Butera told her she could work up to as many hours as necessary initially to get it going, and then only up to 45 hours a week. Paul Butera told Hoffman that she was being offered \$15 an hour, and 2 weeks vacation. Hoffman asked if it would be a union position, and Judy Butera stated, "At this time, yes." Hoffman said she would consider it and get back to them. Hoffman later notified Respondent that she declined the offer.

Hoffman testified that, prior to her reduction to part time, she was earning \$15.45 an hour, that she worked 40 hours a week, and she received time and one half overtime every Sunday because it was her day to close. Hoffman testified that other than that she very seldom received overtime. Hoffman was receiving 4 weeks of vacation and three personal holidays. Hoffman testified the offer Paul Butera made was half the vacation and less pay. Hoffman

rate of \$14.95 an hour.

testified her responsibilities would have changed under Butera's offer because she would have had to schedule people to cover the liquor registers and she had never done that before. Hoffman testified she declined the offer because she was afraid she would be reduced again. Hoffman testified she had health insurance at Festival at the time of her testimony. She testified she went without insurance for a period of time, during her early employment at Festival.

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2. Tina Meinhardt

Tina Meinhardt began working for Respondent on October 11, 1993, and she ceased working for Respondent on November 5, 2011. Tina Meinhardt worked at Store 15 as a stocker and she filled in for the assistant manager as a manager on duty (MOD). Tina Meinhardt acted as an MOD a couple of times a month, but she was paid an extra \$.50 an hour for all the hours she worked because she served as an MOD. Tina Meinhardt's husband Dave Meinhardt currently works for Respondent. When Tina Meinhardt stopped working for Respondent in November 2011, she was on part-time status. Tina Meinhardt and her husband were reduced to part-time status on the September 15 schedule.

Tina Meinhardt was notified she was being reduced to part-time status in September. The conversation was in Holtz' office, with Braunreiter present. Holtz told Tina Meinhardt she was being reduced to part-time. Holtz asked her is she carried health insurance, and Tina Meinhardt said she and her husband each carried insurance. Holtz told Tina Meinhardt she would have insurance until the end of November. Tina Meinhardt testified that at no point was she offered her full-time hours back. Tina Meinhardt testified she stopped working for Respondent in November 2011 because when she became part-time she lost her benefits including medical, dental, manager on duty pay, and premium pay for Sundays.

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3. Lauriel Hansen

Hansen testified she began working for Respondent on June 15, 1999 and her employment ended on September 30, 2011. Hansen most recently worked at Store 15 as a deli clerk. At the time Hansen stopped working for Respondent she was scheduled on average 25 hours a week of work, which was a part-time position. Hansen was reduced from full-time to part-time in mid-September. Hansen was notified of the decision on September 15 by Holtz and Braunreiter. Holtz told Hansen she would have health insurance through November. Hansen testified she was never offered her full-time hours back. Hansen testified she stopped working for Respondent because of the reduction in hours and loss of benefits. Hansen testified she always had health insurance through her husband's employment. Hansen's husband was not employed at Store 15. Thus, Hansen did not suffer a loss of health insurance when she became part-time. However she did lose 15 hours of work a week

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4. Jeffrey Gross

Gross testified he had worked for Respondent for 23 years and his last day of employment was November 12. Gross was working at Store 15 at the time his employment ended as a stocking clerk and MOD. Gross received an extra \$.50 an hour because of his MOD status. Gross testified that at the time he stopped working for Respondent he was scheduled for 25 hours a week and was considered part-time. Gross was reduced from full-time to part-time in September. Gross testified he lost his contractual benefits and MOD pay due to his reduction to part-time status. He testified after he was reduced to part-time Respondent never offered him full-time hours. Gross testified he left Respondent's employ because he wanted health insurance. At the time of the hearing, Gross was working for another company. He testified he applied for that job at the end of October. Gross testified he is working full-time

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there, that he has health insurance which cost him more than what he had paid at Respondent. Gross testified he is earning just under a dollar an hour more at his new employer than he earned at Respondent.

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5. Laurie Hoppert

Hoppert was employed by Respondent at Store 15 at the time of her testimony. She testified she had worked for Respondent for about 32 years and at Store 15 for about 3 years. Hoppert had previously worked for Respondent in Sheboygan at Store 31. When Hoppert transferred from Store 31 to Store 15 she maintained her seniority. Hoppert testified she works in the office at Store 15 as a cashier. Hoppert's sister Cindy Quasius works for Respondent at Store 15 as a full-time cashier.

At the time of her testimony, Hoppert was working on average 40 hours a week in the office in a full-time position. She had worked part-time for a period when her hours were reduced on September 18. On September 14, Holtz notified Hoppert she was being moved to part-time on the September 15 schedule. Hoppert testified she had insurance through Respondent while she was full-time. Hoppert testified when she became part-time she was told she would be covered by the insurance through November. Hoppert went from working 40 hours the week ending September 17 to 20 hours the week ending September 24.

Hoppert attended a grievance meeting on September 21 concerning her reduction from full-time to part-time status. Hoppert testified Respondent looked to see where Hoppert could bump to full-time, and they said she could take the cashier's hours for Quasius. Hoppert said she would not because Quasius was her sister. Hoppert testified Quasius is a single parent and she needed the insurance. Hoppert testified they asked her if she wanted Terri Hansen's full-time position in the office. Hoppert testified Hansen was pregnant at the time. Hoppert testified she declined. Hoppert testified the meeting ended and nothing was accomplished. Hoppert testified Respondent offered her two full-time positions but she did not want to replace those individuals. Hoppert testified it was because they would lose health insurance that she did not want to take their jobs. Hoppert had health insurance available through her husband.

Withers was present for the grievance discussion concerning Hoppert on September 21. Withers testified they discussed Hoppert's opportunities for bumping a less senior employee. Withers testified that according to Respondent, Hoppert would have the opportunity to bump either Quasius or Hansen. Withers testified Hoppert said she did not want to bump Quasius who is Hoppert's sister and Hansen was pregnant. Hoppert said she was going to think about it at the end of the session. Withers testified Hoppert asked if she would be able to collect unemployment and Zenisek said, "No, not since you filed a grievance." Withers then testified Hoppert asked if Zenisek would contest her unemployment. He testified Zenisek said, "Well, you filed a grievance." Then the following exchange occurred during Wither's testimony:

THE WITNESS: She asked if --she asked Mary if she was going to contest the Unemployment.

JUDGE FINE: Mary who?

THE WITNESS: Mary Zenisek. And Mary said, "Well, you filed a grievance," meaning--

MR. ANDREWS: Objection as to what it--

JUDGE FINE: That was all she said, correct?

THE WITNESS: That's all I --

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JUDGE FINE: She didn't directly say she was going to contest it, did she?
 THE WITNESS: No.¹⁹

5 Withers testified that on September 23 he called Zenisek. He testified he asked Zenisek if she was going to contest Hoppert's unemployment. Zenisek said you guys filed a grievance. Zenisek said they offered a full-time position meaning her sister or Hansen's position. Withers testified Zenisek's remarks were to the effect that, "If you guys hadn't filed the grievance, there wouldn't be a problem." Withers testified he informed Hoppert about the conversation he had with Zenisek.²⁰

10 Hoppert testified that a couple of days after the September 21 grievance meeting, Holtz told Hoppert Respondent wanted it in writing that she did not want to take Quasius' hours. Hoppert refused to sign anything at that time. Hoppert called Withers the same day she met with Holtz and told Withers of her conversation with Holtz. Withers told Hoppert he would help her write a response. Withers emailed her a letter, which Hoppert signed and gave to Holtz. It is dated September 28. Hoppert stated in the letter to Holtz that, "While I relinquish my right to bump my sister Cindy Quasius from her full time position, I do not relinquish my right to pursue my grievance relative to maintaining my full time status." Hoppert stated in the letter that:

20 The Company's attempt to force me to withdraw my grievance or force me to use my right to bump my sister is a false choice. My choice is for the Company to schedule employees by seniority as they have in the past.

I will not put in writing that I refuse a full time position only so the Company can deny my entitlement to unemployment or my right to file a grievance.

25 If you have any future correspondence or concerns, please contact my Union Representative.

30 On October 3, Withers sent an e-mail to Zenisek in an effort to set up grievance mediation meetings concerning the reduction to part-time grievances. As part of the chain of e-mails that followed, Zenisek informed Withers on October 3 that:

Laurie Hoppert should not be on that list going to mediation. If she is on the list, we will follow the contract and put her on the FT cashier schedule since she is able to bump by seniority as we stated in the grievance meeting. Remember, she chose to remain PT and has stated that to us. If you need me to put her in the FT position after she said she

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¹⁹ Withers testified you can apply for unemployment if you are reduced to working part time in Wisconsin. The above conversation was not alleged to have violated the Act in the complaint. The conversation as reported by Withers was not corroborated by Hoppert, who testified concerning a subsequent meeting that Respondent's officials stated they would contest her unemployment because she refused the offer of a full-time position. Withers testimony appears somewhat vague as to the incident.

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²⁰ The complaint in Case 30-CA-67117 paragraph 17 alleges this conversation to be violative Section 8(a)(1) of the Act. I do not find it rises to the level of a violation. First, while Withers testified Zenisek mentioned Hoppert filed a grievance in response to his question concerning whether Respondent was going to contest Hoppert's request for unemployment, he also testified Zenisek stated Hoppert had refused a full-time position. While Withers testified he reported the conversation to Hoppert, he never testified exactly what he told her, nor did Hoppert corroborate his testimony. Rather, Hoppert testified she understood Respondent was going to contest her unemployment because she refused a full-time position. Accordingly,
 50 paragraph 17 of the complaint is dismissed.

did not want it, let me know. Once again, Laurie Hoppert said she didn't want either FT position she has seniority to pull.²¹

5 In a follow up e-mail dated October 3, Zenisek stated to Withers, "Just a reminder: Arbitration is not available to the Union due to the expiration of the contract. Please schedule the mediation on November 8."

10 Hoppert testified she attended a second meeting concerning her grievance on November 8. In attendance were a mediator, Zenisek, Braunreiter, Holtz, Withers, Pricket, and Hoppert. Hoppert testified that during the meeting, Respondent said they " would refuse unemployment for me, and I believe they said yes, because I did refuse hours that were offered me." Hoppert testified following a leading question that it was possible this was also discussed at the September 21 meeting stating, "I am not clear on that." When asked if during the grievance meeting if anyone told Hoppert that she had to drop her grievance or she would be forced to bump her sister, Hoppert testified, "I don't believe they said forced that I recall. I don't remember." Hoppert testified that no one offered her a deal that if she dropped her grievance she would not have to bump her sister.

20 Hoppert testified she never lost her health insurance through Respondent as she became full-time in November following the second grievance meeting. Hoppert testified it just happened that she became full-time. Hoppert testified her sister called and told Hoppert she was back on the schedule to be in the office full-time. Hoppert testified she did not bump anyone. Hoppert's payroll records show she worked full-time beginning the week ending November 5. Hoppert received 40 hours vacation pay for the prior week. While she did not lose her health insurance, Hoppert testified she lost some other benefits when she was part-time. While part-time, Hoppert worked less than 40 hours a week so her earnings were reduced. Hoppert testified there were no holidays during the period she worked part time, but vacation for the following year is based on hours worked.

30 Zenisek testified that Hoppert was offered full-time employment during the September 21 grievance meeting. Zenisek testified she was offered two positions, the CSM backup position, which Zenisek testified she had the right to bump into according to the contract. Zenisek testified Hoppert also the right to bump into the cashier area. Zenisek testified she did not know Hoppert had a sister until Hoppert announced it during the grievance meeting. Zenisek testified the situation developed regarding Hoppert having to potentially bump her sister was pursuant to the seniority clause of the collective bargaining agreement. Zenisek testified Respondent's payroll department never received anything from the state stating Hoppert filed for unemployment.

40 ²¹ The complaint in Case 30-CA-67117 alleges in paragraph 18 that this statement by Zenisek was violative of the Act in that it threatened to force an employee to bump her sister if the Union pursued the grievance on her behalf. However, I do not find the Acting General Counsel has established that the e-mail standing alone served to restrain or coerce employees. First, the e-mail was to a union official, and there was no evidence that Withers disclosed the contents of the e-mail to Hoppert. Rather, the Union and Respondent processed Hoppert's grievance along with the others to the next step of the grievance procedure during a meeting held on November 8. Hoppert failed to testify that during the meeting she was told if she continued with the grievance she would have to bump her sister. In fact, although she continued with the grievance she was not forced to bump her sister, but was subsequently offered full-time employment. Accordingly, paragraph 18 of the complaint is dismissed.

6. Robin Schubert

5 Schubert works for Respondent in Store 15. She began working for Respondent on March 30, 2004. She is a baker in the bakery department, a position she has held for almost 8 years. Schubert was reduced from full-time to part-time in September. She was notified of the reduction by Holtz and Braunreiter. Holtz told her she would have insurance through the end of November. Schubert asked if it would be possible if someone else was willing to give up their full-time to allow Schubert to keep full-time status. They asked who, and Schubert replied bakery employee Debbie Gerdes. Holtz said they would look into it because Gerdes was on vacation. Schubert was then listed as part-time on the September 15 schedule.

10 Withers testified about the discussion at September 21 grievance meeting regarding Schubert's reduction in status grievance. Withers testified Schubert wanted to know why they were being reduced on such short notice, since they found out on Wednesday or Thursday, they were going to be reduced the following week. Schubert said she was on 9 pills a day and was concerned about her health insurance. Withers testified Zenisek stated Withers and Eiden were told in a meeting in January that this was going to happen. Withers stated that was not true. He testified Zenisek responded, "Yeah, we told you when we had the meeting at the corporate office." Withers replied that it never was discussed that people were going to be reduced from full-time to part-time. Zenisek then said, "Oh, no, you are right, it was that other meeting." 15 Withers stated to Zenisek that they did not have another meeting at the corporate office.²² Withers testified Schubert stated Respondent had not done this when Walmart opened. Withers testified a Walmart Super Center had previously opened about a mile away from Store 15 around 2006. Withers testified when the Walmart opened there were no reductions from full time to part time. Rather, there were reductions in hours from the least senior employees. 20 Withers testified part-time employees lost hours, but not full-time.

25 Schubert also testified about the September 21 grievance meeting. Schubert testified she stated Paul Butera wanted the employees to be loyal to him, and look what he did to us. Schubert stated he gave them three days notice before bumping them from full-time to part-time. Schubert said he could have given them two weeks notice to get their financial affairs in order. Zenisek stated they had talked to the Union a year before that, and Withers said no they had not. Zenisek said well then department heads should have talked to their employees. Schubert stated that Denise Perl had talked to them a couple of weeks prior to the reductions and said there might be reductions. She testified Perl said that if they were reduced down to 30 part-time, the part-time employees would be affected before the full-time and that did not happen. Schubert said, during the grievance meeting, that when the Super Walmart had opened a few years ago, customers went to check out the new store, but the majority of them came back. Schubert stated it was going to be the same with Festival, and Festival had not even opened yet so how could they know how it was going to affect the business. Schubert 35 attended another grievance meeting in November. Schubert testified nothing was resolved at that meeting concerning her part-time status.

40 At the time of her testimony, Schubert was working full time because the cake decorator quit, and one of the other full-time employees became the cake decorator. Schubert testified 45

50 ²² The consolidated complaint alleges this statement by Zenisek violated Section 8(a)(1) of the Act. However, I do find it rose to the level of a violation, particularly since Schubert confirmed that immediately during the course of the conversation Zenisek backed down from the remark. Accordingly, the allegation in the complaint in case 30-CA-67117, paragraph 16(b) is dismissed.

that Debbie Gerdes let Schubert step up to full time. Gerdes had been bumped down to part-time also, and she was next in line by seniority to obtain the full time position. However, Gerdes allowed Schubert to bump up to full time because Schubert needed the insurance, and Gerdes' husband had a job with insurance. Schubert's payroll records show she returned to full-time during the week ending November 12.

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7. David Meinhardt

David Meinhardt has been working for Respondent for 23 years. He works at Store 15. David Meinhardt's wife Tina Meinhardt is a former employee of Store 15. David Meinhardt's current position is part-time stocker. David Meinhardt reports to Holtz or Dawn Winkelhorst, the store assistant manager. David Meinhardt was reduced from full-time to part-time status on the September 15 schedule. While he was full-time, David Meinhardt also had the position of manager on duty (MOD), for which he received a shift premium of \$.50 an hour for all hours worked. Tina Meinhardt was also reduced from full-time to part-time in mid-September

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David Meinhardt was informed he was being reduced to part-time on September 15 by Holtz and Braunreiter. During the conversation, Holtz stated that Holtz had already spoken to Tina Meinhardt, and that now Tina Meinhardt and David Meinhardt were part-time employees. David Meinhardt testified he looked at Holtz and said, "Thank you very much." David Meinhardt said after 23 years of service are you kidding me? David Meinhardt said, "Thanks for throwing my little girl to the street." Holtz told David Meinhardt that he was losing his health insurance as of November 30. David Meinhardt testified he lost his shift premium when he became part-time. David Meinhardt testified he is still part time at the time of his testimony and he has lost his health insurance. David Meinhardt testified he and his wife applied for Badger Care, a state subsidized program, which provides health insurance to a point. David Meinhardt testified Tina Meinhardt quit her employment at Respondent. David Meinhardt testified he was involved in his wife's decision to quit. David Meinhardt testified that either he was going to quit or his wife was going to quit because they were not meeting their bills and they both lost their benefits. David Meinhardt testified his wife was the one that quit.

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B. Respondent changes its call in attendance policy on September 17

Respondent's "Restated Attendance and Discipline Policy Effective April 1, 2011," states, in pertinent part:

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Of course, sometimes personal or family illness or injury prevents an employee from working when scheduled or being on time. In these cases, employees unable to meet their schedule are asked to provide a minimum of four (4) hours notice to the person in charge of the store, if possible.

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* * *

Employees unable to meet their schedule due to personal or family illness or injury are asked to provide a minimum of four (4) hours notice to the person in charge of the store, if possible.

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The policy states, "In each occurrence. Piggly Wiggly will consider the scope of the absence, past work history and the particular circumstances surrounding the absence when documenting the employee record." The policy states "If an employee does not notify the store in a timely fashion that they will not be able to work their scheduled shift, this will be considered a 'no call no show'". The policy states "No Call No Show Without Good Cause" for the first occurrence results in a "WL and a 2-Day Suspension w/o Pay". It states "Corrective action may be altered for good cause."

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The prior attendance policy was contained in Respondent's employee handbook effective May 2009. It also contains the statement, "Of course, sometimes personal or family illness or injury prevents an employee from working when scheduled or being on time. In these cases, employees unable to meet their schedule are asked to provide a minimum of four (4) hours notice to the person in charge of the store, if possible." It states, "Unfortunately, disregard for the work schedule through excessive tardiness and/or absences will be cause for progressive discipline up to and including suspension and/or employment termination."

David Meinhardt testified that in the fall of 2010, he called in around noon, about an hour and one half to two hours before the start of his scheduled shift. Meinhardt talked to assistant manager Winkelhorst. Meinhardt told her he was sick and was not coming in, and she said okay. Meinhardt did not receive any discipline or warning for that incident. Meinhardt testified that in March 2011, he called in 20 minutes before the start of his shift and spoke to Holtz. Meinhardt told Holtz that Meinhardt's father was having emergency surgery and Meinhardt would not be to work. Holtz said take care of it. Meinhardt did not receive any discipline or warning for failing to call in 4 hours before the start of his shift.

Employee Hansen testified that while working for Respondent she called in one time in February 2011. Hansen was scheduled to work 6:00 a.m. to 2:30 p.m. that day. She testified she called in after 6:00 a.m. stating she could not come in to work because there was a snowstorm. Hansen testified she called into a fellow employee at the service desk. She was not disciplined for the incident. Hansen testified she did not show up. Holtz testified there was a blizzard during February 2011. Holtz testified there were around 10 employees that did not make it into work. He testified those employees did not receive discipline for not coming into work during the blizzard. When asked why, Holtz testified "I don't have a good answer for that."

On September 17, two days after Holtz notified him that he and his wife were being reduced to part-time status, David Meinhardt was scheduled to work the 2 to 10:30 p.m. shift. Meinhardt testified this was his last full-time shift prior to his reduction to part-time. Meinhardt called in sick an hour before the start of the shift due to a migraine headache. Meinhardt spoke to Winkelhorst stating he had a migraine. Winkelhorst said okay and hung up the phone. Meinhardt returned to work on September 18, which was the first day he worked a part-time schedule. On September 18, Winkelhorst told Meinhardt he was going to work at frozen food that day. Meinhardt went to the freezer in the back room, but then Holtz called him to the office. Meinhardt reported to the office and Winkelhorst was already there. Holtz handed Meinhardt a warning letter and suspension dated September 17. Holtz told Meinhardt that he did not follow the company policy on September 17 of giving 4 hours notice so it is a no-call/no-show, and Meinhardt gets an automatic 2 day suspension. Meinhardt said 23 years of service and now he was being suspended, that Meinhardt had never been suspended. Holtz said that was the company policy. Meinhardt asked Holtz if before himself if anyone had a suspension for this conduct, and Holtz said a few. Meinhardt said, "Yeah, right." Then he left.

On September 23, Union Representative Prickett filed a grievance over Meinhardt's 2 day suspension asserting Respondent violated Article 1, Section 1.11 and other unnamed provisions of the collective-bargaining agreement. Zenisek responded by letter dated September 25 asserting there was no contract violation. There was a grievance meeting over the suspension on September 27 at Store 15. Present were Braunreiter, Holtz, Prickett and Meinhardt. Prickett testified the meeting began by her telling Braunreiter the Union's position was a no-call/no-show meant an employee did not call in to work and did not show up for work. Braunreiter then referenced Respondent's April 1 policy statement pertaining to the no-call/no-show portion of the policy and said employees have to call in timely and he flipped back to the 4 hour language

and said employees are required to call in 4 hours before the start of their shift. Prickett testified Meinhardt stated the policy contained the language "if possible." Prickett stated to Braunreiter the policy says employees are asked to call in 4 hours in advance, if possible. She stated that often times it is not possible or even reasonable to expect that somebody can call in 4 hours ahead of time. Prickett stated, as an example, Meinhardt had a migraine headache and felt he would take a nap to see if it would go away which sometimes worked for him. When Meinhardt woke up he still had the migraine headache so he called in sick to work. Prickett gave another example of why an employee could not always call in 4 hours in advance. She then stated it is not reasonable to expect if an employee worked at 6 a.m. that they would set their alarm clock before 2 a.m. to wake up and see if they felt okay and then go back to bed. Prickett testified Braunreiter reiterated they have to call in timely and they were required to call in 4 hours before the start of the shift. Meinhardt testified they debated what "if possible" meant. He testified Braunreiter kept saying, "Well, four hours."

Prickett testified that, following Meinhardt's discipline, she became aware three other employees had been disciplined in the same manner as Meinhardt. Prickett stated at the September 27 meeting it was her understanding there were now more employees disciplined. She testified Holtz responded yes six last week and two this week. Prickett stated the Union would be grieving them also. She testified that, during the meeting, Meinhardt pointed out there were a couple of instances when his father was ill and he called in with less than four hours notice and was never disciplined. Braunreiter responded according to our policy and past practice that is the way it is. Prickett stated it was a past practice of two weeks. She testified Holtz stated he had been doing it this way ever since he came to the store and he assumed whoever was there before him did it the same way. Prickett told Holtz this was not true and she requested information regarding all disciplines issued for violations of the attendance policy. Prickett asked Holtz how he tracked the occurrences. Holtz stated whoever takes the call is supposed to write it down. Prickett testified, at that point, she made an information request for all disciplines related to violations of the attendance policy, and all documentation regarding people calling in or the tracking sick calls. Prickett testified that prior to Meinhardt being issued the September discipline, she was not aware of any other employees disciplined at Store 15 for failing to call in at least 4 hours prior to the start of the shift.

On September 29, Prickett filed a grievance on behalf of three additional named employees and "other similarly affected employees" who had received a 2 day suspension for a violation of the no call no show policy. The three employees named in the grievance are: Taylor Gruenke, Margaryta Cherkasova, and Tammy Hahn. Prickett also made an information request in the letter. She testified it was the same information she requested during this September 27 meeting. Prickett testified when she made the request during the September 27 meeting, she could not recall if Holtz and Braunreiter asked her to put it in writing or if it was almost as they were saying it, she stated, "I will put it in writing." Prickett testified Respondent had been requiring the Union to make its information requests in writing. The information Prickett requested in the September 27 letter included the following:

- 1.) Copies of the attendance records for all employees for the past 24 months.
- 2.) Copies of any disciplines issued to any employees that called in absent to work within the past 24 months.
- 3.) Copies of all documents used by the Employer to record employees calling in absent or tardy for work (Date, time, etc.) for the past 24 months.

On October 4, Zenisek filed responses to the grievances on behalf of the three named individuals, asserting that the grievance on behalf of Hahn was untimely since the event giving rise to the grievance took place on September 18, and therefore the grievance was filed past

the contractual limit of 7 calendar days. On October 5, Zenisek provided a written response to Prickett's September 27 request for information. Zenisek stated:

5 As to your request for information, we request that the Union provide a statement as to the reason the requested information is necessary in the administration of the employee/Union rights under the Collective Bargaining Agreement. It is clear that your dispute arises from the April 1, 2011 restatement of the Attendance Policy of the Company, any dispute over which the Union has not timely grieved. Be that as it may, please provide the Company with direction as to the need for this information. The Company will then be in a position to further evaluate its compliance obligations under the law and the Collective Bargaining Agreement.

10 Further, as the information sought by the Union is not separately maintained information, if the information request of the Union is appropriate, we invite you to schedule a time to come to the corporate office to review the employment records of the employees of concern. Copies of information which you may desire will be provided to you at our regular charge for copying. I look forward to your response to this letter. If you have any questions, please do not hesitate to contact me directly.

15 Prickett testified there was a meeting concerning the Gruenke, Cherkasova, and Hahn grievances on October 13. Present were Prickett and Holtz. During the meeting, Prickett explained to Holtz why the Union considered the grievance on behalf of Hahn to be timely. Prickett stated as far as the timeliness issue, because the policy was from 2008, it was the Union's position that Respondent had changed the policy when they changed the way they were implementing it, and that was what the Union was grieving. The grievance had asked them to cease and desist and it was the Union's view that the grievance covered all affected employees. Prickett stated it was the Union's position they would not have to continue to file grievances on each individual. Prickett testified she stated the grievance covered everyone going forward as long as Respondent implemented that way. Prickett stated, as far as the information she had requested, it was necessary for her to have the information to process the grievance. Holtz stated he would talk to Zenisek and she would take care of it. Prickett testified that, at the time of her testimony, she had not received the requested information.

20 On November 7, Prickett wrote Zenisek pertaining to the Gruenke, Cherkasova, Hahn, and "all other similarly affected employees" grievances. Prickett stated the Union requested to proceed to grievance mediation under Article VII, Section 7.1.2(c) of the contract. Prickett stated the Union has not received the information requested in the September 29 grievance letter, that the Union again requests this information be forwarded to the Union as it is relevant and necessary for the Union to process the grievance. Prickett suggested November 9 as the date for the mediation, since the mediator was already scheduled to hear a grievance on the same issue on that date. Prickett testified the grievances for Meinhardt and the other three named individuals were taken to mediation, but Respondent refused to arbitrate them because the contract has expired. Prickett testified the grievances are just out there and she thought they were part of the unfair labor practice hearing.

25 Holtz testified he issued a September 17 discipline to Meinhardt for violating the call in policy. Meinhardt was given a 2 day suspension for calling in at 1:05 p.m. to not report to work for his 2 p.m. shift. Holtz testified when Meinhardt called in he spoke to Winkelhorst, who was Holtz' assistant. Holtz testified the first step in the process is whoever takes the call fills a sheet, which is then submitted to Holtz. Holtz testified when he gave Meinhardt the discipline, Meinhardt explained to Holtz that he had a migraine headache as the reason he could not come in. The September 17 write up and suspension to Meinhardt, signed by Holtz states a call was taken at 1 p.m. for a 2 to 10:30 p.m. shift, which was a violation of the call in policy and because

of the time of the call in relation to the shift start up time it was considered a no call no show. The warning contained an attachment stating the reason was a headache, noting the call was received at 1:05, that the absence was not expected in advance, and it was marked considered by supervisor as excused. The attachment was filled out by Winkelhorst. However, Holtz testified it is his position that employees are to provide 4 hours of notice if they are not coming to work, regardless of the reason.

The record contained a list of individuals who were disciplined for failing to follow Respondent's 4 hour call in policy. The list contained five individuals who were disciplined prior to Meinhart's September 17 suspension. Patti Toston was the first to be disciplined, and her discipline was dated May 11. The list shows she called in 11 minutes after her shift was to begin. The actual discipline to Toston is dated May 13. The discipline, signed by Holtz, states this was not the first time this has happened, but it was the first time it was documented. In fact, Holtz testified Toston's absence came under the Family Medical Leave Act (FMLA) and her May 11 discipline was rescinded. The list showed that three of five individuals who were disciplined prior to Meinhardt failed to call in at all and were shown as terminated or job abandoned. The fourth, Jerry Yang is shown on the list as having called in an hour before the start of his shift and receiving a two day suspension. However, Yang's actual written warning dated May 16 signed by Holtz shows that Yang did not call in. Holtz could only list one person, prior to David Meinhart, who called in within the four hour period, that is less than four hours, who was deemed a no call no show. Holtz named Toston, but admitted her discipline was rescinded because she was covered by the FMLA.

C. Analysis

1. The duty to bargaining concerning the September 18 reduction of 19 full-time employees to part-time status

In *NLRB v. Katz*, 369 US 736, 743 (1962), the Court stated, "We hold that an employer's unilateral change in conditions of employment under negotiation is similarly a violation of s 8(a) (5), for it is a circumvention of the duty to negotiate which frustrates the objectives of section 8(a)(5) much as does a flat refusal. In *Comau, Inc.*, 357 NLRB No. 185, slip op. at 3-4 (2012), it was stated:

As to the second and third factors, we find that the nature of the violation was such that it was likely to have a detrimental and lasting effect on employees and to cause employee disaffection from the Union. The Respondent's unilateral change in healthcare substantially affected all, or nearly all, unit employees and it directly impacted their compensation. In this regard, the employees went from paying no health insurance premium to hundreds of dollars every month in some cases.^[FN9] It follows that such a change would undermine the employees' confidence in the Union as their collective-bargaining representative. *Priority One Services*, 331 NLRB 1527, 1527 (2000) (finding that 9.5 % increase in health insurance premiums had a tendency to cause erosion of union support, and thus tainted decertification effort, because the change "substantially affect[s] all unit employees and directly impact[s] employee compensation, one of the fundamental subjects concerning which employers must bargain pursuant to Section 8(d) of the Act."); *Penn Tank Lines, Inc.*, 336 NLRB 1066, 1067-1068 (2001) (finding that unilateral reduction in waiting-time and lost-time pay had a tendency to undermine employees' confidence in the union and to cause erosion of union support); *Powell Electrical Mfg. Co.*, 287 NLRB 969, 976 (1987), *enfd. as modified* 906 F.2d 1007, 1014 (5th Cir. 1990) (unilateral implementation of contract offer without valid impasse contributed to employee disaffection and tainted petition on which withdrawal of

recognition was predicated); *Page Litho, Inc.*, 311 NLRB 881 (1993) (“It is well settled that the real harm in an employer's unilateral implementation of terms and conditions of employment is to the Union's status as bargaining representative, in effect undermining the Union in the eyes of the employees.” (citing *NLRB v. C&C Plywood Corp.*, 385 U.S. 421, 430 fn. 15 (1967))). Further, as the Board found in *Penn Tank Lines*, supra, “[w]here unlawful employer conduct shows employees that their union is irrelevant in preserving ... their wages, the possibility of a detrimental or long-lasting effect on employee support for the union is clear.” *Id.* at 1067.

Similarly, in *Camelot Terrace*, 357 NLRB No. 161, slip op. at 4 (2011), it was stated that, “Unilateral changes concerning wages, hours, benefits, and other important terms and conditions of employment, as well as direct dealings with unit employees, ... would predictably undermine both the Union's leverage in bargaining and its support among employees.” In *Palm Beach Metro Transportation, LLC*, 357 NLRB No. 26 (2011), the Board found the respondent violated Section 8(a)(1) and (5) of the Act by unilaterally reducing the number of hours and days of work of unit employees.

In *Carpenters Local 1031*, 321 NLRB 30, 31 (1966), the Board, in finding the respondent violated Section 8(a)(1) and (5) of the Act, stated it is well established, with limited exceptions, that the decision to lay off employees is a mandatory subject of bargaining; and the hours and days of the week which employees shall be required to work are subjects well within the realm of 'wages, hours, and other terms and conditions of employment' about which employers and unions must bargain. The Board noted in finding a violation of the Act that, after voluntarily recognizing the Union as its employees' bargaining representative, the respondent laid off one employee, changed the hours of another, and then laid him off without prior notice to or bargaining with the union. The Board went on to state:

We disavow the judge's statement in his decision that the “unconscionable delay in commencing bargaining [for a collective-bargaining agreement] was not the fault of the employer, but much more attributable to the dereliction of the Union.” Such a conclusion is unsupported from the record evidence, and, in any event, any delay in scheduling the first negotiating session between the parties was not an issue in this case. *id.* at 33, fn. 3²³

²³ In the present case, on June 27, Eiden sent Paul Butera contract reopener letters for the clerks and meat cutters contracts pertaining to the Store 15 collective-bargaining units. The letters asked Butera to contact Eiden as soon as possible with the earliest dates available to begin negotiations. On July 25, Simandl sent Sweet a letter stating the Sheboygan contracts were set to expire on September 7, and Simandl requested dates when the Union was available to bargain. There were no meetings set for Store 15 contract negotiations prior to the September 15 reduction in status of the employees at issue here. On the other hand, Withers testimony reveals the Union had been participating in negotiations with Respondent concerning the Racine/Kenosha and Menasha stores, and as Respondent was aware, Withers was at the Menasha store on September 15 pertaining to those negotiations. There is no contention by Respondent that the Union abandoned the Sheboygan unit, nor any support for such a contention if made. I do not find the slow start to negotiations here can be attributable to either party, as the Respondent took a month to respond to the Union's initial request for bargaining dates, and even then did not provide the Union with its requested dates. The evidence reveals that following Respondent's reduction in status of the 19 employees, the Union took the position that bargaining was blocked at Store 15 until Respondent restored the employees to their prior positions as full-time employees. I do not find that any of the Union's

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In *Omaha World-Herald*, 357 NLRB No. 156, slip op. at 3-4 (2011), it was stated:

Under well settled Board law, “the waiver of a union's right to bargain does not outlive the contract that contains it, absent some evidence of the parties' intentions to the contrary.” *Ironton Publications*, 321 NLRB 1048, 1048 (1996). This principle applies both to collective-bargaining agreements and to reservation of rights language embodied in outside plan documents incorporated by reference. See *E. I. du Pont De Nemours, Louisville Works*, 355 NLRB No. 176, slip op. at 2 (2010). Because there is no evidence that the parties intended any relevant provision of the agreement to continue in force beyond its expiration, any waiver that might be shown by the contract language or plan documents cited by the Respondent ended when the contract expired. See *Paul Mueller Co.*, 332 NLRB 312, 313 (2000).^[FN13]

In arguing that this change should be found lawful, our dissenting colleague concedes that well-established precedent dictates otherwise. In the dissent's view, the reservation of rights language here, standing alone, authorized unilateral action on the Respondent's part both during the contract term and indefinitely thereafter. However, as the Board recently reiterated in *E.I. DuPont*, a reservation of rights clause is not, in itself, a term or condition of employment that continues in force under Section 8(a)(5) as part of the status quo. See 355 NLRB No. 176 at 3 fn. 9 (citing *Holiday Inn of Victorville*, 284 NLRB 916, 916 (1987)). Rather, when incorporated by reference in a collective-bargaining agreement,^[FN14] a reservation of rights clause is a waiver of a union's statutory right to bargain over such matters and, thus, like any waiver, expires with the contract absent evidence of a clear and unmistakable intent to the contrary. *Holiday Inn*, 284 NLRB at 916. No evidence exists in this case to suggest that the parties intended the reservation of rights language in the 401(k) plan documents to continue post-contract expiration.

In *E.I. Dupont de Nemours*, 355 NLRB No. 176 slip op. at 1-2 (2010), it was stated:

It is settled law that when parties are engaged in negotiations for a collective-bargaining agreement an employer is obliged to refrain from making unilateral changes, absent an impasse in bargaining for the agreement as a whole. (Citations omitted.)

It is undisputed that, at the time that the Respondent unilaterally implemented changes in the Beneflex Plan, the parties were engaged in bargaining and were not at impasse. But relying on the Board's *Courier-Journal* decisions, the Respondent asserts that its unilateral actions were lawful because they were consistent with the parties' past practice. The Respondent bears the burden of establishing this affirmative defense. *Beverly Health & Rehabilitation Services*, 335 NLRB 635, 636 (2001), enfd. 317 F.3d 316 (D.C. Cir. 2003).

We find that the Respondent has not carried that burden. In the *Courier-Journal* cases, a Board majority found that the employer's unilateral changes to employees' health care premiums during a hiatus period between contracts were lawful because the employer had established a past practice of making such changes both during periods when a contract was in effect and during hiatus periods. The Respondent's asserted past practice in this case, in contrast, was limited to changes that had been made when a contract, which included the reservation of rights language, was in effect. It is apparent

actions justifies Respondent's failure to provide the Union with timely notice and an opportunity to bargain concerning the 19 employees' September 18 reduction in status.

that a union's acquiescence to unilateral changes made under the authority of a controlling management-rights clause has no bearing on whether the union would acquiesce to additional changes made after that management-rights clause expired. The Respondent has simply not carried its burden of showing relevant past practice under the *Courier-Journal* cases—annual unilateral changes during hiatus periods. As a result, the Respondent's prior unilateral changes do not establish a past practice justifying the Respondent's unilateral actions during a hiatus between contracts. The *Courier-Journal* decisions are plainly distinguishable on this basis, as the judge explained in a decision we adopt today in *E.I. Dupont*, 355 NLRB 177 (2010), presenting a similar bargaining issue but at a different facility of the Respondent.

This factual distinction is key because it implicates important collective-bargaining principles. Extending the *Courier-Journal* decisions to the situation presented here would conflict with settled law that a management-rights clause does not survive the expiration of the contract embodying it, absent a clear and unmistakable expression of the parties' intent to the contrary,^[FN1] and does not constitute a term and condition of employment that the employer must continue following contract expiration.^[FN2] Those principles apply to a broad management-rights clause as well as to more narrow contractual reservations of managerial discretion addressing, as here, a specific subject of bargaining^[FN3] and embodied in a plan document that has been incorporated in a collective-bargaining agreement.^[FN4]²⁴

Similarly, in *Ironton Publications*, 321 NLRB 1048, 1048 (1996), the Board refused to extend a contract provision granting an employer the right to grant merit increases beyond the term of the contract. The provision was contractual provision pertaining to merit increases with no contention that it was bound up in a generic management's rights clause of the expired collective-bargaining agreement. The Board stated, "Even assuming that Article V constituted a valid waiver of the Union's statutory right to bargain over merit increases, the waiver did not survive the May 7, 1993 expiration of the contract ...". "It is well settled that the waiver of a union's right to bargain does not outlive the contract that contains it, absent some evidence of the parties' intentions to the contrary."

In *Control Services*, 303 NLRB 481, 483-484 (1991), enfd. 975 F.2d 1551 (3rd Cir. 1992), an expired collective-bargaining agreement contained a provision stating that "Nothing

²⁴ Respondent in its brief cites language contained in *Bay Area Sealers*, 251 NLRB 89, 90 (1980), enfd. as modified on other grounds 665 F.2d 970 (9th Cir. 1982), stating that although an employer's contractual obligations cease with the expiration of the contract, those terms and conditions established by the contract and governing the employer-employee relationship, as opposed to the employer-union relationship survive the contract and present the employer with a continuing obligation to apply those terms and conditions, unless the employer gives timely notice of its intention to modify a condition of employment and the union fails to timely request bargaining, or impasse is reached during bargaining over the proposed change. However in *Indiana & Michigan Elec. Co.* 284 NLRB 53, 54-55 (1987), the Board majority refused to follow the analysis set forth in *Bay Area Sealers*, supra., referring to it as "dictum" and pointing out that in its analysis there the Board did not clarify how it would classify various terms and conditions of employment. In *Indiana & Michigan Elec. Co.* the Board stated, "Indeed, a court of appeals has recently rejected an employer's attempt to rely on this very same 'ambiguous dictum' in support of an argument that an employer may unilaterally change hiring hall procedures after contract expiration. *Southwestern Steel & Supply v. NLRB*, 806 F.2d 1111, 1113 (D.C. Cir. 1986)."

contained in this agreement shall be deemed to constitute a guarantee of any particular number of hours, or any particular days of work per week for any employee.” The agreement contained a provision providing for higher hourly wages for full-time than for part-time employees, and a provision for hospitalization and major medical benefits for “regularly employed full time (40 hours or more per week)” employees, but not for other employees. The agreement also
 5 contained a management rights clause which stated the company had the unqualified right to schedule hours of employment, or to relieve employees of duties because of lack of work. However, the Board rejected the respondents arguments that the former contract gave it the right to reduce employees' hours of work, or that it had the derivative right to convert the employees from full-time to part-time status, with accompanying wage reductions and loss of
 10 health benefits, without bargaining with the Union. The Board stated, "the Respondent was legally obligated to bargain with the Union over changes in the employees' working hours (and the effects of those changes on wage rates and health benefits) unless the Union had waived, contractually or otherwise, its right to bargain over those subjects. We find no such waiver." While the contract stated the employees were not guaranteed any particular number of hours of
 15 work per week, the Board held the provision could not be interpreted to mean the involved local unions waived their statutory right to bargain over changes in the numbers of hours to be worked by unit employees, at least insofar as such changes would automatically result in a lowering of wage rates and a loss of medical benefits. The Board stated the contractual management rights clause only gave the respondent the right to schedule hours, not reduce
 20 them. The Board also held a management rights clause is not a term and condition of employment that "outlives the contract that contains it, absent some evidence of the parties' intentions to the contrary. Thus, any waiver of a union's bargaining rights that is bottomed on a ment rights/ment-rights clause normally is limited to the time the contract is in force."

25 In *Bell Atlantic Corp.*, 336 NLRB 1076, 1086 (2001), it was stated:

It has long been settled law that an employer that desires to make material changes in the terms and conditions of employment of its union-represented employees has a duty under the Act to give timely notice to the union and afford the union a meaningful
 30 opportunity to bargain before implementing the changes. It is also well settled that, upon receipt of such notice from an employer, a union must act with due diligence to request bargaining, otherwise it may be found to have waived its right to bargain over the matter. The Board has held, however, that where notice is given too short a time before implementation, or under circumstances where it is clear that the employer has no
 35 intention of bargaining about the subject, then a violation will be found even if the Union has failed to request bargaining. In such cases, the Board has found that the notice is nothing more than informing the Union of a “fait accompli.” In determining whether an employer has presented the Union with a “fait accompli,” the Board looks for objective evidence. (Citations omitted from quote.)

40 In *Brannan Sand and Gravel*, 314 NLRB 282 (1994), the Board found the respondent did not satisfy its obligation to provide the union with timely notice and an opportunity to bargain over a change in health care rather it presented the change to the union as a fait accompli. In this regard by the time the union was apprised of the contemplated changes, the respondent had
 45 already announced them to employees. Plus, the respondent’s own witness testified that any discussion over the health plan changes would have been fruitless because the respondent had no intentions of doing anything other than what it planned to do. Thus, the Board found the respondent violated Section 8(a)(5) by unilaterally implementing the health care changes.

50 In the instant case, the parties had two collective-bargaining agreements at the Sheboygan store each with effective dates of May 7, 2009 to September 7, 2011. One labeled

the clerks agreement and the other the meat department agreement. All individuals working at the store were covered by one of the two agreements, with the exception of Store Manager Holtz. The parties met on January 7, 2011 at Respondent's corporate offices. During the meeting, Respondent Owner Paul Butera told Union officials Eiden and Withers that competition was coming to Store 15 in the form of a Festival store opening in Sheboygan. He reported customer complaints at Store 15 to the Union officials and asked for their help in getting the employees to better service the customers. Respondent Official Zenisek, who attended the meeting, testified she did not recall the Union being notified of any planned reductions in staffing at Store 15 on January 7.

Respondent began to plan for the opening of the Festival store in Sheboygan as early as July. At that time, Holtz received a note from Bucaro concerning a plan for a competitor coming to town. On August 26, Holtz sent Braunreiter an e-mail forecasting sales for the period of the week ending August 27 through the week ending October 15 at Store 15. In the e-mail Holtz predicted substantial drops in sales for the week endings September 17 through October 15 from 2010 sales covering the same period of time. That same date, Holtz wrote Braunreiter an e-mail showing a projected drop in labor hours scheduled for the weeks ending September 17 through October 15. Braunreiter responded on August 29, stating that for the weeks ending September 24 to October 15, he predicted a larger hit in the range of a 16% to 26% drop informing Holtz that Braunreiter preferred to be on the conservative side in preparing for the sales loss. In fact, Holtz gave a pre-hearing affidavit on November 25, in which he stated he and Braunreiter met in early September and made a decision concerning future scheduling at Store 15 based on an anticipated 30% sales decrease from the current sales compared to the sales they did in the same week the year before.

While Holtz testified the decision to reduce the full-time to part time employees and the scheduling of those employees was solely the decision of Braunreiter and Holtz, I do not credit this testimony. First, it was Bucaro who contacted Holtz in July about a need for a plan for the coming competition. Bucaro followed up with an e-mail on September 2, sent to Holtz, Braunreiter, and Zenisek summarizing Bucaro's thoughts pertaining to Festival's opening in two weeks. Bucaro stated they should anticipate a drop of 15 to 20% from last year's sales, and instructed that they must make adjustments in scheduling from day 1. He instructed them to reduce labor costs. He instructed a hiring freeze, and the termination of certain probationary employees. He informed them that they would likely need to address status reductions. This was all the more likely in view of Bucaro's instruction to reduce labor costs since full-time employees received significant benefits unavailable to part-time employees. Thus, on September 2, Burcaro informed Holtz, Braunreiter, and Zenisek to formulate a plan to begin on day 1 of Festival's opening, with no mention of their notifying or bargaining with the Union prior to the plan's implementation. On September 14, a human resource specialist from Respondent's corporate office sent Holtz an e-mail, copied to Braunreiter and Zenisek, with an attachment pertaining to frequently asked questions concerning notification to employees for a reduction from full-time to part-time status. Holtz was also the recipient of a September 16 outline to employees from Respondent's corporate office pertaining to the status reduction, which predicted a 30 to 40% reduction in sales at Store 15 the first couple of weeks following Festival's September 16 opening. Thus, I have concluded that Respondent's corporate office was instrumental in planning the reduction of the employees from full-time to part-time status, although Holtz and Braunreiter were left to fill in the actual scheduling details pursuant to the confines of Bucaro's September 2 directive.

Holtz testified that on September 13, 14, and 15, he and Braunreiter notified employees individually in meetings they were being reduced from full-time to part-time status effective September 18. They were notified their option for health insurance would end at the

end of November. Their hours were reduced from 40 hours a week to for the most part 25 hours a week, which would cut into their vacation pay, as well as earnings for shift premiums, among other benefits lost. In all, 19 employees were reduced from full-time to part-time in a complement of about 118 employees. Two employees who were on leave were not notified at that time. However, Holtz posted the schedule for the following week on September 15, where
 5 all 19 employees were reduced specifically listing them on the schedule as "PT" signaling to all employees in the unit their change in status. Holtz testified no union representative was present when the employees were notified of their change in status and he did not inform anyone from the Union that he was going to be speaking to the employees. Similarly, Zenisek testified she did not inform anyone from the Union the schedule changes were going to be made before they
 10 were made. In fact, Zenisek stated in her pre-hearing affidavit that Respondent was allowed to make the changes pursuant to the management rights clause in section 1.1 of the clerk's agreement and 1.10 of the meat agreement. Zenisek stated in the affidavit that because the contract allowed Respondent to make the changes they did not need to notify and bargain with the Union. Thus, Respondent unilaterally altered 19 employees work schedules and reduced
 15 their hours, earnings, and benefits, including informing them they would lose health insurance and/or the ability to obtain health insurance coverage through Respondent for themselves and their families, without first notifying the Union or offering the Union an opportunity to bargain. The testimony of Respondent's witnesses reveals this was done as a *fait accompli* obviating the Union's need to request bargaining over Respondent's actions. See, *Bell Atlantic Corp.*, 336
 20 NLRB 1076, 1086 (2001); and *Brannan Sand and Gravel*, 314 NLRB 282 (1994).

Therefore, Respondent will be found to have violated Section 8(a)(1) and (5) of the Act pertaining to its unilateral reductions concerning employees, unless it raises a valid affirmative defense in support of its conduct. The Respondent bears the burden of establishing this
 25 affirmative defense. *Beverly Health & Rehabilitation Services*, 335 NLRB 635, 636 (2001), *enfd.* in relevant part 317 F.3d 316 (D.C. Cir. 2003). Respondent's reductions to part-time status affected 17 employees from the clerks unit and 2 employees from the meat department unit at Store 15. Withers credibly testified that during the initial grievance meeting on September 21 pertaining to the reduction in status grievance Zenisek informed the Union that Respondent was
 30 privileged to make these reductions in status under the aforementioned management rights clause in each of the collective-bargaining agreements. Both collective-bargaining agreements contain identical management rights provisions. Withers asked Zenisek if there were any other provisions, and she replied no. Withers testimony is confirmed by admissions in Zenisek's pre-hearing affidavit that she thought Respondent did not need to notify and bargain with the Union
 35 over the reductions due to the contractual management rights provisions as well as by her testimony at the hearing. In fact, on December 5, Respondent attorney Simandl submitted a position statement to the Regional office wherein he stated, citing the collective-bargaining agreements management rights provision, that "Prior to the expiration of the collective bargaining agreement ("CBA"), the Union unequivocally waived its right to bargain over the
 40 Company's right to plan, determine, direct and control store operations and hours". Simandl went on to state "It is the past practice of unilateral activity under the management-rights clause of the CBA, and not the existence of the management-rights clause itself, that the Company relied on in determining that it has the right to unilaterally adjust the Sheboygan schedules based on the needs of the Company."

45 However, at the unfair labor practice trial, Respondent's counsel took a different position as to what enabled Respondent to make the September 15 reductions in status of the bargaining unit employees. In this regard, the following exchange occurred:

50 MR. ANDREWS: Correct, Your Honor. And just to correct another point of clarification here. We are not contending that reliance upon the management rights clause is what

allowed the Employer to do this. The opinion of certain lay witnesses may have made reference to the management rights clause in a generic sort of sense that it is the management's right to do so, but that is not our contention at this time.

JUDGE FINE: What -- is that going to change later or do you mean --

5 MR. ANDREWS: No, it is not our contention at all, that the management rights clause is something that would give us the right to do so. We clearly understand that the management rights clause expires with the collective bargaining agreement.

JUDGE FINE: All right, so you are not saying -- what is your position as to why Article 3.3 would survive the collective bargaining agreement when the management rights clause does not?

10 MR. ANDREWS: Because it is specifically and clearly bargained for, a specific procedure to be followed, triggered only by particular business needs. And the fact that the General Counsel's representative argues that that particular business need had not been met, I think belies the fact that -- that is their concern is that perhaps the trigger had not been set, and it is exactly right that is -- Your Honor's point -- that it is something for a grievance or an arbitration to determine whether that trigger had been met, so we can --

JUDGE FINE: Well, I am not saying that is my point --

MR. ANDREWS: -- we can demonstrate that it can. (Tr. 51-52)

20 In this regard, Respondent states in its post-hearing brief that, "it is hornbook law that a collective bargaining agreement remains in effect post expiration except for a limited number of clauses that expire with the contract, such as the management rights clause and no strike provisions." (Resp. Brief at 16). Respondent continues to rely on language contained article 3.3 in its post-hearing brief as granting it the post contract expiration right to reduce the employees status as this is the only contractual provision it cites in its brief in support of its position.

In The Chesapeake and Potomac Telephone Company v. NLRB, 687 F.2d 633, 636-637 (2nd Cir. 1982), the court stated:

30 However, national labor policy disfavors waivers of statutory rights by unions and thus a union's intention to waive a right must be clear before a claim of waiver can succeed. Waivers can occur in any of three ways: by express provision in the collective bargaining agreement, by the conduct of the parties (including past practices, bargaining history, and action or inaction), or by a combination of the two. The language of a collective bargaining agreement will effectuate a waiver only if it is "clear and unmistakable" in

35 waiving the statutory right. The same standard applies to conduct of the parties; whether alone or in combination with contractual language, conduct can effectuate a waiver only if the union's intent to waive is clear and unmistakable from the evidence presented. (Citations omitted.)

40 A waiver of a statutory right will not be inferred from a general contractual provision, such an undertaking must be explicitly stated, and "the waiver must be clear and unmistakable." See, *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983). "To meet the 'clear and unmistakable' standard, the contract language must be specific, or it must be shown that the matter claimed to have been waived was fully discussed by the parties and that the party

45 alleged to have waived its rights consciously yielded its interest in the matter." *Allison Corp.*, 330 NLRB 1363, 1365 (2000); *Georgia Power Co.*, 325 NLRB 420, 420-421 (1998), enfd. 176 F.3d 494 (11th Cir. 1999); *St. Joseph Medical Center*, 350 NLRB 808 (2007); and *Philadelphia Coca-Cola Bottling Co.*, 340 NLRB 349, 353 (2003), enfd. mem. 112 Fed.Appx. 65 (D.C.Cir. 2004).

50 In *Philadelphia Coca-Cola Bottling Co.*, id. at 353, the following principles were set forth:

A past practice is defined as an activity that has been “satisfactorily established” by practice or custom; an “established practice”; an “established condition of employment;” a “longstanding practice” (citations omitted). *Exxon Shipping Co.*, 291 NLRB 489, 493 (1988); See, also, *Golden State Warriors*, 334 NLRB 651 (2001) *Dow Jones & Co., Inc.*, 318 NLRB 574, 578 (1995). Thus, an activity, such as the Respondent's distribution of bonuses, becomes an established past practice, and hence, a term and condition of employment, if it occurs with such regularity and frequency, e.g., over an extended period of time, that employees could reasonably view the bonuses as part of their wage structure and that they would reasonably be expected to continue. *Sykel Enterprises*, 324 NLRB 1123 (1997); *Blue Circle Cement Co.*, 319 NLRB 661 (1995); *Lamonts Apparel, Inc.*, 317 NLRB 286, 287 (1995); *Central Maine Morning Sentinel*, 295 NLRB 376, 378 (1989); *General Telephone Co. of Florida*, 144 NLRB 311 (1963); *The American Lubricants Co.*, 136 NLRB 946 (1962).

In the present case, the only contractual provision Respondent relies on in support of its otherwise unilateral action is contained in the clerk's contract and reads as follows:

3.3. The Employer will schedule hours of work on a seniority basis. The Employer will schedule employees who are full-time within the meaning of this Agreement for hours not below the full-time classification threshold unless:

- (i) the employee requests a temporary reduction in hours for two more weeks and/or
- (ii) the Employer makes a permanent reduction in the full-time positions in a classification based on business needs.

Respondent has cited no provision in the meat department contract although it reduced two employees there to part-time status on September 18. Thus, Respondent has raised no contractual defense pertaining to its reduction of meat department employees Sommersberger and Thede on the September 15 schedule. Moreover, Respondent entered no evidence that any meat department employees at Store 15 had been reduced from full-time to part-time status in the past under the most recent collective-bargaining agreement, or during a prior contractual hiatus. Accordingly, I find Respondent has failed to meet its burden of establishing a defense as to failure to bargain with the Union concerning reduction to part-time status of Sommersberger and Thede, and that it violated Section 8(a)(1) and (5) of the Act by reducing them to part-time status.²⁵

²⁵ Respondent did not cited meat department contract article 7.8 as a basis for its actions pertaining to the meat department reduction to the Union during the grievance meetings, in its pre-hearing position statement, at the trial, or in its post-hearing brief. It is clear article 7.8 was not followed at the time of the reduction as the two meat department employees were not scheduled to be laid off as required by the article. Rather, I have concluded as admitted in Zenisek's pre-hearing affidavit that at the time of the layoff Respondent's officials were relying on the contractual management rights provisions in each of the contracts, and only after the fact switched to a reliance on article 3.3 in the clerks agreement, when it was concluded that reliance on the management rights articles did not create a legally sound argument under Section 8(a)(5) of the Act. Moreover, while Zenisek testified she mentioned seniority to the Union officials during the grievance meetings over the status reductions, I do not find her testimony persuasive. I find seniority may have been referenced as to which employees were selected for reduction, but Respondent, at the time, was relying solely on the contractual management rights provisions in its decision to reduce employees without bargaining with the

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As to the reduction of the 17 clerk's department employees, Respondent as of the time of its brief only relies on clerks agreement provision set forth in article 3.3. Withers testimony reveals that the term "business needs" appeared for the first time May 2009 to September 2011 agreement, and that it was an employer proposal. Withers testified the parties agreed to the "business needs" language because it was something that was tangible that they could both review. Withers testified that present for the meeting when this was discussed were: the federal mediator, Simandl, Judy Butera, Keonig, and Union officials Eiden and Withers. Withers testified the issue of Festival Foods was raised by Respondent through the mediator. Withers testified it was stated that if a Festival store opened up across the street and by example if there was a 40% reduction that would trigger a reduction in staffing if the Respondent was able to demonstrate the reductions were necessary relating to the business needs language. Withers testified this addressed the Union's concerns because they would be able to review the evidence. Withers testified Respondent had provided the Union with financial records in the past. Withers testified there was no minimum level of business needs in which Respondent would not have to provide the Union the evidence. Rather, he testified if they claimed business needs they would have to demonstrate it to the Union.

I do not find the term business needs as written in article 3.3 gave the Respondent the unilateral right to reduce employees to part-time. The term as written is ambiguous in that it does not state business needs as determined by Respondent. Rather, Withers undisputed testimony reveals that the parties contemplated a discussion between the parties and the Union's review of Respondent's financial records should Respondent raise the business needs issue to the Union in terms of a proposed reduction in status. While Withers testified no floor in terms of business needs was established during the contract negotiations, his undisputed testimony reveals that further discussion and negotiation between the parties would occur should Respondent raise the issue during the life of the agreement. Thus, I have concluded that the contract language standing alone did not provide the Respondent the unilateral right to reduce employees to part-time status.²⁶ Moreover, even if it did there was no evidence submitted by Respondent that the parties discussed or agreed that the contract language would remain in effect following the termination of the agreement. Finally, Respondent has produced no evidence of an established past practice that would enable it to unilaterally reduce employees. Rather, Respondent cites only one example where three employees were reduced from full-time to part-time status in the deli-department in May 2010. The grievance over this reduction came on the heels of employees from another Sheboygan store bumping into Store 15. The Union's failure to take the reduction to arbitration could have resulted from an

Union in the first instance.

²⁶ The facts in this case also do not establish that Respondent has established business needs in support of the reduction of the 17 clerks unit employees. Respondent admits that it made the reductions based on loss of sales forecasts premised on the opening of the new Festival store. However, these projections were made before the store even opened. Holtz testimony and the documentary evidence reveals these forecasts varied greatly between Bucaro, Braunreiter and Holtz. Moreover, as of the September 21 grievance meeting, Withers testimony reveals the Union officials were told the reduction of 19 employees was based on a projected 30% percent loss of sales. Withers testimony is confirmed by admissions in Holtz and Zenisek's pre-hearing affidavits. In fact, Respondent's records revealed that for the first full 6 weeks following Festival's opening there was only an average of a loss of 10.73 % of sales from the prior year. As set forth above, regardless of the actual loss of sales, I do not find that Respondent had the right to act unilaterally in reducing employees in the circumstances presented here.

accommodation of placing employees from the other store into Store 15. Regardless, a one time event does not constitute evidence of a waiver or of an established past practice. See, *Philadelphia Coca-Cola Bottling Co.*, supra. Similarly, Respondent's argument that it schedules employees' work hours does not convert to the unilateral right to reduce employees' status from full-time to part-time with the resulting loss of pay and benefits, including access to health insurance. See, *Control Services*, 303 NLRB 481, 483 (1991).²⁷

I do not find the cases cited by Respondent require a different result. In *Holiday Inn of Victorville*, 284 NLRB 916 (1987), the Board stated a management rights clause is not a term and condition of employment to the extent it authorizes unilateral action to change matters that are mandatory subjects of bargaining. The Board stated normally the statutory waiver created by a management rights clause would be limited to the time during which the contract that contains it is in effect. However, the Board stated it does not follow that work rules and practices promulgated by virtue of the management rights clause during the term of the contract expire with the termination of the contract. The Board stated because work rules are a mandatory subject of bargaining in that instance a successor employer had an obligation to bargain with the union about proposed changes to those rules, except for changes the successor had a right to make when setting the initial terms and conditions of employment. In the present case, Respondent promulgated no work rules independent of article 3.3 related to that article during the term of the contract. I have also found no established past practice giving Respondent the right to unilaterally reduce employees to part-time status. Since Respondent has not established any past practice sufficient to survive the extant collective-bargaining agreement, I also find *Frontier Homes Corporation*, 153 NLRB 1070, 1072 (1965), enfd. in part . 371 F.2d 974 (8th Cir. 1967), not applicable here.

In *Beverly Health and Rehabilitation Systems v. NLRB*, 297 F.3d 468 (6th Cir. 2002), also cited by Respondent, the court affirmed the Board's finding that a waiver of a bargaining right in a management's rights clause did not survive the term of the collective-bargaining agreement. The court also found, as I find here, that the respondent there had not established evidence of a past practice that independently survived the expiration of the collective-bargaining agreement and the court affirmed the Board's finding that the respondent's unilateral changes violated Section 8(a)(1) and (5) of the Act. *Shell Oil Co.*, 149 NLRB 283, 287-290 (1964), cited by Respondent, does not alter my conclusions here. There the Board held a 10 year frequently invoked practice of contracting out occasional maintenance work on a unilateral basis predicated upon observance and implementation of article XIV of the parties collective-bargaining agreement had become an established employment practice and, as such, a term and condition of employment which survived during a hiatus period between collective bargaining agreements. The Board specifically noted it did not appear the subcontracting

²⁷ Respondent argues the Acting General Counsel's argument of a shifting defense does not constitute a basis to reject Respondent's contractual argument pertaining to article 3.3 raised at the hearing arguing contract interpretation is a matter of law. However, I find that at the time Respondent reduced the employees' status to part time it was relying solely on the contractual management rights provisions. This was not just the opinion of lay persons such as Zenisek, but it was incorporated in Respondent Attorney Simandl's pre-hearing position statement. Withers testimony reveals Simandl was present for the negotiations when the "business needs" language in article 3.3 was inserted into the clerks agreement. Simandl's failure to raise it as a justification in his position statement, confirms Withers' testimony that the parties did not view it as a contractual waiver at the time it was inserted, or as a carte blanche for Respondent to act unilaterally in the reduction of employees status as happened here.

during this hiatus period materially varied in kind or degree from what had been customary in the past. The Board was careful to state, "we wish to make it clear that our present holding is limited to the particular circumstances of this case and that we do not pass upon whether or not Respondent may, in the future, lawfully expand its subcontracting practice without prior notice and consultation with the Union."

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I find Respondent has not established that its reduction of its 17 clerks unit employees to part-time status was in accordance with any established past practice, or that any contractual provision gave Respondent the right to engage in such an action, in particular following the expiration of the operative contract, or that the Union clearly and unequivocally waived its right to bargain about such matters. Accordingly, I find Respondent violated Section 8(a)(1) and (5) of the Act by its unilateral reduction of the 17 clerks unit employees to part-time status on the September 15 schedule effective September 18.

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2. The constructive discharges of Jeffrey Gross,
Lauriel Hansen, Laura Hoffman, and Tina Meinhardt

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In *Control Services, Inc.*, 303 NLRB 481, 485 (1991), enfd mem. 975 F.2d 1551 (3rd Cir. 1992) the respondent was found to have unlawfully unilaterally reduced the wages and hours of employees and eliminated their health insurance. The Board found that employees who quit as a result of the respondent's actions were constructively discharged in violation of Section 8(a)(3) of the Act. The Board stated, "we rely on the theory of constructive discharge applicable to employees who quit after being confronted with a choice between resignation or continued employment conditioned on relinquishment of statutory rights."^[FN27] In the instant case, the employees were required to work under conditions that were established in derogation of the right to bargain." See also, *Schwickerts of Rochester, Inc.*, 343 NLRB 1044, 1057 (2004); and *Excel Fire Protection Co.*, 308 NLRB 241, 248 (1992).

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Tina Meinhardt, Hansen and Gross' credited testimony reveals they quit Respondent's employ as a result of their September 18 reduction in hours and benefits when they were converted to part-time employees. Since I find they were converted to said status in derogation of the Union's bargaining rights I find they were constructively discharged in violation of Section 8(a)(1) and (3) of the Act.

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Hoffman in the beginning of September was working for Respondent as a full-time employee splitting duties as a liquor manager and MOD. Hoffman was told on September 15 by Holtz that she was being reduced to part-time status and her health insurance would end at the end of November. Prior to her reduction Hoffman was earning \$15.45 an hour, was receiving health insurance and other contractual benefits available to full-time employees, including a time and a half shift differential for her regularly scheduled Sunday work. For the week ending September 24 at Respondent, Hoffman was listed as part-time. Her hours were reduced, and her hourly rate was reduced to \$14.95 an hour. On September 27, Hoffman accepted an offer of employment with Festival. On September 29, Hoffman learned she had been listed on Respondent's schedule as full-time in a new position which was in the office as a customer service manager assistant. On October 1, Hoffman notified Respondent's officials she had accepted a position with Festival and she was giving them her three weeks notice. Hoffman worked one of those three weeks for Respondent, and took two of the weeks off as vacation. For this three week period, Hoffman continued to be compensated at the rate of \$14.95 per hour. Hoffman testified she left Respondent's employ because she was reduced in hours and benefits and she needed full-time work. She credibly testified she accepted the position at Festival before she knew she had been restored to full-time status at Respondent. Hoffman credibly testified that while working for Festival, she declined an offer of work from Respondent

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because she was afraid she would be reduced again. I find the reason Hoffman left Respondent's employ was because of Respondent's unilateral reduction of her pay, hours, and benefits. She accepted employment with another employer at the time she had been reduced to part time status. Even though she was given a full-time position with Respondent before she actually left Respondent's employ it was at a different position and at a reduced hourly rate than the one she occupied prior to Respondent's unilaterally reducing her. She testified she refused to accept future employment with Respondent out of fear that they would reduce her again. I find Hoffman was constructively discharged by Respondent in violation of Section 8(a)(1) and (3) of the Act as her decision to leave was a direct result of Respondent's unilateral action visited upon her in derogation of the Union's bargaining rights. See, *Control Services, Inc.*, supra.

3. Direct Dealing pertaining to Hoffman

The Board has held that an unlawfully discharged employee remains part of the bargaining unit and is eligible to vote in a Board conducted election. *Metro Transport, LLC*, 351 NLRB 657, 663 (2007). In *Formosa Plastics Corp.*, 320 NLRB 631, 632 (1996), the Board held that an employer violates Section 8(a)(5) of the Act by adjusting an employee's grievance without permitting the collective-bargaining representative an opportunity to be present. In that case, the union was processing a discharge grievance on behalf of an employee. Yet the respondent met directly with the employee to adjust the matter in part, without informing the Union, or offering it an opportunity to be present at the meeting. The Board held the employer's repeated counsel to the employee that the Union had given him bad advice undermined the union's statutory authority, and that the respondent bypassed the Union and dealt directly with its employees in violation of Section 8(a)(5) of the Act.

In the present case, Hoffman was working for Respondent as a liquor manager and manager on duty (MOD) as a full-time employee with benefits including health insurance. She was earning \$15.45 an hour. On September 15, Hoffman was told she was going to be reduced to part-time status, and that her health insurance would end at the end of November. The Union filed a grievance on behalf of Hoffman's reduction in status on September 16, and she was represented by the Union during grievance meetings on September 21 and on November 8. As a result of her reduction Hoffman accepted employment at Festival in October, but she continued to work for Respondent for a brief period during which her hourly rate was reduced to \$14.95 per hour and she was given a different position. As set forth above, I have concluded Hoffman was constructively discharged by Respondent in violation of Section 8(a)(1) and (3) of the Act as a result of its unilateral action in reducing her status. Since I have found she was discharged in violation of the Act she had reinstatement rights with Respondent and remained a member of the bargaining unit following her termination. *Metro Transport, LLC*, supra. In fact, since I have found that Hoffman was unlawfully reduced from her full-time position on September 15, she retained reinstatement rights to that position.

Hoffman was invited to a meeting by Respondent's officials which she attended on January 13, 2012. In attendance were Paul Butera, Judy Butera, Suokko, and Hoffman. During the meeting Paul Butera offered Hoffman a job in Respondent's liquor department stating she would she would be in charge of ordering, the displays, the pricing, and the scheduling of employees. She was told she could work up to 45 hours a week, and she would be earning \$15 an hour with 2 weeks vacation. Hoffman asked if it would be a union position, and Judy Butera stated, "At this time, yes." Thus, Respondent had offered Hoffman a position similar to the liquor manager position from which she had been removed. The offer was at a lower pay rate, increased overtime, reduced vacation, and with increased scheduling responsibilities. The Union maintained an outstanding grievance over Hoffman's removal from the liquor manager

position, and I find Respondent's meeting with Hoffman without first notifying the Union and allowing them to attend constituted direct dealing in violation of Section 8(a)(1) and (5) of the Act since it changed the terms and conditions of the position it offered her from the one she occupied prior to her September 18 reduction in status. See, *Formosa Plastics Corp., supra*.

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4. Respondent denigrated the Union to employees

10 On September 14, 15, and 16 Respondent's officials, without notice to the Union, met with 17 full-time employees and informed them they were being reduced to part-time status. On September 15, Respondent posted its weekly schedules in plain view of both bargaining units listing a total of 19 employees who it unilaterally converted from full-time to part-time status. The reduction to part-time status resulted in the loss of work hours, the eventual loss and/or availability of health insurance, and the immediate loss of other benefits. Respondent failed to
15 notify the Union in advance that it was going to take these actions, which I have found to constitute unlawful unilateral changes in violation of Section 8(a)(1) and (5) of the Act.

20 Withers was first informed of Respondent's actions when he received a phone call at around 4:30 p.m. on September 14 from a bargaining unit employee who informed Withers she had been notified she had been reduced to part-time. Withers gave the employee instructions to call him on September 15 after the schedule was posted at the store, and assured her that he had time to file a grievance after the schedule was posted. That same employee called Withers on the morning of September 15 and informed him that 10 or 15 employees were being reduced to part-time status. Withers told the Store 15 employee that either Withers or another Union
25 representative would be at Store 15 on September 16. Respondent was aware that Withers was at another of Respondent's stores on September 15 where he spent a good portion of the day meeting with those employees.

30 On September 15, Holtz, at the direction of Zenisek, posted a letter of that date from Zenisek to Union President Eiden on Respondent's locked bulletin board in plain view next to the work schedules showing that 19 employees had been reduced in status. The letter informed the readers of the reduction in status of the employees. It then went on to state the affected employees "were concerned about their reduction in hours and reached out to the Union to voice their questions and concerns. Unfortunately, Grant Withers informed the employees that he did not have the time to address their concerns. Needless to say, employees were incredibly
35 upset to hear that the Union was too busy to help them." Respondent placed no evidence that Withers ever made any such a statement to employees. In fact, Withers credited testimony reveals he informed the employee who contacted him that the Union would be at the store in a timely fashion to file grievances on behalf of the affected employees. In fact, Withers showed up at the store on September 16, grievances were filed on behalf of all known employees, and grievance meetings were scheduled promptly and attended by the Union. Moreover, Respondent's statements of an alleged concern pertaining to the Union's not reporting to the store on September 15, are undermined by its failure to give the Union advanced notice of the reduction in status, and its later delays or refusals to furnish the Union with requested
40 information pertaining to it. Rather, I find Respondent intentionally kept the Union in the dark, engaged in unilateral changes severely impacting on a large number of employees, and then posted untrue statements about the Union clearly designed to undermine the Union's support amongst bargaining unit employees. Zenisek went on to state in her September 15 posting, "Frankly, the Company is concerned with the Union's lack of support for our employees. Rather
45 than leaving the employees hung out to dry, the Company will be holding an informational meeting for employees to address their questions and concerns. If you have any further

questions, please do not hesitate to call me directly." Thus, while simultaneously announcing unilateral changes which in themselves would foreseeably undermine the Union's support, Respondent posted a message to the employees painting a false concern about the alleged lack of support by the Union, and suggesting they could only come to the company for help with the unilateral acts Respondent committed.

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I find that by its September 15 posting to employees, Respondent violated Section 8(a)(1) of the Act by denigrating the Union to its bargaining unit members. In its posting, Respondent falsely accused the Union of being unavailable to employees, made false representations about statements the Union allegedly made to employees, impugned the Union's representational abilities, and questioned the Union's good faith toward unit members. Despite the fact that it was Respondent which initiated the unilateral changes which I have found to be unlawful; in its message Respondent sought to convey that it, not the Union, was trying to protect employees' interests and the employees relying on the Union would be futile. The Respondent's denigration of the Union did not occur in a vacuum, but in the context of its simultaneous unilateral reduction to part-time status of 19 employees. Instead of accepting responsibility for and remedying its unlawful conduct, the Respondent sought to put the onus on the Union for what it had done. Accordingly, I find that Respondent's published September 15 missive was part of an organized effort to denigrate and undermine the Union. See, *Regency House of Wallingford, Inc.*, 356 NLRB No. 86 (2011); *Billion Oldsmobile-Toyota*, 260 NLRB 745, 754 (1982), *enfd.* 700 F.2d 454 (8th Cir. 1983); *Albert Einstein Medical Center*, 316 NLRB 1040 (1995) (supervisor told employee union could not help a discharged employee get his job back because it was too weak, it had no money and had a lawyer with Alzheimer's disease, and that the employees should have listened to management and not voted for the Union); *Carib Inn San Juan*, 312 NLRB 1212, 1223 (1993) (employer's statement that union did not back up employees and should have obtained certain moneys for employees, and that no union could defend them); and *Lehigh Lumber Co.*, 230 NLRB 1122, 1125 (1977), *enfd.* 577 F.2d 727 (3rd Cir. 1978), *cert. denied* 439 U.S. 928 (1978) (employer violated Sec. 8(a)(1) when it remarked that the union was no good, was "screwing" employees, and employees ought to look for another union).

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By letter of September 19, Eiden responded to Zenisek's September 15 letter. Zenisek responded to Eiden by letter dated September 22, which she again instructed Holtz to post on Respondent's bulletin board to employees.²⁸ In her letter, Zenisek cites Eiden's letter, and states, "It is true that the Company has the right under the contract to reduce hours, but the Union is in part to blame for causing the Company's need to reduce hours. Since January, the Company has warned the Union time and again that nonunion Festival Foods stores were going to compete for Piggly Wiggly business, especially in Sheboygan. We have asked the Union why it is not organizing the non-union stores to create a level playing field." By her posted statement Zenisek conveys to employees that the Union is in agreement that Respondent has the contract right to reduce hours, which the Union was not. She sought to blame the Union for the Respondent's reducing hours by another misstatement that Respondent had warned the Union "time and again" that a Festival store was coming to Sheboygan. There was no evidence presented that Respondent had previously asked the Union why it was not organizing the Festival stores. Zenisek then sought to impugn the Union in the way it was representing Respondent's employees by criticizing it concerning actions to be taken concerning another employer. I have concluded that the posting of Zenisek's September 22 letter to bargaining unit employees was part and parcel of Respondent's orchestrated effort to denigrate and undermine the Union, and that in the context of Respondent's other conduct, the posting of the letter

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²⁸ There is no contention that Respondent posted Eiden's September 19 letter.

coerced employees in violation of Section 8(a)(1) of the Act.

5. Respondent unilaterally changed its call in policy

5 In *United Rentals, Inc.*, 350 NLRB 951, 952 (2007), following an election won by a union the respondent was found to have violated Section 8(a)(1) and (5) of the Act by unilaterally changing its call in policy, when pursuant to the change it disciplined employees for lateness and no longer allowed employees to make up the time at the end of their shift. The Board held there that where employees are subject to discipline for failing to comply with a unilaterally changed policy, "such a change is material, substantial, and significant." In *Holiday Inn of Victorville*, 284 NLRB 916 (1987), the Board stated that work rules and practices promulgated by virtue of the management rights clause during the term of the contract do not expire with the termination of the contract. The Board stated work rules are a mandatory subject of bargaining and in that instance an employer had an obligation to bargain with the union about proposed changes to those rules.

15 In the present case, Respondent's written call-in policy in effect in September read in part, "employees unable to meet their schedule are asked to provide a minimum of four (4) hours notice to the person in charge of the store, if possible." That statement was contained in a restated policy effective April 1, and was also in Respondent's employee handbook effective May 2009.

25 In the fall of 2010, David Meinhardt called in sick around an hour to two hours before the start of his scheduled shift and stated he was not coming in. In March 2011, Meinhardt called in about 20 minutes before the start of his scheduled shift and spoke to Holtz telling Holtz that Meinhardt's father was receiving emergency surgery and Meinhardt was not coming in. Holtz told Meinhardt to take care of it. Meinhardt received no discipline for either incident. In February 2011, Hansen called in called in after the start of her 6 a.m. shift stating she could not come to work due to a snow storm. Holtz testified around 10 employees did not show up for work that day. He testified none of the employees received discipline for not showing up, and that he could not explain the reason there was no discipline.

35 On September 15, Holtz and Braunreiter informed David Meinhardt that his wife Tina Meinhardt had been reduced from full-time to part time status, and that David Meinhardt was being similarly reduced. Holtz told David Meinhardt that he would be losing health insurance as of November 30. David Meinhardt told Holtz that he had 23 years of service and said thanks for throwing Meinhardt's daughter to the street. On September 16, Withers filed with Holtz grievances on behalf of 18 employees including the David and Tina Meinhardt over their reduction in status.

40 On September 17, David Meinhardt called in sick with a migraine headache and hour before the start of his schedule shift. On September 18, after he returned to work, Holtz handed Meinhardt a warning letter and a two day suspension dated September 17. Holtz told Meinhardt the reason for the discipline was that he did not follow Respondent's no call no show policy of calling in 4 hours before not reporting to work.

45 On September 27, a grievance meeting was held over David Meinhardt's discipline and suspension. Meinhardt, who attended, was represented by Prickett. Holtz and Braunreiter represented the Respondent. During the discussion, Prickett raised the call in "if possible" language included in Respondent's policy. She gave examples, citing Meinhardt's situation with a migraine headache, as to why it was not always possible for an employee to call in 4 hours ahead of schedule. The credited testimony reveals that Braunreiter remained firm that an

employee had to call in 4 hours before the start of the shift. During the meeting, it was discussed that since Meinhardt's discipline more employees had been disciplined under the call in policy. On September 27, Prickett filed a grievance on behalf of three named employees and other similarly situated employees who had been disciplined under the call in policy. Holtz testified it was his position that employees are to provide 4 hours notice if they are not coming to work regardless of the reason. However, prior to the David Meinhardt incident, Holtz could not name anyone who called in within 4 hours before the start of the shift who was disciplined.

I find that Respondent unilaterally changed its call in policy when it disciplined Meinhardt and subsequently others who called in within 4 hours, but prior to the start of their shift. The policy itself said employees were to give 4 hours notice "if possible". The past practice shows through the testimony of David Meinhardt and admissions by Holtz that Respondent liberally applied the "if possible" exception and allowed employees leeway when they called in if they provided a reasonable excuse. However, statements by Braunreiter at the grievance meeting and admissions by Holtz reveal that Respondent effectively removed the term "if possible" from the policy when on September 17 Holtz disciplined and suspended David Meinhardt. Rather, Respondent was now disciplining all employees who failed to call in 4 hours prior to the start of the shift regardless of the reason they presented. Respondent's new interpretation of the policy not only altered the plain meaning of the policy language but was in contravention of Respondent's past practice.²⁹ Respondent changed its interpretation of the policy and implementation of the policy without notifying or bargaining with the Union. I find that all of those individuals beginning with and since David Meinhardt, who called in, but who were nonetheless disciplined and suspended, were disciplined under the altered policy, and their disciplines and suspensions are violative of Section 8(a)(1) and (5) of the Act.³⁰

²⁹ Respondent argues in its brief that the good cause language inserted into the call in policy in April 2011, altered the policy and allowed it to discipline unless they demonstrated good cause for their failure to call in 4 hours in advance. I reject this argument. I do not view the good cause language as altering the "if possible" language which remained in the rule. Moreover, the credited testimony of Prickett and Meinhardt reveals that Respondent's officials never considered whether Meinhardt's having a migraine headache constituted good cause for his not calling in 4 hours prior to the start of the shift. Rather, Braunreiter and Holtz response during the grievance meetings, and in Holtz testimony revealed that no reason was going to be acceptable if an employee failed to call in 4 hours in advance. I have found Respondent's new interpretation of the policy constituted a unilateral change.

³⁰ I realize an argument can be made that some individuals who called in may not have had a legitimate reason for not calling in 4 hours prior to the start of the shift. However, the Respondent unilaterally altered the policy taking the legitimacy of the timing of the call out of the equation. I find by its actions it created ambiguity as to what it might have done if it had not altered the policy, and that ambiguity should be held against the wrongdoer, which in this case is Respondent. It should be noted that David Meinhardt's suspension took place two days after he protested his and his wife's reduction in status to Holtz, and one day after the Union filed a grievance on behalf of the reduction in status employees. There is evidence of timing and animus concerning Union activities on this record, but there is no Section 8(a)(3) allegation in the complaint concerning the alteration of the call in policy so I make no finding as to whether the policy change was also violative of Section 8(a)(3) of the Act.

6. The requests for information

5 It has long been held that an employer violates Section 8(a)(5) and (1) of the Act when it fails to provide information requested by the bargaining representative of its employees needed for contract negotiations or administration. *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 152-153 (1956). Information pertaining to employees in the bargaining unit is presumptively relevant. When information pertains to nonunit matters, the burden to show relevance is “not exceptionally heavy.” And the Board uses a “broad discovery-type of standard” in assessing relevance in information requests. *Alcan Rolled Products*, 358 NLRB No. 11, slip op. at 4 (2012). See also, *National Grid USA Service Company, Inc.*, 348 NLRB 1235, 1242 (2006); and *Ormet Aluminum Mill Products*, 335 NLRB 788, 801 (2001). An employer cannot require that information requests be in writing. *Tubari, Ltd.*, 299 NLRB 1223, 1229 (1990); *A.W. Schlesinger Geriatric Center*, 304 NLRB 296, 297 fn.7 (1991); and *Kingsbury, Inc.*, 355 NLRB No. 195 (2010), review denied 2010 WL 5367794 (D.C. Cir., 2010), holding that information that was readily available should have been provided to the union within days of its oral request.

15 In *A-Plus Roofing, Inc.*, 295 NLRB 967, 970 (1989), enfd. 39 F.3d 1410 (9th Cir. 1994), the following principles were set forth pertaining to information requests:

20 Once the initial showing of relevance has been made, “the employer has the burden to prove a lack of relevance ... or to provide adequate reasons as to why he cannot, in good faith, supply such information.” *San Diego Newspaper Guild*, supra at 863, 867. Where the relevance of requested information has been established, an employer can meet its burden of showing an adequate reason for refusing to supply the information by demonstrating a “legitimate and substantial” concern for employee confidentiality interests which might be compromised by disclosure. *Detroit Edison v. NLRB*, 440 U.S. 25 301, 315, 318-320 [(1979)]. In resolving issues of asserted confidentiality, the Board first determines if the employer has established any legitimate and substantial confidentiality interest and then balances that interest against the union's need for the information. *Detroit Edison*, id. at 315, 318; *Minnesota Mining & Mfg. Co.*, 261 NLRB 27, 30 (1982); *Pfizer Inc.*, 268 NLRB 916 (1984). However, where the employer fails to demonstrate a legitimate and substantial confidentiality interest, the union's right to the information is effectively unchallenged, and the employer is under a duty to furnish the information. *Oil Workers Local 6-418 v. NLRB*, 711 F.2d 348, 360 (D.C. Cir. 1983); *NLRB v. Jag-gars-Chiles-Stovall, Inc.*, 639 F.2d 1344, 1346-1347 (5th Cir. 1981); *NLRB v. Associated General Contractors of California*, 633 F.2d 766 (9th Cir. 1980).

35 In the instant case, on September 15, at Zenisek's direction, Holtz posted a letter on Respondent's bulletin Board in plain view of all bargaining unit employees falsely accusing Withers of informing employees that he did not have the time to address their concerns, and raising a false concern on the part of Respondent about the Union's alleged lack of support of its employees. On September 16, Withers showed up at Respondent's facility and verbally asked Holtz for the names of all employees whose status had been reduced from full-time to part-time. At Zenisek's direction, Holtz told Withers he had to put the request in writing. Holtz testified it was Respondent's policy that all of the Union's information requests had to be placed in writing. There is no claim that the Union's request was ambiguous, and as set forth above, an employer cannot require a Union to make its information request in writing. Withers filed a grievance on September 16, on behalf of 18 of the 19 reduced employees. No grievance was filed on behalf of employee Gerharz at the time because Withers was not aware he had been reduced in status. In fact, the Union had to later file a separate grievance on his behalf necessitating a separate grievance meeting for him from the other similarly situated employees

thereby consuming the Union's resources. Coming in the wake of Zenisek's published verbal assault on the bonifides of the Union, I can only conclude Respondent was purposely engaging in obstructionist tactics of the provision of information, and I find Respondent's conditioning of a request for the list of reduced employees on September 16, upon a written request, to constitute an unlawful refusal to provide information in violation of Section 8(a)(1) and (5) of the Act.

5 On September 19, Eiden sent a letter to Zenisek requesting information, including information pertaining to predicted store sales total and by department for the previous 24 month period broken down on a weekly basis. Eiden reiterated Withers September 16 verbal request for a list of all of the employees who had been reduced in hours, and their telephone contact information. Zenisek responded to Eiden by letter dated September 22, stating 10 Respondent did not have information pertaining to the Union's request for projected stores sales for the prior 24 month period. However, Holtz testified Respondent had, at the time, in fact made sales projections for the weeks ending September 17, 24, October 1, and October 8, which were used in calculations pertaining to the reductions of status for the employees in mid-September. Respondent provided no reason for refusing to provide this information to the 15 Union other than contending it did not exist. Since it admittedly did exist, and it was raised by the Respondent as a cause of its actions in the grievance meetings for the staff reductions, I find that Respondent violated Section 8(a)(1) and (5) of the Act by its failure to tender it to the Union. Zenisek sent the Union a list of the names of the employees who had been reduced but 20 not their phone numbers stating the Union was already in possession of their phone numbers because the employees were required to complete a membership application with their phone numbers at the time they became Union members. As Withers testified, some of the employees at issue were long term employees and it was predictable to Zenisek that phone numbers on the union membership applications may have been outdated. The Union was entitled to current 25 phone numbers as they were maintained in Respondent's files. See, *Dynatron/Bondo Corp.*, 305 NLRB 574 (1991), enfd. 992 F.2d 313 (11th Cir., 1993); *Valley Programs*, 300 NLRB 423 (1990); and *Burkart Foam*, 383 NLRB 351 (1987), enfd. 848 F.2d 825 (7th Cir. 1988). I find Respondent's refusal to provide such numbers was part of its obstructionist tactics in preventing the Union from performing its representational functions and violative of Section 8(a)(1) and (5) 30 of the Act.

By letter dated September 27, Withers sent Zenisek a five item information request, items 3 and 4 of which are dispute herein. Item 3 required the production of work schedules of 35 by department for each Piggly Wiggly Store within a 3.5 mile radius of a Festival Foods store for the 12 months "preceding and proceeding" the opening of the Festival Store. Zenisek responded by letter dated October 5, wherein she sought the meaning of the word "proceeding" and stated once that was explained Respondent would make available schedules for Sheboygan for the past 12 months. I do not find Respondent's response to be satisfactory. First, the Union established the relevance of the requested information at the outset of its 40 request by stating that during the course of the September 21 grievance meetings Respondent maintained the projected sales forecast and subsequent reduction in full-time positions for Store 15 were formulated from similar stores with similar sales and competition with Festival stores. Thus, it is undisputed that Respondent had established the relevance of the information by the arguments it raised at recent grievance meetings. Moreover, Zenisek did not raise a relevance 45 objection in her October 5 response. She claimed not to understand the meaning of the work proceeding. I do not credit this claim, but rather I find she merely seized on the word in an effort to set up road blocks to the Union access to the requested information. In the context of the way the sentence was written it is clear when the Union used the word preceding that it was asking for the schedules 12 months before the Festival store opened, and therefore proceeding 50 could only mean 12 months after the store opened. The Union's request was not limited to the Sheboygan store, but for all stores where a Festival opened in competition with Respondent's

stores within the specified geographical description. Moreover, regardless of any claimed misunderstanding of the word "proceeding" there was no reason provided for not providing in a timely manner the schedules for each of the stores covered before the rival Festival store opened, and no reason provided for limiting the response to only the Sheboygan store. Finally, since I have concluded that the Union's request for information was sufficiently clear on its face, I find that Respondent has provided no reason for its delay in providing the information requested. Rather, Respondent has demonstrated a desire to block compliance with the Union's information requests and has done so again here. Withers testified Respondent during one of the September 21 grievance meetings in explanation of the reduction of the full-time employees cited their history of Walmart coming to Sheboygan. Item 4 of the Union's information request asked for the number of reduced or eliminated full-time positions when Walmart opened in Sheboygan. Zenisek did not challenge the relevancy of the Union's request in her October 5 response. She merely stated, "We have no information responsive to your request." I do not find this answer satisfactory. If no positions were reduced or eliminated, she could have so stated, otherwise I believe it was well within Respondent's ability to provide any alleged number of reductions or eliminations.³¹ Accordingly, I find Respondent violated Section 8(a)(1) and (5) of the Act by failing to provide the Union with information requested in items 3 and 4 of Withers September 27 letter.

Withers testified that during the mediation meeting on November 8, held relating to the reduction in status grievances, Withers requested copies of Respondent's surveillance videos dating back to September 17. Withers testified he had seen employees working out of classification on September 21 and again on November 8. He testified that on November 8, grievant Thede informed him that meat cutters had been performing meat wrapper work. Withers testified he requested the information as proof that Respondent was short staffed in support of the Union's position in the reduction in status grievances. Withers testified Zenisek responded that Withers would have to place the request in writing and sign a confidentiality agreement. Withers replied he would not place the request in writing and he would not sign a confidentiality agreement.

On November 11, Zenisek wrote Withers that Respondent would provide Store 15's video footage for a period of time, despite Withers refusal to place the request in writing. Zenisek stated Respondent would supply the information after Respondent received a signed confidentiality agreement. Zenisek informed Withers that Respondent's camera system had a limited amount of recording days so the full extent of the requested information may not be available unless Withers responded in a timely manner. Zenisek asked the Union to provide a statement as to why the information was necessary for the administration of employee rights under the collective-bargaining agreement. On November 11, Withers responded in writing stating, "I have received your letter of November 11 regarding the Union's request for the video tapes of employee activities for the period 9/17/2011 forward." In his letter, Withers stated he would clarify the Union's reason for the request stating the information was to be used in support of the Union's reduction in status grievances pertaining to the approximately 20 full-time employees. Withers stated Respondent had supplied no reason for a confidentiality agreement therefore the Union would not sign one. Withers stated the Respondent had provided such information in the past without the Union signing a confidentiality agreement. Withers stated the Union would file an unfair labor practice charge, and demanded Respondent place a litigation hold on the information for "the period of September 17, to date."

³¹ Respondent argues in its brief that it did not keep records going as far back as when the Walmart opened. This contention was never raised to the Union, nor established on the record. Accordingly, I reject it.

On December 22, Respondent attorney Simandl wrote Union Attorney Sweeney that Respondent would no longer require a confidentiality agreement to view the video footage at Store 15. Withers testified that the Union has since been over to review video footage from two weeks prior to November 8. However, the Union requested footage dating back to September 17. While Withers testified his November 11 letter expanded the Union's information request until an unnamed date going forward, the letter also only asked Respondent to put a hold on information from September 17 to date, indicating the time period was September 17 to November 11. In fact, Respondent complied with the ending period set forth in Withers original November 8, request, as Withers testified the information was supplied up until November 8.³² While Zenisek testified at the hearing that the storage and provision of the video footage was burdensome, Respondent never raised that as a timely defense to the Union in terms of the provision of the video footage for the period of September 17 to November 8. Respondent has also never explained to the Union or justified its condition of providing the information to the Union with the signing of a confidentiality agreement. In fact, Respondent provided a portion of the information without requiring the agreement to be signed. I find Respondent has not timely raised a defense to the provision of the requested information, and Respondent has violated Section 8(a)(1) and (5) of the Act by failing and refusing to provide the Union with copies for viewing of surveillance tapes for the period of September 17 to November 8.

On September 23, Union Representative Prickett filed a grievance over David Mienhardt's two day suspension concerning Respondent's call in policy. Zenisek responded to the letter on September 25, asserting there were no contract violations. There was a grievance meeting on September 27 over the suspension attended by Prickett, Meinhardt, Holtz and Braunreiter. During the meeting, Prickett made a verbal request for information for all disciplines related to a violation of Respondent's attendance policy, and all people calling in or the tracking of sick calls. On September 29, Prickett filed a grievance with Zenisek on behalf of three additional named employees and "other similarly affected employees" who had received a two day suspension for a violation of the no call no show policy. Prickett also made an information request in the letter. She testified it was the same information she requested during this September 27 meeting. She testified she told Holtz and Braunreiter during the meeting she would put the request in writing. The information Prickett requested in the September 27 letter included the following:

- 1.) Copies of the attendance records for all employees for the past 24 months.
- 2.) Copies of any disciplines issued to any employees that called in absent to work within the past 24 months.
- 3.) Copies of all documents used by the Employer to record employees calling in absent or tardy for work (Date, time, etc.) for the past 24 months.

On October 4, Zenisek filed responses to the grievances filed by Prickett on September 29. On October 5, Zenisek provided a written response to Prickett's September 29 request for information. In the response Zenisek asked Prickett to provide a statement as to why the information was necessary in the administration of the collective bargaining agreement. Zenisek also stated in effect there were costs involved in gathering the requested information, and invited Prickett, if her information request was appropriate, to schedule an appointment at Respondent's corporate office to review the records, and to pay for all copying costs at Respondent's regular rate which was unspecified.

³² Counsel for the Acting General Counsel stated at the hearing that the complaint allegation only covered the period of September 17 to November 8.

Prickett attended a meeting with Holtz on October 13 concerning the September 29 grievances. During the meeting, Prickett stated, as far as the information she had requested, it was necessary for her to have the information to process the grievances. Holtz stated he would talk to Zenisek and she would take care of it. On November 7, Prickett wrote Zenisek concerning the outstanding two day suspension grievances and Prickett again requested the information sought in Prickett's September 29 letter.

I find Respondent violated Section 8(a)(1) and (5) of the Act by failing and refusing to provide the Union with information requested in Prickett's September 29 letter. The information relating to bargaining unit employees was presumptively relevant, and therefore there was no requirement that the Union establish relevance. Zenisek's demand for a written statement that the Union do so was clearly made in bad faith. Moreover, the Union's request came in a letter where the Union was filing grievances over Respondent's call-in policy. Thus, aside from the fact that the Union's was entitled to the information without explanation, the need for the information was self evident in the letter containing the information request. I find Zenisek's response was part of a pattern of conduct exhibited by Respondent to delay in the production of information, hamper the Union's efforts to represent the bargaining unit employees, and drain the Union's resources. In these circumstances, I do not find Respondent's request that Prickett come to Respondent's facility and pay copying costs was made in good faith. Rather, Respondent's request was made with the purpose of creating another impediment to the Union's effective representation of bargaining unit employees. See, *Albertsons Inc.*, 351 NLRB 254, 286-289 (2007).

7. The September 18 reduction of 19 employees to part-time status is violative of Section 8(a)(1) and (3) of the Act

In *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the Board established an analytical framework for deciding cases turning on employer motivation. To prove that an employee was discharged in violation of Section 8(a)(3), the General Counsel must first persuade, by a preponderance of the evidence, that an employee's protected conduct was a motivating factor in the employer's decision. If the General Counsel is able to make such a showing, the burden of persuasion shifts "to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct." *Wright Line*, supra at 1089. The elements commonly required to support a finding of discriminatory motivation are union activity, employer knowledge, and employer animus. *Farmer Bros. Co.*, 303 NLRB 638, 649 (1991), enfd. mem. 988 F.2d 120 (9th Cir. 1993).

Withers credited testimony reveals that on January 7, he attended a meeting at Respondent's corporate offices, wherein Paul Butera stated he was going to have his attorneys there and demanded the Union officials meet with him. Withers testified there was a discussion about full-time to part-time employees during the January 7 meeting in the context of Paul Butera complaining about his attorneys fees with Simandl and the fact that the Union was supposedly causing all these problems as they had just been through an unfair labor practice trial in November.³³ Withers stated if you would just turn over the information the Union

³³ On March 28, 2011, an administrative law judge issued a decision finding Respondent refused to provide requested information, delayed in furnishing information, and failed to bargain with the Union over the effects of its closure of two stores, one of which was located in Sheboygan. The judge's decision was in large part affirmed by the Board in *Piggly Wiggly*

requested they would not have all these issues, and all the litigation. Withers testified they had an arbitration coming up with seven individuals. Withers testified he stated some of the grievances could have been avoided if the Union had been provided information.

5 In July, Bucaro, vice president of Respondent's retail operation contacted Store 15 manager Holtz about formulating a plan for Festival Foods opening as a competitor in Sheboygan. On September 2, Bucaro sent an e-mail to Holtz, Braunreiter, and Zenisek relating to Festival's opening stating they must make adjustments from day 1. He instructed them to reduce the labor costs for Store 15, which would foreseeably reduce the number of full-time vis a vis part time employees since full-time employees received a much larger array of fringe benefits including health insurance. Bucaro mentioned likely status reductions in his e-mail. He said nothing about bargaining with the Union. On September 14, Holtz and Braunreiter began to notify 19 employees on an individual basis that they were being reduced from full-time to part-time status and they would lose their health insurance or right to health insurance by the end of the November. The Union was not notified in advance of these meetings. On September 15, Holtz posted the weekly schedule to all bargaining unit employees displaying that 19 of them in a unit of 118 had been reduced from full-time to part-time status. Such a unilateral change in terms and conditions of employment predictably would undermine the Union in the eyes of it bargaining unit members. See, *Comau, Inc.*, 357 NLRB No. 185 (2012); and *Camelot Terrace*, 357 NLRB No. 161 (2011). Respondent went much further, right next to the unilaterally changed schedules it posted a letter by Zenisek containing clear misrepresentations about the Union's actions, and denigrating the bonafides of the Union to the unit members. I have found Zenisek's September 15 and 22 postings to be violative of Section 8(a)(1) of the Act, and they clearly demonstrate animus to the Union and thereby its supporters. Shortly thereafter, Respondent engaged in another unilateral change concerning its call-in policy which resulted in 2 day suspensions for several bargaining unit members. Finally, while publicly slamming the Union in Zenisek's postings for purportedly not representing its members in a situation Respondent created, Respondent engaged in a pattern of refusing to provide the Union with requested information to pursue grievances over Respondent's conduct.

30 Thus, Respondent's conduct reveals its harbors strong animus towards the Union, and its employees for engaging in union activities. The burden shifts to Respondent to prove that it would have reduced 19 employees from full-time to part-time status on its schedule beginning September 18, had there been no Union at Respondent's facility. I find Respondent has failed to meet this burden. First, on September 2, Bucaro sent an instruction for Zenisek, Braunreiter and Holtz to cut labor costs at Store 15. Second, Holtz informed Withers during the September 21 grievance meeting that they had made the reductions based on a forecast of a projected 30% decline in sales with Festival's opening. The projection used was unexplained and much larger than Holtz original forecast as revealed in his August 26 e-mail. In fact, Respondent's actual records following the event reveal a weekly average of less than 11% loss in sales from the year before for the first six weeks following Festival's opening. Withers also credibly testified that he saw employees working out of classification on September 21, and again on November 8 to cover for the loss of coverage resulting from Respondent's staffing reductions. Respondent has put on no concrete evidence to rebut the Acting General Counsel's prima facie case as to the number or nature of the staffing reductions, or that absent the employees' Union activity it would have reacted in the way or to the extent that it did. Accordingly, I find Respondent violated Section 8(a)(1) and (3) of the Act when it reduced the 19 employees from full-time to part-time status on the schedule for the work week beginning on September 18, 2011.³⁴

50 ³⁴ *Midwest, LLC*, 357 NLRB No. 191 (2012).

³⁴ Counsel for the Acting General Counsel filed a motion to strike an attachment to
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CONCLUSIONS OF LAW

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

2. United Food and Commercial Workers Union, Local 1473 (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

3. The Union represents Respondent's employees in the following appropriate bargaining units:

All employees of all present and future Employer stores located in Sheboygan County, State of Wisconsin, including all employees in said stores who are actively engaged in the handling or selling of merchandise excluding employees working in the meat department, employees of other companies working in leased departments in the store, in-store bank employees, stock auditors, specialty men and demonstrators employed by vendors, and supervisory employees, within the meaning of the National Labor Relations Act.

All employees of all present and future Employer stores working in the meat department located in Sheboygan County, State of Wisconsin, including all employees in said stores who are actively engaged in handling or selling meat as defined by the parties' collective bargaining agreement which expired on September 7, 2011; excluding employees working as retail clerks and one Store Manager per store, one manager trainee per store, employees of other companies working in leased departments in the store, in-store bank employees, stock auditors, specialty persons and demonstrators employed by vendors and supervisory employees, within the meaning of the National Labor Relations Act.

4. On September 18, 2011, Respondent unilaterally reduced 19 full-time employees to part-time status, causing them to lose their full-time benefits, including the eventual loss of or access to health insurance, without notifying or bargaining with the Union in violation of Section 8(a)(1) and (5) of the Act; and because of the employees membership in or support of the Union, and to discourage that support in violation of Section 8(a)(1) and (3) of the Act.

5. By its actions on September 18, 2011, Respondent constructively discharged employees Jeffrey Gross, Lauriel Hansen, Laura Hoffman, and Tina Meinhart in violation of Section 8(a)(1) and (3) of the Act.

6. On September 16, 2011, Respondent violated Section 8(a)(1) and (5) of the Act by

Respondent's post-hearing brief which contains a portion of the transcript to a district court proceeding taking place on March 7, 2012. Counsel for the Acting General Counsel correctly points out that the attachment was not the complete transcript. Moreover, representations in the selected portion of the transcript that certain employees were returned to full-time status do not impact on this proceeding. Even if that were to be the case, there is no indication that they were restored to the positions they occupied prior to the September 18 unilateral change. There is no concrete evidence on the record before me as to who was made full-time, when it took place, or the position they were returned to. This argument would not affect the findings herein as to the underlying unfair labor practices, but may be raised again at a compliance proceeding concerning backpay. Accordingly, since Respondent's submission pertaining to the district court proceeding is incomplete, and unsubstantiated on this record, the motion to strike is granted as well as all references to the document in Respondent's post-hearing brief.

refusing the Union's request to furnish the Union with a list of the names of employees being reduced from full-time to part-time status unless the Union put the request in writing.

7. Since September 19, 2011, Respondent violated Section 8(a)(1) and (5) of the Act by failing and refusing to provide the Union the telephone numbers of employees who were reduced from full-time to part-time status on September 18; and by failing and refusing to provide the Union requested information it maintained relating to predicted stores sales for Store 15 for the prior 24 months broken down on a weekly basis.

8. Since September 27, 2011, Respondent has violated Section 8(a)(1) and (5) of the Act by failing and refusing to provide the Union information more fully described in items 3 and 4 in a written information request to Respondent on that date relating to work schedules for Respondent's stores following the opening of an area Festival Food store, and the number of full-time positions reduced or eliminated at Store 15 when a Walmart Supercenter opened on Sheboygan's south side.

9. Since September 29, 2011, Respondent has violated Section 8(a)(1) and (5) of the Act by failing and refusing to provide the Union information requested as more fully described in a letter of that date relating to attendance records, disciplinary records relating to employees calling in to be absent from work within the past 24 months, and documents used to record employees calling in to be absent or tardy for the past 24 months.

10. Since November 8, 2011, Respondent has violated Section 8(a)(1) and (5) of the Act by failing and refusing to provide the Union for review a complete set of requested copies of surveillance videos at Store 15 for each department for the period of September 27 to November 8, 2011.

11. Since September 17, 2011, Respondent has violated Section 8(a)(1) and (5) of the Act by unilaterally changing its call in policy, and by issuing and continuing to issue warnings and 2 day suspensions to employees as a result of the changed policy.

12. Since on September 15 and 22, 2011, Respondent violated Section 8(a)(1) of the Act by posting and maintaining letters denigrating the Union to employees, which included statements that the Union was at fault for the reduction of full-time employees to part-time status, and by falsely accusing Union representatives of making statements that they did not have time to represent the employees.

13. On January 12, 2012, Respondent violated Section 8(a)(1) and (5) of the Act by bypassing the Union and dealing directly with an employee concerning their wages, hours, and other terms and conditions of employment by offering to rehire an employee at different terms and conditions of employment from that which previously existed, and different from that provided for under the most recent collective-bargaining agreement.

14. Respondent's unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found Respondent has engaged in certain unfair labor practices, I find it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Respondent having unilaterally and discriminatorily reduced 19 employees from full-time to part-time status must offer them reinstatement to their pre September 18, 2011 reduction positions and schedules and make them whole for any loss of earnings and other benefits from September 18, 2011, the date their reductions were implemented to a proper offer of reinstatement to their prior positions, less any net interim earnings.³⁵ Concerning the four individuals who I have found to have been

³⁵ The Respondent shall be required to remit all payments it owes to fringe benefit funds as a result of the reductions, and to make whole the employees for any expenses they may have incurred as a result of Respondent's failure to make such payments in the manner set forth in

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constructively discharged, since their terminations were a result of Respondent's unilateral actions on September 18, 2011, like the other 15 employees impacted by those actions, they should be offered reinstatement to the full-time positions and made whole based on based on the positions they held on the schedule issued prior to September 15, 2011.³⁶ Respondent must also make whole and remove from their records any employees who were disciplined and/or suspended pursuant to its call in policy on or after September 17, 2011.³⁷ Backpay for all individuals covered by this remedy shall be computed as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), 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).³⁸

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended³⁹

ORDER

The Respondent, Piggly Wiggly Midwest, LLC located at Sheboygan, Wisconsin, its officers, agents, successors, and assigns, shall

1. Cease and desist from:

(a) Unilaterally reducing full-time employees to part-time status, causing them to lose their full-time benefits, including the loss of or access to health insurance, without notifying or bargaining with the Union.

(b) Reducing full-time employees to part-time status, causing them to lose their full-time

Kraft Plumbing & Heating, 252 NLRB 891 (1980), enf. mem. 661 F.2d 940 (9th Cir. 1981). See, also *Anderson Enterprise*, 329 NLRB 760, 784 (1999), enf. mem. 2 Fed.Appx. 1 (D.C. Cir. 2001); and *Gaucho Food Products, Inc.*, 311 NLRB 1270, fn. 1 (1993).

³⁶ As part of this remedy, no employee shall be required to leave a position which they currently occupy against their will to return to their full-time positions occupied prior to September 18, 2011. Rather, since they were removed from those prior positions based on an unlawful unilateral change, their actual return to their prior position shall take place upon request of the Union for each individual affected individual. Nevertheless, they shall be made whole in terms of backpay and benefits until Respondent provides each a written offer to return to their prior positions, with a copy of that offer served upon the Union.

³⁷ Those employees in this class only include those employees who actually called in to report an absence regardless of the time they called, whether it was before or after their scheduled reporting times. In this regard, Respondent's policy called for 4 hours notice "if possible" therefore any arguments after the fact must be construed against Respondent since it created the ambiguity as to whether it would have found the reason provided justified when it unilaterally changed the policy to accept no reason. On the other hand, Respondent has demonstrated that it would have disciplined employees in the past who failed to call in at all, and therefore they are not covered by the remedy provided for in this decision.

³⁸ All changes to the above compensation remedies counsel for the Acting General Counsel seek in their brief are deferred to the Board to the extent they are seeking changes in the currently announced Board policy.

³⁹ 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.

benefits, including the loss of or access to health insurance because of the employees' membership in or support of the Union, and to discourage that support.

(c) Constructively discharging employees by causing them to quit by unilaterally reducing them from full-time to part-time status causing them to lose their full-time benefits without bargaining with the Union.

5 (d) Refusing to honor oral requests for information by the Union by informing them that they have to put their requests in writing.

(e) Refusing to honor requests for information by the Union necessary and relevant to the performance of its statutory functions, including requests for: the telephone numbers of employees who were reduced from full-time to part-time status; predicted stores sales for Store 10 15; information pertaining to work schedules for Respondent's stores following the opening of an area Festival Food store, and the number of full-time positions reduced or eliminated at Store 15 when a Walmart Supercenter opened in Sheboygan; information relating to attendance records, disciplinary records relating to employees calling in to be absent from work, and documents used to record employees calling in to be absent or tardy; and surveillance videos at 15 Store 15 for each department for the period of September 27 to November 8, 2011.

(f) Unilaterally changing its call in policy by issuing written warnings and two-day suspensions to all employees that fail to provide 4 hours notice that they will not be reporting to their scheduled shift.

(g) Denigrating the Union to its employees by posting letters containing statements such as it was the Union's fault for the reduction of full-time employees to part-time status, and by 20 falsely accusing Union representatives of making statements that they did not have time to represent the employees.

(h) Bypassing the Union and dealing directly with an employees concerning their wages, hours, and other terms and conditions of employment by offering to rehire them at different 25 terms and conditions of employment from that which previously existed, and different from that provided for under the most recent collective-bargaining agreement.

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

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

30 (a) Within 14 days from the date of this Order make an offer to restore Tina Meinhardt, Dave Meinhardt, Laura Hoffman, Shantel Edler, Kim Fisher, Laurie Hoppert, Tammy Edler, Pat Grunke, Tanya Weisfeld, Robin Schubert, Lauriel Hanson, Sue Fliss, Brenda Thede, Andy Sommersberger, Jeffrey Gross, Kelly Haak, Debbie Gerdes, and Abraham Gerharz to their 35 former full-time positions and benefits occupied prior to September 18, 2011, and make them whole for any loss of earnings and other benefits suffered as a result of their reduction to part-time status in the manner set forth in the remedy section of this decision, including, but not limited to, reimbursing them for any medical expenses or costs they incurred as a result of their losing their health insurance..

40 (b) Within 14 days from the date of this Order, remove from its files any reference to the unlawful reduction to part-time status of the above 19 listed employees, and within 3 days thereafter notify them in writing that this has been done and that their reductions will not be used against them in any way.

(c) Provide the Union with:

45 1: The telephone numbers of employees who were reduced from full-time to part-time status on September 18, 2011; and information maintained relating to predicted stores sales for Store 15 for the prior 24 months to September 19, 2011, broken down on a weekly basis.

2. Information more fully described in items 3 and 4 of the Union's September 27, 2011, written information request relating to work schedules for Respondent's stores following the opening of an area Festival Food store, and the number of full-time positions reduced or 50 eliminated at Store 15 when a Walmart Supercenter opened on Sheboygan's south side.

3. Information more fully described in the Union's September 29, 2011, letter including

attendance records, disciplinary records relating to employees calling in to be absent from work within the past 24 months, and documents used to record employees calling in to be absent or tardy for the past 24 months.

4. Make arrangements with the Union for viewing a complete set of surveillance videos at Store 15 for each department for the period of September 27 to November 8, 2011.

5 (d) Apply the call in policy as it existed prior to September 17, 2011, and rescind any discipline and suspensions and expunge them from its records for any employees disciplined under that policy who called in at any time until the prior policy is reinstated as directed by this decision and order.

10 (e) Notify employees disciplined and suspended under the call in policy instituted on September 17, 2011, including David Meinhardt, Justin Hernandez, Tammy Hahn, Margaryta Cherkasova, Cheryl Warner, Taylor Gruenke, Kelli Fairbanks, and other similarly situated employees in writing that the disciplines have been removed from their files and will not be relied on for any reason, and make them whole for their suspensions, plus interest, in the manner described in the remedy section of this decision.

15 (f) Remove the letters dated September 15, 2011 and September 22, 2011 from Manager of Retail Operations Mary Zenisek from all bulletin boards at Store 15, and do not post them, or any similar materials anywhere else in the store.

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

25 (h) Within 14 days after service by the Region, post at its facility at Store 15 in Sheboygan, Wisconsin copies of the attached notice marked "Appendix."⁴⁰ Copies of the notice, on forms provided by the Regional Director for Region 30, 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 at Store 15 in Sheboygan, Wisconsin. In addition to physical
30 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
35 material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed its operations at Sheboygan, Wisconsin, 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 Store 15 at any time since September 14, 2011.

40 (i) 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.

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50 ⁴⁰ If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

Dated, Washington, D.C. May 21, 2012

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Eric M. Fine
Administrative Law Judge

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APPENDIX
NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

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

FEDERAL LAW GIVES YOU THE RIGHT TO

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

WE WILL NOT refuse to bargain in good faith with the UNITED FOOD AND COMMERCIAL WORKERS UNION LOCAL 1473 (the Union) as the exclusive representative of our employees with respect to the terms and conditions of employment for employees in the collective bargaining units described in our two most recent collective-bargaining agreements at our Store 15 located in Sheboygan, Wisconsin.

WE WILL NOT unilaterally reduce full-time employees to part-time status, causing them to lose their full-time benefits, including the eventual loss of or access to health insurance, without notifying or bargaining with the Union, and because of the employees membership in or support of the Union, and to discourage that support.

WE WILL NOT constructively discharge employees by causing them to quit by unilaterally reducing them from full-time to part-time status causing them to lose their full-time benefits without notice to and bargaining with the Union.

WE WILL NOT unilaterally change our call in policy by automatically issuing written warnings and two-day suspensions to employees that fail to provide 4 hours notice that they will not be reporting to their scheduled shift, without bargaining with the Union.

WE WILL NOT refuse to provide the Union with requested information necessary and relevant to representing employees within its bargaining units at Store 15.

WE WILL NOT refuse oral information requests by the Union by asserting those requests must be in writing.

WE WILL NOT refuse to provide the Union information by asserting that information is confidential when that claim is not made in good faith, and with good cause shown.

WE WILL NOT bypass the Union and deal directly with employees concerning their wages, hours, and other terms and conditions of employment by offering to rehire an employee at different terms and conditions of employment from that which previously existed, and different from that provided for under the most recent collective-bargaining agreement.

WE WILL NOT post letters or otherwise denigrate the Union to employees, by making such statements as the Union was at fault for the reduction of full-time employees to part-time status, and by falsely accusing Union representatives of making statements that they did not have time to represent the employees.

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

WE WILL within 14 days from the date of the Board's Order offer to restore Tina Meinhardt, Dave Meinhardt, Laura Hoffman, Shantel Edler, Kim Fisher, Laurie Hoppert, Tammy Edler, Pat Grunke, Tanya Weisfeld, Robin Schubert, Lauriel Hanson, Sue Fliss, Brenda Thede, Andy Sommersberger, Jeffrey Gross, Kelly Haak, Debbie Gerdes, and Abraham Gerharz to

their former full-time positions and benefits occupied prior to September 18, 2011, and make them whole for any loss of earnings and other benefits suffered as a result of their reduction to part-time status in the manner set forth in the Board's decision, including, but not limited to, reimbursing them for any medical expenses or costs they incurred as a result of their losing their health insurance.

WE WILL within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful reduction to part-time status of the 19 employees listed above, and within 3 days thereafter notify them in writing this has been done and that their reductions will not be used against them in any way.

WE WILL within 14 days from the date of the Board's Order provide the Union with the following requested information as more fully described in the Board's Order including: the telephone numbers of employees who were reduced from full-time to part-time status; predicted stores sales for Store 15; information pertaining to work schedules for our stores following the opening of an area Festival Food store, and the number of full-time positions reduced or eliminated at Store 15 when a Walmart Supercenter opened in Sheboygan; information relating to attendance records, disciplinary records relating to employees calling in to be absent from work, and documents used to record employees calling in to be absent or tardy; and surveillance videos at store 15 for each department for the period of September 27 to November 8, 2011.

WE WILL apply our call in policy as it existed prior to September 17, 2011, and rescind any discipline and suspensions and expunge them from our records for any employees disciplined under the policy adopted on or after September 17, 2011, who called in at any time until the prior policy is reinstated as directed by the Board's Order .

WE WILL notify employees disciplined and suspended under the call in policy instituted on September 17, 2011, including David Meinhardt, Justin Hernandez, Tammy Hahn, Margaryta Cherkasova, Cheryl Warner, Taylor Gruenke, Kelli Fairbanks, and other similarly situated employees in writing that the disciplines have been removed from their files and will not be relied on for any reason, and make them whole for their suspensions, plus interest, in the manner described in the Board's Order.

WE WILL remove the letters dated September 15, 2011 and September 22, 2011 from Manager of Retail Operations Mary Zenisek from all bulletin boards at Store 15, and not post them anywhere else in the store.

PIGGLY WIGGLY MIDWEST, LLC

(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

310 West Wisconsin Avenue, Federal Plaza, Suite 700 Milwaukee, Wisconsin 53203-2211

Hours: 8 a.m. to 4:30 p.m. 414-297-3861.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 414-297-1819.

UNITED STATES OF AMERICA
 BEFORE THE NATIONAL LABOR RELATIONS BOARD
 DIVISION OF JUDGES

PIGGLY WIGGLY MIDWEST, LLC

and

Cases 30-CA-67117
 30-CA-73311

UNITED FOOD & COMMERCIAL WORKERS
 UNION, LOCAL 1473

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 for the Charging Party.
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 for the Respondent.

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