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Redburn Tire Company and General Teamsters (Excluding Mailers), State of Arizona, Local Union No. 104, an affiliate of the International Brotherhood of Teamsters. Cases 28–CA–023527 and 28–CA–061437

August 31, 2012

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS HAYES,
AND BLOCK

On April 23, 2012, Administrative Law Judge Gerald A. Wacknov issued the attached decision. The Acting General Counsel filed exceptions, a supporting brief, and a reply brief. The Respondent filed an answering brief.¹

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 exceptions² and briefs and has decided to affirm the judge's rulings,³ findings,⁴ and conclusions and to adopt the recommended Order.

¹ The Respondent argues that the Board lacks the necessary quorum to rule in this proceeding on the grounds that the President's recess appointments of Members Block and Griffin to the Board were invalid. For the reasons set forth in *Center for Social Change, Inc.*, 358 NLRB No. 24 (2012), we reject this argument.

² No exceptions were filed to the judge's dismissal of the allegations that the Respondent violated Sec. 8(a)(1) by (1) threatening a union business agent at the bargaining table during an April 28, 2011 meeting, (2) interrogating three employees about not attending work the day following a concerted walk off, and (3) refusing to let employees, after they had been permanently replaced, withdraw their 401(k) funds in retaliation for striking.

³ In its answering brief, the Respondent renews its unopposed motion to correct the transcript. We note that the judge granted the Respondent's motion in his decision, and we affirm the judge's ruling.

⁴ The Acting General Counsel has implicitly excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

On May 9, 2011, the Union's secretary-treasurer, Andy Marshall, met with the Respondent's co-owners, J.D. Chastain and Donald Lefler. Despite using the correct date earlier in the decision, in his "Analysis and Conclusions" section the judge incorrectly described the meeting as occurring on May 29 instead of May 9. We correct the judge's typographical error, which does not affect our agreement with the judge that the parties reached impasse as stated in the Respondent's letter to the Union dated May 25, 2011. At the parties' May 9 meeting and again by letter on June 1, the Union firmly stated that there would be no agreement unless the Respondent changed its final offer—a final offer that the union membership unanimously voted to reject on or

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

Dated, Washington, D.C. August 31, 2012

Mark Gaston Pearce, Chairman

Brian E. Hayes, Member

Sharon Block, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Mary Davidson, Esq. and *Sandra Lyons, Esq.*, for the General Counsel.

Jon E. Pettibone, Esq. (Quarles & Brady, LLP), of Phoenix, Arizona, for the Respondent.

Jerry Anthony Ienuso, Business Representative, Teamsters Local 104, of Phoenix, Arizona, for the Union.

DECISION

STATEMENT OF THE CASE

GERALD A. WACKNOV, Administrative Law Judge. Pursuant to notice a hearing in this matter was held before me in Phoenix, Arizona, on December 13, 14 and 15, 2011. The charge in Case 28–CA–02357 was filed by General Teamsters (Excluding Mailers), State of Arizona, Local Union No. 104, an affiliate of the International Brotherhood of Teamsters (the Union) on May 27, 2011. The charge in Case 28–CA–061437 was filed by the Union on July 20, 2011, and an amended charge was filed on August 30, 2011. Thereafter, on August 31, 2011, the Regional Director for Region 28 of the National Labor Relations Board (the Board) issued a consolidated complaint and notice of hearing alleging a violation by Redburn Tire Company (Respondent) of Section 8(a)(1), (3), and (5) of the National Labor Relations Act, as amended (the Act). The Respondent, in its answer to the complaint, duly filed, denies that it has violated the Act as alleged.

The parties were afforded a full opportunity to be heard, to call, examine, and cross-examine witnesses, and to introduce relevant evidence. Since the close of the hearing, briefs have been received from counsel for the Acting General Counsel (the General Counsel) and counsel for the Respondent. Upon the

about May 20. The Acting General Counsel cites testimony that, following the May 20 vote, employees discussed with the Union possible concessions. There is no evidence that the Union advised the Respondent of those discussions, however, and they did not result in any movement by the Union. The Union failed to put forth any counteroffers before the Respondent unilaterally implemented its final offer on June 1. In fact, the Union had not offered a proposal since March 29.

entire record,¹ and based upon my observation of the witnesses and consideration of the briefs submitted, I make the following.

FINDINGS OF FACT

I. JURISDICTION

The Respondent, an Arizona Corporation with an office and place of business in Phoenix, Arizona, is engaged in the business of selling and retreading tires. In the course and conduct of its business operations the Respondent annually derives gross revenues in excess of \$500,000, and purchases and receives goods at the Respondent's Arizona facility valued in excess of \$50,000 directly from points outside the State of Arizona. It is admitted and I find that the Respondent is, and at all material times has been, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

It is admitted, and I find, that the Union is, and at all times material herein has been, a labor organization within the meaning of Section 2(5) of the Act,

III. ALLEGED UNFAIR LABOR PRACTICES

A. Issues

The principal issues in this proceeding are whether the Respondent has violated and is violating Section 8(a)(1), (3), and (5) of the Act by implementing a last and final offer prior to reaching impasse, by making unlawful threats, interrogating and disciplining employees for their union activities, and by permanently replacing unfair labor practice strikers.

B. Facts

The Respondent is engaged in the business of selling and retreading truck tires. It has facilities in five states and employs a total of about 240 employees. About 40 of these employees are engaged in tire retreading. Eleven of these retreaders, who worked at the Respondent's Phoenix, Arizona facility, were the Respondent's only unionized employees.

Since about 1970 the Respondent has recognized the Union as the exclusive collective-bargaining representative of the Phoenix, Arizona retread employees. The parties' most recent collective-bargaining agreement extended from January 1, 2007 through December 31, 2009, and by its terms was automatically extended to December 31, 2010.

The parties began bargaining for a successor agreement on December 15, 2010.

Between December 15, 2010 and May 25, 2011 the parties met approximately 10 times at the offices of the Federal Mediation and Conciliation Services (FMCS).

The Respondent's owners, J.D. Chastain, president, and Donald Leffler, secretary-treasurer, bargained on behalf of the Respondent. Jerry Ienuso, the Union's business agent, was the Union's principal negotiator. Ruben Martinez Sr. and Ruben Martinez Jr., retreader employees, comprised the Union's bargaining committee.

The overriding issue from the very first bargaining session and throughout negotiations was the matter of free health insurance coverage for unit employees with 10 or more years of service (the 10-year benefit). During the instant set of negotiations seven of the unit employees who had 10 or more years of service were receiving, and had received under prior contracts, free medical insurance for themselves and their dependents. The Respondent wanted to change this, so that all unit employees, regardless of their tenure, would be subject to the same schedule of health insurance premiums as all of its other approximately 230 nonunion employees. The Union, on the other hand, was insistent that this 10-year benefit which the unit employees had enjoyed for many years should not be taken away.

The matter of free medical insurance had been a significant issue during the proceeding set of negotiations which culminated in the 2007–2009 agreement, and resulted in an arbitration award favoring the Union's position that the bargain the Respondent and Union had struck during those negotiations had not eliminated the 10-year benefit. Thus, on July 27, 2007, the arbitrator determined that, "The Company will continue to refrain from deducting such premiums [from the weekly checks of the unit employees with ten or more years of service] until and if a proper change . . . is negotiated between the Parties."

On March 1, 2011, the Respondent wrote to the Union as follows:

Attached is our last, best and final offer.

After months of negotiation, we were left with only three major open issues after our last negotiation.

Two of the three are wage increases and holidays. We will accept the Union's latest proposal for wage increases and holidays and those proposals are included in our offer.

We therefore have tentative approval on all articles of the Collective Bargaining Agreement except for the Health & Welfare and Pension article.

As you know, the Company's intent in the prior negotiations that culminated in the Agreement that covered January 1, 2007 through December 31, 2009 was to have the Redburn employees begin paying a portion of their medical insurance premiums under that contract. In exchange, we agreed to raises during that period which were almost double the raises that had been negotiated previously. We understood that to have been the agreement reached between us. However, the arbitration over the disagreement between us that followed resulted in no medical insurance payments being made by bargaining unit employees. As we have explained, our other employees bear some of the cost of the premiums for their medical benefits and it is again our intent in these negotiations that all Redburn employees do so. We believe that is both fair and reasonable.

The proposal in our final offer is that the Redburn employees covered by the new Collective Bargaining Agreement pay the same amount as all other non-supervisory Redburn employees for the type of medical insurance coverage that they elect.

As we have repeatedly discussed during the current negotiations, for us this is a matter of fairness and also competitive-

¹ The Parties' unopposed requests to correct the transcript, as specified in their briefs, is hereby granted.

ness. None of our competition provides free insurance to their employees. Obviously, our ability to compete and to continue to provide steady, goodpaying jobs will be enhanced if all of our employees contribute to their medical coverage just as the employees of our competitors do.

We request that the Union present this offer to the eligible Redburn employees for a ratification vote. We also request that your bargaining committee support its ratification.

On March 15, the Union conducted a ratification vote among the unit members. The Respondent's proposed final offer was unanimously rejected.

Thereafter, bargaining continued. Ron Collotta, the Federal Mediation and Conciliation Service (FMCS) mediator, who worked with the parties, initiated a one-on-one meeting between Leffler and Ienuso. Up to that point neither party had yet moved from its initial December 15, 2010 position on the 10-year benefit. At this one-on-one "sidebar" meeting between Leffler and Ienuso, which occurred sometime after March 15, 2011, Leffler proposed that in order to resolve the one open issue and reach agreement the Respondent was willing to change its initial proposal by phasing in the costs of medical insurance over the 3-year term of the new contract rather than immediately; in this manner the unit employees who were then receiving free medical insurance would, over a 3-year period, gradually reach parity with what the Respondent's other employees were paying for medical insurance.²

The next negotiating session was held on March 29, 2011. At this meeting the Union lowered its initial December 15, 2010 medical insurance proposal—from free medical insurance for employees with only three or more years of service—to the status quo, that is, retention of the current 10-year benefit; the Union also proposed that for employees with employee-only coverage, which would affect only one unit employee, medical benefit premiums would be escalated over the 3-year contract term; and further, the Union proposed a regressive premium for employees who signed up for dependent coverage but had less than 10 years of service, that is, the premiums under a new contract would be less than the premium schedule of the expired contract. In addition to these proposals on medical coverage, the Union proposed an additional wage increase over and above that which had been accepted by the Respondent prior to the March 15, 2011 ratification vote.

The parties next met again on April 11, 2011 at FMCS. At that meeting, the Respondent offered a "package" proposal: it accepted the Union's higher wage proposal even though wages had been previously agreed to, and proposed a 3-year phase-in of medical premiums that was more favorable to the unit employees than its earlier 3-year phase-in offered by Leffler at the sidebar meeting; thus, under the Respondent's new phase-in proposal, at the end of 3 years the unit employees would no longer reach parity with the nonunit employees, as Leffler had originally proposed, but rather they would be paying less than parity, that is, less than what the nonunit employees would likely be paying at the end of 3 years due to the escalating costs of health insurance. Therefore, as of the end of the April 11,

2011 meeting the parties were again apart only on the issue of medical coverage.

The parties, including the Union's employee bargaining committee, met again on April 28, 2011. Chastain was also present on behalf of the Respondent. Prior to the meeting the Union had requested additional information, including a list of Respondent's customers. At the outset of the meeting the Respondent complied with the request and furnished the Union with a lengthy list of customers.³ Leffler asked Ienuso what he intended to do with the customer list. Ienuso replied that he intended to call the customers. Leffler testified that at that point Chastain said, in a normal conversational tone of voice, "If you start calling our customers, you could be in a world of hurt." Ienuso took offense at this statement. Leffler testified as follows:

Jerry [Ienuso] stood up, got all the way across the table into JD's [Chastain's] face and was screaming. "Are you fucking threatening me? Are you fucking threatening me?" I think he got it out twice before JD then stood up and said, "Do we need to taker this outside?"

At that point, I stood up right alongside Jerry, and I said, Jerry, sit down. Nobody's threatening you. I think I even said, "We don't even care, just sit down. What JD meant was that if you call our customers, you could subject the union to legal liability." I said, "it's called tortious interference with a business relationship, Jerry, write it down, t-o-r-t-i-o-u-s." He said something about, "Take your tortious and shove it."⁴

The federal mediator came in the room to find out what the commotion was all about. He told Leffler and Chastain leave the room and spoke with Ienuso. After talking with Ienuso, he advised Leffler and Chastain that Ienuso was very upset and did not want to continue the negotiating session. This was not acceptable to Leffler, who said that the Respondent had a final offer to present and wanted to continue bargaining. Leffler testified he believed it was the mediator's recommendation that Leffler write at the top of the written offer that it was a final proposal. Leffler did so, writing at the top, "This is firm and final proposal, Donald Leffler, 4/28/11."⁵ Leffler and Chastain then reentered the room occupied by Ienuso and his committee,

³ Leffler testified that even though the Respondent did not believe the Union was entitled to such a list, nevertheless it was furnished in order to avoid a subsequent information-request dispute; and, in any event, the identity of the Respondent's customers was "no secret," so that anyone who might make an effort to obtain such information could likely do so.

⁴ I credit Leffler's detailed account of the incident as he appeared to be a forthright witness with a thorough recollection of what transpired. Moreover, his account did not differ significantly from Ienuso's rather disjointed and less comprehensive account. According to Ienuso, Chastain said, "If you reach out or communicate with our customers, you're going to get hurt." According to Rubin Martinez Sr., a member of the Union's bargaining committee, Chastain replied, "Well, if you do [contact customers] you're going to pay for that, you're going to be sorry if you do that." I credit the testimony of Leffler to the extent it is inconsistent with that of Ienuso and Rubin Martinez Sr.

⁵ The final offer was identical to the offer the Respondent had presented the Union on April 11, 2011, except it was not designated as a "package" proposal.

² The record does not reflect Ienuso's response to this new proposal.

and Leffler handed Ienuso the final offer. Then Leffler read from a text that he had prepared prior to the meeting that day, as follows:

Here's our proposal today except it's not a package. We don't like bidding against ourselves, but we want to wrap up these negotiations. We've met you on every item now except for insurance. So here's our final proposal. This is a [sic] far as we intend to go and this is what we need for a contract. Get back to us in a week, we'll weigh our options.⁶

The record does not indicate there was further discussion. Apparently the aforementioned statement by Leffler concluded the meeting.

Ienuso, in response to the Respondent's final offer, set up a meeting between his boss, Andy Marshall, Local 104's secretary-treasurer, Leffler, and Chastain. The meeting was held on May 9, 2011. Leffler's testimony regarding Marshall's remarks stands un rebutted in the record. Marshall, according to Leffler, did most of the talking and made four major points. He said that the Union would not approve give-backs or concessions that would reduce the net take home pay of bargaining unit employees; the Union would not recommend the Respondent's final offer to the employees; there would be no new contract unless the Respondent changed its position on medical insurance; and the Union intended to call the Respondent's customers to advise them there might be some disruption with the Respondent's ability to provide them with tires.

Having been given this ultimatum by Marshall, it was concluded by Leffler and Chastain that the Union would make no further concessionary proposals and therefore there was no possibility of reaching an agreement with the Union.

On May 20, 2011, Ienuso advised the Respondent that the Union's membership had again unanimously rejected the Respondent's second final offer. By letter dated May 25, 2011 Leffler registered his disappointment that the Respondent's proposal was again voted down by the membership, and went on to state:

After approximately eleven bargaining sessions over six months, we were hopeful that the one issue remaining after we accepted all other union proposals on open issues, i.e., employee contributions to health care premiums, would not prevent us from finally having a new contract. As you know, the media has carried news reports that other unions and employers across the country have agreed to increases in employee contributions to health care premiums. We believe our proposal to be very reasonable under the circumstances that we have thoroughly discussed.

As we have previously advised, the health care premium issue is critical to us and we do not foresee that we will change our

⁶ Ienuso's testimony indicates that because the April 28, 2011 final offer was identical to the April 11, 2011 proposal and was not presented to him until after the verbal exchange, he believed that the Respondent had at that time decided to change the proposal to a final offer in retaliation for his outburst. Clearly this was not the case. I credit Leffler and find that the Respondent had planned to make the final offer and therefore had prepared the final offer language in advance of the meeting so that there would be no doubt of the Respondent's position.

position on it. While we are certainly willing to consider any change in the Union's position on this issue, both parties' recent unwillingness to further compromise on this issue has convinced us that we are at an impasse in our effort to reach agreement on a successor contract.

Therefore, please be advised that it is our intent to implement our final offer effective June 1, 2011. We encourage you to work with us on maintaining our relationship despite our inability to reach agreement on all items necessary for a successor contract and we hope that your members will reconsider their rejection of ratification.

Ienuso replied by letter dated June 1, 2011. The letter states that the Union had made significant movement by its proposal at the April 11, 2011 meeting, which the Respondent rejected; that the Union had been prepared to make a counteroffer at the April 28 meeting until the threat by Chastain abruptly ended the negotiations; and that "The Company's claim to 'impasse' is false." The letter goes on to state:

The Company has repeatedly told the Union Committee (if not at every session) due to an arbitration decision that favoured (sic) the Union on Health Care approximately four (4) years ago the Company will now demand employees 'catch up' and pay premiums in some instances of one third their salary per week.⁷ This is pure retaliation for losing the arbitration.

This is bargaining in bad faith.

The Union has repeatedly told the Federal Mediator it is willing to resume negotiations. This was after the membership on May 20th rejected the Company's firm and final by one hundred per cent (100%)

Once again I will reiterate our members have voted. We do not vote the same offer twice as you suggested. Should the Company return to negotiations and the offer is changed another vote would be taken.

The Respondent implemented its final offer on June 1, 2011 as it had stated it would in its May 25, 2011 letter.

Thereafter, the sequence of events material to the complaint is summarized as follows: The parties briefly met again but no face-to-face bargaining took place, and the parties exchanged emails; all of the unit employees walked off the job; employees, who failed to show up for work the next day were issued warning notices for missing work; all of the unit employees participated in a strike; during the strike the Respondent placed a sign outside its premises advising the strikers of how many new

⁷ This language, according to the Respondent, is misleading. The Respondent maintains that in fact under the Respondent's implemented final offer (infra), which includes a wage increase, the unit employees without health insurance would receive a substantial raise, and the take-home pay of unit employees with health insurance would decrease by approximately 1% for the first two years of the contract; however, during the third year of the contract the take-home pay of employees' with dependent coverage would decrease significantly: \$22 per week for employees with "Employee & Children" coverage; \$46 per week for those employees with "Employee & Spouse" coverage; and \$75 per week for those employees with "Employee & Family" coverage.

applicants had applied for their jobs; the Respondent advised the Union that the strikers had been permanently replaced; an additional bargaining session was held; and some replaced strikers who inquired about withdrawing their 401(k) funds were told they were not eligible to do so. These events are set forth below.

The parties met again on June 2, 2011. It was a very brief meeting. According to Leffler, Ienuso said the Union had another proposal to present. Leffler asked Ienuso to hand it to him so he could review it and “get back to him.”⁸ Ienuso refused to hand the proposal to Leffler, but emailed it to him later that day. Both Ienuso and Rubin Martinez Sr. testified that they were surprised and perturbed that Leffler was not there to negotiate. Rather, Leffler did not even sit down. He merely told them that the Respondent had implemented its final offer on June 1, 2011, the day before the meeting. Ienuso asked what it would take to stop the implementation, and Leffler answered, “We will continue to entertain any offers you send us, email them to me or send them to me.” In effect, according to Martinez Jr., Leffler was saying, “Keep sending me offers until . . . I get the one I like.”

The proposal Ienuso emailed to the Respondent that day contained only one change from the Union’s previous proposal, namely, changing the 10-year benefit to a 12-year benefit, so that free medical insurance would be given to employees with 12 or more years of service. This would not have affected any of the seven current employees with dependent medical care as each of these employees had twelve or more years of service.

Leffler replied to this proposal the following day, June 3, 2011, stating, *inter alia*, that the Respondent had previously advised the Union that the Respondent did not intend to change its position on medical premiums and the Union had not changed its position; that the Respondent would be happy to meet again if the Union would commit to moving off its position; and that “We have carefully reviewed your email and, since your position on the only open issue has not changed in any significant way, we again reject it.”

On Friday, June 3, 2011, after having been told what had happened at the meeting the preceding day, all 11 unit employees walked off the job early. Three of these employees failed to show up for scheduled work on the following day, Saturday, and had not called in to their supervisor to report that they would be absent. According to Rubin Martinez Jr., as a result of the absence of these three employees the entire shift was sent home after “a couple of hours tops,” because the absent employees happened to be the three individuals who knew how to run a particular machine and “we couldn’t run the shift.” The three employees returned to work the following Monday, June 6, 2011.

While it was unusual for Leffler and Chastain to become involved in such matters, it was decided that they, rather than the employees’ supervisor, Mike Salaz, should interview each of the employees to ensure, pursuant to counsel’s instructions, that

there would be no reference to the Friday walkout. Leffler testified, “Given the situation, we called our attorney and asked for advice and he recommended that JD Chastain and I do it ourselves to make sure the questions were asked properly.” Leffler and Chastain met with the employees at the end of the shift that Monday, June 6, 2011. Leffler took notes while Chastain conducted the interviews. The employees were interviewed individually. Both Shop Manager Salaz and Shop Steward Rubin Martinez Jr., were present for each interview.

Leffler testified that each of the employees was asked why he had neither come to work nor called in on Saturday. According to Leffler, strikes and walkouts were not mentioned during the interviews; and none of the employees was asked whether their absence on Saturday was an extension of the Friday walkout or whether they were striking or engaged in a walkout on Saturday. Nor did any of the three say they had been engaged in a walkout. Rather, each gave a different reason. Leffler testified that Juan Ybarra was asked, through an interpreter, why he had not come to work or called in. Ybarra, who held up a prescription bottle, said that he had been sick or “hurting,” adding something like “why bother” to call in. George Clark was asked the same question. Clark replied that he was sick and at first simply forgot to call in; then, when he remembered, he could not find his cell phone.⁹ Rubin Martinez Sr. was asked the same question. He stated the union contract did not require him to come in on Saturdays, and added that he would not be coming to work the following Saturday either.¹⁰ A copy of the contract was produced and it was pointed out to Martinez Sr. that, contrary to his statement, the contract did not say that workdays were only Monday through Friday.

Martinez Jr. testified that at the outset of each interview Chastain “asked if it was some kind of work slowdown, if . . . somebody told them not to come in and were we trying to slowdown or something. It was just some kind of work slowdown.” Rubin Martinez Sr., one of the employees who had been absent, and the only one of the three employees who testified regarding the interview, did not corroborate the testimony of Martinez Jr. on this point. Rather, Martinez Sr.’s brief account of the interview is as follows: Chastain “began the meeting” by asking him “why I wasn’t there on Saturday.” Martinez Sr. replied that “I didn’t have to answer him because it was not a regularly scheduled day.” According to Martinez Sr. there was disagreement regarding what the regularly scheduled workweek was, and “that’s pretty much where it ended.”

Both Leffler and Chastain testified that to their knowledge no bargaining unit employee had previously failed to call in to report that he would be absent. Chastain testified that either before or after the interviews he verified this with Shop Manager Salaz, who told him that he, Salaz, could recall no instance when a bargaining unit employee had been a no call/no show.¹¹ Leffler and Chastain, not Salaz, made the decision to discipline all three employees by issuing them a written warning.

As a result of the interviews, on the following day, June 7, 2011, Clark and Martinez Sr. were, in the presence of Leffler,

⁸ While Leffler did not so testify, according to a subsequent email he sent Ienuso he had been waiting for 30 minutes for Ienuso to arrive and had previously scheduled another appointment as he anticipated the meeting would be brief.

⁹ Neither Ybarra nor Clark testified in this proceeding.

¹⁰ In fact, Martinez Sr. did come to work the following Saturday.

¹¹ Salaz did not testify in this proceeding.

Chastain and Salaz, given written warnings, signed by Salaz, for not showing up or calling in to report their absence on Saturday. The attachment to Clark's "Warning Report" states that during the interview, "Your supervisor mentioned that this was very unusual because you had always called in the past."¹²

Martinez Sr. testified that both he and Clark had each been employed by the Respondent for 36 years and neither employee had ever received a written warning for anything. He testified that it was "pretty common, people don't show up to work, they never get written up. Once in a while, somebody will tell them something. Sometimes they don't get told anything." Martinez Sr. related the following examples of such incidents: A recent instance of an employee who took a trip to Mexico and didn't return for 2 days and, upon returning to work, the employee was asked why he didn't show up or call in and was not given a warning; an employee who quit after he was taken to the office for discipline, and came back to work several days; an employee who continually refuses to work on Saturdays because he has another part-time job on Saturdays; an employee who is late almost every day and often doesn't show up on Saturdays. Regarding all of the above hearsay examples, Martinez Sr. was not asked nor did he testify that he was involved in these matters or was privy to discussions between supervision and the employees involved. Nor did Martinez Sr. testify that during his 36 years of employment he had ever failed to call in to his supervisor to report that he would be unable to come to work.

Shop Steward Martinez Jr., asked whether he was aware of employees who have missed shifts and failed to call in to work, testified that "I'll be the first to tell you, I have done it myself." Regarding this matter, Martinez Jr. testified, "I just basically ran my course throughout the day and I talked to Mike Salaz in the morning when he came in and was talking (sic) to and that was it." Thus, he did not receive a writeup although apparently he was "talked to" by Salaz. Martinez, Jr., who has been employed since June 9, 2008, did not testify when during his employment this incident occurred.

Ienuso testified that the Union never filed a grievance over the warning notices give to Martinez Sr. and Clark because "the grievance would have no merit" as the employees "were wrong."

The Union called a strike commencing on June 21, 2011. All bargaining unit employees went on strike. On June 28, 2011 the Respondent posted a large sign outside its premises, which remained posted for a short period of time until, as Ienuso testified, "It fell down." The sign stated:

STRIKER
REPLACEMENT
APPLICATIONS
RECEIVED
125+

Leffler testified that the intent of the sign was to encourage the strikers to consider returning to work. The Respondent had not, at that point, hired any replacements. The strikers did not return

¹² Ybarra was not given the written warning that had been prepared for him as he never returned to work after June 6, 2011.

to work, and in early July 2011 the Respondent permanently replaced all of the strikers. It so notified the Union of this on July 15, 2011.

The parties met again on July 14, 2011. The Union verbally (and later by two July 18, 2011 emails) proposed that it would accept the Respondent's phase-in schedule for medical premiums for employee-only coverage provided that the Respondent agreed to "red circle" the current employees with more than 10 years of service so that they would continue receiving free medical coverage; future hires, however, would not have the free medical benefit regardless of tenure. The Union also proposed that "all employees will pay employee coverage regardless of years of service should they opt for coverage."¹³

Leffler replied to this latest proposal by email dated July 19, 2011 as follows:

Thanks for your emails reiterating and clarifying the verbal offer you made last Thursday on medical premiums. We appreciate the movement the Union has made on employee-only coverage.

JD [Chastain] and I have discussed your proposal and we have decided not to accept it. As you know, the dependent coverage represents the bulk of the cost of the medical coverage. Since all of the employees who have dependent coverage had more than 10 years of service when we implemented our final offer, red circling free dependent coverage for them and eliminating the 10-year benefit for new hires does not equate with meaningful improvement for the Company at any time under a new 3-year contract.

Leffler testified that the essence of the Union's proposal is that "ten years from ratification we wouldn't have to provide for [free] insurance to that future hired employee." Thus, this was a change that could not benefit the Respondent for 10 years, and was unacceptable as it did not accomplish what the Respondent had set out to negotiate from the outset of negotiations, namely the elimination of the 10-year benefit for current employees.

By July 5, 2011, the Respondent had hired a full complement of new employees to permanently replace the striking employees. It so notified the Union of this fact by email dated July 15, 2011. Ienuso advised the striking employees of this, telling them that being permanently replaced was in effect the same as being fired. Some of the strikers wanted to withdraw their 401(k) funds, and Ienuso contacted Leffler about this. Leffler apparently believed this would not be a problem as he sent Ienuso an email giving him the phone number of the Respondent's HR representative and advising Ienuso to have the employees call the representative; Ienuso testified that in the email Leffler said the HR representative "would get the forms ready so they could withdraw their money." Martinez Jr. and other

¹³ While the ramifications of this latter proposal were not explored on the record, the proposal apparently means that current uninsured employees who decided to opt for dependent coverage medical insurance after they accrued 10 or more years of service would not receive free medical insurance; rather, they would pay the premiums corresponding to employee coverage even though they signed up for dependent coverage.

employees called the HR representative and were told that they were still active employees and as active employees they could take a loan against the moneys; however an employee could not withdraw the full amount unless he was over 55 years old and either quit or had been terminated.

Shortly after the strike began Ienuso asked Leffler if the Respondent would pay the striking employees for accrued vacation pay. They discussed the matter, and it was agreed that the Respondent would pay all of the employees up to 1 week of paid vacation. The Respondent did so.

On September 23, 2011 the Union made an unconditional offer to return to work on behalf of all the strikers. The Respondent replied stating that because the strike was an economic strike and the strikers had been permanently replaced it would take back strikers as vacancies arose. Ienuso replied that the strike was an unfair labor practice strike and all the strikers were entitled to immediate reinstatement. Leffler, by email dated October 13, 2011, replied:

We have carefully considered the Union's offer to return to work. Our position has not changed. We firmly believe that we implemented our final offer only after bargaining to a lawful impasse and, therefore, the strike was an economic one. As we informed you on October 5, 2011, we will offer strikers the opportunity to fill vacancies as they arise.

C. Analysis and Conclusions

The overriding issue from the outset of negotiations was free medical insurance – the 10-year benefit – for current employees. The Respondent wanted to eliminate the benefit for its 11 union-represented employees and require them to pay what its other approximately 230 nonunion employees were paying for the same coverage. The Union wanted the unit employees to continue receiving free medical insurance during their tenure with the Respondent. Both the Respondent and Union were in good faith attempting to resolve their differences over this critical contract issue. After many bargaining sessions, often with the participation of FMCS mediators, and concessions by the Respondent in an attempt to make its proposed elimination of the 10-year benefit more palatable to the Union, the parties had no further proposals to present. Indeed, after the Respondent had presented its last and final offer, the Union not only had nothing further to propose but was also insistent that there would be no agreement unless the Respondent changed its last and final offer. Thus, it is significant that on May 29, 2011 the Union's secretary-treasurer, Andy Marshall, told Leffler and Chastain that there would be no new contract unless the Respondent changed its position on medical insurance, similarly, on June 1, 2011 Ienuso wrote to the Respondent, inter alia, as follows:

Once again I will reiterate our members have voted. We do not vote the same offer twice as you suggested. Should the Company return to negotiations and the offer is changed another vote would be taken.

Under the foregoing circumstances I find the parties had reached an impasse. *California Pacific Medical Center*, 356 NLRB No. 159, slip op. 6–7 (2011).

Because the parties reached a lawful impasse prior to the Respondent's announcement of its intent to implement its final offer and the actual implementation of its final offer, I find the announcement of intent to implement and the subsequent implementation are therefore not violative of the Act, as alleged. I shall dismiss these allegations of the complaint.

I find no merit to the General Counsel's contention that during the April 28, 2011 negotiating session the two statements by Chastain to Ienuso constituted, respectively, an unlawful threat of unspecified reprisal and a subsequent unlawful threat of physical harm. Chastain, in a non-threatening tone of voice, said, "If you start calling our customers, you could be in a world of hurt." Ienuso took offense at this statement and, according to Leffler's credited testimony, "stood up, got all the way across the table into JD's [Chastain's] face and was screaming. 'Are you fucking threatening me? Are you fucking threatening me?'" This conduct caused Chastain to respond, "Do we need to take this outside?" Leffler immediately told Ienuso that nobody was threatening him and explained that Chastain was referring to the possibility of legal liability for "tortious interference" with the Respondent's customers. Even after Leffler explained Chastain's intent, Ienuso was not to be placated and told Leffler to "Take your tortious and shove it." While the record evidence does not indicate how long the exchange lasted, it was obviously very brief. I do not find that this exchange amounted to anything more than an initial misunderstanding on the part of Ienuso, a spontaneous response from Chastain who was being cursed at, and a conciliatory statement by Leffler who immediately diffused a possible escalation of the situation. Thus, Leffler advised Ienuso, as well as the unit employees on the bargaining committee who were present, that Chastain's statement should not be understood as a personal attack against Ienuso but rather as a cautionary warning that contact with customers could result in legal proceedings. I shall dismiss this allegation of the complaint.

Nor do I find, as maintained by the General Counsel but not alleged in the complaint, that the Respondent bargained in bad faith by changing a prior bargaining proposal to a last and final offer in retaliation for Ienuso's profanity and conduct toward Chastain. It is clear, and I find, that the Respondent had decided to present the proposal as its last and final offer in advance of the meeting, and did so at the meeting for reasons unrelated to Ienuso's outburst.

It is alleged that the post-impasse June 6, 2011 interrogation of employees Ybarra, Clark and Martinez, Sr. was unlawful because, according to the complaint, "the Respondent, by Leffler and Chastain . . . interrogated its employees about their Union and concerted activities." I find no merit to this assertion. In fact, the record shows, and I find, that Leffler and Chastain assiduously avoided, on the advice of counsel, interrogating Ybarra, Clark and Martinez Sr. about such matters.¹⁴ Rather, they wanted to know why these three employees, unlike all the other employees who walked out the previous day, did

¹⁴ I do not credit the contrary testimony of Martinez Jr. on this point, as it was not corroborated by Martinez, Sr. and moreover, Leffler appeared to be a credible witness.

not show up for work on Saturday, June 4, 2011. While the complaint alleges that these three employees “continued to engage in the [June 3, 2011] strike,” the employees did not tell Chastain and Leffler that they were continuing the walkout from the day before. Rather, they gave other excuses unrelated to union and/or protected concerted activity. Leffler testified that he took them at their word, and that he and Chastain decided to give them written warnings for failing to report to work and failing to call in. While the complaint alleges that Clark and Martinez Sr. were each issued “an unwarranted written discipline,” even the employees’ business representative maintains that the Union filed no grievance over the matter because the employees “were wrong.”

The General Counsel argues that under the circumstances the evidence supports the conclusion that the written warnings were in retaliation for the three employees’ concerted activity, as it was not the custom of Shop Manager Salaz to issue written warnings for infractions of this nature. While I find that the record evidence is insufficient to show what Salaz’s practice is with regard to such matters, it is clear that Salaz did not make the determination that the written warnings be issued.¹⁵ Rather, it was Leffler and Chastain. Under the circumstances, Leffler and Chastain had legitimate reasons for conducting the interviews and imposing the discipline, regardless of whether Salaz would have done so.¹⁶

It is clear that the June 21, 2011 strike was not an unfair labor practice strike, as alleged in the complaint, as the Respondent committed no unfair labor practices. The strike was clearly an economic strike from its inception. I so find. I shall dismiss this allegation of the complaint. Furthermore, as the strike was an economic rather than an unfair labor practice strike, I find it was not unlawful for the Respondent to advise its striking employees of the number of “striker replacement applications” it had received in an effort to induce the strikers to return to work. See, *River’s Bend Health & Rehabilitation Service*, 350 NLRB 184, 184–187 (2007). Nor was it unlawful for the Respondent to hire permanent replacements for the strikers, notify the Union that the strikers had been permanently replaced, and refuse the Union’s unconditional offer to return to work on behalf of the permanently replaced strikers. I shall dismiss these allegations of the complaint.

¹⁵ Martinez Sr. testified that during the interview Chastain “stood over” Salaz and handed the warning notice to him stating, “here Mike [Salaz] sign this.” Salaz signed the notice and then it was handed to Martinez Sr.

¹⁶ I credit their testimony that to their knowledge no bargaining unit employees had previously been no-calls/no-shows. However, even if this were not the case, the explanations given by Clark and Martinez Sr., as well as Ybarra, were particularly weak, and did not provide the Respondent with a rationale to simply overlook or excuse their disregard of company policy.

It is alleged that the statement by the Respondent’s HR representative to the effect that the replaced employees could not withdraw their 401(k) funds from the Respondent’s pension plan is violative of Section 8(a)(1) of the Act. Whether the HR representative was correct or not, it has not been demonstrated that the Respondent attempted to either mislead the employees or prevent them from withdrawing their funds as a form of retaliation for their union activities. The pension plan document, introduced in evidence in this proceeding, and to which the Union has always been entitled as the representative of the unit employees, contains the provisions under which the employees may or may not be permitted withdraw of such funds, and the Respondent has no authority to alter its provisions. Indeed, Leffler, who had earlier made an agreement with the Union to provide striking employees with vacation pay, was clearly trying to be accommodating when he advised Ienuso that he believed the employees should have no problem withdrawing their funds, and suggested that they could receive assistance in this regard from the Respondent’s HR representative. I shall dismiss this allegation of the complaint.

On the basis of the foregoing, I shall dismiss the complaint in its entirety.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(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. The Respondent has not violated the Act as alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹⁷

ORDER

The complaint is dismissed in its entirety.
Dated, Washington, D.C. April 23, 2012

¹⁷ 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.