

NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

Pratt Industries, Inc. and International Union of Operating Engineers, Local 30. Cases 29–CA–030271, 29–CA–030281, and 29–CA–030382

June 5, 2012

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS HAYES
AND GRIFFIN

On August 30, 2011, Administrative Law Judge Lauren Esposito issued the attached decision. The Respondent filed exceptions and a supporting brief, the Acting General Counsel filed an answering brief, and the Respondent filed a reply brief.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge’s rulings, findings,¹ and conclusions and to adopt the recommended Order.²

¹ In finding that the Respondent violated Sec. 8(a)(5) and (1) by unilaterally subcontracting unit work in June 2010, we agree with the judge that the Respondent did not establish a defense under *Westinghouse Electric Corp.*, 150 NLRB 1574 (1965). In particular, we find that, as to the two unnamed employees, the Respondent, which bears the burden of proving this defense, failed to show that the subcontracting comported with its customary business operations, did not vary significantly in kind or degree from an established past practice, and had no demonstrable adverse impact on unit employees. As to employee Andre Jones, we find that the Respondent failed to show that it gave the Union an opportunity to bargain over the subcontracting decision and did not show that the subcontracting would have no adverse impact on unit employees.

In addition, for the reasons stated by the judge, Chairman Pearce would find that the *Westinghouse* analysis is inapplicable where, as here, the subcontracting occurs while a newly-certified union is negotiating a first contract. *Eugene Iovine, Inc.*, 356 NLRB No. 134 fn. 3 (2011). Member Griffin finds it unnecessary to pass on that question in light of the fact that the Respondent here failed to establish a defense under *Westinghouse*.

Member Hayes agrees with his colleagues that the instances of subcontracting to two unnamed individuals were unlawful under *Westinghouse*. As to the subcontracting to Andre Jones, however, he would find that the Respondent lawfully subcontracted work consistent with its narrow past practice of “auditioning” contractors to fill vacancies.

² We amend the judge’s remedy to provide that the make-whole remedy shall be computed in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), enf’d. 444 F.2d 502 (6th Cir. 1971), rather than with *F. W. Woolworth Co.*, 90 NLRB 289 (1950). The *Ogle Protection* formula applies where, as here, the Board is remedying “a violation of the Act which does not involve cessation of employment status or interim earnings that would in the course of time reduce backpay.” *Ogle Protection Service*, supra at 683; see also *Pepsi-America, Inc.*, 339 NLRB 986, 986 fn. 2 (2003).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Pratt Industries, Inc., Staten Island, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Dated, Washington, D.C. June 5, 2012

Mark Gaston Pearce, Chairman

Brian E. Hayes, Member

Richard F. Griffin, Jr., Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Nancy Reibstein, Esq. and Linda Tooker, Esq., for the Acting General Counsel.

Jane B. Jacobs, Esq. (Klein, Zelman, Rothermel, LLP), of New York, New York, for the Respondent.

Paula Clarity, Esq. (Archer, Byington, Glennon & Levine, LLP), of Melville, New York, for the Charging Party.

DECISION

STATEMENT OF THE CASE

LAUREN ESPOSITO, Administrative Law Judge. Based upon charges filed on June 15, 2010, June 23, 2010, and September 7, 2010, by International Union of Operating Engineers, Local 30 (the “Union”), a consolidated complaint and notice of hearing issued on September 17, 2010, and a second consolidated amended complaint and notice of hearing issued on November 24, 2010. The second consolidated amended complaint (the “Complaint”) alleges that Pratt Industries, Inc. (“Employer” or “Respondent”) violated Sections 8(a)(1) and (5) of the Act by altering terms and conditions of employment for bargaining unit employees, which involve mandatory subjects of bargaining, without first bargaining to agreement or to a good-faith impasse. At the hearing, the complaint was amended to include an allegation that the discipline of employee Joe Hamilton pursuant to Respondent’s altered call-out and sick leave policies violated Sections 8(a)(1) and (5). Respondent filed an answer denying the material allegations of the complaint. This case was tried before me on February 4, 2011, and on March 28, 29, and 30, 2011, in Brooklyn, New York.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the Acting General Counsel (the “General Counsel”) and Respondent I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is a domestic corporation with an office and place of business located at 4435 Victory Boulevard, Staten Island, New York, where it is engaged in the manufacture and recycling of paper and packaging products. Annually, Respondent in the course and conduct of its business operations purchases and receives at its Staten Island facility goods, supplies, and materials in excess of \$50,000 directly from points outside the State of New York. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

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

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

Respondent recycles paper and cardboard waste, manufacturing paper and packaging products, at its Staten Island facility. Within the facility there is a production department which operates machinery, a recycling department that receives and sorts the arriving waste paper, a maintenance department which performs mechanical work, a warehouse department which stores and ships the finished product, and an electrical and instrumentation (hereinafter "E&I") department.

On September 28, 2009, following a representation election, the Union was certified as the exclusive collective-bargaining representative of the following bargaining unit:

All full-time and regular part-time electrical and instrumentation technicians employed by the Respondent at the Respondent's Staten Island facility, excluding other maintenance employees, truck drivers, clamp truck operators, paper makers, yard operators, yard leads, barge operators, other production employees, clerical employees, professional employees, guards, managers, superintendents, and supervisors as defined in the Act.

Respondent admits and I find that since September 28, 2009, the Union has been the exclusive representative of the bargaining unit employees for the purposes of collective bargaining.

At the time of the hearing in this matter, there were six bargaining unit employees—Darren Kologi, Joseph Hamilton, John O'Donnell, Ramon Cedeno, Gary Stern, and Bob MacIntosh. Another bargaining unit employee, Larry Dobson, resigned his employment during the summer of 2010, and at the time of the hearing had not been replaced. Kologi and Hamilton are shop stewards for the Union, and have attended negotiating sessions. Kevin Cruse is a field representative employed by the Union, and has been the Union's chief spokesperson during collective-bargaining negotiations with Respondent.

Victor Columbus is the chief labor relations spokesperson for all of Respondent's locations throughout the United States, and has been Respondent's chief spokesperson during the collective-bargaining negotiations regarding the E&I technicians. John Hennessy is the general manager of Respondent's mill division, and is responsible for the overall operations of the

Staten Island facility. Mark Mays is Respondent's engineering manager at the Staten Island facility. Keelie Cruz is the Regional A term manager, and is responsible for human resources at five of Respondent's facilities, including the Staten Island facility. Mike Austin has supervised the E&I technicians since approximately January 2010, and prior to that Kevin O'Rourke supervised the bargaining unit employees.

B. Respondent's facility and the work of the bargaining unit employees

Respondent's Staten Island facility consists of four—the main mill, the sorting line where recycled materials are recycled, the warehouse, and a separate corrugating mill. The E&I technicians perform installation, maintenance, repairs, and ordering for electrical wiring and electrical and instrumentation components of machinery at the facility. They work in all of the buildings, ensuring that motors are running, providing wiring and communications, and maintaining and repairing valves, screens, and other machinery. They are responsible for cleaning and maintaining motors and replacing motors when necessary from an inventory of spare motors kept on racks. During the period of time material to the allegations here, Hamilton was responsible for the organization of the motors in the inventory area. The E&I technicians are also responsible for maintaining emergency lights and exit signs, and work on other special projects over longer periods of time.

The E&I technicians meet with their supervisor for 15 minutes prior to the start of each shift, and are given tasks for the day. Each E&I technician is assigned a particular area to review on a daily basis, ensure that all machinery is working properly, and note any problems which need to be evaluated or fixed. During a shift the E&I technicians also receive calls from Austin reassigning them to more urgent tasks as they arise.

C. Alleged changes in work hours and schedules, and collective-bargaining negotiations

Prior to June 20, 2010,¹ the E&I technicians worked 4 days per week. On three of these days, they worked a 12-hour shift, and on the 4th day they worked an 8-hour shift. Kologi, Hamilton, and O'Donnell worked weekdays. Dobson and MacIntosh worked some weekdays as well, but also covered the weekends. Cedeno and Stern worked night-shift hours. All worked at total of at least 44 scheduled hours per week.² There is no real dispute that on June 20, the regular hours of the weekday shift E&I technicians were reduced, and their work schedules changed. Kologi, Hamilton, and O'Donnell's hours were reduced to 41.25 hours per week, and the work schedule was changed so that each was required to work five 8-hour days per week.

Negotiations for a first collective-bargaining agreement began in late September 2009. Almost all of the negotiating sessions have taken place at the employer's facility, except for the third (which was held at the Union's offices) and the fourth

¹ All subsequent dates are in 2010 unless otherwise indicated.

² In the summer of 2009, the E&I technicians' hours were reduced from 48 to 44 hours per week. They continued to work a 4 day week, but one of the 4 days was reduced from a 12-hour day to an 8-hour day.

(which took place at a hotel in Staten Island). Outside of the negotiating sessions, Cruse and Columbus communicated by e-mail to exchange proposals and information, and to schedule meeting dates.³

The initial negotiating sessions took place on September 28 and 29. On the first day of negotiations, the Union presented its proposals, and on the second day the company made its initial response. At the first negotiating session, the Union proposed that the technicians be paid on a weekly instead of biweekly basis, and the company agreed to that proposal the next day. At the first session, the Union also proposed additional beeper or on-call pay.

On October 8, 2009, Cruse emailed Columbus offering October 21 for a negotiating session, and requesting a copy of the E&I technicians' current medical package so that he could review the information before meeting. Columbus replied that the company was not available, and offered other dates, including October 28. Cruse accepted the October 28 date, but Columbus then said he was unavailable. Cruse asked Columbus for his availability on Wednesdays, because Hamilton was off on Wednesdays and Kologi's shift ended at 3 p.m. Columbus offered November 11 and 18, and December 2, 9, and 16. Cruse accepted November 11, 2009, and later asked that the next meeting take place on December 16, due to other matters he was working on.

On November 12, 2009, Cruse emailed Columbus the Union's proposed general overtime equalization language, which Columbus had requested. Cruse suggested that the parties try to adapt the language to the E&I department's operations.

At the third session, on December 16, 2009, the Union modified its proposal regarding on-call or beeper pay to provide for 2 hours pay. At the end of the meeting, Columbus told Mays to show the Union the new schedule. Mays said that the company was presenting a new schedule for the E&I technicians, and gave the Union copies. The new schedule reduced the employees' hours, and introduced rotating shifts. Cruse asked when the schedule change was going to take place, and the company said it would take effect within the next month or 2. Cruse also noted that the employees with higher seniority were not assigned the better or more lucrative schedules. Cruse expressed disappointment, telling the company that the schedule change was "unprofessional" given that the rest of the meeting had been productive. Cruse also stated that changing the schedule at that time was an unfair labor practice. Cruse, Kologi, and Hamilton all testified that the Union did not agree to the schedule change at this meeting.

On January 19, Cruse emailed Columbus the Union's updated proposals for weekend differentials and equalization of overtime.

³ I base the following account of the parties' negotiations primarily on documentary evidence and the testimony of Cruse, Kologi, and Hamilton. Although Columbus addressed the negotiations during his testimony, he did not provide a specific factual account, often focusing on the company's intentions as opposed to the substantive content of the sessions, and admitted that he could not recall what was actually said during the negotiations. I therefore find the testimony of Cruse, Kologi, and Hamilton more probative in general than that of Columbus.

At the next session on January 20, Cruse asked the company why they wanted to change the E&I technicians' schedule, and Columbus said that the company wanted to reduce the employees' hours. Cruse asked other questions regarding the scheduling of specific employees. Columbus did not provide a specific date for implementation of the schedule. Cruse reiterated that the implementation of the schedule would be an unfair labor practice, and stated that he wanted to negotiate something acceptable to everyone. Columbus suggested that the Union prepare a proposed schedule, and Kologi and the other E&I technicians did so.

On February 10, Columbus emailed Cruse information regarding the hours worked and earnings of the bargaining unit employees, which Cruse had requested in order to calculate the cost of the Union's proposals. Cruse then requested additional information regarding salaries and bonuses. He also reiterated his request for information regarding the medical plan, which Columbus had told him was comparable to the plan available through the Local 30 benefit funds, but significantly less expensive. Finally, Cruse told Columbus he was working on a proposal regarding the E&I technicians' schedules, and would forward it soon.

At the next session, on February 24, the Union presented the alternative work schedule it had prepared. After reviewing the Union's proposed schedule, Columbus stated that the company could not agree to it, because it needed some employees available for day shift rotation at all times. Cruse raised issues regarding assignment of specific employees, rotating shifts, and equalization to correct disparities in overtime earnings. According to Cruse, Columbus did not respond, and the parties agreed to exchange ideas regarding scheduling and begin discussing wages at the next session. Cruse again stated that changing the E&I technicians' schedule would be an unfair labor practice.

On March 15, Cruse sent revised proposals to Columbus, and Columbus asked for more specifics regarding Cruse's calculations. An email exchange regarding the calculation of the cost of Cruse's proposals followed over the next week. A negotiating session during that month was scheduled to follow a grievance meeting involving the Papermakers bargaining unit.⁴ However, because the grievance meeting ran 2 hours longer than anticipated, Kologi and Hamilton left, and the session did not take place. Cruse testified that such late starts were a recurring problem with E&I negotiations scheduled after grievance meetings involving the Papermakers unit.

At the end of March, Cruse and Columbus had an email exchange regarding additional dates for negotiating sessions. Cruse had asked Columbus for additional dates, concerned because Columbus appeared to be more limited in his availability for the E&I technicians' negotiations than for bargaining involving the Papermakers unit. In response, Columbus offered May 26, and Cruse asked for dates which were not an entire month apart, suggesting that the parties meet every Wednesday. Columbus suggested that negotiating sessions alternate between New York and Atlanta, which Cruse stated was not feasible

⁴ This is another bargaining unit of employees at the Staten Island facility represented by the Charging Party Union.

given the size of the Union's negotiating committee. Columbus suggested conference calls as an alternative, and declined to schedule consecutive days because the bargaining sessions usually did not last more than a few hours.

At the next session, on April 21, the parties briefly discussed the proposed schedule changes, with the company providing another written schedule which was similar to the schedule it had presented at the December 2009 meeting. The company said that the new schedule would take effect in 2 weeks. The parties did not reach agreement on the proposed schedule change at that meeting, and Cruse again reiterated that changing the schedules would constitute an unfair labor practice.⁵ The parties also began discussing the Union's economic proposals at this meeting, with Cruse explaining his calculations. Cruse also modified the Union's sick time proposal to request 7, as opposed to 10, days of sick time per year. The discussion ended with Cruse proposing that shifts be chosen by the employees based on seniority, and Columbus responding that the company assigned the shifts at its own discretion. At the conclusion of this session, the parties agreed to meet again on May 12, May 26, and June 9.

Columbus testified that after the April 21 negotiating session ended the parties were still bargaining. Throughout the negotiations neither party declared impasse, and the company never announced that it was making or would implement a final offer.

The next day, Cruse emailed Columbus, asking for a copy of the new E&I technicians' schedule and the schedules of other nonbargaining unit employees. Columbus responded by stating that the schedule of the maintenance employees was being changed to mirror the new E&I technicians' schedule. Columbus also noted that he was unavailable for a negotiating session on May 12, and suggested May 27. Cruse suggested June 23, and Columbus countered with June 30, as he would be traveling the week before that. Columbus then sent Cruse a detailed calculation of the cost of the Union's proposals, and ideas for allocating proposed wage increases toward the cost of the Local 30 benefit plans.

At some point after the April 21 negotiating session, Cruse received a call from Kologi, who told him that the schedule change had been implemented. Cruse then consulted the Union's attorney about filing an unfair labor practice charge. However, while discussing another matter with Columbus, Cruse asked him to hold off on implementing the schedule change, and Columbus agreed.⁶ Columbus explained in an email to Hennessey, Cruz, and Mays that, "Kevin Cruse called and pleaded that we delay the roster change."⁷ Mays responded that same day that he "would be OK with delaying it until June 7," when the shift mechanics began their new schedule. Columbus sent an email on May 1 to Cruse telling him that the

company would delay the implementation of the schedule change until after the parties met on May 26. However, Cruse canceled the May 26 meeting because he had been subpoenaed to appear at a legal proceeding, and the parties rescheduled the session for June 9.

Columbus subsequently prepared a response to the Union's proposals for use at the scheduled June 9 session, which he shared with other members of the company's negotiating team. This proposal contained a change in the company's position on call-in and beeper pay, to provide the same benefits as those provided under the Papermakers' contract. This new proposal essentially agreed to the Union's call-in and beeper pay proposal as modified at the December 16, 2009 session. Columbus testified that the modified call-in and beeper pay proposal was implemented in conjunction with the June 20 schedule changes, and Mays testified that the company agreed to increased beeper pay during negotiations regarding its proposed schedule changes.

The June 9 negotiating session did not take place, but there is no definitive evidence in the record as to why. Although Columbus contended that the June 9 session was canceled by the Union, I do not find this testimony particularly probative in light of documentary evidence establishing that other sessions he contends were canceled by the Union were in fact not confirmed or were canceled by Columbus himself. In an e-mail acknowledging that Cruse had canceled the May 26 session because he was required to appear at a legal proceeding, Columbus said that he would "re-book" for June 9, but there is no evidence regarding Cruse's response.

On June 9, Mays called a lunch meeting with some of the day-shift E&I employees at the Staten Island facility. Mays distributed a memo from Cruz attaching a new schedule, and memos regarding calling in sick and the use of unpaid time for sick leave.⁸ The new schedule required that each employee work a fixed 8-hour shift, 5 days per week, without rotating shifts.⁹ These 8-hour shifts—7 a.m. to 3 p.m., 9 a.m. to 5 p.m., and 11 a.m. to 7 p.m.—had not existed prior to this time. In addition, McIntosh and Hamilton were assigned to work nights and weekends as part of their regular schedule. Kologi and O'Donnell expressed dissatisfaction and asked Mays if the employees could rotate the shifts; Mays said that they could do so.¹⁰ Kologi testified that the union representatives at this meeting did not agree to the schedule change, and had never agreed to any of the schedule changes proposed by the company during negotiations. Kologi informed Cruse, and on June 15 the Union filed the charge in Case 29-CA-30271, alleging that Respondent had unlawfully altered the bargaining unit employees' work schedules and sick leave policies.

The new schedule took effect on June 20, and thereafter Kologi and Hamilton were more restricted in terms of their avail-

⁵ Cruse testified that he repeatedly told Columbus that the implementation of the new schedules would be an unfair labor practice. Columbus confirmed that Cruse accused him of committing unfair labor practices throughout the negotiations.

⁶ Cruse arranged an off-the-record meeting with the company on June 8, at a restaurant in Staten Island, but no substantive issues were discussed at that time.

⁷ The schedule can also be referred to as the roster.

⁸ Austin and Cruz were also present at this meeting. Hamilton was given the schedule and other memos by Austin a few days later.

⁹ Because the new schedule reduced the hours worked per day from 12 to 8, sick, vacation, and holiday pay were reduced accordingly.

¹⁰ Kologi, O'Donnell, and Hamilton subsequently agreed to a schedule amongst themselves whereby they rotated each of the three new shifts implemented by the company.

ability for negotiating sessions. Cruse, Kologi, and Hamilton all testified that the Union never agreed to the schedule change implemented on June 20 during previous or subsequent negotiations.

Columbus was on vacation for the last 2 weeks in July, and Hennessey was on vacation for the first 2 weeks of August. On July 29, Columbus emailed Cruse asking him when they were going to meet again. Regarding an annual incentive for the E&I technicians which was “due shortly,” Columbus stated as follows:

... since you file a NLRB charge every time we do anything, we will not do anything with regard to a payment or denial of payment until we have reached an agreement on what we are going to do or disagree on what we are going to do. Be advised that the annual incentive is 100% discretionary.

On August 5, Cruz emailed Cruse to tell him that Columbus was trying to reach him regarding dates for further E&I negotiations. Cruse responded that he was checking on dates with Kologi and Hamilton. On August 10, Cruz sent Cruse a list of dates that Columbus was available for negotiations from late August through December. During email exchanges in September, Cruse proposed seven specific dates that Columbus was available, and asked to do conference calls as well in order to move things along. However, Cruse then canceled these dates, explaining that the E&I employees had given him an incorrect schedule. The next week, Cruse emailed Columbus seven different dates for negotiating session, and eventually the parties agreed on eight dates in October, November and December.

On November 3, Columbus emailed Cruse a comparison of the medical benefits under the company and Local 30 plans. Cruse again asked for a Summary Plan Description (“SPD”) for the company’s medical plan, and Columbus said that he would provide one as soon as it was complete. Cruse responded that he would have to cancel the upcoming meetings unless Columbus provided the SPD, as he would be unable to prepare proposals. Columbus and Cruse exchanged dismayed emails, and Columbus suggested that he might request a Federal Mediator. The next week, Columbus sent Cruse a copy of the SPD and asked about scheduling additional negotiating sessions.

On December 10, Columbus sent Cruse E&I department job descriptions that Cruse had requested, with classifications for the different E&I technicians. Columbus also asked for a detailed assessment to illustrate how the Local 30 medical plan was superior to the company’s plan. Columbus stated that the safety policy would be revised “for discussion and clarification when we meet next.” Columbus offered the E&I technicians terms identical to those contained in the collective-bargaining agreement which applied to the Papermakers, but agreed to the ten percent coverage pay proposed by the Union (with restrictions). Columbus also stated that the company would provide the discretionary incentive payment to the E&I technicians if the Union agreed that it would not file an unfair labor practice charge. He concluded that the company would agree to “discuss further” placing specific percentage wage increases in the contract. Columbus also stated that Cruse had not scheduled any future meetings.

It is undisputed that during the course of the negotiations the

parties never reached agreement regarding wages, benefits, and many other terms and conditions of employment.

D. Sick leave and call-in policies, and the discipline of Joe Hamilton

At the June 9 meeting described above, the company also issued two memos to the E&I technicians regarding call-out procedures and unexcused absences. Kologi and O’Donnell testified that prior to that time, when calling in sick the employees would call the facility and leave a voicemail message for their supervisor. They did not have to speak to a supervisor directly, and were never required to provide a doctor’s note regarding their absence. Kologi, O’Donnell, and Hamilton also testified that if they exceeded their allotment of 3 sick days per year, they were permitted to take unpaid leave for any additional absences. They were not required to use vacation time for absences in excess of 3 days per year.

In an email dated June 9 from Austin to Cruz, Austin suggested two “items that I would like to change in the department.” Austin suggested that the employees be required to call out to him on his cell phone or at home at least 45 minutes prior to the start of their shift. Austin also suggested that employees with no remaining sick time be required to use a vacation day when they call out. Cruz testified that she and Austin were going to have a lunch meeting regarding the new E&I technician schedules and that Austin wanted her to write a memo “with the changes for the call-out policy.”

In the June 9 memos distributed to the employees, the company required that the E&I technicians speak directly to their supervisor (Austin), either on his mobile phone or home telephone number, when calling in sick. The employees were required to leave a message if they could not reach their supervisor, but also “to keep calling until you have physically spoken to someone.” If the employees were unable to reach their supervisor, they were required to contact the engineering manager (Mays), and then the shift foreman if the engineering manager was unavailable. The memo stated that “Effective immediately, employees who do not follow the process outlined above will be subject to disciplinary action.”

Another of the June 9 memos stated that “There are no unpaid excused days off,” and that employees would be required to use vacation days after exhausting their allotment of 3 sick days per year. This memo also required that employees provide a “sick note,” and that failure to do so would result in the application of “the standard attendance disciplinary process.”

On December 27, Austin issued a written disciplinary report to Hamilton for calling out that day, when he had no sick or vacation time available.

In the initial negotiating session, the Union proposed increasing the number of sick days to 10 per year, and the company proposed eliminating the 3 sick days per year that employees then received. The company also proposed eliminating the employees’ ability to use vacation days as sick time. The company never made any other proposals regarding procedures for the use of sick leave. The Union never agreed to any of the company’s proposals.

E. Subcontracting of E&I department work

It is undisputed that after the June 20 schedule change, Respondent brought in three employees of a contractor known as Jisk. Columbus testified that one of the employees, Andre, was brought in to replace E&I technician Larry Dobson, who had resigned. Columbus testified that the other two employees were brought in to familiarize themselves with the operations of the mill. These two employees were not intended to remain with the company, and only worked for a few weeks. Andre, who was being “auditioned” to replace Larry Dobson, did not complete his probationary period. Columbus testified that Respondent has not engaged any subcontracted employees in the E&I department since these three Jisk employees left.

Kologi, O’Donnell, and Hamilton testified that they observed the Jisk employees reorganizing the motor inventory, work which would normally have been done by Hamilton. They also observed the Jisk employees repairing and replacing emergency and density lights and exit signs, work normally done by E&I technician Gary Stern.

It is undisputed that in the past Respondent has used subcontractors to perform E&I department work during monthly shut-downs for equipment maintenance, and for large scale jobs which require that significant amounts of work be performed in a short period of time. Respondent also used subcontractors for work on specific equipment, or work beyond the technical expertise of the E&I technicians. Columbus and Mays both testified that the company used its discretion to determine whether the particular work or volume of work required bringing in subcontractors. It is also undisputed that Respondent has used subcontractors to “audition” employees for permanent positions. O’Donnell and Hamilton both testified that they were both hired by Respondent in this manner, as were Stern, Dobson, and Cedeno.¹¹

Columbus testified that on June 16, at an arbitration regarding an unrelated matter, he and Cruse had a conversation regarding the resignation of E&I technician Larry Dobson. Dobson left his employment without providing 2 weeks’ notice. Columbus testified that after the arbitration concluded, he and Cruse began discussing Dobson. Columbus testified that Cruse told him that the E&I technicians were talented employees who would have no problem finding other employment. According to Columbus, Cruse stated that he had assisted Dobson with finding another job, and would similarly help the other E&I technicians find work elsewhere. Columbus responded that if Cruse intended to “poach” the E&I technicians and leave the mill short handed, he would be forced to have subcontractors come to the plant and begin the training process. Columbus testified that he asked Cruse to return to the mill with him to discuss the situation, and Cruse said that he had to attend a photo shoot.

Columbus testified that Hennessey, Mays, and Cruz were present during this conversation, and that union attorney Paula

Clarity may have been present as well. Cruz testified that she only heard Cruse tell Columbus that he had found other work for Dobson before she left the conversation. Mays testified that Cruse told Columbus that Dobson was leaving the mill because Cruse had found him another job, and commented that he was actively looking for other jobs for all of the E&I technicians. According to Mays, Columbus said that the company would then get some subcontractors into the facility to familiarize themselves with the mill’s operations. Mays testified that Columbus asked Cruse to come to the mill to discuss it, and Cruse declined.

Clarity testified that the entire conversation involved scheduling additional negotiating sessions, and that the discussion regarding Cruse’s finding work for Dobson and the E&I technicians never took place.

The company never made any proposal regarding subcontracting during the contract negotiations, and subcontracting was never discussed.

III. ANALYSIS AND CONCLUSIONS

A. Alleged changes in work hours and work schedules

The evidence establishes that on June 20, Respondent altered the work hours and schedules of the E&I technicians. Respondent makes three arguments in support of its contention that these changes were not unlawful. Respondent contends that it was permitted to alter the E&I technicians’ work hours and schedules because the parties were at impasse in negotiations, because the Union engaged in dilatory bargaining, and because the Union agreed to the changes. The evidence does not support these assertions.¹²

Under Section 8(a)(5) of the Act, an employer may not unilaterally institute changes regarding wages, hours, and other terms and conditions of employment before a valid impasse in negotiations for an overall agreement is reached. *NLRB v. Katz*, 369 U.S. 736 (1962). Until that time, an employer may not unilaterally implement changes in terms and conditions of employment unless the union “insists on continually avoiding or delaying bargaining,” or “economic exigencies compel prompt action.” *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991), *enfd.* 15 F.3d 1087 (9th Cir. 1994) (internal quotations omitted); *Hospital Perea*, 356 NLRB No. 150 at p. 13 (2011). When a genuine impasse exists, or either of the exceptions articulated in *Bottom Line Enterprises* apply, the employer is free to implement any changes reasonably comprehended within its previous proposals. *Richmond Electrical Services*, 348 NLRB 1001, 1003 (2006).

A genuine impasse exists when there is no realistic possibility that continuation of discussions would be “fruitful,” and both parties believe that they are “at the end of their rope.” *Monmouth Care Center*, 356 NLRB No. 29 (2010), 354 NLRB 11, 59 (2009), citing *Essex Valley Visiting Nurses Assn.*, 343

¹¹ O’Donnell testified that the Jisk employees he observed in the plant after the schedule change were not being directed by permanent E&I employees, as he had been during his “audition” period, but were working independently. Hamilton also testified that the Jisk employees were not working with the permanent E&I employees.

¹² Respondent adduced evidence intending to show that the changes in the E&I technicians’ work hours and schedules did not reduce their overall earnings once overtime, beeper pay, and call-in pay were taken into account. This evidence is not relevant to General Counsel’s contention that Respondent unlawfully reduced the E&I technicians’ regularly scheduled work hours and altered their work schedules.

NLRB 817 (2004); *Cotter & Comp.*, 331 NLRB 787 (2000), enf. denied in part, 254 F.3d 1105 (D.C. Cir. 2001). In order to determine whether an impasse exists, the Board evaluates the parties' bargaining history, their good faith in negotiations, the length of the negotiations, the importance of the issues forming the basis for the parties' disagreement, and the parties' contemporaneous understanding regarding the state of negotiations. *Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967), enf'd. 395 F.2d 622 (D.C. Cir. 1968). With respect to the parties' contemporaneous understanding, in order to find a valid impasse the evidence must establish that both parties believed no fruitful negotiations were possible, or that both parties were unwilling to compromise further. *Monmouth Care Center*, supra at 59; *Essex Valley Visiting Nurses Assn.*, 354 NLRB at 840; see also *Ford Store San Leandro*, 349 NLRB 116, 121 (2007). The existence of an impasse is "not lightly inferred," and the burden of proving that a genuine impasse existed rests with the party making the contention. *Monmouth Care Center*, supra at 59; *Serramonte Oldsmobile*, 318 NLRB 80, 97 (1995), enf. denied in part, 83 F.2d 227 (D.C. Cir. 1996). When interposed as a defense to allegedly unlawful unilateral changes, the evidence must demonstrate that impasse existed at the time the disputed changes were implemented. *Northwest Graphics, Inc.*, 343 NLRB 84, 90–92 (2004) (impasse occurring after unilateral implementation of employer's bargaining proposals irrelevant).

The evidence here does not establish that the parties were at an impasse in negotiations as of June 2010, when the change in work hours and schedules was announced and implemented. The evidence establishes, that as of that time neither party had declared impasse, and Respondent had not made anything it described as a final offer. In fact, Columbus testified that after the April 21 session, the last session before the implementation of the new work hours and schedule, the parties were still negotiating. This evidence tends to demonstrate that the parties were not, at the time, under the impression that fruitful negotiations were impossible. *American Standard Cos.*, 356 NLRB No. 4 (2010), 352 NLRB 644, 652 (2008); *Monmouth Care Center*, supra at 59; *Essex Valley Visiting Nurses Assn.*, 343 NLRB at 841. Indeed, at the end of the April 21 session additional negotiating sessions were scheduled for the May and June, indicating that the parties still believed that productive negotiations were possible.¹³ See *Laurel Bay Health & Rehabilitation Center*, 356 NLRB No. 3 (2010), 353 NLRB 232, 233 (2008) (agreement to further meetings militates against a finding of impasse).

Other factors also indicate that the parties were not at impasse when the new work hours and schedule change were implemented. As of June 2010, only six negotiating sessions had taken place, and the parties only began discussing economic proposals at the April 21 meeting. Particularly in the context of first contract negotiations, the limited number of sessions which had actually occurred prior to implementation belies a contention that the parties were at impasse at the time.

¹³ Although Respondent claims that the Union canceled negotiating sessions in May, the evidence establishes that Columbus was ultimately unavailable to meet on May 12, and that the union's cancellation of the May 26 session, was necessitated by Cruse's having been subpoenaed.

Monmouth Care Center, supra at 59. The evidence also establishes that at the April 21 negotiating session the Union modified its proposal regarding sick time, and proposed that employees be permitted to choose the new shifts suggested by the company on a seniority basis, indicating its flexibility and willingness to compromise regarding the scheduling issue. See *Laurel Bay Health & Rehabilitation Center*, supra at 233 (no impasse where union stated that it was willing to consider alternative medical plan proposals and would begin preparing a counterproposal of its own); *American Standard Cos.*, supra at 652 (no impasse given union's willingness "to continue coming up with offers and alternative proposals"). Finally, the evidence establishes that when he learned from Kologi after the April 21 meeting that the new schedule was going to be implemented, Cruse "pleaded" with Columbus to delay implementation so that the parties could discuss the issue at the next negotiating session. This turn of events indicates that there was no contemporaneous understanding that the parties had reached impasse. *Essex Valley Visiting Nurses Assn.*, supra at 841 (no impasse existed where union requested additional bargaining prior to implementation of employer's proposal).

The cases discussed by Respondent in support of its assertion that the parties had reached impasse involve factual circumstances which make them inapplicable here. A number of these cases involve substantial bargaining over economic terms, resulting in intransigent positions, whereas in the instant case bargaining over economics had barely begun. *ACF Industries*, 347 NLRB 1040, 1040–1042 (2006); *McAllister Brothers*, 312 NLRB 1121, 1121–1122 (1993); *Hamady Brothers Food Markets*, 275 NLRB 1335, 1335–1336, 1337–1338 (1985). In addition, although the cases involve negotiations comprised of fewer than 10 bargaining sessions, the employers there began negotiations with economic proposals based on openly announced cost cutting imperatives that the unions were unwilling to approach, let alone accept. *ACF Industries*, supra at 1041; *McAllister Brothers*, supra at 1121–1122; *I. Bahcall Industries*, 287 NLRB 1257, 1258–1259, 1262 (1988); *Hamady Brothers Food Markets*, supra at 1337–1338. Strikes and strike votes were also involved, and in most of the cases impasse was declared or a final offer was clearly articulated by the employer. *ACF Industries*, supra at 1040–1041; *McAllister Brothers*, supra at 1121–1122; *I. Bahcall Industries*, supra at 1259; *Hamady Brothers Food Markets*, supra at 1336. As a result, the situations addressed in these cases are not factually comparable to the evidence in the record here.

For all of the foregoing reasons, I find that the parties were not at impasse in June 2010 when Respondent implemented its changes in the E&I technicians' work hours and schedules.

The evidence also does not support Respondent's contention that the Union continually avoided or delayed bargaining such that implementation of the schedule change was permissible under *Bottom Line Enterprises*. The evidence establishes that Cruse and Columbus made repeated, mutual efforts to agree on dates for negotiating sessions. Prior to the April 21 session, Cruse in his emails to Columbus had suggested scheduling additional negotiating sessions, scheduling dates less than a month apart, and meeting every Wednesday, when the employee negotiating committee members were regularly avail-

able. See *Ford Store San Leandro*, supra at 121 (no evidence that union delayed bargaining where it proposed alternate dates when unable to meet on dates proposed by the company). After the April 21 session, Cruse and Columbus continued to exchange dates for additional sessions, and the evidence establishes that the May 26 session was canceled by Cruse because he received a subpoena requiring that he appear at a legal proceeding. By contrast, the cases finding implementation justifiable due to union delay in bargaining involve lengthy, obstinate refusals on the union's part to meaningfully participate in negotiations not characteristic of the Union's conduct here. See *Serramonte Oldsmobile*, supra at 100–101 (union repeatedly stated it was unable to prepare proposals, failed to discuss proposals with bargaining unit employees, refused to commit to additional negotiating sessions during the month prior to implementation, and failed to respond to requests for additional dates in the last week of that month); *Southwestern Portland Cement Co.*, 289 NLRB 1264, 1276–1277 (1988) (union representative repeatedly absented himself from bargaining and designated a completely uninformed and unprepared replacement without actual authority to negotiate to agreement); *M & M Contractors*, 262 NLRB 1472 (1982), pet. for review denied, 707 F.2d 516 (9th Cir. 1983) (union “clearly manifested its aversion to bargaining” over a 7-month period prior to implementation by refusing to provide meeting dates, and by delaying arranging meeting dates after finally demanding negotiations). I therefore find that the union here did not delay the bargaining process in any manner justifying implementation of the reduced work hours and schedule changes.

Finally, the evidence does not support Respondent's contention that the Union agreed to the schedule changes and reduction in work hours. Cruse, Kologi, and Hamilton all testified that the Union did not agree to the changes prior to their implementation. The documentary evidence regarding the negotiations—bargaining notes and emails—does not reflect any agreement. After the schedule change was announced in April, Cruse, according to Columbus, “pleaded” that the implementation of the schedule change be delayed until after the parties met again. Five days after the changes were implemented, the Union filed an unfair labor practice charge alleging that they were unlawful. None of this evidence is consistent with the Union's having agreed to the reduction in work hours and schedule change.

The evidence adduced by Respondent does not substantiate its argument that the Union agreed to the changes. Columbus and Mays did not actually testify that Cruse agreed to the schedule change or to its implementation. Instead, they contended that the union's proposals regarding weekly pay and beeper/call-in pay were discussed simultaneously with the company's proposed schedule changes. Thus, Respondent ultimately bases its argument that the Union agreed to their implementation on its own purportedly simultaneous implementation of the Union's weekly pay and beeper/call-in pay proposals. I find this argument unpersuasive. First of all, the evidence establishes that Respondent agreed to the Union's weekly pay proposal at the second negotiating session on September 29, 2009, and not when the schedule changes were announced or implemented in June 2010. In addition, the tempo-

ral correlation between Respondent's implementation of the reduction in hours and schedule change and its implementation of the Union's beeper/call-in pay proposal is insufficient to establish the Union's actual agreement to the reduction in hours and schedule change, given the evidence militating against such a conclusion. The fact that Respondent chose to simultaneously implement the Union's beeper/call-in pay proposal cannot in and of itself establish the Union's agreement to the company's proposed schedule change and reduction in work hours. Therefore, the evidence does not substantiate Respondent's argument that the Union agreed to these changes prior to their implementation.

For all of the foregoing reasons, I find that Respondent violated Sections 8(a)(1) and (5) by unilaterally reducing the work hours of the day-shift E&I technicians and changing the E&I technicians' work schedules absent a valid impasse or an overall agreement, as alleged in the complaint.

B. Alleged changes in sick leave and call-out policies, and the discipline of Joe Hamilton

As discussed above, an employer may not make unilateral changes in policies involving mandatory subjects of bargaining under Section 8(d) of the Act. *NLRB v. Katz*, 369 U.S. 736 (1962). It is well settled that sick leave, requiring that employees provide a doctor's note after taking sick leave, and disciplinary policies are mandatory subjects of bargaining. *Flambeau Airmold Corp.*, 334 NLRB 165 (2001) (sick leave); *Interstate Transport Security*, 240 NLRB 274, 279 (1979) (doctor's note requirement); *Bath Iron Works Corp.*, 302 NLRB 898, 902 (1991) (disciplinary policies). An employer is required to provide notice and the opportunity to bargain regarding such changes, where they have a “significant, substantial, and material” impact on terms and conditions of employment. See, e.g., *Success Village Apartments*, 348 NLRB 579 (2006). The Board has held that an employer's unilateral elimination of the prerogative to take unpaid leave without using sick or vacation time is a significant and substantial change, which violates Section 8(a)(5). *United Rentals*, 349 NLRB 853, 863 (2007).

The evidence establishes that the June 9 memos regarding Respondent's sick leave and call-out policies were issued without providing the Union with notice and the opportunity to bargain. The evidence also demonstrates that the parties did not address the specific policies addressed in the June 9 memos during contract negotiations, and that, as discussed above, the parties had not bargained to an overall agreement or a valid impasse. Instead, Respondent argues that the sick leave policies issued on June 9 did not constitute a change in the E&I technicians' terms and conditions of employment, and contends that any changes contained in the call-out policy issued on June 9 were de minimis.

Respondent's argument that the policies contained in its June 9 memo regarding sick leave—the elimination of unpaid excused days off, the requirement that employees provide a doctor's note, and the imposition of discipline when employees failed to comply—were not in fact changes in the existing policies is not substantiated by the record. At the time of the hearing, Kologi, O'Donnell, and Hamilton had been employed by Respondent as E&I technicians for 12 years, 10 ½ years, and 5

years respectively; all testified that throughout their employment with the company, they had been permitted to take unpaid days off after exhausting their yearly allotment of sick days, and had never been required to provide a doctor's note when returning to work. Payroll documents for O'Donnell and Hamilton confirm that both took unpaid leave in 2008 and 2009, and nothing contradicts their testimony that these unpaid leaves represented time off in excess of their yearly allotted sick leave. Respondent's human resources director Keelie Cruz testified that in 2009 she discovered that E&I supervisor O'Rourke was permitting the E&I technicians to take unpaid absences. When Austin, O'Rourke's replacement, emailed Cruz on June 9 to discuss the policies contained in the June 9 memos, he described them as "items that I would like to change in the department."¹⁴

In addition, Respondent's 2006 employee handbook, which was distributed to the E&I technicians and in effect as of June 2010, does not contain any provisions prohibiting employees from taking unpaid days off, requiring a doctor's note for absences due to illness, or stating that employees will be disciplined for failing to comply with such rules. The 2006 Handbook states that it "replaces all prior versions of the Handbook, as well as any prior inconsistent memos, bulletins, policies, or procedures."

In light of the above evidence, Respondent's argument that such policies were actually in effect, based on 1999 and 2001 attendance and lateness/early out policies that were discovered inserted on a sheet of paper into a December 15, 1998 employee handbook, is unavailing.¹⁵ Human Resources Director Cruz, who has been employed by Respondent since February 2008, testified that she found these documents in a file cabinet in her office. However, Cruz also testified that the most recent (2006) employee handbook contained the terms and conditions of employment in effect as of 2010, and did not know whether any prior versions of the handbook or the attendance policy she found in her files were distributed to the E&I technicians.¹⁶ I therefore credit the testimony of Kologi, O'Donnell, and Hamilton that they never received any previous sick leave and call-out policies, and find that prior to June 2010 the attendance and call-out policies in effect were consistent with the E&I technicians' testimony as discussed above.

¹⁴ I decline to draw an adverse inference from Respondent's failure to call Austin and O'Rourke to testify regarding this email, as suggested by General Counsel. However, I have taken into account the fact that Austin, who is still employed by Respondent, was not called to testify in my consideration of the evidence pertinent to Respondent's contention that the June 9 memos merely reiterated previously existing policies regarding use of sick leave and calling out.

¹⁵ The 1998 handbook itself does not discuss the provisions of the attendance policy.

¹⁶ During cross-examination, Cruz testified that the 1999 attendance policy may have been distributed with the 1998 handbook in which it was discovered. I do not credit this testimony, as Cruz could not possibly have knowledge of the facts regarding distribution of these documents almost 10 years prior to her employment with Respondent. I also do not credit her testimony that previous versions of the employee handbook, as opposed to the 2006 version, may have applied as of June 2010, given the 2006 handbook's explicit language.

Respondent also argues that the requirement that employees submit a doctor's note for absences was not a change in policy, based on two doctor's notes O'Donnell and Kologi submitted in 2000 and 2001. Cruz testified that she found these notes in the office files, but was understandably unable to elucidate the specific circumstances surrounding their submission. In such a context, the two doctor's notes, from a remote period in time, are insufficient to establish that Respondent's June 2010 policy requiring that doctor's notes be provided did not constitute a change in terms and conditions of employment.

Nor were the changes in the call-out policy de minimis, as Respondent argues. The Board has previously held that changes in "sick leave reporting procedures" have a material, substantial, and significant impact on terms and conditions of employment. See *Flambeau Airmold Corp.*, supra at 165-166 (new policy requiring one hour's notice prior to taking a sick day "material, substantial, and significant" change); *Consec Security*, 328 NLRB 1201 fn. 2, 1203 (1999). The altered policy here required that employees take the additional time, at least 45 minutes prior to the start of their shift, to make repeated calls until they actually spoke with a supervisor directly, as opposed to simply leaving a message. Although Respondent argues that the policy only increased the notification time prior to the start of the employees' shifts by 15 minutes, the Board has found such a period of time to be "material, substantial, and significant" in other contexts. See *AT&T Corp.*, 325 NLRB 150 (1997) (unilateral elimination of 15-minute period for cashing paychecks when check cashing service unavailable violated Section 8(a)(5)). Finally, because both of the new policies explicitly provided for disciplinary consequences where none had existed before, they constituted material and substantial alterations in the E&I technicians' terms and conditions of employment. *Flambeau Airmold Corp.*, supra at 166; see also *Bath Iron Works Corp.*, supra at 902 (policies which "created entirely new grounds for discipline" were material, substantial and significant unilateral changes).

For all of the foregoing reasons, I find that by its June 9 memos Respondent unilaterally changed its sick leave and call-out policies in the manner described above prior to reaching impasse or overall agreement, in violation of Sections 8(a)(1) and (5) of the Act. Because there is no dispute that Hamilton was disciplined on December 27 for violating the unilaterally implemented policies, I find that the discipline imposed upon him violated Sections 8(a)(1) and (5) of the Act as well. See, e.g., *Consec Security*, supra at 1201-1202.

C. Alleged subcontracting of bargaining unit work

It is well settled that the subcontracting of bargaining unit work is a mandatory subject of bargaining, unless it involves a substantial capital commitment or change in the nature, scope, or direction of the business. See, e.g., *O.G.S. Technologies, Inc.*, 356 NLRB No. 92 at p. 3-4 (2011), discussing *Fibreboard Corp. v. NLRB*, 379 U.S. 203 (1964), *Torrington Industries*, 307 NLRB 809 (1992); *Mission Foods*, 350 NLRB 336, 344-345 (2007). Where subcontracting involves merely "the substitution of one group of workers for another to perform the same work," the union must be given notice and a meaningful opportunity to bargain. *Mission Foods*, supra at 344.

The evidence establishes that in June 2010, Respondent subcontracted work performed by the E&I technicians to the contractor Jisk for several weeks. The evidence establishes that the three subcontractor employees were performing work which was typically performed by the bargaining unit E&I technicians, specifically Hamilton and Stern. The evidence also establishes that the Union was not provided with notice or the opportunity to bargain regarding the subcontracting prior to its having taken place and, as described above, that no impasse or overall agreement had been reached at that time.

Respondent does not contend that the June 2010 subcontracting constituted some sort of change in the nature, scope, or direction of its business that would obviate an obligation to bargain. Respondent instead argues that it was privileged to continue subcontracting in a manner consistent with its past practice, pursuant to the Board's decision in *Westinghouse Electric Corp.*, 150 NLRB 1574 (1965). Respondent asserts that here, as in *Westinghouse Electric Corp.*, the subcontracting:

- (1) was motivated solely by economic considerations; (2) comported with its customary business operations; (3) did not vary significantly in kind or degree from an established past practice; (4) had not demonstrable adverse impact on the bargaining unit employees; and (5) was preceded by the union's having an opportunity to bargain over the decision.

Sociedad Espanola de Auxilio Mutuo y Beneficencia de P.R., 342 NLRB 458, 469 (2004), *enfd.* 414 F.3d 158 (1st Cir. 2005).

The applicability of the *Westinghouse Electric Corp.* in the context of a newly certified union engaged in negotiations for a first contract appears to me to be questionable. The case itself is clearly distinguishable on that basis, as *Westinghouse* involved parties with a lengthy bargaining relationship, and the union during previous collective-bargaining negotiations had repeatedly withdrawn proposals to limit the subcontracting later alleged to be unlawful in exchange for other enhanced contract benefits. *Westinghouse Electric Corp.*, *supra* at 1576–1577; see also *Courier Journal*, 342 NLRB 1094, 1094 (2004) (union's 10-year acquiescence in unilateral changes to health plan privileged additional changes during pre-impasse bargaining); *Gulf Coast Automotive Warehouse, Inc.*, 256 NLRB 486, 488–489 (1981) (union failed to object to polygraph tests later alleged to constitute a unilateral change). By contrast, the Board has found that where there is no history of acquiescence by the specific Charging Party union representing the particular bargaining unit in question, the employer is not permitted to make unilateral changes. *Eugene Iovine, Inc.*, 356 NLRB No. 134 at fn. 3 (2011), 353 NLRB 400, 405–406 (2008) (acquiescence of previous union in past practice of unilateral layoffs does not exempt employer from providing notice and opportunity to bargain to union currently representing bargaining unit employees); see also *Wehr Constructors*, 315 NLRB 867, 868 (1994), *enf. denied*, 159 F.3d 946 (6th Cir. 1998) (*Westinghouse* inapplicable where parties' previous collective bargaining agreement prohibited subcontracting, indicating lack of union acquiescence). In particular, in *Eugene Iovine, Inc.*, the Board affirmed the ALJ's conclusion that "the overwhelming weight of case law supports the view that nonunion employers' past prac-

tices will not justify unilateral implementation of mandatory subjects of bargaining once a union represents the employees," characterizing the ALJ's discussion as "fully consistent with Board precedent." 356 NLRB No. 134 at fn. 3, 353 NLRB at 406, fn. 9. Prior to that, in cases involving newly certified unions and first contract situations, the Board often limited its analysis to the existence of impasse in overall contract negotiations, waiver, and exigent circumstances, as opposed to the *Westinghouse* analysis, even where issues of "past practice" were addressed by the ALJ. See, e.g. *Brede, Inc.*, 335 NLRB 71, 72–73, 93–95 (2001); *Sociedad Espanola de Auxilio Mutuo y Beneficencia de P.R.*, *supra* at 458, fn. 3, 469; but see *St. George Warehouse, Inc.*, 341 NLRB 904, 905–906, 924 (2004). Indeed, the Board has also repeatedly held that "past practice in effectuating discretionary employment decisions" is not a cognizable defense to unilateral change allegations after the union's certification.¹⁷ *Essex Valley Visiting Nurses Assn.*, 343 *supra* at 843, citing *Mackie Automotive Systems*, 336 NLRB 347 (2001); *Adair Standish*, 292 NLRB 840, fn. 1 (1989), *enfd.* in relevant part 912 F.2d 854 (6th Cir. 1990).

For all of the foregoing reasons, it appears that the *Westinghouse* analysis is not a viable legal framework for addressing the allegedly unlawful subcontract here. Nevertheless, I find that the evidence in the record does not establish that Respondent has satisfied the *Westinghouse* standard.

Respondent argues that its decision to subcontract in June 2010 was motivated solely by economic or business considerations, in that it was necessarily reacting to a threat made by Cruse at the June 16 arbitration to assist the all of the other E&I technicians with obtaining employment elsewhere, as he had for Dobson.¹⁸ This contention is not particularly persuasive. First of all, I find it inherently implausible that the representative of a newly certified union in the midst of negotiations for a first contract would pursue a strategy of removing all of the bargaining unit employees (among whom it had won an election), including its shop stewards and negotiating committee members, from an employer's facility. In addition, Columbus testified that the two subcontractor employees not "auditioning" for a permanent E&I technician position only worked at the facility for a few weeks, and were never replaced, indicating that the imminent departure of the bargaining unit E&I technicians was not an ongoing concern. Indeed, there is no evidence that the issue was discussed during negotiations after the subcontracting took place. As a result, the evidence suggests that even if Cruse did actually tell Columbus that he intended to provide assistance in finding other employment for the bargaining unit employees, Respondent did not consider the E&I technicians' coordinated abandonment of their positions to be an immediate possibility.

The evidence also does not establish that the June 2010 subcontracting was consistent with Respondent's customary business operations and past practices in this regard. As the party

¹⁷ Here, Columbus and Mays testified that Respondent's determination to hire subcontractors was discretionary, in both the "audition" and the workload contexts.

¹⁸ Cruse informed Dobson and Kologi of the position that Dobson apparently took when he left Respondent's employ.

asserting the existence of a past practice, Respondent bears the burden of proof, and must establish that the practice was characterized by “such regularity and frequency that employees could reasonably expect the practice to continue or reoccur on a regular and consistent basis.” *Eugene Iovine, Inc.*, 356 NLRB No. 134, 353 NLRB at 400, quoting *Sunoco, Inc.*, 349 NLRB 240, 244 (2007). The evidence here establishes that Respondent had previously subcontracted the work of the E&I technicians for shut down periods and large projects, when a significant amount of work needed to be completed within a relatively short period of time. Respondent had also previously subcontracted work related to specific pieces of equipment beyond the expertise of the E&I technicians. By contrast, there was no shut down period or large project at issue in June 2010, and the uncontradicted testimony of the E&I technicians establishes that the Jisk employees were performing work ordinarily done by Hamilton and Stern—reorganizing the motor inventory and replacing emergency lights, density lights, and exit signs. In addition, there is no evidence that in the past subcontractors were brought in to familiarize themselves with the mill’s operations, the purpose for which Columbus testified that the subcontractors were retained in June 2010. Although the evidence establishes that the majority of the bargaining unit E&I technicians had been hired by “auditioning” them through subcontractors, only one of the three subcontractor employees in June 2010 had been brought into the mill for this purpose. As a result, Respondent has not established that the work performed by the Jisk employees at that time was consonant with any previously established practice of subcontracting.

Respondent claims that the subcontracting in June 2010 had no discernable impact on the bargaining unit employees, and thus the fourth component of the *Westinghouse* analysis supports a finding that the subcontracting was permissible. The E&I technicians testified that they were inconvenienced and their work impeded by the activities of the subcontractor employees; any remunerative impact is impossible to discern from the record. Nevertheless, the continuing legal vitality of this component of the *Westinghouse* analysis has been eroded, if not abrogated, by subsequent Board decisions finding that a detrimental impact on the bargaining unit employees need not be demonstrated in order to find that unilateral subcontracting is unlawful. See e.g., *Acme Die Casting*, 315 NLRB 202 fn. 1 (1994); see also *Sociedad Espanola de Auxilio Mutuo y Beneficencia de P.R.*, supra at 469.

Finally, I find that the Union was not provided with an opportunity to bargain regarding the subcontracting decision. There is no evidence in the record that Respondent provided the Union with notice or any opportunity to bargain prior to subcontracting, and the issue was not addressed during collective-bargaining negotiations prior to June 2010. As a result, I find that Respondent has not satisfied this component of the *Westinghouse* analysis.

For all of the foregoing reasons, I find that Respondent violated Sections 8(a)(1) and (5) by unilaterally subcontracting bargaining unit work in June 2010 in the absence of a genuine impasse or an overall agreement.

CONCLUSIONS OF LAW

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

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

3. At all times since September 28, 2009, the Union has been the certified exclusive collective-bargaining representative, within the meaning of Section 9(a) of the Act, of an appropriate unit of employees consisting of the following:

All full-time and regular part-time electrical and instrumentation technicians employed by the Respondent at the Respondent’s Staten Island facility, excluding other maintenance employees, truck drivers, clamp truck operators, paper makers, yard operators, yard leads, barge operators, other production employees, clerical employees, professional employees, guards, managers, superintendents, and supervisors as defined in the Act.

4. Respondent violated Sections 8(a)(1) and (5) of the Act by making the following unilateral changes in the terms and conditions of employment of the bargaining unit employees without previously bargaining to agreement or to a lawful impasse:

a. Reducing the regularly scheduled work hours of bargaining unit employees on or about June 20, 2010;

b. Modifying the work schedules of regular day-shift bargaining unit employees on or about June 20, 2010;

c. Subcontracting bargaining unit work in and around June and July 2010;

d. Since on or about June 9, 2010, requiring that bargaining unit employees use vacation days, as opposed to taking unpaid leave, after exhausting their sick leave, eliminating unpaid leave;

e. Since on or about June 9, 2010, requiring that employees submit a doctor’s note for sick leave;

f. Since on or about June 9, 2010, requiring that employees speak to a supervisor directly when calling to inform Respondent that they will not be coming to work, as opposed to leaving a message.

g. On or about June 9, 2010, instituting a disciplinary policy for bargaining unit employees who fail to comply with the attendance and leave requirements unilaterally implemented on that date, as described in paragraphs (d), (e), and (f), above.

5. By issuing a written warning to Joseph Hamilton on or about December 27, 2010, for violating its policies unilaterally implemented on June 9, 2010, Respondent has violated Sections 8(a)(1) and (5) of the Act.

6. The above-described unfair labor practices affect commerce within the meaning of Section 2(2), (6), and (7) of the Act.

THE REMEDY

Having found that Respondent has violated Sections 8(a)(1) and (5) of the Act, I shall recommend that it cease and desist therefrom and take certain affirmative action necessary to effectuate the Act’s purposes.

Respondent shall make whole the bargaining unit employees for any loss of earnings and other benefits suffered as a result of the unilateral changes in work hours, day-shift employee work schedules, call-out policies, and sick leave policies, and subcontracting implemented in June 2010, as prescribed in *F.W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as set forth in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010).

Respondent shall be directed to restore the terms and conditions of employment that existed prior to its unlawful implementation of the June 2010 modified work hours, modified day-shift employee schedules, subcontracting, and modified sick leave and attendance policies. Respondent shall make whole Joseph Hamilton for any loss of earnings and other benefits suffered as a result of the discipline imposed upon him on December 27, 2010, as prescribed in *F.W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as set forth in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010). Respondent shall also be required to remove from its files all references to Hamilton's December 27, 2010 discipline, and to notify him in writing that this has been done and that the discharge shall not be used against him.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹⁹

ORDER

Respondent Pratt Industries, Inc., Staten Island, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Implementing changes in work hours, day-shift employee work schedules, call-out policies, and sick leave policies in the absence of an overall agreement or a lawful impasse in collective-bargaining negotiations.

(b) Unilaterally subcontracting bargaining unit work in the absence of an overall agreement or a lawful impasse in collective-bargaining negotiations.

(c) Making unilateral changes in work hours, day-shift employee work schedules, call-out policies, and sick leave policies, or any other term or condition of employment in the absence of an overall agreement or a lawful impasse.

(d) Disciplining bargaining unit employees for the violation of any unilaterally implemented policies.

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

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

(a) On request, bargain in good faith with the Union as the exclusive representative of its employees in the following unit:

All full-time and regular part-time electrical and instrumentation technicians employed by the Respondent at the Respon-

dent's Staten Island facility, excluding other maintenance employees, truck drivers, clamp truck operators, paper makers, yard operators, yard leads, barge operators, other production employees, clerical employees, professional employees, guards, managers, superintendents, and supervisors as defined in the Act.

(b) On the request of the Union, restore to its bargaining unit employees all terms and conditions of employment prior to the changes unlawfully implemented in June 2010, including, but not limited to, work hours, day-shift employee work schedules, call-out policies, and sick leave policies, and subcontracting.

(c) Make the bargaining unit employees whole for any loss of earnings and other benefits suffered as a result of the unilateral changes in work hours, day shift employee work schedules, call-out policies, sick leave policies, and subcontracting implemented in June 2010, in the manner set forth in the Remedy section of this decision.

(d) Make Joseph Hamilton whole for any loss of earnings and other benefits suffered as a result of the December 27, 2010 discipline issued to him, in the manner set forth in the Remedy section of this decision.

(e) Within 14 days of the date of this Order, remove from all files any reference to the December 27, 2010 discipline of Joseph Hamilton, and within 3 days thereafter, notify Hamilton in writing that this has been done and that the discipline will not be used against him in any way.

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

(g) Within 14 days after service by the Region, post at the facility at 4435 Victory Boulevard, Staten Island, New York, copies of the attached notice marked "Appendix."²⁰ Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site and/or other electronic means if Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to

¹⁹ If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

²⁰ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

all current employees and former employees employed by the Respondent at any time since June 1, 2010.

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

Dated, Washington, D.C., August 30, 2011

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities

WE WILL NOT implement changes in work hours, day-shift employee work schedules, call-out policies, and sick leave policies in the absence of an overall agreement or a lawful impasse in collective-bargaining negotiations.

WE WILL NOT unlawfully subcontract bargaining unit work in the absence of an overall agreement or a lawful impasse in collective-bargaining negotiations.

WE WILL NOT make unilateral changes in work hours, day-shift employee work schedules, attendance policies, and sick leave policies, or any other term or conditions of employment in the absence of a lawful impasse.

WE WILL NOT discipline bargaining unit employees for the

violation of any policies unilaterally implemented in the absence of an overall agreement or a lawful impasse.

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

WE WILL on request of the Union bargain in good faith with the Union as the exclusive representative of our employees in the following unit:

All full-time and regular part-time electrical and instrumentation technicians employed by the Respondent at the Respondent's Staten Island facility, excluding other maintenance employees, truck drivers, clamp truck operators, paper makers, yard operators, yard leads, barge operators, other production employees, clerical employees, professional employees, guards, managers, superintendents, and supervisors as defined in the Act.

WE WILL on request of the Union, restore to our bargaining unit employees all terms and conditions of employment as they existed prior to June 2010, including, but not limited to, work hours, day shift employee work schedules, call-out policies, sick leave policies, and subcontracting.

WE WILL make the bargaining unit employees whole for any loss of earnings and other benefits suffered as a result of the unilateral changes in work hours, day-shift employee work schedules, call-out policies, sick leave policies, and subcontracting implemented in June 2010.

WE WILL make Joseph Hamilton whole for any loss of earnings and other benefits suffered as a result of the discipline imposed on December 27, 2010, less any net interim earnings, plus interest.

WE WILL within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful December 27, 2010 discipline of Joseph Hamilton, and within 3 days thereafter, notify Hamilton in writing that this has been done and that the discipline will not be used against him in any way.

PRATT INDUSTRIES, INC.