JD(ATL)–22–13
Detroit, MI

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

AMERICAN AXLE AND MANUFACTURING, INC.

and **Case 07-CA-084340**

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW), AFL-CIO

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for the Respondent.
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DECISION

STATEMENT OF THE CASE

ROBERT A. RINGLER, Administrative Law Judge. This case was heard in Detroit, Michigan from April 29 to May 1, 2013. The original charge was filed by the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL-CIO (the Union) on July 2, 2012.[1] The complaint alleged, inter alia, that American Axle and Manufacturing, Inc. (AAM or the Respondent) violated Section 8(a)(1) and (5) of the National Labor Relations Act (the Act) by failing to bargain in good faith with the Union concerning the effects of its decision to close plants in Cheektowaga, New York and Detroit, Michigan (respectively the Cheektowaga and Detroit plants). Specifically, the bad faith bargaining allegation averred that AAM conditioned its final offer on the Union acquiescing to non-mandatory bargaining topics, i.e. a mid-contractual waiver of the early retirement provision in the collective bargaining agreement, and a general employee release.

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1 All dates herein are in 2012, unless otherwise stated.

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

FINDINGS OF FACT

I. JURISDICTION

At all material times, AAM, a corporation, has manufactured automotive axles at its Cheektowaga and Detroit plants. During 12-month period immediately preceding February 25, it purchased and received goods and services worth over $50,000 directly from out-of-state suppliers. Based upon the foregoing, AAM 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. It further 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

Most of the controlling facts are undisputed.[2] AAM has, at all relevant times, recognized the Union, and its constituent Locals 22 and 846,[3] as the exclusive collective bargaining representative of the following appropriate bargaining unit of workers at the Cheektowaga and Detroit plants (collectively described as the unit, and individually identified as the Cheektowaga and Detroit units):

> [A]ll production and maintenance associates . . . , except associates employed in sales, accounting, personnel and industrial relations departments, superintendents and assistant superintendents, general supervisors, supervisors [,] . . . associates whose work is of a confidential nature, time study persons, plant protection personnel . . . , all clerical associates, chief engineers and shift operating engineers in power plants, designing (drawing board), production, estimating and planning engineers, draftspersons and detailers, physicists, chemists, metallurgists, artists, designer-artists and clay plaster modelers, timekeepers, technical school students, and those employed in technical or professional positions who are receiving training, kitchen and cafeteria help.[4]

(JT Exh. 23). Such recognition has been embodied in successive contracts, the most recent of which was effective from May 23, 2008 through February 25 (the CBA). (Id.).

A. Pension and Retiree Health Care Benefits

The CBA afforded various pension and retiree health care benefits to unit employees.[5]

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2 Unless otherwise explained, factual findings arise from admissions, joint exhibits, stipulations and uncontroverted testimony.

3 Local 846 represented the Cheektowaga unit, while Local 22 represented the Detroit unit

4 There were 334 employees in the unit. (Tr. 543).

5 The CBA did not contain a re-opener provision, which required pre-expiration bargaining over pension matters.

(JT Exh. 23 at 127). Pension offerings included disability, normal and "mutually satisfactory retirement" (MSR) benefits. (JT Exh. 24). MSR benefits became payable, when unit employees over age 50 with more than 10 years of service were laid off due to a plant closing. (Id. at 5, 23-24). Under such circumstances, MSR employees also received retiree health insurance benefits. (JT Exh. 25).

B. Plant Closing Notice

In late-2011, AAM advised the Union that it would permanently close the Cheektowaga and Detroit plants on February 25. (GC Exhs. 33, 45). Under the CBA, 87 unit employees consequently became eligible for MSR benefits. (Tr. 543; R. Exh. 3.)

C. MSR Dilemma

AAM's obligation to pay such MSR benefits as a result of the plant closings, however, shed light on a dilemma: the severe underfunding of the unit's pension plan. Specifically, AAM determined that, because the pension plan was funded below 60 percent, it was statutorily prohibited from paying MSR benefits to the 87 unit workers at issue.

AAM's alleged inability to pay MSR benefits was supported by the Internal Revenue Code, which stated:

> **Funding-based limits on shutdown benefits . . . .** If a participant of a defined benefit plan . . . is entitled to an unpredictable contingent event benefit . . . such benefit may not be provided if the adjusted funding target attainment percentage for such plan year . . . **<u>is less that 60 percent</u>** . . . .

26 U.S. C. Sec. 436(b) (emphasis added). AAM's position was also corroborated by its actuarial firm, Towers Watson, which reported that MSR benefits could not be paid to unit employees, absent it raising the pension plan's funding levels beyond the 60 percent threshold by investing an additional $10 million in the plan. (R. Exh. 1; Tr. 416, 420).

D. Effects Bargaining

The parties bargained over the effects of AAM's decision to close the Cheektowaga and Detroit plants on January 18, 25-26 and 30, and February 17, 21, 23-25. (JT Exhs. 1-11). Negotiations mostly focused upon the MSR dilemma and the payment of severance wages.

The Union's bargaining team consisted of: Administrative Assistant to the President Richard Isaacson; International Representatives Carmen Giardina, Gloria Morgan and Jimmy Lakeman; and others. AAM's bargaining team consisted of: Vice President of Human Resources Terri Kemp; Senior Manager of Corporate Labor Relations Judy Giese; and others.

1. January 18

The Union proposed that AAM would provide severance, health and life insurance, and transfer

benefits to affected employees. (JT Exh. 1). In exchange, it proposed that unit employees receiving severance would be subject to a general release.[6] (Id.). Isaacson stated that the MSR dilemma was first raised at this meeting.

2. January 25

AAM declared that any effects bargaining agreement was, "[c]ontingent upon resolution of the MSR issue." (JT Exh. 2). Isaacson recollected that:

> The Company took a position . . . [that] severance . . . was contingent upon the resolution of the MSR issue . . . . So, when we caucused, I told our committee that I was going to go in and tell the Employer that we might be willing to withdraw the MSR issue if that's what it took to get a decent severance package . . . . So, in an effort to get an agreement, I told the Employer we might be willing to withdraw the MSR based on an entire package . . . .

(Tr. 140-41). He recalled Kemp rejecting his withdrawal offer. (Tr. 140-142, 257, 404, 510).

Concerning employee releases, he recollected being generally amenable and said:

> I don't think I've been involved in a plant closing agreement where there wasn't some type of release signed as a result of a severance being paid. I don't think that's the issue . . . . The issue is the release you wanted the employees to sign.

(Tr. 148).

3. January 26 and 30

AAM proposed a plant closure agreement, which remained contingent upon resolution of the MSR issue. (JT Exh. 3-4). Kemp recalled announcing that:

> [AAM was] looking at doing a severance for all associates . . . . I said but with that, we were going to need a couple of things from the UAW, and we were looking at these in the form of acknowledgments. The first acknowledgment . . . was for the UAW to acknowledge that we had funded the pension plan appropriately. The second thing was that we were below 60 percent, and given those two things, . . . MSR is not payable . . . . [W]e needed to do this was because I wasn't going to hand out a whole bunch of money in severance to have the associates turn around and sue us over the MSR issue. So we said if we have acknowledgment . . . that we have funded this appropriately, which we believe we have . . . , if we are below 60 percent, which we believe we would be, and

[6] The Union's proposal did not describe the parameters of this release.

> given those two things with the law, then if both parties agree to that, then the chances of a . . . third-party lawsuit are reduced . . . .

(Tr. 361). She added that she also imposed a February 25 acceptance deadline because:

> [I]f the plan went to 60 percent in 2013, it doesn't make you eligible. If it's [underfunded] . . . the year the plant closes, it's gone forever.

(Tr. 364).

4. February 6

Isaacson recalled Kemp reiterating that a resolution on the MSR issue was mandatory. Kemp testified that Isaacson said that the Union might be willing to concede that:

> They would not fund or foster a lawsuit against . . . [AAM] in reference to the MSR. He indicated that this isn't something that they do in a lot of cases . . . .

(Tr. 368).

5. February 14

Isaacson indicated that the Union still had not taken a position on MSR or employee releases, which were on "hold for legal review." See also (GC Exh. 14). Regarding MSR, he added:

> We . . . weren't aware of the funding . . . . Axle told us what they believed the funding levels were. The Company was continuing to take the position that if we didn't . . . [concede the MSR issue], there would be no severance . . . .

(Tr. 76).

6. February 17

a. Union's Proposal

Isaacson testified that the Union proposed that employees, who voluntarily waived MSR benefits, would receive a buyout. The Union made a comprehensive proposal, which provided that: unit employees, who voluntarily waived their MSR rights, received $75,000; additional severance monies ranging from $16,000 to $72,000 would be paid to unit employees, following the execution of a general release; and the Union would release and discharge AAM from all claims. The MSR portion of the Union's proposal stated:

> With respect to employees who elect to participate in the Settlement Option, Union agrees not to pursue any claim against AAM concerning those claims released. MSR-Eligible Associates who do not elect the Settlement Option shall

> retain any rights they may have to bring claims seeking the benefits enumerated in this paragraph, and the Union shall retain any right it may have to pursue such claims on [their] . . . behalf . . . .

(JT Exh. 5). Concerning severance, the Union proposed:

> To participate in the Severance Program, an Associate must voluntarily sign a General Release to be negotiated by the Company and the Union. For MSR-Eligible Associates who do not participate in the Settlement Option, the General Release shall exclude claims for the benefits enumerated in [the MSR paragraph] . . . . Eligible Associates who execute and do not revoke a General Release will receive $4,000 for each year of service. The minimum payment . . . will be $16,000 and the maximum . . . will be $72,000 . . . .

(Id.).

b. AAM's Counterproposal

AAM countered that the Union must concede these points, in exchange for the payment of severance monies to the unit:

- AAM did not owe MSR benefits because the pension was funded below 60%;
- AAM had met all of its past pension funding obligations;
- MSR employees were ineligible for retiree health insurance benefits; and
- The Union would not aid any MSR litigation.

(JT Exh. 6). Isaacson testified that he could not entertain this proposal because the Union's actuaries had not yet verified AAM's MSR assertions regarding the pension's funding levels.

On the same date, AAM e-mailed "General Release of All Claims" forms for the Union's review, which provided, inter alia, that:

> In consideration for my participation in the Closure Agreement [and receipt of severance monies], I . . . forever discharge AAM, [and] the UAW . . . from all claims . . . which I may have related to my employment with AAM, the cessation of my employment . . . or the denial of any associate benefit . . . . This release specifically includes, without limitation, a release of any claims . . . under The Employee Retirement Income Security Act of 1974 (ERISA), as amended; the Age Discrimination in Employment Act [ADEA], which prohibits age discrimination in employment; Title VII of the Civil Rights Act of 1964 . . . ; the Americans with Disabilities Act [ADA] . . .; the Equal Pay Act [EPA]; the Worker Adjustment and Retraining Notification Act [WARN]; state fair employment practices or civil laws; and any other federal, state, or local laws or regulations, or any common law actions relating to employment or employment

> discrimination . . . . This General Release does not waive any claims that arise after the effective date of this General Release.
>
> I further agree not to institute any proceedings . . . related to my employment, cessation of my employment, the representation of me by the UAW, or the denial of any associate benefit. I agree that if I file a lawsuit or claim of any type in any forum against the Released Parties concerning a right that has been waived in connection with this General Release, except for a lawsuit challenging this General Release or attempting to assert a claim under the Age Discrimination in Employment Act notwithstanding the prohibition against doing so contained in this General Release, I will return to AAM the entire value of the Severance Benefit received as a result of this General Release before proceeding in any way with the lawsuit or claim. I further agree that I will pay all of the costs, expenses and attorney's fees incurred by any and all of the Released Parties in defending against such a lawsuit or claim . . . .

(JT Exh. 12). Giese stated that this release mirrored others negotiated at prior plant closures.

7. February 21

AAM advanced a counterproposal, which repeated its constant stance on the MSR issue, and threatened that, "this proposal shall be deemed withdrawn if not ratified by 11:59 p.m. on February 25." (JT Exh. 7). February 25 was, notably, the last effective date of the CBA, as well as the last production date at the Cheektowaga and Detroit plants. Kemp explained that:

> MSR benefits become vested when the plant closes . . . . So if we're going to talk about healthcare and . . . MSR, we have to get this done by midnight [i.e. before the CBA's expiration] or . . . we can't talk about these subjects anymore. They're vested. . . . . So I told them on the 21st that all of the proposals going forward . . . needed to be ratified . . . [before the CBA's expiration] . . . on February 25th. . . .
>
> [W]e felt that if we had alignment, it would reduce the risk of how many people would sue us, and if we had the UAW not . . . fostering lawsuits, we would have . . . [fewer] lawsuits.

(Tr. 371-72). AAM's proposal offered a week of severance pay for each service year. (JT Exh. 7). It also resubmitted its proposed "General Release of All Claims." (JT Exh. 13). Isaacson stated that he told AAM that he believed that, if the Union waived the unit's MSR and other rights, it might breach the duty of fair representation that the Union owed to the unit.

8. February 23

The Union e-mailed a counterproposal to AAM, which reduced their prior severance and MSR buyout demands. (Tr. 94-95). The Union proposed the following MSR provision:

> [AAM] agrees to offer MSR-Eligible Associates a cash payment of $50,000 in exchange for a release of claims . . . . With respect to employees who elect . . . the Settlement Option, Union agrees not to pursue any claim against AAM . . . . MSR-Eligible Associates who do not elect the Settlement Option shall retain any rights they may have to bring claims seeking the benefits . . . , and the Union shall retain any right . . . to pursue such claims on [their] behalf . . . .

(JT Exh. 8). The Union modified the "General Release of All Claims" forms, which clarified that, the release "[did not] waive . . . claims for . . . vested [MSR] benefits." (JT Exh. 14).

9. February 24

AAM's counterproposal reiterated its prior ratification deadline and MSR demands. (JT Exh. 9). Its proposal, however, withdrew its demand that the Union waive its future right to aid any MSR or retiree health care benefit litigation.

10. February 25

Although the Union reduced its MSR buyout request in this proposal, it remained unwilling to succumb to AAM's MSR demands, which still sought its agreement that:

- the unit's pension plan was funded below 60%;
- AAM was unobligated to provide MSR or connected retiree health care benefits;
- AAM had met all of its earlier pension funding obligations; and
- AAM had no duty to make additional contributions to the pension plan.

(JT Exh. 10).

AAM, ultimately, countered with its "last, best and final" offer, which again tied its ongoing MSR and general release[7] demands to severance. (JT Exh. 11). In this proposal, however, AAM withdrew its demand that the Union agree that MSR retirees were ineligible for health insurance coverage. (Id.). Isaacson stated this offer remained unsatisfactory because:

> The Employer was insisting on us agreeing that their funding calculations [were] correct. They . . . wanted us to agree . . . that these benefits were not payable by law . . . . [,] waive our members' rights to sue American Axle . . . . [and] agree that we would not fund any lawsuits . . . .

(Tr. 102-103). Giese asserted that the Union never protested that AAM's MSR proposal was a permissive bargaining subject, or otherwise refused to discuss this matter.

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[7] AAM, on the same date, non-substantively modified its "General Release of All Claims" proposal. (JT Exh. 15). Kemp averred that analogous releases were negotiated at other closed facilities. (Tr. 354).

E. February 25 - Ratification Meeting – Plant Closure

At the ratification vote, the Union's members rejected AAM's last, best and final offer.[8] Unit employees also ceased working at the Cheektowaga and Detroit plants on this date.

F. Pension Plan Litigation

On February 28, the Union filed a Complaint against AAM in U.S. District Court, Eastern District of Michigan, which alleged, inter alia, that AAM, "violated Section 301 of the Labor Management Relations Act ("LMRA") by failing to provide certain pension and welfare benefits [i.e. MSR benefits]. . . after closing AAM's [Detroit and Buffalo] plants . . . ." (JT Exh. 22). On April 20, AAM filed countersuit. (JT Exh. 20).

In July, Congress amended the Pension Plan Protection Act (the PPPA amendments). The PPPA amendments changed the methodology used for calculating a pension plan's funding levels, and now permitted AAM to newly calculate the unit's pension plan funding above 60 percent. (JT Exh. 26; Tr. 485). This revision allowed AAM to pay MSR benefits to unit employees, without depositing an additional $10 million in the pension plan.

On December 19, the parties entered into a settlement agreement, which resolved the MSR litigation in U.S. District Court. (JT Exh. 22). The settlement, which was clearly facilitated by the PPPA amendments, did not, however, resolve the instant NLRB charge.

III. ANALYSIS

AAM violated Section 8(a)(5), when it conditioned its final effects bargaining offer upon the Union's acquiescence to non-mandatory bargaining subjects. These permissive subjects were: the Union's mid-term release of MSR rights under the CBA; and an overbroad employee release.

A. Applicable Precedent

Although an employer that closes its facility for economic reasons is not required to bargain over the decision itself, it must still bargain over connected effects on unit employees.[9] *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 681-82, 686 (1981). A party, however, violates its effects bargaining obligation, when it conditions an agreement upon acceptance of non-mandatory bargaining subjects. See *NLRB v. Borg-Warner Corp.*, 356 U.S. 342, 349 (1958); *KCET-TV*, 312 NLRB 15 (1993). While parties are always free to procure *voluntary* resolutions over non-mandatory subjects during effects bargaining,[10] neither can "posit the [non-mandatory] matter as an ultimatum." *Longshoremen ILA v. NLRB*, 277 F.2d

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8 The Union's Constitution required membership ratification of the plant closure agreement.

9 Effects bargaining often covers these mandatory bargaining topics: severance, retraining and health coverage.

10 See, e.g., *Bridon Cordage*, 329 NLRB 258, 264 (1999).

681, 683 (D.C. Cir. 1960).[11] The Board, as a result, has held that parties cannot condition effects bargaining on: mid-term contract modifications, absent reopener provisions (e.g. AAM's MSR waiver proposal);[12] or broad releases of employee rights (e.g. AAM's general employee release),[13] given that such topics are considered permissive matters.

The Board has also held that, in rare cases, permissive subjects can transform into mandatory topics, when they are "sufficiently intertwined" with other mandatory items. *Borden, Inc.*, supra, 279 NLRB at 399, fn.5 (1986); *Regal Cinemas, Inc.*, supra, 334 NLRB at 305-306, fn.8.[14] The Board has explained that:

> To establish the requisite nexus, the subjects must be "intertwined" and "inseparable," perhaps demonstrating a connection with "reciprocal [cost/benefit] effects." Such cases are rare . . . .

Smurfit-Stone Container Enterprises, supra, 357 NLRB No. 144, slip op. at 4.

B. AAM Conditioned Effects Bargaining Upon Non-Mandatory Bargaining Topics[15]

AAM unlawfully sought a mid-term release of its pension and MSR obligations under the CBA, which was a permissive subject. Although there might be a debate over whether the pension was indeed underfunded or whether an MSR benefit could issue without additional funding, it is undisputed that the CBA expressly provided MSR benefits to unit employees impacted by the plant closure. It is equally clear that AAM's proposed waiver sought to eviscerate this MSR provision during the CBA's term.[16] Given that the CBA did not contain a reopener provision that rendered this proposal mandatory, this matter remained a permissive topic. See *Smurfit-Stone Container Enterprises,* supra.

AAM's "general release of all claims" component of its final offer was also a

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11 See also *Detroit Newspapers*, 327 NLRB 799, 800 (1999), enf. denied on other grounds, 216 F.3d 109 (D.C. Cir. 2000); *Westvaco Corp*., 289 NLRB 301 (1988); *Taft Broadcasting Co.*, 274 NLRB 260, 261 (1985).

12 See, e.g., *Smurfit-Stone Container Enterprises*, 357 NLRB No. 144, slip op. at 2, 6 (2011).

13 See, e.g., *Borden, Inc.*, 279 NLRB 396, 399 (1986) (general waiver of a right to sue in a release is non-mandatory subject of bargaining, where the waiver broadly covered toxic tort claims and other matters unrelated to the employment transaction); but c.f. *Regal Cinemas, Inc.,* 334 NLRB 304, 305-306 (2001), enf'd, 317 F.3d 300 (D.C. Cir. 2003) (specific release linked only to "claims arising from the termination of the employees - the very same employment transaction that occasioned bargaining over severance pay" is lawful).

14 See also *Sea Bay Manor Home for Adults*, 253 NLRB 739 (1980) (interest arbitration was a mandatory subject of bargaining because it was intertwined with mandatory subjects), enf'd mem., 685 F.2d 425 (2d Cir. 1982).

15 The Complaint broadly alleged that AAM unlawfully insisted, as a condition of reaching a plant closure agreement, that the Union, "accept a broad release of claims provision." This expansive pleading included AAM's mid-term proposal that the Union "release" its MSR obligations under the CBA, as well as the "general release of all claims." Both subjects were comprehensively litigated at the hearing by all parties, and voluminous evidence concerning both topics was admitted, without objection.

16 AAM insisted that the MSR benefit had to be altered before the plant's February 25 closure, which was also before the CBA's expiration. See (Tr. 371-72; JT Exh. 11).

permissive bargaining topic. This release was not limited to "claims arising from the termination of employees," but, expansively sought the unit's waiver of a litany of other rights (e.g. MSR, ADA, ERISA, ADEA, WARN, EPA and "any other federal, state, or local law or regulations or any common law actions relating to employment or employment discrimination" rights). (JT Exhs. 12-15). This release, consequently, exceeded the "sufficiently intertwined" boundary set forth by *Regal Cinemas*, and entered into the territory proscribed by *Borden*.[17] Or put another way, AAM's expansive list of statutory and other waivers was not "inseparable" from severance pay bargaining.[18] This release was, therefore, a permissive bargaining topic.

In sum, AAM conditioned effects bargaining upon the Union's willingness to concede to non-mandatory bargaining subjects.[19] Such proposals were advanced throughout bargaining,[20] and steadfastly included in AAM's final offer.[21] This negotiating tactic was unlawful. See *Smurfit-Stone Container Enterprises,* supra, 357 NLRB No. 144, slip op. at 6.

CONCLUSIONS OF LAW

1. AAM 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 Union is, and, at all material times, was the exclusive collective bargaining representative of the following appropriate units at the Cheektowaga and Detroit plants:

> All production and maintenance associates, except associates employed in sales, accounting, personnel and industrial relations departments,

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17 See 334 NLRB at 305, fn. 8 (finding that the *Borden* release was unlawful because it, like AAM's release, conceivably covered toxic tort and other claims unrelated to the employment transaction that occasioned bargaining).

18 AAM could have limited its proposed release to "claims arising from the termination" at issue, and omitted language seeking waiver of MSR, ERISA, WARN and other subjects beyond the scope of the termination. Its release was, thus, not "inseparable" from severance pay bargaining. See *Regal Cinemas*, supra.

19 Although these violations have been described and analyzed collectively, each violation independently merits the relief and remedy set forth herein. See *Smurfit-Stone Container Enterprises,* supra.

20 At the outset, AAM made it clear that effects bargaining hinged on "alignment" on these permissive subjects. See (GC Exh. 52). When Isaacson tested AAM's resolve and sought to withdraw the MSR issue from bargaining, Kemp insisted that the matter required resolution. (Tr. 140-142, 257, 404, 510).

21 The parties' subsequent settlement of the MSR lawsuit in U.S. District Court was not a continuation of effects bargaining. First, the settlement expressly excluded the instant NLRB charges. Second, the parties agreed that their MSR lawsuit settlement discussions were limited to the lawsuit itself, and did not expansively cover effects bargaining. (R. Exh. 3) (stating "for Rule 408 discussions only"). Third, AAM's unlawful insertion of non-mandatory bargaining subjects in its final offer persisted until unit employees ceased working, and, thus, deprived the Union of any leverage it might have enjoyed while unit work was still being performed at the plants. See *Smurfit-Stone Container Enterprises,* supra. This unlawful tactic was, accordingly, not cleansed by AAM's subsequent negotiation of a settlement to the MSR lawsuit, even if some covered matters coincidentally overlapped the effects bargaining agenda. In sum, AAM's contention that the "Rule 408" settlement talks were effects bargaining is nothing more than a convenient, albeit creative, afterthought.

superintendents and assistant superintendents, general supervisors, supervisors, associates whose work is of a confidential nature, time study persons, plant protection personnel, all clerical associates, chief engineers and shift operating engineers in power plants, designing (drawing board), production, estimating and planning engineers, draftspersons and detailers, physicists, chemists, metallurgists, artists, designer-artists and clay plaster modelers, timekeepers, technical school students, and those employed in technical or professional positions who are receiving training, kitchen and cafeteria help.

4. AAM violated Section 8(a)(1) and (5) by demanding, as a condition of reaching an agreement on the effects of its decision to close the Cheektowaga and Detroit plants, that the Union consent to various permissive bargaining topics.

5. The unfair labor practice set forth above affects commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that AAM committed unfair labor practices, it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

In order to remedy AAM's unlawful failure to bargain with the Union over the effects of its decision to close the Cheektowaga and Detroit plants, it shall be ordered to bargain with the Union, upon request, about this matter. As a result of its unlawful conduct, however, unit employees have been denied an opportunity to bargain, when AAM still required their services and a balance in bargaining power potentially existed. Meaningful bargaining cannot be assured until some measure of economic strength is restored to the Union. A bargaining order alone, therefore, cannot serve as an adequate remedy for the unfair labor practices committed.

It is necessary, in order to ensure that meaningful bargaining occurs and to effectuate the policies of the Act, to accompany the bargaining order with a limited backpay requirement designed both to make whole the unit employees for losses suffered as a result of the violation and to recreate in some practicable manner a situation in which the Union's bargaining position is not entirely devoid of economic consequences for AAM. AAM is, thus, ordered to pay backpay to unit employees in a manner similar to that required in *Transmarine Navigation Corp.,* 170 NLRB 389 (1968), as clarified in *Melody Toyota,* 325 NLRB 846 (1998).

AAM shall pay its Cheektowaga and Detroit unit employees backpay at the rate of their normal wages when last in its employ from 5 days after the date of the Board's decision and order, until the occurrence of the earliest of the following conditions: (1) the date AAM bargains to agreement with the Union on those subjects pertaining to the effects on the unit employees of its decision to cease operating the Cheektowaga and Detroit plants; (2) a bona fide impasse in bargaining; (3) the Union's failure to request bargaining within 5 business days after receipt of the Board's decision and order, or to commence negotiations within 5 business days after receipt of AAM's notice of its desire to bargain with the Union; or (4) the Union's

subsequent failure to bargain in good faith. In no event, however, shall the sum paid to these employees exceed the amount they would have earned as wages from the date on which AAM ceased its Cheektowaga and Detroit operations to the time they secured equivalent employment elsewhere, or the date on which AAM shall have offered to bargain in good faith, whichever occurs sooner. However, in no event shall this sum be less than the employees would have earned for a 2-week period at the rate of their normal wages when last in AAM's employ. Backpay shall be based on earnings which the unit employees would normally have received during the applicable period, less any net interim earnings, and shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010), enf. denied on other grounds sub. nom., *Jackson Hospital Corp. v. NLRB*, 647 F.3d 1137 (D.C. Cir. 2011). AAM shall file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters and compensate unit employees for any adverse tax consequences associated with receiving lump-sum backpay awards covering more than 1 calendar year. *Latino Express, Inc.*, 359 NLRB No. 44 (2012).

AAM is further ordered to distribute appropriate remedial notices electronically via email, intranet, internet, or other appropriate electronic means to unit employees, who were employed by it on February 25, 2012, if it normally communicated with unit employees in this manner, in addition to the mailing of paper notices. See *J Picini Flooring*, 356 NLRB No. 9 (2010).

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended[22]

ORDER

Respondent, American Axle and Manufacturing, Inc., Cheektowaga, New York and Detroit, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

a. Refusing to bargain collectively with the Union by demanding, as a condition of reaching agreement on the effects of its decision to close the Cheektowaga and Detroit plants, that the Union consent to various permissive bargaining subjects. The Union is the exclusive collective bargaining representative of the following appropriate bargaining unit at the Cheektowaga and Detroit plants:

> All production and maintenance associates, except associates employed in sales, accounting, personnel and industrial relations departments, superintendents and assistant superintendents, general supervisors, supervisors, associates whose

[22] 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.

work is of a confidential nature, time study persons, plant protection personnel, all clerical associates, chief engineers and shift operating engineers in power plants, designing (drawing board), production, estimating and planning engineers, draftspersons and detailers, physicists, chemists, metallurgists, artists, designer-artists and clay plaster modelers, timekeepers, technical school students, and those employed in technical or professional positions who are receiving training, kitchen and cafeteria help.

b. 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. Upon request, bargain collectively in good faith with the Union as the exclusive representative of employees in the above-described appropriate unit concerning the effects of its decision to permanently close the Cheektowaga and Detroit plants, and embody any resulting understanding in a signed agreement.

b. Within 14 days from the date of the Board's order, pay affected unit employees their normal wages for the period set forth in the remedy section of this decision.

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

d. File a report with the Social Security Administration allocating backpay to the appropriate calendar quarters for the affected employees, and compensate affected employees for the adverse tax consequences, if any, associated with receiving one or more lump-sum backpay awards covering periods longer than 1 year.

e. Within 14 days after service by the Region, the Respondent shall duplicate and mail, at its own expense and after being signed by the Respondent's authorized representative, copies of the attached notice marked "Appendix."[23] to the Union and to all unit employees who were employed by it on February 25, 2012.

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

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[23] 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."

Dated Washington, D.C. August 27, 2013

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Robert A. Ringler
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

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

WE WILL NOT refuse to bargain collectively with the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL-CIO (the Union), or its constituent Locals 22 and 846, by demanding, as a condition of reaching an agreement on the effects of our decision to close our Cheektowaga and Detroit plants, that the Union consent to non-mandatory bargaining proposals.

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

WE WILL, upon request, bargain in good faith with the Union with respect to the effects of our decision to permanently close our plants and permanently lay off unit employees, and **WE WILL** reduce to writing and sign any connected agreement.

WE WILL pay unit employees, who were permanently laid off at the Cheektowaga and Detroit plants, their normal wages for the period described in the remedy section of this Decision, with interest.

WE WILL file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters for affected unit employees, and compensate these employees for the adverse tax consequences, if any, associated with receiving one or more lump-sum backpay awards covering periods longer than 1 year.

AMERICAN AXLE AND MANUFACTURING, INC.
(Employer)

Dated: _____ **By:** _____
(Representative) **(Title)**

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

477 Michigan Avenue, Room 300, Detroit, MI 48226-2543
(313) 226-3200, Hours: 8:15 a.m. to 4:45 p.m.

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

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (313) 226-3244.